SECTION 1983: QUALIFIED IMMUNITY

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Author's Note

This outline is arranged under various topic headings that indicate problem areas likely to be encountered in the qualified immunity analysis. **Other than in the material dealing with absolute immunity, immunity for private actors, and that covering the basic scope of the immunity doctrine, the outline arranges the cases according to Circuits under each topic, with the most recent cases listed first.** The outline does contain some district court decisions if they have useful language or analysis.

Please be advised that I do not use research assistants to prepare these outlines, so that any errors are my own. Each updated outline attempts to remove cases that may no longer be good law or to indicate any negative history of a case where important. **It is important that you KeyCite any case you intend to rely on, especially a district court opinion.**

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QUALIFIED IMMUNITY

I. INTRODUCTION

A. Note on Absolute Immunity

A government official may invoke one of two types of immunity from personal liability for damages: absolute or qualified immunity. The Supreme Court has adopted a "functional" approach to absolute immunity, so that whether an official is entitled to absolute immunity will depend on the function performed by that official in a particular context. ***Forrester v. White***, 484 U.S. 219, 224 (1988). Most government officials are entitled only to qualified immunity. Officials performing **judicial**, **prosecutorial**, or **legislative** functions, however, have been afforded absolute immunity. **Witnesses** in judicial proceedings have likewise been afforded absolute immunity with respect to their testimony. The **President** enjoys absolute immunity when performing his official functions. ***Nixon v. Fitzgerald***, 457 U.S. 731 (1982). *But see* ***Clinton v. Jones***, 117 S. Ct. 1636, 1644 (1997) ("[W]e have never suggested that the President, or any other official, has an immunity that extends beyond the scope of any action taken in an official capacity.").

The leading cases on judicial, prosecutorial, witness, and legislative immunity are set out below.

1. Judicial Immunity

a. Judges

See, e.g., ***Mireles v. Waco***, 502 U.S. 9 (1992) (absolute judicial immunity where conduct is in excess of jurisdiction rather than in absence of jurisdiction);); ***Forrester v. White***, 484 U.S. 219, 228-29 (1988) (judge has absolute immunity only when acting in judicial, as opposed to administrative, capacity); ***Stump v. Sparkman***, 435 U.S. 349 (1978) (absolute immunity for judge acting within jurisdiction); ***McCullough v. Finley***, No. 17-11554, 2018 WL 5318146, at *3–5 (11th Cir. Oct. 29, 2018)

("A judge's motivation is irrelevant to determining whether his act was judicial. A judge enjoys absolute immunity for judicial acts regardless of whether he made a mistake, acted maliciously, or exceeded his authority. . . And the 'tragic consequences' that result from a judge's acts do not warrant denying him absolute immunity from suit. . .The district court erred when it based its decision on the judges' motivation instead of the nature and function of their acts. The district court reasoned that the judges' acts were not judicial because 'municipal revenue generation is not a function normally performed by a judge.' But even if the judges were motivated to generate municipal revenue, their acts 'do[ ] not become less judicial by virtue of an allegation of malice or corruption of motive.'. . Instead of assessing the motivation behind the judges' acts,

we determine whether the nature and functions of the alleged acts are judicial by considering four factors: (1) the precise act complained of is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity. . . Each of those factors favors immunity here. . . .Alabama law empowers municipal-court judges to order defendants to sit-out fines in jail, Ala. Code § 15-18-62, so the judges did not exceed their subject-matter jurisdiction when they did so. . . All of the jailees' claims against the judges are barred by absolute judicial immunity."); ***Woodworth v. Hulshof***, 891 F.3d 1083, 1091-92 (8th Cir. 2018) ("Properly framed, the relevant inquiry is whether Judge Lewis's handling of evidence and his failure to disclose exculpatory evidence fell within the scope of his judicial duties. Judge Lewis came upon the relevant evidence through the judicial acts of appointing a special prosecutor, convening a grand jury, and presiding over a juvenile-certification hearing. His authority to conduct these activities is undisputed. . . Further, as the district court noted, the forwarding of correspondence to defense attorneys—or the failure to do so—was likewise a judicial act. . . We also note that Woodworth does not dispute that he was 'dealing with the judge in his judicial capacity' at all relevant times. . . Thus, even if true, the allegations in Count I are insufficient to defeat judicial immunity."); ***Stevens v. Osuna***, 877 F.3d 1293, 1304 (11th Cir. 2017) ("Considering both the adjudicatory role that Immigration Judges play within the immigration-hearing process and the existence of what we view—in the light of the Supreme Court's guidance—as sufficient pertinent safeguards, we are persuaded that Immigration Judges are judges entitled to absolute immunity for their judicial acts, without regard to the motive with which those acts are allegedly performed."); ***Bright v. Gallia County, Ohio***, 753 F.3d 639, 652 (6th Cir. 2014) ("While we ultimately conclude that Judge Evans is entitled to absolute judicial immunity, we cannot help but add our voices to the chorus of condemnation for his actions. By operating in such an unreasonable manner, Judge Evans has brought dishonor on himself and his position. The Ohio Supreme Court properly sanctioned him for this behavior. But we say again, absolute judicial immunity is not designed to protect individual bad actors; rather it is in place to protect judicial independence. In our legal system, there is often someone who loses his money, his liberty, or his life. This cannot be helped. But if that defeated party could turn around and file suit against the judge or judges in his case, then the whole system would unravel as the threat of suit crept into the judges' minds. This conclusion does little to help Bright, who was wronged by Judge Evans. It, however, preserves the independent judiciary. For the above reasons, we hold that Judge Evans is entitled to absolute judicial immunity."); ***Davis v. Tarrant County Tex.***, 565 F.3d 214, 225, 226 (5th Cir. 2009) ("After considering the applicable legal standard, the authorities that support each side of the immunity question in this case, and the underlying purpose of the judicial immunity doctrine, we believe that the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act, and therefore that the judges' acts at issue in this suit must be considered to be protected by judicial immunity. . . . The Supreme Court has held that the related doctrine of prosecutorial immunity, which is justified by a similar rationale and governed by similar rules, may apply to acts made outside the context of a specific lawsuit when the acts are 'directly connected with the conduct of a trial' and 'necessarily

require legal knowledge and the exercise of related discretion.'[citing *Van De Kamp*] Ultimately, the acts at issue in this case involve the performance of duties which are intimately connected to a judge's adjudicatory role, and are therefore judicial in nature."); ***Barrett v. Harrington***, 130 F.3d 246, 264 (6th Cir. 1997) ("We hold that a judge is entitled to absolute immunity when contacting prosecutors to prompt an investigation of conduct by a disgruntled litigant which may constitute obstruction of justice in connection with an action or decision taken or made by the judge in his or her adjudicatory capacity. We affirm the District Court's ruling that Judge Harrington was not entitled to absolute immunity for her statements to the media, because such statements are not judicial acts."); ***Archie v. Lanier***, 95 F.3d 438, 441 (6th Cir. 1996) (holding that "stalking and sexually assaulting a person, no matter the circumstances, do not constitute 'judicial acts.'").

See also ***Strawser v. Strange***, 100 F. Supp. 3d 1276, 1282 (S.D. Ala. 2015) ("The issuance of marriage licenses is a purely ministerial act. *See Ex parte State ex rel. Alabama Policy Institute,* ——So.3d ——, ——, ——, 2015 WL 892752, *4, 8 (Ala., March 3, 2015) (discussing and referring to the probate judges' 'ministerial act of licensing marriages'). Neither Davis nor Russell is charged with discretion or judgment in carrying out this ministerial duty. Accordingly, the court finds Defendants are not entitled to judicial immunity.")

See also ***Savoie v. Martin***, 673 F.3d 488, 496 (6th Cir. 2012) ("Savoie also asked the court to enjoin Tennessee judges 'from presiding over any matter under which they served as a Rule 31 mediator.' Savoie's claim for injunctive relief fails because 'injunctive relief shall not be granted' in an action brought against 'a judicial officer for an act or omission taken in such officer's judicial capacity ... unless a declaratory decree was violated or declaratory relief was unavailable.' 42 U.S.C. § 1983; *accord Montero v. Travis,* 171 F.3d 757, 761 (2d Cir.1999). The district court did not err in declining to render this relief.").

b. Officials Acting in Judicial or Quasi-Judicial Capacity

Tobey v. Chibucos, 890 F.3d 634, 650 (7th Cir. 2018) ("[I]n filing the memoranda requesting that the state's attorney begin proceedings to revoke probation, Chibucos was engaged in a quasi-judicial function for which she is protected by absolute immunity. . . . Absolute immunity does not, however, extend to day-to-day duties in the supervision of a parolee or investigating and gathering evidence for revocation."); ***Garcia v. Cty. of Riverside***, 817 F.3d 635, 644 (9th Cir. 2016) ("It is true that 'prison officials charged with executing facially valid court orders enjoy absolute immunity from section 1983 liability for conduct prescribed by those orders.'. . However, absolute immunity applies 'only to the *fact* of a prisoner's incarceration pursuant to a facially valid court order—*i.e.*, the prison official in question must act within his or her authority and strictly comply with the order.'. . Here, according to Plaintiff's allegations, Baca did not strictly comply with the order, as it was applied to the wrong person, and Plaintiff challenged not just the fact of his incarceration, but also the lack of procedures to prevent the misidentification. Because the facts Plaintiff has alleged go beyond the limits of quasi-judicial immunity, this immunity does not apply to Baca."); ***Flying Dog Brewery, LLLP v. Michigan***

Liquor Control Comm'n, 597 F. App'x 342, 349, 352 (6th Cir. 2015) ("We find the Third Circuit's analysis of the non-exhaustive *Cleavinger* factors useful. We apply a similar approach to decide only whether the Administrative Commissioners who grant or deny beer label registration applications are entitled to quasi-judicial immunity. We expressly do not consider whether quasi-judicial immunity is warranted for other factual situations the Administrative Commissioners may face, nor do we consider whether the Hearing Commissioners who suspend or revoke liquor licenses in disciplinary cases are entitled to quasi-judicial immunity. . . .Because the six *Cleavinger* factors are divided evenly both for and against a grant of quasi-judicial immunity, we call this close question in favor of Flying Dog. We limit our decision on quasi-judicial immunity to the specific factual and legal circumstances presented by this case. Accordingly, we reverse the district court's conclusion that quasi-judicial immunity is warranted here, and we turn to the question of qualified immunity."); ***Capra v. Cook County Bd. of Review,*** 733 F.3d 705, 709, 710 (7th Cir. 2013) (Individual members of Cook County Board of Review were entitled to absolute quasi-judicial immunity when performing duties that are functionally comparable to judicial officer."); ***Engebretson v. Mahoney***, 724 F.3d 1034, 1039-42 (9th Cir. 2013) ("Consistent with this functional approach, the courts of appeals that have addressed whether prison officials are absolutely immune from § 1983 liability for enforcing facially valid court orders have uniformly concluded that they are. Absolute immunity applies even where a prisoner claims that the order at issue is invalid or the order is later overturned. [collecting cases] We now join our sister circuits and hold that prison officials charged with executing facially valid court orders enjoy absolute immunity from § 1983 liability for conduct prescribed by those orders. Our reasons are straightforward. First, such immunity is grounded in the common law. . .Second, such immunity is consistent with the Supreme Court's recent case law, because it is beyond dispute that prison officials enforcing court orders are 'performing functions necessary to the judicial process.'. . It is no accident that most courts refer to absolute immunity for prison officials enforcing court orders as 'quasi-judicial immunity.'. .Third, absolute immunity is necessary to free prison officials from the fear of litigation and 'insure that such officials can perform their function without the need to secure permanent legal counsel.'. . .Our sister circuits have been careful to extend absolute immunity only to the *fact* of a prisoner's incarceration pursuant to a facially valid court order—*i.e.,* the prison official in question must act within his or her authority and strictly comply with the order. . . . This case fits within these limitations. There can be no question that the state court had the authority to issue Engebretson's sentencing order, that the defendants had the authority to enforce the order, or that the order was facially valid. . . .Prison officials who simply enforce facially valid court orders 'are performing functions necessary to the judicial process.'. . They must not be required to second-guess the courts if that process is to work fairly and efficiently. For this and the other reasons discussed above, we hold that prison officials, like the defendants in this case, who are charged with executing facially valid court orders enjoy absolute immunity from § 1983 liability for conduct prescribed by those orders."); ***Jackson v.Pfau***, 523 F. App'x 736 (2d Cir. 2013) (Judge, judge's law clerk, chief judge, and other judicial officers were entitled to judicial immunity from suit under § 1983 for actions taken in performance of duties); ***Heyde v. Pittenger***, 633 F.3d 512, 517, 519 (7th Cir. 2011) ("Here, the district judge found that the BOR [Board of Review] members are entitled to absolute immunity because, under the *Butz* criteria and

Illinois statutes governing the BOR, their actions while reviewing Heyde's property assessment claim were quasi-judicial in nature. We agree. . . . The BOR has the characteristics that counsel towards granting absolute immunity. The BOR members' actions while performing their duties as instructed by Illinois statutes, Heyde's ability to present evidence and question witnesses, his ability to appeal both to the PTAB and, if still dissatisfied, to the Illinois courts, and the need to protect BOR members from fear of intimidation and litigation, fall squarely within the *Butz* factors and within our previous decisions regarding absolute immunity for state and local administrative officials. Accordingly, the BOR members are entitled to absolute immunity."); ***Keystone Redevelopment Partners, LLC v. Decker***, 631 F.3d 89, 101 (3d Cir. 2011) ("In sum, we hold that the *Butz* factors, on balance, clearly support quasi-judicial immunity for members of the Pennsylvania Gaming Control Board."); ***Jallali v. Florida***, No. 10-12386, 2011 WL 5019382, at *1 (11th Cir. Dec. 10, 2010) (not reported) ("Absolute judicial immunity extends not only to judges, but to other persons whose 'official duties have an integral relationship with the judicial process.'. .Because drafting an appellate court opinion is an inherently judicial activity, a law clerk enjoys absolute immunity in doing so."); ***Disraeli v. Rotunda***, 489 F.3d 628, 632, 633 (5th Cir. 2007) (enforcement attorney with Texas State Securities Board was acting in quasi-judicial capacity when issuing an emergency order and entitled to absolute immunity); ***Dotzel v. Ashbridge,*** 438 F.3d 320, 323, 324, 327 & n.5 (3d Cir. 2006) ("Analysis of the functions undertaken by the Board in ruling on permit applications persuades us that the Board members act in a quasi-judicial capacity and are therefore entitled to absolute immunity from suit.. . . . As its name suggests, 'quasi-judicial' immunity is a doctrine under which government actors whose acts are relevantly similar to judging are immune from suit. 'Quasi-judicial absolute immunity attaches when a public official's role is "functionally comparable" to that of a judge.' . . Regardless of his job title, if a state official must walk, talk, and act like a judge as part of his job, then he is as absolutely immune from lawsuits arising out of that walking, talking, and acting as are judges who enjoy the title and other formal indicia of office. . . .The Board members here were acting in a quasi-judicial capacity, and are absolutely immune from suit in their individual capacities. Any actions against them in their individual capacities must therefore be dismissed. . . . The remaining substantive due process claim against the Township and the Board members in their official capacities is not affected by our decision in this appeal. The substantive due process claim against the Board members in their official capacities 'is, in all respects other than name, to be treated as a suit against the entity.'. . The Township, as a municipal entity, is not entitled to any form of immunity."); ***Diva's Inc. v. City of Bangor***, 411 F.3d 30, 40, 41(1st Cir. 2005) (City Council members performed an adjudicatory function when they reviewed and voted on special amusement permit and thus were entitled to absolute immunity in their personal capacities); ***In re Castillo,*** 297 F.3d 940, 953 (9th Cir. 2002) (Bankruptcy trustee is entitled to quasi-judicial immunity for both scheduling and noticing of confirmation hearing); ***Lonzetta Trucking and Excavating Company v. Schan***, No. 04-2758, 2005 WL 730363, at *4 (3d Cir. Mar. 9, 2005) (unpublished) ("[Z]oning officials, including the supervisors of Hazle Township, members of the Hazle Township Zoning Board, and the Zoning Officer of Hazle Township would be entitled to absolute immunity in their individual capacities if they were performing 'quasi-judicial' functions. However, the zoning officials in their official capacities, the Hazle Township Zoning Board, and

the Hazle Township are not entitled to absolute immunity. The planning board as a governmental agency has no immunity whatsoever."); ***Tobin for Governor v. Illinois State Board of Elections,*** 268 F.3d 517, 523-26 (7th Cir. 2001) (collecting and discussing cases where court has extended absolute immunity to members of various state agencies acting in an adjudicatory capacity; concluding that "the board members act in the functional capacity of judges when they rule on the validity of nomination petitions, which entitles them to quasi-judicial absolute immunity."); ***Beck v. Texas State Bd of Dental Examiners,*** 204 F.3d 629, 635, 636 (5th Cir. 2000) (members of Board of Dental Examiners performed quasi-judicial function when they participated in disciplinary proceedings and had absolute immunity; ***Watts v. Burkhart***, 978 F.2d 269 (6th Cir. 1992) (*en banc*) (affording absolute immunity to members of state medical licensing board sued in their individual capacities with respect to suspension or revocation of doctor's license).

See also ***In Re: J & S Properties, LLC***, 872 F.3d 138, 148-51 (3d Cir. 2017) (Fisher, J., concurring in the judgment) ("Whether or not the Trustee sufficiently preserved her *Harlow* qualified immunity defense, I believe this case should be decided based on the historical tradition of according quasi-judicial immunity to bankruptcy trustees sued by third parties for actions taken within the scope of their official duties. It has long been understood that the various immunities from suit possessed by public officials at common law in 1871, the year Congress passed 42 U.S.C. § 1983, are retained in suits against state officials under that statute. . . . Among the immunities firmly established in the common law is the absolute immunity judges enjoy for actions when carrying out their judicial functions. . . Pre-1871 common-law courts also extended quasi-judicial immunity to public servants performing 'official acts involving policy discretion but not consisting of adjudication.'. . . Applying the analytical framework set forth in *Antoine*, Chapter 7 bankruptcy trustees should be accorded quasi-judicial immunity for actions taken within the scope of their duties that are necessary to the bankruptcy court's adjudication of a debtor's estate. The bankruptcy trustees of today perform quasi-judicial functions that trace back to their sixteenth-century English predecessors. . . . Against this background, granting the Trustee quasi-judicial immunity in this case is not a close call.")

But see ***Brunson v. Murray***, 843 F.3d 698, 710-14 (7th Cir. 2016) ("The district court's grant of absolute immunity for action on a license renewal has support in our opinions in *Killinger v. Johnson*, 389 F.3d 765 (7th Cir. 2004), and *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), which hold or indicate that absolute immunity is available not only for a local liquor commissioner's decisions to suspend or revoke licenses, but also for actions on license renewals. On further consideration, however, and in light of supplemental briefing on the question, we conclude that those cases must be narrowed so as to exclude license renewal decisions. The key holding expressed in *Reed* based its grant of absolute immunity for license renewal decisions on a view of Illinois law that is no longer accurate and on a broad view of absolute immunity that the Supreme Court has narrowed. We reverse the grant of absolute immunity to the mayor with respect to the non-renewal of Brunson's liquor license. We start the analysis with the Supreme Court's approach to the strong medicine of absolute immunity. Absolute immunity is a powerful shield attaching primarily to judicial functions—not to the person or position. . . When a functional

analysis of the responsibilities at issue reveals that they are judicial in nature, the actor is entitled to absolute immunity from damages no matter how erroneous the act or injurious the consequences. . . If the functions are not judicial in nature, however, then absolute immunity is not available. The official is left with the still-important protection of qualified immunity, which defeats individual liability unless his or her actions were contrary to clearly established law. . . Under the reasoning of *Cleavinger* and *Butz*, the action of renewing or not renewing an Illinois liquor license is a bureaucratic and administrative act—not a judicial act. Under state law, a local liquor commissioner's action on a license renewal lacks the procedural formalities and protections that apply to the same official's decision to suspend or revoke a license. The differences are great enough to produce different results for the availability of absolute immunity. . . . In this appeal, we invited the parties to file supplemental briefs on whether the absolute immunity holding of *Reed* and the *dictum* of *Killinger* on license renewals should be revisited. The principles of *stare decisis* demand that we give significant weight to our prior decisions unless supervening developments arise. . . While recognizing the importance of *stare decisis* in general, we conclude that we must narrow the *Reed* holding and disagree with the *dictum* in *Killinger*. We must deny absolute immunity to local liquor commissioners in decisions to renew licenses. We take this step based on developments in both federal and state law. . . The principal development in federal law is the Supreme Court's decision in *Cleavinger*, which laid out the factors discussed above for deciding when the rare grant of absolute immunity is *required*. . . .*Cleavinger* was decided after *Reed* and was not cited in *Killinger*, which in any event did not need to address whether absolute immunity should apply to decisions whether to renew licenses. . . .Accordingly, the combination of *Cleavinger*, the Illinois legislative response to *City of Wyoming*, and the more recent decision in *Knoob Enterprises* convinces us that the key assumption in *Reed* concerning non-renewals no longer applies. Absolute immunity should no longer apply to non-renewal decisions, which lack the hallmarks of a judicial act."); ***Burton v. Infinity Capital Mgmt.,*** 753 F.3d 954, 959, 961 (9th Cir. 2014) ("[T]he sole question in this appeal is whether an attorney who drafts an order at the request of a judge is entitled to absolute quasi-judicial immunity. We conclude that he is not. . . .Although the function performed by Gugino had a close nexus to the judicial process—he prepared the order during a judicial proceeding, and orders are a basic and integral part of judicial proceedings—preparing the order did not involve the kind of discretionary judgment that is protected by the doctrine. . . . Gugino argues that he is entitled to absolute immunity because a law clerk would have been entitled to absolute immunity for preparing the order. Although law clerks are entitled to absolute immunity and certainly prepare orders, an attorney cannot be compared to a law clerk, who is 'probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function.'. . Gugino also contends he is entitled to absolute quasi-judicial immunity because he was doing what Judge Israel asked him to do. Other circuits have held that a function undertaken pursuant to the explicit direction of a judge entitles the subordinate to absolute immunity. . . However, immunity was extended in all of those cases to court officials, and Gugino is not a court official."); ***Goldstein v. Moatz,*** 364 F.3d 205, 216, 217 (4th Cir. 2004) ("The peer review functions in *Ostrzenski* [*v. Seigel*, 177 F.3d 245 (4th Cir.1999)] are readily distinguishable from those performed by the Defendants [officials of PTO conducting attorney disciplinary

investigation], however, in that the peer reviewer was obliged by regulation not only to investigate but also to make recommendations to the Board concerning the actions it should take. . . As Judge Wilkins carefully explained, the peer reviewer could enjoy absolute immunity only when performing a protected prosecutorial function, which in that instance was 'reviewing the evidence to determine whether to recommend prosecution.'. . The function of recommending prosecution is protected by absolute immunity because it requires the exercise of discretion. And the doctrine of absolute immunity was designed to protect, among other things, the free exercise of discretion. . . The Defendants here, unlike the peer reviewer in *Ostrzenski*, have neither the statutory nor regulatory authority to recommend disciplinary action; they merely investigate. [footnote omitted] Although the peer reviewer enjoyed absolute immunity for the intertwined activities of making his recommendation to the Board and conducting the investigation to support his recommendation, we decline to expand or extend *Ostrzenski* to cover circumstances such as these, involving purely investigative activities without a concomitant recommendation."); ***Dean v. Byerley,*** 354 F.3d 540, 556, 557 (6th Cir. 2004) ("In this case, the actions Byerley allegedly took in response to Dean's picketing are not functions normally performed by an adjudicator nor are they related to functions normally performed by an adjudicator. Although Byerley was employed as Regulation Counsel for the State Bar of Michigan and although the Bar is merely an extension of the Michigan Supreme Court for purposes of deciding whether to grant or deny Bar applications, it is clear on the record as it now stands that Byerley was not performing an adjudicative function during the March 27, 2001 confrontation. [footnote omitted] Dean alleges that in response to his picketing, Byerley threatened that Dean would never practice law in the state of Michigan and threatened to have the picketers arrested. Neither of these actions are related to the decision of whether to grant or deny Dean's Bar application. While reporting an applicant's conduct to the police and the Bar might be related to the functions normally performed by an adjudicator, the actions Dean alleges that Byerley took were of a different function and nature. Byerley's alleged actions were in the form of a threat for the purpose of intimidating Dean so that Dean would cease picketing. Byerley's alleged actions were not in the form of a statement to the police for the purpose of reporting conduct by Dean that was unlawful, or in the form of a statement to the Bar for the purpose of reporting conduct by Dean that reflected adversely on Dean's character. Because Byerley has failed to demonstrate in any way that he was engaged in an adjudicative function when he allegedly retaliated against Dean, Byerley is not entitled to summary judgment based upon the defense of absolute immunity.").

Redmond v. Fulwood, 859 F.3d 11, 13 (D.C. Cir. 2017) ("Dissatisfied with his parole denials and without any option to appeal, Redmond brought suit against the then-Chairman of the United States Parole Commission, Isaac Fulwood, Jr., in his personal capacity, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). . . The district court *sua sponte* dismissed Redmond's complaint under the Prison Litigation Reform Act, 28 U.S.C. §§ 1915(e)(2)(B)(iii), 1915A(b)(2), holding that Fulwood is absolutely immune from suit for acts taken in the course of his duties as Chairman of the United States Parole Commission. Redmond appealed to this court, and we now affirm. We do so, however, because Fulwood is entitled to qualified immunity for each of the claims in Redmond's complaint. Accordingly, we

need not and do not reach the question of whether Fulwood is entitled to absolute immunity for actions taken during his tenure as Chairman of the United States Parole Commission."); ***Figg v. Russell***, 433 F.3d 593, 598 & n.2 (8th Cir. 2006) ("[T]he Parole Board was within its power when it applied the conditions of Figg's parole to her suspended sentence, and when it took action concerning her suspended sentence when she violated parole. Thus, under our holding in *Patterson* [*v. Von Riesen*, 999 F.2d 1235 (8th Cir.1993)], the Parole Board's actions regarding Figg's parole and suspended sentence are entitled to absolute immunity.. . . . Even if the Parole Board had acted in violation of Figg's constitutional rights, as Figg asserts, those actions would not fall outside the board's power, such that absolute immunity would not apply. 'An official does not act outside her jurisdiction simply because she makes an unconstitutional or unlawful decision.' . . Rather, the subject matter of the action is the measure of the board's proper exercise of power. 'A decision about whether or not to grant parole is at the heart of a parole board member's jurisdiction, whether that decision is based on lawful or unlawful considerations.'. . In this case, decisions regarding a suspended sentence are also at the heart of the board members' jurisdiction, and thus are entitled to absolute immunity."); ***Homes v. Crosby***, 418 F.3d 1256, 1258, 1259 (11th Cir. 2005) (per curiam) ("We repeatedly have held that individual members of the Parole Board are entitled to absolute quasi-judicial immunity from a suit for damages. . . Thus, we hold that the district court erred in permitting the claims for monetary damages to proceed against the individual Board members. We have not yet determined, however, whether a parole officer is also entitled to quasi-judicial immunity. We held in *Hughes v. Chesser*, 731 F.2d 1489, 1490 (11th Cir.1984) that probation officers receive immunity in preparing presentence investigation reports. Additionally, we held in *Jones v. Cannon*, 174 F.3d 1271, 1281 (11th Cir.1999), that witnesses in criminal trials and grand jury proceedings are afforded absolute immunity even if their testimony is false. . . . Although a parole hearing is not a criminal hearing or grand jury proceeding, we read the Supreme Court's and our previous cases to imply that parole officers enjoy immunity for testimony given during parole revocation hearings when they act within the scope of their duties. Thus, because Crosby was acting within the scope of his duties when he testified, we conclude that the district court erred in permitting the claims for monetary damages to proceed against Crosby."); ***Swift v. California,*** 384 F.3d 1184, 1191, 1193 (9th Cir. 2004) ("Applying the functional analysis articulated in *Antoine* and *Miller*, we conclude that Christian and Rodriguez are not entitled to absolute immunity for their conduct while: (1) investigating parole violations, (2) ordering the issuance of a parole hold and orchestrating Swift's arrest, and (3) recommending the initiation of parole revocation proceedings. . . . We conclude that, like the parole officer in *Scotto*, Christian and Rodriguez's actions requesting that the BPT initiate revocation proceedings, were more akin to a police officer seeking an arrest warrant, than to a prosecutor exercising quasi-judicial discretion to initiate criminal proceedings. Thus, Christian and Rodriguez are not entitled to absolute immunity for recommending that the BPT initiate revocation proceedings."); ***Scotto v. Almenas***, 143 F.3d 105, 111-13 (2d Cir. 1998) ("Parole officers are entitled to absolute immunity when they perform judicial functions. Thus, a parole board official is absolutely immune from liability for damages when he 'decide[s] to grant, deny, or revoke parole,' because this task is functionally comparable to that of a judge. . . . Parole officers also receive absolute immunity for their actions in initiating parole revocation proceedings and in presenting the case for

revocation to hearing officers, because such acts are prosecutorial in nature. . . . Upon deciding that Scotto had probably violated his parole, Almenas was required to recommend that a warrant issue. Senior parole officer Wegman thereafter made the discretionary decision to issue the warrant and initiate the parole revocation 'prosecution.' Almenas's role was similar to that of a police officer applying for an arrest warrant, a function for which qualified immunity is sufficient."); ***Walrath v. United States***, 35 F.3d 277, 281 (7th Cir.1994) (holding that "parole board members are absolutely immune from suit for their decision to grant, deny, or revoke parole." (collecting cases)).

See also ***Ellingson v. Piercy***, No. 2:14-CV-04316-NKL, 2015 WL 3713989, at *7 (W.D. Mo. June 15, 2015) ("The Court concludes the coroner's inquest conducted by Coroner Jones was a quasi-judicial proceeding, as a matter of law. Furthermore, Coroner Jones' function during the coroner's inquest was equivalent to a prosecutor's function during a grand jury proceeding. Therefore, Coroner Jones is entitled to absolute immunity for his actions in presenting, or not presenting, testimony or other materials during the coroner's inquest he conducted. Coroner Jones is entitled to absolute immunity even if he acted with malice, intentionally failed to present evidence, or presented false or misleading evidence. The Plaintiffs' conspiracy claims are also barred by absolute immunity because Coroner Jones' alleged participation in the conspiracy consisted of otherwise immune acts, that is, his decision not to present certain testimony and other materials at the coroner's inquest."); ***Mahoney v. Holder***, 62 F. Supp. 3d 1215, 1220 (W.D. Wash. 2014) ("It is clear that Mr. Bobb was appointed by the district court to oversee formulation of a Policy which was both the product and the subject of an ongoing 'dispute between parties'—namely, the City of Seattle and the United States Department of Justice. According to Plaintiffs, Mr. Bobb agreed with the DOJ's preferred solutions and disagreed with the outcome preferred by Plaintiffs (who were not formal parties to the litigation). Still, this alleged course of action does not deprive his conduct of judicial character. Far from it: judges are usually persuaded by one side as opposed to another as they adjudicate disputes in our adversarial system. An outcome that favors one party is no less a 'resolution' because it does not please all stakeholders. Here, the Court agrees with Defendant Bobb that even if Mr. Bobb engaged in the conduct Plaintiffs assign to him, he was engaged in an essential judicial function: that of resolving a dispute between the parties to the *City of Seattle* litigation at the request of a federal district court judge."); ***Phillips v. Conrad***, No. 10-40085-FDS, 2011 WL 684166, at *7, *8 (D. Mass. Feb. 18, 2011) ("Neither the Supreme Court nor the First Circuit has interpreted the phrase 'judicial officers' in the context of this statute. . . Parole board members and officers performing quasi-judicial functions within the scope of their official duties are treated like judges under the doctrine of absolute immunity from damages. . . And the only federal courts to have considered the issue have concluded that claims for injunctive relief and attorney's fees against parole board officials performing quasi-adjudicative functions are likewise barred. [collecting cases] . . . . [I]t would be incongruous to determine that parole board members and officers performing quasi-adjudicative functions are entitled to absolute immunity from damages but are not 'judicial officers' immune from actions seeking injunctions and attorney's fees under § 1983 and § 1988. If Congress intended the statute to apply differently to quasi-judicial officers, it would have been easy enough to say so. Accordingly, the parole board

defendants in this case are 'judicial officers' within the meaning of the FCIA, and are therefore generally immune from actions seeking injunctive relief or attorney's fees, absent violation of a declaratory decree or the unavailability of declaratory relief."); ***Borzych v. Frank,*** No. 04-C-632-C, 2004 WL 235999, at *7 (W.D. Wis. Oct. 14, 2004) ("Because I conclude that the persons making recommendations for the disposition of inmate complaints are entitled to absolute immunity, plaintiff will not be allowed to proceed against defendants Hautumaki, Trumm, John Ray or Ellen Ray. This conclusion is consistent with the purpose behind affording absolute immunity, which is to free the judicial process from harassment and intimidation. . . The potential for harassment or intimidation is particularly high in the prison setting given the unusually litigious tendencies of inmate populations. Although the Wisconsin Administrative Code empowers inmate complaint examiners and corrections complaint examiners the authority to conduct investigations, plaintiff does not complain about the execution of any such investigation. Therefore, I will reserve for another day the question whether inmate complaint review personnel are entitled to absolute immunity for conducting investigations."); ***Friedland v. Fauver***, 6 F. Supp.2d 292, 304 (D.N.J. 1998) ("Following the lead of the Ninth Circuit Court of Appeals, the First, Fourth, Seventh, and Eighth Circuits have generally awarded parole officials absolute immunity for actions taken in the processing of alleged parole violations. However, the Court of Appeals for the Third Circuit has ruled that 'probation and parole officers are entitled to absolute immunity when they are engaged in adjudicatory duties,' but '[i]n their executive or administrative capacity, probation and parole officers are entitled only to a qualified, good faith immunity,' *Wilson v. Rackmill*, 878 F.2d 772, 775 (1989) . . . In this Circuit, parole board members and officers are entitled to absolute immunity only when serving as a hearing examiner or making a decision to revoke or deny parole.").

But see ***Victory v. Pataki***, 814 F.3d 47, 66-67 (2d Cir. 2016) ("We affirm the district court insofar as it concluded that Graber was entitled to absolute immunity for any actions taken while performing the quasi-judicial function of deciding whether to rescind Victory's parole. We reject, however, the contention that Graber's absolute immunity automatically serves to shield any other individual who may have been involved in the sequence of events precipitating the initiation of the rescission proceedings. . . .We agree with the district court that Graber was entitled to absolute immunity for any actions taken while performing the quasi-judicial function of adjudicating whether to rescind Victory's parole. . . .However, Graber's absolute immunity does not extend to the alleged fabrication of evidence when performed outside that adjudicatory role, before the initiation of rescission proceedings. . . Nor does it protect alleged wrongdoers who, while not performing the function of an adjudicator or an advocate, enlist themselves in a scheme to deprive a person of liberty by rescinding his parole based on grounds known to be fabricated. . . . A government official cannot immunize for Section 1983 purposes all unlawful conduct performed prior to and independent of a later immunized act, merely by subsequently engaging in conduct entitled absolute immunity. . . This Court explained long ago that the doctrine of absolute immunity does not permit 'relating back' absolute immunity afforded for certain subsequent acts to acts of fabrication performed at earlier stages of the proceedings where absolute immunity did not attach. . . Accordingly, we reject the district court's categorical conclusion that, due to Graber's absolute immunity, Victory could not maintain a Section 1983 claim arising out of the procedural infirmities

at the rescission hearing unless he showed that another Defendant had 'directly participate[d] in the rescission hearing' or participated in a conspiracy to deprive him of his rights."); ***Thornton v. Brown***, 757 F.3d 834, 840 (9th Cir. 2014) ("Absolute immunity does not extend, though, to Plaintiff's claim that the parole officers enforced the conditions of his parole in an unconstitutionally arbitrary or discriminatory manner. Parole officers' 'immunity for conduct arising from their duty to supervise parolees is qualified.'. . Plaintiff's allegation that the officers enforced the residency restriction against him but not against similarly situated parolees relates to the manner in which Defendants implemented that condition—an element of their supervisory function. Absolute immunity therefore does not apply to Plaintiff's enforcement-based claim.")

See also ***Turner v. Houma Municipal Fire and Police Civil Service Board,*** 229 F.3d 478, 483 (5th Cir. 2000) ("[A] § 1983 suit naming defendants only in their 'official capacity' does not involve personal liability to the individual defendant. Concomitantly, defenses such as absolute quasi-judicial immunity, that only protect defendants in their individual capacities, are unavailable in official-capacity suits. . . . Appellants' contention that the Houma Board members should be granted absolute quasi-judicial immunity in their official capacities derives from a misreading of the case law in this circuit. To be fair, this circuit has not been explicit in articulating which 'capacity' we have granted absolute quasi- judicial immunity; however, a precise reading of the cases relied on by appellants demonstrate that the holdings in [*Kentucky* v.] *Graham* and *Hafer* have been consistently applied in this circuit and offer no support for the appellants' argument.").

c. Officials Executing or Enforcing Judicial Orders

Moss v. Kopp, 559 F.3d 1155, 1164, 1166-69 (10th Cir. 2009) ("Even if Judge Medley's *approval* of the motions that lead to the two challenged court orders was error, even grave procedural due process error, there is no indication under Utah law that Judge Medley was without *subject matter jurisdiction* to entertain the motions. And since he was a judge of a court of general jurisdiction, neither Judge Medley's commission of error in granting the motions that led to the two disputed orders, nor the apparent lack of a statute authorizing Judge Medley's approval of the motions leading to the orders, rendered his actions in 'clear absence of all jurisdiction.' Therefore, the district court here was correct to find this aspect of the quasi-judicial immunity analysis satisfied. . . . Even if the court orders here are unlawful, several considerations demonstrate that the orders did not reach the level of illegality necessary to render them *facially* invalid for purposes of quasi-judicial immunity and to justify imposing liability on the deputies: (1) Utah sheriff's deputies–who do not have the benefit of a formal legal education– are otherwise subject to being authorized to seize property in noncriminal actions through writs of replevin; (2) we are pointed to no law totally forbidding entry into a dwelling when executing a writ of replevin;. . . and (3) an order in a civil case that authorizes entry into a residence but does not meet warrant requirements is not as clearly unlawful as a similar order in a criminal case, where law enforcement officers are familiar with the requirements for legally obtaining evidence. Therefore, we conclude that the court orders in this case meet the facial validity requirement. . . .Here Kopp and Herlin obeyed the statute and executed Judge Medley's orders. From the facts presented, it cannot be said that they

acted outside the scope of their jurisdiction. . . . Kopp and Herlin did not exceed the court orders even if they inadvertently obtained property that was not 'owned' by Yanaki, because the Discovery Order specifically directed the Salt Lake County Sheriff's Office to take custody of property 'in the possession, custody, or control' of Yanaki– not merely property 'owned' by Yanaki. . . . Under these facts, Kopp and Herlin did not exceed either the Discovery Order or the Supplemental Order. . . . As Yanaki and Moss rely entirely on the conduct of the deputies alone, they can only be alleging *respondeat superior* liability for [Sheriff] Kennard and Salt Lake County, which the Supreme Court has ruled cannot support § 1983 liability against municipalities. . . Therefore, the district court properly dismissed the claims against Kennard and Salt Lake County."); ***Cooper v. Parrish***, 203 F.3d 937, 950 (6th Cir. 2000) ("Law enforcement officials are entitled to absolute quasi-judicial immunity when they act pursuant to a valid court order."); ***Mays v. Sudderth***, 97 F.3d 107, 113 (5th Cir. 1996) (concluding "that an official acting within the scope of his authority is absolutely immune from a suit for damages to the extent that the cause of action arises from his compliance with a facially valid judicial order issued by a court acting within its jurisdiction."); ***Marr v. Maine Dep't of Human Services,*** 215 F. Supp.2d 261, 269, 271 (D.Me. 2002) ("As alleged in the complaint, Irwin's duties included meeting with the child, investigating, and reporting to the court the best interests of the child . . . In performing these duties, Irwin carried out a function that was 'integral to the judicial process.' . . . . Thus, Irwin is entitled to absolute quasi-judicial immunity for claims against him in the performance of these acts as a GAL. . . . A GAL is entitled to absolute immunity under § 1983 from any suit for damages based on the performance of his duties within the scope of his appointment.").

Compare ***Martin v. Hendren***, 127 F.3d 720, 722 (8th Cir. 1997) ("Martin argues that even if [Officer] Hendren is absolutely immune from liability for implementing the judge's orders, Hendren ceased to act in a quasi-judicial capacity when he carried out those orders using excessive force. . . . Absolute quasi-judicial immunity would afford only illusory protection if it were lost the moment an officer acted improperly. . . .Because judges frequently encounter disruptive individuals in their courtrooms, exposing bailiffs and other court security officers to potential liability for acting on a judge's courtroom orders could breed a dangerous, even fatal, hesitation.") *with* ***Martin v. Hendren***, 127 F.3d 720, 725 (8th Cir. 1997) (Lay, J., dissenting) ("When a judicial order is given to a courtroom official, the judge presumes that the order will be carried out in a lawful manner that does not violate the constitutional rights of the trial participants. When an allegation arises that such is not the case, justice demands that no more than qualified immunity should apply, so that the facts of the incident may be evaluated in relation to the nature of the traditional function of the officer."). *See also* ***Martin v. Board of County Commissioners***, 909 F.2d 402, 405 (10th Cir.1990) ("Neither the rationale nor the express holding of *Valdez* [*v. Denver*, 878 F.2d 1285 (10th Cir. 1989)] supports defendants' argument that peace officers are absolutely immune from liability for the manner in which they carry out otherwise proper court orders.").

See also ***Russell v. Richardson***, 905 F.3d 239, 248, 250-51 (3d Cir. 2018) ("Appellants here contend that the relevant function that justifies affording Richardson absolute immunity is 'the enforcement of judicial orders by a court's marshal. . .' Reading two of our precedents and

one from the Tenth Circuit as standing for a categorical rule that 'any public official acting pursuant to a court directive is immune from suit,' regardless of the specific action challenged in that suit, Appellants argue that Richardson enjoys immunity from the excessive force claim here because at the time he shot L.T. he was acting 'at the direction of a judge.'. . And, according to Appellants, '[t]here simply cannot be one rule for a deputy who is able to accomplish th[at] directive without incident and a different rule for a deputy who meets with resistance that results in an injury or death.'. . The problem with this argument is that it ignores the distinction between claims based on the actions actually authorized by court order, which are barred by quasi-judicial immunity, and those based on the manner in which a court order is enforced, which are not. As we explain below, that distinction dates to common law, has been consistently recognized by the Courts of Appeals, and is all but dictated by the 'functional' approach to modern-day immunity. It also leads us to affirm the District Court's denial of absolute immunity to Richardson. . . . Today, we join our Sister Circuits and make explicit what was implicit in our decisions in *Lockhart* and *Waits*: Quasi-judicial immunity extends only to the acts authorized by court order, i.e., to the execution of a court order, and not to the manner in which it is executed. . . .We measure an officer's acts against the yardstick of that officer's functions, and—contrary to Appellants' insistence that an officer is immune for all acts incident to the execution of a court order, regardless how less-than-perfect' those actions may be, . . we extend quasi-judicial immunity only to acts consistent with the '*appropriate* exercise of those functions.'"); ***Brooks v. Clark Cty.***, 828 F.3d 910, 915-19 (9th Cir. 2016) ("We have never held that courtroom officials—bailiffs, marshals, and the like—receive absolute immunity whenever they act pursuant to a judge's order, regardless of whether they execute such order in a way that deviates from what the judge commanded. The circuits are divided on the question. *Compare Richman v. Sheahan*, 270 F.3d 430, 438–39 (7th Cir. 2001) (rejecting absolute immunity), *and Martin v. Bd. of Cty. Comm'rs*, 909 F.2d 402, 404–05 (10th Cir. 1990) (same), *with Martin v. Hendren*, 127 F.3d 720, 721–22 (8th Cir. 1997) (holding such officials do have absolute immunity). . . .In this case, Brooks has alleged that Keener violated his Fourth Amendment rights by using excessive force to remove him from Judge Lippis's courtroom. And the allegation is quite clear that Judge Lippis did not order Keener to use excessive force; instead, the allegation is that Keener acted beyond the scope of Judge Lippis's express and implied instructions. . . . We are satisfied that neither precedent nor first principles justify giving courtroom officials absolute immunity when they allegedly use force in excess of what their judge commanded and the Constitution allows."); ***In re Mills***, 287 F. App'x 273, 279 (4th Cir. 2008) ("We do not find the Eighth Circuit's decision [in *Martin*] persuasive. As recognized by the dissent in that case, the majority failed to appreciate the distinction between protection from liability simply for following a judge's order and protection from liability for carrying out a judge's order in a manner not sanctioned by the judge. . . . Here, Mills's alleged unconstitutional execution of the order was not specifically authorized by the judicial officer who issued the warrant. Nor does the complaint seek to hold Mills liable for a quasi-judicial decision. Rather, the decision challenged in the complaint is the defendants' decision of how to execute the warrant. Thus, the state defendants clearly are not entitled to absolute quasi-judicial immunity."); ***In the Matter of Foust v. McNeill,*** 310 F.3d 849, 855 (5th Cir. 2002) ("Law enforcement officers have absolute immunity for enforcing the terms of a court order

but only qualified immunity for the manner in which they choose to enforce it."); ***Richman v. Sheahan,*** 270 F.3d 430, 435, 436 (7th Cir. 2001) (" We have not yet had occasion to consider whether law enforcement officers charged with using unreasonable force when seizing a person pursuant to a judge's order are entitled to quasi-judicial immunity. Two other circuit courts of appeal have addressed this question, with different results. [citing *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir.1990) and *Martin v. Hendren*, 127 F.3d 720 (8th Cir.1997)] We believe that the Eighth Circuit stretches the reasoning in *Mireles* too far, and confuses the question suggested by the Tenth Circuit in *Martin*– whether the challenged conduct was specifically ordered by the judge-with the separate question of whether the conduct was lawful or exceeded the actor's authority. . . . [W]hen the conduct directly challenged is not the judge's decision making, but the manner in which that decision is enforced, we agree with the Tenth Circuit that the law enforcement officer's fidelity to the specific orders of the judge marks the boundary for labeling the act 'quasi-judicial.'"); ***Levine v. Lawrence,*** No. 03-CV-1694(DRH ETB), 2005 WL 1412143, at **8-10 (E.D.N.Y. June 15, 2005) (not reported) ("[T]here appears to be no case in this Circuit discussing when arrests or uses of force by court officers restoring order in a courtroom or enforcing summary contempt orders fall within the scope of absolute quasi-judicial immunity, and the other authorities that have addressed this issue appear to be split. . . . While the outcomes of the various cases addressing this issue have thus varied, most courts seem to agree that absolute quasi-judicial immunity should not extend to court officers enforcing judicial orders if either (1) the judge's order is facially invalid, . . . or (2) the judge's order is not facially invalid, but the court officer exceeds the scope of that order, . . . or enforces it in an improper manner. . . In the latter regard, some courts have held that a bailiff is only entitled to quasi-judicial absolute immunity where his use of force to remove a person from the courtroom is within the scope of a direct judicial order. . . . Thus, where it is unclear from the record whether all of a court officer's challenged conduct, or the manner in which he acted was 'done under the trial judge's authority and direction,' the officer is not entitled to absolute quasi-judicial immunity.").

In ***Antoine v. Byers & Anderson Inc.***, 113 S. Ct. 2167 (1993), the Court held that a court reporter was not entitled to absolute immunity from damages for failing to produce a transcript of a federal criminal trial.

2. Prosecutorial Immunity

a. Prosecutors

Burns v. Reed, 500 U.S. 478 (1991) (prosecutor absolutely immune for functions performed in probable cause hearing, but only qualified immunity attached to function of giving legal advice to police); ***Imbler v. Pachtman***, 424 U.S. 409, 424-26 (1976) (absolute immunity for prosecutors performing prosecutorial acts). *See, e.g.*, ***Munchinski v. Solomon***, No. 17-2633, 2018 WL 4090881, at *2-4, *6-7 (3d Cir. Aug. 28, 2018) (not reported) ("A prosecutor's knowing failure to preserve exculpatory evidence is not entitled to absolute immunity because it is not part of the prosecutorial function. . . . Warman's modification of the Goodwin report during pretrial discovery

to remove information about whether the Bowen interview had been recorded was tantamount to the destruction of exculpatory evidence, which, like the knowing failure to preserve evidence, falls outside the prosecutorial function. . . As such, Warman is not entitled to absolute immunity under these facts. . . . The question before us is whether a prosecutor loses the protection of absolute immunity when, in addition to withholding exculpatory evidence in violation of *Brady*, he violates a judicial order. The more discretion a judicial order eliminates from the prosecutor's role, the more likely it is that a violation of that order strips the prosecutor of absolute immunity."); ***Nero v. Mosby***, 890 F.3d 106, 118-20 (4th Cir. 2018) ("The official claiming absolute immunity 'bears the burden of showing that such immunity is justified for [each] function in question.' *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). In applying this functional approach, the Supreme Court has distinguished between advocative functions and investigative or administrative functions, holding that the former enjoy absolute immunity but the latter do not. . . A prosecutor acts as an advocate when she professionally evaluates evidence assembled by the police, *Buckley*, 509 U.S. at 273, 113 S.Ct. 2606, decides to seek an arrest warrant, *Kalina*, 522 U.S. at 130, 118 S.Ct. 502, prepares and files charging documents, *id.*, participates in a probable cause hearing, *Burns*, 500 U.S. at 492, 111 S.Ct. 1934, and presents evidence at trial, *Imbler*, 424 U.S. at 431, 96 S.Ct. 984. In contrast, a prosecutor does not act as an advocate, but rather in an investigative or administrative capacity, when she gives legal advice to police during an investigation, *Burns*, 500 U.S. at 493, 111 S.Ct. 1934, investigates a case before a probable cause determination, *Buckley*, 509 U.S. at 274, 113 S.Ct. 2606, and personally attests to the truth of averments in a statement of probable cause, *Kalina*, 522 U.S. at 129, 118 S.Ct. 502. . . .We see no material difference between the conduct protected in *Kalina* and *Springmen* and the acts the Officers allege here. Mosby's assessment of the evidence—the knife, the failure to seatbelt Gray, information regarding what the Officers knew about Gray's medical condition before finding him unconscious—and her conclusion that it supported probable cause mirror the prosecutor's 'determination' in *Kalina* 'that the evidence was sufficiently strong to justify a probable-cause finding.'. . Mosby's alleged instruction to Cogen to file charges against the Officers is tantamount to a 'decision to file charges' under *Kalina*. . . And that decision is absolutely immune regardless of its motivation. . . Mosby's advice to Cogen that there was probable cause to charge the Officers is indistinguishable from that in *Springmen*, where the Assistant State's Attorney advised a police officer that the facts in an application for Statement of Charges were sufficient to warrant filing. . . And, assuming Mosby helped write the application here, both her characterization of the facts and her decision to provide some facts while omitting others fall within *Kalina*'s 'drafting of the certification' of probable cause and 'selection of the particular facts to include.'. . We reject the argument, as we did in *Springmen*, that providing legal advice to police is never entitled to absolute immunity. . . To be sure, the Supreme Court held in *Burns* that 'advising police in the *investigative phase* of a criminal case' is not 'so intimately associated with the judicial phase of the criminal process that it qualifies for absolute immunity.'. . But the Court has not retreated from the principle that 'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings'—including 'the professional evaluation of the evidence assembled by the police'—are absolutely immune. . . Where, as here, plaintiffs allege that a prosecutor initiated charges against them by informing a

police officer that the evidence gathered amounted to probable cause and directing the officer to file charges, the prosecutor is entitled to absolute immunity. . . We also reject the Officers' argument that Mosby's involvement in the investigation of Gray's death strips her of absolute immunity. Certainly, prosecutors enjoy only qualified immunity for their actions before securing probable cause for an arrest. . . And Mosby apparently began investigating before she had probable cause. . . But conducting an investigation is not actionable—in fact, it was Mosby's *responsibility* to investigate—and the Officers make no specific allegation that Mosby engaged in misconduct during that investigation. . .To the extent the Officers ask us to create a new rule that participation in an investigation deprives a prosecutor's subsequent acts of absolute immunity, we balk at the proposition. Such a rule would not only upend the functional approach that the Supreme Court has articulated and applied for decades, . . but it would effectively eliminate prosecutorial immunity in police-misconduct cases. Most jurisdictions, including Baltimore, charge prosecutors with independently investigating cases of criminal behavior by police. . . Per the Officers' theory, whenever a prosecutor takes on one of these cases, her actions—even those intimately tied to the judicial phase—no longer enjoy absolute immunity. This approach torpedoes the fundamental premise of absolute prosecutorial immunity: ensuring a fair, impartial criminal justice system, in which prosecutors have the independence to hold even powerful wrongdoers accountable without fear of vexatious litigation. . . And we refuse to sanction it. When determining whether a prosecutor is entitled to absolute immunity, we look at the specific act challenged, not the prosecutor's preceding acts. . . For the foregoing reasons, Mosby's absolute-immunity defense plainly defeats the Officers' § 1983 claim. Holding otherwise would require us to rewrite the doctrine of absolute prosecutorial immunity. This we will not do."); ***Loupe v. O'Bannon***, 824 F.3d 534, 539-40 & n.4 (5th Cir. 2016) ("Applying the principles of absolute immunity and the functional approach prescribed by the Supreme Court's decisions, we conclude that O'Bannon is absolutely immune from suit for money damages based on her alleged malicious prosecution of Loupe. . . .However, applying the Supreme Court's decisions, we conclude that O'Bannon is not absolutely immune from Loupe's federal and state actions based on O'Bannon's alleged order of Loupe's warrantless arrest, as that conduct was not part of O'Bannon's prosecutorial function. In *Burns*, the Supreme Court held that giving legal advice to police, including advice as to whether there is probable cause to arrest a suspect, is not a function protected by absolute immunity. . . The same is true when a prosecutor orders a warrantless arrest. . . . Ordering a warrantless arrest is not intimately associated with the judicial phase of the criminal process; it is conduct outside the judicial process and therefore is not protected by absolute immunity. . . .Contrary to O'Bannon's assertions, it makes no difference that she ordered Loupe's arrest while in a courtroom. Just as 'the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor,' . . . a prosecutor's conduct is not intimately associated with the judicial phase of the criminal process merely because it takes place in a courtroom.")

In ***Buckley v. Fitzsimmons***, 509 U.S. 259 (1993), the Supreme Court held that prosecutors did not have absolute immunity with respect to claims that they had fabricated evidence during the preliminary investigation of a crime and had made false statements at a press conference announcing the arrest and indictment of petitioner. *See also* ***Bianchi v. McQueen***, 818 F.3d 309,

318-19 (7th Cir. 2016) ("[I]t's clear that absolute immunity knocks out a large part of the case against McQueen—most notably the claims premised on allegations that McQueen presented false statements to the grand jury and at trial. Still, some of the allegations cover conduct that stretches back to the investigative period before McQueen was engaged in what could reasonably be called prosecutorial advocacy. The complaint contains allegations of evidence fabrication and other chicanery months before the grand jury was empaneled. . . . We agree with the judge that McQueen is not absolutely immune for his investigative conduct in the months before the grand jury was convened."); ***Simon v. City of New York***, 727 F.3d 167, 172-74 (2d Cir. 2013) ("We have previously held that when a prosecutor seeks a material witness warrant, he does so as an advocate and is immune from suit. . . Any alleged misstatements by Longobardi in his application for the material witness warrant therefore cannot form the basis for liability. However, defendants do not have absolute immunity for their detention of Simon against her will for two full days. . .The *execution* of a material witness warrant is a police function, not a prosecutorial function, as New York's material witness statute, and the warrant issued in this case, explicitly state. While under New York law a prosecutor is responsible for seeking a material witness warrant, only police officers, not prosecutors, are authorized to execute the warrant by arresting people. . . Accordingly, the warrant issued by the court in this case was directed to 'any police officer in the State of New York.' The arrest of Simon and her detention for questioning were thus police functions, not prosecutorial ones. . . .The prosecutorial function may encompass questioning a witness for a brief period before presentation to determine whether, in the prosecutor's judgment, the witness's testimony should still be pursued or whether the witness should be released without further action. Based on Simon's testimony, however, a reasonable jury could find that the detention and interrogation went beyond what could reasonably be construed as clarifying Simon's status or 'preparing' her for a grand jury appearance, and became an investigative interview. . . Under New York law, as under federal law, a prosecutor has no power to subpoena a witness to appear outside of judicial proceedings to answer questions from the prosecution or the police. A material witness warrant serves the purpose of securing a witness's presence at a trial or grand jury proceeding. It does not authorize a person's arrest and prolonged detention for purposes of investigative interrogation by the police or a prosecutor. . . . Therefore, the officers are not entitled to absolute immunity for their execution of the material witness warrant, even if they were following Longobardi's instructions. Police officers and a prosecutor who engage in extended detention and interrogation—including requiring attendance for a second full day—of a material witness whom the court has ordered to be brought before the court to determine whether she should be detained or bailed as a material witness are, as a matter of law, engaged in an *investigative* function that entitles them to, at most, qualified immunity."); ***Knowlton v. Shaw***, 704 F.3d 1, 9 (1st Cir. 2013) ("*Burns* and *Buckley* teach us that investigative steps taken to search for 'clues and corroboration' that might lead to an arrest are more removed from the judicial process and merit only qualified immunity. . . But here, the state officials' execution of the consent agreements was not part of any investigative activity. By the time the consent agreements were on the table, the investigation had already revealed Knowlton's and Bankers Life's violations of Maine's insurance laws. The agreements resolved those violations and allowed all parties to avoid further legal proceedings on the matter. . . .In sum, the state officials carried their burden in establishing they are entitled to

absolute immunity for entering into the consent agreements with Knowlton and Bankers Life. Given our ruling, we need not reach whether qualified immunity applies or delve into the merits of Knowlton's due process claim."); ***Odd v. Malone***, 538 F.3d 202, 217 (3d Cir. 2008) ("[W]e conclude that both [ADAs] failed to perform a fundamentally administrative task, viz., notifying the warrant-issuing judges that [Plaintiffs] remained incarcerated after it was clear that their testimony would not be needed for quite some time, if ever. We also find that the policies underlying the recognition of prosecutorial immunity do not apply with the same force in these cases because the aggrieved persons are unindicted third-party witnesses rather than criminal defendants."); ***Villars v. Kubiatowski***, No. 12 CV 4586, 2014 WL 1795631, *11, *12 (N.D. Ill. May 5, 2014) ("The Seventh Circuit and, much more recently, the Third and Sixth Circuits, have held that a prosecutor's actions related to securing a material witness warrant fall within the scope of absolute immunity. . . The Seventh Circuit tackled the issue more than 35 years ago in a case where a witness accused a federal prosecutor of violating his constitutional rights by lying to the court to have him detained as a material witness. . . Therefore, to the extent that Villars seeks to hold Kubiatowski liable for misrepresentations that Kubiatowski allegedly made to Judges Castillo and/or Denlow to secure Villars's detention, Kubiatowski is absolutely immune. . . .However, Villars also alleges that Kubiatowski violated his Fourth Amendment and due process rights, along with the federal material witness statute and Federal Rule of Criminal Procedure 46(h), by failing to keep the court apprised of Villars's continued detention, causing him to remain in jail for almost two months—from November 15, 2010 until January 11, 2011—without a bail hearing. . . . The Seventh Circuit did not have occasion in *Daniels* to address whether immunity shields a prosecutor from the sorts of allegations made by Villars, nor has the court of appeals addressed the issue of a prosecutor's immunity in the material witness context since then. The Third Circuit, however, recently ruled on an analogous set of allegations. In *Odd v. Malone,* a detainee brought suit for constitutional violations against a prosecutor who obtained a material witness warrant, but then failed to notify the Court that the trial for which the witness was being detained had been continued. . . The Third Circuit, following *Daniels,* held that, although the prosecutor was acting in her prosecutorial capacity when she secured the material witness warrant (and thus was entitled to absolute immunity), the state's attorney's failure to inform the Court that the detainee remained incarcerated—akin to a failure by a federal prosecutor to make report a list of material witness detainees to the Court in accordance with Rule 46(h), the Third Circuit said—was primarily administrative, because it required no advocacy on the part of the prosecutor. . . As to this administrative oversight, the Court held, the prosecutor was not entitled to absolute immunity. . . The Court finds the Third Circuit's reasoning persuasive, and notes, as the Third Circuit did, that it is the prosecutor's burden to show that he was functioning as the state's advocate when performing the action in question. Taking Villars's allegations as true, as the Court must, Kubiatowski has not done that at this stage of the litigation.")

In ***Van de Kamp v. Goldstein***, 129 S. Ct. 855 (2009), the Court unanimously held that a district attorney and chief deputy district attorney had absolute immunity as to claims "that the prosecution failed to disclose impeachment material . . . due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an

information system containing potential impeachment material about informants." *Id.* at 858, 859. Although these obligations were "administrative" in nature, the Court said they were "unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like." *Id.* at 862. The obligations at issue here required "legal knowledge and the exercise of related discretion." *Id.* The Court concluded that the "management tasks at issue. . . concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties. And, in terms of *Imbler's* functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike." *Id.* at 863. Note that *Van de Kamp* dealt only with the individual liability of the defendants and did not address any entity liability based on a policy or custom of the office. [See cases infra and cases collected in Blum, Overview of Section 1983 Outline]

See also ***Savage v. Maryland***, 896 F.3d 260, 265, 270-74 (4th Cir. 2018) ("We agree with the district court that prosecutorial immunity bars Savage's claims against Oglesby. Reviewing and evaluating evidence in preparation for trial, making judgments about witness credibility, and deciding which witnesses to call and which cases may be prosecuted all are directly connected to the judicial phase of the criminal process, protected by absolute immunity. . . . Because Oglesby was acting in his role as advocate, reviewing potential evidence for use at trial, he is protected by prosecutorial immunity. . . .That a judgment about witness credibility or which cases to try has negative employment consequences—even readily foreseeable ones—does not change the underlying nature of that judgment; the immunity analysis focuses on the prosecutorial conduct in question, and 'not on the harm that the conduct may have caused.'. . Nor does the effect on Savage's career do anything to distinguish this case from all the others, discussed above, in which courts apply absolute immunity when police officers lose their jobs or suffer other adverse actions because their employers are informed by prosecutors that they no longer will be used as witnesses. . . Most important, the Supreme Court has clarified that even if all or some of the conduct complained of by Savage could be categorized as employment-related and hence 'administrative,' it still would be protected by absolute immunity. In *Van de Kamp*, the Court considered whether prosecutors could be sued for non-disclosure of *Giglio* impeachment material that allegedly resulted from their failure to train and supervise attorneys properly or to collect potential impeachment material about informants. . . The Court recognized that the functions in which the defendant-prosecutors were engaged—training, supervision, and information-systems management—were 'administrative' in nature. . . But because they also were 'directly connected with the conduct of a trial' and required the exercise of legal discretion, the Court concluded. . . they remained protected by absolute immunity: 'The management tasks at issue ... concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties.'. . The same 'direct connection' to the trial process and the prosecutor's role as advocate is present here. Even if we were to categorize Oglesby's alleged actions—in particular, his communications with City officials about Savage's status—as 'administrative' or 'managerial,' they would remain inextricably linked with the

underlying assessment of Savage's credibility and discretionary judgment about how best to respond. . . It remains the general rule, of course, that prosecutors will not be entitled to absolute immunity when acting in their administrative capacities as employers. . . It is only 'a certain kind of administrative obligation—a kind that itself is directly connected with the conduct of a trial,' like Oglesby's communications with the City regarding his assessment of Savage as a potential trial witness—that calls for the protections of absolute immunity. . . And we agree with Savage that not *every* action a prosecutor might take against a police officer who has been barred from testifying will be covered by absolute immunity. Even in that context, if a prosecutor's alleged conduct cannot be connected to discretionary judgments about which witnesses to call and which cases to prosecute, then absolute immunity will not apply. . . . But when, as here, the alleged prosecutorial conduct involves the decision not to call an officer as a witness and communication of that decision to the relevant employer, it is 'intimately tied to the judicial process' and thus entitled to absolute immunity."); ***Torres v. Goddard***, 793 F.3d 1046, 1058 (9th Cir. 2015) ("Plaintiffs' claims against Goddard are analogous to the hypothetical case discussed in *Van de Kamp.* They don't arise from Goddard's '*general* methods of supervision,' but rather arise from Goddard's 'acquiesce[nce]' and 'ratifi [cation]' of Holmes's procurement of particular seizure warrants. Under *Van de Kamp*, the absolute immunity that protects Holmes's preparation and application for the warrants also protects Goddard's decision to permit Holmes to do so. There is no functional difference between a civil forfeiture prosecutor's preparation and application for seizure warrants, and his supervisor's decision to allow him to engage in those activities. A supervisor's decision to permit a subordinate prosecutor to prepare and apply for seizure warrants is an 'act[ ] undertaken by [the supervisor] in preparing for the initiation of judicial proceedings,' and 'occur[s] in the course of [the supervisor's] role as an advocate for the [s]tate.'. . Indeed, if the rule were otherwise, a plaintiff could just 'restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision' and thereby 'eviscerate *Imbler*.'. . .Plaintiffs also allege that Goddard 'culpably acquiesced in and subsequently ratified the service of warrants and the seizure' of their funds. We hold that service and execution of seizure warrants, even when performed by a prosecutor, aren't protected by absolute immunity because those acts are functions of police officers, not prosecutors. . . Under *Kalina,* Goddard's supervision of Holmes's service and execution of seizure warrants is likewise a function of a supervising police officer, not a supervising prosecutor. Service and execution aren't 'intimately associated with the judicial phase' of the proceedings. Goddard therefore can't claim absolute immunity with respect to his supervision of the service and execution of the seizure warrants.")

Compare ***Lacey v. Maricopa County***, 693 F.3d 896, 928-31 (9th Cir. 2012) (en banc) ("Lacey's challenge to Thomas's decision to appoint a special prosecutor presents a question that we have never addressed, a question that rests at the confluence of a district attorney's employment-related decisions, such as the hiring and promoting of deputy prosecutors, and his litigation related decisions to designate deputy prosecutors to act as the advocates of the state in particular matters. . . . If *removing* a prosecutor from a particular case is within the district attorney's duties, it stands to reason that *appointing* a prosecutor to a particular case would also fall within the prosecutorial function. The line between appointments in particular cases and

employment decisions follows naturally from similar decisions concerning judicial immunity. . . . From these examples, we can draw a broad principle. Decisions related to general conditions of employment—including decisions to hire, promote, transfer, and terminate—and which do not affect the prosecutor's role in any particular matter are generally not sufficiently related to the initiation and conduct of a prosecution in a court of law or their role as an advocate of the state to qualify for absolute immunity. Decisions related to appointments and removals in a particular matter will generally fall within the exercise of the judge's or prosecutor's judicial and quasi-judicial roles and are shielded from suit by absolute immunity. . . . Even if Wilenchik were in some sense hired by Maricopa County, he was appointed by Thomas to do one and only one thing: prosecute the *New Times*.") *with* ***Lacey v. Maricopa County***, 693 F.3d 896, 940-42 (9th Cir. 2012) (en banc) (Kozinski, C.J., dissenting in part) **("**Adjectives matter. They're not as action-packed as verbs, nor as self-sufficient as nouns. But adjectives do make a difference. Here, the majority overlooks a crucial one: 'special.' Dennis Wilenchik wasn't just any prosecutor: He was a special prosecutor. He got the job because his crony, County Attorney Andrew Thomas, gave it to him. Plaintiffs allege Wilenchik used that power to harass Thomas's and Sheriff Joe Arpaio's enemies. For this, the majority anoints Thomas with every governmental wrongdoer's favorite unguent, absolute immunity. The Supreme Court has told us that 'absolute prosecutorial immunity [is justified] only for actions that are connected with the prosecutor's role in judicial proceedings.' *Burns v. Reed*, 500 U.S. 478, 494 (1991). By appointing Wilenchik as special prosecutor, Thomas took no action remotely connected with any judicial proceeding. Instead, he gave up the power to take any such action and transferred it to his special buddy, Wilenchik. . . . If hiring and firing line prosecutors is not protected by absolute immunity, appointing a special prosecutor certainly is not. Subordinate prosecutors, after all, require general supervision and training, which remain the chief prosecutor's responsibility. Not so a special prosecutor. Once appointed, he serves as an independent agent and makes all prosecutorial decisions without any input or oversight of the chief prosecutor. There is absolutely no justification for giving Thomas absolute immunity for the non-prosecutorial and self-serving act of appointing Wilenchik to do his dirty work. . . . By enveloping Thomas with absolute immunity, my colleagues encourage malicious or corrupt prosecutors to do exactly what plaintiffs allege Thomas did here: intimidate and harass political rivals by delegating prosecutorial authority to a straw man. It's a blueprint for prosecutorial excess and abuse; we'll rue the day we started down this road.")

Compare ***Adams v. Hanson***, 656 F.3d 397, 399, 403-08, 411 (6th Cir. 2011) ("In her federal § 1983 suit, Adams claims that she was unlawfully detained for twelve days as a result of Hanson's false and misleading representations to the state trial court regarding Adams's availability as a witness. The district court granted Hanson's motion for summary judgment on the grounds that Hanson is entitled to absolute immunity for conduct falling within her role as a prosecutor. Adams appeals, arguing that Hanson acted as a complaining witness or, in the alternative, fulfilled an administrative function. The American Civil Liberties Union Fund of Michigan filed an amicus brief arguing that absolute immunity should not protect prosecutors from suits filed by third-party witnesses. When making statements at a preliminary examination about the availability of a witness, Hanson functioned as an advocate for the State of Michigan and

performed acts intimately associated with the judicial process. Because she is absolutely immune from suit for her prosecutorial conduct, we **AFFIRM** the district court's grant of summary judgment to Hanson. . . . Adams claims that Hanson made false and misleading factual representations to the state trial court, ex parte and off the record during a hearing recess, regarding the availability of Adams as a witness, and that these statements led to her unlawful arrest and detention. The district court determined that Hanson was entitled to absolute immunity from suit because she was acting as an advocate for the state in connection with a preliminary examination. Adams disagrees: she claims that Hanson acted as a complaining witness, or, in the alternative, fulfilled an administrative function. The case thus presents an issue of first impression in this circuit: whether a prosecutor is entitled to absolute immunity for her false and misleading statements to a trial court in the course of criminal proceedings about the availability of a witness. The Michigan ACLU as Amicus argues that, as a rule, absolute immunity should not apply to actions of a prosecutor with respect to a third-party witness. Under this view, actions of a prosecutor vis-à-vis a criminal defendant should be distinguished from actions vis-à-vis a third-party witness, and absolute immunity should not be extended to the latter because the historical and policy rationales for absolute immunity do not apply with equal force in the witness context. Other circuits that have addressed the question have held that prosecutors are ordinarily entitled to absolute immunity for conduct falling within a prosecutorial function when they seek detention of a material witness pursuant to judicial order. [citing cases] The Third Circuit has cautioned, however, that 'policy considerations underlying prosecutorial immunity counsel against recognizing absolute immunity' in material-witness cases. . . We have stated in dicta that absolute immunity protects a prosecutor seeking the incarceration of a material witness, *White by Swafford v. Gerbitz,* 860 F.2d 661, 665 n. 4 (6th Cir.1988), *cert. denied,* 489 U.S. 1028, 109 S.Ct. 1160, 103 L.Ed.2d 219 (1989), but not a prosecutor who fails to act timely to secure a material-witness's release after being ordered to do so by the court, *id.* The scope of a prosecutor's immunity in this context, however, has never been squarely addressed by this court.We conclude that Hanson's statements before the trial court at the preliminary examination regarding Adams's availability as a witness fell within her role as an advocate for the State of Michigan and are therefore absolutely protected. The prosecutorial function includes initiating criminal proceedings, appearing before the court at a probable cause hearing or before a grand jury, seeking an arrest warrant, and preparing witnesses. . . Hanson's challenged conduct involved the analogous acts of appearing at a preliminary examination and making statements about her discussions with a potential witness–activities 'closely related ... to h[er] *role as an advocate* ' before the court in criminal proceedings. . . Furthermore, because the issuance of either a material-witness warrant or an order of contempt 'is unquestionably a judicial act,' a prosecutor's statements to the court regarding the availability of a witness are ' "intimately associated with the judicial phase of the criminal process" .... [and are] connected with the initiation and conduct of a prosecution, particularly where,' as here, 'the hearing occurs after arrest [of the defendant]' in the criminal proceedings. . . It is especially instructive that, under Michigan law, it is the prosecutor's particular, non-delegable duty to 'make a diligent good-faith effort to find and produce' witnesses in criminal prosecutions. . . Although the parties dispute whether Hanson sought to hold Adams as a material witness or in contempt of court, there is no dispute that Hanson sought to secure Adams's testimony as a witness in a criminal

prosecution, a province of the prosecutor. That Hanson allegedly acted outside of formal judicial proceedings, in an off-the-record discussion with the trial judge, does not strip her automatically of immunity for this conduct. . . . Specifically, conduct related to the preparation and presentation of witness testimony may be protected whether it occurs in or out of court. . . . Because Hanson's actions fell within her prosecutorial role, she is entitled to absolute immunity even if her statements were false or misleading. . . . The responsibility is thereby placed with the court to provide a witness the opportunity to be heard and to assess itself the materiality of her testimony and the likelihood that she would fail to appear. . . Because this judicial process was not followed in this case, Adams was not provided the opportunity to be heard or to furnish bail before the trial court ordered her detained. Although we remain seriously troubled by the abrogation of Adams's procedural rights, Adams's 'experience illustrates the importance of vigilant exercise of this checking role by the judicial officer to whom the warrant application is presented,' not that prosecutors must be held accountable for judicial error. *Al-Kidd,* 131 S.Ct. at 2088 n. 2 (Ginsburg, J., concurring). . . .Unlike the incarcerations in *Odd,* which were prolonged past the intention of the court due to prosecutorial oversight, it was left to the state trial court in this case 'to determine whom to incarcerate and for what length of time.' Our opinion does not foreclose the possibility that Adams's constitutional rights were violated . . . or that a prosecutor's actions in relation to a witness may be administrative or investigative in another context. . . If Hanson had detained Adams without a court order, she likely would have been engaging in an 'investigative act[ ] antecedent ... to the judicial process' rather than absolutely protected prosecutorial activity. . . If police had detained Adams unilaterally, or misrepresented the facts when applying for a warrant, she may have been able to bring a viable § 1983 claim against them. . . In fact, however, Adams was arrested pursuant to a signed order from the trial judge, and while it was Hanson's job to present information about witnesses to the court, it was the court's duty to respond with appropriate protections. Therefore, whether or not Adams's detention violated her constitutional rights, Hanson's acts are protected by absolute immunity. . . . Absent direction from the Supreme Court, we decline to make a categorical exception to traditional absolute immunity analysis for prosecutorial actions with respect to third-party witnesses. Accordingly, we hold that Prosecutor Hanson is entitled to absolute prosecutorial immunity for her acts of advocacy before the state trial court in seeking to procure witness testimony at a preliminary examination.") *and* ***Schneyder v. Smith***, 653 F.3d 313, 334 (3d Cir. 2011) ("One thing that *Van de Kamp* does not change is our characterization of the conduct in question as the nonperformance of a constitutional duty to advise the court of a significant change in the circumstances surrounding the detention of a material witness. We also continue to think that this duty is, broadly speaking, administrative rather than advocative. After *Van de Kamp,* we must ask the further question whether this is the sort of administrative duty the performance or nonperformance of which is protected by prosecutorial immunity. We hold that it is not. . . . After the continuance, the *Overby* case was a long way off, and it simply is not the prosecutor's prerogative to decide how long to keep a material witness detained. Declining to reveal the change in *Overby's* status was an abdication of Smith's responsibility to provide the court with information sufficient for it to decide an issue within its sole competence. As the sole government official in possession of the relevant information, Smith

had a duty of disclosure that was neither discretionary nor advocative, but was instead a purely administrative act not entitled to the shield of immunity, even after *Van de Kamp*.").

See also ***Safar v. Tingle***, 859 F.3d 241, 249-51 (4th Cir. 2017) ("A prosecutor's decision to seek an arrest warrant is protected by absolute immunity, . . . but it remains an open question whether a prosecutor receives absolute immunity when she fails to withdraw an arrest warrant after learning that no crime had been committed. Because a prosecutor's decision whether to withdraw an arrest warrant is 'intimately associated with the judicial phase of the criminal process,' *Imbler*, 424 U.S. at 430, we conclude that Tingle is entitled to absolute immunity. Plaintiffs contend that retracting a stale warrant is merely a ministerial duty and thus cannot be protected by absolute immunity. This argument misses the mark. To the extent a decision to revoke an arrest warrant can be cast as administrative, it is 'directly connected with the prosecutor's basic trial advocacy duties,' *Van de Kamp*, 555 U.S. at 346, and 'require[s] legal knowledge and the exercise of related discretion,' *id.* at 344. Under Virginia law, a prosecutor does not have unilateral authority to withdraw an arrest warrant and must first file a motion to dismiss with the appropriate court. . . Filing and arguing motions in court is garden-variety trial work that falls comfortably within a prosecutor's core advocacy duties. . . The decision to file a motion to rescind, moreover, generally involves the exercise of substantial discretion. A prosecutor is not bound to withdraw a warrant every time a victim purports to recant or conflicting information comes to light. Rather, prosecutors engage in the familiar task of 'evaluating evidence' and determining whether to retain the warrant based on a revised assessment of probable cause. . . Consequently, we find that the choice to move the court for withdrawal is an extension of the prosecutor's fundamental judgment of 'whether and when to prosecute.'. . Moreover, deciding whether or not to withdraw an arrest warrant is one of those advocacy functions 'to which the reasons for absolute immunity apply with full force.'. . If absolute immunity does not insulate prosecutors for their refusal to withdraw an arrest warrant, it would work an end run around *Kalina* and give rise to an anomalous regime where criminal defendants could mount civil suits against prosecutors for the maintenance of arrest warrants even though those same defendants could not challenge the initial decision to seek a warrant. Given the frequency with which prosecutors come across new information after a warrant is sworn out, we are hesitant to open the door to all manner of collateral attacks on what at bottom is a prosecutor's appraisal of probable cause. We recognize, of course, that Safar's case, at least as alleged in the complaint, presents a stark scenario where the charges have been wholly discredited. But absolute immunity 'does not exist to help prosecutors in the easy case; it exists because the easy cases bring difficult cases in their wake.'. . .There are also existing safeguards that deter egregious prosecutorial misconduct in this arena. Prosecutors remain subject to criminal sanction for willful acts of abuse. . . And '[t]he organized bar's development and enforcement of professional standards for prosecutors' provides a 'well-developed and pervasive mechanism' for controlling official malpractice. . . . We acknowledge that granting absolute immunity leaves Safar, who was 'genuinely wronged' by Tingle's oversight, 'without civil redress' under § 1983. . . Yet the overall value of prosecutorial discretion may require that we accept the possibility that such discretion might be abused in the occasional case. As Justice Powell observed, the alternative of qualifying a prosecutor's immunity 'would disserve the broader public interest' by 'prevent[ing]

the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.'"); ***Diaz-Colon v. Fuentes-Agostini***, 786 F.3d 144, 151 (1st Cir. 2015) ("Prosecutors regularly prepare and present testimony by witnesses to whom the government has offered inducements to secure their cooperation. Disclosure requirements and due process principles provide some protection to criminal defendants from abuses of this practice. . . It is another thing altogether, though, to provide wrongfully charged individuals with a private damages remedy against prosecutors when cooperating witnesses lie. If prosecutors could be sued civilly every time any such witness claimed a wrongful inducement to lie, prosecutors might well be exposed to numerous such suits. Weighing the costs and benefits to the public interest of such an exposure to civil liability, the law bars such claims when they arise out of the prosecutor's work in a criminal proceeding. . . In a last-ditch effort, plaintiffs' counsel argued that ADA Redondo's participation on 'the prosecution team' defeated absolute immunity, presumably by making him liable for the misconduct of others in the previous procuring of the false statements. Adopting this approach would render prosecutors vicariously liable in all cases involving improper actions since, at some point, a prosecutor is always a member of 'the prosecution team.' Such an exponential increase in potential liability plainly conflicts with the purpose of affording prosecutors absolute immunity, to insulate prosecutorial discretion and resources from the threat of litigation. . . Absolute immunity therefore shields ADA Redondo from having to stand trial for the malicious prosecution and conspiracy claims under section 1983."); ***Stapley v. Pestalozzi***, 733 F.3d 804, 811, 812 (9th Cir. 2013) ("The Court has never stated that government attorneys receive absolute immunity for all litigation-related conduct, even in criminal cases. Rather, the Court has repeatedly stated that only certain actions taken by prosecutors receive absolute immunity, and that a functional comparison of the activities performed is critical. . . . The question here is whether, in the circumstances of this case, Thomas and Aubuchon are entitled to absolute immunity from claims arising out of their initiation of the civil RICO suit. Defendants have the burden of showing that they are entitled to absolute immunity. . . We conclude that Defendants have not carried their burden. Because the RICO suit was civil, . . .it was not 'intimately associated with the judicial phase of the *criminal* process.'. . Defendants therefore try to analogize this case to *Butz*, where absolute immunity was extended in the civil context to 'functions analogous to those of a prosecutor.'. . We conclude that Defendants' actions here were not 'analogous to those of a prosecutor' for two reasons. . . First, the federal RICO statute does not provide any special authorization for county attorneys to file civil RICO suits. County attorneys may file civil RICO suits under 18 U.S.C. § 1964(c), but they have no status as plaintiffs different from private citizens. . . As the district court noted, Thomas and Aubuchon were thus 'in the same position as ... private lawyers' in bringing the RICO suit. . . This case is therefore distinguishable from all cited cases where a government attorney was granted absolute immunity. In those cases, the government attorney was taking action that only a legal representative of the government could take. . . Inasmuch as Defendants did not act in a uniquely governmental role in filing their civil RICO suit, their actions were not 'analogous to those of a prosecutor.'. .Second, the circumstances of this case indicate that the civil RICO suit was not 'analogous' to a criminal prosecution. Rather, Defendants filed the RICO suit as part of their long-running 'political war' against members of the Board of Supervisors, judges, and others. The suit was essentially a harassing public-relations ploy.

Defendants filed baseless criminal suits against Stapley and others both before and after filing the RICO suit, seeking media publicity for their actions in connection with these suits. Before initiating the civil RICO suit, Defendants received warnings from attorneys both inside and outside their office that the suit had no basis in fact or law and would likely result in sanctions. Defendants had also been warned of ethical conflicts related to filing the suit."); ***Knowlton v. Shaw***, 704 F.3d 1, 6 (1st Cir. 2013) (An agency official's decision to initiate administrative proceedings 'aimed at legal sanctions,'. . . is discretionary, 'very much like [a] prosecutor's decision to initiate or move forward with a criminal prosecution' and is, therefore, entitled to absolute immunity."); ***Slater v. Clarke***, 700 F.3d 1200, 1203 (9th Cir. 2012) ("The decision whether to extradite him, like the decision whether to prosecute him, was intimately associated with the judicial phase of the criminal process. Indeed, the decision whether to extradite was the next step in the judicial process. Accordingly, whether the decision in this case is characterized as a decision not to extradite, or as a decision to extradite only from a limited area, defendants are entitled to absolute immunity for their participation in that decision. We acknowledge that cases granting absolute immunity often involve decisions that are subject to judicial oversight, but judicial oversight is not a requirement of absolute immunity. . . Defendants are entitled to absolute immunity to the extent they participated in making the extradition decision described in plaintiffs' complaint."); ***Giraldo v. Kessler***, 694 F.3d 161, 166, 167 (2d Cir. 2012) ("Good prosecutors may—usually should—perform acts reasonably characterized as investigative at all phases of a criminal proceeding. The investigative acts that are entitled to only qualified immunity are those undertaken in the phase of law enforcement that involves the gathering and piecing together of evidence for indications of criminal activities and determination of the perpetrators. . . In contrast, investigative acts reasonably related to decisions whether or not to begin or to carry on a particular criminal prosecution, or to defend a conviction, are shielded by absolute immunity when done by prosecutors. To be sure, as the Supreme Court cautioned in *Buckley*, even the presence of probable cause 'does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards.'. . Such acts are shielded by absolute immunity only when they are of a kind reasonably related to the ordinary functions of a prosecutor with such probable cause. Viewed through the eyes of a reasonable prosecutor, appellants' acts in the present case were well within their legitimate functions as prosecutors. Monserrate had been arrested prior to appellants' interview of appellee. Once the arrest took place, legal decisions at the core of the prosecutorial function—pursuit of the charges, arraignment, bail, etc.—had to be made by appellants and made quickly. The interview of appellee was clearly in a 'pending or in preparation [of] a court proceeding in which the prosecutor acts as an advocate.'. .Appellee was obviously an important witness with regard to the proceeding against Monserrate. That she claimed her injuries resulted from an accident hardly weighed against interviewing her. Viewing the circumstances objectively, her claim that her injuries were the result of an accident might well cause a reasonable prosecutor to believe that interrogation was even more necessary than would have been the case in more common circumstances. A reasonable prosecutor easily could—should—have viewed a first-hand interview and personal weighing of the credibility of appellee's self-propelled-shattering-glass story as necessary. While questioning an important witness may accurately be described as investigative, appellants' interview was an integral part of appellants' advocatory function as

prosecutors protected by absolute immunity."); ***Flagler v. Trainor***, 663 F.3d 543, 548, 549 (2d Cir. 2011) ("Seeking a material witness order is within the prosecutor's 'function' as an advocate. A prosecutor employs prosecutorial discretion when determining whether to seek such an order. . . . It is an act 'intimately associated' with presenting the State's case. The material witness order ensures the attendance of a 'material' witness at trial, which often makes or breaks the prosecutor's case. Nevertheless, Flagler argues that the Third and Ninth Circuits have denied absolute prosecutorial immunity for wrongdoing in connection with prosecutorial functions. Flagler, however, fails to recognize that the wrongdoing in those cases was either administrative in nature or akin to the function of law enforcement officers in protecting the public safety by making a complaint of wrongdoing. Therefore, notwithstanding Flagler's arguments to the contrary, we find Trainor absolutely immune for making alleged false statements in support of a material witness order and warrant.") [footnotes omitted]

See also ***Fields v. Wharrie***, 740 F.3d 1107, 1113, 1114 (7th Cir. 2014) (***Fields II***) ("Wharrie is asking us to bless a breathtaking injustice. Prosecutor, acting pre-prosecution as an investigator, fabricates evidence and introduces the fabricated evidence at trial. The innocent victim of the fabrication is prosecuted and convicted and sent to prison for 17 years. On Wharrie's interpretation of our decision in *Buckley*, the prosecutor is insulated from liability because his fabrication did not cause the defendant's conviction, and by the time that same prosecutor got around to violating the defendant's right he was absolutely immunized. So: grave misconduct by the government's lawyer at a time where he was not shielded by absolute immunity; no remedy whatsoever for the hapless victim. . . . A prosecutor cannot retroactively immunize himself from conduct by perfecting his wrong-doing through introducing the fabricated evidence at trial and arguing that the tort was not completed until a time at which he had acquired absolute immunity. That would create a 'license to lawless conduct,' which the Supreme Court has said that qualified immunity is not to do. . . .So Wharrie has not demonstrated an entitlement to absolute immunity—nor to qualified immunity for the fabrication, either. For it was established law by 1985 (indeed long before), when the fabrication is alleged to have occurred, that a government lawyer's fabricating evidence against a criminal defendant was a violation of due process. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 21516 (1942); *Mooney v. Holohan*, 294 U.S. 103, 110, 112–13 (1935) (per curiam). It is true that the cases we've just cited involved not merely the fabrication, but the introduction of the fabricated evidence at the criminal defendant's trial. For if the evidence hadn't been used against the defendant, he would not have been harmed by it, and without a harm there is, as we noted earlier, no tort. But when the question is whether to grant immunity to a public employee, the focus is on his conduct, not on whether that conduct gave rise to a tort in a particular case. . . .So notice the disjunction: the immunity depends on the official's acts; the existence of a cause of action depends on the illegality of those acts *and* on whether an injury results, because, to repeat, no injury—no tort."); ***Fields v. Wharrie***, 740 F.3d 1107, 1117-24 (7th Cir. 2014) (***Fields II***) (Sykes, J., concurring in part and dissenting in part) ("To the extent that the § 1983 and state-law claims against Wharrie are based on his alleged coercion of the false statement from Sumner, absolute immunity does not apply. That act took place before there was probable cause to arrest Fields—that is, before the judicial process began—

and was not functionally prosecutorial, so Wharrie cannot claim to be absolutely immune from suit for damages. . .But Wharrie remains protected by qualified immunity. . . . The Supreme Court's decision in *Buckley* addressed only absolute prosecutorial immunity; the Court did not have occasion to decide the qualified-immunity question. That is, the Court did not decide whether coercing or otherwise inducing a witness to give a false statement during a criminal investigation violates clearly established constitutional rights. But we decided that very question when the Supreme Court returned *Buckley* to this court for further proceedings. In our decision on remand in *Buckley,* we held that coercing or otherwise soliciting a witness to falsely incriminate a suspect during a criminal investigation does *not* violate any established constitutional rights—except perhaps the rights of the witness who is coerced. . . If the suspect is charged, then failing to disclose the false statement's corrupt origins at trial violates his due-process right to a fair trial under the rule of *Brady v. Maryland,* 373 U.S. 83 (1963), and knowingly using perjured testimony to convict him is a more general violation of his due-process right to a fair trial. . . But a prosecutor who commits these acts or omissions at trial is functioning quintessentially as a prosecutor, so under well-established immunity law, he is absolutely immune from suit for damages under § 1983. . . In contrast, a prosecutor who coerces or otherwise procures a false statement from a witness during an investigation, before probable cause exists and the judicial process has begun, is not protected by absolute immunity, but he *is* entitled to qualified immunity because his conduct does not violate clearly established constitutional rights. . . In our earlier opinion in this case, we relied on this qualified-immunity holding from *Buckley* as an alternative basis for finding Wharrie and Kelley immune from suit under § 1983 for their solicitation of false statements from Hawkins and Langston. . . . Our alternative holding in *Fields I* followed the rule, established in *Buckley,* that even if a prosecutor participates in securing a false statement from a witness during a criminal investigation, his 'absolutely immunized prosecutorial decision to proceed to trial and introduce the [witness's] testimony' forecloses suit against him; there is no independently cognizable due-process claim for his investigative misconduct. . . Three months after we issued our opinion in *Fields I,* a new decision of this court, *Whitlock v. Brueggemann,* 682 F.3d 567 (7th Cir.2012), unsettled *Buckley* (and by extension, unsettled *Fields I* as well), which led the district court to do an about-face on remand in this case. Wharrie's new appeal requires us to decide whether *Whitlock* and *Buckley* can be reconciled. I think the answer is plainly 'no.'. . . I appreciate the force of stare decisis; we should try to harmonize the two cases if we can. With respect, however, harmonization is impossible. *Whitlock* and *Buckley* are factually indistinguishable and legally irreconcilable. They cannot both be the law. We must decide which one is correct. . . . For my part, I think *Buckley* is correct and *Whitlock* should be reconsidered. Because mine is the minority view here, any reconsideration of *Whitlock* must await a petition for rehearing en banc, which Wharrie may choose to pursue or forego. For the record, I'll briefly sketch the conceptual difficulty *Whitlock* has introduced, which I believe warrants the full court's attention. . . . Common-law causation analysis cannot be used to transform an act that does not violate the Constitution into one that does. That, in essence, is the effect of *Whitlock.* It turns the prosecutor's nonactionable investigative misconduct into an actionable constitutional wrong by recharacterizing it as a subsidiary 'cause' of a due-process violation that occurs later at trial but is absolutely immunized. . . . A prosecutor who coerces a witness to falsely incriminate a suspect during a criminal investigation breaches no

constitutional duty owed to the suspect. If the suspect is charged, then suborning perjury against him at trial would violate his due-process rights—so too would withholding evidence about the coercion of the witness. But these are trial rights, and a prosecutor's violation of them is absolutely immunized. The prosecutor's investigative misconduct cannot independently support a due-process claim; that conduct violates no due-process duty. . . . The specific conduct in question here—inducing a witness to tell a lie during an investigation—is clearly wrong, but it does not violate any constitutional rights. . . . No one doubts that wrongful convictions are unjust; a person who is convicted and punished for a crime he did not commit has a serious moral claim to a compensatory remedy. Usually the law provides one, commonly in the form of a *Brady* claim against the officers who were involved in suppressing exculpatory evidence during the prosecution. It's possible that in some cases the effect of absolute immunity—or the combined effect of absolute and qualified immunity—might leave a wrongly convicted person without an actionable damages claim against *any* of the wrongdoers. I could be wrong, but I don't think that happens very often. Prosecutors do not work alone, and if the police officers working with them withhold exculpatory information about coerced or fabricated evidence, the aggrieved defendant will have a good § 1983 claim against the officers for violation of *Brady.* The *Brady* duty is well established, and the claim against the officers is available regardless of whether the prosecutor participated in the 'creation' of the fabricated evidence or the cover-up at trial or both. That basically describes this case. . . . Although a complicit prosecutor escapes civil liability for damages, he remains subject to criminal prosecution and professional discipline for his misdeeds; he is not immune from these consequences for his misconduct. . . . Although Wharrie's alleged wrongdoing may go unredressed via a federal damages remedy against him, Fields has an ongoing § 1983 claim against the police officers who were allegedly complicit in withholding exculpatory evidence about the circumstances surrounding Sumner's false statement. In sum, applying *Buckley* requires a conclusion that Wharrie is entitled to qualified immunity for his investigative misconduct. . . . I would reconsider *Whitlock,* restore *Buckley,* and reverse with instructions to dismiss the § 1983 claim against Wharrie."); ***Whitlock v. Brueggemann***, 682 F.3d 567, 580-86 (7th Cir. 2012) ("As the Supreme Court suggested in *Saucier v. Katz,* 553 U.S. 194 (2001), we will take up first the question whether the plaintiffs have identified a violation of their constitutional rights, and we will then consider whether the law was clearly established such that any reasonable person should have known what was required. We have consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of her liberty in some way. . . .The only question is whether a prosecutor who is acting in an investigatory capacity is subject to rules that are any different. We think not. A prosecutor who manufactures evidence when acting in an investigatory role can cause a due process violation just as easily as a police officer. The fact that the prosecutor who introduces the evidence at trial cannot be liable for the act of introduction, whether it is the same prosecutor who fabricated the evidence or a different prosecutor, is beside the point. . . . McFatridge enjoys absolute immunity for anything that happened at trial, of course. We thus focus exclusively on the legal question whether coercing witnesses to perjure themselves during the investigatory phase of a case can give rise to an actionable due process violation against a prosecutor. McFatridge's error is to assume that because a prosecutor acting in a prosecutorial

capacity cannot be liable for the act of introducing perjured testimony (because of the protection of absolute immunity), he cannot be liable while acting in an investigatory capacity for creating false testimony. The only wrong, he argues, is the one that occurred at trial and thus any fabrication in which he participated is beyond the reach of the law. . . . Here, the plaintiffs have properly alleged that the act of fabrication caused a harm to them: the fabricated evidence, because it was introduced against them at trial, was instrumental in their convictions. . . . Thus, a prosecutor whose investigatory conduct is the proximate cause of the due process violation that occurs when the false evidence is introduced at trial is held to the same standard of liability as a police officer who does the same thing. . . . We conclude, in summary, that the plaintiffs have asserted claims that, if proven, would demonstrate a violation of their constitutional rights, and thus they have satisfied the first step of *Saucier* and *Pearson* . . . .We turn therefore to the second issue, which is the one on which the district court focused: whether the 'right to due process that the plaintiffs claim' was clearly established before February 19, 1987, the date of their conviction. . . . Significantly, all courts that have directly confronted the question before us agree that the deliberate manufacture of false evidence contravenes the Due Process Clause. . . . Our decision to deny qualified immunity under the unusual circumstances presented by this case should not deter prosecutors from engaging in legitimate investigatory work. Qualified immunity remains an important shield that protects 'all but the plainly incompetent or those who knowingly violate the law.'. . Furthermore, the plaintiff bears the burden of alleging in the complaint 'enough factual matter' to supply 'plausible grounds' to infer that absolute immunity has not yet attached, that the prosecutor knowingly fabricated evidence, that the evidence was later used against the plaintiff at her criminal trial, and that it was material enough to have caused a wrongful conviction. . . . Finally, and in some ways most importantly, these claims cannot be brought at all unless and until a criminal defendant is able to secure a dismissal or reversal of his criminal conviction."); ***Fields v. Wharrie***, 672 F.3d 505, 512-16 (7th Cir. 2012) (***Fields I***)("Prosecutors do not function as advocates before probable cause to arrest a suspect exists. . . If a prosecutor plants evidence before someone is arrested, he enjoys only qualified immunity. . . . Yet, for that same fabrication of evidence, if he commits the act during a judicial proceeding, he receives absolute immunity. . . The question before us, then, is whether, once judicial proceedings have been initiated, the trial prosecutor, who fabricates evidence after the trial, ceases to function in a prosecutorial manner once he is no longer the specific prosecutor handling the appeal or retrial.In *Partee*, we answered this question affirmatively. . . . The Supreme Court's reasoning in *Van de Kamp*, however, suggests that a prosecutor's direct participation in an appeal or retrial is no longer dispositive of his right to absolute immunity. The Court's hypothetical conferred absolute immunity upon a prosecutor's colleagues and supervisors—who may not have been directly involved in his particular case—for their failure to satisfy their disclosure obligations under *Giglio* . . . and *Brady*. . . .The Court did not explicitly state that the colleagues and supervisors had any individual *Brady* or *Giglio* obligations. . . That is, it did not expressly instruct us that every individual prosecutor in an office owes a *Brady* or *Giglio* obligation to a defendant solely due to his employment in the office, regardless of whether or not he is involved in that defendant's prosecution. Yet, for purposes of the hypothetical, the Court *assumed* that the supervisors and office prosecutors in question had *Brady* and *Giglio* obligations to the defendant and suggested that, insofar as these disclosure responsibilities existed, absolute immunity applied. Hence, *Brady*

and *Giglio* duties are functionally prosecutorial—they are intimately related to the judicial phase of the criminal process. . . . While other state actors, like the police, share the prosecutor's constitutional obligation to disclose exculpatory evidence to the defendant, the prosecutor owes a distinct, if not heightened, disclosure obligation to the defendant once judicial proceedings commence. . . . One might argue that since we allow civil suits against police officers for causing *Brady* violations, . . . failure to fulfill due process in this manner is not a functionally prosecutorial action. In our view, however, a *Brady* violation is not committed unless and until a prosecutor, in the course of preparing for or conducting a trial or direct appeal, does not turn over the material evidence in question. . . *Brady* and *Giglio* violations breach a defendant's trial rights and are, thus, inherently prosecutorial in nature. Allowing a police officer to be sued for his role in eventually causing the prosecutor to violate *Brady* or *Giglio* does not alter the nature of the violation. We recognize that this analysis allows for police officers to potentially incur financial liability where a prosecutor may not, even though the prosecutor and the police officers may both fabricate or suppress evidence. Herein lies the rub: absolute immunity doctrine focuses on whether the nature of the action is prosecutorial, not the fact that the actor is a prosecutor; *Brady* and its progeny, by contrast, elevate the prosecutor—qua prosecutor—as ultimately responsible for fulfilling the State's obligation to provide fair process. . . Under *Brady*, the office of prosecutor entails a special duty to 'get it right.' Perhaps counterintuitively, this heightened duty carries with it greater immunity from financial liability. Yet, so long as we view *Brady* and *Giglio* as distinct versions of the right to due process, and the prosecutor as responsible for ensuring *Brady* and *Giglio* compliance, we must also recognize that in fulfilling this responsibility, the prosecutor acts as an officer of the court embroiled in the judicial phase of the criminal process . . . . Our immunity analysis, therefore, must focus not only on whether a prosecutor is actively participating on a trial team when he suppresses material evidence, but also on whether he owes a continuing *Brady* or *Giglio* obligation to the defendant in question. If he does, he functions as a prosecutor when he commits the suppression. . . .A prosecutor's *Brady* and *Giglio* duties may survive the conclusion of a trial. . . . Accordingly, a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness. . . . The district court suggests that because Wharrie was preparing for other trials and no longer directly involved in Fields' appeal or retrial, this fact wrests from him his prosecutorial function. We disagree. As the original prosecutor on the case, Wharrie had a continuing *Brady* obligation to reveal material evidence to the defense until Fields' conviction became final, as the ongoing judicial process continued to evolve. . . .[H]e was not fully divorced from Fields' judicial proceedings until all direct judicial remedies were exhausted and Fields' conviction became final. It follows that the immunity attendant to his prosecutorial disclosure obligation survives his departure from the courtroom as well."); ***Starks v. City of Waukegan***, 123 F.Supp.3d 1036, 1047-50 (N.D. Ill. 2015) ("*Fields's* remarking 'the fabrication of evidence harmed the defendant before and not just during the trial, because it was used to help indict him,' 740 F.3d at 1112, does not establish that a plaintiff can maintain a § 1983 suit based solely on the use of fabricated evidence or testimony to procure an indictment. That passage in *Fields*, which did not cite *Rehberg*, explicitly relied on *Julian v. Hanna*, 732 F.3d 842, 846–47 (7th Cir.2013), which involved a malicious prosecution claim—a

federal malicious prosecution claim, which was allowed because Indiana law was found not to provide an adequate remedy under the circumstances of that case. . . And malicious prosecution, of course, is all about the baseless *initiation* of criminal proceedings—unlike the due process clause. . . Furthermore, that passage from *Fields* appears in a hypothetical in which a prosecutor, acting in an investigative capacity, fabricates evidence that a second prosecutor then uses to obtain a conviction. . . The hypothetical thus explicitly involved the introduction of fabricated evidence *at trial;* the question was whether the first prosecutor—the one who fabricated the evidence but then dropped out of the case—could be held liable for the fabrication. *Fields* answered 'yes.'. . But nowhere did *Fields* question the requirement that the fabricated evidence must be introduced at trial; to the contrary, it reaffirmed that requirement. . . Likewise, citing that passage from *Fields*, *Armstrong* reasoned that an eventually acquitted defendant is still deprived of his liberty if he is imprisoned awaiting trial, and therefore that if police irretrievably destroy (as opposed to merely suppress) exculpatory evidence, the defendant may have a viable *Brady* claim. . .This passage from *Armstrong* is inapposite, for it involved the destruction of evidence and not fabricated grand jury testimony. Moreover, *Armstrong* reaffirmed that a viable *Whitlock* claim requires the fabricated evidence to have been introduced at trial . . . . In any event, because the Seventh Circuit has not circulated to the full court under Circuit Rule 40(e) the question whether *Alexander* should be overruled, it cannot be understood in *Fields* or *Armstrong* to have silently overruled the requirement that a faulty photo array must taint the trial in order for it to give rise to a due process violation. . . without so much as citing it. . . . For these reasons, Starks cannot maintain his § 1983 claim against Juarez based on his grand jury testimony about the victim's photo identification. . . . There admittedly is tension between *Sornberger* and *Whitlock* . If, as *Whitlock* holds, a police officer violates due process by fabricating testimony for *other* witnesses to deliver in court, why should the officer escape liability if he gives the false testimony himself? Either way, the defendant suffers the same harm. But the same tension exists in the grand jury context, where the Supreme Court—recognizing that, as here, absolute immunity does not 'extend[ ] to *all* activity that a witness conducts outside of the grand jury room'—has nonetheless held that immunity 'may not be circumvented by ... reframing] a claim to attack the preparation instead of the absolutely immune actions themselves.'. . .The important point, however, is that *Whitlock* did not purport to overrule *Sorenberger,* which remains good law in the Seventh Circuit and, being squarely on point . . . decides the issue here. . . Therefore, Biang's allegedly false recounting of his own conversation with Starks cannot, under governing Seventh Circuit precedent, serve as the basis for a due process claim under § 1983. Nor can his allegedly false report, since it was never used against Starks during the criminal proceedings. Waukegan Defendants are therefore entitled to summary judgment on Starks's federal due process claim.").

See also ***Cousins v. Lockyer*** , 568 F.3d 1063, 1069 (9th Cir. 2009) ("[T]o the extent Cousins faults the AG for failing to maintain an institutionalized information system for tracking all California appellate decisions with a direct bearing on individual prisoners' convictions. . . , the Supreme Court has indicated that, even if properly characterized as an attack on an office's administrative procedures, such a challenge does not strip a supervising prosecutor of absolute immunity."); ***Atherton v. District of Columbia Office of Mayor***, 567 F.3d 672, 686, 687 (D.C.

Cir. 2009) ("In sum, it is clear that Bailey-Jones was performing administrative/managerial functions when she dismissed Atherton from the Superior Court grand jury. The District has failed to meet its burden to show that the acts performed by Bailey-Jones were quasi-judicial functions that were functionally comparable to those of a judge. Therefore, the District Court erred in dismissing Atherton's claims against Bailey-Jones on the ground that she is entitled to absolute immunity. . . . Simply because a prosecutor's conduct is connected with the grand jury does not make it advocatory. Prosecutorial immunity undoubtedly may extend to cover prosecutors' conduct before grand juries . . . . In this case, however, Zachem was not the AUSA who was presenting evidence to the grand jury. He was the supervising AUSA who was called in to address complaints raised by members of the grand jury who were allegedly annoyed with Atherton's behavior during grand jury deliberations. . . . This determination is not inconsistent with the Supreme Court's recent decision in *Van de Kamp v. Goldstein* . . . . It is plain that the Court's analysis in *Van de Kamp* is inapposite here. In this case, Zachem's alleged activities–improperly removing a grand juror on the basis of his ethnicity and/or for the content and quality of his deliberations–had nothing to do with a prosecutor's preparation for or participation in a criminal trial. In sum, Zachem is not entitled to absolute immunity because the activities for which he is being sued do not relate to his performance as an advocate for the government."); ***Bertuglia v. City of New York***, 839 F.Supp.2d 703, 732-33 (S.D.N.Y. 2012) ("Whether the ADA defendants already had made the decision to seek an indictment when they issued the first subpoenas and began conducting interviews in this case, and could therefore be considered to be preparing to present their case to the grand jury and initiate a prosecution, rather than investigating whether any criminality existed, is a factual dispute that cannot be resolved on this motion. Indeed, the parties dispute as a factual matter whether a grand jury had been convened by the return date of some of the subpoenas at issue. Accordingly, the record is insufficient to determine whether the ADAs' actions prior to the convening of the grand jury are protected by absolute immunity. . . . The next issue is whether the ADA defendants' activities in conducting interviews and subpoenaing witnesses *after* the grand jury had been convened were entitled to absolute immunity. These actions were plainly taken in the ADA defendants' roles as advocates, because they were in the process of gathering and presenting evidence to the grand jury. . . .Accordingly, based on the pleadings, the ADA defendants' actions in issuing subpoenas and interviewing potential grand jury witnesses after the convening of a grand jury constituted advocacy, were protected by absolute immunity, and cannot serve as the basis for a claim in this case."); ***Lawlor v. Connelly***, No. 3:10-cv-1282 (JCH), 2011 WL 1740178, at *5, *6, *8,*9 (D. Conn. May 5, 2011) ("In sum, a prosecutor's role in preparing and filing an application for an investigatory jury pursuant to Conn. Gen.Stat. § 54-47c is akin to the court-related advocacy functions that have been recognized to be protected by absolute immunity. . . . Second Circuit precedent supports application of absolute immunity to conduct before a grand jury, regardless of whether that grand jury is engaged in an investigation or issuing an indictment. . . . The investigatory grand jury proceeding at issue here is closely tied to the judicial phase of criminal proceedings and to the initiation of prosecution. . . . In sum, because a prosecutor is entitled to absolute immunity for claims relating to his presentation of evidence to a grand jury, . . . and more generally for conduct in preparation for 'the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the

State,' *Buckley,* 509 U.S. at 273, Connelly is entitled to absolute immunity from Lawlor's claims based on his failure to disclose exculpatory evidence to the investigatory grand jury. . . . The Complaint alleges that, after the grand jury investigation, Connelly failed to disclose exculpatory information to the prosecutor assigned to litigate the state's case against Lawlor. . . The Supreme Court's unanimous decision in *Van de Kamp v. Goldstein,* 129 S.Ct. 862 (2009), makes clear that Connelly is entitled to absolute immunity on any claim arising from this conduct. . . .The hypothetical case considered in *Van de Kamp* is precisely the one before the court. Lawlor alleges that Connelly ought to have disclosed the exculpatory *Brady* material after the matter was transferred to a colleague for prosecution. . . At that point, the prosecutors were clearly preparing for litigation of criminal charges, and their decisions about what information to disclose is clearly protected by absolute immunity.").

Compare ***Smith v. Burge***, 222 F.Supp.3d 669, 695-96 (N.D. Ill. 2016) ("As the Court has already concluded, Defendants are not protected by qualified immunity in relation to Plaintiff's *Brady* claim. Nonetheless, Defendant Kelly argues that *Brady* violations are inherently prosecutorial, and thus he is protected by absolute immunity. Indeed, once a case passes the investigative stage and the prosecutors start preparing for trial, failure to turn over exculpatory evidence is subject to absolute immunity. . . Plaintiff's claims against Defendant Kelly, however, concern Defendant Kelly's misconduct during the investigatory stage of the proceedings, as well as his conspiratorial conduct unrelated to the prosecution of Plaintiff's claims. The Court further notes that Defendant Kelly was not the trial prosecutor. As such, this argument is without merit.") *with* ***Kitchen v. Burge***, 781 F.Supp.2d 721, 732 (N.D. Ill. 2011) ("Under *Van de Kamp* Lukanich and Eannace are entitled to prosecutorial immunity for their alleged post-trial suppression of exculpatory evidence. Although Lukanich and Eannace were no longer prosecutors on the case, they were colleagues of the prosecutors who had been assigned to work on the appellate phase of Kitchen's case. As *Van de Kamp's* hypothetical illustrates, immunity extends to a prosecutor's colleagues and supervisors, without regard to 'the pattern of liability among prosecutors within a single office.'").

Compare ***Livermore v. Arnold***, No. 10-507-B-M2, 2011 WL 693569, at *5-*7 & n.11 (M.D. La. Jan. 20, 2011) ("Considering that the only way to impose Section 1983 liability against a District Attorney's office is pursuant to a *Monell* custom/policy claim and that the plaintiff's claims against Perrilloux and Peever, in their official capacities, are to be treated as claims against the District Attorney's office, the only remaining Section 1983 claim for the undersigned to consider is plaintiff's *Monell* custom/policy claim against the DA's office (*i.e.,* the plaintiff's claim that Perrilloux, as the final policymaker for the D.A.'s office, has implemented an unconstitutional policy of prosecuting all misdemeanor charges without investigation and regardless of whether they have merit). . . . The Western District of Louisiana, in *Johnson,* faced the precise issue before the Court herein relative to Perrilloux's official capacity liability– whether the Supreme Court's holding in *Van de Kamp* concerning failure to supervise and train claims mandates the dismissal of the plaintiff's complaint insofar as it asserts a *Monell* claim against the District Attorney's Office (*i.e.,* against the district attorney in his official capacity). . . . Perrilloux argues that the

plaintiffs have failed to state a claim against him in his official capacity because he is entitled to absolute immunity under an extension of *Imbler's* and *Van de Kamp's* policies to official capacity claims. However, as with the DA defendants in *Johnson,* he is unable to point to any cases from a superior court in which a *Monell* claim against a District Attorney's office has been expressly dismissed on the basis of absolute immunity. . . . This Court also recognizes the uncertainty created by *Van de Kamp* and the debate over whether municipal liability under Section 1983 is consistent with the doctrine of absolute immunity but agrees with the Western District of Louisiana that there is no binding authority from a superior court holding that the doctrine of absolute immunity applies to *Monell* claims and that it is inappropriate to speculate as to whether the doctrine will ultimately be expanded beyond its present scope to official capacity claims. Accordingly, because of the lack of any binding authority supporting the argument that Perrilloux is entitled to absolute immunity concerning the plaintiffs' official capacity *Monell* claim, the plaintiffs may proceed against him on that claim to the extent they have otherwise stated a claim upon which relief may be granted under *Monell.* . . . What plaintiffs' claim boils down to is an allegation that the District Attorney's Office has a policy of prosecuting all misdemeanors without first investigating them to determine whether they have merit. Thus, the constitutional violation alleged is a failure to investigate prior to initiating and proceeding with misdemeanor prosecutions. The Fifth Circuit has specifically recognized that a claim 'that [a] prosecutor failed to investigate is not of constitutional dimension' because '[t]here is no such due process right.'. . Thus, even though Perrilloux is not entitled to absolute immunity with respect to plaintiffs' *Monell* claim, such claim should nevertheless be dismissed for failure to state a claim pursuant to Rule 12(b)(6). . . . [E]ven if plaintiffs' *Monell* claim was not subject to dismissal because of the failure to allege a constitutional violation, it would also be subject to dismissal because the plaintiff has failed to specifically allege a pattern of constitutional violations caused by the alleged general policy (such as any other cases where misdemeanors were prosecuted by the 21st Judicial District D.A.'s office without investigating whether the charges had merit), as required when proceeding under a policymaker theory of liability."); ***Gearin v. Rabbett***, No. 10-CV-2227 (PJS/AJB), 2011 WL 317728, at *7, *8 & n.8 (D. Minn. Jan. 28, 2011) ("Although the Eighth Circuit does not appear to have addressed the question of whether a prosecutor's immunity from § 1983 claims extends to municipalities, . . . the Eighth Circuit has held that defendants who were functionally similar to prosecutors and judges did not enjoy absolute immunity from claims brought against them in their official capacities. . . There is thus substantial authority for the proposition that prosecutorial immunity does not extend to municipalities. The contrary decisions cited by the City–four district-court cases from the 1980s–are not persuasive. Notably, two of those four decisions are from New York federal district courts and thus were overruled by the Second Circuit's decision in *Pinaud v. County of Suffolk,* 52 F.3d 1139 (2d Cir.1995). The Court therefore concludes that Kantrud's immunity does not extend to the City. . . . [T]he Eighth Circuit has held that, when a plaintiff attempts to pin *Pembaur*-type liability on a municipality by arguing that the *prosecutor* is a policymaker, the prosecutor's immunity also shields the municipality. *Patterson v. Von Riesen,* 999 F.2d 1235, 1238 n. 2 (8th Cir.1993) ("Because of the prosecutors' absolute immunity, Patterson cannot attach liability to the decision in question, and, thus, even if the policy was county policy, Patterson still may not recover damages.") . . . . [T]he Court reads *Patterson* to hold only that a plaintiff cannot state a *Monell*

claim by alleging that a prosecutor was acting as a policymaker when performing functions protected by absolute prosecutorial immunity."); ***Johnson v. Louisiana***, No. 09-55, 2010 WL 996475, at *11, *12 (W.D. La. Mar. 16, 2010) ("The parties join issue on whether the Supreme Court's holding in *Van de Kamp* mandates the dismissal of Johnson's complaint insofar as it asserts a *Monell* claim against the District Attorney's Office. The District Attorney's Office concedes that the Supreme Court addressed only the individual capacity claims asserted by the plaintiff in *Van de Kamp*, but argues no distinction should be made and that the Supreme Court's ruling in *Van de Kamp* mandates dismissal of Johnson's *Monell* claims. . . . The Court's conclusion that absolute immunity does not extend to *Monell* claims is supported by the exacting requirements a plaintiff must establish in order to recover for a claim based on the policymaker's failure to take affirmative action . . . . Absent a pattern of similar constitutional deprivations, a plaintiff will prevail only where the need for training or other affirmative action 'is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [District Attorney's Office] can reasonably be said to have been deliberately indifferent to the need.'. . A need for training or other affirmative action 'is considered sufficiently obvious only where the deprivation of constitutional rights is a "highly predictable consequence" of the training deficiency.'. . . Accordingly, the Court finds that District Attorney Davis and District Attorney Burkett are not cloaked with the protection of absolute immunity insofar as Johnson asserts claims against them in their *official* capacity– claims which must be treated as *Monell* claims against the District Attorney's Office itself.") *with* ***Hatchett v. City of Detroit***, 714 F.Supp.2d 708, 726 & n.6 (E.D. Mich. 2010) ("The court is unaware of any binding authority extending a municipality's training duty to professionally educated and degreed employees, such as prosecutors. . . As Justice O'Connor indicated, a municipality's duty to train arises in two circumstances. The first arises when (1) a clear constitutional duty governs particular employees (e.g., police officers) who are likely to face a certain situation and be called upon to act in a certain way (e.g., using deadly force while attempting to apprehend a fleeing felon), ***and*** (2) 'it is ... clear that failure to inform [them] of that duty will create an extremely high risk that constitutional violations will ensue.'. . It is the second of these two requirements that is absent in the case of professionally educated employees– particularly prosecutors, who at the time they are hired presumably are already aware of their constitutional duties by virtue of the fact that they have graduated from law school and passed the bar examination. A municipality need not train prosecutors about that which they already know, including their duties under *Brady*. . . . An exception might well exist if the municipality were aware that its prosecutors have repeatedly violated citizens' rights under *Brady.* In this event, a duty to train (or, more aptly, to retrain) could arise under the second circumstance identified by Justice O'Connor–namely, where there is a 'pattern of constitutional violations.'. . Plaintiff does not allege the existence of any such pattern of *Brady* violations in Macomb County.").

See also ***Dock v. State of Nevada***, No. 2:10-cv-00275-RCJ-LRL, 2010 WL 5441642, at *5 (D. Nev. Dec. 28, 2010) ("The question remains whether immunity should stretch so far as to immunize a municipality itself for its alleged deliberate indifference in failing to train an assistant of the courts, such as a child protective services worker, simply because the latter enjoys immunity for the alleged unconstitutional acts. The Court finds that it does. Last year, the Supreme Court

unanimously reversed the Ninth Circuit in holding that a district attorney's office enjoys absolute immunity against failure-to-train claims arising out of one of its attorney's prosecution-related actions. *See Van de Ramp v. Goldstein,* 129 S. Ct. 855, 862 (2009). The *Van de Kamp* Court noted that with respect to prosecution-related actions, an office's '*general* methods of supervision and training' are not distinguishable from direct supervisory decisions. . .This is a commonsense ruling. If the rule were otherwise, a plaintiff could easily circumvent the immunity doctrines by suing a municipality directly and arguing it 'failed to train' the judge and/or prosecutor. The same reasoning applies to a child protective services worker acting in her investigative capacity. The Court therefore grants the motion to dismiss as to the second cause of action.")

See also ***Nazir v. County of Los Angeles***, No. CV 10-06546 SVW ("GRx), 2011 WL 819081, at *8 (C.D. Cal. Mar. 2, 2011) ("Under *Weiner,* this Court joins the reasoning of the courts in *Goldstein* and *Neri* in concluding that the DA's Office in this case was a state actor when creating a procedure to place police officers on 'Brady Lists.' As discussed in *Goldstein, Weiner* extends to decisions on how to proceed with a prosecution. Furthermore, as discussed in *Neri*, evaluating a witness's credibility, determining what constitutes 'Brady Material,' and decisions on whether to use a police officer as a witness in the future, are prosecutorial functions. . . Having found that the alleged policymaker, the DA's Office, was a state actor in implementing the allegedly unconstitutional procedure, the Court holds that Plaintiff's allegations against the DA's Office are alleged against the state and are barred by Eleventh Amendment immunity. . . Further, as the state is the relevant actor, the County cannot be held liable for the allegedly unconstitutional procedures. . . Thus, the County's Motion is GRANTED and the County and the DA's Office, *as entities,* are DISMISSED WITH PREJUDICE."); ***Neri v. County of Stanislaus Dist. Attorney's Office***, No. 1:10-CV-823 AWI GSA, 2010 WL 3582575, at *8 (E.D. Cal. Sept. 10, 2010) ("Placing Neri's name on a *Brady* List, disclosing what the district attorneys considered to be *Brady* Material, and not utilizing objective criteria for *Brady* List determinations is conduct that requires witness evaluation, involves obligations imposed pursuant to the Supreme Court (*Brady v. Maryland*), requires the application of legal knowledge, and is associated with the judicial phase of the criminal process. . . As such, the acts of placing Neri's name on a *Brady* List and disclosing *Brady* Materials were acts done in a prosecutorial capacity; thus, the acts were done by those who were the agents of the State of California. . . The DAO, and the district attorneys who actually performed the conduct, are entitled to Eleventh Amendment immunity. . . Further, because the conduct at issue was on behalf of the State and not the County, no viable claims are alleged against the County.").

In ***Kalina v. Fletcher***, 522 U.S. 118 (1997), the Supreme Court held, in a unanimous opinion, that a prosecutor who makes false statements of fact in an affidavit supporting an application for an arrest warrant, is entitled to qualified, rather than absolute, immunity. The Court explained:

> [P]etitioner's activities in connection with the preparation and filing of two of the three charging documents-the information and the

> motion for an arrest warrant-are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well. . . . [W]e merely hold that § 1983 may provide a remedy for respondent insofar as petitioner performed the function of a complaining witness. We do not depart from our prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate.

Id. at 129, 131.

See also ***Garmon v. Cty. of Los Angeles***, 828 F.3d 837, 843-45 (9th Cir. 2016) ("Garmon argues that we should adopt a rule that absolute prosecutorial immunity is unavailable against claims of unindicted third-party witnesses. . . She cites no circuit court opinion adopting such a rule and we decline to do so here. . . .Construed in the light most favorable to Garmon, the operative complaint alleges three acts performed by Hanisee: issuing the subpoena duces tecum, drafting its supporting declaration and publicizing Garmon's medical records at trial to discredit her testimony. Garmon does not dispute that Hanisee is entitled to absolute immunity for performing the 'traditional functions of an advocate' when using Garmon's medical information at trial. *See Kalina*, 522 U.S. at 131. We conclude that Hanisee is absolutely immune for issuing the subpoena duces tecum, but that the district court erred in granting absolute immunity to Hanisee for the accompanying declaration. Hanisee is entitled to absolute immunity for issuing the subpoena duces tecum to Kaiser because a 'prosecutor gathering evidence is more likely to be performing a quasi-judicial advocacy function when the prosecutor is "organiz [ing], evaluat[ing], and marshaling [that] evidence" in preparation for a pending trial, in contrast to the police-like activity of "*acquiring* evidence which might be used in a prosecution."'. . Although issuing a subpoena is necessarily an evidence-gathering action, here it was issued in preparation for evaluating and countering a defense witness's testimony. In light of the timing and context, it is clear that Hanisee's subpoena was directed at obtaining evidence in preparation for trial. Thus, absolute immunity properly applies to this act. . . However, the district court erred in concluding that Hanisee is entitled to absolute immunity for presenting a false statement in a declaration supporting her application for the subpoena duces tecum. In *Kalina*, the Supreme Court distinguished the preparation and filing of charging documents from the execution of a supporting certification 'under penalty of perjury,' holding that the latter is not protected by absolute immunity. . . .The circumstances here are similar to those in *Kalina*. Under California law, like Washington law as described in *Kalina*, the party filling out and issuing the subpoena need not be an attorney. . . Further, like the prosecutor in *Kalina*, Hanisee's declaration states particular facts under penalty of perjury, making her more akin to a witness than a prosecutor in this function. Thus, following *Kalina*, Hanisee is not entitled to absolute immunity for her declaration in support of the subpoena. In sum, the district court erred in concluding that Hanisee is absolutely immune from suit here.

We conclude that she is entitled to absolute immunity for issuing the subpoena and using the medical records at trial, but to qualified immunity, at most, for her declaration. . . .An attorney supervising a trial prosecutor who is absolutely immune is also absolutely immune. *Van de Kamp*, 555 U.S. at 345–46. So are prosecutors who conducted '*general* office supervision or office training.'. . 'But nothing in *Van de Kamp* permits us to grant a supervising prosecutor absolute immunity for supervising an activity that's *not* protected by absolute immunity under *Imbler* and its progeny.'. . Thus, Cooley is immune to the same extent as Hanisee."); ***Torres v. Goddard***, 793 F.3d 1046, 1052, 1054-57 (9th Cir. 2015) ("We . . . hold that absolute immunity is available to prosecutors in the context of civil forfeiture proceedings. In doing so, we join every other circuit that has addressed this question. [collecting cases] Holmes's preparation of and application for seizure warrants is the civil forfeiture analog to the prosecutor's application for an arrest warrant in *Kalina.* These actions are likewise shielded by absolute immunity and may not form the basis of a claim for damages. . . . Because Holmes went beyond the 'traditional functions of an advocate' and 'carr[ied] out' the warrants, he was only entitled to the qualified immunity that a police officer would receive when doing so. . . .Serving and executing seizure warrants are the functions of police officers, not the 'traditional functions of an advocate,'. . . and thus under *Kalina* are functions that aren't protected by absolute immunity. We acknowledge that our application of the functional approach means that Holmes is entitled to absolute immunity with respect to some acts but not others, even though all of plaintiffs' claims are predicated on the same constitutional violation: seizure of their funds without probable cause. However, the result we reach is the 'essence of the function test' because absolute immunity is based on the nature of the function performed, not the underlying constitutional claim. . . Critically, if Holmes's service and execution of the warrants were acts protected by absolute immunity, we'd be faced with an 'incongruous' result where a prosecutor performing the function of a police officer would be entitled to absolute immunity merely because of his status as a prosecutor. . . Service of the self-executing seizure warrants merely carried out the command of the warrants; it wasn't a 'function[ ] that require[s] the exercise of prosecutorial discretion.'. . Extending absolute immunity to this type of police activity would be inconsistent with the distinction drawn by the Supreme Court in *Kalina.* . . We express no opinion as to whether Holmes is entitled to qualified immunity. Although defendants raised qualified immunity in their cross motion for summary judgment, the district court didn't reach the issue because it held that absolute immunity barred all of plaintiffs' claims. The parties did not brief the issue on appeal. We therefore remand to the district court to determine, in the first instance, whether Holmes's actions in serving and executing the warrants are protected by qualified immunity. If the district court determines that any of Holmes's actions aren't protected by qualified immunity, it must then go on to assess whether those unprotected acts (and only those acts) give rise to a cause of action for damages against Holmes under section 1983."); ***Olson v. Champaign Cnty., Ill.,*** 784 F.3d 1093, 1103 (7th Cir. 2015) ("Employing the functional approach and applying the teachings of *Kalina* here, we conclude that Ziegler is not entitled to absolute immunity. He performed the same function as a police officer witness when he swore to facts. A police officer witness would not be entitled to absolute immunity for swearing to false information, so neither is Ziegler. His signature is below the following statement: 'The undersigned, being duly sworn, states upon information and belief that the facts set forth in the foregoing information are

true.' It is irrelevant that his affidavit was not on a separate piece of paper. In signing that he stated 'upon information and belief that the facts set forth' were true, Ziegler converted that part of the information into his own affidavit.Ziegler resists this conclusion and tries to distinguish *Kalina* by arguing that he did not attest to the truth of the allegations in the information because he was empowered by state law to verify the information. Illinois law provides that 'an information shall be signed by the State's Attorney and sworn to by him or another.' 725 Ill. Comp. Stat. 5/111–3(b). This statute thus distinguishes between the signing of the information as a charging document, which 'shall' be done by the State's Attorney, and swearing to the facts, which may be done 'by him or another.' All this shows is that Illinois law tracks the distinction between the roles of initiating a prosecution and swearing to facts—two roles that the Supreme Court took great care to keep separate in *Kalina.* An Illinois prosecutor who complies with state law that 'an information shall be signed by the State's Attorney' is using her professional judgment. . . . A prosecutor who signs and files an information, but does not swear to any of the facts contained in it, is protected by absolute immunity because she is acting as an advocate of the State. But, as *Kalina* explains, a prosecutor does not act as an advocate when testifying to facts because her professional 'judgment could not affect the truth or falsity of the factual statements themselves.'. . Accordingly, when a prosecutor goes beyond signing the information to initiate the suit by swearing to the facts it contains, the attorney is no longer absolutely immune from suit."); ***Spivey v. Robertson***, 197 F.3d 772, 775, 776 (5th Cir. 1999) ("We are presented in the instant case with an opportunity to clarify the effect of the Supreme Court's opinion in *Kalina v. Fletcher* . . . on the Fifth Circuit's decision in *Hart v. O'Brien* 127 F.3d 424. Both courts apply a functional approach to absolute immunity. . . . The courts differ, however, as to their analysis of the threshold timing of prosecutorial absolute immunity. In *Hart*, this court held that the earliest time that absolute immunity may attach to a prosecutor's activities is when charges are filed. Shortly after this court's opinion in *Hart,* the Supreme Court decided *Kalina.* In *Kalina*, the Supreme Court found that a prosecutor has absolute immunity when acting as an advocate in supplying legal advice to support an affidavit for an arrest warrant, unless that prosecutor personally attests to the truth of the evidence presented to a judicial officer, or exercises judgment going to the truth or falsity of evidence. *Hart* is in conflict with *Kalina*, because a prosecutor may select the facts to include in the certification prior to when charges are filed. The starting point must be earlier than the formal onset of judicial proceedings, at least encompassing preparatory moments. *Kalina* now governs when absolute immunity may apply, thus the district court erred in applying *Hart's* chronological analysis to the facts of the instant case. *Hart* is no longer valid law regarding the threshold timing for absolute immunity. . . . Under *Kalina*, a prosecutor acts as an advocate in supplying legal advice to support an affidavit for an arrest warrant and is entitled to absolute immunity as long as a prosecutor does not personally attest to the truth of the evidence presented to a judicial officer, or exercise judgment going to the truth or falsity of evidence. Because the prosecutors were acting as advocates in supplying legal advice based on facts provided by police officers to support an affidavit for an arrest warrant, the prosecutors in the instant case are absolutely immune."); ***Roberts v. Kling***, 144 F.3d 710, 711 (10th Cir. 1998) (on remand) ("Assuming without deciding that Kling acted as a complaining witness in testifying to the truth of the statements contained within the criminal complaint, a role which would deny his conduct the protection of absolute immunity under *Kalina*,

we nonetheless reaffirm our earlier decision that summary judgment was properly granted to Kling in this case. First, *Kalina* leaves untouched our affirmance of the district court's conclusion that Kling was entitled to absolute immunity for his actions in preparing a criminal complaint against Roberts and in seeking a warrant for her arrest. . . . The only remaining issue is whether Kling is entitled to qualified immunity for his execution of the criminal complaint, by which he affirmed the truth of the facts set forth in that document to the best of his information and belief. . . . [W]e agree with the district court that Roberts has not demonstrated that Kling violated clearly established law."); ***Springmen v. Williams***, 122 F.3d 211, 212-14 (4th Cir. 1997) ("Absolute prosecutorial immunity does not rest. . . on the technicality of who signed charging documents. Rather, it protects decisions that are integrally related to the charging process, such as Williams' decision to approve the prosecution here. . . . The fact that in this case a police officer implemented the prosecutor's decision does nothing to change this conclusion. . . . The Supreme Court has recently granted certiorari in *Fletcher v. Kalina* . . . to further address the doctrine of absolute prosecutorial immunity. *Fletcher* deals with a claim of absolute immunity for executing an affidavit in support of an arrest warrant–conduct which is not at issue here."); ***Ireland v. Tunis***, 113 F.3d 1435, 1450 (6th Cir. 1997) (investigator in prosecutor's office who vouched for the truth of the contents of the criminal complaint in front of a judicial officer entitled to qualified immunity); ***Kohl v. Casson***, 5 F.3d 1141, 1146 (8th Cir.1993) ("[T]he function of seeking an arrest warrant is subject only to qualified immunity, not absolute immunity."; prosecutor who vouched for truth of arrest warrant affidavits is analogous to police officer in *Malley*).

In ***Ireland v. Tunis***, 113 F.3d 1435, 1446-47 (6th Cir. 1997), the court explained:

> A prosecutor's decision to file a criminal complaint and seek an arrest warrant and the presentation of these materials to a judicial officer fall squarely within the aegis of absolute prosecutorial immunity. . . . Presenting the charging documents to a judicial officer and procuring an arrest warrant must be considered part of the formal process of initiating a prosecution and securing the presence of the accused at trial. . . . Absolute prosecutorial immunity will likewise attach to administrative or investigative acts necessary for a prosecutor to initiate or maintain the criminal prosecution. . . . Nonetheless, when a prosecutor or other official switches from presenting the charging document to vouching personally for the truth of the contents of the document, we believe the protection afforded by absolute immunity must give way to a qualified immunity inquiry. . . . [W]e believe that the only level of protection from suit that is potentially available when an official vouches for the truth of the contents of a criminal complaint is qualified immunity.

See also ***Lacey v. Maricopa County***, 693 F.3d 896, 913, 914 (9th Cir. 2012) (en banc) ("Wilenchik argues that he is entitled to absolute immunity for claims arising out of the issuance

of the purported grand jury subpoenas and those arising out of the arrests. With regard to the subpoenas, Wilenchik cannot claim absolute immunity, although we think the issue is a close one. . . . Had Wilenchik followed Arizona law, his drafting of the grand jury subpoenas would likely have come within the shield of absolute immunity. . . . Even if Wilenchik's authoring of a grand jury subpoena might in another context be considered 'a vital part of the administration of criminal justice,' by avoiding judicial scrutiny, his actions were one step 'further removed from the judicial phase of criminal proceedings.'. . Where the prosecutor has side-stepped the judicial process, he has forfeited the protections the law offers to those who work within the process. . .Wilenchik is also not entitled to absolute immunity in connection with ordering or advising those making the arrests. Neither are prosecutorial functions. . . . The same logic also precludes Wilenchik from claiming immunity for playing other roles in the arrests, including ordering them. Such decisions entail the same determination. When a prosecutor orders or counsels warrantless arrests, he acts directly to deprive someone of liberty; he steps outside of his role as an advocate of the state before a neutral and detached judicial body and takes upon himself the responsibility of determining whether probable cause exists, much as police routinely do. Nothing in the procuring of immediate, warrantless arrests is so essential to the judicial process that a prosecutor must be granted absolute immunity."); ***Waggy v. Spokane County Washington***, 594 F.3d 707, 713 (9th Cir. 2010) ("[W]e conclude that where a prosecutor submits a motion for a bench warrant to the court applying the law to facts alleged in supporting affidavits signed by witnesses, she is acting not in an investigative capacity, but instead as a judicial advocate before the court. This entitles her to absolute prosecutorial immunity from suit for civil rights claims arising from the discharge of her duties."); ***McGhee v. Pottawattamie County, Iowa***, 547 F.3d 922, 933 (8th Cir. 2008) ("We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function.' The district court was correct in denying qualified immunity to Hrvol and Richter for their acts before the filing of formal charges."), *cert. dism'd*, 130 S. Ct. 1047 (2010); ***Mink v. Suthers***, 482 F.3d 1244, 1261, 1262 (10th Cir. 2007) ("[T]here is no bright line between advocacy and investigation. It is clear that a prosecutor's courtroom conduct falls on the advocacy side of the line. . . And it is equally clear that advocacy is not limited to filing criminal charges or arguing in the courtroom. . . Thus, especially when considering pre-indictment acts, it is important to consider other factors, such as (1) whether the action is closely associated with the judicial process, *Burns*, 500 U.S. at 495, (2) whether it is a uniquely prosecutorial function, *id.* at 491 n. 7, and (3) whether it requires the exercise of professional judgment, *Kalina*, 522 U.S. at 130. In sum, a prosecutor is entitled to absolute immunity for those actions that cast him in the role of an advocate initiating and presenting the government's case. Absolute immunity, however, does not extend to those actions that are investigative or administrative in nature, including the provision of legal advice outside the setting of a prosecution. . . . We now turn to whether absolute immunity applies to the deputy district attorney's review of the affidavit in support of the search warrant in *Mink's* case. For the following reasons, we conclude the district attorney was not wearing the hat of an advocate and, thus, is not entitled to absolute prosecutorial immunity. . . . Here, the review of the affidavit squarely falls on the side of investigatory legal advice, and not advocacy before a judicial body.

The deputy district attorney played no role in preparing the affidavit, nor was she involved in preparing, analyzing, and presenting pleadings to a court. If she were, this would be quite a different case. We acknowledge this conclusion is complicated by those cases where prosecutors have been absolutely immunized for drafting, filing, and arguing in support of an arrest or search warrant. . . . In those cases, however, the prosecutor was acting as an advocate–evaluating evidence, preparing pleadings, and appearing in court. It may be true that a lawyer's more active involvement in preparing a warrant application and presenting it in court will confer absolute immunity. But in this case the prosecutor's function was not that of an advocate; her function was to provide legal advice outside the courtroom to aid a nascent investigation. . . . Here, the prosecutor was not preparing her case. Accordingly, in these circumstances, immunity does not attach. The district attorney urges us to consider her reliance on Colorado law in support of a finding of absolute immunity. . . .As the district court correctly noted, however, a state statute–even one requiring affirmative action–cannot create immunity from a federal civil rights claim where the functional analysis suggests otherwise. . . And under the Supreme Court's functional analysis we look to what the attorney did–she provided legal advice–and not to what state law requires."); ***Genzler v. Longanbach***, 410 F.3d 630, 639-41 (9th Cir. 2005) ("The timing of evidence gathering is a relevant fact in determining how closely connected that conduct is to the official's core advocacy function in the judicial process, and thus informs the inquiry into whether the official's conduct is protected by absolute immunity. The Supreme Court has held that when a witness is being coached at or during a break in trial, the prosecutor is protected by absolute immunity even if he or she is instructing the witness to lie. . . Longanbach and O'Brien rely on the timing of their meetings with Flanders to argue that they are entitled to absolute immunity. They point out that their meetings with Flanders occurred after Genzler's April 19 arrest, which Genzler concedes was based on probable cause. In *Buckley*, the Court held that '[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.'. . But the Court in *Buckley* was careful to note that 'a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination ... a prosecutor may engage in "police investigative work" that is entitled to only qualified immunity.'. . Thus, while interviews conducted before probable cause to arrest has been established are not protected by absolute immunity, the converse is not necessarily true. . . . Timing is thus a relevant, but not necessarily determinative, factor. . . . [J]ust as the existence of probable cause to arrest is not conclusive, we do not view the filing of the complaint as an event after which, by definition, all actions by the prosecutor and his staff are protected by absolute immunity."); ***KRL v. Moore***, 384 F.3d 1105, 1111-14 (9th Cir. 2004) ("The Supreme Court has not addressed whether a prosecutor is entitled to absolute immunity when assisting with the acquisition of evidence pursuant to a post-indictment search warrant. We have concluded, however, that '[p]rosecutors are absolutely immune from liability for gathering additional evidence after probable cause is established or criminal proceedings have begun when they are performing a quasi-judicial function.'. . . We conclude that, to the extent the second search warrant sought evidence to prosecute the crimes charged in the indictment, Riebe's and Irey's review of the warrant prior to submission was intimately associated with the judicial process. Probable cause had been established by the grand jury, and the prosecutors' actions were directed

at the upcoming trial. . . . Ensuring that evidence recovered pursuant to a post-indictment search warrant will be admissible at trial is no less the function of an advocate than deciding what evidence will be presented at trial. . . . Where a prosecutor has secured an indictment and begins to marshal evidence for trial, i.e., undertakes the second or third step in the process of obtaining a conviction, *Malley* implies that exposing a prosecutor to liability for his or her decisions at that later stage has a greater likelihood of interfering with the prosecutor's independent judgment. . . . Unlike in *Burns*, the prosecutors here did not serve as free-standing legal advisors to police officers. Rather, because probable cause had been established, and because an indictment had issued against Womack, they were performing a traditional function of an advocate for the State, namely, overseeing trial preparations. . . . Hall is also entitled to absolute immunity for his reliance on the second search warrant to gather evidence for the prosecution of Womack. Investigative activities carried out in preparation for a prosecutor's case may enjoy absolute immunity. . . . Because we focus on 'the nature of the function performed, not the identity of the actor who performed it,' . . .an investigator gathering evidence, a month after an indictment was filed, to prepare the prosecutor for trial is engaged in an advocacy function intimately associated with the judicial process, and is entitled to the same immunity that would be afforded a prosecutor. . . . The collateral investigation into whether KRL is permeated with fraud went beyond any legitimate preparation to prosecute Womack for any crime in the removal of the storage tank or for the other crimes charged in the indictment. Like advising officers about the existence of probable cause during the pretrial investigation,. . . approving a search warrant to assist with a collateral investigation into new crimes is an investigative function that is not entitled to absolute immunity. . . . We must emphasize that our result would not necessarily be the same had the prosecutors reviewed an arrest warrant, rather than a search warrant, prior to submission. . . . Here, because probable cause had not been established to prosecute anyone for conduct relating to the collateral investigation, the prosecutors did not serve as advocates in reviewing and approving the investigatory search warrant."); ***Bernard v. County of Suffolk***, 356 F.3d 495, 498, 504 (2d Cir. 2004) ("We reverse with respect to the denial of absolute immunity for advocative functions, reiterating what this court has held in other cases: as long as a prosecutor acts with colorable authority, absolute immunity shields his performance of advocative functions regardless of motivation. . . . The appropriate inquiry, thus, is not whether authorized acts are performed with a good or bad *motive*, but whether the *acts* at issue are beyond the prosecutor's authority. Accordingly, where a prosecutor is sued under § 1983 for unconstitutional abuse of his discretion to initiate prosecutions, a court will begin by considering whether relevant statutes authorize prosecution for the charged conduct. If they do not, absolute immunity must be denied. . . But if the laws do authorize prosecution for the charged crimes, a court will further consider whether the defendant has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct. For example, where a prosecutor has linked his authorized discretion to initiate or drop criminal charges to an unauthorized demand for a bribe, sexual favors, or the defendant's performance of a religious act, absolute immunity has been denied. . . Where, as in this case, a prosecutor's charging decisions are not accompanied by any such unauthorized demands, the fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity."); ***Spurlock v. Thompson,*** 330 F.3d 791, 798-800 (6th Cir. 2003)

("Here, as in *Imbler*, Thompson's decision, as prosecuting attorney, to have Whitley and Apple testify falsely at Spurlock's second criminal trial, even if done knowingly, is protected by absolute immunity. . . . Thompson clearly acted as an advocate during the second prosecutions of Spurlock and Marshall. However, at the time of the alleged coercion and threats, those prosecutions had concluded. There were no ongoing adversarial proceedings. Absolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings, including direct appeals, habeas corpus proceedings, and parole proceedings, where the prosecutor is personally involved in the subsequent proceedings and continues his role as an advocate. . . However, where the role as advocate has not yet begun, namely prior to indictment, or where it has concluded, absolute immunity does not apply. . . . Functionally, a prosecutor who injects himself into a post-trial investigation into the possibility of misconduct during the trial is not acting as an advocate. Likewise, coercing a witness to maintain his false testimony during this and other proceedings does not constitute protected advocacy. Rather, Thompson's retaliatory conduct after the trial was completed is more like the administrative and investigative acts for which prosecutors have been held not to be entitled to absolute immunity."); ***Cousin v. Small,*** 325 F.3d 627, 633 (5th Cir. 2003) ("Although *Buckley* did not explicitly hold that all witness interviews conducted after indictment are advocatory in nature, the Court's reasoning strongly indicates that many, perhaps most, such interviews are likely to be advocatory rather than investigative. . . .In this case, therefore, the question of absolute immunity turns on whether Cousin had been identified as a suspect at the time Rowell was interviewed and whether the interview related to testimony to be presented at trial."); ***Broam v. Bogan,*** 320 F.3d 1023, 1030, 1031 (9th Cir. 2003) ("Prosecutors are absolutely immune from liability for gathering additional evidence after probable cause is established or criminal proceedings have begun when they are performing a quasi-judicial function. . . . However, even after the initiation of criminal proceedings, a prosecutor may receive only qualified immunity when acting in a capacity that is exclusively investigatory or administrative.").

Hart v. Hodges, 587 F.3d 1288, 1298 (11th Cir. 2009) ("Hart's argument on appeal relies heavily on his assertion that a prosecutor should be categorically denied absolute immunity if he disobeys a judge's order (e.g., the second state sentence that Hodges appealed) outside the presence of the judge. This argument, however, misapprehends the functional analysis used in considering absolute immunity. As we repeatedly have stated, the determination of absolute prosecutorial immunity depends on the nature of the function performed, not whether the prosecutor performed that function incorrectly or even with dishonesty, such as presenting perjured testimony in court. . . . Hart's argument that conduct violating a judge's order, or more broadly, violating a legal obligation, should not be entitled to absolute immunity is not consistent with the fundamental purpose of absolute immunity. Absolute immunity renders certain public officials completely immune from liability, even when their conduct is wrongful or malicious prosecution."); ***Cady v. Arenac County***, 574 F.3d 334, 341, 342 (6th Cir. 2009) ("[Plaintiff] has pointed to no authority, in this circuit or elsewhere, that supports his contention that a prosecutor's actions in connection with the negotiation and entry of a release-dismissal agreement is outside the scope of a prosecutor's role as an advocate. The defendants, on the other hand, have persuasively argued that

County Prosecutor Broughton's actions in connection with the DPA [Deferred Prosecution Agreement] should be covered by absolute immunity."); ***Milstein v. Cooley,*** 257 F.3d 1004, 1007-10 (9th Cir. 2001) (discussing Supreme Court's absolute immunity precedent with respect to prosecutors); ***Cooper v. Parrish***, 203 F.3d 937, 947, 948 (6th Cir. 2000) ("We agree that the prosecutors in this case may still be absolutely immune even though the alleged constitutional violations occurred when the officials were pursuing a civil action. Indeed, as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense. . . . Like the prosecutors in *Ireland,* the prosecutors in the present case are entitled to absolute immunity for their decision to file the public nuisance and civil forfeiture complaints and for their decision to seek the temporary restraining orders."); ***Prince v. Hicks***, 198 F.3d 607, 612, 614 (6th Cir. 1999) ("The line between conduct that is part of a preliminary investigation and conduct that is intimately associated with the judicial phase of a criminal proceeding is difficult to draw in some cases. . . Nevertheless, the approach endorsed by the Supreme Court in *Burns* and *Buckley* requires a court to focus on the specific conduct at issue in a case and determine whether a prosecutor was acting as an advocate for the state or whether she was simply engaging in preparatory conduct and performing administrative or investigative functions. Indeed, although prosecutors generally are not absolutely immune when they engage in administrative or investigative acts, the absolute immunity question nonetheless turns on the specific circumstances of the case. . . . A prosecutor performing an investigative function before she has probable cause to arrest a suspect cannot expect to receive the protection of absolute immunity, but a prosecutor who initiates criminal proceedings against a suspect whom she had no probable cause to prosecute is protected by absolute immunity. . . . The dividing line is not, as Prince argues, the point of determination of probable cause. Instead, the dividing line is the point at which the prosecutor performs functions that are intimately associated with the judicial phase of the criminal process."); ***Mastroianni v. Bowers***, 173 F.3d 1363, 1366 (11th Cir. 1999) ("Although Mastroianni suggests that the prosecutors acted beyond the scope of their prosecutorial functions by both participating in the investigatory stages of the case and advising the GBI before bringing the notice of indictment, the record itself does not create a genuine issue of fact or give rise to a reasonable inference that Bowers and Deering engaged in pre-grand jury, pretestimonial conduct that would warrant stripping away their prosecutorial immunity.").

See also ***Rowe v. Fort Lauderdale,*** 279 F.3d 1271, 1281 (11th Cir. 2002) ("The most Lazarus did while acting in an investigative role, when he was protected only by qualified immunity, was to be aware that others were tampering with evidence and take no action to stop them. Rowe does not cite any decisions, and we are not aware of any, clearly establishing that a prosecutor's mere awareness of (as opposed to participation in) evidence fabrication or tampering violates the federal rights of a criminal defendant. To the contrary, in an analogous context, this Court has held that a police officer did not violate clearly established law merely by failing to act in the face of knowledge that another officer had fabricated a confession. . . Therefore, Lazarus is entitled to qualified immunity for the actions he personally took or failed to take while in the investigator's role."); ***Michaels v. New Jersey***, 222 F.3d 118, 121, 122 (3d Cir. 2000) (coercion

of child witnesses did not violate any right held by petitioner and, although petitioner's due process rights were violated when the testimony was used at trial, prosecutors had absolute immunity), *cert. denied sub nom* ***Michaels v. McGrath,*** 121 S. Ct. 873 (2001). *See also* ***Michaels v. McGrath***, 121 S. Ct. 873, 874 (2001) (Thomas, J., dissenting from denial of writ of certiorari) ("I believe that the Second Circuit's approach [in *Zahrey*] is very likely correct, and that the decision below leaves victims of egregious prosecutorial misconduct without a remedy. In any event, even if I did not have serious doubt as to the correctness of the decision below, I would grant certiorari to resolve the conflict among the Courts of Appeals on this important issue. I respectfully dissent."); ***Masters v. Gilmore***, No. 08-cv-02278-LTB-KLM, 2009 WL 3245891, at *14, *15 (D. Colo. Oct. 5, 2009) ("I first note that the Supreme Court recently granted certiorari in *Pottawattamie County, Iowa v. McGhee,* __ U.S. __, 129 S.Ct. 2002, 173 L.Ed.2d 1083 ("pr. 20, 2009) to review *McGhee v. Pottawattamie County, Iowa,* 547 F.3d 922 (8th Cir.2008). There the Eighth Circuit, like the Second Circuit in *Zahrey v. Coffey,* 221 F.3d 342 (2nd Cir.2000), essentially rejected the Seventh Circuit's analysis in *Buckley IV.* Resolution of *McGhee* could clarify whether there is any merit to Mr. Gilmore's argument regarding the first prong to qualified immunity analysis. I must, however, proceed to decide this issue without the benefit of a decision in *McGhee,* and I am unpersuaded by the Seventh Circuit's analysis in *Buckley IV.* . . . I therefore decline to apply the majority's alchemic analysis in *Buckley IV* in this case and proceed to the second prong of qualified immunity analysis. . . . Remarkably, Mr. Gilmore argues that during the relevant time period a reasonable prosecutor would not have known that fabricating, destroying and/or concealing evidence violated Mr. Masters' constitutional rights. Given the egregious conduct alleged, taken as true, I disagree. . . . In *Pierce,* the Tenth Circuit recognized that it was clearly established in 1986 that the knowing or reckless falsification or omission of evidence in the pre-arrest and post-arrest stages of a prosecution violated an accused's constitutional rights. . . *See also Limone v. Condon,* 372 F.3d 39, 45-48 (1st Cir.2004) (right to not be framed by law enforcement agents through the subornation of false testimony from a key witness and the suppression of exculpatory evidence was clearly established in 1967 based on Supreme Court precedent dating back to 1935). To avoid the inescapable conclusion that he had clear warning that the fabrication, destruction and/or concealment of evidence during the Hettrick murder investigation beginning in 1987 was a violation of Mr. Masters' constitutional rights, Mr. Gilmore focuses on his status as a prosecutor and relies on *Buckley IV* and *Michaels* to demonstrate that, at a minimum, it was unclear at the relevant time whether a prosecutor violated a defendant's constitutional rights by engaging in these acts. But, until Mr. Gilmore's intimate involvement with the preparation of the arrest warrant affidavit, taken as true, the allegations are that his role and function was that of an investigator. . . . [T]he limited authority cited by Mr. Gilmore cannot render decades of jurisprudence recognizing the unconstitutionality of the fabrication and suppression of evidence by law enforcement officers unclear.").

See also ***Lampton v. Diaz***, 639 F.3d 223, 227, 228 (5th Cir. 2011) ("Lampton is a federal prosecutor with no duty to bring complaints before a state ethics commission, and the actions for which he seeks immunity are unrelated to his prosecution of the Diazes. Lampton protests that he would not have had access to the tax records were it not for his role as a prosecutor, but that

connection is too tenuous. A prosecutor does not have *carte blanche* to do as he pleases with the information he can access. He can use it only to fulfill his duties as a prosecutor, and Lampton's actions went well beyond those bounds. Lampton's insistence that he had a duty under the Mississippi Rules of Professional Conduct to report Diaz's misconduct does not change that conclusion. . . Lampton could have reported Diaz's misconduct without releasing the tax records, so his ethical duty did not compel violation of the federal statute. Lampton's ethical responsibilities did not make the transfer of tax records to a state commission part of his duty as a prosecutor. In short, Lampton points to no case–and we know of none–extending immunity to post-trial conduct relating to a new action before a new tribunal. Every case extending immunity to post-trial actions involves conduct related to the criminal proceeding that the prosecutor initiated. . . Lampton cannot claim immunity, because his post-trial actions did not relate to the criminal proceedings and thus are beyond the scope of immunity at common law."); ***Warney v. Monroe County***, 587 F.3d 113, 122-25 (2d Cir. 2009) ("On the facts of this case, we must now decide whether, and how, absolute immunity extends to prosecutors working on post-conviction collateral proceedings. We see no principled reason to withhold absolute immunity for work performed in defending a conviction from collateral attack. . . . Although a collateral attack is technically a separate, civil proceeding, a prosecutor defending a post-conviction petition remains the state's advocate in an adversarial proceeding that is an integral part of the criminal justice system. . . The considerations that militate in favor of absolute immunity for work done at trial or on appeal are just as relevant in the context of a collateral proceeding. . . . Several courts have already held, or suggested, that absolute immunity shields work performed by prosecutors opposing habeas petitions. [citing cases] We join these courts in holding that absolute immunity shields work performed during a post-conviction collateral attack, at least insofar as the challenged actions are part of the prosecutor's role as an advocate for the state. . . . Warney does not complain that the prosecutors ordered the testing; after all, that testing is what led to his release. Nor is Warney complaining (here) about the denial of access to test the DNA for himself. . . Nor is he complaining of non-disclosure of the test results–disclosure was made. Warney's narrow focus is (understandably) on the specific act that caused his harm: the failure to disclose the DNA results *promptly.* . . . For the following reasons, we conclude that it is unhelpful to ascertain the prosecutors' functional role by isolating each specific act done or not done; rather, a prosecutor's function depends chiefly on whether there is pending or in preparation a court proceeding in which the prosecutor acts as an advocate. Unless the DNA testing is considered with reference to context, it is impossible to classify functionally. If the testing inculpated Warney, it would be a potent tool of the advocacy; if it exculpated Warney, it might be deemed administrative, in the sense that it would entail disclosure; if it inculpated someone else, it would be investigative, at least to the extent that it might identify the real killer. But the steps taken here–testing, disclosure, and even the delay in making disclosure, as well as the identification of the real killer–were integral to and subsumed in the advocacy functions being performed in connection with Warney's post-conviction initiatives. The decisions made by the prosecutors in this case–whether to test for potentially inculpatory (or exculpatory) information, how and when to disclose or use that information, and whether to seek to vacate Warney's conviction–were exercises of legal judgment made in the 'judicial phase' of proceedings integral to the criminal justice process. . . . On the facts of this case, we need not, and do not, decide whether absolute

immunity extends to prosecutorial conduct regarding DNA evidence, occurring after a prisoner's appeals and collateral attacks have been exhausted. Moreover, because we extend absolute immunity in this case, we do not address the prosecutors' alternative argument that they are entitled to qualified immunity."); ***Yarris v. County of Delaware***, 465 F.3d 129, 136-39 (3d Cir. 2006) ("We believe that destroying exculpatory evidence is not related to a prosecutor's prosecutorial function. Unlike decisions on whether to withhold evidence from the defense, decisions to destroy evidence are not related to a prosecutor's prosecutorial function. . . . Accordingly, the ADAs are not entitled to absolute immunity from suit for constitutional violations caused by their alleged deliberate destruction of exculpatory evidence. . . . Less clear is whether the ADAs are absolutely immune from claims based on allegations that they withheld exculpatory evidence, in the form of DNA samples, after Yarris was convicted and sentenced to death. . . We agree with other courts that '[a]bsolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings ... where the prosecutor is personally involved ... and continues his role as an advocate,' but that 'where the role as advocate has not yet begun ... or where it has concluded, absolute immunity does not apply.'[citing cases] After a conviction is obtained, the challenged action must be shown by the prosecutor to be part of the prosecutor's continuing personal involvement as the state's advocate in adversarial post-conviction proceedings to be encompassed within that prosecutor's absolute immunity from suit. Based on the facts on the record as it now stands, the prosecutors have not satisfied their burden of showing that they are entitled to the immunity they seek. Yarris's direct appeal to the Supreme Court of Pennsylvania was argued in April and decided in October of 1988. *See Commonwealth v. Yarris*, 519 Pa. 571, 549 A.2d 513 (Pa.1988). Yarris's numerous requests for DNA testing of physical evidence began in March 1988–presumably in an attempt to uncover new evidence that might entitle him to extraordinary relief in case the legal avenues he was pursuing did not succeed. The prosecutors have not shown that their response to Yarris's DNA test requests was part of their advocacy for the state in post-conviction proceedings in which they were personally involved. Without such a showing, a prosecutor acting merely as a custodian of evidence after conviction serves the same non-adversarial function as police officers, medical examiners, and other clerical state employees and–just as with certain police investigative work–'it is neither appropriate nor justifiable that, for the same act, [absolute] immunity should protect the one and not the other [s] .'. . The handling of requests to conduct scientific tests on evidence made after conviction–not related to grounds claimed in an ongoing adversarial proceeding–can be best described as part of the 'prosecutor's administrative duties ... that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings' and 'are not entitled to absolute immunity.'. . Because the ADAs have not yet shown how the handling of DNA evidence related to ongoing adversarial proceedings in which they were personally involved, we conclude that the prosecutors may have been 'function[ing] as ... administrator[s] rather than as ... officer[s] of the court' and, thus, may be 'entitled only to qualified immunity.' . . . As a general matter, we note that a prosecutor is absolutely immune from liability for using 'false testimony in connection with [a] prosecution.'. . With respect to the solicitation of false statements alleged here, the ADAs are entitled to absolute immunity to the extent that their conduct occurred while they were acting as advocates rather than investigators."); ***Parkinson v. Cozzolino***, 238 F.3d 145, 151, 152 (2d Cir. 2001) ("[I]f a

prosecutor's conduct prior to conviction is protected by absolute immunity, equivalent conduct pending appeal of the conviction must be afforded the same protection. . . . Likewise, trial courts in this and other circuits have applied absolute immunity to shield prosecutors from liability for post-conviction conduct. [citing cases] We now join these courts in holding that absolute immunity covers prosecutors' actions after the date of conviction while a direct appeal is pending."); ***Dababnah v. Keller-Burnside***, 208 F.3d 467, 473 (4th Cir. 2000) (Motz, J., concurring in the judgment) ("The Supreme Court has never held that the particular forum in which challenged conduct takes place is definitive one way or the other on the question of prosecutorial immunity. Nor has the Court eliminated the prosecutor's burden of proving entitlement to absolute immunity when she demonstrates that her allegedly wrongful act occurred before a judge while the court was in session. Similarly, the Court has not limited the investigative or administrative function analysis to conduct that takes place outside the formal strictures of a court proceeding. Faithful application of the functional approach prescribed by *Imbler* and its progeny focuses on the *underlying* function of the prosecutor's specific acts rather than on the context in which they occur."); ***Peterson v. Bernardi***, 719 F.Supp.2d 419, 435, 436 (D.N.J. 2010) ("Where it is shown that a post-conviction inquiry will be genuinely probative (because, for example, new evidence has come to light), a prosecutor's interest, at least initially, in preserving a conviction's integrity may be in tension with the interest of the public in convicting and punishing the guilty. . . Because a prosecutor's advocacy in these cases is on his own behalf, his purpose is more administrative than genuinely prosecutorial. . . . .Despite this marked attenuation, Defendant Bernardi insists that his conduct's procedural context–that is, responding to a motion for post-conviction relief in court–places the conduct squarely within the traditional judicial/quasi-judicial prosecutorial function. In *Yarris,* the Third Circuit held that the decision of prosecutors to deny requests for the testing of DNA evidence was not a prosecutorial function entitled to absolutely immunity. . .The only material difference here is that Defendant Bernardi's prosecutorial decision may have been made in the context of a motion for post-conviction relief. The fortuitous fact that Plaintiff filed a motion, rather than requesting DNA testing from Defendant Bernardi directly, does not alter the conclusion that such determinations are not traditionally advocative in nature. Entitlement to prosecutorial immunity cannot turn upon the accident-of-fate that Plaintiff happened to request relief from a court, rather than from Defendant Bernardi directly. The applicability of prosecutorial immunity here is a close and difficult call on which reasonable minds may differ. It is certainly counterintuitive that a prosecutor's conduct in defending a conviction on appeal is immunized, but his conduct in responding to a motion for post-conviction relief may not be. The manifest conclusion of the controlling cases is that the relevant inquiry is one not of type, but of degree. The precedents, in other words, turn not upon easily recognized categories or labels, but rather a measurement of conceptual proximity. Given the attenuated connection of Defendant Bernardi's conduct–particularly in light of its context, execution, and purpose–with a prosecutor's traditional advocative role, Defendant Bernardi's instruction to oppose Plaintiff's July 2002 motion is not protected by absolute immunity.")

See also ***White v. McKinley***, 519 F.3d 806, 813, 814 (8th Cir. 2008) (***White I***) ("The right *Brady* describes definitely applies to prosecutors and imposes upon them an absolute disclosure

duty. But, *Brady*'s protections also extend to actions of other law enforcement officers such as investigating officers. However, an investigating officer's failure to preserve evidence potentially useful to the accused or their failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith. *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir.2004). . . . Consequently, to be viable, White's claim must allege bad faith to implicate a clearly established right under *Brady*. . . . Richard argues that the *Brady*-derived right alleged was not clearly established and that there are no cases factually similar that would have put him on notice of White's rights. . . . We hold that no reasonable police officer in Richard's shoes could have believed that he could deliberately misrepresent the nature and length of his relationship with Tina, or that he could deliberately fail to preserve a child victim's diary containing potentially exculpatory information. Because Richard is asserting the qualified immunity defense, he has the burden to establish the relevant predicate facts for its application. He has not done so. During this review, we are limited to the facts as alleged by the plaintiff. Given these facts, a reasonable juror could find that Richard deliberately misrepresented his relationship with Tina and that he deliberately failed to preserve the diary in bad faith. Therefore, we find no error in the district court's denial of qualified immunity for White's due process claim."); ***Villasana v. Wilhoit,*** 368 F.3d 976, 980 (8th Cir. 2004) ("Villasana would extend *Brady*'s absolute liability to any law enforcement officer who was part of the prosecutor's 'team,' including in this case scientists employed by the Highway Patrol Crime Laboratory. This extension is not needed to secure post-conviction relief for one whose conviction was tainted by a *Brady* violation, because the prosecutor's duty is absolute. The extension is simply a device to avoid the impact of the prosecutor's absolute immunity from § 1983 damage liability. We conclude the extension is unsound. In *Imbler,* the Court explained that one reason for applying the prosecutor's absolute common law immunity to § 1983 damage actions is that the focus of post-conviction procedures–whether the accused received a fair trial–'should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.' 424 U.S. at 427. That reasoning applies equally to post-conviction *Brady* inquiries into whether evidence unknown to the prosecutor should have been disclosed by another government official. Under *Brady,* the prosecutor is responsible for failing to produce materially favorable evidence regardless of fault, that is, intentional suppression or bad faith. The Supreme Court has also considered whether other law enforcement officers, including laboratory technicians, should be liable for destroying evidence that *might* have produced test results favorable to the defense. The Court concluded that 'failure to preserve potentially useful evidence does not constitute a denial of due process' in the absence of bad faith. *Youngblood,* 488 U.S. at 58; *see California v. Trombetta,* 467 U.S. 479, 488 (1984). We conclude this bad faith standard should likewise apply to due process claims that law enforcement officers preserved evidence favorable to the defense but failed to disclose it. In other words, *Brady* ensures that the defendant will obtain relief from a conviction tainted by the State's nondisclosure of materially favorable evidence, regardless of fault, but the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial. We note that the few decisions in other circuits purporting to extend '*Brady* liability' to police officers have involved claims of intentional or bad faith failure to

disclose *Brady* material to the prosecutor or to the defense. *See Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir.2001); *McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir.1996), *cert. denied*, 521 U.S. 1121 (1997).") *Accord*, ***Porter v. White***, 483 F.3d 1294, 1308 (11th Cir. 2007) ("On the authority of *Daniels* and *Cannon*, we hold that mere negligence or inadvertence on the part of a law enforcement official in failing to turn over *Brady* material to the prosecution, which in turn causes a defendant to be convicted at a trial that does not meet the fairness requirements imposed by the Due Process Clause, does not amount to a 'deprivation' in the constitutional sense."); ***Ihekoronye v. City of Northfield, Minn.***, No. 07-CV-1642(JMR/FLN), 2008 WL 906206, at *6, *7 (D.Minn. Mar. 31, 2008) ("There is no freestanding constitutional right to be free from unduly suggestive identification procedures. . . And the mere existence of exculpatory evidence does not violate the Fourteenth Amendment. A prosecutor's intentional withholding of such evidence at trial rises to the level of a constitutional violation. . . But the simple existence of exculpatory evidence does not violate the constitution. Only a violation of the 'core right' to a fair trial is actionable under § 1983, . . . and plaintiff must show prejudice. . . Absent a trial, there is no prejudice, and no due process violation. . . The Court cannot doubt that an erroneous charge and detention are excruciatingly painful, but plaintiff was exonerated and released as soon as it was discovered that the charges against him could not be proven. While he had to endure a criminal charge, that burden does not violate the constitution. There is no evidence showing the officers and investigator engaged in anything but regular investigative work. Plaintiff has not shown they knew or believed they were building a case against an innocent man. Ultimately, there is a total lack of any bad faith, as required for a procedural due process violation. *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir.2004). There is no showing whatsoever of behavior which shocks the conscience, as required for a substantive due process violation. . . Negligent conduct–even grossly negligent conduct–does not violate due process. . . While not every interview was totally consistent, the resident's multiple interviews did not reveal her statements to be so entirely unreliable that defendants' reliance upon them would violate due process.").

b. Officials Acting in Advocacy Capacity

See ***Patterson v. Van Arsdel***, 883 F.3d 826, 830-32 (9th Cir. Feb. 23, 2018) ("While this court has not yet addressed the precise circumstances under which a pretrial release officer may be entitled to prosecutorial immunity, our precedents regarding the official immunity of parole officers are instructive. Parole board members have absolute immunity for adjudicative actions and for other discretionary decisions related to the processing of parole applications. . .However, parole officers, when responsible for investigating potential parole violations and submitting recommendations regarding revocation, have only qualified immunity. . . The rationale is that a parole officer in the latter category fulfills a function that is 'more akin to a police officer seeking an arrest warrant, than to a prosecutor exercising quasi-judicial authority.'. . .Given the similarities between Van Arsdel's role and those of a parole officer and a law enforcement officer, we conclude that Van Arsdel's action in submitting the bare unsigned warrant to Judge Tichenor should be seen as making a recommendation that the warrant be signed, just like a parole officer recommending revocation, as in *Swift*, or like a police officer submitting documentation for an arrest warrant to a

judge, as in *Malley*. Accordingly, Van Arsdel is not entitled to absolute immunity. . . .Mindful of the Supreme Court's warning to avoid extending absolute immunity 'further than its justification would warrant,' we hold that Van Arsdel is not entitled to absolute prosecutorial immunity."); ***Spuck v. Pennsylvania Bd. of Prob. & Parole***, 563 F. App'x 156, 158 (3d Cir. 2014) ("Spuck does . . . specifically challenge the District Court's determination that Defendant Robinson is entitled to immunity for his actions in representing the [Parole] Board in proceedings before the Pennsylvania Supreme Court. While we have not addressed this direct issue, we discern no error with the District Court's conclusion that a state agency attorney should be afforded such protection from liability in damages when carrying out courtroom functions. *See, e.g., Williams v. Consovoy,* 453 F.3d 173, 178 (3d Cir.2006) (citing *Burns v. Reed,* 500 U.S. 478, 484, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), and noting that absolute immunity attaches to those who perform functions integral to the judicial process); *Barrett v. United States*, 798 F.2d 565, 572 (2d Cir.1986) (extending absolute immunity to defending government litigators); *Fry v. Melaragno,* 939 F.2d 832, 837 (9th Cir.1991) (extending absolute immunity to government attorneys involved in civil tax litigation in a state or federal court); ***Mangiafico v. Blumenthal***, 471 F.3d 391, 395-97 (2d Cir. 2006) ("We have not specifically decided whether absolute immunity protects a government official's discretionary determination regarding litigation pursuant to a statute such as Connecticut's. . . . As a general principle, a government attorney is entitled to absolute immunity when functioning as an advocate of the state in a way that is intimately associated with the judicial process. . . . We have consistently afforded absolute immunity to a government attorney's decision whether or not to initiate litigation on behalf of the state. . . . In light of this precedent, we can divine no meaningful difference between the Attorney General's decision in this case not to defend a state employee and the decisions of prosecutors and government attorneys to initiate (or not to initiate) civil or administrative proceedings. In both instances, the government attorney is serving as an advocate of the state, determining whether to commit the state's resources, reputation, and prestige to litigation. The structure of the statute confirms this conclusion since under its terms the state funds the defense or indemnifies the official. The state withholds the provision of a defense when the Attorney General, acting on its behalf, determines that a state-supported defense of the employee would be inappropriate. Conn. Gen.Stat.§ 5-141d(b). . . . It is apparent to us that in deciding not to commit the state's financial and legal resources to Mangiafico's defense, Blumenthal served as an advocate for the state and performed functions analogous to those of agency officials or prosecutors and other government attorneys whose decisions to commit or not commit the state are protected by absolute immunity. . . . It is not in the public interest that the Attorney General be constrained in making decisions under the Connecticut statute by potential consequences such as his own liability in a suit for damages. The defense of such suits would necessarily complicate, if not intimidate, the making of what may be routine, discretionary decisions, even where the Attorney General's decision was supported by the outcome of the underlying case. For these reasons we believe that qualified immunity is inadequate to ensure that the Attorney General can properly decide whether to defend a state employee in litigation pursuant to his statutory responsibilities without the specter of harassment or intimidation. . . . If Mangiafico were found to have acted within the scope of his employment in the discharge of his duties and not to have acted wantonly, maliciously, or recklessly, Connecticut law would mandate

post-litigation reimbursement from the state for legal costs and fees. See Conn. Gen.Stat.§5-141d(c). Thus, if Mangifico acted reasonably– but in some respect improperly–the state would be obligated to make him whole. Only if he acted wantonly or maliciously . . . are such payments barred. We have little difficulty in concluding that this alternative means of redress is adequate and that its existence further supports granting absolute immunity."); ***Tomaselli v. Beaulieu***, No. 08-10666-PBS, 2010 WL 1460259, at *6 (D. Mass. Mar. 10, 2010) ("Town Counsel employed to prosecute or defend claims, actions or proceedings by or on behalf of any town or town agency is immune from suit, even if a private law firm is retained as Town Counsel. . . Since all of the conduct by Kopelman and Paige which the plaintiffs challenge is 'closely relate[d] to the judicial process, or the lawyer's role as an advocate [,]' the attorneys are entitled to absolute immunity. . . . For these reasons, all the federal constitutional claims against these defendants should be dismissed."); ***Moore v. Schlesinger,*** 150 F. Supp.2d 1308, 1311, 1312 (M.D. Fla. 2001) ("The Defendants do not cite to any case, nor has the Court located one, where the Eleventh Circuit has addressed under what circumstances, if any, a government attorney who defends the government in a civil action is entitled to absolute immunity. A review of the case law of other jurisdictions, however, reveals support for conferring absolute immunity in such a situation. . . . the Court approves of the decision of the Second Circuit in *Barrett v. United States* and those courts which have extended the cloak of absolute immunity to a government defense attorney's performance of regular advocacy functions in a civil suit.").

See also ***Brent v. Wayne Cty. Dep't of Human Servs.***, 901 F.3d 656, 684-85 (6th Cir. 2018) ("[W]e once held that a social worker could not receive absolute immunity for 'the act of personally vouching for the truth of the facts that provide the evidentiary support for [the family court's] finding of probable cause.'. . *Young*, however, is unpublished and non-binding, and our later published precedent overrides *Young*'s holding. In *Barber v. Miller*, 809 F.3d 840 (6th Cir. 2015), for instance, we held that a social worker is entitled to absolute immunity against allegations that he 'included false and misleading statements of fact in the protective-custody petition.'. . As we explained then, the social worker 'offered his factual assessment in his capacity as a legal advocate initiating a child-custody proceeding in family court.'. . Because a petition for a removal order triggers a subsequent hearing in court, . . . a social worker's actions as a complaining witness are 'more analogous to a prosecutor's decision to prosecute than a police officer's testifying by affidavit in support of probable cause.'[citing *Bauch*]'The district court therefore did not err in granting absolute immunity to Wenk for serving as the 'complaining witness' in support of the removal order. Finally, plaintiffs argue that Wenk is not entitled to absolute immunity for her role in executing the removal order on February 18, 2017. . . On this point we agree. Social workers are entitled only to qualified immunity when removing children from a home because, in such circumstances, the social workers are 'acting in a police capacity rather than as legal advocates.' [citing *Kovacic*]"); ***Bauch v. Richland County Children Servs.,*** 733 F. App'x 292, ___ (6th Cir. 2018) ("The central dispute over absolute immunity therefore concerns whether Hartman was acting in her capacity as a legal advocate when she completed and submitted her affidavit in support of emergency custody. As the party seeking absolute immunity, Hartman has the burden of demonstrating that the immunity is justified for the function being

challenged. . . The district court held that Hartman was not acting as a legal advocate in completing the affidavit in support of emergency custody, relying primarily on this Court's previous unpublished decision in *Young v. Vega*, 574 Fed.Appx. 684, 689 (6th Cir. 2014). . . .[M]ultiple decisions of this Court, issued after both *Young* and *Kalina* were decided, have held in situations analogous to this case that the submission of an affidavit that triggers judicial child-removal proceedings is in fact an act of legal advocacy by social workers. . . .Like the social worker's petition in *Barber*, Hartman's affidavit offered her factual assessment as a legal advocate initiating a child-custody proceeding. . . Unlike a police officer's application for a search warrant, Hartman's affidavit for emergency custody necessarily triggered a subsequent custody proceeding in court pursuant to Ohio law. . . .Accordingly, Hartman's actions were more analogous to a prosecutor's decision to prosecute than a police officer's testifying by affidavit in support of probable cause. This case is also distinguishable from the facts of *Kalina*—although the affidavit submitted by the prosecutor in *Kalina* was 'filed as part of an *ex parte* process prior to the indictment that begins the criminal case,' Hartman's affidavit in support of emergency custody was 'an undeniable part of the judicial process' because 'the [affidavit] initiated the [removal] action' and subsequent hearing. . . .Just as absolute immunity is essential for prosecutors engaged in legal advocacy because 'any lesser degree of immunity could impair the judicial process itself,'. . . that same immunity must be given to a children's services advocate as the initiator of home-removal actions; any lesser protection would jeopardize the essential process that has been established to provide protection to those children who need it most."); ***Hardwick v. County of Orange,*** 844 F.3d 1112, 1115-16 (9th Cir. 2017) ("Absolute immunity from private lawsuits covers the official activities of social workers only when they perform quasi-prosecutorial or quasi-judicial functions in juvenile dependency court. . . The factor that determines whether absolute immunity covers a social worker's activity or 'function' under scrutiny is whether it was investigative or administrative, on one hand, or part and parcel of presenting the state's case as a generic advocate on the other. Absolute immunity is available only if the function falls into the latter category. . . . Preslie's complaint targets conduct well outside of the social workers' legitimate role as quasi-prosecutorial advocates in presenting the case. Our opinion in *Beltran v. Santa Clara County*, 514 F.3d 906 (9th Cir. 2008) (en banc) (per curiam) disposes of this issue. . . . Accordingly, we affirm the district court's denial to these defendants of absolute immunity."); ***Barber v. Miller***, 809 F.3d 840, 844 (6th Cir. 2015) ("Here, Barber complains that Miller included false and misleading statements of fact in the protective-custody petition. But Miller offered his factual assessment in his capacity as a legal advocate initiating a child-custody proceeding in family court; *Pittman* therefore shields. And though Barber invites this court to revisit *Pittman,* we may not. . . Miller thus enjoys absolute immunity against allegations of false and misleading statements to the family court."); ***Piccone v. McClain,*** 586 F. App'x 709, (1st Cir. 2014) ("[T]o the extent the Piccones may be alleging that the juvenile court affidavit submitted by Nietsche and co-signed by Rice contained misrepresentations and omissions, these defendants, as witnesses at judicial proceedings, would be entitled to either absolute or qualified immunity from § 1983 liability as to this claim. *See Watterson v. Page,* 987 F.2d 1, 9 & n. 8 (1st Cir.1993)."); ***Booker v. S. Carolina Dep't of Soc. Servs.,*** 583 F. App'x 147, 148 (4th Cir. 2014) ("[W]e agree with the district court that Sullivan was entitled to absolute immunity from Booker's claim that she made

intentional misstatements when preparing and presenting a petition for J.J.'s retention in SCDSS's custody. *Vosburg v. Dep't of Soc. Servs.,* 884 F.2d 133, 138 (4th Cir.1989). Although not addressed by the district court, we also conclude that Sullivan's absolute immunity extends to her alleged failure to notify Booker of J.J.'s removal and the resulting probable cause hearing.") (unpublished); ***B.S. v. Somerset County***, 704 F.3d 250, 262, 264-66, 270 (3d Cir. 2013) ("As Appellees correctly point out, we have recognized that the justifications for according absolute immunity to prosecutors sometimes apply to child welfare employees. Specifically, in *Ernst v. Child & Youth Services of Chester County*, 108 F.3d 486 (3d Cir.1997), we joined several of our sister circuits in deeming 'child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state ... absolute[ly] immun[e] from suit for all of their actions in preparing for and prosecuting such dependency proceedings.'. . . As a careful comparison of this case to *Ernst* reveals, the same sorts of protection we identified there actually do apply here with respect to the caseworkers' function of seeking judicial orders related to custody of Daughter. . . . [A]lthough *Ernst* is certainly distinguishable in that absolute immunity was available to child welfare workers 'for their actions on behalf of the state in preparing for, initiating, and prosecuting *dependency proceedings," id.* at 495 (emphasis added), that distinction is not dispositive as far as the availability of 'important safeguards that protect citizens from unconstitutional actions' goes. *Id.* . . . Having determined that the absence of dependency proceedings is not, in itself, a basis for resolving the absolute immunity question, we must now consider whether Eller and Barth were, in fact, formulating and presenting recommendations to a court when they undertook the conduct of which Mother complains. In other words, we need to ascertain whether Eller and Barth 'function[ed] as the state's advocate when performing the action(s)' that gave rise to the due process violations Mother seeks to redress, or whether those claims instead arose from unprotected 'administrative or investigatory actions.'. . . Inasmuch as their acts were fundamentally prosecutorial, in the manner described in *Ernst,* we conclude that Eller and Barth are absolutely immune from liability with respect to the procedural due process claims. . . . We emphasize, however, as we did in *Ernst,* that this holding does not insulate from liability all actions taken by child welfare caseworkers. . . Investigations conducted outside of the context of judicial proceedings may still be susceptible to due process claims. Nor can caseworkers shield their investigatory work from review merely by seeking a court order at some point. . . The key to the absolute immunity determination is not the timing of the investigation relative to a judicial proceeding, but rather the underlying function that the investigation serves and the role the caseworker occupies in carrying it out. . . Here, Eller advocated on behalf of the County in the May 5 meeting and continued in that role through the June 23 custody determination. Because the underlying function of her actions throughout that judicial proceeding—including during the investigation and composition of the report—was fundamentally prosecutorial in nature, she is entitled to absolute immunity for this claim."); ***Pittman v. Cuyahoga County Dept. of Children and Family Services***, 640 F.3d 716, 724-26 (6th Cir. 2011) ("[S]ocial workers are absolutely immune only when they are acting in their capacity as *legal advocates*–initiating court actions or testifying under oath–not when they are performing administrative, investigative, or other functions. The case before us turns on whether the actions of which [the plaintiff] complains were taken by [the defendant social worker] *in her capacity as a legal advocate.* . . Hurry filed both the

complaint and the affidavit in support of the motion for permanent custody in her capacity as a legal advocate, and she is therefore entitled to absolute immunity with regard to these actions. Hurry's submission of the affidavit for publication was conduct intimately associated with the judicial process and also qualifies for absolute immunity. Ensuring adequate service of process in juvenile court proceedings is a judicial function committed to the juvenile court under Ohio law. . . . Hurry's absolute immunity also protects her from Pittman's claim that her allegedly false assertions in the complaint and affidavits stem from an inadequate investigation. For these reasons, the district court erred by determining that Hurry was not absolutely immune from Pittman's claims based on the complaint and two affidavits she submitted to the juvenile court."); ***Costanich v. Department of Social and Health Services***, 627 F.3d 1101, 1109 (9th Cir. 2010) ("The institution of a license revocation proceeding is sufficiently analogous to a decision to institute a custody termination proceeding to deserve absolute immunity. . . .Duron is not entitled to absolute immunity from the claims that she deliberately fabricated evidence in her investigation and made false statements in the sworn declaration submitted in support of the guardianship termination proceedings."); ***Abdouch v. Burger***, 426 F.3d 982, 989 (8th Cir. 2005) (State social workers were entitled to absolute immunity from § 1983 liability for initiating and maintaining termination of parental rights proceedings against mother); ***Miller v. Gammie,*** 335 F.3d 889, 897, 898 (9th Cir. 2003) (en banc) ("The Court in *Kalina* . . . emphasized that it is only the specific function performed, and not the role or title of the official, that is the touchstone of absolute immunity. . . . We must now recognize that beyond those functions historically recognized as absolutely immune at common law, qualified and only qualified immunity exists. . . . The burden is on the official claiming absolute immunity to identify the common-law counterpart to the function that the official asserts is shielded by absolute immunity. . . . The relation of the action to a judicial proceeding, the test we formulated in *Babcock,* is no longer a relevant standard. . . . Our decision in *Meyers* is consistent with the controlling Supreme Court decisions. *Meyers* recognized absolute immunity for social workers only for the discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents. *Meyers,* 812 F.2d at 1157. At least two of our sister circuits have also recognized that the scope of absolute immunity for social workers is extremely narrow. *See, e.g., Snell v. Tunnell*, 920 F.2d 673, 686-91 (10th Cir.1990) (denying absolute immunity to social workers for the function of seeking a protective custody order that did not initiate court proceedings); *Vosburg v. Dep't of Soc. Servs.,* 884 F.2d 133, 135-38 (4th Cir.1989). In *Vosburg,* citing our court's decision in *Meyers,* the Fourth Circuit held social workers absolutely immune from liability resulting from a decision to file a removal petition, which was deemed prosecutorial, but not immune for investigating whether a removal petition should be filed. *See id.*"); ***Eldridge v. Gibson,*** 332 F.3d 1019, 1021 (6th Cir. 2003) (granting absolute immunity to private attorneys who were appointed as special prosecutors in criminal prosecution against former state prisoner, and who simultaneously represented crime victim in civil action against prisoner); ***Rippy v. Hattaway,*** 270 F.3d 416, 422, 423 (6th Cir. 2001) ("Prosecutors and, by analogy, social workers who initiate proceedings related to the welfare of a child are entitled to absolute immunity while functioning in roles intimately associated with the judicial phase of proceedings. . . . The promulgation and enforcement of policies is not related to the judicial phase of child custody proceedings."); ***Gray v. Poole,*** 243 F.3d 572, 577 (D.C. Cir.

2001) ("[W]e hold that government attorneys who prosecute child neglect actions perform 'functions analogous to those of a prosecutor [and] should be able to claim absolute immunity with respect to such acts.' [citing *Butz*] In so doing, we join every circuit that has addressed the question."); ***Holloway v. Brush***, 220 F.3d 767, 775, 779 (6th Cir. 2000) (en banc) ("The analytical key to prosecutorial immunity . . .is advocacy–whether the actions in question are those of an advocate. . . By analogy, social workers are absolutely immune only when they are acting in their capacity as legal advocates–initiating court actions or testifying under oath–not when they are performing administrative, investigative, or other functions. . . . What Brush did was not the evaluation and presentation of evidence. It was not controlling the testimony of her witness. It was not intimately associated with the judicial process, nor was it the function of an advocate. Finally, it was not a recommendation to the county court. It was a usurpation of the judicial process that denied Holloway her right to be heard in court. The proper test is whether Brush has carried her burden of establishing that she was functioning as an advocate when she performed the actions complained of. . . She was not. The judgment of the district court granting summary judgment on grounds of absolute immunity to Defendant Brush is reversed."); ***Ernst v. Child and Youth Services of Chester County***, 108 F.3d 486, 488-89 (3d Cir. 1997) ("Like the other courts of appeals that have addressed the issue, we hold that child welfare workers and attorneys who prosecute dependency proceedings on behalf of the state are entitled to absolute immunity from suit for all of their actions in preparing for and prosecuting such dependency proceedings.").

But see ***Thomas v. Kaven***, 765 F.3d 1183, 1191-94 & nn. 6, 7 (10th Cir. 2014) ("The Supreme Court has not addressed the question of whether social workers can gain absolute immunity from suit for actions functionally analogous to a prosecutor's duties. But at least one Justice has noted potential problems with making absolute immunity available to social workers. *See Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J., dissenting from denial of petition for writ of certiorari) ("The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983.") . . . . In *Snell*, we held that the crucial distinction for determining whether a social worker was entitled to absolute immunity was whether the social worker was acting in a way functionally analogous to a prosecutor or in an investigative capacity. . . Because the social workers in that case sought a custody order as part of their investigation into child abuse and before any petition was filed to adjudicate the status of the child, the social workers were acting in an investigative capacity. . . In concluding the social workers could claim only qualified immunity, we held that '[a] social worker seeking a pre-petition order for protective custody functions like a police officer seeking an arrest warrant; a functional approach to immunity requires that those performing like functions receive like immunity.'. . . Other circuits agree that absolute immunity does not protect social workers acting in an investigative capacity, but that it does protect social workers acting in a prosecutorial capacity—such as when initiating child custody proceedings in court. . . . The Thomases urge us to find that the defendants' roles in seeking involuntary commitment were not akin to the role of a prosecutor. They argue, rather, that filing an involuntary residential treatment petition is more akin to the role

of a complaining witness. The Supreme Court has held that a complaining witness, as opposed to an official acting in a prosecutorial capacity, is not entitled to absolute immunity. . . The relevant distinction for absolute immunity purposes is whether the official's actions are prosecutorial or testimonial; is the prosecutor acting as an advocate for the state or as fact witness? . . . We need not fully decide this difficult question in this case. The injury alleged by the Thomases derived solely from the defendants' decision to place M.T. on a seven-day emergency medical hold. . . . The infringement on the Thomases' right to familial association stemmed solely from the emergency medical hold the defendants placed on M.T prior to the filing of the petition. Even if we were to find a causal connection between the filing of the petition and the injury, we doubt the defendants would be entitled to absolute immunity for their decision to seek a judicial order. . . . [T]he children's court attorney has the sole discretion to initiate involuntary commitment proceedings. The role of the physician or psychologist under this scheme is more akin to the role of the complaining witness who 'set[s] the wheels of government in motion by instigating a legal action.'. . Extending absolute immunity to government employees who are not statutorily authorized to petition the court directly would be an unwarranted expansion of absolute immunity protection. . . . Extending absolute immunity to those who solicit a government attorney to initiate judicial proceedings is unnecessary to protect the judicial process. . . . The defendants' decision to place an emergency medical hold on M.T. in anticipation of Mrs. Thomas's attempt to discharge M.T. is not protected by absolute immunity. The decision to place the hold was not closely associated with the judicial process. An emergency medical hold is a mechanism for facilities to temporarily prevent a patient's discharge when personnel believe the patient's medical circumstances warrant such a measure. Medical personnel are not required to obtain judicial permission before placing a temporary hold on a patient's discharge. In this case, the medical hold preceded the filing of an involuntary residential treatment petition and was functionally analogous to law enforcement officials taking unilateral emergency action. . . . In sum, the defendants are not entitled to absolute immunity for their decision to place M.T. on a medical hold."); ***Young v. Vega***, 574 F. App'x 684, 689 (6th Cir. 2014) ("Absolute immunity will not bar Young's claims to the extent he has limited the wrongful acts complained of to Vega's swearing to the truth of the facts that provided the evidentiary basis for the juvenile court's probable cause determination."); ***Kovacic v. Cuyahoga County Dept. of Children and Family Services***, 724 F.3d 687, 694 (6th Cir. 2013) ("Concerning the removal of the children from the home, the district court did not err in denying the social workers' motion for absolute immunity. When the social workers removed the children from the home, they were acting in a police capacity rather than as legal advocates."); ***McNulty v. Massachusetts Dep't of Children & Families***, CIV.A. 11-11569-GAO, 2014 WL 4965403, *3 (D. Mass. Sept. 30, 2014) ("There does not appear to be a judicial order deciding specifically whether a DCF employee making recommendations to a juvenile court judge falls into the category of functions intimately associated with the judicial process. However, the First Circuit has found that witness testimony and guardians ad litem are protected by absolute immunity because of their association with the judicial process. . . Similarly, other jurisdictions have found absolute immunity for probation officers preparing presentencing reports, *Demoran v. Witt,* 781 F.2d 155, 157–58 (9th Cir.1985); grand jurors, *Sellars v. Procunier*, 641 F.2d 1295, 1301 fn.11 (9th Cir.1981) (internal citations omitted); state parole officers, *id.* at 1303; court-appointed

psychiatrists, *LaLonde v. Eissner*, 539 N.E.2d 538, 541 (Mass.1989); and social workers initiating child dependency proceedings, *Meyers v. Contra Costa County Dep't of Soc. Servs.,* 812 F.2d 1154, 1156–57 (9th Cir.1987). The defendants' argument that Segura's conduct before the Barnstable Juvenile Court 'falls squarely within the confines of behavior protected by absolute immunity' is convincing. . . Segura's reports may have recommended actions that ultimately resulted in harm to the minor child, but in the end it was the judge who made the final decision, as the defendants point out. . . Moreover, the policy justification and factors articulated in *Butz* counsel in favor of according the protection of absolute immunity to officials such as Segura.")

See also ***Newton v. City of New York***, 738 F.Supp.2d 397, 408-11 (S.D.N.Y. 2010) ("Here, the testing of the rape kit was 'integral to and subsumed in the advocacy functions being performed in connection with [Newton's] post-conviction initiatives.'. . Ryan's analysis was conducted for the sole purpose of determining whether *Newton's* continued incarceration was necessarily warranted, not for a general purpose investigation to identify potential suspects in V.J.'s attack. Indeed, '[t]he DNA testing obviously would have bearing on the advocacy work of deciding whether to oppose [Newton's] initiatives' to vacate his conviction. . . . Taken as a whole then, the circumstances of the instant case support absolute immunity for Ryan. Certainly, the extension of absolute immunity to laboratory scientists presents the supremely difficult task of balancing the equities between the public good and individual rights, with 'evils inevitable in either alternative.'. . . [T]he protection of absolute immunity may not be appropriate in a pre-conviction context where the jury's determination of guilt may result from a faulty scientific process, and where the laboratory scientist's role is primarily an investigative one. . . . But these are not the circumstances presented here. Newton had an opportunity to assert his innocence at trial. He presented two alibi witnesses to testify on his behalf and successfully convinced the jury to acquit him of one of the incidents of rape with which he was charged. . . Biological evidence played no role in his initial conviction. Ryan's role in his prolonged incarceration resulted from her participation in a court ordered post-conviction adversarial proceeding, as a state advocate engaged in a search for the truth–thus satisfying 'the ultimate question' for the grant of full immunity.")

But see ***Cornejo v. Bell***, 592 F.3d 121, 128, 129 (2d Cir. 2010) ("[T]he district court was incorrect in its conclusion that the caseworker defendants were also entitled to absolute immunity. . .Although they undoubtedly played a substantial role in providing the information that helped initiate many of the actions here complained of, the caseworker defendants essentially functioned much more like investigators than prosecutors. Even when they made the initial decision to remove Kevin from his mother's custody, their actions were the functional equivalent of police officers' making arrests in criminal cases, which are a classic example of actions entitled to qualified, rather than absolute immunity. . . . Under these circumstances, it was objectively reasonable for the caseworker defendants to believe that immediate temporary removal of both children without prior judicial authorization was proper. . .The caseworker defendants are thus entitled to qualified immunity on the due process and unlawful seizure claims arising from their initial removal of Kevin. As for the subsequent actions taken in Family Court, these actions were chiefly taken by the lawyer defendants, who, as already determined, were entitled to absolute immunity."); ***Morris***

v. Dearborne, 181 F.3d 657, 670, 671 (5th Cir. 1999) ("In *Hodorowski* [*v. Ray*, 844 F.2d 1210 (5th Cir.1988)], we grappled with the appropriate balance between independence for social workers charged with investigation of child abuse and protection for family privacy. We noted that other circuits have extended to such professionals absolute prosecutorial immunity, analogizing their function to that of executive branch officials who investigate and initiate criminal prosecutions. . . We also recognized that some courts have afforded absolute immunity to child protective service workers for policy reasons rather than by analogy to prosecutors. . . However, we rejected both of those approaches, concluding that qualified, rather than absolute immunity strikes the better balance and allows for the evaluation of the motive for and reasonableness of a welfare worker's challenged actions.").

3. Witnesses

Rehberg v. Paulk , 132 S. Ct. 1497, 1505-08 (2012) ("The factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses. In both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony. In *Briscoe,* the Court concluded that the possibility of civil liability was not needed to deter false testimony at trial because other sanctions—chiefly prosecution for perjury—provided a sufficient deterrent. . . Since perjury before a grand jury, like perjury at trial, is a serious criminal offense, see, *e.g.*, 18 U.S.C. § 1623(a), there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony. . . .[W]e conclude that grand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony. In addition, as the Court of Appeals held, this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution. . . . In sum, testifying, whether before a grand jury or at trial, was not the distinctive function performed by a complaining witness. It is clear—and petitioner does not contend otherwise—that a complaining witness cannot be held liable for perjurious *trial* testimony. *Briscoe,* 460 U.S., at 326. And there is no more reason why a complaining witness should be subject to liability for testimony before a grand jury. Once the distinctive function performed by a 'complaining witness' is understood, it is apparent that a law enforcement officer who testifies before a grand jury is not at all comparable to a 'complaining witness.' By testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution. . . .Instead, it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury, and in many jurisdictions, even if an indictment is handed up, a prosecution cannot proceed unless the prosecutor signs the indictment. [footnote omitted] It would thus be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute.")

See also ***DiPasquale v. Hawkins***, No. 17-4138, 2018 WL 4944824, *___ & n.6 (6th Cir. Oct. 12, 2018) (not reported) ("Grand-jury witnesses enjoy absolute immunity from suit based on their grand-jury testimony. . . Hawkins argues that here the district court improperly found 'that an exception applied to remove Detective Hawkins'[s] entitlement to absolute immunity, based on *King v. Harwood*,' claiming *King* represents a narrow 'exception to the general rule of absolute immunity for grand jury testimony.' . . But *King* does not represent an exception to absolute immunity for claims based on grand-jury testimony—indeed, it reaffirms that 'absolute immunity is to be afforded to *all* grand-jury witnesses, even law-enforcement officers who have "conspired to present false testimony."'. . The complaint before us adequately alleges only a claim based on Hawkins's grand jury testimony, and that claim is barred by absolute immunity. DiPasquale argues that he also asserts a malicious prosecution claim. *King* recognizes that there is a 'thin but conspicuous line between, on the one hand, law-enforcement officers who only provide grand-jury testimony ... and, on the other hand, law-enforcement officers who either (1) "set the wheels of government in motion by instigating a legal action," or (2) "falsify affidavits" or "fabricate evidence concerning an unsolved crime."'. .Hawkins claims that 'DiPasquale never alleges any act by Detective Hawkins "prior to" or "independent of" his grand-jury testimony,'. . . but this is not exactly the case. Although the complaint does allege that Hawkins's grand-jury testimony was 'false, materially incomplete, and/or in reckless disregard of the truth,' it also alleges that 'Hawkins made, influenced, and/or participated in the decision to prosecute' when '[t]here was a lack of probable cause for the criminal prosecution.'. . The complaint also contains factual allegations about Hawkins's role in the investigation independent of his grand-jury testimony, including his decision to pursue a criminal case. Moreover, in assessing DiPasquale's malicious prosecution claim, the magistrate judge properly considered only Hawkins's role in 'setting the prosecution in motion based upon the allegedly false statements of Procter and Herres' and did not consider his testimony before the grand jury. . . .If the complaint intends to identify Hawkins's grand jury testimony as the sole act of participation in the decision to prosecute, then the entire claim is barred by absolute immunity and subject to dismissal."); ***Stillwagon v. City of Delaware, Ohio***, No. 17-3873, 2018 WL 4055972, at *10 (6th Cir. Aug. 24, 2018) (not reported) ("The district court noted that all this alleged false and fabricated evidence by Detective Segaard was prepared four months before he testified in front of the grand jury. The court concluded that such evidence could be viewed at laying the groundwork for an indictment but could not be viewed as a preparatory activity for grand-jury testimony and therefore not protected by absolute immunity. Applying the legal principles set forth in *Rehberg* and *King*, we agree with the district court."); ***Montoya v. Vigil***, 898 F.3d 1056, 1069-71 (10th Cir. 2018) ("Montoya is not necessarily seeking to hold Detective Vigil liable *for his testimony*, but rather for the unconstitutionally coercive interrogation that happened much before. Had his coerced statements been introduced in some other way—say, through a videotape—Montoya would make exactly the same claim against the Detectives. And, Montoya emphasizes, as broad as *Rehberg*'s language was, the Supreme Court disclaimed any approach that would allow absolute testimonial immunity too broad a reach. . . .Montoya thus suggests a claim is only 'based on' testimony when it depends on the wrongfulness of the testimony at trial, and not simply on the fact the testimony existed. After all, the Supreme Court has

admonished that absolute immunity should apply sparingly. . . We have suggested the same once before. [discussing *Vogt v. City of Hays*, 844 F.3d 1235 (10th Cir. 2017)] . . . .*Vogt* supports Montoya's distinction between testimony that merely completes a violation and testimony that forms the basis of the wrongful conduct complained of. But even if Montoya is correct about this distinction, we conclude absolute testimonial immunity bars his claim. Unlike Vogt, who did 'not allege that the defendants acted unlawfully by testifying,'. . . Montoya's claim depends on showing Detective Vigil *did* act unlawfully by testifying. There is a simple reason for this: the trial court suppressed all testimony about the part of the interrogation Montoya claims was unconstitutionally coercive. Thus, in order to show Detective Vigil introduced his coerced statements at trial, Montoya must show Detective Vigil violated the suppression order—that he acted wrongfully by testifying. Put differently, Montoya is not complaining the Detectives coerced his confession and that his statements happened to be used against him through trial testimony as opposed to some other means; he is claiming both that they coerced his confession *and* that Detective Vigil unlawfully introduced his statements by disobeying the suppression order. Shielding witnesses from claims their testimony was unlawful is precisely what absolute testimonial immunity is meant to do. We conclude, then, that Montoya's Fifth Amendment claim is 'based on' trial testimony and is barred by absolute immunity."); ***Stinson v. Gauger***, 868 F.3d 516, 529 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. ___ (2018) ("As we discussed in the panel opinion, Stinson's claims against Johnson and Rawson focused on their actions while Cychosz's murder was being investigated, not on their testimony at trial or preparations to testify at trial. And if a prosecutor does not have absolute immunity for investigating the case, it follows that an expert witness does not either. So Johnson and Rawson are not entitled to absolute immunity."); ***Miller v. Maddox***, 866 F.3d 386, 394-95 (6th Cir. 2017) ("Maddox seems to suggest that he cannot be held liable for the false statements made in the warrant affidavits because his testimony before the judicial commissioner was based on the false statements. His logic is apparently that because he is absolutely immune from § 1983 liability based on his testimony, that he is also immune for the false statements previously made in the affidavits. . . . We conclude. . . that Maddox is not entitled to absolute immunity for the false statements he made in his warrant affidavit."); ***King v. Harwood***, 852 F.3d 568, 584-91 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 640 (2018) ("Crucially, . . . *Rehberg* does not affect the thin but conspicuous line between, on the one hand, law-enforcement officers who only provide grand-jury testimony (including related 'preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony,' *Rehberg*, 566 U.S. at 370, and including any conspiracy with prosecutors or other officers to *testify* falsely), and, on the other hand, law-enforcement officers who either (1) 'set the wheels of government in motion by instigating a legal action,'. . . or (2) 'falsify affidavits' or 'fabricate evidence concerning an unsolved crime[.]'. . . Only qualified immunity extends to the acts of officers in these latter situations. . . .True, *Rehberg* most certainly applies to our case and affords Harwood absolute immunity from suit to *the extent that King's claims are based on his grand-jury testimony*, but *Rehberg* does not afford Harwood absolute immunity for his actions that are prior to, and independent of, his grand-jury testimony. And because King has alleged that Harwood set her prosecution in motion—and that Harwood both sought warrants despite the absence of probable cause *and* made knowing or reckless false statements implicating King in his investigative report—

King may properly base her malicious-prosecution claim on those actions by Harwood without triggering the absolute immunity established by *Rehberg*. . . .We hold that where (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury), the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive. This exception to the presumption of probable cause finds support in Supreme Court caselaw, in our precedent, and in the decisions of our sister circuits and the district courts. First, the plain language and intent of *Rehberg* extend absolute immunity to grand-jury witnesses without declaring or even contemplating the complete foreclosure of malicious-prosecution claims. If a grand-jury indictment created an irrebuttable presumption of probable cause (which it would if the *only* way to overcome such a presumption were to rely on grand-jury testimony that is inadmissible under *Rehberg*), then there would be no point in distinguishing, as *Rehberg* and even *Sanders* did, cases in which a law-enforcement officer has set the prosecution in motion, for a plaintiff would be unable to prove the lack-of-probable-cause element of a malicious-prosecution claim even in such cases. Moreover, the Supreme Court's recent decision in *Manuel v. Joliet*, No. 14-9496 (U.S. Mar. 21, 2017), considered and rejected the argument that either a judge's finding of probable cause or 'a grand jury indictment or preliminary examination' forecloses a Fourth Amendment claim arising from unlawful pretrial detention. . . . The Court in *Manuel* went on: 'Whatever its precise form, if the proceeding [finding probable cause] is tainted—as here, by fabricated evidence—and the result is that probable cause is lacking, then the ensuing pretrial detention violates the confined person's Fourth Amendment rights.'. . Second, maintaining the viability of malicious-prosecution claims against officers who wrongly set prosecutions in motion is rooted in the common-law distinction of 'complaining witnesses,' who—unlike *testifying* witnesses—were not afforded absolute immunity, as *Rehberg* details at length. . . . Third, the decisions of our court have, since our court first recognized 'malicious prosecution' as a § 1983 claim cognizable under the Fourth Amendment, slowly but continually articulated both the elements of the claim and the contours of the exceptions to the presumption that an indictment provides proof of probable cause. . . Though *Sanders* states in dicta that 'it is well-established in this circuit that an indictment by a grand jury *conclusively* determines the existence of probable cause *unless* the defendant-officer "knowingly or recklessly present[ed] false testimony to the grand jury,"'. . . this statement mistakes the precedents it cites: while we certainly said in those cases that an officer's false statements to a grand jury are *sufficient* to overcome the presumption of probable cause, we have not said that such statements are *necessary* to do so. . . Nor did we have reason in *Webb* or other cases specifically to address the question whether the presumption of probable cause may be overcome by an officer's wrongful setting in motion of a prosecution or falsification or fabrication of evidence *apart* from the officer's grand-jury testimony, either because *Rehberg* had not yet been pronounced (as in *Cook*) or because the parties waived the applicability of *Rehberg* by failing to raise it (as in *Webb* and *Robertson*). None

of these cases, which are the only cases cited by *Sanders* for its far-reaching statement that false *grand-jury testimony* is the *only* means of overcoming the presumption of probable cause, foreclose our adoption of the rule we pronounce today, which only clarifies, in light of *Rehberg*'s distinction of ordinary grand-jury witnesses and officers who do more than only testify before a grand jury, that a plaintiff may overcome the presumption of probable cause in cases like King's upon a showing that the officer has made knowing or reckless false statements or has falsified or fabricated evidence in the course of setting a prosecution in motion. Fourth, there is no logical obstacle to the rule we articulate today. According to the discussion in *Sanders*, . . . a malicious-prosecution claim resting on evidence *other than* grand-jury testimony would seemingly fail for one of two reasons in attempting to overcome the presumption of probable cause created by an indictment: (1) if the other evidence were material to the grand jury's return of the indictment, then the evidence must have been introduced to the grand jury by means of grand-jury testimony (how else would the grand jury know of it?), in which case absolute immunity would foreclose a claim based on that evidence; or (2) if the evidence were not material to the indictment, then the plaintiff would be unable to show that probable cause did not exist apart from the evidence, and thus would be unable to prevail on the merits of a malicious-prosecution claim. . . But an officer's actions of wrongly setting a prosecution in motion or falsifying or fabricating evidence may be material to the grand-jury indictment *even though* they do not constitute 'testimony' or related preparation for testimony, and nothing in the caselaw indicates that such actions somehow *mutate into* grand-jury testimony simply because they are material to the return of an indictment. . . .Fifth, other courts have likewise rejected the proposition that *Rehberg* completely forecloses malicious-prosecution claims against law-enforcement officers who set a prosecution in motion or who falsify or fabricate evidence. . . .Applying our rule, we therefore hold that King has raised genuine issues of material fact as to (1) whether Harwood set King's prosecution in motion by applying for search warrants despite the lack of probable cause to search, by seeking King's indictment despite the lack of probable cause on which to prosecute King for murder, or by making knowing or reckless false statements in Harwood's investigative report; (2) whether any false statements made by Harwood, together with his material omissions of facts—if true—such as King's having one leg, the fact that the bullet wounds in Breeden's skull were non-exiting, or Harwood's knowledge that the bullets in King's home did not match the bullets that killed Breeden, were material to King's prosecution; and (3) whether any such false statements, evidence, and omissions were independent of Harwood's grand-jury testimony, so as to constitute 'laying the groundwork for an indictment,'. . rather than the sort of 'preparatory activity' in advance of a grand-jury hearing that would provide absolute immunity under *Rehberg*[.]. . . Thus, King has raised genuine issues of material fact sufficient to overcome, at least at summary judgment, the presumption that King's indictment is proof of probable cause. Accordingly, we hold that *Rehberg* does not bar King's claims on the basis of absolute immunity, nor does *Rehberg* preclude the possibility that King may prevail on the merits of her malicious-prosecution claim."); ***Avery v. City of Milwaukee,*** 847 F.3d 433, 440-43 (7th Cir. 2017) ("The judge's second reason for setting aside the verdict rested on the immunity rule that witnesses at a criminal trial cannot be sued for damages flowing from their testimony. *See generally Briscoe v. LaHue*, 460 U.S. 325 (1983). The judge thought the detectives' perjured testimony—and not their falsification of the confession—actually caused Avery's injury. So he

concluded that the due-process claims were blocked by absolute immunity. This rationale is flawed for two reasons. First, virtually any item of evidence introduced at trial must be authenticated by oral testimony. . . Here, the detectives testified about Avery's 'confession' and authenticated their false reports memorializing it; the reports were then introduced into the trial record. If an officer who fabricates evidence can immunize himself from liability by authenticating falsified documentary or physical evidence and then repeating the false 'facts' in his trial testimony, wrongful-conviction claims premised on evidence fabrication would be a dead letter. That would squarely conflict with our caselaw—most notably *Whitlock*—and would put us at odds with every other circuit to consider the viability of due-process claims premised on fabricated evidence. . . Second, and more fundamentally, the judge's reasoning is utterly at odds with the Supreme Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). There the Court held that although a prosecutor is absolutely immune from liability for the actions he takes during the course of a prosecution, he remains subject to liability for misconduct committed in an investigative capacity 'before he has probable cause to have anyone arrested.'. . We've read the *Buckley* exception to mean that a 'prosecutor cannot retroactively immunize himself from conduct by perfecting his wrong-doing through introducing the fabricated evidence at trial and arguing that the tort was not completed until a time at which he had acquired absolute immunity.' . . Although this case involves evidence fabrication by detectives, not a prosecutor, the judge's ruling gives the detectives' testimony precisely that impermissible effect. It's true that the detectives' testimony was a factual predicate for Avery's claim: A § 1983 claim requires a constitutional violation, and the due-process violation wasn't complete until the false confession was introduced at Avery's trial, resulting in his conviction and imprisonment for a murder he did not commit. *See Cairel v. Alderden*, 821 F.3d 823, 831 (7th Cir. 2016) (explaining that the plaintiff's acquittal foreclosed his due-process evidence-fabrication claim); *see also Whitlock*, 682 F.3d at 582. After all, it was the admission of the false confession that made Avery's trial unfair. As we explained in *Fields II*, however, under common-law causation principles, '[h]e who creates the defect is responsible for the injury that the defect foreseeably causes later.'. . When the detectives falsified their reports of a nonexistent confession, it was entirely foreseeable that this fabricated 'evidence' would be used to convict Avery at trial for Griffin's murder. That was, of course, the whole point of concocting the confession. An unbroken causal chain connects the acts of evidence fabrication to Avery's wrongful conviction and imprisonment. The detectives are liable under § 1983 for this due-process violation even though their trial testimony, standing alone, would not subject them to damages liability. So the judge was wrong to set aside the verdict on this ground. The jury's verdict—including the City's liability on the *Monell* claim, which is not independently challenged—must be reinstated."); ***Canen v. Chapman***, 847 F.3d 407, 414-15 (7th Cir. 2017) ("Ultimately, Ms. Canen has pointed us to no case that establishes the legal principle that an officer is obliged to reveal the limitations on his training when he has stated his background, such as it is, and then exposed himself to cross-examination by the defense. We accordingly see no reason to conclude that Detective Chapman's failure to declare affirmatively his lack of training in latent fingerprint evaluation violated any clearly established right. . . To the extent that Ms. Canen's allegation focuses on Detective Chapman's actual testimony and his preparation for that testimony, he also is protected by the traditional absolute immunity accorded to witnesses at a judicial proceeding. It

is long-established that witnesses enjoy absolute immunity, *Briscoe v. LaHue*, 460 U.S. 325, 330–33 (1983), and we have acknowledged that this protection covers the preparation of testimony as well as its actual delivery in court, *Newsome v. McCabe*, 319 F.3d 301, 304 (7th Cir. 2003). The rule is designed to aid the search for truth by limiting any fear of recrimination, which in turn decreases any attendant motivation to self-censor."); ***Royse v. Wilbers***, No. 16-5199, 2016 WL 5682710, at *1 (6th Cir. Oct. 3, 2016) (not published) ("In cases raising an absolute immunity issue, courts have followed *Rehberg* in concluding that, in claims for malicious prosecution based only on grand-jury testimony, absolute immunity applies. *See Coggins v. Buonora*, 776 F.3d 108, 113 (2d Cir. 2015). We have reached the same conclusion in several unpublished decisions. *See Kavanaugh v. Lexington Fayette Urban Cty. Gov't*, 638 Fed.Appx. 446, 454–55 (6th Cir. 2015); *Vaughan v. City of Shaker Heights*, 514 Fed.Appx. 611, 613 (6th Cir. 2013)."); ***Morris v. Town of Lexington Alabama***, 748 F.3d 1316, 1321 n. 14 (11th Cir. 2014) ("The Supreme Court's decision in *Rehberg v. Paulk, . . .* which was not brought to the District Court's attention before it issued the rulings being appealed, foreclose the claims in Counts IV and V, as Morris readily concedes. Those two counts are based in significant part on the testimony Bradford, Bowers, and Wigginton provided to the Lauderdale County District Attorney and subsequently to the grand jury. *Rehberg* holds that 'a grand jury witness has absolute immunity from any § 1983 claim based on the witness'[s] testimony.'. . The Court also held that this absolute immunity 'may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness'[s] testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.'"); ***Morales v. City of New York***, 752 F.3d 234, 237 (2d Cir. 2014) ("[T]he rationale supporting immunity for grand jury witnesses in § 1983 actions applies with equal force to *Bivens* suits. Each of the policy justifications that *Rehberg* cited in support of granting absolute immunity to grand jury witnesses exists in the context of a *Bivens* action. . . And second, extending *Rehberg's* shelter to *Bivens* liability reflects the 'general trend in the appellate courts,'. . . of incorporating § 1983 law into *Bivens* suits. The District Court therefore correctly held that to the extent that Morales's claims are based on Arnett's grand jury testimony, *Rehberg* forecloses them under both *Bivens* and § 1983.").

See also ***King v. Harwood***, No. 3:15-CV-762-GNS, 2017 WL 6029633, at *8 (W.D. Ky. Dec. 5, 2017) ("Nothing in the *King* exception allows a plaintiff to reach a police officer's grand jury testimony and use that as evidence of liability (as *Rehberg* explicitly prohibits). Instead, it expands on unprotected pre-grand jury activities – such as filing affidavits –thereby crafting a new way for a criminal defendant turned civil plaintiff to overcome the presumption of probable cause created when a grand jury issues an indictment. In *Rehberg*, as explained in greater detail above, the Supreme Court recognized that there were some pre-testifying activities, other than ordinary preparation for testifying, that would not fall under *Rehberg*'s new protections. . . The *King* exception specifically addresses those activities. The undersigned interprets *Rehberg* as granting absolute immunity to an officer's grand jury testimony itself but not to other actions an officer might take with regard to the underlying information. So, for instance, a law enforcement officer might manufacture crime scene evidence and testify about that evidence at a grand jury proceeding. Under the *King* exception, a civil plaintiff is barred from using what the officer said

before the grand jury, but could rely on the officer's (hypothetical) falsification of evidence. Therefore, the Court concludes that the *King* exception is not contrary to Supreme Court precedent."); ***Allen v. Rucker***, No. 5:17-CV-00340-JMH, 2018 WL 1611595, at *4–6 (E.D. Ky. Apr. 3, 2018) ("Citing *Manuel*, the Supreme Court recently granted certiorari, vacated the judgment, and remanded a Sixth Circuit case decided only two months before *Manuel*. *Sanders v. Jones*, 138 S. Ct. 640 (2018). In the original Sixth Circuit case, *Sanders v. Jones*, 845 F.3d 721 (6th Cir. 2017), the circuit found 'it is well-established in this circuit that an indictment by a grand jury conclusively determines the existence of probable cause unless the defendant-officer "knowingly or recklessly presented false testimony to the grand jury to obtain the indictment."'. . The court further explained that *Rehberg* eliminated plaintiff's ability to rebut probable cause because grand-jury testimony was now untouchable. . . This created a 'harsh' consequence by 'largely foreclosing malicious prosecution claims where the plaintiff was indicted.'. . The circuit has since eased the 'harsh' result recognized in *Sanders*. In *King v. Harwood*, the court created a new exception allowing plaintiffs indicted by a grand jury to rebut probable cause in malicious prosecution cases where:

(1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury), the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive.

852 F.3d at 587-88.

The court reasoned that this exception fits *Rehberg*'s framework by allowing actions against 'complaining witnesses' (as opposed to 'testifying witnesses') who 'set the wheels of government in motion by instigating an action.'. . *King* further explains that the new exception aligns with the Supreme Court's decision in *Manuel* and circuit precedent. . . But *King* did not disturb the absolute immunity afforded to officers in malicious prosecution cases "*to the extent that [Plaintiff's] claims are based on [Defendant's] grand-jury testimony.*". . . Accordingly, plaintiffs cannot use grand-jury testimony to rebut probable cause. . . But plaintiffs may use evidence from *outside* the grand-jury room to rebut probable cause. . . Thus, the analysis does not begin and end with grand-jury testimony. To the contrary, 'actions that are prior to, and independent of, [an officer's] grand-jury testimony' may rebut the probable-cause presumption. . . . As such, a grand-jury indictment in the Sixth Circuit is no longer 'a talisman that always wards off a malicious-prosecution claim.'. . A plaintiff can overcome the grand-jury-indictment-created probable cause through 'pre-indictment nontestimonial acts that were material to the prosecution.'. . As such, to state a claim for malicious prosecution in a case where a grand-jury indictment has been issued, a plaintiff must plead specific facts showing a defendant-officer made false statements or fabricated evidence that set the prosecution in motion. Without more, a plaintiff cannot rebut the presumption of probable cause established by a grand-jury indictment. . . .*King* did not alter the federal pleading standard; it established a new route around the probable cause presumption created by a grand jury

indictment. To take that route, a plaintiff must show that the officer made false statements or fabricated evidence, and those actions set the wheels of prosecution in motion. . . And to plead that a defendant-officer made false statements or fabricated evidence, a plaintiff must identify *specific* instances of such false statements or fabricated evidence. . . In other words, a plaintiff must tell the court what *particular* evidence was fabricated or what *particular* testimony was falsified. General statements alleging false, misleading, or fabricated evidence, without more, amount to vague conclusory allegations, 'not specific allegations necessary to survive a motion to dismiss.'. . . In sum, although Allen *says* Rucker employed improper tactics, concealed facts, suppressed evidence, omitted material facts, presented false information, and misled prosecutors, Allen fails to explain any of her allegations. She does not point to a single *specific* instance of any of these things happening. Simply saying so does not make it true. Nor does it satisfy the federal pleading standard. Even in her response to Rucker's Motion to Dismiss, Allen fails to include any specific factual allegations supporting her claims. Without *any* factual allegations, Allen's claims fail. Her complaint reads precisely like those in *Meeks, Bickerstaff,* and *Rapp*: general, vague, and conclusory allegations unsupported by specific facts. Without any particular facts, these statements amount to legal conclusions and do not provide a basis for surviving a motion to dismiss."); ***Osman v. Weyker***, No. 16CV908 (JNE/TNL), 2017 WL 3425647, at *8 (D. Minn. Aug. 9, 2017) ("A court thus asks whether an officer who allegedly fabricated evidence tainted the grand jury process. A complicating factor for that analysis is witness immunity. A grand jury witness is entitled to absolute immunity from a § 1983 claim based on the witness' testimony. *Rehberg v. Paulk*, 566 U.S. 356, 369 (2012). That immunity extends to a witness' 'preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony,'. . but it does not extend to all of a testifying witness' earlier activity outside the courtroom[.] . . For example, absolute immunity does not apply to officers 'who falsify affidavits and fabricate evidence concerning an unsolved crime;' they are subject instead to qualified immunity. . . But the court may not use 'evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.'. . Thus, the court may not rely on what was actually said in testimony before the grand jury. The focus must be on alleged wrongdoings in the investigation resulting in the allegedly unconstitutional seizure.").

Jones v. Dalton, 867 F.Supp.2d 572, 584 (D.N.J. 2012) ("Porter, as an investigator, is not entitled to prosecutorial immunity, but seeks absolute immunity with respect to his grand jury testimony. After briefing closed on these Motions, the Supreme Court resolved a Circuit split in *Rehberg v. Paulk* . . . . The work in preparation for such testimony is also absolutely immune. . .Accordingly, Porter may not be held liable for § 1983 claims on the basis of his grand jury testimony or preparatory work therefor. . . . Both malicious prosecution and First Amendment retaliation claims require Plaintiff to prove that the proceeding was not initiated with probable cause. . . A grand jury indictment is prima facie evidence of probable cause. Absolute immunity prohibits Jones from rebutting this presumption with evidence that Porter made misrepresentations to the grand jury. Accordingly, the Motion will be granted on these two claims.").

But see ***Cole v. Carson,*** 802 F.3d 752, 774-76 (5th Cir. 2015), *cert. granted sub nom Hunter v. Cole, judgment vacated and case remanded for further consideration in light of Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam), 137 S. Ct. 497 (2016), *opinion reinstated on remand,* ***Cole v. Carson***, 905 F.3d 334 (5th Cir. 2018) ("Under *Rehberg,* Officer Carson is immune for grand jury testimony, preparation for that testimony, and any conspiracy to falsely testify. He argues that all of his alleged conduct falls into those categories, but the First Amended Complaint goes further. The Coles allege that Officer Carson made false statements in the course of the *initial* investigation into the shooting, before a decision had been made by prosecutors to charge Ryan with aggravated assault. The FAC indicates that Carson intended these statements to influence the decision to bring charges against Ryan in the first place. An officer who lies to investigating officers in order to try to get someone charged with a crime—before the decision to charge has been made—is not entitled to absolute testimonial immunity. The Supreme Court has held that a prosecutor is not entitled to absolute immunity when she falsifies an affidavit supporting an arrest warrant. Neither is a police officer who submits an affidavit for a warrant, leading to an arrest without probable cause. Nor are prosecutors absolutely immune when they act alongside police officers to 'solve' an unsolved crime by shopping for an unscrupulous expert. *Rehberg* confirmed that these holdings are still good law. We have likewise held that 'non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity because they are not part of the trial.' The conduct here—lying to investigators—comes closer to possibly preparing for grand jury testimony than some of the conduct in earlier cases, but the timing and purpose of the statements matter. The Supreme Court and this court have emphasized that absolute immunity for prosecutors, witnesses, and others is based on a need to protect central judicial proceedings. Thus conduct that occurs during investigation to discover probable cause and before the decision to charge has been made is not generally entitled to absolute immunity. Some of the false statements in this case are alleged to have been this investigation-stage type of conduct. In these circumstances, lying to investigating officers is similar to falsifying a police report, which the Second Circuit recently held is not protected by testimonial immunity. . ..The Coles alleged that Officer Carson lied to investigating officers, telling them that Ryan turned around and pointed his gun at Officer Hunter prior to his being shot, and that Officer Hunter gave a warning before firing. They make it clear that some of these statements were made prior to the decision to charge, were intended to influence, and did influence that decision."); ***Lisker v. City of Los Angeles***, 780 F.3d 1237, 1242-43 (9th Cir. 2015) ("Immunity for pre-testimony conduct. . . 'is not limitless.'. . In addressing claims of witness immunity, we have distinguished conspiracies to testify falsely from 'non-testimonial' acts, such as 'tampering with documentary or physical evidence or preventing witnesses from coming forward.'. . Our sister Circuits have done the same. [citing cases] The detectives argue that the notes and reports in the Murder Book are 'inextricably tied' to their testimony because these documents were not introduced at trial, and their purpose was to memorialize the substance of eventual testimony. We disagree. As the Sixth Circuit has recognized, police investigative materials have evidentiary value wholly apart from assisting trial testimony—they 'comprise part of the documentary record before the prosecution and defense' and affect charging decisions, plea bargaining, and cross-examination of the investigating officers. . . This non-testimonial evidentiary value distinguishes the materials in the Murder Book from pre-

trial activity aimed exclusively at influencing testimony. . . The materials in the Murder Book are analogous to the sorts of documentary and physical evidence—such as falsified videotaped interviews and forensic reports—that fall outside the protection of absolute immunity. . . . The same conclusion applies to the allegedly falsified reconstruction of the crime scene. The photographs from the reconstruction were introduced at trial. . . They are therefore squarely governed by this Court's previous holding that 'a pretrial, out-of-court effort to ... fabricate physical evidence ... is not "inextricably tied"—or tied at all—to any witness' own testimony,' even '[i]f a potential witness does happen to be involved.'". . .Landgren and Monsue plainly acted in an investigative capacity in producing the Murder Book and crime-scene photographs. Qualified immunity provides sufficient protection for these activities. . . .The circumstances presented here fall squarely outside the carefully limited holding of *Rehberg.*"); ***Coggins v. Buonora***, 776 F.3d 108, 112-14 (2d Cir. 2015) ("The question before us is whether a law enforcement officer is entitled to absolute immunity as a grand jury witness pursuant to *Rehberg* when a § 1983 plaintiff alleges that the officer withheld and falsified evidence in addition to committing perjury before the grand jury—an issue of first impression in our circuit. . . .Buonora asserts that, at its core, Coggins's claims all 'involve his grand jury appearance.'. . We disagree. Buonora's interpretation of *Rehberg* would set a dangerous precedent: Any police officer could immunize for § 1983 purposes any unlawful conduct prior to and independent of his perjurious grand jury appearance merely by testifying before a grand jury. Such an outcome would also be inconsistent with the limitations *Rehberg* explicitly imposes on the scope of the absolute immunity, which the Supreme Court instructed was not to 'extend[ ] to *all* activity that a witness conducts outside of the grand jury room.'. . When a police officer claims absolute immunity for his grand jury testimony under *Rehberg,* the court should determine whether the plaintiff can make out the elements of his § 1983 claim without resorting to the grand jury testimony. If the claim exists independently of the grand jury testimony, it is not 'based on' that testimony, as that term is used in *Rehberg.* . . Conversely, if the claim requires the grand jury testimony, the defendant enjoys absolute immunity under *Rehberg.* . . .In this case, the TAC plausibly alleges misconduct by Buonora without reference to his perjurious grand jury testimony. The TAC's allegations are based on, among other things, Defendants' police reports, the statements of the unnamed Floral Park Police Officer, Buonora's knowledge of the falsity of Vara's police report, Buonora's statements to the district attorney, . . . and police radio transmissions. All of these facts existed before Buonora's March 2005 grand jury testimony and are independently actionable under § 1983 such that Coggins would be able to prove his claims without ever relying on the officers' grand jury testimony. . . The fact that Buonora's grand jury testimony paralleled information he gave in other contexts does not mean that Coggins's malicious prosecution claim was 'based on' Buonora's grand jury testimony. . . Rather it was based on Buonora's conduct that laid the groundwork for Coggins's indictment. The TAC alleges misconduct by Buonora that is not *based on* his grand jury testimony, and the district court properly found that absolute immunity is inappropriate."); ***Frederick v. New York City***, No. 11 Civ. 469(JPO), 2012 WL 4947806, at *3, *4 (S.D.N.Y. Oct. 11, 2012) ("Appearing in this case to oppose Plaintiff's request, the DA invokes the Supreme Court's recent opinion in *Rehberg v. Paulk,* 132 S.Ct. 1497 (2012), as the beginning and the end of the analysis, categorically foreclosing the relief sought by Plaintiff here. If the DA's position were correct—and *Rehberg*

barred the use of grand jury witness testimony in a malicious prosecution suit brought under § 1983—then Plaintiff could not establish a particularized need to unseal A.C.'s grand jury records. Accordingly, the DA's argument is addressed at the outset. In *Rehberg*, a unanimous Court held that grand jury witnesses enjoy absolute immunity from § 1983 liability based on their testimony. . . It also declined to recognize exceptions for complaining witnesses or law enforcement witnesses. . .To preempt exceptions that could swallow its rule, the Court noted that this grant of immunity 'may not be circumvented by claiming that a grand jury witness conspired to present false testimony, or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.'. . Without such a corollary to its main holding, *Rehberg* would soon become a nullity, since 'a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.'. . This context is critical to an understanding of the specific language with which the Court expounded and protected its new rule. . . That very language rests at the heart of the DA's argument, which fixates on the final clause of the *Rehberg* corollary: a ban on 'using evidence of the [grand jury] witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution.'At first glance, this language appears to support the DA's position that *Rehberg*-whether intentionally or inadvertently-precludes the introduction of any grand jury testimony as evidence in a § 1983 malicious prosecution claim. Yet the apparent incongruity between such a sweeping prohibition and the traditionally narrow compass of absolute immunity doctrine suggests the need for a closer look. . . So does the oddity of locating this doctrinal innovation in a corollary whose stated purpose is to protect grand jury witness immunity. The question is thus whether Rehberg's reference to 'any other § 1983 claim' refers to *any claim at all*-or, as Plaintiff urges, to *any claim against the witness who testified.* This is almost, but not quite, a question of first impression. The DA offers four citations to support his claim. Three of these cases, however, are inapposite, since they do not address circumstances where a witness *other* than the § 1983 defendant, and with whom the defendant had *not* conspired, offered the disputed grand jury testimony. . . Upon careful review of the opinion, this Court holds that *Rehberg* does not create a categorical bar to the use of grand jury testimony as evidence against defendants in malicious prosecution suits brought pursuant to § 1983. Rather, where *Rehberg* bans 'using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution,' that decision prohibits only the use of a witness's own grand jury testimony against that witness if he or she subsequently becomes a § 1983 defendant."); ***Sankar v. City of New York***, No. 07 CV 4726(RJD)(SMG), 2012 WL 2923236, *2, *3 (E.D.N.Y. July 18, 2012) ("Defendants cite *Rehberg v. Paulk* to argue that Officer Ostrowski is absolutely immune from *'any* § 1983 claim based on the witness' testimony.'. . Defendants argue that *Rehberg* 'clearly counsels against the Court's finding' that Ostrowski's signing of the sworn criminal complaint alone is sufficient to satisfy the initiation prong of a malicious prosecution claim. . . In *Rehberg*, the Supreme Court held that an investigator employed by the DA's office was entitled to the same absolute immunity under Section 1983 as a trial witness. In *dicta*, the Court observed: 'By testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution.... [S]uch a witness, unlike a complaining witness at common law, does not make the decision to

press criminal charges.'. . *Rehberg*, however, is inapplicable. *Rehberg* did not alter controlling Second Circuit (and New York) law that an officer's filing of a sworn complaint is sufficient to satisfy the initiation prong of a malicious prosecution claim. Ostrowski's testifying at the grand jury was but one additional step this officer took in his effort to push the case against plaintiff forward. If anything, *Rehberg* reinforces the distinction between one who simply testifies at a grand jury and 'does not make the decision to press criminal charges,' *Rehberg*, 132 S.Ct. at 1508, and one, like Ostrowski, who 'set[s] the wheels of government in motion by instigating a legal action.'. . Defendants' attempt to convert grand jury testimony into an all-purpose shield from malicious prosecution liability is unpersuasive. The adoption of such a broad interpretation of *Rehberg* would allow any police officer—regardless of the extent of their involvement in laying the groundwork for an indictment—to escape liability merely by securing an appearance before a grand jury.").

See also ***Vidro v. U.S.***, 720 F.3d 148, 149 (2d Cir. 2013) ("We must address two questions of first impression in this circuit: (1) whether, in FTCA suits, the United States may assert all defenses available to private persons; and (2) whether grand jury witness testimony is absolutely privileged under Connecticut law. Although our analysis is different from that of the district court, we concur with its ultimate conclusion that, if its agents would enjoy immunity from suit under state tort law, the United States may also assert immunity in FTCA actions. Further, because Connecticut would recognize an absolute privilege for grand jury witness testimony, the United States is not vicariously liable under the FTCA for the officers' statements before the federal grand jury. The district court's order of dismissal is affirmed.").

Briscoe v. LaHue, 460 U.S. 325, 342 (1983) (police officers entitled to absolute immunity for claims brought pursuant to § 1983 arising out of allegedly perjured testimony at criminal trials); ***Vakilian v. Shaw,*** 335 F.3d 509, 516 (6th Cir. 2003)(investigator denied absolute immunity for role in procuring arrest warrant and for his testimony as a "complaining witness"); ***Harris v. Roderick***, 126 F.3d 1189, 1199 (9th Cir. 1997) ("While Cooper and Roderick are correct that police officers are generally entitled to absolute immunity for perjury committed in the course of official proceedings, *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), complaining witnesses who wrongfully bring about a prosecution generally are not. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). While we have extended the absolute immunity that exists for the testimony of law enforcement officials at the trial stage to other fora, including grand juries, we have not considered the question whether there is an exception to the absolute immunity rule with respect to law enforcement witnesses who serve functionally as complaining witnesses. In other words, we have not determined whether *Malley* provides an exception to *Briscoe*. The Second, Fifth, Seventh, and Tenth Circuits have expressly concluded, however, that law enforcement officials are not entitled to absolute immunity for false testimony when they function as complaining witnesses. [citing cases] . . . . We agree with the reasoning of the other circuits and hold that if Cooper and Roderick functionally served as complaining witnesses who may be said to have initiated Harris's prosecution they are not entitled to absolute immunity for their false statements."); ***Mejia v. City of New York***, 119 F. Supp.2d 232,

273 n.38 (E.D.N.Y. 2000) ("Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.' [citing *Ricciuti*, 124 F.3d at 130] . . . Similarly, in the context of a § 1983 malicious prosecution claim, defendants should not be able to claim qualified immunity on the basis of an objectively reasonable belief that probable cause existed, where there is evidence on which a reasonable juror could find that the defendants induced the prosecutor to commence proceedings through the presentation of false testimony.").

See also ***Rolon v. Henneman***, 517 F.3d 140, 145-47 (2d Cir. 2008) ("Because absolute immunity is 'justified and defined by the functions it protects and serves, not by the person to whom it attaches,' *Forrester v. White*, 484 U.S. 219, 227 (1988), in *Austern v. Chicago Board of Options Exchange, Inc.*, 898 F.2d 882 (2d Cir.1990), we extended the common law protection of immunity accorded to judges to arbitrators in contractually-agreed upon arbitration proceedings. . . . Rolon urges that our holding in *Austern* should represent the limit of absolute immunity conferred to participants in the arbitration process; he argues that there is no sound basis for extending the absolute immunity doctrine to witnesses testifying at police disciplinary hearings of the type involved in this case. We do not agree. . . . The policy rationale for witness immunity, as articulated by the Supreme Court in *Briscoe*, applies with equal or near equal force in the arbitral context . . . . Applying the Supreme Court's reasoning in *Briscoe*, we therefore conclude that because the nature of this arbitration was materially indistinguishable to that of formal judicial proceedings, and because Henneman performed the same function as his judicial witness counterpart, absolute immunity should attach to Henneman as a testifying witness at the arbitration hearings. . . We acknowledge, however, that not all arbitrations will be conducted in a manner equivalent to that of the judicial process. . . The procedural safeguards employed in arbitrations may vary, altering the function of witnesses accordingly. We need not and do not opine as to the minimum safeguards required in order for absolute immunity to attach in other arbitral settings. It suffices for our decision that the arbitral proceeding at issue encompassed an adequate number of safeguards so as to ensure that its function and the function of the witnesses sufficiently mirrored the judicial process. Accordingly, we hold that, under a functional approach to immunity, Henneman is absolutely immune for his testimony in the arbitration proceedings."); ***Todd v. Weltman, Weinberg & Reis Co., L.P.A.,*** 434 F.3d 432, 440-44, 447 (6th Cir. 2006) ("Plaintiff contends that Defendant should not receive absolute immunity for its affidavit because there were no procedural safeguards in insuring the veracity of the affidavit at the time it was submitted, due to the *ex parte*, nonadversarial nature of the initiation of garnishment proceedings under Ohio law. . . . While Plaintiff's proposed inquiry of adversarial-nonadversarial for questions of absolute immunity is viscerally appealing, considering the ease of its application and its partial support in the rationale of *Briscoe*, it is ultimately unviable. We agree with the cited cases insofar as they stand for the proposition that witness testimony at an adversarial proceeding is entitled to absolute immunity, because this proposition is supported by the rationale in *Briscoe* that witness immunity, coupled with 'the crucible of the judicial process,' is the path that would best 'lead to the ascertainment of truth.' . . . We do not agree, however, that the nonadversarial nature of a

proceeding automatically precludes applicability of absolute immunity to witness testimony given at such a proceeding. One glaring example not mentioned by either Plaintiff or Defendant is witness testimony in grand jury proceedings. A grand jury proceeding is the quintessential form of an *ex parte*, nonadversarial proceeding where many of the procedural safeguards of a trial do not exist. Despite this fact, most circuits, including this circuit, have held that absolute witness immunity applies to witness testimony before a grand jury. . . .The question then becomes what the proper inquiry actually should be. We find that a reviewing court should look at the twin rationales listed in *Briscoe*: insuring that a witness is unafraid of providing testimony, and, when the witness testifies, insuring that the witness is not impermissibly pressured to alter her testimony. . . .Additionally, a reviewing court should look to the common law to determine whether immunity was available in specific instances. . . . The case law cited above demonstrates that states have allowed claims where a plaintiff alleges an improper garnishment, whether the claim is one of malicious prosecution, abuse of process, or wrongful garnishment. This includes a claim that the defendant improperly garnished exempt property. The defendant is not entitled to absolute immunity to counter these claims; instead, he has the defenses of probable cause and lack of malice. This common law backdrop generally indicates that Defendant would not be absolutely immune from suit for an improper garnishment. The question then becomes whether Defendant, although not immune from suit, should receive absolute immunity for the statements he made in the affidavit. From the Supreme Court precedent previously discussed, this Court draws several rules:

(1) A private witness testifying at trial is absolutely immune for her testimony;

(2) A private witness testifying at a grand jury is absolutely immune for her testimony;

(3) A private witness testifying as a complaining witness has no immunity for her testimony.

This Court finds that Defendant is a complaining witness. . . . From a practical perspective, treating Defendant as a complaining witness without immunity simply makes sense. The Court reserves absolute immunity for individuals when they functionally serve as 'integral parts of the judicial process,' such as judges, advocates, and witnesses in their ordinary judicial roles. . . The purpose of this immunity is to preserve the integrity of our judicial system, not to assist a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding.").

See also ***Manning v. Miller,*** 355 F.3d 1028, 1031-33 (7th Cir. 2004) ("Ultimately, in this case, whether Agents Buchan and Miller are entitled to absolute immunity depends on how this court allows Manning to characterize his claim. On one hand, Agents Buchan and Miller believe this is merely a dressed-up claim of perjury and conspiracy to commit perjury (and therefore want absolute immunity). On the other hand, Manning characterizes this as a *Brady* claim [footnote omitted], that is, a claim for the withholding of exculpatory evidence (and claims there is no absolute immunity). The facts of this case are unique, after considering them closely we feel that Manning's claim may properly be brought under *Brady* and the agents are not entitled to absolute immunity. The law regarding immunity is very fact dependent, and the various facts courts have considered reveal a spectrum of behavior that has ultimately been categorized as immune or not

immune. On the end of the spectrum where behavior is solidly considered to be immune from civil liability is perjury. . . . On the other end of the spectrum are cases where prosecutors withhold exculpatory evidence; in these cases they are not immune. . . . Agents Buchan and Miller worry that permitting Manning to style his cause of action as a *Brady* claim rather than a perjury claim will 'perform an effective end run around' testimonial immunity. . . We agree that in some cases it may be hard to distinguish the two. [footnote omitted] However, in this case Manning is accusing the agents of behavior that goes well beyond testimony given at trial. Additionally, while we must certainly be careful not to diminish testimonial immunity, we must also be cautious of eroding the viability of *Brady* claims. Considered from a different view, one could argue that appellants ask us to create a rule that would eliminate the availability of *Brady* claims any time perjury is involved. In short, based on the specific facts of this case, we believe that Manning has presented a *Brady* claim and as such, Agents Buchan and Miller do not have absolute immunity."); ***Newsome v. McCabe (Newsome II),*** 319 F.3d 301, 304, 305 (7th Cir. 2003) ("Seeking a way around our decision that the officers are not entitled to qualified immunity, Chicago now contends that they should have received *absolute* immunity. . . . Chicago contends that testimonial immunity should be extended to non-witnesses who assisted in the testimony's preparation. We rejected that extension in *Ienco v. Chicago*, 286 F.3d 994, 1000 (7th Cir.2002), and see no reason to revisit that issue because Newsome's case does not present it. McCabe and McNally were not held liable for conspiring with the eyewitnesses to commit perjury; their liability is under the due process clause because they concealed exculpatory evidence–the details of how they induced the witnesses to finger Newsome."), *cert. denied,* 123 S. Ct. (2003); ***Keko v. Hingle,*** 318 F.3d 639, 642, 644 (5th Cir. 2003) (" . . . . Dr. West asserts that he is entitled to absolute immunity (a) for the expert witness report he authored, which was offered at a probable cause hearing to obtain an arrest warrant for Keko, and (b) for the research and investigative work that led to preparation of the expert report. Although West has not been sued for his testimony at Keko's criminal trial, he bases his claim on the Supreme Court's decision in *Briscoe v. LaHue*, . . . holding that witnesses, like judges and prosecutors, are shielded by absolute immunity from § 1983 liability arising from their participation in judicial proceedings. Dr. West argues, not without force, that the protection of absolute immunity is lost if an expert witness, whose testimonial competence derives solely from the application of his expertise to an investigation conducted by the state, may be sued for the activity that spawned his testimony. Or, as Judge Easterbrook put it, It would be a hollow immunity if the aggrieved party could turn around and say, in effect: 'True, your delivery of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony.' Substance is exactly what *Briscoe* puts off limits. . . . Unfortunately for Dr. West, the Supreme Court not only perpetuated absolute immunity for witnesses in judicial proceedings, based on an historical analysis of the law as it stood when § 1983 was enacted, but the Court has subsequently bounded absolute immunity within the precise confines of adversarial judicial proceedings. Thus, when either a police officer or a prosecutor becomes a 'complaining witness' in a probable cause hearing, neither official may claim absolute immunity. . . . These decisions suggest that an informal, ex parte probable cause hearing is not the type of judicial proceeding for which a witness's testimony would require the full shield of absolute immunity. The only 'testimony' now at issue is his report submitted in such a probable cause hearing. We decline to

extend absolute witness immunity into an arena where the Supreme Court has not found factual testimony to justify such heightened protection. . . .Further, to the extent Dr. West's pre-testimonial activities were investigative, his immunity ought to correlate with the merely qualified immunity granted to the police for comparable activities. Thus, if, as alleged, Dr. West used shoddy and unscientific research techniques that resulted in a report critical to a baseless murder prosecution of Keko, there is no obvious reason why Dr. West should enjoy immunity greater than that of other investigators. By holding that absolute immunity does not shield Dr. West, we do not imply any opinion on the strength of his qualified immunity defense or the ultimate validity of Keko's conspiracy allegations."); ***Hinchman v. Moore,*** 312 F.3d 198, 205 (6th Cir. 2002) ("Immunity regarding testimony, however, does not 'relate backwards' to events that transpired prior to testifying, even if they are related to subsequent testimony. . . . Hinchman's claims are based on the defendants' alleged prevarications prior to testifying at the preliminary hearing. Specifically, Hinchman contends that the defendants lied to State Trooper Taylor and to the prosecutors in order to establish probable cause to arrest, imprison, and prosecute her. Although she asserts in the complaint that the defendants also lied on the witness stand during the preliminary hearing, her claims are not based on such conduct. The defendants, therefore, are not entitled to absolute witness immunity."); ***Ienco v. City of Chicago,*** 286 F.3d 994, 1000 (7th Cir. 2002) ("If Ienco were merely claiming damages based upon the officers' perjured testimony, the officers would be entitled to absolute immunity. . . However, Ienco's claims are not based upon the officers' perjured testimony. Instead, he argues that the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted him. Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity. . . Therefore, no absolute testimonial immunity attaches to the actions of the officers outside of trial, and they are proper defendants in this action."); ***Gray v. Poole,*** 275 F.3d 1113, 1117-19 (D.C. Cir. 2002) ("Poole's actions as an investigator and adviser to the Corporation Counsel - i.e., relating to whether Corporation Counsel should bring the neglect action - are analogous to actions taken by police officers prior to the giving of testimony in a criminal prosecution. Like a police officer, Poole tracked down information, made professional judgments, and passed on her findings to attorneys in the office of the Corporation Counsel. These functions are subject to qualified, not absolute, immunity . . . The statement Poole signed in the child neglect action in Superior Court is a different matter, however, because her function in this connection was as a witness in a judicial proceeding and hence was 'intimately associated' with the judicial process. Poole is therefore entitled to absolute immunity from suit for what she said in that statement. . . . It does not matter whether Poole's sworn statement was given in oral or written form; what matters is that her statement was the equivalent of sworn testimony in a judicial proceeding. . . . In this case, Poole's statement under oath was not that of a 'complaining witness.' Rather, the petition initiated the neglect action in Superior Court, just as a complaint does in federal district court, and Poole's sworn statement was thus an undeniable part of the 'judicial process.'"); ***Newsome v. McCabe***, 256 F.3d 747, 751-53 (7th Cir. 2001) (Plaintiff, whose conviction for murder was overturned after he had served 15 years of his sentence, could state a procedural due process claim against officers who withheld exculpatory evidence from prosecutors; no immunity for officers), *petition for reh'g denied,* 260 F.3d 824 (7th Cir. 2001), *abrogated by* ***Manuel v. City***

of Joliet, 137 S. Ct. 911 (2017) ; ***Zahrey v. Coffey***, 221 F.3d 342, 344, 349, 356, 357 (2d Cir. 2000) ("We hold that there is a constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty.")*;* ***Jones v. Cannon***, 174 F.3d 1271, 1288, 1289 (11th Cir. 1999) ("Whether Powers has absolute immunity from liability in a § 1983 action for allegedly suborning perjured testimony from Jones's cell mate presents an issue of first impression in this Circuit. The majority of circuits that have addressed the issue have extended the absolute immunity for a witness's trial testimony under *Briscoe* to those persons who allegedly conspired with the witness to present allegedly false testimony. [citing cases] In these cases, the circuit courts held that prosecutors and witnesses have absolute immunity for claims of conspiracy to commit perjury based on a witness's allegedly false testimony at trial, before a grand jury, or at a post-conviction hearing. . . . We concur with the Tenth Circuit [*see Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir.1991)] that the extension of absolute immunity from civil liability to those who allegedly procure the perjured testimony serves the same important purposes as immunity to witnesses themselves.").

See also ***Doe v. Boland***, 630 F.3d 491, 499 (6th Cir. 2011) ("Absolute immunity, it is true, also extends to witnesses, but it does not apply to the kind of conduct at issue here. . . . [T]his defense originated as an immunity 'only against suits for defamation,'. . . and is limited to in-court statements. That some 'acts may ultimately lead to witness testimony does not serve to cloak these actions with absolute testimonial immunity.' *Spurlock v. Satterfield*, 167 F.3d 995, 1001 (6th Cir.1999). . . . Because Boland created and possessed the images prior to testifying in court, he has no claim to any such immunity."); ***Gregory v. City of Louisville,*** 444 F.3d 725, 739, 741(6th Cir. 2006) ("This Court has consistently held that nontestimonial, pretrial acts do not benefit from absolute immunity, despite any connection these acts might have to later testimony. As early as 1987 this Court noted in *Alioto v. City of Shively* that the doctrine of absolute immunity would not protect an official accused of falsifying evidence or even conspiring to falsify evidence. . . More than a decade after the *Alioto* case, the *Spurlock* panel found that efforts to persuade a third-party witness to lie were non-testimonial acts, regardless of the acts' connection to the third-party witness' later testimony. . . The *Spurlock* case is particularly instructive, both because it establishes the law in this Circuit on the extent of absolute immunity, and because the facts alleged in the instant case and the facts alleged by the *Spurlock* plaintiffs are strikingly similar. . . . The Supreme Court demands a functional test for the extension of absolute immunity for government actors. This Circuit has consistently held that absolute immunity for testimony at trial does not 'relate back' to shield pretrial, nontestimonial acts such as fabrication of evidence. Accordingly, we affirm the district court's amended order and find that Defendants Katz, Carroll, and Clark are not entitled to absolute immunity on Plaintiff's fabrication of evidence claims."); ***Mowbray v. Cameron County, Texas,*** 274 F.3d 269, 277, 278 (5th Cir. 2001) ("Although witnesses are entitled to absolute immunity against § 1983 suits based on their testimony in a criminal trial, *Briscoe v. LaHue, . . .* it is less certain whether the rule of *Briscoe* extends to claims that a witness entered a pre-trial conspiracy to commit perjury. Of the eight circuits that have addressed the issue, seven have extended absolute witness immunity. [footnote omitted] The Second Circuit stands

alone in reaching a contrary conclusion. [footnote omitted] We find the reasoning of the majority of circuits persuasive. As a matter of logic, '[a] person may not be prosecuted for conspiring to commit an act that he may perform with impunity.' . . .Accordingly, we conclude that absolute witness immunity bars § 1983 suits for conspiracy to commit perjury."); ***Paine v. City of Lompoc,*** 265 F.3d 975, 983 (9th Cir. 2001) ("[A]bsolute witness immunity does not shield an out-of-court, pretrial conspiracy to engage in non-testimonial acts such as fabricating or suppressing physical or documentary evidence or suppressing the identities of potential witnesses."); ***Franklin v. Terr,*** 201 F.3d 1098, 1102 (9th Cir. 2000) ("We are not presented with, and do not decide, the question whether § 1983 provides a cause of action against a defendant who conspired to present the perjured testimony of another but who did not testify as a witness herself. In concluding that the rule of *Briscoe* applies to allegations of conspiracy to commit perjury by someone who has testified as a witness in the proceeding where the perjury took place, or was to take place, we join six circuits that have reached the same conclusion."); ***Spurlock v. Satterfield***, 167 F.3d 995, 1001 (6th Cir.1999) ("The simple fact that acts may ultimately lead to witness testimony does not serve to cloak them with absolute testimonial immunity."). ***Dory v. Ryan***, 25 F.3d 81, 84 (2d Cir.1994) (declining to give witness absolute immunity for extra-judicial action of conspiring to convict Dory on the basis of perjured testimony); ***Mitchell v. City of Boston***, 130 F. Supp.2d 201, 210-13 (D. Mass. 2001) ("In the wake of the Supreme Court's holding in *Briscoe*, most circuits have rejected § 1983 claims alleging that the defendants who were testifying witnesses were not entitled to absolute immunity because they were engaged in a conspiracy with each other or with the prosecutor to offer perjurious testimony in a criminal case against the plaintiff. [citing cases] Courts have differed on whether a non-testifying police officer is shielded by absolute immunity when he is charged with persuading a testifying witness to commit perjury.[comparing cases] . . . . The First Circuit has not yet had the opportunity to speak with a firm voice in the post-*Briscoe* debate. . . . I agree with the many courts that have held that a plaintiff cannot use a conspiracy claim to short-circuit *Briscoe*'s grant of absolute immunity to testifying witnesses . . . However, as several courts including the First Circuit have noted, a defendant cannot use *Briscoe*'s rule of absolute immunity as a shield to protect a whole course of conduct merely because, at some point, the defendant was linked to testimony given in a judicial proceeding. . . . Holland's actions differed from DeMarco's in that they were not inextricably tied to his role in the judicial proceedings. . . .[A]ll of the key allegations in the conspiracy claim deal with the extra-judicial course of conduct taken on Holland's part to secure the conviction of Mitchell with a fabricated story of a police station confession. . . Under these circumstances, a defendant is not entitled to take cover behind the shield of absolute immunity.").

See also ***Jones v. Cannon***, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999) ("This Court in *Mastroianni* pointed out in a footnote that several circuits have carved out exceptions to the doctrine of absolute immunity for testifying witnesses, but declined to decide whether that 'case challenges the previously delineated limits of our doctrine of absolute immunity.' For several reasons, we expressly reject carving out an exception to absolute immunity for grand jury testimony, even if false and even if Powers were construed to be a complaining witness. First, although *Mastroianni* cites circuits adopting an exception for complaining witnesses, we agree

with the Third Circuit's rejection of that approach and its observation that *Malley* does not affect the broad witness protection adopted for law enforcement officers in *Briscoe*. *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 n. 16 (3d Cir.1992). The Third Circuit rejected the reasoning of *White v. Frank*, 855 F.2d 956 (2d Cir.1988), one of the cases cited in the footnote in *Mastroianni*. *Id*. Second, this case vividly illustrates the serious problems with carving out such an exception and imposing civil liability for post-indictment detention based on Powers's false testimony deceiving the grand jury. To prove or to defend against such a claim would necessitate depositions from the prosecutor, the grand jury witnesses, and the grand jury members. Thus, allowing Powers's grand jury testimony, even if false, to subject Powers to additional civil damages on the false arrest claims for Jones's post-indictment detention, in effect, would emasculate both the absolute immunity for grand jury testimony and the confidential nature of grand jury proceedings. The remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages.").

See also ***Zamora v. City of Belen***, 383 F.Supp.2d 1315, 1334, 1335 & n.2 (D.N.M. 2005) ("Zamora is attempting to sue Valdez in his individual capacity for the prosecutor's failure to play the audiotape. . . . Zamora's argument fundamentally misconstrues the roles and respective duties of, on the one hand, an investigating law enforcement officer who testifies before a grand jury, and, on the other hand, the prosecuting attorney. Unlike the situation in which the officer has not reported or disclosed exculpatory evidence to the prosecutor, or in which the officer provides false or fabricated evidence to the prosecutor, [Valdez] fulfilled his duty as the investigating officer by providing all relevant information to Harwell. Zamora does not cite any case involving an officer's failure to present exculpatory evidence to a grand jury that the officer had already disclosed to the prosecuting attorney. . . In effect, without sound explanation for how he gets there, Zamora treats Valdez as the prosecutor. . . .The Court could also not locate any cases–Tenth Circuit or otherwise–which addressed whether an officer, having reported all relevant information to the prosecuting attorney and not having made any false or misleading representations, can nevertheless still be held liable under § 1983 for his failure to mention exculpatory evidence in his grand jury testimony. Instead, the cases located by the Court discuss the effect of an officer or other state office allegedly withholding exculpatory evidence from, or provided false evidence to, the prosecuting attorney. . . . The Tenth Circuit has stated that a police officer can be a 'complaining witness'–and therefore not entitled to absolute immunity–and 'initiate ... a baseless prosecution by giving false testimony at a grand jury proceeding.'. .The situation in this case, however, is fundamentally different from an officer excluding exculpatory evidence from the prosecuting attorney; here, Valdez provided all evidence–including the alleged exculpatory evidence–to Harwell. Harwell's legal determination of what constituted exculpatory evidence is the province of the prosecuting attorney, not the investigating officer. . . Because there is no evidence to support the allegation that Valdez testified falsely or misled the prosecutor, there is no genuine issue of material fact whether Valdez initiated or instigated the alleged wrongful prosecution of Zamora. Valdez is therefore entitled to absolute immunity for testimony at the grand jury proceeding. To hold otherwise would lead to the untenable situation in which an officer faithfully and dutifully discloses all material evidence–exculpatory and otherwise–to the

prosecutor, but can nevertheless be held liable for damages arising out the prosecutors' legal decision to not present certain evidence at the grand jury proceedings. That is a result no court has yet endorsed.")

The Court of Appeals for the Third Circuit has distinguished cases involving misrepresentation of facts from cases involving misrepresentation of law. *See* ***Egervary v. Young,*** 366 F.3d 238, 250, 251(3d Cir.2004) ("To sum up, we adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures but reaches an erroneous conclusion because he or she is misled in some manner as to the relevant facts, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions. . . However, we draw a distinction between that situation and the facts as presented both here and in *Townes,* where the actions of the defendants, while clearly a cause of the plaintiff's harm, do not create liability because of the intervention of independent judicial review, a superseding cause. We conclude that where, as here, the judicial officer is provided with the appropriate facts to adjudicate the proceeding but fails to properly apply the governing law and procedures, such error must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability. . . . Thus, because the judge's execution of the ex parte Order superseded any prior tortious conduct by defendants and shrouded any subsequent actions with a cloak of legitimacy, we find no basis for imposing *Bivens* liability on any of the defendants. This is not to say that we condone behavior in which an attorney urges the court to make an erroneous decision or fails to properly investigate the facts or governing law before presenting them to the court. However, such actions or omissions would neither excuse judges from their responsibility to correctly ascertain the relevant law and procedures nor would they create civil liability on the part of others for errors of law committed by judges. Finally, we note that neither the District Judge's error in granting the Order nor the defendants' actions in seeking and executing it left Egervary without a remedy in the underlying case. Egervary initially filed a motion for reconsideration of the ex parte Order. He could have pursued this motion, and, if it were denied, appealed the ruling. A reversal by this Court then would have permitted Egervary to enlist the aid of the State Department in obtaining Oscar's return. He instead chose to withdraw his motion for reconsideration and pursue the *Bivens* claim. While it was clearly his right to do so, he is now left with the consequences of that decision.").

4. Legislative Immunity

Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for members of state legislature). In ***Bogan v. Scott-Harris***, 118 S. Ct. 966 (1998), a unanimous Court made "explicit what was implicit in our precedents: Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities." *Id*. at 972. The Court went on to address question of whether Court of Appeals erred in classifying conduct here as administrative rather than legislative.

> Although the Court of Appeals did not suggest that intent or motive can overcome an immunity defense for activities that are, in fact, legislative, the court erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative. Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. . . . This leaves us with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative. We have little trouble concluding that they were. Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official. . . .We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office.

Id. at 972, 973.

See also ***Allen v. Cooper***, 895 F.3d 337, 358 (4th Cir. 2018) ("In this case, the North Carolina officials were sued in their individual capacities for 'conspir[ing] to convert [Allen's] copyrighted works into public documents' through the enactment of § 121–25(b). But the only actual conduct alleged in furtherance of the conspiracy—that the officers 'wrote, caused to be introduced, lobbied for passage of, and obtained passage' of § 121–25(b)—is quintessentially legislative in nature and falls squarely within the scope of legislative immunity. Allen and Nautilus's only argument to the contrary is that the complaint alleges that the officers sought enactment of § 121–25(b) with *impure motives*, seeking to benefit an affiliated nonprofit entity and to remove the threat of legal liability. As noted, however, motive is irrelevant to the issue."); ***Young v. Mercer County Comm'n***, 849 F.3d 728, 734-35 (8th Cir. 2017) ("[D]ecisions about whether to approve or deny proposed budget items fall squarely within the discretion of the Commission as a legislative body, and we have little difficulty concluding that the Commissioners are entitled to legislative immunity for their action denying Mr. Young's budget request for part-time assistance. . . .Although this is a closer question, we believe the district court correctly ruled the Commissioners are entitled to legislative immunity for their termination of the Agreement and cessation of rent payments. . . . Thus, regardless of whether the decision to terminate the

Agreement was budgetary or an independent act, the Commission is the legislative body tasked with housing and funding the county offices. When the Commission discovered the Agreement was possibly in violation of the state constitution, the Commissioners were entitled to take action to remedy the situation. . . .In this instance, the Commissioners met as a legislative body and voted on the appropriate course of action to deal with the possible illegality of a contract into which they had entered. . . That course of action was legislative, regardless of whether it resulted in an ordinance. We conclude that the district court correctly ruled that the Commissioners are entitled to legislative immunity for denying Mr. Young's budget request, terminating the Agreement, and ceasing the $350.00 monthly rental payments."); ***Bierce v.Town of Fishkill***, No. 15-860-CV, 2016 WL 3749047, at *3 (2d Cir. July 13, 2016) (not published) ("Here, the Board voted to eliminate two positions from the police department, citing budgetary concerns. The district court concluded that LaColla's actions were legislative, and granted LaColla.s motion for judgment on the pleadings. However, we have previously held that personnel decisions—even if accomplished by vote—are administrative, and therefore not immune to liability, if they are directed at a particular employee and do not adopt or implement a broader legislative policy. . . The Board's resolution affected just two employees—both of whom were specifically identified by name. Even if we were to conclude that this resolution was not directed at a particular employee, the pleadings contain no allegations that the resolution formed part of a broader legislative policy. Defendants' reliance on *Bogan*, then, is misplaced. Although that decision involved the elimination of a particular department, of which the plaintiff was the sole employee, the elimination occurred as part of a larger budgetary package that proposed freezing the salaries of all municipal employees and eliminating 135 positions. . . We therefore conclude that the allegations were insufficient to support LaColla's claim of absolute legislative immunity on a motion for judgment on the pleadings.); ***Reeder v. Madigan***, 780 F.3d 799, 803 (7th Cir. 2015) ("[T]he activity in question here—the decision whether to confer media credentials on an applicant—was legislative in nature, and integrally so. . . .Reeder's primary argument to the contrary—that the action to deny him credentials was administrative in nature, not legislative—finds little support in the case law or in the slim record before us. Reeder's conception of the scope of legislative immunity is too restrictive."); ***McCray v. Maryland Dept. of Transp., Maryland Transit Admin.***, 741 F.3d 480, 485, 486 (4th Cir. 2014) ("Finally, and most helpful to the MDOT and MTA, our case law shows that legislative immunity extends to those individuals who advise legislators. . .This case law stands for the proposition that just as a legislator is immune from discrimination lawsuits when she makes budget decisions based on improper animus, aides to that legislator are also immune. Legislative immunity is a shield that protects despicable motives as much as it protects pure ones. For this reason, the district court's conclusion is correct insofar as it shields the MTA and MDOT from lawsuit based on the counsel they gave executive officials in Maryland who carried out the budget cuts.Nonetheless, we vacate and remand because the complaint alleges discriminatory actions that took place before the legislative activity began."); ***Leapheart v. Williamson***, 705 F.3d 310, 315 (8th Cir. 2013) ("The Defendants in the present case are entitled to legislative immunity because this case is distinguishable from *Canary*. Like *Canary*, the job duties appeared to stay the same after the Defendants recreated the human resources position. However, control over the position moved from the Mayor to the City Council, a quintessential legislative decision.

Therefore, in the present case, moving control over human resources has 'implications beyond the occupant of a particular office' that were lacking in *Canary*. *See also Bagley*, 646 F.3d at 395–96 (declining to follow *Canary* because the newly created position, although similar, had different job tasks than the eliminated position at issue)."); ***Schmidt v. Contra Costa County***, 693 F.3d 1122, 1138 (9th Cir. 2012) ("All four *Kaahumanu* factors support our determination that the Policy adopted by the Superior Court's Executive Committee in May 2004 was legislative. Furthermore, the district court correctly rejected Schmidt's argument that the Judge Defendants were liable for applying the Policy to her: the Policy was a legitimate legislative act, and was not applied to Schmidt until May 20 at the earliest, one day after it was unanimously adopted by the Executive Committee. We therefore conclude that the Judge Defendants are entitled to legislative immunity for their role in adopting and applying the Policy."); ***Kensington Volunteer Fire Dept., Inc. v. Montgomery County***, 684 F.3d 462, 471 (4th Cir. 2012) ("Leggett and Bowers were tasked with executive and administrative duties, but they are named as defendants based on their legislative activity in proposing, submitting, and advocating for a budget. . . Legislative immunity includes 'officials outside the legislative branch ... when they perform legislative functions.'. . Thus, the district court properly found that Leggett and Bowers are entitled to legislative immunity."); ***Bagley v. Blagojevich***, 646 F.3d 378, 393-96 (7th Cir. 2011) ("Legislative immunity claims are not successful when the action relates to the firing of a specific individual rather than the elimination of positions. . . .Other circuits apply the same distinction between actions that involve the elimination of positions for policy reasons (legislative actions) and actions that result in an individual's termination for reasons that relate to that individual (administrative actions). . . . Nothing in the record suggests that the Governor targeted particular employees; rather, he targeted the positions. Thus, Governor Blagojevich's line-item veto was substantively a legislative act and not administrative. . . . Because we find that Governor Blagojevich's veto was legislative, we also hold that the district court did not abuse its discretion in blocking the Governor's deposition and limiting Curry's deposition."); ***Community House, Inc. v. City of Boise, Idaho***, 623 F.3d 945, 973 (9th Cir. 2010) ("CHI must be satisfied with the City and the Council as defendants on the substantive issues raised in this case and with Chatterton and Birdsall in their official capacities only. Our decision today has no effect on CHI's claims against them. As the Supreme Court held in *Owen v. City of Independence*, 'imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but ... no such pernicious consequences [are] likely to flow from the possibility of a recovery from public funds.'. . We hold only that as a matter of law, the individual defendants are beyond the reach of CHI's claims. To pursue these individuals–as suggested at oral argument by CHI's counsel–for damages, punitive or otherwise, serves no legally cognizable purpose. Mayor Bieter and City Council members Jordan, Clegg, Bisterfeldt, Eberle, Mapp, and Shealy are absolutely immune from suit, either for damages or injunctive relief. The lease and sale of Community House to the BRM, preceded as it was by the City's long partnership with CHI and grants of large amounts of funding, 'reflected a discretionary, policymaking decision implicating the budgetary priorities of the[C]ity and the services the [C]ity provides to its constituents.'"); ***Bryant v. Jones***, 575 F.3d 1281, 1305, 1306 (11th Cir. 2009) ("By preparing the 2004 budget proposal, which Jones approved and submitted to the Board of Commissioners, Stogner argues that he necessarily acted in a legislative

capacity and is deserving of absolute immunity. As part of his argument, Stogner seeks to have us adopt a *per se* rule that would provide an executive official immunity any time he drafts a proposal that is later submitted to a legislative body. We decline to adopt such a rule as it cuts too broadly and is inapposite to the principle that our inquiry is not bound by officials' titles and the characterizations officials place on their own activities. Instead, we examine the facts of each case to determine 'whether the [official] in the instant case [was] engaging in legislative activity.'. . . Relying on *Bogan v. Scott-Harris,* . . . Stogner characterizes his behavior as a legitimate legislative act by virtue of his developing and drafting the budget proposal that was later adopted by the Board of Commissioners. Implicit within this characterization is the assertion that the elimination of Lowe's position (Deputy Director of Strategic Management and Development Parks and Recreation Department) arose out of broad policy and budget considerations and did not stem from specific facts as they related to Lowe. We agree. . . . Lowe, however, attempts to cast this case as merely an employment action masked by the legislative process. He argues that legislative immunity is unavailable where, as here, the legislation adversely impacted a single individual. The argument is unavailing. Ordinarily, the decision to terminate an individual's employment is characterized as an administrative action, . . . but Lowe's employment was not terminated in this case. The Board of Commissioners chose to adopt the 2004 budget, which abolished the position of Deputy Director of Strategic Management and Development, Parks and Recreation Department. This distinction proves dispositive. . . . Unlike employee personnel decisions, the elimination of a public employment position does constitute a legislative act. In *Bogan,* the Supreme Court noted that the elimination of a public employment position–as compared to the firing of a single individual–is a quintessential legislative act."); ***Sable v. Myers***, 563 F.3d 1120, 1126, 1127 (10th Cir. 2009) ("Mr. Sable, quite naturally, focuses on the particularity of the City Council action in this case. The condemnation was directed specifically at him. There was, as he sees it, no general policy involved in this land grab, just one discrete, and despicable, act. Adoption of this perspective, however, would virtually eliminate legislative immunity in the § 1983 context. Almost every plaintiff will perceive the challenged conduct as a particular act directed at violating the plaintiff's rights. Brandhove viewed the California legislative committee's hearing not as a pursuit of public policy but as an attempt to silence him. *See Tenney,* 341 U.S. at 371. Scott-Harris viewed the elimination of her one-person office as retaliation for her complaints against racism. *See Bogan,* 523 U .S. at 47. And the Frys viewed the vacation of county roadways as retaliation for their exercise of First Amendment rights. *See Fry,* 7 F.3d at 937. The decisions in these cases teach us that we must consider such claims from a broader perspective than the specific complaint of the plaintiff. In general, legislative investigations, the elimination of public agencies, and the vacation of roadways are matters of public interest and legitimate legislative concern. Legislators should be able to make decisions in these areas without fear of lawsuits against them personally. So, too, for decisions to construct or expand public works. We appreciate the discomfort that may arise from the recognition of legislative immunity in this case. Mr. Sable's allegations (whose truth has not been adjudicated) create an ugly picture of the abuse of public power to achieve improper ends. Perhaps such pettiness is more likely to arise in municipal legislative bodies than in legislatures with more members and broader jurisdiction. It is also true, however, that charges of improper motive are likely easier to bring at the local-government level. And the honor and fortune that

come from service in local government are slight enough that many capable candidates for municipal office would surely forgo the rewards of such service if faced with the possibility of being sued for every decision taken without public consensus. . . . Moreover, those mistreated by municipal legislators are not without remedy. Not only are political remedies available, but a municipality, as opposed to its officials, is subject to suit under § 1983."); ***Smith v. Jefferson County School Bd. of Com'rs***, 549 F.3d 641, 659, 660 (6th Cir. 2008)("We recognize that local legislators can be sued both in their individual and in their official capacities. Although plaintiffs may sue a local legislator in his or her *official* capacity under § 1983, local legislators may invoke legislative immunity to insulate themselves as *individuals* from liability based on their legislative activities. . . .Therefore, we hold that the Board members may be sued in their official capacities, but may not be sued as individuals for money damages, or declaratory or injunctive relief. Because the Board members are entitled to legislative immunity with respect to the claims made against them in their individual capacities, we need not address qualified immunity, which also is a doctrine applicable only in the context of individual capacity suits.); ***State Employees Bargaining Agent Coalition v. Rowland***, 494 F.3d 71, 93, 94 (2d Cir. 2007) ("Assuming *arguendo* that defendants' alleged actions are substantively and procedurally legislative under *Bogan*, defendants must still show, before they are afforded the protections of legislative immunity as to claims for injunctive relief, that the requested relief would enjoin them in their legislative capacities. . . . Because ordering defendants to hire plaintiffs into existing positions in the state workforce would not require either a new allocation of funds or the passage of new legislation, but would instead compel defendants to act only in their administrative capacities as executive branch officials with authority over the state workforce, we conclude that legislative immunity presents no obstacle to the District Court's ordering of any such relief. . . . If defendants successfully demonstrate that their actions in terminating plaintiffs' positions were legislative in nature under *Bogan*, plaintiffs' claims for reinstatement to their previous positions would be barred by legislative immunity. This is so because ordering such relief would require no less than a judicial order compelling defendants, in their official capacities, to re-create positions that would have been eliminated through prior legislative action."); ***Baraka v. McGreevey***, 481 F.3d 187, 197-203 (3d Cir. 2007) ("Baraka contends he named Governor McGreevey as a defendant not because the Governor signed the repealer, but because he advocated and orchestrated the legislation that abolished the position of poet laureate. His argument appears to concede the Governor's actions were central, or integral, to the legislative process. The New Jersey Constitution authorizes the Governor to 'recommend such measures as he may deem desirable,' and to convene the Legislature 'whenever in his opinion the public interest shall require.' N.J. Const. art. V, ' 1. The New Jersey Governor, therefore, is constitutionally authorized to recommend legislative measures. Furthermore, this is consistent with the type of activity designated as 'legislative' in *Brewster* and *Youngblood.* As the Governor's appointee, Harrington's actions in advising and counseling Governor McGreevey and the Legislature are also legislative. . . Though neither Governor McGreevey nor Harrington were legislators, their actions as public officials in proposing and advocating the repealer are properly characterized as legislative. . . . In determining whether legislative immunity attaches to municipal actors engaging in arguably administrative activities, we ask whether the activities are 'both substantively and procedurally legislative in nature.'. . . Here, defendants are public officers and

state actors. Our cases differ as to whether the two-part substance/procedure inquiry, first applied to municipal actors, is also appropriate for actors at the state level. . . . Regardless of the level of government, we believe the two-part substance/procedure inquiry is helpful in analyzing whether a non-legislator performing allegedly administrative tasks is entitled to immunity. . . . In sum, we concluded their actions were procedurally legislative. Their actions in support of the repealer were also substantively legislative. This law, formally enacted, eliminated the position of poet laureate, a position that was legislatively created. Eliminating the position of poet laureate constitutes the type of 'policy-making' that traditional legislation entails, and the actions here were substantively legislative. . . . Nevertheless, Baraka contends the purpose of the repealer was to remove him specifically as poet laureate after he refused to resign, and its effect is better analogized to the termination of an individual's employment than to the elimination of a position. Baraka contends he was punished for his speech, which his detractors termed anti-Semitic. In his view, the intent and motive behind the purpose of the repealer was perceived anti-Semitism. But a defendant's intent and motive are immaterial to whether certain acts are entitled to legislative immunity. . . Accordingly, Baraka's allegation as to Governor McGreevey's and Harrington's intent and motive-which we accept as true in reviewing the denial of a Fed.R.Civ.P. 12(b)(6) motion-cannot affect our analysis. . . . Baraka contends that even if legislative immunity bars his claim for damages, it does not bar his claim for reinstatement against Governor McGreevey and Harrington in their official capacities. He notes that legislative immunity is a personal immunity defense, citing *Kentucky v. Graham,* 473 U.S. 159 (1985), for the proposition that personal immunity defenses are unavailable in official-capacity actions. . . . Baraka seeks to require New Jersey legislators to rescind their votes repealing the statute and to enact legislation recreating the position. We agree with the District Court's conclusion that this 'would be inconsistent with the general policies underlying legislative immunity,' and 'would seriously interfere with the role assigned exclusively to the Legislature.'. . Debating, voting on, and passing statutes are 'role[s] assigned exclusively' to the Legislature, and this case is an 'appropriate case' for application of legislative immunity to a claim for prospective relief. . . Accordingly, the District Court did not err in concluding that Baraka's request for reinstatement was barred by legislative immunity."); ***Almonte v. City of Long Beach***, 478 F.3d 100, 103 (2d Cir. 2007) ("We hold that legislative immunity applies not only to the Council members' vote on the budgetary resolutions that terminated the budget lines for Plaintiffs' positions, but also to any discussions and agreements the Council members may have had regarding the new budget prior to the vote, regardless of whether those discussions and agreements took place in secret. Thus, to the extent that the '§ 1983, 1985, and 1986 claims against the Council members relate to the legislative termination of the budget lines for Plaintiffs' positions, the District Court's denial of legislative immunity is reversed. While the grant of legislative immunity covers all aspects of the legislative process, it would not protect the Council members from a charge, if asserted here, that they administratively fired, or conspired to administratively fire, any Plaintiff prior to the date on which his or her position was effectively abolished pursuant to the legislative resolutions."); ***Fowler-Nash v. Democratic Caucus of the Pennsylvania House of Representatives***, 469 F.3d 328, 340 (3d Cir. 2006) ("Neither Harhai nor Brubaker nor the Caucus were acting in a legislative capacity when they terminated Fowler-Nash. Harhai's decision did not reach beyond a single employee. It did not

eliminate Fowler-Nash's position, thereby affecting future employees. Harhai's decision, according to the Caucus's pleadings, did not rely on any broad consideration of policy, neither was it directed to creating a new policy. It was a textbook example of a legislator performing an administrative function."); ***Torres-Rivera v. Calderon-Serra,*** 412 F.3d 205, 212-14 (1st Cir. 2005) ("The Supreme Court of a state is entitled to legislative immunity when its members act in a legislative capacity to promulgate a State Bar Code. . .As well, the President acts legislatively when he approves or vetoes bills passed by Congress. . . Likewise, a governor who signs into law or vetoes legislation passed by the legislature is also entitled to absolute immunity for that act. . . . . The plaintiffs also seek damages for the actions taken by Governor Calderon, Miranda-Rodriguez (Governor Calderon's Chief of Staff), and Charriez to implement the new legislation: the naming of a new Chairman and new Commissioners, the notice to the plaintiffs that their positions had been eliminated, and the consequent termination of their employment. The actions by the executive officials (including the governor) taken to implement legislation are not shielded by legislative immunity. Under *Scheur v. Rhodes*. . . these implementation actions (as opposed to the governor's signing the law) should be evaluated under the qualified immunity doctrine, rather than under legislative immunity."); ***Kaahumanu v. County of Maui,*** 315 F.3d 1215, 1223, 1224 (9th Cir. 2003) ("In denying a single application for a CUP [conditional use permit], the Council did not change Maui's comprehensive zoning ordinance or the policies underlying it, nor did it affect the County's budgetary priorities or the services the County provides to residents. . . The Maui County Council's decision to deny the CUP was ad hoc, affected only the plaintiffs and did not bear all the hallmarks of traditional legislation. Despite its formally legislative character, the decision was administrative and the individual members of the Maui County Council are therefore not entitled to legislative immunity.");***Bryan v. City of Madison***, 213 F.3d 267, 274 (5th Cir. 2000) ("Although activities related to board meeting were "irregular and inappropriate[,]" they were "still legislative in nature because they involved a rezoning provision. It may be that at some point, when a legislature acts in a wholly irresponsible and undemocratic manner, its immunity for 'legislative' acts dissipates because it is no longer operating as a legislature, as we understand the term. But we are reluctant to conclude that this point has been reached here."); ***Canary v. Osborn***, 211 F.3d 324, 330, 331 (6th Cir. 2000) (distinguishing *Bogan* and finding school board members were acting in administrative rather than legislative capacity when they voted not to renew certain employee's contract); ***Acevedo-Garcia v. Vera-Monroig***, 204 F.3d 1, 9 (1st Cir. 2000) ("Although these two ordinances provided a framework for the administrative decisions of Vera and Gonzalez in implementing the layoff plan, it is precisely those administrative decisions that are at issue in this case. . . . Because the defendants' decisions stemmed from specific facts about the party affiliation of individuals and affected particular individuals differently from others, these actions were administrative rather than legislative. Legislative ratification does not shield the defendants from liability."); ***Macuba v. DeBoer***, 193 F.3d 1316, 1321 (11th Cir. 1999) ("When DeBoer and Youseff voted to reorganize the land use departments, and later when they approved the CDD structure, they were exercising a 'quintessentially legislative' function. . . . Therefore, insofar as Macuba rests liability on the elimination of his position as a License Investigator, appellants are entitled to absolute immunity."); ***Kamplain v. Curry County Bd. of Commisioners***, 159 F.3d 1248, 1251, 1252 (10th

Cir. 1998) ("We are not persuaded by the approach taken by some of our sister circuits in determining legislative capacity or function. These courts rest their analysis on the number of persons affected by a legislative body's decision. [citing cases] Other courts have limited immunity to functions involving legislative speech and debate, voting, preparing committee reports, conducting committee hearings, and other 'integral steps in the legislative process.' [citing *Bogan*] . . . Not all actions taken at a legislative meeting by a local legislator are legislative for purposes of immunity. . . Nor does voting on an issue, in and of itself, determine that the act is legislative in nature. . . At issue here is not the Board's ejection of Plaintiff from the public meeting but its vote to ban Plaintiff from all future Commission meetings and its subsequent decision to prohibit Plaintiff from participating in or speaking before the Board at Curry County Commission meetings. After considering the function and character of the Board's actions, we conclude that its ban of Plaintiff from attending Commission meetings and its subsequent decision to prohibit Plaintiff from speaking at or participating in meetings were administrative acts. Because the circumstances of this case did not concern the enactment or promulgation of public policy, we cannot say that the bans were related to any legislation or legislative function. The Board's decisions to ban Plaintiff were simply efforts to monitor and discipline his presence and conduct at future Commission meetings. In voting to censure Plaintiff and prevent him from disrupting future public meetings, the Board members were not voting on, speaking on, or investigating a legislative issue. . . Even though the Board may have acted during a 'regularly scheduled meeting,' we hold that the Board did not commit these acts in a legislative capacity; the acts were of an administrative nature. . . Further, even if we accept Defendants' claim that the Board acted in relation to the business of awarding bids, we believe that the function of awarding of bids is essentially an administrative or executive function. Awarding bids and purchasing county property are actions whereby the Board applies known rules and legislation to make an administrative business decision." footnotes omitted); ***Woods v. Gamel***, 132 F.3d 1417, 1419-20 (11th Cir. 1998) ("[C]ounty commissioners can be entitled to legislative immunity when acting in their legislative capacities. . . . In this case, the commissioners' act of passing the budget was legislative: policymaking of general application. The county commissioners deliberated and then voted on a budget resolution for the entire county, not just the jail. . . . Although we have not specifically ruled on the applicability of legislative immunity to local budgetary decisions, other circuits have addressed this issue and have held that absolute immunity applies to budgetary decisions. [citing cases] We agree with those decisions. The budgetary decisions made by defendants for funding the county –including the jail–are legislative acts protected by legislative immunity."); ***Jessen v. Town of Eastchester***, 114 F.3d 7, 8 (2d Cir. 1997) (assuming, without deciding, that absolute immunity would apply to legislative acts of Town Board); ***Whitener v. McWatters***, 112 F.3d 740, 742 (4th Cir. 1997) (absolute immunity applies similarly to federal, state and local legislative bodies).

See also ***Koury v. City of Canton***, No. 1:04-CV-02248, 2005 WL 2649883, at *13 (N.D. Ohio Oct. 17, 2005) ("In the present case, the city counsel members did not actually determine whether or not to grant Plaintiff Koury the liquor licenses so their actions were not quasi-judicial in nature. While their request for a hearing pertained to a specific individual's application for a

license rather than to any general policy concern, the Ohio legislature delegated this responsibility to the city counsel, thus vesting them with the special prerogative of requesting such hearings. Similar to the traditional legislative process, the council members adopted a formal resolution to request a hearing on the Cook Avenue application. The Court thus finds that their acts were legislative in nature and that the city council member defendants are entitled to absolute immunity for their requests."); ***Thomas v. Baca***, No. CV 04-008448 DDP, 2005 WL 1030247, at *3 (C.D. Cal. May 2, 2005) (not reported) ("Here, the plaintiffs allege that the [County] supervisors failure to fund the Sheriff's Department resulted in the plaintiffs being forced to sleep on the floor of the county jail as well as the over-detention of plaintiff Thomas. Budget decisions bear all 'the hallmarks of traditional legislation.'. . They reflect discretionary policymaking that determines the services the County provides to its citizens. Perhaps, most importantly, they require tradeoffs that apply to the public at large, and thus inevitably leave some portion of the citizenry dissatisfied. Such decisions inherently involve the formulation of policy and affect the public at large. . . The traditional and best means of recourse for this dissatisfaction is that ultimate check on legislative abuse, the electoral process. Accordingly, the Court finds that this theory of liability is precluded by the supervisors' absolute legislative immunity."); ***Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County,*** 333 F.Supp.2d 1305, 1335 (S.D. Fla. 2004) ("The plaintiffs contend, and I agree, that the Commissioners' votes to impose specific contract measures– i.e., set-asides and goals–on various solicitations for A & E [architectural and engineering] services, and to continue to apply the measures on specific contracts in the face of the advice from the County Manager that such action violated the County's own ordinance, are activities that do not constitute legislative action. Government officials are entitled to absolute legislative immunity only when they take actions that are 'an integral part of the deliberative and communicative process by which [they] participate in ... proceedings with respect to the consideration and passage of legislation.'. . On the other hand, legislators' administrative acts, such as employment decisions, are not entitled to legislative immunity even though those decisions are made through votes. . .The decision as to whether to hire architects and engineers to work on County contracts, and whether to apply performance goals to their specific contracts, is closely akin to decisions relating to the hiring of employees. . . . Accordingly, I conclude that the Commissioners were acting in an administrative, rather than legislative, capacity when they voted to apply performance goals to specific County A & E contracts, and therefore they are not absolutely immune.").

See also ***E.E.O.C. v. Washington Suburban Sanitary Com'n***, 631 F.3d 174, 181 (4th Cir. 2011) ("Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes. . . Consequently, if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply."); ***Powell v. Ridge,*** 247 F.3d 520, 525 (3d Cir. 2001) ("Despite their understanding of legislative immunity's broad parameters, however, the Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined. Nor are the Legislative Leaders seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation by submitting briefs,

motions, and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order. As we noted at the outset, and as the Legislative Leaders conceded at oral argument, the privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist."); ***Morris v. Lindau***, 196 F.3d 102, 111, 112 (2d Cir. 1999) ("The immunities Town Board members enjoy when sued personally do not extend to instances where they are sued in their official capacities. In other words, municipalities have no immunity defense, either qualified or absolute, in a suit under § 1983. . . . Being absolutely immune for their legislative acts, the Town Board members cannot be found personally liable for the abolition of the Police Department. But plaintiffs also named the Town as a defendant. The elimination of the Police Department, a legislative act passed by the Town Council, qualifies under *Monell* as a municipal act for which the Town may be held liable."); ***Cunningham v. Hill***, 438 F.Supp.2d 718, 720-24 (E.D. Tex. 2006) ("Although no Supreme Court or Fifth Circuit decision directly addresses whether a testimonial privilege arising from the doctrine of legislative immunity applies to local legislators, the Supreme Court has recognized the privilege as it applies to other legislative actors and has alluded that the privilege is inherent to the doctrine of legislative immunity.[discussing cases] Several circuit courts have also recognized the testimonial privilege as it applies to federal and state legislative actors. [discussing cases] Although the Supreme Court and appellate court decisions cited above do not directly address the application of the testimonial privilege to local legislators, in *Bogan*, the Supreme Court stated that '[t]he rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators.'. . Therefore, it is reasonable to conclude that the rationales for applying the testimonial privilege to federal, state, and regional legislators apply with equal force to local legislators. Accordingly, local legislators are protected by the testimonial privilege from having to testify about actions taken in the sphere of legitimate legislative activity. . . To hold otherwise, would undoubtably have a chilling effect on local legislative bodies and their members. Denying local legislators the protection of the testimonial privilege would likely dissuade some citizens from volunteering for such local legislative bodies and would surely hinder the free flow of discussion that is such an integral part of the democratic legislative process employed by these and all other legislative bodies in this country. . . . Cunningham may not depose Mosely or other trustees with regard to anything that occurred while the Board was debating, discussing, or voting on the decision to deny Cunningham's Level III grievance. Cunningham is also prevented from asking any questions regarding the mental impressions of Mosely or other trustees during the September 19 session at issue, or any other session held by the Board. However, the testimonial privilege is narrow in the sense that Cunningham may depose Mosely and the other trustees with regard to anything that occurred outside the sphere of legitimate legislative activities. Cunningham may ask Mosely or other trustees questions related to comments they might have made to members of the public or the press prior to or after the session in question, even if the comments were related to the session. However, Cunningham may not ask questions related to discussions or comments made by trustees or to trustees during the session in question, or any other session."); ***Jama Investments, L.L.C. v. Incorporated County of Los Alamos,*** No. CIV 04-1173 JB/ACT, 2006 WL 1304903, at *6 (D.N.M. Jan. 20, 2006) ("As a threshold matter, the Court must determine

whether legislative immunity should apply in a situation such as this one, where the legislators have invoked the principle not to shield themselves from suit but to avoid testifying in a trial where non-legislators are the Defendants. While the Supreme Court and the Tenth Circuit have repeatedly upheld the centuries-old tradition of legislative immunity, those cases have arisen in the context of suits against the legislators themselves or the imposition of contempt sanctions on legislators personally. . . The initial question before the Court is whether, to the extent that courts have left this precise issue unaddressed, it should recognize legislative immunity against the act of testifying itself. The Court concludes that the same policy considerations that bar suit against legislators for legislative acts also prevents the Court from compelling them to testify about legislative acts. The knowledge that a legislator may have to justify his actions in court one day may hinder the free exercise of his judgment. . . The time and expense incurred in testifying, perhaps in another city, for potentially any legislative act done while in office may deter some legislators from seeking election in the first place. . . Finally, citizens may be able to more effectively question, and turn out of office, their local legislators than state or federal lawmakers, rendering judicial inquiry unnecessary. . . The Court also notes that the Fourth Circuit, in the past, has expressed support for a testimonial privilege based on legislative immunity, though it is unclear whether the Fourth Circuit still maintains that view. *See Berkley v. Common Council*, 63 F.3d at 303 n. 9; *Schlitz v. Virginia*, 854 F.2d at 46."); ***Knights of Columbus v. Town of Lexington,*** 138 F. Supp.2d 136, 139, 140 (D. Mass. 2001) ("[T]he doctrine of legislative immunity precludes inquiry into the individual defendants' state of mind. Moreover, since one of the purposes of the doctrine is to safeguard legislators from being burdened with the demands of discovery, the objective facts which can be used to challenge regulations should, if at all possible, come from sources other than the testimony of legislators. Therefore, unless the plaintiffs can establish that they cannot get the factual information they need from other sources, they are hereby precluded from taking the depositions of any of the Selectmen."); ***East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City School Dist.,*** 81 F. Supp.2d 1199, 1204 (D. Utah 2000) ("If scrutiny of legislative motive would be inappropriate for the court itself to undertake at this stage of this case, it seems likewise inappropriate for parties to invoke the court's machinery to conduct the same kind of scrutiny of individual Board members' motivations through deposition discovery."); ***Cooper v. Lee County Board of Supervisors***, 966 F. Supp. 411, 416 (W.D. Va. 1997) ("Although the defendant Board agrees that it is not immune from suit, it contends summary judgment is appropriate as to it because the individual board members, immune from suit, cannot be compelled to testify as to their motives, *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir.1988), overruled in part by *Berkley*, 63 F.3d at 303, and thus the suit against the Board is barred. It is true that the individual board members enjoy a testimonial privilege flowing from the doctrine of legislative immunity. *See Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir.1996). However, while the plaintiff therefore must establish his prima facie case without the benefit of the supervisors' testimony, it does not necessarily follow that the suit against the Board is barred by the supervisors' privilege. Were that the case, Fourth Circuit precedent declining to extend immunity to a legislative board would in effect be defeated any time individual board members were entitled to exercise immunity. Further, the testimonial privilege may be waived.").

But see ***Trombetta v. Bd. of Education, Proviso Township High School District 209,*** No. 02 C 5895, 2004 WL 868265, at **2-5 (N.D. Ill. Apr. 22, 2004) ("In their present motion, the District and Jackson seek reconsideration of the Court's denial of their motions *in limine* nos. 4 and 10. In those motions, defendants sought an order barring questioning of any School Board members at trial regarding their motivations for what they characterize as the reorganization (plaintiff characterizes it as a termination of his employment) on the grounds of legislative immunity from suit, as well as any comment about those motivations by Trombetta or his attorneys (motion # 4), and any reference to their motives regarding the 'termination' (motion # 10). . . . Defendants' request to preclude any inquiry or mention of their motives amounts to a request for entry of summary judgment. Were the Court to grant what defendants request, the case would be over. A claim of retaliation for the exercise of First Amendment rights requires the plaintiff to prove that he suffered adverse action *because of* his exercise of protected rights, or, to put it another way, that 'the defendants' actions [were] *motivated by* [the plaintiff's] constitutionally protected speech.'. . The plaintiff cannot conceivably prevail without introducing evidence of, and arguing, the motivation of those who made the decision he attacks–in this case, Superintendent Jackson, Mayor Serpico, and the Board as a whole. Thus if defendants prevail on their motion for reconsideration, they are entitled to judgment in their favor. This request amounts to a motion for summary judgment which is not made in timely fashion. . . . There is another significant reason why defendants' claim is without merit. The District and Jackson argue that the Board members' legislative role entitles them to a testimonial privilege against inquiry about their reasons for acting. Even were this a viable claim, it is beyond question that the Board members have waived any such privilege. Each of the Board members appeared, without objection, for a deposition (nearly a year ago) and testified fully and completely about all of the events surrounding the termination / reorganization, including inquiries about their motives in acting as they did. If a testimonial privilege existed, it existed when the depositions were taken. Yet the Board members testified at their depositions about their reasons for acting, and they made no effort to seek a protective order barring inquiries about their reasons for acting as they did. . . . Finally, other than citing a plethora of cases, most of them either state-law decisions or non-controlling decisions of other district courts, defendants have made no effort to focus the Court in on any cases like this one in which the decision under attack is an employment-related decision by a public body and the plaintiff's claim is one that, as noted earlier, *requires* inquiry into the motivating factors for the decision. Based on our quick review, most of the cases appear to concern zoning matters, not the termination of a person's employment. If the purported evidentiary privilege proposed by the District and Jackson barred inquiry into the motivations of the members of a public entity that made employment decisions, it effectively would amount to a grant of immunity not just to the entity's individual members, but to the entity as a whole. If accepted, this would not only contravene *Owen v. City of Independence*, 445 U.S. 622 (1980), in which the Supreme Court held that municipal bodies sued under 42 U.S.C. § 1983 are not entitled to the immunities from suit available to government officials, but would also effectively abrogate prohibitions against employment discrimination (Title VII, the ADEA, the ADA) for any municipal body whose "legislative" members are given decision making authority over employment matters. Defendants have marshaled no support for such a sweeping rule.").

See also ***Lake Country Estates, Inc. v. Tahoe Regional Planning Agency***, 440 U.S. 391, 406 (1979) (absolute immunity for members of regional land planning agency acting in legislative capacity); ***State Employees Bargaining Agent Coalition v. Rowland***, 494 F.3d 71, 86 (2d Cir. 2007) (distinguishing local officials from state officials and adhering "to the law of the Circuit that legislative immunity may bar claims for injunctive relief against state officials."); ***Scott v. Taylor,*** 405 F.3d 1251,1254-56 & n.6 (11th Cir. 2005) ("Appellee relies on *Kentucky v. Graham* . . . . In *Graham*, the Court emphasized 'the practical and doctrinal differences between personal and official capacity actions.' . . One key difference between individual and official capacity suits is the available defenses. . . The Court noted that a government official sued in his individual capacity may be entitled to various personal immunity defenses. . . However, because an official capacity suit against a government official is generally treated as a suit against the underlying governmental entity, such personal immunity defenses are unavailable. . . . Scott relies on the . . . language in *Graham* in arguing that the instant action sues the state legislators in their official capacity and that these defendants therefore are not entitled to legislative immunity, a personal defense. Scott's argument fails to appreciate an important exception to the *Graham* opinion's general rule. As the *Graham* Court stated, personal defenses are generally unavailable in official capacity suits because such suits are treated as suits against the underlying entity. . . The exception, however, is derived from *Ex Parte Young*, . . . which held that official capacity suits for prospective relief to enjoin state officials from enforcing unconstitutional acts are not deemed to be suits against the state and thus are not barred by the Eleventh Amendment. . . .Thus, the instant action–seeking prospective relief against these state legislator defendants in their official capacities–is not to be treated as a action against the entity. Therefore, the general rule of *Graham* is not applicable. For these reasons, our holding is not only controlled by *Consumers Union*, it is entirely consistent with *Graham*. Indeed, the Supreme Court in *Graham* discussed and expressly approved of the *Consumers Union* Court's holding that the Virginia Supreme Court's chief justice was protected by absolute legislative immunity when sued in his official capacity for promulgating an attorney ethics code that violated the First Amendment. . . . Following *Consumers Union*, we hold that the legislator defendants in the instant official capacity suit for prospective relief are entitled to absolute immunity. . . In addition to being consistent with prior Supreme Court opinions, our holding is consistent with the purposes of legislative immunity. . . . The purpose of legislative immunity being to free legislators from such worries and distractions, it makes sense to apply the doctrine regardless of the capacity in which a state legislator is sued. We finally turn our attention to Scott's argument that applying legislative immunity in this case would leave her with no recourse for the alleged discrimination she suffered. This is not so. Scott is free to maintain her suit against the Board of Elections. Indeed, the Board of Elections is the only defendant in this case which has any role with respect to the relief sought by Scott, i.e., prospective relief seeking to enjoin the enforcement of the challenged voting district and a declaration as to its legality. . . As noted above, the legislator defendants have no role in the enforcement or implementation of the voting district. Should Scott prevail, she will still be able to obtain all of the relief she seeks. . . . Because Appellants are state legislators who acted in their legislative capacities, they are entitled to absolute legislative immunity. This is true regardless of whether a suit seeks damages or

prospective relief and regardless of whether the state legislators are named in their individual or official capacity. . . .[W]e are not concerned in this case with local legislators, and therefore we leave to another day issues relating to scope and breadth of their legislative immunity.").

But see ***Fuller v. Acklman***, 616 F.Supp.2d 1307, 1309 n.3 (N.D. Ga. 2009) ("This court believes that the legal analysis regarding official capacity in *Scott* is wrong. That court recognized that official capacity suits seeking injunctive relief "are not deemed to be suits against the state and thus are not barred by the Eleventh Amendment." 403 F.3d at 1255. However, the court went on to say, "Thus, the instant action–seeking prospective relief against these state legislator defendants in their official capacities–is not to be treated as a[sic] action against the entity." *Id.* This statement, however, misstates the legal fiction that official capacity suits seeking injunctive relief are not against the state. In *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court allowed an official capacity suit seeking injunctive relief against the state to proceed on the legal fiction that the state was not really the defendant and thus the Eleventh Amendment was not implicated. However, the Court did not treat the case as being against the person individually. Official capacity suits seeking injunctive relief are in practice against the state, but the legal fiction that they are not avoids the Eleventh Amendment issue. In discussing legislative immunity, the Eleventh Circuit treated the defendants as though they were sued in their personal capacities since legislative immunity, like qualified immunity, is available to a defendant sued only in his individual capacity, not his official capacity. The Eleventh Circuit's statement that the Supreme Court in *Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), ruled that the chief justice of the Supreme Court of Virginia was entitled to legislative immunity in both his individual and official capacities is simply incorrect. Nowhere in *Consumers Union* did the Supreme Court make such a conclusion. Finally, this court notes that the Eleventh Circuit, in discussing "official capacity" (which is a term of art and does not mean "scope of official duties") conflated the concept of official capacity with the possible immunity enjoyed by persons in their individual capacities and coined the term "official legislative capacities." 405 F.3d at 1254. Such "capacities" are unknown in Supreme Court jurisprudence. However, the Eleventh Circuit's error in giving legislative immunity to persons sued in their official capacities cannot be corrected by this court; only the Supreme Court (or the Eleventh Circuit sitting en banc) can do that.").

B. Note on Qualified Immunity and Private Actors

1. *Richardson v. McKnight*

The Supreme Court has held that private defendants in § 1983 suits challenging their use of state replevin, garnishment or attachment statutes later held unconstitutional, cannot invoke the qualified immunity available to government officials in such suits. ***Wyatt v. Cole***, 504 U.S. 158, 168-69 (1992).

On remand, the Court of Appeals for the Fifth Circuit held that "private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." ***Wyatt v. Cole***, 994 F.2d 1113, 1120 (5th Cir. 1993). On the difference between qualified immunity and the Agood faith" defense, *see* ***Tapley v. Collins***, 211 F.3d 1210, 1215 (11th Cir. 2000) ("Qualified immunity is an objective test, . . .while good faith defenses are subjective in nature . . . Qualified immunity is as a question of law for the judge, while good faith generally is a jury question. . . Because it is a question of law for the judge, a qualified immunity defense more often can be, and generally should be, decided earlier in the litigation than a good faith defense. . . Finally, a denial of qualified immunity is interlocutorily appealable, . . . while a denial of a good faith defense is appealable only after there has been a final judgment in the case . . . .").

In ***Richardson v. McKnight***, 117 S. Ct. 2100, 2102 (1997), the Court held that "prison guards who are employees of a private prison management firm are [not] entitled to a qualified immunity from suit by prisoners charging a violation of . . . § 1983." The opinion was five-four, with Justice Breyer writing for the majority (joined by Justices Stevens, O'Connor, Souter and Ginsburg).

The Court found four aspects of *Wyatt* relevant to its decision: 1) *Wyatt* reaffirmed that § 1983 can sometimes impose liability upon a private individual; 2) *Wyatt* reinforced a distinction that exists between an "immunity from suit" and other kinds of legal defenses; 3) *Wyatt* identified the legal source of § 1983 immunities as both historical origins and public policy concerns underlying suits against government officials; and 4) *Wyatt* was a limited decision, not applicable to all private individuals regardless of their relationship to the government. *Id*. at 2103-04.

The majority concluded that "[h]istory does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards." *Id*. at 2104. Furthermore, the Court found the public policy concerns underlying immunity for government officials C discouragement of "unwarranted timidity," reduction of threat of damages suits as a deterrent to talented candidates pursuing careers in public service and elimination of "distraction" from duty C were not implicated in the context of prison employees of the large, multistate private prison management firm. *Id.* at 2105-08.

The Court rejected petitioners' argument that a functional approach should be applied in deciding the immunity question. As the Court notes:

> The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity–absolute or qualified–a public officer should receive. [cites omitted] And it never has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, . . . especially for a private person who performs

> a job without government supervision or direction. Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery.

Id. at 2106.

2. *Filarsky v. Delia*

The Supreme Court distinguished *Richardson* in ***Filarsky v. Delia***, 132 S.Ct. 1657, 1665-68 (2012) ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis. . . .*Wyatt* is plainly not implicated by the circumstances of this case. Unlike the defendants in *Wyatt,* who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are 'principally concerned with enhancing the public good.'. . Whether such individuals have assurance that they will be able to seek protection if sued under § 1983 directly affects the government's ability to achieve its objectives through their public service. Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity. . . .*Richardson* was a self-consciously 'narrow[ ]' decision. . . The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. . . Instead, the Court emphasized that the particular circumstances of that case—'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms'—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. . . Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work. A straightforward application of the rule set out above is sufficient to resolve this case. Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky's claim to the protection accorded Wells, Bekker, and Peel solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions, and we see no justification for doing so under § 1983. New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Mr. Filarsky. There is no reason Rialto's internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.")

Accord ***Bartell v. Lohiser***, 215 F.3d 550, 557 (6th Cir. 2000) ("[T]he purposes of qualified immunity apply with particular force to the foster care services provided by LSS [Lutheran Social Services]. Decisions pertaining to the welfare of a child, which may, as in this case, result in the

termination of the natural bond between parent and child, require the deliberate and careful exercise of official discretion in ways that few public positions can match. The necessity that this delicate process not be over-burdened with encumbering litigation comports entirely with the *Harlow* Court's formulation of the purposes of qualified immunity protection. Accordingly, because of the closely monitored, non-profit interrelationship between FIA [Family Independence Agency] and LSS, we hold that the LSS defendants may assert qualified immunity."); ***Camilo-Robles v. Hoyos***, 151 F.3d 1, 10 (1st Cir. 1998) ("Here, the psychiatrists acted under contract with the police department to assist in a necessary departmental function: the evaluation of officers. Hence, the psychiatrists, virtually by their own admission . . . are for purposes of this case state actors performing in concert with the department. As such, they are both subject to suit under section 1983 and eligible for the balm of qualified immunity."); ***Young v. Murphy***, 90 F.3d 1225, 1234 (7th Cir. 1996) (private physician hired by office of county public guardian to evaluate competency of attorney's client was entitled to assert defense of qualified immunity); ***Eagon v. City of Elk City***, 72 F.3d 1480, 1490 (10th Cir. 1995) ("Because defendant Nelda Burch was not 'invok[ing] state law in pursuit of private ends,' [*citing Warner*], *Wyatt* is inapplicable. Instead, Ms. Burch was performing a government function pursuant to a government request–determining what displays would, and would not, be allowed at Christmas in the Park. Under *Warner*, she is entitled to qualified immunity 'if a state official would have been entitled to such immunity had he performed the function himself.'"); ***Warner v. Grand County***, 57 F.3d 962, 967 (10th Cir. 1995) ("We hold that a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself. We believe that this holding is consistent with . . . *Wyatt* and the policy rationale that has shaped the qualified immunity defense from its inception."); ***Mejia v. City of New York***, 119 F. Supp.2d 232, 261, 267, 268 (E.D.N.Y. 2000) ("Although it is presumably common place for private citizens to assist law enforcement in making arrests, the question of whether qualified immunity is available to such persons turns out to be surprisingly novel. No court in this circuit has addressed the issue, and the few decisions from courts in other circuits that have addressed similar questions, were decided before *Richardson* or else do not conduct the historical inquiry required by *Richardson*. . . . In sum . . . there was (1) strong support in the common law as of 1871 for shielding private citizens who are enlisted by the police to assist in making unlawful arrests, though that support probably does not rise to the level of a firmly rooted tradition, and (2) the purposes behind qualified immunity all strongly weigh in favor of recognizing the availability of qualified immunity in such cases. The conflict between the two prongs of the *Richardson* test in this case, thus, raises the question whether the *Richardson* test is truly conjunctive in nature. On the one hand, *Richardson* could be interpreted as commanding a reviewing court to examine both history and policy in deciding whether qualified immunity is available, but allowing the court to weigh the two considerations against each other if the two inquiries yield opposite results. On the other hand, *Richardson* may require that both inquiries be made and that each of them weigh in favor of recognizing the availability of qualified immunity. . . .[I]t is clear that the strength of common law tradition alone cannot justify extending qualified immunity to a given class of § 1983 defendants. However, this result leaves open the question presented by this case: whether sufficiently strong policy considerations, buttressed by a

clear line of common law authority, though not one that can be properly described as a firmly rooted tradition, suffice to establish qualified immunity for a particular class of private actors. . . . It may be inferred . . . that the *Richardson* and *Wyatt* courts contemplated that qualified immunity might be available in cases where policy considerations strongly support extending qualified immunity, even if the relevant common law authorities do not unequivocally support its recognition. This case presents exactly such a scenario, and the above discussion of the relevant policy considerations leads to the conclusion that qualified immunity is available to private actors who are enlisted by law enforcement officials to assist in making an arrest."); ***Calloway v. Boro of Glassboro Dep't of Police***, 89 F.Supp.2d 543, 557 n. 21 (D.N.J.2000) (holding that private citizen asked by police to act as sign language interpreter in course of the interrogation of deaf suspect was entitled to qualified immunity on ground that she was a "private individual who was asked to participate in a single criminal investigation, an undoubtedly essential governmental activity, and also was acting under the supervision of the investigators who could not themselves perform the function"); ***Murphy v. New York Racing Ass'n, Inc.,*** 76 F. Supp.2d 489, 506, 507 (S.D.N.Y. 1999) ("Just as *Richardson* focused on the private prison management firm's guards–as opposed to its administrators or its cafeteria workers, so the Board Defendants focus on the private racing association's board of trustees–as opposed to its executive officers or its stable workers. We therefore find the Board Defendants' characterization (of the pertinent historical tradition) more appropriate than Plaintiff's. Hence, given that Plaintiff does not contest the Board Defendants' contention that there is a firmly-rooted common law tradition of affording corporate directors immunity from suit, we hold that the Board Defendants have satisfied the history prong of the *Richardson* test. This brings us to *Richardson*' s "purpose" prong. . . .[W]e conclude that, unlike the prison management firm in *Richardson*, NYRA is not really a market participant subject to competitive market pressures. As such, unlike the prison firm's employees, NYRA's trustees need the encouragement and protection of qualified immunity."); ***Ruppel v. Ramseyer***, 33 F.Supp.2d 720, 728-29 (C.D.Ill.1999) (holding that private physician and nurse were immune from suit for subjecting motorist to blood-alcohol test, after she refused treatment following automobile accident, since police officer, acting under authority vested by state statute, ordered them to withdraw blood after driver was arrested for driving under the influence); ***Erwin v. City of Chicago***, No. 90 C 950, 1998 WL 794297, *4 (N.D. Ill. Sept. 30, 1998) (unpublished) ("This court and others have suggested that public policy requires that the court, in some cases, grant qualified immunity to private actors ordered to act on behalf of the state. This court has recognized the importance of permitting a private defendant to be shielded by qualified immunity when justice requires. . . . [S]ubjecting lawyers to suit for acting pursuant to a court's mandate would strain the already short supply of resources most courts have in monitoring court ordered remedies. Flaxman and Seliger acted pursuant to court order. Just as the individual City defendants did."); ***Heinrich ex rel Heinrich v. Sweet***, 62 F. Supp.2d 282, 318 (D.Mass. 1999) ("[B]ecause the private defendants in this case were engaging in matters of public concern rather than merely acting out of self-interest pursuant to something like a garnishment statute, the Court follows *Camilo-Robles* in holding that the private defendants are entitled to seek qualified immunity.").

3. Post-*Filarsky* Cases

See ***Perniciaro v. Lea***, 901 F.3d 241, 251-53 & nn. 9, 11 (5th Cir. 2018) ("Circuits are divided on whether privately employed doctors who provide services at prisons or public hospitals pursuant to state contracts are entitled to assert qualified immunity. *Compare McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012) (no immunity for privately paid physician working at county prison), *Jensen v. Lane Cty.*, 222 F.3d 570 (9th Cir. 2000) (no immunity for privately employed psychiatrist providing services at public psychiatric hospital), *and Hinson v. Edmond*, 192 F.3d 1342 (11th Cir. 1999) (no immunity for privately employed physician providing services at county jail), *with Estate of Lockett ex rel. Lockett v. Fallin*, 841 F.3d 1098 (10th Cir. 2016) (immunity for privately employed physician providing services at state penitentiary). . . After considering the facts of this case in light of the history and purposes of immunity, we find the cases disallowing immunity distinguishable and hold that Drs. Thompson and Nicholl may assert the defense of qualified immunity. . . . Here, as in *Filarsky*, . . . Drs. Thompson and Nicholl are private individuals who work in a public institution and alongside government employees, but who do so as something other than full-time public employees. And here, as in *Filarsky*, . . . it is clear that their public counterparts would be entitled to assert qualified immunity[.] . . Accordingly, as in *Filarsky*, general principles of immunity at common law support the right of Drs. Thompson and Nicholl to raise the defense of qualified immunity. . . .We note that while the Ninth and Eleventh Circuits reached contrary conclusions in *Jensen* and *Hinson*, respectively, they did so before the Supreme Court decided *Filarsky*. Accordingly, they followed *Richardson*'s lead and framed the relevant question as whether there was a firmly-rooted tradition of immunity for private doctors performing some government-related function. . . Finding no tradition of immunity even for doctors working directly for the state, the Ninth and Eleventh Circuits concluded that history did not support immunity for the privately employed doctors there at issue. . . But *Richardson* considered only the issue of qualified immunity for prison guards employed by and working at a private prison; it explicitly did not consider the more nuanced question of whether a person 'briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision' would be entitled to assert immunity. . . That reserved question was then expressly taken up in *Filarsky*, resulting in a different focus to the necessary historical excavation. As described above, the Court in *Filarsky* suggests that where the defendant at issue worked in a governmental entity and alongside government employees, the relevant historical question asks whether someone bearing that relationship to the state would have had immunity at common law, not whether immunity was accorded to purely private persons performing some governmental function. . . The Court's deep dive into the common law yielded an answer in the negative. . . The Sixth Circuit decided *McCullum* just months after the Supreme Court decided *Filarsky*. With respect for our sister circuit's deep historical analysis of whether doctors had any special immunity at common law, . . . we read *Filarsky* to require a different focus. . . . [T]he market forces assumed in *Richardson*'s reasoning are much weaker here. First, the state, not Tulane, oversees the operation of ELMHS and the services that Drs. Thompson and Nicholl provide there. ELMHS is a state-run facility, operated pursuant to state policies and overseen by a state employee. Dr.

Thompson reports directly to Lea, not to anyone at Tulane. Similarly, issues pertaining to patient safety and the quality of care provided by the Tulane psychiatrists are reviewed by state employees, including Lea. . . Whereas the Supreme Court in *Richardson* concluded that the private prison guards there at issue "resemble those of other private firms and differ from government employees," 521 U.S. at 410, 117 S.Ct. 2100, here we conclude just the opposite. When Drs. Thompson and Nicholl go to work at ELMHS, they act within a government system, not a private one. The market pressures at play within a purely private firm simply do not reach them there. . . Furthermore, their direct employer, Tulane University, is not 'systematically organized' to perform the 'major administrative task' of providing mental-health care at state facilities. . . Unlike the private entities at issue in cases denying qualified immunity, . . . the university's primary function is not providing health-care services, whether by contract or directly. The professors it employs have many duties, including research and teaching, and their pay, as well as other means of incentivization, are likely determined by factors besides the quality of care they provide to any patients they may see at ELMHS. Any marketplace pressures influencing the performance of the university's employees, therefore, are likely not fine-tuned to preventing overly timid care at ELMHS. Finally, it does not appear that the pressures created by the threat of replacement are at play here. Unlike in *Hinson*, where the firm responsible for providing health services in a county jail had recently been replaced in light of performance concerns, . . . Tulane has held the contract to provide psychiatric services for the state since 1992. There is no indication in this record of any other private entities vying for the contract. Under these circumstances, it is unlikely that, absent immunity, market forces would swiftly intervene to discipline overly timid performance. . . . This level of state involvement and supervision sets this case apart from the Ninth and Eleventh Circuit cases denying qualified immunity to privately employed doctors. . . .In sum, considering the history and purposes of immunity in conjunction with the facts of this case, we hold that Drs. Thompson and Nicholl may raise the defense of qualified immunity."); ***Estate of Clark v. Walker***, 865 F.3d 544, 550-51 (7th Cir. 2017) ("The Court in *Filarsky* reached its conclusion on the part-time lawyer through an historical inquiry, asking whether the person asserting qualified immunity would have been immune from liability under the common law in 1871 when Congress passed the law later codified as § 1983. . . In a detailed opinion, the Sixth Circuit applied *Filarsky*'s historical method and held that a privately employed doctor working for a state prison could not invoke qualified immunity. *McCullum v. Tepe*, 693 F.3d 696, 697 (6th Cir. 2012). After examining numerous nineteenth-century sources, the Sixth Circuit concluded that 'the absence of any indicia that a paid physician (whether remunerated from the public or private fisc) would have been immune from suit at common law, convince[s] us that there was no common-law tradition of immunity for a private doctor working for a public institution at the time that Congress passed § 1983.'. . We found the Sixth Circuit's reasoning persuasive in *Currie*, 728 F.3d at 632, and have held in other post-*Filarsky* cases that private medical personnel in prisons are not afforded qualified immunity. See, e.g., *Rasho*, 856 F.3d at 479; *Petties*, 836 F.3d at 734. Because Kuehn was a privately employed nurse working at the Green Lake County Jail, she is ineligible for qualified immunity."); ***Meadows v. Rockford Housing Authority***, 861 F.3d 672, 677-78 (7th Cir. 2017) ("Of particular importance to the Court in *Richardson* was that the defendants worked 'independently' of 'ongoing direct state supervision,' 521 U.S. at 409; indeed, it repeated this

requirement at several points in its opinion, *see id.* at 413 (noting that the case before it arose in the context of a private firm 'with limited direct supervision by the government,' and that it did not involve 'a private individual ... acting under close official supervision'). Moreover, in *Filarsky*, the Court explained that providing qualified immunity to defendants performing specific tasks at the instruction of government officials implicated '[t]he public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits.'. . Such distractions not only affected a defendant's ability to perform his or her duties, but also 'affect[ed] any public employees with whom they work by embroiling those employees in litigation' as well. . . Here it is undisputed that Hodges and Novay were working under the direct supervision of RHA officials when they carried out the actions that Meadows challenges. Doyle, RHA's Security Support Manager, instructed Hodges that the locks on the door should be changed, and Novay was present in the apartment for that purpose. . . Meadows does not dispute that qualified immunity would protect Doyle if he had changed the lock himself. Here, given the 'purposes that underlie government employee immunity,' *see Richardson*, 521 U.S. at 404, Novay and Hodges should be afforded the same protections. As in *Richardson*, our holding is a narrow one. It should, by no means, be read to guarantee qualified immunity to all employees of private security companies that provide contractual security services to governmental entities. The circumstances presented here, however, establish that the defendants were operating at the direct instruction of a supervising government official. Under these circumstances, qualified immunity is available to the defendants."); ***Brewer v. Hayne***, 860 F.3d 819, 823-24 (5th Cir. 2017) ("Plaintiffs point to *McCullum v. Tepe*, a Sixth Circuit case holding that a part-time prison psychiatrist was not entitled to assert qualified immunity because there was 'no common-law tradition of immunity for a private doctor working for a public institution.'. . But Defendants here, though calling on their medical training, were performing a role that more closely parallels criminal investigation—'a core government activity' traditionally protected at common law by immunity. . . .We are persuaded that Defendants, as consulting forensic experts, were engaged in the criminal investigative functions of the state protected at common law and are here entitled to assert qualified immunity."); ***Rasho v. Elyea***, 856 F.3d 469, 479 (7th Cir. 2017) ("This Court has construed the Supreme Court's holding that employees of privately-operated prisons may not assert a qualified-immunity defense also to deny that defense to employees of private corporations that contract with the state to provide medical care for prisoners. *Zaya*, 836 F.3d at 807 (citing *Richardson v. McKnight*, 521 U.S. 399, 412, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)). Thus, Dr. Massa, as an employees of the private contractor Wexford, cannot assert qualified immunity as a defense to Rasho's claims. *See Petties*, 836 F.3d at 734 ("[Q]ualified immunity does not apply to private medical personnel in prisons.") (citing *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 794 (7th Cir. 2014)); *see also Currie v. Chhabra*, 728 F.3d 626, 632 (7th Cir. 2013) (citing with approval the Sixth Circuit's holding in *McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012), that "a [private] doctor providing psychiatric services to inmates at a state prison is not entitled to assert qualified immunity")."); ***Estate of Lockett v. Fallin***, 841 F.3d 1098, 1108-09 (10th Cir. 2016) ("Dr. Doe is entitled to assert qualified immunity because the purposes of qualified immunity support its application here: carrying out criminal penalties is unquestionably a traditional function of government, exactly the sort of activities that *Richardson* reasoned qualified immunity was meant to protect. If participants in an execution

could be held liable for problems during the execution, that would necessarily implicate *Filarsky*'s concerns about '[t]he public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits,' which the Court noted 'is also implicated when individuals other than permanent government employees discharge these duties.'. . The attorney in *Filarsky* received qualified immunity largely because a permanent government attorney doing the same acts would receive it. The *Filarsky* Court determined that denying a temporarily retained attorney the same defense as a full-time government attorney would undermine the purposes of the doctrine. The same is true here—for instance, had a state employee performed the same duties as Dr. Doe did here, qualified immunity would apply. We see no sense in depriving a private doctor the same protection. Here, Dr. Doe stands in the same position as the attorney in *Filarsky*—he was a private party hired to do a job for which a permanent government employee would have received qualified immunity. Thus, we conclude that qualified immunity applies to Dr. Doe."); ***Saenz v. Flores***, No. 15-50119, 2016 WL 4750908, at *2 (5th Cir. Sept. 12, 2016) (not reported) ("Romero alleged that he was acting in the scope of his employment with a private security company under its contract with the City of El Paso when he assisted in transporting Saenz to jail. He also noted that Roswitha's own pleadings stated that Romero's responsibilities in transporting prisoners had traditionally been the exclusive province of the state, and that he was therefore in a 'position of interdependence' with the City of El Paso. In addition, Romero's pleadings explicitly stated that he was entitled to qualified immunity with respect to Roswitha's 42 U.S.C. § 1983 claims on multiple occasions. Taken together, these assertions are sufficient to invoke the defense of qualified immunity, and the district court erred in holding that Romero failed to do so. We stress, however, that we do not rule here on whether Romero, as an employee of a private contractor, is entitled to qualified immunity as a threshold matter. The district court should determine on remand whether Romero is entitled to qualified immunity in the first instance."); ***Zaya v. Sood***, 836 F.3d 800, 807-08 (7th Cir. 2016) ("Dr. Sood contends that even if a jury could find that he consciously disregarded the risks of delaying Zaya's return to Dr. Bussey, he is nonetheless entitled to summary judgment on qualified-immunity grounds. The Supreme Court has held that employees of privately operated prisons may not assert a qualified-immunity defense. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997). We have construed that holding to extend to employees of private corporations that contract with the state to provide medical care for prison inmates. *See Currie v. Chhabra*, 728 F.3d 626, 631–32 (7th Cir. 2013); *see also Shields v. Ill. Dep't of Corrs.*, 746 F.3d 782, 794 n.3 (7th Cir. 2014). As an employee of Wexford, a private corporation that contracts with the Illinois Department of Corrections, Dr. Sood asks us to reconsider our earlier decisions. We need not do so because even if a qualified-immunity defense were available to Dr. Sood, he would not be entitled to summary judgment on that basis. 'The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."'. . Zaya's deliberate-indifference claim turns on Dr. Sood's mental state, and it is well established what the law requires in that regard. *See Farmer*, 511 U.S. at 837. If Dr. Sood consciously disregarded the risks of delaying Zaya's return to Dr. Bussey, then his conduct violates clearly established law under the Eighth Amendment. *See Petties*, slip op. at 18. As we've explained, that's a question of fact that needs to be resolved by a

jury."); ***Petties v. Carter***, 836 F.3d 722, 733-34 (7th Cir. 2016) (en banc) ("While the district court did not reach the issue, in the proceedings below, the defendants pursued the additional argument that they were entitled to qualified immunity. But even if the defendants preserved this argument, qualified immunity does not apply to private medical personnel in prisons. *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782, 794 (7th Cir. 2014). Even if the Wexford employees were entitled in theory to qualified immunity, it could not be granted at this point. If a jury finds that Dr. Carter and Dr. Obaisi knew that the course of treatment they were pursuing was inadequate to meet Petties's serious medical needs, such conduct violates clearly established law under the Eighth Amendment. *See Farmer*, 511 U.S. at 837. Given that the threshold factual questions of the defendants' states of mind remain disputed, summary judgment on the basis of qualified immunity is inappropriate."); ***United States v. Ackerman***, 831 F.3d 1292, 1296 & n.1, 1300, 1303 (10th Cir. 2016) ("[W]hen an actor *is* endowed with law enforcement powers beyond those enjoyed by private citizens, courts have traditionally found the exercise of the public police power engaged. . . . *Richardson v. McKnight*, 521 U.S. 399 (1997), might appear an exception to this rule, for there the Supreme Court held that certain private prison guards weren't state actors for purposes of qualified immunity. . . But *Richardson* was criticized at the time for elevating form over function, . . . (Scalia, J., dissenting), and since then the Court has both returned to *Dartmouth College*'s tried and true approach and expressly limited *Richardson* to its facts, *see Filarsky*, 132 S. Ct. at 1662-65, 1667. . . .NCMEC's [National Center for Missing and Exploited Children] law enforcement powers extend well beyond those enjoyed by private citizens—and in this way it seems to mark it as a fair candidate for a governmental entity. . . . Even if we are wrong and NCMEC isn't a governmental entity, that doesn't necessarily mean its searches escape the Fourth Amendment's ambit. . . . As we've already acknowledged, a governmental licensing and regulation regime does not always suffice to render the licensed or regulated party a governmental entity or agent. After all private lawyers, doctors, and accountants are all licensed and regulated by the state, yet they don't (usually) qualify as governmental entities or agents. But as we've already observed, too, in this case we don't face a general licensing or regulatory regime open to all qualified applicants but a statutory grant of special law enforcement authority to a single entity and no other, authorizing and encouraging it to perform functions no other private person or entity may lawfully undertake. And as we've seen, helping law enforcement is at least part of NCMEC's intentions when it reviews emails pursuant to its statutory tipline authority."); ***Kellum v. Mares***, 657 F. App'x 763, 768 n. 3 (10th Cir. 2016) ("As the district court noted, this court has yet to decide whether or not qualified immunity is available to employees of a private company providing medical services to inmates. *See Richardson v. McKnight*, 521 U.S. 399, 409-12 (1997) (holding that prison guards employed by a large, for-profit multistate private prison management company that had contracted with the state to manage the prison are not entitled to qualified immunity in a prisoner's § 1983 action); *McCullum v. Tepe*, 693 F.3d 696, 704 (6th Cir. 2012) (holding that a private doctor providing psychiatric services to inmates at a state prison is ineligible for qualified immunity); *but see Filarsky v. Delia*, ___ U.S. ___, 132 S. Ct. 1657, 1665, 1667-68 (2012) (extending qualified immunity under § 1983 to private investigator who was temporarily retained by a city to assist in an internal investigation, holding that "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some

other basis"). We decline to decide this issue because we agree with the district court's alternative conclusion that, assuming for the sake of argument Nurse Breen could assert a qualified immunity defense, Ms. Kellum's complaint states a plausible claim that Nurse Breen is not entitled to such immunity because she violated Ms. Kellum's clearly established Eighth Amendment rights."); ***Franco v. Bd. of Cnty. Comm'rs for the Cnty. of Roosevelt***, 609 F. App'x 957, 959-60 (10th Cir. 2015) ("We agree with the district court that Ms. Peel's position as an independently contracted probation officer is a good deal more like the one in *Filarsky* than *Richardson*, especially given the Court's express admonition that the 'typical case of an individual hired by the government to assist in carrying out its work' will fall outside *Richardson's* exception."); ***Gomez v. Campbell-Ewald Co.,*** 768 F.3d 871, 881, 882 (9th Cir. 2014) ("Campbell–Ewald contends that a new immunity for service contractors was espoused by the Supreme Court in *Filarsky v. Delia*, —— U.S. ——, 132 S.Ct. 1657 (2012). Yet the Court did not establish any new theory, and although the *Filarsky* discussion does include a broad reading of the qualified immunity doctrine, *id.* at 1667–68, that doctrine is not implicated by this case. . . . *Filarsky* has little to offer Campbell–Ewald. The decision is applicable only in the context of § 1983 qualified immunity from personal tort liability. . . Moreover, the Court afforded immunity only after tracing two hundred years of precedent. Here, not only do we lack decades or centuries of common law recognition of the proffered defense, we are aware of *no* authority exempting a marketing consultant from analogous federal tort liability. . . . The record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them. Consequently, we decline the invitation to craft a new immunity doctrine or extend an existing one."); ***United Pet Supply, Inc. v. City of Chattanooga, Tenn***., 768 F.3d 464, 471, 479, 480 & n.2, 483 (6th Cir. 2014) ("We conclude that Hurn, acting as a private animal-welfare officer, may not assert qualified immunity as a defense against suit in her personal capacity because there is no history of immunity for animal-welfare officers and allowing her to assert qualified immunity is not consistent with the purpose of 42 U.S.C. § 1983. However, Walsh and Nicholson, acting both as private animal-welfare officers and as specially-commissioned police officers of the City of Chattanooga, may assert qualified immunity as a defense against suit in their personal capacities. . . . Hurn was not commissioned as a special police officer; she was working only in the capacity of her position as a McKamey employee, that is, an employee of a private contractor. Determining whether an employee of a private contractor that is acting under color of state law may herself assert qualified immunity demands a fact-intensive analysis under which some employees may be permitted to assert qualified immunity and some may not. . . . [T]he absence of a history of qualified immunity for similarly situated defendants, under *Brentwood*, does not necessarily preclude Hurn from asserting qualified immunity. . . . We recently noted, however, that it was unclear ' "whether policy and history form a conjunctive or disjunctive test," ' and we questioned whether a court may 'extend qualified immunity where there was no history of immunity at common law, even if sound policy justified the extension.'. . . In sum: there is no history of immunity for similarly situated defendants, but similar organizations did not exist in 1871 and there is no history of denying immunity; McKamey faces market pressures; refusing to allow qualified immunity could discourage qualified animal-welfare advocates from working on behalf of the City of Chattanooga; and having to go through a lawsuit could distract the defendants-

appellants and possibly a single state employee from their job duties. This is a very close case but because there is no history of immunity and the most important immunity-producing concern—preventing unwarranted timidity—counsels against permitting the assertion of qualified immunity, we conclude that Hurn may not assert qualified immunity as a defense to suit in her personal capacity."); ***In re KBR, Inc., Burn Pit Litigation***, 744 F.3d 326, 343-45 (4th Cir. 2014) ("Contrary to the district court's conclusion, there is no indication that the Supreme Court intended *Filarsky* to overrule *Yearsley* and its progeny. . . . After tracing the history of common law immunity up to the point Congress enacted § 1983, the Court concluded 'immunity *under § 1983* should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.'. . The opinion never mentions *Yearsley*, sovereign immunity, or the FTCA and never purports to extend beyond § 1983 qualified immunity. We therefore believe that the district court erred in concluding that *Filarsky* compelled altering the conclusion that it reached in *Burn Pit I.* We interpret *Filarsky* as reaffirming the principles undergirding the *Yearsley* rule, albeit in the context of § 1983 qualified immunity rather than derivative sovereign immunity. Like *Filarsky, Yearsley* recognizes that private employees can perform the same functions as government employees and concludes that they should receive immunity from suit when they perform these functions. Furthermore, *Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky.* By rendering government contractors immune from suit when they act within the scope of their validly conferred authority, the *Yearsley* rule combats the 'unwarranted timidity' that can arise if employees fear that their actions will result in lawsuits. . . Similarly, affording immunity to government contractors 'ensur[es] that talented candidates are not deterred from public service' by minimizing the likelihood that their government work will expose their employer to litigation. . . Finally, by extending sovereign immunity to government contractors, the *Yearsley* rule 'prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits.'. . We now turn to applying the *Yearsley* rule, which asks us to consider whether the government authorized KBR's actions in this case. . . . According to the Servicemembers, KBR exceeded its authority in this case because it violated the specific terms of LOGCAP III and other 'government directives.' By contrast, KBR takes a broader view, contending that it acted within the scope of its authority by performing general waste management and water treatment functions. . .*Yearsley* supports the Servicemembers' view. . . . KBR is entitled to derivative sovereign immunity only if it adhered to the terms of its contract with the government."); ***Lee v. Willey***, 543 F. App'x 503, 2013 WL 5645773, *1, *3-5 (6th Cir. Oct. 17, 2013) ("When the party raising qualified immunity as a defense works for the state as a private contractor, as is the case here, we must first engage in an antecedent inquiry concerning whether the defendant may properly invoke the defense qualified immunity. In this case, the district court gave us no answer to this question. We conclude that it was improper for the district court to gloss over the threshold question of assertability, and we answer that question in the plaintiff's favor. For this reason, we **AFFIRM** the district court's decision, finding that the defendant was not entitled to the defense of qualified immunity as a basis for his motion to dismiss. . . . When a private employee working at a state prison is sued under § 1983, we must first determine whether that employee 'can invoke qualified immunity in a lawsuit arising out of his activities at the prison.'. . To do so, we ask two questions: (1) whether 'there was

a firmly rooted history of immunity for similarly situated parties at common law'; and (2) 'whether granting immunity would be consistent with the history and purpose of § 1983.'. . In this instance, however, we need not strain ourselves to discern the answer, for it was already decided in *McCullum v. Tepe,* 693 F.3d 696 (6th Cir.2012) that a psychiatrist 'employed by an independent non-profit organization, but working part-time for the County as a prison psychiatrist' was not entitled to the defense of qualified immunity. . . We found no nineteenth-century common law contemporary to § 1983's passage that granted immunity for private doctors working at public institutions. . . We also concluded that the policy considerations undergirding § 1983 immunity militated against granting immunity, where, as here, the defendant's primary employer, a private firm, is capable of 'offset[ing] ... [the] increased ... liability risk' resulting from its employees' lack of § 1983 immunity. . .There is little doubt that *McCullum* applies here. As Mehra's counsel conceded at oral argument, there is no meaningful distinction between him and the psychiatrist in *McCullum.* Acknowledging this reality, Mehra instead opts to attack the wisdom of our prior decision, contending that *McCullum* was wrongly decided. He cites four reasons in support of his argument: (1) the decision disregarded the Supreme Court's recognition of common-law immunity for private doctors in *Richardson v. McKnight,* 521 U.S. 399 (1997); (2) the *McCullum* court erroneously assumed that the silence of nineteenth-century caselaw on common-law immunity for private doctors meant that no such immunity existed; (3) the role of private physicians is not distinguishable from other protected functions identified by the Supreme Court in *Filarsky v. Delia,* 132 S.Ct. 1657 (2012); and (4) the policy analysis used by the *McCullum* court applied only to private prisons and employees thereof. From the outset, we note that a three-judge panel of this court is not the proper audience for such contentions. *McCullum* is a published decision of this circuit, and whatever the wisdom of Mehra's arguments may be, we must treat it as binding authority. . . But *stare decisis* is not the only reason we reject Mehra's arguments—they are, in a word, wrong. We address each of them in turn. *First,* the *McCullum* court *did* address *Richardson,* noting its 'cryptic comment' about the possibility of private doctors being entitled to qualified immunity. It observed that the *Richardson* Court's dicta had no support in the law. . . Neither the common law contemporary to § 1983s passage nor the common law of the twentieth century supported the idea that there was a firmly rooted common-law practice of extending immunity to private psychiatrists. . . . *Second,* Mehra seems to suggest that this court improperly constrained itself by analyzing *only* nineteenth-century caselaw in concluding that there was no common-law immunity for private doctors serving the government. But nothing in twentieth-century caselaw helps his case, either. . . Moreover, we limited ourselves to nineteenth-century cases because the *Filarsky* Court suggested that we do so. . . *Third,* we need not distinguish private physicians from 'other protected functions identified by the Supreme Court,' as the Court has itself eschewed such a functional comparison. In *Filarsky,* the Court acknowledged that 'examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself.'. . Instead of comparing occupations side-by-side, the Court limited its analysis to the question of whether caselaw establishing immunity for a particular occupation existed at the time § 1983 was enacted. . . *Finally,* Mehra's contention that 'the Supreme Court's analysis of the policy rationales in *Richardson* apply only to denying qualified immunity to a private prison and its personnel' is incorrect. Indeed, the *Filarsky* decision

belies this observation; the case had nothing to do with prisons, yet the Court still looked to *Richardson*'s policy rationales to conclude that an investigator hired by a municipality was eligible to invoke the defense of qualified immunity. . .With no good reason to disturb our holding in *McCullum,* we conclude that there is no meaningful distinction between the psychiatrist in that case and Mehra; thus, we conclude that, under *McCullum,* Mehra is not eligible to invoke the defense of qualified immunity."); ***Currie v. Chhabra***, 728 F.3d 626, 631, 632 (7th Cir. 2013) ("The Supreme Court recently considered the question whether 'an individual hired by the government to do its work is prohibited from seeking [absolute or qualified] immunity, solely because he works for the government on something other than a permanent or full-time basis.'. . It held that 'immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.'. . On the other hand, the *Filarsky* Court reaffirmed the holding of *Richardson* categorically rejecting immunity for the private prison employees there; in so doing, the Court emphasized that the incentives of the private market suffice to protect employees when 'a private firm, systematically organized to assume a major lengthy administrative task ... for profit and potentially in competition with other firms,' assumes responsibility for managing an institution. . . In a detailed opinion tracking the Court's analysis in *Filarsky*, the Sixth Circuit recently held that a doctor providing psychiatric services to inmates at a state prison is not entitled to assert qualified immunity. *McCullum v. Tepe,* 693 F.3d 696 (6th Cir.2012) (discussing the historical roots of immunity for similarly situated parties and the history and purpose of § 1983); see also *Hasher v. Hayman*, 2013 WL 1288205 (D.N.J. Mar. 27, 2013) (private medical employees failed to establish that they are entitled to assert a qualified immunity defense, 'even after *Filarsky*'). We find the Sixth Circuit's reasoning persuasive, though we need not definitively decide the issue today; even if our defendants were entitled to seek qualified immunity as a general matter, we would conclude that the defense is not applicable here."); ***McCullum v. Tepe***, 693 F.3d 696, 697, 699-704 (6th Cir. 2012) ("There does not seem to be a history of immunity from suit at common law for a privately paid physician working for the public, and the policy rationales that support qualified immunity are not so strong as to justify our ignoring this history, or lack of history. . . . The issue in this appeal is whether Tepe, a physician employed by an independent non-profit organization, but working part-time for the County as a prison psychiatrist, can invoke qualified immunity in a lawsuit arising out of his activities at the prison. A physician who contracts to provide medical services to prison inmates, the Supreme Court has held, acts under color of state law for purposes of § 1983. *West v. Atkins*, 487 U.S. 42, 54 (1988). But a party is not entitled to assert qualified immunity simply because he is amenable to suit under § 1983. *Harrison v. Ash*, 539 F.3d 510, 521 (6th Cir. 2008). . . . We cited both *Hinson* and *Jensen* with approval in our published *Harrison* opinion, relying on both for the conclusion 'that there is no "firmly rooted" common law practice of extending immunity to private [nurses working at a county jail].'. . . After *Filarsky*, however, *Hinson* and *Jenson*'s historical analyses—which rested on Twentieth Century law—are suspect, at best. . . . [W]hile *Filarsky* did not impose a rigid date limit, it does illustrate the scope of the relevant inquiry: whether a person in the same position as the party asserting qualified immunity would have been immune from liability under the common law of the late Nineteenth Century. . . . With this in mind, we consider whether a private doctor working for a state institution would have been immune from a suit for damages at

common law. . . . [Court examines cases from late 19th Century] These cases, as well as the American and English cases involving private physicians in private practice, and the absence of any indicia that a paid physician (whether remunerated from the public or private fisc) would have been immune from suit at common law, convince us that there was no common-law tradition of immunity for a private doctor working for a public institution at the time that Congress passed § 1983. The first piece of the *Richardson* analysis, then, suggests that we should not allow Tepe to assert qualified immunity. . . . We acknowledge that it is somewhat odd for a government actor to lose the right to assert qualified immunity, not because his job changed, but because a private entity, rather than the government, issued his paycheck. But just as market pressures, a private firm's ability to 'offset any increased employee liability risk with higher pay or extra benefits,'. . . the 'continual . . . need for deterring constitutional violations[,] and . . . [the] sense that the [private] firm's tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms,'. . . vitiated any policy-based concerns in *Richardson*, these same factors suggest that immunity would be inappropriate here. . . . Despite the Supreme Court's somewhat cryptic comment in *Richardson* that a doctor may have had immunity from damages at common law, there does not appear to be any history of immunity for a private doctor working for the government, and the policies that animate our qualified-immunity cases do not justify our creating an immunity unknown to the common law."); ***Walter v. Horseshoe Entertainment***, No. 11–30867, 2012 WL 2041536, at *1, *2 & n.3 (5th Cir. June 6, 2012) (not published) ("Because we hold that the appellants' claims are in any event barred by the rule established in *Heck v. Humphrey*, 512 U.S. 477 (1994), we do not reach the question of whether the Horseshoe security staff should be considered state actors for the purposes of § 1983. . . . The district court found that the Horseshoe security staff was entitled to qualified immunity, which 'protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . The law is not established in this circuit, however, as to whether private entities such as these are entitled to the protections of qualified immunity. While individuals who are retained by the government to perform a particular task are entitled to qualified immunity when performing that task, it is less clear whether a security guard working in concert with the police is entitled to the protections. See *Filarsky v. Delia*, 132 S.Ct. 1657, 1661–68 (2012) (holding that an individual retained by the government may be entitled to qualified immunity regardless of whether he is a full-time employee); *Bishop v. Karney*, 408 F. App'x 846, 848 (5th Cir.2011) (holding that a private doctor under contract with a state prison to provide medical care is entitled to qualified immunity). *Cf. Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (holding that prison guards employed by a private prison are not entitled to qualified immunity).").

See also ***Salim v. Mitchell***, No. CV-15-0286-JLQ, 2017 WL 3389011, at *10-11 (E.D. Wash. Aug. 7, 2017) ("Citing *Filarsky*, Defendants argue they should not be 'left holding the bag-facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.'. . However, as Plaintiffs pointed out at prior arguments, Defendants can hardly be considered to be left 'holding the bag'. They operated under a profit incentive different than that of Government employees. The Defendants and the company they

formed were paid $80 million dollars. There is an indemnity provision in the contracts between the Government and the CIA under which the CIA has paid the considerable defense litigation expenses for this action. Defendants argue *Filarsky* immunity is available if the contractor's claim for immunity is: 1) historically grounded in the common law; and 2) did not violate clearly established rights. . . Plaintiffs argue Defendants are not entitled to derivative immunity under *Filarsky* because psychologists were not traditionally entitled to immunity at common law and Defendants violated clearly established rights. Defendants' argument fails under both prongs. Defendants argue psychiatrists and psychologists are given immunity when they render an opinion on a criminal defendant's mental competency in a legal proceeding. Defendants' actions herein are not analogous to a psychologist assisting court proceedings by evaluating a criminal defendant and writing a report or testifying. Additionally, Plaintiffs rely on *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000) for the proposition that medical doctors performing psychological assessments during commitment proceedings are not entitled to immunity. In *Jensen* the court referenced a lack of a 'firmly rooted tradition' of such immunity. . . The court also addressed privatization and market force arguments in acknowledging distinctions between private contractors and government employees. The court observed 'the potential for insurance, indemnification agreements, and higher pay all may operate to encourage qualified candidates' to undertake such obligations even without immunity. . . Defendants have not established their claim for immunity is historically grounded in the common law. Secondly, Defendants argue it was not clearly established that subjecting an individual to torture or other cruel, inhuman, and degrading conditions violated clearly established rights, citing to *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012). However, the illegality of torture is long-established. See for example *Filartiga v. Pena–Irala*, 630 F.2d 876, 884 (2nd Cir. 1980)("We conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."). The case Defendants rely upon states, 'the unconstitutionality of torturing a United States citizen was beyond debate by 2001.' *Padilla v. Yoo*, 678 F.3d 748, 763 (9th Cir. 2012). The inquiry in this case is whether the enhanced interrogation methods outlined in the Program constituted 'torture'."); ***Powers v. City of Ferguson***, 229 F.Supp.3d 894, 901 (E.D. Mo. 2017) ("[P]laintiffs have not cited, and the Court has not found, any cases decided after *Filarsky* in which a prosecutor was denied absolute immunity based on his or her status as a private attorney. By contrast, several cases have extended immunity to private attorneys serving prosecutorial roles. [collecting cases]"); ***Bonaparte v. Wexford Health Sources. Inc.***, No. GJH-15-738, 2015 WL 7738066, at *2 (D. Md. Nov. 30, 2015) ("Defendants claim entitlement to qualified immunity, citing *Filarsky v. Delia*. . . . *Filarsky* overturned the denial of qualified immunity to an attorney who was retained by a city in California to assist in an internal investigation concerning a firefighter's potential wrongdoing. . . Defendants fail to demonstrate that *Filarsky* has been extended to contractual health care providers working in detention centers or correctional facilities. and the Court will not extend the holding in *Filarsky* based on the record before it in the instant case."); ***Zikianda v. Cnty. of Albany***, No. 1:12-CV-1194, 2015 WL 5510956, at *16 n.6 (N.D.N.Y. Sept. 15, 2015) ("The parties have not adequately briefed the issue of whether qualified immunity applies to Dr. Depner, a private physician working under a contract that made him prison medical director, at least at some points in his service. A question therefore might exist as to whether

qualified immunity is even a possibility in this context. Courts are clear that 'private actors are not *automatically* immune (*i.e.,* § 1983 immunity does not automatically follow § 1983 liability) [.]'. . Courts have found that immunity may be available for a private actor subject to liability under Section 1983 when granting immunity comports with 'general principles of tort immunities and defenses applicable at common law, and the reasons [the Superme Court has] afforded protection from suit under § 1983.' *Filarsky v. Delia,* 132 S.Ct. 1657, 1662 (2012). In determining whether immunity is available to private persons fulfilling a governmental role, then, the Court is 'to look both to history and to the purposes that underlie government employee immunity in order to find the answer.'. . As the Sixth Circuit has described this test, the Court must 'determine whether: (1) there was a firmly rooted history of immunity for similarly situated parties at common law; and (2) whether granting immunity would be consistent with the history and purpose of § 1983.' *McCullum v. Tepe,* 693 F.3d 696, 700 (6th Cir.2012). Applying that standard, the Sixth Circuit determined that a prison psychologist employed by a private company could not claim qualified immunity in a case where he failed to provide any treatment to a patient who committed suicide. . . . The Court finds that, to the extent that Dr. Depner operated as a private physician working for the prison, he could not claim qualified immunity. The authority cited by the Court in *McCullum* in holding that private physicians working for the government did not traditionally enjoy any immunity from suit is persuasive. . . . As with other private prison employees, Dr. Depner's position as a private provider mitigates concerns about potential liability in ways not present for other public employees . . . . The parties did not fully develop this argument, and Defendant appears to offer no reply on the qualified immunity issue. In any case, as explained above, even when considered, qualified immunity is unavailable."); ***Jones v. Joubert***, No. CIV.A. CCB-14-2391, 2015 WL 5136355, at *3 (D. Md. Aug. 31, 2015) ("Defendants fail to demonstrate that *Filarsky* has been extended to contractual health care providers working in detention centers or correctional facilities, and the holding in *Filarsky* will not be extended in this case based on the limited record before the court."); ***Starks v. City of Waukegan***, No. 09 C 348, 2015 WL 5012131, at *11 (N.D. Ill. July 24, 2015) ("[I]t is questionable whether private dentists are even entitled to assert qualified immunity under § 1983. *See Currie v. Chhabra,* 728 F.3d 626, 632 (7th Cir.2013) (finding "persuasive" the Sixth Circuit's holding in *McCullum v. Tepe,* 693 F.3d 696 (6th Cir.2012), that a private doctor providing services to state prison inmates is ineligible for qualified immunity); *Shields v. Ill. Dep't of Corr.,* 746 F.3d 782, 794 n. 3 (7th Cir.2014) (same); *compare Filarsky v. Delia,* 132 S.Ct. 1657, 1665, 1668 (2012) (holding that a private lawyer retained by the city is entitled to assert a qualified immunity defense because "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis"), *with Richardson v. McKnight,* 521 U.S. 399, 412 (1997) (holding that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case"). Dentist Defendants also argue that they are not "state actors" for purposes of § 1983. Doc. 351 at 10–13; *but see Burke v. Town of Walpole,* 405 F.3d 66, 88 (1st Cir.2005) (holding that a forensic odontologist was a state actor because he "rendered a bite mark opinion only because the Norfolk District Attorney's Office, at the recommendation of the state's own forensic odontologist, sought his assistance with the analysis of forensic evidence in a criminal investigation"). The court need not resolve these issues, as Dentist Defendants prevail on

the merits of Starks's due process claim."); ***Johnson v. Wexford Health Sources, Inc.***, No. CIV.A. JKB-14-2513, 2015 WL 3441958, at *3 (D. Md. May 26, 2015) ("Defendants also claim entitlement to qualified immunity, citing *Filarsky v. Delia*. . . . *Filarsky* overturned the denial of qualified immunity to an attorney who was retained by a city in California to assist in an internal investigation concerning a firefighter's potential wrongdoing. . . Defendants fail to demonstrate that *Filarsky* has been extended to contractual health care providers working in detention centers or correctional facilities, and the undersigned will not extend the holding in *Filarsky* based on the record now before the court. Thus, dismissal of plaintiff's original and amended complaint based on qualified immunity is denied."); ***Wilder v. Rockdale Cnty***., No. 1:13-CV-2715-RWS, 2015 WL 1724596, at *8-9 (N.D. Ga. Apr. 15, 2015) ("At oral argument, CorrectHealth argued that subjecting it to suit under § 1983 without permitting it to assert qualified immunity would be an unfair result, and therefore using the *Richardson* analysis to determine whether an entity is subject to suit under § 1983 would create a clearer standard. However, existing precedent compels the Court to find that the state-actor and qualified-immunity inquiries are different. The factors discussed in *Richardson* do not control whether a defendant acts under color of law for § 1983 purposes. As a result, the Court relies on *West v. Atkins* and finds that CorrectHealth acted under color of law and is subject to § 1983. . . . Defendants next argue that even if they acted under color of state law, they are entitled to qualified immunity because they did not violate Mr. Wilder's clearly established constitutional rights. The doctrine of qualified immunity protects government officials performing discretionary functions from being sued in their individual capacities. . . . Defendants fail to show that qualified immunity is available to them. As explained above, the purposes of the immunity doctrine do not justify extending immunity to a private, for-profit firm providing medical care potentially in competition with other firms. Like in *Richardson*, Defendants here operate subject to 'marketplace pressures' that encourage them 'to avoid overly timid, insufficiently vigorous, unduly fearful, or "nonarduous" employee job performance.'. . In fact, Defendants emphasize (albeit in an attempt to show that they are not state actors under § 1983) that they are similar to the defendants in *Richardson*, . . . and the Court agrees. Consequently, Defendants fail to show that they are entitled to qualified immunity, and the CorrectHealth Defendants' Motion for Partial Summary Judgment is **DENIED.**"); ***Howard v. Koppel***, No. CIV.A. RDB-14-3053, 2015 WL 1085628, at *4 (D. Md. Mar. 10, 2015) ('Defendant also claims entitlement to qualified immunity. Defendants cite *Filarsky v. Delia*. . . . *Filarsky* overturned the denial of qualified immunity to an attorney who was retained by a city in California to assist in an internal investigation concerning a firefighter's potential wrongdoing. . . Defendant fails to demonstrate that *Filarsky* has been extended to contractual health care providers working in detention centers or correctional facilities, and the undersigned will not extend the holding in *Filarsky* based on the record presented here."); ***Miller v. Lehman,*** No. CIV.A. JKB-14-0896, 2015 WL 641299, at *2 (D. Md. Feb. 12, 2015) ("Defendants claim entitlement to qualified immunity, citing *Filarsky v. Delia,* —— U.S. ——, 132 S.Ct. 1657, 1667–68 (2012). *Filarsky* overturned the denial of qualified immunity to an attorney who was retained by a city in California to assist in an internal investigation concerning a firefighter's potential wrongdoing. . . Defendants fail to demonstrate that *Filarsky* has been extended to contractual health care providers working in detention centers or correctional facilities, and the undersigned will not extend the holding in

Filarsky based on the record now before the court. Further, assuming arguendo that defendants can invoke the doctrine of qualified immunity, the determination of whether they are entitled to qualified immunity is more appropriately addressed after the facts of the case have been developed and a determination has been made as to whether plaintiff has suffered a violation of his constitutional rights. Accordingly, dismissal of plaintiff's complaint based on qualified immunity is not proper at this time."); ***Dicks v. Shearin***, No. CIV.A. GLR-14-1463, 2015 WL 629002, at *4 (D. Md. Feb. 10, 2015) ("The Medical Defendants argue they are entitled to qualified immunity and cite to [*Filarsky v. Delia*] . . . . *Filarsky* overturned the denial of qualified immunity to an attorney who was retained by a city in California to assist in an internal investigation concerning a firefighter's potential wrongdoing. . . The Medical Defendants fail to demonstrate that *Filarsky* has been extended to contractual health care providers working in detention centers or correctional facilities. The Court will not extend the holding in *Filarsky* based on the record before it. Accordingly, the Court will deny the Medical Defendants' Motion to Dismiss."); ***Foster v. City of Philadelphia***, CIV.A. 12-5851, 2014 WL 5821278, *21-*23 (E.D. Pa. Nov. 10, 2014) ("Jefferson's situation is very different from the attorney's situation in *Filarsky* because Jefferson was not retained by the City in any manner to promote the public good. . . . Here, there is no question that Jefferson, in his actions with Boyle, was pursuing a purely private end: the removal of Foster's vehicles from his private property. . . . In this case, . . . the facts show that Jefferson's conduct does not fall under the three potential categories from which qualified immunity may arise as set forth in *Richardson.* Not only was Jefferson's conduct purely for private purposes and not the greater societal good, his interaction with the government was not fleeting. . . .It was not a brief association with a government body. . . .Furthermore, this case involves the seizure of allegedly abandoned cars from a private garage. This is not an 'essential governmental activity.' Jefferson also did not act under close official supervision. The seizures were done at his initiative, and he did not engage in any conduct that was 'closely' supervised by Boyle. . . .Despite Jefferson not being entitled to qualified immunity, he is entitled to assert good faith as an affirmative defense at trial. . . .Jefferson's subjective state of mind is for a jury to determine and cannot be disposed of on summary judgment. . . . Century Motors relies on *Filarsky v. Delia* to support its claim that it should have the protection of qualified immunity. . . Again, the facts in *Filarsky* are very different than the facts here involving Century Motors. For the reasons that *Filarsky* does not support Jefferson's claim of qualified immunity, it does not support Century Motors' claim. Finally, Century Motors' situation here does not fall within the cautionary language in *Richardson,* where the Court noted that the case did not involve a private individual briefly associated with a governmental body, serving as an adjunct to government in an essential government activity, or acting under close official supervision. . . Century's interaction with NSU was not brief. It operated under a contract with the City and towed cars and took parts that were pointed out by Officer Boyle. It expended considerable time storing the vehicles and parts, and returning cars to their owners. Thereafter, paperwork on the results of Century's activity was sent to NSU. Such actions by Century are not brief but protracted."); ***Pierce v. Moore***, 1:11-CV-132 CEJ, 2014 WL 4724771, *3, *5 (E.D. Mo. Sept. 23, 2014) ("Defendants have not addressed whether there were common-law immunities available for private physicians and nurses providing psychiatric services for a public institution in 1871. The Sixth Circuit undertook the relevant inquiry, however, and

determined that there was no such common-law tradition of immunity. . . Defendants provide no persuasive argument to the contrary; indeed, they have made no effort to conduct the relevant inquiry and the Court determines that they have not established that a relevant immunity existed at common law. . . . Defendants here are more akin to the prison guards in *Richardson* than the internal investigator in *Filarsky.* Defendants note that the county hospital had ultimate control and supervision over the psychiatric unit. That assertion, without more, does not establish that defendants worked in joint participation with state actors and there is no evidence in the record that defendants consulted with hospital administrators in making decisions regarding plaintiff's care. Defendants do not argue that they were performing an essential government function or that affording them qualified immunity is consistent with or serves the purposes served by immunities that were available at common law in 1871. The Court finds that defendants have failed to establish that there is substantial ground for difference of opinion about a controlling question of law on this point."); ***Herrera v. Santa Fe Pub. Sch.***, 41 F.Supp.3d 1027, 1099 (D.N.M. 2014) ("Permitting corporations to raise a qualified immunity defense also leads to the anomalous result where corporations performing functions for governments will have more protection from suit than the governments, government officials, or private individuals engaged in the same unconstitutional conduct. ASI argues in its motion that it is entitled to protection under the *Monell* standard for local governmental liability *and* it is entitled to protection under the qualified immunity doctrine. Of course, government officials and private actors deemed to be engaged in state action are not entitled to the protections of *Monell* and local governments are not entitled to qualified immunity. . . For the rationale articulated in *Richardson* and *Filarsky*, the particular circumstances presented in this case, and the incoherence of applying *Monell* and qualified immunity protections to a corporation like ASI, the company should not be permitted to raise the defense of qualified immunity."); ***Schneider v. Cnty. of Sacramento***, CIV. S-12-2457 KJM, 2014 WL 4187364, *11, *12 (E.D. Cal. Aug. 21, 2014) ("Defendant argues the policies underlying qualified immunity-avoiding timidity in the performance of public duties, ensuring that people are not deterred from public service, and preventing lawsuits from distracting people from government work-apply equally to a contractor engaged to inspect mines and enforce environmental laws. . .Defendant provides no independent examination whether a geologist or one involved in civil enforcement would have been entitled to immunity in 1871, but instead relies on the *Filarsky* court's examples: immunity was extended to private citizens who acted as justices of the peace and assisted in the execution of warrants, among other things. . . He analogizes his position to those enlisted to execute warrants, arguing that he is empowered to enter onto mine property to carry out an inspection. . .In addition, he attempts to distinguish *Richardson v. McKnight,* 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), which held that a guard employed by a private prison was not entitled to qualified immunity, by saying that the Supreme Court itself recognized *Richardson'*s narrow holding. . . In *Richardson,* the Supreme Court said 'a private firm, systematically organized to assume a major, lengthy administrative task ... with limited direct supervision by the government for profit and potentially in competition with other firms' was not entitled to assert qualified immunity, whereas 'a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision' might be able to claim protection. . .Although defendant makes a more robust showing

now in support of his claim for qualified immunity, the court need not at this point definitely decide whether he has established the historical basis for his claim of immunity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . In determining whether a governmental officer is immune from suit based on the doctrine of qualified immunity, the court generally considers two questions. The district court may decide the order of addressing these questions and answer only the second, in accordance with fairness and efficiency and in light of the circumstances of a particular case. . . The first is, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? . . A negative answer ends the analysis, with qualified immunity protecting defendant from liability. . .If a constitutional violation occurred, a court must further inquire 'whether the right was clearly established.'. . . As noted above, plaintiffs have adequately pleaded that in 2012 defendant deprived them of property rights arbitrarily, in response to political pressure; yet the Ninth Circuit had said that a city council's rejection of the landowner's request to build condominiums because of pressure from neighboring landowners violated due process, *Del Monte Dunes,* 920 F.3d at 1508, and an arbitrary deprivation of a property right might give rise to a substantive due process claim. *Action Apt. Ass'n,* 509 F.3d at 1026. Moreover, the court has also recognized that actions taken in retaliation for protected activities are improper. *Soranno's Gasco,* 874 F.2d at 1314. A reasonable county official would have been aware that arbitrary, retaliatory actions could have violated plaintiffs' rights. Defendant has not shown he is entitled to qualified immunity."); ***Maldonado v. Powers***, 12-CV-773-JPG-PMF, 2014 WL 2926522, *8 (S.D. Ill. June 27, 2014) ("The Seventh Circuit Court of Appeals has yet to decide whether or not qualified immunity is available to employees of a private company providing medical services to inmates. *See Currie v. Chhabra,* 728 F.3d 626, 632 (7th Cir.2013). In *Currie,* the Seventh Circuit discussed the U.S. Supreme Court's 2012 decision in *Filarsky,* which permitted application of the qualified immunity defense to certain private individuals hired by the government. The Seventh Circuit also noted in *Currie* that *Filarsky* also reaffirmed the U.S. Supreme Court's decision *Richardson v. McKnight,* which held that employees of a private prison management firm were not entitled to qualified immunity by reasoning that the private firm was 'subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide-pressures not necessarily present in government departments' (*Richardson v. McKnight,* 521 U.S. 399, 412, 117 S.Ct. 2100, 2108 (1997)). . . Further, the Seventh Circuit in *Currie* found persuasive the reasoning of a Sixth Circuit Court of Appeals decision, *McCullum v. Tepe,* which held that a doctor providing psychiatric services to inmates is not entitled to assert qualified immunity (*McCullum v. Tepe,* 693 F.3d 696 (6th Cir.2012)). . . Similarly, I find the reasoning of the *McCullum* and *Richardson* decisions persuasive, and I would hold that Dr. Powers is not entitled to assert the qualified immunity defense. Even if Dr. Powers was entitled to assert the defense, the contours of Maldonado's Eighth Amendment rights were sufficiently clear that Dr. Powers would have been on notice, as the facts appears before the court for purposes of this motion, that the unnecessary and wanton infliction of pain upon Maldonado by failing to provide adequate medical care would be unlawful."); ***Sampson v. Blue Cross Blue Shield of Michigan***, 997 F.Supp.2d 777, 790-92 (E.D. Mich. 2014) ("Although

the BCBS Defendants acknowledge the first prong of the test, their brief glosses over prong one and focus on policy arguments, citing favorable portions from *Filarsky.* At oral argument, Counsel for the BCBS Defendants asserted that the BCBS Defendants were simply private citizens aiding the police in executing search warrants. While it is true that in 1871 Sheriffs executing a warrant were empowered to 'enlist the aid of able-bodied men of the community in doing so' and that '[w]hile serving as part of this "posse comitatus," a private individual had the same authority as the sheriff, and was protected to the same extent,' (*Filarsky, supra,* at 1664), that is not the situation that is alleged here. The BCBS Defendants were *not uninterested* townspeople who, out of necessity, were asked to aid law enforcement officers with a warrant. Rather, Plaintiffs allege that the BCBS Defendants were the *complaining witnesses* who instigated the investigation and that they acted in furtherance of BCBS's interests in participating with the searches and that they used information obtained during those searches for BCBS's own purposes. As the Supreme Court instructed in *Wyatt,* 'in determining whether there was an immunity at common law that Congress intended to incorporate in the Civil Rights Act,' this Court should 'look to the most closely analogous torts.'. . As in *Wyatt,* the most closely analogous torts here are malicious prosecution and abuse of process. Indeed, Plaintiffs have separately-titled § 1983 counts for malicious prosecution and abuse of process. And *Wyatt* tells us that '[a]t common law, these torts provided causes of action against private defendants for unjustified harm arising out of the misuse of governmental processes.' There was no immunity at common law extended for *complaining witnesses.* Accordingly, the Court finds prong one has not been met. . . As explained in *Wyatt,* . . . private parties such as the BCBS Defendants 'hold no office requiring them to exercise discretion' and therefore extending immunity to them 'would have no bearing on whether public officials are able to act forcefully and decisively in their jobs.'. .Moreover, Plaintiffs allege that: 1) the BCBS Defendants initiated criminal proceedings to further their own private interests in collecting or freezing funds allegedly owed to BCBS; 2) a BCBS Defendant approached the prosecutors and the police; and 3) the BCBS Defendants gave them a three-inch binder of information pertaining to BCBS's investigation of Dr. Sampson. . . The BCBS Defendants were not uninterested parties that the police, for some reason such as their professional expertise. . . asked to aid them in the execution of the search warrants. Like the private defendants in *Wyatt,* the BCBS Defendants are alleged to have used the government processes to achieve their own ends and were not 'principally concerned with enhancing the public good.'"); ***Cady v. Cumberland County Jail***, No. 2:10–cv–00512–NT, 2013 WL 3967486, *1 (D. Me. Aug. 1, 2013) ("I write to address only one issue. The Magistrate Judge pointed out to the Court that the law on qualified immunity for private actors who are under contract to perform duties statutorily required of the state is unsettled. I agree with the Magistrate Judge that the Corizon Defendants are more like the defendants in *Richardson v. McKnight*, 521 U.S. 399 (1997) (where guards working in a prison facility run by a private contractor were not entitled to qualified immunity) than the defendant in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012) (private attorney who was retained by city to assist in investigation of firefighter's potential wrongdoing was entitled to seek qualified immunity). . . . Magistrate Judge Kravchuk also points to a First Circuit case, which predated *Richardson* and which was not cited by the parties, wherein the First Circuit held that private social workers who work for agencies under contract with the state to provide counseling and investigative services in suspected cases of child

abuse were the functional equivalent of state actors and therefore entitled to qualified immunity. *Frazier v. Bailey*, 957 F.2d 920, 929 (1st Cir.1992). Because this case falls somewhere in between *Frazier* and *Richardson*, and because the First Circuit has not yet revisited *Frazier* in light of *Richardson* and *Filarsky*, I agree with the Magistrate Judge's prudent decision to assume for the sake of argument that the Corizon defendants are entitled to qualified immunity. I adopt her approach, and I agree with her conclusion for the reasons she states, that even if the Corizon Defendants are entitled to raise a qualified immunity defense, their defense fails."); ***Cady v. Cumberland County Jail***, No. 2:10–cv–00512–NT, 2013 WL 3967486, *31-*33 (D. Me. Aug. 1, 2013) (Kravchuk, J., R & R) ("The defendants argue that Corizon's relationship to CCJ is different from the relationship that the private jailer had to the State of Tennessee in *Richardson v. McKnight.* This is a fair statement because the State of Maine has not privatized corrections to the extent that Tennessee has, there are county policy makers involved in the operation of CCJ, the Corizon defendants work alongside county-employed correctional officers, and there is consultation and collaboration between Corizon and the County on operational and financial matters. . . However, I am not persuaded that these differences justify extending the doctrine of qualified immunity to Corizon's employees because there has been no showing that this result is supported by legal tradition and because it appears that private market forces will influence Corizon as much as they do other private companies serving this market. . .Nothing in *Filarsky v. Delia*, 132 S.Ct. 1657 (2012) (extending qualified immunity to a private attorney specially retained by the government to assist with an investigation), or *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir.2005) (extending qualified immunity to physicians on contract with the state to perform forensic investigative services), cited by defendants, contradicts this assessment. The facts demonstrate a relationship between the government and the private service provider that is much more like the relationship in *Richardson v. McKnight.* Cumberland County has contracted with Corizon to assume the day-to-day responsibility of managing the delivery of medical care in CCJ and Corizon has undertaken that task for profit. Pursuant to the contract, Corizon has insured itself against prisoner claims. . . There is governmental oversight, but Cumberland County's policy-makers and jail administrator do not oversee or direct the day-to-day provision of medical care by Corizon employees. Additionally, Corizon has developed its own policies and procedures concerning the provision of medical services. Given these factors and the defendants' failure to identify a tradition of immunity in this context, I conclude that qualified immunity is not available to the individual Corizon defendants. Notwithstanding this conclusion, the court needs to be aware of a case not cited by the individual Corizon defendants, *Frazier v. Bailey*, 957 F.2d 920 (1st Cir.1992). The First Circuit decided *Frazier* prior to the Supreme Court's decisions in *Richardson* and *Wyatt*, and held that a privately employed social worker who conducted child abuse counseling was entitled to qualified immunity because her employer was 'under contract to perform the duties statutorily required of the state,' the idea being that she was 'compelled' to perform this function and therefore deserved qualified immunity for being the 'functional equivalent' of a state actor. . . Adherence to *Frazier* would call for application of the qualified immunity standard because the Corizon defendants were under contract to perform duties statutorily assigned to the state. *Richardson* would appear to supplant *Frazier* because it prescribes a different test than the 'functional equivalence' standard stated in *Frazier.* Additionally, *Richardson* is more closely on

point because *Frazier* concerned a private party conducting child abuse counseling or investigations, whereas *Richardson* concerned private parties providing the state with jail services, as is the case here. Unfortunately, although the First Circuit has cited *Frazier* subsequent to *Richardson,* it has not done so in support of giving qualified immunity to private actors and has never discussed *Richardson* (or *Wyatt*) in the context of giving qualified immunity to private actors. Despite my reservations about the binding force of *Frazier,* '[u]ntil a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority.'. . This court may ultimately decide that *Frazier* is 'unmistakably cast into disrepute,' but for purposes of providing a complete recommendation, qualified immunity is considered here."); ***Allen v. Shawney***, No. 11–cv–10942, 2013 WL 2480658, *10 (E.D. Mich. June 10, 2013) ("In *Filarsky v. Delia,* 132 S.Ct. 1657 (2012), the Supreme Court held that an attorney hired by a municipality was entitled to raise a defense of qualified immunity even though he was a private attorney rather than a municipal employee. . . .Here, Drs. Hutchinson and Mamidipaka are not employees of the state. Nevertheless, they are engaged in a public service and acting on behalf of the government agency, MDOC. Accordingly, they are entitled to raise the defense of qualified immunity."); ***Young v. County of Hawaii,*** No. 11–00580 ACK–RLP, 2013 WL 2286068, *13-*16 (D. Haw. May 22, 2013) ("As an initial issue, Defendant Yamada is employed by the Hawaii Island Humane Society, which is an independent contractor hired by the County of Hawai'i to carry out the 'County's animal control program' under Hawai'i County Code and the Hawai'i Revised Statutes. . . The Supreme Court has held that private defendants are not covered by immunity unless 'firmly rooted tradition' and 'special policy concerns involved in suing government officials' warrant immunity. . . In this case, Officer Yamada qualifies for qualified immunity. . . . In this case, state and county law demonstrates that officers of HIHS like Defendant Yamada are duly appointed by law to execute search warrants and perform law enforcement functions like those of the police. . . . The statutory provisions, close collaboration between HIHS and the HCPD, and HCPD's power to review HIHS procedures merits a conclusion that officers of HIHS are private actors enlisted by the police department to exercise police powers to discharge special public duties. . . Accordingly, in this situation, the private actors also enjoy the same protections afforded to law enforcement officers. . . . In *Filarsky,* the Supreme Court also noted that private individuals who work in close coordination with public employees may face threatened legal action for the same conduct. . . .In such cases, private individuals may be deterred from accepting such assignments. This special policy concern applies in this case, where HIHS officers are required to accompany HCPD officers upon request. . . .In conclusion, the nature of the relationship between HIHS and HCPD combined with the historical background of private individuals employed by law enforcement officers establishes that Officer Yamada is protected by qualified immunity in this case. . . . While HIHS as an independent contractor may also have competitive market pressures; the Court in *Richardson* noted that the prison performed its task independently, with relatively less ongoing direct state supervision.'. . Such freedom allowed the private contractor prison to respond to market pressures to adjust employee behavior. . .In this case, there is close government collaboration and supervision that restricts HIHS's ability to respond as a private firm to market pressures. . . Accordingly, the Court concludes that Defendant Yamada is protected by qualified immunity

because of HCPD's collaboration with HIHS and its supervision over HIHS' work."); ***Hogan v. Wellstar Health Network, Inc***., No. 1:12–CV–1418–RWS, 2013 WL 1136980, *11 & n.5 (N.D. Ga. Mar. 14, 2013) ("The Wellstar Defendants argue that *Filarsky* controls here and therefore, they are entitled to qualified immunity as to the § 1983 claim. Plaintiffs maintain that this case is more analogous to *Richardson* and therefore, qualified immunity does not apply. . . Of course, if Defendants were not acting under color of state law for qualified immunity purposes, they were not acting under color of state law for purposes of § 1983 liability. Given the similarities between the Wellstar Defendants and the private defendants in *Richardson,* and Plaintiffs' own position that the Wellstar Defendants did not act under color of state law, . . .the Court finds that the Wellstar Defendants should be treated as private actors in this case. Therefore, the § 1983 claims against the Wellstar Defendants are **DISMISSED.** . . . Plaintiffs' reliance on *Richardson* has substantial merit. This case does not involve a single individual briefly associated with a government body like the private attorney in *Filarsky.* Instead, like the defendants in *Richardson,* the Wellstar Defendants are affiliated with a private firm, systematically organized to assume a major lengthy administrative task (administration of health clinics in Cobb County detention facilities, as well as provision of medical care and personnel in those facilities) with limited direct supervision by the government, undertaking that task for profit and potentially in competition with other firms."); ***Ford v. Wexford Health Sources, Inc***., No. 12 C 4558, 2013 WL 474494, *7, *8 (N.D. Ill. Feb. 7, 2013) ("Whether a privately employed medical official working at a prison may invoke qualified immunity is an open question in the Seventh Circuit. . . Assuming the Individual Defendants may seek qualified immunity, construing the facts in a light most favorable to Ford, he has sufficiently set forth his deliberate indifference claims against Dr. Carter, Dr. Ghosh, and Williams under the first factor of the qualified immunity standard. The Court therefore turns to the second factor. Since the Supreme Court's 1976 decision in *Estelle,* 'it ha[s] been clearly established that medical treatment of prisoners would amount to cruel and unusual punishment if the conduct demonstrated a "deliberate indifference" to the prisoner's condition and an "unnecessary and wanton infliction of pain."'. . Indeed, the Seventh Circuit has repeatedly concluded that disregarding inmate complaints of severe pain constitutes deliberate indifference. . . Because these cases are analogous to the present matter, the Individual Defendants had fair warning that their treatment of Ford was unconstitutional."); ***Estate of Pridemore v. Bluegrass Regional Mental Health-Mental Retardation Bd***., No. 11–38–KSF, 2012 WL 6691597, *4 (E.D. Ky. Dec. 21, 2012) ("The facts of *McCullum* are strikingly similar to this case. Here, Taylor, while not a physician, is a licensed clinical social worker. He is employed by Bluegrass, a private corporation and independent contractor doing business with the Detention Center pursuant to a contract between the parties. The Plaintiffs have failed to show any firmly rooted tradition of granting immunity to private parties like Taylor, nor does the history and purpose of § 1983 justify extending such immunity. Accordingly, Taylor is not entitled to assert the defense of qualified immunity.").

But see ***Bracken v. Okura***, 869 F.3d 771, 776-78 (9th Cir. 2017) ("Chung conceded at oral argument that he 'absolutely' acted under color of state law in helping detain Bracken, and he argues that, because of this, qualified immunity is necessarily available to him. We agree that Chung acted under color of state law for § 1983 purposes: In preventing Bracken from leaving the

party, Chung invoked the authority conveyed by his police uniform and badge. . . We disagree, however, that this automatically entitles him to invoke qualified immunity. State action for § 1983 purposes is not necessarily co-extensive with state action for which qualified immunity is available. . . . 'The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'. . Qualified immunity, on the other hand, 'protect[s] *government's* ability to perform its traditional functions.'. . .Thus, the availability of immunity does not necessarily overlap with state action under § 1983 when a government officer uses the 'badge of their authority[]'. . . in service of a private, non-governmental goal. . . .Neither this court nor the Supreme Court has addressed the general availability of qualified immunity to off-duty police officers acting as private security guards. . . In other contexts, however, we have followed the Supreme Court's instruction to 'look both to history and to the purposes that underlie government employee immunity in order to find the answer.' . . The first inquiry is whether '[h]istory ... reveal[s] a "firmly rooted" tradition of immunity.'. . We look principally to 'the common law as it existed when Congress passed § 1983 in 1871.'. . The next question is whether granting immunity would serve the purposes underlying the immunity doctrine – such as 'protecting government's ability to perform its traditional functions,' 'preserv[ing] the ability of government officials to serve the public good,' 'ensur[ing] that talented candidates [are] not deterred by the threat of damages suits from entering public service,' and 'protecting the public from unwarranted timidity on the part of public officials.'. . Applying that framework, we conclude qualified immunity is unavailable to Chung. First, he has shown no 'firmly rooted' tradition of immunity for off-duty or special duty officers acting as private security guards. Indeed, Chung has not cited any supporting historical authority. Nor has our own review revealed a 'firmly rooted' tradition of immunity. . . .We are not aware of any state that offers immunity where an officer serving as a private security guard did not act in service of a public duty, and some states have held immunity is simply unavailable in this context. . . Thus, the historical inquiry does not support immunity for Chung here. Second, Chung has not shown that the policies underpinning qualified immunity warrant invoking the doctrine here. In detaining Bracken, Chung did not act 'in performance of *public* duties' or to 'carry[ ] out *the work of government*.'. . He does not contend, for example, that he was preventing Bracken from committing a crime. Instead, Chung – acting on behalf of the hotel, at the hotel's direction and while being paid by the hotel – aided the hotel in realizing *its* goal of issuing Bracken a warning. Thus, shielding Chung from suit would not advance the policies underlying qualified immunity. . . We hold that qualified immunity is not available to Chung."); ***Gregg v. Ham***, 678 F.3d 333, 339-41 & n.6 (4th Cir. 2012) ("A private party may be liable under § 1983 if acting 'under color of state law'. . . but is not necessarily entitled to assert a qualified immunity defense. . . . Thus, when determining whether a private party acting under color of state law is entitled to qualified immunity, the Supreme Court has instructed courts 'to look both to history and to the purposes that underlie government employee immunity.'. . .Applying the test articulated in *Richardson*, we conclude that the history and policy behind the qualified immunity defense do not support extending it to bail bondsmen. First, there is no evidence that bail bondsmen have historically been afforded immunity for their actions. . . .Second, the policy justifications underlying qualified immunity do not apply to bail bondsmen. . . . Courts have traditionally

afforded qualified immunity to public officials because susceptibility to suit would distract them from performing their public functions, inhibit discretionary action, and deter desirable candidates from performing public service. . . There is no need, however, for qualified immunity to shield bondsmen from suit, as they are not entrusted with a public function. To the contrary, while the law certainly allows a bail bondsman to apprehend a fugitive, that right is exercised in tandem with the obligation of law enforcement to accomplish the same objective. . . Moreover, rather than operating in the interest of public service, the work of a bail bondsman is fueled primarily by a strong profit motive. . . In sum, neither history nor policy support extending the qualified immunity defense to bail bondsmen. . . . . The Court's recent decision in *Filarsky*—holding that immunity under § 1983 does not vary based on whether an individual works full-time for the government or does so on some other basis—does nothing to change the result in this case. . . As we have explained, Ham was a bail bondsman, not an 'arm of the court,' and thus operated in pursuit of his own financial self-interest. He was not employed by the Sheriff's Department and did not report to law enforcement. Moreover, the sheriff did not call on Ham to assist in its efforts to apprehend Rose; instead, it was Ham who called on Deputy Yelton to prevent—unsuccessfully it turns out—a breach of the peace at Gregg's home. Finally, as Yelton confirmed, Ham was in charge of the search and did not act at Yelton's direction. Because Ham was not hired by or working on behalf of the government in any capacity, *Filarsky* is inapposite and, for the reasons discussed, Ham is not entitled to qualified immunity.")

See also ***Al Shimari v. CACI Intern., Inc.,*** 679 F.3d 205, 263, 264 (4th Cir. 2012) (en banc) (Niemeyer, J., joined by Wilkinson, J., and Shedd, J., dissenting) [arguing that court had jurisdiction to entertain interlocutory appeal but court lacked subject matter jurisdiction over case because claims raised nonjusticiable political questions] ("In short, the unique federal interest embodied in the combatant activities exception to the FTCA is an interest in freeing military actors from the distraction, inhibition, and fear that the imposition of state tort law by means of a *potential* civil suit entails. It makes no difference whether the military actors are low-level soldiers, commanders, or military contractors. The Supreme Court has made clear that immunity attaches to the *function* being performed, and private actors who are hired by the government to perform public functions are entitled to the same immunities to which public officials performing those duties would be entitled. *See Filarsky*, 132 S.Ct. at 1661–66. The unanimous Supreme Court in *Filarsky* emphasized that imposing liability on private individuals performing public functions will result in 'unwarranted timidity' on the part of 'those engaged in the public's business,' calling this concern 'the most important special government immunity-producing concern.'. . It recognized the need to 'afford[ ] immunity not only to public employees but also to others acting on behalf of the government' because 'often when there is a particular need for specialized knowledge or expertise ... the government must look outside its permanent work force to secure the services of private individuals.'. .This case presents just such an example. The military had a need for specialized language and interrogation skills and hired private individuals to work with the military in performing its public function. Because potential suit and liability would result in 'unwarranted timidity' on the part of these government contractors, they must share the common law immunity enjoyed by the military and retained by the FTCA combatant activities exception. These interests

underlying this immunity are only protected if the immunity is not only an immunity from liability, but also an immunity from suit. Thus, the denial of a combatant activities defense will be effectively unreviewable at final judgment because the defendants will no longer be able to vindicate their right to avoid the burdens and distractions of trial. Military contractors will have to undertake future actions 'arising out of combatant activities' with the understanding that they are presumptively subject to civil tort law and must abide by state law duties of care in the middle of a foreign war zone. The result will be exactly what the Supreme Court cautioned against in *Filarsky:* 'those working alongside [government employees] could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.'. . The governmental interests in uninhibited military action and in the attraction of talented candidates, both public and private, animate the combatant activities exception, and these interests are far broader than the limited interests recognized by the majority, which focuses only on 'sensitive military issues.'. . Such a narrow mischaracterization of the federal interest ignores the broad language of the exception (protecting actions "*arising out of* combatant activities") and finds no support in federal common law.")

See also ***Harrison v. Ash***, 539 F.3d 510, 521-25 (6th Cir. 2008) ("[A]s employees of a private medical provider, rather than Macomb County itself, Defendant nurses may not assert a defense of qualified immunity and thus we lack jurisdiction to hear their appeal. . . . As an initial matter, it is undisputed that Defendant nurses are subject to suit under § 1983 because they acted 'under color of state law.' . . . In the instant case, Defendant nurses were acting under the color of state law when the alleged constitutional violation occurred because of the contractual relationship between Macomb County and CMS. . . . Being subject to suit under § 1983, however, does not mean that a party has the right to assert qualified immunity. . . . Thus, this Court must engage in a context specific analysis, examining the common law tradition of immunity as well as the policy considerations supporting qualified immunity, to determine whether nurses employed by a private medical provider are eligible to assert qualified immunity in a § 1983 action.. . . . Applying the wisdom of *Richardson* to the instant case, we find that the purposes of qualified immunity do not support the extension of the doctrine to nurses employed by a private medical provider. . . .Importantly, like the company in *Richardson*, CMS is a for-profit entity that has undertaken the major administrative task of providing health care to Macomb County inmates, operates with little supervision from Jail authorities, and is subject to the pressures of the marketplace. . . . [O]ther circuits have denied qualified immunity to private medical providers under similar circumstances. [collecting cases]"); ***Cook v. Martin***, 148 F. App'x 327, 2005 WL 2175922, at *13, *14 (6th Cir. Jul. 27, 2005) (not published) ("We therefore conclude that there is no firmly rooted history at common law of according qualified immunity to privately employed prison medical providers. Hence, Mason has failed to satisfy the first factor in determining whether a private individual is entitled to the protections of qualified immunity. Mason has also failed to satisfy the second factor because the purposes underlying the doctrine of qualified immunity do not warrant granting immunity for privately employed prison medical providers. . . . As for the first two purposes cited by the Court, we can discern no sufficiently meaningful distinction between the private prison management firms at issue in *Richardson* and the private prison medical providers at issue in the

case at bar. . . . Mason argues that his situation is distinguishable because he was assigned to a state prison hospital and was required to abide by the same guidelines and regulations as state-employed personnel, therefore his actions were controlled by state supervision, pursuant to which he is entitled to qualified immunity. Mason's private employer, EMS, however, was subcontracted to MDOC through Correctional Medical Services (CMS), a separate private enterprise. Thus, Mason is effectively two steps removed from direct state supervision and can hardly be said to be controlled by the state. Inasmuch as Mason's employer, EMS, is accountable to another private entity, CMS, rather than to the State of Michigan, surely the marketplace pressures that attend Mason's functions carry even more weight. . . . Our examination of the history and purposes of qualified immunity does not reveal anything sufficiently special about the work of private prison medical providers that would warrant providing such providers with governmental immunity. Accordingly we agree with the district court that Mason is not protected by the doctrine of qualified immunity."); ***Derfiny v. Pontiac Osteopathic Hospital***, No. 02-2308, 2004 WL 1543166, at *7 (6th Cir. July 6, 2004) ("Plaintiff attempts to argue that the Defendants do not even facially qualify for qualified immunity since they were private physicians employed by a private hospital contracted by the County to provide medical services at the County jail. As discussed above, since qualified immunity is reserved for state actors, private litigants are generally not eligible to receive qualified immunity pursuant to § 1983. . . The Court has previously held, however, that a private litigant, who performed service at the 'behest of the sovereign,' is entitled to receive qualified immunity from suit.[citing *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir.1997)] We addressed this issue again in *Cooper v. Parish*, and ruled that particular plaintiff was not working at the behest of the sovereign, or performing any unique government function; therefore, qualified immunity was not applicable. 203 F.3d 937, 953 (6th Cir.2000). As Defendant responds, this issue was neither briefed nor argued in the lower court; thus, this is yet another reason for this Court to remand."); ***United States v. Thomas,*** 240 F.3d 445, 448, 449 (5th Cir. 2001) ("It goes without saying that the policy considerations supporting private corrections officers' not being entitled to qualified immunity are quite different from those concerning whether they are 'public officials' for purposes of the federal bribery statute. Obviously, the Government has just as strong an interest in the integrity of private corrections officers charged with guarding federal detainees as it has in the integrity of federal corrections officers employed in federal facilities. Under such circumstances, and for purposes of the federal bribery statute, there is simply no basis for differentiating between such private and public officers."); ***Jensen v. Lane County***, 222 F.3d 570, 576-78 (9th Cir. 2000) ("Limited information has been presented on the historical availability of immunity for doctors asked by the government to make a decision to commit persons suspected of mental illness. . . .[T]he parties have not offered, and we have not found, any definitive common law history of immunity outside of Oregon that would support a finding of qualified immunity here. . . . This case is similar to *Richardson* in many respects. PA is a privately organized group of psychiatrists providing services to the government pursuant to contract. The privatization and market forces arguments are equally applicable here as well. PA psychiatrists must provide psychiatric services for the County with the market threat of replacement for failure to complete their duties adequately. As in *Richardson*, the potential for insurance, indemnification agreements, and higher pay all may operate to encourage qualified candidates to engage in this

endeavor and to discharge their duties vigorously."); ***Hinson v. Edmond***, 192 F.3d 1342, 1345-47 (11th Cir. 1999) ("For the same reasons that the *Richardson* Court declined to extend the doctrine of qualified immunity to privately employed prison guards, we decline to extend qualified immunity to this privately employed prison physician. . . . The parties have not been able to point to, and independent research– including a look at the sources cited by the Supreme Court in *Richardson*– does not reveal, cases which show a common law tradition of immunity from liability for privately employed prison physicians for acts amounting to recklessness or intentional wrongdoing. Instead, case law shows that even state physicians may be subject to liability for intentional torts. . . . In addition to the lack of historical support for immunity, the public policy reasons for qualified immunity do not justify the extension of qualified immunity in this case. . . .Also, as was the case in *Richardson*, Wexford Health Sources was systematically organized to perform a major administrative task for profit. . . . Moreover, as was the case in *Richardson*, Wexford performed its task with limited direct supervision and control by the government. . . . Despite arguments raised by defendant in this case, that the inability of a privately employed prison physician to raise the defense of qualified immunity will deter qualified candidates is doubtful. Employee indemnification, increased benefits and higher pay are all tools at the disposal of a private company like Wexford; and they can be used to attract suitable employees."), *opinion revised on other grounds*, 205 F.3d 1264 (11th Cir. 2000); ***Bibeau v. Pacific Northwest Research Foundation, Inc.***, 188 F.3d 1105, 111, 112 (9th Cir. 1999) ("[C]ircuit precedent suggests that the private defendants are not entitled to qualified immunity here. [citing *Halvorsen*] . . . . This isn't a firm that was 'briefly associated with a government body,'. . . but rather a firm that conducted research at the OSP for a decade, from 1963 to 1973. We can find no principled distinction between private researchers such as the PNRF, the private prison guards involved in *Richardson* and the private detoxification facility in *Halvorsen*. Accordingly, [defendants] are not entitled to qualified immunity."); ***Malinowski v. DeLuca***, 177 F.3d 623, 627 (7th Cir. 1999) (no qualified immunity for private building inspectors); ***Halvorsen v. Baird***, 146 F.3d 680, 685 (9th Cir. 1998) ("A private firm providing a municipality with involuntary commitment services for inebriates does not enjoy qualified immunity, under *Richardson v. McKnight*. . . . The only significant difference between the private prison guard firm in *Richardson* and the private detoxification facility in the case at bar is that the firm in *Richardson* was for-profit, the one in the case at bar not-for-profit. That difference is not material, because both profit and nonprofit firms compete for municipal contracts, and both have incentives to display effective performance. That revenues may go to salaries and other activities of the firm, as opposed to dividends, is not likely to dampen the ardor of the nonprofit firm's employees."); ***Ace Beverage Company v. Lockheed Information Management Services***, 144 F.3d 1218, 1219 (9th Cir. 1998) (private corporation that processes parking tickets for City of Los Angeles not entitled to qualified immunity); ***Bender v. General Services Admin***., No. 05 Civ. 6459(GEL), 2008 WL 619035, at *10, *11 (S.D.N.Y. Mar. 5, 2008) ("Following *Richardson*, the circuit courts have generally rejected qualified immunity for private parties operating under contract for the government.[citing cases] Where courts have found qualified immunity, it has been in cases falling within *Richardson*'s narrow caveat regarding private party acts that are isolated, taken at the specific direction of the government, or done without profit or other marketplace incentive. [citing cases] Nothing about Del Valle's situation suggests he is

entitled to the protections of qualified immunity. The services provided by Del Valle to the federal government were done under a contract in which Del Valle and his employer benefitted financially, and the contract was awarded to HWA in a market in which it competed with other security services firms. Such services to the federal government are continuous, not isolated and sporadic, and HWA has every opportunity and incentive to establish administrative systems for the efficient delivery of its service. Consequently, like the operator of private prisons in *Richardson*, there is every reason to think that 'marketplace pressures' will ensure that HWA employees are neither over-nor under-zealous in the performance of their duties in the face of constitutional liability, and there is therefore no justification for extending them the special protections of qualified immunity."); ***Weigand v. Spadt,*** No. 4:03CV3040, 2004 WL 1064235, at ** 5-7 (D. Neb. May 12, 2004) (assuming defendants were state actors and denying qualified immunity to Emergency Medical Services, Inc. ("EMS"), an independent contractor that oversees the provision of emergency medical services in the City of Lincoln and EMS's medical director); ***Tewksbury v. Dowling,*** 169 F. Supp.2d 103, 114 (E.D.N.Y. 2001) ("There are three Circuit Court cases that have examined whether private physicians are entitled to a qualified immunity from suit. In *Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir.1993), the Seventh Circuit found that a private psychiatric facility that was ordered by a state court to detain the plaintiff against his will and to treat him as it deemed appropriate was entitled to qualified immunity. *Id.* at 405-06. The court, however, rested its holding largely on the fact that the defendant had acted pursuant to court order on an emergency basis. *Id.* The Ninth Circuit, on the other hand, found that qualified immunity was unavailable to a private physician who, pursuant to a contract with a municipal government, detained an individual suspected of mental illness. *Jensen v. Lane County*, 222 F.3d 570 (9th Cir.2000). Finally, the Eleventh Circuit held that a jail's medical director who was an employee of a private, for-profit company that had contracted with the county to provide medical services to the jail was not entitled to a qualified immunity from suit. *Hinson v. Edmond*, 192 F.3d 1342 (11th Cir.1999). This Court finds that *Sherman v. Four County Counseling Center* is distinguishable since Defendants were not acting pursuant to a court order and the remaining authority supports a finding that Defendants are not entitled to a defense of qualified immunity."); ***Paz v. Weir,*** 137 F. Supp.2d 782, 805 (S.D. Tex. 2001) ("[U]nder either an entwinement analysis or a delegated duty theory, Weir, as head chaplain at the Jail, was acting under color of state law when interacting with Paz and other female inmates. In this instance, the County delegated to a private corporation its duty under state law to provide religious services to inmates and granted this entity broad access to inmates when providing such services. Under similar circumstances, the Sixth Circuit held a volunteer chaplain at a state prison to be a state actor. *See Phelps v. Dunn*, 965 F.2d 93, 102 (6th Cir.1992)."); ***Hernandez v. Hines,*** 159 F. Supp.2d 378, 383 (N.D. Tex. 2001) ("The Court is aware of no firmly rooted history of immunity for foster parents. The Clauds do not allege that they are state workers; indeed, they are private defendants. . . . This Court declines to extend the law of the Fifth Circuit to grant qualified immunity to foster parents."); ***Lawson v. Liburdi,*** 114 F. Supp.2d 31, 40, 41 (D.R.I. 2000) ("In *Skelton v. Pri-Cor, Inc*., 963 F.2d 100 (6th Cir.1991), the Sixth Circuit has held that when a private corporation administers a state correctional facility pursuant to a contract with the state, it is a state actor for purposes of 1983. . . . Wyatt [Detention Center] can be easily distinguished. Here, there is no element of delegation.

The State has not delegated to Cornell Corrections, or its employees a function performed on behalf of the government. Rather, the state, pursuant to the [Municipal Detention Facility Corporations] Act, has allowed the creation of a corporation, the CFDFC [Central Falls Detention Facility Corporation]. The CFDFC in turn built the prison, for economic needs. The Wyatt center was constructed not as a delegation of the state's responsibility to house its inmates, but rather, as a money making venture. The CFDFC then contracted with Cornell to operate the facility. Again, there is no delegation from the state to Cornell or the CFDFC to assume responsibility for housing of state inmates. Wyatt only houses federal pre trial detainees. Here, a private, non governmental corporation, Cornell Corrections, and its employees operate the Wyatt Detention Center. As the Supreme Court discussed in *Richardson*, operating a prison has never been the 'exclusive prerogative of the state'. Since operating a prison has never been the exclusive prerogative of the state, since Wyatt is run by a private, non governmental corporation and its employees, and since there is no delegation by the state to house its inmates, I find that the named defendants are not 'state actors' under the public function doctrine. . . . [T]he Supreme Court in *Richardson* impliedly rejected the premise that private guards are subject to § 1983 liability by not treating private prison guards like their state employed counterparts. Thus, this court finds that the named defendants are not proper defendants under 42 U.S.C. § 1983."); ***Payton v. Rush-Presbyterian-St. Luke's Medical Center***, 82 F. Supp.2d 901, 907, 908 (N.D. Ill. 2000)("Given that the hospital is subject to competitive market pressures, little or no direct government supervision and has insurance, we cannot find any special immunity-related need to encourage effective and responsible performance by the special police in this case. . . . The presumption is against immunity for private actors unless tradition and strong policy reasons dictate conferring immunity."); ***Edwards v. Alabama Dep't of Correction***, 81 F. Supp.2d 1242, 1254, 1255 (M.D. Ala. 2000) ("Eleventh Circuit precedent clearly states that when a private corporation contracts with a state to perform a function traditionally within the province of the state government, including the provision of medical services to state inmates, then that corporation should be treated as a government entity and as a person acting under color of state law within the meaning of § 1983. . . . As such, the private entity is not entitled to qualified immunity, but certain special requirements for liability do apply. . . In order to prove that CMS should be liable, the plaintiffs would have to demonstrate that CMS itself directly caused the violation of their constitutional rights through their adoption of some official policy or practice."); ***Kesler v. King***, 29 F. Supp.2d 356, 371, 374 (S.D. Tex. 1998) ("Applying the public function test to the actions of Defendant CCRI, the Court concludes that this private company was performing a function, the incarceration of inmates, that falls within the exclusive responsibility of the state, and thus was acting under color of state law. . . . Insofar as Defendant Crawford, the warden of the CCRI facility, was the ultimate decision-maker for CCRI with respect to the operations it conducted under color of state law at the Brazoria County facility, his actions are attributable to CCRI."); ***Raby v. Baptist Medical Center***, 21 F. Supp.2d 1341, 1358 (M.D. Ala. 1998) ("In summary, because the policy concerns which have prompted courts to apply qualified immunity to municipal police officers also apply to Baptist Medical Center police officers, the court finds that the unique factual circumstances presented by this case require the application of qualified immunity to these private defendants to whom the state has given the same powers as those given to state and municipal police officers."); ***Giron v. Corrections Corporation***

of America, 14 F. Supp.2d 1245, 1248-49 (D.N.M. 1998) ("Although *Richardson* noted that 'correctional functions have never been exclusively public', . . . it did not conclude that correctional functions are not government functions. For one thing, the fact that a function may be privately performed does not exclude it from the 'government function' category. . . The function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state. This is a truly unique function and has been traditionally and exclusively reserved to the state. For example, the government must retain final control with respect to inmate admissions and releases and further deprivations of basic freedoms, including, for example, disciplinary action, parole, good time credit, and furloughs. The fact that correctional functions have never been exclusively public does not mean that, because run by a private corporation, that the extent of the governmental nature of the function is any less. Only the government is empowered to incarcerate a citizen, and Defendant Torrez, as a corrections officer, was a state-regulated private actor performing the basics of this function. Defendant Torrez was 'acting under color of state law' in that he was performing a 'traditional state function' of checking on an inmate at the time he was admitted by the 'control officer' into Giron's cell. . . . I conclude that Torrez was able to rape Plaintiff only because of the abuse of his position as a corrections officer."), *aff'd in part, and rev'd and remanded in part,* 191 F.3d 1281 (10th Cir. 1999); ***Nelson v. Prison Health Services***, 991 F. Supp. 1452, 1462, 1463 (M.D. Fla. 1997) ("The provision of medical treatment to an entire institution like the Pinellas County Jail, with little or no supervision by the Sheriff, is clearly the sort of 'major lengthy administrative task' contemplated by the Court in *Richardson*. . . . Moreover, the analysis undertaken by the *Richardson* Court supports the conclusion that private entities providing medical care or treatment to inmates may not raise a defense of qualified immunity. Like the private operation or management of the entire prison, private provision of medical care or treatment to inmates appears to have been historically commonplace and bare of the immunity traditionally afforded public functions. . . . Similarly, the same marketplace pressures that guard against a private prison guard's becoming overly timid in his or her duties, also guard against a private medical provider's becoming overly timid in his or her treatment of inmates. . . . *Richardson* leaves unaltered, however, the case law holding that a private medical provider is a 'state actor' for the purposes of section 1983."); ***McDuffie v. Hopper***, 982 F. Supp. 817, 823-25 & n.7 (M.D. Ala. 1997) ("To no avail, the Defendants argue that *Richardson*'s narrow holding leaves the door open for this court to distinguish the present Defendants, private party health care providers, from private party guard defendants, for purposes of § 1983 immunity. . . . It would strike this court as strange to find that private contractor doctors can claim the protections of qualified immunity, while private contractor guards cannot. Fairness dictates that like-situated persons be treated alike. *Richardson* makes it clear that the function that a private party serves is not determinative of whether they are entitled to qualified immunity. *Richardson* further makes clear that those who contract to engage in government services without supervision, and for profit in a competitive marketplace, subject themselves to liability under § 1983 without the protections of immunity. CMS and its employees are within *Richardson*'s holding. They are, therefore, not entitled to claim the protections of qualified immunity. . . . . Plaintiff also makes an additional argument for denying qualified immunity to CMS. That argument analogizes the position of CMS to that of a municipality. When municipal corporations are sued under § 1983, a plaintiff must

prove that the violation occurred because of the municipality's official policy or custom. . . The municipality is not entitled to claim qualified immunity. . . Here, McDuffie is asserting that because companies are treated like municipalities for the purposes of § 1983 liability, companies should also be treated like municipalities for the purposes of qualified immunity. Plaintiff is not able to cite to any case for the proposition that a company should be treated like a city for purposes of qualified immunity. The court does not have to decide whether private companies should be treated like municipalities for the purposes of qualified immunity. A distinction between CMS and the doctors in its employ, for purposes of qualified immunity, will make no difference here. If CMS is treated like an individual, it is not entitled to qualified immunity based on the analysis stated above. If it is treated like a municipality, it would also not be eligible to claim the protection of qualified immunity.").

See also See also ***S.P. v. City of Takoma Park***, 134 F.3d 260, 268, 269 (4th Cir. 1998) (where involuntary commitment statute, "when viewed as a whole, is more permissive than mandatory, and [where] it grants private physicians complete medical discretion in determining whether an individual should be involuntarily committed[, court] decline[d] to hold the private individuals to be state actors...").

4. Note on *Malesko, Minneci, and Ziglar*

In ***Correctional Services Corp. v. Malesko,*** 122 S. Ct. 515, 519 (2001), the Court refused to extend an implied cause of action for damages under *Bivens* against private entities acting under color of federal law. The Court did not address the question of whether private individuals employed by such entities were subject to a *Bivens* action. That question has been answered in ***Minneci v. Pollard,*** 132 S. Ct. 617 (2012). The plaintiff in *Minneci* was a prisoner in a federal facility run by a private prison management company, Wackenhut Corrections Corporation. Plaintiff claimed that he had been deprived of adequate medical care in violation of the Eighth Amendment, and sought damages from several prison employees. The Ninth Circuit held that the Eighth Amendment provided Pollard with a *Bivens* action. *Pollard v. The GEO Group, Inc.,* 607 F.3d 583, 603, as amended 629 F.3d 843, 868 (9th Cir. 2010). With only Justice Ginsburg dissenting, the Court (per Justice Breyer) held that Pollard could not assert a claim under *Bivens*. 132 S. Ct. at 623. The Court explained that "Pollard's Eighth Amendment claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake." *Id.* The Court noted that research disclosed that "state law imposes general tort duties of reasonable care (including medical care) on prison employees in every one of the eight States where privately managed secure federal facilities are currently located." *Id.* at 624. Finally, the Court acknowledged that state tort remedies may often prove "less generous" than *Bivens* actions, but this did not make such remedies inadequate. *Id.* at 625. The Court left "different cases and different state laws to another day[,]" concluding that "where, as here, a federal prisoner seeks damages from privately employed personnel working at a privately operated federal prison, where the conduct allegedly amounts to a violation of the

Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here), the prisoner must seek a remedy under state tort law." *Id.* at 626.

In ***Ziglar v. Abbasi***, 137 S. Ct. 1843 (2017), the Court refused to extend *Bivens* to "claims challenging the conditions of confinement imposed on respondents pursuant to the formal policy adopted by the Executive Officials (Ashcroft, Mueller, Ziglar) in the wake of the September 11 attacks." *Id.* at 1858. The Court likewise viewed claims against the Wardens based on their alleged knowledge of and failure to stop abuse by guards to present "a new *Bivens* context" and remanded those claims with instructions that the Second Circuit perform a "special factors analysis" and consider whether alternative remedies were available. *Id.* at 1864-65. *See also* ***Hernandez v. Mesa***, 137 S. Ct. 2003 (2017) (vacating and remanding for Court of Appeals "to address the *Bivens* question in the first instance" in light of ***Abbasi*** in case asserting both Fourth and Fifth Amendment claims against a U.S. Border Patrol Agent who shot and killed a 15 year old Mexican boy standing on Mexican soil; "The Fourth Amendment question in this case . . . is sensitive and may have consequences that are far reaching. It would be imprudent for this Court to resolve that issue when, in light of the intervening guidance provided in *Abbasi*, doing so may be unnecessary to resolve this particular case.").

But see ***Ziglar v. Abbasi***, 137 S. Ct. 1843, 1877-78 (2017) (Breyer, J., joined by Ginsburg, J., dissenting) ("The claims in this suit would seem to fill the *Bivens'* bill. . . . It is true that the plaintiffs bring their 'deliberate indifference' claim against Warden Hasty under the Fifth Amendment's Due Process Clause, not the Eighth Amendment's Cruel and Unusual Punishment Clause, as in *Carlson*. But that is because the latter applies to convicted criminals while the former applies to pretrial and immigration detainees. Where the harm is the same, where this Court has held that both the Fifth and Eighth Amendments give rise to *Bivens'* remedies, and where the only difference in constitutional scope consists of a circumstance (the absence of a conviction) that makes the violation here worse, it cannot be maintained that the difference between the use of the two Amendments is 'fundamental.'") Justices Sotomayor, Kagan, and Gorsuch took no part in the decision. *See also* ***Hernandez v. Mesa,*** 137 S. Ct. 2003, 2008-11 (2017) (Breyer, J., and Ginsburg, J., dissenting) (would remand for determination of the *Bivens* and qualified immunity questions but would decide the Fourth Amendment question, concluding the Fourth Amendment applies and protects boy who was shot by Border Patrol Agent while boy was standing in the culvert between Mexico and United States).

Note that the following cases, some of which present *Bivens* Claims, are Pre-*Ziglar* Cases:

Mack v. Warden Loretto FCI, 839 F.3d 286, 304-05 (3d Cir. 2016) ("Next, we address Mack's claim that the prison officers' anti-Muslim conduct violated his First Amendment right to freely exercise his religion. . . Mack seeks only monetary relief, asserting that he has an implied right of action for damages pursuant to *Bivens*. But neither the Supreme Court nor this Court has ever extended *Bivens* to Free Exercise claims. In view of RFRA's broad protections for religious

liberty, we decline to do so here. . . The Supreme Court in *Wilkie v. Robbins* . . . set forth a two-part framework for considering whether to extend *Bivens* to new contexts. First, we ask whether there is an alternative remedial scheme available to the plaintiff and, if so, whether the existing scheme 'convinc[es]' us to refrain from providing a new, freestanding damages remedy. . . If not, then we consider whether 'special factors' counsel hesitation in creating a new cause of action for damages. . . 'Special factors' typically relate to the question of who should decide whether and how a remedy should be provided. . . . [A]s we have explained, RFRA provides claimants with all 'appropriate relief' for such violations. Given this alternative remedial scheme, we can conceive no adequate justification for extending *Bivens* to Free Exercise claims. We will therefore affirm the District Court's dismissal of Mack's Free Exercise claim."); ***Koprowski v. Baker***, 822 F.3d 248, 250-52, 257-58 (6th Cir. 2016) ("The Supreme Court has consistently reaffirmed its holding in *Carlson v. Green* . . . that federal prisoners may bring *Bivens* claims under the Eighth Amendment against federal prison officials. Joining the three other circuits [7th, 9th, and 10th] to have considered this issue, we conclude that the IACA [Inmate Accident Compensation Act] does not displace such an action simply because the alleged Eighth Amendment violation occurred in the context of the prisoner's employment. . . . The Supreme Court has not expressly addressed whether the IACA is meant to exclude a prisoner's ability to seek money damages from a prison official for a *constitutional* tort like the one claimed by Koprowski. Three other circuits have addressed the question, . . . and each of them has come out the same way: The IACA does not displace an Eighth Amendment *Bivens* claim. . . . We agree and hold that the IACA does not displace Koprowski's Eighth Amendment *Bivens* claim. . . .In *Carlson*, the Supreme Court explicitly found that no special factors suggested that an Eighth Amendment *Bivens* remedy would be inappropriate. . . First, federal prison officials 'do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.'. . Second, qualified immunity protects federal prison officials such that the availability of a *Bivens* remedy would not overly interfere with their ability to do their jobs. . .The defendants want to re-litigate the second point, but *Carlson* has already closed the door on their arguments. Even though subjecting prison officials to personal liability through *Bivens* suits 'might inhibit' prison officials in 'their efforts to perform their official duties,' qualified immunity 'provides adequate protection.'. . The Supreme Court's conclusion has become even more pertinent over time because the qualified-immunity doctrine has expanded to give more protection to government officers . . . Furthermore, the defendants have not presented any evidence of their concerns actually manifesting themselves in the three circuits that already allow *Bivens* suits despite the existence of the IACA. In sum, the defendants have not put forth any new special factors for us to consider. And we find no special factors that require us to preclude *Bivens* relief here. . . . The dissent looks at this case from the opposite direction. It presumes no *Bivens* remedy is available despite *Carlson*, and then asks whether we should create one, with a heavy presumption against doing so. But only the Supreme Court may overrule its own precedents, and we are bound by its decision 'until such time as the Court informs [us] that [we] are not.'. . Although some of *Carlson's* analytical framework has been altered by later decisions, its core holding allowing just this sort of suit binds us."); ***Alvarez v. U.S. Immigration & Customs Enf't***, 818 F.3d 1194, 1206-09 & n.6 (11th Cir. 2016) ("Although we have never explicitly considered

whether to imply a *Bivens* remedy in the immigration context, two of our sister circuits have counseled against it, concluding both that the Immigration and Nationality Act provides an adequate alternative remedy and that, even if it didn't, special factors counsel in favor of hesitation. . . . We too hold that a plaintiff cannot recover damages under *Bivens* for constitutional violations that caused him to endure a prolonged immigration detention. . . . We need not, and do not, decide whether a *Bivens* remedy would be available in cases of physical abuse, . . .or punitive confinement conditions, *Turkmen v. Hasty*, 789 F.3d 218, 235–37 (2d Cir.2015). Alvarez does not allege that he was mistreated during his detention, and thus we have no occasion to grapple with the unique issues that these types of allegations could present. . . Congress has provided for a host of review procedures tailored to the differently situated groups of aliens that may be present in the United States. The Act sets out numerous avenues for aliens to obtain review of ICE decisions by an immigration judge or federal court, as well as opportunities for aliens to seek discretionary relief. . . .Additionally, the Supreme Court has made it abundantly clear that a detained alien can seek a petition for a writ of habeas corpus to challenge his detention in the event that the statute's review procedures are insufficiently protective. . . . [T]he complexity of the Immigration and Nationality Act, and Congress's frequent amendments to it, suggest that no *Bivens* remedy is warranted."); ***Meshal v. Higgenbotham***, 804 F.3d 417, 418, 424-27, 429 (D.C. Cir. 2015) ("Faced with a shifting paradigm in which counterterrorism and criminal investigation merge, we rely on a familiar framework in an unconventional context. No court has countenanced a *Bivens* action in a case involving the national security and foreign policy context. And, while *Bivens* remedies for ill-executed criminal investigations are common, extraterritorial application is virtually unknown. We hold that in this particular new setting—where the agents' actions took place during a terrorism investigation *and* those actions occurred overseas—special factors counsel hesitation in recognizing a *Bivens* action for money damages. . . . To our knowledge, no court has previously extended *Bivens* to cases involving either the extraterritorial application of constitutional protections. . . or in the national security domain, let alone a case implicating both—another signal that this context is a novel one. . . .Two special factors are present in this case. . . .First, special factors counseling hesitation have foreclosed *Bivens* remedies in cases 'involving the military, national security, or intelligence.'. . Second, the Supreme Court has never 'created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States.'. . . At no point has the Supreme Court intimated that citizenship trumps other special factors counseling hesitation in creating a *Bivens* remedy. . . .If people like Meshal are to have recourse to damages for alleged constitutional violations committed during a terrorism investigation occurring abroad, either Congress or the Supreme Court must specify the scope of the remedy."); ***Klay v. Panetta***, 758 F.3d 369, 372, 373, 377 (D.C. Cir. 2014) ("[W]hile *Bivens* could have ushered in a new era of broad constitutional tort liability, history has taken a different course. Only twice has the Supreme Court approved the application of *Bivens's* reasoning to new classes of cases, and never in the past thirty years. *See Davis v. Passman*, 442 U.S. 228, 230–31, 234 (1979) (congressional employee's employment discrimination claim under the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 18–23 (1980) (prisoner's cruel and unusual punishment claim against prison officials under the Eighth Amendment). In numerous other cases, by contrast, the Court has found extension of *Bivens*

unwarranted, *see Minneci v. Pollard,* 132 S.Ct. 617, 622–23 (2012) (collecting cases), expressing its 'reluctan[ce] to extend *Bivens* liability to "to any new context or new category of defendants,"' *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1948 (2009) (quoting *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 68 (2001)); *see also Wilkie v. Robbins,* 551 U.S. 537, 550 (2007) (noting that "in most instances we have found a *Bivens* remedy unjustified"). This unwillingness to extend *Bivens* derives from the Court's shift toward disfavoring judicially implied causes of action generally. . . .Given that Congress is extensively engaged with the problem of sexual assault in the military but has chosen not to create such a cause of action, we decline to imply a *Bivens* remedy here, even in the face of plaintiffs' allegations of statutory violations. . . .We therefore join the Fourth Circuit in concluding that no *Bivens* remedy is available here. *See Cioca v. Rumsfeld,* 720 F.3d 505 (4th Cir.2013)."); ***Davis v. Billington***, 681 F.3d 377, 388-90 (D.C. Cir. 2012) (Rogers, J., dissenting) ("From the unremarkable fact that Congress was *aware* that it was not including employees of the Legislative Branch in the remedial provisions of the Civil Service Reform Act of 1978 ('CSRA'). . . the court concludes that 'Congress consciously, "not inadvertently" omitted remedies' for Library of Congress employees, and thus the CSRA precludes a *Bivens* [footnote omitted] remedy for Col. Morris D. Davis. . . The premise of the court's holding is that when Congress enacts a remedial scheme for a specific group of claimants, it is making a conscious decision *not* to enact a remedial scheme for *other* claimants, regardless of how far beyond the intended scope of the enacted scheme those other claimants are, and even in the absence of any evidence demonstrating Congress chose to exclude them *because* it did not want them to have a remedy at all. There is no limiting principle to this theory, and in adopting it, the court allows the 'special factor' exception to swallow the rule. The Supreme Court has not gone so far, *see Minneci v. Pollard,* 132 S.Ct. 617 (2012); nor should we. . . . The court views the fact that Library of Congress employees are excluded from the CSRA's remedial scheme for personnel actions . . . as evidence that Congress intentionally withheld a remedy from them, and thus the CSRA constitutes a 'special factor' precluding a *Bivens* action for Davis. . . Although the exclusion of Library employees is dispositive in this case, it demands the opposite result. . . . No evidence suggests that Congress intended *anything* about what remedies should be available to Library employees when it enacted the CSRA; it was addressing the altogether different question of how to provide a fair system for adjudicating remedial claims within the Executive Branch civil service. That Library employees are in the 'excepted service' as a matter of vernacular convenience adds nothing to the analysis. Congress did not view itself as legislating on what remedies should be available to Library employees when it enacted the CSRA and it is thus irrelevant to the 'special factors' analysis.")

See also ***Robles v. Kane***, No. 12–14314, 2013 WL 6671556, *3, *4 (11th Cir. Dec. 19, 2013) (not published) ("Robles argues that the defendants violated his First Amendment right to confidential communication with his attorney. Because the Facility is a privately run prison, Robles cannot have a viable claim for relief unless we recognize a *Bivens* cause of action against it. . . We may do so only if: (1) there are no adequate alternative remedies under state or federal law, and (2) no 'special factors' counsel against implying a cause of action here. . . Robles' claim flounders on the first criterion. . . .We base our conclusion largely on the fact that Robles' constitutional claim would, if successful, entitle him only to nominal damages. Prisoners like

Robles—who claim interference with their legal mail but no actual injury—can receive only nominal damages. . . That sets a very low bar for Georgia tort law to provide 'roughly similar incentives' and 'roughly similar compensation.' *Minneci,* —— U.S. ——, 132 S.Ct. at 625. Georgia law clears that bar by providing several causes of action for prisoners like Robles. [discussing Georgia tort claims available] Both Georgia law torts are arguably better remedies than a *Bivens* claim would be because they would allow Robles to seek compensatory and punitive damages, as well as 'apply principles of *respondeat superior* and thereby obtain recovery from a defendant's potentially deep-pocketed employer.' *Minneci,* —— U.S. ——, 132 S.Ct. at 625. At the least, the two Georgia law torts provide roughly similar incentives and compensation to a *Bivens* claim. For that reason, we decline to recognize a *Bivens* cause of action under these circumstances."); ***Ingram v. Faruque,*** 728 F.3d 1239 (10th Cir. 2013) (VA (Veterans Affairs) immunity statute provided an exclusive remedy for intentional torts arising in the context of VA health care employees providing medical care or treatment, thus precluding the creation of a remedy under *Bivens*); ***Flores v. U.S.***, 689 F.3d 894, 902, 903 (8th Cir. 2012) ("In recommending that summary judgment be granted to the APS defendants on plaintiffs' *Bivens* claim, the magistrate judge addressed 'whether decedent's representatives may pursue a *Bivens* action against a private physician employed by a private corporation that has contracted with the government to provide medical services to prison inmates.'. . The magistrate judge considered the circuit split on the issue, noting that this circuit had not yet addressed the question, and concluded that 'a *Bivens* action should not extend to private employees of federal prisons where state tort law already provides a remedy.'. .The magistrate judge concluded that alternative remedies were available to plaintiffs in the form of state tort law and that a *Bivens* action should not be allowed. After final judgment was entered, the Supreme Court resolved the circuit split in *Minneci v. Pollard,* 132 S.Ct. 617 (2012). The Court held that it could not 'imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison' because 'state tort law authorizes adequate alternative damages actions [.]'. . In light of the holding in *Minneci,* plaintiffs cannot maintain a *Bivens* action against Dr. Salmi and APS—a private citizen and a private corporation—because Minnesota law provides adequate alternative tort actions, including a wrongful death claim based on medical malpractice."); ***El-Hanafi v. United States***, 1:13-CV-2072-GHW, 2014 WL 4199643, *4 (S.D.N.Y. Aug. 22, 2014) ("As in *Minneci,* El–Hanafi brings claims against the employees of a private company for the negligent provision of medical care in violation of the Eighth Amendment. Because *Minneci* foreclosed a *Bivens* remedy in precisely this type of situation, El–Hanafi's claims are barred. While the Supreme Court in *Minecci* left open the possibility that some constitutional claims might not have a state tort law analogue, and that the court might therefore have to decide whether to imply a *Bivens* action 'when and if such a case arises,' 132 S.Ct. at 626, this is not such a case. The Supreme Court in *Minneci* was clear that 'state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations,' thereby foreclosing a *Bivens* remedy for a federal prisoner seeking damages from a private employee, 'where the conduct allegedly amounts to a violation of the Eighth Amendment, and where that conduct is of a kind that typically falls within the scope of traditional state tort law (such as the conduct involving improper medical care at issue here) ...'. . . In this case, there is no

question that analogous state law remedies do exist; El–Hanafi brings state law claims founded on the same negligent acts in this very action. El–Hanafi attempts to distinguish *Minneci* by arguing that the plaintiff there was an inmate at a privately-operated prison, while El–Hanafi was incarcerated at a state facility that contracted with the federal government. . . The Court does not believe that this distinction should trigger a departure from *Minneci.* In fact, CCS and Conmed assert that their contracts were actually with a local entity—the City of Alexandria—which in turn contracted with the federal government, . . . a claim which El–Hanafi does not dispute. Thus, defendants are, if anything, potentially even further removed from the federal government than the defendant in *Minneci*, a fact that would counsel in favor of, not against, foreclosing a *Bivens* remedy. . . Accordingly, because El–Hanafi's Eighth Amendment claims against the individual employees of Conmed and CCS staff are clearly premised on the improper provision of medical care, precisely the type of conduct that 'typically falls within the scope of traditional state tort law' and therefore cannot be the basis of a *Bivens* action, . . . El–Hanafi's *Bivens* claim against the individuals employed by Conmed and CCS employees is dismissed."); ***Espinoza v. Zenk***, No. 10–CV–427 (MKB), 2013 WL 1232208, *8-*10 (E.D.N.Y. Mar. 27, 2013) ("The holding of *Minneci* only specifically bars Eighth Amendment claims. For non Eighth Amendment *Bivens* claims against employees of private prisons, federal courts have declined to find them barred and decided them on the merits. *See, e.g., Shan Wei Yu v. NEOCC,* No. 12–CV–0507, 2012 WL 6705857, at *3 (N.D. Ohio Dec.26, 2012) (stating that "[w]hile *Minneci* clearly bars Eighth Amendment claims against individual employees of a private prison, it remains unclear whether Fourteenth Amendment claims" are barred and therefore deciding the Fourteenth Amendment equal protection claim on the merits); *Govereh v. Pugh,* No. 12–CV–697, 2012 WL 3683541, at *2 (N.D. Ohio Aug.22, 2012) (declining to find that the plaintiff's First Amendment claim was barred and deciding them on it on the merits ((collecting cases)); *Murray v. Corr. Corp. of Am.,* No. 11–CV–2210, 2012 WL 2798759, at *2 (D. Ariz. July 9, 2012) (finding that "Eighth Amendment claims are no longer cognizable under *Bivens"* but allowing the First Amendment claims to proceed on the merits); *McKaney v. Keeton,* No. 12–CV–148, 2012 WL 1718056, at *3 (D. Ariz. May 15, 2012) ("While *Minneci* bars Plaintiff's Eighth Amendment claims against individual employees of a private prison, it remains unclear whether Plaintiff's First Amendment claims are of the type which fall within the scope of traditional tort law."). *Cf. Baker v. Bannum Place of Saginaw, LLC,* No. 09–CV–10360, 2012 WL 3930122, at *7 (E.D. Mich. Sept.10, 2012) ("While *Minneci* definitively bars Eighth Amendment claims against individual employees of a private prison, it is still unclear as to whether other constitutional claims, such as those under the First or Fifth Amendment, are of the type that fall within traditional tort law. Accordingly, the Court will consider Plaintiff's First Amendment claims on their merits."). . . . .A few courts have read *Minneci* expansively and found that it bars all claims against employees of private prisons. *See, e.g ., Vega v. United States,* No. 11–CV–632, 2012 WL 5384735, at *2 (W.D. Wash. Nov. 1, 2012) (dismissing Eighth, First, Fourth and Fifth Amendment claims "[b]ecause *Minneci* clarified that private employees acting under color of federal law cannot be held liable under *Bivens"*) [*aff'd in part on other grounds*, 724 F. App'x 536 (9th Cir. 2018)] ; *Gapa v. Three Unknown Named Officers of GEO Group,* No. 12–CT–3083, 2012 WL 3060376, at *2 (E.D.N.C. July 26, 2012) (holding that *Minneci* bars First Amendment retaliation claims); *Robles v. Stine,* No. 511–

CV–109, 2012 WL 3000832, at *1 (S.D. Ga. July 23, 2012) (holding that *Minneci* bars both Eighth Amendment and First Amendment claims); *Feldman v. Lyons*, 852 F.Supp.2d 274, 279 (N.D.N.Y.2012) (holding that there could be no *Bivens* action against private individual after *Minneci*). However, the Court notes that if the Supreme Court intended to bar *all Bivens* claims against employees of private prisons, the Court would have stated so clearly. . . . In order to determine whether *Bivens* applies to the case at bar, this Court must consider whether there are adequate state law remedies for Plaintiff's claims against the MVCC Defendants and whether any special factors counsel against applying *Bivens*.") [Court goes on to conclude that intentional infliction of emotional distress and false imprisonment are not adequate alternative state law remedies to Plaintiff's Fifth Amendment and First Amendment claims based on his placement in the SHU.]; ***Camp v. Richardson***, No. 11–3128–SAC, 2014 WL 958741, *2 (D. Kan. Mar. 11, 2014) ("Mr. Camp attempts to avoid *Minneci* by 'reiterate(ing) his position' that defendants were federal actors. His position remains based upon his having witnessed 'employees of CCA' wearing pins resembling badges worn by U.S. Marshals and the display within the CCA of murals of the United States Marshal Service and the United States Department of Justice next to the CCA company logo. He argued in his Exhibit One that defendants were federal actors because there was a direct link between the CCA and the federal Government and the private parties were performing a government function. These allegations do not convince the court that the privately employed defendants at the CCA–Leavenworth may be sued as federal actors. The Supreme Court found in *Minneci* that where a federal prisoner seeks damages from personnel employed by a private firm, and not the government, that 'fact—of employment status—makes a critical difference.'"); ***Dorsey v. Tripp***, No. 5:13–CT–3171–D, 2014 WL 630851, *1 (E.D.N.C. Feb. 18, 2014) ("Rivers is 'a privately run facility in North Carolina operated by the GEO Group, Inc. under contract with the federal Bureau of Prisons.' *Holly v. Scott,* 434 F.3d 287, 288 (4th Cir.2006). As this court noted in 2008, 'courts in this district have repeatedly held, and the Fourth Circuit has agreed, that private individuals who work as employees for [privately-operated prisons] are not subject to liability under *Bivens.*' *Holly v. Christensen,* No. 5:07–CT–3134–D, 2008 WL 956722, at *4 (E.D.N.C. Apr. 8, 2008) (unpublished) (collecting cases). The Supreme Court's decision in *Minneci v. Pollard,* 132 S.Ct. 617, 623–26 (2012), confirmed this court's observation. Thus, Dorsey's constitutional claim against Warden Tripp is frivolous."); ***Pinet v. Zickefoose***, No. 10–2347 (NLH), 2013 WL 6734241, *8 (D.N.J. Dec. 19, 2013) ([Relying on *Minneci*, court held that] Plaintiff cannot proceed against the St. Francis Defendants, for alleged inadequate medical care, under a *Bivens* theory."); ***Flores v. Rodriguez***, No. 4:13cv1460, 2013 WL 6731788, *3 (N.D. Ohio Dec. 19, 2013) ("Plaintiff asserts claims for 'false accusation, harassment, detriment of character .... wrong doing, injuries, liability, fraud, wrongful termination, medical malpractice, violation Due Process, violation of Fourteenth Amendment, misapplication of statute, malicious prosecution, [and] lack of jurisdiction.' *ECF No. 1 at 3–4.* Most of these claims, with the exception of his due process claim, are already state law claims. His due process claim is based on a statement made by Rodriguez in the presence of other inmates which Plaintiff believes endangered his life. Traditional tort law addresses claims for placing another individual in harm's way if a duty is owed to that individual by the actor. Consequently, Plaintiff cannot proceed with his due process claim in a federal civil rights action against the employee of a private prison facility."); ***Oladokun v.***

Correctional Treatment Facility, No. 13–00358(RC), 2013 WL 6147940 (D.D.C. Nov. 22, 2013) ("Next, CAA argues that, as a private entity, no constitutional claims could be asserted against it. CCA's argument is based on cases and analysis presuming that plaintiff's claims are premised on a theory of liability under *Bivens*. . . But as set forth above, the Court interprets plaintiff's claims as being pursued against the District of Columbia and the contractor that operates its prison treatment facility as being brought pursuant to 42 U.S.C. § 1983. Under these circumstances, courts have allowed claims against private prison operators like CCA. *See, e.g., Smith v. Corrections Corp. of America,* 674 F.Supp.2d 201 (D.D.C.2009); *Gabriel v. Corrections Corp. of America,* 211 F.Supp.2d 132 (D.D.C.2002). As such, CCA's argument fails."); ***Cox v. Cunningham***, No. 11–3215–SAC, 2013 WL 6094232, *2 (D. Kan. Nov. 19, 2013) ("In *Minneci v. Pollard,* 132 S.Ct. 617 (2012), the Supreme Court refused to extend a *Bivens* remedy to a federal prisoner seeking damages from privately employed personnel working at a privately operated federal prison for the alleged denial of adequate medical care in violation of the Eighth Amendment. . . Plaintiff's argument that he was confined at CCA–LVN as a pretrial detainee presumed innocent of the federal charges against him, and not as a convicted prisoner as in *Minneci,* is a distinction that lacks persuasive legal force."); ***Baumann v. Federal Reserve Bank of Kansas City***, No. 12–cv–01310–CMA–MEH, 2013 WL 4757264, 1 n.3 (D. Colo. Sept. 3, 2013) ("To be sure, the Court recognizes that Plaintiff may have contemplated bringing his constitutional claims against the FRLEOs under *Bivens v. Six Unknown Named Federal Narcotics Agents,* 403 U.S. 388 (1971), which permits a claim for damages arising out of constitutional violations attributable to federal action. However, courts are divided as to when *Bivens* suits are tenable against private individuals acting under color of federal law. [collecting cases] Notwithstanding the ongoing dispute over the reach of *Minneci,* or the apparent inequity in allowing § 1983 claims against private parties acting under color of state law but prohibiting *Bivens* claims against the same parties acting under color of federal law, the Supreme Court's reasoning in *Minneci* seems to apply here, where state tort law appears to provide an 'alternative, existing process' capable of protecting the constitutional interests at stake. . . A remedy for Plaintiff's Fourth Amendment claim can be found in the tort of false imprisonment. . . Likewise, his claim for outrageous conduct can provide relief for the deprivation he asserts under his Fourteenth Amendment substantive due process claim. . . The Court presumes that for these reasons Plaintiff did not pursue an alternative argument under *Bivens.*"); ***Doe v. Rumsfeld***, 683 F.3d 390 (D.C. Cir. 2012) (refusing to imply a *Bivens* remedy on behalf of a United States citizen, an employee of an American-owned defense contracting firm, who alleged he was imprisoned at Camp Cropper for nine months, subjected to harsh treatment and ultimately never charged with a crime); ***Lebron v. Rumsfeld***, 670 F.3d 540, 547, 548, 550-56 (4th Cir. 2012), *cert. denied,* 132 S. Ct. 2751 (2012) ("The designations of persons and groups as special threats to national security may be subject to a variety of checks and to habeas corpus proceedings. But they are not reviewable by the judiciary by means of implied civil actions for money damages. . . . We do not require congressional action before recognizing a *Bivens* claim, as that would be contrary to *Bivens* itself. We will, however, refuse to imply a *Bivens* remedy where, as in this case, Congress's pronouncements in the relevant context signal that it would not support such a damages claim. . . .Special factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention. First, the Constitution delegates authority over

military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government. Together, the grant of affirmative powers to Congress and the Executive in the first two Articles of our founding document suggest some measure of caution on the part of the Third Branch. . . .To the extent the Constitution may require these defendants to justify in court who is and is not an enemy combatant, it does so in the very different context of habeas corpus proceedings, . . . proceedings that Padilla took full advantage of up until his transfer to civilian custody. . . . In short, Padilla's complaint seeks quite candidly to have the judiciary review and disapprove sensitive military decisions made after extensive deliberations within the executive branch as to what the law permitted, what national security required, and how best to reconcile competing values. It takes little enough imagination to understand that a judicially devised damages action would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability. Of course Congress may decide that providing a damages remedy to enemy combatants would serve to promote a desirable accountability on the part of officials involved in decisions of the kind described above. But to date Congress has made no such decision. This was not through inadvertence. Congress was no idle bystander to this debate. Indeed, it devoted extensive attention to the precise questions Padilla presents pertaining to the treatment of detainees and to the legitimacy of interrogation measures, *see, e.g.*, Military Commissions Act of 2009, Pub.L. 111–84, 123 Stat. 2190; Military Commissions Act of 2006, Pub.L. 109–366, 120 Stat. 2600; Detainee Treatment Act of 2005, Pub.L. 109–148, 119 Stat. 2739. . . .This is a case in which the political branches, exercising powers explicitly assigned them by our Constitution, formulated policies with profound implications for national security. One may agree or not agree with those policies. One may debate whether they were or were not the most effective counterterrorism strategy. But the forum for such debates is not the civil cause of action pressed in the case at bar. The fact that Padilla disagrees with policies allegedly formulated or actions allegedly taken does not entitle him to demand the blunt deterrent of money damages under *Bivens* to promote a different outcome. Being judicial requires that we be judicious, and adherence to our constitutional role in this area requires that we await 'affirmative action by Congress.' Put simply, creating a cause of action here is 'more appropriately for those who write the laws, rather than for those who interpret them.'. . . Even a cursory survey thus suffices to illustrate that when Congress deems it necessary for the courts to become involved in sensitive matters, such as those involving enemy terrorists, it enacts careful statutory guidelines to ensure that litigation does not come at the expense of national security concerns. Such circumscribed grants and detailed directions as those set forth above stand in stark contrast to the unencumbered discretion that Padilla would invite all Article III courts across this country to exercise. Padilla responds that such constructs as qualified immunity and the state secrets privilege should suffice to allay these concerns. . . . But the litigation of such matters still presents the potential of diverting 'efforts and attention' from the primary obligations of officials entrusted with the sober responsibilities of protecting the lives and safety

of American citizens. . . Moreover, courts have developed these doctrines to prevent unintended adverse effects on national security from already-established causes of action. . . Here, by contrast, Padilla asks for a new *Bivens* cause of action, and the Supreme Court has instructed us to consider any aspect of that claim that would cause us to hesitate before entertaining suit. . . We need not await the formal invocation of doctrines such as qualified immunity or state secrets to say that the prospect of adverse collateral consequences confirms our view that Congress rather than the courts should decide whether a constitutional claim should be recognized in these circumstances. . .The factors counseling hesitation are many. We have canvassed them in some detail, but only to make a limited point: not that such litigation is categorically forbidden by the Constitution, but that courts should not proceed down this highly problematic road in the absence of affirmative action by Congress. If Congress were to create a damages remedy here, we would trust that the legislative process gave due consideration to the broader policy implications that we as judges are neither authorized nor well-positioned to balance on our own. . .Before recognizing a *Bivens* action, courts must not only consider special factors that would counsel hesitation, but also 'whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'. . Here, Padilla had extensive opportunities to challenge the legal basis for his detention. Padilla challenged his military detention in habeas corpus proceedings before five different courts. In adjudications on the merits before district courts in the Southern District of New York and the District of South Carolina, and on appeals to the Second Circuit and to this court, Padilla was able to present essentially the same arguments that he makes here about the legality of militarily detaining a U.S. citizen. . . Padilla pursued those claims up until the very moment that they were mooted by his transfer into civilian custody. And if Padilla is again detained by the military, he could presumably avail himself further of whatever 'adequate and effective substitute for habeas corpus' is in use for detainees at that time. . . With respect to Padilla's claims arising from his enemy combatant designation, this is not a case of 'damages or nothing.'. . The Supreme Court has warned that 'the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.'. .. Because we conclude that Padilla's *Bivens* action cannot be maintained, we need not reach the questions of whether the defendants are entitled to qualified immunity or whether Padilla has pleaded his claim with adequate specificity."); ***Chen Chao v. Holder***, No. 10–CV–2432 (RRM)(LB), 2013 WL 4458998, *3-*7 (E.D.N.Y. Aug. 16, 2013) ("In two cases, the Supreme Court has considered whether to extend a *Bivens* remedy to a plaintiff in the privately run prison context. Both times it has declined to do so. [discussing *Malesko* and *Minneci*] Here, Chen asserts a number of constitutional claims against Gaston, an Ahtna employee, related to his detention at the Varick Street Detention Facility. Defendants argue that because Gaston is a private employee, Chen's constitutional claims against her should be dismissed under *Minneci* since Chen has alternative remedies under New York law. . . .Because the Court agrees with defendants, the Court declines to imply a *Bivens* remedy against Gaston and dismisses the constitutional claims. . . .Defendants argue that Chen's claims against Ahtna, a private corporation, are barred under *Malesko* and that, in any event, *Bivens* should not be extended here since alternative remedies exist under state law. . . The Court agrees. As in *Malesko,* implying a *Bivens* action against Ahtna would not advance *Bivens'* core purpose of deterring individual

officers from engaging in constitutional wrongdoing. Furthermore, Chen has available alternative remedies under New York law against Ahnta. In particular, an employer is vicariously liable for the tortious acts of its employees under a theory of *respondeat superior* if those acts were committed in the furtherance of the employer's business and within the scope of employment. . .Thus, Chen could hold Ahtna liable if it could prove that Gaston was negligent in failing to protect him from Huang's attack and that she was negligent while acting within the scope of her employment."); ***Kinningham v. Adwell***, 1:12-CV-00439-JMC, 2013 WL 4041888, *4 (D.S.C. Aug. 8, 2013) ("In holding that the plaintiff could not maintain a *Bivens* suit against employees of the privately-operated prison, the *Minneci* Court distinguished the case from a claim of constitutional violations by employees of the federal government. . . The Court also found that the plaintiff had adequate state-law remedies to protect the constitutional interests at issue. . . .Here, Plaintiff does not dispute that he also has available state-law remedies. . . Additionally, while *Minneci* only applied to employees of privately-operated prisons, the reasoning of *Minneci* appears equally applicable to defendant GEO in this case. Therefore, the undersigned recommends the district judge decline to extend *Bivens* to create liability for a private corporation operating a prison and grant Defendants summary judgment."); ***Bonilla v. Corrections Corp. of America***, No. 4:11CV1349, 2012 WL 263378, at *3 (N.D. Ohio Jan. 27, 2012) ("Similar to the plaintiff in *Minneci,* Plaintiff herein is a federal prisoner seeking damages from privately employed personnel working at a privately operated federal prison for alleged Eighth Amendment violations that would typically fall within the scope of traditional Ohio state tort law. Accordingly, Plaintiff's Eighth Amendment *Bivens* claim against Defendant Rupeka in his individual capacity fails to state a claim upon which relief may be granted and is, therefore, dismissed pursuant to 28 U.S.C. § 1915(e).").

See also ***Maggio v. Shelton***, No. 2:14-CV-01682-SI, 2015 WL 5126567, at *7 n.5 (D. Or. Sept. 1, 2015) ("Dr. Anderson also relies on this Court's opinion in *Lantis v. Marion Cnty.*, 2014 WL 1910960, at *1 (D.Or. May 13, 2014). *Lantis* interpreted the Supreme Court's decision in *Minneci v. Pollard,* 132 S.Ct. 617 (2012), as foreclosing the proposition that a private physician providing medical services to inmates at a county jail could be held liable under Section 1983. Upon further consideration and review of *Minneci* and subsequent cases, the Court finds *Minneci* is not applicable to Section 1983 cases. In *Minneci,* the Supreme Court declined to extend *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971), to find an implied cause of action under the Eighth Amendment against employees of a private company that operated a *federal* prison facility. *Minneci* considered when the judicial branch should recognize an implied cause of action under *Bivens.* It is not relevant to Section 1983 cases, where Congress has already created a cause of action. After *Minneci,* courts continue to recognize the validity of Section 1983 claims against private medical service providers. [collecting cases]")

The Ninth Circuit in *Pollard* had also held that the private prison employees acted under color of federal law. That holding was not reviewed by the Supreme Court. 132 S. Ct. at 627 n.* (Ginsburg, J., dissenting). *Compare* ***Pollard v. Geo Group, Inc.***, 629 F.3d 843, 854-58 (9th Cir. 2010), rev'd on other grounds sub nom, ***Minneci v. Pollard,*** 132 S. Ct. 617 (2012) ("[T]he threshold question presented here is whether the GEO employees can be considered federal agents

acting under color of federal law in their professional capacities. We conclude that they can. . . . We note at the outset that the one federal court of appeal to have directly addressed the question–the Fourth Circuit–has held that employees of private corporations operating federal prisons are not federal actors for purposes of *Bivens.* Neither the Supreme Court nor our court has squarely addressed whether employees of a private corporation operating a prison under contract with the federal government act under color of federal law. That said, we have held that private defendants can be sued under *Bivens* if they engage in federal action. . . . In our view, there is no principled basis to distinguish the activities of the GEO employees in this case from the governmental action identified in *West.* Pollard could seek medical care only from the GEO employees and any other private physicians GEO employed. If those employees demonstrated deliberate indifference to Pollard's serious medical needs, the resulting deprivation was caused, in the sense relevant for the federal-action inquiry, by the federal government's exercise of its power to punish Pollard by incarceration and to deny him a venue independent of the federal government to obtain needed medical care. On this point, *West* is clear. . . . The relevant function here is not prison management, but rather incarceration of prisoners, which of course has traditionally been the State's '*exclusive* prerogative.'. . .Likewise, in the § 1983 context, our sister circuits have routinely recognized that imprisonment is a fundamentally public function, regardless of the entity managing the prison. . . . In accord with *West* and other federal courts of appeal, we hold that there is but one function at issue here: the government's power to incarcerate those who have been convicted of criminal offenses. We decline to artificially parse that power into its constituent parts–confinement, provision of food and medical care, protection of inmate safety, etc.–as that would ignore that those functions all derive from a single public function that is the sole province of the government: 'enforcement of state-imposed deprivation of liberty.'. .Because that function is 'traditionally the *exclusive* prerogative of the [government],' it satisfies the 'public function' test under *Rendell-Baker*.") *and* ***Holly v. Scott***, 434 F.3d 287, 297, 300, 301(4th Cir. 2006) (Motz, J., concurring in the judgment) ("The majority's holding that private correctional employees are not governmental actors ignores or misreads controlling Supreme Court case law. Those cases, as well as numerous cases from other federal courts, establish that individual private correctional providers are government actors subject to liability as such. Accordingly, I cannot join the majority opinion. However, because Ricky Holly possesses an alternative remedy for his alleged injuries, no action under *Bivens* . . . lies in this case. For that reason alone, I concur in the judgment. . . . In this case, the government has delegated its authority to the privately employed defendants, empowering them to incarcerate, to confine, to discipline, to feed, and to provide medical and other care to inmates who are imprisoned by order of the federal government. The defendants are acting as agents of the government; their actions are thus clearly attributable to the federal government, and a prisoner must be able to seek redress from the defendants if they cause him constitutional injury. Therefore, if Holly had no alternative remedy for the alleged deprivation of his constitutional rights, it seems to me that he could certainly bring a *Bivens* action against these defendants. . . . The fact is that, at least in this country, incarceration of those charged with committing crimes is, and always has been, the province and prerogative of the government. That historically immunity has not been afforded those performing some correctional duties demonstrates only that the government has delegated some of its correctional functions to private actors. . . These

correctional functions have not been 'exclusively public,' . . . only in the sense that private individuals have long been empowered by the government to fulfill the tasks involved in the fundamentally governmental function of incarceration of criminals. But this government delegation of some duties to private persons or entities does not change the public character of the underlying function performed by 'private correctional providers,' as the Court recognized in *Malesko* . . . Indeed, in *Richardson* itself, the Court recognized that its historical discussion did not apply to questions of governmental action. After concluding that the defendants lacked qualified immunity, the *Richardson* Court remanded for a determination of whether the defendants were, in fact, liable as governmental actors for their operation, confinement, and care of inmates. . . If the Court's historical analysis of 'public function' for immunity purposes were meant to control the 'public function' determination for liability purposes–as the majority holds today–the Court would not have needed to remand the case at all. . . . In holding to the contrary, the majority disregards all of this authority and creates a circuit split. Indeed, like the *en banc* majority in *West*, the majority's view stands alone among the federal circuits addressing this point. [citing cases] Even more disturbingly, the majority, again like the *en banc* majority in *West*, misreads and misunderstands Supreme Court precedent. Pursuant to that precedent, the defendants here were clearly exercising authority fairly attributable to the government and so are government actors for liability purposes.") *with* ***Holly v. Scott***, 434 F.3d 287, 288 (4th Cir. 2006) (actions of private prison employees not fairly attributable to federal government).

See also ***Schneider v. Donald***, 2006 WL 1344587, at *7, *8 (S.D. Ga. May 12, 2006) ("While the *Richardson* Court did not address whether privately employed prison guards should be subject to lawsuit under Section 1983, other courts have held that employees of privately run prison facilities are subject to Section 1983 liability. [citing cases] The rationale used by these courts for finding private individuals subject to Section 1983 liability is that the privately run prisons perform 'a function which is traditionally the exclusive prerogative of the state.' . . A curious result follows. Employees of privately run prison facilities may be sued under Section 1983 because those prisons perform a function that courts deem the 'exclusive prerogative of the state.' Those same employees, however, may not claim qualified immunity because, according to the Supreme Court in *Richardson*, prison administration has never been an exclusively state function. The liability of employees of private prison facilities under Section 1983 becomes even more muddled when one considers the parallel universe of liability created by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides an avenue of recovery for constitutional violations caused by federal employees. Two courts have recently held that employees of privately run federal prison facilities are not subject to liability under *Bivens*. *Holly v. Scott*, 434 F.3d 287, 294 (4th Cir.2006); *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1108 (10th Cir.2005). In reaching its decision in *Holly*, the Fourth Circuit followed the Supreme Court's analysis in *Richardson* and found that prison administrators did not perform a traditionally 'public function.' . . . For prisoners, whereas their counterparts in federal private prison facilities may have no remedy at all in federal court for constitutional violations, and whereas their counterparts in state-run prison facilities must overcome the qualified immunity defense, prisoners in state private prison facilities may file under Section 1983 and not be

concerned about the qualified immunity hurdle. The Court finds no reason for a prisoner in a state private facility to be in a more favorable position than his counterparts in state-run facilities or in federal facilities. The Court suggests that, to remedy this anomaly, the time has come for courts to revisit the liability of employees at state private prison facilities in light of the Supreme Court's analysis in *Richardson*. Defendants employed by CCA in this case, however, have not raised the issue of qualified immunity, and the Court accordingly will leave resolution of the issue for another day.").

See also ***Del Campo v. Kennedy***, 517 F.3d 1070, 1072-74, 1080, 1081 & n.16 (9th Cir. 2008) ("Our question is whether a private company contracting with a district attorney for services related to a diversion program is entitled to state sovereign immunity. We decide that it is not. . . American Corrective Counseling Services ('ACCS'), a private corporation, contracted with the District Attorney for Santa Clara County, California, (the 'DA') to run a bad check diversion program. Its conduct of that program generated this litigation. . . . ACCS argued that it acted as an arm of the state when implementing the diversion program. As the court had 'determined that the diversion program in Santa Clara County is a county program and not a state program,' it held that 'ACCS's involvement in the diversion program cannot be a central function of the state government' and denied immunity. ACCS timely appealed the district court's immunity decision. . . . ACCS contends that it is entitled to state sovereign immunity, even though it is a private entity. . . . There is . . . no case of which we are aware in any circuit that would support granting state sovereign immunity to ACCS. . . The law makes clear that state sovereign immunity does not extend to private entities. . . . To be clear: Although we hold that private entities cannot be arms of the state, we emphatically do *not* hold that they cannot act under color of state law for the purposes of 42 U.S.C. § 1983 and similar statutes."); ***Holly v. Scott***, 434 F.3d 287, 292 n.3 (4th Cir. 2006) ("It is an open question in this circuit whether § 1983 imposes liability upon employees of a private prison facility under contract with a state. We need not decide that issue here.").

See also ***Gen. Steel Domestic Sales, L.L.C. v. Chumley***, No. 15-1293, 2016 WL 6441028, at *3 (10th Cir. Nov. 1, 2016) ("There are three instances when courts may extend qualified immunity to private parties. First, if the private parties are 'closely supervised by the government.' *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc*., 413 F.3d 1163, 1167 (10th Cir. 2005); see also DeVargas v. Mason & Hanger–Silas Mason Co., 844 F.2d 714, 722 (10th Cir. 1988). Second, if there is a historical basis for providing immunity to that type of private entity. *Richardson v. McKnight*, 521 U.S. 399, 404, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997). Third, if extending immunity implicates 'special policy concerns involved in suing government officials.' *Wyatt*, 504 U.S. at 167, 112 S.Ct. 1827. We need not delve into this analysis because this suit in no way involves the government, and Armstrong Steel has not identified a historical basis for providing private parties immunity from suit under the CDA [Communications Decency Act]."); ***Phillips v. Tiona***, No. 12–1055, 2013 WL 239891, *15 (10th Cir. Jan. 23, 2013) (not published) ("In any event, while all these considerations bear somewhat on the problem, in the end we are still faced directly with a question of statutory interpretation: Is CCA a public entity? Is it an instrumentality of government in the same sense as a 'department, agency, or special purpose

district'? We think not. In the absence of clarification on the point in the 2008 Amendments to the ADA or any of the regulations issued before or since, we agree with the reasoning of the Second Circuit in *Green* that the proper canon of construction to apply is *noscitur a sociis* (a word is known by the company it keeps), and that 'instrumentality' refers to a traditional government unit or one created by a government unit. Accordingly, we join the Eleventh Circuit and the overwhelming majority of other courts that have spoken directly on the issue, and hold that Title II of the ADA does not generally apply to private corporations that operate prisons. In particular, it does not apply to CCA with respect to the management of KCCC. And the complaint fails to state a claim against CCA upon which relief could be granted for an alleged violation of the ADA.")

5. Post-*Abbasi* Cases

D.C. Circuit

Liff v. Office of Inspector General for U.S. Dept. of Labor, 881 F.3d 912, 918-20 (D.C. Cir. 2018) ("Because the 'defense of qualified immunity from a *Bivens* damages action directly implicates the antecedent question whether to recognize that *Bivens* action at all,'. . . that question is appropriae for interlocutory appeal. . . .We begin with the availability of a *Bivens* remedy. The District Court declined to rule on this question; however, it is appropriate to determine the availability of a *Bivens* remedy at the earliest practicable phase of litigation because it is ' "antecedent' to the other questions presented[.]'. .In considering the availability of a *Bivens* remedy, we first look for 'an "alternative, existing process" capable of protecting the constitutional interests at stake.'. . . The constellation of statutes and regulations governing federal contracts, as well as the Privacy Act, provide a remedy for Liff's claims. And, to the extent that these statutes leave gaps in the remedies available to Liff, the presence of significant legislated remedies in this arena counsels against the recognition of a judicially created *Bivens* remedy.")

Second Circuit

Doe v. Hagenbeck, 870 F.3d 36, 42-44 (2d Cir. 2017) ("Doe seeks to hold her superior officers personally liable for money damages in connection with their decisions regarding the training, supervision, discipline, education, and command of service personnel at West Point, an officer training school and military base. But Congress, 'the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy'for the constitutional claim that Doe asserts. . . The Supreme Court, citing the 'inescapable demands of military discipline ... [that] cannot be taught on battlefields,'. . . has held, unanimously, that absent Congressional authorization, 'it would be inappropriate [for courts] to provide enlisted military personnel a *Bivens*-type remedy against their superior officers.'. . We conclude that *Chappell* and its progeny are dispositive of Doe's *Bivens* claim and, accordingly, that the district court erred in determining that Doe's *Bivens* claim may proceed. . . . Doe was a member of the military at the time the events giving rise to her claim occurred, and the claim concerns superior officers. Further, her claim calls into question 'basic choices about the discipline, supervision, and control' of

service personnel and would 'require[ ] the civilian court to second-guess military decisions,' thus triggering the incident-to-service rule. . . In such circumstances, her *Bivens* claim must be dismissed.")

Doe v. Hagenbeck, 870 F.3d 36, 51, 61 (2d Cir. 2017) (Chin, J., dissenting) ("While West Point is indeed a military facility, it is quintessentially an educational institution. As its website proclaims, it is 'one of the nation's top-ranked colleges,' and it provides its 'students with a top-notch education.'. . In my view, the *Feres* doctrine does not bar Doe's equal protection claims. For these and other reasons discussed below, I would affirm the district court's decision denying the individual defendants' motion to dismiss the equal protection claim. Accordingly, I dissent. . . . [T]he majority and the Government rely on two recent decisions of other Circuits rejecting *Bivens* claims brought by current and former service members alleging they had been raped and sexually assaulted by other service members. The plaintiffs in these cases contended that the actions and omissions of current and former Secretaries of Defense had created a military culture of tolerance for sexual assault and misconduct. *See Klay v. Panetta*, 758 F.3d 369, 371-72 (D.C. Cir. 2014); *Cioca v. Rumsfeld*, 720 F.3d 505, 513-14 (4th Cir. 2013). The cases, however, are distinguishable, for they involved active duty service members who brought broad challenges to policies of high-ranking government officials, raising questions as to military discipline and command for those in active duty. The cases did not involve students or an educational institution or the deprivation of meaningful access to an education because of discriminatory academic policies or school administrators tasked with running an educational institution. The *Feres* concerns—particularly the question of interfering with military command and discipline—play out very differently in this scenario.")

Gonzalez v. Hasty, No. 12CV5013BMCSMG, 2017 WL 4158491, at *10-15 (E.D.N.Y. Sept. 18, 2017) ("*Ziglar* . . . made it clear that the *only* recognized implied rights of action were the narrow situations presented in *Bivens*, *Davis*, and *Carlson*, and lower courts must scrutinize attempts to expand the *Bivens* remedy, even where courts had assumed the availability of such a remedy. . . Practically speaking, this means that even where a circuit court had previously found a *Bivens* remedy, that court must still consider the availability of an implied right of action in subsequent cases relying on the same precedent. . . Thus, this Court must also look 'anew' at the particular facts in this case. . . In doing so, this Court is guided by additional principles handed down by the Supreme Court. As an initial matter, even though the Supreme Court has recognized causes of action in *Bivens* under the Fourth Amendment, in *Davis* under the Fifth Amendment, and in *Carlson* under the Eighth Amendment, that does not mean that any cause of action may lie under those Amendments simply by virtue of these Supreme Court cases. In fact, the Supreme Court has refused to extend *Bivens* contexts beyond the specific clauses of the specific amendments for which a cause of action had been implied, or even to other classes of defendants facing liability under those same clauses. . . .Instead, the recognition of a cause of action is context-specific, and the Supreme Court has established a rigorous inquiry that courts must use before implying a *Bivens* cause of action in a new context or against a new category of defendants. . . . If the context is new, then the court must next ask 'whether any alternative, existing process for

protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'. . Irrespective of whether an alternative remedy exists, a federal court must also conduct a specific analysis, 'paying particular heed ... to any special factors counselling hesitation before authorizing a new kind of federal litigation,' otherwise known as the 'special factors analysis.'. . . [T]here is no precedent suggesting that the unavailability of money is a factor that carries any weight in determining the expansion of a *Bivens* remedy. Rather, the emphasis is simply on the existence of an avenue to protect the right, not the method of protection that Congress or the Executive has chosen. . . . Thus, in light of Supreme Court precedent, past and very recent, there are significant special factors that give me pause, and in this context, there is reason to 'fear that a general *Bivens* cure would be worse than the disease.'. . .*Ziglar* has given priority to the need to consider the availability of *Bivens* relief, even where the Circuit had previously assumed the availability of a *Bivens* remedy. . . . In fact, *Ziglar* requires courts to consider each case individually, even where the court had previously found a new *Bivens* remedy, just as the Third Circuit recently recognized. In *Vanderklok*, the Third Circuit found that, even though it had previously found a *Bivens* remedy in a First Amendment retaliation context, it nonetheless 'must look at the issue anew in this particular context, and as it pertains to this particular category of defendants.'. . .Given all of the foregoing, I decline to create a new *Bivens* Fifth Amendment cause of action, and plaintiff's Fifth Amendment claim is dismissed." [Court also goes on to find Plaintiff's Eighth Amendment medical and non-medical claims lacked merit])

Third Circuit

Vanderklok v. U.S., 868 F.3d 189, 194, 197-200, 204-09 (3d Cir. 2017) ("Because Kieser sought and was denied summary judgment on the merits of Vanderklok's Fourth Amendment claim, rather than on the basis of qualified immunity, that claim cannot be reviewed on interlocutory appeal. By contrast, Kieser's appeal of the denial of qualified immunity as to Vanderklok's First Amendment claim is properly before us. As it turns out, however, a preliminary and dispositive question must be answered first: whether a First Amendment claim against a TSA employee for retaliatory prosecution even exists in the context of airport security screenings. Because we conclude that it does not, we will vacate the District Court's order, without reaching the issue of qualified immunity, and direct the District Court to enter judgment for Kieser on the First Amendment claim. . . .The qualified immunity dispute centers on whether a First Amendment right to be free from retaliation by a TSA employee was clearly established at the time of the incident in question. . . . In sum, our jurisdiction at this point extends only to the issue of whether Kieser ought to be immune from suit for Vanderklok's First Amendment retaliation claim, and, preliminary to that, whether such a claim exists at all in the specific circumstances of this case. . . . The Supreme Court has never implied a *Bivens* action under any clause of the First Amendment. . . .The present case compels us to decide the issue we assumed away in *George*. The facts here require it. Moreover, as the role of the TSA has become prevalent in the lives of the traveling populace, disputes involving airport screening personnel may come up with some frequency, and the existence of a *Bivens* action for First Amendment retaliation is no longer something that we

should assume without deciding. Today we hold that *Bivens* does not afford a remedy against airport security screeners who allegedly retaliate against a traveler who exercises First Amendment rights. . . . It is not enough to argue, as Vanderklok does, that First Amendment retaliation claims have been permitted under *Bivens* before. We must look at the issue anew in this particular context, airport security, and as it pertains to this particular category of defendants, TSA screeners. . . .[F]or decades, the Supreme Court has repeatedly refused to extend *Bivens* actions beyond the specific clauses of the specific amendments for which a cause of action has already been implied, or even to other classes of defendants facing liability under those same clauses. . . . Instead, it has established a rigorous inquiry that must be undertaken before implying a *Bivens* cause of action in a new context or against a new category of defendants. . . .In summary, then, there can be a remedy against the United States in cases where the employee had the responsibility of an officer, and there can be a state law remedy against the individual when the offending TSA employee acted outside the scope of employment. Based on the District Court's orders as they now stand, however, there are no alternative judicial remedies available to Vanderklok, because the District Court concluded that Kieser was not an investigative or law enforcement officer and there was no challenge as to whether Kieser acted within the scope of his employment. . . .Here, Vanderklok asks us to imply a *Bivens* action for damages against a TSA agent. TSA employees like Kieser are tasked with assisting in a critical aspect of national security – securing our nation's airports and air traffic. The threat of damages liability could indeed increase the probability that a TSA agent would hesitate in making split-second decisions about suspicious passengers. In light of Supreme Court precedent, past and very recent, that is surely a special factor that gives us pause. . . .Ultimately, the role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context. The dangers associated with aircraft security are real and of high consequence.")

Fifth Circuit

Hernandez v. Mesa, 885 F.3d 811, 814, 816-23 (5th Cir. 2018) ("This appeal returned to the court en banc following remand from the United States Supreme Court. Prompted by the High Court, we have carefully considered a question antecedent to the merits of the Hernandez family's claims against United States Customs & Border Patrol Agent Mesa: whether federal courts have the authority to craft an implied damages action for alleged constitutional violations in this case. . . We hold that this is not a garden variety excessive force case against a federal law enforcement officer. The transnational aspect of the facts presents a 'new context' under *Bivens*, and numerous 'special factors' counsel against federal courts' interference with the Executive and Legislative branches of the federal government. . . .Pursuant to *Abbasi*, the cross-border shooting at issue here must present a 'new context' for a *Bivens* claim. Because Hernandez was a Mexican citizen with no ties to this country, and his death occurred on Mexican soil, the very existence of any 'constitutional' right benefitting him raises novel and disputed issues. There has been no direct judicial guidance concerning the extraterritorial scope of the Constitution and its potential application to foreign citizens on foreign soil. . . To date, the Supreme Court has refused to extend the protection of the Fourth Amendment to a foreign citizen residing in the United States against

American law enforcement agents' search of his premises in Mexico. *United States v. Verdugo–Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). . . Language in *Verdugo*'s majority opinion strongly suggests that the Fourth Amendment does not apply to American officers' actions outside this country's borders. . . . Likewise, the plaintiffs can prevail on a substantive due process Fifth Amendment claim only if federal courts accept two novel theories. The first would allow a *Bivens* action to proceed based upon a Fifth Amendment excessive force claim simply because *Verdugo* might prevent the assertion of a comparable Fourth Amendment claim. . . .The second theory would require the extension of the *Boumediene* decision, . . . both beyond its explicit constitutional basis, Art. I, § 9, cl. 2, the Habeas Corpus Suspension Clause, and beyond the United States government's *de facto* control of the territory surrounding the Guantanamo Bay detention facility. . . .The plaintiffs assert that because this is just a case in which one rogue law enforcement officer engaged in misconduct on the operational level, it poses no 'new context' for *Bivens* purposes. On the contrary, their unprecedented claims embody not merely a 'modest extension'—which *Abbasi* describes as a 'new' *Bivens* context—but a virtual repudiation of the Court's holding. *Abbasi* is grounded in the conclusion that *Bivens* claims are now a distinctly 'disfavored' remedy and are subject to strict limitations arising from the constitutional imperative of the separation of powers. The newness of this 'new context' should alone require dismissal of the plaintiffs' damage claims. Nevertheless, we turn next to the 'special factors' analysis assuming arguendo that some type of constitutional claims could be conjured here. . . . Although members of the Border Patrol like Agent Mesa may conduct activities analogous to domestic law enforcement, this case involved shots fired across the border within the scope of Agent Mesa's employment. . . In a similar context—airport security—the Third Circuit recently denied a *Bivens* remedy for a TSA agent's alleged constitutional violations. . . .The same logic applies here. . . Implying a private right of action for damages in this transnational context increases the likelihood that Border Patrol agents will 'hesitate in making split second decisions.' Considering the 'systemwide' impact of this *Bivens* extension, there are 'sound reasons to think Congress might doubt [its] efficacy.'. .Extending *Bivens* in this context also risks interference with foreign affairs and diplomacy more generally. . . .Congress's failure to provide a damages remedy in these circumstances is an additional factor counseling hesitation. . . .Relevant statutes confirm that Congress's failure to provide a federal remedy was intentional. For instance, in section 1983, Congress expressly limited damage remedies to 'citizen[s] of the United States or other person[s] within the jurisdiction thereof.' 42 U.S.C. § 1983. Given that *Bivens* is a judicially implied version of section 1983, it would violate separation-of-powers principles if the implied remedy reached further than the express one. . . .Nor, under *Abbasi*, does the plaintiffs' lack of a damages remedy favor extending *Bivens*. The Supreme Court has held that 'even in the absence of an alternative' remedy, courts should not extend *Bivens* if any special factors counsel hesitation. . . .For cross-border shootings like this one, however, criminal investigations and prosecutions are already a deterrent. While it is true that numerous federal agencies investigated Agent Mesa's conduct and decided not to bring charges, the DOJ is currently prosecuting another Border Patrol agent in Arizona for the cross-border murder of a Mexican citizen. *See United States v. Swartz*, No. 15-CR-1723 (D. Ariz. Sept. 23, 2015). The threat of criminal prosecution for abusive conduct is not hollow. In some instances, moreover, a state-law tort claim may be available to provide both

deterrence and damages. That claim is unavailable here because the DOJ certified that Agent Mesa acted within the scope of his employment, and so the Westfall Act protects him from liability. . . . [T]he novelty and uncertain scope of an extraterritorial *Bivens* remedy counsel hesitation. As the Eleventh Circuit recently averred, the legal theory itself may constitute a special factor if it is 'doctrinally novel and difficult to administer.'. . An extraterritorial *Bivens* extension is 'doctrinally novel.' The Supreme Court 'has never created or even favorably mentioned a non-statutory right of action for damages on account of conduct that occurred outside the borders of the United States. *Vance v. Rumsfeld*, 701 F.3d 193, 198–99 (7th Cir. 2012) (en banc). Nor has any court of appeals extended *Bivens* extraterritorially. *See Meshal v. Higgenbotham*, 804 F.3d 417, 424–25 (D.C. Cir. 2015), *cert. denied*, —— U.S. ——, 137 S.Ct. 2325, 198 L.Ed.2d 755 (2017). Extraterritoriality, moreover, involves a host of administrability concerns, making it impossible to assess the 'impact on governmental operations systemwide.' *Abbasi*, 137 S.Ct. at 1858. . .But novelty is by no means the only problem with an extraterritorial *Bivens* remedy. The presumption against extraterritoriality accentuates the impropriety of extending private rights of action to aliens injured abroad. . . . Having weighed the factors against extending *Bivens*, we conclude that this is not a close case. Even before *Abbasi* clarified the 'special factor' inquiry, we agreed with our sister circuits that '[t]he only relevant threshold—that a factor "counsels hesitation"—is remarkably low.'. . Here, extending *Bivens* would interfere with the political branches' oversight of national security and foreign affairs. It would flout Congress's consistent and explicit refusals to provide damage remedies for aliens injured abroad. And it would create a remedy with uncertain limits. In its remand of *Hernandez*, the Supreme Court chastened this court for ruling on the extraterritorial application of the Fourth Amendment because the issue is 'sensitive and may have consequences that are far reaching.'. . Similar 'consequences' are dispositive of the 'special factors' inquiry. The myriad implications of an extraterritorial *Bivens* remedy require this court to deny it.")

Hernandez v. Mesa, 885 F.3d 811, 823-24 (5th Cir. 2018) (Dennis, J., concurring in the judgment) ("In my view, we need not decide the difficult question of whether a *Bivens* remedy should be available under the circumstances of this case because, under Supreme Court precedent, Agent Mesa is entitled to qualified immunity. I find compelling the plaintiffs' arguments that Hernández was entitled to protections under the Fourth Amendment in light of *Boumediene v. Bush* . . . and the circumstances surrounding the border area where Mesa shot and killed him. . . But the extraterritorial application of these protections to Hernández was not clearly established at the time of Mesa's tortious conduct. Mesa is therefore entitled to qualified immunity. . . .The plaintiffs contend that questions about the extraterritorial application of constitutional protections do not preclude Mesa's liability. After all, according to the complaint, Mesa essentially committed a cold-blooded murder. . . Surely every reasonable officer would know that Mesa's conduct was unlawful, the plaintiffs argue. While that is a fair point, I believe this argument is foreclosed by Supreme Court precedent, which holds that the right giving rise to the claim—here, Hernández's Fourth Amendment rights—must be clearly established. *See Davis v. Scherer,* 468 U.S. 183, 197, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). In *Davis v. Scherer*, the Supreme Court held, 'A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant

official's qualified immunity only by showing that *those* rights were clearly established at the time of the conduct at issue.' *Id.* (emphasis added). The Court stated that 'officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages.'. . In light of *Davis*, the plaintiffs' argument that Mesa forfeited his qualified immunity because his conduct was shockingly unlawful cannot succeed. I am therefore compelled to concur in affirming the district court's dismissal of the plaintiffs' claims.")

Hernandez v. Mesa, 885 F.3d 811, 824-32 (5th Cir. 2018) (Prado, J., joined by Graves, J., dissenting) ("Today's en banc majority denies Sergio Hernandez's parents a *Bivens* remedy for the loss of their son at the hands of a United States Border Patrol agent. The majority asserts that the transnational nature of this case presents a new context under *Bivens* and that special factors counsel against this Court's interference. While I agree that this case presents a new context, I would find that no special factors counsel hesitation in recognizing a *Bivens* remedy because this case centers on an individual federal officer acting in his law enforcement capacity. I respectfully dissent. . . . The majority repeatedly attempts to frame this case around the issue of whether aliens injured abroad can pursue *Bivens* remedies. That characterization, however, overlooks the critical who, what, where, when, and how of the lead actor in this tragic narrative. This case involves one federal officer 'engaged in his law enforcement duties' in the United States who shot and killed an unarmed, fifteen-year-old Mexican boy standing a few feet away. The Supreme Court in *Abbasi* went to great lengths to indicate support for the availability of a *Bivens* remedy in exactly the circumstances presented here: an instance of individual law enforcement overreach. As the Court recently reaffirmed in no uncertain terms, *Bivens* is 'settled law ... in [the] common and recurrent sphere of law enforcement.'. . For the following reasons, I would retain *Bivens* in that common sphere and recognize a remedy for this senseless and arbitrary cross-border shooting at the hands of a federal law enforcement officer. . . . Plaintiffs allege that an individual Border Patrol agent while on duty on U.S. soil shot and killed an unarmed fifteen-year-old boy. If recognizing a *Bivens* remedy in this context implicates border security or the Border Patrol's operations, so too would any suit against a Border Patrol agent for unconstitutional actions taken in the course and scope of his or her employment. Yet, as the majority recognizes, Border Patrol agents are unquestionably subject to *Bivens* suits when they commit constitutional violations on U.S. soil. . . It make little sense to argue that a suit against a Border Patrol agent who shoots and kills someone standing a few feet beyond the U.S. border implicates border and national security issues, but at the same time contend that those concerns are not implicated when the same agent shoots someone standing a few feet inside the border. . . .I readily acknowledge Hernandez was standing on the Mexican side of the culvert when he was shot, but it cannot be forgotten that Agent Mesa was acting from the American side of the culvert. It is hard to understand how the mere fact that a plaintiff happens to be standing a few feet beyond an unmarked and invisible line on the ground would suddenly create a host of administrability concerns or a systemwide impact on governmental operations that would not otherwise exist if the plaintiff was standing a few feet within the United States. As ordinary *Bivens* litigation against a federal law enforcement officer seeking damages for unconstitutional use of force, 'the legal standards for adjudicating the claim pressed here are well-established and easily administrable.'. . . In sum, this Court is more than qualified to consider

and weigh the costs and benefits of allowing a damages action to proceed. This case simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an unarmed fifteen-year-old boy standing a few feet away. I would elect to recognize a damages remedy for this tragic injury. As Chief Justice John Marshall wrote, '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'. . In this case, I would recognize a *Bivens* remedy for this senseless cross-border shooting at the hands of a federal law enforcement officer. Therefore, I respectfully dissent.")

Eighth Circuit

Osman v. Weyker, No. 16CV908 (JNE/TNL), 2017 WL 3425647, at *6-7 (D. Minn. Aug. 9, 2017) ("Because these are Fourth Amendment claims, given the context of this particular case, the Court need not decide whether the proper vehicle for Osman's claims is a § 1983 or *Bivens* cause of action. It is well established that a *Bivens* cause of action exists for arrests that allegedly violate the Fourth Amendment for lack of probable cause. [citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (U.S. June 19, 2017) (plurality opinion) and other cases] Several aspects of this case clearly weigh in favor of allowing a *Bivens* claim: the right at issue—the Fourth Amendment—is the same as in *Bivens*, and the defendants are individual investigating police officers, not high-level executive officers or military officers or private employees of a private entity. . . Defendants argue nevertheless that this case presents a new context for *Bivens*. The Court disagrees. . . . [T]he fact that there was legal process in Osman's case, whereas *Bivens* involved only an arrest, is not a meaningful distinction. Per *Manuel*, the legal process, such as the grand jury's indictment, does not remove Osman's claim from the Fourth Amendment unreasonable seizure analysis. If legal process is not fatal to a pretrial detainee's claim for arrest and detention without probable cause, the Court sees no compelling reason why it should thrust that claim into a new context for *Bivens* purposes. Other courts have applied *Bivens* on similar facts. . . . Deciding whether the proper cause of action would be § 1983 or *Bivens* is unnecessary at this time. A *Bivens* remedy would be available, so the question is not dispositive of the case. And *Bivens* claims are analyzed like § 1983 claims.")

Ninth Circuit

Lanuza v. Love, 899 F.3d 1019, 1021, 1026-28, 1033-34 (9th Cir. Aug. 14, 2018) ("We are tasked with answering in part a question asked by many legal commentators in the wake of the Supreme Court's decision in *Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 198 L.Ed.2d 290 (2017): where does *Bivens* stand? . . . . We recognize that the Supreme Court 'has made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity,'. . . but, if the principles animating *Bivens* stand at all, they must provide a remedy on these narrow and egregious facts. We therefore reverse the district court's holding that Lanuza was not entitled to a *Bivens* remedy. . . . [W]hile *Abbasi* clearly limited *Bivens*'s scope, it did not preclude this case; nor is this case precluded by other Supreme Court precedent. . . . Although *Mirmehdi* and this case both arise out

of immigration generally, the similarities between *Mirmehdi* and Lanuza's case end there. *Mirmehdi* relates to the detention of suspected terrorists, while Lanuza's case concerns an individual attorney's violation of his due process rights in a routine immigration proceeding. Accordingly, precedent does not preclude providing a *Bivens* remedy here. . . . Lanuza's claim arises in the context of deportation proceedings where a federal immigration prosecutor submitted falsified evidence in order to deprive Lanuza of his right to apply for lawful permanent residence. We know of no other case that has discussed a *Bivens* remedy in this context. . . The conclusion that Lanuza's case arises in a context meaningfully different is ineluctable. And it is likely for that reason that the district court, and both parties, agree. . . .We conclude that the special factors articulated in *Abbasi* do not counsel against extending a *Bivens* remedy to the narrow claim here, where an immigration official and officer of the court forged and submitted evidence in a deportation proceeding to deprive an individual of his right to relief under congressionally enacted laws. . . . Because providing a *Bivens* remedy does not risk improper intrusion by the judiciary into the functioning of other branches; the judiciary is well-equipped to weigh the costs and benefits of this case; the need for deterrence is substantial; and allowing a lawsuit to proceed will place little burden on the government, it is a proper use of our judicial power to allow this *Bivens* action to proceed. . . .For these reasons, we hold that a *Bivens* remedy is available here, where a government immigration attorney intentionally submitted a forged document in an immigration proceeding to completely bar an individual from pursuing relief to which he was entitled. Failing to provide a narrow remedy for such an egregious constitutional violation would tempt others to do the same and would run afoul of our mandate to enforce the Constitution. At its core, this case is about a lie, and all the ways it was used, over several years, to defraud the courts. Government attorneys are given great power, and with that power comes great responsibility. These attorneys represent the United States, and when they act, they speak for our government.")

Rodriguez v. Swartz, 899 F.3d 719, 735-47 (9th Cir. 2018),), *petition for cert. filed*, No. 18-309 (U.S. Sept. 7, 2018) ("In *Hernandez v. Mesa*, the Fifth Circuit confronted a cross-border shooting similar to the one here. It held that even if the shooting was unconstitutional, the law was not clearly established at the time. It did not decide whether the family of the boy who was shot had a *Bivens* cause of action. In fact, the officer who shot him had not moved to dismiss on that basis. Yet the Supreme Court reversed, holding that whether *Bivens* applied was ' "antecedent" to the other questions presented.' It then remanded the case so that the Fifth Circuit could consider whether the boy's family had a *Bivens* cause of action. In a different context, we have also held that qualified immunity 'by necessity' implicates whether there is a *Bivens* cause of action. We therefore hold that we have jurisdiction to decide whether Rodriguez has a *Bivens* cause of action. Given the Supreme Court's instruction in *Hernandez*, we must now address that issue. . . . *Abbasi* demonstrates several principles that have emerged from this line of cases. First, *Abbasi* makes plain that even though a *Bivens* action lies for some constitutional violations (like the Fourth Amendment claim in *Bivens*), it does not lie for all violations (like the Fourth Amendment claim in *Abbasi*). Second, *Abbasi* explains that if a case presents a 'new context' for a *Bivens* claim, then we must exercise 'caution' in determining whether to extend *Bivens*. That is because 'expanding the *Bivens* remedy is now a "disfavored" judicial activity.' And

while *Abbasi* mandates caution and disfavor only when courts extend *Bivens* into a 'new context,' a case presents a new context whenever it is 'different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court.' Third, if a case presents a new context for a *Bivens* claim, then we can extend it only if two conditions are met. One condition is that the plaintiff must not have any other adequate alternative remedy. The other condition is that there cannot be any 'special factors' that lead us to believe that Congress, instead of the courts, should be the one to authorize a suit for money damages. Together, these three principles restrict when we can extend a *Bivens* cause of action. But *Bivens* and its progeny are still good law. *Bivens*, *Davis*, and *Carlson* have never been overruled, implicitly or explicitly. Instead, *Abbasi* went out of its way to emphasize that the Court did 'not intend[ ] to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose.' So at least in the 'common and recurrent sphere of law enforcement,' *Bivens* is 'settled law.' This brings us to a fourth principle of the Court's *Bivens* jurisprudence: in the right case, we may extend *Bivens* into a new context. . . .We apply these four principles in this case. This case presents a new *Bivens* context. Like *Bivens*, this case is about a federal law enforcement officer who violated the Fourth Amendment. But this case differs from *Bivens* because J.A. was killed in Mexico (by a bullet fired in the United States) and because we are applying the Constitution to afford a remedy to an alien under these circumstances. We therefore cannot extend *Bivens* unless: (1) Rodriguez has no other adequate alternative remedy; and (2) there are no special factors counseling hesitation. We now turn to those two inquiries, keeping in mind that extension is disfavored and that we must exercise caution. . . . Rodriguez cannot bring a state-law tort action against Swartz without the Westfall Act converting it into an FTCA suit against the United States. At that point, as discussed, the claim would be barred by the FTCA's foreign country exception because the injury occurred in Mexico. Although the application of Arizona law would not on its face qualify as the application of foreign law, the concern was that a state's choice of law rules as applied to common law torts *could* still require the application of foreign law. . . . The United States indicted and tried Swartz for murdering J.A. Though a jury acquitted him of murder, the government has indicated that it will retry him for manslaughter. If he is convicted, federal law will require him to pay restitution to J.A.'s estate. The United States argues that such restitution is an adequate remedy. But restitution is not an adequate remedy for several reasons. . . .In short, for Rodriguez, it is damages under *Bivens* or nothing, and Congress did not intend to preclude *Bivens*. . . . Though a *Bivens* action is Rodriguez's only available adequate remedy, we cannot extend *Bivens* if a 'special factor' counsels hesitation. Because we must proceed with caution and are reluctant to extend *Bivens*, we have carefully weighed all the reasons Swartz and the United States have offered for denying a *Bivens* cause of action. But this case does not present any such special factors. . . .Rodriguez does not challenge any government policy whatsoever. And neither the United States nor Swartz argues that he followed government policy. Instead, federal regulations expressly *prohibited* Swartz from using deadly force in the circumstances alleged. Rodriguez also sued a rank-and-file officer, not the head of the Border Patrol or any other policy-making official. This case is therefore like the ones that *Abbasi* distinguished—those involving 'standard law enforcement operations' and 'individual instances of ... law enforcement overreach.' The standards governing Swartz's conduct are the same here as they would be in any

other excessive force case. Thus, *Abbasi* implies that *Bivens* is available. . . It cannot harm national security to hold Swartz civilly liable any more than it would to hold him criminally liable, and the government is currently trying to do the latter. Thus, national security is not a special factor here. . . . The United States is correct that courts should not extend *Bivens* if it requires courts to judge American foreign policy. But the United States has not explained how any policy is implicated or could be complicated by applying *Bivens* to this shooting. It has not identified any policy that might be undermined. Just as national security cannot be used as a talisman to ward off inconvenient claims, neither does the 'mere incantation' of the magic words 'foreign policy' cause a *Bivens* remedy to disappear. In this case, extending *Bivens* would not implicate American foreign policy. There is no American foreign policy embracing shootings like the one pleaded here. . . . We fail to see how extending *Bivens* here would actually implicate American foreign policy. No policy has been brought to our attention, and no policymaking individuals have been sued, unlike in *Abbasi*. Swartz did not act pursuant to government policy. He broke the rules that were in the Code of Federal Regulations." [footnotes omitted])

Rodriguez v. Swartz, 899 F.3d 719, 749-58 (9th Cir. 2018) (Smith, J., dissenting),), *petition for cert. filed*, No. 18-309 (U.S. Sept. 7, 2018) ("This case presents yet another 'tragic cross-border incident in which a United States Border Patrol agent standing on United States soil shot and killed a Mexican national standing on Mexican soil.' *Hernandez v. Mesa*, —— U.S. ——, 137 S.Ct. 2003, 2004, 198 L.Ed.2d 625 (2017) (per curiam). However, before we can appropriately address any of the other challenging issues presented by this case, we must first respond to a question recently posed by the Supreme Court: 'When a party seeks to assert an implied cause of action under the Constitution itself, ... separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts?'. . In this case, the obvious answer is Congress. We lack the authority to extend *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), to the cross-border context presented in this case. In holding to the contrary, the majority creates a circuit split, oversteps separation-of-powers principles, and disregards Supreme Court law. I therefore respectfully dissent. . . .*Hernandez*'s lengthy path through the federal court system underscores several points. First, the availability of a *Bivens* remedy is a critical threshold question. Second, *Abbasi* did not merely recapitulate the Supreme Court's past law on *Bivens*—the Court characterized *Abbasi* as 'intervening guidance.'. . Third, a principled application of *Abbasi* to the facts of this case can yield only one answer: We lack the authority to extend a *Bivens* remedy to the cross-border shooting context. Unlike the Fifth Circuit, which faithfully followed the Supreme Court's guidance, the majority fails to acknowledge the underlying principles of *Abbasi*, choosing instead to distinguish *Abbasi* on narrow factual grounds. The majority authorizes an impermissible extension of *Bivens* to a new context despite the presence of numerous special factors counselling judicial hesitation. In doing so, the majority creates a circuit split and tees up our court for a new 'chastening' by the Supreme Court. . . . The majority fails to accord any meaningful significance to the conclusion that this case presents a new context for a *Bivens* claim. By the majority's reckoning, the fact that a *Bivens* claim presents a new context means only that a court must perform the second half of the *Bivens* analysis—the special-

factors inquiry—and nothing more. This approach clearly flouts the Supreme Court's instructions. The majority fails to heed the Supreme Court's warning that expanding *Bivens* is a 'disfavored' activity, . . . and that courts may not run roughshod across the separation of powers. As was the case in *Hernandez*, Rodriguez's 'unprecedented claims embody ... a virtual repudiation of the Court's holding' in *Abbasi*. . . In fact, '[t]he newness of this "new context" should alone require dismissal of [Rodriguez's] damage claims.'. . .Contrary to the majority, I conclude that several special factors prevent us from implying a damages remedy in this case. The special factors in this case are weighty, and counsel strongly against judicial interference 'in the absence of affirmative action by Congress.'. . .In dissenting today, I am fully mindful of the tragedy underlying this case. I am also aware of the Supreme Court's warning that '[t]here are limitations ... on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments,' and that 'national-security concerns must not become a talisman used to ward off inconvenient claims—a "label" used to "cover a multitude of sins."' Rather, heeding the Court's guidance in *Abbasi*, I have undertaken my analysis with one controlling question in mind: ' "[W]ho should decide" whether to provide for a damages remedy, Congress or the courts?'. . . Here, the task of deciding whether to create a damages remedy for Rodriguez lies squarely within the purview of Congress, not of the judiciary. By creating an extraterritorial *Bivens* remedy in this case, the majority veers into uncharted territory, ignores Supreme Court law, and upsets the separation of powers between the judiciary and the political branches of government. The majority pays only lip service to the new-context inquiry, without any real regard for the principles set forth in *Abbasi,* and concludes, remarkably, that there are no special factors weighing against this unprecedented expansion of *Bivens*. The Supreme Court has made clear its views on expanding *Bivens*, and the majority has, in turn, made clear how it views the Court's instructions. Instead of following suit, the majority turns back to the *ancien regime* now repudiated by the Court. Three circuit courts touch the border between the United States and Mexico—our court, the Fifth Circuit, and the Tenth Circuit. Today, two of the three are split. The implications are troubling. Whereas an alien injured on Mexican soil by a Border Patrol agent shooting from Texas lacks recourse under *Bivens*, an alien injured on Mexican soil by an agent shooting from California or Arizona may sue for damages. This is an untenable result, and will lead to an uneven administration of the rule of law. Applying Supreme Court law, I would adopt the reasoning of the Fifth Circuit. This case presents a new *Bivens* context, and numerous special factors counsel against judicial creation of an implied damages remedy in the cross-border context. I respectfully dissent." [footnotes omitted])

Brunoehler v. Tarwater, No. 16-56634, 2018 WL 3470210, at *2-3 (9th Cir. July 19, 2018) (not reported) ("Here, the Wiretap Act was another 'legal mandate under which the [Agents were] operating.'. . Given the Supreme Court's observation that 'even a modest extension is still an extension' of *Bivens*, we conclude that the application of an extensive statutory scheme like the Wiretap Act constitutes a meaningful difference from *Bivens*, which concerned only the Fourth Amendment. . .Further, under *Ziglar*, an extension of *Bivens* is not available here. . . . Because the Wiretap Act provides for damages when agents improperly obtain wiretaps, Brunoehler had an adequate alternative remedy for his alleged harm. That Brunoehler's claims under the Wiretap Act

ultimately failed for lack of standing does not mean he did not have access to alternative remedies, but rather that he lacked standing to challenge the wiretaps at issue. Thus, in light of the available alternative remedies, we decline to extend *Bivens* in this context, and conclude that the district court did not err when it dismissed Brunoehler's claim for unlawful wiretapping. . . . We . . . conclude that Brunoehler's unlawful search and arrest claims are not 'meaningfully different' from *Bivens*, which involved the same claims—albeit for different crimes—in virtually the same search-and-seizure context. Thus, Brunoehler's allegation of unlawful search and arrest does not seek an extension of *Bivens*, and the district court erred when it dismissed those claims.")

Brunoehler v. Tarwater, No. 16-56634, 2018 WL 3470210, at *4, *9-11 (9th Cir. July 19, 2018) (not reported) (Bea, J., dissenting in part) ("I agree with the Majority that Dwight Brunoehler's Wiretap Act claim should be dismissed because he does not have standing to challenge the wiretap he alleges was based on a faulty application. However, I think Brunoehler has entirely failed to state a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 91 S. Ct. 1999 (1971). I therefore respectfully dissent in part. . . . The Majority concludes that Brunoehler's arrest was not meaningfully different than Bivens's. The Majority is incorrect, because Bivens was subjected to a warrantless arrest . . . and Brunoehler was arrested pursuant to a warrant which followed a Grand Jury indictment. The difference is crucial: the officers whom Brunoehler now sues were operating under a different 'legal mandate[]'. . .than were the officers in *Bivens*, who executed a *warrantless* search without probable cause. As a result, per *Ziglar*, the difference between our case and *Bivens* is 'meaningful.'. . .The basic premise of a *Bivens* claim is that a plaintiff has suffered an injury to his constitutional rights. Each of Brunoehler's claims flows from wiretaps which he has no right to challenge, and from which he suffered no constitutional injury. The *Bivens* claim therefore fails. Even if we read Brunoehler's complaint to state a claim for an illegal arrest, the *Bivens* claim still would not lie, for the simple reason that such arrest was made upon a warrant supported by probable cause based on the Grand Jury's indictment. Further, where an adequate alternative remedy is available, the court may not extend a *Bivens* claim into a new context. The Wiretap Act provides such an adequate alternative. The district court's dismissal of Brunoehler's *Bivens* claim should be affirmed in full. I therefore respectfully dissent in part.")

Vega v. United States, 881 F.3d 1146, 1152-53 (9th Cir. 2018) ("Here, Vega asks us to expand the *Bivens* remedy against private defendants for allegedly violating his First Amendment right to access to courts, as well as his Fifth Amendment right to procedural due process. Although the district court stated that '*Minneci* clarified that private employees acting under color of federal law cannot be held liable under *Bivens*,' *Minneci's* holding was in fact much more narrow. In *Minneci*, the Court examined whether to expand the *Bivens* remedy to include Eighth Amendment violations allegedly committed by employees of a private prison. . . In declining to do so, the Court relied on the fact that the defendants were private employees and that, unlike federal employees, they were subject to state law tort claims without qualified immunity. . . As such, the Court found that state law provided an adequate, alternative remedy, and declined to extend *Bivens*.. . In fact, the *Minneci* Court did not completely foreclose applying *Bivens* to private actors. . . For the following reasons, however, we decline to expand *Bivens* to include Vega's First and Fifth Amendment

claims against private employees of a residential reentry center. . . . The Supreme Court has never explicitly recognized a *Bivens* remedy for a First Amendment claim. . . .In the Ninth Circuit, however, we have previously held that *Bivens* may be extended to First Amendment claims. . . . But because neither the Supreme Court nor we have expanded *Bivens* in the context of a prisoner's First Amendment access to court or Fifth Amendment procedural due process claims arising out of a prison disciplinary process, the circumstances of Vega's case against private defendants plainly present a 'new context' under *Abbasi*. . . .Here, Vega had adequate alternative remedies at his disposal and we therefore decline to address whether any special factors counsel hesitation. . . .Here, Vega had alternative means for relief against the alleged violations of his First and Fifth Amendment rights by the private defendants. First, Vega had a remedy 'to seek formal review of an issue relating to *any aspect* of his ... own confinement' under the Administrative Remedy Program ("ARP"). . . . Second, Vega could have sought review of the incident report by the UDC under 28 C.F.R. § 541.7, which is exactly what he ultimately did. . . .Third, Vega had state law claims as an alternative remedy. . . .That Vega's state law claims ultimately failed to satisfy the requirements of Washington law, or federal pleading standards, does not mean that he did not have access to alternative or meaningful remedies. . . .And although Vega contends that '[f]or [him], "it is damages or nothing,"' the fact that the administrative procedures in place to review sanctions resulted in his return to a residential reentry center belies his claim. Expanding *Bivens* in this context, therefore, seems imprudent given the Court's admonition that 'any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'")

Jones v. Hernandez, No. 16-CV-1986 W (WVG), 2017 WL 5194636, at *11-12 (S.D. Cal. Nov. 9, 2017) ("Plaintiff urges the Court to infer unconstitutional retaliation based on the allegation that Jones asked Agent Hernandez, 'What's your fucking problem?' and was thereafter arrested and searched, allegedly through the use of excessive force. . . Judicially imposing First Amendment liability for arresting or searching a cursing suspect would threaten significant disruption of the proper functioning of the executive branch. . . It would extend the specter of litigation over broad swaths of agents' decision-making in the field, and it would likely increase the costs of enforcing federal law as a general matter. Second, and critically, this incident took place directly adjacent to the United States border—a place where 'the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country' has been long-recognized and broadly protected. . . . Extending First Amendment *Bivens* liability to suspects trading profanities with border protection officers at the border could have wide-reaching consequences to agents' future decision-making—in searches as well as arrests. This is not the same ***Bivens*** context as those Plaintiff cites in opposition. . . As such, the question now becomes whether there exist ' "special factors counselling hesitation[,]"'. .—or, in modern parlance—' "who should decide" whether to provide for a damages remedy, Congress or the courts?'. . . .Here, Plaintiff urges the Court to extend a *Bivens* remedy for a violation of the First Amendment through retaliation for an exchange of profanity with a Border Patrol agent, directly adjacent to the border itself. There are at least two reasons why the Judiciary is not 'well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to

proceed' in this context. . . First, just as the *Ziglar* Court reiterated as to the military, the public purse, and federal land, Congress has designed its regulatory authority in a guarded way as to border protection. . . Second, such a remedy could have wide-reaching consequences as to the costs of enforcing the law at the border.")

II. QUALIFIED IMMUNITY:PRELIMINARY PRINCIPLES

A. Basic Doctrine

A public official performing a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not violate clearly established federal statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). The immunity is "immunity from suit rather than a mere defense to liability." ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985).

See also ***Bamdad v. Drug Enforcement Admin.,*** 617 F. App'x 7, 9 (D.C. Cir. 2015) ("In any event, Bamdad is incorrect in arguing that qualified immunity does not apply to nominal-damages claims. In *Elkins v. District of Columbia,* 690 F.3d 554 (D.C.Cir.2012), this Court upheld a grant of summary judgment on qualified immunity grounds in a case seeking nominal damages. . . And for good reason. Qualified immunity is an immunity from *suit,* not just remedial absolution.")

Note: In ***Ziglar v. Abbasi***, 137 S. Ct. 1843 (2017), Justice Thomas wrote separately to express his "growing concern" with the Court's qualified immunity jurisprudence. His comments are worth noting:

> The Civil Rights Act of 1871, of which § 1985(3) and the more frequently litigated § 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. . . Although the Act made no mention of defenses or immunities, 'we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them.'. . We have done so because '[c]ertain immunities were so well established in 1871 ... that 'we presume that Congress would have specifically so provided had it wished to abolish' them.'. . Immunity is thus available under the statute if it was 'historically accorded the relevant official' in an analogous situation 'at common law,'. . . unless the statute provides some reason to think that Congress did not preserve the defense[.] . . .In some contexts, we have conducted the common-law inquiry that the statute requires. . . For example, we have concluded that legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871. . . We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the 'judicial phase of the criminal process,'. . .

although not from suits relating to the prosecutor's advice to police officers[.] In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson,* we held that police officers are not absolutely immune from a § 1983 claim arising from an arrest made pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. . . Rather, we concluded that police officers could assert 'the defense of good faith and probable cause' against the claim for an unconstitutional arrest because that defense was available against the analogous torts of 'false arrest and imprisonment' at common law. . .In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. . . In the decisions following *Pierson,* we have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'. . Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, we instead grant immunity to any officer whose conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . We apply this 'clearly established' standard 'across the board' and without regard to 'the precise nature of the various officials' duties or the precise character of the particular rights alleged to have been violated.'. . We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. [*citing* Baude, Is Qualified Immunity Unlawful?] Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret [ing] the intent of Congress in enacting' the Act. . . Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make. . . We have acknowledged, in fact, that the 'clearly established' standard is designed to 'protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties.'. . The Constitution assigns this kind of balancing to Congress, not the Courts. In today's decision, we continue down the path our precedents have marked. We ask 'whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted,'. . . rather than whether officers in petitioners' positions would have been accorded immunity at common law in 1871 from claims analogous to respondents'. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.

Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment).

B. Note on Application to Federal Statutory Claims

See ***Baas v. Fewless***, 886 F.3d 1088, 1093 (11th Cir. 2018) ("When considering whether an official 'would have known that his actions were prohibited by the law at the time he engaged in the conduct in question,' '[t]he standard is one of objective reasonableness.'. . We use two methods to determine whether a reasonable officer would know that his conduct violates federal law. The first 'looks at the relevant case law at the time of the violation; the right is clearly established if a concrete factual context exists so as to make it obvious to a reasonable government actor that his actions violate federal law.'. . The second 'looks not at case law, but at the officer's conduct, and inquires whether that conduct lies so obviously at the very core of what the [law] prohibits that the unlawfulness of the conduct was readily apparent to the officer, notwithstanding the lack of fact-specific case law.'. . To establish a violation of the DPPA, a plaintiff must show 'that a defendant (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) for a purpose not permitted.'. . 'The plain meaning of the third factor is that it is only satisfied if [it is] shown that obtainment, disclosure, or use was not for a purpose enumerated under § 2721(b)'; 'the burden [to show this] is properly upon the plaintiff.'. .There is no case law clearly establishing that Fewless' use of the photos was impermissible. Moreover, Appellants were required to show that no reasonable officer in the officers' position could have believed that he was accessing or distributing the photos for a permissible use under the DPPA. Appellants failed to make that showing. Appellees are therefore entitled to qualified immunity."); ***Maciver v. Schmitz***, No. 17-1790, 2018 WL 1406669, at *8 (7th Cir. Mar. 21, 2018) ("MacIver responds that as a matter of law, qualified immunity does not apply to statutory claims arising from the SCA [Stored Communications Act]. That is not, however, the direction in which our decisions have gone in cases under the Wiretap Act. We have consistently recognized qualified immunity for alleged Wiretap Act violations. See *Narducci v. Moore*, 572 F.3d 313, 323 (7th Cir. 2009); *Davis v. Zirkelbach*, 149 F.3d 614, 618 (7th Cir. 1998). The Sixth and Eleventh Circuits agree. See *Blake v. Wright*, 179 F.3d 1003, 1012 (6th Cir. 1999); *Tapley v. Collins*, 211 F.3d 1210, 1216 (11th Cir. 2000). MacIver relies heavily upon the D.C. Circuit's decision in *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998), which went the other way and held that qualified immunity did not apply to the Wiretap Act. . . We see no persuasive reason, however, to distinguish the SCA from the Wiretap Act or to depart from circuit precedent. To the extent it makes any difference (and that is unclear), we hold that qualified immunity is available to SCA defendants in general, and these defendants in particular."); ***Kampschroer v. Anoka Cty.***, 840 F.3d 961, 962 (8th Cir. 2016) (per curiam) ("After the parties briefed these appeals, we issued our decision in *McDonough v. Anoka County*, 799 F.3d 931 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 2388 (2016), which squarely addressed this qualified immunity issue: 'Because the meaning of "obtain" in this context is unambiguous, ... [defendants'] contention that qualified immunity applies to [their] conduct because the meaning of "obtain" is unclear ... fails.'. . We invited the parties in all the pending DPPA cases to submit supplemental briefs on a different issue -- how we should apply the 'plausibility analysis' in our

McDonough opinion to these appeals. Appellants did not take that opportunity to submit a brief arguing footnote 6 in *McDonough* does not govern their qualified immunity appeals. We conclude *McDonough* is controlling precedent. Our decision that the statutory term 'obtain' is unambiguous controls appellants' additional argument that the rule of lenity entitles them to qualified immunity."); ***McDonough v. Anoka Cnty.,*** 799 F.3d 931, 956-57 (8th Cir. 2015) ("The circuits' varied interpretations of § 2724's mental state element reflect a lack of clarity regarding 1) to which element or elements the 'know[ledge]' requirement applies; 2) the standard of care, if any, that disclosers must exercise when ascertaining the purpose for an information request; and 3) whether the word 'purpose' in § 2724 refers to the discloser's purpose for divulging the information or the obtainer's purpose for requesting it. Even if, at the time of the disclosures in the instant action, it was clearly established that a discloser has a duty under the DPPA to make some effort to ascertain a recipient's purpose, it was not clearly established that the ascertained purpose must be express and explicit. Drivers allege that DPS issued passwords to police officers, employees at sheriffs' offices, court staff, or other similarly situated government agents in connection with their jobs. There are no allegations that DPS issued passwords to agents or officers whose job duties did not require the use of personal information in motor vehicle records and who nevertheless accessed Drivers' personal information. Drivers allege that Law Enforcement Does received training about proper use of the database and that the website used to log on to the database stated, 'Access to this service is for authorized personnel only conducting official business....' Law Enforcement Does thus implicitly certified a permissible purpose each time they logged on. In these circumstances, we cannot say that, at the time of the alleged accesses, any reasonable official would have understood that DPS's policy of allowing the above-described government employees password-protected access to the database violated Drivers' rights under the DPPA. Drivers also allege that Commissioners and DPS Does knew of the widespread misuse of the system and 'knowingly disclosed' Drivers' personal information by 'failing to safeguard and monitor the database' and by 'willfully refusing to correct the misuses.' These allegations, at most, allege negligence or recklessness. Even assuming that the DPPA imposes a duty of some degree of care on DPS officials, that duty of care was not clearly established at the time of the alleged violations. To the extent that Drivers attempt to allege, without support, that Commissioners and DPS Does actually knew that the particular disclosures alleged in the complaint were for impermissible purposes, such bald allegations are conclusory and are properly disregarded when determining whether the complaint survives a motion to dismiss."); ***Drimal v. Tai***, 786 F.3d 219, 225-26 (2d Cir. 2015) ("While issues related to qualified immunity frequently must await a motion for summary judgment, that might not be the case here. A putative amended complaint, pleaded with the requisite specificity based on the hearing before Judge Sullivan, likely would enable the district court to address qualified immunity issues, at least in part, at the pleading stage. Section 2518(5) of Title III does not precisely define the minimization requirement. It states only that agents must 'minimize the interception of communications not otherwise subject to interception.' 18 U.S.C. § 2518(5). In *Scott v. United States*, the Supreme Court articulated an 'objective reasonableness' test to determine whether agents have properly minimized calls. . . This standard requires 'an objective assessment of an officer's actions in light of the facts and circumstances then known to him.'. . The district court must thus evaluate each agent's

minimization efforts under such an 'objective reasonableness' standard based on the facts of this case to determine whether each defendant 'would understand that what he is doing violates' Title III's minimization requirement. . . .Should Drimal file an amended complaint, in assessing the defendants' claim of qualified immunity on remand, the district court must consider the actions of each individual defendant. . . . Government Exhibit 30, featured at the suppression hearing in the criminal case and of which we take judicial notice, . . . makes it apparent that different defendants responded differently to their duty to minimize: some may be able to successfully claim qualified immunity even at the pleading stage where others may not."); ***Gillie v. Law Office of Eric A. Jones, LLC***, 785 F.3d 1091, 1109 & n.21 (6th Cir. 2015) ("[Q]ualified immunity is inapplicable to an action brought directly under the FDCPA [Fair Debt Collection Practices Act], where Congress has included an explicit exemption from debt collector liability for government officials. . . . Qualified immunity typically applies to actions brought under § 1983 or pursuant to *Bivens.* We have only extended its coverage to actions brought directly under a federal statute on a few occasions, *see, e.g., Cullinan v. Abramson,* 128 F.3d 301, 312 (6th Cir.1997) (RICO); *Blake v. Wright,* 179 F.3d 1003, 1011–12 (6th Cir.1999) (Federal Wiretap Act), and those statutes did not include explicit exemptions for public officials."); ***Bryant v. Texas Dep't of Aging & Disability Servs.***, 781 F.3d 764, 771 (5th Cir. 2015) ("Bryant has not cited to a single judicial opinion holding that employees on FMLA leave have a right to be free from phone calls. Thus, Littleton is entitled to qualified immunity on Bryant's remaining interference claim."); ***Davila v. Gladden***, 777 F.3d 1198, 1202-12 (11th Cir. 2015) ("After careful consideration, we conclude that Congress did not clearly waive sovereign immunity to authorize suits for money damages against officers in their official capacities under RFRA. Also, even if we were to assume the statute authorizes suits for money damages against officers in their individual capacities, we hold that the Defendants here would be entitled to qualified immunity. . . .In *Sossamon v. Texas,* . . . the Supreme Court held that identical 'appropriate relief' language in the related statute RLUIPA did *not* waive states' sovereign immunity from money damages. . . .The only two circuit courts to address whether RFRA waived the federal government's sovereign immunity have held that it did not. [citing *Oklevueha Native Am. Church of Haw., Inc. v. Holder,* 676 F.3d 829, 841 (9th Cir.2012) and *Webman v. Fed. Bureau of Prisons,* 441 F.3d 1022, 1026 (D.C.Cir.2006)]. . . . We recognize that in *Sossamon,* the Court was addressing the sovereign immunity of the states. . . However, the Court's analysis in addressing the ambiguity of 'appropriate relief' applies equally to issues of federal sovereign immunity. Congress did not unequivocally waive its sovereign immunity in passing RFRA. RFRA does not therefore authorize suits for money damages against officers in their official capacities. . . . Second, we decline to address whether RFRA authorizes suits against officers in their individual capacities. Even if RFRA did authorize individual-capacity suits for money damages, these Defendants would be entitled to qualified immunity. . . . Whether or not the District Court concludes that the Defendants violated Mr. Davila's rights under RFRA at trial, the law preexisting the Defendants' conduct did not *compel the conclusion* that their actions violated RFRA. . . . Officers are entitled to clear notice about how their actions violate federal rights. In order to do away with qualified immunity for these offices, it must have been clearly established under RFRA that a prisoner can get religious property from outside sources when the religious items available through authorized means are not sufficient to meet the prisoner's

religious needs. Mr. Davila has offered no prior case clearly establishing that proposition. . . . So even if Mr. Davila is successful at trial in proving a RFRA violation, these Defendants would be protected from paying money damages in their individual capacities."); ***U.S. ex rel. Parikh v. Brown,*** 587 F. App'x 123, 127-29 (5th Cir. Oct. 1, 2014) (on panel reh'g) ("The parties largely dispute the categorical availability of qualified immunity against FCA suits, but we expressly decline to resolve this dispute. Instead, assuming *arguendo* that qualified immunity is an available defense, we hold on the merits that Brown and Campbell are not entitled to qualified immunity against these FCA claims. . . .Relators have born their burden on the first step of the qualified immunity analysis. As the district court found, Relators sufficiently pleaded that Appellants violated the FCA by submitting, or conspiring to submit, claims for payment while knowingly falsely certifying compliance with the AKS and Stark Law. . . . Because the well-pleaded complaint alleges that Brown and Campbell certified claims with "actual knowledge of their falsity," we need not address the more difficult question whether qualified immunity may be available for other FCA violations on a lesser scienter showing, namely deliberate indifference or recklessness. The key question, then, is whether the contours of the FCA were sufficiently clear at the time such that every reasonable official would have understood that—as Relators pleaded in their complaint—presenting claims for payment, while knowingly falsely certifying compliance with the AKS and Stark Law, violated the FCA. Based on circuit precedent, we answer in the affirmative."); ***Walden v. Centers for Disease Control and Prevention***, 669 F.3d 1277, 1285 (11th Cir. 2012) ("The defense of qualified immunity applies not only to constitutional claims, but also to claims brought for alleged violations of RFRA. *See, e.g., Rasul v. Myers,* 563 F.3d 527, 533 n. 6 (D.C.Cir.2009) (per curiam) (holding, in the alternative, that federal officials were entitled to qualified immunity against claims brought for violations of RFRA); *cf. Tapley v. Collins,* 211 F.3d 1210, 1214 (11th Cir.2000) ("[T]he Supreme Court has said that the defense of qualified immunity is so well established, that if Congress wishes to abrogate it, Congress should specifically say so."); *id.* at 1215 n. 9 (collecting cases holding that qualified immunity is a defense to claims arising under various federal statutes)."); ***Tapley v. Collins***, 211 F.3d 1210, 1214, 1215 (11th Cir. 2000) ("In *Gonzalez* the plaintiff argued that the existence of the good faith defenses in the Fair Housing Act meant that Congress intended to abrogate the defense of qualified immunity to claims under that act. We unequivocally rejected that argument and held that qualified immunity is a defense to the Fair Housing Act, despite the inclusion of a good faith statutory defense. . . . We cited eleven federal appeals court decisions holding that qualified immunity is available as a defense to claims arising under eight different federal statutes. . . *Gonzalez* forecloses Tapley's contention, and the district court's holding, that the existence of an explicit good faith defense in [the Federal Wiretap Act] rules out the defense of qualified immunity. . . . [C]ourts should not infer that Congress meant to abolish in the Federal Wiretap Act that extra layer of protection qualified immunity provides for public officials simply because it included an extra statutory defense available to everyone."). *Accord* ***Blake v. Wright***, 179 F.3d 1003 (6th Cir.1999); ***Higgins v. Town of Concord***, No. 16-CV-10641-DLC, 2017 WL 1224540, at *9 n.1 (D. Mass. Mar. 31, 2017) ("The plaintiff argues that qualified immunity cannot be granted on a statutory claim, but instead requires a constitutional right. The Court does not agree. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials from liability for civil damages

insofar as their conduct does not violate clearly established *statutory or constitutional* rights of which a reasonable person would have known.") (internal quotation marks omitted; emphasis added); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)."); ***Klayman v. Obama***, 125 F.Supp.3d 67, 87 (D.D.C. 2015) ("Qualified immunity analysis applies to claims against public officials for RICO violations. *See, e.g., BEG Invs., LLC v. Alberti*, 34 F.Supp.3d 68, 81–82 (D.D.C. 2014)."); ***Spence-Jones v. Rundle***, 991 F.Supp.2d 1221, 1256 (S.D. Fla. 2013) ("[A]lthough, the Eleventh Circuit has not directly addressed the issue of whether absolute or qualified immunity applies to a RICO claim, its application of immunity with respect to other statutes, and its citation of cases from other circuits strongly suggest that immunity would be found to be available. In *Tapley v. Collins*, 211 F.3d 1210, 1216 (11th Cir.2000), while holding that qualified immunity was available as a defense to the Federal Wiretap Act, the Court stated that 'the qualified immunity defense is so well rooted in our jurisprudence that only a specific and unequivocal statement of Congress can abolish the defense.'"); ***Babb v. Eagleton***, No. 07-CV-24-TCK-SAJ, 2008 WL 2492272, at *3, *4 & n.4 (N.D. Okla. June 18, 2008) ("First, the Court must address whether quasi-judicial absolute immunity is a defense to a Title III claim, which presents a question of first impression in the Tenth Circuit. Father argues that the only defenses to a Title III claim are those listed in the statute, see, e.g., 18 U.S.C. § 2511(2)(a)-(i) (setting forth specific exceptions to Title III liability), and that the Court may not apply any defenses existing solely at common law, such as quasi-judicial immunity. . . The Court concludes that quasi-judicial absolute immunity is a defense to Title III liability, notwithstanding the fact that it is not listed as a specific statutory exception in the text of Title III. In the context of prosecutors performing quasi-judicial functions, federal courts have indicated that quasi-judicial immunity can serve as a defense to a Title III claim. . . . In addition, there is authority holding that qualified immunity extended to government actors is a defense to Title III liability. [citing cases] . . . .The Tenth Circuit has not directly weighed in on the question of whether qualified immunity is a defense to Title III. In the case of *Davis v. Gracey*, 111 F.3d 1472, 1481-85 (10th Cir.1997), the court addressed separately the issues of whether officers were entitled to qualified immunity from § 1983 liability and whether officers qualified for a statutory defense to Title III liability. This led the Sixth Circuit to classify the Tenth Circuit as having 'implied' that statutory defenses and qualified immunity are 'separate defenses.'. . However, the Court does not interpret *Davis* to hold or imply that federal common-law immunity doctrines are not defenses to Title III claims."); *Contra* ***Berry v. Funk***, 146 F.3d 1003 (D.C.Cir.1998).

See also ***Gonzalez v. Lee County Housing Authority***, 161 F.3d 1290, 1299, 1300 (11th Cir. 1998) ("Neither the text nor the legislative history of section 3617 [of Fair Housing Act] indicates that Congress intended to abrogate the qualified immunity to which executive-branch officials were entitled under common law. Because of this fact and in light of the importance of protecting officials' decision-making capacity, we conclude that executive-branch officials sued in their individual capacities under section 3617 may assert the defense of qualified immunity. In reaching this conclusion, we follow the only other court of appeals that has considered the matter. *See Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1238-39 (D.C.Cir.1997) (allowing public officials sued in their individual capacities under section 3617 to plead the

affirmative defense of qualified immunity); *see also Baggett v. Baird*, No. Civ.A.4:94CV0282-HLM, (N.D.Ga. Feb. 18, 1997) (granting summary judgment on the basis of qualified immunity in section 3617 action). Our holding also is consistent with various decisions in which this court and others have held that public officials are entitled to assert the defense of qualified immunity when sued under a federal statute other than section 1983."); ***United States v. Kent State Univ.***, No. 5:14CV1992, 2015 WL 5522132, at *3-4 (N.D. Ohio Sept. 16, 2015) ("Defendants assert that there is no controlling authority or robust consensus of case law that placed them on notice that the Fair Housing Act applies to student housing. The Court finds no merit in Defendants' assertions. . . .Kent State contends that it is not settled that the FHA applies to 'student housing.' In so doing, Kent State ignores that the FHA applies to all dwellings except those specifically exempted. . . None of the statutory exemptions suggest that student housing is somehow exempt from the FHA. Importantly, from the Court's review, 'student housing' or 'university owned housing' is not a term of art, nor a term defined or even referenced in the statutory text of the FHA. Accordingly, it comes as no surprise to the Court that there are not any lengthy analyses in case law determining whether student housing is covered by the FHA. To undertake such an analysis, a court would first have to manufacture 'student housing' as some subset of dwellings that was previously unmentioned by Congress. Additionally, even if this Court were inclined to recognize such a subset, it is not entirely clear that the apartments at issue could be included in that defined group. Many of the residents of the Allerton complex are not students at all, but rather the spouses and children of students. As a result, even acknowledging 'student housing' as some subset would not support the grant of immunity herein at this stage of the proceedings. Having found that the plain language of the FHA renders it applicable to 'student housing,' it follows that the rights at issue herein [including right to keep a "therapy dog" in University housing] were clearly established. Accordingly, Defendants motion to dismiss the individual defendants is not well taken.").

See also ***Tanvir v. Tanzin***, 894 F.3d 449, 472 (2d Cir. 2018) (as amended, June 25, 2018) ("Having held that RFRA authorizes a plaintiff to sue federal officers in their individual capacities for money damages, we consider whether those officers should be shielded by qualified immunity. At the panel's request, the parties submitted supplemental briefing addressing two questions: (1) 'whether, assuming *arguendo* that RFRA authorizes suits against officers in their individual capacities, [Defendants] would be entitled to qualified immunity,' and (2) 'whether *Ziglar v. Abbasi*, No. 15-1358 [—— U.S. ——, 137 S.Ct. 1843, 198 L.Ed.2d 290], 2017 WL 2621317 (June 19, 2017), applies in any relevant way to this question or the other questions presented in this appeal.'. .We are sensitive to the notion that qualified immunity should be resolved 'at the earliest possible stage in the litigation.'. . Indeed, we have, in some circumstances, 'permitted the [qualified immunity] defense to be successfully asserted in a Rule 12(b)(6) motion.'. . Nevertheless, as a general matter, '[i]t is our practice in this Circuit when a district court fails to address the qualified immunity defense to remand for such a ruling.'. . Here, the district court decision below did not address whether Defendants were entitled to qualified immunity. Similarly, until the panel prompted the parties at oral argument and in its post-argument order, neither side fully addressed or briefed the issue of qualified immunity on appeal. In the absence of a more

developed record, we decline to address in the first instance whether the Defendants are entitled to qualified immunity. We remand to the district court to make such determination in the first instance.")

But see ***Abrams v. Dep't of Pub. Safety***, 764 F.3d 244, 255 (2d Cir. 2014) (revised opinion) ("Since 'Title VII imposes no liability on individuals, the doctrine of qualified immunity is irrelevant to plaintiff's Title VII claims.' *Genas v. State of N.Y. Dep't of Corr. Servs.,* 75 F.3d 825, 829 n. 3 (2d Cir.1996) (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir.1995)). On remand, the district court should only consider the individual Defendants' entitlement to qualified immunity with regard to the Equal Protection Clause claim brought under § 1983.").

The Eleventh Circuit has held that "for qualified immunity purposes, the term 'damages' includes costs, expenses of litigation, and attorneys' fees claimed by a plaintiff against a defendant in the defendant's personal or individual capacity." ***D'Aguanno v. Gallagher***, 50 F.3d 877, 881 (11th Cir. 1995). The court noted:

> In the present case, these kinds of monetary claims might follow from plaintiffs having a successful outcome (if they do) on their federal-law-based demands for injunctive and declaratory relief. . . The policy that supports qualified immunity–especially removing for most public officials the fear of personal monetary liability–would be undercut greatly if government officers could be held liable in their personal capacity for a plaintiff's costs, litigation expenses, and attorneys' fees in cases where the applicable law was so unsettled that defendants, in their personal capacity, were protected from liability for other civil damages. . . . Put differently, if a defendant has qualified immunity for damages, the defendant has good faith immunity for the purposes of fees and so on.

Id. at 881-82.

But see ***Meredith v. Federal Mine Safety and Health Review Commission***, 177 F.3d 1042, 1049 (D.C. Cir. 1999) ("In this case, the UMWA sought an order under section 105(c) of the Mine Act. . . directing the party accused of unlawful discrimination to take affirmative action to abate the violation–a purely equitable remedy. In one of the complaints, the UMWA additionally sought payment of attorney's fees; but where attorney's fees are provided for by statute, as here, qualified immunity has no application."); ***Tonya K. v. Board of Educ. of the City of Chicago***, 847 F.2d 1243, 1246 (7th Cir.1988) (attorneys' fee award does not violate qualified immunity); ***Helbrans v. Coombe***, 890 F. Supp. 227, 232 (S.D.N.Y. 1995) ("[T]he defense [of qualified immunity] has no application to a request for attorneys [sic] fees under Section 1988.").

C. Affirmative Defense

Although qualified immunity is an affirmative defense, *see* ***Gomez v. Toledo***, 446 U.S. 635, 640 (1980), once the defendant asserts qualified immunity, a number of circuits hold that the

burden then shifts to the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.,* ***Perry v. Spencer***, No. 16-2444, 2018 WL 4182452, at *2 (1st Cir. Aug. 29, 2018) (per curiam) (not reported) ("[T]o avoid summary judgment for the defendant based on qualified immunity, a plaintiff must show that the defendant's actions violated a specific statutory or constitutional right, and that the right allegedly violated was clearly established at the time of conduct in issue. *See Mitchell v. Miller*, 790 F.3d 73, 77 (1st Cir. 2015) ("The plaintiff bears the burden of demonstrating that the law was clearly established at the time of the alleged violation, and it is a heavy burden indeed")."); ***Felarca v. Birgeneau***, 891 F.3d 809, 815 (9th Cir. 2018) ("A plaintiff must prove both steps of the inquiry to establish the officials are not entitled to immunity from the action. *Marsh v. County of San Diego*, 680 F.3d 1148, 1152 (9th Cir. 2012)."); ***Matthews v. Bergdorf,*** 889 F.3d 1136, 1143 (10th Cir. 2018) ("Because the caseworkers have asserted the defense of qualified immunity, the burden is on Plaintiffs to establish their right to proceed."); ***Mayfield v. Harvey County Sheriff's Dep't***, 732 F. App'x 685, ___ (10th Cir. 2018) ("When a defendant raises qualified immunity at the summary judgment stage, the burden shifts to the plaintiff, who must show (1) the defendant violated his constitutional rights and (2) the rights were clearly established. . . To satisfy the second requirement, the plaintiff must show it would have been 'clear to a reasonable officer that his conduct was unlawful in the situation.' *Maresca v. Bernalillo Cty.*, 804 F.3d 1301, 1308 (10th Cir. 2015) (internal quotation marks omitted). Only after 'the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment—showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law.'"); ***Cotropia v. Chapman***, 721 F. App'x 354, ___ (5th Cir. 2018)("In her appellate brief, Chapman merely asserts that qualified immunity should be granted because it was Cotropia's burden to show that physicians' offices are not closely regulated. We reject this assertion. While 'we sometimes short-handedly refer to only one party's burden, the law [with respect to the qualified immunity defense] is that both bear a burden.' *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992). The defendant must first 'plead his good faith and establish that he was acting within the scope of his discretionary authority.'. . Next, 'the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law.'. . In showing that the defendant's actions violated clearly established law, the plaintiff need not rebut every conceivable reason that the defendant would be entitled to qualified immunity, including those not raised by the defendant."); ***Becker v. Bateman***, 709 F.3d 1019, 1022 (10th Cir.2013) ("This court reviews summary judgments based on qualified immunity differently than other summary judgments. When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff ...." (internal quotation marks omitted)); ***Crosby v. Monroe Cnty.,*** 394 F.3d 1328, 1332 (11th Cir.2004) ("Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity."); ***Gardenhire v. Schubert***, 205 F.3d 303, 311(6th Cir. 2000) ("The defendant bears the initial burden of coming forward with facts to suggest that he acted within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in his position would have clearly understood that he was under an affirmative duty to

refrain from such conduct."); ***Pierce v. Smith***, 117 F.3d 866, 871 (5th Cir. 1997) (where § 1983 defendant pleads qualified immunity and shows he is a government official whose position involves the exercise of discretion, plaintiff has the burden to rebut qualified immunity defense by establishing the violation of clearly established law); ***Magdziak v. Byrd***, 96 F.3d 1045, 1047 (7th Cir. 1996); ***Dixon v. Richer***, 922 F.2d 1456, 1460 (10th Cir. 1991).

See also ***Stanley v. Finnegan***, 899 F.3d 623, 626 n.2 (8th Cir. 2018) ("On the merits, to defeat a qualified immunity defense, plaintiff has the burden of proving that defendant's conduct violated a clearly established constitutional right. . . But at the Rule 12(b)(6) stage, the issue is whether plaintiff 'pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' . . Thus, the district court's statement that Finnegan 'has not established' the defense, though imprecise, was not error."); ***Sayed v. Virginia***, No. 17-1445, 2018 WL 3640817, at *3–4 (10th Cir. July 31, 2018) (unpublished) ("Defendants first challenge the district court's determination that they forfeited qualified immunity. They assert the court improperly required them to show that they were entitled to the defense rather than require Mr. Sayed to show that qualified immunity was inappropriate. They point out that '[o]nce the defense of qualified immunity is raised, as it was in this case, a "heavy [two-part] burden" is then shifted to the plaintiff to show that qualified immunity is not appropriate.'. . .The flaw in this argument, however, as revealed by defendants' citation to *Buck*, is that it employs the summary judgment standard for analyzing the qualified immunity defense. . . But defendants did not file a summary judgment motion—they raised qualified immunity in a motion to dismiss, which, as we have said, 'subjects the defendant to a more challenging standard of review than would apply on summary judgment,' *Peterson*, 371 F.3d at 1201. Again, on a motion to dismiss, we evaluate 'the defendant's conduct *as alleged in the complaint*.'. . Thus, the district court did not improperly shift the burden to defendants to show they were entitled to qualified immunity; they assumed the more challenging standard by raising the defense at the motion-to-dismiss stage rather than at summary judgment. Although the district court faulted defendants for failing to argue in favor of qualified immunity, the court correctly recognized that defendants did not address the dual qualified immunity inquiry—*viz.*, whether the complaint plausibly alleged a constitutional violation and whether the rights at issue were clearly established. Indeed, defendants merely recited general qualified immunity principles in a five-sentence paragraph. They then proceeded with a *Heck* analysis, but they did not discuss the allegations in the complaint or dispute whether there was a constitutional violation or whether the rights asserted were clearly established. Nor did they address qualified immunity in their reply brief. This certainly suggests defendants forfeited qualified immunity, at least for purposes of Rule 12(b)(6). Nevertheless, we have discretion to overlook a potential forfeiture. . . Therefore, assuming without deciding that defendants failed to preserve qualified immunity, we exercise our discretion to consider it on the merits and proceed to evaluate defendants' qualified immunity arguments.")

But see ***Outlaw v. City of Hartford***, 884 F.3d 351, 356 (2d Cir. 2018) ("On the cross-appeal, we conclude that Allen's contentions are without merit given that, as qualified immunity is an affirmative defense, the burden was on Allen to prove by a preponderance of the evidence any

factual predicates necessary to establish that defense[.]"); ***Halsey v. Pfeiffer***, 750 F.3d 273, 288 (3d Cir. 2014) ("Unlike some other courts, . . . we follow the general rule of placing the burden of persuasion at a summary judgment proceeding on the party asserting the affirmative defense of qualified immunity. *See, e.g., Reedy v. Evanson,* 615 F.3d 197, 223 (3d Cir.2010) ("The burden of establishing entitlement to qualified immunity is on [the defendant-movant]."); *Bailey v. Pataki,* 708 F.3d 391, 404 (2d Cir.2013) ("Qualified immunity is an affirmative defense and the burden is on the defendant-official to establish it on a motion for summary judgment."); *see also Harlow,* 457 U.S. at 812, 102 S.Ct. at 2735 ("The burden of justifying *absolute* immunity rests on the official asserting the claim." (emphasis added)). Thus, appellees either had to show that there was no genuine dispute of material fact to refute their contention that they did not violate Halsey's constitutional rights as he asserted them, or show that reasonable officers could not have known that their conduct constituted such a violation when they engaged in it."); ***Estate of Montanez v. City of Indio***, No. 517CV00130ODWSHK, 2018 WL 1989533, at *12 (C.D. Cal. Apr. 25, 2018) ("Because qualified immunity is an affirmative defense, the burden of proving the absence of a clearly established right initially lies with the official asserting the defense.").

See also ***Chavez v. Robinson***, 817 F.3d 1162, 1167-69 (9th Cir. 2016) ("The next question—and the crux of this appeal—is whether the district court had authority to dismiss sua sponte Chavez's claims against Robinson and Moore on qualified immunity grounds. Chavez's position is that a court should not be able to 'dismiss a case on qualified immunity grounds unless and until the defense has been affirmatively raised in a responsive pleading.' The statute governing IFP filings requires a court to dismiss an action 'at any time' if it determines that the complaint 'seeks monetary relief against a defendant who is immune from such relief.' 28 U.S.C. § 1915(e)(2)(B)(iii). Chavez acknowledges that the statute applies to absolute immunity. He argues, however, that we should not read § 1915 to permit a district court to screen sua sponte for qualified immunity before the defendants have been served and affirmatively raised the issue in a responsive pleading. . . . At the time Congress adopted this revision, the distinction between absolute and qualified immunity was well developed in the case law, . . . and '[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.'. . Although Congress could have limited dismissal under 28 U.S.C. § 1915(e)(2)(B)(iii) to absolute immunity, it did not do so. We conclude that Congress intended § 1915(e) to apply to both types of immunity. . . .We hold that a district court may dismiss a claim on qualified immunity grounds under 28 U.S.C. § 1915(e)(2)(B)(iii), but only if it is clear from the complaint that the plaintiff can present no evidence that could overcome a defense of qualified immunity. . . . Chavez's pro se complaint did not clearly show that he would be unable to overcome qualified immunity. Further amendment or proceedings would be necessary to clarify, for example, whether Robinson was acting under color of state law in operating the sex offender treatment program and whether Robinson or Moore violated any clearly established law."); ***Buckley v. Fitzsimmons***, 20 F.3d 789, 793 (7th Cir. 1994) (Where the defense had not been waived, the court observed that "[a]lthough qualified immunity is an affirmative defense, [citing *Gomez*] no principle forbids a court to notice that such a defense exists, is bound to be raised, and is certain to succeed when raised.); ***Alexander v. Tangipahoa Parish Sheriff Dept.***, No. 05-2423, 2006 WL 4017825, at *5 (E.D. La. Oct. 2, 2006) ("Although

there is some authority to the contrary, it appears that the majority of courts, including the Fifth Circuit, currently hold that the court 'may raise the issue of qualified immunity sua sponte.' [collecting cases]").

D. Timing and Questions of Waiver or Forfeiture

In ***Guzman-Rivera v. Rivera-Cruz***, 98 F.3d 664, 667 (1st Cir. 1996), the Court discusses the question of when, during the course of the litigation, the defense may be raised:

> Because the doctrine of qualified immunity recognizes that litigation is costly to defendants, officials may plead the defense at various stages in the proceedings. Specifically, defendants may raise a claim of qualified immunity at three distinct stages of the litigation. First defendants may raise the defense on the pleadings, in a motion to dismiss. . . . Second, if a defendant cannot obtain a dismissal on the pleadings, he or she may move for summary judgment . . . . Finally, the defense is, of course, available at trial.

See also ***Washington v. Denney***, 900 F.3d 549, 559 n.3 (8th Cir. 2018) ("The corrections officials initially phrase their argument in their opening brief as one of qualified immunity. . . . 'But a party seeking a qualified-immunity defense must continue to urge it during and after trial in order to avoid forfeiting the argument on appeal.'. . . The record shows that but for a contention in their reply brief to their Rule 50(b) motion that they 'did not violate Plaintiff's clearly established constitutional rights,' . . . the corrections officials never renewed their qualified-immunity argument. We acknowledge that the Supreme Court 'left open the possibility that a "qualified immunity plea raising an issue of a purely legal nature" may be "preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)."'. .Here, the corrections 'officials' claims of qualified immunity hardly present "purely legal" issues capable of resolution "with reference only to undisputed facts." Cases fitting that bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law.'. . Accordingly, we decline to address the corrections officials' argument to the extent they claim they are entitled to qualified immunity."); ***Wheatt v. City of East Cleveland***, No. 17-4232, 2018 WL 3409605 (6th Cir. July 12, 2018) (not reported) ("While the appeal was pending, the plaintiffs and the County Defendants negotiated a settlement. . . Only the City Defendants' portion of the appeal remains for our determination. . .The plaintiffs argue that because the underlying judgments are neither final orders nor appealable collateral orders, inasmuch as the City Defendants did not assert qualified immunity in the district court, we have no jurisdiction. The City Defendants reply that they 'are appealing the district court's finding that they had waived the affirmative defense of qualified immunity.'. . The district court, noting that it 'does not lightly find waiver in this instance,' explained that 'in fully briefing their motion to dismiss, their summary judgment motion, and their opposition to [the] [p]laintiffs' motion for summary judgment, the City Defendants did not mention immunity.'. . . As a factual finding, this is uncontested—the City Defendants do not claim that they raised qualified immunity in any of these motions, nor could they. They instead

rely on their answer to the complaint, in which they included the affirmative defense of immunity 'under all doctrines,' and contend that that alone is sufficient to inject qualified immunity into the district court's opinion and judgment, and preserve it for interlocutory appeal here. That is an unusual proposition, to say the least. We recognize that the district court used the word 'waiver,' whereas this is more appropriately a 'forfeiture' analysis. . . Therefore, we analyze this as forfeiture. In arguing for summary judgment in the district court, the City Defendants did not assert qualified immunity expressly or even implicitly. Consequently, they never challenged the plaintiffs to respond to a qualified-immunity claim; they did not compel the district court to decide the merits of a qualified-immunity dispute; and they did not preserve any substantive qualified-immunity question or error for appeal. That is forfeiture. The City Defendants point out that pursuant to *Henricks v. Pickaway Correctional Institution*, 782 F.3d 744, 749 (6th Cir. 2015), we have held that appellate panels have jurisdiction to hear interlocutory appeals on the question of whether a defendant forfeited qualified immunity. . . True enough. But here the defendants have so clearly and unmistakably forfeited any claim to qualified immunity that there is nothing further to decide and this appeal is frivolous, as the district court has already held. . . Consequently, we must DENY the plaintiffs' motion to dismiss for lack of jurisdiction and AFFIRM the judgment of the district court because it was correct."); ***Easley v. City of Riverside***, 890 F.3d 851, 855 (9th Cir. 2018) ("Although qualified immunity is an affirmative defense, . . a district court is not proscribed from directing the parties to brief the issue when it has been properly raised. Here, Macias raised qualified immunity as a defense in his answer, and he never waived or abandoned his claim of qualified immunity. Macias did not move for summary judgment, but reasonably asserted qualified immunity when directed by the district court to brief the issue. The district court did not err by raising the issue of qualified immunity sua sponte and addressing it on summary judgment."); ***Burns v. Martuscello***, 890 F.3d 77, 94 n.4 (2d Cir. 2018) ("We acknowledge that defendants did not raise the defense of qualified immunity in the district court. Although we do not generally consider a claim raised for the first time on appeal, we can exercise our discretion to do so where, as here, 'the argument presents a question of law and there is no need for additional fact-finding.' *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004)."); ***Oliver v. Roquet***, 858 F.3d 180, 188 (3d Cir. 2017) ("[A]lthough amicus makes much of the fact that Roquet did not assert qualified immunity in her first motion to dismiss, 'there is no firm rule' as to when a defendant must raise this affirmative defense, . . and the defense is not necessarily waived by a defendant who raises it later in the case, *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 210 (3d Cir. 2001). Indeed, it may be raised even after trial if the plaintiff suffers no prejudice. *Sharp*, 669 F.3d at 158. Thus, Roquet's failure to assert qualified immunity at an earlier stage does not divest us of jurisdiction over her immediate appeal."); ***Conte v. Rios,*** 658 F. App'x 639, 642-43 (3d Cir. 2016) ("Here, the District Court identified the right at issue. The District Court then found that there were disputed issues of material fact and went no further, deferring a decision on the qualified immunity issue. It reached this conclusion, however, without determining whether Conte's Fourteenth Amendment right was clearly established at the time of the conduct at issue. Moreover, the District Court failed to identify what factual issues were relevant to its deferral. These omissions constitute legal error that requires us to vacate the order denying the appellants' motions to dismiss. . . If the District Court at that point determines that

such a right was clearly established, it may then determine whether the facts it already found to be in dispute—facts that were not clearly specified in its order—are material to assessing whether that right was violated."); ***Cox v. Glanz***, 800 F.3d 1231, 1243-45 (10th Cir. 2015) ("Ms. Cox avers that because Sheriff Glanz exclusively briefed the no-constitutional-violation issue at summary judgment, he is not entitled to expand the inquiry on appeal by claiming an absence of clearly established law. In effect, Ms. Cox asks us to deem Sheriff Glanz's clearly-established-law argument to be forfeited. . . . The forfeiture issue turns on the extent of Sheriff Glanz's obligation to do more than nominally raise the qualified-immunity defense—that is, it turns on whether he was obliged to marshal particularized arguments in support of the clearly-established-law question, *viz.*, specific arguments demonstrating that, under then-extant clearly established law, neither he nor any of his identified subordinates violated Mr. Jernegan's Eighth Amendment rights. Even assuming *arguendo* that he was required to do this, and therefore forfeited his clearly-established-law arguments by failing to do so, we cannot ignore, in deciding whether to recognize the forfeiture, the unique briefing burdens of the nonmovant plaintiff in the qualified-immunity context, and Ms. Cox's feeble efforts to bear them. Specifically, by asserting the qualified-immunity defense, Sheriff Glanz triggered a well-settled twofold burden that Ms. Cox was compelled to shoulder: not only did she need to rebut the Sheriff's no-constitutional-violation arguments, but she also had to demonstrate that any constitutional violation was grounded in then-extant clearly established law."); ***Henricks v. Pickaway Corr. Inst.,*** 782 F.3d 744, 749-52 (6th Cir. 2015) ("Only one issue raised in this interlocutory appeal is properly before us: whether the district court was correct to hold at the summary judgment stage that Officer Maynard and Dr. Gonzalez waived the affirmative defense of qualified immunity by failing to assert it in a responsive pleading. The district court's holding that the defense was waived can be considered an appealable final order for purposes of 28 U.S.C. § 1291, under which we have jurisdiction to review 'final orders' of a district court, because it conclusively forecloses the defendants' entitlement not to stand trial and is separate from the merits of Henricks's claim. It is thus closely analogous to an appeal challenging the legal basis of a district court's denial of a summary judgment motion invoking qualified immunity, which is an appealable final order. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). This jurisdictional conclusion is consistent with the analyses of the three circuits to have considered the issue. *Eddy v. Virgin Islands Water and Power Auth.*, 256 F.3d 204, 209 (3d Cir.2001); *Pasco v. Knoblauch,* 566 F.3d 572, 576–77 (5th Cir.2009); *Hernandez v. Cook Cnty. Sheriff's Office,* 634 F.3d 906, 912–13 (7th Cir.2011). . . . [T]he district court did not abuse its discretion in holding that Dr. Gonzalez and Officer Maynard waived qualified immunity. In light of Officer Maynard and Dr. Gonzalez's disregard for timeliness in asserting defenses, it was permissible for the district court to refuse to inconvenience itself and Henricks and further delay trial to make up for the defendants' errors. In the first place, Officer Maynard and Dr. Gonzalez's failure to plead qualified immunity at the very least subjects them to the possibility of waiver. Officer Maynard and Dr. Gonzalez raised qualified immunity in their motion to dismiss, but not in any responsive pleading. . . . Because Officer Maynard and Dr. Gonzalez have no reasonable explanation for their failure to plead qualified immunity and were very tardy in raising the defense, the district court did not abuse its discretion in presuming prejudice to Henricks and finding waiver. . . . In this case, Officer Maynard and Dr.

Gonzalez asserted an affirmative defense in a motion to dismiss but did not object when the magistrate judge ignored the defense and did not file an answer or other responsive pleading. Henricks could fairly conclude from this conduct that Officer Maynard and Dr. Gonzalez did not intend to assert the qualified immunity defense. . . . However, as counsel for Henricks agreed at oral argument, the district court on remand may determine that the defendants' waiver of qualified immunity in pre-trial proceedings does not preclude the defendants from asserting the defense at trial. As we explained in *English v. Dyke*, a waiver 'need not waive the defense for all purposes but would generally only waive the defense for the stage at which the defense should have been asserted.' *English,* 23 F.3d at 1090."); ***Ayers v. City of Cleveland***, 773 F.3d 161, 167 (6th Cir. 2014) ("Because Cipo and Kovach failed to raise their qualified-immunity defense in either a Rule 50(a) or Rule 50(b) motion, they have forfeited the defense on appeal. This court held that the qualified-immunity defense was forfeited when faced with a similar procedural posture in *Sykes v. Anderson,* 625 F.3d 294, 304 (6th Cir.2010). Like the defendants in *Sykes,* Cipo and Kovach made an oral Rule 50(a) motion, but that motion 'failed to provide the required notice' to the court of the qualified-immunity defense. . . The *Sykes* court found dispositive the fact that the Rule 50(a) motion never mentioned 'qualified immunity' or other terms associated with that defense (e.g., 'clearly established law' or 'objectively unreasonable actions') that might have put the court and the plaintiffs on notice as to that particular issue. . .Raising the defense in a later Rule 50(b) motion—which Cipo and Kovach failed to do here—did not save the defendants in *Sykes.* . . Neither did resting on the argument made at the summary-judgment stage. . . We therefore decline to consider Cipo and Kovach's qualified-immunity defense on appeal."); ***Chasensky v. Walker***, 740 F.3d 1088, 1094 (7th Cir. 2014) ("That the defendants did not raise qualified immunity earlier in response to Chasensky's original complaint is irrelevant because the defendants raised the defense of qualified immunity at the very first opportunity after Chasensky filed her amended complaint. They then raised it again later in their answer to her amended complaint. Accordingly, as a matter of law, defendants did not waive the defense of qualified immunity."); ***Evans v. Vinson***, 427 F. App'x 437, 447 (6th Cir. 2011) ("Defendants asserted the defense of qualified immunity both below and on appeal; however, they did so in both instances in a one-and-a-half page statement of the law with no attempt at argument, and they cited only the first prong of the test: whether their alleged conduct violated a constitutional right. Defendants have failed to argue that the rights at issue were not clearly established, and as a result they have waived that defense."); ***Sykes v. Anderson***, 625 F.3d 294, 304 (6th Cir. 2010) ("'[E]ven if a defendant raises qualified immunity at summary judgment, the issue is waived on appeal if not pressed in a Rule 50(a) motion.' *Parker v. Gerrish*, 547 F.3d 1, 12 (1st Cir.2008); *see also* Fed.R.Civ.P. 50. The Defendants' failure to make a pre-verdict motion for judgment as a matter of law under Rule 50(a) on the grounds of qualified immunity precluded them from making a post-verdict motion under Rule 50(b) on that ground. The qualified-immunity claim is waived."); ***Norwood v. Vance***, 591 F.3d 1062, 1068-70 (9th Cir. 2010) (denying rehearing and rehearing en banc) (court finds that plaintiff waived the waiver argument, so addresses qualified immunity sua sponte and grants qualified immunity where prison officials denied outdoor exercise to prisoners for extended time in the midst of ongoing prison violence); ***Narducci v. Moore***, 572 F.3d 313, 325 (7th Cir. 2009) (where qualified immunity defense to Title III claim was raised for first time

in reply brief, court finds defense waived at summary judgment stage, but Ait remain[ed] available as a basis for a motion for judgment as a matter of law during the course of a trial in this case, or depending on the jury's verdict, as the basis for an appeal afterwards."); ***Pasco ex rel. Pasco v. Knoblauch***, 566 F.3d 572, 577, 578 (5th Cir. 2009)("We have noted that a failure to plead an affirmative defense in the first response is 'especially excusable' where the law on the topic is not clearly settled. . .Despite referencing the above law, the district court found waiver based solely on the fact that a fifty-two month delay existed between Knoblauch's first responsive pleading and his assertion of qualified immunity. The district court concluded that Pasco was presumptively prejudiced by this delay, without any analysis or description of the prejudice. However, under Rule 8(c) we do not take a formalistic approach to determine whether an affirmative defense was waived. Rather, we look at the overall context of the litigation and have found no waiver where no evidence of prejudice exists and sufficient time to respond to the defense remains before trial. . . . We accordingly hold that the lack of prejudice to Pasco combined with the unusual circumstances and history of this litigation indicate that Knoblauch did not waive qualified immunity."); ***Parker v. Gerrish***, 547 F.3d 1, 11-13 (1st Cir. 2008) ("Gerrish contends, in the alternative, that his decision to fire the Taser was at worst a reasonable mistake in judgment for which he should receive qualified immunity. Parker contends that Gerrish waived this defense by failing to raise it in his Rule 50(a) motion. . . . [W]e have held that even if a defendant raises qualified immunity at summary judgment, the issue is waived on appeal if not pressed in a Rule 50(a) motion. . . . .Gerrish does not dispute this proposition, but rather argues that he did raise qualified immunity in his motion under Fed.R.Civ.P. 50(a). Gerrish admits that the oral motion did not use the term 'qualified immunity,' but argues that he addressed every prong of the qualified immunity analysis. . . . Gerrish contends that he dealt with the first prong of the qualified immunity analysis, whether there was a constitutional violation, while discussing the excessive force issue. While it is true that Gerrish argued that there was no constitutional violation, he argued only that issue and did not place it in the context of a qualified immunity argument. Gerrish next points to his argument that 'the Taser itself has not been declared by any court as a *per se* unconstitutional use of force.' Gerrish contends that argument invoked the second prong of the qualified immunity analysis, whether his actions violated 'clearly established' law. But this argument was made entirely in the context of an argument that there was no unconstitutional use of force. Gerrish did not refer to 'clearly established law' and made no effort to address his argument to qualified immunity. Similarly, Gerrish contends that he addressed the third prong of the qualified immunity analysis, whether a reasonable officer would have known that his conduct was unlawful, when he argued that 'an objectively reasonable officer in Officer Gerrish's position' would have seen Parker's arm movement as a threat to Caldwell justifying the Taser usage. But, as noted above, the excessive force analysis is also keyed to the perceptions of an objectively reasonable officer. Thus, Gerrish's discussion is again simply addressed to the argument that Gerrish did not use excessive force. In this way, the oral Rule 50(a) motion only argued that the evidence was insufficient to support a finding of a constitutional violation. Though Gerrish stated that there were two issues, he only argued the excessive force issue. Gerrish did not specify qualified immunity as the legal basis for his motion or give the district court judge adequate notice that he was renewing that claim in this context."); ***Noel v. Artson***, No. 07-1987, 2008 WL 4665418, at *2 (4th Cir. Oct. 22, 2008) ("Our

cases have been consistent on one thing: that to be preserved for appeal, the defense of qualified immunity must be raised in a timely fashion before the district court. . . . Here, plaintiffs would suffer prejudice because they had no chance to address the issue in their opposition to summary judgment. It was not until their reply to plaintiffs' opposition to the summary judgment motion that defendants even argued the immunity defense, and '[c]onsidering an argument advanced for the first time in a reply brief ... entails the risk of an improvident or ill-advised opinion ....' Our cases require that an affirmative defense be raised in a timely fashion for a reason: what happened here deprived plaintiffs of any chance to brief the question and receive a fully considered ruling. The failure to raise the defense in a timely fashion likewise deprived the district court of orderly process and this court of the full benefit of the district court's reasoning. To permit appellate review in these circumstances would reward parties who bypass settled procedural requirements, and would encourage imprecise practice before the trial courts. Accordingly, we decline to entertain this interlocutory appeal and remand the action for further proceedings in the district court."); ***Evans v. Fogarty***, 241 F. App'x 542, 2007 WL 2380990, at * 6 n.9 (10th Cir. Aug 22, 2007) ("Although the defense of qualified immunity provides public officials important protection from baseless and harassing lawsuits, it is not a parachute to be deployed only when the plane has run out of fuel. Defendants must diligently raise the defense during pretrial proceedings and ensure it is included in the pretrial order."); ***Ahmad v. Furlong***, 435 F.3d 1196, 1202-04(10th Cir. 2006) ("We agree with the D.C. Circuit that the best procedure is to plead an affirmative defense in an answer or amended answer. And, as that court pointed out, absence of prejudice to the opposing party is not the only proper consideration in determining whether to permit an amended answer; a motion to amend may also be denied on grounds such as ' Aundue delay, bad faith or dilatory motive ..., or repeated failure to cure deficiencies by amendments previously allowed."'. . Accordingly, courts should not permit a party to circumvent these other restrictions on amendments simply by filing a dispositive motion rather than a motion to amend. . . But that concern can be obviated without a strict requirement that the answer be amended before raising a defense in a motion for summary judgment. Rather than demanding that the defendant first move to amend the answer, we need only apply the same standards that govern motions to amend when we determine whether the defendant should be permitted to 'constructively' amend the answer by means of the summary-judgment motion. Because we review for abuse of discretion a district court's ruling on a motion to amend, . . . we apply the same standard to a ruling on whether an affirmative defense may first be raised in a motion for summary judgment. . . . [H]aving accepted the district court's determination that qualified immunity with respect to the RLUIPA claim was not pleaded in the Amended Answer, but also having concluded that it was adequately raised by the summary-judgment motion, we consider whether Appellants should have been precluded from constructively amending their answer by raising the defense in the motion. No grounds for such preclusion are apparent to us. Indeed, perhaps because Mr. Ahmad read the Amended Answer as asserting the defense, his response to the motion for summary judgment raised no objection to Appellants' claiming RLUIPA qualified immunity. Nor did his counsel at oral argument point to any prejudice he would have suffered had the district court considered the defense. In particular, counsel acknowledged that no additional discovery would have been necessary. We therefore hold that the defense could be raised for the first time in the summary-judgment motion. Had the district

court ruled otherwise, the ruling would have been an abuse of discretion."); ***Isom v. Town of Warren,*** 360 F.3d 7, 9 (1st Cir. 2004) ("[D]efendants did not raise immunity as an issue at the time of their Rule 50 motion, and so they have waived that defense as a grounds for the motion."); ***Anthony v. City of New York,*** 339 F.3d 129, 138 n.5 (2d Cir. 2003) ("Anthony argues that Officers Collegio and Migliaro waived the defense of qualified immunity by failing to assert that defense in their answer before the district court. . . Officers Collegio and Migliaro first raised the defense in their motion for summary judgment, which the district court implicitly construed as a motion to amend the answer. Although affirmative defenses like qualified immunity must be pleaded in response to a pleading, see Fed.R.Civ.P. 8(c), the district court may, in its discretion, construe a motion for summary judgment as a motion pursuant to Fed.R.Civ.P. 15(a) for leave to amend the defendant's answer."); ***Brown v. Crowley,*** 312 F.3d 782, 787, 788 (6th Cir. 2002) (Defendants waived right to present issue of qualified immunity on appeal, where, A[a]lthough the defendants preserved the defense in their first responsive pleading and in their answer to Brown's complaint, they did not pursue this argument before the district court in the motion for summary judgment that they filed after the case was remanded. . . . On the other hand, . . .the judgment of the district court must be vacated and the case remanded for further proceedings, because the district court erred in its application of the law to Brown's retaliation claim. The defendants will thus be free to reassert their immunity defenses in the district court. . . . By declining to consider qualified immunity defenses on appeal that were not raised properly before the district court, moreover, we might encourage future defendants to properly raise this defense at the district court level."); ***Hill v. McKinley,*** 311 F.3d 899, 902 (8th Cir. 2002) ("The defendants raised the qualified immunity defense in their answer to Hill's third amended and substituted complaint, but did not file a motion for summary judgment, as is the usual practice. Although the defendants did not receive the benefit of an early resolution to their claim of qualified immunity, the defense is not waived by failure to assert it by motion prior to trial."); ***St. George v. Pinellas County,*** 285 F.3d 1334, 1337 (11th Cir. 2002) ("While the defense of qualified immunity is typically addressed at the summary judgment stage of a case, it may be, as it was in this case, raised and considered on a motion to dismiss. . . . The motion to dismiss will be granted if the 'complaint fails to allege the violation of a clearly established constitutional right.' . . . Whether the complaint alleges such a violation is a question of law that we review *de novo*, accepting the facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor. . . . The scope of the review must be limited to the four corners of the complaint. . . While there may be a dispute as to whether the alleged facts are the actual facts, in reviewing the grant of a motion to dismiss, we are required to accept the allegations in the complaint as true."); ***Skrtich v. Thornton,*** 280 F.3d 1295, 1306 (11th Cir. 2002) ("This Circuit has held that qualified immunity is a question of law that may be generally asserted (1) on a pretrial motion to dismiss under Rule 12(b)(6) for failure to state a claim; (2) as an affirmative defense in the request for judgment on the pleadings pursuant to Rule 12(c); (3) on a summary judgment motion pursuant to Rule 56(e); or (4) at trial. *Ansley v. Heinrich*, 925 F.2d 1339, 1241 (11th Cir.1991). However, all these pleadings must conform to the Federal Rules of Civil Procedure. In this case, because a responsive pleading–an answer–had been filed, under the plain language of Rule 12(b), a motion to dismiss would have been inappropriate."); ***Marsh v. Butler County,*** 268 F.3d 1014, 1023 (11th Cir.

2001) (en banc) ("We apply the qualified immunity defense to dismiss a complaint at the 12(b)(6) stage where, (1) from the face of the complaint, (2) we must conclude that (even if a claim is otherwise sufficiently stated), (3) the law supporting the existence of that claim–given the alleged circumstances–was not already clearly established, (4) to prohibit what the government-official defendant is alleged to have done, (5) before the defendant acted."); ***Provost v. City of Newburgh,*** 262 F.3d 146, 161 (2d Cir. 2001) ("Because [Defendant officer] did not specifically include a qualified immunity argument in his pre-verdict request for judgment as a matter of law, he could not have included such an argument in his post-verdict motion even had he attempted to do so."); ***Eddy v. Virgin Islands Water and Power Authority,*** 256 F.3d 204, 210 (3d Cir. 2001) ("We agree with the conclusions of the First and Sixth Circuits that the defense of qualified immunity is not necessarily waived by a defendant who fails to raise it until the summary judgment stage. Instead, the District Court must exercise its discretion and determine whether there was a reasonable modicum of diligence in raising the defense. The District Court must also consider whether the plaintiff has been prejudiced by the delay."); ***Sales v. Grant***, 224 F.3d 293, 296, 297 (4th Cir. 2000) ("In concluding that Mason and Grant have waived their right to assert qualified immunity, we do not hold categorically that a section 1983 defendant must pursue the defense of qualified immunity on every occasion possible in order to preserve his right to raise that defense later in the proceedings. Rather, we hold only that where, as here, a defendant only cursorily references qualified immunity in his answer to a section 1983 complaint, and thereafter fails to mention, let alone seriously press, his assertion of that affirmative defense, despite filing several dispositive motions in the district court and despite participating in a trial on the merits of the section 1983 claim, that defendant may not actively pursue his claim of qualified immunity for the first time on remand after appeal.").

See also ***Draine v. Bauman***, No. 09 C 2917, 2010 WL 1541674, at *13 (N.D. Ill. Apr. 16, 2010) ("The defendants' failure to have based their argument for qualified immunity on anything beyond the claimed non-existence of a Fourth Amendment violation in their supporting memorandum constituted a waiver of the qualified immunity argument to the extent it rested on some other theory. *See Ruffino v. Sheahan,* 218 F.3d 697, 700 (7th Cir.2000) (defendant had to raise second part of *Saucier* inquiry)"); ***Thompson v. City of Tucson Water Department***, No. CIV 01-53-TUC-FRZ, 2006 WL 3063500, at *6 n. 14 (D. Ariz. Oct. 27, 2006) ("The Court notes, however, that the Ninth Circuit case law doesn't address the exact issue before the Court. While there is case law indicating that qualified immunity can be raised in a Rule 50 motion, the case law does not address whether qualified immunity can be considered waived by a defendant where he raises the isz-sue in a motion for the first time on the fourth day of trial. It seems equitable to hold that waiver would apply in such circumstances. However, as the Ninth Circuit has generally found that qualified immunity can be raised in a Rule 50 motion, the Court will err on the side of caution and find that the qualified immunity defense has not been waived."); ***Garcia v. Brown***, 442 F.Supp.2d 132, 143, 144 (S.D.N.Y. 2006) ("[T]his Court's Individual Practice Rules require that any defendant planning to claim qualified immunity must (1) file a pro forma motion for summary judgment on that ground along with his answer; (2) depose the plaintiff and file additional papers in support of the qualified immunity motion within thirty days thereafter; and (3) obtain a

decision on the motion before conducting further discovery. *See* Ind. Practices of J. McMahon, Rule 3(C). The defendants in this case did not follow this procedure, but rather waited until the end of discovery to move for summary judgment on the ground of qualified immunity. Under my rules, the failure to obtain a qualified immunity determination at the outset means that I will not consider the defense on a belated motion, leaving the matter for trial. However, Brown counters that under this Court's Individual Practice Rule, a plaintiff who brings an action in which a defense of qualified immunity is to be anticipated must send defense counsel a copy of this rule. According to defendants' reply papers, plaintiffs did not do so. As neither party appears to have complied with this Court's Individual Practice Rules, I will consider the motion."); ***Philpott v. City of Portage***, No. 4:05-CV-70, 2006 WL 1008868, at *1, *2 (W.D. Mich. Apr. 14, 2006) ("Here, defendant did not initially raise the defense of qualified immunity and he was properly subjected to a deposition. The defense of immunity is an affirmative defense . . . and may be waived like any other defense at different stages of litigation. . . Thus, it can be waived during the discovery process, yet nevertheless raised later in a motion for summary judgment. . . But now that the defense of qualified immunity has been raised, this court is required to address it–prior to permitting further discovery–absent a finding that material facts are in fact in dispute. . . The burden is on the party seeking additional discovery to demonstrate why such discovery is necessary prior to resolution of the issue of qualified federal immunity. The affidavits and other papers filed by the plaintiff fail to convince the court that the purpose of further discovery concerning Trooper Whiting, such as the purported need to delve into unrelated past incidences to see if a credibility problem exists, would have any bearing on the legal issues set forth above which underlie a qualified immunity defense. Accordingly, defendant's motion for a protective order staying further discovery as to this defendant (docket no. 41) is GRANTED pending resolution of the defense of qualified immunity."); ***Lee v. McCue***, 410 F.Supp.2d 221, 225 (S.D.N.Y. 2006) ("In *Saucier*, the United States Supreme Court directed that issues of qualified immunity should be decided before discovery. Accordingly, this Court issued a Local Rule requiring that any defendant who planned to claim qualified immunity (1) file a pro forma motion for summary judgment on that sole ground with his answer; (2) depose the plaintiff and file papers in support of the motion within thirty days thereafter; and (3) obtain a decision on the motion before conducting any further discovery. The plaintiff's deposition enables the moving defendants to obtain all the particulars of plaintiff's claim and, after hearing them, to evaluate whether–viewing the facts most favorably to plaintiff–the defense of qualified immunity is likely to succeed. The defendant officers in this case did not follow my Local Rule. Instead, they waited until the close of discovery to move for summary judgment on all available grounds. Under this Court's Local Rule, 'A plaintiff who brings an action in which a qualified immunity defense is ordinarily asserted shall send defense counsel a copy of this rule. Failure to proceed in accordance with these rules after receipt of such notice shall operate as a waiver of the defense of qualified immunity as a matter of law.' Plaintiff did not demonstrate that he complied with this rule by sending a copy of this Court's qualified immunity rule to defense counsel and did not argue waiver in his opposition to the motion. I thus have no way of determining whether the defense was waived. Counsel for both sides are directed to observe this rule in the future."), *aff'd*, 218 F. App'x 26 (2007); ***Broudy v. Mather,*** 366 F.Supp.2d 3, 9 n.7 (D.D.C. 2005) ("Plaintiffs first argue that Defendants' claim of absolute immunity is precluded, or waived,

because it was 'not raised in their initial motion to dismiss filed over a year and a half ago.'. .. This argument is unconvincing. The Sixth Circuit, faced with the issue of waiver of the qualified immunity defense at the pleadings stage in *English v. Dyke*, 23 F.3d 1086, 1090 (6th Cir.1994), concluded that 'the trial court has discretion to find a waiver if a defendant fails to assert the defense within the time limits set by the court or if the court otherwise finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes.' Both the First and Third Circuits have adopted this position. [citing cases] This issue has not been directly addressed by our Circuit. These cases, however, present a well-reasoned analysis. Applying that analysis to the instant case, it is clear that Defendants have not waived the absolute immunity defense. First, Defendants raised the defense of qualified immunity in their initial motion to dismiss. While it is true that they did not raise the defense of absolute immunity until the instant Motion, the Court cannot say that Defendants failed to exercise a 'reasonable modicum of diligence in raising the defense.' . . Second, Plaintiffs would not be significantly prejudiced by the delay generated by claims of absolute immunity. Moreover, Plaintiffs have had ample opportunity to brief the issue."); ***Tiffany v. Tartaglione,*** No. 00 Civ. 2283(CM)(LMS), 2004 WL 540275, at *2 (S.D.N.Y. Mar. 5, 2004) ("Plaintiff is incorrect that defendants waived their opportunity to move for qualified immunity as a matter of law by not so moving with their answer. My individual rules currently impose such a requirement, consistent with the United States Supreme Court's directive, in *Saucier v. Katz,* 533 U.S.194 (2001), that the issue of qualified immunity as a matter of law be determined at the earliest point in a case–preferably prior to discovery–so that an officer who is entitled to the doctrine's protections can take full advantage of them. However, I only added that requirement to my individual rules in 2003. While defendants should have made this motion far earlier in the case as a matter of logic, no such rule bound them to make the motion prior to discovery when this case was in that posture."); ***Shepard v. Wapello County,*** 303 F. Supp.2d 1004, 1012 (S.D. Iowa 2003) ("Preliminarily, the Court notes that defendants make a point of stating that qualified immunity 'ordinarily should be decided by the court long before trial. . . That is true. The reason the issue was not decided long before trial in this case was that defendants did not present it until their Rule 50(a) motions made during trial. [footnote omitted] When qualified immunity is raised after a trial in which the plaintiff has prevailed, the first question in the qualified immunity analysis is, examining the trial evidence in the light favorable to plaintiff, was the evidence 'so one-sided that defendants were entitled to prevail as a matter of law' on the constitutional claim.").

See also ***Falkner v. Houston***, 974 F. Supp. 757, 759-61 (D. Neb. 1997), where the court explains:

> Under the objective reasonableness standard set forth in *Harlow*, in the ordinary case a defendant official may prevail on the qualified immunity defense at any one of four progressive findings: (1) Defendant's challenged conduct is not a violation of constitutional or federal law as currently interpreted; or (2) Although defendant's challenged conduct is a violation of constitutional or federal law as currently interpreted, that violation was not "clearly established" at the time of

> defendant's challenged conduct; or (3) The facts are undisputed, and a reasonable officer, confronting these facts and circumstances at the time of her challenged conduct, would not have understood that conduct to have violated plaintiff's clearly established constitutional or federal rights; or (4) The facts are disputed, and viewing the facts in the light most favorable to plaintiff–that is, assuming that the plaintiff will prove his allegations –a reasonable officer, confronting these facts and circumstances at the time of her challenged conduct, would not have understood that conduct to have violated plaintiff's clearly established constitutional or federal rights. . . . Simply stated, unless there is a good reason for doing so, it is much more efficient, for all concerned, for the defendant to present the defense at the outset. . . .In the exceptional case, where detailed factual findings significantly affect the qualified immunity inquiry, it may be appropriate to defer presentation of the defense until trial. Such cases are rare, however, and consideration of a request to defer presentation of the defense requires a case-by-case determination in accordance with the facts peculiar to the inquiry. . . At the very least, the defendant official should show that significant disputed facts would very likely preclude a successful motion to dismiss or for summary judgment on qualified immunity grounds and that the filing of such a motion would be nothing but a waste of time and money.

But see ***Dixon v. Parker,*** No. 01 C 7419, 2002 WL 99747, at *1 (N.D. Ill. Jan. 25, 2002) (unpublished order of Judge Shadur) ("Given the repeated teachings from the highest judicial sources (see particularly *Saucier v. Katz*, 121 S.Ct. 2151 (2001)), this Court continues to be amazed at the stubborn persistence of counsel for law enforcement personnel (whether as here from the Attorney General's Office, or from the Cook County State's Attorney's Office, or from the City of Chicago Corporation Counsel's Office) in invariably asserting qualified immunity defenses in a Pavlovian manner, rather than only selectively where such a defense is appropriate. In this instance Dixon's allegations, when accepted as gospel in AD [Affirmative Defense] terms, cannot spare defendants the need 'to stand trial or face the other burdens of litigation' (*Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985))–and so qualified immunity plays no legitimate role at this stage. If factual development were to change that, so that (for example) a qualified immunity defense might extricate one or more defendants from the case (say on a Rule 56 motion for summary judgment, see *Saucier*), the defense may be raised at that time. For the present, however, the advancement of that defense is just wrong."); ***Gonzalez v. Albarran,*** No. 99 C 4589, 2000 WL 655960, at *1 & n.1 (N.D. Ill. May 19, 2000) ("It is of course fundamental to the concept of an AD [affirmative defense] that it accepts the plaintiff's allegations as true but goes on to state some legal basis for the responding defendant's nonliability . . . . Yet Albarran's First AD is predicated on the proposition that 'a reasonable police officer objectively viewing the facts and circumstances that confronted Officer Albarran and having the information that Office Albarran possessed could have believed his actions to have been lawful and not in violation of any clearly established law.' That position is totally at odds with the allegations of FAC [first amended complaint] as to Albarran's unprovoked imposition of unreasonable and excessive force on

Gonzalez, and so it simply cannot stand as an AD. . . . [T]here is no way that a defense of qualified immunity can come into play under the FAC, because it will require either a trial or a successful motion for summary judgment to demonstrate Gonzalez' allegations to be untrue. . . . It is really time that the City's Corporation Counsel's Office changed its position of asserting an AD of qualified immunity in cases such as this. Definitive case law from the Supreme Court (and from our Court of Appeals as well) squarely teaches the inappropriatness of that concept in the type of head-on factual confrontation situation that is involved here, and the Corporation Counsel's stated concern as to the possible waiver of a qualified immunity defense is wholly without merit.").

E. Discretionary Function

In some cases qualified immunity has been denied because the official was not performing a discretionary function. *See, e.g.*, ***Groten v. California,*** 251 F.3d 844, 851 (9th Cir. 2001) ("Although the Fourteenth Amendment right to due process in the application procedure may not have been clearly established at the time of the alleged violations, Groten alleged that the appellees refused to give him the proper application materials and did not allow him to apply for the licenses which he sought. These ministerial acts are unshielded by qualified immunity, which protects 'only actions taken pursuant to discretionary functions.'"); ***In re Allen***, 106 F.3d 582, 593 (4th Cir. 1997) (holding "that an official who performs an act clearly established to be beyond the scope of his discretionary authority is not entitled to claim qualified immunity under § 1983."), *reh'g en banc denied*, 119 F.3d 1129 (4th Cir. 1997); ***Brooks v. George County***, 84 F.3d 157, 165 (5th Cir. 1996) (where Mississippi law imposed on Sheriff "a non-discretionary duty to keep records of work performed by pretrial detainees and to transmit those records to the board of supervisors so that pretrial detainees [could] be paid[,]" Sheriff was not entitled to qualified immunity on plaintiff's due process claim.). *See generally* ***Dugas v. Jefferson County***, 931 F. Supp. 1315, 1321 n.4 (E.D. Tex. 1996) (collecting circuit court cases commenting on the limited scope of the ministerial exception). *See also* ***Atteberry v. Nocona General Hospital***, 430 F.3d 245, 257 (5th Cir. 2005) ("The Plaintiffs argue that these alleged violations of state statutes imposed non-discretionary duties upon Norris and Perry, vitiating their qualified immunity defense altogether. Qualified immunity is only available when an official acts 'within the scope of [his or her] discretionary authority.'. . . In both the Plaintiffs' complaint and in their briefs before this court, this argument is tenuous. It is enough, at this point, to say that some of these statutes may create non-discretionary duties which would vitiate qualified immunity, and others may create duties with an element of discretion.").

See also ***Estate of Cummings v. Davenport***, No. 17-13999, 2018 WL 4705723, at *3-4, *6–7 (11th Cir. Oct. 2, 2018) ("The district court ruled, and we agree, that Davenport is not entitled to qualified immunity because he failed to establish that his alleged actions were within his discretionary authority. Davenport has the initial burden of raising the defense of qualified immunity by proving that his discretionary authority extended to his alleged actions. Because Alabama law establishes that a prison warden does not have the discretionary authority to control a dying inmate's end-of-life decisions, Davenport cannot satisfy that burden and is not

entitled to qualified immunity. . . .We look to state law to determine the scope of a state official's discretionary authority, as our decisions in *Harbert International* and *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995), illustrate. . . .The district court correctly looked to Alabama law to determine whether Davenport's alleged actions were within his authority. And it correctly held that they were not. The Alabama Natural Death Act, Ala. Code § 22-8A-1 *et seq.*, compels the conclusion that the office of a prison warden grants no authority to enter a do-not-resuscitate order or to order the withdrawal of artificial life support on behalf of a dying inmate. . . .Davenport argues that he is entitled to qualified immunity because he had some general authority to make medical decisions for inmates, but this argument misunderstands our precedents. The reason we take care not to 'assess the defendant's act at too high a level of generality,' *Holloman*, 370 F.3d at 1266, is not to give officials additional slack; it is to avoid the 'tautology' of asking whether a defendant had the authority to violate the law, *Harbert Int'l*, 157 F.3d at 1282. What we strip away from the defendant's allegedly unconstitutional action to isolate its 'general nature' is nothing more than its alleged unconstitutionality: 'that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances.'. . If Davenport categorically lacked the authority to enter a do-not-resuscitate order or to withdraw Cummings's life support, we cannot hold that he is entitled to qualified immunity simply because he had some authority to make *other* medical decisions. That shift in the level of generality would be more generous to Davenport than is 'necessary to remove the constitutional taint[.]' If Alabama *did* empower prison wardens to make end-of-life decisions for permanently incapacitated inmates, then we would have to decide whether Davenport's exercise of that authority violated clearly established constitutional law. But the Act makes clear that Alabama has not given prison wardens that authority, and our recognition that Davenport's alleged actions were outside his discretionary authority says nothing about the merits of the estate's constitutional claim. Finally, contrary to our precedents, Davenport suggests that the discretionary-authority requirement is not part of the qualified-immunity analysis. He asserts that '[w]hile the requirement ... is ubiquitous in Eleventh Circuit authority, interestingly, such a requirement is nowhere to be found in Supreme Court qualified immunity cases.' True, the Supreme Court has never addressed the scope of an official's burden to establish that a suit against him is based on actions taken within his authority, but Davenport is wrong to suggest that Supreme Court precedent offers no support for such a requirement. On the contrary, the Court has explained that '[t]he conception animating the qualified immunity doctrine ... is that "*where an official's duties legitimately require action* in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences."'. . And recent precedent reiterates that '[g]overnment officials are entitled to qualified immunity with respect to "*discretionary functions*" *performed in their official capacities*.' [citing *Ziglar v. Abbasi*] We acknowledge that not every circuit court has formulated the discretionary-authority requirement as part of its qualified-immunity analysis, *see, e.g.*, *Stanley v. Gallegos*, 852 F.3d 1210, 1214–16 (10th Cir. 2017) (opinion of Hartz, J.) (collecting cases and discussing pros and cons of the requirement); *id.* at 1225–27 (Holmes, J., concurring in the judgment) (arguing that Tenth Circuit precedent forecloses the requirement), and we acknowledge that not all of those that have formulated it apply it in precisely the same way as

this Court, *see In re Allen*, 119 F.3d 1129, 1132 (4th Cir. 1997) (Motz, J., concurring in the denial of rehearing en banc). But these ambiguities, however potentially fascinating to legal scholars, are of no help to Davenport in this appeal. As Davenport concedes, we are bound by 'ubiquitous' circuit precedent to apply the discretionary-authority requirement. And we are bound to hold, based on the comprehensive Alabama law that governs end-of-life decisions, that Davenport acted beyond the scope of his discretionary authority when he allegedly instructed the University Hospital to enter a do-not-resuscitate order for Cummings and to remove him from artificial life support. We affirm the denial of qualified immunity."); ***Wilson v. Miller,*** 650 F. App'x 676, 681 (11th Cir. 2016) ("Officer Miller was clearly performing a legitimate job-related function when he responded to Sergeant Cook's request for assistance in locating Wilson. Even if we assume that Officer Miller was outside his jurisdiction when he located Wilson, . . . Officer Miller was still acting 'through means that were within his power to utilize.' Under Georgia law, police officers are authorized to make warrantless arrests for offenses committed in the officer's presence, even if the officer is outside his jurisdiction. . . . When Wilson threatened immediately to kill Officer Miller and approached Officer Miller in a threatening way, Officer Miller -- still acting within his discretionary authority -- used deadly force to protect himself from what he perceived reasonably to be an imminent threat of serious physical injury. In the light of the circumstances of this case, Officer Miller was acting inside the scope of his discretionary authority when the shooting occurred."); ***Gaillard v. Commins***, 562 F. App'x 870, 872, 873 (11th Cir. 2014) ("Officer Commins participated in a police chase to arrest a felony suspect. Given that this activity falls within a police officer's job duties and authority, Officer Commins has established that he was acting within his discretionary function. . . .The district court reached the opposite conclusion after noting that Commins (1) was off-duty when he joined the police chase and (2) may have violated an internal police department rule by continuing the pursuit beyond the borders of his home jurisdiction without obtaining the required approval. But these facts do not change the calculus: an officer may act within his discretionary function even when he is off-duty or when his conduct possibly violates a department policy. What matters is whether the officer 'was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize.' *Harland*, 370 F.3d at 1265. Officer Commins's pursuit of a fleeing felony suspect easily meets this test."); ***Johnson v. Phillips***, 664 F.3d 232, 238, 239 (8th Cir. 2011) ("If Phillips were a police officer with arguable authority to conduct searches incident to arrest, then he would have qualified immunity for the search of the passenger compartment. As of 2006, before the Supreme Court's decision in *Gant*, this court's interpretation of the Fourth Amendment in light of *Belton* established a bright-line rule that officers could search the passenger compartment of a vehicle incident to arrest. . . A police officer with appropriate authority who relied on pre-*Gant* precedent to conduct a search before April 2009 is entitled to qualified immunity. . . Phillips is not entitled to qualified immunity for the search of the passenger compartment, however, because he acted outside the clearly established boundaries of his authority as an Auxiliary Reserve Police Officer. . . Of course, not every improper exercise of duties or violation of law eliminates qualified immunity. The dispositive question in evaluating the availability of immunity is 'whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties.'. . It is

clear that Phillips's act of searching the car was not. Phillips's position as Auxiliary Reserve Police Officer did not grant him the power to arrest or search incident to arrest. Velda City Ordinance § 200.110(5) states that reserve officers have no power to arrest beyond that of any other citizen, and Phillips acknowledged this limitation in his deposition. With Phillips standing in the same shoes as any other citizen, it was clearly established that he had no authority under state or local law to arrest persons believed to have committed traffic offenses. . . And Phillips likewise clearly lacked authority to conduct a search incident to an arrest that he was not authorized to make. We therefore conclude that Phillips is not entitled to qualified immunity on Johnson's claim for unlawful search of her vehicle."); ***Jones v. City of Atlanta***, No. 06-12140, 2006 WL 2273171, at *4 (11th Cir. Aug. 9, 2006) (not published) ("In this case, Officers Stone and Frye have not proven that they were acting within the scope of their discretionary authority when they interacted with Jones. The officers do not dispute that they were outside of their police jurisdiction when they allegedly violated Jones's constitutional rights. And, they have presented nothing to support a finding that their interaction with Jones was undertaken in performance of their official duties. While they suggest, in a footnote in their appellate brief, that Georgia law authorizes police officers to arrest those committing crimes in their presence even if the crime is committed outside of the officers' police jurisdiction, Officers Stone and Frye did not contend in the district court nor on appeal that they were arresting Jones. Instead, they have maintained that they intended to render him aid. And, Dr. Richard Clark, the City of Atlanta Police Department's head of Planning and Research, testified that, in such circumstances, City of Atlanta police officers have only the same authority as an ordinary citizen when they are outside the territorial jurisdiction of the City of Atlanta. . . Thus, Officers Stone and Frye are not entitled to summary judgment grounded upon qualified immunity for their actions during the interaction with Jones."); ***Holloman ex rel. Holloman v. Harland,*** 370 F.3d 1252, 1263-67, 1283 (11th Cir. 2004) ("To even be potentially eligible for summary judgment due to qualified immunity, the official must have been engaged in a 'discretionary function' when he performed the acts of which the plaintiff complains. . . It is the burden of the governmental official to make this showing. . . A defendant unable to meet this burden may not receive summary judgment on qualified immunity grounds. . . While a number of our cases omit this step of the analysis, . . .binding Supreme Court and Eleventh Circuit precedents require us to consider expressly this critical threshold matter. . . . In many areas other than qualified immunity, a 'discretionary function' is defined as an activity requiring the exercise of independent judgment, and is the opposite of a 'ministerial task.'. . In the qualified immunity context, however, we appear to have abandoned this 'discretionary function / ministerial task' dichotomy. In *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir.1995), we interpreted 'the term Adiscretionary authority" to include actions that do not necessarily involve an element of choice,' and emphasized that, for purposes of qualified immunity, a governmental actor engaged in purely ministerial activities can nevertheless be performing a discretionary function. Instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities. Our inquiry is two-fold. We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize. . . . [T]o pass the first step of the discretionary function test for qualified immunity, the defendant must

have been performing a function that, but for the alleged constitutional infirmity, would have fallen with his legitimate job description. Of course, we must be sure not to characterize and assess the defendant's act at too high a level of generality. Nearly every act performed by a government employee can be described, in general terms, as ostensibly 'furthering the public interest.' If we jump to such a high level of abstraction, it becomes impossible to determine whether the employee was truly acting within the proper scope of his job-related activities. Consequently, we consider a government official's actions at the minimum level of generality necessary to remove the constitutional taint. . . . .After determining that an official is engaged in a legitimate job-related function, it is then necessary to turn to the second prong of the test and determine whether he is executing that job-related function–that is, pursuing his job-related goals–in an authorized manner. The primary purpose of the qualified immunity doctrine is to allow government employees to enjoy a degree of protection only when exercising powers that legitimately form a part of their jobs. . . . Under this standard, Allred–as a matter of law–was undoubtedly engaged in a discretionary function in chastising Holloman for raising his fist during the Pledge of Allegiance and later referring him to Harland for punishment. . . .[but] [p]raying goes sufficiently beyond the range of activities normally performed by high school teachers and commonly accepted as part of their job as to fall outside the scope of Allred's official duties, even if she were using prayer as a means of achieving a job-related goal. It is not within the range of tools among which teachers are empowered to select in furtherance of their pedagogical duties. . . . We emphasize that, at this juncture, we are not denying Allred summary judgment on qualified immunity grounds against this claim because we feel her acts violated the Establishment Clause. Instead, we are holding her ineligible for qualified immunity as a matter of law because she failed to establish that her act–this type of act–fell within her duties or powers as a teacher. The fact that Allred is a teacher does not mean that anything she says or does in front of a classroom necessarily constitutes an exercise of her discretionary powers or is a job-related function. . . . Consequently, Allred is not even potentially entitled to summary judgment on qualified immunity grounds against Holloman's Establishment Clause claim."); ***Vicari v. Ysleta Independent School Dist***., 546 F.Supp.2d 387, 421, 422 (W.D. Tex. 2008) ("The exception to qualified immunity for functions that are 'ministerial' rather than 'discretionary' is quite narrow. For qualified immunity purposes a duty is 'ministerial' only where the statute or regulation [in question] leaves no room for discretion–that is, it 'specifies the precise action that the official must take in each instance.'. . Moreover, 'the ministerial-duty exception applies only where it is a violation of the ministerial duty that gives rise to the cause of action for damages.'. . Here, Vicari does not claim Miller is liable because he violated a YISD regulation; rather she seeks damages based on Miller's purported taking of her salary without due process, in violation of the Fourteenth Amendment. . . Thus, the issue before the Court is whether Miller violated any clearly established constitutional right rather than whether he violated a YISD policy. . . Further, the Eighth Circuit Court of Appeals has concluded 'the ministerial-duty exception to the qualified immunity defense is dead letter' law . . . . Indeed, it appears the First, Fifth, and Seventh Circuits have, like the Eighth Circuit, challenged the ministerial-discretionary distinction's relevance in the qualified immunity context. . . In addition, the Second Circuit has concluded a subordinate employee is entitled to qualified immunity when the subordinate performs a solely ministerial task by carrying out an order which is: (1) not facially

invalid, and (2) issued by a superior employee who is himself entitled to qualified immunity . . . With these principles in mind and to the extent it is necessary for the Court to determine whether Miller's actions were 'discretionary' or merely 'ministerial,' after examining the relevant summary judgment evidence, the Court concludes Miller's actions were discretionary as a matter of law. The district regulations in question do not sufficiently specify the precise action that officials such as Miller must take in each instance to make actions taken pursuant to those regulations 'ministerial,' as the Supreme Court has narrowly defined the term. . . In sum, the Court concludes Miller is eligible to raise the defense of qualified immunity with regard to Vicari's § 1983 claim against him." (footnotes omitted)); ***Scheuerman v. City of Huntsville, AL***, 499 F.Supp.2d 1205, 1218 (N.D. Ala. 2007) ("While qualified immunity protects officials performing discretionary duties, it is not at all clear to the court that qualified immunity protects an off-duty bank fraud investigator who becomes angry after allegedly being tailgated, and who admittedly is not engaging in a traffic stop. If Weaber was not performing a traffic stop, then what was he doing? And how can he be performing a discretionary duty that qualified immunity was designed to protect?In some ways, Weaber's act of exiting his vehicle can be analogized to an off-duty officer who walks into a bar and becomes angry when someone bumps into him. If the officer confronts the person with his gun drawn, can he be said to be acting within his discretionary authority? Or is he, instead, abusing his authority? Does the mere fact that he is a police officer when he engages in the confrontation entitle him to qualified immunity? Of course not.Defendant has cited no case law to indicate how he would be qualifiedly immune from suit under such circumstances. To be sure, off-duty police officers performing discretionary duties can be entitled to qualified immunity. But it is not clear from the record before this court that defendant was acting pursuant to his discretionary authority for purposes of qualified immunity in this instance. The defendant must first establish that he was acting within his discretionary authority in performing a contested act before 'the burden shifts to the plaintiff to show that qualified immunity is not appropriate.' *Lee*, 284 F.3d at 1194. Defendant has failed to do so."), *aff'd*, 2008 WL 656080 (11th Cir. Mar. 12, 2008); ***Street v. City of Bloomingdale***, 2007 WL 1752469, at *4 (S.D.Ga. June 15, 2007) ("In the instant case, Defendants have failed to even address whether their actions were part of their discretionary job functions. Accordingly, their motion to dismiss on qualified immunity grounds is DENIED."); ***Reed v. Okereke,*** No. 1:04-CV-1064-JOF, 2006 WL 2444068, at *19 (N.D. Ga. Aug. 22, 2006) ("The Court concludes that Defendants are not entitled to qualified immunity. For qualified immunity to apply, Defendants have the initial burden of showing that they engaged in a discretionary function. . . . .Defendants' motion for summary judgment is silent on the issue of whether Defendants were acting within the scope of their discretionary functions. In fact, Defendants' motion for summary judgment fails to identify the individual Defendants or their roles in the Fulton County Waste Management system. . . Without evidence of Defendants' job functions, they have not met their burden of showing that they were engaged in discretionary functions. . . As a result, Defendants are not entitled to summary judgment on the '§ 1981 and 1983 claims on the basis of qualified immunity."); ***Rodriguez v. McClenning***, No. 03 Civ. 5269(SAS), 2005 WL 937483, at *6 & n.95 (S.D.N.Y. Apr. 22, 2005) (not reported) ("Here, qualified immunity does not protect McClenning because the sexual assault of a prison inmate is outside the scope of a corrections officer's official duties. *Boddie* established that the sexual assault

of a prison inmate by a prison employee serves no legitimate punitive purpose. . . New York State law criminalizes any sexual contact initiated by a prison employee against an inmate. . . A corrections officer who sexually assaults a prison inmate does not mistakenly judge how he should carry out his duties; instead, such conduct blatantly disregards a New York State criminal statute and Second Circuit case law. . . . In sum, both of McClenning's arguments for summary judgment on the sexual assault claim fail. If McClenning engaged in the alleged sexual assault, that conduct would constitute an Eighth Amendment violation because such behavior violates contemporary standards of decency. Qualified immunity cannot protect McClenning as the sexual assault of a prison inmate falls outside the scope of a corrections officer's official duties. . . . In his motion for summary judgment, McClenning argued that he is entitled to summary judgment on the basis of qualified immunity because sexual assault is not a clearly established Eighth Amendment violation. Since qualified immunity does not apply to McClenning's alleged acts, the question of whether the sexual assault of a prison inmate is a clearly established Eighth Amendment violation need not be addressed."); ***Rossignol v. Voorhaar***, 321 F.Supp.2d 642, 647, 648 (D. Md. 2004) ("The typical qualified immunity case involving police officers centers around action that is unquestionably taken in the course of the officers' discretionary function of enforcing a community's laws. Thus, whether the questioned action was taken within the scope of the officer's employment is rarely debated within this legal genre. This element is nevertheless a crucial piece of a qualified immunity analysis, for without it, the claim of immunity is not permitted. . . . Defendants' briefing focuses on the lack of action under color of law as the main counter-point to the bulk of Rossignol's claims. The effectiveness of this strategy is evidenced by this Court's being persuaded, upon its first consideration of the case, that despite its abhorrence for Defendants' actions, they were not taken under color of law sufficient to trigger a cause of action under § 1983. With the benefit of the Fourth Circuit's contrary determination, however, this Court can now only conclude that this case falls into that category of actions taken under color of law, yet outside of the scope of the actors' employment as law enforcement officers. . . . Accordingly, the same arguments made in Defendants' briefs that persuaded this Court in its prior opinion that their actions were not taken under color of state law, now lead it to conclude that the defense of qualified immunity is unavailable to any of the defendants in this action.").

See also ***Kjellsen v. Mills***, 209 F. App'x 927, 2006 WL 3544923, at **1-3 (11th Cir. Dec. 8, 2006) (" In the qualified immunity context, a discretionary function includes actions that 'are of a type that fell within the employee's job responsibilities.' *Hollman*, 370 F.3d at 1265. This Court asks whether the government employee was (1) performing a legitimate job-related function (pursuing a job-related goal (2) through means that were within her power to utilize. . . In applying the above test, the most difficult task is characterizing a defendant's conduct. If framed too narrowly, such as whether it was within a defendant's discretion to violate a plaintiff's constitutional rights, 'the inquiry is no more than an untenable tautology.' *Hollman* 370 F.3d at 1266. If framed too generally, such as whether it was within a defendant's discretion to perform acts to further the public interest, then every act performed by a government employee would qualify. *Id.* The test developed by this Circuit is to characterize a government official's actions 'at the minimum level of generality necessary to remove the constitutional taint.' *Id.* Therefore,

applied to this case, we should not ask whether the Appellants had the right to wrongfully withhold mitigating evidence from the prosecutor and the court; rather, this Court should ask whether the Appellants had the power to withhold test results for any reason. . . . Although the Appellants failed to present sufficient evidence that they acted in their discretionary capacities in their briefs to this Court and their motion for summary judgment in the district court, such evidence exists in the record. The district court was correct in finding there was insufficient evidence based on what Appellants presented to it on summary judgment. We remand, however, because of the importance of deciding issues of qualified immunity as early as possible in a proceeding and because evidence exists in the record that should be more fully briefed to and analyzed by the district court.") (*See opinion after remand*, ***Kjellsen v. Mills***, 517 F.3d 1232 (11th Cir. 2008) (rejecting plaintiff's Fourth Amendment malicious prosecution claim and Sixth Amendment denial of compulsory process claim); ***Harbert International, Inc. v. James***, 157 F.3d 1271, 1281-83 (11th Cir. 1998) ("To establish the defense of qualified immunity, the burden is first on the defendant to establish that the allegedly unconstitutional conduct occurred while he was acting within the scope of his discretionary authority. . . If, and only if, the defendant does that will the burden shift to the plaintiff to establish that the defendant violated clearly established law. . . The doctrine of qualified immunity was developed to defray the social costs of litigation against government officials. . . . When a government official goes completely outside the scope of his discretionary authority, he ceases to act as a government official and instead acts on his own behalf. Once a government official acts entirely on his own behalf, the policies underlying the doctrine of qualified immunity no longer support its application. For that reason, if a government official is acting wholly outside the scope of his discretionary authority, he is not entitled to qualified immunity regardless of whether the law in a given area was clearly established. . . . While Harbert alleges the defendants engaged in a myriad of unlawful and improper conduct, only the conduct that caused Harbert's alleged constitutional injury is relevant to the discretionary authority inquiry. That conduct consists of the defendants' allegedly improper handling of Harbert's claim for extra compensation and their decision to withhold damages from Harbert under a liquidated damages clause in the construction contract. The determinative question is whether the defendants had the authority to receive and process Harbert's claims for compensation, and whether they had the authority to decide whether to withhold damages from Harbert under a liquidated damages clause of the construction contract. . . . With the inquiry properly defined, we see the defendants have met their burden of demonstrating that their conduct was undertaken pursuant to their duties and that they were acting within the scope of their authority when the allegedly unconstitutional conduct occurred."); ***Sims v. Metropolitan Dade County***, 972 F.2d 1230, 1236 (11th Cir.1992) (rejecting the contention that "any time a government official violates clearly established law he acts beyond the scope of his discretionary authority" as "untenable" and explaining that "the question of whether the defendants acted lawfully [is distinct from] the question of whether they acted within the scope of their discretion"); ***Randles v. Hester,*** No. 98CV1214, 2001 WL 1667821, at *7 (M.D. Fla. June 27, 2001) (not reported) ("Given the position that the Department of Corrections has taken in related litigation, one could conclude that Defendant, in ignoring Department of Corrections' written policies, the known risk of harm for exposure to contaminated blood and the availability of protective clothing and equipment, stepped outside the scope of his discretionary authority and

lost the protection of qualified immunity, if applicable."); ***Conner v. Tate,*** 130 F. Supp.2d 1370, 1378, 1379 (N.D. Ga. 2001) ("The Eleventh Circuit has held that the qualified immunity defense is available to officers in their individual capacities accused of violating the Federal Wiretap Act. *Tapley v. Collins*, 211 F.3d 1210, 1216 (2000). Neither party has addressed in their briefs whether the police officers and other officials in this case were acting within their discretionary authority when the alleged violations occurred. A "[g]overnment official proves that he acted within the scope of his discretionary authority for purposes of establishing qualified immunity by showing objective circumstances that would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of this authority." *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir.1990); *Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir.1994). It is unclear from the facts outlined in the Complaint what duties the individual Defendants were performing when they distributed the contents of the taped conversations. Neither Plaintiff nor Michael Tate were under investigation by the department, and Defendant Tate was not operating as an undercover or confidential informant when the tapes were made. . . Given that the officers have not established that their actions as alleged in the Complaint were in the performance of their duties and within the scope of their authority, the Court holds that the Defendants were not acting within their discretionary authority. Therefore, at least at this stage of the litigation, the individual Defendants are not entitled to the defense of qualified immunity."); ***Adams v. Franklin***, 111 F. Supp.2d 1255, 1266, 1267 (M.D. Ala. 2000) ("In determining whether a defendant acted within the scope of his or her discretionary authority, the test is not whether the government official acted lawfully. Rather, the court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of the government official's discretionary duties. [citing *Sims*] Based on the foregoing, the court must ask whether Rogers and Estes were, at the very least, acting within the scope of the outer limits of their discretionary authority in detaining Plaintiff and in making decisions regarding his medical needs. In other words, under the first step, the court does not examine the manner in which Rogers and Estes performed their duties.").

See also ***Varrone v. Bilotti***, 123 F.3d 75, 82 (2d Cir. 1997) ("The continued validity of the ministerial-discretionary function distinction in determining qualified immunity has been questioned. . . . Both the Supreme Court and this court, however, have continued to articulate the distinction. . . We need not here decide whether the distinction continues to have validity because we conclude that even if these two subordinate officers performed solely a ministerial function in conducting the strip search, they still have qualified immunity for carrying out the order, not facially invalid, issued by a superior officer who is protected by qualified immunity. . . . Those two subordinate officers are entitled to qualified immunity for conducting the strip search of Varrone pursuant to the facially lawful order of their superior officer, even if making the search involved the performance of a ministerial function."); ***Roberts v. Caise***, No. Civ.A.5:04-01-JMH, 2005 WL 2454634, at *4, *5 (E.D. Ky. Oct. 3, 2005) ("In several other recent cases, the Sixth Circuit has found that defendants who failed to provide medical care to prisoners were not entitled to qualified immunity at the summary judgment stage, but the court did so not on the basis of the ministerial nature of the challenged activities, but rather on the grounds that the defendants were

deliberately indifferent. [citing cases] In other words, the Sixth Circuit went straight to the qualified immunity analysis without regard to the ministerial nature of the defendants' actions. Other circuits have explicitly rejected the argument that the availability of qualified immunity rests on a distinction between ministerial and discretionary acts. [citing cases] As described by the Eleventh Circuit, courts that have applied the ministerial/discretionary distinction have done so based on a misreading of the Supreme Court's decision in *Harlow*. . . . The Supreme Court in *Harlow* held that 'government officials performing discretionary functions' are entitled to immunity so long as they do not violate clearly established rights. . .An unduly narrow reading of *Harlow* only allows for immunity for nonministerial functions. A better reading, according to recent case law from other circuits, interprets the 'discretionary functions' language from *Harlow* as meaning simply that the government officials must be acting within the scope of their discretion, i.e., within the scope of their authority. . . Language from recent decisions indicates that the Sixth Circuit follows the latter reading of *Harlow*: 'Qualified immunity protects government officials from civil liability for actions taken within their official discretion.'. . [I]t would be anomalous to hold Caise personally liable for removing the extension cord, when he was required to do so by BOP procedures.").

See also ***Greene v. Cabral,*** No. CV 12-11685-DPW, 2015 WL 4270173, at *5 (D. Mass. July 13, 2015) ("While the Eleventh Circuit regularly analyzes in detail whether an official is acting within the official's discretionary authority as a prerequisite to a qualified immunity analysis, . . . courts elsewhere, and in the First Circuit in particular, typically spend little time on this element. The First Circuit has held that '[g]enerally, prison officials and officers are included in the category of those whose positions qualify them for such immunity.' . . Each of the defendants here was alleged by the plaintiff to be involved in making high-level determinations about the practices and policies of the Suffolk Department of Correction or Suffolk House of Correction and their misconduct is alleged to be the creation or implementation of an improper practice or policy. Greene's efforts to undercut the claim of qualified immunity based on a non-discretionary function fails.")

One Tenth Circuit panel has recently expressed diverse views on this subject. Compare the opinions below:

Stanley v. Gallegos, 852 F.3d 1210, 1211-19 (10th Cir. 2017) ("The appeal before us raises a related issue that is not settled in this circuit. Say the violation of federal law was not clearly established, but under state law the action was unauthorized. Does a public officer lose the protection of qualified immunity when he acts outside the scope of his authority? Is there any justification for granting immunity in that context? The answer is not an easy one, as suggested by the division within this panel. Judge Holmes would not recognize a scope-of-authority exception to qualified immunity. Judge Matheson would not address whether the exception should be recognized or, if it were recognized, what the scope of the exception should be, because, in his view, the parties agree that the exception should apply and that the defendant's

lack of authority must be clearly established. The author likewise would not decide whether to recognize or reject a scope-of-authority exception but would hold that were this court to recognize a scope-of-authority exception to qualified immunity, the lack of authority under state law would have to be clearly established at the time of the challenged action. In this case the district court endorsed the scope-of-authority exception to qualified immunity and ruled that Defendant Donald Gallegos, a district attorney, had clearly acted without state-law authority in forcibly removing a barrier that Plaintiff David Stanley had placed on a road to prevent traffic through his property. It therefore held that Defendant could not invoke the protection of qualified immunity. Exercising jurisdiction under 28 U.S.C. § 1291, the panel reverses and remands to the district court for further consideration of whether Defendant violated clearly established federal law or is instead entitled to qualified immunity. . . . Qualified immunity shields officials from the distractions of frivolous litigation, allowing them to effectively discharge their duties for the public good. But why worry about causing the employee to flinch when the employee's actions do not come within the job description? One could conclude that when officials are no longer acting with official authority, they are just like private citizens, so the doctrine of qualified immunity should not apply. . . .Why not provide the same treatment to a government employee who has no official sanction to be involved in the activity for which § 1983 liability is alleged? Perhaps it is not surprising that over half the circuit courts of appeal appear to have recognized a scope-of-authority exception to the protection of qualified immunity. [collecting cases] . . . .None have explicitly rejected the exception. These decisions find support in the intuition that a public official still has a private persona and when acting in that capacity the official should not be protected by qualified immunity any more than a private person would be. The scope-of-authority exception provides a natural place to draw the line between an official's two personas. On the other hand, the focus of § 1983 is federal law, not state law. Why should qualified immunity under that provision depend on whether the government employee complied with state law? That appears to be the lesson of *Davis*, in which the plaintiff sued state officials under § 1983 for unlawfully terminating his employment. . .The Supreme Court rejected the plaintiff's argument that the defendants were not entitled to qualified immunity because they failed to comply with a state regulation governing employee discharges. . . . No binding precedent of this court has adopted the scope-of-authority exception to qualified immunity. Despite the apparent endorsement of the exception by most other circuits, I think we should be quite circumspect before embracing it. To begin with, it is unclear how to draw the line between conduct that *violates* state law (which *Davis* said is irrelevant to qualified immunity) and conduct that *is unauthorized by* state law (which is the purview of the scope-of-authority exception). The federal appellate cases invoking a 'scope of authority' exception do not define the term. Nor does it appear to be a commonly used term of art in other contexts. As a matter of English usage, one might say that a state official acts beyond the scope of authority if he fires an employee without first giving him the opportunity to respond in writing, as required by state law. But *Davis* held that this misconduct was just a violation of state law that did not deprive the official of the protection of qualified immunity. . . This suggests that an official's *scope of authority* should be interpreted broadly. . . .The opportunity

for (the risk of) litigation of the meaning of *scope of authority* is obvious. Difficult line-drawing questions are inevitable. Consider, for example, a suit against an animal-control officer under § 1983 for arresting the owner of an animal. If the arrest was for a misdemeanor and state law permits such an officer to arrest a person only for a felony, has the officer acted outside the scope of authority (so that the scope-of-authority exception applies), or has the officer merely violated state law (so that under *Davis* the officer is still entitled to qualified immunity)? What if state law gives animal-control officers no power of arrest whatsoever? One must pause before adopting a doctrine of such uncertain scope that is so in tension with controlling Supreme Court authority. . . .Even if Defendant was exceeding his authority, the action was on a matter of public interest, not a purely personal concern. And this litigation will distract Defendant from performing official duties regardless of the grounds for the claims and defenses. An additional concern raised in *Davis* also has purchase here. One reason the Court rejected consideration of state-law violations in determining whether an official enjoyed qualified immunity was that the federal court might then need to determine 'the meaning or purpose of [state law], questions that federal judges often may be unable to resolve on summary judgment.'. . . Taking into account all these concerns about the scope-of-authority exception, I conclude that if the exception were to be adopted, it should be limited to cases in which there was clearly established state law that the government official's actions exceeded the scope of authority. Any less stringent standard would pose too great a risk of deterring public officials from vigorously performing their duties, embroil them in excessive litigation that would distract them from their duties, and overly complicate and delay litigation by requiring federal courts to become expert in state law. . .So limiting the possible scope-of-authority exception is as far as this court need go to resolve the appeal before us, because New Mexico law did not clearly establish that Defendant exceeded his authority as district attorney. . . .In the federal courts it is widely accepted that prosecutors possess investigative and police-like power, even though this is not quasi-judicial power for which prosecutors have absolute immunity. When civil-rights claims are brought against prosecutors based on investigative or police-like actions, courts allow the prosecutors to invoke qualified immunity—without any suggestion that a prosecutor has no business engaging in police-like actions. . . .I cannot say that Defendant's conduct was beyond the scope of his authority under clearly established New Mexico law. His actions must be considered in context. Plaintiff asserts that Defendant needed court authority to halt a blockade of a road. But if someone were intentionally blocking an interstate highway, surely the district attorney could instruct law-enforcement officers to remove the obstruction without first waiting for a court order. Although Plaintiff argues that there was no emergency here, this does not go to Defendant's scope of authority, but to whether the action was constitutional. . .Plaintiff therefore cannot escape qualified-immunity doctrine under the scope-of-authority exception. Plaintiff argues in his appellate brief that even if his scope-of-authority argument fails, he has shown that Defendant is not entitled to qualified immunity because Defendant's acts violated clearly established constitutional law. But

because the district court has not addressed the issue, this court should follow its general practice of having such matters first resolved by the district court.")

Stanley v. Gallegos, 852 F.3d 1210, 1219-28 (10th Cir. 2017) (Holmes, J., concurring in the judgment) ("I concur but only in the judgment. I respectfully disagree with the Lead Opinion's (i.e., the opinion of Judge Hartz) decision to apply a variant of the 'scope-of-authority exception to qualified immunity[]'. . . in resolving this case. . . The Supreme Court and our court have consistently engaged in a two-pronged inquiry centered on *federal* law when a defendant asserts a qualified-immunity defense: specifically, we ordinarily ask (in substance) whether the plaintiff can demonstrate (1) that the defendant violated his *federal* constitutional rights, and (2) that the rights in question were clearly established under *federal* law at the time of the defendant's conduct. This two-pronged inquiry constitutes settled law, and it does not contemplate—and, indeed, makes no room for—an antecedent, potentially dispositive examination of whether the defendant acted within the scope of his authority, as defined by *state* law; yet, the Lead Opinion's application of the scope-of-authority exception would require us to engage in precisely such an examination. As such, the Lead Opinion's application of this exception is legally erroneous; that is, the exception should be rejected and not applied at all to these facts. And, lest there be any confusion, the impropriety of the Lead Opinion's application of this exception is not diminished in any meaningful sense by the Lead Opinion's equivocation at the precipice about whether our court should formally endorse the exception. In this regard, the Lead Opinion states that '[t]he author ... would not decide whether to recognize or reject a scope-of-authority exception but would hold that were this court to recognize a scope-of-authority exception to qualified immunity, the lack of authority under state law would have to be clearly established at the time of the challenged action.'. . However, this vacillation is cold comfort to those concerned about the improper erosion of the settled two-pronged inquiry for addressing the qualified-immunity defense. . . Whether it formally adopts the exception or not, the Lead Opinion's application of it on these facts may cause such an erosion. In sum, I respectfully disagree with the Lead Opinion's decision to apply a scope-of-authority exception here. For the reasons explicated below, however, I nevertheless concur in the judgment. . . .In my view, the scope-of-authority exception that the Lead Opinion applies upends our federally focused qualified-immunity standard, by erroneously grafting onto it an antecedent state-law inquiry that becomes '*always* relevant and often *dispositive* of a[n] [official's] *federal* right to qualified immunity.'. . Like my colleagues, I would reverse the district court's summary-judgment order—hence, my concurrence in the result. But my reason is more fundamental: the district court should never have applied a scope-of-authority exception in the first place. I would remand for the district court to address DA Gallegos's entitlement to qualified immunity under the established two-pronged qualified-immunity decisional framework. . . .Plaintiff-Appellee argued that an official's 'fail[ure] to comply with a clear *state* regulation,' 'although not itself the basis of suit, should *deprive the official of qualified immunity* from damages for violation of other statutory or constitutional provisions.'.

. In effect, Plaintiff-Appellee contended that, 'because officials fairly may be expected to conform their conduct to [the] legal norms,'. . . found in state statutes and regulations, their violation of a clear state statute or regulation should be *dispositive* 'in deciding claims of qualified immunity[.]'. . . Significantly for present purposes, the *Davis* Court rejected Plaintiff-Appellee's argument in full. It underscored that *Harlow*'s objective-reasonableness inquiry makes an official's liability under § 1983 depend on whether he violated clearly established *federal* law. . . Thus, the Court flatly stated, "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some [state] statutory or administrative provision.". . . The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated. Yet, under appellee's submission, officials would be liable in an indeterminate amount for violation of any constitutional right—one that was not clearly defined or perhaps not even foreshadowed at the time of the alleged violation—merely because their official conduct also violated some statute or regulation. . . .In my view, *Davis* makes clear that the Lead Opinion's application of the scope-of-authority exception is wrong-headed. Akin to Plaintiff-Appellee in *Davis*, the Lead Opinion erroneously permits an additional 'circumstance [ ]' to inform the qualified-immunity calculus—*viz.*, a threshold scope-of-authority exception—and makes it, in many instances, '*decisive* of the qualified immunity question.'. . That is, if an official acts outside of his scope of authority, as defined by clearly established *state* law, he 'forfeits' his right to have a federal court in a § 1983 action consider the merits of his defense that his actions did not violate clearly established *federal* law. However, *Davis* leaves no doubt that this approach is erroneous: aside from *Harlow*'s objective-reasonableness inquiry, '[n]o other "circumstances" are relevant to the issue of qualified immunity.'. . And officials do not "forfeit their immunity" defense simply because they are shown to have acted outside the scope of their authority under state law. . . .Rather than 'pause before adopting a doctrine of such uncertain scope that is so in tension with controlling Supreme Court authority,'. . . the Lead Opinion should reject the scope-of-authority exception outright and conclude not only that it is 'in tension with' that authority, but also contrary to it. In sum, under *Harlow* and *Davis*, an official should be granted qualified immunity *so long as* he 'did not violate clearly established federal constitutional or statutory rights[;] [n]othing else is required for entitlement to the defense and nothing else need be shown.'. . Despite this established decisional framework, the Lead Opinion suggests, through its application of a scope-of-authority exception, that there is a threshold condition that an official must satisfy before a federal court can even consider whether he has violated clearly established federal law. In my view, controlling Supreme Court precedent leaves no analytic space for such an antecedent condition. . . . Accordingly, I could reject on this basis alone the Lead Opinion's approach. . . But there is more. . . . [T]he Lead Opinion candidly acknowledges that its proposed exception has no footing in our controlling caselaw. . . And, in my view, we would be deviating without authority from our precedent—which endorses and applies the two-part qualified-immunity framework outlined *supra*—if we

adopt this exception here. . . .I would explicitly reject this exception as contrary to Supreme Court and Tenth Circuit precedent. Like my colleagues, I would **reverse** the district court's judgment. However, I would do so, not because the court applied the scope-of-authority exception improperly, but instead because it applied the exception at all. I respectfully concur in the judgment only.")

Stanley v. Gallegos, 852 F.3d 1210, 1228 (10th Cir. 2017) (10th Cir. Mar. 17, 2017) (Matheson, J., concurring in the result) ("I concur in the result. I commend my colleagues on their thoughtful opinions. I agree we must remand for the district court to consider Mr. Gallegos's qualified immunity defense. Like Judge Hartz, I would defer deciding whether this court should adopt a scope-of-authority test for cases brought under 42 U.S.C. § 1983. But I also would leave the question open and not constrain the eventual content of a test this court may adopt later when it has the benefit of more robust briefing on this significant issue. Seven other circuits have adopted some version of the scope-of-authority test. . . In this case, the district court applied the test from *In re Allen*, 106 F.3d 582 (4th Cir. 1997): 'an official may claim qualified immunity as long as his actions are not clearly established to be beyond the boundaries of his discretionary authority.'. . We have not adopted the *Allen* test as circuit precedent, but both parties use it to make their arguments on appeal. Considering the parties' arguments based on the *Allen* test and without opining whether this court should adopt it, I think the district court erred. . . As Judge Hartz shows, New Mexico law did not clearly establish Mr. Gallegos's actions exceeded his authority as district attorney. We must therefore remand for the district court to consider the qualified immunity issue.")

F. "Extraordinary Circumstances"

In ***Harlow***, the Court indicated that there may be some cases where, although the law was clearly established, "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." 457 U.S. at 819. This "extraordinary circumstances" exception is applied rarely and generally in the situation where the defendant official has relied on advice of counsel or on a statute, ordinance or regulation that is presumptively constitutional.

1. Reliance on Advice of Counsel

See ***Messerschmidt v. Millender***, 132 S. Ct. 1235, 1249, 1250 (2012) ("[B]y holding in *Malley* that a magistrate's approval does not automatically render an officer's conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers' determination that the warrant was valid. . . . The fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause.")

Compare ***Sims v. Labowitz***, 885 F.3d 254, 260, 262-65 (4th Cir. 2018) ("Although we may consider either prong of the qualified immunity inquiry first, we begin by examining the constitutional right advanced by Sims. *See Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 898-99 (4th Cir. 2016). This approach is beneficial here because our inquiry addresses 'questions that do not frequently arise' and, therefore, 'promotes the development of constitutional precedent.'. . .[W]e hold that Sims sufficiently alleged a violation of his Fourth Amendment right to be free from the sexually invasive search of his person. . . .We therefore turn to consider the second prong of the qualified immunity analysis, namely, whether Abbott should have known that his combined acts of (1) seeking to obtain a photograph of Sims' erect penis, and (2) demanding that Sims masturbate in the presence of others to achieve an erection, was unlawful under clear precedent at the time the search occurred. . . . Because there was no justification for the alleged search to photograph Sims' erect penis and the order that he masturbate in the presence of others, we conclude that well-established Fourth Amendment limitations on sexually invasive searches adequately would have placed any reasonable officer on notice that such police action was unlawful. . . Thus, the alleged conduct plainly did not qualify as the type of 'bad guesses in gray areas' that qualified immunity is designed to protect. . . We further observe that the Administrator is not entitled to invoke qualified immunity simply because no other court decisions directly have addressed circumstances like those presented here. . . For good reason, most outrageous cases of constitutional violations rarely are litigated. . . Abbott's conduct affronted the basic protections of the Fourth Amendment, which at its core protects personal privacy and dignity against unjustified intrusion by governmental actors. . . .Our conclusion is not altered by the Administrator's insistence that Abbott's conduct was not unlawful because he first obtained a warrant to take a photograph of Sims' erect penis. As a general matter, search warrants provide officers a 'shield of immunity' with respect to challenged searches because a neutral magistrate has considered whether the warrant is supported by probable cause and justifies the intrusion into an individual's privacy. . . But the fact that a search warrant has been obtained 'do[es] not confer immunity if it was objectively unreasonable' for the officer to rely on the warrant. . . Here, the obvious, unconstitutional invasion of Sims' right of privacy that was required to carry out the warrant rendered reliance on that warrant objectively unreasonable, thereby eliminating the protection that a search warrant typically would have afforded an executing officer. . . For these reasons, we conclude that the district court erred in dismissing Sims' Section 1983 Fourth Amendment claim on the ground of qualified immunity.") *with* ***Sims v. Labowitz***, 885 F.3d 254, 265, 268-70 (4th Cir. 2018) (King, J., dissenting) ("I write separately to dissent from the majority's denial of Detective Abbott's qualified immunity claim. With great respect for my good colleagues, their decision fails to recognize the controlling facts that undermine the § 1983 claim of plaintiff Sims. That is, Detective Abbott was acting pursuant to the advice of counsel and adhering to a court order. In my view, Abbott's actions were entirely consistent with applicable law and the Fourth Amendment. . . .Put succinctly, where a police officer has sought and obtained a search warrant and acted within its scope, the resulting search is presumptively reasonable. In this situation, the safeguards guaranteed by the Fourth Amendment were carefully observed—i.e., the search of Sims was conducted pursuant to a search warrant issued by the neutral magistrate, and it was supported by probable cause. . . This was therefore a warranted search, carried out under the

law of Virginia and in compliance with Fourth Amendment jurisprudence. Because Abbott obtained a search warrant and acted within its scope, his search of Sims is presumptively reasonable. . . Therefore, the § 1983 claim alleged by Sims plainly fails the first prong of *Saucier*, that is, no constitutional right was contravened in these circumstances. . . .If Detective Abbott somehow contravened a Fourth Amendment right (as the majority rules today), the § 1983 claim alleged by Sims would nevertheless fail under *Saucier*'s clearly established prong, which requires an assessment of 'whether the constitutional violation was of a clearly established right.'. .The majority's ruling—that any reasonable law enforcement officer would have recognized that the search warrant violated a clearly established constitutional right—is not supported by any precedent, much less the compelling precedent that would 'have placed the statutory or constitutional question beyond debate.' . . This lack of precedent fails to even create a 'gray area' that would require a reasonable police officer to make a close call. . . Addressing the merits of *Saucier*'s clearly established prong, I agree with the district court that Abbott's conduct did 'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . As we have recognized heretofore, 'there is simply no basis for a rule that would require law enforcement officers to take issue with or second-guess the considered judgments of prosecutors and magistrates.'. . Put simply, the search warrant at issue here was properly and legally issued, it was complied with, and Detective Abbott is entitled to qualified immunity.")

Compare ***Kiesling v. Holladay***, 859 F.3d 529, 534-37 (8th Cir. 2017) ("Whether or not the existence of probable cause for one item in a warrant is sufficient to immunize defects as to all of the other items, we conclude that Spurlock retains the shield of immunity conferred by the warrant because it was not entirely unreasonable for him to believe that his affidavit established sufficient probable cause for the search and seizure of the items included in the warrant. As an initial matter, it is important to emphasize that the relevant inquiry in cases such as this is not whether a warrant application was, in fact, sufficient to establish probable cause of criminal activity. Rather, when a search or seizure is conducted pursuant to a duly issued warrant, we must determine whether it was 'entirely unreasonable' for an officer to *believe* that the warrant application established probable cause. . . . On the record before us, we hold that it was not entirely unreasonable for Spurlock to believe that his affidavit established sufficient probable cause for the search and seizure of the items included in the warrant. . . . The dissent contends that there is 'no plausible connection' between the misdemeanor offense of keeping a deer as a pet and the items described in numbers five and six of the warrant. . . As an initial matter, the dissent appears to require actual probable cause and ignores *Messerschmidt*'s more lenient 'entirely unreasonable' standard. Regardless, we do not agree that the inclusion of these items rendered Spurlock's reliance on the warrant entirely unreasonable. First, the inclusion of digital storage devices does not defeat immunity because there was a fair probability that officers would find digitally stored pictures of the deer or records of its purchase or the purchase of food, pens, or other related items. At the very least, it would not be entirely unreasonable for Spurlock to reach this conclusion, and *Messerschmidt* explicitly approved of the seizure of evidence that helps establish possession of items related to the crimes specified in a warrant application. . . As for the evidence of other instrumentalities of criminal activity, we agree with the dissent that the warrant affidavit likely

fails to establish probable cause due to its limited focus on AGFC Code § 9.14. However, it would not be 'entirely unreasonable' for Spurlock to conclude that suspects keeping a live deer in their home also may be engaging in wildlife trafficking, which would constitute a violation of AGFC Code § 9.07. . . Relying on this inference, a reasonable officer could conclude that money, guns, and other such evidence would be relevant for a future prosecution in the same way that similar instrumentality evidence was justified in *Messerschmidt*. . . . In sum, although we are inclined to think that the affidavit contained sufficient indicia of probable cause to support the seizure of most of the items in the warrant, at a minimum, this is not the rare case where a warrant affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' . . As such, the district court erred in determining that Spurlock was not entitled to qualified immunity.") *with* ***Kiesling v. Holladay***, 859 F.3d 529, 537 (8th Cir. 2017) (Gritzner, District Judge, dissenting) ("Because I hold the view that the warrant was clearly overbroad, and the District Court properly declined to recognize the protection of qualified immunity, I respectfully dissent. I would find the warrant that Spurlock executed was so obviously overbroad in relation to the criminal act at issue that any reasonable officer would have known there was no probable cause for the scope of the warrant. . . Put simply, no reasonable officer could conclude that a search and seizure of digital storage devices, firearms, or monies would bear any plausible connection to a misdemeanor regulatory infraction of housing a deer as a pet. As it stands, the majority opinion could potentially permit overbroad, and thus unconstitutional, warrants so long as some portion of the warrant is supported by probable cause, substantially weakening the Fourth Amendment's protections against general searches.")

Compare ***Smith v. Munday***, 848 F.3d 248, 254-56 (4th Cir. 2017) ("In short, Munday had no evidence about Smith's conduct, let alone whether she was a participant in, connected to, or even physically present near the drug sale in question. His only information about Smith was that she had previously been convicted for selling drugs years past, that she was a black woman, and that she was 'near' the site of the drug sale because her home address was eleven miles away. If this amount of evidence were sufficient for probable cause, then officers would have probable cause to obtain arrest warrants for any local residents who fit the generic description of the day--be it 'black woman,' 'black man,' or otherwise--so long as they had a criminal history and an unfortunately common name. Such scant evidence barely meets the threshold of 'mere suspicion,' let alone the threshold of probable cause. An investigating officer need not 'exhaust[ ] every potential avenue of investigation.' . . But an investigating officer must still conduct some sort of investigation and assemble individualized facts that link the suspect to the crime. . . .A magistrate judge's approval of the arrest warrant does not alter this conclusion. We generally accord great deference to a magistrate judge's determination of probable cause, but that deference is not 'boundless.' . . . Here, the evidence placing Smith at the crime is so scant--indeed, it is nonexistent--that deferring to the magistrate judge would be inappropriate. Munday's application for an arrest warrant lacked probable cause and thus violated Smith's Fourth Amendment rights. . . . Having found that no probable cause existed for the warrant, the next question is whether Munday is entitled to qualified immunity. 'Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest

indication that the officers acted in an objectively reasonable manner, or in "objective good faith."'. . But there is an exception to this general rule. Qualified immunity does not apply 'where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'. . .A warrant is so deficient in indicia of probable cause when it has an 'error that is apparent from a "simple glance" at the face of the warrant itself, not a defect that would "become apparent only upon a close parsing of the warrant application."'. . And here, even a glance shows that Munday was unreasonable if he believed he had probable cause. Smith did have a criminal history for possessing and selling cocaine. But as discussed above, Munday had no evidence about her conduct whatsoever, let alone any evidence connecting her to the crime in question. It would be unreasonable for any officer to view Munday's dearth of evidence as sufficient to establish probable cause. As a result, qualified immunity does not apply.") *with* ***Smith v. Munday***, 848 F.3d 248, 261-62 (4th Cir. 2017) ("In a Fourth Amendment seizure case, 'the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner.'. . The magistrate's decision will be insufficient to show objective reasonableness only when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue,' such as 'where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'. . The Supreme Court has recognized that 'the threshold for establishing this exception is a high one.'. . .While the majority finds probable cause totally lacking, it has cited to no case with circumstances similar to this one in which the Court found a complete dearth of probable cause. Thus, it is baffling how the majority can now find that Munday had 'fair warning that his alleged conduct was unconstitutional.'. . Munday's 'judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not plainly incompetent.'. . Nor did the magistrate in this case 'so obviously err[ ] that any reasonable officer would have recognized the error.'. . The majority opinion leaves no room for the 'reasonable error' inherent in the qualified immunity analysis –- particularly where, as here, the officer obtained a warrant from a neutral magistrate -- and is not consonant with our qualified immunity jurisprudence, which does not support this type of de novo hindsight. Its overzealous use of retroactive perfection chills the effective operation of law enforcement officers, 'impair[ing] their ability to protect the public,'. . . and causing 'overdeterrence of energetic law enforcement by subjecting governmental actors to a high risk of liability,' Rowland v. Perry, 41 F.3d 167, 172 (4th Cir. 1994).")

Compare ***Burgan v. Nixon,*** 711 F. App'x 855, ___ (9th Cir. 2017) ("We do not think that 'every reasonable official' would have understood that he was violating the Fourth, Fifth, or Fourteenth Amendments by issuing a trespass citation to Mr. Burgan under the circumstances of this case. Even assuming that the Burgans' easement was clearly established in August 2013, whether Mr. Burgan had exceeded the scope of that easement remained murky. . . Additionally, Mr. Rieger and Mr. Nixon had been informed that the property dispute between the Burgans and their neighbor was escalating, that Mr. Burgan had cut the lock on his neighbor's gate, and that there was going to be 'trouble.' Both Mr. Burgan and the neighbor had called on Mr. Nixon and Mr. Rieger for help managing the dispute. Rather than attempting to resolve the legal questions himself, Mr. Rieger consulted with Mr. Nixon and relied on his legal advice in deciding to issue

the trespass citation. Officers are entitled to rely on such legal advice, and 'while it will not automatically insulate an officer from liability, "it goes far to establish qualified immunity."') *with* ***Burgan v. Nixon,*** 711 F. App'x 855, ___ (9th Cir. 2017) (Wardlaw, J., concurring in part and dissenting in part) ("Unlike my colleagues, I believe that—at the very least—it is clearly established that a law enforcement officer violates due process when he intervenes to settle a private property dispute by threatening to arrest one of the disputing parties. . . On this motion to dismiss, taking the allegations in the complaint as true and construing them in the light most favorable to the Burgans, Nixon and Rieger violated that clearly established right. Their actions were not, as the majority suggests, a neutral preservation of the status quo. Indeed, the status quo was one in which Burgan had a prescriptive right to cross his neighbor's land—as Nixon and Rieger should have been aware. The officials' intervention deprived Burgan of that right, effectively ousting him from his easement for eighteen months. By taking it upon themselves to adjudicate Burgan's property rights in their 'curbside courtroom,'. . . Nixon and Rieger violated Burgan's clearly established due process rights. . . .In the end, a reasonable officer in Nixon and Rieger's shoes—that is, in possession of notarized affidavits from multiple disinterested and knowledgeable third parties stating that Burgan held a prescriptive easement across Brien's property—would have known that it was unlawful to charge Burgan with criminal trespass and threaten him with arrest for using that easement. I would affirm the district court's denial of qualified immunity, at least with regard to the procedural due process claim. Therefore, I respectfully dissent.").

See also ***Young v.Mercer County Comm'n***, No. 16-1324, 2017 WL 744042, at *6 (8th Cir. Feb. 27, 2017) ("The district court properly found that the Commissioners are entitled to qualified immunity as to their request that the state attorney general review the legality of the Agreement. . . .The Youngs' argument on this point focuses on their broad contention that 'the right to criticize elected officials and seek redress of grievance[s] was clearly established well before the events giving rise to the Youngs' retaliation claim.'. . The problem with this argument is the same one the Supreme Court confronted in *Reichle* where the respondent argued that 'cases have settled the rule that, as a general matter[,] the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for his speech.'. . Here, as in *Reichle*, 'the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official.'. . Therefore, the Youngs need to establish that on March 31, 2014, when the Commissioners wrote the letter to the state attorney general to request the investigation, they would have understood that the request violated the Youngs' constitutional rights. . . However, no authority has been presented for the proposition that legislators, informed by independent counsel that an agreement may be legally unsound and advised by that counsel to ask the attorney general to investigate the matter, may not follow that advice. . . The district court correctly determined that the Commissioners were entitled to qualified immunity for this action."); ***Barboza v. D'Agata***, 676 F. App'x 9, 12-15 (2d Cir. 2017) ("This case is not 'on all fours' with *Mangano*, as the district court concluded. . . Barboza did not transmit his offensive communication through a channel 'set up for the purpose ... of receiving complaints from the public.' Rather, he wrote his profane message on a government form the principal purpose

of which was to transmit payment for a traffic offense to which he had already pleaded guilty. The recipients of his invective were employees charged with the clerical processing of such payments, not with receiving public complaints. This is not to conclude that such communications are not entitled to constitutional protection from § 240.30(1) prosecution. We observe only that neither *Mangano* nor any other case clearly established such a First Amendment right at the time of the events at issue. . . .On the totality of these circumstances, we cannot conclude that no reasonable officer in the position of defendants D'Agata and Gorr could have believed that Barboza could be arrested for aggravated harassment without violating the First Amendment. As already explained, precedent did not clearly establish the unconstitutional facial vagueness of § 240.30(1) until 2014. Rather, at the time at issue, New York's Court of Appeals had recognized both permissible and impermissible applications of the statute. Thus, existing precedent did not yet place the question of § 240.30(1)'s constitutional application to the circumstances of this case beyond debate. Further, an assistant district attorney, after discussing the matter with the district attorney, advised the officers that Barboza's communication was threatening and warranted a § 240.30(1) charge (and, indeed, directed its filing). That conclusion was reinforced by the actions of two judges, one of whom, after reviewing the charging information, advised Barboza that he was about to be arrested, and the second of whom, upon similar review, arraigned and detained Barboza on the charge. An officer is not automatically entitled to qualified immunity simply because prosecutors or magistrates approve a challenged arrest; he can still be subject to suit if 'it is obvious that no reasonably competent officer would have concluded' that a lawful arrest could be made. *Malley v. Briggs*, 475 U.S. at 341. But the threshold for reaching that conclusion 'is a high one' that is not easily satisfied where a challenged charging instrument is approved by both a prosecutor and magistrates. *Messerschmidt v. Millender*, 132 S. Ct. at 1245. The error here—a matter of constitutional law—was not one officers could be expected to identify at 'a simple glance.'. . In these circumstances, '[t]he fact that none of the officials who reviewed [a charging instrument] expressed concern about its validity demonstrates that any error was not obvious.' *Messerschmidt v. Millender*, 132 S. Ct. at 1250. Accordingly, we conclude that the defendant police officers are entitled to qualified immunity, not because—as the district court ruled—the First Amendment right violated was clearly established but the officers' conduct was nevertheless objectively reasonable, but rather because a First Amendment right to engage in the charged conduct in the circumstances of this case was *not* yet clearly established so that no reasonable officer could have thought (even if mistakenly) that Barboza could lawfully be arrested for aggravated harassment in violation of N.Y. Penal Law § 240.30(1)."); ***Belsito Communications, Inc. v. Decker***, 845 F.3d 13, 24 (1st Cir. 2016) ("One more important qualified-immunity nugget to keep in mind as we go forward: if an officer consulted with a prosecutor about 'the legality of an intended action' — disclosing known info pertinent to that analysis — then his 'reliance on emergent advice might be relevant ... to the reasonableness of his later conduct' and so 'may help to establish qualified immunity.'. . As a policy matter, 'it makes eminently good sense, when time and circumstances permit, to encourage officers to obtain an informed opinion before charging ahead.'. . But we have cautioned that consultation with 'a friendly prosecutor does not automatically guarantee that qualified immunity will follow' and that 'the officer's reliance on the prosecutor's advice' must be 'objectively reasonable' — *i.e.*, '[r]eliance' will not forestall liability 'if an objectively reasonable

officer would have cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy.'"); ***Hinshaw v. Moore***, 666 F. App'x 565, 568 (8th Cir. 2016) ("The conclusion that qualified immunity protects Borders' conduct is supported by the fact that he consulted the county prosecutor prior to arresting Hinshaw. 'Although following an attorney's advice does not automatically cloak [officers] with qualified immunity, it can show the reasonableness of the action taken.'. . Here, Borders followed the county prosecutor's advice that he could charge Hinshaw with false imprisonment and peace disturbance if Hinshaw refused to move the tractor. We thus conclude that Borders arguably had probable cause to arrest Hinshaw for false imprisonment and peace disturbance."); ***Graham v. Gagnon***, 831 F.3d 176, 182-83 (4th Cir. 2016) ("The right at issue here is not the general right to be free from arrest without probable cause, but rather the right to be free from arrest under the particular circumstances of the case. . . The appellee officers lose the shield of qualified immunity if it would have been clear to reasonable officers in their position that they lacked probable cause to arrest Graham for violating Virginia's obstruction of justice statute. . . In other words, the officers' immunity turns on the 'objective legal reasonableness' of their conclusion that there was probable cause to arrest Graham. . . Graham argues that it was objectively unreasonable for Gagnon and Clipp to conclude there was probable cause to arrest her. Therefore, Graham argues, the district court erred in holding that the officers were entitled to qualified immunity. We agree. . . Before evaluating the reasonableness of the officers' probable cause determination, we first clarify the effect of the arrest warrant. The officers make much of the fact that Gagnon obtained—at least the second time he asked—an arrest warrant from a neutral magistrate. However, an arresting officer is not automatically immunized from suit merely because the officer successfully requested an arrest warrant first. . . .Consistent with *Malley* and *Messerschmidt*, we have repeatedly held that arrest warrants do not confer immunity if it was objectively unreasonable to conclude there was probable cause for the arrest. . . Accordingly, if the officers' decision to request a warrant for Graham's arrest was outside the range of professional competence expected of an officer—that is, if it was objectively unreasonable to conclude there was probable cause that Graham violated Virginia's obstruction statute—then the officers are not immune from suit."); ***Sampson v. Gee-Cram***, 655 F. App'x 383, 389 (6th Cir. 2016) ("Plaintiffs cannot point to any defect in the financial warrants that was 'glaring' in a way comparable to the defect at issue in *Groh*. Rather, the facts of this case more closely approximate those of *Messerschmidt*, in which potential defects in the warrant 'would have become apparent only upon a close parsing of the warrant application.'. . Thus, we disagree with Plaintiffs that the district court misapplied *Messerschmidt*, and we affirm the court's grant of summary judgment to Cram and Rose as to Count I."); ***Burritt v. Ditlefsen***, 807 F.3d 239, 251 (7th Cir. 2015) ("Further bolstering Ditlefsen's qualified immunity is the fact that she consulted with the Polk County District Attorney and her supervisor before arresting Burritt. In *Fleming*, we explained that the fact that the officer had consulted with the District Attorney prior to arresting the plaintiff-arrestee 'goes a long way toward solidifying his qualified immunity defense.'. . Prior to Burritt's arrest, Ditlefsen met with the Polk County District Attorney, Steffen, multiple times to keep him advised of developments in the investigation. When Ditlefsen believed she had probable cause to arrest Burritt, legal counsel (Steffen) and her supervisor (Smith) vetted her determination. When it came time to arrest Burritt, Steffen made the decision to arrest and told Ditlefsen to take Burritt into

custody. Steffen independently determined that probable cause existed. Also, Ditlefsen's supervisor, Smith, believed probable cause supported the arrest. We find Ditlefsen was reasonable in her belief that she had probable cause to arrest Burritt. Further, Ditlefsen was objectively reasonable in her reliance on Steffen's probable cause determination and instructions to effect the arrest. Because Ditlefsen is entitled to qualified immunity, the district court did not err in granting her motion for summary judgment on Burritt's § 1983 claims."); ***Zimmerman v. Doran***, 807 F.3d 178, 183 (7th Cir. 2015) ("It is undisputed that Zimmerman received notice to depart the property, both from the owner in the cease and desist letter and in texts, and from the officers relaying the information to him directly. He chose to remain on the property against the owner's wishes and therefore falls within the plain language of the criminal statute. Moreover, before arresting Zimmerman, the defendants attempted to sort out the relative legal rights, including contacting the state's attorney for advice as to whether the actions constituted criminal trespass. We have held that ' "[c]onsulting a prosecutor may not give an officer absolute immunity from being sued for false arrest, but it goes far to establish qualified immunity. Otherwise the incentive for officers to consult prosecutors—a valuable screen against false arrest—would be greatly diminished."'. . . Zimmerman's claim that no reasonable officer could believe that there was probable cause to believe he was trespassing is based on his theory that the timber deed rendered him the 'owner' of the property. He further faults the defendants for failing to read the timber deed which he asserts would have established his right to remain on the property. Zimmerman, however, provides no caselaw that would have indicated to the defendants that a timber deed granted such rights to the recipient. The timber deed itself transfers to him only ownership of the specified timber and grants a right of access to harvest the timber. It does not provide that the right of access is unbounded and cannot be restricted in time or manner by the property owner."); ***Stonecipher v. Valles,*** 759 F.3d 1134, 1144, 1145 (10th Cir. 2014) ("Where the law is technical and obscure, seeking the advice of a legally trained individual may be required. But in this case, the nuances of Missouri law in combination with the facts and federal law were not so obvious that Valles acted recklessly in failing to recognize their operation. To the contrary, Valles proceeded reasonably by securing the legal opinion of the AUSA when the law was unclear to him. The Stoneciphers argue that several aspects of the materials Valles reviewed should have put him on further notice that Mr. Stonecipher was not convicted for purposes of § 922(g)(9). . . . In sum, the amount of conflicting information in the documents reviewed by Valles indicates that Valles may have been, at most, negligent in the course of his investigation. But his effort to secure the second opinion of AUSA Jennings further undercuts any notion that Valles acted recklessly. The Supreme Court's holding in *Messerschmidt* is instructive. . . . Here, Valles did not simply tell Jennings that Mr. Stonecipher had a conviction on his record; he provided Jennings with all of the materials he used to reach that conclusion. Indeed, the potential for a technical, legal mistake in the probable cause determination is precisely why Valles would seek out a legal expert. Valles did not act in reckless disregard for the truth when he not only sought legal advice from an AUSA, but also provided the AUSA with all the materials he used to make his assessment. . .Based on the totality of the circumstances, Valles proceeded in an objectively reasonable manner based on arguable probable cause. The district court correctly granted summary judgment in his favor on qualified immunity grounds with respect to the claims for unlawful search and entry."); ***Snider v. City of Cape Girardeau***, 752 F.3d

1149, 1156, 1157 (8th Cir. 2014) ("Beginning in 1974, with *Spence,* and culminating in 1989 and 1990, with *Texas v. Johnson* and *Eichman,* the Supreme Court clearly established the First Amendment prohibits the prosecution of an individual for using the American flag to express an opinion. This right had been clearly established for twenty years when Officer Peters arrested Snider on October 24, 2009, and, thus, a reasonably competent officer would have known Snider's expressive conduct was constitutionally protected. In response, Officer Peters argues his conduct should be insulated because he acted pursuant to an arrest warrant issued by a local magistrate judge, and he cites the Supreme Court's recent decision in *Messerschmidt v. Millender,* ––U.S. ––, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). In *Messerschmidt,* the Court granted qualified immunity to officers who had executed a search warrant unsupported by probable cause, holding that 'the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner[.]'. . . However, the Court noted 'the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness.'. .The *Messerschmidt* court also affirmed the survival of the standard set forth in *Malley v. Briggs,* 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), which held there would be no grant of qualified immunity if 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.'. . We have also noted the survival of the *Malley* standard post-*Messerschmidt.* . . This outcome is a sensible one as both the Supreme Court and this Court have observed the fact that a warrant has issued should not be dispositive because 'it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should.'. .Officer Peters' actions are not insulated by the arrest warrant. This country has a long history of protecting expressive conduct on First Amendment grounds, especially when the American flag is the mode of expression. A reasonably competent officer in Officer Peters' position would have concluded no arrest warrant should issue for the expressive conduct engaged in by Snider. Although it is unfortunate and fairly inexplicable that the error was not corrected by the county prosecutor or the magistrate judge, no warrant should have been sought in the first place. Thus, the district court correctly concluded Officer Peters was not entitled to qualified immunity."); ***Armstrong v. Asselin***, 734 F.3d 984, 990-94 (9th Cir. 2013) ("This is a civil lawsuit, primarily for money damages, against police officers for obtaining and executing search and arrest warrants. . . We need not determine whether *Satan Burger* is 'indecent' or 'obscene,' because that does not control whether Officer Asselin and his colleagues are entitled to qualified immunity. We assume without deciding, for purposes of this decision, that *Satan Burger,* taken as a whole, is not obscene or indecent, and that giving the book to a minor did not violate the Anchorage ordinance. This assumption, however, does not control the qualified immunity determination for two reasons. First, all that is needed for a search or arrest warrant is probable cause, not proof, that giving the material to a minor would amount to a violation of the Anchorage ordinance. . . The cover (portraying a bare buttocks squatting over a dinner plate) and the few pages support a reasonable belief by a police officer that the work as a whole portrayed excretory functions or sexual conduct in a manner establishing violation of the ordinance. Even if the book were, on a full reading, not indecent, it would be too much to say that no reasonable police officer could seek a search warrant directed at the premises of the person who gave it to a minor until the police officer had read every word of the book and evaluated its literary value as a

whole. A police officer may be entitled to qualified immunity even for a search and arrest based on invalid warrants if he has a 'reasonable belief that the warrant was supported by probable cause.'. .That low standard might be satisfied without reading the book in its entirety, even though the obscenity and municipal indecency standards would not be satisfied for purposes of a criminal conviction. . . .Second, and most important to the outcome of this case, the police officers subjected every step of their invasions of Armstrong's privacy to evaluation both by prosecutors and by neutral judicial officials before they acted. Such prior review of proposed searches and arrests supports qualified immunity, shielding police officers from liability under the line of cases reaffirmed and broadened most recently by *Messerschmidt v. Millender*. . . .Under *Messerschmidt,* consulting with and getting approval of one's superiors and of a judicial officer operates for an individual police officer something like liability insurance, though, like liability insurance, there are exceptions and exclusions to protection. One such exception occurs when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.'. . The Court illustrates this 'obvious' standard by reference to a warrant that authorized the search *of* a house *for* a concealed two story house and to seize that house concealed within the house to be searched-an obvious error that would have been revealed by 'just a simple glance.'. . The Court uses the example to show that 'obvious' means error that is apparent from a 'simple glance' at the face of the warrant itself, not a defect that would 'become apparent only upon a close parsing of the warrant application.'. . Of course, such patent absurdity is not the only way the police officer can lose the shield of immunity. *Leon* establishes that another way the 'high' threshold for establishing an exception to immunity can be crossed is if the officer lied to the issuing magistrate . . . or if the issuing magistrate did not perform his neutral and detached function, serving instead as a mere 'rubber stamp for the police.'. . .Since *Messerschmidt* came down, we have identified 'rare' exceptions, at least in the context of motions to suppress in criminal cases. . . .Under *Messerschmidt,* approval by superiors, prosecutors, and a judge almost guarantees the honest police officer's claim to qualified immunity . . . Officers Asselin and Vandegriff consulted with six prosecutors and obtained warrants from five judicial officials. As *Messerschmidt* holds, we would have to treat all eleven prosecutors and judges as 'plainly incompetent' to deny Officer Asselin and the other officers qualified immunity. . . .Second, the officers in this case were not searching for or seizing *Satan Burger*. They already had the book. The affidavits focused upon the repeated contacts between an older man and underage boys despite parental requests that he leave their sons alone, his giving of gifts to the boys, his suggestion to a boy that he carry a weapon when he retrieved his gifts, and meeting with the boys in secret. The searches were for evidence of disseminating indecent material, stalking the boys, and eventually possession of child pornography, not for the book. The police officers, prosecutors, and judicial officials were not 'plainly incompetent' in concluding that there was a fair probability that the searches would turn up evidence of stalking and dissemination of indecent material to minors. The subsequent search and arrest warrants were supported by even greater evidence of probable cause, including pictures of the victims urinating, and the photograph of prepubescent boys performing fellatio. Those photographs did indeed provide a fair probability that the search would reveal evidence of possession of child pornography on Armstrong's computers, and thus Officer Vandegriff, the officer who applied for the last two warrants, is protected by qualified immunity."); ***Tebbens v.***

Mushol, 692 F.3d 807, 821 (7th Cir. 2012) ("[W]e have held that an officer who makes an arrest based on a reasonable understanding of a court order is entitled to qualified immunity."); ***Merchant v. Bauer***, 677 F.3d 656, 662-66 & nn.6 & 7 (4th Cir. 2012) ("Bauer contends that an objectively reasonable officer could have believed that probable cause existed to arrest Dr. Merchant, and he maintains that the procedural steps that he took further justified his decision to seek an arrest warrant. . . . Dr. Merchant maintains that, although she was arrested on the basis of a warrant, it was not supported by probable cause and was therefore unreasonable. The issue of whether Merchant's arrest in Virginia for impersonating a police officer was reasonable or supported by probable cause is evaluated under an objective standard, based on what a prudent officer would have believed under the circumstances. . . .To his credit, Officer Bauer sought to corroborate his probable cause analysis by seeking advice from a deputy Commonwealth's Attorney and relying on the magistrate's evaluation of his warrant application. In *Torchinsky v. Siwinski*, we deemed it significant that the arresting officer had solicited an experienced supervisor's opinion that there was probable cause to arrest the plaintiffs, and that a magistrate had issued arrest warrants. . . . Nevertheless, *Torchinsky* is distinguishable because it involved a mistake of fact, i.e., an assault victim's misidentification of his attackers, rather than (as here) a mistake of law. . . . Relying on *Wadkins*, Bauer asserts that the district court erred by giving insufficient consideration to the procedural steps that he undertook before seeking an arrest warrant. . . . We do not discount that Officer Bauer sought assurances from the prosecutor prior to seeking an arrest warrant for Dr. Merchant. We do, however, agree with the district court's view of the matter: Bauer's conversation with the state's lawyer does not—as a matter of law—overcome the unreasonableness of the criminal charge and its lack of probable cause. . . . Bauer actually discovered information tending to exonerate Dr. Merchant but nevertheless pursued the charge against her. Moreover, that a magistrate issued an arrest warrant at Bauer's request is not determinative 'where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'. . Although Bauer's warrant application is not in the record, we assume, consistent with the constraints of summary judgment review, that it contained only the undisputed facts, which fail to show probable cause. Considering the totality of the circumstances, we conclude that no prudent person would have believed that Dr. Merchant violated the Impersonation Statute. It follows, then, that her arrest lacked probable cause and was unreasonable. Thus, Merchant's constitutional right not to be unreasonably seized was violated, and we must resolve the first *Saucier* inquiry in favor of Dr. Merchant. . . Having ascertained that Officer Bauer violated Dr. Merchant's Fourth Amendment right, we turn to whether that constitutional right was clearly established. . . .No reasonable police officer in Bauer's position could have believed that the Fourth Amendment permitted an arrest when no aspect of the Impersonation Statute had been established. . . . In ruling as we do today, we observe that the qualified immunity issue is not finally resolved against Bauer. As the district court explained in the Opinion, Bauer is entitled to reassert the defense at trial, pursuant to which the jury could resolve the disputed facts in his favor, such that qualified immunity applies. . . . On February 22, 2012, the Supreme Court decided *Messerschmidt v. Millender*. . . . Although the Court acknowledged that a magistrate's signature on a warrant is a clear indication of objective reasonableness, it nonetheless emphasized that a lawsuit can proceed when " 'it is obvious that no reasonably competent officer would have concluded that a warrant

should issue."'. .*Messerschmidt,* therefore, does not control our decision today."); ***Fleming v. Livingston County, Ill.*** , 674 F.3d 874, 881 (7th Cir. 2012) ("We also note that Turner's act in calling state's attorney Carey Luckman goes a long way toward solidifying his qualified immunity defense. . . As we have stated before, '[c]onsulting a prosecutor may not give an officer absolute immunity from being sued for false arrest, but it goes far to establish qualified immunity. Otherwise the incentive for officers to consult prosecutors—a valuable screen against false arrest—would be greatly diminished.'. . Under these circumstances, Turner had arguable probable cause and was entitled to qualified immunity."); ***Cochran v. Gilliam***, 656 F.3d 300, 309-11 (6th Cir. 2011) ("[A] law enforcement officer's phone call to a county or district attorney for general guidance when confronted with a situation where there is no legal basis for the contemplated actions does not automatically convert unreasonable actions into reasonable actions. . . . Defendants identify no extraordinary circumstance in this case, and we fail to find any. Nor do we find any merit in the attempt to factually distinguish *Soldal* from this case. The Gilliams argue that the landlord in *Soldal* did not have an eviction notice authorizing the removal of the trailer, while here the Landlords did have a valid eviction notice. However, a valid eviction notice in hand is not the operative fact. Both in *Soldal* and here, a deputy sheriff called a county attorney to ask whether to intervene. The deputy sheriff in *Soldal* was concerned because there was no eviction notice. Here, there was a valid eviction notice but the Gilliams were concerned with the confiscation of Cochran's personal property because the eviction notice made no provision for such a taking. Thus, while the deputies in *Soldal* oversaw an unlawful eviction, here the Gilliams facilitated an unlawful taking of Cochran's belongings. It is not reasonable for the Gilliams to oversee and personally assist the Landlords in taking possession of Cochran's belongings when there was no apparent legal basis for such action. In addition to their attempt to distinguish *Soldal,* the Gilliams argue that Kentucky state law supports their reasonable belief that the Landlords had a right to take Cochran's property, thereby absolving them of any constitutional wrongdoing. The Gilliams point to a Kentucky state statute that allows a landlord lien on a tenant's personal property to secure payment of rent. Ky.Rev.Stat. ("K.R.S") § 383.070. However, as the district court correctly noted, this section of the Kentucky code merely gives the landlord a lien on the personal property–the lien does not give a landlord *carte blanche* to take possession of the tenant's property without going through the proper judicial processes. *See* K.R.S. § 383.030. It is unclear to this Court how it could be construed as reasonable that two deputy sheriffs, knowing that the eviction notice was silent as to the amount owed to the landlord and the disposition of the tenant's personal property, could believe that a 'swat team' had the right to the tenant's worldly possessions. . . . Having established the Gilliams violated Cochran's Fourth Amendment rights, we consider the second prong of the *Saucier* analysis–whether the right at issue was 'clearly established' at the time of the Gilliams' conduct. The Gilliams argue that, even if there was a violation of Cochran's Fourth Amendment right based upon an unreasonable seizure of his personal property, there was no 'clearly established' decision or precedent on point that would have placed them on notice that their conduct could be construed as a constitutional violation. We disagree. The Gilliams argue for an overly narrow reading of the 'clearly established' standard, one in which it would appear no case would be sufficiently on point if the facts at issue were not identical. The Gilliams' reasoning is untenable in the larger view of qualified immunity determinations. . . . .Furthermore, this Court

has employed a more reasonable, common sense approach to the 'clearly established' analysis, one that acknowledges that, while every situation will involve slightly different factual scenarios, they are not so different that courts and public officials cannot intuit the contours of the rights at issue. . . .This Court is satisfied that the Fourth Amendment violation was clearly established. . . .Accordingly, we reject the Gilliams' argument that their active involvement in assisting the Landlords in seizing Cochran's property was objectively reasonable in light of the legal rules that were 'clearly established' at the time. . . While the Gilliams' involvement may have begun as a civil standby to serve the eviction notice and simply keep the peace, their actions quickly turned into active participation in the seizure of Cochran's property–conduct explicitly foreclosed by the holding of *Sodal*, and in line with the reasoning from *Coleman* and *Haverstick.*"); ***Kelly v. Borough Of Carlisle***, 622 F.3d 248, 251, 254-56, 258, 259 (3d Cir. 2010) ("The gravamen of Kelly's appeal-that the District Court erred when it held that Officer Rogers's reliance upon legal advice before he arrested Kelly shielded him from liability-raises a question of first impression in the Third Circuit. . . . Recognizing its discretion to do so under *Pearson*, the District Court bypassed the question of whether Kelly's constitutional rights were violated and first considered whether the law was clearly established. Although the District Court explicitly held that the First Amendment law was not clearly established, its analysis of the Fourth Amendment did not engage the relevant state court precedents interpreting the Wiretap Act. Instead, the District Court simply concluded that Officer Rogers acted reasonably under the circumstances. . . . Kelly claims Officer Rogers violated his clearly established Fourth Amendment rights by arresting him without probable cause. In challenging the District Court's conclusion that Officer Rogers acted reasonably, Kelly contends the District Court failed to analyze the Wiretap Act and inappropriately relied on the presence of legal advice. Conversely, Officer Rogers argues that reliance on a prosecutor's advice is a permissible consideration in determining the reasonableness of his actions, and that the District Court correctly held his reliance was reasonable. . . . Neither the Supreme Court nor this Court has squarely addressed the question of whether a police officer's reliance upon legal advice cloaks him with qualified immunity. Although there is no holding directly on point, we do not write on a blank slate. . . . Like the Supreme Court in *Malley*, we reject the notion that a police officer's decision to contact a prosecutor for legal advice is *per se* objectively reasonable. Nevertheless, we recognize the virtue in encouraging police, when in doubt, to seek the advice of counsel. Considering the proliferation of laws and their relative complexity in the context of a rapidly changing world, we cannot fairly require police officers in the field to be as conversant in the law as lawyers and judges who have the benefit not only of formal legal training, but also the advantage of deliberate study. Consistent with these principles, the First Circuit has stated that advice obtained from a prosecutor prior to making an arrest 'should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity.' *Cox v. Hainey*, 391 F.3d 25, 34 (1st Cir.2004) (collecting cases from other circuits) . . . . Although we agree with much of the First Circuit's opinion in *Cox*, we do not adopt its 'totality of the circumstances' approach. In our view, encouraging police to seek legal advice serves such a salutary purpose as to constitute a 'thumb on the scale' in favor of qualified immunity. Accordingly, we hold that a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack

of probable cause. That reliance must itself be objectively reasonable, however, because 'a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one.' *Id.* at 34. Accordingly, a plaintiff may rebut this presumption by showing that, under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice. . . . In addition to its failure to make essential factual findings, the District Court did not analyze sufficiently the state of the law at the time of Kelly's arrest. . . Instead, the District Court relied upon the mere existence of legal advice without considering the relative clarity or obscurity of the Pennsylvania Wiretap Act and the cases interpreting it. This was error. . . .In light of the foregoing precedents, at the time of Kelly's arrest, it was clearly established that a reasonable expectation of privacy was a prerequisite for a Wiretap Act violation. Even more to the point, two Pennsylvania Supreme Court cases-one almost 20 years old at the time of Kelly's arrest-had held that covertly recording police officers was not a violation of the Act. Finally, it was also clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects. . . . In sum, because the District Court did not consider the facts in the light most favorable to Kelly, did not evaluate the objective reasonableness of Officer Rogers's decision to rely on ADA Birbeck's advice in light of those facts, and did not evaluate sufficiently the state of Pennsylvania law at the relevant time, we will vacate the summary judgment insofar as it granted qualified immunity to Officer Rogers on Kelly's Fourth Amendment claims and remand for additional factfinding and application of the proper legal standard.") [*See also* ***Kelly v. Borough of Carlisle***, 815 F.Supp.2d 810, 814-20 (M.D. Pa. 2011) ("In its opinion remanding this matter, the Court of Appeals outlined three questions for this Court's consideration. The first two questions are questions of fact, namely: (1) whether Plaintiff hid the camera and was in fact 'secretly' recording Defendant during the stop; and (2) whether Defendant called ADA Birbeck to seek legal advice. . . The third question is a question of law. The Court of Appeals held that it was clearly established that probable cause did not exist to arrest Plaintiff for a violation of the Pennsylvania Wiretap Act. In light of this holding, the court of appeals asked this Court to determine 'how the Pennsylvania Wiretap Act fits into the landscape painted' by cases holding that police officers generally have a duty to know the basic elements of the laws they enforce. . . The Court interprets this directive as requiring it to determine whether Defendant's erroneous probable cause determination was unreasonable as a matter of law and therefore not entitled to qualified immunity. Because an affirmative response to the legal inquiry would obviate the need for any further findings of fact, the Court will consider this issue first. Then, if necessary, the Court will make the findings of fact ordered by the court of appeals. . . .In the present case, a finding that the Defendant is not, as a matter of law, entitled to qualified immunity solely because he made an erroneous probable cause determination regarding a statute that was clearly established would unfairly burden police officers and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'. . Although the law in this matter was clearly established and showed that Defendant did not have probable cause to make an arrest, the Court cannot conclude that Defendant must be denied qualified immunity on this basis. . . . In the case at bar, the Court is bound to assume certain facts. First, it must assume that during the stop Plaintiff made an audio and visual recording of Defendant. Plaintiff did not request Defendant's permission to make the recording, nor did Plaintiff

tell Defendant he was making the recording. Plaintiff, sitting in the passenger seat as Defendant was standing on the driver's side of the car, kept the camera in his lap the entire time Defendant was at the car. The Court must further assume, however, that although Plaintiff's hands were in his lap, his hands were not covering the camera. In addition, Defendant saw Plaintiff holding the camera measuring approximately two inches wide by four inches long by two inches tall at the outset of the stop and did not object to the recording until after issuing Shopp a traffic citation. Before arresting Plaintiff, Defendant confiscated the camera and called ADA Birbeck. Defendant informed ADA Birbeck that he had pulled over a truck for a traffic violation and that the passenger in the truck had been secretly recording him without his permission. Defendant did not inform ADA Birbeck that pursuant to standard Carlisle Police Department procedure he was also recording the stop. After relaying these facts, Defendant asked if the conduct gave rise to a Wiretap Act violation. After reviewing the statute, ADA Birbeck informed Defendant that there was probable cause for an arrest and gave Defendant an approval number to charge Plaintiff. As the Court previously explained, when viewed in a light most favorable to Plaintiff, these facts could give rise to the conclusion that Defendant deliberately misled ADA Birbeck when he called for permission to charge Plaintiff. If a jury concluded that Defendant misled ADA Birbeck to secure an approval to arrest, then the Court could not conclude that Defendant relied in good faith on ADA Birbeck's advice. . . Accordingly, although qualified immunity should be decided at the earliest possible stage in the litigation, . . the outstanding dispute of material fact prevents the Court from making the qualified immunity determination at summary judgment. . . This is not to say that Defendant is not entitled to qualified immunity. Rather, the Court concludes that it requires a jury to resolve the outstanding questions of fact identified in this memorandum prior to making the qualified immunity determination.") **and** ***Kelly v. Rogers***, No. 1:07–cv–1573, 2012 WL 2153796, *4, *5 (M.D. Pa. June 13, 2012) ("The Court acknowledges that there is a tension between the principle that officers should know the elements of the laws they enforce and a potential finding that reliance on erroneous advice from a prosecutor regarding the elements of an offense could be reasonable. As explained in its prior order, however, this Court must conclude that a police officer's reliance on erroneous advice could, under some very limited circumstances, be found reasonable. . . .The Court acknowledges the Third Circuit's holding that the elements of the Pennsylvania Wiretap Act were clearly established and that probable cause did not exist to arrest Plaintiff for a violation of the Wiretap Act. However, the Court is compelled to find that in this matter, based on the facts as determined by the jury, Defendant Rogers is entitled to qualified immunity. . . .As has been explained by the Third Circuit, the advice given by ADA Birbeck was contrary to clearly established law. . . The advice was, however, consistent with Defendant's training and plausible in the absence of a thorough review of the relevant case law and given the time limitations and obvious lack of available legal resources at a roadside traffic stop. . . .The facts of this case show that Defendant acted precisely as one would hope that a police officer would act when confronted with a violation of a statute with which he could not reasonably be expected to be familiar: He stopped, he sought out a legal authority, he made a good faith reasonable recitation of the facts to that authority, and he reasonably relied on the advice of that authority. In the face of these facts, the Court cannot find that any purpose would be served by holding Defendant liable for his conduct in effectuating the arrest. The Court finds that this is one of those

rare situations where, in the words of the Second Circuit, 'the legal fiction [that public officials know the elements of the laws they enforce] does not make sense.'. . To hold Defendant liable would have little effect beyond 'dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.'")]; ***Stearns v. Clarkson***, 615 F.3d 1278, 1284 (10th Cir. 2010) ("Under certain circumstances, we have recognized that an officer's receipt of a prosecutor's pre-arrest probable cause determination supports the officer's qualified immunity defense. . . We have never held, however, that an officer's receipt of a favorable probable cause determination from a prosecutor prior to making an arrest necessarily entitles the officer to qualified immunity. Rather, we agree with our sister circuits that the fact that an officer obtains a prosecutor's determination of probable cause prior to making an arrest is only one factor that is relevant to the qualified immunity analysis."); ***Ewing v. City of Stockton***, 588 F.3d 1218, 1231 (9th Cir. 2009) ("The Ewings do not establish that the unlawfulness of charging Heather with murder on the facts in question was clearly established. . . Further, the officers were entitled to rely on the legal advice they obtained from [the prosecutor]. . . Many courts, including this one, have endorsed such consultation . . . and while it will not automatically insulate an officer from liability, 'it goes far to establish qualified immunity.'. . . The officers are similarly entitled to qualified immunity with respect to their arrest of Mark. As the district court noted, the evidence against Mark was slim. One witness made a tentative identification. The officers did, however, have some circumstantial evidence. . . . Most significantly, however, they had [the prosecutor's] recommendation to add a murder charge. As stated, an officer's consultation with a prosecutor is not conclusive on the issue of qualified immunity. . . However, it is evidence of good faith, and in the present case, it tips the scale in favor of qualified immunity."); ***Friedman v. Boucher***, 580 F.3d 847, 859 (9th Cir. 2009) (reliance on advice of prosecutor does not provide qualified immunity where reasonable officer would have known Athat forcibly taking a DNA sample from a pre-trial detainee without a search warrant or other court authority would violate the detainee's clearly established Fourth Amendment rights."); ***Poulakis v. Rogers***, No. 08-15425, 2009 WL 2447356, at *9-*11 (11th Cir. Aug. 10, 2009) (not published) ("We have not had occasion to squarely address the role that an officer's prior consultation with counsel may play in Fourth Amendment qualified immunity analysis. . . Even where an officer has consulted with an attorney prior to making an arrest, we still must look at the relevant case law and the statutory text. If the case law or statutory text is crystal clear in prohibiting the officer's arrest of the civil rights plaintiff, the officer's consultation with an attorney will not aid him in our qualified immunity analysis, because an attorney's advice cannot transform the officer's patently unlawful activity into objectively reasonable conduct. Thus, for example, if the firearm in this case had been found in the glove compartment of the car, rather than in the center console, in the face of this statute, advice from an Assistant State Attorney that an officer had probable cause would be plainly insufficient to insulate the officer on the theory of qualified immunity. Conversely, if there was no case on point and the statutory text was unclear in its application, the officer's consultation with an attorney would be unnecessary to our analysis because the officer would be entitled to qualified immunity, regardless of whether he had consulted with an attorney. But, where the application of the law to the facts falls on the hazy border between clear and ambiguous, the officer's consultation with an attorney prior to making the arrest may become relevant to the calculus. . . . We agree with

the approach taken by our sister circuits. As a practical matter, it is altogether consistent with a totality of the circumstances analysis to consider pre-arrest consultation and advice of a district attorney as being one circumstance contributing to the objective reasonableness of an officer's conduct. . . . . In this case, we think the officers acted in an objectively reasonable manner. Faced with a statute that was not abundantly clear in its application, and unsure of how to proceed, the officers asked their superior, who in turn called the on-duty Assistant State Attorney for advice. The undisputed facts indicate that the officers fairly explained the circumstances and material facts, the Assistant State Attorney unambiguously expressed his opinion that the officers would have probable cause to arrest Poulakis, and the officers had no reason to believe the prosecutor acted wrongfully. Thus, the opinion of the Assistant State Attorney should be considered as part of the mix in examining the question of qualified immunity, and it was of the kind that an objectively reasonable officer could consider reliable. When each of these circumstances is taken together, a reasonable officer could have believed that he had probable cause to arrest Poulakis for a violation of Fla. Stat. ' 790.01(2). Quite simply, we believe that Officers Rogers and Stender had arguable probable cause to arrest Poulakis for a violation of Fla. Stat. ' 790.01(2), and, therefore, that they are entitled to qualified immunity on the wrongful arrest claim."); ***Sueiro Vazquez v. Enid Torregrosa De La Rosa***, 494 F.3d 227, 235, 236 (1st Cir. 2007) ("Reliance on advice of counsel alone does not per se provide defendants with the shield of immunity. . . . This case does not involve advice from private counsel, who may have financial incentives to provide exactly the advice the client wants. Rather, it involves advice from the office of the Secretary of Justice of Puerto Rico, which has much broader duties and obligations. Reliance on the advice of Puerto Rico's chief legal officer, advice the defendants were required to follow by Puerto Rico law, was not unreasonable here. . . We leave for another day the hypothetical situation in which there is very strong evidence that newly appointed or elected defendant state officials acted in conspiracy with the chief public legal officer to produce and act on plainly unreasonable legal advice meant to result in the violation of a plaintiff's clearly established rights under federal law. *Cf. Vance v. Barrett,* 345 F.3d 1083, 1094 n. 14 (9th Cir.2003).This case does not come close to being that situation. Plaintiffs ask us to get into the legal question of whether the Secretary of Justice correctly or even reasonably interpreted Puerto Rico law as to whether plaintiffs' appointments were null and void. That is not an appropriate inquiry for the federal court engaged in an immunity analysis. Even if the Secretary's advice were wrong or not even within the reasonable range of interpretations (and the Secretary's advice was within a reasonable range), that would not itself mean that reasonable officials in the position of defendants would understand that they were acting in violation of plaintiffs' clearly established constitutional rights. At oral argument, plaintiffs argued that Torregrosa de la Rosa's request for an opinion from the Secretary contained a 'mischaracterization' of Sueiro's job duties and description, that this mischaracterization was motivated by political discrimination, and that this led the Secretary astray. Other circuits have denied immunity to officers in Fourth Amendment cases where officers manipulate evidence to mislead a prosecutor into authorizing an arrest. *See, e.g., Sornberger v. City of Knoxville,* 434 F.3d 1006, 1016 (7th Cir.2006). . . . We leave for another day whether there is an analogy to these cases for mandated reliance on advice of the Secretary of Justice in a First Amendment political termination case which turns on a state law classification issue. This theory was not raised in the

district court, nor was it raised in the plaintiffs' opening brief in this court, and it is twice forfeited."); ***Miller v. Administrative Office of the Courts***, 448 F.3d 887, 896, 897(6th Cir. 2006) ("In this case, Administrator Vize and Judge Wine conducted a pre-termination investigation into Miller's status to determine whether any special procedures needed to be followed in order to lawfully terminate her. The advice they received from the AOC's Director, its attorney, and its Personnel Director was consistent–that Miller was a nontenured employee. Given this information, a reasonable officer would not have clearly known that terminating Miller without the procedures required only for tenured employees was unlawful. This is not a case where the official responsible for terminating a government employee was 'plainly incompetent' or 'knowingly violat[ed] the law.'. . Rather, Vize and Wine took precautionary measures to ensure that Miller was nontenured and, whether or not she was in fact nontenured, those precautionary measures, under the circumstances, rendered reasonable their decision to terminate Miller without a hearing. Furthermore, even if we were to conclude that Miller had met her burden in the second step of the qualified immunity analysis, we would still hold that Vize and Judge Wine are entitled to qualified immunity under the third step that this court occasionally employs. The decision to terminate Miller was simply not 'objectively unreasonable' based on the information Vize and Wine had received in their pre-termination investigation."); ***Silberstein v. City of Dayton***, 440 F.3d 306, 317, 318 (6th Cir. 2006) ("The Board Members also argue that their actions were objectively reasonable because they relied upon the advice of counsel that Silberstein was an unclassified employee. This circuit has determined that reliance on counsel's legal advice constitutes a qualified immunity defense only under 'extraordinary circumstances,' and has never found that those circumstances were met. . . .The Board Members cannot cloak themselves in immunity simply by delegating their termination procedure decisions to their legal department, as the availability of such a defense would invite all government actors to shield themselves from §1983 suits by first seeking self-serving legal memoranda before taking action that may violate a constitutional right. . . There is no evidence that the Board Members' circumstances were in any way extraordinary. The Board Members argue that they are not attorneys, but this fact alone cannot give rise to 'extraordinary circumstances.' A reasonably competent public official is presumed to know the law governing his or her conduct."); ***Armstrong v. City of Melvindale***, 432 F.3d 695, 701, 702 (6th Cir. 2006) ("Defendants present two arguments that they did not violate a clearly established right. First, they again proffer the forfeited argument regarding the Michigan drug forfeiture laws. Second, they argue that the assurances of constitutional propriety gained from consultation with Prosecutor Plants, her review of the warrant and supporting affidavit, and the judge's issuance of the warrant rendered reasonable their belief that probable cause supported the issuance of the warrant. . . . The district court never reached the question of whether the officers' reliance on the issuance of the warrant was unreasonable. It instead focused only on the fact of a constitutional violation. This suggests a misconception; even with a constitutional breach, the law accords qualified immunity protection under appropriate circumstances. This case presents such circumstances. Defendants consulted with Prosecutor Plants because they were uncertain as to whether a warrant to search the Melvindale premises was constitutional. Plants not only advised them that a warrant would be constitutionally permissible, she also sanctioned a draft of the warrant and supporting affidavit. . . Only then did Defendants apply to a judge for the warrant. With the

judge's approval, Defendants executed the search, and Plaintiffs do not allege that the search exceeded the scope of the warrant. . . . Defendants wrongly believed that probable cause supported the warrant, but their mistake was not so unreasonable as to deny them qualified immunity. . . . Because the officers exercised reasonable professional judgment in applying for the warrant and because reasonable officers in Defendants' position might have believed that the warrant should have issued, we cannot say that Defendants violated a clearly established right by conducting the search of Plaintiffs' business."); ***Cox v. Hainey***, 391 F.3d 25, 34-36 (1st Cir. 2004) ("[T]he appellant submits that a police officer should not be able to insulate himself from liability for an erroneous determination simply because he obtained a prosecutor's blessing to arrest upon evidence that did not establish probable cause. We agree with the appellant's premise that a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one. That is not to say, however, that a reviewing court must throw out the baby with the bath water. There is a middle ground: the fact of the consultation and the purport of the advice obtained should be factored into the totality of the circumstances and considered in determining the officer's entitlement to qualified immunity. Whether advice obtained from a prosecutor prior to making an arrest fits into the totality of circumstances that appropriately inform the qualified immunity determination is a question of first impression in this circuit. In *Suboh v. Dist. Atty's Office of Suffolk Dist.*, 298 F.3d 81 (1st Cir.2002), we noted the question but had no occasion to answer it. *See id.* at 97. In dictum, we implied that if an officer seeks counsel from a prosecutor anent the legality of an intended action and furnishes the latter the known information material to that decision, the officer's reliance on emergent advice might be relevant, for qualified immunity purposes, to the reasonableness of his later conduct. . . Other courts, however, have spoken authoritatively to the issue. [collecting circuit cases] . . . .We agree with our sister circuits and with the implication of the *Suboh* dictum that there is some room in the qualified immunity calculus for considering both the fact of a pre-arrest consultation and the purport of the advice received. As a matter of practice, the incorporation of these factors into the totality of the circumstances is consistent with an inquiry into the objective legal reasonableness of an officer's belief that probable cause supported an arrest. It stands to reason that if an officer makes a full presentation of the known facts to a competent prosecutor and receives a green light, the officer would have stronger reason to believe that probable cause existed. And as a matter of policy, it makes eminently good sense, when time and circumstances permit, to encourage officers to obtain an informed opinion before charging ahead and making an arrest in uncertain circumstances. . . . Although we acknowledge the possibility of collusion between police and prosecutors, we do not believe that possibility warrants a general rule foreclosing reliance on a prosecutor's advice. . . . We caution, however, that the mere fact that an officer secures a favorable pre-arrest opinion from a friendly prosecutor does not automatically guarantee that qualified immunity will follow. Rather, that consultation comprises only one factor, among many, that enters into the totality of the circumstances relevant to the qualified immunity analysis. . . The primary focus continues to be the evidence about the suspect and the suspected crime that is within the officer's ken. In considering the relevance of an officer's pre-arrest consultation with a prosecutor, a reviewing court must determine whether the officer's reliance on the prosecutor's advice was objectively reasonable. . . Reliance would not satisfy this standard if an objectively reasonable

officer would have cause to believe that the prosecutor's advice was flawed, off point, or otherwise untrustworthy. . . Law enforcement officers have an independent duty to exercise their professional judgment and can be brought to book for objectively unreasonable mistakes regardless of whether another government official (say, a prosecutor or a magistrate) happens to compound the error. . . The officer's own role is also pertinent. If he knowingly withholds material facts from the prosecutor, his reliance on the latter's opinion would not be reasonable. . . In this case, the advice that Hainey received from the assistant district attorney was of the kind that an objectively reasonable officer would be free to consider reliable. The undisputed facts indicate that the two reviewed the available evidence fully and had a frank discussion about it. This discussion culminated in the prosecutor's statement that he believed Hainey had probable cause to arrest the appellant. And, finally, there is nothing to suggest that the prosecutor was operating in bad faith. We conclude, therefore, that an objectively reasonable officer would have taken the prosecutor's opinion into account in deciding whether to make the arrest. Thus, the district court appropriately considered that opinion in assessing the objective reasonableness of Hainey's actions and, ultimately, in granting him qualified immunity."); ***Davis v. Zirkelbach***, 149 F.3d 614, 620 (7th Cir. 1998) ("[O]fficers were objectively reasonable in their reliance on [counsel's] advice. A contrary conclusion on these facts would create perverse incentives for police officers faced with an unusual problem: if they sought advice of counsel that turned out to be wrong, they would be liable, but if they maintained a deliberate ignorance, they might be able to get away with arguing that no reasonable officer would have known that the rule applied to their particular situation."); ***V-1 Oil Co. v. Wyoming Dep't of Envtl. Quality***, 902 F.2d 1482, 1488-89 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990) (collecting cases and identifying four factors that determine when extraordinary circumstances exist in the context of reliance on counsel).

See also ***Sjurset v. Button***, 810 F.3d 609, 620, 622 (9th Cir. 2015) ("Like the two officers in *Mueller* who 'made no decisions at all,'. . . the Stayton officers similarly made no independent decisions regarding protective custody and merely assisted DHS in securing the children. We thus decline to find that the Stayton officers were either plainly incompetent or that they knowingly violated the law when they relied on DHS's determination that Sjurset's children were in imminent danger. To hold otherwise would place the Stayton officers in a Catch–22 situation: either challenge DHS's determination, which could potentially endanger the children's safety and put the officers at risk of liability or discipline if harm had befallen the children, or carry out DHS's instructions in the absence of a court order at the risk of being sued for violating the children's and the parents' constitutional rights. The correct answer would not be obvious to a reasonable officer. Thus, the 'contours' of the Fourteenth and Fourth Amendment rights at issue were not clearly established in this context. Accordingly, for the purposes of qualified immunity, those rights did not preclude the officers' reliance on DHS's determination. . . . The Stayton officers were therefore not incompetent in believing that they were legally authorized to act in reliance on DHS's determination. And even if the officers were mistaken in their belief that they could remove the children at the direction of DHS without court authorization, their actions were objectively reasonable under the circumstances. Accordingly, the Stayton officers are entitled to qualified immunity.")

See also ***Bell v. Norwood***, 2:11-CV-3732-RDP, 2014 WL 4388348, *8 (N.D. Ala. Aug. 28, 2014) ("Similar to the facts in *Ulrich,* there is a factor in this case that supports the application of qualified immunity. Not only were Norwood and Cater called upon to interpret Alabama law, the DA's office approved the applications that Norwood and Cater submitted in support of the arrest warrants. Under the totality of the circumstances, Norwood and Cater reasonably relied on the DA's erroneous probable cause determination, and that is what actually resulted in Bell's arrests. . . Here, although Norwood and Cater were mistaken in applying for the arrest warrants, Bell would never have been arrested if the DA's office had not (erroneously) approved the applications for warrants. Thus, notwithstanding Norwood and Cater's mistaken understanding of Defendant's notification and registration requirements, no arrest warrants would have issued if the DA's office had reached a correct determination that Bell was not required to register a new address if he moved within Jefferson County."); ***Phillips v. Hubbard***, No. 1:11–cv–00087, 2012 WL 3542640, *7, *8 (S.D. Ohio Aug. 16, 2012) ("As noted by Deputy Hubbard, he is being sued in his individual capacity for actions that he took pursuant to advice, counsel, and authority of the chief legal officer of Brown County, Prosecuting Attorney Jessie Little. Thus, Hubbard asserts that it cannot be said that he violated clearly established law by initiating criminal proceedings at the direction of the Prosecuting Attorney against Plaintiff for knowingly obstructing or interfering with a farmer's easement in the middle of the season. In *Harlow,* the Supreme Court created an 'extraordinary circumstances' exception that entitles a defendant to qualified immunity even where he or she is otherwise not entitled to it. . . The Sixth Circuit has held that reliance on the advice of counsel may constitute 'extraordinary circumstances' which would entitle a defendant to qualified immunity. *York v. Purkey,* 14 F App'. 628 (6th Cir.2001). Four factors are considered when a public official has followed the advice of counsel: (1) whether the advice was unequivocal and specifically tailored to the particular facts giving rise to the controversy; (2) whether complete information was provided to the advising attorney(s); (3) the prominence and competence of the advising attorney(s); and (4) how soon after the advice was received the disputed action was taken. . . . In light of the facts and circumstances surrounding this action, it appears the four factors weigh in favor of finding that Hubbard's reliance on Prosecutor Little's advice may constitute 'extraordinary circumstances' which would entitle Hubbard to qualified immunity. However, the undersigned declines to engage in a lengthy discussion of this issue, as further discussed below, as Prosecutor Little's advice to Hubbard is not the sole basis for determining that Hubbard's actions were objectively reasonable for purposes of qualified immunity. *See York,* 14 F. App'x at 633 (consulting an attorney and relying on rendered legal advice alone is not extraordinary for purposes of qualified immunity, it is a factor to consider)."); ***Pate v. Village of Hampshire***, 2007 WL 3223360, at *14, *15 (N.D.Ill. Oct. 25, 2007) ("Chief Atchison and Mayor Magnussen further argue that their actions are protected by the 'extraordinary circumstances' exception to the lack of immunity based on their reliance of counsel's advice before terminating Pate's and Stroyan's employment. If an immunity defense fails because the law was clearly established and a reasonably competent public official should have known the law governing the conduct, the public official may still be immune from suit if extraordinary circumstances exist, such as relying on the advice of counsel in making the disputed decision. *See Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th

Cir.1998) (*Davis*). Factors included in determining whether immunity may be granted based on this extraordinary circumstance include: (1) whether the advice of counsel was unequivocal, (2) whether the advice of counsel was specifically tailored to the particular facts giving rise to the controversy, (3) whether complete information was provided to the advising counsel, (4) the prominence and competence of the advising counsel, and (5) the time span after the advice was received and the disputed action was taken. . . In the instant case, the undisputed facts before the Court are insufficient to determine if the extraordinary circumstances defense applies to Chief Atchison's and Mayor Magnussen's decisions to terminate Pate's and Stroyan's employment based on advice from McGuire. . . . Accordingly, summary judgment based on qualified immunity and the extraordinary circumstance defense is denied."); ***Schroeder v. City of Vassar***, 371 F.Supp.2d 882, 897 (E.D. Mich. 2005) ("The evidence shows that the legal counsel unequivocally approved the termination, the information Adkins provided to the attorney included the draft letter, the attorney consulted was competent to serve as the city's counsel, and that the action took place immediately after receiving the advice. The Court finds that Adkins is entitled to qualified immunity under the circumstances of this case.").

See also ***Poolaw v. Marcantel***, 565 F.3d 721, 743, 744, 748, 749 (10th Cir. 2009) (O'Brien, J., dissenting) ("While not conclusive evidence of the officers' reasonable belief, a law trained judge found the affidavit sufficient to establish probable cause and issued the warrant. Moreover the officers also consulted counsel with respect to the adequacy of the affidavit before it was presented to the judge. . . In such circumstances the threshold over which the officers must pass to avoid suppression of evidence in a criminal case or to be entitled to qualified immunity in a civil case is quite low. . . . If the search was erroneously authorized the consequences of the error ought not be visited on Marcantel and Hix, who followed proper procedure in obtaining the warrant, which, in turn, was executed in good faith by other officers. . . .Assuming, *arguendo*, a constitutional violation occurred, Marcantel and Hix are entitled to qualified immunity because the law at the time of the search did not fairly warn their conduct was unlawful. . . . [T]he test is not whether the officers were incorrect in their assessment of probable cause or whether the judge was wrong to issue the warrant. It is whether the officers' request and the judge's response were reasonable. Even if the officers were mistaken, their mistake was reasonable. The protection of qualified immunity extends to such reasonable mistakes, whether they are ones of law, fact or a combination thereof.")

But see ***Poolaw v. Marcantel***, 565 F.3d 721, 734, 735 (10th Cir. 2009) ("The dissent presses the point that because Marcantel and Hix sought and obtained a search warrant from a judge, they should be entitled to qualified immunity unless they intentionally misled the judge. . . This conclusion is misguided for two reasons. First, it is clearly established that 'employ[ing] a reasonable process in seeking the warrant' does not relieve officers of their constitutional duty to 'exercise their own professional judgment' as to the existence of probable cause. . . .Second, it is beyond question that an officer's duty to exercise his independent professional judgment is not met simply because he lacks subjective bad faith. . . . Whether the officers intentionally misled the judge is simply of no moment unless such intent is an element of the plaintiffs' claims, which it is

not here. . . As we explain above, given the absence of a factual connection other than Marcella between Astorga and the Poolaws' property, an officer could not reasonably apply for a search warrant believing that probable cause existed."); ***Sornberger v. City of Knoxville***, 434 F.3d 1006, 1016 (7th Cir.2006) ("This record cannot establish that Officer Clauge and Chief Pesci simply made a good-faith mistake as to the existence of probable cause. We have held that, when an officer presents his case in good-faith to a prosecutor and seeks that official's advice about the existence of probable cause, his subsequent action, based on the prosecutor's advice that probable cause exists, is powerful evidence that the officer's reliance was in good faith and deserving of qualified immunity. . . Here, however, the record, as it comes to us, hardly establishes such a good-faith seeking of legal advice. Rather, the record is susceptible to the view that the officers themselves realized the weakness of their case, and therefore manipulated the available evidence to mislead the state prosecutor into authorizing Scott's arrest. . . This conduct, as alleged, creates serious factual issues as to whether the officers reasonably relied on the prosecutor's advice. On this record, neither Chief Pesci nor Officer Clauge can be entitled to qualified immunity. . . . In the present case, the officers had obtained a warrant for the search of the Sornbergers' parents' computer, which would have allowed the investigators to confirm the couple's alibi. Rather than waiting to obtain this critical information, the officers arrested Scott while the search of his parents' home was taking place. On this record, given that the lynchpin of a probable cause determination was on the verge of being obtained, the officers' arrest of Scott before reviewing the results of the computer search appears to have been unreasonably premature."); ***Putnam v. Keller,*** 332 F.3d 541, 545 n.3 (8th Cir. 2003) (rejecting college officials' Aargument that they are insulated from liability due to 'extraordinary circumstances'–that is, their reliance on the advice of their attorney."); ***Roska v. Peterson,*** 328 F.3d 1230, 1254 (10th Cir. 2003) (*Roska I*) ("In this case, the district court alternatively concluded that the defendants were entitled to qualified immunity based on their reliance on advice of counsel. For the reasons set forth below, we reverse and remand. First, the district court again based its decision on Utah Code ' 78-3a- 301, which, as discussed *supra,* does not authorize removal without pre-deprivation procedures. Second, based on the record before us, we cannot determine whether the district court was correct in concluding that Petersen's advice related specifically to the conduct in question: removing Rusty from his home without any pre-deprivation procedures. Finally, although the district court concluded that the advice 'was specifically tailored to the facts giving rise to this controversy,' neither the district court opinion nor the record indicate the specific facts upon which Defendant Peterson relied in approving removal."[footnotes omitted]); ***Charfauros v. Board of Elections***, 249 F.3d 941, 954 (9th Cir. 2001) (reliance on advice of counsel does not establish that a reasonable elections official would not know that his or her conduct violated the Equal Protection Clause); ***Wadkins v. Arnold***, 214 F.3d 535, 542 (4th Cir. 2000) ("[T]he mere fact that Detective Arnold acted upon the Commonwealth's Attorney's authorization in applying for the warrants does not automatically cloak Arnold with the shield of qualified immunity. However, this authorization–by the elected chief law enforcement officer of Washington County–is compelling evidence and should appropriately be taken into account in assessing the reasonableness of Arnold's actions."); ***Woodwind Estates, Ltd. v. Gretkowski***, 205 F.3d 118, 125 (3d Cir. 2000) ("[T]he supervisor defendants contend that their Rule 50(a) motion should be upheld on the alternative ground that

they are entitled to qualified immunity for their decision to deny Woodwind's application for subdivision approval. According to the supervisors, they are entitled to qualified immunity simply because they were relying upon the recommendation of the planning commission and the township solicitor. We disagree. . . . Under the local ordinance, the Woodwind plan as submitted must have been approved as a subdivision because it satisfied all of the objective criteria. Yet the supervisor defendants denied approval for the subdivision plan. The supervisor defendants have not shown that their interpretation or understanding of the ordinance was reasonable or that Pennsylvania law on the subject was unclear. Accordingly, the defense of qualified immunity is not available to the supervisor defendants in the instant matter."); ***Gilbrook v. City of Westminster***, 177 F.3d 839, 870 (9th Cir. 1999) ("Both Demonaco and Huntley testified that they consulted with counsel before discharging Garrison because of his press release. Huntley even went so far as to read a Supreme Court opinion himself, before determining that Garrison had exceeded the permissible bounds of protected public-employee speech. Although such efforts are laudable, standing alone they do not bestow on public officials the shield of qualified immunity. . . . Were we to rule that reliance on the advice of counsel is sufficient to confer qualified immunity, no matter what the outcome of the *Pickering* balance, we would be abdicating to individual lawyers our collective judicial responsibility to evaluate the merits of First Amendment retaliation claims and providing an incentive for lawyers to tell public-employer clients that they have immunity even when other factors suggest the absence of immunity. In summary, on the record before us, we conclude that the *Pickering* balance so clearly weighs in favor of Garrison that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech.").

See also ***Pattee v. Georgia Ports Authority***, 477 F.Supp.2d 1253, 1268 (S.D. Ga. 2006) ("Finally, the defendants argue that they are entitled to qualified immunity because they relied on an attorney's advice that terminating Pattee for lying would not violate his constitutional rights. . . . Defendants point to no Eleventh Circuit case applying the 'extraordinary circumstances' exception, nor any case granting a defendant qualified immunity for relying on the advice of private counsel. Furthermore, even were the Court to find *V-1* persuasive, the legal advice in that case was extraordinary–from a high-ranking government attorney and regarding an untested statute–not the run-of-the-mill advice defendants received from their attorney in this case. Thus, the defense does not apply here."); ***Masonoff v. Dubois***, 336 F.Supp.2d 54, 64, 65 (D. Mass. 2004) ("The First Circuit and courts in other jurisdictions have held that a state law sanctioning the conduct at issue can keep a reasonable official from knowing the relevant constitutional standard. . . Similarly, courts have also deemed reliance on advice of counsel reasonable under certain circumstances. . . Ultimately, the question here boils down to whether it was objectively reasonable for these defendants to believe, based upon *Langton* and advice of counsel, that their conduct conformed to law. . . . I conclude that *Langton* gave the defendants more than 'fair notice' that the portable toilets and slop sinks must be kept clean and well-maintained in order to pass constitutional muster. . . . In other words, it would not be reasonable for the defendants to rely on *Langton*–or advice of counsel–for the proposition that the conditions at SECC would always be constitutional, especially in the face of the court's warning in *Langton* and its prophylactic order regarding cleaning and maintenance of the portable toilets.").

See also ***In re County of Erie***, 546 F.3d 222, 225, 229, 230 (2d Cir. 2008) ("After reviewing the submissions of the parties in regard to the Petition, we first determined that the writ was an appropriate device to review the discovery order in this case because the Petitioner presented an important issue of first impression: whether communications passing between a government attorney without policy-making authority and a public official are protected by the attorney-client privilege when the communications evaluate the policies' legality and propose alternatives. . . . An analysis of the attorney-client privilege in the government context and its application to the factual background of this case led us to conclude that each of the ten disputed e-mails was sent for the predominant purpose of soliciting or rendering legal advice. They convey to the public officials responsible for formulating, implementing and monitoring Erie County's corrections policies, a lawyer's assessment of Fourth Amendment requirements, and provide guidance in crafting and implementing alternative policies for compliance. This advice–particularly when viewed in the context in which it was solicited and rendered–does not constitute general policy or political advice unprotected by the privilege. . . We therefore granted the writ and directed the District Court to enter an order preserving the confidentiality of the e-mails in question. . . . .We hold that a party must *rely* on privileged advice from his counsel to make his claim or defense. We decline to specify or speculate as to what degree of reliance is required because Petitioners here do not rely upon the advice of counsel in the assertion of their defense in this action. Although the District Court held, *inter alia*, that the qualified immunity defense asserted by Petitioners placed the privileged communications between the County Attorney's Office and the Sheriff's personnel at issue, this is not so. . . . The question of whether a right is 'clearly established'is determined by reference to the case law extant at the time of the violation. . . This is an objective, not a subjective, test, and reliance upon advice of counsel therefore cannot be used to support the defense of qualified immunity. Petitioners do not claim a good faith or state of mind defense. They maintain only that their actions were lawful or that any rights violated were not clearly established. In view of the litigation circumstances, any legal advice rendered by the County Attorney's Office is irrelevant to any defense so far raised by Petitioners. . . . The Petition for Mandamus is granted. The District Court's order to produce the ten e-mails is vacated, and the District Court is directed to enter an order protecting the confidentiality of those privileged communications. Respondents shall have leave to reargue forfeiture of the privilege before the District Court should the Petitioners rely upon an advice-of-counsel or good-faith defense at trial."); ***Ross v. City of Memphis***, 423 F.3d 596, 597, 598 (6th Cir. 2005) ("Regardless of the way this case is captioned, the real dispute is between the City of Memphis (the 'City') and its former police director, Walter Crews, who has also been sued in his individual capacity. The City asserts the attorney-client privilege as to the content of conversations between Crews, while he was police director, and various attorneys employed by the City. However, in the present lawsuit, Crews has raised the advice of counsel as the basis of his qualified immunity defense. Thus, we are asked to determine whether Crews's invocation of the advice of counsel impliedly waives the attorney-client privilege held by the City. To answer this question, we must first decide whether a municipality can hold the attorney-client privilege. Holding that a municipality can maintain the

privilege and that Crews's litigation choices cannot waive the City's privilege, we reverse the district court and remand for further proceedings.").

See also ***McRaven v. Sanders***, 577 F.3d 974, 981 (8th Cir. 2009) ("Given McMurrian's knowledge of the drugs McFarland consumed and his physical state–facts that should have triggered special concern–it was unreasonable to rely on a medical assessment grounded on incorrect information.").

Note that ignoring advice of counsel may weigh against granting qualified immunity. *See, e.g.*, ***Brockton Power LLC v. City of Brockton***, No. 12–11047–LTS, 2013 WL 2407220, *20 (D. Mass. May 30, 2013) ("As set forth above, the plaintiffs have presented sufficient allegations of constitutional violations, satisfying the first prong of the qualified immunity analysis. . . With respect to the second prong, the plaintiffs repeatedly have alleged that the defendants 'knowingly violate[d] the law.'. . Two factual allegations are especially relevant to assessing whether reasonable people in the defendants' positions would have realized their conduct violated the plaintiffs' due process and equal protection rights. First, the defendants allegedly acted in the face of warnings from the City's legal counsel against 'delay tactics,' 'acting outside the rules,' and failing 'to treat the plaintiffs fairly, disclose conflicts of interest, and not discriminate.'. . Second, the plaintiffs allege the defendants formed an agreement pursuant to which all applications and submissions related to the project would be either 'rejected ... out of hand' or denied after 'pretextual reviews.'. . Reasonable people in the defendants' positions should have understood such a systemic denial of any process whatsoever—including the denial of a landowner's request for access to drinking water—was beyond the scope of constitutionally permissible conduct. The defendants' bids for qualified immunity, therefore, are denied without prejudice to renewal at summary judgment, after further development of the relevant facts in discovery.")

2. Reliance on Statutes, Ordinances, Regulations

While not a qualified immunity decision, the Court's opinion in *Heien v. North Carolina*, 135 S. Ct. 530 (2014) is worth reading for comparison to qualified immunity doctrine.

Heien v. North Carolina, 135 S. Ct. 530, 539-40 (2014) ("Heien is correct that in a number of decisions we have looked to the reasonableness of an officer's legal error in the course of considering the appropriate remedy for a constitutional violation, instead of whether there was a violation at all. . . In those cases, however, we had already found or assumed a Fourth Amendment violation. An officer's mistaken view that the conduct at issue did *not* give rise to such a violation—no matter how reasonable—could not change that ultimate conclusion. . . Any consideration of the reasonableness of an officer's mistake was therefore limited to the separate matter of remedy. Here, by contrast, the mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal. If so, there was no violation of the Fourth Amendment in the first place. None of the cases Heien or the dissent cites precludes a court from considering a reasonable mistake of law in addressing that

question. . . . Contrary to the suggestion of Heien and *amici*, our decision does not discourage officers from learning the law. The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved. . . And the inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation. Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.")

Heien v. N. Carolina, 135 S. Ct. 530, 541 (2014) (Kagan, J., joined by Ginsburg, J., concurring) ("[T]he inquiry the Court permits today is more demanding than the one courts undertake before awarding qualified immunity. . . Our modern qualified immunity doctrine protects 'all but the plainly incompetent or those who knowingly violate the law.'. . By contrast, Justice Story's opinion in *The Friendship,* 9 F. Cas. 825, 826 (No. 5,125) (CC Mass. 1812) . . . suggests the appropriate standard for deciding when a legal error can support a seizure: when an officer takes a reasonable view of a 'vexata questio' on which different judges 'h[o]ld opposite opinions.'. . Or to make the same point without the Latin, the test is satisfied when the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view. . . A court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. As the Solicitor General made the point at oral argument, the statute must pose a 'really difficult' or 'very hard question of statutory interpretation.' And indeed, both North Carolina and the Solicitor General agreed that such cases will be 'exceedingly rare.'")

Heien v. N. Carolina, 135 S. Ct. 530, 543-44, 547 (2014) (Sotomayor, J., dissenting) ("Traffic stops like those at issue here can be 'annoying, frightening, and perhaps humiliating.'. . We have nevertheless held that an officer's subjective motivations do not render a traffic stop unlawful. . . But we assumed in *Whren* that when an officer acts on pretext, at least that pretext would be the violation of an actual law. . . Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands this authority. . . One wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so. In addition to these human consequences—including those for communities and for their relationships with the police—permitting mistakes of law to justify seizures has the perverse effect of preventing or delaying the clarification of the law. Under such an approach, courts need not interpret statutory language but can instead simply decide whether an officer's interpretation was reasonable. . . . This result is bad for citizens, who need to know their rights and responsibilities, and it is bad for police, who would benefit from clearer direction. . . Of course, if the law enforcement system could not function without permitting mistakes of law to justify seizures, one could at least argue that permitting as much is a necessary evil. But I have not seen any persuasive argument that law enforcement will be unduly hampered by a rule that precludes consideration of mistakes of law in the reasonableness inquiry. After all,

there is no indication that excluding an officer's mistake of law from the reasonableness inquiry has created a problem for law enforcement in the overwhelming number of Circuits which have adopted that approach. If an officer makes a stop in good faith but it turns out that, as in this case, the officer was wrong about what the law proscribed or required, I know of no penalty that the officer would suffer. . . Moreover, such an officer would likely have a defense to any civil suit on the basis of qualified immunity. . . .While I appreciate that the Court has endeavored to set some bounds on the types of mistakes of law that it thinks will qualify as reasonable, and while I think that the set of reasonable mistakes of law ought to be narrowly circumscribed if they are to be countenanced at all, I am not at all convinced that the Court has done so in a clear way. It seems to me that the difference between qualified immunity's reasonableness standard—which the Court insists without elaboration does not apply here—and the Court's conception of reasonableness in this context—which remains undefined—will prove murky in application. . . I fear the Court's unwillingness to sketch a fuller view of what makes a mistake of law reasonable only presages the likely difficulty that courts will have applying the Court's decision in this case. To my mind, the more administrable approach—and the one more consistent with our precedents and principles—would be to hold that an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment. I respectfully dissent.")

See also ***Ericson v. Frankenberry***, No. 18-1845, 2018 WL 4922812, at *3 (7th Cir. Oct. 10, 2018) (Rovner, J., concurring in part and dissenting in part) ("[I]n my view, dismissal of the claims against the arresting officers was premature. . . .[N]o reasonable officer could have believed that Ericson had committed the crime of loitering as that offense is defined by the Rochelle Code of Ordinances (hereafter "Code"). The applicable part of the Code provides: No person shall loiter on any part of the airport or in any building on the airport. Violators will be subject to the provisions of section 66-403 of the Municipal Code. . . The Code further provides that, 'Loiter means to remain in an area for no obvious reason.'. . This provision is virtually identical to the Chicago loitering ordinance invalidated by the Supreme Court some twenty years before these officers arrested Ericson. That ordinance defines 'loiter' as 'to remain in any one place with no apparent purpose.'. . .Arresting a person for violating an ordinance that is essentially identical to one that has been invalidated by the Supreme Court is a mistake of law. And although the Supreme Court has found that 'reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition,' I am aware of no case allowing officers to make a warrantless arrest on probable cause for violating an invalidated law. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). . . . That the unrepresented plaintiff failed to apprehend the importance of this point does not mean that we are similarly constrained. We should not countenance an arrest made for a non-existent crime and we should certainly not do so on a motion to dismiss."); ***Halley v. Huckaby***, 902 F.3d 1136, 1151 (10th Cir. 2018) ("Even if their actions violated clearly established law, Huckaby and Deputy Calloway nonetheless contend they are entitled to qualified immunity because their actions were objectively reasonable. Huckaby and Deputy Calloway claim they acted in reliance on the Oklahoma Children's Code, which they argue authorizes the detention of a child under these circumstances. Once a plaintiff shows a constitutional violation and that it was clearly established,

'it becomes defendant's burden to prove that her conduct was nonetheless objectively reasonable.'. . 'Of course, an officer's reliance on an authorizing statute does not render the conduct per se reasonable.'. . . To determine whether statutory authorization renders an. official's unconstitutional conduct objectively reasonable, we consider '(1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional.'. .Because the statute cannot reasonably be read to authorize the conduct in question, we conclude Deputy Calloway's actions were not objectively reasonable; we also conclude for this reason that Huckaby's actions were not objectively reasonable."); ***Weed v. Jenkins***, 873 F.3d 1023, 1028-29 (8th Cir. 2017) ("Weed argues that Jenkins's order to disperse violated the First Amendment. Weed says that the order also violated due process because it was void for vagueness. This court need not reach the merits of those issues due to the doctrine of qualified immunity. . . . Jenkins could reasonably interpret St. Charles ordinance § 340.020 to forbid overpass protests that hinder or impede vehicular traffic. The ordinance authorized Jenkins to issue a proper order to disperse. The doctrine of qualified immunity protects Jenkins from First Amendment damages because he had no reason to know, based on preexisting law, that his order was unlawful."); ***United States v. Diaz***, 854 F.3d 197, 204 & n.12 (2d Cir. 2017) ("We think that Officer Aybar's belief that the apartment-building stairwell qualified as a 'public place' within the meaning of the open-container law was an objectively reasonable prediction of the scope of the law when it was made. As in *Heien*, her assessment was premised on a reasonable interpretation of an ambiguous state law, the scope of which had not yet been clarified. Even now, the New York Court of Appeals has not addressed whether a common area inside an apartment building is a 'public place' within the meaning of the open-container law, and the other New York courts that have done so have reached conflicting conclusions. . . . In light of these conflicting precedents, Officer Aybar's belief that an apartment-building stairwell is a public place within the meaning of the open-container law was a reasonable, even if mistaken, assessment of the scope of that law at the time it was made. Thus, contrary to Diaz's contention, Officer Aybar had probable cause to believe that Diaz had violated the open-container law. . . .In this respect, the label 'mistake of law' may be a misnomer that could lead to confusion. The notion of a mistake seems to presuppose that the legal question was already settled, yet it is only when the legal question is unsettled that an officer's erroneous assessment of the law can be objectively reasonable. It may be useful, therefore, to think of such an assessment instead as an inaccurate *prediction* of law. In this light, the question is whether the officer's prediction as to the scope of the ambiguous law at issue was objectively reasonable—even if ultimately mistaken—such that a reasonable judge could have accepted it at the time it was made in light of the statutory text and the available judicial interpretations of that text. Formulated this way, the *Heien* principle has echoes of a defendant's due-process right to fair warning of the crime for which he or she is punished."); ***Smith v. City of Fairburn, Georgia***, 679 F. App'x 916, 923-24 (11th Cir. 2017) ("In short, some cases (which could be distinguished) suggest that Smith's statement to Officer Hammock could support a terroristic threats charge and some cases (which could be distinguished) suggest that it could not. A reasonable officer could come to either conclusion. As a result, even if Detective Israel was wrong to conclude that Smith's statement

demonstrated intent to communicate under Georgia's terroristic threats statute, his error was a reasonable mistake of law. And a reasonable mistake of law does not destroy probable cause. *Cahaly v. Larosa*, 796 F.3d 399, 408 (4th Cir. 2015) ("[O]fficers may have probable cause based on reasonable mistakes of law."). *Cf. Heien v. North Carolina*, 574 U.S. ___, 135 S. Ct. 530, 536–540 (2014) (holding that an officer has reasonable suspicion to conduct traffic stop even when his suspicion that a law has been violated is based on a reasonable mistake of law). As a result, Smith's alleged statements would support a finding of probable cause. . . Of course, Detective Israel did not parse the decisions discussed above before seeking a warrant for Smith's arrest. Few, if any, officers would. And he indicated that he was not aware that intent to communicate the threat was an element of terroristic threats. But that doesn't matter. In determining the existence or non-existence of probable cause, we do not ask what evidence the officer seeking an arrest warrant thought he needed to establish probable cause. We ask whether a reasonable officer, knowing the facts that the officer in question knew, would have had sufficient evidence to believe that probable cause existed. Detective Israel did here.")

Compare ***von Brincken v. Voss***, 671 F. App'x 962, 963 (9th Cir. 2016) ("An officer in Voss's position could reasonably believe that Arizona Revised Statutes section 28-3169(A) required that von Brincken produce his driver's license upon Voss's demand, and that section 28-622 in turn made von Brincken's refusal to comply with Voss's lawful order a misdemeanor. . . While Voss subjectively believed that von Brincken's refusal to present his license violated a different statute, section 28-1595(B), an officer's 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause,' *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Because an officer in Voss's position could reasonably believe von Brincken committed a misdemeanor in his presence, Voss and Legarra could reasonably believe that Voss had the authority to arrest von Brincken, *see* Ariz. Rev. Stat. § 13-3883(A)(2), and that the arrest would not violate von Brincken's Fourth Amendment rights, *see Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Because Voss and Legarra could reasonably believe that their conduct complied with the law, and any unlawfulness was not clearly established (even assuming their conduct was unlawful), they are entitled to qualified immunity.").") *with* ***von Brincken v. Voss***, 671 F. App'x 962, 963-64 (9th Cir. 2016) (Thomas, J., dissenting) ("The Fourth Amendment serves to ensure that one may not be arrested on suspicion of non-criminal conduct. Because Officers Voss and Legarra arrested Tarahawk von Brincken without probable cause to believe he had committed a crime, the Officers violated von Brincken's clearly established constitutional rights. Therefore, the Officers are not entitled to qualified immunity, as the district court correctly held. Because I agree entirely with the district court's analysis on this issue, I must respectfully dissent. The Fourth Amendment to the US Constitution protects people from unreasonable searches and seizures. U.S. Const. amend. IV. The Supreme Court has held that 'Fourth Amendment seizures are reasonable only if based on probable cause to believe that the individual has committed a crime.'. . Officer Voss relied on Arizona Revised Statute § 28-921(A)(1) (driving an improperly equipped vehicle) and § 28-1595(B) (failure to produce identification) as his authority for arresting von Brincken. However, the former statute is a civil traffic offense that does not subject one to arrest for criminal conduct. . . The latter statute subjects a driver to arrest for

criminal conduct for not producing a driver's license upon the request of an officer only if the officer first conducted a traffic stop of the driver. . . Because it is undisputed that Officer Voss did not conduct a traffic stop of von Brincken before demanding to see his driver's license, the arrest for failure to produce the driver's license lacked probable cause and was therefore unconstitutional. To hold otherwise, as the majority does, turns a traffic offense statute into a 'stop and show me your papers' statute. Furthermore, the right to be free from unreasonable seizures was clearly established at the time of von Brincken's arrest. This is so even though the Arizona Supreme Court has not previously held that being pulled over while driving is a prerequisite to a reasonable arrest pursuant to Arizona Revised Statute § 28-1595(B). . . . Officers Voss and Legarra violated von Brincken's clearly established constitutional right to be free from an unreasonable seizure. As a result, they are not entitled to qualified immunity, as the district court properly held. I respectfully dissent.")

See also ***Wilber v. Curtis***, 872 F.3d 15, 21-22 (1st Cir. 2017) ("We have explained that, with respect to a § 1983 claim that seeks to hold a police officer liable for making a warrantless arrest without probable cause, 'if the presence of probable cause is arguable or subject to legitimate question, qualified immunity will attach.'. . We also have made clear that police officers are, in determining whether probable cause exists to make a state law arrest, entitled to qualified immunity for their reasonable but mistaken assessments of the bounds of state law. . . Here, as we have noted, the defendants identify two state law offenses for which an officer reasonably could have determined that there was probable cause to arrest Wilber beyond the two state law offenses (disorderly conduct and disturbing the peace) that the Magistrate Judge considered. In affirming the grant of summary judgment on qualified immunity grounds, we focus on only one of these two other state law offenses: interfering with the duties of a police officer, which is a common law crime in Massachusetts. . . .[F]or purposes of qualified immunity, it is not enough to show that the officers may have made a mistaken determination about whether Wilber's conduct provided probable cause to conclude that he had committed the offense for which he was arrested. Wilber must show that it was clear under state law that there was not probable cause to arrest him for this crime. . . And, with respect to that question, Wilber cites no authority—and we are aware of none—that would suggest that it was clear at the time of his arrest that this offense does not encompass the particular circumstances that the officers confronted. After all, Wilber does not dispute that Kinsella and Curtis were present at the worksite for a legitimate law enforcement reason, that he placed yellow tape across the worksite which the officers had to take down, or that he then remained on the site after those officers repeatedly requested that he leave in consequence of his actions and even after the officers had informed him that he would be arrested if he failed to comply with their request that he leave. To be sure, Wilber is right that there is nothing in the record to suggest that he had any physical contact with the officers. But Wilber cites to no Massachusetts authority that would indicate such contact is a requirement of the crime, nor does he make any argument as to why it would be unreasonable to conclude that no such requirement exists. Rather, the cases he does cite for the proposition that physical contact is required merely show that one can commit the crime by engaging in such conduct, . . . and not that this offense imposes any requirement that such conduct must have occurred . . . Thus, while the

defendants bear the burden of proving that they are entitled to summary judgment on qualified immunity grounds, we conclude that that they have met that burden here. Accordingly, we affirm the grant of summary judgment on this ground."); ***Mackey v. Meyer***, 675 F. App'x 705, 709 (9th Cir. 2017) ("In the context of the Fourth Amendment, 'if the officer's mistake as to what the law requires is reasonable, [then] the officer is entitled to the immunity defense.'. . Here, Meyer's mistake was unreasonable as both statutes at issue are clear on their face. First, no reasonable officer would arrest an individual without ensuring that individual did not have a permit under Section 1860(a). Second, it was objectively unreasonable for Meyer to think Mackey was obstructing or intimidating individuals based on the information relayed by the dispatcher in combination with what he witnessed upon arriving on the scene. We thus conclude that Meyer is not entitled to qualified immunity."); ***Graham v. Gagnon***, 831 F.3d 176, 186-89 (4th Cir. 2016) ("We cannot find in the record any attempted action by the officers that could be said to have been 'obstructed' by Graham, and the officers' brief and oral argument are likewise missing even a suggested action that was actually obstructed. Regardless, we are not the first court to read this statute. Both the Virginia courts and this Court have applied the statute many times before, and there is a small mountain of caselaw that makes clear that whatever the outer boundary of Virginia Code § 18.2-460(A), Graham came nowhere near it. . . .It is true that an actual lack of probable cause is not dispositive for qualified immunity purposes; qualified immunity protects officers who make mistakes if those mistakes are reasonable. But the officers' contention misses the point. The boundaries of the statute are extremely relevant to an assessment of whether a mistake was reasonable. . . .Numerous decisions of the Virginia courts and this Court provide guidance on the scope of Virginia Code § 18.2-460(A). There are undoubtedly still gray areas at the statute's boundaries, meaning that officers enforcing it will at times face close cases. This was not one of those cases. Given Graham's known conduct, it would have been clear to reasonable officers in Appellees' position that they lacked probable cause to arrest Graham for obstruction of justice. We therefore reverse the district court's grant of summary judgment to Gagnon and Clipp."); ***Neita v. City of Chicago***, 830 F.3d 494, 499 (7th Cir. 2016) ("An official who reasonably relies on a facially valid state law may be entitled to qualified immunity if his conduct is later challenged. . . But Neita has alleged that the officers never received a complaint of animal abuse or neglect, or alternatively, that they knew that any such complaint was false. Accepting these allegations as true, section 10 of the Illinois Act is not implicated, and the officers cannot invoke reliance on it as a basis for qualified immunity. Dismissal on qualified-immunity grounds was unwarranted at this stage of the litigation."); ***Citizens in Charge, Inc. v. Husted***, 810 F.3d 437, 440-43, 445-46 (6th Cir. 2016) ("At the time Husted acted, no court had declared this residency requirement unconstitutional and he acted reasonably in saying he would enforce it. When public officials implement validly enacted state laws that no court has invalidated, their conduct typically satisfies the core inquiry—the 'objective reasonableness of an official's conduct'—that the immunity doctrine was designed to test. . . . Because Secretary Husted acted in the face of legislative action (a duly enacted, presumptively constitutional law) and judicial inaction (the absence of an on-point decision making the law unconstitutional), he did not violate clearly established law or otherwise act unreasonably. . . . So far as the parties' research has revealed and so far as our own research has uncovered, the Supreme Court has *never* denied qualified immunity

to a public official who enforced a properly enacted statute that no court had invalidated. This indeed would seem to be the paradigmatic way of showing objectively reasonable conduct by a public official. . . . The enforcement of a presumptively valid law, it is also true, does not automatically entitle officials to qualified immunity. Some laws may be 'so grossly and flagrantly unconstitutional' that any reasonable officer would decline to enforce them. . . This exception means that, contrary to plaintiffs' concerns, the Secretary would not receive qualified immunity for enforcing an 'involuntary servitude' law or one that required 'separate but equal racial accommodations,' even if such laws somehow were enacted by the Ohio General Assembly. . . .Today's election statute is not a 'grossly and flagrantly unconstitutional' law. At the same time that the Tenth Circuit has invalidated residency requirements for initiative-petition circulators, . . . the Eighth Circuit has upheld such a requirement, *see Initiative & Referendum Inst. v. Jaeger,* 241 F.3d 614, 616–17 (8th Cir.2001). . . . Whether our court would accept the Eighth Circuit's reasoning if presented with the same question matters not. What matters is that the existence of a circuit split by itself amply supports Husted's position that he could reasonably conclude that Ohio's residency requirement was constitutional. . . If judges can reasonably disagree about the meaning of the Constitution, we should not punish public officials for reasonably picking one side or the other of the debate. . . .The plaintiffs worry that permitting public officials to rely on a presumption of constitutionality will convert qualified immunity into absolute immunity whenever an executive officer enforces a validly enacted law. They note that, while courts have expressed concern about imposing personal liability on police officers who enforce presumptively legitimate statutes, the same anxieties do not apply to the Secretary of State, who has the legal staff and the budget to assess a law's constitutionality. But the *DeFillippo* inquiry does not create an absolute bar, and we may still hold executive officers liable for 'grossly and flagrantly unconstitutional' conduct, . . . as we have done before . . . . And while police-officer cases may raise some different concerns than the present one, we have never suggested that the qualified-immunity inquiry differs depending on the precise official at issue."); ***Mocek v. City of Albuquerque***, 813 F.3d 912, 922-27, 929 (10th Cir. 2015) ("During an investigative stop supported by reasonable suspicion of a predicate, underlying crime, 'it is well established that an officer may ask a suspect to identify himself.' [citing *Hiibel*] A state may criminalize the suspect's failure to comply. . . Thus, to determine whether Mocek's arrest comported with the Fourth Amendment, we must first consider whether there was reasonable suspicion to stop him and request his identity. If there was, we next must determine whether probable cause existed to believe he concealed his identity. Although we hold the investigative stop was justified by reasonable suspicion of disorderly conduct, we doubt that there was probable cause to arrest Mocek merely for failing to show documentation proving his identity in this case. Nonetheless, the officers are entitled to qualified immunity because even assuming they misinterpreted New Mexico law, their mistake was reasonable. . . . In concluding there was reasonable suspicion of disorderly conduct, we emphasize the uniquely sensitive setting we confront in this case. . . . Based on the face of the complaint, the information available to Officer Dilley indicated that Mocek had distracted multiple TSA agents, persistently disobeyed their orders, already caused a 'disturbance' (according to the agents on the scene), and potentially threatened security procedures at a location where order was paramount. Under these circumstances, a reasonable officer would have had reason to believe, or at least investigate further,

that Mocek had committed or was committing disorderly conduct. Accordingly, Officer Dilley was justified in stopping Mocek and asking him to identify himself as part of the investigation. . . .Mocek argues there was no probable cause to arrest him for concealing name or identity under § 30–22–3 because (1) Officer Dilley never even asked for Mocek's name; (2) although Officer Dilley did ask for Mocek's I.D., he did not ask for other identifying information; and (3) the statute does not criminalize the mere failure to produce physical documentation of identity. Mocek may be correct that Officer Dilley misinterpreted the statute. But even if he did, he at least had arguable probable cause to arrest Mocek because any mistake of law on his part was reasonable. . . .New Mexico law is not entirely clear on whether someone in Mocek's shoes might be required to answer basic questions about his identity, such as a request for his address. But Officer Dilley's *only* request was for documentation, and failing to show documentation, in isolation, during an investigative stop for disorderly conduct might not amount to concealing one's identity. Nonetheless, Officer Dilley is entitled to qualified immunity. A reasonable mistake in interpreting a criminal statute, for purposes of determining whether there is probable cause to arrest, entitles an officer to qualified immunity. . . . Here, New Mexico courts had explicitly held '[i]dentity is not limited to name alone' and 'failing to give either name or identity may violate the statute.'. . They had also held that at least during traffic stops, the statute requires a driver to produce a driver's license or the information therein upon request. . . Although the court declined to 'specify[ ] what identifying information might be appropriate' outside the driving context, . . . it nowhere foreclosed the possibility that documentation is required elsewhere. Thus, a reasonable officer could have believed that an investigative stop for disorderly conduct at an airport security checkpoint required the production of some physical proof of identity. And Mocek provided none. . . . Given Mocek's continued refusal to show identification and resolution to remain silent, a reasonable officer could have thought he was intentionally hindering investigative efforts. . . . Thus, in these circumstances, an officer who reasonably believed identification was required could have also believed that Mocek's ongoing failure to show it violated the statute. . . .We therefore hold Officer Dilley is entitled to qualified immunity on Mocek's Fourth Amendment claim."[footnotes omitted]); ***United States v. Cunningham***, 630 F. App'x 873, 878-79 (10th Cir2015) ("The officers in this case could reasonably believe this language encompassed turns when exiting a private parking lot because such turns constitute 'turn[ing] a vehicle from a direct course.' And they could also reasonably believe that 'turn[ing] a vehicle from a direct course' need not occur 'upon a roadway.'. . But it really doesn't matter. Even assuming 'upon a roadway' modified 'turn [ing] a vehicle from a direct course,' the officers could have reasonably believed Ulloa's failure to signal in this case occurred 'upon a roadway'—her turn required her to cross the westbound parking and driving lanes of the public road and enter its eastbound driving lane. Similarly, while Colorado's traffic code does not apply to private roads and driveways, *see* Colo.Rev.Stat. § 42–4–103(2), the conduct in this case did not occur exclusively on a private road or driveway. The officers could reasonably conclude (as we do) that such conduct involved 'the use of streets or highways' under § 42–4–103(2). We have found no authority from the Colorado Supreme Court or any Colorado Court of Appeals indicating otherwise."); ***Freeman v. City of Tampa,*** No. 8:15-CV-2262-T-30EAJ, 2015 WL 8270025, at *4 (M.D. Fla. Dec. 8, 2015) ("Freeman alleges that Defendant Officers violated the Fourth Amendment because they lacked

reasonable suspicion to detain him and search him. Freeman also alleges that Defendant Officers violated the Second Amendment to the extent that they interfered with his constitutional right to keep and bear arms. Defendants quibble with the facts, arguing that Defendant Officers had arguable reasonable suspicion to temporarily detain Freeman based on Fla. Stat. § 790.053(1), which prohibits the open carrying of a weapon. Defendants argue that Defendant Officers did not know that openly carrying a handgun while fishing was exempted conduct so they did not 'knowingly' violate the law. And that arguable reasonable suspicion can be supported by a mistake of law. This argument may ring true at the summary judgment stage. But the alleged facts, which this Court must accept as true at this stage, do not state or even suggest that Defendant Officers were acting under a mistake of law. Thus, qualified immunity cannot be determined at this time. Defendants' motion to dismiss on this issue is denied.")

Compare ***Coates v. Powell***, 639 F.3d 471, 476, 477 (8th Cir. 2011) ("On appeal, neither Coates nor Glandon challenge the court's determination that Glandon's conduct violated the Fourth Amendment. Accordingly, we turn to the second inquiry of qualified immunity analysis. . . . [W]e frame the clearly established question as whether a reasonable police officer would have known that he violated clearly established Fourth Amendment law by remaining in Coates's home for ten to fifteen minutes when the officer was accompanying a social services worker investigating a complaint of child neglect as authorized by state statute. We affirm the grant of qualified immunity. . . . Here, Glandon undertook an obligation under Missouri law to assist Clevenger in the investigation relating to Coates's children. . . Although Coates ordered the officers out of the house, she did not address Clevenger in that request. . . Clevenger remained inside the house, attempting to continue the investigation. We believe that a reasonable police officer could act in good faith and remain in the house still assisting Clevenger.") *with* ***Coates v. Powell***, 639 F.3d 471, 477-79 (8th Cir. 2011) (Shepherd, J., concurring in part and dissenting in part) ("I part ways with the majority. . .over its decision to grant qualified immunity to Glandon. I am deeply concerned about the Fourth Amendment violation at issue in this case. . . . The Supreme Court is crystal clear that without a warrant, an officer cannot enter a home absent exigent circumstances. . . Because Glandon did not have a warrant and there were no exigent circumstances, Glandon could only enter the home with Coates's voluntary consent . . . and he remained in the home subject to her approval. . . . Although a report of child abuse is a serious allegation, by the time Glandon was asked to leave the home, Glandon knew there was no immediate danger to the children. Accordingly, Glandon violated Coates's Fourth Amendment rights when he did not leave her home at her request. . . A finding of a Fourth Amendment violation does not end the analysis, and I agree with the majority that the crux of the qualified immunity question is whether a reasonable officer would have understood that remaining in Coates's home without her permission violated clearly established Fourth Amendment law. But I disagree with the majority's conclusion that despite the longstanding Fourth Amendment prohibition, Glandon acted reasonably because of the obligations imposed on officers under the Missouri statute at issue. Because I believe the Missouri statute did not make Glandon's actions objectively reasonable, I respectfully dissent. . . . [B]efore concluding that the Missouri statute at issue made Glandon's actions reasonable, I think the majority should have considered the statute's specificity. Because the Missouri statute imposes only a general

obligation on officers, Glandon's compliance with the statute did not make his actions reasonable. The relevant Missouri statute, section 2010.145 .4 of the Missouri Revised Statutes, states that '[t]he appropriate law enforcement agency shall ... assist the [Children's] division in the investigation.' The statute does not, however, define or specify the form of assistance required. Thus, although the statute obligated Glandon to offer some type of help, it did not specifically require him to accompany social services workers in their investigations, let alone require him to accompany them into private homes or remain with them in private homes even after homeowners withdraw their consent . . . Here, because remaining in Coates's home without her consent violated well-established Fourth Amendment law and nothing in Missouri statute obligated Glandon to stay, Glandon's actions were not objectively reasonable. . . .If the Missouri statute had in fact required Glandon to 'accompany' the social services worker, I would most likely agree that it made Glandon's actions reasonable. Because the statute imposed only a general obligation to assist, however, I conclude that despite the Missouri statute, a reasonable officer would have known that remaining in Coates's home violated clearly established Fourth Amendment law. I respectfully dissent from the majority's decision to grant qualified immunity to Glandon.").

See also ***Cahaly v. Larosa***, 796 F.3d 399, 407 (4th Cir. 2015) ("We turn to Cahaly's cross-appeal of his § 1983 and state law claims. Because we find that probable cause supported his arrest for violating the anti-robocall statute, we affirm the district court's grant of summary judgment to the Defendants. . . Cahaly alleges that LaRosa and Lloyd violated § 1983 by arresting and prosecuting him in retaliation for his exercise of free speech. He first argues that a genuine issue of material fact exists as to whether LaRosa had probable cause to arrest him. We disagree. A law enforcement officer who obtains an arrest warrant loses the protection of qualified immunity '[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'. . Although we agree with Cahaly and the district court that the statute is unconstitutional, at the time of Cahaly's arrest, 'there was no controlling precedent that [the statute] was or was not constitutional [and a] prudent officer [is not] required to anticipate that a court would later hold the [statute] unconstitutional.'. . Thus, our earlier holding has no bearing on whether LaRosa had probable cause when he arrested Cahaly."); ***Vincent v. Yelich***, 718 F.3d 157, 170 (2d Cir. 2013) ("The district court in *Vincent I* also found qualified immunity appropriate on the ground that ' "absent contrary direction, state officials ... are entitled to rely on a presumptively valid state statute ... until and unless the statute is declared unconstitutional[.]"'. . . We agree with the principle. But that presumption cannot be relied upon once the federal court of appeals for the circuit in which the officials operate has ruled that the exact conduct of the official, undertaken on the basis of the state statute, violates federal law. Although we note that qualified immunity may sometimes be available where a decision of the Supreme Court or this Court has announced a constitutional principle and subsequent cases have differed as to the reach of that holding, *see, e.g., Safford Unified School District # 1 v. Redding,* 557 U.S. 364, 378–79 (2009), such instances usually involve fact patterns that differ. Here, however, the very conduct that is challenged in the present cases is the conduct that was held unconstitutional in *Earley I.* Indeed, it was held unconstitutional with respect to one of the present plaintiffs. . . . The fact that it was not until 2008 that the New York Court of Appeals declared the administrative imposition

of PRS on prisoners who had not been so sentenced judicially to be unlawful under State law, however, did not affect the invalidity of such impositions under federal law, which was announced in *Earley I* in 2006. State and local officials are required to comply not just with state law but with federal law as well."); ***Acosta v. City of Costa Mesa***, 718 F.3d 800, 823, 824 (9th Cir. 2013) ("[O]ur determination that § 2–61 is facially invalid does not impact our review of the district court's determination that the individual officers are entitled to qualified immunity. When a city council enacts an ordinance, officers are entitled to assume that the ordinance is a valid and constitutional exercise of authority. . . If an officer reasonably relies on the council's duly enacted ordinance, then that officer is entitled to qualified immunity. . . . In the present case, qualified immunity still protects the officers even though we find the statute upon which they relied facially unconstitutional. Like the statute in *Grossman,* § 2–61 was duly promulgated by the proper process and was recognized as a valid portion of the Costa Mesa Municipal Code. Just as the officer in *Grossman* reasonably believed the statute constitutional, the officers here reasonably believed § 2–61 was constitutional. During oral argument, strong arguments were presented for the constitutionality of this statute and it would not be fair to require the officers of Costa Mesa to be versed in the nuances of the canons of construction such that they would recognize this statute's potential constitutional invalidity. Thus, it was objectively reasonable for the officers to believe the ordinance valid when they removed and later arrested Acosta for violating § 2–61."); ***Mueller v. Auker***, 700 F.3d 1180, 1188 (9th Cir. 2012) ("Idaho law permits a police officer to place a child in shelter care *without a court order* when necessary to prevent serious physical injury. I.C. § 16–1612(since renumbered as I.C. § 16–1608). The Muellers' late assertion in their reply brief that this law is 'obviously unconstitutional' is of no help to them on this issue, because at the time the disputed decisions were made, no clearly established law existed to that effect. Moreover, the existence of a state statute authorizing an official's disputed conduct weighs in that official's favor, so long as the statute itself does not offend the Constitution, and I.C. § 16–1612 does not."); ***Austell v. Sprenger***, 690 F.3d 929, 936, 937 (8th Cir. 2012) ("Qualified immunity is particularly appropriate in this instance because the DHS defendants were operating under conflicting statutory directives. DHS was required under Mo.Rev.Stat. § 210.245(2) to give TYBE notice and, upon TYBE's request, a hearing. However, TYBE's license expired on July 31, 2007, and Mo.Rev.Stat. § 210.211.1 explicitly prohibited TYBE from operating a childcare facility without a license 'in effect.' Once TYBE's license expired, DHS could not provide TYBE with pre-deprivation notice—the license expired by operation of law—while simultaneously enforcing the licensing requirement. We cannot say the DHS defendants' attempt to resolve this foggy statutory conflict was constitutionally unreasonable."); ***Alston v. Read***, 663 F.3d 1094, 1099, 1100 (9th Cir. 2011) ("[N]either *Haygood* nor *Alexander* establishes a duty to obtain a prisoner's court file where the institutional file appears complete, the sentence was appropriately recalculated under state law, and the prisoner has presented no evidence to the contrary. Read and Simmons were entitled to rely on the state statute and the original judgment received from the court in their sentencing calculations and were not required to go in search of additional courthouse records that might affect Alston's sentence beyond what was initially received from the court for inclusion in DPS's institutional file. . . . We conclude that there is no clearly established duty on a prison official to review a prisoner's original court records beyond those in his institutional file on the facts of this

case. Thus, Read and Simmons are entitled to qualified immunity."); ***Reher v. Vivo***, 656 F.3d 772, 775-78 (7th Cir. 2011) ("Where the law is open to interpretation, qualified immunity protects police officers who reasonably interpret an unclear statute. . . .The difficulty, and the reason the officers in this case are entitled to qualified immunity, is that, given the lack of case law on point, a reasonable officer would not necessarily have known whether Reher's alleged videotaping of the children was suspicious enough to cross the line between 'mere videotaping' and videotaping plus whatever else is necessary to give rise to disorderly conduct in Illinois. Certain things, however, should have been clear to the officers. It should have been clear that refusing to talk to and calling Gabinski a pejorative name was not enough to arrest Reher for disorderly conduct. . . It also should have been clear that the neighbors' agitation, alone, did not give the officers probable cause to arrest–especially since Reher claims to have told the officers that he remained calm when the neighbors accosted him and took his bicycle. . . But here there was more. Gabinski, at least, was aware that there was a long history of domestic disputes between Reher and Outlaw. While the last such dispute had occurred several years before, the incidents Gabinski was aware of were fairly serious, and included distributing nude pictures of Outlaw in the apartment complex, throwing a rock through Outlaw's window, and violating orders of protection. At the scene, Outlaw accused Reher of harassing her and her daughter, and at least one neighbor told the police that she had seen Reher in the park before. An arrest for disorderly conduct is justified when the defendant directly harasses or threatens other people. . .And Illinois courts have found that behavior similar to stalking can form the basis of a disorderly conduct charge. . . We find that, in light of Outlaw's accusations at the scene, it would have been reasonable for an officer with Gabinski's knowledge of Reher and Outlaw's turbulent history to conclude that Reher was harassing Outlaw and Ashley. Gabinski therefore had probable cause to arrest Reher for disorderly conduct. Even assuming otherwise, Gabinski would be entitled to qualified immunity. . . Whether Vivo is entitled to immunity is a closer question. He was not aware of Outlaw's allegations against Reher. . . .However, Vivo was aware that one of the women had accused Reher of videotaping the children. The same woman also told the officers that she was suspicious because she had seen Reher in the park several times before watching the children. Vivo would also have heard that Llorens, another neighbor, was worried that Reher was a sex offender or a peeping Tom. . . . [A]n officer faced with the circumstances present here could have reasonably, but mistakenly, believed that Reher was in fact harassing the children and alarming their parents, giving rise to probable cause to arrest. . .Therefore, Vivo is entitled to qualified immunity."); ***Amore v. Novarro***, 624 F.3d 522, 534, 535 (2d Cir. 2010) ("The plaintiff and *amici* suggest the fact that the statute had been held unconstitutional automatically and necessarily strips the officer of immunity. We disagree. We accept that it is the unusual case where a police officer's enforcement of an unconstitutional statute will be immune. And there are suggestions from the Supreme Court and our own court that an officer's entitlement to rely on a statute ordinarily expires when a binding court decision declares the statute unconstitutional. . . There are cases, too, from other circuits where qualified immunity was denied to an officer enforcing a statute that, while still 'on the books,' had previously been declared unconstitutional in a binding court decision. . . We have no reason to doubt the conclusions of those courts. But the statutes at issue and the circumstances of arrest they were considering differ from the facts presented here. . . None of these cases, nor any other binding

authority of which we are aware, stands for the categorical proposition that if a statute has been held unconstitutional, adherence to it by a law enforcement official is, *ipso facto,* unreasonable for qualified immunity purposes irrespective of the circumstances. We do not think that to be the law. . . We ordinarily impute knowledge of the case law to public officials. . . But, as Judge Hartz of the Tenth Circuit has noted, albeit in dissent, '[t]he statement in *Harlow* that reasonably competent public officials know clearly established law[ ] is a legal fiction.' *Lawrence v. Reed,* 406 F.3d 1224, 1237 (10th Cir.2005) (Hartz, J., dissenting) (internal citation omitted). Qualified immunity is appropriate in 'those situations in which the legal fiction does not make sense and applying that fiction would create problems that qualified immunity is intended to avert.'. . While we may not consider an official's subjective intent in determining whether he is entitled to qualified immunity, . . . we do–and must–consider 'the particular facts of the case,'. . . including the objective information before the officer at the time of the arrest. In the case at bar, where the defendant acted deliberately and rationally in seeking to determine the then–valid, applicable and enforceable law before taking the actions for which the plaintiff now seeks to hold him accountable, we cannot say that Novarro's arrest of Amore was objectively unreasonable. His immunity stands. . . . Our conclusion that Novarro's motion for summary judgment on the section 1983 claim against him must be granted on qualified-immunity grounds does not detract, of course, from Amore's remaining failure-to-train claim against the City of Ithaca; indeed the facts upon which it is based may tend to support such a claim."); ***Finch v. Peterson***, 622 F.3d 725, 726 (7th Cir. 2010) ("The 1978 consent decree does not operate to confer qualified immunity on the city officials who were involved in making the challenged promotions. Nothing in that decree required them to take race into consideration in making promotions. To the contrary, specific language in the decree required promotions within the Police Department to be made without regard to race or color."); ***Cowart v. Enrique***, 311 F. App'x 210, 215, 216 (11th Cir. 2009) ("Florida law gives agents of the FDOA inspection powers 'to enter into or upon any place ... if determined by the department to pose a threat to agricultural or public interest of this state.' Fla. Stat. ' 581.031(15)(a). The statute does not specifically require the agent to obtain a warrant before conducting an inspection. . . Deputies Enrique and Poole acted with the understanding that Agent Fagan did not need a warrant to remove the tree in Cowart's yard. Their reliance on the statute also led them to believe that Cowart committed a crime when he refused to allow the tree to be taken without a warrant. However, the Deputies' mistake will not subject them to liability for civil damages. The Deputies enforced a statute as it was enacted and therefore had no 'fair warning' that strict adherence to the Florida statutes would have them run afoul of the Constitution."); ***Kloch v. Kohl***, 545 F.3d 603, 609 (8th Cir. 2008) ("Even if we were to conclude that Dr. Kloch properly alleged a constitutional violation, we are satisfied that Bruning is entitled to qualified immunity under the second prong of our analysis: whether the right at issue was so clearly established that a reasonable official would have known that his conduct was unconstitutional. . . Qualified immunity protects public officials who act in good faith while performing discretionary duties that they are obligated to undertake. . . Bruning had a statutory obligation to enforce the laws of his state. . . His decision to enforce a law of arguable constitutional validity falls within the ambit of protected official discretion."); ***Hancock v. Baker***, 263 F. App'x 416, 2008 WL 268267, at *2, *3 (5th Cir. 2008) ("[D]ismissal of Hancock for refusing to take a polygraph that required her to waive her Fifth Amendment rights

was a violation of clearly established law. . . . Considering the clearly established law, a reasonable official should not have fired an employee under those circumstances. A reasonable official would have understood that a waiver of rights required by an officer from a different agency could have voided his promise that the investigation was administrative. The Supreme Court has clearly established that regardless of the ultimate effectiveness of the waiver, the coercion to waive the right violates the Fifth Amendment. . . . The fact that Fincher's requirement that Hancock waive her rights was a 'matter of procedure' does not make Baker's actions reasonable. That Fincher was blindly following a blanket procedure does not excuse Baker's violation of a clearly established constitutional right."); ***Kay v. Bemis,*** 500 F.3d 1214, 1221 n.6 (10th Cir. 2007) ("The question also remains whether the prison officials are entitled to qualified immunity in applying prison regulations to Kay's religious practices. Kay must show at the time of his challenged action it was clearly established that any regulation was unconstitutional. . . We have recognized that an officer's 'reliance on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question' may absolve the officer from knowing that his conduct was unlawful. . . The exception to this rule is that 'where a statute authorizes conduct that is Apatently violative of fundamental constitutional principles," reliance on the statute does not immunize the officer's conduct."); ***Boles v. Neet***, 486 F.3d 1177, 1183, 1184 & n.6 (10th Cir. 2007) ("The parties' disagreement about how broadly to define the constitutional right is understandable. As we have previously noted, striking the right balance is crucial to the qualified immunity analysis. . . . Our task is to evaluate Warden Neet's assertion of qualified immunity in the context of the circumstances that he faced without being too constrained by the particular facts of the case. . . . In support of his summary judgment motion, Warden Neet argued that his decision to deny Boles's request to wear religious garments during transport was based solely on prison regulations in effect at the time. . . . We appreciate Warden Neet's position that he did not intend to violate Boles's constitutional rights, but he is not immune from liability simply because he acted in accordance with prison regulations. . . . Warden Neet's actions were reasonable and he is entitled to qualified immunity only if the regulation that he relied on was reasonably related to a legitimate penological interest. Since, as we have already held, there is nothing in the record to indicate as much, he has not established the defense of qualified immunity. . . . We recognize that one of the relevant factors in evaluating the reasonableness of Warden Neet's actions is whether he relied on a regulation or official policy that explicitly sanctioned his conduct. . . But the regulation at issue here, AR 300-37 RD, at most only implicitly sanctioned his conduct. It states that inmates are to be transported in orange jumpsuits and transport shoes. In our view, whether it implicitly forbids the wearing of other items depends on the purpose behind the regulation."), qualified immunity granted on remand, *Boles v. Neet,* 2009 WL 3158125 (D. Colo. Sept. 29, 2009); ***Field Day v. County of Suffolk***, 463 F.3d 167, 192 (2d Cir. 2006) ("In support of their assertion that no clearly established right has been pleaded in this case, the Suffolk County Employees make two related arguments. First, they argue that the Mass Gathering Law 'withstood a constitutional challenge in the New York State Court system,'. . . . Second, citing *Vives v. City of New York*, 405 F.3d 115 (2d Cir.2005), the Suffolk County Employees argue that because the Mass Gathering Law had never been declared unconstitutional they were entitled to rely on it as presumptively valid, and thus were without 'prior notice of an alleged constitutional infirmity.' These related arguments suffer

from the same defect: They confuse and conflate the facial constitutionality of a statute with the unconstitutional application of that same statute. . . .*Vives* has no application to the issue presented here."); ***Way v. County of Ventura***, 445 F.3d 1157, 1166 (9th Cir. 2006) (Wardlaw, J., concurring) ("In this case, the Ventura County Sheriff's Department policy authorized the conduct in question. Officers Brooks and Hanson complied with that policy. In addition, California Penal Code ' 4030(f) specifically exempts those arrested on misdemeanor 'weapons, controlled substances or violence' charges from the general prohibition on strip and body cavity searches of persons arrested for misdemeanors. Because the policy and the state statute had not fallen into desuetude, *Grossman*, 33 F.3d at 1209 n. 19, nor were they 'patently violative of fundamental constitutional principles,' *id.* at 1209, it was objectively reasonable for officers Brooks and Hanson to rely on the policy and the state statute in performing the strip search on Way. I therefore concur with the majority in finding that the officers are entitled to qualified immunity."); ***Roska v. Sneddon***, 437 F.3d 964, 971, 972, 978 (10th Cir. 2006) ("In *Roska I*, this court held that Defendants' removal of Rusty without a warrant or pre-deprivation hearing deprived Plaintiffs of their clearly established constitutional right to maintain a family relationship. . . Usually, if the law is clearly established at the time of defendant's conduct, a qualified immunity defense will fail. . . 'Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.'. . Reliance on a state statute is one extraordinary circumstance which may render an official's conduct objectively reasonable. . . Reliance on a statute does not, however, make an official's conduct *per se* reasonable. . . Rather, it is one factor 'which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.' . . Relevant factors in determining whether reliance on a statute rendered an official's conduct objectively reasonable include: (1) the degree of specificity with which the statute authorized the conduct; (2) whether the official in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the official could have reasonably concluded the statute was constitutional. . . Defendants bear the burden of proving their conduct was objectively reasonable in light of a state statute. . . Utah Code Ann.§62A-4a-202.1 (1998) [In footnote court points out that AUtah child protection laws were amended after the events that gave rise to this litigation. The amended statute, which took effect in July 2002, requires exigent circumstances before DCFS can remove a child without a warrant. Utah Code Ann.§62A-4a-202.1(1) (2000 & Supp.2005)"] authorized DCFS to take a child into protective custody without obtaining a warrant if: (1) a caseworker had substantial cause to believe any of the factors in Utah Code Ann.§78- 3a-301 existed, and (2) the caseworker provided the child's parents or child with services that would eliminate the need for removal, if those services were reasonably available and consistent with the child's safety and welfare. Utah Code Ann.§62A-4a-202.2 provided for post-deprivation procedures that had to be in place before DCFS could remove a child without a warrant pursuant to Utah Code Ann. § 62A-4a-202.1. The parties agree that these statutory provisions had not fallen into desuetude at the time of Defendants' actions. Further, Defendants could have reasonably concluded the statute was constitutional. . . . Applying the factors this court articulated in *Roska I*, Defendants could have reasonably concluded Utah Code Ann.§§62A-4a-202.1 and -202.2 were

constitutional and had not fallen into desuetude. Defendants, however, failed to actually comply with the statute upon which they purportedly relied. While only one of the Roska I factors weighs against concluding Defendants' actions were objectively reasonable, it is an important factor and, in this case, it is dispositive. . . . [B]y failing to offer or provide preventive services that were reasonably available when faced with the opinion of the main treating physician that removal might harm Rusty more than allowing him to remain in the home, Defendants failed to properly consider and balance the parents' interest. In light of the balancing required by the statute and the Constitution, this failure was objectively unreasonable. Defendants are therefore not entitled to qualified immunity."); ***Cooper v. Dillon,*** 403 F.3d 1208, 1211, 1220 (11th Cir. 2005) ("This appeal requires us to determine the constitutionality under the First Amendment of a Florida statutory provision which makes it a misdemeanor for a participant in an internal investigation of a law enforcement officer to disclose any information obtained pursuant to the investigation before it becomes public record. . . .Now that we have determined that Fla. Stat. ch. 112.533(4) is unconstitutional, we turn to Cooper's claims that Dillon's enforcement of the statute subjected him to liability under § 1983 . . . in his individual and official capacities. At the time of Cooper's arrest, the statute had not been declared unconstitutional, and therefore it could not have been apparent to Dillon that he was violating Cooper's constitutional rights. . . While Cooper argues that the unconstitutionality of the pre-1990 version of the statute and Supreme Court precedent gave Dillon 'fair warning' that the new version would also be constitutionally deficient, such an argument is not persuasive. The legislative history reveals that the current version of the statute was designed to correct the constitutional problems within the pre-1990 statute, . . . and Dillon was entitled to assume that the current version was free of constitutional flaws."); ***Mimics v. Village of Angel Fire***, 394 F.3d 836, 846, 847 (10th Cir. 2005) ("Reliance on a statute does not make an official's conduct per se reasonable. . . It is, however, 'one factor to consider in determining whether the officer's actions were objectively reasonable, keeping in mind that the overarching inquiry is one of fair notice.' . . Determining whether reliance on a statute makes an official's conduct objectively reasonable, despite violating the plaintiff's clearly established rights, depends on '(1) the degree of specificity with which the statute authorized the conduct in question; (2) whether the officer in fact complied with the statute; (3) whether the statute has fallen into desuetude; and (4) whether the officer could have reasonably concluded that the statute was constitutional.' . . Reliance on a statute or regulation will not make an official's conduct objectively reasonable if the statute or regulation is obviously unconstitutional or if the officer 'unlawfully enforces [such] ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance.' . . To the extent Hasford is interpreting the Village ordinance and New Mexico statutes to permit nonconsensual warrantless entries at any time and under any circumstance, his understanding is not objectively reasonable. It has long been the rule that such warrantless nonconsensual entries into commercial property not open to the public violate the Fourth Amendment. . . More importantly, Hasford's reliance on the statue and regulations does not make his conduct objectively reasonable because there is evidence that Hasford did not comply with the terms of the statute and regulations."); ***Connecticut ex rel. Blumenthal v. Crotty***, 346 F.3d 84, 104 (2d Cir. 2003) ("Common sense dictates that reasonable public officials are far less likely to conclude that their actions violate clearly established rights when they are enforcing a

statute on the books with no transparent constitutional problems. Thus, in the realm of objective reasonableness, we hold that enforcement of a presumptively valid statute creates a heavy presumption in favor of qualified immunity. The question, then, becomes whether the Nonresident Lobster Law was so plainly unconstitutional and its enforcement so clearly unlawful, in light of all facts and circumstances, that the presumption in favor of qualified immunity is overcome, whereby Appellants should be held personally liable for monetary damages. We think not . . . ."); ***Buonocore v. Harris***, 134 F.3d 245, 253 (4th Cir. 1998) ("[A]lthough reliance on counsel's advice may indeed be a factor to be considered in deciding whether a defendant has demonstrated an 'extraordinary circumstance,' reliance on legal advice alone does not, in and of itself, constitute an 'extraordinary circumstance' sufficient to prove entitlement to the exception to the general *Harlow* rule.").

See also ***Crawford v. Blue***, No. CV 14-13042-WGY, 2017 WL 4181348, at *9 (D. Mass. Sept. 21, 2017) ("Here, it is undisputed that the Defendants were merely following the letter of the state law [that required a nonrefundable $25 filing fee to appeal a civil motor vehicle infraction]. Crawford puts forth no evidence suggesting that they should have known the state law was unconstitutional. The Defendants are therefore immunized from monetary damages."); ***Barrios v. City of Chicago***, No. 15 C 2648, 2016 WL 164414, at *15 (N.D. Ill. Jan. 14, 2016) ("The plaintiffs have identified a single case in this circuit supporting their claimed procedural due process right: *Niemeyer*, a 2012 Central District of Illinois district court decision. The *Niemeyer* court cited a 2004 Tenth Circuit case to support the proposition that a police officer who actively assists a private actor's repossession efforts can be liable under § 1983. . . This court agreed with the analysis in *Niemeyer*. However, it does not believe that the outcome in *Niemeyer* was foreordained by prior precedent, given the *Niemeyer* court's reliance on a 2004 out-of-circuit case. This is especially true given that the court has conducted its own research on the constitutional issue presented in this case. There is neither a robust nor a substantial consensus of opinion that encouraging a lienholder to repossess a car violates the right to procedural due process when remedies exist to challenge the impoundment of the car, as well as challenge any wrongful repossession. . . Moreover, the plaintiffs' allegations that Officer Jaeger's actions were taken in furtherance of the challenged City policy undermine their contention that he should have recognized that his actions violated a clearly established constitutional right. Reliance on a policy does not 'render the officer's conduct per se reasonable' for the purposes of qualified immunity. . . Thus, the existence of a policy cannot 'make reasonable a belief that was contrary to a decided body of case law.'. . But if 'the state of the law...[is] at best undeveloped,' it can be reasonable for a law enforcement officer to rely on a policy. . .The court finds that Officer Jaeger's reliance on the City's alleged policy is, therefore, further support for the court's conclusion that he is entitled to the protection of qualified immunity."); ***Peterson v. Bernardi***, No. 07-2723 (RMB/JS), 2010 WL 2521392, at *14 (D.N.J. June 15, 2010) ("Since the Court has held that Defendant Bernardi's instruction to resist DNA evidence-testing is not subject to absolute immunity, the question remains whether Defendant Bernardi is entitled to qualified immunity for this conduct. The answer is straightforward: Defendant Bernardi cannot be faulted for his errant interpretation of a novel statute, particularly where the first court to pass upon his interpretation adopted it. Here, the

controlling statute, N.J. Stat. Ann. § 2A:84A-32a, was enacted on January 8, 2002, just six months before Plaintiff filed his motion for post-conviction relief. Plaintiff's motion called upon Defendant Bernardi to interpret the statute without guidance from any prior cases, and the questions presented by the motion were matters of first impression. If ever an area of law were not 'clearly established', this area was not. . . Nothing in the record suggests that Defendant Bernardi's interpretation of the statute was objectively unreasonable. Indeed, although the Appellate Division ultimately vindicated Plaintiff's reading of the statute, the trial judge had sided with Defendant Bernardi in denying Plaintiff's motion. Accordingly, Defendant Bernardi's decision to oppose Plaintiff's July 2002 motion for postconviction relief is clearly protected by qualified immunity."); ***McNally v. Eve***, No. 8:06-CV-2310-T-23EAJ, 2008 WL 1931317, at *10 n.18 (M.D. Fla. May 2, 2008) ("Defendants . . . argue that Eve is entitled to qualified immunity because the Sheriff's internal use of force policy governed Eve's taser use and the level of force used was consistent with the Sheriff's general order. Defendants submit expert opinion evidence that the Sheriff's taser policy 'is consistent with the recommended guidelines, practices, and procedures of professional law enforcement agencies and their use of force models.' . . . Defendants cite no authority to support the proposition that compliance with an internal policy acts as a complete shield to liability and entitles an officer to qualified immunity."); ***Copar Pumice Co., Inc. v. Morris***, No. CIV 07-79 JB/ACT, 2008 WL 2323488, at *28 (D.N.M. March 21, 2008) ("Copar Pumice had a right not to be inspected without a search warrant, unless the state officials conducted their search pursuant to and in compliance with the substitute for a warrant–the statute and the permit. Furthermore, no extraordinary circumstances appear to have existed justifying the Defendants' failure to comply with state law or to secure a warrant. Nothing appears to have prevented the Defendants from knowing the law and following it. Additionally, reliance on a statute or regulation, such as the statute in this case, will not make an official's conduct objectively reasonable if the official 'unlawfully enforces [such] ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance.' [citing *Mimics, Inc.*] The plain language of the statute and of the permit told Morris and Yantos what needed to be done. A reasonable officer would realize that, to comply with the statute and come within the warrantless exception, he or she must follow the statute. Morris and Yantos did not comply with the plain language of the statute or the permit. There is no basis to excuse the Defendants' violation of a well-established constitutional right on the basis of extraordinary circumstances. The Court will thus deny Defendants' motion for summary judgment on the basis of qualified immunity in regards to Morris and Yantos' search."); ***Wares v. Simmons***, 524 F.Supp.2d 1313, 1325, 1326 (D. Kan. 2007) ("In considering the 'objective legal reasonableness' of the state officer's actions, one relevant factor is whether the defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question. . . Of course, an officer's reliance on an authorizing statute does not render the conduct *per se* reasonable. . . Rather, 'the existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional.' . . . Here, it is uncontested that defendants removed the desired religious books as a disciplinary measure in reliance upon and in accordance with the requirements of the property restrictions found in the relevant policies, which were official policies of the KDOC. These policies are not obviously

unconstitutional, and no reason has been shown why defendants should have believed they were acting unconstitutionally in removing the books. This is particularly so since during the course of plaintiff's grievance about defendants' seizure of the books, defendants consulted with and relied upon the opinion of one considered to be an expert in the matter–a Jewish rabbi. When asked about the specific application of their policies to the religious books desired by plaintiff, the rabbi unequivocally confirmed that neither the 'Tanya' nor the 'Tehillim' was essential for the practice of plaintiff's faith. Although plaintiff now implies that the rabbi may have lacked knowledge about the details of plaintiff's particular branch of Judaism, defendants' reliance upon the rabbi's opinion was nonetheless objectively reasonable. Defendants had no reason to believe that the rabbi was uninformed or that their policy, which at all times preserved the inmate's right to possess the primary texts of his religion and to practice his religion, was unconstitutional. Accordingly, defendants are entitled to qualified immunity."); ***Steele v. City of Bemidji,*** 242 F. Supp.2d 624, 627, 628 (D.Minn. 2003) ("Defendants correctly note that the City's ordinances had not been ruled unconstitutional in 1998. They further point to the Magistrate's ruling, upheld by the District Court, finding the ordinances constitutional. . . From this, the City defendants argue that while the ordinances may have been found unconstitutional on appeal, their infringement on the First Amendment was not clearly established at the time of the incidents about which Steele complains. This argument is not without some persuasive force. The Court can hardly expect police officers to know better than judges that a duly-enacted city law violated the Constitution. Thus, the Court finds the police officers, who relied on the advice given to them by the City Attorney, are entitled to qualified immunity in this case. But this determination does not end the Court's inquiry. In the words of the Eighth Circuit, viewing the facts in the light most favorable to Steele, the City Attorney sought to apply these ordinances to Mr. Steele 'whether or not he attempt[ed] to sell his newspapers and whether or not he place[d] them on City property.' . . Therefore, although the ordinances' unconstitutionality may not have been clearly established for all parties in August, 1998, the Court sees no basis on which the City Attorney could presume they were in conformity with the Constitution when Steele simply gave the Herald away, without charge, on the sidewalk outside the Post Office. The Court finds that the contours of the First Amendment are such that a reasonable city attorney would recognize this constitutional infirmity.").

But see ***United Pet Supply, Inc. v. City of Chattanooga, Tenn***., 768 F.3d 464, 488, 489 (6th Cir. 2014) ("[T]here is no dispute that *never* providing an opportunity to challenge a permit revocation violates due process. Thus, the revocation of Pet Supply's permit without a pre-deprivation hearing or a post-deprivation hearing violated due process. No reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy was constitutional. Walsh argues that she was entitled to rely on the constitutionality of the Chattanooga City Code, which does not provide for a hearing on the revocation of a pet-dealer permit. Certainly, there are policy reasons that counsel in favor of allowing government officials to presume the constitutionality of statutes and ordinances. . . . But the Chattanooga City Code does not make the revocation of the permit automatic upon the determination that negligence or misconduct has occurred. The Code states that an animal-related

permit '*may be* revoked if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public.'. . The Code did not tie Walsh's hands; it was her discretionary decision immediately to revoke the permit. This is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious. . . . no reasonable officer could believe that revoking this permit without providing any opportunity for a hearing was constitutional. Accordingly, the evidence taken in the light most favorable to Pet Supply demonstrates the violation of a clearly established right, and so we deny qualified immunity to Walsh on this claim."); ***Courtney v. Oklahoma ex rel., Dept. of Public Safety***, 722 F.3d 1216, 1226, 1227 (10th Cir. 2013) (no qualified immunity based on "mistaken legal conclusion regarding the scope of the felon-in-possession statute" where statute is not ambiguous and it was clear that officer lacked probable cause for arrest); ***Denton v. Rievley***, 353 F. App'x 1, 6, 7 (6th Cir. 2009) ("Finally, Rievley argues that he is entitled to qualified immunity because he was following a Tennessee statute denoting a preference for arrest in cases where there is probable cause of domestic abuse. . . Other Circuits have held that while reliance on a statute is a factor to consider in determining whether or not an officer's actions were objectively reasonable, '[r]eliance on a statute does not make an official's conduct *per se* reasonable.'. . Here, the relevant statute states: If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or felony, or was committed within or without the presence of the officer, the preferred response of the officer is arrest. . . .Even if compliance with a state statute generally renders an officer's conduct more reasonable, this particular statute lacks specificity and is not necessarily applicable to the case at hand. First, the statute does not require arrest in situations involving domestic violence; it has merely been interpreted to *permit* warrantless arrests in such situations. . . . Second, the statute does not specifically address warrantless in-home arrests; it is silent on whether its preference for arrest applies inside a home when an officer lacks consent or exigent circumstances. . . We, therefore, do not think an interpretation of Tenn.Code Ann. ' 36-3-619 to permit warrantless in-home arrests is objectively reasonable in light of long-standing Supreme Court precedent holding that such arrests violate the Fourth Amendment."); ***Guillemard-Ginorio v. Contreras-Gomez***, 490 F.3d 31, 38-41(1st Cir. 2007) ("With respect to Contreras, Defendants argue that he is entitled to qualified immunity because he was acting pursuant to a presumptively constitutional statute. Defendants point out that the Puerto Rico Insurance Code authorizes the Insurance Commissioner to 'suspend, revoke or refuse to renew a license' by issuing an 'order ... to licensee not less than fifteen days prior to the effective date thereof, subject to the right of the licensee to have a hearing,' and provides that 'pending such hearing, the license shall be suspended.' P.R. Laws Ann. tit. 26, ' 947(2)(a). . . . [T]o the extent Contreras or Juarbe acted in reliance on section 947(2)(a), enacted in 1957, we find such reliance unreasonable because that statute is no longer in effect, having been superseded by the Puerto Rico Uniform Administrative Procedure Act, P.R. Laws Ann. tit. 3, ' 2101 *et seq.* (the "Puerto Rico APA"). . . . Neither party disputes that the Puerto Rico APA provides for pre-deprivation hearings at all agency levels. . . . The Supreme Court of Puerto Rico has held that the Puerto Rico APA expressly supersedes any conflicting statutes. . . . Given the Puerto Rico APA's pre-deprivation hearing requirement, any claimed reliance on section 947's summary-revocation provision is unreasonable as a matter of law. . . . We also find reliance on section

947(2)(a) unreasonable because the statute is patently unconstitutional. Although state officials are ordinarily entitled to rely on presumptively valid state statutes, courts have held such reliance unreasonable where the relevant law is 'so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.' . . . Section 947(2)(a) is patently unconstitutional because it specifically provides for the suspension of a professional license before a hearing is provided, without limitation. . . . . Thus, we find that Defendants are not entitled to rely on section 947(2)(a)'s allowance for pre-hearing deprivations because a reasonable official in their position would have known that it violates the Due Process Clause.").

Compare ***Lawrence v. Reed***, 406 F.3d 1224, 1230-36 (10th Cir. 2005) ("The only question on appeal, then, is whether 'extraordinary circumstances' excused [Sheriff] Reed from knowing the clearly established law. Mr. Reed points to two reasons why he neither knew nor should have known that the seizure of Mrs. Lawrence's vehicles violated clearly established law: his consultation with the city attorney, and his reliance on the derelict vehicle ordinance. . . . In this case, we find particularly significant the fact that Mr. Reed and City Attorney Lewis never once discussed the applicable constitutional law governing Mr. Reed's conduct. Mr. Reed concedes that a warrant or notice-and-hearing are required before depriving a citizen of their property; he also concedes that these constitutional requirements were clearly established and that he violated them. Yet he now argues that his consultation with the city attorney–who never once mentioned the requirement of a warrant or notice-and-hearing– somehow prevented him from knowing that these procedures were constitutionally required. This cannot be the case. What Mr. Reed really wants us to conclude is that it is generally reasonable to rely on the city attorney's advice–that it is the attorney's job, not the police officer's, to point out when a statutorily authorized course of conduct violates the Constitution. But this is an argument that officers should not be held responsible for knowing the law in the first place, not that consultation with the city attorney somehow interfered with that knowledge. Given Mr. Reed's concession that his conduct violated Mrs. Lawrence's clearly established rights, and given the Supreme Court's admonishment that 'a reasonably competent public official should know the law governing his conduct,' . . . Mr. Reed must point to something in his consultation with the city attorney that prevented him from knowing the law. This he has not done. The district court therefore erred by granting Mr. Reed immunity on the basis of his consultation with the city attorney. . . . Alternatively, Mr. Reed argues that he should not be held responsible for knowing the unlawfulness of his conduct because his conduct was authorized by the Rawlins derelict vehicle ordinance. . . . Thus, officers can rely on statutes that authorize their conduct–but not if the statute is obviously unconstitutional. Again, the overarching inquiry is whether, in spite of the existence of the statute, a reasonable officer should have known that his conduct was unlawful. . . . Just as we do not require officials to predict novel constitutional rulings, we do not require them to predict novel statutory rulings. Instead, the focus of the qualified immunity inquiry is on what a reasonable officer should have known. Here, Mrs. Lawrence concedes that the derelict vehicle ordinance applies on its face to her property; but she argues that the 1982 Settlement Agreement carved out an exception for her industrially zoned property. What she has failed to produce, however, is any evidence that Mr. Reed knew or should have known about the 1982 Settlement Agreement. Absent such evidence, we cannot conclude

that the agreement rendered unreasonable Mr. Reed's conclusion that the derelict vehicle ordinance authorized his conduct. . . But this does not end our inquiry. Another important consideration is whether Mr. Reed could reasonably have concluded that the statute was constitutional. . . . Mr. Reed should have known that the ordinance was unconstitutional. Had the derelict vehicle ordinance provided some form of pre-or post-deprivation hearing–even a constitutionally inadequate one–we would not necessarily expect a reasonable officer to know that it was unconstitutional. For once the ordinance provides a hearing, its constitutionality turns on a court's resolution of the *Mathews* balancing test, which, in the absence of case law directly on point, is not something we would require officers to predict. Here, however, the ordinance provides no hearing whatsoever; an officer need not understand the niceties of *Mathews* to know that it is unconstitutional. Our decisions, and those of other circuits, have made abundantly clear that when the state deprives an individual of property–for example, by impounding an individual's vehicle–it must provide the individual with notice and a hearing. . . This is especially true where, as here, the state not only impounds the vehicles but permanently disposes of them. . . In sum, a hearing is '[t]he fundamental requirement of due process,' . . . and the Rawlins derelict vehicle ordinance does not even pretend to provide one. This is a sufficiently obvious constitutional violation that Mr. Reed should have known about. Mr. Reed, therefore, was not entitled to rely on the ordinance, and qualified immunity is inappropriate. . . . In spite of the layers of complexity built up around the doctrine of qualified immunity, the fundamental inquiry is fairly simple: should the officer have known that his conduct was unlawful? For the reasons set forth above, we find that Mr. Reed should have known that his conduct was unlawful, and we therefore REVERSE the district court's grant of immunity and its dismissal of Mrs. Lawrence's claims, and REMAND for further proceedings.") *with* ***Lawrence v. Reed***, 406 F.3d 1224, 1236-39 (10th Cir. 2005) (Hartz, J., dissenting) ("I respectfully dissent. The Supreme Court opinion providing for qualified immunity in 'extraordinary circumstances' despite the violation of clearly established law, *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), gives little guidance on what circumstances are 'extraordinary.' The majority may well have construed the term correctly. But the very concerns expressed in *Harlow* suggest to me that Sheriff Reed is entitled to qualified immunity. . . . Given the complexities of the law today, it should not be surprising to find intelligent, conscientious, well-trained public servants who do not know all the clearly established law governing their conduct. The statement in *Harlow* that reasonably competent public officials know clearly established law, . . . is a legal fiction. Nevertheless, the objective test, and the legal fiction it embraces, can advance the policies behind qualified immunity if the extraordinary-circumstances exception is properly understood. The extraordinary-circumstances exception should encompass those situations in which the legal fiction does not make sense and applying that fiction would create problems that qualified immunity is intended to avert. In my view, this goal can be advanced by including as an extraordinary circumstance the official's reliance on specific advice by a nonsubordinate attorney of sufficient stature regarding the specific challenged action. Although, as I previously stated, it is doubtful that reasonably competent public officials actually know all the clearly established law governing their conduct, it is largely true that reasonably competent public officials are sufficiently versed in the law that they know not to take certain actions without seeking proper legal advice. If they violate clearly established

law without having sought legal advice, holding them liable makes good sense. But there is little sense in holding officials liable for unlawful action that received the imprimatur of properly sought legal advice. The *Harlow* legal fiction should not be extended to say that reasonably competent public officials know when the legal advice they receive is contrary to clearly established law. . . . Thus, in my view, incorrect legal advice is an extraordinary circumstance cloaking an official with qualified immunity when, as here, it comes from the highest level nonsubordinate attorney with whom the official is to consult and the attorney is fully informed of the planned action and the surrounding circumstances. . . . In the present case Sheriff Reed fully informed the City Attorney of the relevant surrounding circumstances and how he intended to proceed. The City Attorney gave his imprimatur. It would be contrary to Harlow's underlying concern about 'dampen[ing] the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties,' . . . to tell officials like the sheriff that they cannot rely on their chief nonsubordinate government attorneys but must postpone action (to conduct their own research or call a professor at the nearest law school?) or risk being sued.").

Compare ***Leonard v. Robinson***, 477 F.3d 347,355, 356, 361 (6th Cir. 2007) ("Probable cause is clearly relevant to Leonard's First Amendment retaliation claims. *See Hartman v. Moore*, 126 S.Ct. 1695, 1699 (2006). In *Hartman*, the Supreme Court determined that probable cause is an element of a malicious prosecution charge brought as constitutional tort under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). . . Although there are differences between wrongful arrest and malicious prosecution, . . . there is an obvious similarity in that 'the significance of probable cause or the lack of it looms large,' . . . .*Hartman*, therefore, calls into question our cases holding that 'probable cause is not determinative of the [First Amendment] constitutional question.' . . Yet, we need not decide whether *Hartman* adds another element to every First Amendment claim brought pursuant to § 1983 because, when viewed in the light most favorable to the plaintiff, we find that the facts of this case demonstrate an absence of probable cause. In sum then, both Leonard's claims . . . and Robinson's defenses turn on the laws that Leonard allegedly violated and their validity as applied in the context of a democratic assembly. Again, when the facts are viewed in a light most favorable to Leonard, we believe that First Amendment freedoms, clearly established for a generation, preclude a finding of probable cause because the laws cited by Robinson are either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct) at a democratic assembly where the speaker is not out of order. . . . We therefore hold that no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly. . . . Therefore, because Leonard's arrest was not supported by probable cause, it was error for the district court to grant Robinson qualified immunity on the Fourth Amendment claims.") *with* ***Leonard v. Robinson***, 477 F.3d 347, 363-67 (6th Cir. 2007) (Sutton, J., concurring in part and dissenting in part) ("Put yourself in the shoes of Officer Robinson when it comes to enforcing just one of these statutes, §750.170 ("Disturbance of lawful meetings"), on the evening of October 15, 2002. Let us assume (improbably) that Robinson had looked at the statute before attending the meeting. Let us assume (even more improbably) that

Robinson had looked at judicial interpretations of the statute before the meeting. And let us assume (most improbably) that Robinson had read *Cohen v. California*, 403 U.S. 15 (1971), before the meeting. The statute, he would have learned, says that '[a]ny person who shall make or excite any disturbance ... at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor.' Nothing about the case law enforcing the provision would have tipped him off that he was clearly forbidden from applying it here. . . .Even had Robinson been equipped with this uncommonly extensive knowledge of Michigan and federal law, indeed even had Robinson carried a laptop equipped with Westlaw and Lexis/Nexis to the meeting, I am hard pressed to understand how he would have known that it was 'clearly established' that he could not enforce this law in this setting. . . . To my knowledge, the Supreme Court has never rejected a claim of qualified immunity to a police officer who enforced a statute that had not been declared unconstitutional at the time of the citizen-police encounter. While [*Michigan v.*] *DeFillippo*[, 443 U.S. 31 (1979)] acknowledges 'the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws, . . . the exception remains just that–a theoretical possibility, one that can be imagined but that the Court has never enforced. Adhering to *DeFillippo's* guidance that the combination of legislative action and judicial inaction generally 'forecloses speculation by enforcement officers concerning [a statute's] constitutionality,' 443 U.S. at 38, the Sixth Circuit has resisted imposing liability on police officers and other officials who fail to anticipate each twist and turn of judicial review. [collecting Sixth Circuit cases] The other courts of appeals have taken the same path. [collecting cases] . . . . In the end, Leonard not only asks us to take a road less traveled but one never traveled. It is one thing to credit police officers with knowledge of all statutory and constitutional rulings potentially bearing on all statutes they enforce; but this necessary requirement needlessly loses any connection with reality when we hold police officers to the standard of anticipating a court's later invalidation of a statute that was duly enacted by legislators sworn to uphold the Constitution, that is presumed constitutional, that has been on the books for 75 years and that has withstood two constitutional challenges. The First Amendment properly protected Leonard from being prosecuted for his unruly speech and conduct–and for now that is enough. To expose Robinson to money damages for enforcing these laws not only seems unfair (absolute immunity protects the legislature from similar risks, *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998)) but also risks placing him in the push-me-pull-me predicament of having to decide which duly enacted laws to enforce and which ones not to enforce on the pain of losing either way–because he is charged with dereliction of duty when he opts not to enforce the law and because he is charged with money damages when he does enforce the law. . . . Leonard fares no better under his free-speech retaliation claim. Because probable cause existed to arrest Leonard, as has been shown, our case law forecloses this claim as a matter of law.")

See also ***Sampson v. City of Schenectady***, 160 F. Supp.2d 336, 350 (N.D.N.Y. 2001) ("In this Court's view, even if the Officers' assertions were given full credit and borne out by discovery, their claims of negligent training and unlawful policy do not create the type of 'extraordinary circumstances' needed to invoke the exception to the general *Harlow* rule. This is so because municipal liability for negligent training and unlawful policies are typically incorporated into

section 1983 claims of the type found here. If the Court were to conclude that a claim for negligent training or an unlawful policy on the part of a municipality entitled an official to avoid liability even if their actions violated clearly established constitutional rights, the 'extraordinary circumstances' exception to *Harlow* would become nullified as any officer could claim the exception to the rule simply because a Plaintiff filed suit against the municipality as well as the individual officer. Moreover, given the clarity of existing case law and the flagrancy with which the Officers violated it, the Court will not allow their city policy and negligent training claims to cloak their unlawful conduct with the veil of objective reasonableness.").

G. Supervisory Officials vs. "Line" Officers

See, e.g., ***Marsh v. Phelps County***, 902 F.3d 745, 754-56 (8th Cir. 2018) ("Marsh's claim that Samuelson and Gregg 'knew or should have known' their actions or omissions created a substantial risk of injury to Marsh evinces a negligence standard not contemplated under § 1983. . . 'To establish personal liability of the supervisory defendants, [Marsh] must allege specific facts of personal involvement in, or direct responsibility for, a deprivation of [her] constitutional rights.'. . As to Marsh's failure-to-train claim, '[a] supervisor's failure to train an inferior officer may subject the supervisor to liability in his individual capacity only "where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officers] come into contact."'. . Overarching these claims is qualified immunity. A supervising officer will not be individually liable for an otherwise unlawful act if he is entitled to qualified immunity. Qualified immunity protects government officials from liability for civil damages in their individual capacities if their conduct did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . Marsh does not allege that Samuelson or Gregg ordered or directed Campana to sexually assault female inmates, or Marsh particularly. Thus, their alleged liability cannot be based on direct participation in this constitutional violation. In this action, Marsh alleges that Samuelson and Gregg failed to protect her from the substantial risk of harm that Campana presented to herself and other inmates. She argues the evidence that Campana might possibly have problems working around females, that he was counseled to be careful with his interactions lest he open himself up to a law suit, the verbal complaints of Johnson not wanting to work alongside Campana, and the evidence of Campana's character while performing his job duties, all support an inference that Samuelson and Gregg were aware of the risk Campana posed to female inmates. Marsh claims as to Samuelson that it was his inaction against the 'known' danger Campana posed that establishes his liability. Sheriff Samuelson is entitled to qualified immunity unless he had notice of a pattern of conduct that was sufficiently egregious in nature. Qualified immunity from supervisory liability turns on what Samuelson knew of Campana's actions. . . Here, there is insufficient evidence to infer that Samuelson knew of any danger posed by Campana, and most certainly he did not receive notice of a pattern of unconstitutional acts. Much of the problem in this matter is that the evidence Marsh points to as creating material fact issues, is largely information garnered *after* Campana's suspension. That it became known later, when Campana no longer had a presence at the jail, there were red flags lurking but unknown at the time of his hiring does not create liability for Samuelson,

nor does it create a fact issue on appeal when these facts were not known by Samuelson prior to Campana's suspension. . . .On these facts, a reasonable officer in Sheriff Samuelson's shoes would not have known that he needed to more closely supervise Campana. . The district court correctly granted Samuelson qualified immunity. . . . Marsh claims that there were written policies that prohibited male officers from being in the female cells and claims without record citation that Samuelson and Gregg were aware Campana 'openly defied' those policies. 'Assuming without deciding that "turning a blind eye" could ever constitute actual notice' of wrongdoing sufficient to support a constitutional claim, being aware that Campana violated jail policy, without more, by accompanying female inmates in their cells 'falls far short of notice of a pattern of conduct that violated' Marsh's constitutional rights. . . .On the facts before us, neither Gregg (nor Samuelson) had information that would have raised an inference that Campana was violating his duties as an officer by sexually assaulting female inmates. It is not a reasonable inference on these facts, for example, to assume that a general claim that someone might possibly have a problem working with women indicates that individual poses a threat of sexually assaulting women."); ***Gerhart v. McLendon***, 714 F. App'x 327, 333-35 (5th Cir. 2017) ("McLendon concedes that the Gerharts have established the first prong of the qualified immunity analysis, but he contends that they cannot establish the second prong for two reasons. First, there is no case that requires an officer who does not plan a search or lead a search team to ensure that the place to be searched is correctly identified. Second, the extreme circumstances under which he mistakenly entered the Gerhart residence tip the reasonableness balance in his favor. We consider (and reject) each of these arguments in turn. . . . McLendon concedes that the Gerharts have established the first prong of the qualified immunity analysis, so we can assume that he did not make reasonable efforts to correctly identify the target residence. The question, then, is whether McLendon had fair notice that his efforts fell short of that standard under the second prong. An unpublished case from this circuit is directly on point. . . .McLendon counters that there is no binding precedent in which this court or the Supreme Court has held that a similarly situated officer acting under similar circumstances violated the Fourth Amendment. The Supreme Court has rejected a rigid requirement that previous cases be 'materially similar' in order for the law to be clearly established. . . We need not immunize an officer from suit for an obvious violation simply because no case has held that the officer's precise conduct was unlawful. . . The law was clear that McLendon had to make 'a reasonable effort to ascertain and identify the place intended to be searched.'. . McLendon is right, of course, that we have not exhaustively and precisely defined the contours of what constitutes a 'reasonable effort.' Whatever the precise contours of that phrase, it surely means that officers must make an effort to be sure they search the right residence in order to receive the protections of qualified immunity. . . . McLendon's conduct does not fall at the hazy borders of the law. The district court found that he was totally unaware of key operational details and did not even bother to ask. On this record, it appears that he did little more than show up. McLendon argues that the cases establish only that officers leading a search must make such efforts. We cannot endorse such a confined view of the precedent. To the contrary, although the cases impose heightened obligations on leaders, they make clear that officers who participate in searches still have an obligation to make reasonable efforts to correctly identify the place to be searched. . . . An officer who makes no reasonable effort to correctly identify the place to be searched does not

get immunity merely because someone else was leading the search. Accordingly, McLendon violated clearly established law by failing to make any effort to ensure that he could correctly identify the target residence."); ***Ehlers v. City of Rapid City***, 846 F.3d 1002, 1010 (8th Cir. 2017) ("Generally, an assisting officer is entitled to rely on the probable cause determination of the arresting officer and may receive qualified immunity as long as the reliance is reasonable. *Doran v. Eckold*, 409 F.3d 958, 965 (8th Cir. 2005) (finding that an officer assigned to operate a battering ram had no constitutional duty to verify the supervising officer's decision to execute a no-knock entry based on "the settled principle that law enforcement officers may rely on information provided by others in the law enforcement community, so long as the reliance is reasonable"); *see also Mitchell v. Shearrer*, 729 F.3d 1070, 1073 (8th Cir. 2013) (noting that "[t]here is no evidence to suggest that [the assisting officers] were involved in the decision to arrest [the plaintiff] or that they knew or should have known that the seizure was unlawful"). Other circuits likewise do not require assisting officers to have independent probable cause in order to receive qualified immunity. *See Stearns v. Clarkson*, 615 F.3d 1278, 1286 (10th Cir. 2010); *Brent v. Ashley*, 247 F.3d 1294, 1305-06 (11th Cir. 2001); *Liu v. Phillips*, 234 F.3d 55, 57-58 (1st Cir. 2000). Nothing in the record indicates that Dirkes's reliance on Hansen's instruction was unreasonable, and Ehlers does not argue to the contrary. Accordingly, Officer Dirkes is entitled to qualified immunity from Ehlers's unlawful arrest claim."); ***Heaney v. Roberts***, 846 F.3d 795, 804 (5th Cir. 2017) ("Unlike the deputy in *Cozzo*, who had ample time and reasons to conclude that he was carrying out an illegal act, Black had no reason to believe that he was violating Heaney's First Amendment rights by following Roberts's order. We agree with the district court that 'Black was not required to cross-examine and second-guess Roberts regarding his First Amendment motives before acting.' *See Collinson v. Gott*, 895 F.2d 994, 997 (4th Cir. 1990) (affirming qualified immunity for a sheriff's deputy who escorted a citizen out of a city council meeting upon receiving orders to do so from the presiding officer). Black is entitled to qualified immunity on the First Amendment claim because his actions as sergeant-at-arms were not objectively unreasonable in light of clearly established law. We affirm on that claim."); ***Reza v. Pearce***, 806 F.3d 497, 507 (9th Cir. 2015) (order denying reh'g and reh'g en banc and amending opinion) ("Reza also contends that Officers Jeff Trapp and John Burton violated his constitutional rights by preventing him from entering the Building, and by subsequently arresting him. The officers respond that they are entitled to qualified immunity, because they were complying with a facially-valid order from Senator Pearce to exclude Reza, and because they had probable cause to arrest Reza. We hold that the district court did not err in granting the officers' motion to dismiss on qualified immunity grounds, because they arrested Reza for criminal trespass pursuant to a facially-valid order issued by Senator Pearce."); ***Barnes v. Furman***, 629 F. App'x 52, 56-57 (2d Cir. 2015) ("Taken together, our earlier decisions have clearly established that prison officials may not prohibit a sincere religious practice without some legitimate penological interest. The only legitimate penological objectives defendants point to are related to the requirement that inmates register their religious affiliation with prison officials and the Department of Corrections, and that prison officials rely to some extent on that designation. Defendants do not, however, provide any legitimate penological reasons behind prison officials' and chaplains' former adherence to a policy that limited Jewish inmates' head coverings to yarmulkes only. Nor do the defendants offer a legitimate penological reason for deferring to the

New York State Board of Rabbis where the sincerity of Barnes's belief was apparently uncontested. . . .For qualified immunity to apply on this basis, defendants must demonstrate that 'no rational jury could fail to conclude' that it was reasonable for them to believe that their conduct did not violate the prisoner's constitutional rights. . . When officials follow an established prison policy, as defendants did here, their entitlement to qualified immunity depends on 'whether a reasonable officer might have believed that the challenged order was lawful in light of legitimate penological interests supporting' the directive. . . While the individual corrections officers who confiscated Barnes's Tsalot–Kob may very well have been acting reasonably when following DOCS policy, a different analysis may apply to those responsible for the policy. On this record, it is not apparent whether there was a legitimate penological reason to limit only Tsalot–Kobs to inmates registered as Rastafarian. Therefore, we cannot say as a matter of law that it was objectively reasonable for those defendants to believe that denying a Tsalot–Kob to an inmate registered as Jewish was constitutional. Moreover, because defendants have not identified any penological interests supporting the policy, we cannot assess the reasonableness of their actions. Accordingly, we remand to the district court for further proceedings and development of the record."); ***Estate of Brown v. Thomas***, 771 F.3d 1001, 1002, 1005 (7th Cir. 2014)) ("The estate contends not that Secor shouldn't have pulled the trigger when he saw a shotgun was pointed at him but that the police search was executed in an unreasonable manner (see, e.g., *Terebesi v. Torreso*, 764 F.3d 217, 233–36 and n. 16 (2d Cir.2014); cf. *Petkus v. Richland County*, 767 F.3d 647, 650–52 (7th Cir.2014)), violating the Fourth Amendment and causing Secor mistakenly to think he had to kill Brown in self-defense. . . . [Expert] Gaut's report concludes that the search of the apartment was a 'gross deviation from accepted police practices and procedures by the Brown County Sheriff's Office,' a deviation that rose 'to the level of substantial, deliberate indifference for the rights and safety of" Brown. But even if Gaut's report is 100 percent on the mark, it can't justify imposing liability on Secor. Secor did not devise the search policy adopted by Brown County. He was doing what he was told to do when, accoutered as he was, he led the search of Brown's apartment. Of course if one is told by one's superiors to do something that is obviously illegal, it is no defense that one was just obeying orders; that was a defense conclusively rejected at the Nuremberg trials of Nazi war criminals. But the situation in this case was not that extreme. There were as we mentioned reasons for having the undercover officer, who needs a goatee, sideburns, etc. in his undercover work, lead the search. There was no compelling reason for him to be the one to knock on the door, but it wasn't because of that, but because he was visible through the window, that Brown saw him and commenced his fatal flight. Even if we thought Secor may have been exceeding proper constitutional bounds in leading the search given his appearance, he would still be entitled to qualified immunity, thus defeating the estate's claim against him."); ***Elkins v. District of Columbia***, 690 F.3d 554, 568, 569 (D.C. Cir. 2012) ("The district court denied Williams–Cherry qualified immunity on the ground that it has long been clearly established that seizing items based on a warrant that does not authorize such seizure is unconstitutional. In doing so, the district court misapplied the 'clearly established' inquiry. That Elkins's rights were clearly violated does not mean Williams–Cherry clearly should have known she was violating them. The appropriate question for us to ask is whether it would have been clear to a reasonable official in Williams–Cherry's situation that seizing Elkins's notebook was unlawful. Williams–Cherry was

one of several people who carried out the search, including MDP officers and officials from DCRA and HPO. The MPD officers led the search along with DCRA employee Juan Scott, one of Williams–Cherry's supervisors,. . . who provided primary oversight of the agency officials. Williams–Cherry was never given a copy of the warrant. She was not shown the warrant. Scott had the warrant in hand when he and the other agency officials arrived first at the home. When MPD officers arrived, Scott gave the warrant to them. According to Elkins, no one searched for any documents until an MPD officer announced that they had the right to do so. . . After the search began, Scott told Williams–Cherry, who was taking pictures of the outside of the house, to come inside and photograph its interior. Inside, Williams–Cherry saw officials searching through drawers. She asked Scott if that was allowed. Scott conferred with an MPD officer within earshot of Williams–Cherry, and the officer said again that anything related to construction, including documents, could be seized. When Elkins produced the notebook Williams–Cherry, who was standing nearby, took it from her. We do not think it would be clear to 'a reasonable officer ... in the situation [Williams–Cherry] confronted' that taking the notebook from Elkins was a violation of the Fourth Amendment. . . Williams–Cherry was but a junior member of the search team present to take pictures in an inspection led by police and her superiors. Before taking the notebook from Elkins, Williams–Cherry asked her superiors about the permissible scope of the search and relied upon the judgment of her supervisor and the police officer in charge. We do not find any one of these factors dispositive, but viewing them together, we conclude that Williams–Cherry's actions, though mistaken, were not unreasonable. . . Several other circuits have addressed the reasonableness of an inferior officer's reliance upon the conclusions of a superior and reached similar outcomes. [collecting cases] Whether an official's reliance is reasonable will always turn on several factors, but there is no basis in this record to find that Williams–Cherry's was not. She is entitled to summary judgment based on qualified immunity."); ***Shepard v. Hallandale Beach Police Dept.***, No. 09-14265, 2010 WL 3795067, at *4 (11th Cir. Sept. 30, 2010) (not published) ("This Court has concluded that assisting officers during a search are entitled to qualified immunity when there is no indication that they acted unreasonably in following the lead of a primary officer or that they knew or should have known that their conduct might result in a Fourth Amendment violation, even when the primary officer is not entitled to qualified immunity."); ***Kennedy v. City Of Cincinnati***, 595 F.3d 327, 337, 338 (6th Cir. 2010) ("Here, after Zucker questioned Kennedy for approximately fifteen minutes, he determined that his 'basis for any reasonable suspicion to stop Mr. Kennedy had ceased, because [he] had no crime that [he] could verify had been committed, nor could [he] identify one that [was] being committed or [was] going to be committed.' Zucker informed Hudepohl of this fact, but Hudepohl still asked Zucker to confiscate Kennedy's pool pass and to order him off the premises. Zucker fully complied with this request, and, arguably, ordered Kennedy to not enter *any* CRC property for an indefinite period of time. Zucker avers that he should be immune from suit because he was following the orders of Hudepohl, an agent of the municipal pool. However, 'since World War II, the Ajust following orders" defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order.'. . Regardless of the authority Hudepohl possessed, Zucker was not 'relieve[d] ... of his responsibility to decide for himself whether to violate clearly established constitutional rights[.]'.

. '[U]nder the Supremacy Clause, public officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy.'. . Thus, viewing the facts alleged in the light most favorable to Kennedy, we conclude that Zucker violated Kennedy's constitutional rights by banning him from all City recreational property without due process of law. . . . Any competent government official, particularly a police officer, should have realized that he cannot deprive a person, who has not committed a crime or violated some regulation, nor was likely to do so, of access to public grounds without due process of law. Therefore, we hold that for purposes of defendants' motion for summary judgment, Kennedy possessed a constitutionally-protected liberty interest to use municipal property open to the public and that depriving him of his liberty interest, without procedural due process, constituted a violation of a clearly established constitutional right."); ***Parrish v. Ball***, 593 F.3d 993, 1002, 1003 (8th Cir. 2010) ("We have . . . noted that a supervisor's failure to train an inferior officer may subject the superior to § 1983 liability in his individual capacity, 'where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.'. . The plaintiff must also prove that the alleged failure to train 'actually caused' the constitutional deprivation. . .Thus, it follows that a supervisory officer is entitled to qualified immunity for a § 1983 failure to train action unless a reasonable supervisor would have known that his training program (or lack thereof) was likely to result in the specific constitutional violation at issue. . . As we noted in our analysis above, we find that there is no patently obvious need to train officers not to sexually assault women, nor is there a patently obvious need to train officers that if they sexually assault a woman, they may be charged with a felony. Moreover, a reasonable supervisor in Sheriff Ball's position would not know that a failure to specifically train Fite not to sexually assault a woman would cause Fite to engage in that very behavior. Thus, the district court correctly found that Sheriff Ball is entitled to qualified immunity in his individual capacity."); ***Merriweather v. Zamora***, 569 F.3d 307, 318 (6th Cir. 2009) (no qualified immunity for supervisors who encouraged atmosphere of disregard for proper mail-handling procedures of prisoners' legal mail; qualified immunity for mail-room employees where no particular individual could be linked to improper handling of mail); ***Hunt v. Tomplait***, 301 F. App'x 355, 2008 WL 5129642, at *4 (5th Cir. Dec. 8, 2008) ("The reasoning in *Ramirez* is persuasive. Deputy Tomplait was not a mere bystander in the execution of the search warrant. . . He actively led the search team at Chief Hunter's request to the only 'Hunt residence' that he was aware of, without reading the search warrant or pursuing additional information about the residence described in the search warrant. The fact that Deputy Tomplait did not enter the house does not relieve him of liability as a matter of law; his identification of the Hunt residence as the residence to be searched–and subsequent leadership of the search team to the residence–was a direct cause of the Fourth Amendment violation. . . . Because Deputy Tomplait took the lead in identifying the residence without inquiring beyond the name of the family that lived there, he cannot contend that he did not effectuate the violation because he did not physically enter the incorrect residence."); ***Killmon v. City of Miami***, 199 F. App'x796, 2006 WL 2769526, at *3 (11th Cir. Sept. 27, 2006) ("When an officer is present with a fellow officer and both observe the same course of events, it is unreasonable for an officer to rely upon the fellow-officer rule to determine that probable cause exists. Florida courts apply the fellow-officer rule when the arresting officer was absent for a significant portion of the

events that gave rise to probable cause. . . . It is reasonable for an officer in that situation to rely upon his fellow officer's judgment about probable cause. The rule typically requires that the fellow officer actually communicate to the arresting officer the basis for probable cause. . . When the arresting officer observed the same events as his fellow officer, the fellow-officer rule does not apply. As the district court acknowledged and we have explained, 'the Ajust following orders" defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a Areason why any of them should question the validity of that order."'); ***KRL v. Moore***, 384 F.3d 1105, 1117 (9th Cir. 2004) ("The district court properly denied qualified immunity to Hall on Plaintiffs' claim that he unreasonably relied on the search warrant and that he seized documents predating 1990 during the January 13 search. Assuming he was the lead investigator, Hall would have greater responsibility for ensuring that the warrant was not defective. . . Even if probable cause existed to believe KRL was 'permeated with fraud' since 1995, no reasonable officer could conclude that the discovery of a 1990 ledger and several checks showed that KRL had been primarily engaged in fraudulent activity since 1990. . .The fact that a judge and a prosecutor had approved the warrant does not make Hall's reliance on it reasonable. . .Regarding the claim of overbroad execution, the law is clearly established that a search may not exceed the scope of the search warrant, and the warrant here was limited to documents created after 1990. . . Thus, Hall is not entitled to qualified immunity on Plaintiffs' claim that he seized documents predating 1990."); ***Penn v. United States,*** 335 F.3d 786, 790 (8th Cir.2003) ("We recognize that the *ex parte* nature of the order, its county-wide scope, and its thirty-day pre-hearing duration raise legitimate questions about its legality. A determination of whether an order is unlawful, however, is an inquiry distinct from whether it is facially valid. Penn does not complain about the manner in which Captain Vettleson and Sheriff Landeis served and executed the order– her complaint is that they carried it out at all. Given the circumstances, we will not subject the officers to the difficult choice 'between disobeying the court order or being haled into court to answer for damages.'"); ***Evett v. DETNTFF* (*Texas Narcotics Trafficking Task Force*)**, 330 F.3d 681, 690 (5th Cir. 2003) ("We believe that, based on the facts of this case, requiring Mendiola, as the supervising officer at the scene of the raid, to personally seek out all available information from all participating law enforcement officers before approving an arrest would not have been practicable. As a result, we find that Mendiola did not act with deliberate indifference by ultimately giving his approval of Evett's arrest. As noted above, Mendiola cannot be held liable for unintentional oversights; particularly when the evidence indicates Mendiola could not have consciously believed his actions, based on the information made available to him, would lead to a violation of Evett's constitutional rights. We, therefore, reverse the district court and hold that Mendiola is entitled to qualified immunity as a matter of law."); ***Sorensen v. City of New York,*** No. 00-9366, 2002 WL 1758432, at * (2d Cir. July 30, 2002) (unpublished disposition) ("Although it is true that low-level employees have been granted qualified immunity where they followed orders promulgated by their superiors, immunity has been granted only when the orders were facially valid. [citing cases] The strip-search policy at issue here, however, had twice been declared unconstitutional by this court, and so was not facially valid. . . . Appellants thus cannot establish that it was objectively reasonable for them to believe under the circumstances that strip-searching Sorensen was constitutional."); ***Lawrence v. Bowersox,*** 297 F.3d 727, 733 (8th

Cir. 2002) (not inconsistent for jury to find excessive force was used, but not maliciously and sadistically by person following orders; fact that lower-level officer was found not liable did not establish that supervisor was entitled to qualified immunity; AOrchestrating an unnecessary pepper spray shower violated clearly established rights of which a reasonable person should have known."); ***Ramirez v. Butte Silver Bow County,*** 298 F.3d 1022, 1027, 1028 (9th Cir. 2002) ("Law enforcement officers are entitled to qualified immunity if they act reasonably under the circumstances, even if the actions result in a constitutional violation. . . What's reasonable for a particular officer depends on his role in the search. . . . The officers who lead the team that executes a warrant are responsible for ensuring that they have lawful authority for their actions. A key aspect of this responsibility is making sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct. The leaders of the expedition may not simply assume that the warrant authorizes the search and seizure. Rather, they must actually read the warrant and satisfy themselves that they understand its scope and limitations, and that it is not defective in some obvious way. . . . Line officers, on the other hand, are required to do much less. They do not have to actually read or even see the warrant; they may accept the word of their superiors that they have a warrant and that it is valid. . . .The line officers here acted reasonably: They were told that a warrant had been obtained and learned through an advance briefing what items could be seized. . . Because they were not required to read the warrant, the line officers conducting this search cannot reasonably have been expected to know that it was defective."), *aff'd by* ***Groh v. Ramirez***, 124 S. Ct. 1284, 1293, 1294 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case–perhaps just a simple glance–would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal."); ***Liu v. Phillips***, 234 F.3d 55, 57, 58 (1st Cir. 2000) ("[T]his case primarily presents the question whether and when an officer who participates in an arrest . . . may reasonably rely on a fellow officer or agent who does (or by position should) know the substantive law and the facts and who (based on that knowledge) asserts that an offense has been committed. Police officers without complete knowledge of the facts regularly participate in arrests ordered or authorized by superiors or by fellow officers. Where the authorizing officer has made a factual mistake but the mistake is not apparent, immunity for the officer who reasonably assisted is well settled. . . The outcome should not be different where the agent who directs or authorizes the arrest has made a mistake of law equally invisible to the assisting officer. . . . In the few pertinent cases we could find, officers who reasonably relied on superior officers have been held to be entitled to qualified immunity even if the officer who gave the direction acted on a misapprehension as to the law. *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir.2000); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1348 (7th Cir.1985).").

See also ***Arevalo v. City of Farmers Branch***, No. 3:16-CV-1540-D, 2017 WL 5569841, at *9, *11, *13 (N.D. Tex. Nov. 20, 2017) ("The court will assume *arguendo* that Arevalo has stated a claim for supervisory liability based on the violation of a constitutional right through a failure to train, and it will focus on *Saucier*'s second prong and determine whether Arevalo has overcome Chief Fuller's entitlement to qualified immunity. Accepting the second amended complaint's well-

pleaded facts as true, and viewing them in the light most favorable to Arevalo, the record establishes the following: Chief Fuller decided not to provide deadly force training to an individual police officer with eight years of prior law enforcement experience who had been disciplined by a prior law enforcement employer on at least three different occasions for using excessive force and had been the subject of two excessive force complaints filed against him during those eight years. 'The relevant inquiry' then, 'is whether existing precedent placed the conclusion that [Chief Fuller] acted unreasonably in these circumstances "beyond debate."'. . . . Beyond *Brown*, the Fifth Circuit has declined to find deliberate indifference in several cases where the officers in question had histories generally suggestive of future misconduct—'even where a municipal employer knew of a particular officer's propensities for violence or recklessness.'. . . These decisions all instead looked for evidence concerning the officer's proclivity to commit the specific constitutional violation that had occurred. . . . Even if the court assumes that Officer Johnson violated E.R.'s rights through the use of excessive force, the bases for excessive force allegations can vary widely, and not all involve the application of deadly force. . . . If Officer Johnson's excessive force reprimands arose from the use of deadly force, then his use of such force against E.R. could be a 'highly predictable consequence' of not receiving training from Chief Fuller. But if the reprimands involved the use of non-deadly force, 'the evidence is far more equivocal on the question of whether there was...an obvious need for more or different training.'. . Thus without more specifics concerning the grounds for the reprimands, the court cannot say that Chief Fuller was objectively unreasonable under clearly established law for not providing deadly force training to Officer Johnson. Chief Fuller is therefore entitled to qualified immunity from Arevalo's § 1983 Fourth Amendment claim for failure to train. . . . [T]he court holds that hiring Officer Johnson was not unreasonable under clearly established law, despite his three excessive force reprimands and two excessive force complaints. Like the prior crime in *Rivera*, an excessive force allegation can cover a broad range of conduct, only some of which involves the application of deadly force. If Officer Johnson's reprimands for use of excessive force were due to the misuse of deadly force, there is a stronger connection between Officer Johnson's background and the subsequent shooting of E.R..Without the details of these reprimands, however, the court cannot conclude that Chief Fuller's decision to hire Officer Johnson was objectively unreasonable. Therefore, Chief Fuller is entitled to qualified immunity from individual liability on Arevalo's hiring claim. . . . Although Arevalo's second amended complaint fails to allege facts that would overcome Chief Fuller's qualified immunity, the court will order Arevalo to file a Rule 7(a) reply specifically to Chief Fuller's assertion of qualified immunity for both the failure to train and hiring claims."); ***Glowczenski v. Taser Intern., Inc.***, No. CV04–4052 (WDW), 2013 WL 802912, *18, *19 (E.D.N.Y. Mar. 5, 2013) ("Here, the use of the TASER by Platt was not gratuitous-he was ordered to apply it-nor was it excessive in the context of the injuries inflicted by the TASER in isolation. . . As noted, the only 'force' used by Platt against Glowczenski was multiple applications of the TASER, resulting in pain and marks on Glowczenski's body. Under the totality of the circumstances here, I find that those injuries, or, to put it differently, the force used to inflict them, are de minimis. The TASER is acknowledged as a pain compliance tool, so pain is not a sufficiently serious injury to rise to the necessary level of harm for an excessive force claim based on TASER applications. And, the marks on Glowczenski's body, which the plaintiffs argue were

third degree burns, but which, I found earlier, cannot be so identified based on the evidence presented by the plaintiffs, are most akin to bruises and also are insufficiently serious for excessive force purposes. Nor was the use of the TASER multiple times objectively unreasonable as discussed *infra* in regard to qualified immunity, even without regard to the seriousness of the injuries. . . . Here, it would not have been clear to a reasonable officer on February 4, 2004 that using a TASER on an emotionally troubled individual-all of the disputed issues of fact notwithstanding-when ordered to do so by a superior officer was unlawful. Nor would a reasonable officer have believed that multiple applications of the TASER were unlawful. As Platt reports, the Second Circuit has noted that TASER application in drivestun mode 'typically causes temporary, if significant pain and no permanent injury.'. . The plaintiffs have pointed to no admissible evidence that the police knew or should have known in 2004 (or now, for that matter) that multiple drive-stun applications of the TASER could cause harm that would amount to excessive force. Under these circumstances, Platt's actions were objectively reasonable and he is entitled to qualified immunity."); ***Battiste v. Lamberti***, 571 F.Supp.2d 1286, 1297, 1298 (S.D. Fla. 2008) ("Here, the arresting deputies argue that they arrested Plaintiffs because they were ordered to–that when they heard the call for an arrest team, they followed that order and arrested the first individuals they saw on the railroad tracks. . . They also testified that they did not see Plaintiffs committing any crime, except for trespassing and failing to disperse. . . Viewing the facts in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether the arresting deputies should have known not to follow the order to make arrests on the railroad tracks. The Court has already held there is a genuine issue as to whether the arresting deputies had arguable probable cause to arrest Plaintiffs for trespassing, based on whether the arresting deputies knew or should have known that Plaintiffs were not on the tracks willfully. It follows that if the arresting deputies knew or should have known Plaintiffs were not on the tracks willfully, they would have had a reason to question the validity of an order to arrest them (given that no arguable probable cause existed to arrest Plaintiffs for any other crime). Thus, the arresting deputies are not entitled to qualified immunity on the basis of their 'following orders' argument."); ***Rauen v. City of Miami***, 2007 WL 686609, at *20, *21 (S.D. Fla. Mar. 2, 2007) ("Brooks also argues, and other Individual Defendants incorporate his argument by reference, that because he was following the orders of his superior officers, he is entitled to qualified immunity unless Plaintiffs can establish that a reasonable officer in Brooks' position would have had fair notice that his carrying out of orders given by high-ranking Miami police officers would violate clearly established federal law. . . Officers following the orders of their superiors are entitled to qualified immunity unless they 'acted unreasonably in following [their superior's] lead, or ... they knew or should have known that their conduct might result in a violation of the plaintiff's rights.' *Hartsfield v. LeMacks*, 50 F.3d 950, 956 (11th Cir.1995). Qualified immunity has been afforded to officers following superiors' orders where, for example, an officer is ordered to search a person previously questioned by the officer's superior (such that the officer reasonably believes that there is individualized suspicion supporting the search). . . This case is not a case of that type. The Individual Defendants asserting this argument here had no reason to believe that an order from high-ranking Miami police officers to suppress legal protest on a wholesale basis with allegedly no justification would not result in a violation of clearly established federal law. Thus, the Individual Defendants who have

asserted this argument are not entitled to qualified immunity on the basis that they were following orders."); ***Hunt v. County of Whitman***, 2006 WL 2096068, at *7 (E.D. Wash. July 26, 2006) ("While the Ninth Circuit has decided that a supervisor is not entitled to qualified immunity where a jury issue exists with respect to whether his subordinate violated clearly established law, *Watkins*, 145 F.3d at 1093, the Ninth Circuit does not appear to have decided whether a supervisor is entitled to qualified immunity where, as here, his subordinates did not violate clearly established law. Nevertheless, there is every reason to think the Ninth Circuit will follow its sister circuits' lead. One of the objectives of the qualified-immunity doctrine is to enable public servants to effectively perform their duties by freeing them from the fear of harassing litigation. . . This objective can be accomplished only if public servants 'reasonably can anticipate when their conduct may give rise to liability for damages [.]' . . . As other circuits have recognized, granting a supervisor qualified immunity when his subordinate has not violated clearly established law 'comports with [this] core principle of qualified immunity by protecting supervisory officials from suit when they could not reasonably anticipate liability.' *Camilo-Robles*, 151 F.3d at 6. Assuming, then, that the Ninth Circuit will follow its sister circuits' lead, Sheriff Tomson is entitled to qualified immunity because Deputy Reavis, Sergeant Kelley, and Deputy McNannay did not violate clearly established law."); ***DeToledo v. County of Suffolk***, 379 F.Supp.2d 138, 148, 149 (D. Mass. 2005) ("That *Swain* settled the strip search issue in this Circuit with respect to pretrial detainees, as Judge Gertner thought in *Ford*, is thrown into doubt by subsequent First Circuit cases. The arrestee in *Swain* was held in isolation in a temporary holding facility where there was no risk of contact with other prisoners. That fact, and the difference in magnitude between security concerns in a holding cell and those in a prison, led an equally divided *en banc* Court in *Savard* to conclude that neither *Swain* (nor *Arruda*) gave definitive guidance with respect to pretrial detainees. . . . *Savard* left standing a district court grant of qualified immunity to defendants who had implemented a policy mandating strip and visual body cavity searches of all persons admitted to a facility housing pretrial detainees, convicts in protective custody, and newly sentenced felons. I will assume without deciding that by July 26, 1998, the law was reasonably clear in banning strip searches in a case like this one (although *Swain* did not address the issue of the reasonableness of a policy mandating strip searches of persons like Williams who are arrested for serious non-violent felonies). Thus, the remaining step in the *Saucier* analysis requires a determination of whether a reasonable corrections officer in the position of Thomas (or Sinclair) would have known that her actions in carrying out a strip search in accordance with institutional policy would violate Williams' Fourth Amendment rights. At the time, the women officers were acting pursuant to a written directive promulgated by the general counsel of the Suffolk County Sheriff's Department on behalf of their ultimate superior, the Sheriff. The policy had been in place in one form or another since at least 1991. . . Neither woman held a policymaking position or was imbued with the discretionary authority to dispense with the strip search of a prisoner, even had the policy permitted the exercise of such discretion. Under the circumstances, it would be unreasonable to conclude that a similarly situated line officer would have believed that compliance with a long-established policy directive emanating from the leadership of the Department involved a violation of a prisoner's constitutional rights. That the defendants are excused from liability by virtue of 'following orders' is not intuitively appealing, but also not shocking in a correctional environment strongly influenced by

military values of hierarchy and obedience to orders. A ruling encouraging low-ranking officers to second-guess the constitutionality of policies and procedures mandated by their superiors would appear neither constitutionally wise nor institutionally desirable. Nor does elemental fairness counsel holding rank-and-file officers liable while letting those who formulated and implemented an unconstitutional policy go scot free. Consequently, both Sinclair and Thomas are entitled to a grant of qualified immunity." [footnotes omitted]); ***Leonard v. Compton***, 2005 WL 1460165, at *6 (N.D. Ohio June 17, 2005) (not reported) ("Even assuming that Lieutenant Seroka explicitly told Officer Compton that he could violate Ms. Leonard's clearly established constitutional rights by arresting her in her home without a warrant, that advice does not insulate Officer Compton from liability. . .Although supervisors may be liable under Section 1983 for the misconduct of an official he or she supervises if the supervisor condoned, encouraged, authorized, approved, or knowingly acquiesced to the unconstitutional conduct, . . . defendants have not identified a single case to support their proposition that reliance on a supervisor's advice absolves subordinates from liability for their own misconduct. Just as an official policy does 'not make reasonable a belief that was contrary to a decided body of case law,'. . police officers cannot obtain a license to violate clearly established constitutional rights from their superior officers. . . Accordingly, even if Officer Compton was relying on the advice of his superior officer in effectuating the warrantless arrest of Ms. Leonard in her home, his conduct was nonetheless objectively unreasonable in light of clearly established constitutional law."); ***Anoushiravani v. Fishel***, 2004 WL 1630240, at *14 (D.Or. July 19, 2004) (not reported) ("In sum, plaintiff fails to show a reasonable front line Customs official would understand that the actions of defendant Fishel illegally deprived plaintiff of property without due process of law. While plaintiff alleges facts to support a possible constitutional violation, the case law, as set forth by plaintiff and defendants, is not so clear that a reasonable front line Customs official should be able to understand its nuances and consistently apply its teachings. . . . Unlike defendant Fishel, a front line Customs official, defendants Stilwell and Goldfarb are trained in the law, trained in its jargon and sometimes subtle distinctions. Furthermore, as lawyers for a federal law enforcement agency, an agency on the front lines of the inevitable conflict between government action and individual rights, they are expected to be well versed in core due process jurisprudence.").

See also ***KRL v. Estate of Moore***, 512 F.3d 1184, 1191, 1192 (9th Cir. 2008) ("Faced with an assessment of probable cause upon which reasonable minds could disagree, defendants properly sought review by District Attorney Riebe and approval by a neutral and detached magistrate. . .These acts are sufficient to establish objectively reasonable behavior. . .We also reject Plaintiffs' argument that Moore, Irey and Hall, as lead investigators, held a greater responsibility than Riebe, who was minimally involved, for ensuring that the warrants were not defective. Interpreting the vague language in our prior opinion, the district court was led to assume that we had denied Hall qualified immunity for both the January 11 and January 13 warrants. Based on this assumption, it held that Riebe acted reasonably when he reviewed the January 11 warrant, but Hall acted unreasonably when he reviewed and relied on the same warrant. The district court reconciled this disparity by concluding that, under *Ramirez*, lead investigators have a greater responsibility than reviewing attorneys to ensure that warrants are supported by probable cause. . . . To alleviate any

confusion caused by the admittedly ambiguous wording of our prior opinion, we stress that the liability of government attorneys reviewing a warrant for probable cause is not comparable to that of line officers executing a warrant under *Ramirez*. In *Ramirez*, we distinguished between lead and line officers in the context of the execution of a search warrant, when a few officers are typically in charge and other law enforcement personnel assist in defined roles. . . The rule from *Ramirez*, however, should not be used to distinguish between officers and government attorneys when the sole issue is whether the supporting affidavit provides sufficient facts to show probable cause. A rule requiring officers to question reasonable assessments of probable cause by government attorneys and magistrates would 'cause an undesirable delay in the execution of warrants' and 'would also mean that lay officers must at their own risk second-guess the legal assessments of trained lawyers.'. . Such a rule is not required by the Constitution, nor is it supported by a fair reading of *Ramirez*.")

KRL v. Estate of Moore, 512 F.3d 1184, 1192, 1193 (9th Cir. 2008)("Despite the January 13 warrant's obvious lack of probable cause, Hall argues that he reasonably relied on the warrant as a 'line officer' during the actual search. . . We reject Hall's argument, as well as his wishful reading of *Ramirez*. When analyzing qualified immunity , our underlying inquiry is the reasonableness of the officer's conduct.. . We recognized in *Ramirez* that 'officers' roles can vary widely' during a search. . . The distinction between lead and line officers lends itself well to cases with facts similar to *Ramirez*, in which some officers plan and direct the search, and other officers merely assist in its execution. . . However, the 'lead officer' and 'line officer' designations should not be treated as inflexible categories, nor should they obscure our underlying inquiry into the reasonableness of an officer's conduct in a particular case.In this case, Hall's role in the January 13 search defies easy classification. On the one hand, Hall correctly points out that his involvement in the actual search was dissimilar to that of the search leader in *Ramirez*. Hall did not draft the affidavit and warrant; he did not appear before the magistrate; and there is no evidence that he conducted the pre-search briefing or supervised the search. . . On the other hand, it would be inaccurate to classify Hall as a line officer at the January 13 search. Hall's involvement in the criminal investigation was not confined to assisting as part of the search warrant entry team. Rather, the record shows that Hall played an integral role in the overall investigation. . . . Although Hall's participation differed from that of the search leader in Ramirez, his activities with respect to the January 13 search place him on the 'lead' side of the lead-line distinction. . . . Thus, when analyzing Hall's role pursuant to the January 13 warrant, it is most useful to ask the question posed in *Saucier*: 'whether it would be clear to a reasonable officer [in Hall's position] that his conduct was unlawful in the situation he confronted.' . . . Given his leadership role in the overall investigation, Hall acted unreasonably when he relied on the January 13 warrant without first ensuring that the warrant was facially valid. As we previously concluded, any reasonable officer making such an inquiry would conclude that the discovery of a ledger and several checks predating the allegedly fraudulent activity by five years did not provide sufficient probable cause to search for documents dating back to 1990. . . . We affirm the district court's denial of qualified immunity to Hall to the extent that he relied on the January 13 warrant, which was so lacking in indicia of probable cause as to render official belief in its existence unreasonable.")

H. Development and Demise of the "Rigid Order of Battle"

1. *Siegert v. Gilley*

In ***Siegert v. Gilley***, 500 U.S. 226 (1991), plaintiff, a clinical psychologist, brought a ***Bivens*** action against his supervisor, claiming impairment of future employment prospects due to the sending of a defamatory letter of reference. The Court of Appeals for the District of Columbia had dismissed on grounds that plaintiff had not overcome respondent's claim of qualified immunity under the "heightened pleading standard."

The Supreme Court held that the claim failed at an analytically earlier stage. The plaintiff did not state a constitutional claim. Under ***Paul v. Davis***, 424 U.S. 693 (1976), there was no constitutional protection for one's interest in his reputation, even if facts sufficient to establish malice were pleaded.

Chief Justice Rehnquist set out the "...analytical structure under which a claim of qualified immunity should be addressed." The first inquiry is whether the plaintiff has alleged the violation of a clearly established constitutional right. This question is a purely legal question. "Once a defendant pleads a defense of qualified immunity, '[o]n summary judgment, the judge . . . may determine not only currently applicable law, but whether the law was clearly established at the time," and until this threshold immunity question is resolved, there should be no discovery.

2. *County of Sacramento v. Lewis*

In ***County of Sacramento v. Lewis***, 523 U.S. 833 (1998), a majority of the Court reinforced the view that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all." *Id.* at 841 n.5. Justice Souter, writing for the majority, explained:

> [T]he generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in

> none of these instances would qualified immunity be available to block a determination of law. . . But these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity.

Id. Justice Stevens would limit *Siegert's* analytical approach to cases where the constitutional issue is clear. Where the question is difficult and unresolved, he would prefer its resolution in a context where municipal liability is raised and the case cannot be disposed of on qualified immunity grounds. *Id.* at 859 (Stevens, J., concurring in the judgment). Justice Breyer wrote separately in *County of Sacramento* to express his agreement with Justice Stevens' view that *Siegert* "should not be read to deny lower courts the flexibility, in appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented." *Id*. at 858, 859 (Breyer, J., concurring).

See also ***Conn v. Gabbert***, 526 U.S. 286, 290 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.").

3. *Wilson v. Layne*

In ***Wilson v. Layne***, 526 U.S. 603 (1999), the Supreme Court resolved a split among the Circuits as to the availability of qualified immunity for law enforcement officers who invite the media to Aride along" to observe and record the activities of the officers while executing a warrant in a private home. The Court of Appeals for the Fourth Circuit, in a divided en banc opinion, had granted the officers qualified immunity on the ground that, at the time of the challenged conduct, no court had held that the bringing of media into a private residence in conjunction with the execution of a warrant was a violation of the Fourth Amendment. Finding that the law was not clearly established at the time, the Fourth Circuit did not address the Amerits" question of whether such media ride-alongs, involving entry into a private residence, constituted a violation of the Fourth Amendment**.** 526 U.S. at 608.

The Supreme Court affirmed the grant of qualified immunity, but did so by adopting the analytical approach it had established in *Siegert*, *County of Sacramento*, and *Conn.* Before addressing whether the law was clearly established at the time of the alleged violation, the court must first determine whether the plaintiff has alleged the violation of a constitutional right at all. 526 U.S. at 609. A unanimous Court concluded that such media ride-alongs violated the Fourth Amendment. AWe hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Id.* at 614. *Wilson* not only strongly reinforces (requires?) the merits-first approach to the qualified

immunity analysis, but also clarifies that this approach is not reserved for those cases in which the court determines that the constitutional right does *not* exist.

With only Justice Stevens dissenting, the Court went on to conclude that, despite the finding of a constitutional violation by a unanimous Court, the law was not clearly established at the time of the officers' conduct such that a reasonable officer would have known that the conduct violated the Fourth Amendment. The Court framed the issue as the objective question of Awhether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.**"** *Id.* at 615. The Court concluded general Fourth Amendment principles did not apply with obvious clarity to the officers' conduct in this case. *Id.* Furthermore, A[p]etitioners [had] not brought to [the Court's] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 616. Finally, the Court gave considerable weight to the fact that the federal and local law enforcement departments involved in the incident had ride-along policies which Aexplicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests," or Adid not expressly prohibit media entry into private homes." *Id.* at 617.

Justice Stevens took the position that A[t]he absence of judicial opinions expressly holding that police violate the Fourth Amendment if they bring media representatives into private homes provides scant support for the conclusion that in 1992 a competent officer could reasonably believe that it would be lawful to do so. Prior to our decision in *United States v. Lanier*, . . . no judicial opinion specifically held that it was unconstitutional for a state judge to use his official power to extort sexual favors from a potential litigant. Yet, we unanimously concluded that the defendant had fair warning that he was violating his victim's constitutional rights." *Id.* at 621. (Stevens, J., concurring in part and dissenting in part).

See also ***Hanlon v. Berger***, 526 U.S. 808, 810 (1999) (per curiam) ("Petitioners maintain that even though they may have violated the Fourth Amendment rights of respondents, they are entitled to the defense of qualified immunity. We agree. Our holding in *Wilson* makes clear that this right was not clearly established in 1992. The parties have not called our attention to any decisions which would have made the state of the law any clearer a year later–at the time of the search in this case. We therefore vacate the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.").

4. *Saucier v. Katz*

In ***Saucier v.Katz,*** 121 S. Ct. 2151 (2001), *overruled in part by* ***Pearson v. Callahan***, 129 S. Ct. 808 (2009), the Court reinforced this analytical approach as follows:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. [citing *Siegert*] In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.
>
> 121 S. Ct. at 2156.

5. Courts Doing *Saucier* Analysis

D.C. CIRCUIT

Pitt v. District of Columbia, 491 F.3d 494, 510, 511 & n.3 (D.C. Cir. 2007) ("This court has not yet addressed whether malicious prosecution can give rise to a violation of the Fourth Amendment. However, nearly every other Circuit has held that malicious prosecution is actionable under the Fourth Amendment to the extent that the defendant's actions cause the plaintiff to be 'seized' without probable cause. . . . We join the large majority of circuits in holding that malicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment. . . . . [W]e hold that the evidence received at trial sufficiently demonstrates that the defendant officers violated Mr. Pitt's Fourth Amendment rights. . . . At first glance, it may appear unnecessary to reach this issue at all, given that–as explained below–we hold that the officers are entitled to qualified immunity on the malicious prosecution claims brought under § 1983. However, the Supreme Court has expressly stated that courts must determine whether a constitutional right has been violated *before* moving to the analysis of whether a right was 'clearly established' at the time of the defendant's actions. . . . The Supreme Court has not addressed the

precise scope of a malicious prosecution action under § 1983. The Court has held that malicious prosecution does not violate 'substantive' due process rights, but it left open the question whether such claims implicate Fourth Amendment rights. . . . [W]e hold that at the time of the officers' actions, it had not been 'clearly established' in this Circuit that malicious prosecution was a violation of any constitutional rights. Accordingly, the defendant officers are entitled to qualified immunity on the malicious prosecution claims brought under § 1983.").

Lederman v. United States, 291 F.3d 36, 39 (D.C. Cir. 2002) ("In this interlocutory appeal, we consider a facial First Amendment challenge to a regulation banning leafleting and other 'demonstration activit [ies]' on the sidewalk at the foot of the House and Senate steps on the East Front of the United States Capitol. Finding that the sidewalk is a public forum and that no part of the ban is narrowly tailored to further a significant governmental purpose, we declare the ban unconstitutional. Because the Capitol Police violated no clearly established legal rules in arresting Appellant for leafleting in violation of the ban, however, we conclude that the officers named in Appellant's *Bivens* claim are entitled to qualified immunity.").

Kar v. Rumsfeld, 580 F.Supp.2d 80, 84, 85 (D.D.C. 2008) ("It may indeed be inconvenient to hold prompt probable cause hearings in Iraq, and military officials will be justifiably wary of releasing a suspected insurgent–particularly one thought to be involved in the manufacture of the IEDs that have claimed so many American lives. But it is startling that the government thinks it fitting to rely on a century-old Oliver Wendell Holmes opinion that asserts, flatly and without nuance, that 'public danger warrants the substitution of executive power for judicial power.' . . Granted that the 'exigencies are more pressing' in Iraq, and that 'the stakes are higher' there, and that 'pre-existing systems are more rudimentary'–an army that is fully equipped with the latest technology can surely organize itself to convene a probable cause hearing in far less than 48 days. . . Kar's problem in this suit, however, is that his right to a probable cause hearing was not clearly established with sufficient specificity to overcome the defendants' qualified immunity . As weak as the government's authority is, Kar has provided none at all–no precedent that clearly establishes the right of a U.S. citizen to a prompt probable cause hearing when detained in a war zone. Any attempt to apply the two-day requirement from *City of Riverside* or the seven-day requirement from the Patriot Act to Kar's circumstances ignores the differences between detention on U.S soil and detention in hostile territory. Because defendants did not violate any clearly established Fourth Amendment right, they are entitled to immunity.").

FIRST CIRCUIT

Philip v. Cronin, 537 F.3d 26, 34 (1st Cir. 2008) ("[E]ven if a constitutional right is clearly established, the defendant is entitled to qualified immunity so long as a reasonable official in Cronin's position could believe, albeit mistakenly, that his conduct did not violate the First Amendment. . . This is an objective test: Cronin is entitled to immunity so long as he reasonably could have believed on the facts before him that no violation existed.").

Jennings v. Jones, 499 F.3d 2, 10, 11 (1st Cir. 2007)(on rehearing) ("We have typically applied *Saucier* using a three-part test in which we inquire: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. . . Although this inquiry subdivides the second prong of the *Saucier* analysis into two separate questions, it is functionally identical to that analysis.").

Higgins v. Penobscot County Sheriff's Department, 446 F.3d 11, 14, 15 (1st Cir. 2006) ("At least arguably, then, Higgins has adduced enough evidence to meet the first two parts of this circuit's tripartite qualified-immunity inquiry. *See, e.g., Wilson v. City of Boston*, 421 F.3d 45, 52 (1st Cir.2005) (summarizing the first two questions the court should ask as: "(1) whether the claimant has alleged the deprivation of an actual constitutional right; [and] (2) whether the right was clearly established at the time of the alleged action or inaction ..."); *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 60-61 (1st Cir.2004) (similar). In our view, the viability of Higgins' constitutional claims against Tibbetts depends on whether, to the extent that what happened properly can be found to have been an 'eviction' at all, Tibbetts could be found to have known that it was an unlawful eviction. Such a finding is necessary if Higgins is to clear the final hurdle presented by the qualified-immunity defense Higgins has interposed. . . . One could not reasonably find in Higgins' favor on this issue. As set forth above, Tibbetts encountered a volatile and potentially dangerous situation–described by Higgins himself as a 'screaming contest'–when he arrived at the trailer park. The subject of the dispute was a man who, so far as Tibbetts could tell, was driving a truck with out-of-state license plates, and who claimed a right to occupy a building with which Tibbetts was familiar and which Tibbetts reasonably thought, based on his prior knowledge of the building and the circumstantial evidence at the scene, to have been long unoccupied. The man provided no written lease or other documentation to support his claimed occupancy right, but only made a conclusory verbal claim of entitlement. Opposing this man were several members of his own family, all of whom disputed his claimed entitlement and informed Tibbetts that he previously had been told to stay away, and one of whom–the man's father–produced a deed which substantiated the father's claim of ownership of the property. . . . In these circumstances, Tibbetts' decision to disbelieve Higgins and to defuse the situation by asking him to leave under threat of citation for trespass was neither plainly incompetent nor involved a deliberate violation of the law. Given the paucity of evidence that Higgins was entitled to occupy the property and the abundance of evidence pointing the other way, Higgins' argument essentially invites us to hold, as a matter of constitutional law, that a police officer, summoned to mediate a volatile dispute involving an alleged trespasser, is obliged to leave the situation unresolved simply because the trespasser represents himself to be entitled to be there. To state the proposition is to expose its foolishness.").

Higgins v. Penobscot County Sheriff's Department, 446 F.3d 11, 15-17 (1st Cir. 2006) (Howard, J., concurring in the judgment) ("The opinion of the court applies the three-part qualified immunity analysis called for in our recent cases and concludes that Tibbetts is entitled to qualified immunity

at prong three. . . I write separately because I believe that Tibbetts should have prevailed on the initial inquiry–whether he violated Higgins' constitutional rights–and more generally to urge consideration of a return to the 'two-step process,' *Brosseau v. Haugen*, 543 U.S. 194, 195 (2004), traditionally employed in qualified immunity cases. I do so because our three-step process invites erroneous holdings and, possibly, erroneous outcomes, especially in Fourth Amendment cases. For most of the last decade, this court has usually asked three questions when evaluating whether a government actor is entitled to qualified immunity: (1) Does the official conduct in question, as alleged, constitute the violation of an actual federal right? (2) If so, was the right so clearly established at the time of the alleged violation that a reasonable official would have been on notice that the conduct was unconstitutional? (3) If so, would a reasonable official have understood that the conduct violated the clearly established right at issue? . . . A negative answer to question one means that there has been no violation of a federal right; a negative answer to question two or three gives rise to qualified immunity insofar as plaintiff is seeking money damages from the defendant. The second and third questions we ask derive from an elaboration of the two-step process described in the Supreme Court's qualified-immunity cases. The two-step test directs courts evaluating assertions of qualified immunity to ask: (1) Do the specific case facts alleged describe a violation of a federal right? (2) If so, should the defendant, who is charged with knowledge of clearly established law, have known that the conduct in question violated that right? . . . Our elaboration seems to have been prompted, at least in part, by a desire to emphasize that official defendants should not be held liable in situations where they have made reasonable mistakes about the facts of the situation they confront, as well as reasonable mistakes as to whether, in light of clearly established law, their conduct infringed a federal right. . . . Of course, officials should not be made to pay damages for reasonable but mistaken factual judgments made in circumstances such as these. But the reason they should not be held liable is that an official who acts reasonably vis-a-vis the plaintiff has not violated the plaintiff's constitutional rights–even if the invasion in question proves unwarranted with the benefit of 20/20 hindsight. . . In such a situation, the qualified-immunity defense should not even be addressed because its necessary antecedent–the presence of a viable claim for the invasion of a federal right–is lacking. Our recent qualified-immunity cases obscure this point by suggesting that reasonable factual errors, like reasonable legal errors, are grist for the qualified-immunity mill, and are not to be analyzed as part of the threshold federal-right issue. . . . I would not write separately if my concern were merely theoretical. Although the results in *Wilson* and this case remain the same whether we hold that there has been no invasion of a right or that there has been a reasonable mistake of fact made in connection with the invasion of the right, that is so only because the plaintiff in each case sought only monetary damages, and not declaratory or injunctive relief . . . . We should not hold or imply, as we are invited to do in our tripartite elaboration of the qualified-immunity analysis, that a government official violates the Constitution when she makes a reasonable but mistaken factual judgment that a particular situation calls for a forceful intervention by her office. The traditional two-step qualified immunity analysis, still employed by the Supreme Court, does not permit this error, for it channels consideration of issues of reasonable mistakes of fact into the initial inquiry: whether there has been an invasion of a federal right. . . We should return to the two-step inquiry employed by the Supreme Court.").

Olmeda v. Ortiz-Quinonez, 434 F.3d 62, 65-68 (1st Cir. 2006) ("Although qualified immunity requires merely that a reasonable official could believe that his conduct was lawful, the Supreme Court has directed that the qualified immunity inquiry itself begin by asking whether on the facts alleged there is a constitutional violation at all. . . *Saucier's* inversion has its own logic, . . .but it has the potential to cause problems where answering this first question in the abstract is difficult. . . A first amendment right to protection against political discrimination was recognized by the Supreme Court about thirty years ago in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980). *See also Rutan v. Republican Party of Ill*., 497 U.S. 62 (1990). Where improper motive is shown, the employee is protected against significant adverse employment action–this is a loose formulation–but the right exists only where the job is one for which political affiliation is an improper criterion. . . . In a nutshell, protection does not extend to positions which potentially 'involve decision making on issues where there is room for political disagreement on goals or their implementation' and where the jobholder is a policymaker, confidential assistant, spokesman, or similar officeholder. . . . The cases have not been able to come up with a terse formula or standard for describing policy-related positions that are outside the constitutional constraint. Yet as we observed in *Flynn*, our circuit has 'regularly upheld against First Amendment challenge the dismissal on political grounds of mid- or upper-level officials or employees who are significantly connected to policy-making.' . . Olmeda's job description makes clear that she is an official, that she is involved in policymaking at least as an adviser, and that she is expected on occasion to serve as a representative of the Board itself. . . .Olmeda's case is not close: she is not federally protected against political discrimination and the federal damage claims are barred by qualified immunity.")**.**

Jordan v. Carter, 428 F.3d 67, 71, 72 (1st Cir. 2005) ("To answer the immunity question, we employ a three-part test that examines both the state of the relevant law and the nature of the alleged conduct. . . First, we consider whether plaintiffs' allegations, if true, establish a constitutional violation. Second, we look at whether the right allegedly violated was clearly established at the time of the challenged conduct. Finally, if the prior two questions are answered affirmatively, we determine 'whether a similarly situated reasonable official would have understood that the challenged action violated the constitutional right at issue.' . . If the final answer is 'no,' a defendant will be entitled to qualified immunity notwithstanding constitutional injury to the plaintiff. The Supreme Court has directed us, in the absence of special circumstances, to take up these questions in order, even though it might be easier at times to bypass the substantive constitutional question and conclude that, at a minimum, the law was not clearly established when the challenged conduct occurred.").

Gonzalez-Alvarez v. Rivero-Cubano, 426 F.3d 422, 429, 430 (1st Cir. 2005) (" In the opinion from which this appeal arises, the district court essentially skipped over the first inquiry in order to reach the subsequent queries, which it found decisive. The court reasoned that 'even assuming arguendo, that constitutional rights were violated, ... it was objecti[vely] reasonable for Pedro to believe that his actions did not violate these clearly established rights.' . . Although we recognize the logic of

this approach, the court's election to forego deciding whether the cancellation of the milk quotas constituted an unconstitutional taking, and instead to dismiss the claims based on the failure to demonstrate that whatever rights may have been violated were 'clearly established,' runs contrary the analysis required by the Supreme Court. . . . The district court–by 'assuming arguendo ' that a constitutional violation had occurred–was able to dismiss the cases without deciding whether the cancellation of appellants' milk quotas did in fact constitute an unconstitutional taking of their property. The problem with this methodology is that the law will be no clearer when future similarly situated plaintiffs bring the same claim. This unending state of ambiguity, which potentially allows the bad man (in this context, a government official) to walk the line time and time again, is precisely what the Supreme Court instructs us to avoid. Thus, we must now consider whether appellants' allegations, if true, establish a constitutional violation. . . In this case, the essential facts are undisputed, and we have no difficulty in concluding that the cancellation of appellants' milk production quota did not constitute a taking for which they would be entitled to compensation.").

Riverdale Mills Corp. v. Pimpare, 392 F.3d 55, 60-63 & n.6, 65 (1st Cir. 2004) ("As most recently explained by Justice Breyer in his concurring opinion in *Brosseau v. Haugen*, the test laid out in *Saucier* has two basic parts: 'Saucier requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question.' . . This Circuit has usually explained qualified immunity as a three-stage test by subdividing *Saucier's* second stage into two distinct questions. [footnote omitte] . . . The three-part test asks first: 'Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'. . . As to the second prong, we have asked 'whether the right was clearly established at the time of the alleged violation' such that a reasonable officer would 'be on notice that [his] conduct [was] unlawful.'. . On the third prong, we ask whether a 'reasonable officer, similarly situated, would understand that the challenged conduct violated' the clearly established right at issue. . . It is not always evident at the time an official takes an action that a clearly established right is involved. For example, the factual situation might be ambiguous or the application of the legal standard to the precise facts at issue might be difficult; in either case the officer's actions may be objectively reasonable and she may be entitled to qualified immunity. . . In this last stage we consider any material facts as long as they are undisputed. . . The Supreme Court has stated that courts should begin with the first prong, that is, whether the facts as seen in the light most favorable to the injured party show that the officers' conduct violated a constitutional right. . . This first step is meant to aid in the 'law's elaboration from case to case.'. . The issue of how specific the first prong is meant to be is an issue that has troubled courts for some time. . . The level of specificity depends on the stage of the proceedings at which a qualified immunity defense is brought. A qualified immunity defense can, of course, be brought as a Fed.R.Civ.P. 12(b)(6) motion for failure to state a claim upon which relief can be granted. In such a case the entire qualified immunity analysis, including the first prong, must be based only on the facts stated in the complaint itself. . . At the 12(b)(6) stage, the question on the first prong is whether, using all of the well-pleaded facts stated in the complaint and viewing them in the light most favorable to the plaintiff, the plaintiff has stated a claim for a violation of some constitutional right. The

first prong inquiry at this 12(b)(6) stage is unlikely to be very specific, given that federal civil practice is based on notice pleading, where great specificity is not required,. . . and that there is no heightened pleading requirement for civil rights cases. . . .Where, as here, qualified immunity is brought at the summary judgment stage, the inquiry on the first prong is somewhat different. The language in *Saucier* is ambiguous on this point; the case refers both to 'the facts alleged' and to the 'parties' submissions.' . . But subsequent Supreme Court cases have clarified, implicitly if not explicitly, that courts assessing the first prong at summary judgment should look beyond the complaint to the broader summary judgment record. . . The first prong inquiry will usually gain specificity at this summary judgment stage because of the ability to determine then whether plaintiff's claim survives in light of all the uncontested facts and any contested facts looked at in the plaintiff's favor, rather than just the allegations that appear on the face of the complaint. We emphasize that the rule stating that the first prong must be performed before the rest of the qualified immunity analysis is not completely inflexible. The purpose of starting with the first prong is to aid in law elaboration. *Saucier* itself suggests that this law elaboration function will be well served only in 'appropriate cases,' . . . and we have previously noted that in some cases, such as where the claim depends on a 'kaleidoscope of facts not yet fully developed,' the law elaboration function is not well served and thus the *Saucier* rule may not strictly apply. . . . Indeed, three Supreme Court justices expressed concern in a recent concurrence that a rigid application of the *Saucier* rule–that the first prong must be decided before the rest of the qualified immunity inquiry–was unwise because of its tendency to lead to wasted judicial resources and to constitutional decisions that were insulated from judicial review. These justices thus asked that the rule be reconsidered. [citing *Brosseau*] However, the *Saucier* rule has not been overruled by the Supreme Court. Nonetheless, it is clear that when performing the first prong of the analysis, it is generally inadequate to state a very generalized proposition such as whether it is a constitutional violation for enforcement officers to perform an unreasonable search. . . Such an inquiry does nothing to further elaborate the law. In this case, Granz and Pimpare have raised the qualified immunity defense on summary judgment and not as a 12(b)(6) motion. We take it as undisputed at this stage that the agents lacked a warrant and that they exceeded the scope of Knott's consent. . . These issues, however, go only to the 'reasonableness' of any Fourth Amendment 'search.' The threshold issue is whether there was a 'search' at all for Fourth Amendment purposes. . . .We hold that based on the summary judgment record and using the normal summary judgment standard, Riverdale's Fourth Amendment rights were not violated and the agents are entitled to qualified immunity on the first prong. We thus need not reach the other two prongs of the qualified immunity analysis; we address the second prong merely as an alternative ground for decision, should we be wrong on the first prong.").

Bellville v. Town of Northboro, 375 F.3d 25, 30(1st Cir. 2004) ("Normally, we endeavor to avoid deciding constitutional issues and attempt to decide cases on the narrowest grounds possible. That approach is not available here. In evaluating a claim of qualified immunity, the Supreme Court has told us that we must evaluate whether there was a constitutional violation before we address the other elements of a qualified immunity defense." Court found no constitutional violation where civilians were used in search to assist in identification of stolen property).

Dirrane v. Brookline Police Dept., 315 F.3d 65, 69-71(1st Cir. 2002) ("In a decision issued after the district court ruled, the Supreme Court has instructed us to start not with the immunity issue but with the question whether the facts *as alleged* make out a violation of the First Amendment. [citing *Saucier v. Katz*] This makes sense where the issue is whether some abstract right exists; otherwise the 'rights' issue may never be resolved. . . But it is an uncomfortable exercise where, as here, the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. It may be that *Saucier* was not strictly intended to cover the latter case. . . . Nevertheless, assuming *arguendo* that *Saucier* applies, we agree with Dirrane that a colorable constitutional claim would be made out if *everything* asserted by Dirrane in his very lengthy complaint were established as true and–perhaps more importantly–defendants had *no* other facts with which to justify their actions. . . . In sum, the allegations have the structure of a classic cover-up in which the whistleblower suffered an adverse change in employment 'because' of his speech on a public issue. . . . However, on qualified immunity, the outcome is different. . . . Here, as is common where there is a lack of precedent, this is not a case in which a reasonable officer *must* have known that he was acting unconstitutionally.").

Duriex-Gauthier v. Lopez-Nieves, 274 F.3d 4, 9 (1st Cir. 2001) ("The Supreme Court has . . .noted the importance of providing certainty as to what are the clearly established rules of primary conduct for government officials. . . Rulings on qualified immunity grounds avoid reaching the issue of whether there is a violation at all. For these reasons, the Court has expressed that 'the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.'").

Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir. 2001) ("This Court has identified a three-step process for evaluating qualified immunity claims: (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.").

Gardner v. Vespia, 252 F.3d 500, 502 (1st Cir. 2001) ("A cause of action brought under § 1983. . . reverses the normal order of judicial analysis and requires that we consider the constitutional question first. . . .").

Seekamp v. Michaud*,* 109 F.3d 802, 805 n.4 (1st Cir. 1997) ("We note that a great many § 1983 claims are resolved under the doctrine of qualified immunity, *see, e.g., Hegarty v. Somerset County,* 53 F.3d 1367, 1379, 1381 (1st Cir.), cert. denied, __ U.S. __, 116 S.Ct. 675, 133 L.Ed.2d 524 (1995), without considering their constitutional merit. Our most recent decision involving an alleged seizure by roadblock, *Horta v. Sullivan*, 4 F.3d 2, 15 (1st Cir.1993) (declining to consider whether partial roadblock constituted a seizure), was such a case. With that constitutional issue squarely presented in the case now before us, however, we take the occasion to discuss the merits

in some detail with a view to affording a modicum of concrete guidance not often warranted in our earlier cases.").

Aversa v. United States, 99 F.3d 1200, 1214-15 (1st Cir. 1996) ("Some courts have read this language [in *Siegert*] as requiring a resolution of the merits under current law before beginning the analysis of the law as it stood at the time of the alleged violation. . . But we think that these statements, read in context, simply mean that the plaintiff must assert a clearly established federal constitutional (or statutory) right, and not merely a state law tort claim. . . . This is not to say that currently applicable law cannot be considered in the course of, in addition to, or instead of determining the law in effect at the time of the alleged violation. . . . Or a court may look to current Supreme Court law to determine that, although the right may now exist, it was not clearly established before. . . A court may also bypass the qualified immunity analysis if it would be futile because current law forecloses the claim on the merits. . . We follow the latter course in this case . . . .").

Singer v. State of Maine, 49 F.3d 837, 844-45 (1st Cir. 1995) ("[T]he threshold question in our qualified immunity analysis is whether [plaintiff] has established that defendants violated her Fifth Amendment right against self-incrimination.").

Watterson v. Page, 987 F.2d 1, 7 (1st Cir. 1993) ("[B]efore even reaching qualified immunity, a court of appeals must ascertain whether the appellants have asserted a violation of a constitutional right at all." citing *Siegert*).

Tardiff v. Knox County, 397 F.Supp.2d 115, 140, 141 (D.Me. 2005) ("Although it has been clearly established in the law for some time that a blanket policy of strip searching all misdemeanor detainees is unlawful, the constitutionality of a policy of strip searching detainees charged with non-violent, non-weapon, and non-drug felonies without reasonable suspicion has not been previously established in this Circuit. The fact that neither the Supreme Court nor the United States Court of Appeals for the First Circuit has specifically ruled on the constitutionality of blanket strip search policies for detainees charged with non-violent, non-weapon or non-drug felonies, inclines the Court to find that Sheriff Davey is entitled to the benefit of the doubt on this point. Although conduct could potentially violate clearly established law even if the allegedly unconstitutional conduct had not been the subject of a prior court case, . . . the right allegedly violated must be defined at an appropriate level of specificity before a court can conclude that it was clearly established. . . . The Department of Corrections Standards and the Attorney General's Rules permit strip searches of all felony detainees. Sheriff Davey's reliance on those standards and rules, led to the development and implementation of Knox County's policy authorizing strip searches of all felony detainees. While the Fourth Amendment rights of those individuals charged with felonies of a non-violent, non-weapon, and non-drug nature who were automatically strip searched were indeed violated, the Court concludes that those rights were not clearly established in the law during the relevant class period. The Court concludes that Sheriff Davey is, therefore, entitled to qualified immunity for the Knox County Jail Policy permitting the strip search of all persons

charged with non-violent, non-weapon, and non-drug felonies without reasonable suspicion. . . . During the relevant class period, the Knox County Jail's practice of strip searching all new detainees charged with misdemeanors without reasonable suspicion, was clearly unconstitutional. . . Maintenance of the practice after the operative class date–November 19, 1996–insofar as it applied to misdemeanants, cannot be shielded by qualified immunity.")

Doe v. Magnusson, No. Civ.04-130-B-W, 2005 WL 758454, at *2, **10-13 & n.9 (not reported) (D. Me. Mar. 21, 2005) ("The following discussion of the first inquiry apropos Doe's privacy claim illustrates the difficulty sometimes posed by requiring the court to ask and answer in the first instance if there is a claim for a constitutional violation before undertaking the qualified immunity 'clearly established' inquiry. It also demonstrates the wisdom of the approach dictated by *Saucier v. Katz*. . . as the lingering uncertainty about the question of whether such a right to privacy exists has been fostered by the inclination of courts to leapfrog the merits of the underlying claim by uses of 'even if,' 'assuming arguendo,' or 'whether or not.'. . . Based on the discussion of a right to non-disclosure of private medical information relied upon by the First Circuit in *Borucki*, and the reasoning of the Seventh Circuit in *Pesce v. J. Sterling Morton High School*, the Eleventh Circuit's *Harris v. Thigpen*, the Second Circuit's *Doe v. City of New York*, and the Third Circuit's *Doe v. Delie*, I conclude that there is a Fourteenth Amendment right to privacy that protects private medical information from unjustified disclosure by governmental actors. . . . Accordingly, Doe's complaint states a claim for a violation of his constitutional right not to have his HIV/AIDS status disclosed to others. . . . The discussion above demonstrates quite pointedly that the question of whether or not inmates have a Fourteenth Amendment right to privacy that protects private medical information from disclosure (not justified by legitimate penological reasons) by governmental actors was not clearly established by June 3, 2003. Certainly neither the Supreme Court nor the First Circuit had decisions that established this proposition. . . . Thus, it is with confidence that I conclude that, with respect to an inmate's Fourteenth Amendment right not to have private medical information disclosed to other inmates by governmental actors who were not proceeding on the basis of a legitimate penological reason, such a right was not clearly established by June 3, 2003. . . . While I have attempted 'to set forth principles which [might] become the basis for a holding that a right is clearly established,' . . . given the unsettled nature of the question, even if I am right on the first prong inquiry, it may be sometime before the clearly established question vis -a-vis this right can be answered in the affirmative with confidence.").

SECOND CIRCUIT

Moore v. Andreno, 505 F.3d 203, 215, 216 (2d Cir. 2007)("In concluding that, for purposes of qualified immunity, the Deputies could have reasonably believed that Sines had authority to consent to the search, we note that this analysis is distinct from that in Part I.A., in which we concluded that, for purposes of determining whether there had been a constitutional violation, common understanding could not have supported a belief that Sines had authority to consent. The latter concerns the question of whether the search itself was unreasonable, in violation of the Fourth Amendment (i.e., the first part of the qualified immunity test), based on common social

understanding as clarified in *Randolph*; the former concerns the question of whether the officers' belief in the lawfulness of their conduct was unreasonable, thereby precluding a qualified immunity defense (i.e., the second part of the qualified immunity test), based on the state of the existing law, which of course pre-dated *Randolph*. . . . Thus, in this case, we conclude that the Deputies acted unreasonably when they searched the study because 'no ... authority [to consent] could sensibly be suspected.' *Randolph*, 547 U.S. at 112. However, we also conclude that because the law was unclear, the Deputies could reasonably have believed that Sines had access and a substantial interest and therefore had authority to consent to the search. . . . Because we believe that, at the time of the search, the law was not clearly established as to whether Sines had authority to consent to a search of the study, Deputies Andreno and Palmer are entitled to qualified immunity.")

Walczyk v. Rio, 496 F.3d 139, 154 (2d Cir. 2007) ("When a defendant officer charged with violations of federal constitutional rights invokes qualified immunity to support a motion for summary judgment, a court must first consider a threshold question: Do the facts, viewed in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right? If the answer to this question is no, 'there is no necessity for further inquiries concerning qualified immunity .'. . Only if the answer to the first question is yes must a court proceed to the inquiry for qualified immunity : Was the right at issue clearly established at the time of the defendant's actions? . . . . If the right at issue was not clearly established by then existing precedent, then qualified immunity shields the defendant. Even if the right at issue was clearly established in certain respects, however, an officer is still entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context.")

Walczyk v. Rio, 496 F.3d 139, 165-71 (2d Cir. 2007) (Sotomayor, J., concurring) ("I agree fully with the outcome of this case, and I concur with most of the majority's reasoning; however, I disagree with its description of the qualified immunity standard we should apply and its related discussion of 'arguable probable cause.' A long line of decisions of this Court features the same doctrinal misstatements, and it is time we stopped repeating uncritically this particular language and gave it the attention it deserves. . . . .The portion of the majority's qualified immunity discussion that I find objectionable reads as follows: 'If the right at issue was not clearly established by then existing precedent, then qualified immunity shields the defendant. Even if the right at issue was clearly established in certain respects, however, an officer is still entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context.' . . . These two sentences and the citation to *Malley* reveal the two flaws I see in this circuit's approach to qualified immunity . First, our approach splits the single question of whether a right is 'clearly established' into two distinct steps, contrary to Supreme Court precedent. Second, we demand a consensus among all hypothetical reasonable officers that the challenged conduct was unconstitutional, rather than positing an objective standard of reasonableness to which defendant officers should be held, as the Supreme Court has repeatedly instructed us to do. I address both of these points in turn.The Supreme Court has made clear that '[t]he relevant, dispositive inquiry in determining whether a right is clearly established

is whether it would be clear to a reasonable officer that his [or her] conduct was unlawful in the situation he [or she] confronted.' Saucier v. Katz, 533 U.S. 194, 202 (2001). That is, whether a right is clearly established is the same question as whether a reasonable officer would have known that the conduct in question was unlawful. This Court's case law, in contrast, bifurcates the 'clearly established' inquiry into two steps. . . . By splitting the 'relevant, dispositive inquiry' in two, we erect an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court precedent. . . . Contrary to what our case law might suggest, the Supreme Court does not follow this 'clearly established' inquiry with a second, ad hoc inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete. . . . This Court has used the term 'arguable probable cause' to describe the standard for finding that a defendant officer is entitled to qualified immunity for his or her reasonable but mistaken determination that probable cause existed in a particular context. . . . We have also stated that 'arguable probable cause' falls under the objective reasonableness determination of our qualified immunity test. . . Yet reasonableness–and therefore the existence of 'arguable probable cause'–are considerations that properly fall within the clearly established inquiry as the Supreme Court has described it. . . . It is not surprising, then, that 'arguable probable cause' finds no mention in any Supreme Court opinion; the need for a separate term to describe this concept arises only once we have improperly splintered the 'clearly established' inquiry. Because I believe 'arguable probable cause' is both imprecise and an outgrowth of the first flaw in our qualified immunity analysis, I do not agree with the majority's use of the term. . . . I recognize that the distinction I am drawing is a fine one, but I believe it has real consequences. Our approach does not simply divide into two steps what the Supreme Court treats singly, asking first, whether the right is clearly established as a general proposition, and second, whether the application of the general right to the facts of this case is something a reasonable officer could be expected to anticipate. Instead, we permit courts to decide that official conduct was 'reasonable' even after finding that it violated clearly established law in the particularized sense. By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck 'between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.' . . . My second objection to the majority's formulation of the qualified immunity standard is that it treats objective reasonableness as turning on whether 'officers of reasonable competence could disagree.' . . This language, which our cases frequently recite, . . . derives from the Supreme Court's 1986 decision in *Malley*, 475 U.S. at 341. Whether reasonably competent officers could disagree about the lawfulness of the conduct at issue, however, is not the same question the Supreme Court has repeatedly instructed us to consider: whether 'it would be clear to a reasonable officer that his [or her] conduct was unlawful in the situation he [or she] confronted.'. . . As with our bifurcation of the 'clearly established' inquiry, our requirement of consensus among all reasonable officers departs from Supreme Court dictates and unjustifiably raises the bar to liability for violations of constitutional rights. . . . Asking whether 'officers of reasonable competence could disagree' shifts this inquiry subtly but significantly. Instead of asking whether the defendant's conduct was beyond the threshold of permissible error, as the reasonable officer standard does, this inquiry affords a defendant immunity unless a court

is confident that a range of hypothetical reasonably competent officers could not disagree as to whether the defendant's conduct was lawful. . . . Our Court . . .has adopted an unjustifiably stringent standard in the qualified immunity context by prohibiting liability for constitutional violations where a court believes that one reasonably competent officer would find the conduct at issue lawful, even if the overwhelming majority would not. . . .Finally, I note that although we repeat *Malley*'s 'officers of reasonable competence' test with regularity, and it appears frequently in the decisions of other federal courts of appeals, . . .it has not appeared a second time in any majority opinion of the Supreme Court. It seems curious that we would continue to rest our qualified immunity standard on language the Supreme Court has carefully eschewed for over twenty years since *Malley* was decided. In sum, the Supreme Court has struck a careful balance between the vindication of constitutional rights and government officials' ability to exercise discretion in the performance of their duties. Our case law, in subtle but important ways, has altered this balance in favor of defendants by adding another analytic step to the qualified immunity analysis and equating objective reasonableness with unanimity among 'officers of reasonable competence.' In the vast majority of cases, including this one, the particular phrasing of the standard will not alter the outcome of the qualified immunity analysis. There is no doubt in this case that a reasonable officer would believe that the arrest of Thomas Walcyzk, as well as the search of his home and the seizure of firearms found there, were lawful. Yet the effect in future cases may not always be so benign. What is more, the majority's framework introduces unnecessary complications into an already complicated qualified immunity analysis. It is time to eliminate these complications and reconcile our qualified immunity analysis with the Supreme Court's most recent, authoritative jurisprudence.")

Zieper v. Metzinger, 474 F.3d 60, 68-71 (2d Cir. 2007) ("At the time of defendants' actions, it was well-established that the defendants could ' Aexhort[ ]" private entities' to remove speech so long as they did not engage in 'any threat, coercion, or intimidation' when doing so. . . Thus, it was clearly lawful for defendants to request that plaintiffs remove from the internet a video which they may have believed posed a danger to the public safety. . . However, in making this request, the defendants were forced to walk a difficult line: They could lawfully explain why the government was concerned about the video and request its removal, so long as none of their statements or actions might reasonably be interpreted as coercive. In walking this line, much of what the defendants here did was unobjectionable: They were free to contact both plaintiffs, to explain that the government was concerned about the video's effect on the general public, and to request that plaintiffs remove it from the internet. However, as we held above, a reasonable juror could conclude that some of the defendants' actions here did cross the sometimes fine line between an 'attempt[ ] to convince and [an] attempt[ ] to coerce.' . . Notwithstanding our conclusion that a reasonable juror could find a First Amendment violation, under our case law, the defendants are entitled to qualified immunity if it would not have been clear to a reasonable officer in their position that their conduct was unlawful. . . Here, our pre-existing law would not have made apparent to a reasonable officer that defendants' actions crossed the line between an 'attempt[ ] to convince and [an] attempt[ ] to coerce' because the cases in which we have held that individuals' First Amendment rights were violated involved conduct more likely to be perceived as threatening

than that here. . . . [A]s a result of our holding that a reasonable juror could conclude that the defendants' actions violated the First Amendment, officials who are in a similar situation in the future will be on notice that they must be especially careful to make sure that the totality of their actions do not convey a threat even when their words do not.")**.**

Sira v. Morton, 380 F.3d 57, 81, 82 (2d Cir. 2004) ("[W]e conclude that defendants are entitled to qualified immunity with respect to Sira's sufficiency challenge. As this court recently observed, neither this circuit nor the Supreme Court has clearly defined standards for determining what constitutes 'some evidence' in the context of prison disciplinary hearings; rather, decisions have addressed the problem piecemeal, focusing on the discrete problems raised by the facts of particular cases. . .At the time of Sira's disciplinary proceedings, the law of this circuit recognized a due process obligation to conduct some assessment of informant credibility to support prison discipline,. . . but there was an ambiguity– which persisted at least until this court's decision in *Taylor v. Rodriguez*, 238 F.3d at 192-93, and possibly thereafter, *see Gaston v. Coughlin*, 249 F.3d at 163–as to whether a hearing officer was required to conduct an independent assessment or whether he could rely on the opinion of another person. We have attempted to clarify that point today by reiterating *Taylor's* recognition that due process requires an independent assessment of the confidential informant's credibility. Further, no prior case appears to have addressed the issue whether an independent assessment of informant credibility is necessarily sufficient to establish the reliability of all confidential disclosures, including third-party hearsay. Indeed, in cases where confidential information was found to constitute some reliable evidence, our decisions did not specifically discuss whether the evidence was based on the informant's direct knowledge or on hearsay. . . We today hold that the reliability of evidence is always properly assessed by reference to the totality of the circumstances and that an informant's record for reliability cannot, by itself, establish the reliability of bald conclusions or third-party hearsay. Because this principle was not clearly established before today, it was objectively reasonable for defendants to think that an independent assessment of the credibility of the confidential informants who proffered evidence against Sira, consistent with *Russell v. Scully*, 15 F.3d at 223, satisfied due process, and that Capt. Morton could, without further inquiry, rely on the third-party hearsay disclosed by those informants as some reliable evidence of Sira's participation in the Y2K strike. Accordingly, although we agree with the district court that the present record supports Sira's sufficiency challenge, we reverse the denial of qualified immunity on this part of Sira's due process claim and direct that, on remand, summary judgment be entered in favor of defendants on this point.").

Luna v. Pico, 356 F.3d 481, 491 (2d Cir. 2004) ("Taking these factors together, we hold that a reasonable hearing officer in defendants' position would not have clearly understood from the existing law that he was acting unlawfully. It was not clearly established at the time that the 'evidence' presented to Pico and Cave of Luna's guilt was insufficient to meet the requirements of due process. We are quick to emphasize, however, that our constitutional holding–that a prisoner's due process rights are violated when he is punished solely on the basis of a victim's hearsay accusation without any indication in the record as to why the victim should be credited–is

'clearly established' for the purpose of future qualified immunity cases involving similar fact patterns.").

Hanrahan v. Doling, 331 F.3d 93, 98 (2d Cir.2003) ("During the relevant events in this case, Doling ordered and Selsky affirmed that Hanrahan would serve up to ten years in SHU confinement. Because the reasonableness of their conduct is judged 'based upon the information the officers had when the conduct occurred'–the focus of the qualified immunity inquiry should be on the 120-month SHU sentence imposed on Hanrahan, not the 335 days which Hanrahan served in the SHU before his disciplinary sentence was overturned. . . . As we have already observed, the duration of actual confinement as well as the success of any subsequent administrative appeals may well be relevant in assessing whether sufficient evidence of a due process violation has been proffered in the first place, thus eliminating any need to proceed to the second step of the qualified immunity inquiry.").

Loria v. Gorman, 306 F.3d 1271, 1281 (2d Cir. 2002) ("We conduct a two part inquiry to determine if an official is entitled to qualified immunity. The threshold question is whether, '[t]aken in the light most favorable to the party asserting the injury, ... the facts alleged show the officer's conduct violated a constitutional right.' . . . Addressing this initial question serves the important role of providing a clear standard against which officers can measure the legality of future conduct. . . . Thus, although we have under certain circumstances bypassed this first step and proceeded directly to the qualified immunity inquiry, that is the exception rather than the rule.").

Duamutef v. Hollins, 297 F.3d 108, 112, 114 (2d Cir. 2002) ("[B]efore applying the qualified immunity standard, we ask whether there was a constitutional violation in the first instance . . . .[N]o rational jury could find that defendants' decision to institute a temporary mail watch was not reasonably related to legitimate penological interests. There was no violation of plaintiff's First Amendment rights and, in any event, defendants are entitled to qualified immunity.").

Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 251 (2d Cir. 2001) ("The Supreme Court has encouraged lower courts in appropriate circumstances 'to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all,' before reaching the question of whether the right was clearly established at the time. . . One such circumstance is where, as in the present case, the conduct complained of is of a type that generally occurs without significant warning and ceases in short order, and effectively precludes other forms of judicial review such as suits for declaratory or equitable relief, motions to suppress, or appeals from a conviction. . . In such instances, a § 1983 (or *Bivens*) damage action is likely to provide the only effective vehicle for aggrieved parties to adjudicate their claims, lest the asserted right never be clearly established and the allegedly unconstitutional conduct continue indefinitely. Accordingly, we first address whether the facts plaintiffs allege state a violation of the Constitution.").

Tellier v. Fields, 280 F.3d 69, 79 (2d Cir. 2000) ("[In *Horne*,]we noted that where the challenged conduct is particularly egregious, or where it is likely that the constitutional question would escape review over a lengthy period, or where deciding the constitutional issue plays a role in supporting the action taken by the court, avoidance would contravene the Supreme Court's guidance in *Siegert* and its progeny. . . *Horne* supports the need to address the constitutional question when a court finds that qualified immunity does not exist because the right asserted is clearly established. In that instance, (and in this case) the constitutional inquiry is inextricably bound to the resolution of whether qualified immunity exists. We also note that the challenged conduct here is particularly egregious. Accordingly, we find that it is proper for us to reach the merits of the constitutional question in this case.").

Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) ("We hold that such a staged perp walk exacerbates the seizure of the arrestee unreasonably and therefore violates the Fourth Amendment. But we also hold that, because the Fourth Amendment right at issue was not clearly established until today's decision, the defendant police officer in this case is entitled to qualified immunity."). [*Compare* ***Caldarola v. County of Westchester,*** 343 F.3d 570, 575, 576 (2d Cir. 2003) (Plaintiff's privacy interest in not having his "perp walk" broadcast to the public was outweighed by County's legitimate government purposes).]

X-Men Security, Inc. v. Pataki, 196 F.3d 56, 65, 66 (2d Cir. 1999) ("Under the *Harlow v. Fitzgerald* standard, a government official sued in his individual capacity . . . is entitled to qualified immunity in any of three circumstances: (1) if the conduct attributed to him is not prohibited by federal law; or (2) where that conduct is so prohibited, if the plaintiff's right not to be subjected to such conduct by the defendant was not clearly established at the time of the conduct; or (3) if the defendant's action was 'objective[ly] legal[ly] reasonable[ ] ... in light of the legal rules that were clearly established at the time it was taken.' These three issues should be approached in sequence, for if the second is resolved favorably to the official, the third becomes moot; a favorable resolution of the first moots both the second and the third." [cites omitted]).

Wilkinson v. Russell, 182 F.3d 89, 106, 107 (2d Cir. 1999) ("At the outset of our discussion, we noted the Supreme Court's recent pronouncement that courts 'must' reach the constitutional merits before addressing an immunity defense. [citing *Wilson*] In this case, that guidance makes particularly good sense. Parents complaining that a faulty abuse investigation has prompted a state court to separate them from their children are often barred either by the *Rooker-Feldman* or *Younger* abstention doctrines from pursuing injunctive relief in a federal action. [citing cases] As a result, there have been few if any cases in which courts have considered a constitutional challenge to the adequacy of an abuse investigation unaccompanied by an immunity defense. Rather than separating the constitutional test from the immunity test in the cases that have arisen, courts have simply conflated the two and have routinely extended immunity even in instances of apparent serious abuse by case workers. . . As an unfortunate consequence, defendants have been immunized in connection with an ever expanding range of misconduct since so little has ever been deemed either clearly 'constitutional or non-constitutional.' By taking this opportunity to address

constitutionality in advance of immunity, we have begun the difficult process of identifying particular conduct falling inside and outside of acceptable constitutional parameters. In this way, and at the Supreme Court's urging, we hope to 'promote[ ] clarity in the legal standards for official conduct.' . . Indeed, from this day forward, these and other case workers should understand that the decision to substantiate an allegation of child abuse on the basis of an investigation similar to but even slightly more flawed than this one will generate a real risk of legal sanction. . . . Although our finding on the constitutional merits is sufficient to resolve this case, we therefore consider it useful to undertake a qualified immunity style analysis demonstrating the extent to which there has been an absence of 'clearly established law' in this area. By analyzing a number of past cases, it becomes readily apparent that however marginal defendants' conduct was under the constitutional standard that we apply today, it was at least objectively reasonable for defendants to believe that their conduct was not inconsistent with plaintiffs' clearly established rights.").

Stuto v. Fleishman, 164 F.3d 820, 825 (2d Cir. 1999) ("While we have held that [the *Siegert/Lewis* approach] is non-mandatory, *Medeiros v. O'Connell*, 150 F.3d 164, 169 (2d Cir.1998), we acceded to it in *Medeiros* and affirmed on the merits of the constitutional claim in light of *Lewis*, although the district court's decision was based on qualified immunity. Therefore, we will examine whether Stuto has alleged a violation of due process.").

Medeiros v. O'Connell, 150 F.3d 164, 169 (2d Cir. 1998) ("The district court decided the case on what was then the most expeditious ground, qualified immunity. The Supreme Court's unambiguous preference is that we consider the merits first, and that is the ground on which we affirm.").

Mozzochi v. Borden, 959 F.2d 1174, 1179 (2d Cir. 1992) ("The first step is to determine whether the alleged conduct violates any constitutionally protected right at all. Conduct that does not violate any constitutional right certainly does not violate a constitutional right that was 'clearly established' at the time . . . .").

Baker v. Welch, No. 03Civ.2267(JSR)("JP), 2003 WL 22901051, at *19, *20 (S.D.N.Y. Dec.10, 2003) ("There is no Supreme Court or Second Circuit case on point, few parolee cases and essentially two different lines of prisoner cases. Whatever the scope of the constitutional right should be, this Court has no hesitation in holding that it was not 'clearly established' in September-October 2002 when Ms. Welch observed Mr. Baker's urine test. [footnote omitted] The *Saucier* and *Ehrlich* decisions, however, require this Court to go further and announce, in dicta, the proper scope of the constitutional right. . . Unfortunately, defendants claimed that there was no constitutional violation (based on Ms. Welch's version of the facts) and that, in any event, defendants were entitled to qualified immunity because the right was not clearly established; defendants' qualified immunity argument did not address whether there was a constitutional violation if the facts were as Mr. Baker alleged, i.e., a close viewing of his genitals by Ms. Welch during the urine test. The defendants thus offered the Court no help in this aspect of the decision. The cases make clear that the Court must balance the parolee's privacy interest with the State's

legitimate equal employment and penological interests. [footnote omitted] The Court agrees that based on the current evidence before the Court, the balance should be struck to allow incidental and obscured viewing but prohibit regular and close viewing. Thus, a female parole officer is allowed to conduct a urine test of a male parolee and observe the test from a distance that does not provide a direct view of the male parolee's genitals. If 'close' observation of the urine test becomes necessary, it should be done by a person of the same sex as the parolee. Thus, under Mr. Baker's version of the facts, in the future, a female parole officer would not be entitled to qualified immunity if she conducted the urine test by standing next to the male parolee viewing his penis. Under Ms. Welch's and Mr. Rodriguez's version of the facts, the parole officer's conduct would not violate the parolee's privacy rights. The Court is confident that this balance will sufficiently protect the DOP's legitimate employment and penological interests. Indeed, the Court is essentially is adopting as the constitutional standard the very procedures that defendants Ms. Welch and Mr. Rodriguez describe as the current DOP policy. The Court reiterates that this is dicta and is based on the limited record before the Court (and defense counsel's failure to address this issue); other cases with a better developed record may lead to a different result. But following Ehrlich' s directive, this dicta will serve to put parole officers on notice that in the future, the law will be considered 'clearly established' in forbidding 'close' observation of a parolee's genitals during a urine test by a parole officer of the opposite sex.").

THIRD CIRCUIT

A.W. v. The Jersey City Public Schools, 486 F.3d 791, 794, 795, 803, 806 (3d Cir. 2007) (en banc) ("The first issue we confront is whether we should decide the availability of § 1983 relief for the alleged violations of A. W.'s statutory rights as part of the qualified immunity inquiry that is the basis for the appeal before us. We conclude we can, and should. We have jurisdiction to decide this question because it arises in the course of our analysis of defendants' request for qualified immunity. . . . Thus, the availability of § 1983 to remedy the alleged violations of A.W.'s statutory rights is part and parcel of our 'threshold' inquiry into defendants' qualified immunity defense. . . This inquiry parallels the constitutional or 'threshold' inquiry in the *Saucier* two-part qualified immunity analysis applied to constitutional claims. . . . In light of the recent, clear guidance provided by the Supreme Court in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), regarding the availability of § 1983 to remedy statutory violations, and the well-reasoned opinions of the Courts of Appeals for the Fourth and Tenth Circuits in *Sellers v. School Board of Manassas, Virginia*, 141 F.3d 524 (4th Cir.1998), and *Padilla v. School District No. 1*, 233 F.3d 1268, 1273 (10th Cir.2000), rejecting our holding in *Matula*, we now conclude that we should not continue to adhere to the principle we established in *Matula*. . . . [F]inding the reasoning of *Sellers* and *Padill*a convincing, we do not agree that ' 1415(l) shows that Congress intended the remedies in the IDEA to complement, rather than supplant, § 1983. Just like the savings clause in *Rancho Palos Verdes*, this provision merely evidences Congress' intent that 'the claims available under § 1983 prior to the enactment of the [Act] continue to be available after its enactment.' . . . [W]e [also] conclude that § 1983 is not available to provide a remedy for defendants' alleged violations of A.W.'s rights under Section 504. . . . A.W. has not alleged an actionable violation of his rights under the IDEA

or Section 504. Accordingly, we will reverse the order of the District Court denying defendants' motion for qualified immunity and remand to the District Court for entry of judgment in favor of defendants.").

Miller v. State of New Jersey, No. 04-3502, 2005 WL 1811820, at *2 (3d Cir. Aug. 2, 2005) (not published) ("Miller's cause of action is premised on his belief that Prosecutors and Sheriff's Deputies from Union and Essex Counties conspired to restrict and, in doing so, to violate, what Appellant believes is his absolute right 'under the Second Amendment to possess a firearm [while] off-duty since it is reasonably related to his service in the state-sanctioned militia,' i.e., the Essex County Sheriff's Office. . . . While local law enforcement officers undoubtedly play a critical role in combating future acts of terrorism, the Essex County Sheriff's Office is clearly not a militia for purposes of satisfying the first prong of a qualified immunity analysis, i.e., a clearly established Constitutional right protected by the Second Amendment.")**.**

Gibson v. Superintendent of New Jersey Dep't of Law and Public Safety-Division of State Police, 411 F.3d 427, (3d Cir. 2005)("Several circuits have recognized that police officers and other state actors may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor. [citing cases] We agree. Although *Brady* places the ultimate duty of disclosure on the prosecutor, it would be anomalous to say that police officers are not liable when they affirmatively conceal material evidence from the prosecutor. In this case, Gibson alleges that the Troopers suppressed the extent of their impermissible law enforcement tactics, and had that information been available, he would have been able to impeach several witnesses and possibly could have halted the entire prosecution. We think that Gibson states an actionable § 1983 claim against the Troopers for interference with his Fourteenth Amendment due process rights. However, we also realize that this duty on the part of the Troopers was not clearly established at the time of Gibson's prosecution in 1994. . . . Even in 2000, this Court was only able to assume that police officers 'have an affirmative duty to disclose exculpatory evidence to an accused if only by informing the prosecutor that the evidence exists .'[citing *Smith v. Holtz*, 210 F.3d 186, 197 n.14 (3d Cir.2000)]Because such a right was not clearly established in this Circuit at the time of Gibson's conviction, Troopers Pennypacker and Reilly are entitled to qualified immunity with regard to their failure to inform the prosecutor of *Brady* material.").

Wright v. City of Philadelphia, 409 F.3d 595, 600, 601 (3d Cir. 2005) ("There is some disagreement as to how *Saucier* should be interpreted. Specifically, the dispute is whether a court must determine the issue of whether there has been a constitutional violation before reaching the qualified immunity question, or whether that inquiry is the first part of a two-pronged test for qualified immunity. In some cases, we have interpreted *Saucier* to imply that the issue of qualified immunity is only relevant after a court has concluded that a constitutional violation has occurred. In that view, if there is no constitutional violation, there is no reason to reach the qualified immunity issue. . . In other cases, we have interpreted *Saucier* to mean that a defendant is entitled to qualified immunity unless a plaintiff can prove both that a constitutional right has been violated, and then that the constitutional right violated was clearly established. . .Under either interpretation,

if no constitutional violation is found, a court need not address whether a reasonable officer would have known he or she was violating a clearly established right. As a practical matter, the outcome will be the same whether we conclude that the officers are immune from suit or instead, that the plaintiff has no cause of action. Our concurring colleague believes that *Brosseau v. Haugen* . . . conclusively resolves this dispute in favor of the first interpretation. We note that at least six of our sister Courts of Appeals would seem to disagree. [citing cases] Those Courts of Appeals considered *Brosseau* and yet still treated the constitutional violation as part of the qualified immunity test, as opposed to a separate inquiry like our concurring colleague recommends. . . Accordingly, at least two of those Courts of Appeals have specifically concluded that defendants would be entitled to qualified immunity upon a determination that no constitutional violation was committed. . . We believe that those Courts of Appeals acted reasonably in reading *Brosseau* as consistent with a two-step qualified immunity inquiry, with the first step being the 'constitutional issue' and the second being 'whether the right was clearly established.' This case, however, does not require us to decide between the two readings of *Saucier* because the constitutional violation was presented to us in the context of qualified immunity. Specifically, in the course of asserting their claim for qualified immunity, Heeney and O'Malley argue there was no constitutional violation. We recognize that a conclusion that no constitutional violation took place would also negate an essential element of the § 1983 claim, . . . but the constitutional violation is best addressed as an aspect of the qualified immunity analysis because that was the jurisdictional basis for this interlocutory appeal. . . .While we could construe the officers' arguments as challenging Wright's cause of action, we believe the proper way for us to review the constitutional violation here is through the qualified immunity denial. Accordingly, this opinion analyzes the threshold inquiry, whether the officers' conduct violated Wright's constitutional rights, as the first part of the qualified immunity analysis.")

Wright v. City of Philadelphia, 409 F.3d 595, 605, 606 (3d Cir. 2005) (Smith, J., concurring) ("The majority appears to attempt to avoid confusion by relabeling the second prong of the *Saucier* test. Whereas *Brosseau* refers to the second prong of the *Saucier* test as addressing the *'*qualified immunity*'* issue, the majority refers to that prong as addressing *'*whether the right was clearly established.*'* While I share the concern motivating this seemingly commonsensical change, I think it conceals the basic problem with the majority's approach. That is, the Supreme Court seems clearly to view the second prong of the *Saucier* test as the essential *'*qualified immunity*'* inquiry– not as part of a larger qualified immunity inquiry. . . We should do the same. Unfortunately, in my view the majority compounds its error in describing the nature of our inquiry by holding that the officers in this case were entitled to qualified immunity because there was no constitutional violation. . . To my knowledge, only one of our sister circuits has gone this far. [citing *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 65 (1st Cir.2004)] . . . By contrast, the Eleventh Circuit speaks neither of the qualified immunity inquiry as consisting of two steps, *see Evans v. Stephens*, ___ F.3d ___, No. 02-16424, 2005 WL 1076603, at *4 (11th Cir. May 9, 2005) (en banc), . . . nor holds that failure to establish a constitutional violation triggers qualified immunity.[citing *Purcell v. Toombs County*, 400 F.3d 1313, 1324 (11th Cir.2005)]. . . As the majority's terminology and holding seem to me inconsonant with *Brosseau*, I believe the Eleventh Circuit

employs the better approach. Ultimately, the majority apparently feels compelled to hold that the officers have qualified immunity because 'that was the basis for this interlocutory appeal.' In other words, the majority seems to believe that what arrived in a 'qualified immunity' envelope cannot be returned in a 'failure to state a claim' envelope. I disagree with the majority for two reasons. First, the purpose of the qualified immunity doctrine is to 'permit insubstantial lawsuits to be quickly terminated,'. . . i.e., to allow the 'dismissal of insubstantial lawsuits without trial.' . . In other words, the essential reason we are permitted to exercise interlocutory jurisdiction when qualified immunity is denied by a district court is broadly to determine whether dismissal is appropriate. 'Unless the plaintiff's allegations state a claim of violation of clearly established law,' the Court has explained, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.' . . Thus, '[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged a deprivation of a constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the violation.'. . In my view, where no such claim is stated, dismissal on that ground–rather than on the ground that the officials are immune–is appropriate. Second, the majority's reasoning contravenes the purpose of the two-step *Saucier* inquiry. As discussed above, *Saucier*'s 'order of battle' is designed to force courts to establish precedent on the contours of constitutional rights to provide guidance for law enforcement officers. . . Applying this approach, a court may find that an official's alleged conduct was constitutionally permissible or that the conduct, while constitutionally impermissible, did not cross a 'clearly established' line. Referring to both of these scenarios as establishing 'qualified immunity' sends a confusing signal to law enforcement officials concerning what actions they may or may not take. The majority's reasoning thus ironically has the potential to frustrate the development of 'clearly established' law, the very raison d'etre for *Saucier*'s two-step test. In view of the foregoing, I believe the proper analytical course in this case would be first to consider whether the defendants violated the Constitution. Because we answer that question in the negative, Ms. Wright lacks a cause of action. That determination should end our inquiry, and we should decline to reach the 'second, qualified immunity question.'").

Neuburger v. Thompson, 124 F. App'x 703, 2005 WL 19275, at *2, *3 (3d Cir. Jan. 5, 2005) ("We recognize the Supreme Court indicated in *Hope* . . . that in some cases 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' ' . . Our case law establishes the general rule that a trooper violates an individual's Fourth Amendment rights by employing deadly force when that individual does not pose an immediate threat to the safety of the trooper or others. . . But here there is no persuasive argument that it was objectively unreasonable to respond with deadly force when Ms. Neuburger, who had refused to follow directions to put down her weapon, pointed a handgun at an officer. . . . Mr. Neuburger correctly points out that an overwhelming show of force that shocks the conscience may also amount to a constitutional deprivation under the state-created danger doctrine. . . Mr. Neuburger argues that *Smith* and other cases decided under the state-created danger doctrine, when read in connection with the Fourth Amendment's requirement that an officer's use of force be

objectively reasonable, reveal that a situation in which deadly force becomes necessary because of the troopers' own actions can make out a constitutional violation. In making this argument, Mr. Neuburger is in effect attempting to blend the state-created danger doctrine with the analysis governing Fourth Amendment excessive force claims. Our Court has considered but not adopted this approach. Specifically, in *Abraham v. Raso*, 183 F.3d 279 (1999), we discussed decisions from other circuit courts offering that, in limited circumstances, an officer's acts creating the need for force may be important in evaluating the reasonableness of that officer's eventual use of force. . . But we left 'for another day' whether such an approach should be followed. . . Thus, Mr. Neuburger's assertions advocate a rationale that has not been accepted in our Circuit. As this is not the case to adopt that rationale, Mr. Neuburger's complaint does not allege the violation of a clearly established constitutional right, and therefore the troopers are entitled to qualified immunity.").

Sutton v. Rasheed, 323 F.3d 236, 250 n.27 (3d Cir. 2003) ("We believe that the Supreme Court directive in *Wilson v. Layne* is mandatory. Accordingly, the District Court can decide the issue of qualified immunity only after it has concluded that a cause of action has been stated. Therefore, we initiate our inquiry by examining whether plaintiffs have alleged a constitutional violation.").

Donahue v. Gavin, 280 F.3d 371, 378 (3d Cir. 2002) ("[T]he district court should only have considered the defendants' claim of immunity if Donahue first established that their conduct violated a clearly established statutory or constitutional right. . . . [P]ost-conviction incarceration is not a seizure within the meaning of the Fourth Amendment and, therefore, post-conviction incarceration cannot constitute a Fourth Amendment violation.").

Doe v. Delie, 257 F.3d 309, 315 n.4 (3d Cir. 2001) ("Notwithstanding the fact that the Supreme Court has twice stated in mandatory, unqualified language that '[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all ...'. . . , Judge Garth's dissent would prefer that we skip the first prong of qualified immunity analysis. . . This practice ignores the Supreme Court's express language and creates an exception based on the procedural posture of the case. While there may be pragmatic considerations favoring Judge Garth's qualification of the Supreme Court's unqualified language, the Court has not yet suggested any basis for departing from the rule articulated in *Wilson*.").

Wilson v. Russo, 212 F.3d 781, 786 (3d Cir. 2000) ("The qualified immunity defense requires that we engage in a two-step analysis. First, we must 'determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.' [citing *Conn*] Only if he has should we 'proceed to determine whether that right was clearly established at the time of the alleged violation.' Summary judgment is appropriate if no reasonable juror could conclude that Wilson's clearly established rights were violated. . . This does not mean that the jury determines the contours of the right. Rather, after making a legal determination about the existence of a right, and whether it is

clearly established, we determine whether the facts on the record are such that a jury could conclude that the clearly established right was violated. . . As a methodological matter, we commonly work backwards: We arrange the facts in the light most favorable to the plaintiff, and then determine whether, given precedent, those 'facts,' if true, would constitute a deprivation of a right. And then, if necessary, we determine if the right is clearly established. In this case, since we conclude that Wilson has not adduced facts from which a jury could conclude that his constitutional rights were deprived at all, we need not engage in the second inquiry.")

Hedges v. Musco, 204 F.3d 109, 116 (3d Cir. 2000) ("Because '[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional,'. . . and because we ultimately conclude that plaintiffs have failed to demonstrate a violation of the Fourth Amendment, we will address plaintiffs' Fourth Amendment claim on the merits.").

Torres v. McLaughlin, 163 F.3d 169, 172, 174 (3d Cir. 1998) ("When resolving issues of qualified immunity, we must first determine 'whether the plaintiff has alleged a deprivation of a constitutional right,' [citing *Lewis*] which we generally cannot 'assume [ ], without deciding.' [citing *Siegert*] It is only after satisfying that inquiry that we should then 'ask whether the right allegedly implicated was clearly established at the time of events in question.'. . . [W]e conclude that post- conviction incarceration cannot be a seizure within the meaning of the Fourth Amendment, and Torres's incarceration did not violate his Fourth Amendment rights. The central inquiry before us is the District Court's rejection of the officers' motion for summary judgment based on qualified immunity. Because we have determined that Torres has not alleged a violation of the Fourth Amendment, the only constitutional provision pressed by Torres in this appeal, we need not reach the question of whether the officers have a qualified immunity.").

In re City of Philadelphia Litigation, 158 F.3d 711, 718, 719 (3d Cir. 1998) ("The City argues that because the court's seizure analysis was not required for its resolution of any of these [qualified immunity] issues, that analysis is dicta and therefore does not bind us under the law of the case doctrine. . . . It is . . . clear that the threshold determinations which inform a court's qualified immunity analysis are whether the plaintiff has asserted a violation of a constitutional right and whether that constitutional right was clearly established at the time the defendants allegedly violated that right. . . . [A] court's determination as to whether an official's conduct violated clearly established law must be premised upon an application of the facts as alleged by the plaintiff to the constitutional standards which were clearly established at the time of the official's conduct. . . . The prior panel therefore was required to determine whether the actions of the City officials, as alleged by Ms. Africa, violated her Fourth Amendment right to be free from an unreasonable seizure as that right was understood at the time by reasonable City officials. Inherent in this inquiry is the determination of whether the City officials' alleged actions rise to the level of a Fourth Amendment violation; if the alleged actions are insufficient to amount to a Fourth Amendment violation, the City officials' actions could not possibly violate a clearly established constitutional right. Resolution of the question of whether there was a Fourth Amendment violation based upon the summary judgment record therefore was integral to the

court's qualified immunity analysis. . . . [T]he prior panel could have disposed of the qualified immunity issue by holding that the defendants' alleged conduct did not rise to the level of a constitutional violation. . . . Accordingly, the panel's seizure determination was necessarily subsumed within the court's analysis of the qualified immunity issue and therefore does not constitute dicta to which the law of the case doctrine would not apply.").

In Re City of Philadelphia Litigation, 49 F.3d 945, 961 (3d Cir. 1995) ("*Siegert* . . . instructs that before a court addresses a claim of qualified immunity, it first should determine whether a plaintiff has alleged 'a violation of a constitutional right at all.'").

Brown v. Grabowski, 922 F.2d 1097, 1110 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2827 (1991) (inquiry into whether asserted constitutional right to assistance in gaining access to the civil courts was clearly established at time, would seem to encompass inquiry into whether the right was recognized at all).

Gremo v. Karlin, 363 F.Supp.2d 771, 791 (E.D. Pa. 2005) ("As of November 13, 2001, the state of the law as to the state-created danger basis for constitutional liability, which is the only viable basis in the present case, did not give the individual defendants fair warning that their treatment of Gremo was unconstitutional. A reasonable state actor in the position of the individual defendants in the present case could have reasonably believed that his or her actions and omissions would not violate a constitutional right. Without a close analysis of *D.R.*, *Kneipp*, and *Morse*, as set forth in this opinion, a reasonable state actor could have understood the collective holding to be that state actors would not be constitutionally liable under the facts of the present case. Their understanding could reasonably be gleaned from the facts in *D.R.*, because the underlying incident in the present case occurred in a school, and the perpetrators who physically attacked Gremo were other students. As with the school defendants in *D.R.*, the defendants in the present case were neither the attackers nor were they alleged to have witnessed the actual attack. *D.R.*, which has not been overruled, held that the actions of the school defendants in that case did not result in a state-created danger and, therefore, the school defendants did not violate the plaintiffs' constitutional rights. Therefore, although individual defendants in the present case would be constitutionally liable for a state-created danger, they are entitled to qualified immunity. The motions to dismiss of the individual defendants are granted as to the federal claims for damages.").

Burke v. Mahanoy City, 40 F. Supp.2d 274, 283 n.11 (E.D. Pa. 1999) ("There seems to be some confusion as to whether the failure to assert an alleged deprivation of a constitutional right by a plaintiff means that the immunity question need not be reached, *see Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 590 n. 6 (3d Cir.1998), or merely that the official is entitled to qualified immunity. *See City of Philadelphia Litig.*, 158 F.3d at 719. This court decides to follow the latter position as it is supported by a more recent Third Circuit opinion and by other sister circuits. *See, e.g., Jones v. Collins*, 132 F.3d 1048, 1052 (5th Cir.1998); *Roe v. Sherry*, 91 F.3d 1270, 1273-74 (9th Cir.1996).").

P.F. v. Mendres, 21 F. Supp.2d 476, 480 (D.N.J. 1998) ("Our analysis of the qualified immunity issue will follow the framework set forth by our Court of Appeals most recently in *In re City of Phila. Litig.* and *Larsen v. Senate of the Commonw. of Pa.* . . . . Those precedents instruct us to first ascertain whether the plaintiffs' Complaint has asserted a violation of a constitutional right at all. . . If plaintiffs have alleged a violation of a right which is protected by the Constitution in the general sense, we must next engage in a more particularized inquiry which asks if the defendant's conduct violated a constitutional right which was clearly established under the law as of the date the official acted. . . Necessarily subsumed in this inquiry is whether defendant's actions rose to the level of a constitutional violation. . . . If the Court determines that the defendant's conduct rises to the level of a violation of a clearly established right, we must next address whether the defendant is entitled to qualified immunity on the grounds that the defendant . . . was nonetheless reasonable in his or her belief in the lawfulness of the conduct.").

Lattany v. Four Unknown U.S. Marshals, 845 F. Supp. 262, 266 (E.D. Pa. 1994) ("This more 'complete' examination of the plaintiff's constitutional claim is a practice which has been urged upon court's [sic] in this circuit even before the *Siegert* decision was announced ... The benefit of this procedure is that clearly meritless claims can be disposed of without the exhaustive search for precedents that the clearly-established analysis requires.").

FOURTH CIRCUIT

Parrish ex rel Lee v. Cleveland, 372 F.3d 294, 309, 310 (4th Cir. 2004) ("In conclusion, the evidence does not show that the officers here responded with deliberate indifference to the substantial risk of harm to Lee. Accordingly, the district court should have granted the officers' request for qualified immunity. Because Parrish fails the first prong of the qualified immunity inquiry, we need not consider whether the right alleged to have been violated was clearly established under the specific circumstances of this case.").

Owens by and through Owens v. Lott, 372 F.3d 267, 273-76, 280 (4th Cir. 2004) ("Defendants appeal the district court's conclusion that plaintiffs' section 1983 action states a constitutional violation; defendants agree with the district court, of course, that the law was not clearly established for purposes of qualified immunity. Conversely, plaintiffs agree with the district court's determination that the search was constitutionally invalid, but challenge the court's conclusion that the law was not 'clearly established' at the time. We cannot completely accept either position because, in our opinion, the district court reached the correct result on both steps. Thus, we affirm the judgment of the district court. . . . Whether, and under what circumstances, an 'all persons' warrant is valid under the Fourth Amendment presents a novel question in this circuit. It also remains unanswered in the Supreme Court. . . . In sum, a handful of decisions suggest that an 'all persons' warrant is invalid per se under the Fourth Amendment, concluding it is either functionally the same as a general warrant, or it is not sufficiently particular to satisfy the requirements of the Fourth Amendment's Warrant Clause. . .By contrast, a majority of the courts have rejected the idea that an 'all persons' warrant could never under any circumstances be

constitutional. . . . We agree that the majority view. . . correctly holds that an 'all persons' warrant can pass constitutional muster if the affidavit and information provided to the magistrate supply enough detailed information to establish probable cause to believe that all persons on the premises at the time of the search are involved in the criminal activity. In our view, the inclusion of 'all persons' language in a warrant presents probable cause issues rather than particularity problems. . . . In this case, we agree with the district court that Deputy Maldonado's affidavit did not supply sufficient information to establish probable cause that anyone who happened to be on the premises during the execution of the search warrant was involved in the sale of illegal drugs. . . . [but] We conclude that at the time of the search, the law was not sufficiently clear to strip defendants of qualified immunity.")

Mellen v. Bunting, 327 F.3d 355, 366, 368, 371, 372, 376 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1750 (2004) ("In construing the Establishment Clause, the Court has made clear that a state is prohibited from sponsoring prayer in its elementary and secondary schools. That said, the Court has never directly addressed whether the Establishment Clause forbids state-sponsored prayer at a public college or university. . . . General Bunting contends that we need not reach the 'clearly established' prong of the qualified immunity analysis because the Establishment Clause does not prohibit VMI's supper prayer. . . . Because of VMI's coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults. . . . Although the Establishment Clause plainly forbids public schools from sponsoring an official prayer for young children, the Supreme Court has never addressed the constitutionality of state-sponsored prayer in any university setting, much less in a military college. Indeed, some of our sister circuits have approved prayer at certain university functions. . . . In these circumstances, General Bunting could reasonably have believed that the supper prayer was constitutional, and we must affirm the district court's decision to award him qualified immunity.")

Leverette v. Bell, 247 F.3d 160, 166 n.4 (4th Cir. 2001) ("The applicable authorities dictate that we analyze the constitutionality of the challenged search before addressing whether the law was 'clearly established.' Thus, we cannot bypass, and thereby evade, a constitutional determination wherever the law is uncharted or ambiguous.").

Milstead v. Kibler, 243 F.3d 157, 162 (4th Cir. 2001) (noting that *Wilson* analytical approach Aapplies even when the non-constitutional issues in the analysis may resolve the immunity issue more easily than the underlying question of constitutional law.")

Jean v. Collins, 221 F.3d 656, 658-663 (4th Cir. 2000) (en banc) (on remand from Supreme Court) (per curiam) (Wilkinson, Chief Judge, with whom Judges Widener, Wilkins, Niemeyer, Williams, and Traxler join, concurring in the judgment) ("*Wilson's* directions are straightforward ones. . . . We must initially ask, therefore, if Jean has alleged a Fourteenth Amendment due process violation by Officers Collins and Shingleton. . . . The Supreme Court decisions establishing the *Brady* duty on the part of prosecutors do not address whether a police officer independently violates the Constitution by withholding from the prosecutor evidence acquired during the course

of an investigation. . . . Recent cases, including some from this circuit, have pointed toward such a duty. . . . These cases have left unclear the exact nature of any duty that the law imposes on police with regard to exculpatory evidence. Several characteristics of this duty, however, seem evident. First, alleged failures to disclose do not implicate constitutional rights where no constitutional deprivation results therefrom. In this context, the constitutional deprivation must be defined as a deprivation of liberty without due process of law. . . . Second, to speak of the duty binding police officers as a *Brady* duty is simply incorrect. . . . To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor's *Brady* duty would thus improperly mandate a one-size-fits-all regime. . . . Third, it would be impermissible to hold the police liable for due process violations under § 1983 where they have acted in good faith. . . . Indeed, negligent conduct cannot by definition establish the 'affirmative abuse of power' necessary to constitute a due process deprivation. . . . Because there was no threshold bad faith deprivation, the precise contours of any duty on the police in situations such as these is something we need not explore in detail. . . . As Jean has failed to allege a constitutional violation on the part of Collins and Shingleton, we would affirm the judgment.").

Jean v. Collins, 221 F.3d 656, 664-666 (4th Cir. 2000) (en banc) (on remand from Supreme Court) (per curiam) (Murnaghan, Circuit Judge, with whom Circuit Judges Michael, Motz, and King, and Senior Circuit Judge Hamilton join, dissenting) ("The concurrence does not seriously dispute that a *Brady* violation occurred. Instead, the dispute is whether Jean can redress this *Brady* violation in a § 1983 damages action against Officers Collins and Shingleton. . . . The challenge for the concurrence has been coming up with a way to say two seemingly contradictory things: that while Jean's *Brady* rights were clearly violated, entitling him to reversal of his conviction, Jean can not vindicate his *Brady* rights against Collins and Shingleton in a separate § 1983 damages action. . . . In order to seal the rupture its first en banc opinion created, the concurrence now holds that police officers who withhold exculpatory evidence from prosecutors are not independently liable for *Brady* violations, even under year 2000 jurisprudence. Thus, under the concurrence's new formulation, *Brady* can never furnish the doctrinal basis for a § 1983 action against police officers who fail to disclose exculpatory evidence.").

Chase v. Grant, 215 F.3d 1317 (Table), 2000 630953, at *3 (4th Cir. May 16, 2000) ("In this case. . .the district court neither identified the constitutional right or rights at issue, nor determined whether the right was clearly established. While the district court assumed that Chase alleged violations of the Eighth Amendment, the court did not analyze Chase's allegations to determine whether his version of the facts, if true, was sufficient to support his claim that his constitutional rights were violated. . . . We therefore remand for an analysis under *Wilson v. Layne*. If, after analyzing Chase's isolation confinement and excessive force claims under *Layne*, the district court concludes that there are genuine issues of material fact precluding summary judgment, the court shall recite in detail which facts are in dispute and shall explain the materiality of those disputes as to the qualified immunity defense.").

Randall v. United States, 30 F.3d 518, 522 (4th Cir. 1994) ("Once a defendant has pleaded qualified immunity from suit, the courts should, at the pleading stage, clearly determine whether the plaintiff had an existing constitutional right at the time the defendant acted.").

Gordon v. Kidd, 971 F.2d 1087, 1093 (4th Cir. 1992) ("In analyzing the appeal of a denial of summary judgment on qualified immunity grounds, it is 'necessary first to identify the specific constitutional right allegedly violated, then to inquire whether at the time of the alleged violation it was clearly established, then further to inquire whether a reasonable person in the official's position would have known that his conduct would violate that right.'").

Washington v. Buraker, 322 F.Supp.2d 692, 700, 701 (W.D. Va. 2004) ("Plaintiff recognizes that the concurrence *in Jean II* declined to extend an independent *Brady* obligation to police officers, but argues that this finding should be disregarded as dicta because the concurrence also found that the plaintiff in *Jean II* had only alleged that the police officers were negligent, and negligent conduct is not actionable under § 1983. . . This Court declines to disregard the legal findings of an en banc panel of Fourth Circuit judges. Based on the concurrence in *Jean II*, it appears that the Fourth Circuit does not currently recognize a cause of action under *Brady* against police officers. Accordingly, Washington has not alleged a constitutional violation in his third cause of action. Even if this Court were to disregard *Jean II* and find that a *Brady* claim could be brought against the officers in this case, Washington cannot establish that a reasonable officer in 1983 would have known his conduct in failing to disclose exculpatory information was unlawful.").

McCall v. Williams, 59 F. Supp.2d 556, 559, 560 (D.S.C. 1999) ("Although Plaintiff did not address this issue in his Motion for Reconsideration, this court is constrained to note that *Wilson* clarified the methodology of qualified immunity and thereby highlighted an error in this court's prior Order. In *Wilson*, the Supreme Court ruled that a district court must first evaluate the merits of a plaintiff's claim to determine if his constitutional rights were violated, before it proceeds to determine whether the right that was violated was clearly established at the time of the incident. . . This court did not take the first step in that analysis. Instead of addressing the merits of Plaintiff's case to determine whether his constitutional rights had been violated, this court assumed, for purposes of the qualified immunity analysis, that Plaintiff could prove that Lieutenant Williams had used excessive force in handcuffing his wrists too tightly. Thus, this court did not evaluate whether the force used was excessive. Although such a failure is now demonstrably legal error, it has no effect on the outcome of this case. Just as the Supreme Court found that the officials in *Wilson* had violated the plaintiff's Fourth Amendment rights, yet they were entitled to qualified immunity because the specific right had not been clearly established at the time of the incident, this court finds that Lieutenant Williams is entitled to qualified immunity, even though, taking the evidence in the light most favorable to Plaintiff, Lieutenant Williams violated Plaintiff's Fourth Amendment right to be free from the use of excessive force. Nevertheless, this court will engage in an analysis of the merits of Plaintiff's excessive force claim in order to comply with the Supreme Court's mandate. . . . Considering the severity of the crime, the threat Plaintiff posed to the

officers, and the absence of any attempts on his part to resist or evade arrest, Lieutenant Williams used excessive force in handcuffing Plaintiff too tightly.").

FIFTH CIRCUIT

Gates v. Texas Dept. Of Protective And Regulatory Services, 537 F.3d 404, 427, 438 (5th Cir. 2008) ("[T]he special needs doctrine will not support the decision to remain in the home in the absence of a court order, consent, or exigent circumstances. Therefore, the Gateses have alleged that the individual defendants violated the Fourth Amendment when the defendants did not leave the Gateses' house upon the request of Gary. Moving to the second step in the qualified immunity analysis, however, we note that the law in this area, particularly with respect to the special needs doctrine, was not clearly established in 2000, as described in the previous section. If the law was not clearly established at the time of the alleged constitutional violation, the individual defendants are entitled to qualified immunity . . . . Affirmance is required because the law in this area was not clearly established, and the government's interest in stopping child abuse, along with the doctrine of qualified immunity , tips the balance in favor of TDPRS, Fort Bend, and all of the individual defendants. However, now that we have clearly established the law in this area, we expect that TDPRS, law enforcement agencies, and their agents and employees will abide by these constitutional rules and seek to involve the state courts, who act as neutral magistrates in these complicated matters, as early in the process as is practicable.").

Murray v. Earle, 405 F.3d 278, 293 (5th Cir. 2005) ("In this circuit, it was not well-established at the time of LaCresha's interrogation that an official's pre-trial interrogation of a suspect could subsequently expose that official to liability for violation of a suspect's Fifth Amendment rights at trial. We hold that, as in the analogous context of Fourth Amendment violations, an official who provides accurate information to a neutral intermediary, such as a trial judge, cannot 'cause' a subsequent Fifth Amendment violation arising out of the neutral intermediary's decision, even if a defendant can later demonstrate that his or her statement was made involuntarily while in custody. . . . LaCresha has not identified, and we have not found, any evidence in the record to indicate that the state judge who presided over her juvenile trial failed to hear (or was prevented from hearing) all of the relevant facts surrounding her interrogation before deciding to admit her confession into evidence. Armed with all those facts, that judge nevertheless concluded that LaCresha was not 'in custody' for purposes of *Miranda* or Texas law governing the interrogation of minors, and ruled that her statement to the police was voluntary and admissible. . . Like the state appellate court, we disagree with the trial court's ruling, yet we are constrained to hold that it constituted a superseding cause of LaCresha's injury, relieving the defendants of liability under § 1983. This holding pretermits our consideration whether she suffered a violation of a constitutional right that was clearly established at the time, and whether a reasonable official should have known that he was violating that right. Accordingly, we reverse the district court's denial of qualified immunity for the defendants on LaCresha's Fifth Amendment claim.").

Flores v. City of Palacios, 381 F.3d 391, 395 n.3 (5th Cir. 2004) ("This two-tiered analysis can lead to a 'somewhat schizophrenic approach,' because we must apply current law to the first step and the law at the time of the incident to the second step, which may sometimes result in applying different tests to the two steps. *Petta v. Rivera*, 143 F.3d 895, 900 & n.4 (5th Cir.1998). Despite the confusion this approach creates, the Supreme Court has made clear that we are obliged to go through the first step of the analysis even if the second step shows that the law was not clearly established.").

Kipps v. Callier, 205 F.3d 203, 204 (5th Cir. 2000)(*denial of rehearing en banc*) ("An issue was raised with respect to the panel majority's qualified immunity analysis. Specifically, whether a court could assume arguendo the first prong of the analysis–the existence of a constitutionally protected right. . . Fifth Circuit case law appears to require a court to first answer whether an existing constitutional right has been asserted by a party. *See, e.g., Evans v. Ball*, 168 F.3d 856, 860 (5th Cir.1999) ("We may not pretermit that first prong but must decide whether Evans has alleged any constitutional violation before we may move to the inquiries under the second prong.") (*citing Quives v. Campbell*, 934 F.2d 668, 670 (5th Cir.1991)). Without resolving the question of whether Supreme Court and Fifth Circuit precedent require rigid application of *Evans* to all qualified immunity situations, we have little trouble finding that a constitutional interest in familial association does, in fact, exist and was clearly established at the time Kipps was fired.").

Macias v. Raul A. (Unknown), 23 F.3d 94, 98 (5th Cir. 1994) ("We have interpreted *Siegert* as first requiring the determination whether the plaintiff has stated a constitutional violation before reaching the qualified immunity issue.").

Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993) ("To determine whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right. . . If the plaintiff has asserted the violation of a constitutional right, the court must then determine whether that right had been clearly established so that a reasonable official in the defendant's situation would have understood that his conduct violated that right."), *cert. denied*, 114 S. Ct. 1081 (1994).

Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992) ("Until recently, uncertainty in this Circuit clouded whether or not we had jurisdiction in these interlocutory appeals to decide whether plaintiffs had stated a constitutional claim. . . . The Supreme Court in *Siegert v. Gilley* [cite omitted] has now made it clear that our first inquiry in an appeal asserting qualified immunity is whether a valid constitutional claim has been made.").

Enlow v. Tishomingo County, 962 F.2d 501, 508 & n.19 (5th Cir. 1992) (Noting that "[p]rior to *Siegert*, Courts generally examined the defendant's entitlement to the qualified immunity defense before examining the merits of the plaintiff's constitutional claim[,]" the court acknowledged that *Siegert* instructs the court to first "...decide if the plaintiff allege[s] a violation of a clearly established constitutional right[,].... [and] [o]nly if such an allegation is found, then the court must

decide whether the public official's actions could reasonably have been thought consistent with the constitutional right.")

White v. Taylor, 959 F.2d 539, 545 n.4 (5th Cir. 1992) ("We have interpreted *Siegert* to require that we examine whether the plaintiff has stated a claim for a constitutional violation before reaching the issue of qualified immunity.")

Duckett v. City of Cedar Park, Texas, 950 F.2d 272, 278 (5th Cir. 1992) (noting the Court has "reassembled the analytical structure for reviewing an appeal of a denial of a motion for summary judgment asserting qualified immunity. . . [and has] instruct[ed] us that in a case where a defendant asserts such a qualified immunity defense, we should first resolve the constitutional question...that is, whether [plaintiff] has stated a claim for a violation of a right secured to him under the United States Constitution.").

Idoux v. Lamar University System, 828 F. Supp. 1252, 1256 (E.D.Tex. 1993) ("[P]rior to considering whether a defendant is entitled to qualified immunity, a district court must first address the threshold consideration of whether the plaintiff's complaint even states a violation of a constitutional right.").

SIXTH CIRCUIT

Nader v. Blackwell, 545 F.3d 459, 478 (6th Cir. 2008) (Moore, J., concurring in part and concurring in the judgment) ("We hold that the voter-registration requirement contained in Ohio Rev.Code § 3505.06 is a severe restriction on political speech which cannot survive strict scrutiny. Similarly, we hold that the residency restriction in § 3503.06 severely limits political speech and is not justified by a sufficient state interest. Therefore, we hold that the voter-registration restriction and the residency restriction contained in § 3505.06 are both unconstitutional in violation of the First Amendment. Finally, we conclude that because these violations were not clearly established in 2004, Blackwell is entitled to qualified immunity.").

Leary v. Livingston County, 528 F.3d 438, 443-45 (6th Cir. 2008) ("While there is room for debate over whether the Due Process Clause grants pretrial detainees more protections than the Eighth Amendment does, . . .we need not resolve that debate here. Under either constitutional guarantee, an excessive-force claimant must show something more than *de minimis* force. . . . In the final analysis, this is an unusual case. It is not often that a constitutional tort claimant seeks relief for an alleged assault or battery but then says that the defendant's actions 'didn't hurt or nothing' and never says that he felt threatened by the officer's action. That is why we can agree with our colleague's framing of the issue–that the question is whether the actual or threatened force was *de minimis*, not just whether the injury was *de minimis*–but not with his conclusion. No doubt, the complaint in this case sufficed to move the action from the pleadings stage to discovery. But Leary's answers in discovery made it clear that McGuckin's actions, while rude and unprofessional, did not rise to the level of a cognizable constitutional claim.").

Leary v. Livingston County, 528 F.3d 438, 449-54 (6th Cir. 2008) (Clay, J., dissenting) ("Contrary to the majority's determination, McGuckin's actions were more than *de minimis* and constituted excessive force in violation of Plaintiff's Fourteenth Amendment rights. Therefore, McGuckin is not entitled to qualified immunity and the district court should be affirmed. . . . In evaluating excessive force claims made by pretrial detainees, this Court has adopted the due process rationale announced in *Bell v. Wolfish*. . . Thus, in the instant case, Plaintiff's excessive force claim is governed by the Fourteenth Amendment, which presents an inquiry distinct from the heightened showing required to establish a violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment. . . . When viewing the facts in the light most favorable to the Plaintiff, as the majority seems unwilling to do, it is clear that there is a genuine issue of material fact regarding whether McGuckin's actions were intended to punish Plaintiff because of the nature of the charge for which he was detained. The 'karate chop' at issue was preceded by McGuckin's initial harassment of Plaintiff wherein he called Plaintiff a 'sick bastard.' Moreover, the 'karate chop' served no legitimate penological objective inasmuch as Plaintiff was compliant with the orders given to him. . . . The majority, however, finds that Plaintiff cannot establish a constitutional violation. . . . The majority concludes that McGuckin's use of force was *de minimis*, and therefore not violative of the Fourteenth Amendment, because Plaintiff suffered no ascertainable physical injury. . . .Under the majority's reading of the caselaw outlining the boundaries of permissible uses of force in institutional settings, however, the government and its officials are permitted to engage in uses of force designed to psychologically harm a detainee so long as they do not impose some arbitrary quantum of physical pain. Such a rule is particularly disturbing given the current climate of detainee abuse as well as the evolving techniques of punishment and interrogation that will easily pass this test, while inflicting untold damage upon detainees and prisoners alike. Such a rule cannot stand. . . . [W]hen viewing the facts in the light most favorable to Plaintiff, . . . it cannot be said that McGuckin's flagrant assault on Plaintiff was *de minimis* or constitutionally insignificant. Plaintiff, therefore, is entitled to have his excessive force claim heard by a jury and to have the ability to make his case for damages, even if nominal.").

Revis v. Meldrum, 489 F.3d 273, 284, 286 (6th Cir. 2007) ("In short, no authority cited by Deputy Eaton has permitted levying an execution upon a residence by evicting the owner without postjudgment notice and the opportunity to be heard. This lack of authority permitting Eaton's actions, combined with both the longstanding due process requirements of notice and the opportunity to be heard before eviction and the *Mathews* balancing considerations outlined above, lead us to conclude that Eaton violated Revis's Fourteenth Amendment rights. . . . Revis's right to notice and an opportunity to be heard prior to eviction following the issuance of a writ of execution for his residence is the particular right at issue here. Just as Eaton has set forth no judicial authority that clearly justifies the eviction he effected, neither has Revis cited any federal authority that squarely defines due process requirements in the context of the postjudgment deprivation of one's residence. The lack of settled jurisprudence in this area indicates that the right at issue cannot be said to be 'so "clearly established" that a reasonable official would understand that what he is doing violates that right.' . . . Here, the advice from the County Attorney, combined with the

language of the writs themselves, the newly promulgated Rule 69 of the Tennessee Rules of Civil Procedure, and the absence of clearly established federal caselaw governing the postjudgment deprivation of real property, all support the proposition that Deputy Eaton's actions were not such that a reasonable officer would have understood that what he was doing violated Revis's rights.").

Barnes v. Wright, 449 F.3d 709, 718-20 (6th Cir. 2006) ("We next turn to the question of whether Barnes's unlawful conduct bars his retaliation claim, even if his speech is constitutionally protected. *McCurdy* addressed the question of whether 'it was ... clearly established that the First Amendment prohibited an officer from effectuating an otherwise valid arrest if that officer was motivated by a desire to retaliate against the arrestee's assertion of First Amendment rights.'. . We responded affirmatively, explaining that '[w]e have held that adverse state action motivated at least in part as a response to the exercise of the plaintiff's constitutional rights presents an actionable claim of retaliation.'. . .The District of Columbia Circuit and the Tenth Circuit have also held that plaintiffs do not need to show a lack of probable cause in retaliatory-prosecution suits. . . . Other circuits, however, do require that plaintiffs prove that there was no probable cause for the underlying prosecution. [citing cases] The Supreme Court granted *certiorari* in *Moore* to resolve this split amongst the circuits, and while this case was pending on appeal the Court recently held that 'want of probable cause must be alleged and proven' by a plaintiff bringing a § 1983 or *Bivens* suit for retaliatory prosecution. . . . The concerns regarding the intervening actions of a prosecutor do not apply in this case, because the officers themselves initiated the grand jury proceedings against Barnes. However, in its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly; the Court noted that causation in retaliatory-prosecution cases is '*usually* more complex than it is in other retaliation cases.' *Id.* at 1704 (emphasis added). Regardless of the reasoning, it is clear that the *Hartman* rule modifies our holdings in *McCurdy* and *Greene* and applies in this case. As discussed above with regard to Barnes's malicious-prosecution claim, the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case. Barnes's First Amendment retaliation claim accordingly fails as a matter of law, and we reverse the district court's denial of qualified immunity to the officers on this issue.").

Miller v. Administrative Office of the Courts, 448 F.3d 887, 893-96 (6th Cir. 2006) ("In determining whether a law enforcement officer is shielded from civil liability due to qualified immunity, this court typically employs a two-step analysis: '(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established.'. . This court occasionally considers a third step in the qualified immunity analysis, in addition to the two steps listed above. . .When utilized, this third step requires an inquiry into 'whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'. . The Supreme Court since *Saucier* has continued to use the two-step approach to qualified immunity, but this court has noted that 'the three-step approach may in some cases increase the clarity of the proper analysis.'. . If, on the other hand, the case at issue 'is one of the many cases where, if the right is clearly established, the conduct at issue would also be objectively unreasonable,' then this court has 'collapse [d] the second and third prongs' in

an effort to 'avoid duplicative analysis.'. . Throughout the analysis, the burden is on Miller to show that the individual defendants are not entitled to qualified immunity. . . . The first step in analyzing this claim is to determine whether Miller had an interest that was protected by the Due Process Clause. In order to be entitled to a due process hearing prior to her termination, Miller must prove that 'she enjoyed a property interest in her position' as jury-pool manager. . . . In order to determine whether Miller had a property interest in her job, reference must be made to Kentucky law. . . . Miller therefore has to show that she was a tenured employee, as opposed to a nontenured, at-will employee. The district court found that a 'resolution of this difficult issue was unnecessary to the disposition' of the various motions for summary judgment. To the contrary, the district court should have resolved this preliminary issue before proceeding to the second step of the qualified immunity analysis. . . Although we could remand the case in order for the district court to determine this issue, we will proceed to make the determination ourselves in light of the completeness of the record and in the interests of judicial economy.").

Causey v. City of Bay City, 442 F.3d 524, 528 n.2 (6th Cir. 2006) ("As we recently explained in *Estate of Carter*, Panels of this court occasionally employ a three-step qualified immunity analysis, as opposed to the two-step analysis set forth here. As two recent opinions indicate, both the two-step approach and the three-step approach can be said to capture the holding of *Saucier v. Katz* . . . . The third step is 'whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'. . In cases subsequent to *Saucie*r the Supreme Court has not formally broken up the two steps prescribed by *Saucier* into three steps, . . .but the three-step approach may in some cases increase the clarity of the proper analysis. In many factual contexts, however, including this one, the fact that a right is 'clearly established' sufficiently implies that its violation is objectively unreasonable.").

Silberstein v. City of Dayton, 440 F.3d 306, 319, 320 (6th Cir. 2006) ("While *Pickering* provides the basic framework for analyzing a §1983 First Amendment claim, this circuit employs a different test when a claim is brought by an employee who held a policymaking or confidential position. . . In the cases of *Elrod v. Burns*, 427 U.S. 347, 367-68 (1976), and *Branti v. Finkel*, 445 U.S. 507, 518 (1980), the Supreme Court recognized an exception to the general prohibition against adverse employment actions on the basis of political patronage where an employee occupies a policymaking position. In *Rose v. Stephens*, this court applied the *Elrod/Branti* policymaking exception to a § 1983 First Amendment claim, holding that when an employee is in a policymaking or confidential position and is terminated for speech related to his or her political or policy views, there is a presumption that the *Pickering* balance favors the government. Thus, if Silberstein occupied a policymaking position as Assistant Chief Examiner, and if her letter to the editor related to her policy views, then her free speech interests presumptively lose out to the city of Dayton's interests in efficiently running its government. . . . We conclude that Silberstein was a policymaking employee commenting upon matters of policy, and we therefore apply the *Rose* presumption to conclude that government interests outweigh Silberstein's First Amendment interests. The Board's alleged retaliatory action therefore does not constitute a constitutional

violation. . . . Having found that no First Amendment violation occurred, we need not address the 'clearly established' prong of the qualified immunity analysis. We therefore reverse the district court's denial of the defendants' motion for summary judgment on Silberstein's First Amendment claim.").

Caudill v. Hollan, 431 F.3d 900, 909 n.5, 910 n.10 (6th Cir. 2005) ("We take this opportunity to remind district courts that they may not assume a constitutional violation or skip to qualified immunity, even when qualified immunity analysis seems conclusive. . . . Like *Estate of Carter*, this case is one of the many cases where, if the right is clearly established, the conduct at issue would also be objectively unreasonable. Thus, in order to avoid duplicative analysis, we choose to collapse the second and third prongs discussed in some of our cases into one prong in this case.")

Simasko v. County of St. Clair, 417 F.3d 559, 562 (6th Cir. 2005) ("Simasko was allegedly fired for refusing to support the campaign of his supervisor for a district court judgeship, and for refusing to try to curtail his brother's public support of his supervisor's opponent in the election. Because Simasko's job as an assistant county attorney qualified as a policymaking position subject to the *Elrod/Branti* exception, he could be fired for his political or policy views without violating the First Amendment. Accordingly, the defendants are entitled to qualified immunity.").

Estate of Carter v. City of Detroit, 408 F.3d 305, 311 n.2 (6th Cir. 2005) ("Panels of this court occasionally employ a three-step qualified immunity analysis, as opposed to the two-step analysis set forth here. As two recent opinions indicate, both the two-step approach and the three-step approach can be said to capture the holding of *Saucier* . . . The third step is 'whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'. . In cases subsequent to *Saucier* the Supreme Court has not formally broken up the two steps prescribed by *Saucier* into three steps, . . . but the three-step approach may in some cases increase the clarity of the proper analysis. In many factual contexts, however, including this one, the fact that a right is 'clearly established' sufficiently implies that its violation is objectively unreasonable.").

Adams v. City of Auburn Hills ("dams I), 336 F.3d 515, 520 (6th Cir. 2003) ("In this case, Officer Backstrom's firing at the automobile did not impair Adams's movement. Adams was not hit by Officer Backstrom's bullets and was able to leave the scene unharmed despite Backstrom's use of his firearm. Even though the tire of the Taurus was hit, it appears that the car still was operable and Adams reached his destination, his mother's house. Hence, Adams never was seized, and our holding that no seizure occurred makes the discussion of the reasonableness of Backstrom's conduct unnecessary. Because the Fourth Amendment is not implicated, Adams has not alleged a constitutional violation to support a § 1983 claim. Without an underlying constitutional violation, the question of whether Backstrom is entitled to qualified immunity is moot.").

Higgason v. Stephens, 288 F.3d 868, 876, 877 (6th Cir. 2002) ("The Court applies a three-part test when determining whether a government official is entitled to the affirmative defense of qualified immunity. . . The first inquiry is whether the Plaintiff has shown a violation of a constitutionally protected right; the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right; and the third inquiry is 'whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights.' . . . Here, when applying the three-part test to the facts of this case, Plaintiff's case is barred by the affirmative defense of qualified immunity at the inception inasmuch as Plaintiff has failed to show a violation of a constitutionally protected right. . . As noted, Plaintiff's due process allegation comes down to a claim he was indicted without probable cause. However, it has long been settled that 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." . . Therefore, because Plaintiff was indicted pursuant to a determination made by the grand jury, he has no basis for his constitutional claim.").

Klein v. Long, 275 F.3d 544, 552 (6th Cir. 2001) ("In sum, we conclude that Long and Rogers had probable cause to arrest Klein and that they therefore did not violate Klein's constitutional rights. We need not reach, then, the second part of the qualified immunity analysis delineated in *Saucier*– whether the constitutional right violated was clearly established. 'If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").

Neague v. Cynkar, 258 F.3d 504, 508 (6th Cir. 2001) ("We now make explicit what this court in *Kain* implied: when there is no allegation of physical injury, the handcuffing of an individual incident to a lawful arrest [footnote omitted] is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment. The threshold inquiry in a qualified immunity inquiry is whether a plaintiff has stated a valid constitutional claim. . . Under the undisputed facts of this case, the answer to that inquiry is no. Accordingly, defendants Murphy and Cynkar are entitled to qualified immunity.").

Flagner v. Wilkinson, 241 F.3d 475, 482, 483 (6th Cir. 2001) ("[W]e believe that Flagner has presented sufficient evidence that application of the grooming regulation would violate his constitutional rights. . . . Based on our decision in *Pollock* which upheld an application of the challenged prison regulation, we conclude that Flagner's right to grow his beard and sidelocks in contravention of the Ohio prison grooming regulation at the time of his forced cutting was not 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'").

Seal v. Morgan, 229 F.3d 567, 581 (6th Cir. 2000) ("As an abstract matter, the right of public school students not to be expelled arbitrarily or irrationally has been clearly established since at

least the Supreme Court's decision in *Goss v. Lopez* . . . which held that long-term suspensions and expulsions must comport with minimal standards of due process. More concretely, however, we do not believe that the contours of that right were sufficiently clear to put a reasonable school superintendent on notice in 1996 that a school disciplinary policy's lack of a conscious-possession requirement could produce irrational expulsions and thus violate the legal rights of students expelled under the policy. For this reason, we will reverse the judgment of the district court to the extent that it denied Superintendent Morgan's motion for summary judgment, and remand with instructions to enter summary judgment in his favor. For the future, however, we expect that our opinion today will clarify the contours of a student's right not to be expelled for truly unknowing or unconscious possession of a forbidden object.").

Farley v. Farley, Nos. 98-6114, 98-6115, 2000 WL 1033045, at *6, *7 (6th Cir. July 19, 2000) (not published) ("Since [defendants'] conduct occurred after they had an opportunity to deliberate and consider how to proceed in Ms. Farley's case, they have violated Ms. Farley's substantive due process rights if such conduct was 'deliberately indifferent' to her right to the immediate physical custody of her children. Such conduct would be conscience shocking, thus violating Ms. Farley's substantive due process rights. We are satisfied that the conduct outlined above, as set forth by the district court, is sufficient to show that Brock and Grissom were deliberately indifferent, based on the analysis this court applied in *Claybrook*. . . . At the time of the events giving rise to this suit, the standard for finding a substantive due process violation was whether a defendant 'engage[d] in arbitrary conduct intentionally designed to punish someone....' *Lewellen v. Metropolitan Gov't*, 34 F.3d 345, 351 (6th Cir.1994). . . . The *Lewellen* standard must be applied in determining the issue of qualified immunity. . . . On the facts before us, a genuine issue exists as to whether defendants' conduct constituted a substantive due process violation under *Lewellen*.").

Jackson v. Leighton, 168 F.3d 903, 909 (6th Cir. 1999) ("Before examining the reasonableness of defendants' conduct in light of a clearly established constitutional right, however, we must determine whether Jackson has made out a claim for violation of his constitutional rights at all.").

Jarvis v. Wellman, 52 F.3d 125, 126 (6th Cir. 1995) ("Because disclosure of plaintiff's medical records did not violate a constitutional right, it follows that defendants were entitled to qualified immunity and that plaintiff was unable to state a claim.").

Silver v. Franklin Township, 966 F.2d 1031, 1035-36 (6th Cir. 1992) ("In this case, the district court concluded the Board was immune from liability, but the court never determined whether the Board's action was even sufficient to constitute a violation of [plaintiff's] substantive due process rights. This is contrary to the Supreme Court's directive in *Siegert*...that before reaching a qualified immunity issue a court should determine whether there has been a constitutional violation.").

Lyons v. U.S., 2008 WL 141576, at *15 & n.6 (N.D. Ohio Jan. 11, 2008) ("The Sixth Circuit has vacillated between a three-step or two-step analysis when evaluating the assertion of qualified immunity . . . . The second step under *Saucier* is 'whether the right was clearly established.'. .

Whereas, under the three-step approach in *Dickerson*, the court must determine whether a constitutional violation occurred, whether the right violated was clearly established and finally [A]whether plaintiff has alleged sufficient facts and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional right." . . Employing the third step in *Dickerson* would in the undersigned's view lead to confusion, rather than being helpful because the reliance simply on objective reasonableness is more directed to Fourth Amendment claims rather than Eighth Amendment claims which require proof of objective and subjective components.")

Pierce v. Ohio Dep't of Rehabilitation and Corrections, 284 F.Supp.2d 811, 829, 830 & n.17, 834, 842, 843, 845 (N.D. Ohio 2003) ("Since *Virgili* was decided in 2001 until the date of this memorandum opinion, the *status quo* in this circuit remains: no decision has established the constitutional standard that must be satisfied before prison employees may be strip searched. Interestingly, the court in *Seiter*, and again in *Virgili*, faced the same question of qualified immunity in the same context as the Court faces today, but skipped over the constitutional violation inquiry and, instead, addressed only the second prong of the analysis (*i.e.*, whether such a right was clearly established). In view of the Supreme Court's recent holding in *Hope* and the Sixth Circuit cases issued subsequent to that opinion, the Court observes that a proper qualified immunity analysis requires: *first*, an examination of whether a constitutional violation exists in plaintiff's allegations; and *second*, if, and only if, a constitutional violation is found, an examination of whether that right was clearly established at the time it was allegedly violated. [citing cases] Thus, a court does not reach the clearly-established prong until the constitutional-violation prong is satisfied. . . . Given the precedent dictating that the constitutional violation inquiry be answered first in a qualified immunity analysis and the legitimate justifications presented above for answering this question, the Court examines whether a Fourth Amendment violation exists in the context of the strip searches in this case. . . . Since the first prong goes to the more general inquiry of whether a given act amounts to a constitutional violation, which, in this case, is a question of first impression, there is no apparent justification to refrain from looking initially outside the circuit in which this Court sits in order to make this determination. Although this inquiry still remains within the qualified immunity framework, whether conduct amounts to a constitutional violation is not unique to qualified immunity jurisprudence. Thus, the Court freely examines the case law of other circuits for persuasive authority on how to resolve this issue. . . . Balancing the interests of the correctional officers. . .and the competing interests of the Department, the Court holds in accordance with the above decisions that the Fourth Amendment of the Constitution imposes a reasonable suspicion standard that governs strip searches of prison employees. . . . Based on these circuit decisions [*Seiter* and *Virgili*], the fact that the strip searches in the instant case took place less than a year and a half after the searches at issue in *Virgili*, and that no party or the Court's own research has come up with a case in this circuit since *Virgili* that justifies straying from this binding precedent, the Court necessarily must follow *Seiter* and *Virgili* and hold that, as of November 2000 (*i.e.*, the date of the challenged searches), the Fourth Amendment standard governing strip searches of prison employees was *not* clearly established. Accordingly, qualified immunity shields Defendants from § 1983 liability under the Fourth

Amendment for strip searching Plaintiffs. . . . [T]o implement this standard not only in the discussion of future opinions of the courts, but also in practice within the state penal institutions, the Court recommends that the Ohio Attorney General, who represented Defendants in this case, distribute this memorandum opinion to the wardens of the state prisons for further publication within those institutions.").

SEVENTH CIRCUIT

Phelan v. Village of Lyons, 531 F.3d 484, 488, 489 (7th Cir. 2008) ("Because Phelan's Cadillac was not in fact stolen, and Officer Dyas would have known that had he read line three of the LEADS report he requested, there was no probable cause and the felony traffic stop was unreasonable under the circumstances. . . . Undoubtedly the Fourth Amendment's general proscription against unreasonable seizures was clearly established at the time Officer Dyas stopped Phelan. Our inquiry, however, is whether the application of that right to this particular set of circumstances is clear enough that a " 'reasonable official would understand that what he is doing violates that right.' . . . Instead of focusing on the contours of the right to be free from unreasonable seizures itself, Officer Dyas argues that his behavior under the circumstances was reasonable. Phelan construes this argument as an attempt by Officer Dyas to append a 'third prong' to the qualified immunity inquiry: namely, whether the officer's actions were reasonable even if they violated clearly established law. As Phelan points out, we rejected this precise line of argument in *Jones*.").

Jones v. Wilhelm, 425 F.3d 455, 460, 461 (7th Cir. 2005) ("In *Saucier*, . . . the Supreme Court set out a two-part test for qualified immunity. First, a court must decide whether the facts, when viewed in the light most favorable to the plaintiff, indicate that the officer's conduct violated some constitutional right of the plaintiff. . . Second, if the answer to the first question is 'yes,' then the court must determine whether the constitutional right violated was 'clearly established' at the time of the alleged violation. . . The officer will enjoy qualified immunity unless the court affirmatively answers both questions. . . Wilhelm urges us to append a third prong to the two-part *Saucier* test, contending that '[e]ven if the Court finds that there was clearly established law which was violated, the immunity question should be decided based on whether police officers acted reasonably under the circumstances they faced.' . . *Saucier* clearly states, however, that '[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . It goes without saying that the reasonableness of an official's actions is not a factor in determining whether the facts as alleged constitute a violation of constitutional rights. Neither is the reasonableness of an official's actions an independent factor in determining whether a right is clearly established, as an official is held to have violated a clearly established right only where a reasonable officer would have known the alleged actions to be illegal, if faced with similar circumstances. . . .Thus, following *Saucier*, we reaffirm that the proper standard for qualified immunity remains a two-part test which first examines whether the defendant's alleged actions constitute a violation of constitutional rights, and then determines whether the implicated right was

clearly established at the time. . . . In the alternative, Wilhelm asks that when we determine whether it would have been clear to a reasonable officer that Wilhelm's actions violated the Joneses' constitutional rights, we impute to the hypothetical, reasonable officer only Wilhelm's actual knowledge, and not the knowledge he ought reasonably to have amassed during the execution of the warrant. Such an interpretation, however, would enable state agents to trample on the constitutional rights of citizens by maintaining willful ignorance of what reasonable officers should have known, and we refuse to take such a step. In determining whether a defendant's alleged actions violated a clearly established right, courts may properly take into account any information the defendant ought reasonably to have obtained.").

Crowley v. McKinney, 400 F.3d 965, 971 (7th Cir.2005) ("So we greatly doubt that a noncustodial divorced parent has a federal constitutional right to participate in his children's education at the level of detail claimed by the plaintiff. But if we are wrong it cannot change the outcome of this case. As should be apparent from our discussion, the existence of the right that Crowley asserts is not established law, and McKinney is therefore immune from having to pay damages for violating that right.").

Greenawalt v. Indiana Dep't of Corrections, 397 F.3d 587, 592 (7th Cir. 2005) ("There is no due process claim in this case. It is enough to decide this case that the Fourth Amendment does not provide a remedy for the unpleasantness of being subjected to a psychological test, and that if we are wrong still there is no doubt that the existence of such a remedy was not clearly established when this suit was filed.").

Hildebrandt v. Illinois Dep't of Natural Resources, 347 F.3d 1014, 1036, 1038 n.22 (7th Cir. 2003) ("We begin by noting that the district court did not employ the methodology set forth by the Court in *Saucier v. Katz*, 533 U.S. 194 (2001), to determine whether the defendants were entitled to qualified immunity. According to *Saucier*, the district court was required to analyze first whether there was a constitutional violation and second whether it was clearly established, at the time the defendants took the allegedly discriminatory actions, that such actions violated the Constitution. The district court incorrectly skipped the first step and rather first inquired whether there was qualified immunity. Here, we follow *Saucier* and inquire first whether the actions of each defendant resulted in a constitutional violation. . . . [T]here is a genuine issue of material fact that precludes a finding that Mr. Little did not discriminate against Dr. Hildebrandt on the basis of her sex by giving her a lower raise within the guideline range. Consequently, summary judgment on qualified immunity grounds is not appropriate.").

Sparing v. Village of Olympia Fields, 266 F.3d 684, 691 (7th Cir. 2001) ("Although Sparing has demonstrated a constitutional violation, he cannot show that the violation was clearly established under the second part of the standard for qualified immunity. Indeed, we are in agreement with the First Circuit in concluding that the law surrounding Fourth Amendment 'doorway arrest' questions, particularly on the facts of this case, was not sufficiently settled or defined at the time of the arrest to defeat qualified immunity in this case.")**.**

Townsend v. Vallas, 256 F.3d 661, 672 n.11 (7th Cir. 2001) ("This case implicates none of the concerns noted in *Kalka v. Hawk*, 215 F.3d 90 (D.C.Cir.2000), and *Horne v. Coughlin*, 191 F.3d 244 (2d Cir.1999), that might warrant a deviation from the usual methodology.").

Delaney v. DeTella, 256 F.3d 679, 682, 683 (7th Cir. 2001) ("Whether the first prong of a qualified immunity defense, as outlined by the Court in *Lewis*, is a mandatory step or merely a recommendation remains, to some extent, a bit of an open question. . . However, in recent cases where the Supreme Court considered qualified immunity defenses on summary judgment, [ciitng *Saucier*, *Wilson*, and *Conn*] it first addressed if a constitutional violation was asserted before moving on to the question of whether it was 'clearly established' at the time of the alleged violation. These cases, however, require only that a plaintiff allege a constitutional deprivation; thus we are required to determine only whether Delaney's allegations, if true, state a claim of deprivation.").

Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001) ("In order that legal doctrine may continue to evolve in common law fashion, the Supreme Court has instructed us to decide the merits of an appeal even if there is a good immunity defense, since a decision on whether the defendant is entitled to immunity requires freezing the law as of the date he acted. . . Whether this rule is absolute may be doubted, for reasons explained in *Kalka v. Hawk*, 215 F.3d 90, 94-98 (D.C.Cir.2000), and *Horne v. Coughlin*, 191 F.3d 244 (2d Cir.1999), but the reasons are inapplicable here.").

Denius v. Dunlap, 209 F.3d 944, 950 (7th Cir. 2000) (*Denius I*) ("To evaluate a claim of qualified immunity, we engage in a two-step analysis. First, we determine whether the plaintiff's claim states a violation of his constitutional rights. Then, we determine whether those rights were clearly established at the time the violation occurred. . . . Because the doctrine of qualified immunity should not stand as an impediment to the clarification and evolution of a court's articulation of constitutional principles, we evaluate the constitutionality of the official's conduct even though, in the end, he may not be held liable for monetary damages flowing from that conduct.").

Kitzman-Kelley v. Warner, 203 F.3d 454, 457 (7th Cir. 2000) ("In *County of Sacramento v. Lewis*, . . . the Supreme Court of the United States set forth the appropriate methodology for adjudicating a motion to dismiss on the ground of qualified immunity at the complaint stage of the litigation. *Lewis* counsels that the 'better approach' is for the district court to consider first the question of whether the complaint states a cause of action. If the district court determines that a cause of action has been stated, it must then determine whether qualified immunity nevertheless shields a defendant from trial and possible liability. . . Since the Court's pronouncement in *Lewis*, it has twice repeated this directive.").

Kernats v. O'Sullivan, 35 F.3d 1171, 1176, 1183 (7th Cir. 1994) ("Once a defendant has pleaded a defense of qualified immunity, it is appropriate for courts to approach the issue using a two-step

analysis: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . . Because the case law had not clearly established the unlawfulness of O'Sullivan's alleged actions as of the time he acted, O'Sullivan was entitled to qualified immunity. This does not mean, of course, that the Kernats' allegations do not state a Fourth Amendment claim (we need not and do not reach this question) . . . .").

Kernats v. O'Sullivan, 35 F.3d 1171, 1183 (7th Cir. 1994) (Rovner, J., concurring) ("As Judge Flaum explains, at the time of the official conduct here, it was not clearly established that O'Sullivan's alleged abuse of his position of power and public trust would violate the Fourth Amendment. Having reached that conclusion, Judge Flaum leaves unanswered the ultimate question of whether Kernats successfully alleged an unreasonable seizure under the Fourth Amendment, as it is unnecessary to his conclusion with respect to the state of existing law. I fully concur in Judge Flaum's qualified immunity analysis but write separately to emphasize that...a Fourth Amendment claim was stated.").

Sivard v. Pulaski County, 17 F.3d 185, 189 (7th Cir. 1994) ("An analysis of qualified immunity is appropriate only after resolution of the purely legal question of whether Sivard has alleged a violation of a constitutional right.").

Marshall v. Allen, 984 F.2d 787, 793 (7th Cir. 1993) ("Under the *Harlow* qualified immunity analysis as explicated in *Siegert*, the first inquiry is a threshold issue that can defeat entirely a claim of qualified immunity. If a plaintiff's allegations . . . do not state a cognizable violation of constitutional rights, then the plaintiff's claim fails. . . Courts are not required to examine the clearly established law at the time of the offense if the plaintiff's allegations do not assert a violation of constitutional rights.").

Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991)("Deciding just when it became 'clearly established' that public officials could not do something that the Constitution allows them to do is silly.").

Thornton v. Lund, 538 F.Supp.2d 1053, 1058, 1059 (E.D. Wis. 2008) ("[A]lthough one co-tenant may authorize a search of a home, such authorization is insufficient if another co-tenant is present and objects to the search. . . . In the present case, both plaintiffs were present when defendants sought to search their home, and both refused to consent to a search. The parties dispute whether Sherrie subsequently changed her position, but it is undisputed that Latanga did not. Thus, notwithstanding William's consent, defendants' entry into and search of plaintiffs' home was unreasonable as to Latanga and, under Sherrie's version of the facts, was also unreasonable as to Sherrie. . . Thus, defendants violated Latanga's Fourth Amendment right to be free from unreasonable searches and may also have violated Sherrie's right. . . . In February 2006, it would not have been clear to a reasonable officer that a warrantless search of a parolee's residence was unreasonable as to a present, objecting co-tenant. Prior to *Randolph*, most courts had concluded

that one resident's consent to a home search authorized entry into the home even over the objections of a co-resident. . . Further, several pre-*Randolph* cases treated a parolee's co-tenant as having no more rights than the parolee.").

EIGHTH CIRCUIT

O'Neil v. City of Iowa City, Iowa, 496 F.3d 915, 918 (8th Cir. 2007) ("Giving the court's order the best possible reading, the determination that '[p]laintiff has presented enough documentary evidence' on his First Amendment and due process claims could possibly be intended as a finding that O'Neil has established a constitutional violation–'step one' of *Saucier*. However, even if that generous reading is accurate (and it is doubtful that it is), there is absolutely no discussion on 'step two' of the qualified immunity analysis-whether reasonable officials in the Commissioners' positions would have known that their actions violated O'Neil's constitutional rights.. . .It is possible, we suppose, that the district court considered the issue of qualified immunity and only provided a truncated analysis. However, we can neither affirm nor reverse the denial of qualified immunity based on the cursory commentary advanced by the district court in its denial order. . . . We remand the case to the district court for a more detailed consideration and explanation of the validity, or not, of the defendants' claim to qualified immunity.")**.**

Vaughn v. Ruoff, 253 F.3d 1124, 1128 (8th Cir. 2001) ("Qualified immunity analysis initially asks the following two questions: (1) was there a deprivation of a constitutional right, and, if so, (2) was the right clearly established at the time of the deprivation? *County of Sacramento v.. Lewis*, 523 U.S. 833, 841 n.5 (1998). If either question is answered in the negative, the public official is entitled to qualified immunity. If both questions are answered in the affirmative, a public official can avoid a denial of qualified immunity only if she meets her burden of establishing undisputed and material predicate facts which demonstrate that her actions were reasonable under the circumstances. *Pace v. City of Des Moines*, 201 F.3d 1050, 1056 (8th Cir.2000). If the material predicate facts are undisputed, the reasonableness inquiry is a question of law. *Id.* If there is a genuine dispute over material predicate facts, a public official cannot obtain summary judgment. *Id.*").

King v. Beavers, 148 F.3d 1031, 1034 (8th Cir. 1998) ("When qualified immunity is asserted in a § 1983 action, we 'determine first whether the plaintiff has alleged a deprivation of a constitutional right at all,' and if so, 'whether the right allegedly implicated was clearly established at the time of the events in question.'[*citing County of Sacramento*]").

Rowe v. Lamb, 130 F.3d 812, 814 (8th Cir. 1997) ("In order to determine whether a defendant is entitled to qualified immunity, we engage in a two-part analysis. [citing *Manzano*] The first question is whether the plaintiff has alleged a constitutional violation. [citing *Siegert*] It is not until we have made that required determination that we may analyze whether such right was clearly established at the time of the alleged violation.").

Thomason v. SCAN Volunteer Services, Inc., 85 F.3d 1365, 1371 (8th Cir. 1996) ("Our court has not gone so far as to say that there are no 'clearly established' substantive due process rights held by parents in the context of child abuse investigations. However, in *Myers [v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987)], we did recognize the problem of defining such rights. . . More generally, this need to balance competing interests makes the *Siegert* approach difficult to apply in child abuse cases involving the right to familial integrity. In these types of cases, it is nearly impossible to separate the constitutional violation analysis from the clearly established right analysis.").

Manzano v. South Dakota Dept. of Social Services, 60 F.3d 505, 510 n.2 (8th Cir. 1995) ("We recognize that the Supreme Court's decision in *Siegert* . . . has caused considerable disagreement among the circuits with regard to the proper analytical framework for qualified immunity questions. . .However, our court has consistently interpreted *Siegert* to mean that we must first address the question whether the plaintiff has asserted the violation of a constitutional right, and then consider whether the right was clearly established at the time of the alleged violation.").

Cole v. Bone, 993 F.2d 1328, 1334 (8th Cir. 1993) ("Because we have found that [defendant's] seizure of [plaintiffs' decedent] was constitutionally reasonable as a matter of law, plaintiffs have failed to assert a constitutional violation against [defendant]. Accordingly, it is thus unnecessary for us to reach [defendant's] contention that the district court erred in denying his claim of qualified immunity.").

Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992) ("In *Siegert*, ...the Supreme Court clarified the proper analysis for determining when a public official is entitled to qualified immunity. First, [plaintiff] must assert a violation of its constitutional rights ...If no constitutional right has been asserted, [plaintiff's] complaint must be dismissed.").

Sheridan v. City of Des Moines, No. 4:00-CV-90024, 2001 WL 901267, at *7 (S.D. Iowa Aug. 8, 2001) (not reported) ("The lawful placement of handcuffs on an individual, without more, is inadequate to sustain Plaintiffs' claim for excessive force. Having determined that the officers did not violate Mr. Sheridan's constitutional rights and that an action under § 1983 cannot be maintained, the Court does not need to address the issue of qualified immunity.").

NINTH CIRCUIT

Skoog v. County of Clackamas, 469 F.3d 1221, 1229, 1231-35 (9th Cir. 2006) ("Determining whether an official is entitled to summary judgment based on the affirmative defense of qualified immunity requires applying a three-part test. First, the court must ask whether '[t]aken in the light most favorable to the party asserting the injury, [ ] the facts alleged show the officer's conduct violated a constitutional right?' If the answer is no, the officer is entitled to qualified immunity. If the answer is yes, the court must proceed to the next question: whether the right was clearly established at the time the officer acted. That is, 'whether it would be clear to a reasonable officer

that his conduct was unlawful in the situation he confronted. If the answer is no, the officer is entitled to qualified immunity. If the answer is yes, the court must answer the final question: whether the officer could have believed, 'reasonably but mistakenly ... that his or her conduct did not violate a clearly established constitutional right.' If the answer is yes, the officer is entitled to qualified immunity. If the answer is no, he is not. . . .To demonstrate retaliation in violation of the First Amendment, Skoog must ultimately prove first that Royster took action that 'would chill or silence a person of ordinary firmness from future First Amendment activities.' The parties do not dispute that searching someone's office and seizing materials can satisfy this first requirement. The second requirement is the focus in this case. That requirement involves causation. Skoog must ultimately prove that Royster's desire to cause the chilling effect was a but-for cause of the defendant's action. Whether a plaintiff must plead the absence of probable cause in order to satisfy this second requirement and state a claim for retaliation is an open question in this circuit and the subject of a split in the other circuits. After close review of the relevant precedent, we conclude that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation. . . . In *Hartman v. Moore*, the Supreme Court considered whether the absence of probable cause should be an element of a particular subcategory of retaliation claims: retaliatory prosecution claims. The Court ultimately decided that the absence of probable cause should be an element of that subcategory. Although this outcome might seem to conflict with *Crawford-El*, the Supreme Court's reasoning brings it into harmony with that earlier decision. In *Hartman*, the Supreme Court was careful to explain that the practical problems of establishing causation in retaliatory prosecution actions motivated its decision, not any need to provide additional protection to government officials. According to the Court, it makes sense to require the absence of probable cause in retaliatory prosecution claims because several attributes of such claims make doing so necessary and not very onerous. . . . Pleading and proving the absence of probable cause is necessary in retaliatory prosecution cases, the Court reasoned, because of the complexity of causation in such cases. Retaliatory prosecution claims are really 'for successful retaliatory inducement to prosecute' because they can only be maintained against officials, such as investigators, who may persuade prosecutors to act. To prove causation, then, a plaintiff must show not only that the defendant official harbored retaliatory animus and thus sought to induce prosecution, but also that the official succeeded–that is, that the 'prosecutor [ ] would not have pressed charges otherwise.'. . . The requirement of no probable cause is necessary 'to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity.' Thus, differences between retaliatory prosecution claims and other retaliation claims justified and necessitated the additional requirement in retaliatory prosecution claims. We conclude that the retaliation claim in this case does not involve multi-layered causation as did the claim in *Hartman*. . . . Thus, the rationale for requiring the pleading of no probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim. . . . . We have concluded that Skoog need not have pled the absence of probable cause in order to state a claim for retaliation. Our earlier conclusion that probable cause existed for the still camera's seizure therefore does not preclude his statement of a claim. Moreover, he has stated all the elements necessary for a retaliation claim. Thus, the first prong of the qualified immunity analysis does not end our inquiry and we must proceed to the second. The

second prong requires us to determine whether the right, defined according to the actual facts of the case, was clearly established at the time of the search. In this case, we define the right as the right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause. At the time of the search, the right we have just defined was far from clearly established in this Circuit or in the nation. We have decided only today that a right exists to be free of police action for which retaliation is a but-for cause even if probable cause exists for that action. At some future point, this right will become clearly established in this Circuit. At the time Royster acted, however, the law was far from clear. Accordingly, even assuming Royster's primary motivation for seizing Skoog's still camera was to retaliate for Skoog's exercise of his First Amendment rights, he violated no clearly established law because probable cause existed for the search. Royster is thus entitled to qualified immunity under the second prong of our qualified immunity analysis. We therefore reverse the district court's denial of summary judgment on Skoog's claim for retaliation." [footnotes omitted]).

[But see *Baldauf v. Davidson*, 2007 WL 2156065, at *2, *3 & n.3 (S.D.Ind. July 24, 2007) ("In *Hartman,* the Supreme Court's primary rationale for making proof of probable cause a required element of retaliatory prosecution claims was the complex causation that must ordinarily be established. . . A plaintiff hoping to prevail must show that the officials seeking to retaliate, normally the police officers, induced the prosecutor to bring charges that the prosecutor would not otherwise have brought. . . However, prosecutors ordinarily do not inquire into an arresting officer's motivation; they simply want to know that probable cause exists. In the Supreme Court's view, requiring plaintiffs to establish the absence of probable cause would 'bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action' and would 'address the presumption of prosecutorial regularity.'. . At first glance, no such complex causation problems are present when a person brings a retaliatory arrest claim that focuses entirely on an officer's bodily seizure of a plaintiff through the power of arrest. The Ninth Circuit concluded as much, although with regard to a seizure of property, not of a person. In *Skoog v. County of Clackamas,* the court held that a plaintiff could bring a First Amendment retaliation claim against a police officer who seized a still camera even if probable cause existed for the search and seizure. 469 F.3d 1221, 1232 (9th Cir.2006). The court reasoned that *Hartman's* ruling was limited to retaliation cases involving 'multi-layered causation.'. . . It dismissed the case, however, after finding that the officers were entitled to qualified immunity because 'the right of an individual to be free of police action motivated by retaliatory animus but for which there was probable cause' was not clearly established. . . In contrast, the Sixth and Eighth Circuits have concluded that *Hartman's* ruling sweeps 'broad[ly] enough to apply even where intervening actions by a prosecutor are not present.' *Williams v.. City of Carl Junction,* 480 F.3d 871, 876 (8th Cir.2007) (adopting the reasoning of *Barnes v. Wright,* 449 F.3d 709, 720 (6th Cir.2006)). . . . [T]his court finds the Sixth Circuit's reasoning persuasive for several reasons. First, the distinction between a retaliatory prosecution claim and a retaliatory arrest claim is somewhat artificial. In both cases, the defendants in such suits are the arresting or investigating officers because of the prosecutor's absolute immunity. . . .Moreover, an arrest is merely the first step in a prosecution. Insofar as the plaintiff's injuries stem from the filing of charges, plaintiff, in essence, is claiming retaliatory

prosecution, and under *Hartman*, must show the absence of probable cause. . . . . The Seventh Circuit does not appear to have used the term 'retaliatory arrest' at all, preferring to discuss instead whether a First Amendment retaliation claim might be brought 'in the context of an arrest.' *Abrams v. Walker*, 307 F.3d 650, 657 (7th Cir.2002), *overruled on other grounds by Spiegla v. Hull*, 371 F.3d 928, 941-42 (7th Cir.2004). In this case, decided prior to *Hartman*, the court declined to rule at that time whether the existence of probable cause barred such a claim although it noted that such a rule 'would not be incongruent' with its Fourth Amendment precedent.").**]**

Way v. County of Ventura, 445 F.3d 1157, 1161-63 (9th Cir. 2006) ("We recognize the difficulty of operating a detention facility safely, the seriousness of the risk of smuggled weapons and contraband, and the deference we owe jail officials' exercise of judgment in adopting and executing policies necessary to maintain institutional security. . . However, this does not mean that a blanket policy is constitutionally acceptable simply by virtue of jail officials' invocation of security concerns. . . Rather, the policy must be ' Areasonably related" to the [detention facility's] interest in maintaining security.'. . As there is no evidence that security concerns require strip searching all arrestees on all drug offenses before placement in the general jail population, and none that all persons arrested for being under the influence of a drug are likely to have concealed more drugs in a bodily cavity, the Sheriff Department's blanket policy cannot be a proxy for reasonable suspicion. There was no individualized suspicion that Way concealed drugs in a bodily cavity. Therefore, subjecting her to a strip search with visual cavity inspection offended her constitutional right to be free of an unreasonable search. We had held prior to Way's search that performing a strip search with visual cavity inspection before determining whether the person was eligible for release on his own recognizance could not be justified based on a blanket policy of subjecting all minor offense arrestees to a strip search, *Ward*, 791 F.2d 1329; that a visual body cavity search of a person arrested on an offense that did not involve violence could not be justified by a blanket policy of subjecting all those arrested for felonies to such a search, *Kennedy*, 901 F.2d 702; and that a strip and body cavity search of all felony arrestees could not be justified based on the jail's blanket search policy regardless of the crime with which they were charged, *Fuller*, 950 F.2d 1437. However, we had never previously addressed the constitutionality of a body cavity search policy premised on the nature of this or any other drug offense. More importantly, we had held that the nature of the offense alone may provide reasonable suspicion, *Thompson*, 885 F.2d at 1447, and twice pointed to charges involving drugs, contraband and violence as the kind of offense that might give rise to reasonable suspicion. *Kennedy*, 901 F.2d at 716; *Giles*, 746 F.2d at 618. In these circumstances, we cannot conclude that a reasonable officer would necessarily have realized that relying on a Department policy that excepted arrestees being held on controlled substance offenses from the general prohibition on strip searches, and subjecting Way to a strip search with visual cavity inspection pursuant to it, was unconstitutional. We therefore conclude that subjecting Way to a strip search with visual cavity inspection during the booking process on a misdemeanor charge of being under the influence of a drug was not justified by the jail's blanket policy of strip searching all those arrested on charges involving a controlled substance. Undocumented security needs of the jail facility do not outweigh the invasion of Way's personal rights. Nor is such an intrusive search warranted solely on account of the nature of the charge in

this case, as being under the influence of a drug does not necessarily indicate that the person has concealed more drugs in a body cavity. This said, a reasonable official in the position of Brooks and Hanson would not have understood that following the jail's policy violated Way's rights because the unconstitutionality of the search they conducted was not clearly established at the time.")**.**

Jimenez v. City of Costa Mesa, No. 04-55948, 2006 WL 897711, at *3 (9th Cir. Apr. 5, 2006) (unpublished) ("A jury could reasonably conclude that Officer Chamberlin's use of pepper spray on Tony Maae in the manner alleged was objectively unreasonable. Although Tony Maae initially resisted arrest and the pepper-spraying occurred prior to handcuffing, his arrest was for a minor crime, and he posed little threat at the time because three officers were holding him to the ground. We conclude, however, that Officer Chamberlin is entitled to qualified immunity because in 2001, the contours of the right against excessive force in the pepper-spray context were not so clearly established that a reasonable officer would have known the unlawfulness of this conduct.")**.**

Boyd v. Benton County, 374 F.3d 773, 779, 784 (9th Cir. 2004) ("There are likely circumstances in which a risk to officers' safety would make the use of a flash-bang device appropriate. And we recognize that less-than-lethal alternatives are intended to avoid unnecessary fatalities. Nonetheless, given the inherently dangerous nature of the flash-bang device, it cannot be a reasonable use of force under the Fourth Amendment to throw it 'blind' into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury. Given the facts Boyd has presented, the use of the flash-bang here did not meet these requirements, and thus she has established a Fourth Amendment violation sufficient to overcome summary judgment under the first prong of *Saucier*. . . . We conclude that in October 1997 a reasonable officer faced with these facts, and without guidance from the courts, was not on notice that the use of a flash-bang was unconstitutional. Thus, while we now hold that the officers in the specific circumstances of this case violated Boyd's Fourth Amendment rights in using a flash-bang inside a dark apartment where five to eight people might be sleeping, that error was not so egregious as to have been an unreasonable application of the law that existed at the time of the incident. Consequently, the officers are entitled to qualified immunity because Boyd's Fourth Amendment right to be free from dangerous flash-bang devices under these circumstances was not clearly established.").

Doe v. Lebbos, 348 F.3d 820, 828, 829 (9th Cir. 2003) ("We note that the parties did not brief the issue of whether Herrera's alleged actions, if proven, violated a constitutional right. We are obligated under *Saucier*, however, to address this issue at the outset of our qualified immunity analysis. . . .Herrera did not obtain parental consent or a court order before referring Lacey for a medical sexual abuse examination. . . .We therefore hold, consistent with our reasoning in *Wallis,* that, on the Does' version of the facts, Herrera violated the Does' constitutional rights to family association and procedural due process. .. . Our inquiry, however, does not end here. . . .We conclude that a reasonable social worker in Herrera's position would have believed that she had

an appropriate court order authorizing the examination and that her conduct was lawful. Herrera therefore is entitled to qualified immunity.").

Billington v. Smith, 292 F.3d 1177, 1184, 1185, 1189-91 (9th Cir. 2002) ("[W]e will not assume without deciding that Detective Smith violated Hennessey's constitutional rights and move on to the qualified immunity question. Instead, we will first decide whether Detective Smith did in fact violate Hennessey's rights. . . . The district court assumed that Detective Smith's use of deadly force was reasonable at the moment of the shooting, but denied summary judgment because it found a genuine issue of material fact whether alleged tactical errors made by Detective Smith *before* the moment of the shooting made his reasonable use of force at that moment unreasonable. It is this theory of excessive force that Hennessey's estate advances against Detective Smith's appeal, and the theory is basically that Detective Smith shouldn't have gotten himself into the situation, so he couldn't constitutionally shoot his way out of it. . . . Under *Alexander* [*v. City and County of San Francisco*], the fact that an officer negligently gets himself into a dangerous situation will not make it unreasonable for him to use force to defend himself. . . . But if, as in *Alexander*, an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law. In such a case, the officer's initial unconstitutional provocation, which arises from intentional or reckless conduct rather than mere negligence, would proximately cause the subsequent application of deadly force. . . . even if we were to assume for the sake of argument that a jury could conclude that Detective Smith should have sat in his car until backup arrived, or donned all of his equipment before approaching Hennessey, or have taken precautions against Hennessey grabbing him by his throat and pulling himself out of the car window to attack the detective, or that Detective Smith should have dropped off his wife and daughter somewhere before dealing with Hennessey, none of Detective Smith's supposed errors could be deemed intentional or reckless, much less unconstitutional, provocations that caused Hennessey to attack him. . . . We need not reach the question whether, if Detective Smith violated Hennessey's constitutional rights by shooting him, he would nevertheless be entitled to qualified immunity, because he did not violate Hennessey's rights.").

See also ***Tubar v. Clift***, 2008 WL 5142932 (W.D. Wash. Dec. 5, 2008) ("Clift's decision to approach the stolen vehicle in an attempt to arrest its occupants and then backpedal through the parking lot once the vehicle began moving, may have been a bad tactical decision or even negligent. But the Court cannot employ 20/20 hindsight to find that these decisions effected an unconstitutional provocation as a matter of law. . . . In sum, Plaintiff has not met his burden of demonstrating that Clift intentionally or recklessly provoked a violent response, and such provocation was an independent constitutional violation. Accordingly, partial summary judgment that Defendants are liable for unreasonable seizure is not appropriate.")

Orin v. Barclay, 272 F.3d 1207, 1214 (9th Cir. 2001) ("To determine whether each individual defendant is entitled to qualified immunity, we must first determine whether Orin has stated a prima facie claim that a defendant violated his constitutional rights. . . If we determine that Orin

has stated a prima facie claim that a particular defendant violated his constitutional rights, then we must determine whether the rights allegedly violated were clearly established by federal law.").

Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (en banc) (finding defendants entitled to qualified immunity where plaintiffs failed to state a claim of violation of their substantive due process rights), *overruled*, ***Crown Point Development, Inc. v. City of Sun Valley,*** 2007 WL 3197049, at *4 (9th Cir. Nov. 1, 2007) ("[I***J***it is no longer possible in light of *Lingle* and *Lewis* to read *Armendariz* as imposing a blanket obstacle to all substantive due process challenges to land use regulation.).

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Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992) (where complaint lacked facts sufficient to state a claim under § 1983, consideration of qualified immunity was premature).

Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991) (three inquiries required by the qualified immunity test: (1) identification of the specific right allegedly violated; (2) a determination of whether that right was so "clearly established" as to alert a reasonable officer as to its constitutional parameters; and (3) whether a reasonable officer could have believed lawful his particular conduct at issue, given the circumstances and the information possessed at the time.).

Beaver v. City of Federal Way, 507 F.Supp.2d 1137, 1149 (W.D.Wash. 2007) ("Therefore, the Court finds that at the time of the arrest, a reasonable law enforcement officer might well have failed to recognize that the actions taken by defendants–specifically, the fourth and fifth tasings of Mr. Beaver– violated his Fourth Amendment rights. Under the second prong of *Saucier*, the officers are entitled to qualified immunity. In part, the purpose of the two-prong *Saucier* analytical framework is to force courts to establish contours of the law involving potential violations of civil rights. . . In this case, because the case law on use of Tasers is not well developed, liability for violations of Mr. Beaver's rights caused by the fourth and fifth tasings cannot be imposed. It has been said that qualified immunity exists because police officers 'cannot be expected to predict what federal judges' might decide is constitutionally unacceptable. . . However, at least as far as the undersigned is concerned, the following issues are now clearly established. First, the use of a Taser involves the application of force. Second, each application of a Taser involves an additional use of force. Third, multiple applications of a Taser cannot be justified solely on the grounds that a suspect fails to comply with a command, absent other indications that the suspect is about to flee or poses an immediate threat to an officer. This is particularly true when more than one officer is present to assist in controlling a situation. Fourth, any decision to apply multiple applications of a Taser must take into consideration whether a suspect is capable of complying with an officer's commands."), *aff'd*, 2008 WL 5065620 (9th Cir. Nov. 25, 2008)("Here, there was no clearly established law on August 27, 2004, to put a reasonable officer on notice that tasing an arrestee who was suspected of a serious crime, had attempted to flee from officers, and continued to be non-compliant was unconstitutional. Additionally, the officers' conduct was not a patently offensive violation of Beaver's constitutional rights.").

TENTH CIRCUIT

Kirkland v. St. Vrain Valley School District No. RE-1J, 464 F.3d 1182, 1188 (10th Cir. 2006) ("Although at times it may be tempting for a court to address the second issue first, the Supreme Court directs that a court consider these questions in order.").

Douglas v. Dobbs, 419 F.3d 1097, 1102, 1103 (10th Cir. 2005) ("Having established that Douglas has a constitutional right to privacy in her prescription drug records, we must determine whether ADA Dobbs' conduct violated that right . . . Douglas cites to no statutory or case law to support her claim that the Fourth Amendment is implicated when district attorneys advise law enforcement officers about proposed motions or orders submitted to judges to obtain authorization to conduct searches. . . . Because Douglas cannot rely merely upon identifying an abstract right to privacy protected by the Fourth Amendment and then allege that Dobbs has violated it, she has failed to carry her burden under the threshold inquiry for qualified immunity . . . . Absent a showing that Dobbs' actions in authorizing the submission of the Motion and proposed Order to the magistrate judge violated a clearly established constitutional right, qualified immunity applies and Douglas's suit must fail.").

Lawrence v. Reed, 406 F.3d 1224, 1230 (10th Cir. 2005) ("In the Tenth Circuit, we employ a three-step inquiry. . . First, we ask 'whether the plaintiff's allegations, if true, establish a constitutional violation.' . . If not, the suit is dismissed; if so, we move to the second step: 'whether the law was clearly established at the time the alleged violations occurred.'. . This step gives the official an opportunity to show that he 'neither knew nor should have known of the relevant legal standard' because the law was not clearly established at the time he acted. . . Where the law is not clearly established, courts do not require officials to anticipate its future developments, and qualified immunity is therefore appropriate. If the law was clearly established, we reach the third step of the inquiry: whether, in spite of the fact that the law was clearly established, 'extraordinary circumstances'-such as reliance on the advice of counsel or on a statute-'so "prevented" [the official] from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right.'. . This occurs only 'rarely.'").

Tonkovich v. Kansas Board of Regents (Tonkovich II), 254 F.3d 941, 944 & n.1 (10th Cir. 2001) ("Although *Tonkovich I* dealt with qualified immunity, its analysis and, more importantly, its holding are germane to our Rule 12(b)(6) inquiry. The relevance becomes apparent upon comparing the two analyses. First, both analytical frameworks employ the same factual lens: "[A]ll of the well-pleaded allegations in the complaint [are accepted] as true." . . . Second, the qualified immunity inquiry itself–whether Defendants (1) violated (2) clearly established law–requires a court to confront an obvious Rule 12(b)(6) issue: whether Plaintiff has alleged a legal violation at all. Put more specifically, both analyses require the court to determine whether Plaintiff has argued facts that, if proven, would demonstrate illegal conduct by Defendants for which relief may be granted. . . . The fact that *Tonkovich I* disavowed any intent to review the merits of the case, 159 F.3d at 515-16, does not alter our conclusion. The panel did not do a Rule 12(b)(6) review of the

merits, despite acknowledging its relation to a qualified immunity analysis, because the court lacked jurisdiction to do so. *Id.* However, that does not devalue *Tonkovich I*'s relevance to a subsequent Rule 12(b)(6) analysis such as this. Indeed, in light of the law of the case doctrine, it would be ludicrous to argue that we are free to construe the same aspects of Plaintiff's complaint differently than did *Tonkovich I*, although we address essentially the same issue.").

Cruz v. City of Laramie, 239 F.3d 1183, 1188, 1189 (10th Cir. 2001) ("We do not reach the question whether all hog-tie restraints constitute a constitutional violation per se, but hold that officers may not apply this technique when an individual's diminished capacity is apparent. This diminished capacity might result from severe intoxication, the influence of controlled substances, a discernible mental condition, or any other condition, apparent to the officers at the time, which would make the application of a hog-tie restraint likely to result in any significant risk to the individual's health or well-being. In such situations, an individual's condition mandates the use of less restrictive means for physical restraint. . . . While the use of a hog-tie restraint in this case falls within the rule we announce today, we cannot say, however, that a rule prohibiting such a restraint in this situation was 'clearly established' at the time of this unfortunate incident. The decisions from other circuit and district courts fall shy of the mandated 'clearly established weight of authority from other courts.' ").

Herring v. Keenan, 218 F.3d 1171, 1173 (10th Cir. 2000) ("We conclude that there is a constitutional right to privacy that protects an individual from the disclosure of information concerning a person's health. We reverse the denial of the motion to dismiss, however, because we hold that it was not clearly established, at the time Keenan disclosed to Herring's sister and his employer that Herring had tested positive for HIV, that a probationer had a constitutionally protected right to privacy regarding information concerning his or her medical condition.").

Baptiste v. J.C. Penney Company, Inc., 147 F.3d 1252, 1255 n.6 (10th Cir. 1998) ("In accord with *County of Sacramento v. Lewis*, . . . this court first determines whether Ms. Baptiste has alleged a deprivation of a constitutional right. Only after determining that Ms. Baptiste has alleged a deprivation of a constitutional right, does this court ask whether the right allegedly violated was clearly established at the time of the conduct at issue.").

Abeyta v. Casados, 77 F.3d 1253, 1257-58 (10th Cir. 1996) ("We are unwilling to hold that actions which inflict only psychological damage may never achieve the high level of 'a brutal and inhuman abuse of official power literally shocking to the conscience' [cite omitted] necessary to constitute a substantive due process violation. . . . But we are sure that the actions alleged in the instant case do not reach that level–whether they were done with indifference or with deliberate intent to cause psychological harm. . . . Because we hold that taking plaintiff's claims as true they do not state an actionable 1983 claim against defendant based on the substantive due process violation alleged, we need not discuss qualified immunity as a separate issue.").

Pino v. Higgs, 75 F.3d 1461, 1467 (10th Cir. 1996) ("Applying the two-part inquiry of *Siegert*," defendants are entitled to summary judgment where Appellant failed to allege facts sufficient to show violation of any of her constitutional rights.).

Liebson v. New Mexico Corrections Dep't, 73 F.3d 274, 276 (10th Cir. 1996) ("Following the *Siegert* framework, we must first decide whether Ms. Liebson has asserted the violation of her due process rights.").

Albright v. Rodriguez, 51 F.3d 1531, 1535 (10th Cir. 1995) ("[A] defendant is entitled to qualified immunity if the plaintiff fails to show a violation of a constitutional right at all.").

Romero v. Fay, 45 F.3d 1472, 1478 (10th Cir. 1995) ("The district court denied Defendants qualified immunity on Plaintiff's claim of an unreasonable post-arrest investigation without conducting the inquiry mandated by *Siegert*. Under *Siegert*, the district court should have first ascertained whether Plaintiff sufficiently asserted facts in his complaint and response to Defendants' motion for summary judgment that established the violation of a constitutional right at all.").

Doe v. Bagan, 41 F.3d 571, 577 n.7 (10th Cir. 1994) ("Because plaintiffs have failed to allege the violation of a constitutional right . . . we need not consider whether the various defendants are entitled to immunity. Like the plaintiff in *Siegert* . . . their claims fail at an analytically earlier stage, before consideration of immunity, qualified or otherwise, is necessary. [cites omitted]").

Martinez v. Mafchir, 35 F.3d 1486, 1490 (10th Cir. 1994) ("Courts have recognized that the constitutional right to familial integrity is amorphous and always must be balanced against the governmental interest involved. [cites omitted] As a result, the *Siegert* framework has proved difficult to apply in child abuse cases involving the generalized constitutional right to familial integrity because the threshold constitutional violation analysis may run together with the 'clearly established' analysis. [cites omitted] Nevertheless, we undertake to apply the *Siegert* framework here. In the context of this case, we must first determine whether [Defendant's] actions in pursuing the Neglect Petition, not to seek [the child's] actual physical removal from the Martinez home but basically to force Ms. Martinez to follow through with the recommended psychological evaluations for [the child], rose to the level of a constitutional violation.").

Hinton v. City of Elwood, 997 F.2d 774, 779, 780 (10th Cir. 1993) ("The initial twofold burden imposed on the plaintiff requires a court reviewing a qualified immunity claim to analyze the state of the law at two different times. First, the court must analyze the law at the time of trial to determine whether the plaintiff has alleged a violation of existing law as required by the first prong of the plaintiff's summary judgment burden. Then, pursuant to the second prong, the court must analyze the law at the time of the alleged conduct in order to determine whether the plaintiff has established that the defendant's conduct, when perpetrated, violated clearly established law . . . . Hinton's failure to satisfy the first prong of his summary judgment burden is dispositive of

[defendants'] claim to qualified immunity and renders it unnecessary for us to consider whether Hinton satisfied his burden under the second prong by showing that [defendants] violated clearly established law.").

Maldonado v. Josey, 975 F.2d 727, 729 (10th Cir. 1992) ("As a threshold inquiry to qualified immunity, we first must determine whether [plaintiff's] allegations, even if accepted as true, state a claim for violation of any rights secured under the United States Constitution."), *cert. denied*, 113 S. Ct. 1266 (1993).

Frohmader v. Wayne, 958 F.2d 1024, 1026 n.3 (10 Cir. 1992) ("Identification of the controlling constitutional principles and evaluation of the defendant's compliance therewith is . . . the threshold question to be resolved when qualified immunity is asserted." (citing ***Spielman v. Hildebrand***, 873 F.2d 1377, 1385 (10th Cir. 1989)).

Workman v. Jordan, 958 F.2d 332, 334 n.2 (10th Cir. 1992) (relying on ***Pueblo Neighborhood Health Ctrs., Inc. v. Losavio***, 847 F.2d 642, 646 (10th Cir. 1988), for proposition that defendant may raise qualified immunity by way of Fed.R.Civ.P. 12(b) (6) motion to dismiss for failure to state a claim or by way of summary judgment motion.).

Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990) ("Once a defendant raises the defense of qualified immunity, plaintiffs must come forward with facts or allegations to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." If the plaintiff can't produce enough evidence to show that the challenged conduct violated law "as presently interpreted," then it is unnecessary to consider whether the law was clearly established.).

Anderson v. Alpine City, 804 F. Supp. 269, 276 (D.Utah 1992) ("The court cannot determine whether qualified immunity applies until it first determines that there has been a violation of a constitutional right.")

Pride v. Kansas Highway Patrol, 793 F. Supp. 279, 283 n.3 (D.Kan. 1992) ("Because the threshold requirement of establishing a constitutional violation is not met, the qualified immunity analysis necessarily terminates at this point."), *aff'd*, ***Pride v. Does***, 997 F.2d 712 (10th Cir. 1993).

ELEVENTH CIRCUIT

Bates v. Harvey, 518 F.3d 1233, 1235 (11th Cir. 2008) ("Although we agree that Deputy Harvey deprived Mrs. Bates of her constitutional rights, we nonetheless conclude that Deputy Harvey is entitled to qualified immunity on Mrs. Bates's false arrest claim because at the time he acted, the law did not give a reasonable officer fair and clear warning that a civil commitment order does not present circumstances sufficiently exigent to excuse the warrantless entry and search of an unrelated third party's home. . . . Deputy Harvey's initial warrantless entry and search of Mrs.

Bates's home was presumptively unreasonable and not justified by either the consent or exigent circumstances exceptions to the Fourth Amendment warrant requirement. Therefore, his subsequent seizure and arrest of Mrs. Bates was unlawful, in violation of her constitutional rights under the Fourth and Fourteenth Amendments. Nevertheless, we are constrained to conclude that a reasonable officer could have believed, at the time Deputy Harvey acted, that the averments in the civil commitment order about a person presenting a substantial imminent threat of danger to himself or others presented a sufficiently emergent situation, justifying the warrantless entry and search of a third party's home for that person. Because the contours of the exigent circumstances exception were not sufficiently clear, prior to this case, to give a reasonable officer fair and clear warning that a warrantless entry and search such as this one was not justified, Deputy Harvey is entitled to qualified immunity.")**.**

McClish v. Nugent, 483 F.3d 1231, 1237, 1238, 1248, 1249 (11th Cir. 2007) ("The district court did not determine the constitutionality of Deputy Terry's actions in arresting McClish. Instead, the court avoided answering whether the arrest violated the Fourth Amendment by assuming that it did. The court then disposed of the case on the ground that the law was not clearly established. . . .However, as the Supreme Court has made abundantly clear, qualified immunity determinations may not be disposed of in this arguendo form, by first simply assuming the violation and then proceeding to address whether the law was clearly established at the time of the infraction. . . Although both qualified immunity inquiries are logically related, the two inquiries must be conducted in the proper order. We may not assume an answer to the first question in order to avoid difficult constitutional issues. . . . Having determined that Terry violated McClish's Fourth Amendment rights during the warrantless arrest, however, we must still answer whether the violation was so clearly established that Terry should be stripped of the qualified immunity customarily granted law enforcement officers engaged in the discretionary performance of their official duties. The critical inquiry is whether the law provided Deputy Terry with 'fair warning' that his conduct violated the Fourth Amendment. . . We think the answer is no–the law did not provide the deputy with fair notice when the arrest occurred. . . . No Supreme Court, Eleventh Circuit, or Supreme Court of Florida cases have resolved the question whether *Payton* or *Santana* applies to the arrest of a person who, while standing firmly inside the house, opens the door in response to a knock from the police and is then pulled outside the unambiguous physical dimensions of the home. . . . While we believe that the better answer to the first question is that Deputy Terry's conduct was a violation of the Fourth Amendment, we are constrained to conclude that the unlawfulness of his conduct was not so clearly established as to justify stripping him of qualified immunity. Although we conclude that *Payton* set forth a bright line rule, Appellants have failed to meet their burden of demonstrating that the law was clearly established in 2001 because they have failed to demonstrate, in light of *Santana*, that a reasonable officer would have clearly known that McClish's arrest was unlawful.")**.**

Baltimore v. City of Albany, Georgia, No. 02-00125 CV-WLS-1-1, 2006 WL 1582044, at *3, *5 (11th Cir. June 9, 2006) (not published) ("Here, the district court ruled that summary judgment could not be granted in favor of any of the three remaining defendants on the basis of qualified

immunity because 'genuine issues of material fact' exist as to whether their conduct violated Baltimore's constitutional rights. This application of the summary judgment standard was incorrect because, in qualified immunity cases, a 'material issue of fact' never exists. As we recently explained in *Robinson v. Arrugueta*, 415 F.3d 1252, 1257 (11th Cir.2005), when the district court considers the record in the light most favorable to the plaintiff, as it must, it necessarily eliminates all issues of fact and proceeds with the 'plaintiff's best case before it.'. . . In this case, the district court failed to follow this approach in ruling on the defendants' motion for summary judgment. Instead of eliminating all material fact issues, as it should have, the court searched for disputed facts and, finding them, ruled that summary judgment could not lie. We now rectify this mistake and simply take the evidence, and the facts it establishes, in the light most favorable to Baltimore, and decide whether the officers are entitled to qualified immunity. . . . Even under Baltimore's 'best case scenario,' the evidence shows that Officer Long delivered a quick, surprise blow when he was not under any control or direction of Cpl. Rizer. . . As such, there is no evidence that Cpl. Rizer was individually responsible for the excessive force at issue, the blow to the head. The district court therefore erred in denying Cpl. Rizer qualified immunity."). ***Grayden v. Rhodes,*** 345 F.3d 1225, 1232 (11th Cir. 2003) ("We address the two *Saucier* inquiries in turn. In Part A, we evaluate the plaintiffs' procedural due process allegations in light of the balancing test established in *Mathews v. Eldridge*, . . .and the standard for notice set forth in *Mullane* . . . and conclude that the plaintiffs have alleged a violation of their right to constitutionally-adequate notice under the Fourteenth Amendment. In Part B, we examine the relevant caselaw at the time of eviction and conclude that a reasonable public official could have believed that § 30A.11 of the City Code provided constitutionally-adequate notice to the plaintiffs of their right to challenge the condemnation decision and thus that Rhodes did not violate a clearly established constitutional right.").

Smith v. Siegelman, 322 F.3d 1290, 1297, 1298 (11th Cir. 2003) ("The complaint does not at any point allege that Smith was denied any right or status other than his not being branded a child sexual abuser. Smith has not contended that he was discharged, demoted, or rejected from a job due to the information on the Registry. . . . In short, Smith has not alleged that he has suffered any loss of employment, any diminution of salary, or anything else that 'would ... qualify as Asome more tangible interest[ ]," as required by *Paul.*' . . . Since Smith has failed to allege the violation of a constitutional right, defendants. . . are entitled to qualified immunity on Smith's due process claim.").

Thomas v. Roberts, 261 F.3d 1160, 1169, 1171 (11th Cir. 2001) ("We therefore conclude that the alleged theft of twenty-six dollars, while certainly not insignificant in the context of a grade school, does not present such an extreme threat to school discipline or safety that children may be subject to intrusive strip searches without individualized suspicion. Because the strip searches in this case were conducted without individualized suspicion, they were not justified at their inception and were thus unreasonable under the Fourth Amendment. . . . .[However,] [i]t is . . . difficult to imagine how school officials reading *T.L.O.* or *Vernonia* would have found themselves compelled to conclude that the searches in this case were constitutionally impermissible. Although

a reasonable school official might have paused before strip searching a class of fifth graders, the best she could have discovered from a reading of the available caselaw was that a court may later determine that the searches were unreasonable. We conclude that the law was not developed in such a factually defined context that the individual defendants should have been aware that they were acting illegally when they either ordered or performed the searches in question."), *opinion reinstated and supplemented by* ***Thomas v. Roberts,*** 323 F.3d 950 (11th Cir. 2003).

Oladeinde v. City of Birmingham, 230 F.3d 1275, 1290, 1293, 1294 (11th Cir. 2000) ("In determining whether the defense of qualified immunity is applicable, we must first consider whether the plaintiffs established facts demonstrating a deprivation of an actual constitutional or statutory right. . . . In a law enforcement agency, there is a heightened need for order, loyalty, morale and harmony, which affords a police department more latitude in responding to the speech of its officers than other government employers. . . . [A] report by Officer Fields to the district attorney of her undisclosed and unverified observations, prior to an investigation by the IAD, would have created a risk of harming the reputation and careers of two BPD officers who may not have committed any misconduct. Permitting such an injustice undoubtedly would have harmed the morale of the members of the BPD. We conclude that the plaintiffs' speech was not protected because their interest in speaking out was outweighed by the BPD's interests in maintaining order, loyalty, morale, and harmony. Because the plaintiffs have not demonstrated a violation of a right protected by the First Amendment, we need not proceed to an analysis of whether the law was clearly established. Likewise, we need not consider whether their transfers, and the failure to promote Sergeant Oladeinde were retaliatory. We conclude that Captain Walker and Chief Deutsch were entitled to the protection of the defense of qualified immunity as a matter of law. Thus, the district court erred in submitting this question to the jury . . . and in denying their renewed motions for a judgment as a matter of law.. A).

Taylor v. Adams, 221 F.3d 1254, 1257 (11th Cir. 2000) ("We begin our review of a denial of the qualified immunity by discussing 'Awhether the plaintiff has alleged the deprivation of an actual constitutional right at all,"' [citing *Wilson*] but we may ultimately decide the propriety of the denial on either of two alternative bases: first, on our answer to the question whether there is 'an underlying constitutional violation,' . . . or second, on our determination whether the law the public official is alleged to have violated was 'clearly established' at the time of incidents giving rise to the suit. . . . If either question is properly answered in the negative, then qualified immunity must be granted.").

Hartley v. Parnell, 193 F.3d 1263, 1268 (11th Cir. 1999) ("[W]e must first determine whether the facts, read in the light most favorable to Ms. Hartley, establish that Parnell's actions deprived her of any statutory or constitutional rights. If the answer is 'yes,' we must then consider whether those rights were clearly established at the time of the events in this case.").

Crosby v. Paulk, 187 F.3d 1339, 1345 (11th Cir. 1999) ("In reviewing an assertion of entitlement to qualified immunity, we 'must first determine whether the plaintiff has alleged the deprivation

of an actual constitutional right at all.' [citing *Conn, County of Sacramento, Siegert*] Only if this threshold determination is surmounted do we 'proceed to determine whether that right was clearly established at the time of the alleged violation.'").

Brown v. Cochran, 171 F.3d 1329, 1332, 1333 (11th Cir. 1999) ("*Seigert* stated that a court must first decide whether the plaintiff has presented a violation of a constitutional or statutory right. . . However, this is not an absolute rule. The Supreme Court only suggests that first deciding whether the plaintiff has established a deprivation of a constitutional right at all is the 'better approach.'. . . We follow the 'better approach,' and address first whether or not Brown has established a deprivation of a constitutional right at all.").

Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) ("Where the absence of merit in the plaintiff's case can be readily determined at the interlocutory appeal stage, the *Siegert* analytical approach makes sense . . . . Although we have not considered the *Siegert* approach mandatory, . . . we have followed it on occasion.").

Tinney v. Shores, 77 F.3d 378, 381 (11th Cir. 1996) (per curiam) ("pplying *Siegert*, "we first examine whether the Tinneys have asserted a cognizable constitutional claim.").

Wooten v. Campbell, 49 F.3d 696, 699 n.3 (11th Cir. 1995) ("Our court has not specifically stated which analysis comes first–the establishment of a violation of a constitutional right or the establishment of a violation of a 'clearly established' constitutional right (readily analogized to the question: which came first, the chicken or the egg?). There are several cases in our circuit and in other circuits, however, which intimate that the first question to be answered in this analytical framework is whether the plaintiff establishes the violation of a constitutional right." [citing cases]).

Marshall v. West, No. 2:06cv701-ID, 2008 WL 2262347, at *17 (M.D. Ala. June 2, 2008) ("Having considered the totality of the circumstances, including the absence of evidence of a known threat or a crime more serious than a seatbelt violation, the court concludes that the level of force employed–a gunshot in Plaintiff's direction–was not objectively reasonable and that, therefore, Plaintiff has established a constitutional violation. . . . The court, though, cannot say that West violated Plaintiff's clearly-established constitutional rights when he discharged his weapon. The court finds that the state of the law, which as indicated from the court's discussion above, was not sufficiently developed so as to give West fair warning that he was violating Plaintiff's Fourth Amendment rights when on June 28, 2005, as a warning to Plaintiff, he shot a bullet into the ground six to eight feet from Plaintiff, only after repeatedly commanding, with no success, that Plaintiff 'get on the ground.'. . Accordingly, West is entitled to qualified immunity on Plaintiff's Fourth Amendment claim that he used excessive force when he discharged his weapon.")**.**

6. Courts Not Doing *Saucier* Analysis

D.C. CIRCUIT

Kalka v. Hawk, 215 F.3d 90, 95-98 (D.C. Cir. 2000) ("Both sides tell us we first must determine whether Kalka has alleged a constitutional violation, which depends on whether the 'humanism' to which Kalka allegedly subscribes is a 'religion' within the meaning of the First Amendment.*Wilson v. Layne* . . . they say, precludes us from simply assuming arguendo that Kalka's humanism is a 'religion,' and then determining whether this was clearly established. . . . The Second Circuit treats *County of Sacramento*, and the two cases following it–*Conn* and *Wilson*– as not always requiring federal courts to dispose of the constitutional claim before upholding a qualified immunity defense. . . We agree with the Second Circuit's conclusion but not with all of its reasoning. . . . The Second Circuit. . . refused to treat the *Sacramento* procedure as mandatory because: 'where there is qualified immunity, a court's assertion that a constitutional right exists would be pure dictum.' *Horne*, 191 F.3d at 247. One wonders. A conclusion that a constitutional right exists would be dictum if and only if it were unnecessary to the decision. But if the *Sacramento* line of cases requires the constitutional issue to be reached first, a lower court's resolution of that issue becomes a necessary part of its decision. The fact that the case theoretically could have been decided without deciding the constitutional question is of no moment. . . . The Second Circuit gave another reason for its reading of *Wilson* and *Conn*. Whenever the qualified immunity issue is reached–that is, whenever the constitutional issue is first decided against the official– 'the government defendants will ... have no opportunity to appeal for review of the newly declared constitutional right in the higher courts.' . . . the Second Circuit's point is that the Supreme Court surely could not have wanted newly-devised constitutional rights to be recognized at the district court level without giving federal officials any chance for appellate review. . . . [T]he Supreme Court's stated rationale for the *Sacramento* procedure does not pertain to all constitutional tort actions. . . . [It] has little force when injunctive relief against the official's actions is potentially available, as it will be when an alleged constitutional violation is ongoing. . . . Although the injunctive portion of this case has become moot. . . , there is still the potential that other prisoners who practice humanism may bring such suits and settle the question whether humanism (of one form or another) is a religion within the First Amendment. . . . There is still another distinction between this case and *Sacramento*, *Conn* and *Wilson*, perhaps more important than the ones already mentioned. Whether Kalka's humanism is a religion under the First Amendment could not be decided in the abstract. Not only discovery but also a trial may be necessary to resolve the question. . . . It thus makes no sense to say that in order to determine whether one is entitled to immunity from trial we must first hold the trial. Yet that is what we would be saying if we proceeded directly to the question whether Kalka's form of humanism constituted a religion under the First Amendment. For this and the other reasons we have mentioned, we shall therefore assume arguendo that Kalka's humanism is a 'religion,' but as we next explain, the defendants are still entitled to qualified immunity.").

FIRST CIRCUIT

Estate of Bennett v. Wainwright, 548 F.3d 155, 168, 175, 176 (1st Cir. 2008) ("The reason to favor addressing the first prong at the outset is that 'doing so assists in the development of the law on what constitutes meritorious constitutional claims.' . . However, we have noted that '*Saucier* itself suggested that the law elaboration function of the first prong would be well served only in Aappropriate cases."'. . This law elaboration purpose is not furthered 'where [a] Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependant on the facts.' . . In such cases, we may avoid definitive determinations of the substantive constitutional claims and turn directly to the second and third prongs of the *Saucier* test. . . . This approach is especially prudent when it is clear that the officers are entitled to immunity based on the other prongs. . . Because we find this approach prudent on the facts before us, our analysis of the Estate's various Fourth Amendment claims will generally proceed directly to the third prong. . . . In this case, reasonable officers in Wainwright and Baker's position, faced with an armed mentally ill man, who had already shot at them once, could reasonably believe that they were faced with imminent and grave physical harm that justified resort to deadly force. . . . Since a reasonable factfinder must conclude that Bennett's shooting, while unfortunate, was not the result of plain incompetence or knowing violation of law on the part of the officers, the officers are entitled to qualified immunity under the third prong of the Saucier analysis.").

Hatfield-Bermudez v. Aldanondo-Rivera, 496 F.3d 51, 60 & n.6(1st Cir 2007) ("Given the circumstances, we bypass the standard *Saucier* order of inquiry, thereby freeing us to ask if Hatfield's alleged constitutional right had been clearly established at the time of the alleged violation. *Cf. Santana,* 342 F.3d at 30 (bypassing *Saucier's* step one in a procedural due process case where the existence of a property right turned on an unresolved question of Puerto Rico law). . . . Indeed, the whole premise for *Saucier's* order of inquiry is that it helps 'set forth principles which will become the basis for a holding that a right is clearly established.' *Saucier*, 533 U .S. at 201. Given the context in which we face our current inquiry, our resolution of the constitutional issue would be dependent on ruling on an unclear question of Puerto Rico law. This would hardly create clearly established law for future cases.")**.**

Tremblay v. McClellan, 350 F.3d 195, 199-201(1st Cir. 2003) ("The reason given for first addressing the alleged constitutional violation is that doing so assists in the development of the law on what constitutes meritorious constitutional claims. . . In many cases that approach is useful, especially where some novel theory is advanced. The utility of this approach, however, depends on the level of generality that is permitted in stating the constitutional right at stake. Here, for example, if the question asked is framed at the abstract level of whether a police officer may detain a person without any cause, then the plaintiffs have stated a claim under the Fourth Amendment. But saying that does not clarify the law; it just crosses oft-tread ground. Alternatively, the question could be framed as whether it is unconstitutional for a police officer, acting under a state protective custody statute, to detain a juvenile reasonably suspected to have been drinking and walking along a highway at two in the morning with an intoxicated juvenile companion. . . . This

analysis supports the constitutionality of a statute authorizing the temporary protective detention of a child when there is reasonable suspicion to believe that he or she is in immediate danger. But it does not resolve whether the detention of Jason was authorized under New Hampshire law: while there is in our view no federal constitutional bar to protective custody of a juvenile based on reasonable suspicion of immediate danger to the juvenile, the detention could still be unlawful, but not necessarily unconstitutional, if New Hampshire law required a higher level of suspicion. New Hampshire has not defined what quantum of suspicion or cause is needed to detain a juvenile under its protective custody statute. [footnote omitted] Although *Saucier* can be read as encouraging federal courts to decide unclear legal questions in order to clarify the law for the future, it surely did not mean to require federal courts to define and clarify unclear state statutes when this is wholly unnecessary to decide the case at hand. The plaintiffs are not contending that the U.S. Constitution compels New Hampshire to adopt a standard more stringent than reasonable suspicion for protective custody. In fact, the parties agree, as do we, that the ultimate question resolves into whether New Hampshire law authorized the officer's action based on a reasonable concern that Jason's welfare was endangered. Even were a reasonable suspicion constitutional standard clearly established in 1999 for these circumstances, the question would be whether an objectively reasonable officer in Officer McClellan's position could have understood that his actions did not violate the Fourth Amendment. This question could be considered to merge the second and third prongs of the immunity analysis. . . . On the undisputed facts, there is no doubt that a reasonable officer could have understood that his actions were authorized by the statute and constitutional. . . . Under the circumstances here, a reasonable officer could have believed that he or she was authorized to take Jason into protective custody and then to release him to his home.").

Santana v.Calderon, 342 F.3d 18, 29, 30 (1st Cir. 2003) ("The Supreme Court's 'sequential rule' in *Saucier* reflects a concern that if courts do not decide the constitutional right in question, the law will never become clearly established and guidelines for official conduct will not develop. However, in this case, any ruling by us on the constitutional right question would be premised on our best judgment about the application of the separation of powers doctrine in the Puerto Rico Constitution. The property right at the core of the federal constitutional allegation is dependent on an unresolved issue of Commonwealth constitutional law that can only be resolved definitively by the Puerto Rico Supreme Court. Thus, the sequential rule of *Saucier* may not contemplate a situation such as this. . . . Our primary responsibility in a case such as this is to see that the federal law of qualified immunity is properly applied without presuming to opine on sensitive matters of Commonwealth constitutional law in a case where it is unnecessary to disposition of the appeal, and in which our own prediction one way or the other would not alter our analysis of or decision upon the federal issue. The first step of the qualified immunity analysis–whether Santana has alleged a constitutional violation–turns on whether the Governor of Puerto Rico has the constitutional power to terminate her employment at will, despite the statute stipulating a four-year term for the position of Executive Director. Under other circumstances, we might choose to certify this issue to the Puerto Rico Supreme Court. At issue is a fundamental point of Commonwealth constitutional law on which there is no precedent. . . However, to certify at this stage of the case would cause undue delay in both the resolution of this interlocutory appeal and

the progression of the case on the merits. Moreover, due to the nature of the qualified immunity analysis, such delay would be wholly unnecessary to the outcome of this interlocutory appeal. Regardless of the Puerto Rico Supreme Court's decision–whether they determined that the Governor does or does not have the power to remove the Executive Director of the HRODC at will and, accordingly, whether Santana does or does not have a property interest in her job–we would grant the defendants' qualified immunity on the ground that at the time that Santana was fired, the constitutional right in question was not clearly established and a reasonable government official could have believed that her conduct in firing Santana was lawful. Thus, the best way for us to reconcile our competing obligations of faithful application of the federal law of qualified immunity and respect for the primacy of the Supreme Court of Puerto Rico on issues arising under the Puerto Rico Constitution, is to focus on the second step of the qualified immunity analysis–the clearly established question.").

Joyce v. Town of Tewksbury, 112 F.3d 19, 23 (1st Cir. 1997) (en banc) ("There is some cost in not deciding the Fourth Amendment issue on the merits, even in the form of dictum. But the en banc court is agreed that qualified immunity applies, and there is less consensus about the underlying constitutional issue. Indeed, some members of the en banc court consider that Donovan and Budryk's entry into the Joyce home was of very doubtful legality under the Fourth Amendment. Resolution can properly await a case where the issue is decisive, as it could easily be on a suppression claim where qualified immunity does not apply.").

Doe v. Preston, 472 F.Supp.2d 16, 23-25, 28, 29 (D. Mass. 2007) ("The Supreme Court's reason for 'insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry' is that doing so will aid the 'law's elaboration from case to case,' in the course of which principles may be articulated 'which will become the basis for a holding that a right is clearly established' for similar controversies arising in the future. . . As the First Circuit has noted, however, that purpose is less likely to be achieved satisfactorily 'where the Fourth Amendment inquiry is a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.' *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir.2006). That is especially true where the factual determinations that need to be made involve not simply deciding what happened as a matter of historical fact–e.g., what did the police do when they arrived at the plaintiff's house, as in *Buchanan*, 469 F.3d at 167-68–but also involve identifying, valuing and balancing competing interests, as required by the *Bell v. Wolfish* test. The fine tuning of competing interests can be done most confidently after a full evidentiary hearing on the merits. Facts can be found, values can be assigned, and a balance struck, all in reference to specific and detailed findings based on the evidentiary record. At the summary judgment stage, however, disputes are likely, perhaps as to base facts, but certainly as to the relative value and balance of interests in the concrete case. In such circumstances, there are only two practical options: either judgment can be deferred until a full hearing or judgment can be made prior to that on a version of the disputed facts most favorable to the plaintiff. . . The former course is undesirable because it prevents the early determination of the question of qualified immunity. . . The second option, basing a conclusion about the existence of a constitutional right exclusively on the record in its most favorable light to the

plaintiff's claim, may also be undesirable. It runs the considerable risk of basing the elaboration of constitutional principles on hypothetical cases, since it will be only the rare case where the facts found after full adjudication would mirror the plaintiff's best pretrial version. Assuming facts in the light most favorable to the plaintiff is not an assessment of the realistic possibility of the plaintiff's proving those facts, and not uncommonly a plaintiff who has had the benefit of a particular factual assumption in her favor at the summary judgment stage will fail to establish that fact by her proof at trial. Making constitutional pronouncements on facts that are not tested by proof, and are not even required to be shown to be reasonably likely to be true, is not a very sound method for elaborating new constitutional principles. In this case, we have the circumstance identified by the First Circuit in *Buchanan*: 'Given the complexity of the matter, and since it is perfectly clear that the officers are entitled to immunity, we turn to the second and third prongs [of the qualified immunity test].' 469 F.3d at 168. And so, I turn to those prongs: was it clearly established that the strip search policy complained of by the plaintiff was unreasonable under the Fourth Amendment, and would an objectively reasonable state official in the position of the defendants have known that adopting and promulgating the DYS policy at issue violated that clearly established law? . . . . No First Circuit case has yet addressed the question of routine, suspicionless strip searches of juveniles committed to state custody. . . . So far as our and the parties' research indicates, no circuit had considered strip searches in a juvenile detention facility at the time the defendants promulgated and implemented the policy at issue here. Since then, some appellate courts have addressed the issue of routine strip searches in juvenile detention settings but, notably, those courts have commented on the novelty of the legal issues presented. . . . I conclude that the context of an adult arrested for a minor offense, as in *Roberts* and *Swain*, is sufficiently distinct from the context of a juvenile detained pending trial in a secure DYS facility that, at the very least, the *Bell v. Wolfish* balancing would have to be done independently for the juvenile case, with the consequence that its outcome could not be predicted to be necessarily the same as in the prior cases decided on different facts. . . Again, the present question is not whether those differences warrant a different balancing in this case than in the prior ones, but rather whether objective persons in the defendants' positions could reasonably have thought so and thus would not have understood that their actions in promulgating and implementing the policy violated a clearly established principle of constitutional law. In sum, decisions concerning the lawfulness of strip searches of persons in custody have been divergent, with the determining factors often relating to the specific kind of facility and the particular characteristics of the searched individual. . . . Whatever the ultimate judgment about the constitutionality of the DYS strip search policy, an objective person in the defendants' position, aware of the decided cases pertinent to the question, could reasonably have thought that the DYS policy did not violate the Fourth Amendment. For this reason, the defendants are entitled to qualified immunity from damages under § 1983, and their motion for summary judgment on that basis should be allowed.").

SECOND CIRCUIT

***Vives v. City of New York* (*Vives II*)**, 405 F.3d 115, 118 & n.7 (2d Cir. 2005) (as amended) ("[W]e hold that defendants did not have fair notice of section 240.30(1)'s purported

unconstitutionality and that the District Court erred in denying Detectives Li and Lu qualified immunity on that ground. Because we hold that the District Court's denial of qualified immunity to defendants was improper, we do not reach the question of whether New York Penal Law ' 240.30(1) survives constitutional scrutiny, but save that question for another day. . . . Although the constitutionality of section 240.30(1) was not properly presented to us, Judge Cardamone takes issue with our decision not to address the penal provision's constitutionality. We do not reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the constitutionality of section 240.30(1) either in the District Court or on appeal.").

***Vives v. City of New York* (*Vives II*)**, 405 F.3d 115, 119-24 (2d Cir. 2005) (as amended) (Cardamone, J., concurring in part and dissenting in part) ("I respectfully depart from the majority insofar as it does not address the constitutionality of ' 240.30(1). . . . The majority passes over [*Saucier*'s] preliminary inquiry, holding instead that the 'fair notice' prong of the test is not met and from that concluding that there is no need to reach the constitutional question. *Saucier* precludes this approach. Finding a constitutional violation is a prerequisite to reaching the fair notice issue, and answering the constitutional question is therefore '[ ]necessary to the disposition of the case.' . . . The majority states no rationale for deciding that *Saucier* is inapplicable. Instead, it relies solely on the *Horne* factors as a reason to disregard *Saucier,* an approach that we explicitly rejected in *Ehrlich.* . . . The majority rests its decision on the avoidance of 'constitutional dicta.' Under *Ehrlich,* this is not, in itself, a sufficient ground for disregarding *Saucier.* Even if it were, however, it provides no justification for avoiding the constitutional question in this case. In cases in which we ultimately resolve the issue in favor of defendants on qualified immunity grounds, any finding of a constitutional violation is dicta. As we noted in *Ehrlich,* however, 'the Supreme Court, by the very logic of *Saucier,* makes clear that such dicta is enough to put defendant state actors on notice that, if they repeat their acts, they will not have the benefit of qualified immunity.' *Ehrlich,* 348 F.3d at 56 n. 11. I believe this principle carries added weight in a case where, as here, state courts have placed the imprimatur of legitimacy on an arguable violation of the federal Constitution, and thus if a federal court does not step in and inform state actors that the law violates the federal Constitution, state law enforcement officers will continue to be placed in the same impossible position as the defendants in this case: they will have a duty to enforce a law that violates core federal constitutional rights because state courts have told them that the law is valid. . . . The *Horne* majority raised another objection to constitutional dicta that is more substantial. When we find a constitutional violation, but then find that the defendants are protected by qualified immunity, the defendants have no opportunity to appeal the constitutional issue because they won on qualified immunity. . . This scenario is, of course, an inescapable result of the sequential order of the *Saucier* inquiry, and since we cannot both follow *Saucier* and avoid this problem, we must assume the Supreme Court anticipated this result and was not troubled by it. In any event, if the plaintiff appeals this Court's qualified immunity ruling, there is no reason to believe that the Supreme Court would not review the constitutional issue, since doing so is the first step in analyzing *any* qualified immunity claim. . . As the Supreme Court will have ample opportunity to review our constitutional decision if plaintiff appeals our decision, the expressed concern over

constitutional dicta is to my mind unavailing in the present case, especially since the majority failed to articulate any reason why *Saucier* should not apply. . . . In *Ehrlich*, we stated that '[w]e are, of course, bound to implement [*Saucier*], and fully expect to do so in the vast majority of qualified immunity cases that come before us.'. . The majority's treatment of *Saucier* in this case demonstrates how far we have deviated from *Ehrlich*'s narrow language. Perhaps our responsibilities were less burdensome under *Horne* and other pre-*Saucier* cases, but I am troubled by a decision that seeks to avoid the difficult questions that the Supreme Court has obligated us to face. For whatever reason, New York's courts have shown no inclination to hold that ' 240.30(1) violates the First Amendment insofar as it criminalizes speech that is merely annoying or alarming, and New York police continue to enforce the statute to the detriment of citizens' core First Amendment rights. Accordingly, for the reasons stated, I concur with the majority's resolution of the qualified immunity issue, but respectfully dissent from its refusal to reach the constitutional issue and, once and for all, hold ' 240.30(1) unconstitutional.")

Erlich v. Town of Glastonbury, 348 F.3d 48, 56-60 (2d Cir. 2003) ("In *Saucier*, the Supreme Court made plain that a sequential two-step analysis of qualified immunity claims is not simply recommended but required. We are, of course, bound to implement that decision, and fully expect to do so in the vast majority of qualified immunity cases that come before us. . . But this does not mean that *Horne*'s principles are no longer relevant to qualified immunity analysis, in those situations in which one can conclude that the Supreme Court did not intend to make the *Saucier* sequence mandatory. . . . Moving directly to the immunity question will frequently be appropriate when the existence of a constitutional violation depends on the resolution of uncertain state law. That is the case here. Whether or not Ms. Ehrlich's rights were violated depends, substantially, on how Connecticut defines the rights of a conservator vis-a-vis the property of his ward, and this question, as we have seen, is not settled in Connecticut. . . . we believe we are more faithful to the underlying aim of *Saucier* by declining to make a constitutional determination at the first stage of the inquiry–where that determination, based on an interpretation of ambiguous state law, is provisional only and subject to reversal as a result of subsequent state court rulings–than by following the *Saucier* sequence. Accordingly, this is the course we have chosen to take here.")

African Trade & Information Center, Inc. v. Abromaitis, 294 F.3d 355, 359, 360 (2d Cir. 2002) ("We may, in an appropriate case, decline to rule on the question whether an asserted right exists where, as here, we conclude that it was not clearly established at the relevant time. This is such a case. As discussed below, it squarely raises an issue that was expressly reserved by the Supreme Court in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996): whether applicants for new government contracts who have no pre-existing commercial relationship with the government are protected by the First Amendment from retaliation based on speech. However, the merits of this issue are scarcely mentioned in the briefs on appeal, let alone adequately briefed. Plaintiffs' brief, which devotes barely more than a page to the issue, simply assumes the point, and cites none of the various Supreme Court decisions on which the right they assert would be based. This cursory briefing would make it 'all the more perilous' for us to render an advisory opinion on the issue. . . Moreover, the issue is not likely to evade judicial review if we do not address it now. . . Indeed,

if standing objections can be met, the issue might be addressed in this very case on remand, as plaintiffs seek injunctive relief as well, and qualified immunity is not a defense when such relief is sought. . . Accordingly, we think the more prudent approach in the circumstances of this case is to refrain from deciding whether the asserted right exists.").

Koch v. Town of Brattleboro, 287 F.3d 162, 165-68 (2d Cir. 2002) ("When determining whether a public official is entitled to qualified immunity, we ordinarily begin with a two-step test. . . First, we determine whether a constitutional right was violated. . . Then, we determine whether that right was 'clearly established.' . . . Although we normally apply this two-step test, where we are convinced that the purported constitutional right violated is not 'clearly established,' we retain the discretion to refrain from determining whether, under the first step of the test, a constitutional right was violated at all. . . In such an instance, we may rely exclusively on qualified immunity to decide a case. . . This procedure avoids the undesirable practice of unnecessarily adjudicating constitutional matters. . . The principle concern directing us to decide the constitutional issue, however, is the 'likelihood that the question will escape federal court review over a lengthy period' because federal courts will repeatedly rely on qualified immunity to decide cases. . . Were this to happen, the right would never be 'clearly established' because courts would habitually avoid the question. . . Here, there is little chance that any unsettled constitutional issues raised will escape federal review for long. The facts of this case are not ones that only occur in § 1983 cases. More often, they will be litigated during a motion to suppress in a criminal trial. At such a time, the court will not be able to avoid deciding the constitutional questions raised in this case. Therefore, where appropriate, we refrain from determining whether Koch's Fourth Amendment rights were violated. On such issues, summary judgment was appropriate for the Defendant-officers because Koch cannot point to the existence of a 'clearly established' right. . . . It is unsettled whether the Fourth Amendment allows the police to remain in a home over the objections of the primary occupant when they enter pursuant to the reasonable belief that a third party, whom the police know has lesser authority over the premises than the primary occupant, has consented to their entry. Therefore, Koch cannot point to a 'clearly established right' that was violated. As such, we find it unnecessary to decide, as the district court did, whether the officers violated Koch's Fourth Amendment rights. Instead, we explain both arguments only to show the ambiguity in the law and affirm the grant of summary judgment because the officers were entitled to qualified immunity.")

Vega v. Miller, 273 F.3d 460, 468, 471 (2d Cir. 2001) ("Since this episode occurred seven years ago and involves a highly unusual set of circumstances, unlikely to be repeated, we see no reason to rule definitively on whether the Defendants' action was unlawful. For purposes of the pending appeal, we rule only that on the state of the law in 1994, the Defendants could reasonably believe that in disciplining Vega for not exercising professional judgment to terminate the episode, they were not violating his clearly established First Amendment academic freedom rights. . . . . We do not decide whether termination of Vega's employment was an appropriate response to his allowing the classroom exercise to get out of hand, or whether some lesser sanction might have been sufficient. The issue for us is whether, on the undisputed facts of what occurred, the defendants

are entitled to the defense of qualified immunity from his claims against them for money damages.").

Mollica v. Volker, 229 F.3d 366, 372 (2d Cir. 2000) ("The concerns we discussed in *Horne* counseling against the articulation of constitutional rights in dictum apply forcefully to the case before us. Determining the constitutionality of Volker's checkpoint would require resolution of a complex constitutional question by balancing the factors determining the reasonableness of a checkpoint, where not all factors clearly point in the same direction. Traditional principles of restraint counsel against unnecessary adjudication of this complex constitutional question. . . . Given the scant record before us (as is common in appeals from summary judgment based on qualified immunity), we are faced with three possible courses of action: (1) reach out on an inadequate record to announce a view, in dictum, on a constitutional question whose resolution is unnecessary to decide the case, (2) remand to the district court and direct the district court to require the parties to participate in further proceedings that will have no bearing on the result of their case, or (3) decline to express a view on the underlying constitutional question since we lack adequate information to do so. We think it clear that the third option is the preferable one. We do not read the Supreme Court's precedents as to the contrary. Without doubt there are circumstances that strongly favor the course of action suggested in footnote five of *Sacramento*. . . . But there are others that do not. We conclude that Volker is entitled to qualified immunity and do not reach out to answer whether Volker's checkpoint was constitutional.").

Charles W. v. Maul, 214 F.3d 350, 357, 358, 360 (2d Cir. 2000) ("We acknowledge that the Court should not determine the existence of the constitutional right alleged if the question could be decided in proceedings in which qualified immunity is not a defense. *See Horne v. Coughlin*, 191 F.3d 244, 250 (2d Cir.1999).. . . . We must decide whether this alleged due process right exists before reaching the issue of qualified immunity because McGhie's due process claim presents a question that is unlikely to be reviewed in a proceeding in which qualified immunity is not a defense, such as an action for . . . . [With respect to the equal protection claim,] [t]he district court decided the qualified immunity question before reaching the underlying constitutional issue. This approach was correct in light of *Horne*, 191 F.3d 244. Unlike McGhie's due process claim, his equal protection claim could have been reviewed by way of a habeas corpus petition or an action for an injunction–proceedings in which qualified immunity is not a defense.").

Sound Aircraft Services, Inc. v. Town of East Hampton, 192 F.3d 329, 334, 335 (2d Cir. 1999) ("If the district court deems it appropriate, it may first 'determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.' [citing *Wilson v. Layne*] . . . . If the threshold determination reveals a possible constitutional violation, the court should then assess whether the law violated was clearly established at the time of the alleged violation. If the district court decides to proceed in this manner, it should insist on a full briefing of the constitutional issues by the parties.").

Horne v. Coughlin, 191 F.3d 244, 248-50 (2d Cir. 1999) ("We recognize that since *Sacramento*, the Supreme Court has twice stated that, where the defendant raises qualified immunity as a defense, a court 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.' [citing *Wilson* and *Conn*] However, *Wilson* and *Conn* both relied on *Sacramento*, and neither purported to abandon the measured position adopted in that decision. The opinions in *Wilson* and *Conn* were both also joined by Justice Breyer, who expressly stated in *Sacramento* that courts need not invariably decide the merits before reaching qualified immunity. And, as described below, both cases also provided sound reasons for reaching the merits. We do not understand *Wilson* and *Conn*, to have, intentionally but without explanation, abandoned the carefully modulated position taken in *Sacramento* and adopted instead a rigid rule requiring federal courts to express advisory constitutional opinions in every case governed by qualified immunity. . . . Because the constitutional question in this case is easily amenable to adjudication in a suit for injunctive relief by any adversely affected prisoner, and because this does not represent an instance of egregious, outrageous conduct, we reaffirm our decision to rely on the lack of clearly established law to dismiss Horne's action on grounds of qualified immunity.").

Horne v. Coughlin, 191 F.3d 244, 251, 252, 254 (2d Cir. 1999) (Cardamone, J., dissenting) ***("***In sum, I understand footnote five in *Sacramento* to hold as follows: A federal court faced with a suit alleging the deprivation of a constitutional right under 42 U.S.C. § 1983 should ordinarily decide whether the constitutional right alleged by the plaintiff actually exists, even where the defense of qualified immunity might provide an alternative ground for decision. Although this principle need not govern in each and every case, it is undoubtedly the '[n]ormal[ ]' rule and the 'better approach' to constitutional adjudication in § 1983 litigation. Moreover, neither the policy of avoidance of constitutional questions nor the remote possibility of clarifying the law in later suits for injunctive relief justifies a departure from this general principle. . . . I would defer to the *Sacramento* Court's statement, reiterated by the *Conn* and *Wilson* Courts, that the better approach in § 1983 litigation is first to decide whether the asserted constitutional right exists and only then to determine whether the right was clearly established. While we need not resolve whether *Conn* and *Wilson* foreclose all exceptions to this principle, the Supreme Court's formulation of the principle as a general rule couched in mandatory language requires, at the very least, that a court articulate some persuasive reason to justify its departure from this approach in a given case.").

Wilkinson v. Russell, 182 F.3d 89, 110-13 (2d Cir. 1999) (Calabresi, J., concurring) ("I write separately because I am troubled by the court's holding that we can, as a matter of law, say that Thomas Wilkinson's constitutional rights were not violated by the SRS investigation. Since, however, the unreasonableness of a probe like the one conducted in this case was not clearly established when Wilkinson was falsely labeled a child abuser and deprived of his children, qualified immunity applies and suffices to support the court's judgment. Relying on a line of recent Supreme Court decisions that stem from Footnote Five of *County of Sacramento v. Lewis*, . . . the majority argues that it is appropriate to separate the discussion of whether Wilkinson's

rights were violated from the question of whether those rights, even if infringed, were clearly established at the time the SRS investigation occurred. . . To accomplish this feat, the majority necessarily engages in a 'dual reasonableness' analysis and considers first whether the conduct of the SRS officials was so unreasonable that it violated Wilkinson's parental rights, and then whether, even if Wilkinson's rights were infringed, the SRS officials could reasonably believe that they were not violating his rights and therefore still benefit from qualified immunity. I am skeptical that reasonableness can remain a coherent standard when it is piled layer upon layer in this fashion. On the other hand, I do believe that the majority's effort to identify when a child abuse investigation goes beyond the constitutional pale is admirable, and so I would be inclined to adopt the majority's framework despite my doubts as to whether this kind of analysis can be pulled off successfully. My reason for not joining the majority's opinion derives instead from a different uncertainty, one based on the facts of the case. . . . I believe instead that the reasonableness of Adams' reliance on the doctor's conclusion was, on the facts before us, a jury question (or would have been but for the existence of qualified immunity). . . . [W]e are all in agreement that, whether or not a constitutional violation occurred, the defendants are still entitled to qualified immunity because the law in this area was not clearly established at the time the SRS investigation took place. In one sense, therefore, it does not matter whether the majority or I read the facts correctly, since the entire discussion of the scope of Wilkinson's parental right is, necessarily, dicta. Indeed, all statements about constitutional rights made in the *Sacramento* framework (i.e., where qualified immunity exists notwithstanding the violation of a right since the right was not clearly established at the time the conduct allegedly occurred) are dicta . . . and hence provisional only. The significance of such *Sacramento* statements must rest, therefore, not in ultimately determining what are or are not constitutional rights . . . . The importance of defining rights provisionally in a *Sacramento* context lies elsewhere. Its function is to place government officials on notice that they ignore such 'probable' rights at their peril. The Supreme Court, moreover, said as much when it told the lower courts to issue dicta declaring that certain conduct violates a fundamental right in order to 'promote[ ] clarity in the legal standards for official conduct.' [citing *Wilson*] Footnote Five of *Sacramento*, as expounded in *Wilson*, stands for the proposition that lucid and unambiguous dicta concerning the existence of a constitutional right can without more make that right 'clearly established' for purposes of a qualified immunity analysis. . . As the High Court has told us, the thrust of *Sacramento* is to keep the existence of qualified immunity from preventing the clarification of constitutional rights. By providing that the first statement about a given right will usually be in dicta that is explicit enough to put state actors on notice, . . .*Sacramento* creates a situation in which the next time that particular right is alleged, qualified immunity will not be a defense. On that occasion, the court will therefore face the ultimate questions about the existence and scope of the right that is being contested. The court may then decide to back down from the prior dicta about the right, or it may instead establish that right by turning the prior dicta into a holding. Either way, however, by permitting a subsequent court (and often a second panel of the same court of appeals) to take up a constitutional right in the absence of a qualified immunity defense, *Sacramento* increases the probability that the courts of appeals will receive full briefings and arguments before making final decisions on important constitutional issues. . . It goes without saying that dicta from a prior panel concerning a constitutional right deserves respect. It certainly

ranks with holdings from other circuits. Nevertheless, it is not binding, and therein lies its unusual significance in the constitutional scheme. The majority today finds no violation of a constitutional right. And yet in doing so it draws a line beyond which it means for state actors to operate at their peril. That line is, of course, asserted in dicta. But, in a *Sacramento* context, it is dicta that cannot casually be ignored.").

Severino v. Negron, 996 F.2d 1439, 1441 (2d Cir. 1993) ("If we were to rule today on the due process question, we likely would hold that a violation has occurred . . . . We do not need to rule definitively on the constitutional question, however, because even if there were a violation of due process, the appellee officials would be protected by qualified immunity.").

THIRD CIRCUIT

Egolf v. Witmer, 526 F.3d 104, 109-12 (3d Cir. 2008) ("Although *Saucier* requires that courts engage a two-tiered analysis that first examines whether a constitutional violation exists, we must approach this framework in a manner that is consistent with its purpose. As *Saucier* clearly explains, the underlying principle of first requiring constitutional analysis is to advance the elaboration of the law to give state actors better guidance on the parameters of constitutional violations. . . This principle guides our resolution of this case. Although the District Court thoroughly reviewed the First and Fourth Amendment claims, it found that the state law questions underlying the constitutional issues were ones of first impression for the state courts. . .Accordingly, in both claims of constitutional violations the District Court's analysis relied upon its prediction of how the Pennsylvania courts would rule if this case was before them. . .We find such cases to be exceptions to the constitutional analysis requirement of *Saucier*, because the purpose of *Saucier* would be undermined. . . . . In concluding that we will not analyze the First or Fourth Amendment issues in this case, we find a decision of the Court of Appeals for the Second Circuit to be persuasive in reasoning that the underlying principle of law elaboration is not meaningfully advanced in situations, such as this, when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law. *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 55-58 (2d Cir.2003); *See also Robinette v. Jones*, 476 F.3d 585, 592 n. 8 (8th Cir.2007). We agree that, in cases such as this, federal courts do a disservice to state actors who would be induced to rely on a ruling that might change altogether upon subsequent review by the state court. . . Our position is bolstered by the fact that, even if we were to find constitutional rights violations we are convinced that such rights were not clearly established. . . . Here, even if we assume that the police violated the protesters' rights under the First and Fourth Amendments by arresting them, we are mindful that the circumstances were quite unusual. . . . [T]he choice that the protesters made to portray this particular image [Abu Ghraib] generates a question that would have been difficult to assess on the scene: whether the depiction of an inherently sexually offensive image is any less shocking simply because people recreate it as a protest. While we can rationalize from our vantage point that the scene created by the protesters might be distinguishable from the original image, the objective on-the-scene perspective required of us in this qualified immunity review inexorably mires such contrasts. For these reasons, we conclude that there is ample evidence that this event was precisely the type of scene envisaged in *Saucier*, where an officer in

the field must make 'split second judgments–in circumstances that are tense, uncertain and rapidly evolving.'. . This situation demanded an instantaneous, finely calibrated judgment in response to a disturbance that arose amid circumstances that were undeniably unique, surprising, confusing and charged. It was plainly one in which the parameters of probable cause were confusing and the boundaries of free speech were quite muddled. . . As a result, we cannot characterize the officers' actions, for purposes of qualified immunity, as either incompetent or as willful violations of the law. For these reasons, we conclude that, even if the officers' decision to arrest the protesters was mistaken, it was a reasonable mistake in the context in which it occurred. We do not find error in the District Court's grant of qualified immunity to the police.").

Egolf v. Witmer, 526 F.3d 104, 112-14 (3d Cir. 2008) (Smith, J., concurring) ("Like the majority, I conclude that we should affirm the District Court's grant of summary judgment in favor of the State Troopers. I write separately, however, because I believe the constraints of *Saucier v. Katz*, 533 U.S. 194 (2001), compel a different analytical path. . . . The majority acknowledges that '*Saucier* requires that courts engage a two-tiered analysis that first examines whether a constitutional violation exists.' Yet, the majority declines to follow this mandate because it finds that doing so in this case would not accomplish *Saucier's* purpose. It may be that the Supreme Court will return to its pre-*Saucier* jurisprudence, where determining first whether the plaintiff has alleged a deprivation of a constitutional right is considered only the 'better approach.' . . For now, however, I regard the *Saucier* rule as mandatory and do not believe that inferior courts are free to depart from it. . . . Because I conclude that, on the facts alleged, the Troopers' conduct did not violate the Plaintiffs' constitutional rights, my analytical course would not require that we reach the question of qualified immunity.")**.**

Carswell v. Borough of Homestead, 381 F.3d 235, 240, 421 (3d Cir. 2004) ("Our appellate review of a Rule 50 ruling is plenary and is similar to that in a summary judgment appeal. We review the record as would a District Court. This scope of appellate review places us in the same position as the District Court with respect to the admonition in *Siegert v. Gilley*, 500 U.S. 226 (1991) and *Saucier* to decide the constitutional issue before considering qualified immunity. . . It is quite understandable that the trial judge was hesitant to rule that a constitutional violation had occurred on the facts in the record at that point when the qualified immunity issue offered a more sure-footed disposition of the Rule 50 motion. Here, unlike *Saucier* and *Siegert*, the case had already been in trial for a week. Consequently, Snyder had already lost much of the benefit of qualified immunity - freedom from trial. . . It is preferable to resolve the qualified immunity issue at the summary judgment, or earlier, stage, but if this is not possible, it remains appropriate to consider the matter in a Rule 50(a) motion. . . . We believe that the circumstances here, however, are sufficiently unlike those in *Saucier* and *Siegert* that we may proceed directly to the qualified immunity issue without ruling preliminarily on the constitutional violation claim. . . We are hesitant to hold that the jury could find excessive force based on the record here. It appears to us that without the testimony of Dr. McCauley, the plaintiff failed to establish a constitutional violation. . . We have serious doubts about the admissibility of his opinion that Snyder should not have drawn his gun based on the expert's assumption that the officer knew the husband was

unarmed. . . . Accordingly, we assume, but do not decide, that plaintiff established a Fourth Amendment constitutional violation and proceed to the immunity issue.").

Acierno v. Cloutier, 40 F.3d 597, 606 n.7 (3d Cir. 1994) (en banc) ("The Supreme Court's majority opinion in *Siegert*, when read as a whole, seems to suggest that where practicable or expedient an appellate court should first address whether the plaintiff has alleged a cognizable constitutional claim at all, before turning to the question of whether the constitutional right asserted was 'clearly established' at the time the defendant acted. [cite omitted] In fact, we have emphasized this aspect of the *Siegert* decision in a subsequent case where we decided to address all plaintiffs' allegations of constitutional error as a predicate question to whether the constitutional rights were 'clearly established' at the time the defendant acted. . .Nevertheless, concurring in the judgment in *Siegert*, Justice Kennedy recognized that in certain cases . . . it is an 'altogether normal procedure' for the court of appeals to decide the case 'on the ground that appear[s] to offer the most direct and appropriate resolution,' . . . which in difficult constitutional cases will sometimes be whether the constitutional right was 'clearly established' at the time the defendant acted. Furthermore, the majority opinion in *Siegert* does not state that courts of appeals must always as an initial inquiry address whether a constitutional violation has been alleged by the plaintiff. . . . In cases such as the present one, where the court would be required to undertake a detailed analysis of unreported and undeveloped state and county law issues in order to determine whether a cognizable constitutional claim was alleged at all, we believe a more prudent course is to first address whether the constitutional right asserted by the plaintiff was 'clearly established' at the time the defendant acted. We will follow such a course in this case because . . . the state and county law issues which we would need to decide in order to determine whether Acierno possessed a vested right to develop his commercial property before the rezoning ordinances were passed are particularly difficult and undeveloped.").

Giuffre v. Bissell, 31 F.3d 1241, 1255 (3d Cir. 1994) ("Where appropriate, we may consider whether the constitutional rights asserted by Giuffre were 'clearly established' at the time the individual officials acted, without initially deciding whether a constitutional violation was alleged at all." *citing Acierno*).

Kulwicki v. Dawson, 969 F.2d 1454, 1462 (3d Cir. 1992) (on review of denial of 12(b)(6) motion based on qualified immunity, "...we are concerned neither with the accuracy of the facts alleged nor the adequacy of [the] underlying claim, [cite omitted]; our only duty is to construe the facts in the manner most favorable to [plaintiff], in order to determine whether the official behavior he describes falls outside the cloak of official immunity.").

FOURTH CIRCUIT

Pittman v. Nelms, 87 F.3d 116, 118-19 & n.2 (4th Cir. 1996) ("A qualified immunity case must develop through two primary levels. The first does not involve immunity at all, but focuses on the merits of the plaintiff's claim–whether the defendant's conduct violated a constitutional right

of the plaintiff. It includes the factual issue of what actually happened . . . and the legal question of whether the defendant's actions were unconstitutional. . .Only if the defendant did act illegally must the case proceed to the second level to determine whether he is, nevertheless, immune from suit. . . . When a court addresses qualified immunity in the summary judgment context, it can condense its analysis. As with any motion for summary judgment, it must view the evidence in the light most favorable to the nonmovant, so it need not make factual findings. Nor must it determine directly whether the plaintiff's evidence indicates a constitutional violation. Instead it can combine the second prong of the constitutional inquiry and the first prong of the immunity inquiry by asking whether the plaintiff has 'allege[d] the violation of a clearly established constitutional right.'. . The hybrid inquiry of whether the plaintiff has 'allege[d] the violation of a clearly established constitutional right,'. . . is an easier question than whether there was a violation at all. It is useful, therefore, when a court is determining whether a defendant should be burdened by a trial, or when the law is unclear. But it invokes immunity prematurely if the facts indicate no constitutional violation, clearly established or otherwise.").

Torcasio v. Murray, 57 F.3d 1340, 1352 (4th Cir. 1995) ("[W]e conclude that, although the ADA and the Rehabilitation Act were both in effect at the time of the alleged violations, it was not then clearly established that either statute applied to state prisons. We suspect that the district court reached the opposite, erroneous conclusion because of the order in which the court addressed the defenses raised by the VDOC officials. Rather than begin with the prison officials' claim that they were entitled to qualified immunity because the applicability of the acts to state prisons was not clearly established, the court first considered their defense that the acts do not apply to state prisoners. In a recent decision of this court, we reminded district courts that they are to consider as a threshold matter whether officials in a given case are entitled to qualified immunity, and move on to other issues only after concluding that the officials are not. [citing *DiMeglio*] This case illustrates the dangers of not adhering to this analytical sequence, for we cannot help but suspect that the court's conclusion that it was clearly established that the acts applied to prisons was heavily influenced by its earlier conclusion that the acts today apply to prisons.").

Dimeglio v. Haines, 45 F.3d 790, 795-99 (4th Cir. 1995) ("Although the Supreme Court's decision in *Siegert* . . . has generated significant confusion, that case did not, contrary to the view of almost every court, effect a fundamental change in this analytical framework for deciding whether an official is entitled to qualified immunity. . . . *Siegert* did not mandate that courts determine, as a part of the qualified immunity analysis, whether the plaintiff has stated a claim upon which relief can be granted in a Rule 12(b)(6) sense. It did not direct courts to decide, independent of and prior to addressing a defendant's entitlement to qualified immunity, whether a plaintiff has stated a claim upon which relief can be granted. Nor did it require that courts decide the merits of the constitutional claim. . . . *Siegert* simply reaffirmed that a court reviewing a qualified immunity defense should assess, before anything else, whether the alleged conduct violated law clearly established at the time the conduct occurred. . . . That current law has no application to the specific question of qualified immunity is not to say that courts should be foreclosed from conducting a Rule 12(b)(6) or . . . a summary judgment inquiry, independent of the qualified immunity defense.

In many cases where a defendant has asserted qualified immunity, dismissal or even an award of summary judgment may be obviously warranted, based upon existing law, without the court ever ruling on the qualified immunity question.").

Hodge v. Jones, 31 F.3d 157, 169 (4th Cir. 1994) (Powell, Associate Justice, concurring in the judgment) ("Defendants are entitled to qualified immunity from civil monetary damages if their conduct did not violate the [plaintiffs'] clearly established federal statutory or constitutional rights of which a reasonable person would have known ... In deciding this question, the Court may, in the exercise of its discretion, reach the merits of the underlying constitutional question at issue ... I prefer not to reach them .... [E]ven assuming that Defendants' actions infringed a constitutionally protected liberty interest, such interest was not clearly established at the time of Defendants' conduct.").

FIFTH CIRCUIT

Wooley v. City of Baton Rouge, 211 F.3d 913, 923 (5th Cir. 2000) ("Wooley and Jordan contend that under the rubrics of the foregoing cases the emotional ties between a minor and an unrelated adult care giver can create a liberty interest vis-a-vis the child's biological grandparents when the relationship is countenanced by the child's natural mother. They thus contend that under the circumstances here presented Wooley and Jordan shared a fourteenth amendment protected expectation that the state would not interfere in their relationship. However persuasive this contention ultimately may be, we need not definitively resolve it here, for it is indisputable that, at the time of the events in question, no such fourteenth amendment right could be described as clearly established.").

SIXTH CIRCUIT

Frierson v. Goetz, No. 02-6522, 2004 WL 1152172, at *5 (6th Cir. May 19, 2004) (unpublished) ("Because we have not been presented with enough facts in this case to decide this novel issue concerning privacy expectations in cordless phones, we can only conclude that plaintiff has attempted to allege a constitutional violation. We are unable to conclude, as a matter of law, that the interception of a cordless telephone, in the circumstances alleged, violated the Fourth Amendment. We find no cases that would, in such novel situations, require us to answer conclusively the constitutional question as a matter of law before proceeding to steps two and three [of the qualified immunity analysis]. The answer is clear, however, when we turn to the questions of whether the alleged constitutional violation was 'clearly established' at the time it occurred and whether a reasonable person in defendant's position would have known that his actions violated clearly established rights. . . . The right to privacy in using a cordless phone is not 'clearly established.' As explained above, prior to the amendment to the Federal Wiretap Law in 1994 to cover cordless phones, courts uniformly held that cordless telephone users did not have a reasonable expectation of privacy in their phone conversations under the Fourth Amendment. . .

.To date neither the Supreme Court nor the Sixth Circuit has specifically addressed whether a reasonable expectation of privacy exists under the Fourth Amendment for cordless telephone communications. We therefore agree with the district court that the law is not 'clearly established' that users of cordless phones have a reasonable expectation of privacy under the Fourth Amendment.")**.**

Potts v. Hill, 77 F. App'x 330, 337 (6th Cir. 2003) (unpublished) ("Recognizing that there is a split among Ohio Courts of Appeals, we cannot predict whether the Ohio Supreme Court would hold that, as a matter of law, the first knife was or was not 'concealed' under Ohio Rev.Code 2923.12("). . . We do not decide this issue in the present case because, as explained in the next section, we believe that defendant acted as any reasonable officer would and that he did not violate a clearly established constitutional right. . . . Assuming *arguendo* that a constitutional violation did occur, we now examine whether defendant is entitled to a qualified immunity defense. . . .As discussed above, whether plaintiff's constitutional rights were violated is an open question since the Ohio courts have simply failed to provide its police officers with adequate guidance in this area of law. . . .It does not appear that the State of Ohio had definitively resolved the question of partially concealed weapons even in the decisions made after the search here, let alone at the time of the arrest. Therefore, since plaintiff cannot even now prove that the narrower definition of 'concealed' weapons in Ohio is 'clearly established,'. . .it is beyond doubt that defendant is shielded from any liability by the theory of 'qualified immunity' for his conduct in 1996. He neither was 'plainly incompetent,' nor did he 'knowingly violate the law.'").

Cherrington v. Skeeter, 344 F.3d 631, 640 (6th Cir. 2003) ("[I]t ultimately is unnecessary for us to decide whether the individual Defendants did or did not heed the Fourth Amendment command of reasonableness in their conduct toward Daija King, because they are entitled to qualified immunity in any event. . . . As is evident from our foregoing discussion, the pre-existing law is silent on the lawfulness of keeping a young child with her mother while the latter is placed under arrest and held in custody at a location other than a traditional detention facility. If the Defendant officers had scoured the case law at the time (or even to this day), they could not have located a decision indicating that Daija King's Fourth Amendment rights might be violated if she were taken with her mother to a hotel for about a 24-hour period while Mary Cherrington cooperated with the authorities by attempting to arrange drug purchases. Rather, the most closely analogous case, *Matheny*, leads to the opposite conclusion. Under these circumstances, the individual Defendants are entitled to qualified immunity, because the law did not (and still does not) 'clearly proscribe[]' the actions they took.").

Virgili v. Gilbert, 272 F.3d 391, 394 (6th Cir. 2001) ("We need not, and do not, opine on the Fourth Amendment standard to be applied to strip-searches of prison employees. We conclude merely that the standard to be applied to such searches was not clearly established in this circuit in 1999. In conclusion, we note that ample opportunities exist to establish that standard via other means, for example through actions for declaratory or injunctive relief.").

Williams v. Commonwealth of Kentucky, 24 F.3d 1526, 1542 (6th Cir. 1994) ("We have resolved the qualified immunity issue without addressing whether there was actually a due process violation. We merely held that Williams could not recover monetary damages against defendants in their individual capacities because it was not clearly established at the time of Williams' demotion that failing to provide predemotion notice and hearing would violate Williams' due process rights. In this case, our holding on qualified immunity has nothing to do with the merits of the due process claim.").

Long v. Norris, 929 F.2d 1111 (6th Cir. 1991) ("We need not define in this case precisely what level of individualized suspicion is required in the context of prison visitor searches....The question before the court is not whether the proper standard should be reasonable suspicion...or probable cause...but whether the right to be free from a strip search absent probable cause was clearly established at the time of the conduct ....").

Binkowski v. Family & Children's Services Agency, 39 F. Supp.2d 882, 886 (W.D. Mich. 1998) ("This Court acknowledges that, as a general rule, it is best for courts to identify the 'exact contours of the underlying right said to have been violated.' . . . However, the reasons the Court cited in *Lewis* to support this proposition are more applicable to the Court of Appeals than to the District Court because, among other things, only the Court of Appeals establishes the 'standards of official conduct' under § 1983. . . . Furthermore, there is also a 'policy of avoiding the unnecessary adjudication of constitutional questions,' particularly those which are 'both difficult and unresolved.' *Lewis*, 118 S.Ct. at 1722-23 (Stevens, J., concurring) . . . Accordingly, the Court will resolve the § 1983 claim against Defendants under the doctrines of qualified immunity and Eleventh Amendment immunity, as well as on the particular facts under which certain defendants are being sued, thus avoiding the difficult and unresolved constitutional issue raised by Plaintiff's claim.").

SEVENTH CIRCUIT

Forman v. Richmond Police Dep't., 104 F.3d 950, 958 (7th Cir. 1997) ("In regard to Forman's unreasonable search and seizure claim, it makes sense to initially analyze the second prong of the qualified immunity test–i.e., whether there were clearly established constitutional standards governing the warrantless search of the locked room–in order to avoid addressing the more difficult question of whether the warrantless search was in fact unconstitutional.").

Supreme Video, Inc. v. Schauz, 15 F.3d 1435, 1442 n.9 (7th Cir. 1994) ("Supreme Video argues that the district court erred by following the same decisional process we followed in this opinion, namely by deciding the qualified immunity issue without deciding whether Schauz actually violated a constitutionally guaranteed right. The cases Supreme Video cites, such as *Siegert* . . . do not hold that courts must address the question of a right before speaking to whether that right was clearly established. Rather, *Siegert* held only that both issues are necessary for a successful

Section 1983 action. The Federal Reporters are expanding quickly enough without our addressing issues that will not affect the outcomes of our decisions.").

Viereckl v. Ramsey, No. 05 C 6292, 2006 WL 3319973, at *4, *5 (N.D. Ill. Nov. 13, 2006) ("The question of whether there was probable cause in the instant case is one that largely turns on an interpretation and application of the Illinois criminal code. The answer to that interpretive inquiry is at least relatively clear, and, as explained, leads the Court to conclude that probable cause was present under Illinois law. Nonetheless, candor compels the concession that the answers to the state law issues are not pellucid, as there is no Illinois case directly on point. This lack of absolute clarity, however, is not material to the bottom-line result concerning Deputy Sheriff Pogorzielski's motion to dismiss, because the potential ambiguity serves to underscore why qualified immunity is appropriate, irrespective of how the Illinois issues ultimately are resolved by the Illinois courts in an appropriate case. In such a circumstance, one might be tempted to avoid what is essentially an unnecessary endeavor by a federal court to (attempt to) explicate Illinois's criminal code and to interpret and apply its state law precedents. *Saucier* appears to require this threshold analysis in the qualified immunity context, however, irrespective of whatever considerations might counsel otherwise. . . To be sure, there is a substantial body of jurisprudence criticizing this seemingly inflexible mandate to first assess the constitutional question and related issues and only then proceed to the question of whether any putative unlawfulness was clearly established in applicable precedent, such that qualified immunity does not adhere. . . There also is a meaningful body of federal appellate precedent–much from before the Supreme Court's opinions in *Bunting* and *Brosseau*–which held or strongly suggested that the *Saucler* sequential analysis was more of a preference than a requirement, such that a lower court could proceed simply to the qualified immunity/clearly established question in an appropriate case. [citing cases] In addition, some appellate courts have even gone so far as to put aside the *Saucier* ordering in the context of a qualified immunity question. [citing cases] Were this Court persuaded that there is flexibility to simply assume a constitutional violation arguendo in this case, and to proceed straight to the qualified immunity/clearly established analysis, the Court would almost surely do so. The threshold questions concerning the Illinois criminal code involve areas of state law that are at least somewhat undeveloped in Illinois caselaw; concomitantly, the questions about Illinois law at issue have seldom been of interest or material consequence in the Illinois courts, so it seems particularly inappropriate to opine about them unnecessarily. In this regard, *Saucier* explained that its mandate to resolve the issue of whether a constitutional violation occurred first was necessary to ensure that the refinement and illumination of important constitutional concepts is not frustrated. . . That principle would not seem to mandate that federal courts unnecessarily opine about the meaning of a relatively obscure state criminal statute–here, for example, concerning issues relating to the misdemeanor Illinois offense of obstructing the service of legal process–when such speculation is not necessary to fairly resolve the federal case. . . That dynamic is underscored by the fact that this Court's statements about the meaning of the Illinois statute–indeed, even unanimous pronouncements about the meaning of the Illinois statute by higher federal appellate courts–would have no precedential effect vis-a-vis the Illinois courts, which have not been shy about rejecting federal interpretations of state statutes in at least some other instances. . . Nonetheless, the Court

finds it difficult to see how it can, consistent with the Supreme Court's directives in *Saucier*, as underscored again in *Brosseau*, elide past the threshold issue of whether a false arrest occurred, which issue is interlaced with questions about the meaning of the Illinois statutes. . . As a result, the Court will proceed sequentially through the two-step *Saucier* analysis, even though the answer to the first-step of the analysis is not necessary to the resolution of the case, given the answer to the step-two 'clearly established' question.")

EIGHTH CIRCUIT

Smook v. Minnehaha County, 457 F.3d 806, 814, 815 (8th Cir. 2006) ("In addition to granting partial summary judgment in favor of Smook, the district court's order also granted partial summary judgment for unnamed class members who, as the class was defined by the court, were strip searched at the JDC from June 1, 1999, through September 14, 1999. Banbury and Cheever contend that they are also entitled to qualified immunity from suits for damages by the unnamed class members. To review that contention, it appears that we would be required by the Supreme Court's current direction to resolve first whether the searches of the unnamed class members violated the Fourth Amendment, and then, if so, whether the defendants are nonetheless entitled to qualified immunity. . . . The requirement to resolve the reasonableness of these searches of unnamed class members places us in a quandary. The specific facts underlying the claims are not yet developed, and the reasonableness of a particular search is often highly contextual. . . . The posture of the appeal is complicated further by our decision that the named class representative, Smook, has no claim for damages against the defendants. . . . Under these unusual circumstances, we decline to pass on the merits of the constitutional claims of the unnamed class members that must be resolved as a first step in determining whether Banbury and Cheever are entitled to qualified immunity from suit.").

Young v. City of Little Rock, 249 F.3d 730, 735 (8th Cir. 2001) ("The plaintiff argues that *Baker* [*v. McCollan*, 443 U.S. 137 (1979)] is distinguishable. In *Baker*, the fact of the mistaken identity was not discovered for three days. Here, plaintiff argues, the defendants knew that they had the wrong woman, but decided to keep her detained for a probable-cause hearing on Monday morning nonetheless. If we were faced head on with the question whether the Fourth Amendment was violated, this distinction might well prove dispositive. But when the doctrine of qualified immunity is taken into account, we believe the District Court correctly held that these individual police officers are not liable in an action for damages. We decline to hold officers in this situation to the niceties of legal distinctions, even though the distinctions might seem persuasive to judges in the light of hindsight.").

Greer v. Shoop, 141 F.3d 824, 829 (8th Cir. 1998) (Beam, J., concurring specially) ("The court . . . 'assume[s] without deciding, based on the facts accepted for purposes of summary judgment, that [appellant] has sufficiently alleged a violation of Mora Greer's constitutional rights pursuant to the state-created danger theory.' . . On this assumption, the court proceeds to deal with the issue of qualified immunity. This approach is squarely at odds with *Siegert v. Gilley* . . . . The Supreme

Court established that the 'first inquiry in the examination of [a claim of qualified immunity]' is whether a 'violation of a clearly established constitutional right' has been alleged at all. . . In *Siegert*, as here, the circuit court had assumed, without deciding, that Gilley's actions violated Siegert's constitutional rights. . .The Supreme Court found this approach to be error. It stated, 'We think the Court of Appeals should not have assumed, without deciding, this preliminary issue in this case.'"

Murphy v. Dowd, 975 F.2d 435, 437 (8th Cir. 1992) ("Assuming, without deciding, that a prisoner's involuntary exposure to ETS can state a constitutional claim, we conclude here that the district court properly granted [defendant] summary judgment on the basis of qualified immunity. . . .[A]t the time . . . there was no clearly established constitutional right to be free from exposure to ETS.").

NINTH CIRCUIT

Motley v. Parks, 432 F.3d 1072, 1077, 1078 (9th Cir. 2005) (*en banc*) ("The parties urge us to skip the first step of the *Saucier* analysis. They ask us to assume that the officers violated Motley's constitutional rights by conducting a warrantless and suspicionless search of her apartment without sufficient reason to believe Jamerson lived there, and determine whether those rights were clearly established at the time of the search. The Supreme Court has placed strong emphasis on the need to concentrate at the outset on the definition of the constitutional right. . . . Given the Supreme Court's emphasis on our duty to clarify the constitutional standards governing law enforcement officers in the performance of their duties, we find it necessary to decide, first, what level of knowledge the officers needed to support the belief that Jamerson resided at the 40th Place address. In other words, how certain did they have to be that they were at the right residence? However, resolution of the related constitutional issue, whether the officers also needed particularized suspicion of wrong-doing on Jamerson's part, poses unique circumstances that warrant deviating from *Saucier's* threshold inquiry. The Supreme Court has granted *certiorari* in *Samson v. California* on the precise issue involved in this case. . . Thus, the very justification for *Saucier's* first step is inapplicable; avoiding the constitutional question will not impede the elaboration of constitutional principles, and answering the constitutional question would foster neither certainty nor finality. The confluence of our consideration of this case *en banc* and the Supreme Court's concurrent review of the same issue presents an extraordinary circumstance not before presented. . .In this unusual circumstance, we bypass *Saucier's* first step and decide only whether it was clearly established at the time of the search that the officers needed some suspicion of wrongdoing.").

Hemphill v. Kincheloe, 987 F.2d 589, 593 & n.4 (9th Cir. 1993) ("If a reasonable official could have believed that his actions were lawful, summary judgment on the basis of qualified immunity is appropriate. [cite omitted] This determination should have been made before the district court considered whether the policy was constitutional.... Because we conclude that the officials' belief was reasonable, we need not decide whether the search policy [permitting digital rectal probe

searches on inmates prior to their entry into a secure area of the prison] violated [plaintiff's] Fourth and Eighth Amendment rights.").

Erickson v. United States, 976 F.2d 1299, 1301 (9th Cir. 1992) ("Fundamental principles of judicial restraint require federal courts to consider nonconstitutional grounds for decision prior to reaching constitutional questions.... Thus, a federal court should decide constitutional questions only when it is impossible to dispose of the case on some other ground....Because the doctrine of qualified immunity disposes of this case, we do not reach the question whether the individual defendants violated [plaintiff's] constitutional rights.").

TENTH CIRCUIT

Warner v. Grand County, 57 F.3d 962, 964 (10th Cir. 1995) ("Without addressing the merits of the constitutional issue, we hold that it was not clearly established on the date in question that a strip search following an arrest for possession of marijuana, a misdemeanor for which there was no risk that the suspects would be intermingled with the general jail population, was unconstitutional.").

Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992) ("We do not take the occasion here to decide whether an outside third party or co-employee could ever be liable for sexual harassment under 1983 and the Equal Protection Clause. We resolve this case simply by noting that the Officers here were not violating clearly established law under the Equal Protection Clause when they acted as they did with respect to [plaintiffs].").

ELEVENTH CIRCUIT

Williams v. Bd of Regents of Univ. System of Georgia, 477 F.3d 1282, 1300, 1301 (11th Cir. 2007) (on *sue sponte reh'g*) ("The district court dismissed Williams's second § 1983 claim against Adams, Harrick, and Dooley as individuals, holding that the defendants have qualified immunity and that Williams failed to state a claim. We need not address whether Williams failed to state a claim because we affirm the district court's holding on qualified immunity grounds. . . . The Equal Protection Clause confers a federal constitutional right to be free from sex discrimination. . . . Here, Williams has alleged a harrowing incident, similar to other allegations that unfortunately have become increasingly common on today's university campuses. . . Williams presents a compelling case that Adams, Harrick, and Dooley knew about the criminal and disciplinary problems that plagued Cole's past, but that they considered his basketball skills a greater benefit than his questionable mores were a burden. Furthermore, Williams has presented evidence to show that the defendants' action, coupled with others' actions, may amount to discrimination actionable under Title IX. At a minimum, Adams, Harrick, and Dooley acted recklessly, and their apparent 'win at all costs' attitude resulted in enormous costs and fewer wins than expected. Nevertheless, Williams has failed to present any cases that show the three defendants violated her clearly established equal protection rights by recruiting and admitting an individual like Cole. Therefore,

Williams cannot meet her burden under the second step of the qualified immunity analysis, and we hold that Adams, Harrick, and Dooley are entitled to qualified immunity.")

Hudson v. Hall, 231 F.3d 1289, 1295 n.5 (11th Cir. 2000) ("We recognize that the Supreme Court has written that generally we should–when we adjudicate qualified immunity cases–first decide whether the defendant has violated federal law at all before considering whether the law was clearly established. . . According to the Supreme Court, such an approach facilitates the development of federal constitutional law. . . Our Circuit now follows that practice, [citing *Hartley*], although it means that we often decide close questions of constitutional law when we know that no party in the case before us will be affected by that decision. And at times, some of us do wonder if this abstract development is the kind of development of constitutional law that should be encouraged. But we do not think that the Supreme Court's suggested approach is–without exceptions–required absolutely, and we decline to follow that approach in this instance. In this case, whether probable cause existed–and, whether the Fourth Amendment was violated–turns upon a difficult question of state law. If we followed here the approach set out in *Wilson* and in *Lewis*, we would be required to determine whether O.C.G.A. ' 40-6-123 applies to turns from private driveways onto public roadways before we reached the clearly-established question. And, to determine the true scope of O.C.G.A. ' 40- 6-123–insofar as the plain language of the statute does not seem clear and no Georgia case law exists to guide us–we would need to certify the question to the Georgia Supreme Court. Yet, certification–at least in this case–would be an exercise in futility and a waste of the time and resources of both this Court and the Georgia Supreme Court. Indeed, regardless of the answer delivered by the Georgia Supreme Court, Officer Hall would be entitled to qualified immunity. We are unwilling to engage in–and we do not believe the Supreme Court intended to require–so vain a gesture.").

Denno v. School Board of Volusia County, 218 F.3d 1267, 1274 n.5 (11th Cir. 2000) ("Neither party has argued that we must decide the merits of the substantive constitutional issue before addressing qualified immunity. And we believe that this appeal is one of those exceptional cases in which we are not required to do so. . . Thus, we need decide only whether pre-existing law dictates, that is, truly compels the conclusion that the *Tinker* standard applies to the exclusion of the *Fraser* standard. . . We cannot so conclude.").

Santamorena v. Georgia Military College, 147 F.3d 1337, 1342-44 (11th Cir. 1998) ("[W]e do acknowledge that the existence or nonexistence of a constitutional right (or duty) in this case presents a perplexing question: a question that we–in part, because it cannot be easily answered–decline to answer at this time. . . . A Supreme Court opinion recently suggested that the "better approach"–in cases involving the defense of qualified immunity–might be to decide whether the contended for constitutional right exists at all before determining whether the right was, at the pertinent time, clearly established. [*citing County of Sacramento*] . . . . We do not understand this footnote as an absolute requirement that lower courts must always follow this "normally" "better approach." In *County of Sacramento*, the district court decided the case strictly on qualified immunity grounds, that is, on the ground of the unsettled nature of the law; but the Supreme Court

never said the district court erred. And if the Supreme Court intended to impose an absolute requirement on lower courts always to address the merits of constitutional issues even where qualified immunity obviously applies and readily resolves the case, we believe the Supreme Court would have said so more directly. At least in situations like this one–(1) where the existence of a constitutional right (or duty) presents a perplexing question, (2) where the alleged right obviously was not already clearly established, and (3) where the qualified immunity determination does end the whole case–it remains appropriate, and sometimes preferable, to stop at the determination that the right, if any, was not clearly established. . . . [W]e conclude the Supreme Court did not mean to nullify all the traditional restraint principles or to take away all our discretion to analyze particular qualified immunity cases, involving perplexing constitutional issues, without first deciding whether the constitutional right exists. We think the Supreme Court was telling us that, notwithstanding the usual restraint arguments, sometimes the courts can and should decide the constitutional issues; and we will but– because we believe the Supreme Court has left us with some discretion–not today.").

Spivey v. Elliott, 41 F.3d 1497, 1498-99 (11th Cir. 1995) ("In our opinion, the panel majority had followed the perceived teachings of *Siegert* . . . in which the Supreme Court indicated that faced with this situation a court should first determine whether there is a statutory or constitutional right implicated, and if so, whether that right was clearly established at the time. Upon reconsideration on the suggestion of other members of this Court, we now think it enough to decide that there was no clearly established constitutional right allegedly violated by the defendants. . . . Since a plaintiff must show both that there is a constitutional right that is allegedly violated and that the right was clearly established at the time, a negative decision on either prevents the plaintiff from going forward. Once it is determined that there is no clearly established right, the Court could well leave for another day the determination as to whether there is such a right, albeit not one that a reasonable person would have known.").

Wright v. Whiddon, 951 F.2d 297 (11th Cir. 1992) (court takes an approach which is arguably inconsistent with the analysis required by ***Siegert*** where parents of a pretrial detainee who was shot and killed during an attempted escape, asserted that the use of deadly force violated the detainee's Fourth Amendment rights. The court did not decide the question of whether a pretrial detainee could assert an excessive force claim under the Fourth Amendment, but disposed of the case on qualified immunity grounds because "[t]he presence of such doubt about the existence and content of the constitutional right that [the defendant] is alleged to have violated is enough to entitle him to qualified immunity." *Id*. at 300.).

Powers v. CSX Transportation, Inc., 105 F. Supp.2d 1295, 1307 (S.D. Ala. 2000) ("This Court does not construe *Conn* and *Wilson* as mandating a specific order of analysis to be followed in every case. First, the Supreme Court ordinarily can be expected to acknowledge that it is changing an existing rule. Second, the Court cited *Siegert* and *Lewis* and clearly was aware they do not establish a mandatory scheme. Third, Justice Breyer concurred in *Lewis* for the express purpose of clarifying that *Lewis* 'should not be read to deny lower courts the flexibility, in

appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented.' . . . Fourth, the *Conn* Court's use of the term 'must' can reasonably be read as requiring that the existence of a constitutional right be determined first only in the 'normal' case envisioned by *Lewis*. . . . Moreover, the Supreme Court has identified only two rationales for analyzing first the existence of a constitutional right. The first–to honor the policies undergirding qualified immunity by disposing of cases quickly on legal grounds–is equally applicable to the 'clearly established' inquiry. The second–to 'promot[e] clarity in the legal standards for official conduct,' . . . does not readily apply to decisions of the district courts, which typically are unpublished and which do not create binding precedent in any event.").

Rose v. Town of Jackson's Gap, 952 F. Supp. 757, 762 n.6 (M.D. Ala. 1996) ("The court notes that, in this circuit, it may in some instances no longer be necessary to answer this inquiry [of whether plaintiff has asserted a constitutional violation]. In a recent case, the Eleventh Circuit diverged from the *Siegert* order of analysis and stated that 'we now think it enough to decide that there was no clearly established constitutional right allegedly violated by the defendants.' *Spivey v. Elliott*, 41 F.3d 1497, 1498 (11th Cir.1995). . . . In so deciding, however, the panel emphasized that its decision in no way precludes a court, if deemed appropriate, from first determining whether a plaintiff has asserted the violation of a constitutional right.").

7. Criticisms of the "Rigid Order of Battle"

NOTE: In a denial of certiorari and dissent from the denial, some members of the Court commented on problems caused by the ~~A~~constitutional- question-first rule."

Bunting v. Mellen, 124 S. Ct. 1750, 1751 (2004) (Stevens, J., joined by Ginsburg J., and Breyer, J., respecting the denial of certiorari) ("The 'perceived procedural tangle' described by Justice SCALIA's dissent. . . is a byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity. Justice BREYER and I both questioned the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues when the Court adopted it. See *County of Sacramento v. Lewis*, 523 U.S. 833, 858, 859 (1998). Relaxing that rule could solve the problem that Justice SCALIA addresses in his dissent. Justice SCALIA is quite wrong, however, when he states that the 'procedural tangle' created by our constitutional-question- first procedure explains our denial of certiorari in this case. Indeed, it is only one of three reasons for not granting review.")

Bunting v. Mellen, 124 S. Ct. 1750, 1754, 1755 (2004) (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("The Fourth Circuit's determination that a state military college's grace before meals violates the Establishment Clause, creating a conflict with Circuits upholding state-university prayers, would normally make this case a strong candidate for certiorari. But it is questionable whether Bunting's request for review can be entertained, since he *won*

judgment in the court below. For although the statute governing our certiorari jurisdiction permits application by 'any party' to a case in a federal court of appeals, 28 U.S.C. § 1254(1), our practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed. . . . . I think it plain that this general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases. . . . Not only is the denial of review unfair to the litigant (and to the institution that the litigant represents) but it undermines the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without undue delay. . . This problem has attracted the attention of lower courts. Two Circuits have noticed that if the constitutional determination remains locked inside a § 1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then "government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts." *Horne v. Coughlin,* 191 F.3d 244, 247 (C.A.2 1999) (quoted in *Kalka v. Hawk,* 215 F.3d 90, 96 (C.A.D.C.2000)); see *Horne, supra,* at 247, n. 1 (concluding that this Court could not have reviewed the judgment in *County of Sacramento v. Lewis, supra,* if the Ninth Circuit had not believed the right clearly established). As both Circuits recognized, the mess up here is replicated below. See *Horne, supra,* at 247 (noting the parallel between unreviewability of district court and court of appeals decisions); *Kalka,* 215 F.3d, at 96, and n. 9 (similar). This understandable concern has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory. See *id.,* at 96, 98; *Horne, supra,* at 247, 250; see also *Pearson v. Ramos,* 237 F.3d 881, 884 (C.A.7 2001) (doubting that the *Saucier* rule is "absolute," for the reasons given in *Kalka* and *Horne*). The perception of unreviewability undermines adherence to the sequencing rule we have created. . . . This situation should not be prolonged. We should either make clear that constitutional determinations are *not* insulated from our review (for which purpose this case would be an appropriate vehicle), or else drop any pretense at requiring the ordering in every case.").

See also:

Morse v. Frederick, 127 S. Ct. 2618, 2624 & n.1 (2007) ("We granted *certiorari* on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. . . We resolve the first question against Frederick, and therefore have no occasion to reach the second. . . . Justice BREYER would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is the rather significant one that it is inadequate to decide the case before us. Qualified immunity shields public officials from money damages only. . . In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief.")

Morse v. Frederick, 127 S. Ct. 2618, 2638, 2639 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (" This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more. . . Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. . . .[R]egardless of the outcome of the constitutional determination, a decision on the underlying First Amendment issue is both difficult and unusually portentous. And that is a reason for us not to decide the issue unless we must. In some instances, it is appropriate to decide a constitutional issue in order to provide 'guidance' for the future. But I cannot find much guidance in today's decision. . . . In order to avoid resolving the fractious underlying constitutional question, we need only decide a different question that this case presents, the question of 'qualified immunity.'. . . The relative ease with which we could decide this case on the qualified immunity ground, and thereby avoid deciding a far more difficult constitutional question, underscores the need to lift the rigid 'order of battle' decisionmaking requirement that this Court imposed upon lower courts in *Saucier* . . . . In resolving the underlying constitutional question, we produce several differing opinions. It is utterly unnecessary to do so. Were we to decide this case on the ground of qualified immunity , our decision would be unanimous, for the dissent concedes that Morse should not be held liable in damages for confiscating Frederick's banner. . . .While *Saucier* justified its rule by contending that it was necessary to permit constitutional law to develop, . . . this concern is overstated because overruling *Saucier* would not mean that the law prohibited judges from passing on constitutional questions, only that it did not require them to do so. . . . I would end the failed Saucier experiment now.")

Wilkie v. Robbins, 127 S. Ct. 2588, 2617 n. 10 (2007) (Ginsburg, J., joined by Stevens, J., concurring in part and dissenting in part) ("As I have elsewhere indicated, in appropriate cases, I would allow courts to move directly to the second inquiry.").

Brosseau v. Haugen, 125 S. Ct. 596, 598 n.3 (2004) (per curiam) (" We have no occasion in this case to reconsider our instruction in *Saucier*. . . that lower courts decide the constitutional question prior to deciding the qualified immunity question.")

Brosseau v. Haugen, 125 S. Ct. 596, 598, 600-01(2004) (per curiam) (Breyer, J., joined by Scalia, J., and Ginsburg, J., concurring) ("I join the Court's opinion but write separately to express my concern about the matter to which the Court refers in footnote 3, namely, the way in which lower courts are required to evaluate claims of qualified immunity under the Court's decision in *Saucier v. Katz*. . . . As the Court notes, . . . *Saucier* requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question. I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review, see *Bunting v. Mellen*, 541 U.S. 1019, 1025

(2004) (SCALIA, J., dissenting from denial of certiorari). For these reasons, I think we should reconsider this issue.").

Scott v. Harris, 127 S. Ct. 1769, 1774 n.4 (2007) ("Prior to this Court's announcement of *Saucier's* 'rigid Aorder of battle,'" . . . we had described this order of inquiry as the 'better approach,' . . . though not one that was required in all cases. . . There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. . . . We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is . . . easily decided. Deciding that question first is thus the 'better approach,' . . . regardless of whether it is required.").

Scott v. Harris, 127 S. Ct. 1769, 1780, 1781 (2007) (Breyer, J., concurring) ("[T]he video makes clear the highly fact-dependent nature of this constitutional determination. And that fact-dependency supports the argument that we should overrule the requirement, announced in *Saucier v. Katz* . . . that lower courts must first decide the 'constitutional question' before they turn to the 'qualified immunity question.' . . Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case, I believe that in order to lift the burden from lower courts we can and should reconsider *Saucier*'s requirement as well. Sometimes (e.g., where a defendant is clearly entitled to qualified immunity) *Saucier's* fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (e.g., where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'. . In a sharp departure from this counsel, *Saucier* requires courts to embrace unnecessary constitutional questions not to avoid them. It is not surprising that commentators, judges, and, in this case, 28 States in an amicus brief, have invited us to reconsider *Saucier*'s requirement. . . I would accept that invitation. While this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here. . . . The order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.").

Los Angeles County, California v. Rettele, 127 S. Ct. 1989, 1994 (2007) (Stevens, J., joined by Ginsburg, J., concurring in the judgment) ("This case presents two separate questions: (1) whether the four circumstances identified in the Court of Appeals' unpublished opinion established a genuine issue of material fact as to whether the seizure violated respondents' Fourth Amendment rights . . . (2) whether the officers were nevertheless entitled to qualified immunity because the right was not clearly established. The fact that the judges on the Court of Appeals disagreed on both questions convinces me that they should not have announced their decision in an unpublished opinion. In answering the first question, the Ninth Circuit majority relied primarily on *Franklin v.*

Foxworth, 31 F.3d 873 (C.A.9 1994). As Judge Cowen's discussion of *Franklin* demonstrates, that case surely does not clearly establish the unconstitutionality of the officers' conduct. . . Consequently, regardless of the proper answer to the constitutional question, the defendants were entitled to qualified immunity. I would reverse on that ground and disavow the unwise practice of deciding constitutional questions in advance of the necessity for doing so.").

Criticism by Cases in the Circuits:

Estate of Buchanan v. Maine, 469 F.3d 158, 168-70 (1st Cir. 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment question is a reasonableness question which is highly idiosyncratic and heavily dependent on the facts. The question is close whether under normal summary judgment rules, drawing all inferences in plaintiff's favor, this record would preclude submission to the jury of the question whether, given the circumstances, the officers reasonably entered Buchanan's house when they did rather than wait to see if they could break through a busy phone line to ask Buchanan's social worker for advice. On summary judgment on qualified immunity, the threshold question is whether all the uncontested facts and any contested facts looked at in plaintiff's favor show a constitutional violation. . . Given the complexity of the matter, and since it is perfectly clear that the officers are entitled to immunity, we turn to the second and third prongs. . . . At the time of the deputies' visit to Buchanan's home, it had been clearly established that 'a warrantless entry ... of a residence may be Areasonable," in Fourth Amendment terms,' but was not reasonable unless 'the government [could] demonstrate ... Aexigent circumstances,"' such as 'an imminent threat to the life or safety of members of the public, the police officers, or a person located within the residence.' . . . But, under *Saucier*, that level of analysis is insufficient. The relevant inquiry is whether it would be clear to a reasonable officer that his conduct would be unlawful in the situation he confronted, and this inquiry must be taken in light of the case's specific context, not as a broad general proposition. . . We cannot say the officers had fair warning under the law that if they entered the house when they did, they would violate Buchanan's Fourth Amendment rights. While there is no case directly on point, case law tended to support the officers' actions, not put them on notice of illegality. . . . . Even if we were wrong in our analysis thus far, the deputies would be entitled to immunity on the third prong. Our inquiry at this stage is limited to those objective facts known to (or discernible by) the officers at the time of the event. . . . A reasonable officer could have believed that waiting was not a good idea. There was no assurance the deputies could reach the social worker or that he would have been able to calm Buchanan or provide meaningful help to the officers from his remote location. Plaintiff put on no evidence that a reasonable officer would have waited. Further, the situation was escalating, with Buchanan punching out a window on a cold night, and the deputies did not know that the social worker would be available once the phone line was cleared. Even if the officers were mistaken, this was a reasonable judgment call, and they are entitled to immunity.")**.**

Smith v. Cupp, 430 F.3d 766, 773 n.3 (6th Cir. 2005) ("Two judges of this circuit have recently articulated a number of reasons to eliminate the Supreme Court's requirement that courts always

begin with the question of whether a right has been violated, and never begin with the question of whether any such right at stake has been clearly established. *See Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir.2005) (Sutton and Gibbons, JJ., concurring). Although the points raised are excellent, like those judges, we continue to follow the order of inquiry the Supreme Court set forth in *Saucier*. It is true that the Supreme Court in *Brosseau* exercised its discretion to resolve the qualified immunity inquiry without first resolving whether there was a constitutional violation, notwithstanding the Court's earlier contrary 'instruction' to the lower courts. . . As lower courts we are bound to follow the Supreme Court's reasoning and holdings, as much as, if not more so than, its 'instructions.' The reasoning of *Brosseau* certainly *permits* us to follow the instructions, however, and we continue to do so.")(emphasis original).

Lyons v. City of Xenia, 417 F.3d 565, 581-84 (6th Cir. 2005) (Sutton, J., with whom Gibbons, J., joins, concurring) ("As the Court has acknowledged,. . . requiring courts preemptively to resolve constitutional questions where non-constitutional grounds for disposition remain readily available cuts against the normal grain of constitutional adjudication. The customary rule is that a court 'will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.'. . . Just as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, . . . so there is a risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented. Heightening these concerns is the fact that some constitutional rulings effectively will be insulated from review by the en banc court of appeals or the Supreme Court where the appellate panel identifies a constitutional violation but grants qualified immunity under the second inquiry. . . . By multiplying constitutional holdings that are not subject to review in the normal course, a rigid application of the two-step inquiry may do as much to unsettle the law as to settle it. An unbending requirement in this area produces another oddity: The same lower-court judges that are supposed to adhere to this rule are given complete discretion over whether to publish a given decision. Appellate panels that choose not to publish a decision no more create binding precedent than those that decide only the clearly established question. . . . Lower federal courts given the authority to exercise judgment about when to publish their decisions, it seems to me, ought to be given authority occasionally to decide the last qualified immunity question before the threshold one. The same administrative concerns that permit the former ought to permit the latter. . . . Much as the *Saucier* two-step inquiry is a reasoned departure from the general rule that a court 'will not pass upon a constitutional question' unless essential to the disposition of a case,. . . so also the Court should permit lower courts to make reasoned departures from *Saucier*'s inquiry where principles of sound and efficient judicial administration recommend a variance. Here, as elsewhere, avoiding difficult and divisive constitutional questions will at times promote, not hinder, the enforcement and development of the law. . . . The alternative, as the four separate opinions from this three-judge panel illustrate, is to require courts to issue narrow, panel-riven, fact-bound constitutional rulings of limited precedential value, only to have them then announce that the government officials are entitled to qualified immunity because the precedents 'taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case.'. . And of course in *Brosseau* itself, the very case that prompted the Court

to ask us to take a second look at this case, the Court did not address the constitutional question but only the clearly established question. Lower federal courts ought to have the same authority.").

Robinette v. Jones, 476 F.3d 585, 592 n.8 (8th Cir. 2007) ("*Saucier* requires a full analysis of the first prong of a qualified immunity analysis because it 'permits courts in appropriate cases to elaborate the constitutional right with greater degrees of specificity. . . However, the 'law's elaboration from case to case,' . . . would be ill served by a ruling here, where the parties have provided very few facts to define and limit any holding on the reasonableness of the execution of the arrest warrant. *See Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir.2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment question is a reasonableness question which is highly idiosyncratic and heavily dependent on the facts."); *see also Ehrlich v. Town of Glastonbury*, 348 F.3d 48 (2d Cir.2003).").

Clement v. City of Glendale, 518 F.3d 1090, 1093 n.4 (9th Cir. 2008) ("In deciding a motion for summary judgment in a section 1983 action we are bound to look first to whether there was a constitutional violation and then to whether defendants have qualified immunity, even if the qualified immunity inquiry would resolve the case more easily. . . Some have questioned the logic of this 'rigid Aorder of battle,"' . . . but we are bound to follow it until further notice. We are free to muse, however, that the *Saucier* rule may lead to the publication of a lot of bad constitutional law that is, effectively, *cert*-proof. If a court of appeals holds that a constitutional right exists under *Saucier* in step one, but that the right is not clearly established (as we do in this case), then neither party will have both the incentive and the standing to petition for review of the constitutional ruling. It may be many years before another case arises that presents the same issue in a form ripe for review by the Supreme Court.")**.**

Kwai Fun Wong v. United States, 373 F.3d 952, 956, 957 (9th Cir. 2004) ("The confluence of two well-intentioned doctrines, notice pleading and qualified immunity, give rise to this exercise in legal decisionmaking based on facts both hypothetical and vague. On one hand, the federal courts may not dismiss a complaint unless 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' . . All that is required is a 'short and plain statement' of the plaintiff's claims. . . On the other hand, government officials are entitled to raise the qualified immunity defense immediately, on a motion to dismiss the complaint, to protect against the burdens of discovery and other pre-trial procedures. . . The qualified immunity issue, in turn, cannot be resolved without first deciding the scope of the constitutional rights at stake.[citing *Saucier*] The unintended consequence of this confluence of procedural doctrines is that the courts may be called upon to decide far-reaching constitutional questions on a nonexistent factual record, even where, as the government defendants contend and as may be the case here, discovery would readily reveal the plaintiff's claims to be factually baseless. We are therefore moved at the outset to suggest that while government officials have the right, for well-developed policy reasons, *see Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985), to raise and immediately appeal the qualified immunity defense on a motion to dismiss, the exercise of that authority is not a wise choice in every case. The ill-considered filing of a qualified immunity appeal on the

pleadings alone can lead not only to a waste of scarce public and judicial resources, but to the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed, at least to the summary judgment stage.").

McClish v. Nugent, 483 F.3d 1231, 1253 n.1 (11th Cir. 2007) (Anderson, J., concurring specially) ("Because we hold that the law was not clearly established at the time of the relevant conduct, it would not be necessary to address the constitutional issue in this case but for the Supreme Court's admonition in *Saucier v. Katz* . . . Unfortunately, in this case, because the defendants prevailed on the clearly established prong, the *Saucier* rule not only requires a constitutional holding that would be unnecessary otherwise; it also operates to insulate from further appellate review an erroneous constitutional ruling that will guide the conduct of police officers in three states. . . Also, under the *Saucier* approach, a court is handicapped in addressing the constitutional issue because at least one party often has little incentive to litigate the issue vigorously, especially when it is apparent that the law is not clearly established, as in this case. Similarly, only the Supreme Court's mandate provides an incentive for busy federal judges to focus intently on the issue; they lack the usual incentive that proper resolution of the matter will make a real difference to a real party. For these reasons and others, twenty-eight states and Puerto Rico have recently urged the Supreme Court in an *amicus* brief to reconsider its mandatory *Saucier* approach to qualified immunity. See Brief for 28 States and Puerto Rico as *Amici Curiae* in Support of Petitioner, *Scott v. Harris*, No. 05-1631 (Supreme Court, December 2006).).

8. *Pearson v. Callahan*

In ***Pearson v. Callahan***, 129 S. Ct. 808 (2009), the Court reviewed a decision of the Court of Appeals of the Tenth Circuit that had held the Aconsent-once-removed" doctrine B which permits a warrantless entry into the home by police when consent has been given to an undercover officer who has observed contraband in the home–did not apply when the person to whom consent was given was a police informant rather than a police officer. The Court of Appeals also denied qualified immunity to the officers involved, noting that Athe Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Callahan v. Millard County*, 494 F.3d 891, 898 (10th Cir. 2007), *rev'd by Pearson v. Callahan*, 129 S. Ct. 808 (2009). In granting certiorari, the Supreme Court directed the parties to brief and argue whether *Saucier* should be overruled.

In an unanimous opinion authored by Justice Alito, the Court reexamined the mandatory constitutional-question-first procedure required by *Saucier* and concluded Athat a mandatory, two-step rule for resolving all qualified immunity claims should not be retained." 129 S. Ct. at 817. The Court acknowledged much of the criticism that had been leveled at the Arigid order of battle" by lower court judges and by members of the Court. *Id.* The Court justified its overruling of precedent by highlighting the various criticisms that have been directed at *Saucier's* two-step

protocol: (1) Deciding the constitutional question first often results in substantial expenditures of resources by both the parties and the courts on Aquestions that have no effect on the outcome of the case." *Id.* at 818. (2) The development of constitutional doctrine is not furthered by decisions that are often Aso fact-bound that the decision provides little guidance for future cases." *Id.* at 819. (3) It makes little sense to have lower courts forced to decide a constitutional question that is pending in a higher court or before an en banc panel. *Id.* (4) It likewise does little to further the development of constitutional precedent to force a decision that depends on Aan uncertain interpretation of state law." *Id.* (5) Requiring a constitutional decision at the pleading stage based on bare or sketchy allegations of fact or one at the summary judgment stage resting on Awoefully inadequate" briefs creates a risk of Abad decisionmaking." *Id.* at 820. (6) The mandated two-step analysis often shields constitutional decisions from appellate review when the defendant loses on the Amerits" question but prevails on the clearly-established-law prong of the analysis. Such unreviewed decisions may then have Aa serious prospective effect" on conduct. *Id.* (7) Finally, the approach requires unnecessary determinations of constitutional law and Adeparts from the general rule of constitutional avoidance." *Id.* at 821.

While abandoning the mandatory nature of two-step analysis, the Court continued to recognized that the approach can be beneficial in promoting Athe development of constitutional precedent[,]"*Id.* at 818, and Ais especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id*. In the end, the Court has left it to the lower court judges to decide, as a matter of discretion, what Aorder of decisionmaking will best facilitate the fair and efficient disposition of each case." *Id.* at 821. The Court addressed expressed Amisgivings" about its decision. First, the *Saucier* approach is not prohibited; it is simply no longer mandated. Second, constitutional law will continue to develop in other contexts, such as criminal cases, cases involving claims against government entities and cases involving claims for injunctive relief. Third, the Court does not predict a flood of suits against local governments by plaintiffs pursuing novel claims. *Id.* at 821, 822. Nor does the Court anticipate a new Acottage industry of litigation" over the proper standards to use in deciding whether to reach the merits in a given case. *Id.* at 822.

Without addressing or overruling the constitutional holding of the Court of Appeals, the Court reversed the Tenth Circuit on the grounds that the law on the Aconsent-once-removed" doctrine was not clearly established at the time of the challenged conduct such that a reasonable officer would have understood the conduct here to be unlawful. As the Court explained:

> When the entry at issue here occurred in 2002, the 'consent-once-removed' doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. [citing cases] It had been accepted by every one of those courts. Moreover, the Seventh Circuit had approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants.

> See *United States v. Paul*, 808 F.2d, 645, 648 (1986). The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon*, 398 F.3d 802, 806-808, cert. denied, 546 U.S. 977, 126 S. Ct. 548, 163 L.Ed.2d 460 (2005), and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on Aconsent-once-removed" entries. The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions. . . .[H]ere, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

129 S. Ct. at 822, 823.

9. Post-*Pearson* Cases

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Kisela v. Hughes, 138 S. Ct. 1148, 1152-54 (2018) (per curiam) ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. . . .Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.' [*citing Plumhoff*] That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way. Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment. . . . [N]ot one of the decisions relied on by the Court of Appeals—*Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), *Glenn v. Washington County*, 673 F.3d 864

(C.A.9 2011), and *Harris v. Roderick*, 126 F.3d 1189 (C.A.9 1997)—supports denying Kisela qualified immunity." [majority discusses and distinguishes *Deorle, Glenn,* and *Harris*])

District of Columbia v. Wesby, 138 S. Ct. 577, 589 & n.7 (2018) ("Our conclusion that the officers had probable cause to arrest the partygoers is sufficient to resolve this case. But where, as here, the Court of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, 'we have discretion to correct its errors at each step.'. . We exercise that discretion here because the D. C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.'. . .We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim. . . We addressed the merits of probable cause here, however, because a decision on qualified immunity alone would not have resolved all of the claims in this case.")

District of Columbia v. Wesby, 138 S. Ct. 577, 593 (2018) (Sotomayor, J. concurring in part and concurring in the judgment) ("I agree with the majority that the officers here are entitled to qualified immunity and, for that reason alone, I concur in the Court's judgment reversing the judgment of the Court of Appeals for the District of Columbia. But, I disagree with the majority's decision to reach the merits of the probable-cause question, which it does apparently only to ensure that, in addition to respondents' 42 U. S. C. §1983 claims, the Court's decision will resolve respondents' state-law claims of false arrest and negligent supervision. . . It is possible that our qualified-immunity decision alone will resolve those claims. . . In light of the lack of a dispute on an important legal question and the heavily factbound nature of the probable-cause determination here, I do not think that the Court should have reached that issue. The lower courts are well equipped to handle the remaining state-law claims in the first instance.")

District of Columbia v. Wesby, 138 S. Ct. 577, 593-94 (2018) (Ginsburg, J., concurring in the judgment in part) ("This case. . .leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. . . No arrests of plaintiffs-respondents were made until Sergeant Suber so instructed. His instruction, when conveyed to the officers he superintended, was based on an error of law. Sergeant Suber believed that the absence of the premises owner's consent, an uncontested fact in this case, sufficed to justify arrest of the partygoers for unlawful entry. . . An essential element of unlawful entry in the District of Columbia is that the defendant 'knew or should have known that his entry was unwanted. . . But under Sergeant Suber's view of the law, what the arrestees knew or should have known was irrelevant. They could be arrested, as he comprehended the law, even if they believed their entry was invited by a lawful occupant. Ultimately, plaintiffs-respondents were not booked for unlawful entry. Instead, they were charged at the police station with disorderly conduct. Yet no police officers at the site testified to having observed any activities warranting a disorderly conduct charge. Quite the opposite. The officers at the scene of the arrest uniformly testified that they had neither seen nor heard anything that would justify such a charge, and Sergeant Suber specifically advised his superiors that the charge was unwarranted. . . The Court's jurisprudence, I am concerned, sets the

balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren v. United States*, 517 U. S. 806 (1996), and follow-on opinions, holding that 'an arresting officer's state of mind . . . is irrelevant to the existence of probable cause,' *Devenpeck v. Alford*, 543 U. S. 146, 153 (2004). See, *e.g.*, 1 W. LaFave, Search and Seizure §1.4(f), p. 186 (5th ed. 2012) ('The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality.'). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents was not warranted by 'settled law.' The defendants-petitioners are therefore sheltered by qualified immunity.")

Mullenix v. Luna, 136 S. Ct. 305, 308-12 (2015) (per curiam) ("We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place, and now reverse. . . . In this case, the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not '"use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."'. . Yet this Court has previously considered—and rejected—almost that exact formulation of the qualified immunity question in the Fourth Amendment context. [discussing *Brosseau*] In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer at Cemetery Road. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances 'beyond debate.'. . The general principle that deadly force requires a sufficient threat hardly settles this matter. . . Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. . . . The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. . . By the time Mullenix fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location. This Court has considered excessive force claims in connection with high-speed chases on only two occasions since *Brosseau*. [discussing *Scott* and *Plumhoff*] The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. Leija in his flight did not pass as many cars as the drivers in *Scott* or *Plumhoff*; traffic was light on I–27. At the same time, the fleeing fugitives in *Scott* and *Plumhoff* had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did. . . . Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'. . .More fundamentally, the dissent repeats the Fifth Circuit's error. It defines the qualified immunity inquiry at a high level of generality—whether

any governmental interest justified choosing one tactic over another—and then fails to consider that question in 'the specific context of the case.'. . . Cases decided by the lower courts since *Brosseau* likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's. . . .Finally, respondents argue that the danger Leija represented was less substantial than the threats that courts have found sufficient to justify deadly force. But the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here. The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the ' "hazy border between excessive and acceptable force.'" . . Because the constitutional rule applied by the Fifth Circuit was not ' "beyond debate,"'. . . we grant Mullenix's petition for certiorari and reverse the Fifth Circuit's determination that Mullenix is not entitled to qualified immunity.
It is so ordered.")

Mullenix v. Luna, 136 S. Ct. 305, 312-13 (2015) (per curiam) (Scalia, J., concurring in the judgment) ("I join the judgment of the Court, but would not describe what occurred here as the application of deadly force in effecting an arrest. Our prior cases have reserved that description to the directing of force sufficient to kill *at the person* of the desired arrestee. See, *e.g.*, *Plumhoff* v. *Rickard*, 572 U. S. ___ (2014); *Brosseau* v. *Haugen*, 543 U. S. 194 (2004) (*per curiam*); *Tennessee* v. *Garner*, 471 U. S. 1 (1985). It does not assist analysis to refer to all use of force that happens to kill the arrestee as the application of deadly force. . . . [I]t stacks the deck against the officer, it seems to me, to describe his action as the application of deadly force. It was at least arguable in *Scott* that pushing a speeding vehicle off the road is targeting its occupant for injury or death. Here, however, it is conceded that Trooper Mullenix did not shoot to wound or kill the fleeing Leija, nor even to drive Leija's car off the road, but only to cause the car to stop by destroying its engine. That was a risky enterprise, as the outcome demonstrated; but determining whether it violated the Fourth Amendment requires us to ask, not whether it was reasonable to kill Leija, but whether it was reasonable to shoot at the engine in light of the risk to Leija. It distorts that inquiry, I think, to make the question whether it was reasonable for Mullenix to 'apply deadly force.'")

Mullenix v. Luna, 136 S. Ct. 305, 313-16 (2015) (per curiam) (Sotomayor, J., dissenting) ("Chadrin Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullenix's rogue conduct killed the driver, Israel Leija, Jr. Because it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired the shots, I respectfully dissent from the grant of summary reversal. . . . Here, then, the clearly established legal question—the question a reasonable officer would have asked—is whether, under all the circumstances as known to Mullenix, there was a governmental interest in shooting at the car rather than waiting for it to run over spike

strips.The majority does not point to *any* such interest here. . . . It is clearly established that there must be some governmental interest that necessitates deadly force, even if it is not always clearly established what level of governmental interest is sufficient. Under the circumstances known to him at the time, Mullenix puts forth no plausible reason to choose shooting at Leija's engine block over waiting for the results of the spike strips. I would thus hold that Mullenix violated Leija's clearly established right to be free of intrusion absent some governmental interest. . . . By granting Mullenix qualified immunity, this Court goes a step further than our previous cases and does so without full briefing or argument. . . . When Mullenix confronted his superior officer after the shooting, his first words were, 'How's that for proactive?'. . . The glib comment does not impact our legal analysis; an officer's actual intentions are irrelevant to the Fourth Amendment's 'objectively reasonable' inquiry. . . But the comment seems to me revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.' By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow. For the reasons discussed, I would deny Mullenix's petition for a writ of certiorari. I thus respectfully dissent.")

Taylor v. Barkes, 135 S. Ct. 2042, 2044-45 (2015) (per curiam) ("The Third Circuit concluded that the right at issue was best defined as 'an incarcerated person's right to the proper implementation of adequate suicide prevention protocols.'. . This purported right, however, was not clearly established in November 2004 in a way that placed beyond debate the unconstitutionality of the Institution's procedures, as implemented by the medical contractor. . . . In short, even if the Institution's suicide screening and prevention measures contained the shortcomings that respondents allege, no precedent on the books in November 2004 would have made clear to petitioners that they were overseeing a system that violated the Constitution. Because, at the very least, petitioners were not contravening clearly established law, they are entitled to qualified immunity. The judgment of the Third Circuit is reversed.")

City & Cnty. of San Francisco, Cal. v. Sheehan, 135 S. Ct. 1765, 1775-78 (2015) ("The real question. . . is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan,* 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. . . Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not. To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham v. Connor,*. . . but *Graham* holds only that the ' "objective reasonableness"' test applies to excessive-force claims under the Fourth Amendment. . . That is far too general a proposition to control this case. 'We have

repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures. Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction. . . and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter. Moving beyond *Graham,* the Ninth Circuit also turned to two of its own cases. But even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' *Carroll v. Carman*, 574 U.S. —— —, —— (2014) (*per curiam*) (slip op., at 4), it does not do so here. The Ninth Circuit first pointed to *Deorle v. Rutherford,* 272 F.3d 1272 (C.A.9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue 'an emotionally disturbed' person who 'was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense.'. . The officer there, moreover, 'observed Deorle at close proximity for about five to ten minutes before shooting him' in the face. . . Whatever the merits of the decision in *Deorle,* the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law-breaking, and out of sight. The Ninth Circuit also leaned on *Alexander v. City and County of San Francisco,* 29 F.3d 1355 (C.A.9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home 'for the primary purpose of arresting him' even though they lacked an arrest warrant. . . Quade, in response, fired a handgun; police officers 'shot back, and Quade died from gunshot wounds shortly thereafter.'. . The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no 'exigent circumstances' excusing their entrance. . .*Alexander* too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. . . Under Ninth Circuit law. . . an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'. . Courts must not judge officers with 'the 20/20 vision of hindsight.'. . When *Graham, Deorle,* and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases 'would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.'. . But even assuming that is true, *no precedent clearly established that there was not 'an objective need for immediate entry' here.* No matter how carefully a reasonable officer read *Graham, Deorle,* and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or

gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that 'fair notice,' an officer is entitled to qualified immunity. . . Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. . . .Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'. . Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified. Finally, to the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, . . . no such consensus exists here. . . .In sum, we hold that qualified immunity applies because these officers had no 'fair and clear warning of what the Constitution requires.'. . Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness. * * * For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.")

Carroll v. Carman, 135 S. Ct. 348, 350-52 (2014) (per curiam) ("Carroll petitioned for certiorari. We grant the petition and reverse the Third Circuit's determination that Carroll was not entitled to qualified immunity. . . .In concluding that Officer Carroll violated clearly established law in this case, the Third Circuit relied exclusively on *Marasco*'s statement that 'entry into the curtilage after not receiving an answer at the front door might be reasonable.'. . In the court's view, that statement clearly established that a 'knock and talk' must begin at the front door. But that conclusion does not follow. *Marasco* held that an unsuccessful 'knock and talk' at the front door does not automatically allow officers to go onto other parts of the property. It did not hold, however, that knocking on the front door is *required* before officers go onto other parts of the property that are open to visitors. Thus, *Marasco* simply did not answer the question whether a 'knock and talk' must begin at the front door when visitors may also go to the back door. Indeed, the house at issue seems not to have even had a back door, let alone one that visitors could use. . .Moreover, *Marasco* expressly stated that 'there [was] no indication of whether the officers followed a path or other apparently open route that would be suggestive of reasonableness.' *Ibid.* That makes *Marasco* wholly different from this case, where the jury necessarily decided that Carroll 'restrict[ed] [his] movements to walkways, driveways, porches and places where visitors could be expected to go.'. . To the extent that *Marasco* says anything about this case, it arguably supports Carroll's view. In *Marasco*, the Third Circuit noted that '[o]fficers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may.'. .The court also said that, ' "when the police come on to private property ... and restrict their movements to places visitors could be expected to go (*e.g.*, walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment."'. . Had

Carroll read those statements before going to the Carmans' house, he may have concluded—quite reasonably—that he was allowed to knock on any door that was open to visitors. . . The Third Circuit's decision is even more perplexing in comparison to the decisions of other federal and state courts, which have rejected the rule the Third Circuit adopted here. [citing cases from 2d, 7th, and 9th circuits and New Jersey Supreme Court] We do not decide today whether those cases were correctly decided or whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door. 'But whether or not the constitutional rule applied by the court below was correct, it was not "beyond debate."' *Stanton v. Sims*, 571 U.S. ——, —— – (2013) (*per curiam*) (slip op., at 8) (quoting *al-Kidd,* 563 U.S., at —— (slip op., at 9)). The Third Circuit therefore erred when it held that Carroll was not entitled to qualified immunity. The petition for certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.")

Lane v. Franks, 134 S. Ct. 2369, 2377-79 & n.4, 2381-83 (2014) ("We granted certiorari. . . to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities. . . .Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment. In rejecting Lane's argument that his testimony was speech as a citizen, the Eleventh Circuit gave short shrift to the nature of sworn judicial statements and ignored the obligation borne by all witnesses testifying under oath. . . Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. . . . In holding that Lane did not speak as a citizen when he testified, the Eleventh Circuit read *Garcetti* far too broadly. It reasoned that, because Lane learned of the subject matter of his testimony in the course of his employment with CITY, *Garcetti* requires that his testimony be treated as the speech of an employee rather than that of a citizen. . . . It is undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings. . . For that reason, Lane asked the Court to decide only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern. . . We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today. . . . In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. . . . Respondent Franks argues that even if Lane's testimony is protected under the First Amendment, the claims against him in his individual capacity should be dismissed on the basis of qualified immunity. We agree. . . .The relevant question for qualified immunity purposes is this: Could Franks reasonably have believed, at the time he fired Lane, that a government employer could fire an employee on account of testimony the employee gave, under oath and

outside the scope of his ordinary job responsibilities? Eleventh Circuit precedent did not preclude Franks from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent. . . . *Morris, Martinez,* and *Tindal* represent the landscape of Eleventh Circuit precedent the parties rely on for qualified immunity purposes. If *Martinez* and *Tindal* were controlling in the Eleventh Circuit in 2009, we would agree with Lane that Franks could not reasonably have believed that it was lawful to fire Lane in retaliation for his testimony. But both cases must be read together with *Morris,* which reasoned—in declining to afford First Amendment protection—that the plaintiff's decision to testify was motivated solely by his desire to comply with a subpoena. The same could be said of Lane's decision to testify. Franks was thus entitled to rely on *Morris* when he fired Lane. . . . Lane argues that *Morris* is inapplicable because it distinguished *Martinez,* suggesting that *Martinez* survived *Morris.* . . But this debate over whether *Martinez* or *Morris* applies to Lane's claim only highlights the dispositive point: At the time of Lane's termination, Eleventh Circuit precedent did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection. At best, Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity. Finally, Lane argues that decisions of the Third and Seventh Circuits put Franks on notice that his firing of Lane was unconstitutional. See *Reilly,* 532 F.3d, at 231(CA3) (truthful testimony in court is citizen speech protected by the First Amendment); *Morales v. Jones*, 494 F.3d 590, 598 (C.A.7 2007) (similar). But, as the court below acknowledged, those precedents were in direct conflict with Eleventh Circuit precedent. . . There is no doubt that the Eleventh Circuit incorrectly concluded that Lane's testimony was not entitled to First Amendment protection. But because the question was not 'beyond debate' at the time Franks acted, *al-Kidd,* 563 U.S., at —— (slip op., at 9), Franks is entitled to qualified immunity.")

Wood v. Moss, 134 S. Ct. 2056, 2061, 2066-70 (2014) ("The First Amendment, our precedent makes plain, disfavors viewpoint-based discrimination. . . But safeguarding the President is also of overwhelming importance in our constitutional system. . . Faced with the President's sudden decision to stop for dinner, the Secret Service agents had to cope with a security situation not earlier anticipated. No decision of this Court so much as hinted that their on-the-spot action was unlawful because they failed to keep the protesters and supporters, throughout the episode, equidistant from the President. . . . The particular question before us is whether the protesters have alleged violation of a clearly established First Amendment right based on the agents' decision to order the protesters moved from their original location in front of the Inn, first to the block just east of the Inn, and then another block farther. . . .[W]e address the key question: Should it have been clear to the agents that the security perimeter they established violated the First Amendment? . . . .No decision of which we are aware. . . would alert Secret Service agents engaged in crowd control that they bear a First Amendment obligation 'to ensure that groups with different viewpoints are at comparable locations at all times.'. .Nor would the maintenance of equal access make sense in the situation the agents confronted. . . .It may be, the agents acknowledged, that clearly established law proscribed the Secret Service from disadvantaging one group of speakers in comparison to another if the agents had 'no objectively reasonable security rationale' for their

conduct, but acted solely to inhibit the expression of disfavored views. . . We agree with the agents, however, that the map itself . . . undermines the protesters' allegations of viewpoint discrimination as the sole reason for the agents' directions. The map corroborates that, because of their location, the protesters posed a potential security risk to the President, while the supporters, because of their location, did not. . . .This case comes to us on the agents' petition to review the Ninth Circuit's denial of their qualified immunity defense. . . Limiting our decision to that question, we hold, for the reasons stated, that the agents are entitled to qualified immunity.")

Plumhoff v. Rickard, 134 S. Ct. 2012, 2016, 2017, 2020-23 (2014) ("The courts below denied qualified immunity for police officers who shot the driver of a fleeing vehicle to put an end to a dangerous car chase. We reverse and hold that the officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law. . . .Heeding our guidance in *Pearson*, we begin in this case with the question whether the officers' conduct violated the Fourth Amendment. This approach, we believe, will be 'beneficial' in 'develop[ing] constitutional precedent' in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense. . . . In this case, respondent advances two main Fourth Amendment arguments. First, she contends that the Fourth Amendment did not allow petitioners to use deadly force to terminate the chase. . . Second, she argues that the 'degree of force was excessive,' that is, that even if the officers were permitted to fire their weapons, they went too far when they fired as many rounds as they did. . . We address each issue in turn. . . . Rickard's outrageously reckless driving posed a grave public safety risk. And while it is true that Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car. Just before the shots were fired, when the front bumper of his car was flush with that of one of the police cruisers, Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse 'in an attempt to escape.' Thus, the record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path—underscores the point. In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk. . . .We now consider respondent's contention that, even if the use of deadly force was permissible, petitioners acted unreasonably in firing a total of 15 shots. We reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, 'if lethal force is justified, officers are taught to keep shooting until the threat is over.'. . .This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

In arguing that too many shots were fired, respondent relies in part on the presence of Kelly Allen in the front seat of the car, but we do not think that this factor changes the calculus. Our cases make it clear that 'Fourth Amendment rights are personal rights which ... may not be vicariously asserted.'. . Thus, the question before us is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's. If a suit were brought on behalf of Allen under either § 1983 or state tort law, the risk to Allen would be of central concern. . . But Allen's presence in the car cannot enhance Rickard's Fourth Amendment rights. After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit. . . . We have held that petitioners' conduct did not violate the Fourth Amendment, but even if that were not the case, petitioners would still be entitled to summary judgment based on qualified immunity. An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was '"clearly established"' at the time of the challenged conduct. . . And a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. . . . In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'. . In addition, '[w]e have repeatedly told courts ... not to define clearly established law at a high level of generality,'. . . since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. We think our decision in *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*) squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. . . .*Brosseau* makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they 'could not have given fair notice to [the officer].'. . To defeat immunity here, then, respondent must show at a minimum either (1) that the officers' conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either '"controlling authority"' or a 'robust "consensus of cases of persuasive authority,"'. . . that would alter our analysis of the qualified immunity question. Respondent has made neither showing.")

Stanton v. Sims, 134 S. Ct. 3, 5, 7 (2013) (per curiam) ("There is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was 'plainly incompetent' in entering Sims' yard to pursue the fleeing Patrick. . . The Ninth Circuit concluded that he was. It did so despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. . . .To summarize the law at the time Stanton made his split-second decision to enter Sims' yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last

resort around the Nation were sharply divided. We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.' *al–Kidd, supra,* at ——, 131 S.Ct., at 2083. Stanton may have been mistaken in believing his actions were justified, but he was not 'plainly incompetent.'")

Reichle v. Howards, 132 S. Ct. 2088, 2093-97 (2012) ("We granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards' arrest so held. . . . If the answer to either question is 'no,' then the agents are entitled to qualified immunity. We elect to address only the second question. We conclude that, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment. We, therefore, reverse the judgment of the Court of Appeals denying petitioners qualified immunity. . . .The 'clearly established' standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest. . . .Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right. . . . We next consider Tenth Circuit precedent. Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here. . . .At the time of Howards' arrest, *Hartman's* impact on the Tenth Circuit's precedent governing retaliatory arrests was far from clear. Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests. . . . A reasonable official also could have interpreted *Hartman's* rationale to apply to retaliatory arrests. . . . Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case. Such evidence could be thought similarly fatal to a plaintiff's claim that animus caused his arrest, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury. . . . To be sure, we do not suggest that *Hartman's* rule in fact extends to arrests. Nor do we suggest that every aspect of *Hartman's* rationale could apply to retaliatory arrests. *Hartman* concluded that the causal connection in retaliatory prosecution cases is attenuated because those cases necessarily involve the animus of one person and the injurious action of another, 547 U.S., at 262, but in many retaliatory arrest cases, it is the officer bearing the alleged animus who makes the injurious arrest. Moreover, *Hartman* noted that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the 'presumption of regularity accorded to prosecutorial decisionmaking.'. .That presumption does not apply here. Nonetheless, the fact remains that, for qualified immunity purposes, at the time of Howards' arrest it was at least arguable that *Hartman's* rule extended to retaliatory arrests. . . . *Hartman* injected uncertainty into the law governing retaliatory arrests, particularly in light of *Hartman's* rationale and the close relationship between retaliatory arrest and prosecution claims. This uncertainty was

only confirmed by subsequent appellate decisions that disagreed over whether the reasoning in *Hartman* applied similarly to retaliatory arrests. Accordingly, when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Petitioners Reichle and Doyle are thus entitled to qualified immunity.")

Reichle v. Howards, 132 S. Ct. 2088, 2097, 2098 (2012) (Ginsburg, J., with whom Breyer, J., joins, concurring in the judgment) ("Were defendants ordinary law enforcement officers, I would hold that *Hartman v. Moore* . . . does not support their entitlement to qualified immunity. . . . A similar causation problem will not arise in the typical retaliatory-arrest case. Unlike prosecutors, arresting officers are not wholly immune from suit. As a result, a plaintiff can sue the arresting officer directly and need only show that the officer (not some other official) acted with a retaliatory motive. Because, in the usual retaliatory arrest case, there is no gap to bridge between one government official's animus and a second government official's action, *Hartman*'s no-probable-cause requirement is inapplicable. Nevertheless, I concur in the Court's judgment. Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy. In performing that protective function, they rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge. Whatever the views of Secret Service Agents Reichle and Doyle on the administration's policies in Iraq, they were duty bound to take the content of Howards' statements into account in determining whether he posed an immediate threat to the Vice President's physical security. Retaliatory animus cannot be inferred from the assessment they made in that regard. If rational, that assessment should not expose them to claims for civil damages.")

[Note on Post-*Reichle* Cases: *See Lozman v. City of Riviera Beach, Fla.,* 138 S. Ct. 1945, 1951, 1954-55 (2018) ("Lozman's claim is that, notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meetings lawsuit and his prior public criticisms of city officials. The question this Court is asked to consider is whether the existence of probable cause bars that First Amendment retaliation claim. . . . [W]hether in a retaliatory arrest case the *Hartman* approach should apply, thus barring a suit where probable cause exists, or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case. For Lozman's claim is far afield from the typical retaliatory arrest claim, and the difficulties that might arise if *Mt. Healthy* is applied to the mine run of arrests made by police officers are not present here. . . . Here Lozman does not sue the officer who made the arrest. Indeed, Lozman likely could not have maintained a retaliation claim against the arresting officer in these circumstances, because the officer appears to have acted in good faith, and there is no showing that the officer had any knowledge of Lozman's prior speech or any motive to arrest him for his earlier expressive activities. Instead Lozman alleges more governmental action than simply an arrest. His claim is that the City itself retaliated against him pursuant to an 'official municipal policy' of intimidation. . . In particular, he alleges that the City, through its legislators, formed a premeditated plan to intimidate him in retaliation for his criticisms of city officials and his open-meetings lawsuit. And he asserts that the City itself, through the same

high officers, executed that plan by ordering his arrest at the November 2006 city council meeting. The fact that Lozman must prove the existence and enforcement of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim. . . . This unique class of retaliatory arrest claims, moreover, will require objective evidence of a policy motivated by retaliation to survive summary judgment. Lozman, for instance, cites a transcript of a closed-door city council meeting and a video recording of his arrest. There is thus little risk of a flood of retaliatory arrest suits against high-level policymakers. As a final matter, it must be underscored that this Court has recognized the 'right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights.'. . Lozman alleges the City deprived him of this liberty by retaliating against him for his lawsuit against the City and his criticisms of public officials. Thus, Lozman's speech is high in the hierarchy of First Amendment values. . . For these reasons, Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City. On facts like these, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim. The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts. This is not to say, of course, that Lozman is ultimately entitled to relief or even a new trial. On remand, the Court of Appeals, applying *Mt. Healthy* and other relevant precedents, may consider any arguments in support of the District Court's judgment that have been preserved by the City. Among other matters, the Court of Appeals may wish to consider (1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether, under *Mt. Healthy*, the City has proved that it would have arrested Lozman regardless of any retaliatory animus—for example, if Lozman's conduct during prior city council meetings had also violated valid rules as to proper subjects of discussion, thus explaining his arrest here. For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion."); ***Lozman v. City of Riviera Beach, Fla.,*** 138 S. Ct. 1945, 1955-56 (2018) (Thomas, J., dissenting) ("We granted certiorari to decide 'whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest under [42 U.S.C.] § 1983.'. . Instead of resolving that question, the Court decides that probable cause should not defeat a 'unique class of retaliatory arrest claims.'. . To fall within this unique class, a claim must involve objective evidence, of an official municipal policy of retaliation, formed well before the arrest, in response to highly protected speech, that has little relation to the offense of arrest. . . .No one briefed, argued, or even hinted at the rule that the Court announces today. Instead of dreaming up our own rule, I would have answered the question presented and held that plaintiffs must plead and prove a lack of probable cause as an element of a First Amendment retaliatory-arrest claim. I respectfully dissent. . . .By my count, the Court has identified five conditions that are necessary to trigger its new rule. First, there must be 'an "official municipal policy" of intimidation.'. . Second, the policy must be 'premeditated' and formed well before the arrest—here, for example, the policy was formed 'months earlier.'. . Third, there must be 'objective evidence' of such a policy. . . Fourth, there must be 'little relation' between the 'protected speech' that prompted the retaliatory policy and 'the criminal offense for which the arrest is made.'. . Finally, the protected speech that provoked the retaliatory policy must be 'high in the hierarchy

of First Amendment values.'. . Where all these features are present, the Court explains, there is not the same 'causation problem' that exists for other retaliatory-arrest claims. . . I find it hard to believe that there will be many cases where this rule will even arguably apply, and even harder to believe that the plaintiffs in those cases will actually prove all five requirements. Not even Lozman's case is a good fit, as the Court admits when it discusses the relevant considerations for remand. . . In my view, we should not have gone out of our way to fashion a complicated rule with no apparent applicability to this case or any other. . . Turning to the question presented, I would hold that plaintiffs bringing a First Amendment retaliatory-arrest claim must plead and prove an absence of probable cause.").

See also ***Karns v. Shanahan***, 879 F.3d 504, 522-24 & n.12 (3d Cir. 2018) ("The Supreme Court's decision in *Reichle*, which was decided just weeks before Karns's and Parkers' arrests, conclusively disposes of this inquiry. The Court, on the facts of that case, held that 'it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.'. . As we discuss in the next section, ample probable cause supported the arrests of Karns and Parker. Given the state of the law at the relevant time period, it was therefore reasonable for the officers to believe that an arrest otherwise supported by probable cause would not violate Karns's and Parker's First Amendment rights. The District Court did not err in concluding that the officers were entitled to qualified immunity on the retaliation claim. . . . In the intervening period since Karns's and Parker's arrests in 2012, our Court has held that 'the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.' *Fields v. City of Philadelphia*, 862 F.3d 353, 356 (3d Cir. 2017). However, as in *Fields* itself, this right was not clearly established at the time of the challenged conduct. . . Accordingly, although the right identified by Karns and Parker is now clearly established in this Circuit, our qualified immunity analysis in this case remains unchanged."); ***Hagedorn v. Cattani***, No. 715 F.App'x 499, 506 (6th Cir. 2017) ("Hagedorn's exchange with Esser at the service garage, during which she allegedly called him an 'asshole' and an 'idiot,' did not involve fighting words. . . There can be little dispute that Hagedorn had a clearly established right to criticize Esser in such a way without fear of retaliation. . . But even though 'the Constitution prohibits states from criminalizing conduct that disturbs solely police officers,'. . . Hagedorn did not have an unfettered right to disturb Timberlake residents while engaging in protected speech. Transky, a Timberlake resident, filed a complaint as a result of Hagedorn's exchange with Esser. That complaint indicated that Hagedorn had been yelling and that it disturbed him. And Transky later testified that Hagedorn was 'inappropriately loud' and that he could hear her yelling from his home. . . The record indicates that Esser did not pursue a disorderly conduct charge until after Transky's complaint was filed and that the complaint was central to Esser's decision. Transky provided evidence which would allow a reasonable person to believe that Hagedorn was guilty of making unreasonable noise, in violation of § 648.04(a)(2), despite the protected nature of her speech. Thus, there was a sufficient basis for probable cause. And because probable cause supported the charge, Hagedorn cannot establish a First Amendment retaliation violation. Accordingly, Esser is entitled to qualified immunity for the disorderly conduct charge."); ***Bartlett v. Nieves***, 712 F. App'x 613, 616 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 2709 (2018) ('We reverse the district court's dismissal of Bartlett's retaliatory

arrest claim. The district court dismissed this claim on the ground that the troopers had probable cause to arrest Bartlett. However, we have previously held that a plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest. *See Ford v. City of Yakima*, 706 F.3d 1188, 1195–96 (9th Cir. 2013) "[A]n individual has a right to be free from retaliatory police action, even if probable cause existed for that action."). The Supreme Court's decision in *Reichle v. Howards*, 566 U.S. 658 (2012), does not foreclose this result. In *Reichle*, the Court noted that it had not previously recognized a First Amendment right to be free from a retaliatory arrest supported by probable cause, but did not conclude that a plaintiff must show lack of probable cause to make a retaliatory arrest claim. . . Indeed, the Court emphasized that the rule that it announced in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff cannot make a retaliatory *prosecution* claim if the charges were supported by probable cause, does not necessarily extend to retaliatory arrests. . . We have since clarified that in the Ninth Circuit, a plaintiff can make a retaliatory arrest claim even if the arresting officers had probable cause. When the troopers arrested Bartlett at Arctic Man in 2014, it was clearly established that 'an individual has a right to be free from retaliatory police action, even if probable cause existed for that action.'. . Therefore, the district court erred in concluding that Bartlett's retaliatory arrest claim fails simply because the troopers had probable cause to arrest him. Bartlett has potentially established a claim of retaliatory arrest in violation of the First Amendment because 1) he has 'demonstrate[d] that the officers' conduct would chill a person of ordinary firmness from future First Amendment activity' and 2) the evidence that he has advanced would enable him 'ultimately to prove that the officers' desire to chill his speech was a but-for cause of their allegedly unlawful conduct.'. . Regarding the first prong of the test, we have held that an arrest in retaliation for the exercise of free speech is sufficient to chill speech. . . Regarding the second prong, we have held that, once a plaintiff has provided 'sufficient evidence for a jury to find that the officers' retaliatory motive was a but-for cause of their action,' 'the issue of causation ultimately should be determined by a trier of fact.'. . Construing the facts in the light most favorable to Bartlett, he has advanced sufficient evidence to meet this standard. Most importantly, Bartlett alleged that Sergeant Nieves said 'bet you wish you would have talked to me now' after his arrest. This statement, if true, could enable a reasonable jury to find that Sergeant Nieves arrested Bartlett in retaliation for his refusal to answer Sergeant Nieves's questions earlier in the evening. We therefore conclude that the district court erred in granting summary judgment for the troopers on Bartlett's retaliatory arrest claim."); ***Sigg v. Allen Cty., Kansas***, No. 16-3360, 2017 WL 4618521, at *2–3 (10th Cir. Oct. 16, 2017) (not reported) ("That Deputy Tingley arrested John Sigg for a crime he did not commit does not undermine the reasonableness of the arrest. An arresting officer's 'subjective reason for making [an] arrest need not be the criminal offense as to which the known facts provide probable cause.'. . As long as the officer had reason to believe that any crime had occurred, probable cause exists to support the arrest. . . Deputy Tingley had probable cause to believe John committed *a* crime. Thus, John's claim must fail. John's father, Mitchell Sigg, claims he was unlawfully seized in retaliation for protected speech. But Mitchell cannot prevail for the same reason as his son: the officers had probable cause. When Mitchell arrived, he got out of his car and advanced on Deputy Tingley, who was in the process of handcuffing John Sigg, shouting, 'What the f*** are you doing idiot? What the f*** are you doing?' Deputy Tingley instructed Deputy Kegler to detain Mitchell. In

response, Mitchell told Deputy Kegler, who is black, 'Hey stupid, get your f*** ing hands off me boy. Boy. Yeah I know who you are, you don't f*** with me.' Deputy Tingley instructed Deputy Kegler to 'cuff him, he's going to jail.' Mitchell Sigg was arrested (and charged) for interference with law enforcement. . . .Based on the uncontroverted facts, there was at least probable cause to believe Mitchell violated this statute after he belligerently advanced on the officers during an arrest at night along the side of a highway. . . .We turn then to Mitchell's First Amendment retaliation claim. To establish a § 1983 retaliation claim, a plaintiff must plead and prove: (1) he was engaged in a constitutionally protected activity, (2) a defendant's action caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) a defendant's action was substantially motivated as a response to his exercise of his First Amendment speech rights. . . He must also plead and prove the absence of probable cause for the arrest. . . As discussed, Deputy Tingley had probable cause to arrest Mitchell Sigg. Therefore, Mitchell Sigg's First Amendment retaliation claim cannot survive summary judgment."); ***Scott v. Tempelmeyer,*** 867 F.3d 1067, 1069, 1071-72 (8th Cir. 2017) ("We conclude that the First Amendment right asserted by Scott—a right to be free from retaliatory regulatory enforcement that is otherwise supported by probable cause—was not clearly established. We therefore reverse the district court's order denying in part Tempelmeyer's motion for summary judgment based on qualified immunity. . . .In light of all of this precedent, Scott cannot show a clearly established right to be free from regulatory enforcement that is otherwise supported by probable cause. Scott's claim faces a greater hurdle than those of the plaintiffs in the single-actor arrest cases of *Reichle*, *McCabe*, and *Cross*. Here, Scott alleges that Tempelmeyer induced or directed Mitchell, the building inspector, to enforce the code against the Motel. The case thus presents the scenario addressed in *Williams*, where the actor with alleged retaliatory animus (Tempelmeyer) is different from the actor taking the alleged adverse regulatory action (Mitchell). *Osborne* addressed a claim of retaliatory enforcement of regulations without mentioning the absence of probable cause. But it was reasonably debatable in November 2010 that the reasoning of *Williams* would apply to a claim like Scott's that combined the animus of one actor and the injurious regulatory action of another. It was also not unreasonable to think that the reasoning of subsequent single-actor law enforcement cases such as *Cross* and *McCabe* would apply to a regulatory enforcement case. It was therefore not clearly established at the time of the inspection and condemnation that Scott had a right under the First Amendment to be free from a regulatory enforcement action—directed by Tempelmeyer and implemented by Mitchell—that was supported by probable cause. . . .Because there was probable cause to support Mitchell's regulatory enforcement action against the Motel, Tempelmeyer is entitled to qualified immunity on Scott's First Amendment retaliation claim. The district court's order denying in part Tempelmeyer's motion for summary judgment based on qualified immunity is reversed."); ***Marshall v. City of Farmington Hills***, 693 F. App'x 417, 425-27 & n.4 (6th Cir. 2017) ("Although our precedent suggests that lack of probable cause may be an element of a retaliatory arrest claim *only when accompanied by a malicious prosecution claim*,[4] which is not the case here, affirmance is nevertheless required because we must apply *Reichle v. Howards*, 132 S. Ct. 2088 (2012). *Reichle* held that it was not clearly established at the time of the defendant's arrest in June 2006 (six months before Marshall's arrest in the instant case) that an arrest supported by probable cause could violate the First Amendment. . . Although the district

court did not dismiss Marshall's First Amendment retaliatory use of force and retaliatory-arrest claims on qualified immunity grounds, *Reichle* is nevertheless dispositive. . . . In *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210 (6th Cir. 2011), a First Amendment retaliatory arrest case, this court observed that it had not decided whether lack of probable cause is an element of a retaliatory arrest claim, but suggested that it is not. . . .We applied *Hartman* to claims of retaliatory prosecution and wrongful arrest in *Barnes v. Wright*, 449 F.3d 709, 717–20 (6th Cir. 2006). In *Barnes*, *Hartman*'s 'concerns regarding the intervening actions of a prosecutor d[id] not apply' to the plaintiff's retaliatory-prosecution claim because the arresting officers initiated grand-jury proceedings themselves. . .Because *Hartman* said that retaliatory-prosecution claims 'usually'–not always–involve complex causal chains, however, the absence of probable cause was still an element for the claim of retaliatory prosecution. The absence of probable cause was also an element for the claim of wrongful arrest because that claim was factually interrelated to the allegedly retaliatory prosecution in two ways. First, the arresting agents initiated grand jury proceedings against the plaintiff. Second, they arrested the plaintiff only after the grand jury had indicted him. Thus, *Barnes* governs the applicability of *Hartman* to claims of wrongful arrest *only when prosecution and arrest are concomitant*. Unlike the plaintiff in *Barnes*, Kennedy has raised an ordinary retaliation claim. Following the commonplace pattern for allegedly retaliatory arrests, [defendant officer] Schutzman arrested Kennedy prior to any prosecutorial or grand jury involvement. The straightforward connection between Schutzman's alleged animus and the arrest that he effectuated suggests that Kennedy may not need to demonstrate a lack of probable cause to succeed on his claim of wrongful arrest. *See, e.g., CarePartners LLC v. Lashway*, 545 F.3d 867, 877 n.7 (9th Cir. 2008) (limiting *Hartman* to retaliatory-prosecution actions in which the absence of probable cause is "need[ed] to 'bridge' a causation gap"). *We defer resolution of this question, however, because it does not decide this appeal.* If the absence of probable cause is not an element, then ... Kennedy should prevail because he satisfies the three actual elements [of a retaliatory arrest claim]. If the absence of probable cause is an element, then Kennedy still should prevail because the Fourth Amendment analysis shows that [the defendant officer] lacked probable cause for the arrest. . . . Marshall cites no authority supporting that *Reichle* does not govern here."); ***Smith v. City of Fairburn, Georgia***, 679 F. App'x 916, 925 (11th Cir. 2017) ("Smith's First Amendment claim against Chief McCarthy fails for the same reason her Fourth Amendment claim against Detective Israel did: Detective Israel had probable cause to procure a warrant for Smith's arrest. . .('[T]he existence of probable cause to arrest Dahl defeats her First Amendment claim.')."); ***Pegg v. Herrnberger***, 845 F.3d 112, 118-20 (4th Cir. 2017) ("Here, Pegg admits that his vehicle had an expired inspection sticker in violation of West Virginia law. . . Further, he admits this violation occurred in Herrnberger's presence. Therefore, just as in *Atwater*, though Pegg's offense was minor, the Fourth Amendment does not forbid a warrantless arrest for such a violation. The Supreme Court specifically rejected in *Atwater* the argument Pegg makes here: that the Fourth Amendment would forbid 'custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time....' Under *Atwater*, therefore, whether or not a § 17C-16-9 violation is a jailable offense is irrelevant for purposes of the application of qualified immunity. . . .[U]nder *Atwater* and the West Virginia statutes, Herrnberger had probable cause to arrest Pegg for the expired inspection sticker violation. The district court's determination that Herrnberger arrested

Pegg 'in practicality' for assault and obstruction of justice, instead of the expired inspection sticker, is also ultimately irrelevant. . . The proper focus of the inquiry is not any subjective reason for arresting Pegg, but only the objective facts surrounding the arrest. . . .Thus, Herrnberger did not violate the Fourth Amendment and he is entitled to qualified immunity on this claim as a matter of law. The district court erred in failing to grant summary judgment to Herrnberger on Pegg's claim of unlawful arrest. . . .The probable cause inherent in Pegg's violation of § 17C-16-9 also defeats his First Amendment retaliatory arrest claim. The Supreme Court 'has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'. . Since the *Reichle* decision, no such right has been recognized, so the *Reichle* principle is fully controlling here. Pegg's violation of § 17C-16-9 gave Herrnberger probable cause to arrest Pegg; therefore his arrest was not retaliatory. Contrary to the district court's conclusion, it is not enough, that Pegg 'simply plead "an absence of probable cause"' for his claim to survive summary judgment. . . . . [I]n distinction from the appeal in *Tobey* from the denial of a motion to dismiss, the instant case is a decision on summary judgment. This case is not one where probable cause remains an evidentiary issue; it is undisputed that Pegg violated § 17C-16-9 in the arresting officer's presence, thereby establishing the probable cause for his arrest. Herrnberger is thus entitled to qualified immunity on this claim as well and the district court erred in not granting his motion for summary judgment."); ***Picray v. Duffitt***, 652 F. App'x 497, 498-99 & n.1 (9th Cir. 2016) ("The purported right to be free from a retaliatory arrest that is otherwise supported by probable cause was not clearly established in this circuit at the time of Picray's arrest. *See Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) ("Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct."). In *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006), the Supreme Court held that a plaintiff must plead and prove the absence of probable cause to support a claim for retaliatory prosecution. At the time of Picray's arrest in 2010, however, our case law was far from clear about *Hartman*'s application in the context of retaliatory arrest claims. *Compare Beck v. City of Upland*, 527 F.3d 853, 863-64 (9th Cir. 2008) (stating that under *Hartman*, a plaintiff must prove the absence of probable cause to prevail on a claim for retaliatory arrest or prosecution), *with Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (stating that the existence of probable cause is "not dispositive" in a retaliatory arrest claim); *see also Reichle*, 132 S. Ct. at 2096-97 (noting that *Hartman* "injected uncertainty into the law governing retaliatory arrests, particularly in light of ... the close relationship between retaliatory arrest and prosecution claims").[1] [fn 1 We note that we held in *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013), that *Skoog v. County of Clackamas*, 469 F.3d 1221, 1233-35 (9th Cir. 2006), established that police action motivated by retaliatory animus is unlawful even where probable cause exists. However, *Skoog* concerned only a retaliatory search, and the arrest at issue in *Ford* took place in 2007, before either *Beck* or *Dietrich* was decided.] Given that uncertainty, we cannot conclude that the law was clearly established for purposes of qualified immunity. . . .Unlike the search at issue in *Skoog v. County of Clackamas*, 469 F.3d at 1231, probable cause strongly supported the search since the items sought could have contained direct documentary evidence of Picray's alleged crimes. And defendants' 'previous negative interactions' with Picray create only a 'weak inference' of retaliation, insufficient to sustain his claim. . . We therefore

reverse the district court's denial of qualified immunity."); ***Allen v. Cisneros***, 815 F.3d 239, 244-45 (5th Cir. 2016) ("[A] retaliation claim is only applicable 'when non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.'. . As a result, even where a citizen believes that he has been subject to a retaliatory detention or arrest, if there was reasonable suspicion or probable cause for an officer to seize the citizen, 'the objectives of law enforcement take primacy over the citizen's right to avoid retaliation.'. . .Here, Allen's possession of his shofar independently provided reasonable suspicion for his detention. The city ordinance specifically prohibited 'carry[ing] or possess[ing] while participating in any demonstration' objects that 'exceed three-quarters inch in their thickest dimension.'. . The shofar, which was approximately six inches in width, clearly violated the ordinance. Moreover, Allen refused to relinquish the shofar to Officer Montelongo and continued to possess it until he was detained. Based on the totality of the circumstances, these facts provide a 'minimum level of objective justification' for the detention of Allen by Officer Montelongo. . .Officer Montelongo therefore did not violate Allen's Fourth Amendment rights when he lawfully detained Allen for carrying or possessing the shofar in violation of the city ordinance."); ***Mocek v. City of Albuquerque***, 813 F.3d 912, 930-32 (10th Cir. 2015) ("Mocek . . . contends that he had a First Amendment right to film at the security checkpoint. He asserts that the defendants unconstitutionally retaliated against his exercise of that right when they arrested him for doing so. The district court dismissed this claim after finding it was reasonable to restrict filming at an airport security checkpoint, a nonpublic forum. The defendants add that they are entitled to qualified immunity because they reasonably believed they had probable cause to arrest Mocek, and at the time of the arrest, it was not clearly established that plaintiffs could maintain retaliation claims for arrests supported by probable cause. We agree. . . .Recognizing his threshold problem under this standard, Mocek asks us to rely on cases from other circuits holding there is First Amendment protection for creating audio and visual recordings of law enforcement officers in public places. [collecting cases]. . . .[E]ven if we agreed there is a First Amendment right to record law enforcement officers in *public,* we would still need to determine whether that conduct is protected at an airport security checkpoint. But we need not answer this question because Mocek cannot satisfy the third prong of a retaliation claim: that the government's actions were substantially motivated in response to his protected speech. When Mocek was arrested, it was not clearly established that a plaintiff could show the requisite motive where his arrest was arguably supported by probable cause. Mocek has not addressed Tenth Circuit or Supreme Court precedent compelling that conclusion. . . .It is true that in *DeLoach v. Bevers,* 922 F.2d 618 (10th Cir.1990), we held an arrest 'taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.'. . This might have implied that plaintiffs could maintain retaliatory arrest claims even where probable cause existed. But the Supreme Court in a case after *DeLoach* held a plaintiff stating a retaliatory *prosecution* claim must show there was no probable cause to support the indictment. [citing *Hartman*] Addressing the question of whether *Hartman* abrogated *DeLoach,* we held in 2011 that *Hartman*'s rule for retaliatory prosecution claims did *not* apply to 'ordinary retaliation cases,' so that a retaliatory arrest claim could lie notwithstanding probable cause. *Howards v. McLaughlin,* 634 F.3d 1131, 1148–49 (10th Cir.2011). The Supreme Court reversed. *Reichle v. Howards,* —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). The

Court held the law had not been clearly established in the Tenth Circuit at the time of the arrest at issue (June 2006) because 'reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests.' The Court declined to answer the question on the merits. Mocek was arrested in November 2009. Because the law was not clearly established in June 2006, and because no Supreme Court or Tenth Circuit decision between then and November 2009 clarified the law, the law was not clearly established at the time of Mocek's arrest. Regardless of Officer Dilley's motivations, he could have reasonably believed he was entitled to arrest Mocek as long as he had probable cause. And, as discussed above, he could have reasonably believed he had probable cause. Accordingly, the defendants are entitled to qualified immunity on Mocek's First Amendment retaliation claim."); ***Shamir v. City of New York***, 804 F.3d 553, 557 (2d Cir. 2015) ("Probable cause did exist for arresting Shamir for disorderly conduct by violating an order to disperse. Shamir's 50–h testimony, relevant to what the officers knew at the time of the arrest, establishes that police officers gave such an order. Despite Shamir's vague claim that, in response to the order, he moved 'from where he was located,' he admitted that he 'went up to one of the police officers' and called him a thug. That approach to the officer is the antithesis of complying with an order to disperse. Even if, as Shamir suspects, the motivation for the arrest was his remark to the officer, the violation of the order to disperse provided probable cause to arrest. An officer's motivation is irrelevant to the Fourth Amendment validity of an arrest."); ***Dukore v. D.C.***, 799 F.3d 1137, 1144-45 (D.C. Cir. 2015) ("In reviewing a grant of qualified immunity, we must consider the right asserted 'not as a broad general proposition, but in a particularized sense so that the contours of the right are clear[.]'. . So the right we must consider in this case is 'not the general right to be free from retaliation for one's speech,' but rather 'the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.'. . The Supreme Court has 'never held that there is such a right.'. . Nor was there in February 2012 (nor is there now) any settled consensus view in this court or other federal courts of appeals such that 'the statutory or constitutional question' has been placed 'beyond debate.' . . Quite the opposite, in July 2011, this court recognized that the federal courts of appeals were split on whether a plaintiff claiming retaliatory arrest had to show that the arrest lacked probable cause, and expressly declined to take sides. *See Moore*, 644 F.3d at 423 n. 8. That means that, at the time of the arrests in this case, precedent in this and other circuits was either inconclusive or actively in conflict on whether the existence of probable cause precluded an arrest from being deemed 'retaliatory.' That is a far cry from placing the question beyond debate. Dukore and Canavan argue that the right to be free from retaliation under the First Amendment is clearly established. And they argue that the only confusion in the law concerned retaliatory *prosecutions*, as discussed in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). Dukore and Canavan further contend that any ripples of uncertainty generated by *Hartman* in other jurisdictions did not unsettle this circuit's law, because we have recognized that 'retaliatory arrest and retaliatory prosecution are distinct constitutional violations[.]' *Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C.Cir.2013). The absence of confusion in this jurisdiction, they conclude, left as governing law for the officers the clearly established background right to be free from retaliation under the First Amendment. That argument turns the qualified immunity burden upside down. It is Dukore's and Canavan's burden to show that the particular right in question—narrowly described to fit the factual pattern confronting the officers .

. . was clearly established. It was not the District's burden to show that the right had been called into question. The generality of Dukore's and Canavan's constitutional principle and the widespread instability in the law on the precise question of probable-cause arrests prevent them from discharging that duty.);***Greenman v. Jessen***, 787 F.3d 882, 891 (8th Cir. 2015) ("'In retaliatory arrest cases, we have identified a fourth prong: lack of probable cause or arguable probable cause.'. . Because we conclude there was probable cause for each of the three arrests, we agree with the district court that the officers and prosecutor are entitled to qualified immunity on Greenman's First Amendment retaliatory-arrest claims."); ***Lash v. Lemke***, 786 F.3d 1, 4 n.1 (D.C. Cir. 2015) ("Lash also alleged that his arrest, as distinct from the force used in effecting his arrest, constituted a separate First Amendment violation because it too was motivated by retaliatory animus. After Lash filed his complaint but before the district court ruled below, the Supreme Court held in *Reichle v. Howards* that 'it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation' even if also motivated by retaliatory animus. 132 S.Ct. 2088, 2097 (2012). Lash conceded below that probable cause existed for his arrest and so *Reichle* precludes any First Amendment claim arising on that score. He does not argue otherwise here."); ***Abeyta v. City of New York***, 588 F. App'x 24, 25 (2d Cir. 2014) ("Because we conclude that the District Court's evidentiary rulings were not in error, the jury's verdict that defendants had probable cause to detain plaintiff, and did not use excessive force, was entirely sound. Accordingly, plaintiff's challenge to the District Court's dismissal of his First Amendment retaliation claim is without merit. *See Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 2094, 182 L.Ed.2d 985 (2012) (holding that there is no "specific right to be free from a retaliatory arrest that is otherwise supported by probable cause"); ***Wilson v. Vill. of Los Lunas***, 572 F. App'x 635, 643 (10th Cir. 2014) ("*Reichle* states that when Mr. Howards was arrested in June 2006, '*Hartman* [had] injected uncertainty into the law governing retaliatory arrests.' 132 S.Ct. at 2096. This court did not address that uncertainty in a published opinion until *Howards*, issued in March 2011, long after the events underlying this appeal. And the next year, *Reichle* reversed *Howards* while declining to determine whether there is a First Amendment right to be free from a retaliatory arrest otherwise supported by probable cause. *Reichle* therefore compels the conclusion that the law as to First Amendment retaliatory arrest in the presence of probable cause was no more clearly established in July 2009, when Officer Walker stopped Mr. Wilson, than it was in June 2006. As discussed above, the record before the district court showed probable cause to arrest Mr. Wilson for violating N.M. Stat. Ann. §§ 30–22–24 and 30–22–1. We need not decide whether *DeLoach* survives *Hartman.* It is enough to know that in July 2009 it was not clearly established in this circuit that there is a First Amendment right to be free from retaliatory arrest when the arrest is supported by probable cause. The officers are entitled to qualified immunity."); ***Peterson v. Kopp***, 754 F.3d 594, 602, 603 (8th Cir. 2014) ("In retaliatory arrest cases, we have identified a fourth prong: lack of probable cause or arguable probable cause. . . We agree that Kopp is entitled to qualified immunity on Peterson's retaliatory arrest claim because, as detailed above, Kopp had at least arguable probable cause for the arrest. However, Peterson also claims that Kopp pepper sprayed him in retaliation for criticizing Kopp and asking for his badge number. The defendants do not deny that criticizing a police officer and asking for his badge number is protected speech under the First Amendment. Nor could they. . . . The defendants argue instead that there is no

evidence upon which a reasonable jury could conclude that Kopp pepper sprayed Peterson—even in part—because of his protected speech. . . The defendants claim causation is "free from doubt" in this case because there is only one reasonable conclusion from the record before us: Kopp pepper sprayed Peterson as a reasonable reaction to an escalating situation. We disagree. Taking the evidence in the light most favorable to Peterson, as we must for this summary judgment analysis, Peterson has presented affirmative evidence that Kopp pepper sprayed him in retaliation for criticizing him and asking for his badge number. . . . A reasonable jury could conclude, based on this account, that Kopp pepper sprayed Peterson in retaliation for asking for his badge number, and Peterson's First Amendment right was clearly established at the time of the incident. Accordingly, Kopp is not entitled to summary judgment based on qualified immunity from Peterson's retaliatory use of force claim."); ***Ashcraft v. City of Vicksburg,*** 561 F. Appx. 399, 401 (5th Cir. 2014) ("[W]e are hard-pressed to find that Chief Deputy Dolan's alleged misconduct violated Ms. Ashcraft's First Amendment rights because Ms. Ashcraft has not demonstrated that she had a clearly established 'right' to be free from a retaliatory arrest that was otherwise supported by probable cause. . . . Likewise, Mayor Winfield is entitled to qualified immunity on Ms. Ashcraft's constitutional claims because she has not demonstrated that her traffic stop, for which she blames Mayor Winfield, was constitutionally invalid. To the extent that Mayor Winfield did issue a retaliatory directive for Chief Deputy Dolan to ticket Ms. Ashcraft, Ms. Ashcraft has failed to demonstrate that Chief Deputy Dolan was not legally justified in executing the subsequent traffic stop for her out-of-state vehicle tag. Mayor Winfield's alleged conduct, without a resulting violation of Ms. Ashcraft's constitutional rights, does not abrogate his qualified immunity under these circumstances."); ***Royal Crown Day Care LLC v. Department of Health and Mental Hygiene of City of New York***, 746 F.3d 538, 545 & n.4 (2d Cir. 2014) ("In sum, defendants are not entitled to qualified immunity solely because closing down Royal Crown may have been justified under the Health Code. . .Defendants' motivation in closing down Royal Crown is material to Royal Crown's First Amendment and substantive due process claims, and we do not have jurisdiction to consider whether the dispute about defendants' motivation was genuine. The existence of that genuine dispute of material fact with respect to defendants' violations of Royal Crown's First Amendment and substantive due process rights precludes the entry of summary judgment on behalf of defendants unless they can show that their action was objectively legally reasonable or that the rights they violated were not clearly established. . . . In support of defendants' argument that they are immune from suit because they were mandated to close Royal Crown based on the Health Code, defendants rely on cases involving allegedly retaliatory arrests and prosecutions where there existed probable cause for the government action. . . Defendants' reliance on those cases is unpersuasive because this Court has concluded that cases involving allegedly retaliatory arrests 'do not extend ... to other variations of retaliation claims.' *Blue v. Koren,* 72 F.3d 1075, 1083 n.5 (2d Cir.1995). . . .Properly assuming on this interlocutory appeal that defendants retaliated against Royal Crown for speech protected by the First Amendment, defendants' action was not objectively reasonable. Royal Crown's First Amendment and substantive due process rights to be free from retaliation and irrational government action in response to its letter to Senator Golden were clearly established at the time that defendants closed down plaintiff's day care facility. . . Accordingly, defendants are not entitled to summary judgment

on the basis of qualified immunity."); ***Moral v. Hagen***, 553 F. App'x 839, 2014 WL 341440, *1, *2 (10th Cir. 2014) ("Only recently the Supreme Court explained that it remains unsettled under current law whether an officer violates the Fourth Amendment by initiating an arrest for retaliatory reasons when the arrest itself happens to be supported, as an objective matter, by probable cause. *See Reichle v. Howards,* 132 S.Ct. 2088 (2012). Because this scenario (retaliatory animus but objective probable cause) does not offend clearly established law, the Supreme Court granted qualified immunity to the officers in *Reichle. Id.* We see no lawful way the district court could have reached a different result in this case. . . .Ms. Moral complains that the district court did not resolve the first question in the qualified immunity sequence (whether an arrest objectively supported by probable cause but allegedly made with a retaliatory motive violates the Constitution) before proceeding to the second question in that sequence (whether any such violation was clearly established at the time of Agent Hagen's actions) and resolving it against her. But district courts are generally free to proceed directly to the second step of the qualified immunity analysis where, as here, it is sufficient to dispose of the case."); ***George v. Rehiel***, 738 F.3d 562, 585, 586 (3d Cir. 2013) ("George alleged that the Federal Officials searched and questioned him in retaliation for his possession of the Arabic–English flashcards and a political book critical of American policy in the Middle East in violation of his First Amendment Rights. . . .In this portion of their appeal, the Federal Officials contend that the allegations in the amended complaint do not establish that they retaliated against George for his exercise of his First Amendment rights. . .It is beyond dispute that the First Amendment protects George's right to possess, read and study the flashcards and the book he was carrying. Indeed, the individual Federal Officials . . .readily concede that an airplane passenger may read whatever he or she pleases. However, the fact that George had a First Amendment right to possess, read and study the materials he possessed does not end the inquiry. The fact that George clearly had a right to have these flash cards, does not mean that TSA Officials had to ignore their content or refrain from investigating him further because of the words they contained. The totality of circumstances here could cause a reasonable person to believe that the items George was carrying raised the possibility that he might pose a threat to airline security. That suspicion was the reason for their increased level of scrutiny during the airport screening. The TSA Officials' suspicion was an obvious alternative explanation for their conduct, which negates any inference of retaliation. . . . Moreover, because we have found that the individual Federal Officials' search and questioning of George during the screening did not violate George's Fourth Amendment rights, we are hard-pressed to find that it could result in a First Amendment retaliation claim on this record. [citing *Hartman*] Accordingly, the individual Federal Officials are entitled to qualified immunity on George's First Amendment retaliation claim."); ***Acosta v. City of Costa Mesa***, 718 F.3d 800, 824-26 & n.14 (9th Cir. 2013) ("Acosta presents two arguments that the officers are not entitled to qualified immunity for seizing or arresting him: (1) he was arrested in retaliation for questioning the officers about why his time to speak was cut short and why he was asked to leave the council meeting; and (2) the officers lacked the requisite level of suspicion to seize or arrest him. Resolution of both contentions turns on whether probable cause existed to seize Acosta. Assuming Acosta's contention accurately reflects why he was arrested, Acosta's claim still fails under prong two of *Saucier*. . . In *Reichle,* the Supreme Court held that it had never recognized, nor was there a clearly established First Amendment right to be free from a retaliatory

arrest that is otherwise supported by probable cause. . . Furthermore, at the time of the Council meeting, our precedent had previously upheld restrictions on speech at city council meetings where the speech was actually disruptive and this remains the law. . . Thus, if Acosta's seizure and arrest were supported by probable cause, the officers are entitled to qualified immunity. . . .[W]e find that probable cause existed to arrest Acosta for a violation of § 2–61 and summary judgment was properly granted in favor of the officers on this claim. . . Thus, even assuming that Acosta was arrested in retaliation for his remarks, because probable cause existed for a violation of § 2–61, the officers are still entitled to qualified immunity, not only for the removal of Acosta from the chambers, but also for his subsequent arrest. Summary judgment was properly granted in favor of the officers. . . . We note that if we were to find that no probable cause existed, the officers would still be entitled to qualified immunity. An officer is entitled to immunity where a reasonable officer would believe that probable cause existed, even if that determination was a mistake. . . Here, given the Mayor's repeated directives to cease speaking, the fact that the council meeting was now in recess, and the undisputed fact that Acosta remained at the podium addressing both the audience and the council, a reasonable officer would have believed that probable cause existed to arrest Acosta for a violation of § 2–61."); ***Esparza v. Bowman***, No. 12–2140, 2013 WL 1760932, *5 & n.5 (10th Cir. Apr. 25, 2013) ("Chief Bowman remains entitled to qualified immunity unless Mrs. Esparza can show that her First Amendment right to be free from retaliatory arrest was clearly established at the time of her arrest. We conclude she has. 'The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.'. . Indeed, there can be no doubt that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.' *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Consequently, accepting the facts as found by the district court on summary judgment, Mrs. Esparza has submitted sufficient evidence to overcome Chief Bowman's assertion of qualified immunity. Based on the evidence submitted thus far, we conclude that Mrs. Esparza has satisfied her burden to allege a violation of her clearly established right to be free from retaliatory arrest. . . . The Supreme Court's decision in *Reichle v. Howards*, 132 S.Ct. 2088, 2094 (2012) does not alter our analysis because the evidence before the district court was sufficient to show that Mrs. Esparza's arrest was not otherwise supported by probable cause."); ***Ford v. City of Yakima***, 706 F.3d 1188, 1193-96 (9th Cir. 2013) ("In this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.' *Skoog*, 469 F.3d at 1235. That right was violated when the officers booked and jailed Ford in retaliation for his protected speech, even though probable cause existed for his initial arrest. Ford's criticism of the police for what he perceived to be an unlawful and racially motivated traffic stop falls 'squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech ... is categorically prohibited by the Constitution.'. . .[T]he evidence must be sufficient to establish that the officers' desire to chill Ford's speech was a but-for cause of their conduct. In other words, would Ford have been booked and jailed, rather than cited and arrested, but for the officers' desire to punish Ford for his speech? . . . .Ford does not contend that police officers lacked probable cause to arrest him for violating the city noise ordinance. But Officer Urlacher's probable cause to arrest Ford does not necessarily mean that booking and jailing him

was constitutional. . . While the issue of causation ultimately should be determined by a trier of fact, Ford has provided sufficient evidence for a jury to find that the officers' retaliatory motive was a but-for cause of their action, thus satisfying the causation element of a First Amendment retaliation claim for the purposes of qualified immunity. . . Taken in the light most favorable to Ford, the facts establish that the officers' alleged conduct violated his right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action. . . . [T]his Court's 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action. . . . Thus, *Duran* clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action. The officers' conduct in this case falls squarely within the prohibitions of *Duran* and *Skoog*. While the precise issue of retaliatory booking and jailing has not been addressed in this Circuit, 'closely analogous preexisting case law is not required to show that a right was clearly established.'. . *Duran* addressed a retaliatory arrest and *Skoog* applied to a retaliatory search and seizure, but the unlawfulness of a retaliatory booking and jailing was nevertheless apparent from those cases. After *Duran*, any reasonable police officer would have known that it was unlawful to use his authority to retaliate against an individual because of his speech. Likewise, any reasonable police officer would have understood that *Skoog's* prohibition on retaliatory police action extended to typical police actions such as booking and jailing. Therefore, this case involved the kind of 'mere application of settled law to a new factual permutation' in which we assume an officer had notice that his conduct was unlawful. . . A reasonable officer would have understood that he did not automatically possess the authority to book and jail an individual upon conducting a lawful arrest supported by probable cause. Washington law clearly enumerates the limited factors that would allow a police officer to book and jail an individual who has been arrested for a misdemeanor. CrRLJ 2.1(b)(2). A reasonable officer would have been aware of the law governing his ability to book and jail an individual he lawfully has arrested. Moreover, a reasonable officer would have been aware that Washington law explicitly states that its rules 'shall not be construed to affect or derogate from the constitutional rights of any defendant.' CrRLJ 1.1. Thus, a reasonable police officer would have understood that he could not exercise his discretion to book an individual in retaliation for that individual's First Amendment activity."); ***Ford v. City of Yakima***, 706 F.3d 1188, 1197-1204 (9th Cir. 2013) (Callahan, J., dissenting) ("This case raises an issue of first impression. It is not a case of retaliatory arrest. Nonetheless, our review is informed by cases suggesting that, in order to state a claim for retaliatory arrest, a plaintiff must show a lack of probable cause for the arrest. *See Reichle v. Howards*, —— U.S. ——, ——, 132 S.Ct. 2088, 2095 (2012) (noting that evidence of probable cause "could be thought similarly fatal to a plaintiff's claim that animus caused his arrest, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury"). *But see Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir.2006) (noting "that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation"). The police had probable cause to arrest Ford for violating the city noise ordinance and he does not argue otherwise. . . .Ford seeks monetary damages in an action under 42 U.S.C. § 1983 based on the assertion that the police officers violated his constitutional

rights when, after detaining him for violating the city noise ordinance, they decided to book him based, in part, on his post-detention statements, rather than just issuing a ticket. . . .[H]ere we are concerned not with speech that might give rise to an arrest, but with speech made after a person has been lawfully detained. This is a critical distinction. It is well settled that once an individual is lawfully detained, his or her rights may be restricted for legitimate penological and custodial reasons. . . . Accordingly, Ford's case is analogous to the situation presented in *Reichle*, where the Supreme Court noted that 'the right in question is not the general rule to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.'. . The Court held that it 'has never held that there is such a right.' *Id.* Similarly, Ford has no right not to be booked based on his post-detention statements where the booking is supported by probable cause. . . .The Supreme Court expressed a preference for requiring the showing of the absence of probable cause and approvingly cited decisions by other circuit courts requiring a showing of a lack of probable cause. . . .Rather than focus on whether an officer's action had a chilling effect on the plaintiff, the proper inquiry under cases such as *Reichle* is whether the officer had probable cause to book the detained individual in light of his statements. In other words, did Ford's post-detention statements give the officers reason to believe that Ford might harm himself or others, injure property, or breach the peace? . . . . If the officer has probable cause to book a detained individual based, in part, on the person's post-detention actions or statements, there is no causation; and thus, there is no cause of action for violation of a constitutional right. *See Hartman,* 547 U.S. at 260. The reasons underlying the Supreme Court's opinion in *Reichle* also require a showing of a lack of probable cause in a § 1983 action based on the plaintiff's post-detention speech. Ford's claim of retaliation presents a 'tenuous causal connection between the defendant's alleged animus and the plaintiff's injury' similar to that presented in retaliatory prosecution and arrest cases. . . . [U]nlike probable cause for an arrest or for prosecution, for which there is considerable case law, there is little judicial guidance on how to evaluate an officer's decision to book a lawfully detained individual. Thus, requiring the pleading and proving of a lack of probable cause is necessary to shield officers from being second guessed in civil actions brought by those they lawfully detained. . . . [E]ven if the statement in *Skoog* that a plaintiff need not plead the absence of probable cause survives the Supreme Court's statement in *Reichle* that it 'has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause,' . . . here, the district court's finding that the officers' 'desire to cause the chilling effect' was *not* a 'but-for cause' of Ford's booking terminates the case, even under *Skoog.* . . . Even if I were to agree with the majority that Ford had a constitutional right not to have the officers consider his comments while he was detained, which I do not, I could not agree that this right was 'clearly established.' That is to say, the officers were not on notice that deciding to book Ford based, in part, on his comments while detained, violated his rights under the First Amendment. . . . [T]he extent to which *Skoog* itself clearly established a cause of action for alleged police retaliation despite the presence of probable cause for the officer's action is doubtful. The clarity of this rule is further muddied by the spirit, if not the holding, of the Supreme Court's subsequent opinion in *Reichle*, 132 S.Ct. 2088. . . . The majority states that police officers have been on notice since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech. . . But all of the cases on which the majority relies concerned

actions to arrest or to search based on individuals actions as free private persons. . . Had the officers initially detained Ford based on his speech, the majority's broad axiom might apply. But that is not what Ford alleges. He alleges only that the officers decided to book him instead of giving him a ticket based on what he said *after he was legally detained.* . . . Because an officer's use of a detained person's statements raise substantially different considerations from an officer's reactions to the statements of a free person, the cases cited by the majority did not reasonably put the officers on notice that in telling Ford that he had talked himself into jail, they were chilling Ford's constitutionally protected right to free speech. If we are going to impose such etiquette upon peace officers, we must first clearly so hold, and not expect them to glean such a 'vague' constitutional rule from Ninth Circuit cases that appear to be out of step, if not inconsistent, with recent Supreme Court decisions."); ***Tobey v. Jones***, 706 F.3d 379, 391 & n.6 (4th Cir. 2013) ("Taken together, it is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it. Thus, Mr. Tobey's right to display a peaceful non-disruptive message in protest of a government policy without recourse was clearly established at the time of his arrest. . . .[E]ven though the dissent purports to understand factually analogous precedent is not a prerequisite for finding that a right is clearly established, the entire dissent seemingly hinges on this very premise. Moreover, the unequivocal constitutional precedent provided Appellants with more than adequate notice that they cannot retaliate against Mr. Tobey for exercising his First Amendment rights. This is not an abstract principle but an irrefutable precept. . . . Appellants argue that because there is no case on-point detailing what is a reasonable restriction on speech in an airport screening area, Mr. Tobey's constitutional rights cannot be said to have been clearly established. . . . .While reasonableness in and of itself may be an ineffective guide as to whether a right is 'clearly established,' in this case there are clear constitutional parameters. It may be unclear as to what reasonableness entails in the abstract, but at a minimum, given well-established precedent, we know that it is *unreasonable* to effect an arrest without probable cause for displaying a silent, nondisruptive message of protest—which is what allegedly occurred here. Appellants even conceded at oral argument that it would have clearly been unlawful for them to seize Mr. Tobey if the text of the Fourth Amendment was printed on his t-shirt. We see no reason why the same clear principle should not apply here, as Mr. Tobey's allegations amount to the factual equivalent. Appellants cite *Reichle v. Howards,* 132 S.Ct. 2088 (2012) as supporting their argument that Mr. Tobey's constitutional rights were not clearly established, but in doing so, miss the mark completely. In *Reichle,* an appeal from *summary judgment,* the Supreme Court found that it was not clearly established that a plaintiff could make out a cognizable First Amendment claim for an arrest that was supported by probable cause. . . . *Reichle* does not apply here because Mr. Tobey specifically alleges that his arrest was *not* supported by probable cause, and 'probable cause or its absence will be at least an evidentiary issue in practically all [ ] cases.' *Hartman v. Moore,* 547 U.S. 250, 265 (2006). At this stage in the litigation, of course, we must credit Mr. Tobey's allegation that Appellants arrested or caused him to be arrested without probable cause. He has, therefore, satisfied the requirement in *Hartman* and *Reichle* to plead an absence of probable cause."); ***Tobey v. Jones***, 706 F.3d 379, 400, 401 (4th Cir. 2013) (Wilkinson, J., dissenting) ("Tobey's complaint. . . alleged a violation of the Fourth Amendment as well as the First, and for many of the reasons noted above, the district court rightly

dismissed Tobey's Fourth Amendment claim, describing defendants' decision to summon local law enforcement as 'eminently reasonable.'. . This conclusion should have led it to dispose of Tobey's First Amendment claim as well. For just last Term, the Supreme Court held that, notwithstanding the First Amendment's general prohibition against retaliatory arrests, 'the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause' is not clearly established for purposes of qualified immunity, reasoning that any inference of impermissible causation is severely undermined by the existence of probable cause. . . .The same conclusion applies here: the causation element of Tobey's First Amendment claim is undermined, if not vitiated, by the fact that defendants' actions were reasonable under the Fourth Amendment. In light of *Reichle*, then, it was not clearly established that these same actions violated the First Amendment. The majority responds by pointing to Tobey's allegation that defendants' actions were not supported by 'probable cause.'. . The problem with this argument is that neither Tobey nor the majority cites a single case holding that probable cause is the relevant standard governing the decision by an official who does not have arresting authority, such as a TSA agent, to refer someone to another official who does. And any confusion regarding the appropriate Fourth Amendment standard only bolsters the conclusion that defendants' alleged constitutional violation was not clearly established. For the majority to hold otherwise, it must ignore conflicting precedents and expect lay TSA agents to have imposed on the spot a degree of coherence on First and Fourth Amendment jurisprudence that has eluded serious students of constitutional law. Qualified immunity exists to forestall precisely this result."); ***Moore v. Hartman***, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (per curiam) ("The Supreme Court has directed this court to determine whether our decision in *Moore v. Hartman*, 644 F.3d 415 (D.C.Cir.2011) ("*Moore V* "), holding that 'probable cause is not an element of the First Amendment right allegedly violated' in a retaliatory prosecution suit, *id.* at 423, remains good law in light of *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). There, in examining whether the law governing retaliatory *arrest* claims was clearly established *in the Tenth Circuit* in 2006, the Court expressly declined to decide whether the absence-of-probable-cause requirement identified in *Hartman v. Moore*, 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), is 'best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery.' *Reichle*, 132 S.Ct. at 2096 n. 6. Instead, the Court hinged its decision in *Reichle* on the fact that *Hartman* unsettled Tenth Circuit precedent that had conflated retaliatory arrest *and* retaliatory prosecution claims. *See id.* at 2094–96. Because it was uncertain whether the Tenth Circuit's retaliatory arrest law remained clearly established, the defendants in *Reichle* were entitled to qualified immunity. The Court in *Reichle* was thus agnostic on the issue central to our holding in *Moore V*. Because retaliatory arrest and retaliatory prosecution are distinct constitutional violations and because the precedent in *this* Circuit clearly established in 1988, when the challenged conduct by the Postal Inspectors took place, the contours of the First Amendment right to be free from retaliatory prosecution, nothing in *Reichle* changes our conclusion that the absence-of-probable-cause requirement is not 'an element of a First Amendment retaliation violation.' *Moore V*, 644 F.3d at 424. If the Postal Inspectors believe that the Court in *Reichle* meant to decide what it refused to decide in *Hartman* and bring to a halt this three decades old case involving evidence that, unlike in *Reichle* where probable cause was conceded, 'comes close to the proverbial

smoking gun,' *Moore v. Hartman,* 388 F.3d 871, 884 (D.C.Cir.2004) ("*Moore III"*), they are free to once again petition for certiorari and ask the Supreme Court if it wishes to end this saga."); ***Moore v. Hartman,*** 704 F.3d 1003, 1004 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("In its recent decision in *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012), the Supreme Court indicated that it is not clear whether the absence-of-probable-cause requirement identified in *Hartman v. Moore,* 547 U.S. 250, 252, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), is 'best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery.' *Reichle,* 132 S.Ct. at 2096 n. 6. Because the First Amendment law on this point is not clear, the defendants in this case cannot be said to have violated 'clearly established' First Amendment law. Therefore, the defendants are entitled to qualified immunity, and the suit may not proceed. I respectfully dissent."); ***Thayer v. Chiczewski***, 705 F.3d 237, 252, 253 (7th Cir. 2012) ("Thayer does not dispute that Officer Chiczewski had probable cause for his arrest. Probable cause, if not a complete bar to Thayer's First Amendment retaliatory arrest claim, provides strong evidence that he would have been arrested regardless of any illegitimate animus. *See Reichle v. Howards,* 132 S.Ct. 2088, 2095–97 (2012); *see also Hernandez v. Cook Cnty. Sheriff's Office,* 634 F.3d 906, 915 (7th Cir.2011) ("[E]vidence of probable cause may act as highly valuable circumstantial evidence that the complained-of conduct would have occurred even without a retaliatory motive.") (quotations omitted). The record shows that Thayer's refusal to disperse, not his speech, was the 'but for' cause of his arrest. But even if the record permitted a competing inference in favor of Thayer, Officer Chiczewski is entitled to qualified immunity. . . . The case law is unsettled on whether probable cause is a complete bar to First Amendment retaliatory *arrest* claims. The Supreme Court has said that it is a bar to retaliatory *prosecution* claims. *See Hartman,* 547 U.S. at 261. We have not resolved the issue, *see Hernandez,* 634 F.3d at 915 (citing a 2002 case from this circuit), and other circuits are split, *see, e.g., Skoog v. Cnty. of Clackamas,* 469 F.3d 1221, 1232 & n. 31 (9th Cir.2006) (setting forth circuit split). . . . Based on the Court's decision in *Reichle,* Officer Chiczewski is entitled to qualified immunity. . . . A clearly established right is one that is sufficiently clear such that 'every reasonable official would have understood that what he is doing violates that right.'. . As the Supreme Court held in *Reichle,* the 'clearly established' standard is not met in this case because neither our circuit nor the Supreme Court has 'recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'. . . Lyttle similarly argues that Officers Killackey and Shields arrested him in retaliation for exercising his free speech rights to march down the sidewalk of Michigan Avenue with an anti-war sign. We found that the officers had *arguable* probable cause to arrest Lyttle under subsection (d) and we see no reason to distinguish *Reichle* on that basis. In any event, the record is void of evidence showing that the officers acted with retaliatory animus in arresting him."); ***Storey v. Taylor***, 696 F.3d 987, 997 (10th Cir. 2012) ("The court below found Storey's arrest was lawful. It also found that when an arrest is lawful, 'then there is no but-for causation for a related tort requiring a retaliatory motive.'. . Thus, the court applied qualified immunity and granted summary judgment. This result was consistent with a recent Supreme Court opinion holding that, in the absence of but-for causation, the arresting officer is entitled to qualified immunity from a retaliatory-arrest claim. *Reichle v. Howards,* —— U.S. ——, 132 S.Ct. 2088, 2096, 182 L.Ed.2d 985 (2012). But, as discussed above, Storey's arrest was unlawful because

Taylor lacked probable cause. Thus, the question becomes whether, in light of the evidence, a reasonable jury could conclude that Taylor's retaliatory motive was a but-for cause of Storey's arrest. Since the district court did not answer this question, we remand this issue for further consideration."); ***Marcilis v. Township of Redford***, 693 F.3d 589, 604, 605 (6th Cir. 2012) ("[W]here there is probable cause to file a criminal complaint, a plaintiff will be unable to prevail on retaliation claim. . . Because we find that there was probable cause to file a criminal complaint against Marcilis II, we find that the district court did not err in granting the police officers' motion for summary judgment on the Marcilises' claim of retaliation in violation of the First Amendment."); ***Galarnyk v. Fraser***, 687 F.3d 1070, 1076 (8th Cir. 2012) ('In *McCabe*, we held the '[l]ack of probable cause is a necessary element of' a First Amendment retaliatory arrest claim. . . In *Reichle v. Howards*. . . the Supreme Court determined 'two federal law enforcement agents [were] immune from suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime.' The Supreme Court concluded 'that, at the time of [the defendant's] arrest [in 2006], it was not clearly established that an arrest supported by probable cause could violate the First Amendment.'. . The Supreme Court declined to decide 'whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest,'. . . leaving our conclusion in *McCabe* intact. Accordingly, the district court did not err in holding the presence of probable cause to arrest Galarnyk for trespass defeated Galarnyk's First Amendment retaliatory arrest claim.'); ***Primrose v. Mellott***, 541 F. App'x 177, 180 n.2 (3d Cir. 2013) ("In any event, the jury found that the Mellott's action was supported by probable cause. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Supreme Court held that a First Amendment retaliatory *prosecution* claim could not stand when probable cause supporting the underlying criminal charge has been found. . . The Court considered but declined to reach whether *Hartman's* logic also applied to First Amendment retaliatory *arrest* claims in *Reichle v. Howards*, 132 S.Ct. 2088 (2012). The Court did, however, hold that it was not clearly established that 'an arrest supported by probable cause could give rise to a First Amendment violation,' and that the defendant police officers were therefore entitled to qualified immunity—despite pre-*Hartman* Tenth Circuit precedent that probable cause did not foreclose a retaliatory arrest claim. We have not decided whether the logic of *Hartman* applies to retaliatory arrest claims, and so it appears that Mellott would be entitled to qualified immunity on the First Amendment claim.").

See also ***Phillips v. Blair***, No. 2:16-CV-880, 2018 WL 4681442, at *7 n.3 (S.D. Ohio Sept. 28, 2018) ("Defendants' failure to establish that probable cause existed is sufficient to defeat summary judgment. The Court therefore need not address at this juncture whether it was clearly established law at the time of the arrest in 2014 that there exists a specific Constitutional right to be free from a retaliatory arrest that is otherwise supported by probable cause. It notes without deciding, however, that there appears to have been a coalescence of law in the Sixth Circuit in recent years that an arrest supported by probable cause could nevertheless violate the First Amendment."); ***Marsh v. Town of East Hartford***, No. 3:16-CV-928 (SRU), 2017 WL 3038305, at *6 (D. Conn. July 18, 2017) ("Vanek argues that Marsh's First Amendment retaliation claim must fail because her arrest was supported by probable cause. The Supreme Court has affirmed

that the existence of probable cause is a complete defense to a claim of retaliatory prosecution, but has not addressed whether the same is true with respect to retaliatory arrests. *See Hartman v. Moore*, 547 U.S. 250, 262 (2006); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012). Some courts have distinguished between retaliatory arrest claims and retaliatory prosecution claims, and have held that the existence of probable cause is not necessarily a *per se* bar to a retaliatory arrest claim. *See Valencia v. De Luca*, 2014 WL 11430951, at *19 (D.N.M. Aug. 26, 2014), *aff'd*, 612 F. App'x 512 (10th Cir. 2015) ("Defendants interpret the holding in *Reichle* too broadly when they argue that ... [the existence of] probable cause trumps a retaliatory arrest claim."), *McCoy v. City of Columbia*, 929 F. Supp. 2d 541, 561 (D.S.C. 2013) (allowing plaintiff to proceed with First Amendment retaliation claim despite the fact that the arresting officer had probable cause to arrest him). The Second Circuit is not one of those courts, and has instead held that there is no right to be free from a retaliatory arrest that is otherwise supported by probable cause. *See Abeyta v. City of N.Y.*, 588 F. App'x 24, 25 (2d Cir. 2014); *Fabrikant v. French*, 691 F.3d 193, 218 (2d Cir. 2012). That holding is in accordance with its long line of precedent that a retaliatory arrest claim may only proceed if the plaintiff can also establish a false arrest claim. *See Blue v. Koren*, 72 F.3d 1075, 1083 n.5 (2d Cir. 1995); *see also Coffey v. Callaway*, 86 F. Supp. 3d 111, 123–24 (D. Conn. 2015). Because the absence of probable cause remains an essential element of a First Amendment retaliation claim, at least within this Circuit, summary judgment is granted on Marsh's retaliatory arrest claim."); ***Higginbotham v. Sylvester***, No. 14-CV-8549 (PKC), 2016 WL 6496253, at *5-6 (S.D.N.Y. Nov. 2, 2016) ("The existence of probable cause. . .will defeat a First Amendment claim 'premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive ....' *Fabrikant v. Frenc*h, 691 F.3d 193, 215 (2d Cir. 2012). Here, defendants are entitled to summary judgment as to the First Amendment retaliation claim based on the Court's conclusion that probable cause existed to arrest Higginbotham. Higginbotham argues that his First Amendment retaliation claim could survive despite a finding of probable cause, because 'the arrest was premised solely on the fact that the police wanted to prevent his taping of the escalating nature of the police interaction with the protestors.'. . Put another way, Higginbotham suggests that in the face of a probable cause finding, liability for a First Amendment retaliation claim can still arise where an arrest is solely premised on the exercise of the plaintiff's First Amendment right. Higginbotham's argument appears to be directly contradicted by Second Circuit precedent, which states that '[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government.' *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992). Moreover, both the video and picture evidence demonstrate that there were dozens of camerapersons recording the police interactions with protestors at the very moment that Higginbotham was doing so. . . On these facts, no reasonable jury could conclude that defendant officers targeted Higginbotham, and no other cameraperson, for exercising his First Amendment rights. . . No reasonable juror could conclude that the reason that police officers arrested Higginbotham was to suppress his First Amendment rights. Accordingly, defendants' motion for summary judgment on the basis of their affirmative defense is granted and Higginbotham's First Amendment retaliation claim is dismissed."); ***Marlin v. City of New York***, No. 15 CI V. 2235 (CM), 2016 WL 4939371, at *14 (S.D.N.Y. Sept. 7, 2016) ("Plaintiff insists that Defendants

arrested him in order to prevent and discourage Plaintiff from engaging in protected First Amendment conduct. The existence of probable cause will defeat a First Amendment claim, 'premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory move,' *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012). 'An individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause, [even if it is] in reality an unsuccessful attempt to deter or silence criticism of the government.' *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992). I have already concluded, based on the facts pleaded in the FAC and those to which Plaintiff testified at his pre-answer deposition, that the officers had probable cause to arrest him. I must, therefore, dismiss Plaintiff's First Amendment retaliation claim."); ***Southerland v. Bedwell***, No. 15-3117, 2016 WL 3004618, at *10 (C.D. Ill. May 24, 2016) ("Although the United States Supreme Court has determined that probable cause is a bar to First Amendment retaliatory prosecution claims, the law remains unsettled as to whether it is a bar to First Amendment retaliatory arrest claims. *See Thayer v. Chiczewski*, 705 F.3d 237, 252 (7th Cir. 2012) (citing *Hartman v. Moore*, 547 U.S. 250, 261 (2006)); *Reichle v. Howards*, 132 S. Ct. 2088, 2095-97 (2012). The Supreme Court has never held there is a 'right to be free from a retaliatory arrest that is otherwise supported by probable cause.' *Reichle*, 132 S. Ct. at 2094. Accordingly, that right is not clearly established. Consequently, the Officers would be entitled to qualified immunity if the arrest was supported by probable cause."); ***Kean v. City of Manchester***, No. 14-CV-428-SM, 2016 WL 447482, at *8 (D.N.H. Feb. 4, 2016) ("Kean has not sufficiently identified any 'controlling authority or robust consensus of persuasive authority' suggesting that, in September of 2012, it was clearly established that he had a right to be free from a retaliatory arrest that is also based upon probable cause. . . As noted, Kean's arrest for false personation of a police officer was supported by probable cause. Consequently, even if Kean could have demonstrated that his arrest violated his First Amendment rights, Officer McKenny would be entitled to the protections afforded by qualified immunity on Kean's retaliation claim."); ***Estate of Anastacio Hernandez-Rojas v. United States***, No. 11CV522 L (DHB), 2015 WL 9592533, at *3-4 (S.D. Cal. Dec. 31, 2015) ("In their summary judgment motions, defendants contended that qualified immunity bars plaintiff's First Amended retaliation claim because only the Fourth Amendment governs the use of force during an arrest. In *Graham v. Connor*, 490 U.S. 386 (1988), the Court provided that 'all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment ....'. . . The Court however found that plaintiffs' retaliation claim alleged a First Amendment violation relying on *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006) and *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). Further, the Court found that the right based on retaliation was clearly established. This is the type of legal issue that is appropriate to be taken on appeal in the area of qualified immunity, *i.e.* it is an 'abstract issu[e] of law' relating to qualified immunity. Accordingly, the Court finds that the appeal of plaintiffs' first amendment retaliation claim is appropriately taken at this time. . . . Because at least one issue on appeal is appropriately before the Court of Appeals, the Court finds that defendants' appeal is not frivolous. As an appeal divests the district court of jurisdiction, defendants' motion to stay is redundant: the case is stayed pending a decision from the appellate court."); ***Prip v. Erwin***, No. 14-CV-552-WMC, 2015 WL 4394526, at *8 (W.D. Wis. July 16,

2015) ("[N]either the Supreme Court, nor the Seventh Circuit (as far as this court can tell), has held that probable cause would not bar a First Amendment retaliatory arrest claim. Certainly, on January 17, 2013, the law was (and remains) unsettled on this question. Accordingly, the court will grant qualified immunity to defendants for any First Amendment claim premised on the events on January 17, 2013, at least in light of the court's earlier finding that plaintiff has alleged facts sufficient to cause a reasonable officer to believe that he was engaging in criminal conduct at the time of that arrest. . . As for the July 25, 2013, arrest, however, plaintiff *has* alleged sufficient facts to support a false arrest claim. . . At least at the motion to dismiss stage, therefore, plaintiff's First Amendment retaliation claim will go forward."); ***Harsey v. Marzol,*** No. 3:13-CV-2036-TLW, 2015 WL 4167948, at *7 (D.S.C. July 9, 2015) ("In this case, the court has determined that the defendants had probable cause to arrest Harsey for disorderly conduct. Therefore, to the extent the existence of probable cause prohibits a claim for retaliatory arrest under the First Amendment, the defendants' motion for summary judgment should be granted. . . Moreover, as ably argued by the defendants, less than a year after Harsey's arrest, the Supreme Court held the law regarding retaliatory arrests in violation of the First Amendment to be unsettled. [citing *Reichle*] Thus, it 'was at least arguable that *Hartman*'s rule extended to retaliatory arrests' at the time the defendants arrested Harsey. . . Accordingly, the court finds that, to the extent Harsey's First Amendment retaliatory arrest claim is not precluded by the finding of probable cause to support the arrest, the defendants are entitled to qualified immunity. . . As such, the defendants' motion for summary judgment should be granted as to Harsey's First Amendment claim."); ***Safa v. City of Philadelphia***, No. 2:13-CV-5007-DS, 2015 WL 3444264, at *11 (E.D. Pa. May 29, 2015) ("In a Section 1983 First Amendment retaliation claim for retaliatory *prosecution,* the Supreme Court has held that a plaintiff must prove the absence of probable cause. . . Whether one must establish the absence of probable cause in a First Amendment retaliation claim arising out of an *arrest* is less certain. The arrest here occurred in July 2011. . . At that time, and still today, it remains unclear whether an *arrest,* supported by probable cause, violates the Constitution when pursued out of retaliatory animus. . . Straup asserts that this legal uncertainty protects him from civil liability. . . . Given that it remains unclear in this Circuit whether a retaliatory arrest claim supported by probable cause is actionable, Straup is protected by qualified immunity if the arrests, even pursued out of retaliatory animus, were supported by probable cause. . . Thus, while Plaintiff might theoretically prevail on a retaliatory *arrest* claim in the face of an arrest based on probable cause by showing retaliatory animus and causation, Straup would be protected by qualified immunity given the legal uncertainty as to whether a lack of probable cause is an essential element of this cause of action."); ***Campbell v. City of Milpitas***, No. 13-CV-03817-BLF, 2015 WL 1359311, at *7-8 (N.D. Cal. Mar. 25, 2015) ("Plaintiffs' First Amendment claim cannot be resolved under the 'clearly established' prong of the qualified immunity inquiry. To the contrary, '[p]olice officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech.'. . In 2006, a panel of the Ninth Circuit held that the existence of probable cause for a seizure does not preclude a First Amendment claim that the seizure was retaliatory. . . Although the present case involves an investigative stop for which there was reasonable suspicion. . . rather than a seizure for which there was probable cause, the rationale of *Skoog* clearly would apply. Based upon *Skoog* and numerous other cases establishing that a

deprivation of First Amendment rights occurs when an officer deters or chills political speech, . . . the Officer Defendants had 'fair warning' that conducting an investigative stop in retaliation for, or to chill, protest activities would violate the First Amendment despite the existence of reasonable suspicion. Thus in order to establish the existence of qualified immunity with respect to Plaintiffs' First Amendment claim, the Officer Defendants must demonstrate that they did not violate Plaintiffs' constitutional rights. . . . Based upon this record, and even drawing all reasonable inferences in Plaintiffs' favor, no rational jury could find for nonmoving parties Campbell and Andersen. . . Accordingly, because the Officer Defendants have demonstrated an absence of evidence in the record to support a claim that they violated Plaintiffs' clearly established First Amendment rights, and Plaintiffs have failed to show the existence of a triable issue of material fact that is supported by the evidence, the Officer Defendants are entitled to qualified immunity on Plaintiffs' First Amendment claim."); ***Laning v. Doyle***, No. 3:14-CV-24, 2015 WL 710427, at *15-16 (S.D. Ohio Feb. 18, 2015) ("In *Hartman v. Moore,* 547 U.S. 250 (2006), the Supreme Court held that lack of probable cause was an element of a retaliatory *prosecution* claim. However, neither the Supreme Court nor the Sixth Circuit has yet held that lack of probable cause is a required element in a First Amendment claim of retaliatory *arrest.* . . As explained in *Reichle,* retaliatory prosecution claims are distinguishable from retaliatory arrest claims because 'the intervening decision of the third-party prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury.'. . In *Barnes,* the Sixth Circuit held that the plaintiff's First Amendment retaliation claim failed because the officers had probable cause to seek an indictment and arrest the plaintiff. However, that case is factually distinguishable because, as the court noted, 'the officers themselves initiated the grand jury proceedings,' and the plaintiff was arrested following the indictment. . .In cases involving a 'commonplace' claim of retaliatory arrest prior to prosecution, the Sixth Circuit has subsequently twice deferred resolution of the issue of whether lack of probable cause is a required element. . . In short, the lack of probable cause is not yet a recognized element of a First Amendment claim of retaliatory arrest. . . Moreover, the fact that the law concerning *this* particular issue is unsettled is largely irrelevant to the qualified immunity analysis. . . Viewed in the light most favorable to Laning, the allegations in the Amended Complaint support a finding that Officer Doyle's conduct violated Laning's clearly established right to be free from retaliatory arrest for verbally challenging his conduct. Accordingly, Officer Doyle is not entitled to qualified immunity on the First Amendment claim of retaliatory arrest."); ***Coffey v. Callaway***, No. 3:11-CV-784, 2015 WL 711171, at *12-13 (D. Conn. Feb. 19, 2015) ("The existence of probable cause for that arrest is explained in Part II.A. of this opinion. Its effect is to preclude a claim that the arresting officer was motivated by illicit purposes. The Second Circuit made that plain in *Curley v. Village of Suffern,* 268 F.3d 65 (2d Cir.2001). . . .If the effect of probable cause is to preclude judicial inquiry into an arresting officer's motivation—clearly the rule in this Circuit—then an arrestee cannot ask about or attempt to prove that the officer's 'underlying motive' was retaliatory, or indeed anything else. The practical consequence of that rule is this: A finding that an arresting officer had probable cause for the arrest, or qualified immunity from subsequent suit on account of it, precludes as a matter of law a claim by the arrestee that the arrest was motivated by an intent to retaliate for the arrestee's exercise of his constitutional rights. This Court has made those alternative findings in the case at bar."); ***Grooman v. Clackamas***

Cnty., No. 3:13-CV-00519-HA, 2014 WL 6460840, at *9, *13 (D. Or. Nov. 13, 2014) ("Under the first prong of the qualified immunity test, plaintiff has adequately alleged that her exclusion and arrest violated her First Amendment rights . . . .Under the second prong of the qualified immunity test, the Supreme Court has held that 'it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.' *Reichle v. Howards,* 132 S.Ct. 2088, 2097 (2012). The Ninth Circuit has recently followed such precedent in holding that officers are entitled to qualified immunity from a First Amendment claim when the plaintiff's arrest was supported by probable cause. *Acosta v. City of Costa Mesa,* 718 F.3d 800, 825 (9th Cir.2013). Therefore, the individual defendants may not be entitled to qualified immunity if a genuine issue of material facts remains as to whether the officers had probable cause to arrest plaintiff. . . . In sum, defendants have failed to demonstrate that no issue of material fact remains as to whether the totality of the circumstances demonstrates that the arresting officers had probable cause to exclude plaintiff from the park. Consequently, an issue of fact also remains as to whether Christensen and Hattan are entitled to qualified immunity on plaintiff's First Amendment claim."); ***Ronkin v. Vihn***, 71 F. Supp. 3d 124 (D.D.C. 2014) ("It does not stand to reason that this Court can find that it was 'clearly established' at the time of the plaintiff's 2010 arrest that she had 'a First Amendment right to be free from a retaliatory arrest that is supported by probable cause,' *see Reichle,* —— U.S. at ––––, 132 S.Ct. at 2093, when this Circuit 'expressly declined to decide' this issue, *Moore,* 704 F.3d at 1004. Thus, because the constitutional right 'to be free from a retaliatory arrest that is supported by probable cause,' was not clearly established at the time of the plaintiff's arrest, the Court must grant the defendant's motion for summary judgment on the grounds that he is entitled to qualified immunity as to this claim."); ***Estate of Hernandez-Rojas ex rel. Hernandez v. United States***, 62 F. Supp. 3d 1169, 1179 (S.D. Cal. 2014) ("It is clearly established that police officers may not use their authority to retaliate against protected speech, even if probable cause to arrest exists. *Ford* at 1195–96. In *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir.1990), the Court held that it was clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights. And *Skoog v. Cnty. of Clackamas,* 469 F.3d 1221, 1235 (9th Cir.2006) 'clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action.' Thus, Ninth Circuit precedent has long provided notice to law enforcement officers that it is unlawful to use their authority to retaliate against individuals for their protected speech."); ***Hannibal v. Sanchez***, 13-CV-640 ERK MDG, 2014 WL 3845172, *3, *6 (E.D.N.Y. Aug. 5, 2014) ("Officers Sanchez and Newman stand in the same position as the defendants in *Reichle.* The law was not clearly established at the time they arrested Hannibal. Thus, they are entitled to prevail if there was probable cause for Hannibal's arrest even if the arrest was made in retaliation for the exercise of his First Amendment rights. Moreover, if there was probable cause for Hannibal's arrest, it would also resolve his false arrest claims asserted under the Fourth Amendment and New York law. . . . This is not the first case in which a passenger has found himself arrested and charged with a crime for making a less than serious suggestion that he possessed a bomb at an airport. *See e.g., United States v. Rutherford,* 332 F.2d 444 (2d Cir.1964); *United States v. Allen,* 317 F.2d 777 (2d Cir.1963). Nevertheless, while the discretion vested in law enforcement officers to make arrests in cases such as this may be open to question, the applicable statutes, including 18 U.S.C. § 35 in

addition to the New York statutes at issue here, are premised on the assumption that the statements upon which the arrests are predicated are not true. Under these circumstances, particularly in a nonpublic forum such as an airport, *Int'l Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 680 (1992), where restrictions on speech 'need only be reasonable and viewpoint neutral,' *Make the Rd. by Walking, Inc. v. Turner,* 378 F.3d 133, 143 (2d Cir.2004), I am unable to say that the arrest of Hannibal violated the Constitution or New York law. Accordingly, the defendants' motions for summary judgment are granted."); ***O'Brien v. O'Hara***, No. 12–10600–GAO, 2014 WL 1334168, *9 (D. Mass. Mar. 31, 2014) (*Order Adopting Report And Recommendation*) ("Prior to reaching the merits of the claim, the Court may first address the question of qualified immunity. . . .The defendants argue that the instant case is one where the Court may "quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.". . . The *Hartman* opinion issued on April 26, 2006. From that date until at least the issuance of the *Reichle* decision on June 4, 2012 . . . the law was not clearly established as to whether a retaliatory arrest claim based on the First Amendment was viable when probable cause existed to support the arrest. . . . Indeed, the Supreme 'Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.' *Reichle,* 132 S.Ct. at 2093."); ***Picray v. Duffitt***, No. 6:12–cv–00944–MC, 2014 WL 715519, *8 (D. Or. Feb. 24, 2014) ("As indicated *supra* § II(A), '[t]aken in the light most favorable to [Picray], the facts establish that the officers' alleged conduct violated his right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action.'. . 'Whether [this] right is clearly established for purposes of qualified immunity depends substantially upon the level of generality at which the relevant legal rule is to be identified.'. . 'The relevant inquiry is whether, at the time of the officers' action, the state of the law gave the officers fair warning that their conduct was unconstitutional.'. . 'At the time the officers acted in [2010], the law in this Circuit gave fair notice that it would be unlawful to jail [Picray] in retaliation for his First Amendment Activity.'. . Accordingly, defendants are DENIED summary judgment as to Duffitt and Ridler."); ***Morse v. San Francisco Bay Area Rapid Transit District (BART)***, No.: 12-cv-5289 JSC, 2014 WL 572352, *7, *12-*15 (N.D. Cal. Feb. 11, 2014) (" 'In this Circuit, an individual has a right "to be free from police action motivated by retaliatory animus but for which there was probable cause."' *Ford,* 706 F.3d at 1193 (quoting *Skoog v. Cnty. of* Clackamas, 469 F.3d 1221, 1235 (9th Cir.2006)). To establish a claim of retaliation in violation of the First Amendment, a plaintiff must demonstrate that the officer's conduct 'would chill a person of ordinary firmness from future First Amendment activity.'. . In addition, the evidence must enable a plaintiff ultimately to prove that the officer's desire to chill his speech was a but-for cause of the officer's allegedly unlawful conduct. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916–17 (9th Cir.2012) (en banc). . . . In this Circuit, '[p]olice officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech.' *Ford,* 706 F.3d at 1195. 'Moreover, [the Ninth Circuit's] 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, *even if probable cause existed for that action*.' *Id.* at 1195–96 (emphasis added). Thus, because whether Hartwig retaliated against Plaintiff for his protected speech is a question of disputed fact, qualified immunity is inapplicable, even if probable cause existed for

Plaintiff's arrest. Defendants' argument that *Skoog* no longer governs in light of the Supreme Court's *Reichle* decision is unpersuasive. In *Ford,* the Ninth Circuit specifically applied *Skoog's* holding to a post *Reichle* case in confirming that since 2006 it has been clearly established in this Circuit that retaliatory police conduct is actionable even if the officer's conduct was supported by probable cause. Further, Defendants fail to explain how *Reichle* overruled *Skoog*. In *Reichle,* the Court found that there was not a clearly established right to be free from a retaliatory arrest supported by probable cause under either Supreme Court precedent or Tenth Circuit precedent. The Court did not address the question of whether the absence of probable cause is necessary to state a claim for retaliatory arrest. . . Although not supported by any authority, Defendants' argument appears to be that the Supreme Court's conclusion that there is no clearly established right under its precedent precludes the Ninth Circuit from looking to its own precedent to see if the right was clearly established there. That is not the law. Although '[t]he Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury,' in the Ninth Circuit, the inquiry begins by looking to see '[i]f the right is clearly established by decisional authority of the Supreme Court *or* this Circuit.'. . If it is, '[the] inquiry should come to an end.'. . Thus, while the particular right at issue here has not been clearly established by the Supreme Court, it has been clearly established by the Ninth Circuit in *Skoog,* which ends the inquiry. Even in *Reichle,* the Supreme Court–'[a]ssuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case'– separately considered Tenth Circuit precedent to see if the right was clearly established under its precedent. . . Further, to the extent Defendants argue that *Acosta v. City of Costa Mesa,* 718 F.3d 800 (9th Cir.2013) (per curiam) overruled *Skoog,* the Court is unpersuaded. Without explanation, the *Acosta* court cited *Reichle* for the proposition that 'if Acosta's seizure and arrest were supported by probable cause, the officers are entitled to qualified immunity.' 718 F.3d at 825. As explained above, *Skoog* is binding precedent that since 2006 it has been clearly established in this Circuit that a person has a right to be free from a retaliatory arrest even if supported by probable cause. Generally, '[o]nly the en banc court can overturn a prior panel precedent.' *United States v. Parker,* 651 F.3d 1180, 1184 (9th Cir.2011). And while a three judge panel 'may reexamine normally controlling circuit precedent' where 'the reasoning or theory of [ ] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority,' *Miller v. Gammie,* 335 F.3d 889, 893 (9th Cir.2003), nothing in *Reichle* is 'clearly irreconcilable' with *Skoog* or the rule in this Circuit that the primary source for determining whether a right is clearly established is 'decisional authority of the Supreme Court or this Circuit,' *Boyd,* 374 F.3d at 781. The *Acosta* court provides no analysis as to why *Skoog* would not still apply. Further, the Ninth Circuit's decision in *Ford* –which included a dissent heavily reliant on *Reichle* –explicitly recognized *Skoog* as having clearly established the right at issue in this case. Even after *Acosta,* the Ninth Circuit has continued to cite *Skoog's* holding as good law. *Martin v. Naval Criminal Investigative Serv.,* —– F. App'x ——–, 2013 WL 4757224, at *1 (9th Cir. Sept. 5, 2013) (unpublished) ("Our precedent has long provided notice to law enforcement officers 'that it is unlawful to use their authority to retaliate against individuals for their protected speech,' *Ford,* 706 F.3d at 1195, 'even if probable cause exists for' the challenged law enforcement conduct, *Skoog,* 469 F.3d at 1235."). At oral argument, Defendants argued that

Acosta and the Ninth Circuit's unpublished opinion in *Adkins v. Limtiaco*, 537 F. App'x 721 (9th Cir.2013). . . would at least cause a reasonable officer to doubt that *Skoog* was still the law. In other words, even if *Acosta* was wrongly decided, an officer could nevertheless rely on its holding to reasonably believe that probable cause negated a retaliatory arrest claim. Defendants' argument is unpersuasive because Hartwig's conduct occurred in 2011– before *Acosta, Adkins,* and even *Reichle*. . . At the time of the arrest, it was indisputable that *Skoog* was the law in the Ninth Circuit and thus Hartwig was given fair warning that his alleged conduct was unconstitutional. . . . . [On Fourth Amendment claim,] [b]ecause Plaintiff has failed to demonstrate a material factual dispute as to whether Hartwig had probable cause to arrest Plaintiff, Defendants' motion for summary judgment on Plaintiff's unlawful arrest and false imprisonment claims are GRANTED. Defendants' motion for summary judgment on Plaintiff's Fourth Amendment unlawful arrest claim is granted for the additional reason that Hartwig is entitled to qualified immunity even if there were a dispute as to probable cause."); ***Lewis v. City of New York***, No. 12–CV–2836 (RRM)(RML), 2013 WL 6816615, *10 (E.D.N.Y. Dec. 24, 2013) ("[T]he Supreme Court has expressly declined to opine concerning whether a retaliatory arrest claim may lie despite the presence of probable cause to support the arrest. . . Courts in this Circuit, however, have held that where defendant officers had probable cause to arrest the plaintiff, the court need not inquire into the underlying motive for the arrest."); ***Patterson v. United States***, 999 F.Supp.2d 300, (D.D.C. 2013) ("Defendants' First Amendment arguments miss the mark for two primary reasons: first, while it is true that the Supreme Court has not explicitly authorized a First Amendment *Bivens* action, the D.C. Circuit has, *see Dellums v. Powell*, 566 F.2d 167 (D.C.Cir.1981); and second, even if there is no First Amendment right to be free from retaliatory arrest in the *presence* of probable cause, it is well established that where, as here, there is an allegation of retaliatory arrest in the *absence* of probable cause, the plaintiff has a viable First Amendment claim. . . .What is more, the D.C. Circuit is not alone among the courts of appeals in recognizing a *Bivens* claim premised on a First Amendment violation. To the contrary, since *Dellums* was decided over three decades ago, other circuits have embraced its rationale. [collecting cases] Defendants here question the continued viability of *Dellums* in light of the Supreme Court's recent decision in *Reichle*. . . . *Reichle* involved a circumstance in which there *was* probable cause to arrest the plaintiff based on his conduct during the event in question; the Supreme Court simply did not consider any claim for retaliatory arrest in the *absence* of probable cause. . . Moreover, the *Reichle* Court held only that a First Amendment right not to be subjected to retaliatory arrest when there is probable cause was not 'clearly established' in the Tenth Circuit, . . . *not* that no such right exists. Most important, as described above, the D.C. Circuit has expressly recognized that there is a First Amendment right not to be arrested in retaliation for one's speech where there is otherwise no probable cause for the arrest, *see Dellums*, 566 F.2d at 195–96, and this Court cannot ignore the D.C. Circuit's binding precedent. . . . Consequently, despite Defendant's arguments to the contrary, this Court concludes that Patterson's First Amendment *Bivens* claim—which alleges that Patterson was arrested without probable cause and 'solely on account of the content of his speech'. . . is actionable."); ***Donahoe v. Arpaio***, 986 F. Supp. 2d 1091, 1136-37 (D. Ariz. 2013) ("[T]he Supreme Court has not recognized a constitutional right to be free of either retaliatory arrest or retaliatory prosecution if they are supported by probable cause. [citing *Reichle* and *Hartman*] Notwithstanding this

precedent, the Ninth Circuit concluded in *Ford v. Yakima* that its '2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action.' 706 F.3d 1188, 1195–96 (9th Cir.2013). . . .Subsequently in *Ford,* the court reversed a grant of qualified immunity to a police officer after he booked and jailed a plaintiff for criticizing a traffic stop, which was supported by probable cause but which plaintiff believed was racially motivated. . . It noted that '[a]t the time the officers acted in 2007, the law in this Circuit gave fair notice that it would be unlawful to jail Ford in retaliation for his First Amendment activity.'. . Notwithstanding *Ford* and *Skoog,* one Ninth Circuit panel has subsequently held officers entitled to qualified immunity for making a retaliatory arrest because it was supported by probable cause. *See Acosta v. City of Costa Mesa,* 718 F.3d 800, 825 (9th Cir.2013) (quoting *Reichle* approvingly). This Court need not unravel the tangle of Ninth Circuit and Supreme Court precedents on probable cause in First Amendment retaliation claims. As discussed extensively above, a reasonable jury could find facts amounting to a lack of probable cause for the criminal prosecutions, the search, the arrest, and the civil RICO action. Recurring disputes of fact preclude finding probable cause as a matter of law. Therefore, summary judgment would have to be denied even if the cause of action requires lack of probable cause.")Whether Stapley must prove a lack of probable cause would not affect the ruling on these motions and need not be decided until the jury is instructed. And even then the jury might find lack of probable cause, thus mooting the question here and on appeal."); ***Credico v. West Goshen Police***, No. 13–1255, 2013 WL 6077168, *4 (E.D. Pa. Nov. 18, 2013) ("Credico's First Amendment retaliation claim fails under the second prong of the qualified immunity test. Credico bases his claim on the fact he was stopped in the graveyard for giving the middle finger and issued a citation. In *Reichle v. Howards* the Supreme Court found that it has never held there is a 'right to be free from a retaliatory arrest that is otherwise supported by probable cause.'. . In that case, the plaintiff asserted a claim for retaliatory arrest. The Court found uncertainty existed regarding whether the standard for retaliatory prosecution in violation of the First Amendment—whereby the claim is defeated by the existence of probable cause—extended to retaliatory arrest. Ultimately, because the plaintiff was arrested with probable cause and the right at issue was not clearly established, the officer in that case was entitled to qualified immunity from the plaintiff's § 1983 claims. As applied to Credico's claims, because the Supreme Court held the right to be free from a retaliatory arrest supported by probable cause is not clearly established, and as explained above, Detective Maurer had probable cause to issue a disorderly conduct citation to Credico, Detective Maurer is entitled to qualified immunity for this claim. The claim will be dismissed with prejudice because any amendment would be futile."); ***Miller v. City of Plymouth***, No. 2:09–CV–205 JVB, 2013 WL 5436910, *2 (N.D. Ind. Sept. 27, 2013) ("Plaintiffs also complain that the Court did not properly instruct the Jury as to the alleged First Amendment violation. In particular, they claim that it was an error for the Court to advise the jury that Mr. Miller could not proceed on his First Amendment claim if the Jury found that there was probable cause to arrest him. In doing so, they ignore *Reichle v. Howards,* 132 S.Ct. 2088 (2012). In that case, the Supreme Court held that Secret Service officers were protected by qualified immunity against plaintiff's claim that they arrested him in retaliation for his speech because the arrest was otherwise supported by probable cause. . . . In light of this opinion, this Court correctly instructed the Jury that if there was probable cause to

arrest Mr. Miller, the Jury did not need to consider Mr. Miller's First Amendment claim."); ***Gutierrez v. Cnty. of Los Angeles***, CV 10-7589-CAS PLAX, 2013 WL 3821602, *6, *7 (C.D. Cal. July 22, 2013) ("At least since 1990, police officers have been on notice that 'it is unlawful to use their authority to retaliate against individuals for their protected speech.'. . Subsequently, the Ninth Circuit's 2006 decision in *Skoog* established that even where probable cause justifies a search and seizure of an individual, an officer's actions may nonetheless be unlawful if the officer's primary motivation was to retaliate against an individual's exercise of his First Amendment rights. . . As the Ninth Circuit later held, '*Duran* clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action.'. . Based on the foregoing, a reasonable officer would have understood that he did not have the authority to detain an individual for over two hours in a patrol car in retaliation for that individual's First Amendment speech, even if the officer *could* have permissibly detained such individual pursuant to a valid warrant or incident to a search of the premises. . . It will be for the jury to decide whether the officers were motivated by a desire to retaliate for Hector Jr.'s protected speech or whether the officers acted pursuant to a valid, outstanding warrant. Accordingly, the Court finds that defendants are not entitled to summary judgment on the basis of qualified immunity from suit or judgment on the merits of plaintiff's First Amendment claim."); ***Abrami v. Town of Amherst***, No. 09–30176–DPWJ, 2013 WL 3777070, *11 (D. Mass. July 16, 2013) ("Little need be said of Abrami's claim that Humber arrested him in retaliation for exercising his First Amendment rights—specifically, in retaliation for criticizing the Amherst police department. As earlier discussed, Humber reasonably concluded that arresting Abrami was supported by probable cause to believe he had violated the Noise Bylaw. . . The Supreme Court recently confirmed that its April 2006 opinion in *Hartman v. Moore* . . .'injected uncertainty into the law governing retaliatory arrests.' [citing *Reichle v. Howards*]Thus at the time of Abrami's arrest in October 2006, 'it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation.'. . Regardless of whether a Fourth Amendment violation occurred, Humber is entitled to qualified immunity as to Abrami's First Amendment claim."); ***Smith v. Dixon***, No. 8:11–cv–02388–T–27TGW, 2013 WL 1651813, *6 (M.D. Fla. Apr.16, 2013) ("The existence of arguable probable cause for the arrest also defeats Plaintiff's claim for retaliation under the First Amendment. [citing *Reichle* and other cases]"); ***Cocroft v. Smith***, No. 10–40257–TSH, 2013 WL 1336304, *7 (D. Mass. Mar. 29, 2013) ("As to the false arrest claims, '[a] police officer may not base the decision to arrest upon conduct that is protected by the First Amendment. Whether a plaintiff must establish that the police lacked probable cause in order to state a claim for retaliatory arrest remains an open question. Perhaps as a result, the Supreme Court has recently stated that the right to be free from a retaliatory arrest that is also based upon probable cause has not been clearly established..... [However,] [o]fficers are not entitled to qualified immunity when making retaliatory arrests when they are not based on probable cause.' . . I find that there remains a genuine issue of material fact as to whether in the first instance, Smith arrested Cocroft for exercising her First Amendment rights—that is, whether he arrested her without probable cause. Therefore, Smith is not entitled to qualified immunity with respect to these claims. I will note, however, that if the facts at trial were instead to establish that Smith arrested

Cocroft in retaliation for exercising her First Amendment rights and—at the same time—he had probable cause to arrest her for her conduct, then he would be entitled to qualified immunity (because he would hot have violated a clearly establised right.)"); ***Holland v. City of San Francisco***, No. C10–2603 THE, 2013 WL 968295, *7, *8 (N.D. Cal. Mar. 12, 2013) ("A reasonable juror could infer from this testimony that Holland would not have been arrested or subjected to excessive force had it not been for her persistent questioning of the officers and verbal challenges to their authority. . . . Defendants also argue that the individual officers are entitled to qualified immunity because, they contend, it was not clearly established at the time of Holland's arrest that a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support her arrest. . . In support of this argument, Defendants cite to the Supreme Court's recent opinion in *Reichle v. Howards,* 132 S.Ct. 2088, 2093 (2012). In *Reichle,* the Court observed that it 'has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause,' and that the Tenth Circuit, where *Reichle* originated, likewise had not recognized that specific right. . . This case, by contrast, was brought in the Ninth Circuit, where at the time of Holland's arrest, it was clearly established that a First Amendment retaliatory arrest claim may lie even if the arrest is supported by probable cause."); ***Veth Mam v. City of Fullerton***, No. 8:11–cv–1242–JST (MLGx), 2013 WL 951401, *5, *6 (C.D. Cal. Mar. 12, 2013) ("Based on the record before the Court, the only difference between Mam and those near him was the cell phone being used to record. Moreover, the manner in which Mam was forced to the ground by a leg sweep is also circumstantial evidence of some animus towards Mam. Thus, a rational trier of fact could conclude that Hampton's seizure of Mam, though supported by probable cause, was motivated by Mam's videotaping-a protected activity. Hampton argues at length in his Motion that he is also entitled to qualified immunity on this claim in light of the Supreme Court's recent decision in *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088 (2012). However, the *Ford* decision makes it apparent that *Reichle* has not cast doubt on the Ninth Circuit's prior precedents holding that retaliatory arrests supported by probable cause are actionable under § 1983."); ***McCoy v. City of Columbia***, 929 F.Supp.2d 541, 560-62 (D.S.C. 2013) ("The Court of Appeals for the Fourth Circuit has not squarely addressed this issue. Recently, however, the Fourth Circuit did address *Hartman* and *Reichle,* albeit in a different procedural context. More specifically, *Tobey v. Jones,* 706 F.3d 379, 2013 WL 286226 (4th Cir. Jan.25, 2013), involved, among other claims, an airline passenger's § 1983 and *Bivens* claims against state and federal officers alleging that his arrest for protesting enhanced screening procedures at an airport violated his First and Fourth Amendment rights. . . .One view of *Tobey* is that the Fourth Circuit characterized *Hartman* and *Reichle* as requiring that the plaintiff plead an absence of probable cause in order to make out a cognizable First Amendment claim for retaliatory arrest. . . . On the other hand, a more circumspect view of *Tobey* is that the Fourth Circuit was not adopting the *Hartman* rule in the context of retaliatory arrests, but rather determining the effect of *Reichle* and *Hartman* on the appellants' qualified immunity argument at the motion to dismiss stage of litigation. The latter interpretation of *Tobey* is likely the correct one. For example, *Reichle* does not actually require that a plaintiff plead an absence of probable cause to state a First Amendment retaliatory arrest claim. *See Reichle,* 132 S.Ct. at 2096. Moreover, whether a plaintiff would have to show an absence of probable cause to overcome a *summary judgment* motion on the plaintiff's retaliatory arrest claim was not at issue

in *Tobey*. In light of the important First Amendment issues at stake in this case, the court believes the best approach is to allow McCoy the opportunity to prove retaliatory arrest rather than foreclose his First Amendment claim as a matter of law. . . . Although the court finds that there is a genuine issue of material fact as to whether the Officer Defendants violated McCoy's First Amendment rights during the arrest, the court nevertheless finds that they are entitled to qualified immunity. . . . . Indeed, as discussed above, as of January 25, 2013, there is at least an argument that the Fourth Circuit now requires a plaintiff to plead an *absence* of probable cause to state a cognizable claim for First Amendment retaliatory arrest. . . Therefore, the Officer Defendants are entitled to qualified immunity because McCoy's First Amendment right to be free from a retaliatory arrest that is supported by probable cause was not clearly established at the time of his arrest."); ***Turkowitz v. Town of Provincetown***, 914 F.Supp.2d 62, 73, 74 (D. Mass. 2012) ("A police officer may not base the decision to arrest upon conduct that is protected by the First Amendment. . . Whether a plaintiff must establish that the police lacked probable cause in order to state a claim for retaliatory arrest remains an open question. *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 2094, 182 L.Ed.2d 985 (2012). Perhaps as a result, the Supreme Court has recently stated that the right to be free from a retaliatory arrest that is also based upon probable cause has not been clearly established. . . The Court has already determined that as a result of *Heck*, the plaintiff is foreclosed from challenging probable cause to arrest as part of his § 1983 claim. Therefore, at best, Turkowitz alleges a retaliatory arrest also based upon probable cause. Because this right has not been clearly established, defendants are entitled to qualified immunity on his claim. Plaintiff Richardson's claim stands on different footing. Officers are not entitled to qualified immunity when making retaliatory arrests if they are not based upon probable cause. . . . Based upon the facts in the record, plaintiffs have raised a genuine issue of material fact as to whether Richardson's arrest was based upon probable cause or was in retaliation for protected speech. If a jury credited the plaintiffs' account, Officers Steele and Himes arrested him solely because he questioned why they were not intervening in the other officers' attack on Turkowitz.")]

Messerschmidt v. Millender, 132 S. Ct. 1235, 1244-51 (2012) ("The validity of the warrant is not before us. The question instead is whether Messerschmidt and Lawrence are entitled to immunity from damages, even assuming that the warrant should not have been issued. . . . Under these circumstances—set forth in the warrant—it would not have been unreasonable for an officer to conclude that there was a 'fair probability' that the sawed-off shotgun was not the only firearm Bowen owned. . . And it certainly would have been reasonable for an officer to assume that Bowen's sawed-off shotgun was illegal. . . Evidence of one crime is not always evidence of several, but given Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns among others that Bowen owned. [footnote omitted] . . . .Given the foregoing, it would not have been 'entirely unreasonable' for an officer to believe, in the particular circumstances of this case, that there was probable cause to search for all firearms and firearm-related materials. . . . It would . . . not have been unreasonable—based on the facts set out in the affidavit—for an officer to believe that evidence regarding Bowen's gang affiliation would prove helpful in prosecuting him for the attack on Kelly. . . . Not only would such evidence

help to establish motive, either apart from or in addition to any domestic dispute, it would also support the bringing of additional, related charges against Bowen for the assault. . . . Moreover, even if this were merely a domestic dispute, a reasonable officer could still conclude that gang paraphernalia found at the Millenders' residence would aid in the prosecution of Bowen by, for example, demonstrating Bowen's connection to other evidence found there. . . . Whatever the use to which evidence of Bowen's gang involvement might ultimately have been put, it would not have been 'entirely unreasonable' for an officer to believe that the facts set out in the affidavit established a fair probability that such evidence would aid the prosecution of Bowen for the criminal acts at issue. . . . Whether any of these facts, standing alone or taken together, actually establish probable cause is a question we need not decide. Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments.' *al-Kidd*, 563 U.S., at —— (slip op., at 12). The officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not 'plainly incompetent.'. . . On top of all this, the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause. . . . In light of the foregoing, it cannot be said that 'no officer of reasonable competence would have requested the warrant.'. . Indeed, a contrary conclusion would mean not only that Messerschmidt and Lawrence were 'plainly incompetent,'. . . but that their supervisor, the deputy district attorney, and the magistrate were as well. . . . [B]y holding in *Malley* that a magistrate's approval does not automatically render an officer's conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers' determination that the warrant was valid. . . . The fact that the officers secured these approvals is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause. . . . In contrast to *Groh*, any defect here would not have been obvious from the face of the warrant. Rather, any arguable defect would have become apparent only upon a close parsing of the warrant application, and a comparison of the affidavit to the terms of the warrant to determine whether the affidavit established probable cause to search for all the items listed in the warrant. This is not an error that 'just a simple glance' would have revealed. . . Indeed, unlike in *Groh*, the officers here did not merely submit their application to a magistrate. They also presented it for review by a superior officer, and a deputy district attorney, before submitting it to the magistrate. The fact that none of the officials who reviewed the application expressed concern about its validity demonstrates that any error was not obvious. *Groh* plainly does not control the result here. . . . The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions. Even if the warrant in this case were invalid, it was not so obviously lacking in probable cause that the officers can be considered 'plainly incompetent' for concluding otherwise. . . The judgment of the Court of Appeals denying the officers qualified immunity must therefore be reversed.")

Messerschmidt v. Millender, 132 S. Ct. 1235, 1252 (2012) (Kagan, J., concurring in part and dissenting in part) ("*Malley* made clear that qualified immunity turned on the officer's own 'professional judgment,' considered separately from the mistake of the magistrate. . . . And what we said in *Malley* about a magistrate's authorization applies still more strongly to the approval of other police officers or state attorneys. All those individuals, as the Court puts it, are 'part of the prosecution team.'. . To make their views relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct—like applying for a warrant without anything resembling probable cause.")

Messerschmidt v. Millender, 132 S. Ct. 1235, 1253-61 (2012) (Sotomayor, J., with whom Ginsburg, J., joins, dissenting) ("In this case, police officers investigating a specific, non-gang-related assault committed with a specific firearm (a sawed-off shotgun) obtained a warrant to search for all evidence related to 'any Street Gang,' '[a]ny photographs ... which may depict evidence of criminal activity,' and 'any firearms.'. . They did so for the asserted reason that the search might lead to evidence related to other gang members and other criminal activity, and that other '[v]alid warrants commonly allow police to search for "firearms and ammunition."'. . That kind of general warrant is antithetical to the Fourth Amendment. . . .The Court's analysis bears little relationship to the record in this case, our precedents, or the purposes underlying qualified immunity analysis. For all these reasons, I respectfully dissent. . . . The operative question in this case, therefore, is whether—given that, as petitioners comprehended, the crime itself was not gang related—a reasonable officer nonetheless could have believed he had probable cause to seek a warrant to search the suspect's residence for all evidence of affiliation not only with the suspect's street gang, but 'any Street Gang.' He could not. . . . The majority has little difficulty concluding that because Bowen fired one firearm, it was reasonable for the police to conclude not only that Bowen must have possessed others, but that he must be storing these other weapons at his 73–year–old former foster mother's home.[footnote omitted] Again, however, this is not what the police actually concluded, as Detective Messerschmidt's deposition makes clear. . . .Even assuming that the police reasonably could have concluded that Bowen possessed other guns and was storing them at the Millenders' home, I cannot agree that the warrant provided probable cause to believe any weapon possessed in a home in which 10 persons regularly lived—none of them the suspect in this case—was either 'contraband or evidence of a crime.'. . . The majority asserts, without citation, that the magistrate's approval is relevant to objective reasonableness. . . .In cases in which it would be not only wrong but unreasonable for any well-trained officer to seek a warrant, allowing a magistrate's approval to immunize the police officer's unreasonable action retrospectively makes little sense. . . .To the extent it proposes to cut back upon *Malley*, the majority will promote the opposite result—encouraging sloppy police work and ex-acerbating the risk that searches will not comport with the requirements of the Fourth Amendment. The Court also makes much of the fact that Detective Messerschmidt sent his proposed warrant application to two superior police officers and a district attorney for review. Giving weight to that fact would turn the Fourth Amendment on its head. This Court made clear in *Malley* that a police officer acting unreasonably cannot obtain qualified immunity on the basis of a neutral magistrate's

approval. It would be passing strange, therefore, to immunize an officer's conduct instead based upon the approval of other police officers and prosecutors. [footnote omitted] . . . . The effect of the Court's rule. . . is to hold blameless the 'plainly incompetent' action of the police officer seeking a warrant because of the 'plainly incompetent' approval of his superiors and the district attorney. . . .Qualified immunity properly affords police officers protection so long as their conduct is objectively reasonable. But it is not objectively reasonable for police investigating a specific, non-gang-related assault committed with a particular firearm to search for all evidence related to 'any Street Gang,' 'photographs ... which may depict evidence of criminal activity,' and all firearms. The Court reaches a contrary result not because it thinks that these police officers' stated reasons for searching were objectively reasonable, but because it thinks different conclusions might be drawn from the crime scene that reasonably might have led different officers to search for different reasons. That analysis, however, is far removed from qualified immunity's proper focus on whether *petitioners* acted in an objectively reasonable manner. Because petitioners did not, I would affirm the judgment of the Court of Appeals.")

Ryburn v. Huff, 132 S. Ct. 987, 990-92 (2012) (per curiam) ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction. . . . A reasonable police officer could read these decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. . . . The panel majority—far removed from the scene and with the opportunity to dissect the elements of the situation—confidently concluded that the officers really had no reason to fear for their safety or that of anyone else. As the panel majority saw things, it was irrelevant that the Huffs did not respond when the officers knocked on the door and announced their presence and when they called the home phone because the Huffs had no legal obligation to respond to a knock on the door or to answer the phone. The majority attributed no significance to the fact that, when the officers finally reached Mrs. Huff on her cell phone, she abruptly hung up in the middle of their conversation. And, according to the majority, the officers should not have been concerned by Mrs. Huff's reaction when they asked her if there were any guns in the house because Mrs. Huff 'merely asserted her right to end her conversation with the officers and returned to her home.'. . Confronted with the facts found by the District Court, reasonable officers in the position of petitioners could have come to the conclusion that there was an imminent threat to their safety and to the safety of others. The Ninth Circuit's contrary conclusion was flawed for numerous reasons. . . . [T]he panel majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. . . . Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners' belief that entry was necessary to avoid injury to themselves or others was imminently reasonable. In sum, reasonable police officers in petitioners' position could have come to the conclusion that

the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court. The petition for certiorari is granted, the judgment of the Ninth Circuit is reversed, and the case is remanded for the entry of judgment in favor of petitioners.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080, 2083, 2085 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'. . When, however, a Court of Appeals does address both prongs of qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals' analysis at both steps of the qualified-immunity inquiry needs correction. . . . Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation. . . . A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'. . We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . The constitutional question in this case falls far short of that threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. . . . [Ashcroft] deserves qualified immunity even assuming. . . that his alleged detention policy violated the Fourth Amendment.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2085 (2011) (Kennedy, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., concurring) ("The Court's holding is limited to the arguments presented by the parties and leaves unresolved whether the Government's use of the Material Witness Statute in this case was lawful. . . . The scope of the statute's lawful authorization is uncertain.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2086, 2087 (2011) (Kennedy, J., concurring) ("The fact that the Attorney General holds a high office in the Government must inform what law is clearly established for the purposes of this case. . . .[T]he Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one Court of Appeals has approved a certain course of conduct, other Courts of Appeals may have disapproved it, or at least reserved the issue.When faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with

the governing law of the jurisdiction where the action is taken. . . .The Court of Appeals for the Ninth Circuit appears to have reasoned that a Federal District Court sitting in New York had authority to establish a legal rule binding on the Attorney General and, therefore, on federal law-enforcement operations conducted nationwide. . . . Of course, district court decisions are not precedential to this extent. . . But nationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national officeholders entrusted with urgent responsibilities.")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2087 (2011) (Ginsburg, J., joined by Breyer, J., and Sotomayor, J., concurring in the judgment) ("Is a former U.S. Attorney General subject to a suit for damages on a claim that he instructed subordinates to use the Material Witness Statute, 18 U.S.C. § 3144, as a pretext to detain terrorist suspects preventively? Given *Whren* . . . I agree with the Court that no 'clearly established law' renders Ashcroft answerable in damages for the abuse of authority al-Kidd charged. . . But I join Justice SOTOMAYOR in objecting to the Court's disposition of al-Kidd's Fourth Amendment claim on the merits; as she observes, . . . that claim involves novel and trying questions that will 'have no effect on the outcome of th[is] case.'")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2089, 2090 (2011) (Sotomayor, J., joined by Ginsburg, J., and Breyer, J., concurring in the judgment) ("I concur in the Court's judgment reversing the Court of Appeals because I agree with the majority's conclusion that Ashcroft did not violate clearly established law. I cannot join the majority's opinion, however, because it unnecessarily 'resolve[s][a] difficult and novel questio[n] of constitutional ... interpretation that will "have no effect on the outcome of the case."'. .Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority's opinion suggests. Although the majority is correct that a government official's subjective intent is generally 'irrelevant in determining whether that officer's actions violate the Fourth Amendment,'. . . none of our prior cases recognizing that principle involved prolonged detention of an individual without probable cause to believe he had committed any criminal offense. We have never considered whether an official's subjective intent matters for purposes of the Fourth Amendment in that novel context, and we need not and should not resolve that question in this case. All Members of the Court agree that, whatever the merits of the underlying Fourth Amendment question, Ashcroft did not violate clearly established law. The majority's constitutional ruling is a narrow one premised on the existence of a 'valid material-witness warran[t],' *ante,* at 1–a premise that, at the very least, is questionable in light of the allegations set forth in al-Kidd's complaint. Based on those allegations, it is not at all clear that it would have been 'impracticable to secure [al-Kidd's] presence ... by subpoena' or that his testimony could not 'adequately be secured by deposition.'. . Nor is it clear that the affidavit supporting the warrant was sufficient; its failure to disclose that the Government had no intention of using al-Kidd as a witness at trial may very well have rendered the affidavit deliberately false and misleading. . . The majority assumes away these factual difficulties, but in my view, they point to the artificiality of the way the Fourth Amendment question has been presented to this Court and provide further reason to avoid rendering an

unnecessary holding on the constitutional question. I also join Part I of Justice KENNEDY's concurring opinion. As that opinion makes clear, this case does not present an occasion to address the proper scope of the material witness statute or its constitutionality as applied in this case. Indeed, nothing in the majority's opinion today should be read as placing this Court's imprimatur on the actions taken by the Government against al-Kidd.")

Camreta v. Greene, 131 S. Ct. 2020, 2026-36 & n.11 (2011) ("We conclude that this Court generally may review a lower court's constitutional ruling at the behest of a government official granted immunity. But we may not do so in this case for reasons peculiar to it. The case has become moot because the child has grown up and moved across the country, and so will never again be subject to the Oregon in-school interviewing practices whose constitutionality is at issue. We therefore do not reach the Fourth Amendment question in this case. In line with our normal practice when mootness frustrates a party's right to appeal, see *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950), we vacate the part of the Ninth Circuit's opinion that decided the Fourth Amendment issue. . . . S.G. . . . alleges two impediments to our exercise of statutory authority here, one constitutional and the other prudential. First, she claims that Article III bars review because petitions submitted by immunized officials present no case or controversy. . . Second, she argues that our settled practice of declining to hear appeals by prevailing parties should apply with full force when officials have obtained immunity. . . We disagree on both counts. . . . [T]he critical question under Article III is whether the litigant retains the necessary personal stake in the appeal . . . .This Article III standard often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution. That is not because a court has made a retrospective judgment about the lawfulness of the officials' behavior, for that judgment is unaccompanied by any personal liability. Rather, it is because the judgment may have prospective effect on the parties. . . . If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action. . . Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability. . . . Article III aside, an important question of judicial policy remains. As a matter of practice and prudence, we have generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed us to do so. . . . On the few occasions when we have departed from that principle, we have pointed to a 'policy reaso[n] ... of sufficient importance to allow an appeal' by the winner below. . . We think just such a reason places qualified immunity cases in a special category when it comes to this Court's review of appeals brought by winners. The constitutional determinations that prevailing parties ask us to consider in these cases are not mere dicta or 'statements in opinions.'. . They are rulings that have a significant future effect on the conduct of public officials–both the prevailing parties and their co-workers–and the policies of the government units to which they belong. . . And more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity–and observance–of constitutional rules. . . . [W]e have permitted lower courts to

avoid avoidance–that is, to determine whether a right exists before examining whether it was clearly established. . . . In general, courts should think hard, and then think hard again, before turning small cases into large ones. But it remains true that following the two-step sequence–defining constitutional rights and only then conferring immunity–is sometimes beneficial to clarify the legal standards governing public officials. . . . Here, the Court of Appeals followed exactly this two-step process, for exactly the reasons we have said may in select circumstances make it 'advantageous.'. . To that end, the court adopted constitutional standards to govern all in-school interviews of suspected child abuse victims. . . . Given its purpose and effect, such a decision is reviewable in this Court at the behest of an immunized official. No mere dictum, a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior. . . This Court, needless to say, also plays a role in clarifying rights. Just as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too that purpose may support this Court in reviewing the correctness of the lower court's decision. . . . We emphasize, however, two limits of today's holding. First, it addresses only our own authority to review cases in this procedural posture. The Ninth Circuit had no occasion to consider whether it could hear an appeal from an immunized official: In that court, after all, S.G. appealed the judgment in the officials' favor. We therefore need not and do not decide if an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds. . . Second, our holding concerns only what this Court *may* review; what we actually will choose to review is a different matter. That choice will be governed by the ordinary principles informing our decision whether to grant certiorari–a 'power [we] ... sparingly exercis[e].'. . Although we reject S.G.'s arguments for dismissing this case at the threshold, we find that a separate jurisdictional problem requires that result: This case, we conclude, is moot. . . . When 'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' we have no live controversy to review. . . Time and distance combined have stymied our ability to consider this petition. . . . In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school. We therefore vacate the part of the Ninth Circuit's opinion that addressed that issue, and remand for further proceedings consistent with this opinion. . . . We leave untouched the Court of Appeals' ruling on qualified immunity and its corresponding dismissal of S.G.'s claim because S.G. chose not to challenge that ruling. We vacate the Ninth Circuit's ruling addressing the merits of the Fourth Amendment issue because, as we have explained, . . . that is the part of the decision that mootness prevents us from reviewing but that has prospective effects on Camreta.")

[For an interesting observation about Justice Kagan's comments, *see* ***Glover v. Gartman***, 899 F.Supp.2d 1115, 1138, 1139 & n.5 (D.N.M. 2012) ("While the Court is, of course, obligated to follow faithfully the Supreme Court's decisions and opinions, the Court has always been unenlightened and even troubled by Justice Elena Kagan's comments in *Camreta v. Greene* about 'large' and 'small' cases. 131 S.Ct. at 2032. As a trial judge, the Court has tried assiduously to avoid thinking about or categorizing some cases as 'large' and some as 'small.' It usually is not

mentally healthy for a judge to put all his or her energy into 'large' cases and slight 'small cases'; to the litigants, their case is the most important case on the Court's docket, and it is usually wise for the judge to treat each case on which he or she is working—at that moment—as the most important case at that moment. Getting the decision 'right,' i.e. getting the law and facts correct and accurate, is obviously important, but getting it right is only one-half of a judge's task, particularly for a trial judge. The other half of dispensing justice is the appearance of justice—did the Court listen to the litigant's arguments, wrestle with those arguments, and deal with them in an intellectually honest way. Americans are relatively good about accepting a judicial decision—even an adverse one—and cease obsessing over an issue, if they are convinced that an authority figure has dressed up, taken them seriously, listened patiently and politely, wrestled with the arguments, addressed them, and accurately stated the facts. The Court believes that, if it starts looking at some cases before it as 'large' and some as 'small,' it begins a slippery slope that does not accomplish both halves of the task of dispensing justice. The justice system depends so much on the nation respecting and accepting the courts' proceedings and decisions, because courts have very little 'power' that does not depend on that acceptance. Thus, Justice Kagan's comments are not only not self-defining, but they are disturbing. If, perhaps, a 'large' case is a Supreme Court case or one that comes from the East Coast or California, rather than one in a district court in New Mexico, then it helps to look at what cases the Supreme Court has decided for civil rights plaintiffs. The three most recent qualified immunity cases with which the Supreme Court has dealt are: (i) *Reichle v. Howards,* —– U.S. ——–, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012); (ii) *Filarsky v. Delia,* —– U.S. ——–, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012); and (iii) *Messerschmidt v. Millender,* —– U.S. ——–, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). In *Reichle v. Howards,* the Supreme Court determined that secret service agents were entitled to qualified immunity for arresting a protestor who touched the Vice President and held that it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. *See* 132 S.Ct. at 2092, 2097. In *Filarsky v. Delia,* the Supreme Court held that a private individual whom the government hires to do its work, an internal affairs review, is entitled to seek qualified immunity for Fourth and Fourteenth Amendment violations. *See* 132 S.Ct. at 1660, 1668. In *Messerschmidt v. Millender,* the Supreme Court held that police officers in Los Angeles, California were entitled to qualified immunity when they relied on an invalid warrant to search a home, because a reasonable officer would not have realized the error. *See* 132 S.Ct. at 1241, 1250. The Supreme Court has not denied qualified immunity since 2004 in *Groh v. Ramirez,* 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), where it held that an officer unreasonably relied on a deficient warrant. *See* 540 U.S. at 565, 124 S.Ct. 1284. The Court does not think those presumably 'large' cases (they are Supreme Court cases, after all) are any different—substantively, legally, or factually—than this case involving the suicide of a pretrial detainee in the custody and under the control of a state-run penitentiary. On the flip side, treating large cases like they are large cases can create an appearance problem to the public and to the litigants—that only big cases deserve the Court's attention. A trial judge can overwork a 'large' case. It is better to treat even 'large' cases like every other case; large cases and their litigants need to know and appreciate that they are not the only case on the court's docket, and realize that the scarcity of judicial resources applies to them too.")]

Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (Scalia, J., concurring) ("I join the Court's opinion, which reasonably applies our precedents, strange though they may be. The alternative solution, as Justice KENNEDY suggests, . . . is to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity. . . The parties have not asked us to adopt that approach, but I would be willing to consider it in an appropriate case.")

Camreta v. Greene, 131 S. Ct. 2020, 2036 (2011) (2011) (Sotomayor, J., joined by Breyer, J., concurring in the judgment) ("I agree with the Court's conclusion that this case is moot and that vacatur is the appropriate disposition; unlike the majority, however, I would go no further. As the exchange between the majority and Justice KENNEDY demonstrates, the question whether Camreta, as a prevailing party, can obtain our review of the Ninth Circuit's constitutional ruling is a difficult one. There is no warrant for reaching this question when there is clearly no longer a genuine case or controversy between the parties before us.")

Camreta v. Greene, 131 S. Ct. 2020, 2038, 2040-45 (2011) (Kennedy, J., joined by Thomas, J., dissenting) ("[T]he Court today, in an altogether unprecedented disposition, says that it vacates not a judgment but rather 'part of the Ninth Circuit's opinion.'. . The Court's conclusion is unsettling in its implications. Even on the Court's reading of our cases, the almost invariable rule is that prevailing parties are not permitted to obtain a writ of certiorari. . . After today, however, it will be common for prevailing parties to seek certiorari based on the Court's newfound exception. . . . As today's decision illustrates, our recent qualified immunity cases tend to produce decisions that are in tension with conventional principles of case-or-controversy adjudication. . . . The goal was to make dictum precedent, in order to hasten the gradual process of constitutional interpretation and alter the behavior of government defendants. . .The present case brings the difficulties of that objective into perspective. In express reliance on the permission granted in *Pearson*, the Court of Appeals went out of its way to announce what may be an erroneous interpretation of the Constitution; and, under our case law, the Ninth Circuit must give that dictum legal effect as precedent in future cases. . . . [T]he Court's standing analysis will be inapplicable in most qualified immunity cases. . . When an officer is sued for taking an extraordinary action, such as using excessive force during a high-speed car chase, there is little possibility that a constitutional decision on the merits will again influence that officer's conduct. The officer, like petitioner Alford or the petitioner in *Bunting*, would have no interest in litigating the merits in the Court of Appeals and, under the Court's rule, would seem unable to obtain review of a merits ruling by petitioning for certiorari. . . This problem will arise with great frequency in qualified immunity cases. Once again, the decision today allows plaintiffs to obtain binding constitutional determinations on the merits that lie beyond this Court's jurisdiction to review. The Court thus fails to solve the problem it identifies. . . . It is most doubtful that Article III permits appeals by any officer to whom the reasoning of a judicial decision might be applied in a later suit. Yet that appears to be the implication of the Court's holding. The favorable judgment of the Court of Appeals did not in itself cause petitioner Camreta to suffer an Article III injury entitling him to

appeal. . . . On the contrary, Camreta has been injured by the decision below to no greater extent than have hundreds of other government officers who might argue that they too have been affected by the unnecessary statements made by the Court of Appeals. . . .It is revealing that the Court creates an exception to the prevailing party rule while making clear that the Courts of Appeals are not to follow suit, in any context. . . . If today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect. . . . If qualified immunity cases were treated like other cases raising constitutional questions, settled principles of constitutional avoidance would apply. So would conventional rules regarding dictum and holding. Judicial observations made in the course of explaining a case might give important instruction and be relevant when assessing a later claim of qualified immunity. . . But as dicta those remarks would not establish law and would not qualify as binding precedent. . . . The distance our qualified immunity jurisprudence has taken us from foundational principles is made all the more apparent by today's decision. The Court must construe two of its precedents in so broad a manner that they are taken out of their proper and logical confines. To vacate the reasoning of the decision below, the Court accepts that *obiter dictum* is not just binding precedent but a judgment susceptible to plenary review. I would dismiss this case and note that our jurisdictional rule against hearing appeals by prevailing parties precludes petitioners' attempt to obtain review of judicial reasoning disconnected from a judgment.")

See also ***Floyd v. City of New York***, 08 CIV. 1034 AT, 2014 WL 3765729, *51 n.30 (S.D.N.Y. July 30, 2014) ("The Unions' also cite to *Camreta v. Greene,* 131 S.Ct. 2020 (2011), for the proposition that 'a government official has standing to appeal a finding that his actions were unconstitutional ... because the "judgment may have a prospective effect," and "the official regularly engages" in the acts found unconstitutional.'. . Their reliance on *Camreta* is misplaced. In holding that a prevailing party may nonetheless have standing to appeal in some limited circumstances, the Supreme Court expressly confined *Camreta*'s holding regarding prospective relief to the qualified immunity context in which a named defendant may prevail, even though the court finds that his or her behavior was unconstitutional. . . Contrary to the Unions' reading, the Supreme Court did not hold or even suggest that, in an entirely different context—municipal liability under *Monell*—a non-party may appeal findings of liability against her employer merely because she regularly engages in the behavior at issue.")

D.C. CIRCUIT

Jones v. Kirchner, 835 F.3d 74, 85-88 (D.C. Cir. 2016) ("In this case the magistrate, as clearly indicated on the face of the warrant, affirmatively denied the Defendants permission to search Jones's house before 6:00 AM. The plaintiff alleges the Defendants nonetheless executed the warrant at 4:45 AM. Just as a warrant is 'dead,' and a search undertaken pursuant to that warrant invalid, after the expiration date on the warrant, *Sgro v. United States*, 287 U.S. 206, 212 (1932), a warrant is not yet alive, and a search is likewise invalid, if executed before the time authorized in the warrant. If the Defendants executed the warrant when the magistrate said they could not,

then they exceeded the authorization of the warrant and, accordingly, violated the Fourth Amendment. . . .Nevertheless, we agree with the district court that the Defendants are entitled to qualified immunity, albeit for a different reason: It was not clearly established in Maryland in 2005 that the Fourth Amendment prohibits the nighttime execution of a daytime-only warrant. Although two of our sister circuits had by then so held, s*ee O'Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir. 1989); *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961), the Fourth Circuit, within which this search occurred, did not come to the same conclusion until after the search in this case. *See Yanez-Marquez v. Lynch*, 789 F.3d 434, 466 (2015). Indeed, as the Fourth Circuit noted in that case, an unpublished Fourth Circuit opinion from 2009 had treated 'a nighttime search under the aegis of a daytime warrant as a mere Rule 41 violation, rather than as an unconstitutional search.'. . To repeat, qualified immunity shields an officer from liability unless he reasonably should have known his conduct would violate the law. . . If our learned colleagues on the Fourth Circuit believed as recently as 2009 that the nighttime execution of a daytime-only warrant is not a constitutional violation, then the police officers who work in that jurisdiction cannot be faulted for failing to appreciate in 2005 that their conduct was unconstitutional. Until 2009 the Supreme Court 'required courts considering qualified immunity claims to first address the constitutional question, so as to promote "the law's elaboration from case to case."'. . Today, which part of the qualified immunity analysis to address first is within the 'sound discretion' of the court. . . Where 'it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right,' it may make sense to avoid the constitutional question. . . This is not such a case, however. It seems to us an unremarkable proposition that an officer must respect a time limitation imposed by a magistrate and, indeed, the three other circuits to consider the question reached the same conclusion. In light of the Government's argument to the contrary, . . . we think it important to clarify this point of law. Since *Pearson*, our court has often granted qualified immunity without reaching the constitutional question, but both the constitutional question and the answer are more clear in this case than in any of those. Here we need only follow the teaching of the Supreme Court, as have three other circuits, in order to protect the public from a particular type of unreasonable search. One of those circuits – the Fourth – surrounds the District of Columbia on all sides, and officers from Maryland and Virginia frequently cooperate with officers from D.C. on investigations. Resolving the constitutional question here ensures that officers will take care to abide by a magistrate's limitations regardless where in the Washington area the search is executed. Conservation of judicial resources, *see* Dissent at 11, is a risible justification for avoiding a straightforward question such as this, . . . especially in view of the dramatic reduction in the caseload per judge of our court in recent years. Nor is doubt about the actual time of entry a relevant consideration in this case. That the facts of the case are as yet unsettled is neither surprising nor unique; this appeal is from the grant of a pre-answer motion to dismiss. There is nothing improper about deciding a constitutional question at this stage. . . Indeed, we ordinarily decide questions of qualified immunity early in order to avoid burdening officers with protracted litigation, *see Pearson*, 555 U.S. at 232; under our dissenting colleague's approach, in contrast, we would never reach a constitutional question as long as the defendant's attorney remembered to raise qualified immunity as a defense. Although well-founded doubt about the veracity of a plaintiff's factual allegations might steer us toward constitutional avoidance in some circumstances (*e.g.*, where the

plaintiff's account of the facts on summary judgment is 'utterly discredited by the clear [video] evidence,' *Lash v. Lemke*, 786 F.3d 1, 6 (D.C. Cir. 2015)), those circumstances are not present here, where the Defendants have not submitted contrary evidence nor even filed an answer denying Jones's allegations. . .As the Supreme Court has warned, perpetually addressing only the clearly-established question 'may frustrate the development of constitutional precedent and the promotion of law-abiding behavior.'. . We see no need to avoid the constitutional question here. . . .We affirm the district court's holding that the Defendants have qualified immunity for the timing of the search, reverse its dismissal of Jones's claims for unlawful seizure and no-knock entry, and remand this matter for further proceedings consistent with this opinion.")

Jones v. Kirchner, 835 F.3d 74, 95-97 (D.C. Cir. 2016) (Randolph, J., dissenting in part and concurring in the judgment in part) ("Ever since *Pearson*, this court has developed not a page, but a volume of history following the Supreme Court's decision. In these cases, we have almost invariably declined to decide constitutional questions in qualified immunity cases when it was unnecessary to do so. The majority has made no attempt to distinguish the cases embodying our established practice. [collecting cases] It is no answer to say that this is a matter within the court's discretion. . . . The nearly uniform practice of this court has established such sound legal principles, and the majority has offered no reason to depart from them. I repeat that we are deciding this case on a complaint alone. The defendant officers have yet to file their answer to the complaint. As the Supreme Court recognized in *Pearson*, courts should not proceed to a constitutional question if the answer depends on undeveloped facts. . . Still less should a court decide a constitutional question when developed facts show that the question is not presented. The evidence in the criminal proceedings proved that the search of Jones' premises eleven years ago complied with the warrant's timing requirement. . . The defendants in this case have won a dismissal on this Fourth Amendment issue; they have no reason to seek rehearing en banc or certiorari in the Supreme Court on that issue. . . The answer to the constitutional question here is by no means certain. . . And it is hardly pressing. The majority cites not a single reported case in this jurisdiction in which officers, federal or local, executed a daytime warrant at night. And this is not such a case, in light of Judge Huvelle's findings and the evidence supporting her findings. . . . Whatever case the majority is writing about, it is not this one.")

Lash v. Lemke, 786 F.3d 1, 3, 5, 7-9 (D.C. Cir. 2015) ("The district court granted summary judgment to the officers, concluding they were protected by qualified immunity against Lash's claims because the officer's use of the Taser did not violate the Constitution. We also conclude that qualified immunity shields the officers from Lash's Fourth Amendment claim, but on a different basis that does not require us to take up the constitutional issue the district court reached: A person actively resisting arrest does not have a clearly established right against a single use of a Taser to subdue him. . . .In some cases, it is easier for a court to see that the claimed right, whether it exists or not, is by no means 'clearly established.'. . This is such a case and we will accept the invitation of the Court in *Pearson* to dispose of this suit by holding that the conduct of the officers in arresting Lash did not violate any clearly established law. Thus we need not consider whether the district court was right to conclude that the use of a Taser against Lash in these circumstances

was constitutionally permissible. . . .The officers could not have been on notice that using a Taser in these circumstances would violate Lash's Fourth Amendment rights. Though there is no case from the Supreme Court or our court that is on point, consulting the decisions of our sister circuits reveals a telling pattern. The use of a Taser against a person who is not resisting arrest or merely passively resisting may violate that person's rights. *See, e.g., Brown v. City of Golden Valley,* 574 F.3d 491, 499 (8th Cir.2009). The use of a Taser may also violate an individual's rights even in the face of resistance if the officer uses the Taser to excess, such as firing multiple times after the officers have gained control of the scene. *See, e.g., Meyers v. Baltimore Cnty., Md.,* 713 F.3d 723, 735 (4th Cir. 2013). But '[t]here is no clearly established right for a suspect who actively resists and refuses to be handcuffed to be free from a Taser application.' *Goodwin v. City of Painesville,* 781 F.3d 314, 325 (6th Cir.2015) (internal quotation marks omitted). The Seventh Circuit, surveying the state of the law, found that '[c]ourts generally hold that the use of a[T]aser against an actively resisting suspect either does not violate clearly established law or is constitutionally reasonable.' *Abbott v. Sangamon Cnty., Ill.,* 705 F.3d 706, 727 (7th Cir.2013). The Sixth Circuit reached the same result. *See Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 509–10 (6th Cir.2012) (observing that courts generally find that '[i]f a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a [T]aser to subdue him'). *See also Aldaba v. Pickens,* 777 F.3d 1148, 1158 (10th Cir.2015) (finding that 'where the subject actively resisted a seizure, whether by physically struggling with an officer or by disobeying direct orders, courts have held either that no constitutional violation occurred or that the right not to be tased in these circumstances was not clearly established'). And our own examination of the cases similarly has found that officers who tased individuals actively resisting arrest had qualified immunity against excessive force claims. *See, e.g., De Boise v. Taser Int'l, Inc.,* 760 F.3d 892, 897 (8th Cir.2014); *Buchanan v. Gulfport Police Dep't,* 530 F. App'x 307, 314 (5th Cir.2013); *Meyers,* 713 F.3d at 733; *Hoyt v. Cooks,* 672 F.3d 972, 979–80 (11th Cir.2012). Because this right is still not clearly established today, a reasonable officer in January 2012 would certainly have been justified in believing that she could use a Taser a single time against a resisting suspect. . . . Even if *Mattos* were manifestly contrary to the many cases we discussed above, such an outlier would not invalidate broad agreement among other circuits. The '"consensus view"' we have found necessary to create a clearly established right for qualified immunity purposes requires more than a single decision departing from an otherwise consistent pattern. *Bame,* 637 F.3d at 384 (quoting *Johnson,* 528 F.3d at 976). But more to the point, *Mattos* does not actually contradict the other cases on which we rely. In *Mattos* the Ninth Circuit carefully noted that the level of resistance offered by both arrestees was quite limited. . . . Lash's case offers a different context. Lash twice evaded the officer's efforts to seize him and, even after two officers held his arms, continued struggling between them and fighting against their efforts to force him to the ground. This was not 'some' or 'minimal' resistance, much less a failure to facilitate the arrest of another. As the video record makes clear, Lash was actively resisting arrest in the face of increasing police efforts to control him without resorting to more substantial force. *Mattos* was a different case and in consequence the Ninth Circuit's holding could not have put these officers on notice that using a Taser in this 'specific context,'. . . would violate Lash's rights. And even if *Mattos* had dealt with closely analogous facts, that decision alone would be outweighed by the consensus position: No

clearly established right is violated when an officer uses a Taser a single time against an individual actively resisting arrest.")

Johnson v. Government of Dist. of Columbia, 734 F.3d 1194, 1202-04 (D.C. Cir. 2013) ("Fourth Amendment Class members urge us to find that 'the Fourth Amendment prohibits blanket strip searches of [detainees] arrested on minor charges,' at least where no detainees were held in the general population and 'there [is] no significant contraband problem.'. . Like the district court, however, we have no need to reach the merits of this contested constitutional question in order to find Dillard entitled to qualified immunity. Under our decision in *Bame v. Dillard,* 637 F.3d 380, 384 (D.C.Cir.2011), any Fourth Amendment right Dillard might have violated was insufficiently clearly established at the time. . . . In *Bame,* this Court, addressing only the 'clearly established' stage of the qualified immunity analysis, found Dillard entitled to qualified immunity for Fourth Amendment claims brought by male plaintiffs—claims otherwise virtually indistinguishable from those brought by Fourth Amendment Class members in this case. Like class members, *Bame* plaintiffs were arrested for non-drug, non-violent offenses, held temporarily at 'various police holding facilities,' brought to the Superior Court 'to await disposition of the charges against them,' 'strip searched upon arrival' at the Superior Court cellblock, placed together in holding cells, and released directly from the Superior Court cellblock without spending any time in general jail populations. . . The strip searches at issue in *Bame* occurred in September 2002, near the end of the Fourth Amendment Class period. . . . . [L]ike the district court, we see no daylight between the claims we rejected in *Bame* and the ones Fourth Amendment Class members press here. . . Although class members obviously disagree with *Bame,* that decision is binding on us. As a result, Dillard is entitled to qualified immunity because the Fourth Amendment right he is accused of violating was not clearly established at the time of any violation."

Johnson v. Government of Dist. of Columbia, 734 F.3d 1194, 1205, 1206 (D.C. Cir. 2013) (Rogers, J., concurring in part and concurring in the judgment) ("I write principally because this court, as in ten other circuits, should 'clearly establish[ ],' *Harlow v. Fitzgerald,* 457 U.S. 800, 818–19 (1982), that indiscriminate strip searching of individuals awaiting presentment on non-violent, non-drug offenses who are not held in the general population is unconstitutional under the Fourth Amendment to the United States Constitution in the absence of reasonable suspicion an individual possesses contraband or weapons. . . In the absence of *en banc* review, *Bame,* 637 F.3d 380, is the law of the circuit. . . . In *Bame,* the court applied the doctrine of constitutional avoidance and did not decide whether a Fourth Amendment violation occurred. . . . Not deciding the constitutional question 'threatens to leave standards of official conduct permanently in limbo.' *Camreta,* 131 S.Ct. at 2031. By proceeding directly to the immunity question, not only do '[c]ourts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements,' *id.,* but the failure to decide constitutional questions 'may frustrate "the development of constitutional precedent" and the promotion of law-abiding behavior,' *id.* (quoting *Pearson,* 555 U.S. at 237). Also since *Bame,* six Justices of the Supreme Court have expressed unease with the type of indiscriminate strip searching engaged in by the Superior Court Marshal's Office that is challenged here and was challenged in *Bame*. *See Florence*

v. Bd. of Chosen Freeholders of Cnty. of Burlington, ––U.S. ––, 132 S.Ct. 1510, 1523 (2012) (Roberts, CJ., concurring); *id.* at 1524 (Alito, J., concurring); *id.* at 1525 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting). . . . Nearly every other circuit court of appeals (and the District of Columbia's highest court, *see United States v. Scott*, 987 A.2d 1180, 1196–97 (D.C.2010)) has understood that the humiliating and essentially non-productive practice of strip searching pre-arraignment arrestees not held in the general population is an unreasonable search under the Fourth Amendment in the absence of reasonable suspicion. [collecting cases] The Third Circuit has yet to address the issue, rejecting only a Fourth Amendment challenge to blanket strip searches upon arrestees admission to the general jail population. *See Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 621 F.3d 296, 298–99, 311 (3d Cir.2010). Evidence before the courts and in the instant case confirms that modern technology and law enforcement experience have shown that indiscriminate strip searching of non-violent, non-drug pre-arraignment arrestees after the use of metal detectors and patdowns to locate contraband rarely yields additional security benefits. . . .Members of the Fourth Amendment class here were not being held in the general population with post-arraignment arrestees and strip searches in their circumstances illustrate one aspect of the Justices' unease in *Florence*, 132 S.Ct. at 1523, 1524, 1525. Applying the canon of constitutional avoidance in this circuit is unwarranted, particularly in view of the recurring court challenges to indiscriminate strip searching by the U.S. Marshals Service in the Nation's Capital, the frequent situs of demonstrations as in *Bame*. . . The United States advises that the U.S. Marshals Service has abandoned the challenged strip searching policy and practice. . . This does not ensure that the practice will not be revived, much less provide guidance for new policies and practices, promote law-abiding behavior, or justify the court in not 'clearly establish[ing]' that the Fourth Amendment rights of the appellant class were violated by the Superior Court Marshal. Joining the ten other circuit courts of appeals, I would hold that the indiscriminate strip searching of the Fourth Amendment class in the absence of reasonable suspicion violated the Fourth Amendment.")

Taylor v. Reilly, 685 F.3d 1110, 1113, 1117 (D.C. Cir. 2012) ("[W]e begin (and end) with an examination of whether the right the plaintiff asserts was 'clearly established' at the time of his 2001 and 2005 parole hearings. . . . A parole official applying the 2000 Regulations at Taylor's parole hearings would not have had reason to know that doing so would create a 'significant risk' of longer incarceration than applying the 1987 Regulations. If there were any difference in the ultimate outcome for Taylor, it would not have become apparent without a searching comparison of the application of each of the two sets of regulations to the facts of his case. Hence, although it was clearly established at the relevant times that applying new parole regulations creating a significant risk of longer incarceration violates the Ex Post Facto Clause, it would not have been clear to reasonable parole officials that applying the new regulations to Taylor would actually create such a risk. Nor had any case required officials—particularly officials who did not already have a basis for believing there was such a risk—to conduct a searching comparison before deciding which regulations to apply.")

Youngbey v. March, 676 F.3d 1114, 1116, 1117, 1124, 1126 (D.C. Cir. 2012) ("We need not address on this appeal whether the officers' no-knock, nighttime search violated appellees' Fourth

Amendment rights. . .The dispositive question here is whether, given the circumstances presented by the undisputed record facts, a reasonable police officer would have known that the failure to knock or the nighttime search violated appellees' clearly established Fourth Amendment rights. . . .Since we have found neither controlling precedent of the Supreme Court or this circuit, nor a consensus of persuasive authority from our sister circuits, we must reverse. . . . [I]n determining whether the Fourth Amendment rights at issue are clearly established, a court must look to 'cases of controlling authority in [its] jurisdiction.'. . . [H]aving carefully considered the controlling precedent of the Supreme Court and this circuit, as well as the authority from our sister circuits, we agree with appellants that their no-knock entry of appellees' home did not violate 'clearly established law.'. . . We have little trouble in concluding that there is no clearly established law under the Fourth Amendment that prohibits the nighttime execution of a warrant, where, as here, the warrant does not prohibit such a search. Neither controlling precedent from the Supreme Court or this circuit, nor a consensus of persuasive authority from our sister circuits show that the nighttime search here violated the Fourth Amendment.")

Ali v. Rumsfeld, 649 F.3d 762, 771-73 (D.C. Cir. 2011) ("As it was not clearly established in 2004 that the Fifth and Eighth Amendments apply to aliens detained at Guantanamo Bay–where the Supreme Court has since held the Suspension Clause applies–it plainly was not clearly established in 2004 that the Fifth and Eighth Amendments apply to aliens held in Iraq and Afghanistan– where no court has held any constitutional right applies. . . . The plaintiffs urge us to follow the now-optional *Saucier* procedure and decide, first, whether they have 'alleged a deprivation of a constitutional right at all,'. . . although we may ultimately conclude any such right was not clearly established at the time of the defendants' alleged misconduct. . . The *Saucier* procedure, however, is not appropriate in most cases. Often 'it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'. . In such a case, deciding the existence of the constitutional right *vel non* is 'an essentially academic exercise,'. . . that 'runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality ... unless such adjudication is unavoidable,'. . . and results in the 'substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case[.]'. . .The *Saucier* approach can also preclude an affected party from obtaining appellate review of a decision that could significantly affect its future actions. . . If a court decides that the defendant violated the plaintiff's constitutional right but is entitled to qualified immunity because the right was not clearly established at the time, the 'prevailing' defendant presumably would not be able to appeal the adverse constitutional holding. . . *cf. Camreta v. Greene* . . . (official who prevails on qualified immunity in district court may not be able to obtain appellate review, notwithstanding availability of certiorari review to official who prevails on qualified immunity on appeal). As in *Rasul II*, we believe '[c]onsiderations of judicial restraint favor exercising the *Pearson* option with regard to [the] plaintiffs' *Bivens* claims.'").

Bame v. Dillard, 637 F.3d 380, 384, 386 (D.C. Cir. 2011) ("In this case the principle of constitutional avoidance counsels that we turn directly to the second question. As the Court recognized in *Pearson* itself, 'There are cases in which it is plain that a constitutional right is not

clearly established but far from obvious whether in fact there is such a right.'. . This is such a case. Therefore the first and, as it happens, only question we address is whether it was clearly established in September 2002 that strip searching an arrestee before placing him in a detention facility without individualized, reasonable suspicion was unconstitutional. To answer this question, 'we look to cases from the Supreme Court and this court, as well as to cases from other courts exhibiting a consensus view,' *Johnson v. District of Columbia*, 528 F.3d 969, 976 (D.C.Cir.2008)–if there is one. . . . We conclude the law in 2002 did not clearly establish that strip searching all male arrestees prior to placement in holding cells at the Superior Court violated the Fourth Amendment. The governing precedent was then, as it is now, *Bell v. Wolfish*, and nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility. . . . We are aware of no Supreme Court case . . . that suggests a reasonable officer could not have believed his actions were lawful despite a consensus among the courts of appeals when a precedent of the Supreme Court supports the lawfulness of his conduct. A different reading of *Bell* by the several circuits to have considered the issue before 2002 could not 'clearly establish' the unconstitutionality of strip searches in this context. That *Powell* and *Bull* came down after 2002 is of no moment; those opinions simply accord with our own understanding that *Bell* did not establish the unconstitutionality of a strip search under conditions like those present here. . . . Because there was in 2002 no clearly established constitutional prohibition of strip searching arrestees without individualized, reasonable suspicion, we need not consider whether Dillard had individual suspicion as to each of the plaintiffs.")

Bame v. Dillard, 637 F.3d 380, 388, 392, 398-400 (D.C. Cir. 2011) (Rogers, J., dissenting) ("Contrary to the principles underlying qualified immunity as a limitation on the occasions when liability for unconstitutional conduct by a public official will be excused, the majority holds the conduct is to be evaluated by recently articulated law and not, as the Supreme Court has instructed, by the clearly established law reflected in the consensus of persuasive authority at the time of the conduct. In so doing, this is the first time a circuit court of appeals has suggested that the protections of the Fourth Amendment to the Constitution against unreasonable searches do not extend to an individual arrested for a non-violent minor offense who is awaiting arraignment apart from the general population of detainees, and is subjected to a strip search in the absence of reasonable suspicion he is hiding contraband or weapons. This runs contrary to the consensus of ten circuit courts of appeals at the time of the challenged strip searches. To reach this result the majority tramples over Supreme Court precedent and gives short shrift to the protections of the Fourth Amendment. Accordingly, I respectfully dissent. . . . [P]rior to 2002 all ten of the circuit courts of appeal to address the open question from *Bell* held that strip searches of arrestees for non-violent minor offenses in the absence of reasonable suspicion were unreasonable under the Fourth Amendment. . . . In allowing Marshal Dillard to claim qualified immunity based on post-2002 circuit court of appeals decisions, the majority returns to the pre-*Harlow* subjective standard whereby a public official is empowered to read a Supreme Court decision on the Fourth Amendment (*Bell*) as being conclusive on the constitutionality of strip searches of pre-arraignment arrestees such as the plaintiffs despite the clearly established consensus among the other circuit courts of appeals and district court opinions in the official's circuit. As the Supreme Court has

adhered to the objective standard adopted in *Harlow*, the public official has no such authority. . . . The majority misses the point in its discussion of how the ten circuit courts of appeals had interpreted *Bell* as of 2002. First, for purpose of claiming qualified immunity the Supreme Court has already advised public officials of the standard to which they must conform their conduct: clearly established law as evidenced by a consensus of persuasive authority at the time of their conduct. Of course, had the Supreme Court held, or were this court to hold, that the challenged conduct is Constitutionally permissible, which the majority does not hold, then the plaintiffs would have no *Bivens* claim. . . . But the subjective belief of a public official about the law is not the test. . . . The question left open in *Bell* was answered for Marshal Dillard before September 2002 by a consensus of persuasive authority from the circuit courts of appeals and controlling authority from the federal district court having jurisdiction over his conduct. These courts, upon applying *Bell*'s balancing test, had uniformly held that the Fourth Amendment protects pre-arraignment arrestees who like the plaintiffs were arrested for non-violent minor offenses from strip searches absent reasonable individualized suspicion of hiding contraband or weapons. . . .The Eleventh and Ninth Circuits have the authority to change clearly established law upon rehearing en banc, but under Supreme Court precedent Marshal Dillard had no such authority to ignore clearly established law. . . . The Supreme Court aimed to protect Constitutional rights by limiting the availability of qualified immunity to those officials who learn the law as it stands before they act and then act in accordance with that law, not those who apply their subjective views instead. . . . The majority's approach means there are no objective limits to the scope of qualified immunity because a court may one day hold that the settled consensus of persuasive authority misapprehended a Supreme Court opinion on the requirements of the Constitution.")

Rasul v. Myers, 563 F.3d 527, 529, 530 (D.C. Cir. 2009) ("There is another reason why we should not decide whether *Boumediene* portends application of the Due Process Clause and the Cruel and Unusual Punishment Clause to Guantanamo detainees–and it is on this ground we will rest our decision on remand. The doctrine of qualified immunity shields government officials from civil liability to the extent their alleged misconduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . Our initial opinion followed the requirement of *Saucier v. Katz,* 533 U.S. 194 (2001), that courts must first determine whether the alleged facts make out a violation of a constitutional right; if the plaintiff satisfies this first step, then the court must determine whether the asserted right was 'clearly established' at the time of the violation. . . After our initial decision, the Supreme Court handed down *Pearson v. Callahan*, 129 S.Ct. 808 (2009). *Pearson* ruled that the *Saucier* sequence is optional and that lower federal courts have the discretion to decide only the more narrow 'clearly established' issue 'in light of the circumstances in the particular case at hand.'. . Considerations of judicial restraint favor exercising the *Pearson* option with regard to plaintiffs' *Bivens* claims in Counts 5 and 6. The immunity question is one that we can 'rather quickly and easily decide,'. . .–and already have. . . We thus follow the 'older, wiser judicial counsel 'not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'". . . In view of *Saucier,* constitutional adjudication was "unavoidable" when we rendered our initial decision, but given *Pearson* that is no longer true. Our vacated opinion explained why qualified immunity insulates the defendants from plaintiffs' *Bivens*

claims. . . *Boumediene* does not affect what we wrote. No reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights. . . At the time of their detention, . . . neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights–under the Fifth Amendment, the Eighth Amendment, or otherwise.").

Celikgogus v. Rumsfeld , Nos. 06–1996 (RCL), 08–1677(RCL), 2013 WL 378448, *6 (D.D.C. Feb. 1, 2013) ("In *Rasul II,* the court 'exercis[ed] the *Pearson* option with regard to plaintiffs' *Bivens* claims,'. . and determined that the plaintiffs' Fifth and Eighth Amendment rights were not 'clearly established' at the time of the alleged violations. . . The court reasoned that '[a]t the time of [plaintiffs'] detention, neither the Supreme Court nor this court had ever held that aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights.'. . Again, plaintiffs' constitutional claims fail because they are legally indistinguishable from those addressed in *Rasul II.* Because it was not 'clearly established' at the time of the alleged violations that 'aliens captured on foreign soil and detained beyond sovereign U.S. territory had any constitutional rights,' defendants are entitled to qualified immunity on these claims.")

Estate of Gaither ex rel. Gaither v. District of Columbia, 833 F.Supp.2d 110, 123 (D.D.C. 2011) ("The Court need not decide whether this factual record does or does not in fact amount to a constitutional violation. Rather, the important point is that Plaintiff has not and cannot point to *a single case* predating the challenged conduct that would indicate that the precedent existing at the time of Gaither's death 'placed the ... constitutional question beyond debate.' *Al–Kidd,* 131 S.Ct. at 2083. In the final analysis, after reviewing the legal landscape 'in light of the specific context of this case' and 'not as a broad general proposition,'. . . the Court cannot conclude that the Defendant Correctional Officers were on notice that their conduct would be 'clearly unlawful[.]'"

FIRST CIRCUIT

Hill v. Walsh, 884 F.3d 16, 19-23 (1st Cir. 2018) ("Because the law on the emergency aid exception to the warrant requirement was not clearly established at the time of the incident, we uphold the district court's entry of judgment based on qualified immunity. We also take this opportunity to clarify our circuit's emergency aid doctrine: officers seeking to justify their warrantless entry need only demonstrate '"an objectively reasonable basis for believing" that "a person within [the house] is in need of immediate aid."'. . . They do not need to establish that their belief approximated probable cause that such an emergency existed. We thus modify our previous pronouncements in *United States v. Martins*, 413 F.3d 139 (1st Cir. 2005), and its progeny. . . . The district court granted the defendants' motion for summary judgment on the ground that they did not violate the Fourth Amendment. We affirm on the basis that the officers are entitled to qualified immunity and no claim is stated against the City. . . .Here, the officers allege that they entered 3 Eldridge Street because (1) they received a section 35 warrant of apprehension for Matthew, which was issued by a judge who determined that 'there [were] reasonable grounds' to believe Matthew would not appear for his civil commitment hearing, and,

importantly, that 'any further delay in the proceedings would present an immediate danger to [his] physical well-being,' Mass. Gen. Laws ch. 123, § 35; (2) the warrant stated '3 Eldridge Street,' in its subject line; (3) Officers Henault and Enos thought that they saw a person inside 3 Eldridge Street, whom they believed -- but could not confirm without entry -- was Matthew; and (4) a door to the home was unlocked, and the officers assumed the door would have been secured if the house was unoccupied. There is no clearly established law on point. The Supreme Court has never addressed whether a section 35 warrant -- or any warrant to compel attendance at a civil commitment hearing, for that matter -- is sufficient to justify the police's warrantless entry into the home pursuant to the emergency aid exception. We have also never had the occasion to consider section 35 warrants in this context. . . The district court also aptly pointed to a second wrinkle: this court's language and the test adopted by the Supreme Judicial Court of Massachusetts disagree as to the government's burden of proof under the emergency aid exception. . . We take this opportunity to clarify our circuit law. In light of the Supreme Court's most recent decision on the emergency aid exception, *Michigan v. Fisher*, we hold that the government need not show probable cause, only 'an objectively reasonable basis' for believing that a person inside the home is need of immediate aid . . . in order to effectuate a warrantless entry. This basis need not 'approximate probable cause.'. . .We offer this clarification to bring our case law in line with Supreme Court precedent. The Court's choice of language is instructive. It used 'objectively reasonable basis' for the officers' belief; it did not use the familiar tests of 'reasonable suspicion' or 'probable cause.' At least two of our sister circuits have also so concluded. *See United States v. Toussaint*, 838 F.3d 503, 508-09 (5th Cir. 2016) (adopting the "objectively reasonable basis" standard); *Schreiber v. Moe*, 596 F.3d 323, 330 (6th Cir. 2010) (same). . . .The Hills' only rejoinder is that regardless of the contours of the emergency aid exception, it was not 'objectively reasonable' for the officers to believe that Matthew was inside 3 Eldridge Street. They argue that the face of the section 35 warrant clearly indicated that Matthew was 'CURRENTLY AT MORTON HOSPITAL,' a fact the officers would have 'reasonably known' or 'discover [ed],'. . . had any of them read the warrant carefully, or had Officer Henault reviewed the police blotter, or had Officers Marques or Lavoie verified Matthew's location when radioed. But hindsight is twenty-twenty. The officers' actions do not establish that the decision to enter the home was not objectively reasonable at that time. Given Matthew's history of overdosing and resisting the police, the subject line of the warrant (3 Eldridge Street), and the appearance of a person inside the home, a reasonable officer could have reasonably concluded that her entry was lawful pursuant to the emergency aid exception. We cannot say no reasonable officer would have thought the entry constitutional. And where there is reasonable debate about the constitutionality of the officers' actions, there is qualified immunity.")

Alfano v. Lynch, 847 F.3d 71, 75-80 (1st Cir. 2017) ("The qualified immunity analysis entails a two-step pavane. . . The first step requires an inquiring court to determine whether the plaintiff's version of the facts makes out a violation of a protected right. . . The second step requires the court to determine 'whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.'. .These steps, though framed sequentially, need not be taken in order. . . A court 'may alter the choreography in the interests of efficiency,' defer the first step, and proceed directly to

the second step. . . Because that path seems the most efficacious here, we focus initially on the second step, that is, whether the right at issue was clearly established when Lynch confronted Alfano. The 'clearly established' analysis has two sub-parts. . . The first sub-part requires the plaintiff to identify either 'controlling authority' or a 'consensus of cases of persuasive authority' sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm. . . The second sub-part asks whether an objectively reasonable official in the defendant's position would have known that his conduct violated that rule of law. . . The question is not whether the official actually abridged the plaintiff's constitutional rights but, rather, whether the official's conduct was unreasonable, given the state of the law when he acted. . . The first sub-part of this analysis 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . . In other words, the clearly established law must not be gauged at too high a level of generality; instead, it must be 'particularized' to the facts of the case. . . Even so, there is no requirement of identicality. In arguing for clearly established law, a plaintiff is not required to identify cases that address the 'particular factual scenario' that characterizes his case. . . . Here, the initial question reduces to whether — as of the parties' encounter in July of 2014 — controlling and persuasive precedent provided fair and clear notice that the Fourth Amendment requires probable cause before a police officer, acting under a state protective custody statute, can take an individual into protective custody, handcuff the individual, transport him to a police station, and confine him in a jail cell. . . We turn next to that question. It is hornbook law that the Fourth Amendment requires probable cause to place an individual under arrest. . . The proper approach, though, is a functional one: for decades, controlling precedent has made pellucid that the probable cause requirement extends to certain types of custody that, though short of an arrest, possess attributes that are characteristic of an arrest. . . .Of particular pertinence for present purposes, we have left no doubt that the Fourth Amendment requires officers acting under a civil protection statute to have probable cause before taking an individual into custody of a kind that resembles an arrest. . . . We hold that, in July of 2014, controlling and persuasive authority combined to give a reasonable officer fair and clear warning that the Fourth Amendment required probable cause to take an individual into protective custody, handcuff him, transport him to a police station miles away, and confine him in a jail cell. . . . This holding does not end our odyssey. Concluding, as we do, that the probable cause requirement is clearly established, what remains to be done 'reduces to the test of objective legal reasonableness.'. . Our resolution of this point turns on whether an objectively reasonable officer would have believed he had probable cause to take Alfano into protective custody within the meaning of the relevant protective custody statute. To make this judgment, we must consider whether Lynch's decision to deem Alfano incapacitated, take him into protective custody, handcuff him, transport him to the police station, and confine him in a jail cell was the kind of decision (whether or not correct) that a reasonable officer standing in Lynch's shoes would have reached. . . . The short of it is that Lynch may well have had probable cause to believe that Alfano was intoxicated. Here, however, Lynch's reasons for placing Alfano into protective custody did not extend beyond probable cause to think that Alfano was intoxicated, and intoxication alone is not sufficient to warrant a finding of incapacitation. . . The summary judgment record, construed in the light most favorable to Alfano, simply does not support a conclusion that

Lynch had adequate reason to believe that Alfano, though intoxicated, was likely to harm himself or anyone else or to damage property.")

Belsito Communications, Inc. v. Decker, 845 F.3d 13, 23-27 & n.8 (1st Cir. 2016) ("[T]oday we begin — and end — with the clearly-established step, which requires Blackden to spotlight 'controlling authority' or 'a robust consensus of cases of persuasive authority' (if there is one) that forbade Trooper Decker from acting as he did. . . . Please note: because we resolve this case on the clearly-established ground, we express no view on the constitutionality of Trooper Decker's conduct, *see Barton v. Clancy*, 632 F.3d 9, 12, 30 n.20 (1st Cir. 2011) (taking a similar tack in a qualified-immunity case) — a point so important that we will repeat it again and again throughout this opinion. . . . The bottom line, then, is that while Blackden need not show that the complained-about conduct is the spitting image of conduct previously deemed unlawful, he must show that the conduct's unlawfulness was 'apparent,' given preexisting law. . . What that means is that qualified immunity protects Trooper Decker unless Blackden can persuade us that caselaw on the books in August 2010 put the constitutionality of his actions 'beyond debate.'. . .[A]t step two of the qualified-immunity inquiry we must ask whether Blackden has pinpointed clearly-established law at the time of the seizure that would have stopped a reasonable trooper from thinking exigent circumstances existed 'in the situation [he] encountered.'. . And that situation — remember — was this:

• Trooper Decker believed Blackden had violated a number of state laws, giving him probable cause to arrest Blackden — though the Trooper decided not to do that then and there.
• Blackden knew Trooper Decker was investigating him for possible criminal violations, or so the Trooper thought.
• Trooper Decker believed the camera and memory card contained evidence that could help establish Blackden's presence at the scene, which could help prove Blackden had committed a crime.
• Unlike the turnout coat, helmet, or ambulance, the camera and memory could be destroyed in a flash without breaking a sweat — at least that is what the Trooper concluded.
• And Trooper Decker consulted with a prosecutor before taking the camera and memory card. . . .

Let us be crystal clear: Because we resolve Blackden's Fourth-Amendment claim at the second step of the qualified-immunity test (as we are free to do), we need not say whether Trooper Decker's actions were legal — *i.e.*, we do not say whether exigent circumstances were or were not in play. Nor need we explore what the precise parameters of the exigent-circumstances exception are or should be. All we need say is that Blackden has not met his burden of showing that clearly-established law in August 2010 precluded a reasonable trooper from believing the exigent-circumstances exception applied in this situation. And it is on that basis alone that we affirm the judge's qualified-immunity ruling on this claim.")

Belsito Communications, Inc. v. Decker, 845 F.3d 13, 27-28 (1st Cir. 2016) ("At qualified-immunity's second step, Blackden must show that clearly-established law in August 2010 would have put Trooper Decker on clear notice of his potential First-Amendment liability. And regarding

the 'by means within the law' theory, Blackden points us to nothing that would have put a sensible trooper on notice in August 2010 that even if he (the trooper) had probable cause to pursue criminal charges against a photographer unauthorizedly in a restricted area and had talked to a prosecutor, he still could not have rationally concluded that the photographer had acted *outside* the law while shooting the photos. . . More, Blackden gives us no convincing reason to suppose that the pertinent constitutional principles were so particularized back then that Trooper Decker could not have rationally thought he had the legal wiggle room to do as he did — *i.e.*, he presents nothing to persuade us that Trooper Decker's actions, like the actions of the welfare officials in the slavery hypothetical, constitute conduct so egregious that a reasonable official must have known it was unconstitutional. So that there is no confusion about our holding on the First-Amendment claim: We do not say whether Trooper Decker's actions did or did not violate Blackden's First-Amendment rights. Nor do we say what a complete compendium of First-Amendment rights for news gather[er]s is or should be. We say only that Blackden failed to identify clearly-established law as of August 2010 showing beyond debate that Trooper Decker's specific acts violated the First Amendment. And that is that.")

Eves v. LePage, 842 F.3d 133, 140-42, 144(1st Cir. 2016), *rehearing en banc granted, opinion vacated* (Jan. 19, 2018) (argued April 3, 2018) ("The facts and the parties' arguments touch upon a host of nuanced First Amendment questions. We leave them for another day and affirm dismissal of the damages claims on narrow grounds: Governor LePage is entitled to qualified immunity, because Speaker Eves has not shown that it was beyond debate that the Governor's discretionary actions amounted to unconstitutional retaliation against the Speaker. . . . Qualified immunity analysis, which forecloses Speaker Eves's damages claims, encompasses two inquiries. The first is 'whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right,' and the second is 'whether the right was "clearly established" at the time of the defendant's alleged violation.'. . The second prong, in turn, contains two subparts: '(a) whether the legal contours of the right in question were sufficiently clear that a reasonable [official] would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable [official] would have understood that his conduct violated the right.'. . We jump directly to the second prong. . . and ask whether Speaker Eves has met his burden to show that Governor LePage violated 'clearly established' federal law. . . Although Speaker Eves need not produce 'a case directly on point' to overcome Governor LePage's qualified immunity defense, 'existing precedent must have placed the ... constitutional question beyond debate.'. . . The specific question we must consider is whether a reasonable governor objectively could have been uncertain about either the contours of the legal landscape or the constitutionality of this particular series of actions. . . . On these facts, a reasonable governor could have been uncertain whether the attempts to influence GWH [Good Will-Hinckley] would infringe upon the Speaker's constitutional rights -- even if the attempts were successful. No Supreme Court case or circuit case clearly forbade Governor LePage from informing a potential recipient of a government grant of his intention to exercise funding discretion, afforded him by the state legislature, if the potential recipient chose to persist with a course of action that the Governor disfavored. . . .The Governor reasonably could have believed that his threats and criticisms pertained to subjects within his

political ken and broad discretionary authority as governor, and that he was acting lawfully by criticizing and commenting upon GWH's plan to employ a president with a track record of opposition to Governor LePage's priorities with respect to education policy. To avoid this conclusion, Speaker Eves must identify 'existing precedent ... [that] placed the statutory or constitutional question beyond debate.'. . He cites several circuit cases and says that they put Governor LePage on notice that the Governor's communications with a third party -- that is, GWH -- violated the Speaker's rights. Of the cases the Speaker identifies, we discuss three, each of which involved a governor as defendant: *Mihos v. Swift*, 358 F.3d 91 (1st Cir. 2004); *El Dia, Inc. v. Rossello*, 165 F.3d 106 (1st Cir. 1999); and *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006). None of the three placed it 'beyond debate,' in June 2015, that the Governor's actions violated the Speaker's constitutional rights. . . .By way of conclusion, we reiterate that we have no need to address the constitutionality vel non of Governor LePage's conduct. We hold only that an official in the Governor's position reasonably could have been uncertain whether this particular series of actions, falling within broad discretion given by the legislature and pertaining to funds not yet formally appropriated, amounted to a violation of Speaker Eves's constitutional rights. Our holding is consistent with a long line of Supreme Court cases applying immunity as a shield for public officials who must exercise broad discretion in the discharge of their public duties.")

Eves v. LePage, 842 F.3d 133, 146-49 (1st Cir. 2016) (Thompson, J., dissenting), *rehearing en banc granted, opinion vacated* (Jan. 19, 2018) (argued April 3, 2018) ("Let what happened here sink in for a moment: As part of his 2015 scorched-earth campaign against Democrats, Republican Governor LePage threatened to put GWH — a century-old social-service organization for at-risk children — out of business by withholding over a cool mil in state funding unless GWH canned Democratic House Speaker Eves as its president. . . .[Z]eroing in on the second prong of the qualified-immunity analysis (the clearly-established-right prong), my colleagues basically believe a governor back then could've reasonably thought it perfectly legal to do what Governor LePage did, because, they say, no prior case 'forbade' the precise conduct that Speaker Eves complains of. . . .Convinced that the majority's qualified-immunity analysis is off the mark, I write these words of protest. The qualified-immunity defense hardly gives an official carte blanche to trash a citizen's constitutional rights simply because the fact pattern of the case doesn't precisely match the fact pattern of earlier cases. . . . [M]y co-panelists' analysis doesn't persuade. Take first their comment — point [**a**] — that no case has ever put a public official on the liability hook for pressuring a private third-party entity to ax one of its employees. Undercutting their position is the fact that the very opinion they cite to support their position also says that 'a public official' who took 'some type of adverse action' impinging the plaintiff's First Amendment rights may be personally liable if he ' "*threaten[ed" or "coerce[d]" the third party to act*.' *See Zaloga v. Borough of Moosic*, No. 15-2723, 2016 WL 6156003, at *4 (3d Cir. Oct. 24, 2016) (quoting *McLaughlin v. Watson*, 271 F.3d 566, 573 (3d Cir. 2001)). And assessing the allegations through the required plaintiff-friendly prism, I have no trouble concluding that Governor LePage's bullying — forcing GWH to sack Speaker Eves on pain of losing more than a million bucks in expected state funding, knowing as he did that such a loss would likely kill GWH — is the type of coercion condemned by *Zaloga*. As for the majority's talk about Governor LePage's funding *discretion* — point [**b**]: Does anyone

think the Governor would or should get off scot-free if he had browbeat a state-funds-receiving entity into dumping an employee for religious, racial, or gender reasons? No way. . . .The bottom line: Clearly-established law didn't give Governor LePage the discretion to infract Speaker Eves's constitutional rights. And because the majority — though conscientious — rules otherwise, I respectfully but emphatically *dissent*.")

Marrero-Mendez v. Perez-Valentin, 830 F.3d 38, 43-48 & n.6 (1st Cir. 2016) ("Here, appellants argue that it is unnecessary to address the first prong inquiry because their primary argument is that the second prong has not been satisfied. We can decide based solely on the second prong, however, only if we concluded that appellants are entitled to qualified immunity on that basis. That is not the conclusion we reach. . . .[W]e conclude that the first prong of the qualified immunity inquiry is met: appellants violated the Establishment Clause by (i) forcing Marrero to observe a religious practice against his will and (ii) punishing him for his non-conformance. . . .Where, as here, a religious practice is conducted by a state official at a state function, state sponsorship is so conspicuously present that only 'the plainly incompetent or those who knowingly violate the law,'. . . would deny it. . . . The district court found that a reasonable officer in March 2012 would have known that 'ordering a subordinate to observe a religious prayer ... without giving the subordinate the ability to opt out ... would violate the Constitution.' This formulation of the inquiry, however, is not sufficiently specific. An affirmative answer to this inquiry, though accurate, would state an abstract principle of law, disassociated from the facts of the case. . . Hence, in accordance with the Supreme Court's guidance, we frame the 'clearly established' inquiry as follows: appellants are entitled to qualified immunity if a reasonable officer in March 2012 would not have known that appellants' conduct was coercive in the situation they encountered. . . The relevant situation, and appellants' actions, consisted of the following: (1) after directing Marrero to abandon the formation, Calixto ordered Marrero, as he was walking away, to stop and stand still until the prayer was finished; (2) as Marrero stood in the vicinity of the group, Calixto shouted that Marrero was standing separately from the group because he does not subscribe to the same faith as the rest of the group; (3) after Marrero complained about the incident, he was stripped of his law enforcement responsibilities and demoted to lesser tasks. . . With that clarification, we examine whether the law as of March 2012 put reasonable officers on notice that appellants' conduct -- ordering a subordinate, against his will, to stand nearby while his colleagues engage in a prayer and then humiliating and punishing him for non-conformance -- constitutes religious coercion. We conclude that it did. Indeed, the coerciveness of appellants' conduct is so patently evident that no particular case -- and certainly not one 'directly on point,'. . . need have existed to put a reasonable officer on notice of its unconstitutionality. Nonetheless, existing precedent supports this inescapable conclusion. [discussing cases from other circuits] We reiterate that, while *Anderson*. . . and *Mellen*. . .could be read as suggesting that the prayer at issue in this case would be unconstitutional even with an opt-out opportunity, we do not decide that question on this record. As we noted in footnote 4, the facts indicate that such an opt-out opportunity was not provided to Marrero. . . . However complex the nuances of the Establishment Clause doctrine may be for cases without the direct coercion present in this case, a reasonable officer in March 2012 would have known that appellants' conduct amounted to direct and tangible coercion, a paradigmatic example of an

impermissible establishment of religion. The district court's denial of qualified immunity is, therefore, affirmed.")

Rivera-Corraliza v. Morales, 794 F.3d 208, 217 n.12, 223 (1st Cir. 2015) ("We need not decide whether *Patel*—the Supreme Court's most recent decision dealing with *Burger*—changed the *Burger* test in any way. That is because the key question for qualified-immunity purposes is whether the law was clearly established when the complained-of actions occurred. . . Notice—prior notice, not after-the-fact notice—is what matters, because officers need to know when they are doing wrong. . .And *Patel* was not around when the events here went down. . . . In remanding to get the district court's thoughts on the crucial timing and scope issues, we offer this reminder: To defeat a qualified-immunity defense here, plaintiffs must show that defendants violated their Fourth Amendment rights and that those rights were clearly established at the time. . . Repeating what we said earlier, courts may (and sometimes should) decide qualified-immunity claims based solely on the second step—holding that the contours of the right were not clearly established, without deciding whether there was a constitutional violation. . . If the district court goes that route, both the court and the parties should be ever mindful that the qualified-immunity inquiry is highly context-specific, turning on whether it would be clear to reasonable officers in defendants' positions that their actions violated the Fourth Amendment . . . and that defendants' positions run the gamut from policymakers to advisors to supervisors to implementers. We also leave it to the court on remand to resolve codefendants Gadea–Rivera, Diez de Andino, Vescovacci–Nazario, and Flores–Cortés's argument that they had no personal involvement in any alleged constitutional violation, as required by section 1983.")

Hunt v. Massi, 773 F.3d 361, 366-70 (1st Cir. 2014) ("We conclude that the district court erred in denying qualified immunity to the defendants for the plaintiffs' claim of excessive force. When defined at the appropriate level of specificity, the necessary question is whether Hunt had a clearly established right to have his hands cuffed in front of him due to an alleged injury despite the officers' judgment call to the contrary. There is no such clearly established right. Instead, First Circuit precedent makes clear that the officers' decision to handcuff an arrestee according to standard police practice is a judgment call that must be analyzed based on the totality of the circumstances. Based on the facts here, no reasonable officer would have believed that his or her decision to handcuff Hunt according to standard police practice violated the constitutional prohibition on excessive force. . . . It is in our discretion not to engage in the first inquiry, but to go directly to the second, as we do here. . . We start by defining the right at issue at 'an appropriate level of generality.'. . Citing *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the plaintiffs argue that '[t]here is little doubt that police must refrain from use of excessive force.' This 'casts too broad a net.'. . The Supreme Court agreed that 'there is no doubt that *Graham* ... clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.'. . 'Yet,' the Supreme Court explicitly held, 'that is not enough' to defeat qualified immunity. . . . In this case, the relevant question is not whether the Fourth Amendment generally prohibited excessive force. The relevant question is whether, in 2011, Hunt had a clearly established right to be handcuffed with his hands

in front of him when it would not be obvious to a reasonable officer that Hunt's abdominal scar would prevent him from putting his hands behind his back. The ensuing events, in which Hunt does not claim to have cooperated, occurred in the course of the handcuffing with his hands behind his back. . . To be clearly established, the contours of this right must have been 'sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'. . 'In other words, "existing precedent must have placed the ... constitutional question beyond debate."'. . The district court undertook this analysis at the appropriate level of specificity, but erred in its conclusion that Hunt had a clearly established right to be handcuffed with his hands in front of him due to an alleged injury, 'even if the injury is not visible.'. . The district court relied on four cases to reach this conclusion. . . Two are easily distinguishable from the present case since they involved much more serious, and visible, injuries that would have been exacerbated by the standard police procedure for handcuffing. . . The other two district court opinions, which both acknowledge a debate on the issue, are simply insufficient to show that the law was clearly established for immunity purposes. . . . [O]ther circuits have reached different holdings on the constitutionality of handcuffing an allegedly injured arrestee behind his or her back. [collecting cases] In this circuit, the controlling case is *Calvi v. Knox County,* 470 F.3d 422 (1st Cir.2006), in which we found no constitutional violation when officers handcuffed an allegedly injured arrestee according to standard police practice. . . There, police officers responded to a report of a woman, Calvi, brandishing a knife in a residence. . . Calvi's landlord advised the police officers that Calvi had recently undergone elbow surgery and asked them to be gentle. . . The police officer 'did not observe any debilitating condition,'. . . and handcuffed Calvi according to the '[s]tandard police practice' with her hands behind her back . . . . We held that '[the officer's] decision not to deviate from this practice was a judgment call, pure and simple.'. . . The plaintiffs point to no post-*Calvi* case that would have put the officers on notice that their decision to handcuff Hunt with his hands behind his back was not a 'judgment call,' but clearly violated the Constitution. Nor could they. . . . On the facts of this case, a reasonable officer would not have understood his or her decision to handcuff Hunt with his arms behind his back to constitute excessive force. The officers knew of Hunt's serious and recent criminal history, and they encountered some admitted resistance. They had also looked at the site of his recent surgery and determined that no new injury or exacerbation would result from the standard technique for handcuffing. Nor was this determination unreasonable since Hunt's scar was on his stomach. Most of the cases finding excessive force incident to handcuffing involve injuries to the shoulder or arm. . . After *Calvi,* a reasonable officer would not have understood this judgment call to be a violation of the Constitution. For these reasons, the defendants are entitled to qualified immunity on the plaintiffs' excessive force claim.")

Ford v. Bender, 768 F.3d 15, 23-27 (1st Cir. 2014) ("Federal courts have discretion to bypass the first step of the qualified immunity framework and to focus instead on the second step. . . The defendants ask us to do so here. They state that the issue before the court is whether reasonable prison officials would have understood 'that continuing a lawful DDU sanction during a subsequent period of pretrial detention constituted impermissible punishment proscribed by *Bell*' and that the '2003 ten-year DDU sanction did not provide adequate process for [Ford's] 2007–2008 pretrial DDU placement.' We find that reasonable officials in the defendants' shoes would

not have understood that their actions violated the plaintiff's constitutional rights. Since the law was not clearly established, the defendants are entitled to qualified immunity. . . .Here, the defendants have repeatedly admitted that Ford's pretrial detention in the DDU had a punitive purpose. For example, Bender acknowledged forthrightly in testimony before the district court that his decision to confine Ford to the DDU in 2007 was '[a]bsolutely' intended to punish. The purpose of the DDU confinement, he declared, was to punish Ford for the assault for which he was awaiting trial. Similarly, St. Amand's communique noted that the purpose of Ford's segregated pretrial confinement was to continue serving his punitive DDU sanction. The district court relied on the defendants' plain expressions of punitive intent to find that the plaintiff's tenure in the DDU as a pretrial detainee constituted impermissible punishment and, therefore, abridged his right to substantive due process. While *Bell* provides clear guidance about the constitutional bounds of conditions of confinement for pretrial detainees, *Bell* does not clearly address whether and when punishment is permitted as an individualized disciplinary sanction for a pretrial detainee's misconduct. . . . Ford argues that *Collazo–Leon* concerned a very different factual scenario, one in which the disciplinary infraction and the disciplinary hearing occurred during the pretrial detention itself, whereas Ford's DDU confinement in 2007–2008 was punishment for an offense committed years earlier when he was serving a prior criminal sentence. Ford might be right that the timing of a disciplinary infraction—during the pretrial detention itself as opposed to during a prior period of incarceration—affects the question of whether pretrial disciplinary segregation violates substantive due process. . . The critical inquiry in deciding this appeal, however, is whether any reasonable official in these circumstances would have understood that the continuing disciplinary sanction, imposed when Ford was a pretrial detainee on different charges, for conduct that occurred during a prior period of incarceration, violated Ford's constitutional right to substantive or procedural due process. *Collazo–Leon* does not definitively answer whether Ford's detention was constitutional or not. It does, however, plainly hold that determining whether an act is punitive does not end the constitutional inquiry in the case of an individualized disciplinary process. *Collazo–Leon* thus illustrates why *Bell* alone does not show that the right at issue here was clearly established. . . .The right at issue here is not the right of a pretrial detainee to be free from punishment generally, but rather the right of a pretrial detainee to be free from punishment that was validly imposed while serving a prior criminal sentence. Neither *Bell* nor *Collazo–Leon* clearly answers this question. Viewed at the appropriate level of generality, particularly in light of the decision that MCI–Cedar Junction had just received in *Karnes,* we cannot say that all reasonable prison officials would have known that holding Ford in the DDU during his pretrial detention for an offense that occurred during a prior criminal sentence was unconstitutional. Any violation of Ford's right to substantive due process was not a violation of clearly established law as of 2007–2008. We conclude, therefore, that the defendants were entitled to qualified immunity with respect to the alleged violation of the plaintiff's right to substantive due process.")

MacDonald v. Town of Eastham, 745 F.3d 8, 10, 14, 15 (1st Cir. 2014) ("This appeal poses the question of whether police officers, responding to a call from a citizen concerned that the door to her absent neighbor's home is standing wide open, have a right to enter the home in pursuance of their community caretaking function. While the answer to this question is freighted with

uncertainty, that uncertainty points the way to the proper disposition of the case: because there is no clearly established law that would deter reasonable police officers from effecting such an entry, the individual defendants are entitled to qualified immunity. Consequently, we affirm the district court's dismissal of the action. . . . Given the profusion of cases pointing in different directions, it is apparent that the scope and boundaries of the community caretaking exception are nebulous. The plaintiff appears to concede that this rampant uncertainty exists. Nevertheless, he strives to convince us that, whatever the parameters of the exception, the circumstances here fall outside of it. We are not persuaded. There is no real dispute about what the defendant officers did: they responded to a call from a concerned neighbor, saw the door to the plaintiff's house standing wide open, announced their presence without receiving a reply, and proceeded to enter the home to ensure that nothing was amiss. They conducted their ensuing search in an unremarkable manner. These actions were at least arguably within the scope of the officers' community caretaking responsibilities—and, given the parade of horribles that could easily be imagined had the officers simply turned tail, a plausible argument can be made that the officers' actions were reasonable under the circumstances. The plaintiff disagrees. He contends that the officers' actions were well outside what the law allows and that any reasonable officer should have known as much. To evaluate the plaintiff's contention, we must examine whether, at the time of the incident, there were either controlling cases or a consensus of persuasive authorities such that reasonable police officers could not have thought that their actions were lawful. . . Manifestly, there is no directly controlling authority. The question thus reduces to whether a consensus of persuasive judicial decisions exists. We think not. . . . To render a government official's claim of qualified immunity inert, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . The mixed bag that a canvass of the case law reveals simply does not produce the requisite degree of clarity here. The short of it is that neither the general dimensions of the community caretaking exception nor the case law addressing the application of that exception provides the sort of red flag that would have semaphored to reasonable police officers that their entry into the plaintiff's home was illegal. Qualified immunity is meant to protect government officials where no such red flags are flying, . . . and we discern no error in the application of the doctrine to this case. . . .Let us be perfectly clear. We do not decide today whether or not the community caretaking exception can be applied so as to render constitutional a warrantless and non-consensual police entry into a residence. Nor do we decide whether or not the circumstances that confronted the officers here come within the compass of the community caretaking exception. These questions are down-to-the-wire close—but the very closeness of the questions is telling. Given the nature of the qualified immunity inquiry, it is sufficient to hold—as we do in this opinion—that because these questions are not resolved by clearly established law, the officers who entered and searched the plaintiff's dwelling are entitled to the shield of qualified immunity. We need go no further.")

Goldstein v. Galvin, 719 F.3d 16, 29-31 (1st Cir. 2013) ("[T]he plaintiff complains of an allegedly retaliatory act that is not within the scope of either judicial or prosecutorial immunity, specifically, the use of the plaintiff's name in the public announcement of the enforcement proceeding on the Secretary's website. The district court disposed of this claim on the basis of qualified immunity. . .We choose instead to meet it head-on. . . .It is clear beyond hope of contradiction that the inclusion

of the plaintiff's name in a run-of-the-mill website announcement did not sink to the level of actionable retaliatory conduct. The plaintiff does not contend that the website announcement was false or misleading, nor that it divulged confidential information; he takes issue only with the use of his name. . . . Allowing a plaintiff to weave a First Amendment retaliation claim out of something so mundane as a government official's issuance of a true statement, not couched in inflammatory terms, about a matter of public concern would trivialize the Constitution. . . That ties up this loose end. The plaintiff has not pleaded a plausible claim for unconstitutional retaliation based on the website announcement. Consequently, the district court did not err in dismissing this claim.")

Learning Alliances, LLC v. Rivera–Sánchez, 715 F.3d 1, 10 (1st Cir. 2013) ("The district court concluded that Rocket Learning failed to state a plausible equal protection claim. We do not decide that question. Rather, the appellant's claim falters on the 'clearly established' prong of the qualified immunity test. The record establishes that a reasonable official in the Secretary's position could have rationally concluded that his actions were consistent with the Constitution.")

Eldredge v. Town of Falmouth, MA, 662 F.3d 100, 106, 107 (1st Cir. 2011) ("Turning to the claim against Maguire, we first note that it is not mandatory to address the qualified immunity prongs sequentially. . . Because a finding that a right was not 'clearly established' under the second prong of the analysis is sufficient to warrant a grant of qualified immunity, . . . discussion of the first prong will in some cases result 'in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case[.]'. .We therefore proceed directly to the 'clearly established' prong of the analysis in assessing the claim against Maguire. . . . Maguire urges that, even assuming that he effected an investigatory stop of the plaintiff without reasonable suspicion, he is nonetheless entitled to qualified immunity because the unlawfulness of the detention would not have been apparent to a reasonable officer standing in his shoes. We agree. . . .Here, Officer Maguire was responding to a 911 call in which a fearful caller relayed an urgent situation that was still unfolding–namely, that her ex-boyfriend, who had been drinking, had already 'trashed' the inside of her home where children were present and at the time of the call was continuing his destructive behavior outside. As Maguire drove towards the site of the disturbance, he spotted the plaintiff, a male, walking on Sandwich Road after dark on a weeknight, just minutes after a fresh 911 call originating only half a mile away. These facts could reasonably support the suspicion that the plaintiff was the caller's ex-boyfriend leaving the site of the disturbance. Officer Maguire was therefore entitled to qualified immunity.")

U.S. v. Garcia-Hernandez, 659 F.3d 108, 115, 116 (1st Cir. 2011) (Ripple, J., concurring) (sitting by designation) ("I join without reservation the clear and comprehensive opinion of the court. Unquestionably, after *Hudson,* the exclusionary rule is not an appropriate remedy for violations of the knock-and-announce rule. Nor is it an appropriate remedy if a court should determine that the manner in which a warrant was executed violated the reasonableness requirement of the Fourth Amendment. I write separately only to emphasize that the confluence of the rule we announce today and the prevailing methodological approach to the resolution of

qualified immunity issues raises the significant possibility that conscientious law enforcement officers will be deprived of needed judicial guidance concerning the manner in which warrants must be executed. Today's decision makes it clear that criminal trials, and appeals from those proceedings, rarely will yield judicial determinations about the reasonableness of the force employed in the execution of the warrant. Such determinations therefore will occur most frequently in the adjudication of civil actions brought under 42 U.S .C. § 1983 or under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). In most, although not all, the defense of qualified immunity will be available. In such cases courts now are authorized to decide the qualified immunity issue without reaching the constitutional question. *See Pearson v.. Callahan,* 555 U.S. 223, 236 (2009). In *Pearson,* the Court made clear that the two-step sequence for resolving government officials' qualified immunity claims, previously formulated in [*Saucier*] should not be regarded as an inflexible requirement. . . It is now permissible for a court to determine that considerations such as judicial economy and the danger of premature constitutional adjudication counsel against resting its decision on constitutional grounds. . . Instead, the court first may determine that, at the time they acted, the defendants' actions did not violate settled constitutional principles. As the Court noted in *Pearson,* however, despite this new flexibility in approach, reaching the constitutional question 'is often appropriate' and 'often beneficial.'. . Indeed, the Court emphasized that 'the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . Cases involving the manner in which a search warrant is executed certainly fall within this description. One might argue that the constitutionality of a particular search or seizure is 'so factbound that the decision provides little guidance for future cases,'. . . and therefore it serves no useful purpose to address the constitutional issue. However, Fourth Amendment principles concerning reasonableness in the execution of a warrant, no less than the legal rules for probable cause and reasonable suspicion, 'acquire content only through application.'. . This case-by-case adjudication will not, and need not, yield ' "a highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts ... [which is] literally impossible [to apply] by the officer in the field."'. . It can develop, however, a body of law to provide meaningful guidance that will benefit both law enforcement officers and civilians. . . By contrast, a judicial approach that, as a matter of course, does not reach the underlying constitutional issue will deprive conscientious officers of the guidance necessary to ensure that they execute their responsibilities in a manner compatible with the Constitution. Here, an incomplete constitutional landscape can present a practical problem of governance of significant proportions." [footnotes omitted])

Haley v. City of Boston, 657 F.3d 39, 47-51 (1st Cir. 2011) ("In the first of his two section 1983 forays against the detectives, Haley alleges that they abridged his due process rights by failing to comply with the disclosure obligation imposed by the Fifth and Fourteenth Amendments and explicated by the Supreme Court in *Brady v. Maryland.* Because the answer to the second of the two qualified immunity inquiries required by *Pearson* is plain, we assume without deciding that the alleged no-fault nondisclosure constitutes a viable claim of breach and proceed directly to the question of whether the specific right upon which the claim hinges was clearly established at the

time of Haley's trial. . . . We need not decide when it became clearly established that *Brady* extended to impeachment evidence. Here, qualified immunity attaches for a different and independent reason: in 1972, it was not clearly established that *Brady's* no-fault disclosure obligation applied to police officers as opposed to prosecutors. By its terms, *Brady* applied only to prosecutors. 373 U.S. at 87-88. The Court's decision contained no discussion of any independent disclosure obligations that might affect police officers. In the roughly nine years between *Brady* and Haley's trial, the question of how, if at all, the *Brady* rule might apply to disclosure of material known only to police officers remained uncertain. . . . In *Kyles v. Whitley,* the Court held that the disclosure obligation imposed by *Brady* extends to evidence known only to police officers, but that the responsibility for obtaining and disclosing such evidence remains the duty of the prosecutor, and not the police officer. . . The holding in *Kyles* is antithetic to any suggestion that in 1972, *Brady's* affirmative disclosure obligation reached unreservedly to no-fault nondisclosure of *Brady* materials known only to police officers. A fortiori, it was not then clearly established that police officers owed any affirmative no-fault obligation to criminal defendants. Consequently, the detectives are entitled to qualified immunity. . . . [W]e take Haley's case as he has pleaded it, and proceed to determine whether, as a matter of law, the detectives are entitled to qualified immunity on the deliberate suppression claim. In evaluating this claim, we employ the traditional two-step qualified immunity pavane. . . We start with whether the complaint alleges a violation of a constitutional right. This question is not difficult. Haley's deliberate suppression claim fits easily within the compass of the right described in Mooney. . . Deliberate concealment of material evidence by the police, designed to grease the skids for false testimony and encourage wrongful conviction, unarguably implicates a defendant's due process rights. . . . Almost forty years before Haley was tried, the Supreme Court made it pellucid that due process protects an accused against a conviction procured through deliberate deception. . . .The upshot, then, is that, by 1972, the relevant right was clearly established. The inquiry into whether objectively reasonable officials in the defendants' positions would have known that their actions contravened this clearly established right need not occupy us for long. This inquiry perforce focuses on the facts of the particular case. . . . We think that, even as far back as 1972, a reasonable officer in the circumstances alleged here would have understood that parlous behavior of the sort described in Haley's complaint would contravene the constitutional right limned in *Mooney* and its progeny. . . Consequently, the district court erred in dismissing this claim.").

Diaz-Bigio v. Santini, 652 F.3d 45, 52 (1st Cir. 2011) ("Assuming arguendo that the facts alleged by Díaz-Bigio set forth a claim of a First Amendment violation, we turn to the second prong of *Pearson* and ask whether a reasonably competent city official could have thought that he or she would not violate the First Amendment by terminating Díaz-Bigio's employment given the circumstances of the case–where the city investigated Díaz-Bigio's much publicized allegations of serious improprieties by the executive director of her department, where she refused to provide testimony or evidence to corroborate her claims, where the investigation determined that the claims were false and baseless, and where her actions were found to violate state and local regulations. Under a long line of cases from this circuit granting qualified immunity, the defendants are entitled to summary judgment because the outcome of the *Pickering* balancing of interests in this case was

not so clear as to put all reasonable officials on notice that firing Díaz-Bigio would violate the law. Reasonable officials could well have concluded there was no First Amendment violation on these facts.")

San Geronimo Caribe Project, Inc. v. Acevedo-Vila, 650 F.3d 826, 838, 839 (1st Cir. 2011) ("In this case, we have already held that plaintiffs have made out a due process claim. . . and we assume here that they would prevail in proving a constitutional violation. Still, the second prong of qualified immunity–whether the right at issue was clearly established–remains to be addressed. . . .In this case, we are not persuaded that the state of the law at the time of the incidents put defendants on clear notice that their actions violated due process. Specifically, we explain above that not every deviation from state law qualifies as 'random and unauthorized' conduct within the meaning of *Parratt* and *Hudson,* such that defendants are not required to provide predeprivation process. . . *Zinermon* makes this conclusion unmistakably clear. . . Yet, as we have noted (and in fairness to the defendants), a number of our previous decisions might have been reasonably read to require this erroneous interpretation of *Parratt* and *Hudson.* . . These statements easily could have led the defendants to believe that they were not required to provide a meaningful predeprivation hearing and that, under *Parratt* and *Hudson,* providing postdeprivation remedies was all the process that was due. In view of this, it cannot fairly be said that the defendants were on clear notice that their failure to provide predeprivation process violated the plaintiff's constitutional rights, and defendants thus are entitled to qualified immunity."), *vacated and reh'g en banc granted,* 665 F.3d 350 (1st Cir. 2011). The court has asked the parties to file supplemental briefs addressing the following questions:

1. How do the principles of the *Parratt–Hudson* doctrine, including its development in *Zinermon v. Burch,* 494 U.S. 113 (1990), apply in the circumstances of this case?
2. Is First Circuit law inconsistent with this governing Supreme Court law? If so, is that circuit precedent relevant to the "clearly established law" analysis for purposes of the qualified immunity inquiry?
3. Assuming a due process violation occurred in the present case, does qualified immunity apply?

Mlodzinski v. Lewis, 648 F.3d 24, 34, 36, 37, 39 (1st Cir. 2011) ("All three plaintiffs bring claims of unreasonable seizure against the Bristol officers and Commander Cormier on the theory that there was no justification for keeping them in handcuffs in the living room for forty-five minutes to an hour while the police searched the apartment. The qualified immunity question before us is whether a reasonably competent officer could have thought, even mistakenly, that in light of the clearly established law at the time, it was reasonable to keep plaintiffs in handcuffs for this duration while the search was executed. . . . In light of *Mena,* we conclude that the question of qualified immunity must be decided in favor of these officers. They are entitled to immunity because it would have been fairly debatable among reasonable officers whether detaining plaintiffs in handcuffs for forty-five minutes to an hour during the search was reasonable under the facts. We say the question was fairly debatable because, as the district court carefully noted, there are some obvious differences from *Mena* which we believe reasonable officers should have considered.

First, the number of detainees did not, as in *Mena*, outnumber the number of officers throughout the period of their detention. . . Second, plaintiffs' home was not a gang house known to have firearms in it, but rather an apartment known to house a family that included a fifteen-year-old girl. . . Third, the object of the search was a nightstick used when two teenagers attacked another one over a girl, rather than a gun possessed by a gang member who had recently been involved in a drive-by shooting; although the officers had a fear that there was a firearm on the premises that could be used against them, that fear did not have the same foundation as in *Mena*.. . . Based on these differences, a reasonable officer might well have reached a different conclusion than defendants did here. However, these factors are not so substantial that no competent officer could have thought that the use of handcuffs during the search was permissible. . . . To be clear, we are not holding that on plaintiffs' version of the facts there was no constitutional violation, but rather that if there was a violation, it was not so clear as to give the officers fair warning. . . . For Jessica, the claim of excessive force is based on the fact that she was shoved to the floor by Officer Arell, severely damaging her kneecap, and that she was then handcuffed behind her back with metal handcuffs and detained with an assault rifle held to her head for seven to ten minutes, far beyond the time it took to locate, arrest, and remove Rothman. We do not separate these facts out but rather take them as a whole. . . On plaintiffs' version of events, Jessica, a fifteen-year-old girl, was in no way a threat to the officers. She was not a suspect and made no efforts to resist, but rather complied with all commands. And the officers' actions are alleged to have caused her serious physical injury, which required two surgeries and extensive treatment, as well as psychological injury, including Post Traumatic Stress Disorder. . . . First, the facts are sufficient to support a finding that a Fourth Amendment violation occurred. Second, taking all facts and inferences in Jessica's favor, we conclude, as did the district court, that the CNHSOU officers involved are not on this state of the record entitled to immunity. The law was sufficiently well established to provide the officers with fair warning that the force they are alleged to have used on Jessica was excessive given the circumstances. . . . Even without a First Circuit case presenting the same set of facts, defendants would have had fair warning that given the circumstances, the force they are alleged to have used was constitutionally excessive. . . . The circumstances of Tina's detention in bed are unlike those in which a reasonable officer could have thought that keeping a gun pointed at her head was lawful. . . . There was no reasonable danger that Tina, who was not a suspect and was nearly naked in bed and without a sheet, was concealing a weapon. . . The officers were not carrying out a warrant for a group of individuals who might have been engaged in joint criminal activity with Rothman. . . And the gun pointed at Tina was not, on her version, lowered as soon as it was clearly safe to do so. . . Defendants had fair notice that under the circumstances alleged, the detention of Tina with an assault rifle at her head was objectively unreasonable.")

Lopera v. Town Of Coventry, 640 F.3d 388, 396-98, 402, 403 (1st Cir. 2011) ("In this case, these considerations counsel that we consider the second prong of the analysis and go no further. That prong, we have held, has two aspects: that both (1) the legal contours of the right in question and (2) the particular factual violation in question would have been clear to a reasonable official. . . Together, these two factors ask whether a reasonable officer, similarly situated, would have believed that his conduct did not violate the Constitution. . . . Under the facts alleged by the players,

a reasonable officer could have concluded that Coach Marchand had authority to consent to a search of his students. . . . On the plaintiffs' version of the facts, we cannot say that all officers of reasonable competence would have concluded that Coach Marchand's consent to the search was invalid. . . . While a jury might find that Coach Marchand subjectively believed his consent was coerced, that is not the issue here; we must look to the view of the reasonable officer. . . Like Coach Marchand, the police officers faced a tough decision in a difficult situation. Whether the officers made the correct decision is not the point. . . . The players do not cite any cases from this court or the Supreme Court finding a violation of the Equal Protection Clause in the absence of purposeful discrimination on the part of the relevant officials. Accordingly, we hold that the players have not shown that it is clearly established that acts that effectuate the known discriminatory intent of others, without more, violate the Equal Protection Clause. . . . There is no evidence that all officers of reasonable competence would have believed the search was undertaken because of the national origin or race of the players.").

Lopera v. Town Of Coventry, 640 F.3d 388, 404-06, 411 (1st Cir. 2011) (Thompson, J., dissenting in part) ("I agree with my colleagues that a reasonable officer could have believed that Coach Marchand had *in loco parentis* authority to consent to the search of the players and that their equal protection claims must fail. My colleagues and I part company, however, on the issue of qualified immunity. Because I cannot subscribe to the majority's determination that the officers were entitled to qualified immunity because they could reasonably have believed that Coach Marchand voluntarily consented to the search of his students, I respectfully dissent. . . .My colleagues think that a reasonable officer would be unaware of the duress this state of affairs would inspire in the team's coach. In my view, however, the officers' request of Coach Marchand while he was surrounded by an angry mob and unable to depart with his players left little room for choice. He was subjected to coercion which, though subtler than a peremptory command and more courteous than the irate mob, could hardly be plainer. This coercion vitiated any consent he could give, rendering the subsequent search unlawful. . . . In granting qualified immunity to the officers, my colleagues analyzed only the second prong of the test, as permitted by *Pearson.* . . Because I would deny qualified immunity, however, I must address both aspects of the analysis. . . . Because, as discussed below, I believe that a reasonable officer would have known that Coach Marchand's consent to the search of his players was coerced, the first prong of the qualified immunity test is easily satisfied : there was an actual violation in the form of an unconstitutional search. . . . I am gravely concerned that our case law is treading terribly close to creating 'an impenetrable defense for government officals' and a 'significant risk that qualified immunity will always attach.' *Savard v. Rhode Island*, 338 F.3d 23, 41 (1st Cir.2003)(equally divided en banc court)(opinion of Bownes, J.). The Fourth Amendment is one of our most precious constitutional rights. We should not so comfortably defer to the judgment of government officials at the cost of eviscerating such a fundamental right of our citizens-a right this nation has declared deserves the highest protection. . . . With these concerns in mind and taking, as I must, every inference available in the record in favor of the plaintiffs, I cannot say that a reasonable officer in the defendants' position could have concluded that Marchand voluntarily consented to the search. The Central Falls team's rights were violated; the violation was clear; and a reasonable officer should have recognized it. I would vacate

the district court's entry of summary judgment and remand for resolution of the factual disputes upon which the officers' claim of qualified immunity turns.")

Barton v. Clancy, 632 F.3d 9, 22-27 (1st Cir. 2011) ("In conducting a qualified immunity analysis, a court should 'use its full knowledge of its own [and other relevant] precedents.'. . . [N]either the Supreme Court nor this court has ever held that the rule forbidding denial of valuable governmental benefits in reprisal for protected speech announced in *Perry v. Sindermann* and its progeny extends to the denial of non-compensated positions on voluntary boards. Scant authority in support of such an extension of the doctrine currently exists. [court reviews out-of-circuit precedent] In sum, the Second, Seventh, and Ninth Circuits have found that volunteer positions are entitled to constitutional protection; however, these cases have relied in part, either directly or indirectly, on state statutes which mandate that such volunteers be treated as employees. The Tenth Circuit, albeit in dicta, has concluded that volunteers enjoy First Amendment protection without reliance on any such state statute. The Third Circuit, like this circuit, has assumed without deciding that a public volunteer position is a valuable government benefit, the deprivation of which can trigger First Amendment scrutiny. At the same time, no court has held that volunteers are not protected by the First Amendment. . . . Leaving for another day the question of whether Barton has stated a constitutional violation, we hold that as of April 2006, the law was not sufficiently clear to put Clancy on notice that declining to reappoint Barton to the volunteer position of Parks Commissioner in retaliation for his First Amendment activities was unlawful. . . . In sum, determining whether Clancy was liable for his failure to reappoint Barton would require us to answer two uncertain legal questions: (1) whether a volunteer position is a valuable government benefit the loss of which can form the basis of a First Amendment retaliation claim; and (2) whether, even if the removal from a volunteer position triggers First Amendment scrutiny, the failure to reappoint to a volunteer term position can also trigger such scrutiny. Consequently, the dimensions of the right at issue were far from 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'")

Raiche v. Pietroski, 623 F.3d 30, 36, 37, 39 (1st Cir. 2010) ("Although we do not need to follow the rigid structure that we once did, we will proceed to conduct each step of the analysis in the traditional order. This exercise reveals that, given the jury's resolution of the facts, Pietroski's use of force was not defensible and, therefore, that qualified immunity affords him no refuge. . . . Looking beyond the *Graham* factors to the sufficiency of the evidence, we find that the record contains ample evidence to support a determination that Pietroski's conduct was unreasonable, even under the Boston Police Department's own standards. Coyne's candid testimony is particularly useful here. According to Coyne, the Boston Police Academy instructs officers to follow the Use of Force Continuum in determining the proper amount of force to use when conducting a stop. The Continuum provides five levels of intensity: (1) the presence of a uniformed police officer; (2) verbal command, which includes a police car's overhead lights or siren; (3) open-hand command, which entails physically taking control of a person; (4) non-lethal incapacitating devices, such as pepper spray; and (5) lethal force. Officers are to conduct a traffic stop using the least amount of force necessary and to end the use of force outright when a person

has pulled over and stopped. Coyne's testimony provided a clear framework for the jury to assess Pietroski's use of force; applying this framework, a reasonable jury could easily conclude that the use of force should have ceased when Raiche stopped and pulled over in response to the cruiser's overhead lights. Such a conclusion would compel a finding that Pietroski acted unreasonably when he slammed Raiche and his motorcycle to the pavement. . . .We need not decide whether there are materially similar cases of controlling authority or a consensus of persuasive authority existing at the time of the incident which would have clearly established the law. . . . A reasonable officer with training on the Use of Force Continuum would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped in response to the officer's command to stop and who presents no indications of dangerousness.")

Melendez-Garcia v. Sanchez, 629 F.3d 25, 35-37 (1st Cir. 2010) ("In light of *Pearson*, we may now address the second prong of the qualified immunity test first. . . We follow that course here. . . . We conclude that it would not have been clear to a reasonable UPR official that the conduct at issue here was unlawful. . . . Regardless of whether a plaintiff proceeds under the theory that the defendants are liable because they limited his ability to protect himself (the 'limitation' theory), or under the theory that they are liable because they created or substantially contributed to the danger he faced and then failed to protect him from it (the 'state-created danger' theory), the defendants' actions must also 'shock the conscience of the court[]'. . . in order for the plaintiff to prevail. . . . Even if Meléndez were able to establish that the officials here (1) either (a) created a danger and then failed to protect him from it or (b) limited his ability to protect himself or receive protection from outside sources, and (2) engaged in conscience-shocking conduct, he would still need to prove that it would have been clear to a reasonable UPR official that the relevant behavior here was unlawful. He cannot do so. . . . Meléndez argues that the university has been deliberately indifferent to the ROTC's security needs and that this alleged deliberate indifference shocks the conscience. He does not attempt to explain why he believes the relevant law was 'clearly established.' We conclude that it would not have been clear to a reasonable official that the conduct about which Meléndez complains was unlawful. The district court concluded that the continued implementation of the NCP was not conscience-shocking because it was 'an attempt, however imperfect, to balance the competing rights of free speech, safety and use of university property by different student groups on campus.'. . In light of the evidence that the NCP was established to balance these rights and goals, we conclude that it would not have been clear to a reasonable official that continuing to implement the NCP was unlawful.")

Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 51-53 (1st Cir. 2010) ("This is a case in which any conclusions we might draw about the relevant Commonwealth law would be uncertain at best. Moreover, as we explain below, that very uncertainty is critical to our analysis of the clearly established prong of the qualified immunity doctrine. . . .As we have had occasion to observe in the past, translated Puerto Rico law is both sparse and contradictory on the question of the property interest in continued employment of transitory government employees. . . . In the face of two cases that seem to give opposing answers to the question whether a transitory government employee has an entitlement to his or her continued employment, the plaintiffs do not explain how the law clearly

established that conduct 'materially similar' to that of the defendants in this case was unconstitutional at the time the plaintiffs were fired. . . . Qualified immunity, therefore, shielded the defendants from the due process claims of the plaintiffs.")

Walden v. City of Providence, R.I., 596 F.3d 38, 52 (1st Cir. 2010) ("Courts need not address these questions in order. *Pearson,* 129 S.Ct. at 818; *Maldonado,* 568 F.3d at 269-70. We turn to the second part of the test and specifically whether the right in question was so clearly established as to give notice to defendants that their actions were unconstitutional in 2002. . . This is a question of pure law. This question must be resolved based on the state of the law at the time of the alleged violation. . . . [T]he relevant question in this case is not whether in 2002 the Fourth Amendment generally prohibited the recording of telephone calls. The question is whether, in 2002, public safety employees, like plaintiffs, had a clearly established right under the Fourth Amendment not to have calls made at work recorded. We hold there was no such clearly established law.")**.**

Estrada v. Rhode Island, 594 F.3d 56, 62-64 (1st Cir. 2010) ("In this case, the district court ruled that Officer Chabot had reasonable suspicion to suspect immigration violations, to transport the Plaintiffs to ICE, and to twice pat-down Tamup. The court thus did not reach the issue of qualified immunity. We choose to answer the question of qualified immunity first, which makes it unnecessary to determine whether Officer Chabot had reasonable suspicion to take these actions. . . .After *Pearson,* we no longer have to take these two steps in 'strict sequence.'. . Thus if a reasonable official would not have understood that his conduct violated Plaintiffs' constitutional rights, we must grant him qualified immunity. . . . Plaintiffs do not contest the validity of the traffic stop, nor do they argue that it was unlawful for Officer Chabot to request identification from all the passengers in the van, a question our Circuit has not conclusively decided. . . Instead, Plaintiffs argue that Officer Chabot's inquiry into their immigration status and subsequent call to ICE prolonged the traffic stop, converting it into an unlawful seizure in violation of the Fourth Amendment. We cannot say, however, that it was clear as a matter of law that Officer Chabot's brief line of questioning, nor the three minutes it took for him to receive a response from ICE, unreasonably prolonged the stop such that independent reasonable suspicion was necessary to support his inquiry into Plaintiffs' immigration status. The traffic stop at issue took place a year after the Supreme Court's decision in *Muehler v. Mena,* 544 U.S. 93 (2005). In that case, the Court held that a police officer does not need independent reasonable suspicion to question an individual about her immigration status during the execution of a search warrant, but that such inquiry constitutes 'mere police questioning' so long as the detention was not prolonged by the questioning. Other courts have held that questioning that extends the length of detention 'by only a brief time' does not 'make the custody itself unreasonable.' [citing cases] At the time of the traffic stop, our Circuit had not decided this question. . . . In any event, the law was not and is not [now] clearly established, such that Chabot should have known that he could not investigate further. We thus conclude that Officer Chabot is entitled to federal and state qualified immunity for any possible constitutional violations that he may have committed in asking the van's passengers questions about their immigration status and in contacting ICE.").

Estrada v. Rhode Island, 594 F.3d 56, 68, 69 (1st Cir. 2010 (Lynch, C.J., concurring) ("I join in Judge Torruella's well-done opinion. As he states, this case raises no issue as to whether police officers may ask for the identification of all other passengers in a vehicle that is stopped for a minor traffic violation (failing to signal before changing lanes) by the driver. . . Nor does this case involve whether a police officer may detain and escort to the immigration authorities a vehicle containing persons who do not speak English and appear to be foreign, based on no more than the officer's 'hunch' that the passengers may be aliens who entered or remained in the country illegally. Rather, on the facts of this case, plaintiffs' claims must fail because a reasonable officer would have had no basis in existing law to conclude that his actions violated any constitutional rights, and so Officer Chabot is entitled to immunity. . . The initial stop of the van and the two pat downs were plainly reasonable for safety reasons and provide no basis for any claim of constitutional violation. In my view, the specific facts of this case also require the conclusion that the officer is entitled to immunity on all claims related to the detention and escorting of the vehicle and its passengers to the immigration authorities.").

Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009) ("It is clear from the Supreme Court's description of the second, 'clearly established' step of the qualified immunity analysis that the second step, in turn, has two aspects. One aspect of the analysis focuses on the clarity of the law at the time of the alleged civil rights violation. . . . The other aspect focuses more concretely on the facts of the particular case and whether a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights. . . . In administering the Court's test, this circuit has tended to list separately the two sub-parts of the 'clearly established' prong along with the first prong and, as a result, has articulated the qualified immunity test as a three-part test. . . While the substance of our three-part test has been faithful to the substance of the Court's two-part test, we owe fidelity to the Court's articulation of the test as well. And so we now adopt the Court's two-part test and abandon our previous usage of a three-step analysis.").

Bergeron v. Cabral, 560 F.3d 1, 7, 12, 13 (1st Cir. 2009) ("*Pearson* creates a pathway to flexibility. It does not in any way preclude courts from going step by step. . .Because the parties briefed and argued the case at hand pre-*Pearson*, it makes sense to adhere to a sequential mode of analysis here. We proceed in that fashion. . . . [T]he case law of the Supreme Court and this circuit alone establish that there was fair notice that a reduction in income controlled by the employer was actionable. There is no need to go beyond that; we accept the principle that a single out of circuit case would not alone be enough. But we think it germane to note that there was at least one such case decided prior to the decommissioning that had haunting parallels to this case. . . . In *Bass*, the Tenth Circuit, following an agnate line of reasoning, had held that a sheriff's decision to rescind the commission of a reserve deputy constituted an adverse employment action under what that court viewed as clearly established First Amendment principles. . . .The plain import of these decisions is that, by 2005, it was clearly established that public officials could not significantly impact an employee's compensation or earning capacity on the basis of the employee's political affiliation. Inasmuch as a deputy-sheriff commission offers a jail officer the potential to garner

substantial financial benefits, it was clearly established when the defendant acted that she could not deprive a jail officer of his commission out of political animus. Thus, the plaintiffs have satisfied the second prong of the qualified immunity inquiry. . . . The third prong of the qualified immunity inquiry is qualitatively different from the first two prongs. . . . The inquiry at step three is 'whether it would have been clear to an objectively reasonable official, situated similarly to a particular appellant, that the actions taken or omitted contravened the clearly established right.'. . . So, if the defendant could reasonably have believed that she could decommission the plaintiffs with impunity on the basis of their political advocacy, she would be entitled to qualified immunity. . . . Public officials have long been on notice that, even when they have authority to take a discretionary action for virtually any reason, there are certain reasons– race, gender, religion, to name a few–upon which they may not rely in exercising their discretion to bestow or withdraw valuable government benefits. . . .In this case, the defendant made a calculated decision to decommission several deputy sheriffs who had opposed her bid for office. She acted deliberately and purposefully. When this type of executive decision violates clearly established law, it is much harder to justify than when a public official makes a split-second judgment in the heat of the moment. . .Given the clarity of the law in April of 2005, we do not think that any reasonable public official could have thought that she could divest those who opposed her political aspirations of the opportunity to work lucrative details while leaving her political supporters free to cash in on those opportunities. Accordingly, the plaintiffs have satisfied the third prong of the qualified immunity inquiry.")

Alfano v. Lynch, No. CV 15-12943-RGS, 2016 WL 2993615, at *2-3 (D. Mass. May 23, 2016) ("Alfano's single-count Complaint is framed on the proposition that, under the PCS, police must have probable cause to believe that a person is incapacitated before initiating custody. . . Because this is an undecided issue under Massachusetts law, the Complaint will be dismissed on grounds of qualified immunity. . . . While there are instances in which a court might benefit both the police and the general public by '[d]eciding the constitutional question before addressing the qualified immunity question,'. . . there are also cases 'in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.'. . This is one of those cases. The Supreme Judicial Court has yet to make a definitive determination whether police require probable cause to 'seize' an incapacitated person under the PCS, or may act on the more lenient standard of reasonable belief. . . . Given this lack of clarity, a reasonable officer in Lt. Lynch's situation, could have reasonably believed that that the PCS authorized the detention of a person believed to be incapacitated on a less stringent standard (reasonable belief) than probable cause. Here, the uncontested facts of Alfano's admission to Lt. Lynch that he had been drinking, his failure to pass at least one of the field sobriety tests administered by Lynch, . . . his refusal to take a Breathalyzer test, . . . and the inferences that Lynch could draw from the fact that security guards denied Alfano admission to the concert and instead delivered him to the holding compound, would support a reasonable officer's belief that Alfano was 'by reason of the consumption of intoxicating liquor ... likely to suffer or cause physical harm or damage property.'")

Campos v. Van Ness, 52 F.Supp.3d 240, 242, 244, 246, 251, 254, 256, 258-59 (D. Mass. 2014) ("On May 19, 2014, following seven days of trial and three days of deliberations, the jury was unable to reach a unanimous verdict on either claim. However, the jury did make unanimous findings on two of the three factual questions presented to it. The court declared a mistrial, directed entry of the factual findings, and ordered the parties to brief the issue of qualified immunity in light of the jury's factual findings. A hearing on that issue was held on June 20, 2014. For the reasons explained below, the court finds that Van Ness is entitled to judgment as a matter of law with respect to the claims by Campos individually and on behalf of Martins because he is shielded by qualified immunity as to both. Therefore, judgment is being entered for the defendant. . . . During its deliberations, the jury asked several questions, and eventually indicated that it might not be able to reach a unanimous verdict on either claim. Following three days of deliberations, the jury reported that it was at an irresolvable impasse regarding the ultimate questions in the case. . . However, the jury was able to unanimously decide two of the three factual questions they were asked to resolve:

• 1(b)(i): 'Did Officer Van Ness shoot Mr. Martins before Mr. Martins' car began moving?' **No.**

• 1(b)(iii): 'Was Mr. Martins' car moving, but not at Officer Van Ness, when Officer Van Ness shot him?' **Yes.**

. . .The jury was not able to unanimously decide Question 1(b)(ii): 'Was Mr. Martins' car moving at Officer Van Ness before Officer Van Ness shot him?'. . .

On May 19, 2014, the court declared a mistrial on all claims and directed the Clerk to enter the jury's two factual findings. . . . . In finding the facts for present purposes, the court is employing the Rule 50 standard and giving 'deference ... to the jury's discernible resolution of disputed factual issues.'. . Therefore, the court accepts the jury's factual determinations: (1) that Van Ness did not shoot Martins before Martins' car began moving; and (2) that Martins' car was moving, but not at Van Ness, when Van Ness shot him. . . . The court is, therefore, addressing qualified immunity first, which makes it unnecessary to determine whether Van Ness violated Martins' Fourth Amendment rights. . . . As explained below, Van Ness is not entitled to qualified immunity with respect to Martins' claim based on his actions allegedly taken to defend himself. However, in view of the precedent that existed in July 2008, Van Ness is entitled to qualified immunity with respect to Martins' claim because of the risk that Martins posed to others. . . . The essential question in determining whether Van Ness is protected by qualified immunity, therefore, is whether in July 2008 it was clearly established that this level of risk to others did not justify the use of deadly force. As explained below, neither the parties nor the court have identified a case decided before July 2008 that 'squarely governs the case here,' *Brosseau,* 543 U.S. at 201, and while this Court is not deciding whether Van Ness' conduct violated the Fourth Amendment, some analogous cases to reach the issue have found no Fourth Amendment violation as a matter of law. Most importantly for qualified immunity purposes, the divided body of circuit cases demonstrates that Van Ness' actions 'fell in the "hazy border between excessive and acceptable force."'. . Therefore, Van Ness is entitled to qualified immunity. As the Supreme Court recently explained in *Plumhoff,* '*Brosseau* makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger.'. . The Court went on to find that this remained true at least until July 18,

2004, the date of the incident in *Plumhoff*. . . .In *Brosseau*, *Scott*, and *Plumhoff*, the Supreme Court has indicated that, although the analysis in each case is fact specific, . . . officers who use lethal force to stop a fleeing driver who poses an imminent public safety risk are at least protected by qualified immunity, and may have acted objectively reasonably as a matter of law. As discussed earlier, the undisputed evidence in the instant case shows that Martins' posed a serious, imminent risk to public safety. . . Like the driver in *Brosseau*, it is undisputed that Martins refused to heed the officer's warnings at gunpoint, . . . tried to drive away from the officer and resume his flight, . . . and would be fleeing to an area where other officers and civilians were known to be . . . . These cases do not necessarily show that Van Ness' conduct did not violate the Fourth Amendment. However, they are similar enough to the instant case that, absent a more recent controlling precedent or the development of a robust consensus in the case law between the time when they were decided and July 2008, a reasonable officer Van Ness' position would not have known that using lethal force against Martins violated his Fourth Amendment rights. . . . Van Ness testified that he knew there was a passenger in the vehicle before he shot into and at it. The jury could have found that he intended to shoot and stop the passenger, Campos, as well as Martins. However, based on Van Ness' agreement it was not required to decide this question. Therefore, it is appropriate to assume for present purposes that Campos' Fourth Amendment rights were implicated and force that could be found to have been directed against her was objectively unreasonable. However, in July 2008, a reasonable officer in Van Ness' position would not have known that his conduct violated Campos' Fourth Amendment rights. As the Supreme Court wrote in *Plumhoff* with regard to the state of the law in 2004:

There seems to be some disagreement among lower courts as to whether a passenger in Allen's situation can recover under a Fourth Amendment theory. *Compare Vaughan v. Cox*, 343 F.3d 1323 (11th Cir.2003) (suggesting yes), and *Fisher v. Memphis*, 234 F.3d 312 (6th Cir.2000) (same), *with Milstead v. Kibler*, 243 F.3d 157 (4th Cir.2001) (suggesting no), *and Landol–Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir.1990) (same). We express no view on this question.

134 S.Ct. at 2022 n.4. As the Supreme Court implicitly indicated in this 2014 statement in *Plumhoff*, the law had not become clearly established by 2008.")

Brown v. Pepe, 42 F.Supp.3d 310, 314-17 & n.7 (D. Mass. 2014) ("There are cases 'in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.'. . A trial court, in other words, is at liberty to proceed in the sequence that seems most appropriate to the facts of the case at hand. . . Here, the court will take up the arguably 'more difficult question' or whether Brown has alleged a constitutional violation at all. . . .The court notes, however, that because there is no clearly established law in Massachusetts or the First Circuit giving guidance on the constitutionality of a perp walk, the result would be reached very quickly under a 'clearly established law' analysis. The court chooses the more difficult approach because of the value of establishing such guidance, a benefit which this case has the potential of achieving. . . . The constitutionality of the so-called 'perp walk' is a matter of first impression in this Circuit. Brown's principal argument is based on an alleged violation of his Fourth Amendment right to be free from 'unreasonable ... seizures.'. . . Weighing the 'minimal' intrusion on Brown's

privacy against these significant government interests, it is clear that there was no unreasonable Fourth Amendment seizure in the taping of his perp walk.")

Pineiro v. Gemme, 937 F.Supp.2d 161, 170-73 (D. Mass. 2013) ("Plaintiff contends that he has a constitutional right to carry a firearm outside the home for the 'core lawful purpose' of 'self-defense.' Neither *Heller* nor *McDonald* addressed the question of Second Amendment rights outside the home. Rather than attempt to answer the difficult constitutional question presented here, the Court will instead proceed directly to the qualified immunity analysis. . . .The initial question, therefore, is whether the 'legal contours' of the constitutional right in question were 'sufficiently clear' that a reasonable officer would have understood that what he was doing violated that right. In this context, the answer to that question is relatively easy: the legal contours of the asserted right—that is, the constitutional right to carry firearms outside the home for self-defense—were entirely unclear in 2010, and are hardly more defined today. . . .[N]either the Supreme Court nor the First Circuit has, even today, directly addressed the scope of the right to bear arms outside the home for purposes of self-defense. . . .In short, *Heller* and *McDonald* left open the issue of the application of the Second Amendment to the regulation of firearms outside the home. There is no controlling First Circuit precedent, nor even a general consensus among federal courts as to even the most basic points—such as whether the protections of the Second Amendment extend outside the home, or what standard the courts should apply in assessing government regulation of firearms outside the home. . . .Considering this area of law is still very much unsettled, it is hard to see how Chief Gemme would have been unreasonable in believing that denying plaintiff an unrestricted license to carry was constitutional. The license he issued plaintiff permitted him to keep a firearm for self-defense in the home and to take it outside the home for the purposes of sport and targetshooting. While this restriction may have been arbitrary considering plaintiff's application made no mention of sport and target-shooting, an objectively reasonable police officer could have believed it to be constitutional. Accordingly, the Court finds that Chief Gemme is entitled to qualified immunity.")

Inman v. Siciliano, No. 10–10202–FDS, 2012 WL 1980408, at *7 (D. Mass. May 31, 2012) ("The First Circuit has abandoned its former three-part qualified-immunity analysis and adopted the two-part test articulated by the Supreme Court in *Pearson v. Callahan*, 555 U.S. 223 (2009). *See Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir.2009). Under *Pearson* and *Maldonado*, the relevant inquiries are (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct. . . For purposes of the second step of that analysis, whether the right in question was 'clearly established' depends on'"(a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right.'")

Coughlin v. Town of Arlington, No. 10–10203–MLW, 2011 WL 6370932, at *13 (D. Mass. Dec. 19, 2011) ("Whether the Fourteenth Amendment includes a right against the disclosure of private

information is an unsettled and hotly contested question of law. *See Nat'l Aeronautics & Space Admin. v. Nelson*, ––U.S. ––––, –––– – ––––, 131 S.Ct. 746, 764–65, 178 L.Ed.2d 667 (2011) (Scalia, J., concurring). The Supreme Court has never decided the question despite several opportunities to do so. . . The First Circuit has held that the right, if it exists at all, is not clearly established. *See Borucki v. Ryan*, 827 F.2d 836, 844–45 (1st Cir.1987). Although *Borucki* examined the state of the law as it existed in 1983, the question remains unsettled in the First Circuit. . . Absent a violation of a clearly established constitutional right, qualified immunity shields public officials performing discretionary functions from liability for civil damages. . . A right is 'clearly established' if, at the time of the alleged violation, 'the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . Here, the alleged Fourteenth Amendment right to privacy claimed by plaintiffs was not clearly established at the time of the alleged violations. . . *See Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (courts may dismiss claims on qualified immunity grounds without addressing the merits of the claims provided that the claimed right was not clearly established).")

Mucci v. Town of North Providence ex rel. Vallee, No. CA 09-286 S, 2011 WL 4552541, at *4, *5 (D.R.I. Oct. 3, 2011) ("The Court need not decide whether the instant case raises a genuine issue of material fact with regard to whether the use of a Taser constituted excessive force, because it is clear that Defendants are immune from suit. That is, viewing the facts in the light most favorable to Mucci, a reasonable officer in Officer Tesseris's shoes could have concluded that he was not violating Mucci's constitutional rights in deploying the Taser. Officer Tesseris employed non-deadly force . . . in 'tense, uncertain, and rapidly evolving' circumstances to subdue Mucci in an attempt to secure the safety of all parties and to avoid the need for deadly force. . . Applying the *Graham* factors, it is plain that the safety of Mucci and the officers was paramount. While Mucci arguably was not committing a crime or resisting arrest when the officer deployed the Taser, Mucci does not challenge his initial seizure in accordance with the officers' community caretaking function. The officers knew Mucci was emotionally disturbed and a threat to himself; was wielding a deadly weapon; and was not responding to the officers' directives. The situation had the potential to escalate quickly and a reasonable officer could have believed he needed to gain control of the situation and seize Mucci *before* Mucci hurt himself or one of the officers. The officers' options were limited in that moment, and the Court cannot conclude that a reasonable officer, after ordering Mucci three times to put down the knife, would have known he was violating Mucci's constitutional rights by deploying the Taser. Therefore, the officers are entitled to qualified immunity on the claims of excessive force, assault, and battery.")

Tyree v. Weld, Civ. Nos. 93cv12260-NG, 93cv12725-NG, 2010 WL 145882, at *11, *14, *15 (D. Mass. Jan. 11, 2010) ("Clearly, a court's threshold inquiry into whether a constitutional violation has occurred serves the salutary purpose of clarifying and elaborating on existing law. . . . And this is particularly the case in connection with prison condition litigation. Accordingly, the Court will first consider whether defendants violated plaintiffs' constitutional rights before determining whether they are entitled to qualified immunity because the law they are accused of violating was

not 'clearly established.'. . . [P]laintiffs were assigned to Phase III or the STG Blocks and left there, with no notice or opportunity to be heard. . . and without any means of contesting their assignment for a substantial period of time afterwards. . . . Although the government certainly has an interest in avoiding the imposition of new, costly, and complicated procedural requirements, especially in the context of a state prison, the defendants' decision to assign the plaintiffs to Phase III or the East Wing was 'entirely subjective and discretionary.'. . . It is not just that the defendants did not afford the plaintiffs *due* process. They provided them with no meaningful process at all. . . .Weighing the factors discussed in the preceding section, the Court concludes that, when the facts are viewed in the light most favorable to the plaintiffs, the defendants have failed the *Mathews* balancing test and thus have violated the plaintiffs' rights under the Due Process Clause. . . . After reviewing the applicable law, this Court is obliged to grant the defendants' motion for summary judgment on the issue of qualified immunity. . . . Before the Supreme Court's June 19, 1995, decision in *Sandin v. Conner,* 515 U.S. 472, the question of whether the plaintiffs had a liberty interest in avoiding placement in Phase III was governed by the test articulated in *Hewitt v. Helms,* 459 U.S. at 471-72, which counseled courts to analyze the language of state statutes and regulations to determine whether the state had created a liberty interest in avoiding restrictive prison conditions. If it was not clear that the DSU regulations applied to prisoners placed in Phase III, it was similarly unclear whether Massachusetts had created a federal liberty interest in avoiding such a placement. The Court's decision in *Sandin* did little, if anything, to make clear the unconstitutionality of the defendants' conduct. *Sandin's* holding that a state may create a liberty interest in avoiding an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life' was stated at a high level of generality with little elaboration that would aid in its application to particular cases. . . .Indeed, courts have since struggled to define the baseline against which a hardship's atypicality and significance should be judged. . . . One good result of the litigation in connection with the conditions in Phase III and the East Wing has been that the obligations of the state going forward have been clarified. But since the defendants' obligation to afford the plaintiffs greater procedural protections was not clear at the time that the defendants acted, they are entitled to qualified immunity.").

Marchand v. Town of Hamilton, No. 09-10433-LTS, 2009 WL 3246607, at *7 (D. Mass. Oct. 5, 2009) ("On the pending motion, the question is whether disclosing Marchand's medication or the fact of his receiving psychiatric treatment (implicit in the medication disclosure) was clearly established as a violation of his constitutional right to privacy. The First Circuit left this question open in *Borucki* stating that the law was not 'clearly established' that a constitutional privacy right would be violated by a disclosure of information (as distinct from an area of life protected by the autonomy branch of the right to privacy). . . Since *Borucki*, the law (both within and outside of this circuit) has developed further; this issue was carefully canvassed and analyzed in *Doe v. Magnusson,* 2005 WL 758454 (D.Me.2005). The more recent developments discussed therein persuade me that Marchand has a constitutional right to privacy in the non-disclosure of confidential mental health information allegedly disclosed for no legitimate public purpose. . . However, that right was not, at the relevant time, clearly established. Neither the Supreme Court nor the First Circuit case has recognized clearly the right. The law in other circuits is divided. *See*

Doe v. Magnusson, 2005 WL 758454 (D.Me.2005). Both the Second Circuit in *Powell v. Shriver*, 175 F.3d 107, 113-14 (2nd Cir.1999) and the Third Circuit in *Doe v. Delie*, 257 F.3d 309, 319 (3rd Cir.2001) have concluded that the right to privacy protecting non-disclosure of medical information was not clearly established. Accordingly, the constitutional right to privacy under the Fourteenth Amendment was not clearly established at any time relevant to the Complaint, and Brewer is entitled to qualified immunity from suit.")**.**

Plummer v. Town of Somerset, 601 F.Supp.2d 358, 365 n.16 (D. Mass. 2009) ("The instant case well illustrates the wisdom of the Supreme Court's decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), to dispense with the rigid order of battle mandated by *Saucier v. Katz*, 533 U.S. 194 (2001), that required a court to first explore the issue of whether an official's conduct violated a constitutional right before asking whether the right, if it might exist, was 'clearly established.' In so doing the Court meant to vindicate two important interests, the interest of the judicial system in avoiding the squandering of scarce judicial resources on largely meaningless inquiries, and the interest of a defendant in resolving an insubstantial claim prior to shouldering the burden of discovery. As Justice Alito concluded for a unanimous Court: '[T]here will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional violation at all.'. . This is such a case. Had *Pearson* been decided at the inception of this case, Plummer's substantive due process claims would have been ripe for termination on a Rule 12(b)(6) motion to dismiss.")

SECOND CIRCUIT

Burns v. Martuscello, 890 F.3d 77, 81, 89, 93-95 (2d Cir. 2018) ("Today we hold that the First Amendment protects both a prisoner's right not to serve as an informant, and to refuse to provide false information to prison officials. We have previously held that citizens enjoy a First Amendment right to refuse to provide false information to the government, but have not previously recognized this right in the prison context. *See Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011). With regard to a prisoner's right not to snitch, we have not previously reached this issue—though we have encountered it and declined to decide it on at least two prior occasions. *See Willey v. Kirkpatrick*, 801 F.3d 51 (2d Cir. 2015); *Allah v. Juchenwioz*, 176 Fed.Appx. 187, 189 (2d Cir. 2006) (summary order). Because these rights were not clearly established at the time of the events underlying this suit, the defendants are entitled to qualified immunity. For these reasons, we affirm the judgment of the district court. . . . [T]hough we have not previously considered whether the First Amendment rights discussed in *Jackler* extend to the prison context, we have little difficulty concluding that they do. . . .We also conclude that the First Amendment protects Burns's refusal to act as the guards' snitch by providing truthful information. . . . [W]e need not, and do not, address whether Burns had a First Amendment right to refuse to give truthful information about a past event, or in an emergency. We also wish to underscore that the rights at issue here do not implicate the widespread practice of conditioning pleas or other favorable prosecutorial treatment on the provision of information. Under such circumstances, the government confers a benefit on

the potential informant, in the form of relief from warranted criminal or other adverse action. By contrast, we here are concerned with the distinct circumstances of an inmate punished only in retaliation for refusing to provide information as it may come to the inmate's attention on an ongoing basis. Again, the case before us is illustrative. Construing the evidence in Burns's favor, there is no indication that Burns himself was engaged in wrongful conduct. Burns was given a choice between snitching or incurring an otherwise underserved punishment. The distinction is of appreciable significance. It means that the government may withdraw a benefit—by, for example, refusing to lessen charges where the would-be informant declines to offer information—but may not impose punishments at random. Accordingly, for these reasons, we conclude that the refusal to provide false information and to serve as a snitch on an ongoing basis are protected by the First Amendment. . . .On the facts presented here, we conclude that the defendants are entitled to qualified immunity. . .*Jackler* was not decided until late 2011, well after Burns was released from IPC. And we have not previously held that the First Amendment protects the right not to snitch. Nor do we believe that prior decisions clearly foreshadowed our decision today. By the time of the events in question, we had issued one summary order noting the possibility of a right not to serve as a prison informant. *Allah v. Juchenwioz*, 176 Fed.Appx. 187, 189 (2d Cir. 2006) (summary order). However, in that case, we explicitly noted that we did 'not address whether ... an inmate has a constitutional right not to become an informant.'. . Further, neither the Supreme Court nor any other circuit court has yet to decide whether a prisoner holds a right not to serve as an informant. Accordingly, we conclude that the defendants are entitled to qualified immunity. . . .We hold that the First Amendment protects a prisoner's right not to serve as an informant, as well as the right to refuse to provide false information to prison officials. Nonetheless, due to the novel nature of the legal questions before us, we conclude that defendants are entitled to qualified immunity.")

Lee-Walker v. New York City Dep't of Ed., 712 F. App'x 43, ___ (2d Cir. 2017) ("Neither *Garcetti* nor *Hazelwood* clearly governs this case. In our only decision directly addressing the issue, we explicitly stated that '[i]t is an open question in this Circuit whether *Garcetti* applies to classroom instruction,' and we chose 'not [to] resolve the issue.'. . For that reason, there was no clearly established law premised on *Garcetti* under which the defendants would understand that Lee-Walker's speech was protected by the First Amendment, and the defendants could have reasonably believed that *Garcetti* stripped her of those protections. Because we decide the claims against the individual defendants on the basis of qualified immunity, we need not reach the issue of whether *Garcetti* in fact applies to speech made by educators as a constitutional matter.")

Barboza v. D'Agata, No. 16-258-CV, 2017 WL 214563, at *2 n.2 (2d Cir. Jan. 18, 2017) (not reported) ("To the extent the district court treated the identification of a clearly established right and the objective reasonableness of defendants' conduct as distinct inquiries and concluded that identification of a clearly established right in the context at issue did not necessarily preclude qualified immunity based on the third inquiry, it misread our precedent. *See Zalaski v. City of Hartford*, 723 F.3d at 388–89 (identifying two-inquiry analysis and observing that qualified

immunity may not attach where right is clearly established in particular context); *Walczyk v. Rio*, 496 F.3d at 154 & n.16 (identifying two-inquiry analysis and explaining why concurring opinion's objection to characterization of second inquiry is unfounded). There is no need for us to clarify the two-inquiry standard in a published opinion as *amicus* urges because we have already done so. *See Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 n.11 (2d Cir. 2009) (observing that, despite some cases that might appear to frame it in disjunctive, " 'objectively reasonable' inquiry is part of the 'clearly established' inquiry"). We here need explain only why, on a correct application of the two-step inquiry, defendants are nevertheless entitled to qualified immunity. *See Figueroa v. Mazza*, 825 F.3d 89, 99 (2d Cir. 2016) (reiterating authority to affirm on any ground supported by record).")

Ricciuti v. Gyzenis, 834 F.3d 162, 169-70 (2d Cir. 2016) ("Defendants' second argument fares no better. It is based on our court's decision in *Taravella v. Town of Wolcott*, 599 F.3d 129 (2d Cir. 2010), that 'even where the law is "clearly established" and the scope of an official's permissible conduct is "clearly defined," the qualified immunity defense also protects an official if it was "objectively reasonable" for him at the time of the challenged action to believe his acts were lawful.'. . Defendants contend that because Ricciuti's speech owed its existence to her employment, it was 'reasonable' of the defendants to believe their conduct was lawful under *Garcetti*. *Taravella*'s arguable creation of an additional 'reasonableness' hurdle a plaintiff must satisfy to prevail in a suit against a public officer alleging a constitutional tort has not been without controversy. *See Taravella*, 599 F.3d at 136–48 (Straub, *J.*, dissenting); *Walczyk*, 496 F.3d at 165–71 (Sotomayor, *J.*, concurring). We need not resolve whether the 'reasonableness' of a defendant–officer's belief that his conduct did not violate the law is an independent basis for granting qualified immunity, over and above lack of clarity in the law, because, in any event, on the factually disputed record presented to the district court on the defendants' motion for summary judgment, the obligation to resolve factual disputes in the plaintiff's favor compelled a denial of the defendants' motion for summary judgment on the basis of qualified immunity. As we have explained above, no reasonable officer faced with Ricciuti's version of the facts could have concluded that Ricciuti's speech was made 'pursuant to' her official duties as a patrol officer under the meaning of *Garcetti* merely because her speech owes its existence to her job. Defendants therefore failed to show entitlement to fire Ricciuti or entitlement to qualified immunity under her version of the facts. The law on this issue was clearly established at the time Ricciuti was fired, even though our decision in *Weintraub* had not yet been issued. Thus, defendants' conduct was not 'objectively legally reasonable.'")

McGowan v. United States, 825 F.3d 118, 123-25 (2d Cir. 2016) ("McGowan argues that his claim does not require us to extend *Bivens* to a new context, and, even if it did, that there is no adequate 'alternative remedial scheme' and no 'special factor[ ] counsel[ing] hesitation.'. . Accordingly, he argues, the district court erred in refusing to recognize a *Bivens* remedy. We need not decide this difficult issue, however, because we conclude that McGowan's *Bivens* claim fails for the independent reason that defendant Rivers is entitled to qualified immunity. . . . We conclude that, at the time the alleged violation occurred, our case law did not clearly establish that McGowan had

a First Amendment right to publish his article. The Supreme Court has held that 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'. . .We have not identified any binding authority in existence at the relevant time that either 'directly address[ed]' the reasonableness of the challenged conduct or 'clearly foreshadow[ed]' a ruling in McGowan's favor, . . nor has McGowan cited any such case. McGowan relies instead on cases establishing the right of a prisoner to be free from retaliation for filing a lawsuit or grievance. . . But a prisoner's publishing a bylined article may implicate different penological interests from those implicated by his filing a lawsuit or grievance. For example, in litigating the constitutionality of the Byline Regulation in the District of Colorado, the government took the position that allowing inmates to publish bylined articles could create security problems by permitting such inmates to become 'big wheels' in the prison community, or could incite violence, or could intimidate prison staff members. . . Whether or not we would agree with that analysis is beside the point. We conclude only that, in light of the different interests at stake, our case law establishing a prisoner's right to file a lawsuit or grievance does not clearly establish a prisoner's right to publish an article under a byline. Indeed, the only authority that McGowan has identified that involved expression similar to that at issue in this case is a district court opinion, which, of course, is not binding. *See Shaheen v. Filion*, No. 9:04–CV–625 (FJS/DRH), 2006 WL 2792739, at *3 (N.D.N.Y. Sept. 17, 2006). Thus, in light of the absence of authority clearly establishing the claimed right, we are constrained to hold that Rivers is entitled to qualified immunity from McGowan's *Bivens* claim. In so holding, we do not reach the question of whether Rivers violated McGowan's First Amendment rights.")

Lawson v. Hilderbrand, 642 F. App'x 34, 35-36 (2d Cir. 2016) ("When a government official charged with violating federal constitutional rights seeks summary judgment on the ground of qualified immunity, the Court may first consider whether there was a 'violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.'. . . Here, we conclude that the lack of clearly established law barring the police actions entitles the Defendants to qualified immunity for their actions. The police entered the home with Duncan Lawson's consent, and when that consent was revoked it was objectively reasonable for the defendants to believe that exigent circumstances made their continued presence in the house, and their confinement of the residents to the living room, lawful. . . As 'the need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search,'. . . it follows that the need to prevent the destruction of evidence provides sufficient justification for the less intrusive act of securing the premises until a search warrant is obtained. We have considered all of the plaintiffs' arguments and find them to be without merit. Accordingly, the order of the district court hereby is REVERSED, and this matter remanded for further proceedings consistent with this order.")

See also ***Lawson v. Hilderbrand***, No. 3:13-CV-00206 (JAM), 2016 WL 3039710, at *2-4 (D. Conn. May 30, 2016) (on remand) ("It was perfectly permissible for the Second Circuit to decide this case on qualified immunity grounds without ruling on the constitutional merits of Duncan Lawson's claims. . . Nevertheless, there is no rule that prevents a federal court from addressing the

constitutional merits in a qualified immunity case, and I am hopeful that the Second Circuit will one day decide to consider the constitutionality of the type of 'knock and talk' practice as it was allegedly deployed by the police in this case. Absent such an examination of the underlying constitutional issue, I fear that police officers in the Second Circuit are and remain free to engage in the kind of tactics that the police allegedly did here: that is, to trick their way into the home, only then to seek consent to search the home, and then to lock down the entire home and all its occupants for several hours pending the securing of a search warrant if the homeowner elects to exercise his constitutional rights. It won't matter—as in this case—if the police use such tactics when they are in search of just a few pills that a suspect has freely admitted to possessing in his family's home. It won't matter that the homeowner has been cooperative (other than to assert his constitutional rights). It won't matter that the homeowner has not said or done anything to indicate that he will destroy evidence. And it won't matter if there are sleeping children whose memories may be forever scarred by the experience of a late-night police occupation of their home. Absent a determination by the Second Circuit (or Supreme Court) of the underlying constitutional issue, there won't be 'clearly established' law to deter future police officers from the type of overreaching conduct that has been alleged to have occurred in this case. . . As the Second Circuit has made clear, district court judges have no authority to articulate a legal standard that will be of consequence for future claims of qualified immunity. . . Others have argued that when an appellate court faces a claim of qualified immunity, it should reach and resolve the underlying constitutional issue, because—as one appellate judge has recently acknowledged—'if a court reviewing a constitutional claim to which qualified immunity applies need not address the merits of the claim, the same right may be violated time and again, with courts declining each time to provide a remedy or state the law for future cases.' Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1249 (2015). After all, litigants and the public alike count on our appellate courts not merely to process appeals but to articulate the law, and when an appellate court applies qualified immunity in a manner that declines to reach the constitutional merits of a claim, then this possibly 'interferes with the law-pronouncing function of the federal courts and reduces the amount of guidance about the meaning of the Constitution for both government officials and the public at large.' Alan K. Chen, *Qualified Immunity Limiting Access to Justice and Impeding Development of the Law*, Hum. Rts., July 2015, at 8, 9 (2015); *see also* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 Touro L. Rev. 633, 647-50 (2013) (discussing inclination of appellate courts to avoid merits inquiry); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 49-65 (2015) (recommending that appellate courts explain why they decline to address the merits of constitutional claims and noting that fewer than 10% of federal appeals courts explain why they have decided not to address the underlying constitutional claim). This is by no means to say that appellate courts should invariably resolve the underlying constitutional claim on its merits when deciding questions of qualified immunity. There may be powerful judicial economy reasons not to do so, and I do not doubt that the qualified immunity rule is appropriately applied without resolution of the merits in many instances where the police are engaged in conduct

highly similar to that which has been previously approved by prior case law, or where the police are reacting to emergency circumstances that suddenly confront them, or where it seems at worst that the police acted negligently (perhaps grossly so). I myself have seen and resolved such cases this way. . . Still, this case seems different. Reliance on the qualified immunity rule—without a resolution of the merits—is more troubling when facts suggest that police have *deliberately* deployed a stratagem to circumvent people's assertions of their rights and the sanctity of their homes. A failure to address the merits in such circumstances may unwittingly reward the police for the use of clever techniques that are designed to cheapen the exercise of constitutional rights. And there is surely a paramount interest besides in having clear rules for what the police may do inside a person's home. It seems to me that for such cases as this the courts of appeals should clarify the constitutional baseline for future cases, even if courts might otherwise conclude that—for lack to date of a clearly established rule—qualified immunity should insulate the unconstitutional conduct in the one case before them.")

Lynch v. Ackley, 811 F.3d 569, 576-77, 579-80 (2d Cir. 2016) ("Adjudication of Ackley's motion for qualified immunity does not need to await jury resolution of disputed factual issues. If on Lynch's version of disputed facts—accepting reasonable inferences most favorable to him—there was no clear law at the time prohibiting Ackley's conduct, then Ackley is entitled to qualified immunity. Ackley's motion can be adjudicated on this basis as a pure question of law, and this appeal is properly before us. . . .Ackley contends she is entitled as a matter of law to dismissal of Lynch's First Amendment claims by reason of qualified immunity. She argues that, construing the facts in the light most favorable to Lynch, her allegedly retaliatory actions did not violate constitutional standards that were clearly established at the time. We agree that there was no clear law at the time of the events establishing that Ackley's conduct constituted a First Amendment violation, and we express no view on whether Ackley's alleged conduct should be found to violate the First Amendment. . . .With respect to what may be Lynch's strongest claim for protection from retaliation—his claim that Ackley retaliated against him for his perceived role in the Union's endorsement of Buscetto for mayor—there was no clear law as to whether Ackley's alleged retaliatory actions constituted *prohibited* retaliation because Ackley's alleged retaliatory acts were limited to her exercise of her own First Amendment right to defend herself against Lynch's attacks. Her speech in defending herself involved core First Amendment issues of public importance. With respect to Lynch's claim relating to retaliation for a union grievance, the grievance he expressed was not clearly a matter of public concern under *Pickering.* Finally, with respect to Lynch's remaining claims, we find that because Lynch's speech interfered significantly with Ackley's ability to effectively run the NLPD, she was arguably entitled to retaliate under *Pickering's* balancing test, even under the version of the facts most favorable to Lynch.")

Burgess v. Town of Wallingford, 569 F. App'x 21, 23 (2d Cir. 2014) ("[T]he protection that Burgess claims he deserves under the Second Amendment—the right to carry a firearm openly outside the home—is not clearly established law. . . And as of Burgess's arrest on May 16, 2010, this right was even less concrete, as the Supreme Court had not yet held that the Second Amendment right in *Heller* applies to state governments; it did so shortly thereafter in *McDonald*

v. City of Chicago, 561 U.S. 742 (June 28, 2010). Given this legal ambiguity, Defendants–Appellants were entitled to qualified immunity, and the district court correctly granted summary judgment in their favor on Burgess's Second Amendment claim.")

U.S. v. City of New York, 717 F.3d 72, 92-94 (2d Cir. 2013) ("If a public official intentionally acts to the detriment of current or prospective public employees on the basis of race, the official is not shielded by qualified immunity simply because the official might have been unaware that at trial a burden-shifting scheme would regulate the conduct of ensuing litigation. 'For a constitutional right to be clearly established, *its* contours must be sufficiently clear that reasonable official would understand that *what he is doing* violates that right.'. . .Having rejected the District Court's stated reason for dismissing the federal claims on the ground of qualified immunity, we next consider whether the record supports dismissal of these claims on the ground that the Intervenors have not shown a violation of a federal right. The District Court did not reach that component of qualified immunity, *see Siegert v. Gilley*, 500 U.S. 226, 232 (1991), accepting instead the opportunity created by *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), to decide first whether the right alleged to have been violated was clearly established. . . In considering whether the record would have permitted dismissal on the ground that the officials had not violated a federal right, we encounter two conflicting statements in the District Court's opinion. On the one hand, the Court referred to 'copious evidence' from which a reasonable fact-finder could infer that the officials 'harbored' an intent to discriminate against black applicants. . . On the other hand, the Court stated that there was 'no evidence that directly and unmistakably proves that fact.' . . We question both observations. As to the second one, there is no requirement that an intent to discriminate must be proved 'directly and mistakably.'. . .At the same time, we cannot agree with the District Court that the record revealed 'copious evidence' of the officials' intent to discriminate. . . .Although we disagree with the District Court that there was 'copious evidence' of the officials' intent to discriminate, we cannot say that a reasonable fact-finder might not infer, from all the evidence, that, with respect to the Commissioner heading the FDNY, his involvement in the decision to continue using the results of the Exams indicated an intent to discriminate. Were the decision ours to make, we would not draw such an inference, but our task is the more limited one of determining whether such an inference could reasonably be made by the fact-finder. With respect to the Mayor, however, we think the record does not suffice to permit a fact-finder to draw a reasonable inference of intent to discriminate. In light of the myriad duties imposed upon the chief executive officer of a city of eight million people, more evidence would be needed to permit a trier to find that the decision of one municipal department to continue using the results of the Exams supports an inference of discriminatory intent on the part of the Mayor.")

Winfield v. Trottier, 710 F.3d 49, 51, 54, 57 (2d Cir. 2013) ("At issue is the scope of Winfield's consent to the search of her car, which is determined by looking at what a reasonable person would have understood by the exchange between Trottier and Winfield. We conclude that, while the scope of Winfield's consent was not limited to a search for any particular object of contraband, it did not extend to the text of her mail. However, since this right was not clearly established at the time of the search, Trottier is entitled to qualified immunity. . . . Courts may 'exercise their sound

discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . Here, we analyze both because it is '"difficult to decide whether [the] right [in this case] is clearly established without deciding precisely what the existing constitutional right happens to be."'. . . . The right at issue is properly stated as follows: It is a Fourth Amendment violation when a police officer reads a suspect's private papers, the text of which is not in plain view, while conducting a search authorized solely by the suspect's generalized consent to search the area in which the papers are found. No prior case in the Second Circuit has so held. Accordingly, Trottier's actions were '"objectively legally reasonable in light of the legal rules that were clearly established at the time it was taken,'". . . and he is entitled to qualified immunity.")

Coollick v. Hughes, 699 F.3d 211, 221 (2d Cir. 2012) ("We do not decide whether the specific contents of the letter and the grievance procedures are sufficient under the Constitution. We skip step one of the qualified immunity analysis and instead decide that 'existing precedent' has not 'placed the ... constitutional question beyond debate.'. . Quite to the contrary, the existing precedent, *Harhay* and *Adams* in particular, seem to dictate that no constitutional violation occurred here at all. . . . Viewed in the light most favorable to Coollick, Hughes's actions lie somewhere in the gray area in the spectrum of what satisfies due process given the particular facts of this case. Hughes sent Coollick reasonably clear notice well in advance of any deprivation, which allowed Coollick to avail herself of the collective bargaining agreement's grievance procedures. Without doubt, and certainly undisputed, Coollick received adequate post-deprivation remedies. There is nothing objectively illegal, in a constitutional sense, embodied in Hughes's actions or in what happened to Coollick. Hughes may have been wrong in her view that Coollick did not have certain rights under the collective bargaining agreement, but Coollick was able to avoid any harm through the very grievance procedures in place to remedy any such deprivation. As no constitutional bright lines were transgressed by Hughes in the course of handling Coollick's termination, Hughes is entitled to qualified immunity.")

Sudler v. City of New York, 689 F.3d 159, 173-76 (2d Cir. 2012) ("[W]e. . . conclude that the district court correctly determined that the State Defendants are entitled to qualified immunity on the claim that their due process rights were violated when DOCS officials failed promptly to afford them PJT credits for the time served on their local sentences. Having also concluded, moreover, that in the circumstances here, we best follow that 'older, wiser judicial counsel not to pass on questions of constitutionality ... unless such adjudication is unavoidable,'. . . we reach the determination that the State Defendants are entitled to qualified immunity without deciding the due process questions that this case presents. . . . The State Defendants are clearly entitled to qualified immunity in the *Sudler* action. To repeat, Sudler's claim sounds in procedural due process: He alleges that, whatever New York law provides as to whether his misdemeanor sentences could properly run concurrently with his parole revocation sentence, the State Defendants violated his due process right, made explicit in *Earley*, to serve only the sentence pronounced by Justice Clancy until such time as this sentence was lawfully modified by a judge. Sudler's release date, however, was calculated by DOP personnel *prior to this Court's decision in*

Earley, and Sudler was released from prison approximately one month after the issuance of our decision and one month before our denial of rehearing in that case. It is true that *Earley* held that 'clearly established Supreme Court precedent'—namely, *Wampler*—rendered invalid the five-year PRS term added to Earley's sentence by prison administrators, on the ground that the PRS term was not imposed by the sentencing court. *Id.* at 76. In *Scott v. Fischer*, however, we noted that the conclusion that a legal proposition is '"clearly established" for purposes of its application by professional state court judges' [sic] pursuant to AEDPA does not mean that it is ' "clearly established" in the qualified immunity context, which governs the conduct of government officials who are likely neither lawyers nor legal scholars.' . . Moreover, we went on to hold that *Wampler*, standing alone, was insufficient to establish clearly the right not to serve a term of PRS not imposed by sentence (the right at stake in *Earley*) for purposes of qualified immunity. . . The same logic applies to Sudler's detention. Even assuming, *arguendo*, that *Earley* applies so as to require the provision of PJT credits in circumstances like those here, because the State Defendants' conduct with respect to Sudler occurred prior to our decision in *Earley* (or, at the very latest, a few weeks after that decision and prior to our denial of the petition for rehearing), the only guidance available to the State Defendants as to the due process right at issue here was *Wampler*. We recognized in *Scott*, however, that for the purpose of qualified immunity, *Wampler* itself does *not* clearly establish the procedural right recognized in *Earley* not to have a custodial sentence extended except by a judge. . . We see no reason why *Wampler*, a seventy-year-old case that does not on its face mention the Constitution, could have given the State Defendants notice that administrative alteration of a sentence is in violation of an inmate's due process rights, any more than it could have given the defendants in *Scott* notice of the same. Thus, we cannot conclude that the State Defendants could 'fairly be said to "know"' that due process required that Sudler be afforded PJT credits for the time he served at Rikers. . . We also conclude that the State Defendants are entitled to qualified immunity in the *Batthany* suit. To be sure, Batthany's release date was calculated after our decision in *Earley*, and *Earley* recognized that a prisoner who is in custody as a result of a judicially-imposed sentence has a protected liberty interest in not having the term of this custodial sentence extended (even if the sentencing judge omitted some measure of punishment required by law) by a prison administrator, as opposed to a judge. The State Defendants are correct, however, that this holding, by its terms, does not instruct prison administrators as to the calculation of release dates when multiple sentences are at issue—and, indeed, one sentencing judge's instructions may conflict with another's. . . .We need not here decide the precise question whether 'the unconstitutionality of administratively imposed PRS' was clearly established before April 2008. . . Rather, the fact that New York courts continued to struggle with the implications of *Earley* until at least that date, combined with the critical differences between the case at bar—implicating multiple sentences—and the facts in *Earley*, are sufficient to convince us that the asserted unlawfulness of the State Defendants' conduct in calculating Batthany's release date would not have been apparent to reasonable prison officials.")

Ahlers v. Rabinowitz, 684 F.3d 53, 64-66 (2d Cir. 2012) ("This Circuit has not articulated the standard by which to analyze censorship of mail in the civil commitment context. . . . With regard to *legal* mail, 'an isolated incident of mail tampering is usually insufficient to establish a

constitutional violation. Rather, the inmate must show that prison officials "regularly and unjustifiably interfered with the incoming legal mail."'. . In the context of civil commitment, this formula is easily adapted. A patient must show regular and unjustifiable interference with incoming legal mail; the actions of facility staff in restricting civilly committed individuals' access to legal mail are justified if they advance or protect the state's interest in security, order, or treatment and the restrictions imposed are no greater than necessary to advance the governmental interest involved. Interference with non-legal mail, as Ahlers claims, is more readily justifiable than interference with so-called legal mail. . . We need not articulate the correct standard here, however, because Ahlers's complaint cannot support a claim that any alleged 'interference' with his non-legal mail was 'regular[ ]' or 'unjustifiabl[e].'. . .We have for the first time undertaken a Fourth Amendment balancing analysis with regard to the right of a civilly committed person to be free from unreasonable seizures. In other circumstances, that might justify a remand for a *pro se* complainant to replead. . . . However, we are satisfied that, in any event, 'it was objectively reasonable for [the Defendants] to believe their acts did not violate' Ahlers's Fourth Amendment rights, or his First Amendment or procedural due process rights.")

Hilton v. Wright, 673 F.3d 120, 126, 127 (2d Cir. 2012) ("Although we review grants of summary judgment *de novo,* the opinion of the district court is often helpful in guiding our examination of the record. In this case, the extreme brevity of the district court's opinion with respect to Hilton's Section 1983 claim denies us this usual assistance. Indeed, the district court's determination that Dr. Wright enjoys qualified immunity from Hilton's claim is entirely conclusory and essentially requires this court to consider the issue in the first instance. Under these circumstances, we elect to vacate the district court's grant of summary judgement against Hilton on his Eighth Amendment claim and remand the issue for further explanation as to one or both of the following questions: (1) *why*, given the evidence on the record, there is no genuine issue of material fact about whether Dr. Wright is entitled to qualified and immunity, and (2) *why* there is no genuine issue of material fact about whether the doctor's conduct violated the Eighth Amendment. When clarifying these aspects of its decision, the district court should bear in mind the following. In *Pearson v. Callahan* . . . the Supreme Court revised the traditional two-step qualified immunity analysis set out in *Saucier v. Katz* . . . . [W]e do not pass on which step of the qualified immunity analysis the district court should first undertake. It may begin its analysis by considering whether conditioning medical treatment for a progressive disease on participation in a prison program violates a clearly established right that an objectively reasonable person would have known about, or it may first address whether such a practice *in fact* violates the Eighth Amendment. If the district court decides, or is eventually compelled, to consider the underlying constitutionality of Dr. Wright's conduct, we note there may well be genuine issues of material fact.")

Doninger v. Niehoff, 642 F.3d 334, 345-51 (2d Cir. 2011) ("Following the Supreme Court's decision in *Pearson v. Callahan,* . . . we may now exercise our discretion in deciding the order in which to conduct the qualified immunity analysis. . . . We do not reach the question whether school officials violated Doninger's First Amendment rights by preventing her from running for Senior Class Secretary. We see no need to decide this question. We agree with the district court that any

First Amendment right allegedly violated here was not clearly established, such that 'it would [have been] clear to a reasonable [school official] that [her] conduct was unlawful in the situation [she] confronted.'. . Accordingly, Defendants were properly afforded qualified immunity as to this claim. . . . [T]he Supreme Court in *Tinker* did not clearly establish intent as an element of any claim or defense, nor has our case law pursuant to *Tinker.* As a result, even assuming a factual dispute exists as to Niehoff's motivation, qualified immunity is still proper where Defendants were objectively reasonable in their judgment that they 'might reasonably portend disruption from the student expression at issue.'. . Moreover, even if this were *not* the case–even if intent constituted a clearly established element of a *Tinker* defense–the supposed factual dispute as to whether Niehoff was motivated by the offensiveness of Doninger's speech or by its disruptive potential would still not matter here. As the district court recognized, it was also not clearly established at the time of these events that Doninger had any First Amendment right not to be prohibited from running for Senior Class Secretary because of *offensive* off-campus speech, at least when such speech pertained to a school event, invited students to read and respond to it by contacting school administrators, and it was reasonably foreseeable 'that the speech would come on to campus and thus come to the attention of school authorities.'. . . Doninger's discipline extended only to her role as a student government representative: she was not suspended from classes or punished in any other way. Given that Doninger, in serving in such a position, was to help maintain a 'continuous communication channel from students to both faculty and administration,' it was not unreasonable for Niehoff to conclude that Doninger, by posting an incendiary blog post in the midst of an ongoing school controversy, had demonstrated her unwillingness properly to carry out this role. To be clear, we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities. Here, however, pursuant to *Tinker* and its progeny, it was objectively reasonable for school officials to conclude that Doninger's behavior was potentially disruptive of student government functions (such as the organization of Jamfest) and that Doninger was not free to engage in such behavior while serving as a class representative–a representative charged with working with these very same school officials to carry out her responsibilities. . . . [I]t was objectively reasonable for Niehoff and Schwartz to believe they could prohibit Doninger from running for Senior Class Secretary without violating her First Amendment rights, given the 'specific facts and context of the case.'. . We thus conclude that Niehoff and Schwartz were properly afforded qualified immunity as to Doninger's blog post claim.")

Doninger v. Niehoff, 642 F.3d 334, 353-56 (2d Cir. 2011) ("We again focus on the second prong of the qualified immunity inquiry–whether, assuming that Doninger had a First Amendment right to wear her t-shirt at the assembly, this right was clearly established. . . .The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case. . . . We conclude, for instance, that *Tinker* governs here–that because the t-shirts were not vulgar, *see Fraser,* 478 U.S. at 683, could not reasonably be perceived to bear the School's imprimatur, *see Hazelwood*, 484 U.S. at 271, and did not encourage drug use, *see Morse,* 551 U.S. at 409, they could be subject to regulation different

from that permissible for adults in non-school settings only if they threatened substantial disruption to the work and discipline of the School. . . . That said, a reasonable school official could well note salient differences between the circumstances here and those in *Tinker*. . . . [E]ven assuming, *arguendo*, that it would be clear to a reasonable official that the *Tinker* standard applied in the circumstances presented, Defendants are still entitled to qualified immunity if such an official could have reasonably erred in determining whether the potential for disruption at the assembly was sufficient to satisfy that standard. Even viewing the evidence in the light most favorable to Doninger, we conclude that such is the case here. . . . Given Niehoff's responsibility for ensuring an orderly election process, enforcing the punishment against Doninger, and safeguarding the interests of those students who were to speak at the assembly, she faced a difficult task in assessing whether the threat of disruption was severe enough to justify preventing Doninger from wearing her t-shirt into the assembly. A reasonable jury could find that a school official who believed the threatened disruption here was sufficiently substantial was, under the circumstances, mistaken. We cannot conclude, however, that such a mistake was anything but reasonable–the very sort of mistake for which the qualified immunity doctrine exists to shield officials against unwarranted liability. . . . We conclude that, in the circumstances here, reasonable school officials could disagree about the potential for a substantial disruption of the assembly as a result of permitting students to wear the t-shirts inside. Accordingly, Defendants are entitled to qualified immunity.")

Costello v. City of Burlington, 632 F.3d 41, 47, 48 (2d Cir. 2011) ("Affirmance on the ground of qualified immunity only, as Judge Pooler prefers, may decide this case (this time), but it certainly would not advance matters. That is because: Costello could then immediately return to Church Street, and resume screaming, as he is inspired to do; the police would have no incremental guidance from the courts on what to do; the next police officer who enforced Burlington's noise ordinance would be the defendant in Costello's next lawsuit; in that suit, the district court would have no guidance from this appeal; nor would *we*, on the next appeal–and this judicial proceeding, beginning to end, would be a waste of everyone's time. This is not a case in which prudence counsels kicking the can down the road. . . Judge Pooler argues that, '[w]ithout more of a record,' it may be premature for us to decide whether Burlington's noise ordinance is 'plainly constitutional.'. . In *Costello I*, we previously remanded for further fact-finding, to gauge the ambient noises on Church Street (because shouting in, say, a library is more invasive than shouting in a steel mill). And the district court, having already issued one detailed opinion, responded with a second set of findings–which Judge Pooler still thinks deficient. . . .This case has been considered by the district court twice, and twice by this Court. Another remand would be futile. In any event, such obstacles should not be erected to frustrate enforcement of an ordinance that (as we have already held) is facially valid; otherwise, no police officer could enforce the ordinance without fear of reprisal.")

Taravella v. Town of Wolcott, 599 F.3d 129, 135, 136 (2d Cir. 2010) ("Dunn read the Agreement, sought legal advice, and reasonably concluded that Taravella could be terminated without a hearing. . . Because a reasonable mayor could understand the Agreement to provide that Taravella could be fired without a hearing, it cannot be said that Dunn acted unreasonably in doing so. . . .

Judge Straub's dissent is in two parts. The first part questions why this Circuit analyzes qualified immunity by considering three questions rather than just two. Specifically, Judge Straub would only consider: (1) whether the facts plaintiff alleges establish a violation of a constitutional right and (2) whether this constitutional right was clearly established. Such a formulation would omit consideration of whether it was 'objectively reasonable' for a defendant to believe his actions were lawful. The second part of Judge Straub's opinion, which concerns the particulars of this case, illustrates why this third question is indispensable. Judge Straub recognizes the employment contract is ambiguous as to whether Ms. Taravella had the right to a hearing before dismissal. And, he would remand for a finding (on extrinsic evidence) as to the intent of Mayor Dunn's predecessor, in aid of answering the first inquiry, i.e., whether under the facts she alleged Taravella had a constitutional right to a hearing. However, the ambiguity of a contract is ascertainable as a matter of law, and we all conclude that this contract is ambiguous. Given the contract's ambiguity and the standard–that we look at 'whether a reasonable official would reasonably believe his conduct did not violate a clearly established right,' *Kerman v. City of New York,* 374 F.3d 93, 109 (2d Cir.2004)–it cannot be said that the defendant acted unreasonably when he interpreted the ambiguous contract one way instead of another. . . Although Taravella has alleged a violation of a constitutional right, and although that constitutional right was clearly established at the time of the alleged violation, Dunn's conduct was objectively reasonable in light of the information he had. We therefore reverse the district court's denial of Dunn's summary judgment motion on grounds of qualified immunity.")

Taravella v. Town of Wolcott, 599 F.3d 129, 136, 140, 146, 147 (2d Cir. 2010) (Straub, J., dissenting) ("I respectfully dissent. This is a straightforward qualified immunity case. In line with well-established Supreme Court and Circuit precedent, Mayor Thomas G. Dunn's appeal from the District Court's order denying summary judgment based on qualified immunity should be dismissed because the District Court found that material factual disputes preclude summary judgment. I write to make two main points. First, I wish to call the Court's attention to what appears to me to be a long-standing inconsistency in our case law. For years, our cases have described the qualified immunity analysis both as a two-step process *and* as a three-step process. The latter has no basis in Supreme Court precedent and has served to confuse the case law in this area. Second, on the merits, I would hold that (under any standard) Dunn's appeal should be dismissed for lack of jurisdiction because the District Court found that material factual disputes exist and the record reflects that these factual disputes are indeed material. . . .[I]n accordance with *Saucier* and *Pearson*, the analysis should be as follows: (1) Taken in the light most favorable to the party asserting the injury, do the facts alleged or shown (depending on the stage of litigation) show that the state official's conduct violated a constitutional right? (2) If a constitutional violation can be made out on a favorable view of the parties' submissions, was the right clearly established? . . . Of course, in accordance with *Pearson*, the two elements need not be addressed sequentially. . . . I take no quarrel with the statement that it *could* be said that Dunn acted reasonably. I part company with the majority because the resolution of that question depends on disputed facts. . . . In this dissent, I seek to make two main points. First, I attempt to call our Court's attention to the apparent long-standing inconsistency in our case law regarding the proper standard for analyzing qualified

immunity claims. We should–and it is my hope that we soon will– resolve this inconsistency by holding that qualified immunity is decided in accordance with a *two-step* analysis: (1) a court must determine whether the facts, taken in the light most favorable to the party asserting the injury, show that the state official's conduct violated a constitutional right; and (2) even if a constitutional violation can be made out on a favorable view of the submissions, the official is entitled to immunity if the right was not clearly established. Second, because qualified immunity is not available at the summary judgment stage when there are material facts in dispute, and because the District Court found that such disputes exist in this case, I would dismiss Dunn's appeal of the denial of summary judgment on the basis of qualified immunity. Although this should be tested using the two-step method described above, I would hold that Dunn's appeal should be dismissed even under the standard employed by the majority; when the District Court finds that material facts are disputed as to the qualified immunity analysis, we lack jurisdiction to disturb the District Court's finding that these material factual disputes are genuine.Therefore, I respectfully dissent.").

Redd v. Wright, 597 F.3d 532, 536 (2d Cir. 2010) ("As a result of the Supreme Court's decision in *Pearson v. Callahan* . . . we are no longer required to determine whether Redd's rights were violated under the First Amendment and RLUIPA if we determine that the rights claimed by Redd were not 'clearly established' at the time of the alleged violation. . . The task of framing the right at issue with some precision is critical in determining whether that particular right was clearly established at the time of the defendants' alleged violation. Redd claims that the right at issue here should be characterized as the right 'not to be subjected to punishment or more burdensome confinement as a consequence of his religious beliefs,' Redd Br. 26. As the defendants note, however, the Supreme Court has expressly cautioned against framing the constitutional right at too broad a level of generality. . . And we have interposed a 'reasonable specificity' requirement on defining the contours of a constitutional right for qualified immunity purposes. . . Redd's characterization of his right is not 'reasonably specific' because it fails to account for the 1996 Policy in particular. We agree with the defendants that the right at issue here is Redd's right under the First Amendment and RLUIPA to a religious exemption from the 1996 Policy. At the time Redd was confined in TB hold, it had not been clearly established by either the Supreme Court or this court that the 1996 Policy, or a substantially equivalent policy, was not reasonably related to a legitimate penological interest nor that such terms are not the least restrictive means of furthering a compelling governmental interest. For those reasons, the defendants are entitled to qualified immunity with respect to Redd's First Amendment and RLUIPA claims.").

Okin v. Village of Cornwall-On-Hudson Police Dept., 577 F.3d 415, 433 n.11 (2d Cir. 2009) ("Some cases frame the test [for qualified immunity] as disjunctive: an officer 'is entitled to qualified immunity if his conduct did not violate a clearly established constitutional right, *or* if it was objectively reasonable for him to believe that his conduct did not violate such a right.' *Gilles v. Repicky*, 511 F.3d 239, 246 (2d Cir.2007) (emphasis added). This would imply that an officer whose actions violated clearly established law might escape liability if he had an objectively reasonable belief that his conduct did not violate the clearly established law. However, *Saucier* makes it clear that the 'objectively reasonable' inquiry is part of the 'clearly established' inquiry.

. .Thus, once a court has found that the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred, it is no defense for a police officer who violated this clearly established law to respond that he held an objectively reasonable belief that his conduct was lawful. This is so because a police officer who violates clearly established law necessarily lacks an objectively reasonable belief that his conduct was lawful. We clarify here that the two are part of the same inquiry, not independent elements as some cases suggested.").

Dean v. Blumenthal, 577 F.3d 60, 68 (2d Cir. 2009) ("We exercise our discretion here and will initially evaluate whether the constitutional right asserted by Dean was clearly established during the relevant period. Only if the right was clearly established will we then consider whether the facts that Dean has alleged make out a violation of a constitutional right. We invert the once-mandatory *Saucier* sequence because, as discussed below, it is clear that a constitutional right to receive campaign contributions was not clearly established, but it is 'far from obvious whether in fact there is such a right.'. . We also do not believe that a challenge to a practice that has been defunct for over six years, where injunctive relief is moot and where damages are speculative, presents an appropriate opportunity to explore the complexities of a difficult constitutional question.").

Kelsey v. County of Schoharie, 567 F.3d 54, 61-65 (2d Cir. 2009) ("The development of constitutional precedent is especially important here, where (1) this Court has not spoken on the issue of the constitutionality of clothing exchange procedures in jails although the issue has been presented in district courts in this circuit . . . ; and (2) the constitutionality of clothing exchange procedures in jails may never be developed if this Court were to dispose of all challenges relating to the procedures simply because the procedure is not 'clearly established' as a 'strip search' violative of the Fourth Amendment. It is also said that addressing the constitutional issue first may not only avoid the possibility of drawn-out litigation and the imposition of unwarranted liability, but may also serve to clarify official conduct standards. . .We think that all these purposes are served by undertaking the constitutional inquiry first in this case. . . . We conclude that the incidental observation of the body of an arrestee during a required clothing exchange, in the manner described by plaintiffs, is not an unreasonable search under the Fourth Amendment. Moreover, it seems to us that a clothing exchange observed by corrections officers under the circumstances described by plaintiffs is related to 'maintaining institutional security and preserving internal order and discipline[,] essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.' *Bell v. Wolfish*, 441 U.S. 520, 546 (1979). The objectives served by a clothing exchange, according to Sheriff Bates, include assurance that each inmate has clothing that is clean and free of infestation; that inmates are clearly identifiable and distinguishable from visitors, staff and members of the public; and that a positive state of mind be instilled in each inmate. . . . We hold here only that a process for the exchange of personal clothing for prison clothing under the observation of a corrections officer in the manner described by plaintiffs does not implicate the type of privacy protected by the Fourth Amendment nor does it fall within the prohibitions established by our precedents relating to strip searches. Plaintiffs were not required to display or manipulate their

body parts in any way. Moreover, Plaintiffs did not deny that methods were available to them to protect viewing of their private parts in the event they desired to make use of such methods. . . . Because the plaintiffs have been unable to identify any constitutional violation on the parts of the individual defendants, the Decision and Order of the District Court is reversed, and the case is remanded with instructions to dismiss the action as against the individual defendants. Because the plaintiffs lack any underlying claim of a deprivation of a constitutional right, the claim of municipal liability on the part of defendant County of Schoharie is to be dismissed as well.")

Kelsey v. County of Schoharie, 567 F.3d 54, 65, 71 (2d Cir. 2009) (Sotomayor, J., dissenting) ("I dissent because the majority has exercised jurisdiction where it has none and assumed the wrong party's version of the facts. It has also offered dicta that contradicts this Circuit's precedent and disregards the experienced judgment of jail administrators. Under a correct analysis of this case, we would be presented with the following question: During the relevant time period, did our clearly established precedent interpreting the Fourth Amendment permit arrestees for misdemeanors to be forced to expose their private parts to corrections officers ('COs') and inmates without reasonable suspicion? The answer is 'no.' Accordingly, the judgment of the district court should be affirmed. . . . If, under plaintiffs' version of the facts, arrestees for misdemeanors could have protected their private parts from exposure, I would have agreed with the majority that Fourth Amendment interests would not be implicated and violated. But that is not the case before us. Because plaintiffs' version of the facts indicates a constitutional violation of a clearly established right under the Fourth Amendment against unreasonable searches, we should affirm the district court's denial of summary judgment.").

Gibbs v. City of Bridgeport, No. 3:16-CV-635 (JAM), 2018 WL 4119588, at *1, *4 (D. Conn. Aug. 29, 2018) ("When I view the video and other evidence in the light most favorable to plaintiff (as I am required to do when evaluating a motion for summary judgment), I have to conclude Detective Borona knew that Stukes was no longer armed when he fired the shot that killed him. If plaintiff can prove at trial that Detective Borona knew he was shooting an unarmed man, then plaintiff should be permitted to try to convince the jury that the decision to shoot Stukes was objectively unreasonable in violation of the Fourth Amendment, and the Court in turn may consider anew in light of the trial evidence and jury findings whether Detective Borona should be entitled to qualified immunity. My ruling today is not a conclusion that Detective Borona violated anyone's rights. Detective Borona was pulled in on the spur of the moment to respond to an explosive situation stemming from Stukes' decision to brandish a rifle in a threatening manner on a public sidewalk. My conclusion for now is solely that the facts surrounding Detective Borona's decision after pursuing Stukes to fire the shot that killed him are disputed enough that it should be for a jury to decide what happened at trial. . . .[A] court has discretion to skip the constitutional question and simply address the application of qualified immunity (*i.e.*, whether any constitutional violation amounted to a violation of clearly established law of which any objectively reasonably officer would have been aware). . . But I won't do that here. Bryan Stukes is dead. And Detective Borona is accused of a very serious violation of constitutional rights. In such life-and-death cases and where a court's ruling has important expressive value and may offer guidance for future life-

and-death cases, a court should ordinarily err in favor of addressing the merits of a constitutional claim rather than simply defaulting to consider qualified immunity.")

K.D. ex rel. Duncan v. White Plains School Dist., No. 11 Civ. 6756(ER), 2013 WL 440556, *11& n.12 (S.D.N.Y. Feb. 5, 2013) ("Since no Supreme Court or Second Circuit precedent exists that clearly establishes a right to traditional Fourth Amendment protections during the type of in-school interview alleged here, the Court concludes that a reasonable official would not have understood that the in-school interview of K.D. could implicate her Fourth Amendment rights. Thus, the Individual Defendants are entitled to qualified immunity on K.D.'s Fourth Amendment claim. . . Having concluded that the Individual Defendants are entitled to qualified immunity on K.D.'s Fourth Amendment claim, the Court declines to address the constitutionality of Defendants' conduct.")

Bock v. Gold, No.1:05-CV-149, 2010 WL 370305, at *2 (D. Vt. Jan. 25, 2010) ("Defendants argue, and the Court agrees, that it is proper to address step two of the qualified immunity inquiry first in this case. The dispositive question is whether it was 'clearly established' that Bock had a constitutionally protected liberty interest in his furlough status. Because this question must be answered in the negative, the more cumbersome merits issue–whether a liberty interest actually existed–becomes academic and need not be decided. . . .No federal precedent–Supreme Court, Second Circuit, or otherwise–has clearly established a liberty interest in Vermont's conditional release system.").

THIRD CIRCUIT

Sauers v. Borough of Nesquehoning, 905 F.3d 711, 715-20, 722-23 (3d Cir. 2018) ("Because we conclude that it was not clearly established at the time of the crash that Homanko's conduct, as alleged in the complaint, could give rise to constitutional liability under the Fourteenth Amendment, we will vacate the District Court's denial of qualified immunity. We hope, however, to establish the law clearly now. . . .We accordingly define the right at issue here as one not to be injured or killed as a result of a police officer's reckless pursuit of an individual suspected of a summary traffic offense when there is no pending emergency and when the suspect is not actively fleeing the police. . . . The level of culpability required 'to shock the contemporary conscience' falls along a spectrum dictated by the circumstances of each case. . . Our case law establishes three distinct categories of culpability depending on how much time a police officer has to make a decision. . . In one category are actions taken in a 'hyperpressurized environment[.]'. . They will not be held to shock the conscience unless the officer has 'an intent to cause harm.'. . Next are actions taken within a time frame that allows an officer to engage in 'hurried deliberation.'. . When those actions reveal a conscious disregard of a great risk of serious harm' they will be sufficient to shock the conscience. . . Finally, actions undertaken with 'unhurried judgments,' with time for 'careful deliberation,' will be held to shock the conscience if they are 'done with deliberate indifference.'. . Our case law is clear that this 'shocks the conscience' framework for analysis applies to police-pursuit cases. . . The District Court rightly interpreted the complaint to allege that

Homanko 'had at least some time to deliberate' before deciding whether and how to pursue the traffic offender. . . That places the fact-pattern in the second category of culpability, requiring inferences or allegations of a conscious disregard of a great risk of serious harm. . . . The liability question thus becomes whether deciding to pursue a potential summary traffic offender at speeds of over 100 miles-per-hour, after radioing for assistance from the neighboring jurisdiction where the potential offender was headed, demonstrates a conscious disregard of a great risk of serious harm. We have no difficulty in concluding that it does. . . . In sum, Sauers adequately pled that Homanko's conduct was conscience-shocking under our state-created danger framework. The complaint therefore contains a plausible claim that Homanko violated Sauers's and his wife's Fourteenth Amendment substantive due process rights. . . .At the time of the crash in May 2014, the state of the law was such that police officers may have understood they could be exposed to constitutional liability for actions taken during a police pursuit only when they had an intent to harm. Thus, it was not at that time clearly established that Homanko's actions could violate the substantive due process rights of Sauers and his wife. . . .There is, moreover, an important distinction between assessing whether a plaintiff has pled a 'clearly established theory of liability' and the question of whether that theory is fairly applied to a government official in light of the facts in a given case. . . It is only when both the theory of liability and its application to the established facts are sufficiently plain that the legal question of liability is beyond legitimate debate and a plaintiff can defeat a qualified immunity defense. . . In this instance, as discussed above, Sauers's complaint relies on the clearly established state-created danger theory of liability. The particular factual allegations, meanwhile, involve a police pursuit of a non-fleeing summary traffic offender. Accordingly, to assess whether the right to be free of the risk associated with a non-emergency but reckless police pursuit was clearly established in May 2014, we must ask whether Supreme Court precedent, our own precedent, or a consensus of authority among the courts of appeals placed that right beyond debate. . . . If any uncertainty existed in the law in May 2014 as to whether reckless police driving could give rise to constitutional liability in circumstances such as those alleged here, then we must afford Homanko the protections of qualified immunity. Our survey of the relevant cases reveals that the law was not so clear as to be 'beyond debate.'. . An officer on patrol in May 2014 could have reasonably understood, based on prevailing law, that he could pursue a potential traffic offender, even recklessly, without being subjected to constitutional liability. The Supreme Court, in *County of Sacramento v. Lewis*. . . had adopted an intent-to-harm standard in a police pursuit case involving a high-speed chase of dangerously fleeing suspects. . . In the years between that decision and the events at issue here, the courts of appeals were inconsistent in whether to apply the intent-to-harm standard in police-pursuit cases only when an exigency necessitated a chase, or whether to apply that standard in all police-pursuit cases, regardless of any exigencies. . . . *Lewis*, then, clearly established that an officer can be liable for a substantive due process violation resulting from a high-speed pursuit of a dangerously fleeing suspect only if the officer intended to cause harm. But it left open the possibility that a lower level of culpability could suffice in the right circumstances. In May 2014, the courts of appeals had not coalesced around what those circumstances might be in the police-pursuit context. [discussing cases in circuits] Given those decisions by the Eighth, Ninth, and Tenth Circuits, we cannot conclude that case law by May of 2014 had clearly established that an officer's decision to engage

in a high speed pursuit of a suspected traffic offender could, in the absence of an intent to harm, give rise to constitutional liability. . . A police officer could have understood that, as long as he believed a pursuit was justified, constitutional liability would not follow based on recklessness alone. Our dissenting colleague disagrees, concluding that it was obvious in May 2014 that Homanko's conduct violated the Constitution. . . To the dissent, it is of high importance that the Tenth Circuit in *Green* applied a deliberate difference standard to a police driving case that, as here, involved neither an emergency nor an actively fleeing suspect. But the dissent discounts the fact that no court of appeals (until now) has joined the Tenth Circuit in distinguishing between those police pursuit cases in which a true exigency exists and those in which less is at stake. As we have described above, at least two courts of appeals have explicitly questioned the sort of distinction drawn by the Tenth Circuit. . .We agree with the Tenth Circuit's application of a culpability standard below that of 'intent to harm' in a non-emergency police pursuit case – indeed the entire panel here is in accord on that point. Where we part company with our dissenting colleague is at his rejection of the rest of the Tenth Circuit's decision. That court acknowledged that the law was not yet clearly established. We accept the accuracy of that assessment then and believe the law as of May 2014 still remained unsettled; our dissenting colleague disagrees. While he evidently views the legal conclusion about constitutional liability as obvious, we do not. Nor can we say that the Tenth Circuit's decision in *Green* alone amounts to the '"robust consensus of cases of persuasive authority" in the Court of Appeals' that we have held necessary to clearly establish a right in the absence of controlling precedent. . . That is especially so in light of the Eighth Circuit's post-*Green* decision in *Sitzes*. . . .Although the state of the law in May 2014 was unsettled as to whether police officers engaged in a police pursuit could be subject to constitutional liability for a level of culpability less than an intent to harm, our opinion today should resolve any ambiguity in that regard within this Circuit. Police officers now have fair warning that their conduct when engaged in a high-speed pursuit will be subject to the full body of our state-created danger case law. That law clearly establishes that the level of culpability required to shock the conscience exists on a spectrum tied to the amount of time a government official has to act. In the police pursuit context, it is also necessary to take into consideration the officer's justification for engaging in the pursuit. We recognize that most high-speed police pursuits arise when officers are responding to emergencies or when they must make split-second decisions to pursue fleeing suspects. Our holding today does nothing to alter the longstanding principle that, in such cases, constitutional liability cannot exist absent an intent to harm. But when there is no compelling justification for an officer to engage in a high-speed pursuit and an officer has time to consider whether to engage in such inherently risky behavior, constitutional liability can arise when the officer proceeds to operate his vehicle in a manner that demonstrates a conscious disregard of a great risk of serious harm.")

Sauers v. Borough of Nesquehoning, 905 F.3d 711, 724, 729 (3d Cir. 2018) (Vanaskie, J., concurring in part and dissenting in part) ("I agree with my colleagues that under our state-created danger framework, the facts alleged by Appellee Michael Sauers readily establish that Officer Homanko's conduct was conscience-shocking. I also agree that, going forward, [p]olice officers now have fair warning that their conduct when engaged in a high-speed pursuit will be subject to

the full body of our state-created danger case law.'. . I therefore join parts II.A and II.C of the majority's decision in full. However, because I believe that a reasonable officer in Homanko's position would have known on May 12, 2014, that the outrageous conduct alleged in this case was unconstitutional, I respectfully dissent from the majority's finding that Homanko is entitled to qualified immunity. . . .The unconstitutional nature of Homanko's actions, placing at substantial risk those traveling a two-lane, undivided highway in recklessly criminal pursuit of an unsuspecting motorist for a minor traffic infraction, was clearly established when he slammed into the Sauers' vehicle, mortally injuring Mrs. Sauer and severely injuring her husband. I respectfully dissent.")

Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 168, 170-74 (3d Cir. 2017) ("We agree with the District Court's conclusions pertaining to the claims against the football coach: Walkowiak's alleged conduct, if proven at trial, would be sufficient to support a jury verdict in favor of Mann on his state-created danger claim, but the right in question—to be free from deliberate exposure to a traumatic brain injury after exhibiting signs of a concussion in the context of a violent contact sport—was not clearly established in 2011. Accordingly, the District Court correctly ruled that Coach Walkowiak was entitled to qualified immunity. . . . In this case, the District Court determined that the first prong of the qualified immunity inquiry was satisfied: the Manns had presented sufficient evidence to warrant a jury trial on the question of whether Walkowiak had violated Sheldon's constitutional rights. It is to this part of the qualified immunity test that we first turn our attention. . . . In summary, we hold that there exists a relationship between a student-athlete and coach at a state-sponsored school such that the coach may be held liable where the coach requires a player, showing signs of a concussion, to continue to be exposed to violent hits. Stated otherwise, we hold that an injured student-athlete participating in a contact sport has a constitutional right to be protected from further harm, and that a state actor violates this right when the injured student-athlete is required to be exposed to a risk of harm by continuing to practice or compete. We now turn to the difficult question of whether this right was clearly established in November of 2011. . . . In this case, the specific context is a football player fully clothed in protective gear, including a helmet, who experiences a violent blow, shows signs of a concussion, and is required to continue to engage in the same activity that caused the first substantial hit. We are aware of no appellate case decided prior to November of 2011 that held that a coach violates the student's constitutional rights by requiring the student to continue to play in these circumstances. . . .No case has been called to our attention where a state-created danger was established after a student-athlete was required to continue to compete after sustaining a substantial hit, the results of which were observed by the coach and could potentially signal a head injury, yet where the student-athlete told the coach that he was fine to continue to play, all of which is the evidence in this case. And while not binding, we similarly held as recently as 2013 in a non-precedential opinion that a cheerleader who suffered a serious injury due to a coach's decision to try out a new stunt without proper protective matting in place, did not violate a clearly established right held by the athlete. . . . Here, no case from this Court or any of our sister Courts of Appeals, let alone a Supreme Court case, has applied the principles we elucidated in *L.R.* and *Kneipp* to the school athletic context. We therefore agree with the District Court that the right at issue here was

not clearly established in November of 2011. 'When properly applied, [qualified immunity] protects "all but the plainly incompetent or those who knowingly violate the law."'. . Given the state of the law in 2011, it cannot be said that Walkowiak was 'plainly incompetent' in sending Sheldon in to continue to practice after he saw Sheldon rolling his shoulder and being told by Sheldon, 'I'm fine.'. . Nor is there any basis for concluding that he knowingly violated Sheldon's constitutional rights. Accordingly, we will affirm the District Court's qualified immunity ruling.")

Mirabella v. Villard, 853 F.3d 641, 649, 653, 657 (3d Cir. 2017) ("In the Mirabellas' case, we exercise our discretion to follow the two-step sequence. We do so in order to guide local officials in safeguarding the First Amendment rights of constituents in challenging circumstances: when the government's constituents are also litigation adversaries. . . .The Mirabellas allege—in the first of two claims on appeal—that local officials Walsh and McDonnell retaliated against them for the exercise of their First Amendment rights. We conclude that the Mirabellas have pled a retaliation claim based upon Walsh's 'no contact' email, but not Walsh and McDonnell's threat that they would move for litigation sanctions. As to the second prong of qualified immunity, we conclude that the right was not clearly established. . . . *Reichle* is directly applicable to the Mirabellas' retaliation claim. As in *Reichle*, the disputed issue here is whether it was clearly established that the defendant's act was retaliatory. . . Paralleling *Reichle*, we define the right at issue as the right to be free from a retaliatory restriction on communication with one's government, when the plaintiff has threatened or engaged in litigation against the government. This right was not clearly established when Walsh sent the 'no contact' email. The Mirabellas have identified neither Supreme Court precedent nor a 'robust consensus of cases of persuasive authority.'. . The closest case we have identified, *Tuccio*, held that the refusal of town officials to meet with a litigation adversary did not amount to First Amendment retaliation. . . Thus, Walsh is entitled to qualified immunity on the Mirabellas' First Amendment retaliation claim. . . . The Mirabellas also assert a direct violation of their First Amendment right to petition the government for redress of grievances, again based upon Walsh's 'no contact' email. We conclude that the Mirabellas have pled a constitutional violation, but that the right was not clearly established for qualified immunity purposes. . . .For the reasons above, the Mirabellas have alleged a violation of their First Amendment right to petition the government for redress of grievances. Under the second prong of qualified immunity, however, we conclude that the right was not clearly established. As stated above, we must not 'define clearly established law at a high level of generality.'. . We therefore define the First Amendment right at issue as the right to be free from a restriction on communicating with one's government, when the plaintiff has threatened or engaged in litigation against the government. This right was not clearly established. While other cases have held that there is a clearly established right to petition a local government, those cases did not involve litigation. For example, the Sixth Circuit has held that there is a clearly established right 'to petition a local, elected representative for assistance in dealing with local government agencies.'. . Similarly, the Tenth Circuit has held that there is a clearly established right to petition a local government regarding a tax assessment. . . These cases, while persuasive, do not establish that 'every reasonable official"' in Walsh's position would have understood that his 'no contact' email

violated the Mirabellas' First Amendment rights. . . Thus, Walsh is entitled to qualified immunity on the Mirabellas' Petition Clause claim.")

Thompson v. Howard, 679 F. App'x 177, at *180-81 & n.8, 184 (3d Cir. 2017) ("Here, we exercise that discretion to affirm on the basis of the second part of the qualified immunity test, without deciding whether Howard's actions did in fact violate Thompson's constitutional rights. This is a case 'in which the constitutional question is so factbound that [a] decision provides little guidance for future cases,' *Pearson*, 555 U.S. at 237, at least as to the constitutionality of the police conduct. Because answering the first question will be of relatively little value, the doctrine of constitutional avoidance leads us to decide the case by asking whether the right was clearly established. . . Thus, we only address whether it would be clear to a reasonable officer at the time of the incident that shooting at a person fleeing in a vehicle, with the gas pedal pressed 'all the way to the floor,' after striking an occupied police vehicle was an excessive use of force. . . . It is beyond dispute that, by the time Howard began shooting, Thompson had already demonstrated a reckless disregard for the safety of others by crashing into Mehalik's police car as Mehalik was getting out of it. Thompson then compounded that recklessness by blindly fleeing with the gas pedal 'all the way to the floor,' driving over sidewalks and lawns in a residential neighborhood. . . Thus, regardless of whether Thompson was at that moment driving towards or away from the officers, it was not objectively unreasonable for Howard, when confronted with Thompson's dangerous, chaotic, high-speed flight, to believe that Thompson posed a serious risk to persons who might be in the area and to resort to deadly force to prevent such persons from being injured. . . . Because Thompson, on appeal, has cabined his claim of excessive use of force to the shooting, we do not have occasion to consider whether a claim based on the force used by Howard earlier in the encounter or the course of Howard's conduct viewed as a whole would vitiate qualified immunity. Thompson's allegations regarding Howard's lack of self-control and use of racial epithets and death threats are obviously repugnant, and while we recently held in *Johnson v. City of Philadelphia*, 837 F.3d 343 (3d Cir. 2016), that a superseding cause may limit an officer's liability even where a police officer has arguably acted unreasonably, . . . we did not rule out the possibility that egregious conduct rising to the level of deliberate provocation may be sufficient to undermine immunity. . . Given that the use of force claim here was limited by Thompson to the shooting, we need not decide whether Howard's earlier conduct eliminated the protection afforded by qualified immunity. . . . In conclusion, we again emphasize the narrow scope of our holding. We do not say that Howard was right to have fired at Thompson, or that Howard's earlier actions were justifiable. Instead, we simply conclude that, in light of precedent such as *Mullenix* and *Brosseau*, it is not beyond debate that a reasonable officer in Howard's shoes could have thought the use of deadly force was lawful. Accordingly, we cannot say that it was clearly established that Howard's decision to fire at Thompson involved excessive force. Qualified immunity applies in exactly such circumstances.")

Williams v. Secretary Pennsylvania DOC, 848 F.3d 549, 552, 557-59, 570-76 (3d Cir. 2017), *cert. denied sub nom Walker v. Farnan,* 138 S. Ct. 357 (2017), and *cert. denied sub nom Williams v. Wetzel,* 138 S. Ct. 357 (2017) ("We are asked to decide whether there is a constitutionally protected liberty interest that prohibits the State from continuing to house inmates in solitary confinement

on death row after they have been granted resentencing hearings, without meaningful review of the continuing placement. For the reasons set forth below, we conclude that there is and that the Due Process Clause of the Fourteenth Amendment therefore limits the State's ability to subject an inmate to the deprivations of death row once the death sentence initially relied upon to justify such extreme restrictions is no longer operative. However, we also hold that, because this principle was not clearly established before today, the prison officials ("Defendants") in this consolidated appeal are entitled to qualified immunity. Accordingly, we will affirm the district courts' grants of summary judgment in favor of Defendants based on qualified immunity. In reaching this conclusion, we stress that this liberty interest, as explained more fully below, is now clearly established. . . . As the Supreme Court made clear in *Pearson v. Callahan*, courts are no longer required to tackle these steps in sequential order. The decisions now on appeal represent both possible approaches. The district court that decided Williams's case found that his constitutional rights had not been violated, albeit not in the context of a qualified immunity analysis. The district court in Walker's case discussed only the second prong, concluding that because the right Walker alleged was not clearly established, Defendants were entitled to summary judgment based on qualified immunity. Despite relaxing the 'rigid order of battle' that formerly governed the analysis of qualified immunity, in *Pearson*, the Court nonetheless recognized that it is often appropriate and beneficial to define the scope of a constitutional right. . . The analytical approach is thus left to appellate courts to resolve in the context of the individual case, and the constitutional question, before it. 'Because we believe this case will clarify and elaborate upon our prior jurisprudence in important and necessary ways,' we exercise our discretion under *Pearson* to reach the qualified immunity steps in sequence. Accordingly, we will first determine whether Plaintiffs' rights were violated and then decide if Defendants should have qualified immunity from suit. We adopt this approach for several reasons, not the least of which is the salience of the underlying questions to the ongoing societal debate about solitary confinement. But at a more basic level, lawsuits by prisoners, whether about conditions of confinement or other aspects of incarceration, are frequently—and, we stress, not inappropriately—met with qualified immunity defenses from defendants. Thus, defining rights when given the opportunity to do so not only inures to the benefit of potential plaintiffs, it also informs prison personnel and others about what is appropriate. Those responsible for discharging the difficult responsibility of administering our nation's prisons deserve clear statements about what the law allows. . . . For the reasons we have discussed, we now hold that Plaintiffs had a due process liberty interest in avoiding the extreme sensory deprivation and isolation endemic in confinement on death row after their death sentences had been vacated. However, as we explain below, we must nevertheless affirm the district courts' grants of summary judgment in favor of Defendants because we conclude that they are entitled to qualified immunity. . . . Here, although the precedent that existed when Defendants continued Plaintiffs' confinement on death row should have suggested caution, it was not sufficient to inform Defendants that their conduct violated clearly established law. In arguing to the contrary, Plaintiffs cite *Shoats* for the proposition that an inmate's due process right to avoid solitary confinement was clearly established. We agree that the interest in avoiding extreme seclusion in *Shoats* is analogous to Plaintiffs' liberty interest even though *Shoats* did not involve confinement on death row. As we have already explained, the conditions of confinement in *Shoats*—indefiniteness and

extreme seclusion—closely mirror those Plaintiffs suffered. Thus, *Shoats* is consistent with, and does support, Plaintiffs' claim that they had a protected liberty interest. However, we are not prepared to conclude that *Shoats* was sufficient to *clearly establish* Plaintiffs' due process interest in avoiding confinement on death row. *Shoats* was not the only relevant law in existence during Plaintiffs' confinement after their sentences had been vacated. Section 4303 and its implementing policy setting forth the conditions for release from death row also bear on whether Plaintiffs' due process rights were clearly established. Plaintiffs do not contest the legality of the statute or policy themselves. Rather, Plaintiffs concede that despite *Shoats*, the policy gave Defendants reason to believe their actions were lawful: 'Admittedly, whether Appellants' rights were "clearly established" at the time of the violation is a difficult question. Prison officials were following a prison policy that required that Appellants remain on death row until they were resentenced.'. . . In recognizing the validity of Defendants' interpretation of the policy, we do not suggest that the profound liberty concerns raised by Plaintiffs' continued confinement on death row can be overcome by a carefully worded prison policy. State policy cannot undermine a constitutional interest. Rather, Defendants' policy is only relevant to our qualified immunity analysis because the case law in existence during Plaintiffs' continued confinement on death row did not adequately inform Defendants that the policy ran counter to Plaintiffs' protected liberty interests. Indeed, the limited precedent that existed on the topic suggested the contrary. . . . *Clark*, as well as the district court that decided Williams's claim, read the policy and underlying statute the same way Defendants did. They concluded that these mandates required inmates' continued confinement on death row despite the fact that their death sentences had been vacated. In *Clark*, the Commonwealth Court of Pennsylvania described the policy as establishing that '[a]n inmate successful in having his capital punishment *replaced by another sentence* is eligible to be discharged from custody [on death row].' Although, as we have just noted, *Shoats* should have raised concerns and counseled caution, *Shoats* does not directly dispute *Clark* or Defendants' interpretation of the policy because Shoats was not on death row. Thus, the DOC death row policy was simply not at issue there. We therefore cannot say Defendants' actions here were 'plainly incompetent' or a 'knowing [ ] violat[ion of] the law.' Accordingly, we will affirm the district courts' grants of summary judgment based on qualified immunity in favor of all Defendants and against both Plaintiffs. We realize that the court that decided Williams's case incorrectly concluded that Williams did not have a protected liberty interest and therefore did not reach the question of qualified immunity. However, '[w]e may affirm a judgment on any ground apparent from the record, even if the district court did not reach it.' Our qualified immunity analysis applies equally to Walker and Williams. . . .Given the scientific consensus, it should come as no surprise that courts have recently started recognizing inmates' due process right to avoid solitary confinement as clearly established. The Court of Appeals for the Fifth Circuit's decision in *Wilkerson v. Goodwin* is illustrative. There, the record showed that the inmate had been confined to his cell for approximately twenty-three hours a day for nearly forty years, and his rights to visitation, personal property, and exercise had been severely curtailed. Recognizing the clear threat to liberty such conditions pose, the court denied the prison officials' assertion of qualified immunity: 'Viewed collectively, there can be no doubt that these conditions are sufficiently severe to give rise to a liberty interest under *Sandin*. This is particularly true in light of the district court's finding that

[the inmate's] solitary confinement at Wade is effectively indefinite.' Speaking in nearly identical terms, the Court of Appeals for the Second Circuit held that '[w]hatever confusion *Sandin* may have left in its wake, defendants do not argue, nor could a credible argument be made, that it was not clearly established at the time of the alleged violations that ... ten years of solitary confinement[ ] triggered due process protection.' The Courts of Appeals for the Fourth and Sixth Circuits have also recognized the constitutional implications of solitary confinement. [Discussing *Incumaa v. Stirling* and *Prieto v. Clarke* and recent decision by the United States District Court for the Middle District of Pennsylvania, *Johnson v. Wetzel*] In our ruling today, we now explicitly add our jurisprudential voice to this growing chorus. In doing so, we rely, in part, upon the scientific consensus and the recent precedent involving non-death row solitary confinement. Those decisions advance our inquiry into the unique, yet analogous, scenario presented here. Inmates in solitary confinement on death row without active death sentences face the perils of extreme isolation and are at risk of erroneous deprivation of their liberty. Accordingly, they have a clearly established due process right under the Fourteenth Amendment to avoid unnecessary and unexamined solitary confinement on death row. The State must therefore afford these inmates procedural protections that ensure that continuing this level of deprivation is required for penological purposes, and is not reflexively imposed without individualized justification. . . .Our holding today that Plaintiffs had a protected liberty interest provides 'fair and clear warning' that, despite our ruling against Plaintiffs, qualified immunity will not bar such claims in the future. As we have explained, scientific research and the evolving jurisprudence has made the harms of solitary confinement clear: Mental well-being and one's sense of self are at risk. We can think of few values more worthy of constitutional protection than these core facets of human dignity. Accordingly, we accept Plaintiffs' request that '[t]his Court ... make clear what prison officials should have already known: those no longer subject to the death penalty ... have a due process right to be free from indefinite conditions of solitary confinement.'. . . It is important to emphasize that this right to procedural due process protections is neither abstract nor symbolic, but both meaningful and required. In *Shoats*, upon finding a protected liberty interest in avoiding solitary confinement, we described what we considered to be adequate procedural protections. There, we granted summary judgment to the prison official defendants only because the procedures provided were sufficient to protect Shoats from being improperly held in solitary confinement. We noted that under the applicable DOC policy, 'an inmate must receive written notice of the reason for his placement in administrative custody and he is entitled to receive a hearing before a PRC within six days of the initial transfer to administrative custody.' Most importantly for our purposes, '[e]very thirty days thereafter, inmates ... have the opportunity to be personally interviewed by the PRC, which then determines whether the inmate should continue to be maintained in administrative custody.' That determination takes into account 'a variety of factors including the safety of other inmates and staff [and] the continued public or institutional risk.' According to the DOC procedures as set forth in the record before us in this case, the PRC's decision may be based on evidence such as 'counselor's reports [and] Psychiatric/Psychological information.'. . . We see no justification consistent with these Plaintiffs' constitutionally protected liberty interests for subjecting them to the deprivations of being housed on death row after their death sentences were vacated with any less procedural protections than we held were adequate in *Shoats*. The review that we found

adequate in *Shoats* is not an inconvenient ritual intended to shelter officials from liability so that they may mechanically continue an inmate's confinement on death row after a sentence of death has been vacated without fear of sanction. Rather, such inmates have a right to *regular and meaningful* review of their continued placement on death row. In conjunction with periodic review, to ensure the review is meaningful, this process must include a statement of reasons for the continued placement on death row. Inmates must also have a meaningful opportunity to respond to the reasons provided. These procedures would be of little value absent the attendant right of a hearing. . . .For the foregoing reasons, we will affirm the district courts' orders granting summary judgment in favor of Defendants based on qualified immunity. We also hold that it is now clearly established that inmates on death row whose death sentences have been vacated have a due process right to avoid continued placement in solitary confinement on death row, absent the kind of meaningful protections discussed herein.") [footnotes omitted]

Brantley v. Wysocki, 662 F. App'x 138, 141-42 (3d Cir. 2016) ("Brantley also raises a claim of retaliatory prosecution in violation of her First Amendment right to free speech. The District Court granted summary judgment for Wysocki on qualified immunity grounds. The District Court found that there was a constitutional violation, but that the right was not clearly established. We will affirm on alternative grounds, finding no constitutional violation and not reaching the question whether the right was clearly established. In its analysis, the District Court did not address the *Hartman* requirement that Brantley prove the absence of probable cause. Rather, the District Court concluded that a jury could find causation based upon the 'temporal proximity' between Brantley's 'protests' regarding union policy and her criminal prosecution. . . We exercise our discretion to apply *Hartman* for the first time on appeal. . . We turn then to the ultimate issue—whether Brantley has proven for summary judgment purposes that Wysocki arrested her without probable cause. [Court concludes there was probable cause]").

Zaloga v. Borough of Moosic, 841 F.3d 170, 174-77 (3d Cir. 2016) ("Here, the District Court erred in its consideration of the second prong of the qualified immunity analysis. We therefore do not need to decide whether Mercatili's actions could have violated Zaloga's constitutional rights, and we decline to do so. Discussing the constitutionality of Mercatili's actions would require us to grapple with the tension between his First Amendment right to speak and Zaloga's right to be free of government retaliation. Because the law does not clearly address how to harmonize those competing interests, the second *Saucier* prong is not met and any analysis addressing the first prong would 'be an essentially academic exercise.'. . The doctrine of constitutional avoidance counsels against unnecessarily wading into such muddy terrain. . . We thus move directly to an explanation of our conclusion with respect to the second prong of the qualified immunity analysis. . . . Especially in light of *Reichle*, it is not sufficient to conclude, as the District Court did in this case, that the second *Saucier* prong is satisfied because there is a well-known 'right against government retaliation for exercising one[']s right to [free] speech ... .'. . . That put the question of whether the 'clearly established' standard had been met at much too high a level of abstraction. Instead, we must attend to context; we need to 'consider the state of the existing law at the time of the alleged violation and the circumstances confronting [Mercatili] to determine whether a

reasonable state actor could have believed his conduct was lawful.'. . .Our opinion in *McLaughlin v. Watson*, 271 F.3d 566 (3d Cir. 2001) – which is the most analogous precedent with respect to Mercatili's alleged actions –effectively precludes Zaloga and Correctional Care from arguing that Mercatili's actions violated clearly established law. The plaintiffs in *McLaughlin* were agents of the Pennsylvania Attorney General's office who alleged (among other things) that the United States Attorney for the Eastern District of Pennsylvania had 'acted administratively to influence the Pennsylvania Attorney General to take adverse employment-related action against them.'. . Assuming *arguendo* that those allegations could constitute a First Amendment retaliation claim, . . . we nevertheless concluded that they did not establish the violation of a clearly established right, explaining our reasoning, in part, as follows:

When a public official is sued for allegedly causing a third party to take some type of adverse action against plaintiff's speech, we have held that defendant's conduct *must be of a particularly virulent character*. It is not enough that defendant speaks critically of plaintiff or even that defendant directly urges or influences the third party to take adverse action. Rather, *defendant must 'threate' or 'coerce' the third party to act*.

. . . We ordered dismissal of the case on the basis of qualified immunity. . . *McLaughlin* thus suggests that a government official like Mercatili would not necessarily understand that mere political pushback could be unlawful. . . . The present case. . . does not appear to involve coercion. Unlike the defendant's threats in *R.C. Maxwell*, Mercatili's efforts to pressure members of the Prison Board were not even coercive enough to achieve their desired effect. By Zaloga's own admission, none of the Board members complied with Mercatili's wishes by voting against renewal of the Borough's contract with Correctional Care. . . [E]ven if we were to characterize Mercatili's alleged statements to Prison Board members as a 'threat' to withdraw political support, there is ample room to debate whether a reasonable official would have known that such threats, without any evident coercive power, were constitutionally out of bounds. . . Finally, it has never been established that a governmental official who does not himself retaliate but instead pressures another individual to retaliate –which is the position Mercatili is in – can be held personally liable. At least one of our sister circuits has held that there is no liability in such circumstances, *see Beattie v. Madison Cty. Sch. Dist.*, 254 F.3d 595, 601 (5th Cir. 2001) (observing that government officials "cannot be liable independently if they did not make the final decision"), and another has noted that this remains an unsettled question of law, s*ee Trant v. Oklahoma*, 754 F.3d 1158, 1170 n.5 (10th Cir. 2014) (observing that the Fifth Circuit has held that "only final decisionmakers may be liable" and noting that this is an unsettled question in the Tenth Circuit). We conclude that legal precedent leaves space for good faith disagreement about the constitutionality of Mercatli's alleged actions. Under the high standard for 'clearly established' law, that is enough to defeat the Plaintiffs' challenge to qualified immunity.")

Mack v. Warden Loretto FCI, 839 F.3d 286, 291, 296-301 (3d Cir. 2016) ("Mack's allegations raise several issues of first impression in our Circuit, including (1) whether an inmate's oral grievance to prison officials can constitute protected activity under the Constitution; (2) whether RFRA prohibits individual conduct that substantially burdens religious exercise; and (3) whether RFRA provides for monetary relief from an official sued in his individual capacity. We answer all

three questions in the affirmative, and therefore conclude that Mack has sufficiently pled a First Amendment retaliation claim and a RFRA claim. We agree, however, that Mack's First Amendment Free Exercise claim and Fifth Amendment equal protection claim must be dismissed. . . . Mack clearly alerted prison officials to his principal allegation—i.e., that he was removed from his commissary position for a pretextual reason. Even if Mack did not detail his allegedly protected speech, his grievance nonetheless notified officials that he believed he was unlawfully terminated from his work assignment as retaliation for exercising his First Amendment rights. Exhaustion merely requires 'inmates [to] provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures.'. . Given this fairly lenient standard, and with no specific guidance from BOP grievance procedures, we conclude that Mack exhausted his administrative remedies before bringing his First Amendment retaliation claim. . . . Although the Supreme Court has never formally extended *Bivens* to First Amendment claims, . . . it seems to have occasionally assumed that First Amendment retaliation claims can proceed under *Bivens*. . . Our Court, however, has explicitly recognized a *Bivens* action when a prisoner has been retaliated against for exercising his or her First Amendment right to petition. In *Paton v. La Prade,*. . . we held that a *Bivens* action may be implied directly from the First Amendment. . . . The Petition Clause embraces a broad range of communications, and the availability of its protections has never turned on a perceived distinction between written and oral speech. . . Both the Free Speech Clause and the Petition Clause protect 'personal expression'—both expression generally and expression directed towards the government for the specific purpose of asking it to right a wrong. . . .While we appreciate the Government's concerns, we are not persuaded that an oral grievance should not receive constitutional protection solely because it is lodged by a prisoner as opposed to a civilian. It is well-established that inmates do not relinquish their First Amendment right to petition by virtue of being incarcerated. . . It is also true, as the Government emphasizes, that an inmate only 'retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'. . But under the facts alleged, there is no reason for us to think that the First Amendment rights Mack seeks to vindicate here are incompatible with his status as a prisoner. . . .To our knowledge, only one other circuit has addressed this specific issue. In *Pearson v. Welborn,* . . . the Seventh Circuit held that an inmate's oral complaints to prison guards about the use of shackles in group therapy and the denial of yard time were constitutionally protected under the Petition Clause. . . The court explained that '[n]othing in the First Amendment itself suggests that the right to petition for redress of grievances only attaches when the petitioning takes a specific form.'. . And while 'certain types of "petitioning" would be obviously inconsistent with imprisonment (marches or group protests, for example),'. . the inmate's oral complaints in that case did not fall into that category. We find the Seventh Circuit's rationale to readily apply to the circumstances of this case. . . For these reasons, we conclude that Mack's oral grievance to Stephens regarding the anti-Muslim harassment he endured at work constitutes protected activity under the First Amendment. . . .The remaining question we must answer with respect to Mack's First Amendment retaliation claim is whether Roberts, Venslosky, and Stephens are entitled to qualified immunity. . . . We have long recognized that prisoners have a right to be free from retaliation for exercising their First Amendment right to petition. Indeed, '[r]etaliating against a

prisoner for the exercise of [*any* of] his constitutional rights is unconstitutional.'. . Retaliatory termination is clearly unlawful, both inside and outside the prison context. . . The fact that the officers retaliated against Mack before he reduced his grievance to writing is inconsequential. While we have never held before today that a prisoner's oral grievance, in particular, is constitutionally protected, we have certainly never suggested that such a grievance is entitled to lower protection than one reduced to writing. And there are myriad cases outside the prison context that make no distinction between oral and written grievances. . . Thus we have little doubt concluding that prisoners' oral grievances are indeed entitled to constitutional protection. A reasonable official in the prison officers' position should therefore have known that retaliating against Mack for exercising his right to petition, whether in the form of an oral or written grievance, was unlawful. . . This is especially so if the prison actually encourages its inmates to communicate their concerns orally. Because we conclude that Mack has sufficiently stated a First Amendment retaliation claim, and that the remaining defendants are not entitled to qualified immunity, we will vacate the District Court's dismissal of this claim and remand to the District Court for further proceedings.")

Mack v. Warden Loretto FCI, 839 F.3d 286, 306-07 (3d Cir. 2016) (Roth, J., concurring in part and dissenting in part) ("I respectfully dissent from the holding of the majority in Part II A of its opinion that Mack has stated a First Amendment retaliation claim against defendants Roberts and Venslosky. I believe that, with regard to a retaliation claim made by the inmate of a prison, oral complaints should not be considered protected conduct under the First Amendment. Oral complaints, unlike written grievances, do not create a record. In fact, oral complaints may generate uncertainty about the content, or even the existence, of the grievance. In addition, a written complaint better provides notice to prison officials about the nature of the grievance and the individuals implicated in it. . . This written notice is important because, in the prison setting, inmates constantly interact with multiple prison officials, and 'virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act.'")

Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633, 638-40 (3d Cir. 2015) ("*Pearson* recognized, however, that there are instances where a case is most easily resolved by addressing whether the right was clearly established at the time of the alleged violation. . . We conclude this is such a case and will address the second prong of the qualified immunity analysis at the outset. . . .In this case, the specific context is a student who experiences a brief submersion under water, exits the pool and complains of chest pain, is ordered to return to the pool after a several-minute respite, then stays in the shallow end of the pool for the remainder of the class, and does not exhibit signs of serious distress until more than one hour later. The specific constitutional right under the Due Process Clause in this context is the right to affirmative intervention by the state actor to minimize the risk of secondary or dry drowning. And, for qualified immunity purposes, the question is whether the law in this context was so well-established that it would have been apparent to a reasonable gym teacher that failure to take action to assess a non-apparent condition that placed the student in mortal danger violated that student's constitutional right under the state-created-

danger theory of liability. . . .The case law simply did not inform a reasonable gym teacher that the failure to assess a student who briefly goes under water for the possibility of dry drowning violated that student's constitutional right to bodily integrity free from unwarranted intrusions by the state.") [*See also* ***Dorley v. S. Fayette Twp. Sch. Dist.***, No. 2:15-CV-00214, 2016 WL 3102227, at *5-6 (W.D. Pa. June 1, 2016), *infra*]

Werkheiser v. Pocono Twp., 780 F.3d 172, 176-81, 183 (3d Cir. 2015) ("Because we do not believe the right at issue here was clearly established, we begin with the second step. . . .We. . . conclude that Werkheiser's First Amendment rights, as an elected official, were not sufficiently defined as to warrant denying Appellants qualified immunity. . .We pause here to emphasize that we do not today decide whether *Garcetti* is applicable to elected officials' speech or not. Rather, we conclude *only* that the law was not clearly established on this point. . . .Many of the reasons for restrictions on employee speech appear to apply with much less force in the context of elected officials. . . .While there may be sound reasons to assert that *Garcetti* does not apply to elected officials' speech, we cannot accept the District Court's inherent conclusion that it is 'beyond debate' that this was clearly established law at the time of Werkheiser's non-appointment. . .In this regard, we note the unsettled nature of the law amongst both the circuit courts and the district courts. . . . Although the Supreme Court has noted that qualified immunity is not the guaranteed product of disuniform views of the law, we find that the well-reasoned decisions on both sides render the law sufficiently unclear at the time of Appellants' actions so as to shield them from liability. . . .Against this legal backdrop, and under these circumstances, it is not beyond debate that a reasonable official in Appellants' position would have understood that retaliating against Werkheiser by denying him reappointment would violate his constitutional rights. As a result, Appellants are entitled to qualified immunity.")

Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979, 986, 988-90, 993(3d Cir. 2014) ("The qualified immunity analysis is a two-step process, which a court may address in either order according to its discretion. . . Here, we first decide whether the facts, taken in the light most favorable to Dougherty, establish that the Appellants' conduct 'violated a constitutional right.'. . . Second, we determine whether that right was 'clearly established' at the time of the challenged conduct. . . . Applying *Garcetti*'s test to the facts the District Court identified in the light most favorable to Dougherty, we agree that Dougherty did not speak 'pursuant to his official duties' when he disclosed details of Dr. Ackerman's alleged misconduct in awarding the prime contract to IBS. The District Court found no evidence that Dougherty's communication with *The Philadelphia Inquirer* fell within the scope of his routine job responsibilities at the School District. Unlike the employees in *Garcetti*, *Foraker*, and *Gorum*, 'nothing about Dougherty's position compelled or called for him to provide or report this information,' whether to the School District, the press, or any other source. . . To the contrary, the School District appears to *discourage* such speech through its Code of Ethics' confidentiality provision, which is being used to justify Dougherty's termination in the instant case. Dougherty's report to *The Philadelphia Inquirer*, therefore, was made as a citizen for First Amendment purposes and should not be foreclosed from constitutional protection. . . . [T]aking this opportunity to respond to the parties' differing

interpretations of the Supreme Court's recent decision in *Lane,* we conclude that *Lane* reinforces *Garcetti*'s holding that a public employee may speak as a citizen even if his speech involves the subject matter of his employment. . . .Under *Lane,* our determination stands that Dougherty's report to *The Philadelphia Inquirer* was not made pursuant to his official job duties. Dougherty's claim is not foreclosed merely because the subject matter of the speech concerns or relates to those duties. . . . Viewing the facts the District Court identified in the light most favorable to Dougherty, we find that the illegality of the Appellants' actions was sufficiently clear in the situation they confronted. Since at least 1967, 'it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'. . In the case at bar, Dougherty's particular type of speech—made as a concerned citizen, purporting to expose the malfeasance of a government official with whom he has no close working relationship—is exactly the type of speech deserving protection under the *Pickering* and *Garcetti* rules of decision and our subsequent case law.")

George v. Rehiel, 738 F.3d 562, 577-80, 584 (3d Cir. 2013) ("We believe that the conduct of the TSA Officials here was . . . consistent with Fourth Amendment limitations. It is not disputed that the initial airport screening to which George was subjected by the TSA Officials was a constitutionally permissible administrative search under the Fourth Amendment, even though it was initiated without individualized suspicion and was conducted without a warrant. It was not until after the TSA Officials discovered that he was carrying some handwritten Arabic–English flashcards containing such words as 'bomb,' 'terrorist,' 'explosion,' 'an attack,' 'battle,' 'to kill,' 'to target,' 'to kidnap,' and 'to wound,' that George was taken by John Does 1 and 2 to another screening area where he was eventually questioned by Jane Doe 3. However, at that point, the Officials had a justifiable suspicion that permitted further investigation as long as the brief detention required to conduct that investigation was reasonable. . .We caution, however, that the detention at the hands of these TSA Officials is at the outer boundary of the Fourth Amendment. Once TSA Officials were satisfied that George was not armed or carrying explosives, much of the concern that justified his detention dissipated. However, it did not totally vanish or suggest that further inquiry was not warranted. Suspicion remained, and that suspicion was objectively reasonable given the realities and perils of air passenger safety. The TSA Officials still were confronted with an individual who was carrying Arabic–English flashcards bearing such words as: 'bomb,' 'terrorist,' 'to kill,' etc. In a world where air passenger safety must contend with such nuanced threats as attempts to convert underwear into bombs and shoes into incendiary devices, we think that the brief detention that followed the initial administrative search of George was reasonable. . . .Thus, we cannot say that it was unreasonable for John Does 1 and 2 to *briefly* continue George's seizure to consult with a supervisor. As noted above, 15 minutes after the supervisor (Jane Doe 3) arrived, and while she was in mid-sentence of a conversation with George, Officer Rehiel of the Philadelphia Police Department arrived, placed George in handcuffs and took him away. At that point, the rather brief detention that arose from the initial administrative search ended. As we explain below, despite George's failed attempt at establishing an agency relationship, none of the TSA Officials played any further role in the protracted seizure that followed. . . . For all of the above reasons, we find that George has failed to allege facts showing

that the TSA Screening Officials—John Does 1 and 2 and Jane Doe 3—violated his Fourth Amendment rights. We therefore need not proceed to the second step of the qualified immunity analysis to determine whether that right was clearly established at the time of the challenged conduct. . . . [W]e reject George's contention that the TSA Screening Officials are liable for what he alleges was his unconstitutional arrest and detention by the Philadelphia Police Officers. That contention, as we have explained, is based solely on his conclusory assertions that TSA Officials had either the legal or functional control over the decisions and actions of the Philadelphia Police Officers. . . .We also reject George's claim that allegations about the two JTTF Agents show that they participated in his allegedly unlawful seizure, arrest and detention. . . The JTTF Agents simply responded to a call from the Philadelphia Police, questioned George for about thirty minutes, determined that he posed no security threat, and told him he was free to leave. The JTTF Agents were not at all involved in George's allegedly unconstitutional seizure, arrest and detention.")

Kelly v. Borough of Carlisle, 544 F. App'x 129, 2013 WL 6069275, *3-*6 (3d Cir. Nov. 19, 2013) (not published) ("As we did in *Kelly II* and as the District Court did below, we will focus on *Saucier's* second step—whether the constitutional right was clearly established at the time of the encounter between Kelly and Rogers. We have already determined that, 'at the time of Kelly's arrest, it was clearly established that a reasonable expectation of privacy was a prerequisite for a Wiretap Act violation,' and that 'police officers do not have a reasonable expectation of privacy when recording conversations with suspects.' *Kelly II*, 622 F.3d at 258. But we also noted that, although '[P]olice officers generally have a duty to know the basic elements of the laws they enforce,' *id.*, in circumstances when a police officer 'neither knew nor should have known of the relevant legal standard,' qualified immunity may still be granted. . . In other words, there are circumstances wherein a police officer's violation of a law may be within the bounds of reason, even though the law in question can be said, from the comfort of an armchair, to be 'clearly established.'. . .In *Kelly II*, we adopted reasoning similar to that of the *Amore* court, saying 'a police officer who relies in good faith on a prosecutor's legal opinion that the arrest is warranted under the law is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause.'. . We noted that such 'reliance must itself be objectively reasonable, however, because "a wave of the prosecutor's wand cannot magically transform an unreasonable probable cause determination into a reasonable one."'. . We further held that a plaintiff may rebut the presumptive entitlement to immunity if he demonstrates that, 'under all the factual and legal circumstances surrounding the arrest, a reasonable officer would not have relied on the prosecutor's advice.'. . Finally, we asked the District Court to answer two questions: whether the District Court 'evaluate[d] sufficiently the state of Pennsylvania law at the relevant time' and whether the record indicates that—although the prerequisites of the Wiretap Act are clearly established—Rogers reasonably and in good faith relied on the ADA's advice in arresting Kelly. . . The District Court answered both in the affirmative, and, for at least two reasons, we agree. First, although the prerequisites of the Wiretap Act were clearly established at the time of the incident, this is not a case where Rogers 'knew or should have known' that Kelly's actions were not criminal in nature. . . The District Court noted that Rogers had a 'limited familiarity with the Wiretap Act, gained from his training.'. . Specifically, his understanding of the law was that

because 'he was obliged to inform motorists if he recorded a stop, ... he believed the duty was reciprocal under the Act.'. . . Granted, we have previously acknowledged that 'two Pennsylvania Supreme Court cases—one almost 20 years old at the time of Kelly's arrest—had held that covertly recording police officers was not a violation of the Act,' and that those cases supported the conclusion that a reasonable expectation of privacy was a clearly established prerequisite for a Wiretap Act violation. . . But Rogers's incorrect understanding of the law is not devoid of merit. As the District Court noted, federal courts have recently 'cited with approval the Pennsylvania Superior Court's decision in *Commonwealth v. McIvor* for the proposition that while there is no expectation of privacy at a traffic stop, a police officer ... does have an expectation of non-interception in his communications at the stop,' and thus recording his communications would nonetheless be violative of the Wiretap Act. . . Such recent case law suggests that Rogers was not 'plainly incompetent' in wondering about the state of the law. . . In other words, even though the law was, in a sense, 'clearly established,' it was not so clearly established that one could say a reasonable officer 'would have known' of the illegality of the arrest. . . . And second, instead of proceeding solely on his own understanding of the Wiretap Act, Rogers contacted Birbeck for legal advice on whether he had probable cause to arrest Kelly. Rogers's reliance on Birbeck's comments was justified. Birbeck was 'an experienced prosecutor who had been serving as the chief deputy district attorney in charge of the trial division for more than a decade.'. . In fact, Birbeck conducted his own legal research on the Wiretap Act and whether Rogers had probable cause to arrest Kelly, and his quick research led him to conclude, albeit incorrectly, that Kelly had violated the Act. The District Court eliminated any concern that Rogers's call to Birbeck was merely an attempt to rubber-stamp an arrest. The Court submitted the matter to a jury, which found that (1) Rogers reasonably believed that Kelly was attempting to secretly record him, and Rogers was not looking for a pretextual reason to arrest him; (2) Rogers called Birbeck to seek legal advice on whether probable cause existed to arrest Kelly for a violation of the Wiretap Act, and Rogers was not merely seeking to obtain approval for the arrest; (3) although Rogers neglected to mention that he was recording the traffic stop, he did not deliberately or recklessly omit that fact or any other relevant fact; and (4) Birbeck told Rogers that probable cause existed to arrest Kelly. Although Birbeck's advice was flawed, it was plausible in the absence of a thorough review of the relevant case law and was provided in real-time as Rogers was involved in a traffic stop. Kelly argues for an absolute rule prohibiting qualified immunity when the relevant law is clearly established. If that were the law, we would have said so the first time this case was before us. We remanded the matter to the District Court because the law is more nuanced. Kelly's argument fails because it does not make appropriate allowances for government officials who 'act [ ] precisely as one would hope [they] would act' when faced with law that is nominally 'clearly established' and yet is shrouded in some obscurity or ambiguity. . . One purpose of qualified immunity is to protect police officers who do their best to understand the law and yet are uncertain of how it may apply in a specific situation. An officer engaged in a traffic stop may not have access to a computer, the internet, Westlaw, or enough time to research the law. It is in everyone's interest to encourage law-enforcement officials to seek out legal advice in those situations. . . In essence, qualified immunity may be granted when there is a breakdown in the legal fiction that reasonably competent police

officers know every clearly established law. . . Because Rogers's reliance on Birbeck's advice was in good faith and objectively reasonable, he is entitled to qualified immunity as to Kelly's arrest.")

True Blue Auctions v. Foster, 528 F. App'x 190, 192, 193 (3d Cir. 2013) ("[W]e must determine whether the Magistrate Judge was correct to conclude that as of October 16, 2009, Dreibelbis had no clearly established constitutional right to videotape the officers without threat of arrest. The Report and Recommendation relied principally on *Kelly*, a 2010 case addressing an issue similar to the one we face today. . . .First, the plaintiffs argue that even if *Kelly* held that there was no clearly established right to videotape police officers during a traffic stop, there was nevertheless a clearly established right to tape police officers on a public sidewalk during the course of their duties. . . Even if the distinction between traffic stops and public sidewalk confrontations is as meaningful as the plaintiffs claim, such that *Kelly* is not dispositive, the plaintiffs are simply incorrect in claiming that '[e]very court has ruled there is a First Amendment right to videotape police in non-traffic stops situations in public forums.'. . Instead, as *Kelly* clearly explained, courts have come to divergent conclusions on the issue. [examining cases] Thus, our case law does not clearly establish a right to videotape police officers performing their official duties such that the officers here should have been on notice that Dreibelbis had a First Amendment right to film them. Accordingly, the District Court correctly concluded that the officers were entitled to qualified immunity.")

Marcavage v. National Park Service, 666 F.3d 856, 859, 860 (3d Cir. 2012) ("As the Supreme Court has noted, '[i]f judges ... disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'. . Both a United States Magistrate Judge and a United States District Judge previously determined that the Sixth Street sidewalk was a nonpublic forum—an area that is not used by tradition or designation for public expression and that consequently carries a less stringent standard of review when assessing government justifications for limiting speech. . . This led both judges to find Marcavage's arrest constitutionally permissible. While we ultimately held otherwise, the fact that two judges found no First Amendment violation indicates that Marcavage's constitutional right to demonstrate on the Sixth Street sidewalk was not clearly established. . . . [T]o strip Saperstein and Crane of qualified immunity requires the violation of a clearly established constitutional right. Marcavage's right to demonstrate on the Sixth Street sidewalk was far from clear at the time of his arrest. . . . Until we reversed the Magistrate Judge and District Judge in *Marcavage III*, Saperstein and Crane had made no mistake. They had better than probable cause—they had evidence sufficient for a conviction. As in the First Amendment context, qualified immunity bars Marcavage's Fourth Amendment damages claim.")

Schneyder v. Smith, 653 F.3d 313, 328-31 & n.21 (3d Cir. 2011) ("To summarize what we have said so far: The liberty interests of a detained material witness are protected by the Fourth Amendment, because this court adheres to Justice Ginsburg's 'continuing seizure' theory. Schneyder's detention was a seizure, but because she was not arrested as a criminal suspect 'probable cause' is the wrong lens through which to examine the case. Instead, to determine

whether her rights were violated we must assess whether the seizure was 'reasonable' within the Fourth Amendment's meaning. This requires balancing Schneyder's interests against the government's, and a jury could conclude that Schneyder's interest in going free outweighed the government's interest in keeping her locked up until the new trial date. If Schneyder's rights were violated, Smith was the only official in a position to prevent it–by keeping Judge Means informed of significant changes in the facts underlying the detention order. Smith's duty not to cause a violation of Schneyder's constitutional rights required her to promptly report the continuance in the *Overby* case to Judge Means–though she would have been free to argue that continued detention was warranted even in light of the new facts. Because Smith did not fulfill this obligation, Schneyder has made out a prima facie case for recovery of damages under § 1983. . . Because the foregoing discussion takes place in the context of qualified immunity, our inquiry is not complete. We still must decide whether the duty we have just identified was clearly established at the time the violation occurred. . . . Although we are aware of no decision predating Smith's actions that involved the sort of claim that Schneyder has raised here, we are nevertheless convinced that this is one of those exceedingly rare cases in which the existence of the plaintiff's constitutional right is so manifest that it is clearly established by broad rules and general principles. That is, this ought to have been a member of that class of 'easiest cases' that, according to Judge Posner, 'don't even arise.'. . . No reasonable prosecutor would think that she could indefinitely detain an innocent witness pending trial without obtaining reauthorization. And there can be no doubt that is what Smith intended. The trial at which Schneyder was to testify did not take place until more than a year and a half after her arrest, and there is no indication that Smith would ever have taken steps of her own volition to free her key witness or even to have her status reviewed. If the initial continuance was not something Smith felt a need to report, there is no reason to think that she would have advised Judge Means of any of the subsequent developments. Were it not for the persistence of Schneyder's family and the generous efforts of a public defender with cases of his own and no prior connection to the plaintiff, there can be no telling how long she would have remained locked up. . . . The judges comprising this panel–all three former prosecutors–feel secure in declaring that any reasonable attorney in Smith's position would have known that her course of action was so outrageous as to be unconstitutional, even in the absence of a case telling her so. 'When properly applied, [qualified immunity] protects "all but the plainly incompetent or those who knowingly violate the law."' The self-evident wrongfulness of Smith's conduct is sufficient to place her in either category. She is not entitled to qualified immunity.")

Schmidt v. Creedon, 639 F.3d 587, 589, 590, 598, 599 (3d Cir. 2011) ("We now hold that, except for extraordinary situations, under Pennsylvania law, even when union grievance procedures permit a policeman to challenge his suspension after the fact, a brief and informal pre-termination or pre-suspension hearing is necessary. However, because this rule was not clearly established at the time of Schmidt's suspension, we conclude that appellees are entitled to qualified immunity. . . . At the time of Schmidt's suspension, other circuits had concluded that 'due process requires pre-termination notice and an opportunity to respond even where a [collective bargaining agreement] provides for post-termination procedures that fully compensate wrongfully terminated employees.' [collecting cases] These cases did not clearly establish that Schmidt was entitled to a

hearing before being suspended–as opposed to being terminated. In light of the closeness of the question, the absence of clear precedent in this or other circuits, and the District Court's thoughtful conclusion, we cannot say that 'it would be clear to a reasonable [official] that his conduct was unlawful in the situation' presented to appellees in this case.")

Ray v. Township of Warren, 626 F.3d 170, 177 (3d Cir. 2010) ("We agree with the conclusion of the Seventh, Ninth, and Tenth Circuits on this issue, and interpret the Supreme Court's decision in *Cady* as being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes. The community caretaking doctrine cannot be used to justify warrantless searches of a home. Whether that exception can ever apply outside the context of an automobile search, we need not now decide. It is enough to say that, in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement. . . . Regardless of whether there were exigent circumstances in this case, however, the responding officers are entitled to qualified immunity. . . . There is no dispute that at the time of the officers' actions in this case, two Circuits had arguably extended the community caretaking doctrine to warrantless entries into homes. . . Moreover, this Circuit had addressed the issue only in a nonprecedential opinion, *Burr v. Hasbrouck Heights,* 131 F. App'x 799 (3d Cir.2005), one month prior to the officers' actions, and had left unresolved whether a community caretaking exception might justify a warrantless search of a home. Until our decision in this case, the question of whether the community caretaking doctrine could justify a warrantless entry into a home was unanswered in our Circuit. Given the conflicting precedents on this issue from other Circuits, we cannot say it would have been apparent to an objectively reasonable officer that entry into Ray's home on June 17, 2005 was a violation of the law.")

Kelly v. Borough Of Carlisle, 622 F.3d 248, 259 & n.6, 260, 262 (3d Cir. 2010) ("Kelly also claims the District Court erred when it held his First Amendment right to videotape matters of public concern was not clearly established. . . . Before turning to Kelly's First Amendment claims, we will address the amicus brief submitted by the American Civil Liberties Union. The ACLU takes issue with the District Court's decision to skip the 'violation prong' of the qualified immunity inquiry and proceed directly to the 'clearly established' prong. The ACLU urges us to establish a rule that the *Saucier* sequence should be the default approach to qualified immunity analysis, especially in cases alleging violations of the First Amendment. The ACLU suggests that deviation from the *Saucier* sequence is proper only in cases involving unusual facts or uncertain state law. We decline to adopt the rule proffered by the ACLU because it is inconsistent with *Pearson.* Although the Supreme Court acknowledged that *Saucier's* two-step procedure is often advantageous, *Pearson,* 129 S.Ct. at 821, it also recognized that the costs of *Saucier* outweigh its benefits in some cases. . . .In our view, it would be unfaithful to *Pearson* if we were to require district courts to engage in 'an essentially academic exercise' by first analyzing the purported constitutional violation in a certain category of cases. . . Should the Supreme Court decide that *Saucier* sequencing is necessary in First Amendment cases or any other type of case, it may establish such a rule. It is not our place to do so in light of *Pearson,* and, consequently, the District Court did not abuse its discretion when it bypassed the constitutional question and proceeded to

the clearly established prong. . . . Kelly contends his First Amendment rights were violated when Rogers seized his video camera (prior to calling ADA Birbeck) and when Rogers arrested him. In defense, Rogers argues that a 'right to surreptitiously videotape a police officer without an expressive or communicative purpose' was not clearly established at the time of the arrest. . . . We have not addressed directly the right to videotape police officers. . . . Though we have not had occasion to decide this issue, several other courts have addressed the right to record police while they perform their duties. We turn now to these cases, as well as cases regarding the more general right to record matters of public concern. . . . In light of the foregoing, we conclude there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment. Although *Smith* and *Robinson* announce a broad right to videotape police, other cases suggest a narrower right. *Gilles* and *Pomykacz* imply that videotaping without an expressive purpose may not be protected, and in *Whiteland Woods* we denied a right to videotape a public meeting. Thus, the cases addressing the right of access to information and the right of free expression do not provide a clear rule regarding First Amendment rights to obtain information by videotaping under the circumstances presented here. Our decision on the First Amendment question is further supported by the fact that none of the precedents upon which Kelly relies involved traffic stops, which the Supreme Court has recognized as inherently dangerous situations.")

Bayer v. Monroe County Children and Youth Services, 577 F.3d 186, 192 (3d Cir. 2009) ("On appeal, defendants do not challenge the court's conclusion that plaintiffs were entitled, as a matter of procedural due process, to a post-deprivation hearing within 72 hours. And in light of *Pearson*, we need not reach this issue, as we find that, under the 'clearly established' prong of the *Saucier* test, defendants should be afforded qualified immunity with respect to this claim. . . .Even if we assume that plaintiffs had a constitutional right to a post-deprivation hearing within 72 hours and that this right was clearly established at the relevant time, we consider it objectively reasonable for defendants to have believed, under the law existing at the time, that their particular conduct in this case was lawful and in keeping with this right. A).

Guthrie v. Guthrie, No. CV 15-1183, 2016 WL 6241870, at *3–5 (W.D. Pa. Oct. 25, 2016) ("In *Vargas*, decided only six days before the Guthrie incident, our Court of Appeals 'considered the limits of the community caretaking doctrine,' examining its earlier decisions and those from other circuit courts. . . Our Court of Appeals in *Vargas* extended the community caretaking doctrine to seizures of a person outside of a home for non-investigatory purposes and to protect the individual or the community at large. . . In *Ray v. Twp. of Warren*, . . . decided over four years before *Vargas*, our Court of Appeals held the community caretaking doctrine did not extend to warrantless searches of homes. . . Neither case addresses whether this doctrine provides an exception to the Fourth Amendment prohibition on warrantless seizures *inside* the home. Officer Guthrie asks we apply the community caretaking doctrine and enter judgment in his favor on Mr. Guthrie's Fourth Amendment seizure claim. Officer Guthrie concedes it is 'not clear' whether *Vargas* 'approved of [the community [caretaking] doctrine] inside a person's home,' but asserts because 'there is no

evidence contradicting [his] belief that [Mr. Guthrie] was attempting to get his service revolver, one must inevitably conclude that [Mr. Guthrie's] seizure was justified under the community caretaking doctrine.'. . This is a difficult question of constitutional law which we need not address today. We need not reach the issue of whether Officer Guthrie's seizure of Mr. Guthrie is unlawful because qualified immunity attaches to the seizure claim. 'Qualified immunity protects government officials from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. .It applies to give officers 'breathing room to make reasonable but mistaken judgment.'. . In considering whether to apply qualified immunity, we engage in a two-pronged inquiry. . . First, we must decide 'whether the facts that a plaintiff has ... shown make out a violation of a constitutional right.'. . Second we determine 'whether the right at issue was "clearly established" at the time of officer's alleged misconduct.'. .We may begin consideration with either prong. . . But under the doctrine of constitutional avoidance, we should not unnecessarily wade 'into such muddy terrain' when faced with uncertain violations of a constitutional right. . . . Last summer, the Supreme Court again directed our analysis on whether a right is 'clearly established' must be very narrow: We have repeatedly told courts ... not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, ... will apply to the factual situation the officer confronts. . .As most recently counseled by our Court of Appeals, we look for 'some degree of specificity in the law...before a right is said to be "clearly established."'. . The right claimed by Mr. Guthrie must be 'framed in terms specific enough to put "every reasonable official" on notice of it, and the more specific the precedent, the more likely it is that a right will meet that threshold.'. .Applying this standard, and viewing the evidence in the light most favorable to Mr. Guthrie as the non-moving party, Officer Guthrie's restraint of Mr. Guthrie in his bedroom did not violate a clearly established right. The Supreme Court has not defined the scope of the citizen's right to be free from seizure when an officer is assisting a citizen suffering a seizure and potentially reaching for the officer's gun. Our Court of Appeals' decisions in *Ray* and *Vargas* do not address a clearly established right in this context. In *Ray,* our Court of Appeals affirmed the district court's finding of qualified immunity for officers who entered Mr. Ray's home after a call from Mrs. Ray and based on a known history of domestic disturbances when Mrs. Ray could not see her daughter in the estranged father's home during her visit. . . The Court of Appeals did not apply the community caretaking doctrine to the home, but found the responding officers entitled to qualified immunity given the absence of precedent in this Circuit on warrantless entry into the home based on the community caretaking doctrine. Our Court of Appeals found '[w]hile the police may not have acted ideally in the situation, what is quite clear from the record is that they were trying to do a difficult job in a potentially dangerous situation.'. . Officer Guthrie, as in *Ray,* had no defining authority as to Mr. Guthrie's clearly established rights when suffering a seizure. We must 'attend to context' and 'need to "consider the state of the existing law at the time of the alleged violation and the circumstances confronting [Officer Guthrie] to determine whether a reasonable state actor could have believed

his conduct was lawful."'. . As in *Ray*, we cannot say Officer Guthrie acted unreasonably in restraining Mr. Guthrie during a grand mal seizure. Officer Guthrie is entitled to qualified immunity from the Fourth Amendment seizure claim.")

Dorley v. S. Fayette Twp. Sch. Dist., No. 2:15-CV-00214, 2016 WL 3102227, at *5-6 (W.D. Pa. June 1, 2016) ("Even accepting all of the allegations in the Amended Complaint as true, as the Court must, in applying the directives of *Mullenix* and *Spady*, this Court cannot conclude that *Patrick* and *Sciotto* put every high school football coach on notice in 2009 that they would be violating the Constitution if they designed a non-contact football drill that was actually full-contact where bigger students were matched against smaller students. Unlike the wrestling cases *Sciotto* and *Patrick*, here there were no objective guidelines within the sport that would have necessarily tipped coaches off that they had (and when they had) created an unconstitutional risk of injury. To be sure, it is possible for high school football coaches to be liable for constitutional violations under a state-created danger theory, but football necessarily involves some size and strength mismatches and that fact alone would not create such liability. And while a culture in which bigger students are encouraged, directly or indirectly, to 'test' or 'toughen up' smaller students by gratuitously tossing them around the field of play rests in large part on woefully outdated thinking, and would be reprehensible by any measure, in light of *Spady*, the Court cannot say that the unconstitutionality of such conduct emanating from that culture was in 2009 'beyond debate.' The *Spady* Court expressed its concern for students who are injured in organized physical activities at school, but nonetheless applied qualified immunity in a death by dry drowning context. Indeed, there is no question here that Zachary Dorley suffered severe injuries during the drill and if the coaches acted with the motives and knowledge as now pled, such conduct is beyond the pale. At this point in the process, the allegations in the Amended Complaint are just that—allegations. But if backed up by admissible evidence at trial, a rational jury could find the elements of a state-created danger constitutional violation fulfilled in that: (1) the harm to Zachary Dorley, perhaps while not specifically intended, was 'foreseeable and fairly direct,' (2) that such covert scheming by adults 'shocked the conscience,' (3) that there was a pre-existing relationship between the coaches and players that would make smaller players 'foreseeable' victims, and (4) that the adult coaches would have affirmatively used their authority to create a risk of the harm pled. . . But concluding that what has now been pled would be a constitutional violation if proven does not resolve the matter. . . Because this Court is also duty-bound to apply the qualified immunity doctrine as it is now announced by the Supreme Court, the key issue here is not only whether this conduct would violate Dorley's rights, but then whether as of the date of this episode, it was 'beyond debate' that this conduct was unconstitutional. And as applied to federal litigation in the trial courts, the Supreme Court seems to have made it quite clear that the qualified immunity doctrine gives would-be constitutional tortfeasors a very wide berth, except in the refined circumstances in which a narrowly-crafted, precisely-defined, fact-specific right was so clearly recognized when the conduct occurred that every similarly-situated public official would have known that they were duty-bound to observe it. . . In this regard, the Court believes that *Spady* is a game changer in the school activities/state-created danger context. As the *Spady* Court observed, colorable constitutional violations had previously been found in cases in which an adult educator

directly engaged in conduct that was both egregious *and* intentionally and purposefully focused on causing physical harm to a student. . . The *Spady* Court then contrasted those situations, each involving what was in reality direct physical battery, with the array of *Sciotto*-like cases, each of which (no matter the outcome) involved (as pled) grossly negligent or reckless conduct which created a real and appreciable risk of serious harm, but lacked an intent-to-injure component, and concluded that at least as of September 1, 2015 (the date *Spady* came down) the constitutional rights at issue in *Sciotto* were not so 'clearly established' as to be 'beyond debate.' It is that rule of law that this Court is bound to apply here. Particularly in light of *Spady*'s observations about the *Sciotto* line of cases, the Court concludes that even if Dorley had a constitutional right not to be subjected to football blocking drills against upperclassmen that were twice his size when he was suspecting the drills to be noncontact and when the coaches and the upperclassmen clandestinely knew otherwise, that right was not so clearly established in the *Mullenix/Spady* sense when this incident occurred in 2009 that it was 'beyond debate.' Therefore, the individual School District Defendants are entitled to qualified immunity and the claims against them. . . will be dismissed with prejudice.")

Matheny v. County of Allegheny Pa., No. 09-1070, 2010 WL 1007859, at *4-*6 (W.D. Pa. Mar. 16, 2010) ("Plaintiff asserts that Defendants Mollo and Avetta violated his "clearly established" First Amendment right to record the actions of police officers in public by arresting him in retaliation for making a cell phone audio-and video-recording. The Court disagrees that the First Amendment right–assuming such a right exists at all [FN3. Under the U.S. Supreme Court's decision in *Pearson,* the Court is not required to proceed in the two-step sequence set forth in *Saucier*. *See Pearson,* 129 S.Ct. at 818. Here, it is more appropriate first to address what traditionally has been the second inquiry, *e.g.*, whether the right alleged to have been violated was clearly established. Because the Court finds that the alleged First Amendment right at issue here is not clearly established, the Court does not (and need not) reach the issue of whether Defendants Mollo and Avetta violated Plaintiff's Constitutional rights under the First Amendment.]–was 'clearly established' as of the date of Plaintiff's arrest on April 29, 2009. As an initial matter, neither the United States Supreme Court nor the Third Circuit has held that individuals have an unfettered First Amendment right to record police officers in the performance of their official duties. Although this is not dispositive of the issue, a review of the sparse existing decisional law reveals that the right–assuming one exists at all–is far from 'clearly established.' [collecting and discussing cases] Although these cases may recognize a limited right to videotape police conduct, subject to reasonable time, place, and manner restrictions, such a right notably has not been recognized in the context of an audio recording. . . . Far from demonstrating that the right is clearly established, the existing decisions demonstrate that the law on the subject is plainly underdeveloped. . . . In sum, in light of the existing law as of April 29, 2009, the Court concludes that the purported First Amendment right to record the police was not 'clearly established.' The limited case law on the subject simply does not provide sufficient guidelines or define the contours of the right in such a manner that reasonable officials in Defendants' position would understand that their actions, which were motivated in the first instance by the Pennsylvania Wiretap Act, would impinge upon or violate Plaintiff's purported First Amendment right to record the incident.

Because the First Amendment right to record police conduct is not 'clearly established,' the Court concludes that Defendants Avetta and Mollo are entitled to qualified immunity on Plaintiff's First Amendment retaliation claim under Count I.")

FOURTH CIRCUIT

Allen v. Cooper, No. 17-1522, 2018 WL 3352378, at *13 (4th Cir. July 10, 2018) ("Of course, we need not resolve whether North Carolina's display of the video footage and the still photograph violated the Copyright Act to resolve the issue of qualified immunity. . . What we do conclude is that reasonable officials in the position of the North Carolina officials would not have understood *beyond debate* that their publication of the material violated Allen's rights under the Copyright Act. The issue is indeed debatable. Accordingly, we conclude that Allen and Nautilus's copyright claims against the North Carolina officials in their individual capacities are precluded by qualified immunity.")

Wilson v. Prince George's County, Maryland, 893 F.3d 213, 216, 220-24 (4th Cir. 2018) ("[W]e hold that the district court erred in determining that Officer Gill's conduct did not violate Wilson's Fourth Amendment rights. Nevertheless, we affirm the district court's determination that Officer Gill is entitled to qualified immunity, because we hold that the constitutional violation was not clearly established when the incident occurred. . . .Viewed in the light most favorable to Wilson, the facts show that Wilson did not threaten Officer Gill, Johnson, or any other individual present at the scene during the encounter. Wilson had a small knife in his hand and did not drop the knife when ordered to do so by Officer Gill. However, Wilson testified, and the defendants do not dispute, that Wilson never pointed the pocket knife in the direction of anyone but himself. Neither did Wilson move suddenly or act in a threatening manner toward Officer Gill or others. . . Additionally, at the time Officer Gill discharged his weapon, Wilson had slit his own throat and had stabbed himself in his chest. And finally, a key disputed fact further calls into question whether Officer Gill faced an immediate threat. The parties dispute the distance separating Officer Gill and Wilson at the time that Wilson 'stumbled' forward and Officer Gill discharged his weapon. The estimates of the three people present ranged between eight feet and 20 feet. A jury could determine that Wilson, standing 20 feet away and armed only with a pocket knife that he was using solely against himself, did not pose an immediate threat to Officer Gill or others, thereby rendering Officer Gill's use of lethal force unreasonable. Under these alleged facts, therefore, a jury could conclude that Officer Gill violated Wilson's Fourth Amendment right to be free from excessive force. In reaching this conclusion, we emphasize that we do not make credibility determinations in resolving the first prong of the *Saucier* analysis. . . Therefore, we conclude that the present record, when viewed in the light most favorable to Wilson, establishes that Officer Gill's use of force was not 'objectively reasonable' and, thus, was excessive in violation of the Fourth Amendment. Accordingly, we hold that the district court erred in reaching a contrary conclusion. . . .Defined at the level of specificity required by the Supreme Court, we ask here whether it was clearly established law in October 2012 that shooting an individual was an unconstitutional use of excessive force when: (1) the officer had probable cause to believe that the person had committed

certain misdemeanors, one of which involved the use of force against another person; (2) the individual was standing about 20 feet from the officer holding a knife and using it to hurt himself, but was not threatening anyone or making any sudden movements; and (3) the individual had ignored the officer's repeated commands to drop the knife. Upon our review of relevant precedent, we hold that it was not clearly established law in October 2012 in the Supreme Court, this Circuit, or in the Court of Appeals of Maryland, that an officer shooting an individual under such circumstances would be engaging in an unconstitutional use of excessive force. . . .The conduct at issue here lies somewhere between the officer's unreasonable use of force in *Clem* and the officers' reasonable use of force in *Sigman*. Although *Clem* and *Sigman* both featured a mentally unstable individual, neither case is sufficiently analogous to the circumstances present here. Unlike in *Clem*, Wilson was armed and had been engaged in criminal activity. And unlike in *Sigman*, Wilson never threatened others, either verbally or with the knife, during his interaction with Officer Gill. Therefore, our precedent at the time regarding the use of force on mentally ill individuals did not offer sufficient guidance to place 'every reasonable offic[er]' in Officer Gill's position on notice that his conduct would violate the Fourth Amendment. . . .A survey of other circuits' case law also illustrates the lack of clear consensus regarding violations of this nature. . . .Ultimately, this case simply is not an 'obvious' one, permitting us fairly to say that the decisions in *Garner* and *Graham*, on their own, clearly established the right at issue. . . .[A]s of October 2012, our precedent and the decisions of the Court of Appeals of Maryland fell short of providing sufficient notice to an officer to bar qualified immunity when the officer used deadly force against an armed, but otherwise non-threatening, self-harming individual suspected of committing misdemeanor offenses. . . . We emphasize, however, that as of the date this opinion issues, law enforcement officers are now on notice that such conduct constitutes excessive force in violation of the Fourth Amendment.")

E.W. by and through T.W. v. Dolgos, 884 F.3d 172, 179-87 (4th Cir. 2018) ("To 'provide guidance to those charged with the difficult task' of protecting students 'within the confines of the Fourth Amendment,' we exercise our discretion to first decide whether a constitutional violation occurred. . . And our discussion of the alleged constitutional violation is '[n]o mere dictum' because 'a constitutional ruling preparatory to a grant of immunity creates law that governs the official's behavior.' *Camreta*, 563 U.S. at 708. . . . [W]e have a calm, compliant ten-year-old being handcuffed on school grounds because she hit another student during a fight several days prior. These considerations, evaluated under the *Graham* framework, demonstrate that Dolgos's decision to handcuff E.W. was unreasonable. . . . [T]he use of handcuffs and force is not reasonably expected in the school context because it is counterproductive to the mission of schools and school personnel. For these reasons, the school setting—especially an elementary school—weighs against the reasonableness of using handcuffs. Viewing the facts in the light most favorable to E.W., the totality of the circumstances weighs against Dolgos and demonstrates that her actions were not ' "objectively reasonable" in light of the facts and circumstances confronting' her. . . . Dolgos took a situation where there was no need for any physical force and used unreasonable force disproportionate to the circumstances presented. We therefore find that Dolgos's actions amount to excessive force. As such, E.W. has demonstrated a violation of her constitutional rights under

the Fourth Amendment. . . .At the time Dolgos seized E.W., the law was clear that, as a general matter, an officer must carefully measure the force used to respond to the particulars of a case, including the wrongdoing at issue, the safety threat posed by the suspect, and any attempt to evade arrest or flee. . . But the Supreme Court has emphasized that *Graham* is 'cast at a high level of generality,'. . . and does not by itself 'create clearly established law outside 'an obvious case,"' " *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Brosseau*, 543 U.S. at 199). Here, Dolgos handcuffed a calm, compliant ten-year-old who was surrounded by multiple adults in a closed room for hitting another child three days earlier. While E.W.'s right not to be unreasonably handcuffed is clearly implicated by 'more general applications of the core constitutional principle invoked,'. . . namely, the right to be free from the use of excessive and unreasonable police force, we cannot say that her seizure amounts to an 'obvious case' such that *Graham* put Dolgos on sufficient notice that her conduct was unlawful. . . .[I]t was not obvious that Dolgos could not handcuff E.W. here. Although precedent supports the conclusion that Dolgos acted unreasonably and violated E.W.'s Fourth Amendment rights, it did not put Dolgos on sufficient notice that her conduct was unlawful. Indeed, this Court previously stated that the use of handcuffs would 'rarely' be considered excessive force when the officer has probable cause for the underlying arrest. . . And the parties do not point us to any controlling authority sufficiently similar to the situation Dolgos confronted. In fact, E.W. chiefly relies on *Graham* to define the clearly established law. Without more, we cannot conclude that it would have necessarily been clear to a reasonable officer that handcuffing E.W. would give rise to a Fourth Amendment violation. We emphasize, however, that our excessive force holding is clearly established for any future qualified immunity cases involving similar circumstances. Accordingly, we conclude that E.W.'s right not to be handcuffed under the circumstances of this case was not clearly established at the time of her seizure. As such, Dolgos is entitled to qualified immunity, and we affirm the district court as to the § 1983 claim.")

E.W. by and through T.W. v. Dolgos, 884 F.3d 172, 189, 195-99 (4th Cir. 2018) (Shedd, J., concurring in the judgment only) ("Unfortunately, the majority is not content to speak with one voice and resolve this case on the noncontroversial immunity grounds. Instead, the majority reaches out unnecessarily to hold that E.W. has presented sufficient evidence to withstand summary judgment on her claims that Deputy Dolgos used excessive force and committed assault and battery by handcuffing her during the custodial arrest. In doing so, the majority disregards the undisputed objective fact that Deputy Dolgos handcuffed E.W. in preparation for transporting her from school to juvenile authorities, thereby erroneously judging the deputy's actions without considering the totality of the circumstances. Compounding this factual error, the majority significantly extends our precedent in a novel and uncertain manner that subjects law enforcement officers to potential liability for simply handcuffing a lawful custodial arrestee. The majority's holding runs counter to the prevailing federal rule and provides little, if any, guidance for law enforcement officers going forward. . . I concur only in the result reached by the majority – *i.e.*, the affirmance of summary judgment in Deputy Dolgos' favor. I write separately to explain my disagreement with the majority's holding regarding the merits of E.W.'s federal and state claims. Simply put, on this record, the deputy's conduct is lawful under federal and state law. . . .In a nutshell, the prevailing federal rule appears to be that an arrestee may pursue a Fourth Amendment

excessive force claim based on the use of handcuffs only in very limited circumstances, such as when the handcuffing causes physical injury. That type of circumstance would likely qualify as the rare instance we recognized in *Brown* where handcuffing a lawful custodial arrestee may be unreasonable. However, there is scant authority for the proposition that handcuffing an arrestee, *without more*, may constitute excessive force. . . .To be clear, this is not a case (as described by the majority) where a police officer handcuffed a child and forced her to sit in a closed room surrounded by adults for disciplinary or instructional reasons. Instead, the undisputed facts establish that: Deputy Dolgos had probable cause to arrest and take E.W. into custody; before she changed her mind, she was preparing E.W. for transport from school to juvenile authorities; and she handcuffed E.W. in preparation for transport. Viewing the totality of circumstances, as we are required to do, and mindful of the universal acceptance of handcuffing custodial arrestees, the inherent danger presented in every custodial arrest, and the natural unpredictability of juveniles, it is clear as a matter of law that the deputy's use of handcuffs in this instance was objectively reasonable. . . .If the excessive force holding is limited to the majority's view of the facts of this case (*i.e.*, Deputy Dolgos handcuffed E.W. for disciplinary reasons with no intention of transporting her), then it seems to be relatively narrow: law enforcement officers may not handcuff an arrested juvenile at school simply to punish or teach him a lesson. Interpreted in this manner, the majority's holding would be rather obvious and unexceptional. . . I suspect, however, that the majority intends its excessive force holding to be broader. It is certainly not unreasonable to read the majority opinion as opening the door to permit all custodial arrestees to pursue (but not necessarily win) excessive force claims based on the mere fact that they were handcuffed. It may, perhaps, be slightly more reasonable to read the majority opinion as being limited to cases involving the handcuffing of certain juveniles who are arrested at school. Of course, either reading extends well beyond our precedent, runs counter to the prevailing federal rule, and will hinder law enforcement officers in safely and efficiently performing their duties. Instead of being able to handcuff arrestees for custodial transport as a matter of course for obvious and practical safety reasons, which is the standard procedure in virtually all custodial arrests, officers subject to the majority decision will now have to make on-the-spot predictions about whether every arrestee will peacefully submit to the arrest and transport. Their *ad hoc* predictions will potentially be subjected to judicial second-guessing based on a variety of factors (both known and unknown to the officers) that should be irrelevant to the handcuffing determination. Included among these factors are the relative age or size disparity between the officer and arrestee, the arrestee's gender or background, the potential emotional consequences that an arrestee may one day suffer as a result of the arrest and handcuffing, and anything else a reviewing court may deem to be pertinent.")

Brown v. Elliott, 876 F.3d 637, 643-45 (4th Cir. 2017) ("[V]iewing the evidence in the best light for Ms. Brown, for purposes of summary judgment Deputy Elliott was neither 'stuck' in the truck nor 'dragged' by it, but the evidence was undisputed that Deputy Elliott's torso was inside the truck when he fired the fatal shot. . . With these 'circumstances of the case' in mind, we turn to the question of whether any controlling authority clearly established that an officer must abstain from employing deadly force when a suspect puts a vehicle in motion while the officer is leaning into it. Ms. Brown does not cite, nor have we found, a single case that so holds. In arguing to the

contrary, Ms. Brown principally relies on two clearly distinguishable cases. . . .When Deputy Elliott fired his gun, he was leaning into the window of a moving truck, not standing off to the side as the truck passed him without veering in his direction. He was, as police officers frequently are, 'forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.'. . No 'existing precedent placed the conclusion that [Deputy Elliott] acted unreasonably in these circumstances "beyond debate[.]"' . . Nor has Ms. Brown suggested that Deputy Elliott's actions were so 'extreme' to place him 'on notice that [his] conduct violated established law even in novel factual circumstances.'. . For these reasons, the Defendants are entitled to qualified immunity. Ms. Brown contends that we must 'delv[e] into the reasons' that Deputy Elliott 'cites for his decision' to fire his weapon. . . She maintains that Deputy Elliott explained that he feared for his life and so justified his use of force 'for no other reason' than he was dragged by the truck, and since she offered evidence that he was not dragged, he was not entitled to qualified immunity. . . But the law is well-settled that the qualified immunity inquiry turns on 'the objective reasonableness of an official's conduct, as measured by reference to clearly established law,' not on the official's 'subjective intent.'. . . The relevant question is fact-specific *but* objective, asking whether the law clearly established that an officer's conduct was unlawful in the particular circumstances he or she confronted. Deputy Elliott's subjective intent and his professed justifications for his use of force are irrelevant to that inquiry. . . Our holding today, however, should not be read to suggest that Deputy Elliott's use of force here was in fact reasonable under the Fourth Amendment. We express no view as to the alleged constitutional violation itself. Instead, we simply hold that existing law did not *clearly establish* that an officer in Deputy Elliott's situation violates the Fourth Amendment by using deadly force. Accordingly, we affirm the grant of summary judgment to the Defendants.")

Crouse v. Town of Moncks Corner, 848 F.3d 576, 584-87 (4th Cir. 2017) ("We have the "discretion [to] decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . Because we find that the law was not clearly established here, we will not reach the other step in the analysis—whether a constitutional violation actually occurred. . . The district court granted Caldwell qualified immunity because it was not clear 'from the facts in this case whether [Crouse and Winningham] were speaking as citizens or as government employees.'. .The first inquiry in Crouse and Winningham's case is, again, whether they spoke as 'citizen[s] upon matters of public concern' rather than as 'employee [s] upon matters only of personal interest.'. . . Here, Crouse and Winningham argue that they spoke as citizens because they were in plainclothes and an unmarked car, they went to Berkeley's house during their unpaid lunch hour, and they were never instructed to speak to Berkeley. On the other hand, though, as Chief Caldwell was aware, Berkeley easily identified Crouse and Winningham as police officers from their guns and badges. In fact, Berkeley so clearly recognized Crouse and Winningham as police officers that he told Winder that very day that Moncks Corner police officers had visited his home. While the lunch hour was unpaid, Crouse and Winningham were expected to be on call at that time and to remain prepared to do their job. And police officers have many interactions with citizens that are not the result of an instruction from their supervisor but are still a part of their official duties. Plaintiffs also gave Berkeley the

police department's citizen complaint form. Though these forms were freely available in the police station, Crouse and Winningham's delivery of an official town form lends to their speech an additional connection to their official police duties. These facts allowed Chief Caldwell to reasonably believe that, as a legal matter, Crouse and Winningham were speaking in their capacity as employees of the police department. Unlike in *Hunter,* Crouse and Winningham were clearly identified as police officers, and their speech more closely resembled their daily duties as police detectives than did the *Hunter* plaintiffs' calls to the governor's office. Chief Caldwell's perception may be debated, but he is not 'liable for bad guesses in gray areas.'. . Because it was reasonable for Chief Caldwell to believe that Crouse and Winningham acted in their public roles as police officers, it was reasonable for Caldwell to believe that their speech was not protected, and he is thus entitled to qualified immunity. . . Even were we to assume arguendo that Crouse and Winningham spoke as private citizens on a matter of public concern, Chief Caldwell would still be entitled to qualified immunity because, based on the clearly established law at the time of his decision and the facts he knew at that time, the outcome of the *Pickering* balancing test is not 'beyond debate.'. . . Chief Caldwell could reasonably have believed that Crouse and Winningham were acting as police officers rather than private citizens when they visited Berkeley. Moreover, given Crouse and Winningham's ongoing disputes with Roach, their efforts to conceal their speech, and the challenge their conduct, if not addressed, posed to police department operations, Chief Caldwell could reasonably have viewed the department's interest in maintaining discipline as paramount in the *Pickering* balance. Because his judgments were reasonable ones, Chief Caldwell is entitled to qualified immunity.")

Crouse v. Town of Moncks Corner, 848 F.3d 576, 587-90 (4th Cir. 2017) (Motz, J., concurring in the judgment) ("For the reasons that follow, I agree that qualified immunity shields Chief Caldwell from liability in this case. I write separately because I cannot join the majority's rationale for so holding. . . . In this case, Chief Caldwell forced Detectives Crouse and Winningham to resign because they brought a citizen complaint form to James Berkeley and encouraged him to file a complaint about the treatment he received from Lt. Roach. Thus, the controlling question is whether this speech by Crouse and Winningham 'is itself ordinarily within the scope of [their] duties.'. . The majority apparently believes that it was, but the record does not contain a shred of evidence to support that view. . . .*Garcetti* teaches that if Crouse and Winningham acted pursuant to their official duties, there must have been some job duty they were supposedly carrying out. But the record in this case, viewed in whatever light you please, shows that there was no such duty. It also shows that Chief Caldwell did not believe, and could not have reasonably believed, otherwise. The majority engages in no meaningful inquiry into the detectives' official duties. Instead, it relies almost entirely on the fact that Berkeley easily identified Crouse and Winningham as police officers. . . In effect, the majority holds that whether public employees speak 'pursuant to their official duties' depends on whether their audience can tell what their job is. But that is not the law. Public employees do not lose their First Amendment rights simply because their audience knows, or can guess, where they work. The majority's conclusion to the contrary has no root in *Garcetti* or its progeny. . . .Even though the record is clear that Detectives Crouse and Winningham spoke as citizens on a matter of clear public concern, namely, police brutality, I agree that Chief Caldwell

enjoys qualified immunity from their claims in this lawsuit. To determine the Chief's entitlement to qualified immunity, we balance the detectives' interest in speaking out against the Chief's interest in maintaining efficient delivery of the police department's public service. . . When balancing these interests, we must consider 'the manner, time, and place of the employee's expression,' as well as 'the context in which the dispute arose.'. . Qualified immunity applies in this case because no precedent clearly established that this balance favored the detectives. . . . Police departments have good reason to fear disruption in cases like this. Effective policing requires an effective chain of command, and that is undermined when subordinates try to get their superiors fired at the drop of a hat. More importantly, a police department's ability to protect the public depends on the public's trust that the police department will use its powers responsibly and adequately discipline officers who do not. Officers risk eroding that trust when they go to the public with unsubstantiated allegations of abuse or misconduct without allowing internal review and investigations to unfold. No one is well served when officers rush to try their superiors in the court of public opinion. Under these circumstances, a reasonable officer in Chief Caldwell's position could conclude that the department's interest outweighed that of the detectives. It was not 'beyond debate' which way the scales tilted. . . At best, it was a gray area to which qualified immunity applies. This is not to say that qualified immunity applies whenever police officers speak out about misconduct by their superiors. For example, it is clearly established law in this circuit that police officers may speak out about a department's efforts to cover up an incident of excessive force. . . Our case law also establishes that local police officers may report their superiors' alleged corruption to state law enforcement. . . However, when officers rush to have a superior officer fired for excessive use of force, without giving the department a chance to conduct its own review or investigation, it is not clearly established law that their interest in telling private citizens to take action against their superiors outweighs the department's interest in preventing disruption. Accordingly, I concur with the majority that Chief Caldwell is entitled to qualified immunity.")

Maney v. Garrison, 681 F. App'x 210, 215-22 (4th Cir. 2017) ("In many cases it is beneficial to determine first whether the facts establish a violation of the Constitution. *See, e.g.*, *Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 899–900 (4th Cir. 2016). But in some cases, and this is one, the 'constitutional question is so factbound that' deciding it would provide 'little guidance for future cases.'. . We therefore proceed to the second question, keeping in mind that 'a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'. . . [T]here is no denying that *Melgar* muddied the question of whether officers must issue warnings when utilizing police dogs on leash, as Appellee did here. Indeed, the rule Appellant maintains was clearly established -- that an officer must warn before using a canine, whether on leash or off -- was forcefully articulated in the *Melgar dissent*, rather than the majority opinion. . . As a result, we cannot say that any reasonable officer would have known he was required to warn of Bikkel's presence as he approached Appellant's position. . . .Unlike *Kopf*, there is no indication that Appellee gratuitously prolonged the biting after determining that Appellant was unarmed and surrendering. . . . Under those circumstances we think an objective officer familiar with *Kopf* could reasonably, even if mistakenly, have

believed that he was not required to call Bikkel off for the eight or so seconds that it took to surmise that Appellant posed no immediate threat to officer safety. . . In the end, whatever *Kopf* may say about the likelihood that a suspect will calmly surrender while being bitten by a dog, the case is simply too factually dissimilar to place the situation facing Appellee beyond constitutional debate. Accordingly, we agree with the district court that Appellee's decision to briefly prolong Bikkel's seizure of Appellant did not violate a constitutional right that was clearly established by *Kopf*. . . Appellant's final argument, quite apart from *Kopf* and *Vathekan*, is that every reasonable officer would have known that the use of *any* force was unreasonable here because there was no basis for seizing Appellant in the first instance. . . .[W]e think Appellant did not become the intended object of a seizure for Fourth Amendment purposes until Appellee realized what had happened but nevertheless declined to call off the attack. . . The question, then, is whether every reasonable officer would have known the second and third bites were clearly unreasonable. . . . In sum, Appellee was faced with a situation that was tense, uncertain, and rapidly evolving -- precisely the context in which the Supreme Court has counseled us to make allowances for on-the-scene decisions about the amount of force that is necessary, 'even if it may later seem unnecessary in the peace of a judge's chambers[.]'. . Once he ascertained that Appellant posed no threat and was not resistant, Appellee discontinued the use of force, even though a reasonable officer could have considered Appellant's connection to the robbery suspect and reasons for hiding from the police as yet open questions. Under those circumstances, we cannot say that every reasonable officer would have known his conduct was, beyond question, a violation of the Fourth Amendment. . . . Judge Harris laments the severity of the force employed in this case, and understandably so. One need not look far beyond each morning's newspaper to find alarming examples of police officers using force in ways that should give us -- as citizens and as judges -- cause for concern. This case is no exception. That is why I would not hold, much less suggest, that Appellee's deployment of Bikkel complied with the Fourth Amendment. . .But current events remind us, too, that threats to officer safety are not imaginary, and that police are often asked to intervene at a moment's notice in tense, difficult situations, on the basis of imperfect information and with little time for deliberation. That is why we do not engage in 'unrealistic second-guessing' of action taken in swiftly developing situations, . . and why we do not subject officers to personal liability for 'bad guesses in gray areas,' *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). Our task instead is to assess whether Appellee ran afoul of bright constitutional boundaries. In the dissent's view, the common sense answer is clearly 'yes.' I agree that common sense should guide our decision making. And when three judges consider the same set of facts and in good faith take three different views of the law, common sense tells me that things may not be as clear to every cop on the beat as the dissent would suggest.")

Maney v. Garrison, 681 F. App'x 210, 231-35 (4th Cir. 2017) (Harris, J., dissenting) ("Use of a canine attack in a reasonable-suspicion stop, where a suspect is not resisting, attempting to flee, or otherwise making extraordinary measures 'necessary,' is not a hard question, and it cannot be reconciled with settled understandings about the limited nature of the intrusion permitted by *Terry*. . . I do not want to belabor what I think is an obvious point. But this is an issue on which we must not allow confusion or excuse error. Because they are permitted on less than probable cause, *Terry*

stops are exceedingly common; in New York City alone, police conducted 4.4 million reasonable-suspicion stops between January 2004 and June 2012. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). Countless citizens who ultimately will be found to have committed no crime are subject to *Terry* stops on a daily basis. No police officer should be under the impression that whether canine attacks may be used to carry out those stops, as a first resort against suspects who are neither fleeing nor resisting, is an open or difficult question. . . .[E]ven if we were to hypothesize some other justification for Maney's seizure, so that *Terry*'s restrictions do not apply, it would remain clear that the Fourth Amendment's more general limits on the use of force were exceeded here. Whatever the imagined alternative basis for Maney's seizure — and assuming, for the sake of argument, that there was one, despite the undisputed absence of probable cause — use of force in its effectuation would be subject to the 'objective reasonableness' test of *Graham v. Connor*, 490 U.S. 386, 394-97 (1989). And while many *Graham* cases present close questions, this is not one of them. . . . I do not believe that this case falls within a 'gray area,'. . . entitling Garrison to qualified immunity because the Fourth Amendment limits he exceeded were not sufficiently 'clearly established' to put him on notice. Our qualified immunity analysis takes into account 'not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked.'. . And for the reasons given above, my view is that the 'core constitutional principle[s]' and doctrine articulated in *Terry* and *Graham* make manifest that canine attacks may not be used in the first instance to seize suspects on, at best, reasonable suspicion, and without objective indicia of a weapon. But if more were required, then I believe it is provided by our cases dealing directly with police canine attacks. Those cases clearly establish that *Graham*' s objective reasonableness standard applies to police canine attacks, *see Vathekan*, 154 F.3d at 178; that even the weighty government interest in apprehending *armed and fleeing* robbery suspects may not be enough to justify a canine attack under *Graham*, *see Kopf v. Wing*, 942 F.2d 265, 266, 268-69 (4th Cir. 1991); and that dog attacks are no exception to the rule that even in a fast-moving and tense situation, a use of force that is excusable at one moment may become unreasonable at the next, and that officers are obliged to respond accordingly[.] . . . And even if that were not sufficient, there still would be our determination in *Vathekan* that a police officer may not use a canine attack as a first resort against a person found on the scene of a suspected burglary — after a resident has assured the police that no innocent person should be on the premises — in order to rule out the possibility that he or she is a burglar or otherwise poses a threat. . . Unless we are going to require that the precise conduct at issue already have been held unlawful in order to defeat qualified immunity — which we do not, . . . then surely this is close enough. . . And then, finally, there is common sense. . . Garrison was tracking an unarmed-robbery suspect with no reported accomplice at around 10:00 p.m., while accompanied by a second police officer and a police canine. While I do not doubt that finding Maney crouched outside a vacant house may have been startling and even frightening — notwithstanding Garrison's awareness of the homeless camp in the immediate vicinity — common sense would dictate that use of a violent canine attack to address those fears was an overreaction. And if there is a paucity of case law addressing the intentional use of a police canine attack against a non-fleeing, non-resisting, non-suspect in a non-armed robbery, common sense tells us that this is because the principles of *Terry* and *Graham* are sufficiently clear that no reasonable police

officer could so badly misjudge their application. In the end, what is missing from this case is any sense of proportionality, the touchstone of *Graham*'s objective reasonableness standard. . . Garrison imposed an enormous cost on Maney when he allowed Bikkel to continue his savage attack. He did so intentionally, knowing that Maney was not the suspect he was tracking, without any indication that Maney was armed, and absent any resistance by Maney, in order to address an inchoate concern that Maney nevertheless might pose some threat. Because I believe that the Fourth Amendment unmistakably renders that response disproportionate and excessive, I must respectfully dissent.")

Jones v. Chandrasuwan, 820 F.3d 685, 691-96 (4th Cir. 2016) ("While courts have the discretion to decide which of the steps to address first, based on the facts and circumstances of the case at hand, the two-step procedure is 'often appropriate' and 'beneficial' because it 'promotes the development of constitutional precedent.'. . Indeed, 'our regular policy of avoidance' often 'threatens to leave standards of official conduct permanently in limbo.'. . . To prevent that problem, the Supreme Court permits 'lower courts to determine whether a right exists before examining whether it was clearly established.'. . Nevertheless, the Supreme Court instructs courts to 'think hard, and then think hard again, before turning small cases into large ones.'. . After thinking hard about it twice, we determine that the two-step procedure is appropriate in this case in order to clearly establish the standard that probation officers must meet in order to arrest a probationer who allegedly violated the conditions of his probation. . . . Neither the Supreme Court nor this Court has announced the level of suspicion required under the Fourth Amendment to arrest a probationer for a suspected probation violation. The Supreme Court faced an analogous issue in *Knights*—the level of suspicion required for searches of probationers—which provides guidance in the arrest context. In *Knights,* the Supreme Court determined that, where a probationer was subject to a probation condition that his person or property could be searched at any time without a warrant, reasonable suspicion that the probationer is engaged in criminal activity is enough to make a search reasonable. . . After *Knights,* it remains an open question whether a suspicionless search of a probationer can be constitutional. . .Additionally, the Supreme Court has upheld suspicionless searches of parolees pursuant to a state statute allowing for such searches. . . However, the privacy interests and governmental interests implicated in arrests and searches are sufficiently different to foreclose the possibility of a constitutional suspicionless arrest of a probationer. . . Suspicionless arrests implicate obvious privacy concerns while doing little to advance the government's 'two primary goals of probation—rehabilitation and protecting society from future criminal violations.'. . . While the privacy concerns implicated by an arrest are certainly substantial, balancing the governmental and private interests supports a degree of suspicion lower than probable cause for arresting a probationer for an alleged probation violation. . . . Therefore, we hold that probation officers must have reasonable suspicion before seeking the arrest of a probationer for allegedly violating conditions of his probation. . . . Relying on *Knights,* we hold that reasonable suspicion in the arrest context is present when there is a sufficiently high probability that a probationer has violated the terms of his probation to make the intrusion on the individual's privacy interest reasonable. . . . Appellees could not have had reasonable suspicion that Jones violated a condition of probation by failing to pay his costs and fines because there was no enforceable condition

requiring him to pay the costs and fines before the termination of his probation. . . .In seeking Jones's arrest, Appellees also claimed that Jones had absconded from supervision. . . . Appellees did not have reasonable suspicion that Jones had absconded. Their attempts to reach Jones were completely outside of the Compact. They had no communications with Georgia probation officials, who Appellees acknowledge were supervising Jones's probation. . . . Quite simply, there was not a sufficiently high probability that Jones absconded because no effort was made to contact the office responsible for supervising Jones's probation. Therefore, Appellees violated Jones's Fourth Amendment rights by seeking his arrest for alleged probation violations without reasonable suspicion. . . . As discussed above, neither the Supreme Court nor this Court had announced the level of suspicion required under the Fourth Amendment to arrest a probationer for a suspected probation violation. In other words, precedent had not placed the level of suspicion required to arrest a probationer 'beyond debate.'. . The district court acknowledged that 'this area of the Fourth Amendment is particularly murky.'. . This 'murkiness' is also demonstrated by the fact that Jones originally argued that Appellees violated his rights by arresting him without probable cause, before later settling on a reasonable suspicion standard. As discussed above, precedent had not definitively ruled out suspicionless arrests of probationers. Therefore, we conclude that the standard required by the Fourth Amendment to arrest a probationer was not clearly established at the time Appellees sought Jones's arrest for allegedly violating the terms of his probation. . . Although we find that Appellees violated Jones's Fourth Amendment rights, we affirm the district court's conclusion that they are entitled to qualified immunity because the right at issue was not clearly established at the time Appellees sought Jones's arrest.")

Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 895, 901-10 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 61 (2017) ("On review, we hold that Appellees used unconstitutionally excessive force when seizing Armstrong, but we, nevertheless, agree with the district court that Appellees are entitled to qualified immunity. We, therefore, affirm the grant of summary judgment in Appellees' favor on the grounds explained below. . . .Noncompliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance. . . .And, here, the factual circumstances demonstrate little risk—Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the Hospital. That Armstrong was not allowing his arms to be pulled from the post and was refusing to comply with shouted orders to let go, while cause for some concern, do not import much danger or urgency into a situation that was, in effect, a static impasse. . . . Deploying a taser is a serious use of force. . . .The taser use at issue in this case . . . contravenes current industry and manufacturer recommendations. . . .In 2013, moreover, Taser International, the manufacturer of the taser Appellees used in this case, warned, 'Drive-stun use may not be effective on emotionally disturbed persons or others who may not respond to pain due to a mind-body disconnect.'. . . Taser users, the warning goes on, should '[a]void using repeated drive-stuns on such individuals if compliance is not achieved.'. . Even the company that manufactures tasers, in other words, now warns against the precise type of taser use inflicted on Armstrong. Force that imposes serious consequences requires significant circumscription. Our precedent, consequently, makes clear that tasers are proportional force *only* when deployed in response to a situation in which a reasonable officer

would perceive some immediate danger that could be mitigated by using the taser. . . .While the questions whether an arrestee has been restrained and is complying with police directives are, of course, relevant to any inquiry into the extent to which the arrestee 'pose[s] a continuing threat to the officers' safety,'. . they are not dispositive. A rule limiting taser use to situations involving a proportional safety threat does not countenance use in situations where an unrestrained arrestee, though resistant, presents no serious safety threat. Indeed, application of physical restraints cannot be the only way to ensure that an arrestee does not pose a sufficient safety threat to justify a tasing. If it were, use of a taser would be justified at the outset of *every* lawful seizure, before an arrestee has been restrained. This, of course, is not the law. . . .Unsurprisingly, then, other circuits have held that taser use can constitute excessive force when used in response to non-violent resistance. . . .And this conclusion, that taser use is unreasonable force in response to resistance that does not raise a risk of immediate danger, is consistent with our treatment of police officers' more traditional tools of compliance. . . . Our precedent, then, leads to the conclusion that a police officer may *only* use serious injurious force, like a taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force. At bottom, 'physical resistance' is not synonymous with 'risk of immediate danger.'. .Therefore, in the case before us, Appellees' use of force is only 'proportional[ ] ... in light of all the circumstances,'. . . if Armstrong's resistance raised a risk of immediate danger that outweighs the *Graham* factors militating against harming Armstrong. But when the facts are viewed in the light most favorable to Appellant, they simply do not support that conclusion. Under these facts, when Officer Gatling deployed his taser, Armstrong was a mentally ill man being seized for his own protection, was seated on the ground, was hugging a post to ensure his immobility, was surrounded by three police officers and two Hospital security guards, . . . and had failed to submit to a lawful seizure for only 30 seconds. A reasonable officer would have perceived a static stalemate with few, if any, exigencies—not an immediate danger so severe that the officer must beget the exact harm the seizure was intended to avoid. . . .Appellees, therefore, are not entitled to summary judgment on the question whether they violated the Constitution. Viewing the record in the light most favorable to Appellant, Appellees used excessive force, in violation of the Fourth Amendment. . . . The constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure. . . While our precedent supports our conclusion that Appellees violated that right when seizing Armstrong, we acknowledge that this conclusion was not so settled at the time they acted such that 'every reasonable official would have understood that' tasing Armstrong was unconstitutional. . . .A survey of other circuits' case law confirms that Appellees did not have sufficiently clear guidance to forfeit qualified immunity. . . .Other circuits, in short, have sometimes distinguished permissible and impermissible tasing based on facts establishing bare noncompliance rather than facts establishing a risk of danger. Because Armstrong was not complying with Appellees' commands, these cases negate the existence of any 'consensus of cases of persuasive authority' across our sister circuits 'such that a reasonable officer could not have believed that his actions were lawful.'. . We conclude, therefore, that Armstrong's right not to be tased while offering stationary and non-violent resistance to a lawful seizure was not clearly established on April 23, 2011. . . . This ought not remain an evolving

field of law indefinitely though. 'Without merits adjudication, the legal rule[s]' governing evolving fields of constitutional law 'remain unclear.' John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts,* 2009 Sup.Ct. Rev. 115, 120. 'What may not be quite so obvious, but is in fact far more important, is the degradation of constitutional rights that may result when ... constitutional tort claims are resolved solely on grounds of qualified immunity.'. . This degradation is most pernicious to rights that are rarely litigated outside the context of § 1983 actions subject to qualified immunity—rights like the Fourth Amendment protection against excessive force at issue here. . . . Rather than accept this deteriorative creep, we intend this opinion to clarify when taser use amounts to excessive force in, at least, some circumstances. A taser, like 'a gun, a baton, ... or other weapon,'. . . is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser. The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance-even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force. Where, during the course of seizing an out-numbered mentally ill individual who is a danger only to himself, police officers choose to deploy a taser in the face of stationary and non-violent resistance to being handcuffed, those officers use unreasonably excessive force. While qualified immunity shields the officers in this case from liability, law enforcement officers should now be on notice that such taser use violates the Fourth Amendment.")

Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 910-13 (4th Cir. 2016) (Wilkinson, J., concurring in part), *cert. denied,* 137 S. Ct. 61 (2017) ("I am happy to concur in the judgment of affirmance and in Part III.C of the majority opinion. Having resolved the case by properly awarding judgment to defendants on qualified immunity grounds, the majority had no need to opine on the merits of the excessive force claim. In fact, it runs serious risks in doing so. This was a close case, the very kind of dispute in which judicial hindsight should not displace the officers' judgmental calls. I do not contend that the officers' behavior was impeccable here, but I do believe, with the district court, that it was not the kind of action that merited an award of monetary damages. . . . Having thoughtfully resolved the appeal on qualified immunity grounds, . . . the majority launches into an extended discussion on the merits of the excessive force claim. This is so unnecessary. Sometimes it is best for courts not to write large upon the world but to discharge our simple rustic duty to decide the case. . . .Today's prescription may not fit tomorrow's facts and circumstances. Our rather abstract pronouncements in one case may be of little assistance with the realities and particulars of another. . . . Clarity is arguably most difficult to achieve in Fourth Amendment cases because bright-line rules at most imperfectly take account of the slight shifts in real-life situations that can alter what are inescapably close judgment calls. . . .It is hard to disagree with the majority's highly generalized assertion that Taser use is unwarranted 'where an unrestrained arrestee, though resistant, presents no serious safety threat.'. . But of course, what conduct qualifies as 'resistant,' and what rises to the level of a 'serious safety threat' is once again

dependent on the actual and infinitely variable facts and circumstances that confront officers on their beat. . . .The majority has left it all up in the air. And its approach to this case is not without consequence. The great majority of mentally ill persons pose no serious danger to themselves or others and the challenge of society is to help these good people lead more satisfying lives. A smaller subset of the mentally ill do pose the greatest sort of danger, not only to themselves but to large numbers of people as the string of mass shootings in this country will attest. It is difficult sometimes for even seasoned professionals to predict which is which, not to mention officers and others with more limited training. And yet it is important in this area that law not lose its preventive aspect. It can be heartbreaking to wait until the damage is done. Delivering vague proclamations about do's and don'ts runs the risk of incentivizing officers to take no action, and in doing so to leave individuals and their prospective victims to their unhappy fates. Law enforcement will learn soon enough that sins of omission are generally not actionable. . . And in the face of nebulae from the courts, the natural human reaction will be to desist. Perhaps this is what we mean to achieve, but over-deterrence carries its own risks, namely that those who badly need help will receive no help, and we shall be the poorer for it.")

Raub v. Campbell, 785 F.3d 876, 881-84 (4th Cir. 2015), *cert. denied,* 136 S. Ct. 503 (2015) ("Raub's Fourth Amendment argument is based on the claim that Campbell acted without probable cause in recommending that Raub be taken into custody for a mental health evaluation, and when he petitioned the state court for a temporary detention order. We choose, however, not to reach the question of whether Campbell's conduct amounted to a constitutional violation. Rather, we hold that because Campbell's conduct was not proscribed by clearly established law, summary judgment on the basis of qualified immunity was proper. . . In this prong of the qualified immunity analysis, the 'inquiry turns on the objective legal reasonableness of [Campbell's] action, assessed in light of the legal rules that were clearly established at the time it was taken.'. . As a result, we look not to whether the right allegedly violated was established 'as a broad general proposition' but whether 'it would be clear to a reasonable official that his conduct was unlawful in the situation he confronted.'. . . [T]to the extent the cases should have informed Campbell's conduct, they support the view that he acted reasonably under our prevailing legal standards. Unlike in *Bailey,* Campbell's recommendation that Raub be detained was supported by far more than a 911 call. Rather, it was based on the initial observations of law enforcement officers, the content of Raub's Facebook posts, the information provided by Raub's former colleagues, and—later—on Campbell's own evaluation and observations of Raub. Indeed, the quantum of evidence here is greater than that in *Cloaninger*—where we found probable cause based only on an initial hospital call, a history of suicide reports, and a belief that Cloaninger possessed firearms—and is more like the circumstances in *Gooden* and *S.P.*—where officers based their seizure on both prior reports of distress *and* their personal observations of individuals at the scene. In sum, we think it doubtful that Campbell violated Raub's Fourth Amendment rights based on our existing precedent. We need not, however, pass on that question because we hold that Campbell is entitled to qualified immunity on the ground that the unlawfulness (if any) of his conduct was not clearly established at the time he recommended Raub's seizure.")

West v. Murphy, 771 F.3d 209, 212-16 (4th Cir. 2014) ("In 2007, the district court initially denied defendants' motions to dismiss, holding that the wardens were not entitled to qualified immunity because 'the right of those arrested for offenses not likely to involve weapons or contraband to be free from strip searches without any individualized finding of reasonable suspicion appears to be clearly established' in the Fourth Circuit. . . However, the court reversed course in its 2013 summary judgment opinion, highlighting 'the present lack of a clear test applicable to the specific circumstances of detention practices at [Central Booking] during the years at issue in this litigation.'. . This more recent decision is the subject of this appeal. The Supreme Court's intervening decision in *Florence v. Board of Chosen Freeholders of County of Burlington,* 132 S.Ct. 1510 (2012), prompted the district court to change direction. The Supreme Court held that 'every detainee who will be admitted to the general population [of a jail] may be required to undergo a close visual inspection while undressed.'. . The district court determined that *Florence* 'overruled some aspects of Fourth Circuit law' on which the 2007 decision had 'relied,' and 'left the contours of any "exception" that would apply to the plaintiffs in this case unclear and open to debate.'. . .We may address either prong of the qualified immunity analysis first. [citing *Pearson*] Here the availability of the qualified immunity defense makes it unnecessary to take up the merits of plaintiffs' constitutional challenge. . . .Defendants contend, and the district court held, *Jones v. Murphy,* 2013 WL 822372, at *6 (D. Md. Mar. 5, 2013), that *Florence v. Board of Chosen Freeholders of County of Burlington,* 132 S.Ct. 1510 (2012), demonstrates that the law was not clearly established even though that decision came several years after the close of the class period. The relevant question, however, is whether the law was clearly established *as of the time of the search.* . . . This temporal element inheres in qualified immunity because the inquiry into 'clearly established law' is tethered to the need for notice. Public officials, no less than private citizens, are entitled to know when their actions violate the law. Notice means prior notice, not notice after the fact. . . Decisions issued after the allegedly unconstitutional conduct do not affect whether the law was clearly established at the time of the conduct unless, of course, the later decision addresses or otherwise illuminates whether the law was clearly established at the time of the challenged official action. In some instances, the law may change for the apparent benefit of government officials. But though such a change in law may indicate that there was no constitutional violation on the merits, it does not affect whether the law was clearly established because the favorable judicial decision could not have informed the officials' understanding of whether their actions were unlawful. Of course the need for prior notice is a two-way street. It is just as likely that a later-in-time judicial decision could clearly establish the illegality of the conduct in question. But later-in-time is not at the time, and prescience is not to be presumed in granting or withholding the immunity. The Supreme Court decided *Florence* on April 2, 2012. . . The class period in this case ran from May 12, 2002, until April 30, 2008. . . As *Florence* came down almost four years after the class period closed, it does not demonstrate that the law on jail strip searches either was or was not clearly established at the time these alleged searches were conducted. . . . Under the *Bell* balancing test, the searches in *Logan, Amaechi,* and *Abshire* were unconstitutional because there were no security reasons strong enough to justify the intrusive and public nature of the searches. The searches allegedly performed at Central Booking, however, were conducted in a different and less public setting than those described by our precedents, and the security justifications for the

Central Booking searches were more compelling. We do not address the constitutional merits of these searches. But '[g]iven such an undeveloped state of the law,' the immunity defense does not permit us to tax correctional officers with clairvoyance. . .The district court ultimately was correct that the defendants are entitled to qualified immunity because the law did not clearly establish at the time that the searches were conducted that they were unlawful.")

West v. Murphy, 771 F.3d 209, 217 (4th Cir. 2014) (Wynn, J., concurring) ("I concur in the well-reasoned majority opinion. I write separately to underscore the importance of addressing the legality of strip searching detainees held outside the general population in the appropriate case. . . . [I]n *Florence*, the Supreme Court staked out an important limitation to its holding. *Florence* does not apply to strip searches of detainees held outside of the general population. It now falls to us to apply the Constitution and relevant precedent to those cases that *Florence* does not control. Clearly, as this Court holds today, our ruling in *Logan v. Shealy* does not put officers on reasonable notice as to the limits the Constitution places on strip searches under the circumstances of this case. . .This Circuit has held that it is appropriate to address the constitutional merits in a qualified immunity case where doing so would 'clarify and elaborate upon our prior jurisprudence in important and necessary ways.'. . There can be no question that our jurisprudence in this area needs clarification and elaboration. Unfortunately, by not reaching the constitutional merits in this matter, we leave corrections officers adrift in uncharted waters. Nonetheless, because the trial court confined itself to the 'clearly established' prong of the qualified immunity analysis and did not reach the constitutional merits, and because the parties focused on the 'clearly established' prong on appeal, I join with the majority opinion in delaying our consideration of this important constitutional issue for another day.")

Cantley v. W. Virginia Reg'l Jail & Corr. Facility Auth., 771 F.3d 201, 205-07 (4th Cir. 2014) ("The district court found that the strip search of Teter 'struck a reasonable balance between the need to provide safety and security at the facility and Mr. Teter's privacy interests' and thus held that the search was constitutional. . .The doctrine of qualified immunity protects defendants in § 1983 suits from the burden of going to trial where the 'conduct [at issue] does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . A defendant is entitled to judgment if either 'the facts ... [do not] make out a violation of a constitutional right' or if the law was not '"clearly established" at the time of defendant's alleged misconduct.'. . We may address either prong of this analysis first . . . and we find it unnecessary to reach the constitutional merits of the strip search of Teter. . . .*Logan* did not clearly establish that it was unconstitutional for a correctional officer to conduct a visual strip search in a private room of an arrestee, who was to be held until the next morning in a holding cell with possibly a dozen or more other arrestees. Because the law was not clearly established, the defendants are entitled to qualified immunity for the strip search of Teter. . . .The district court held that the delousing of both Cantley and Teter was constitutional and granted summary judgment on the delousing claims. . . We affirm the grant of summary judgment, but on the grounds that it was not clearly established that the delousing policy was unconstitutional. . . . In short, at the time of the delousing, 'existing precedent [did not] place[ ] the statutory or constitutional question beyond

debate.' *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2083 (2011). The defendants thus are entitled to qualified immunity for the delousing of Cantley and Teter.")

Cantley v. W. Virginia Reg'l Jail & Corr. Facility Auth., 771 F.3d 201, 208 (4th Cir. 2014) (Wynn, J., concurring) ("The majority opinion does not reach the precise question of whether the strip search conducted on Floyd Teter was unconstitutional, but it does cast serious doubt on the legality of similar searches going forward. . . In my view, strip searching pre-arraignment detainees who are held outside the general population of a detention facility is unconstitutional absent reasonable suspicion. *See Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington,* 132 S.Ct. 1510, 1523 (2012) (Roberts, C.J., concurring); *id.* at 1524 (Alito, J., concurring); *id.* at 1525 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., dissenting). I agree with the majority that corrections administrators would be wise to take into account recent changes in the legal landscape governing strip searches when crafting policy in this area, particularly in light of the varying opinions in *Florence.*")

Santos v. Frederick County Bd. of Com'rs, 725 F.3d 451, 463-65, 468, 469 (4th Cir. 2013) ("Because the Constitution grants Congress plenary authority over immigration, *Johnson v. Whitehead,* 647 F.3d 120, 126–27 (4th Cir.2011), state and local law enforcement officers may participate in the enforcement of federal immigration laws only in 'specific, limited circumstances' authorized by Congress, *Arizona v. United States,* 132 S. Ct. at 2507. . . .[W]e hold that, absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law. Like the district court, we conclude that the deputies seized Santos for purposes of the Fourth Amendment when Deputy Openshaw gestured for her to stay seated after dispatch informed him of the outstanding civil ICE deportation warrant. . . At that time, the deputies' only basis for detaining Santos was the civil ICE warrant. Yet as the defendants concede, the deputies were not authorized to engage in immigration law enforcement under the Sheriff's Office's Section 1357(g)(1) agreement with the Attorney General. They thus lacked authority to enforce civil immigration law and violated Santos's rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant. . . . In sum, the deputies violated Santos's rights under the Fourth Amendment when they seized her after learning that she was the subject of a civil immigration warrant and absent ICE's express authorization or direction. . . .Even though the deputies violated Santos's rights under the Fourth Amendment, the deputies still may be entitled to qualified immunity if the right was not clearly established at the time of the seizure. . . .For three reasons, we conclude that when the deputies detained Santos, it was not clearly established that local law enforcement officers may not detain or arrest an individual based solely on a suspected or known violation of federal civil immigration law. First, the Supreme Court did not directly address the role of state and local officers in enforcement of federal civil immigration law until *Arizona v. United States,* which was decided more than three years after the deputies' encounter with Santos. Second, until today, this Court had not established that local law enforcement officers may not seize individuals for civil immigration violations. Therefore, no controlling precedent put the deputies on notice that their

actions violated Santos's constitutional rights. And finally, before *Arizona v. United States,* our Sister Circuits were split on whether local law enforcement officers could arrest aliens for civil immigration violations.")

Hensley v. Koller, 722 F.3d 177, 181 (4th Cir. 2013) ("A court may address the second question—whether a right is clearly established—without ruling on the first-existence of the right. . . But 'there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong.'. .This is such a case. The Hensleys seek injunctive and declaratory relief in addition to money damages. A determination that a right is not clearly established only shields a state official from money damages. . .Thus, if we resolved the case on the ground that no clearly established law permits an award of damages against the state officials, the case would necessarily return to the district court for a determination of the availability of injunctive and declaratory relief. Here, the 'conservation of judicial resources,'. .weighs strongly in favor of resolving the question of whether the Directors violated the Hensleys' federal rights. For this reason, we begin (and end) with the first step of *Saucier's* two-step inquiry—determination of whether § 673(a)(3) creates a privately enforceable right to parental concurrence, which the Directors have violated.") [Court concludes The Adoption Assistance and Child Welfare Act of 1980 does create a privately enforceable right to parental concurrence in change of adoption assistance payments but that the right was not violated]

Williams v. Ozmint, 716 F.3d 801, 805, 806 (4th Cir. 2013) ("A court may exercise its discretion to determine which of the two steps of the qualified immunity analysis 'should be addressed first in light of the circumstances in the particular case at hand.'. . In the present case, we exercise our discretion to determine first whether Williams had a clearly established constitutional right to visitation at the time of the warden's decision. Williams does not cite any case, or combination of cases, from this Court, the Supreme Court, or the highest court in South Carolina, that clearly establishes a constitutional right to visitation in prison grounded in the First, Eighth, or Fourteenth Amendments. . . Having failed to do so, Williams also necessarily has failed to identify any authority establishing a right to such visitation that could not be restricted by prison officials under the facts presented here. The absence of controlling constitutional authority in this regard thus forecloses Williams' argument that, upon application of an objective standard, the warden should have been aware that his conduct violated a clearly established constitutional right. . . .Like the Supreme Court in *Overton,* we need not determine the issue whether, by virtue of their incarceration, prisoners may be deprived of all associational rights in all instances, nor need we define the boundaries of any such associational rights. . . Qualified immunity serves to protect officers from suit for money damages in cases involving 'gray areas' of constitutional rights or the violation of such asserted rights. . . In view of controlling precedent, and upon application of the above standards, we conclude that the warden's action suspending Williams' visitation privileges for two years did not violate a clearly established constitutional right. Accordingly, we hold that the warden is entitled to qualified immunity on Williams' claim for monetary damages arising from the suspension of his visitation privileges. . . . In view of our conclusion that the warden did

not violate clearly established law, we need not address the first step of the *Saucier* analysis, namely, whether a constitutional violation occurred.")

Evans v. Chalmers, 703 F.3d 636, 647-49 (4th Cir. 2012) ("[E]ven when, as here, a prosecutor retains all discretion to seek an indictment, . . . police officers may be held to have caused the seizure and remain liable to a wrongfully indicted defendant under certain circumstances. In particular, officers may be liable when they have lied to or misled the prosecutor, . . . failed to disclose exculpatory evidence to the prosecutor, . . . or unduly pressured the prosecutor to seek the indictment . . . .[I]t seems contrary to the very purpose of qualified immunity to extend personal liability to police officers who have assertedly conspired with, but neither misled nor unduly pressured, an independent prosecutor. Police officers and prosecutors often work together to establish probable cause and seek indictments; such collaboration could always be characterized as a 'conspiracy.' Allowing § 1983 claims against police officers to proceed on allegations of such a 'conspiracy' would in virtually every case render the officers' qualified immunity from suit 'effectively lost,'. . . and make discovery the rule, rather than the exception . . . .
Thus, we hold today that an alleged officer-prosecutor conspiracy does not alter the rule that a prosecutor's independent decision to seek an indictment breaks the causal chain unless the officer has misled or unduly pressured the prosecutor. . . Because the Evans plaintiffs do not allege that Officers Gottlieb and Himan either misled or pressured Nifong to seek their indictments, we reverse the district court's denial of the officers' motions to dismiss the Evans plaintiffs' § 1983 malicious prosecution claims against them.")

Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012) ("Put succinctly, Durham's 'malicious prosecution' claim fails the first step of the qualified immunity inquiry. . . Although 'it is not entirely clear whether [there is] a separate constitutional right to be free from malicious prosecution, if there is such a right, the plaintiff must demonstrate both an unreasonable seizure and a favorable termination of the criminal proceeding flowing from the seizure.'. . Thus, what has been inartfully 'termed a "malicious prosecution" claim ... is simply a claim founded on a Fourth Amendment seizure that incorporates the elements of the analogous common law tort of malicious prosecution.' . . More specifically, 'we have required that [1] the defendant have "seized plaintiff pursuant to legal process that was not supported by probable cause and [2] that the criminal proceedings have terminated in plaintiff's favor."'. . .Durham is unable to establish a constitutional violation because, although the underlying criminal proceedings were terminated in his favor, the prosecution was plainly supported by probable cause, as conclusively established by the three indictments.")

Lebron v. Rumsfeld, 670 F.3d 540, 557-60 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012) ("There exist strong reasons for defendants to believe that RFRA did not apply to enemy combatants detained by the military. Indeed, no authority suggested to the contrary. And the defendants have asserted that, at the very least, they are entitled to the qualified immunity available to public officials on the grounds that 'any rights that enemy combatants may have had under RFRA were not clearly established during the period of Padilla's military detention.'. . We agree.

This case is an appropriate one for the recognition of the immunity defense because it would run counter to basic notions of notice and fair warning to hold that personal liability in such an unsettled area of law might attach. The following discussion underscores why it would be impermissible for us to conclude that the relevant law was clearly established in anything like a manner that would vitiate a qualified immunity defense. We thus dismiss Padilla's RFRA claim on qualified immunity grounds. . . .Padilla offers us no evidence to support the conclusion that RFRA supplies an action at law to enemy combatants in military detention. . . . Indeed, the same concerns about judicial interference with the military that caused us to hesitate in implying a *Bivens* action give us pause in interpreting this statute to achieve an equally unanticipated and comparably disruptive outcome. . . . Were Congress to prefer damages actions over alternate remedies for those in Padilla's situation, that would be one thing. But we have no indication that Congress even considered the prospect of RFRA actions brought by enemy combatants with anything like the care that it has customarily devoted to matters of such surpassing sensitivity. The foregoing discussion underscores what we believe are considerable obstacles to applying RFRA in this context. But we need not go so far as to announce such a proposition in its most absolute terms. Under *Pearson v. Callahan*, 129 S.Ct. 808 (2009), we are permitted to explain directly why 'there was no violation of clearly established law.'. . As set forth in *Pearson*, the qualified immunity inquiry is hardly an empty one. For here it brings us to the threshold question of whether RFRA even speaks to the military detention setting. We think it anything but clearly established that it does. At the very least, the defendants transgressed no clearly established law in this area, and to hold them personally liable in the absence of clear notice that such a prospect was even possible would run counter to the reasons that the immunity exists. . . For the reasons heretofore expressed, we hold that the defendants have asserted a valid qualified immunity defense to Padilla's RFRA claim.")

Lesueur-Richmond Slate Corp. v. Fehrer, 666 F.3d 261, 264, 269 (4th Cir. 2012) ("When qualified immunity is asserted, the reviewing court should usually first ask whether the right was violated on the facts alleged, and then determine whether that right was 'clearly established.'. . We therefore first consider LeSueur–Richmond's Fourth Amendment claims before addressing qualified immunity. . . .[W]here the searches were objectively supported by multiple complaints to which the inspectors were responding and there was no indication that the inspections were a pretext for harassment or other improper conduct, there was no Fourth Amendment violation. We therefore affirm the district court's dismissal of LeSueur–Richmond's complaint for failure to state a claim upon which relief may be granted. . . . Here, having found that there was no constitutional violation, we must conclude that Appellees are protected by qualified immunity.")

Braun v. Maynard, 652 F.3d 557, 560 (4th Cir. 2011) ("In keeping with courts' reluctance to answer constitutional questions unnecessarily, we may determine whether the constitutional rights allegedly violated here were clearly established without first determining whether those rights exist at all. . . In this case, we need not address whether the searches violated the Constitution. Inasmuch as the law regarding Ionscans and searches in the prison employee context was not clearly established, the defendants are entitled to qualified immunity. . . . For purposes of this case, it has

never been clearly established that a strip or visual body cavity search after an Ionscan alarm cannot satisfy Fourth Amendment standards.")

Stickley v. Sutherly, No. 09-2317, 2011 WL 893760, at *2, *3 (4th Cir. Mar. 14, 2011) ("Having heard the parties' arguments and reviewed the record, we believe it appropriate to forego making a determination of whether defendants actually violated Stickley's First Amendment rights. Instead, we consider only whether Stickley's right to comment on his demotion within the Strasburg Police Department was clearly established at the time defendants dismissed him from the force. . . .Having reviewed the substantive law governing employee speech, we are persuaded that the law in this area is not 'clearly established' such that a reasonable person would have known what the law necessarily required in many cases. We reach this conclusion because the language of the *Connick* test itself and the nuanced and careful approach the test requires lead to the conclusion that an employee's right to speech in any particular situation will often not be immediately evident. The first prong of the test requires a determination of whether the employee's speech is on a 'matter of public concern.' This is a highly fact-intensive inquiry, which may be influenced by any variety of factors. Moreover, the line marking when something becomes a matter of public concern is blurry, and thus the boundary confining a public official's behavior is hard to discern. The second prong of the test may be even more problematic because it requires a balancing of the employee's and the employer's competing interests. This not only requires a keen understanding of the respective interests of each party, but also necessitates a conclusion as to which interests are more substantial. This conclusion, in turn, becomes an inherently subjective task, and it is the subjective nature of the inquiry– especially when an official must undertake it ex ante–that makes the inquiry problematic from a qualified immunity standpoint. As we have stated before, 'where a sophisticated balancing of interests is required to determine whether the plaintiff's constitutional rights have been violated, "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected."')

Doe ex rel. Johnson v. South Carolina Dept. of Social Services, 597 F.3d 163, 175-77 (4th Cir. 2010) ("We now hold that when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing 'some responsibility for [the child's] safety and general well-being.'. . Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's right to personal safety and security. . . . [U]nlike the children in *DeShaney*, *Milburn* and *Weller*, Jane was clearly within the custody and control of the state social services department when foster care placement decisions were made. Accordingly, the state officials responsible for those decisions had a corresponding duty to refrain from placing her in a known, dangerous environment in deliberate indifference to her right to personal safety and security. We affirm the grant of summary judgment, however, under the second prong of the qualified immunity inquiry. Although our precedents do not foreclose a foster child's claim that her substantive due process right to personal safety and security is violated by a foster care placement made in deliberate indifference to a known danger, such a right was not clearly established in this circuit at the time Thompson made her placement

decisions regarding Jane. In determining whether there has been a violation of a constitutional right, we must identify the right 'at a high level of particularity.'. . . Here, when the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on fair notice that her actions violated Jane's substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right. In sum, because it would not have been apparent to a reasonable social worker in Thompson's position that her actions violated the Fourteenth Amendment, she is entitled to qualified immunity.")

Garcia v. Montgomery County, No. CV TDC-12-3592, 2015 WL 6773715, at *7-10 (D. Md. Nov. 5, 2015) ("Although the Court finds that there is a constitutional right to video record public police activity, it concludes that the right was not clearly established in this jurisdiction at the time of the incident, and so grants qualified immunity to the officers on the First Amendment damages claim. . . .The United States Court of Appeals for the Fourth Circuit has not addressed in a published opinion whether there is a First Amendment right to record public police activity. However, other circuits confirm that this right exists. [citing cases from 1st, 7th, 9th, and 11th Circuits] Thus, based on the Supreme Court precedent finding First Amendment rights to gather the news and to engage in free discussion of governmental affairs to advance the wise and honest conduct of government, as well as the precedent from other circuits explicitly finding a First Amendment right to record public police activities, this Court finds that video recording of police activity, if done peacefully and without interfering with the performance of police duties, is protected by the First Amendment. . . . Here, none of delineated controlling sources clearly establish that, as of 2011, citizens had a right to record police officers in the routine public performance of their duties. As explained above, the Supreme Court has not spoken directly on the issue. The Fourth Circuit, in its only foray into this area, affirmed in an unpublished opinion a district court's determination that 'the right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct' and did not opine one way or the other on whether such a First Amendment right exists. *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009). Thus, as of the incident in 2011, and even today, the Fourth Circuit has not provided police officers with fair warning that it is unconstitutional to stop someone from video recording the police in the routine public performance of their duties. Nor has the Maryland Court of Appeals weighed in on the issue. . . . The fact that, in 2011, the Montgomery County Police Department had a policy on media relations directing that "to the extent possible, members of the media should be treated as invited guests at incident scenes," and that "no police officer shall take any action to prevent or interfere with the news media in photographing or televising an event," does not alter the analysis. . . A public relations mandate from one's employer, designed to 'enhance [the Department's] image and reputation,' is not the same as a constitutional right. . . While Officers Baxter and Malouf might have been aware of what the media could be invited to do, that knowledge is not a substitute for a clear understanding of what the media or individual citizens have a *right* to do in terms of recording police activity. As discussed above, based on the fairest reading of Supreme Court precedent, and

the great weight of authority from other circuits, it seems fairly well-settled in 2015 that there is a First Amendment right to video record police officers as they carry out their public duties. But the Fourth Circuit has specifically identified the sources from which a clearly established right can be identified, and as of 201I—and still today—none of the three identified courts has held that citizens have a right to record police officers as they perform their routine duties. Indeed, the Fourth Circuit, albeit in an unpublished opinion, expressly stated that this right is not clearly established. *Szymeck*,, 353 F. App'x at 853. Thus, the Court must conclude that the right to record police officers in the routine public performance of their duties was not clearly established in this Circuit at the time of the events at issue in this case. Officers Baxter and Malouf are therefore entitled to qualified immunity from a suit for damages on this aspect of Garcia's First Amendment claim.")

Garcia v. Montgomery County, No. CV TDC-12-3592, 2015 WL 6773715, at *11-12 (D. Md. Nov. 5, 2015) As set forth below, the Court finds that the First Amendment protects against the seizure of a recording of police activity in order to prevent its public dissemination, but concludes that the right was not clearly established in this jurisdiction at the time of the incident, and so grants qualified immunity to Officer Malouf on this aspect of Garcia's First Amendment damages claim. . . .Here, as discussed above, the video recording of public police actions is an activity protected by the First Amendment, so it follows that the recording itself is First Amendment-protected material akin to a film or written publication. Following the reasoning of *Roaden* and *Rossignol*, the seizure of the recording, if done for the purpose of preventing the dissemination of the information on the recording, would constitute an unconstitutional prior restraint. . . The Court therefore holds that the First Amendment protects against the seizure and retention of a video recording of public police activities if the seizure was for the purpose of preventing the public dissemination of the contents of that recording. . . . As noted above, based on Supreme Court and Fourth Circuit precedent predating 2011, it was clearly established that government officials, including police officers, violate the First Amendment if they seize newspapers, films, or other First Amendment-protected materials in order to prevent the dissemination of their content. . . However, under this precedent, the Court cannot conclude that Officer Malouf had 'fair warning' that his actions violated Garcia's First Amendment rights. . . . Garcia's recording was not of something newsworthy—the kind of recording almost certain to enter public circulation—but a recording made on the chance that something newsworthy might happen. There is therefore no easy analogy to be drawn between *Roaden* and *Rossignol* and the facts in this case. Although a right may be clearly established even in the absence of case law involving the exact or 'fundamentally similar' facts, . . . and 'officials can still be on notice that their conduct violates established law even in novel factual circumstances,'. . . the scenario at issue here differs from the controlling case law in one material way: the seized item was not one that was clearly protected by the First Amendment. Because it was not clearly established in the Fourth Circuit in 2011 that recording routine police activity was protected by the First Amendment, it also could not have been clearly established in 2011 that the product of that recording was entitled to the same First Amendment protections applicable to newspapers and films sold or displayed to the public. To be sure, under Garcia's version of events, it would be difficult to justify the seizure and retention of the video card as constitutional. But, as discussed below, the well-traveled path to that conclusion

runs through the Fourth Amendment, not the First Amendment. . . Thus, the Court grants qualified immunity to Officer Malouf on the First Amendment damages claim relating to the seizure of the video card.")

Russell v. Wright, 916 F.Supp.2d 629, 643, 644 (W.D. Va. 2013) ("Lacking any meaningful factual disputes, the court finds that Deputy Wright is entitled to qualified immunity on the excessive force claim. In doing so, the court exercises its judicial prerogative to employ either of the qualified immunity prongs first, and determines that regardless of whether Wright's actions constituted excessive force, an issue the court expressly does not decide, his actions were objectively reasonable because they did not violate clearly established law. . . Given the dearth of caselaw on the use of tasers in excessive force cases, particularly within the Fourth Circuit, the court simply cannot say that Wright's use of his taser under these circumstances violated clearly established law. Tasers are still relatively novel devices, and courts across the country continue to grapple with determining their proper role in assisting law enforcement officers. Reviewing the relevant caselaw that does exist, the court believes that the line between active resistance and compliance is helpful in evaluating whether Wright's behavior was objectively reasonable. The officers in this case were responding to a report of violence, and were confronted with a suspect who refused to obey multiple commands. Unlike in *Draper*, a case where the officer was held not to have used excessive force, Wright and Mattox never had control of the scene before the taser was used. Russell's only acts of compliance with the officers' requests were to initially raise his hands (before later lowering them), and to cease approaching an officer who had his handgun drawn and trained on him. These acts alone do not demonstrate compliance, and are far outweighed by Russell's demonstrations of resistance discussed above. Additionally, the situation confronted by the officers in this case was far more dangerous and fast moving than the facts presented in the Ninth Circuit's consolidated *en banc* cases mentioned above, in which the officers were granted qualified immunity. *See Mattos v. Agarano,* 661 F.3d 433 (9th Cir.2011). Furthermore, another officer on the scene, Deputy Mattox, believed that Wright should deploy his taser—indeed he instructed Wright to do so. Although an officer's actions must be viewed objectively, this fact certainly indicates that a reasonable officer would not have understood that using a taser in these circumstances would violate clearly established law. . . .Even if Wright's actions were deemed excessive, in light of the existing caselaw, it would be simply unfair to subject him to trial for using a taser on a potentially violent, noncompliant arrestee.")

FIFTH CIRCUIT

Linicomn v. Hill, 902 F.3d 529, 535, 538-39 (5th Cir. 2018) ("The Supreme Court has held that we have discretion to address either prong of the qualified immunity analysis first. . . Further, the Court recognized that, even where defendants are clearly entitled to qualified immunity under the second prong, undertaking the two-step procedure 'is often beneficial ... [because it] promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . We believe this to be the case here. Accordingly, although we ultimately conclude that the officers

were entitled to a judgment on the pleadings based on the second prong of the qualified-immunity inquiry, we begin our analysis with the first prong. . . . We therefore conclude that Vernon has facially pleaded sufficient facts to support a plausible claim that the officers violated his Fourth Amendment rights when they entered his house without a warrant and absent proof or showing of exigent circumstances. . . . Though we find plausible Vernon's allegations that the officers' warrantless entry into his house violated his Fourth Amendment right, we cannot conclude, under the second prong of the qualified immunity analysis, that this right was clearly established under the circumstances of this case at the time of the officers' entry. . . The law is clearly established when there is 'controlling authority—or a "robust consensus of persuasive authority"—that defines the contours of the right in question with a high degree of particularity.'. . . An officer is entitled to qualified immunity 'unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution.'. . .Here, however, the officers acted in response to Linda's 911 call asking for assistance checking on her sick and lethargic child. Because Linda's call could reasonably be construed as evidence that her daughter was physically ill, *Troop* does not clearly establish that the officers' actions were unreasonable in light of clearly established law. While *Troop* may be relevant to the question of whether the exigent circumstances exception applies, it is not 'controlling authority ... that defines the contours of the right in question with a high degree of particularity.'. .Vernon does not cite to any controlling authority establishing that the officers' entry into his house would have violated a clearly established right under the circumstances. Accordingly, we affirm the district court's decision to grant the officers' motion for judgment on the pleadings on the basis of qualified immunity.")

Samples v. Vadzemnieks, 900 F.3d 655, 660-63 (5th Cir. 2018) ("This court lacks jurisdiction to determine 'whether the defendant[ ] did, in fact, engage in [a certain course of] conduct'; it only possesses jurisdiction to examine whether that conduct 'would, as a matter of law, be objectively unreasonable in light of clearly established law.'. . We accept the plaintiff's version of the facts as true and review it through the lens of qualified immunity. . .In resolving the purely legal questions, we apply a de novo standard. . . . First, the district court held that '[b]ased on the record, a reasonable jury could conclude that it was more likely than not that Samples's head injury happened when he fell to the ground after being hit [ ] by a taser.' As a procedural matter, we're then barred from gainsaying this determination and must accept that there is indeed a genuine factual dispute about causation. . . .It is eminently reasonable to infer that when someone goes limp and falls backwards, a head eventually hits the ground. . . .We conclude that the evidence is sufficient for a jury to find that Vadzemnieks used excessive force in violation of the Fourth Amendment. We have repeatedly held in the past that a taser is a force that, deployed when not warranted, can result in a constitutional deprivation. . . . In short, the officers lacked reason to believe that Samples committed a crime, sought to flee, or posed a threat of danger to them. We conclude that the first prong of the qualified immunity inquiry is satisfied: the evidence is sufficient to show that Vadzemnieks violated Samples's Fourth Amendment right to be free of excessive force. . . . Vadzemnieks and Samples each marshal caselaw asserting to resolve the question of clearly established law. In our view, *Carroll v. Ellington* provides the closest analogue.

. . In *Carroll*, an officer repeatedly deployed a taser on a schizophrenic man who, like Samples, spoke incomprehensibly when questioned about his identity and conduct, such that the officer believed him to be on drugs. . . As here, the officer in *Carroll* knew that the suspect was unarmed and nonviolent when the officer first elected to tase him. . . And like Samples, the suspect only weighed approximately 160 pounds. . . .In both cases, officers confronted a suspect whom they believed to be on drugs, attempted to verbally secure the suspect's compliance, and chose to deploy a taser despite their knowledge that the suspect was unarmed. Faced with these facts, the *Carroll* panel decided that, as of three years ago, no clearly established law made the officer's decision to resort to the taser unreasonable. And equally important, the *Carroll* panel 'decline[d] to reach the close constitutional question of whether the officer's actions amounted to a Fourth Amendment violation, resting its decision solely on the second prong of qualified immunity. Samples struggles to show that Vadzemnieks's conduct violated clearly established law. But his task is made insurmountably difficult by *Carroll*. He points to *Ramirez v. Martinez* . . . and *Newman v. Guedry*. . . But those cases are factually farther afield—neither of them, nor any other case he cites, presented a situation in which police officers had to decide whether to deploy a taser on an uncooperative suspect who appeared to be drug-addled or otherwise unstable. . . Similarly, for its part, the district court relied on two traffic stop cases involving suspects who were able to communicate clearly with the officers and who could readily understand their situations. . . The difference here is at least plausibly important: erratic, unpredictable behavior on the part of a suspect could lead officers to fear sudden or particularly severe violent outbursts, which could in turn give them license to resort to force more readily than in each of the cases cited by Samples or the district court. In light of *Carroll*'s express reservation of so similar a constitutional question, and in light of the Court's repeated instruction that caselaw involving excessive force claims must be sufficiently particularized and must put the issue altogether 'beyond debate,' we must conclude that Vadzemnieks's actions did not violate law that was clearly established at the time of the incident. Vadzemnieks is therefore entitled to qualified immunity. . . .Right or wrong, the very premise of qualified immunity is that not every constitutional violation suffered by plaintiffs like Samples is redressable. While recognizing an uncertainty of law that sustains the defense of qualified immunity, this opinion has bite, for it offers guidance to officers. We reverse the district court's denial of summary judgment to Vadzemnieks and render judgment for him.")

Sims v. City of Madisonville, 894 F.3d 632, 638-41 (5th Cir. 2018) ("[I]n overruling the short-lived regime of *Saucier v. Katz*, . . . which required courts to first address the underlying constitutional question, *Pearson* recognized it would still 'often [be] advantageous' to follow the two-step order. . . Doing so is 'beneficial' here for reasons the Supreme Court recognized. . . This is the fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can be liable for First Amendment retaliation. [citing cases] Continuing to resolve the question at the clearly established step means the law will never get established. . . Addressing the first-step liability question is 'especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . That is the case here. First Amendment retaliation claims do not arise in criminal litigation (as, for example,

a Fourth Amendment claim often would), and this issue of individual liability would not arise in other civil suits, such as those against a municipality, in which qualified immunity does not apply. Because this is a question unique to section 1983 First Amendment claims brought against individual defendants, we conclude that clarifying the liability question is important to provide guidance to public employees who may find themselves on either side of the "v" in these lawsuits that can raise important issues of whether employees who challenge corrupt governmental practices are protected in exercising First Amendment rights. In our recent decision resolving this question on 'clearly established' grounds, we recognized the tension in our caselaw on whether only final decisionmakers can be individually liable for First Amendment retaliation claims. . . . If an individual defendant's animus against a coworker's exercise of First Amendment rights is a link in the causal chain that leads to a plaintiff's firing, the individual may be liable even if she is not the final decisionmaker. . . . In light of *Jett* and the consensus view of other courts of appeals that individual liability is just a matter of causation, why did uncertainty develop in our circuit on this point? *Beattie v. Madison County School District*, 254 F.3d 595 (5th Cir. 2001), unwittingly planted the seeds of confusion that later sprouted on this issue. . . . [T]he focus of the appeal was on the question of municipal liability, which attaches only if final decisionmakers are liable. . . The unconstitutional motives of the principal and superintendent who recommended the termination were not attributed to the school board that made the final decision because the board did not know about the plaintiff's First Amendment activity. . . Not recognizing that *Beattie* was only confronting *Monell* liability, a later case involving individual defendants read *Beattie* for the principle that 'only final decision-makers may be held liable for First Amendment retaliation employment discrimination under § 1983.' *Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004). In reversing a verdict against a supervisor who retaliated against a subordinate for complaining about sexual harassment, *Johnson* ignored *Jett*'s contrary and precedential position that an individual is liable for First Amendment retaliation if her unlawful conduct is a link in the causal chain that resulted in the plaintiff's firing. Some cases have followed *Johnson*'s categorical view that only final decisionmakers can be liable for First Amendment retaliation. . . . Other cases following *Beattie* and *Johnson* have imposed a causation standard that is more stringent than *Jett*'s 'but-for' standard for nonfinal decisionmakers. . . They have done so because they, like Sims, have mistakenly characterized the question as whether the nondecisionmaker can be liable under a cat's paw theory of imputed liability. That turns cat's paw liability on its head, and is another example of relying on the law of *employer* liability for a question of *employee* liability. As 'cat's paw' liability arose under Title VII in which only employers can be liable, it is not about the liability of individual employees. . . It is instead about whether the employers who are subject to Title VII liability can be held liable by imputing to those entities the unlawful motives of employees who are not final decisionmakers. . . Unlike Title VII, section 1983 applies to individuals. So the question is not whether the metaphorical paw (the City) is liable for carrying out the ill-motivated actions of the metaphorical cat (Covington); it is whether the cat itself can be liable for having unlawful motives that caused the firing. That individual liability turns on traditional tort principles of whether the particular act was a 'causal link' in the termination. . . *Beattie*, *Johnson*, and subsequent cases thus inadvertently created the uncertainty we have recognized in this area. We now provide the overdue clarification. Because it is at odds with our earlier holding

in *Jett*, *Johnson*'s absolute bar on First Amendment liability for those who are not final decisionmakers is not binding. Nor are the imputation principles of cat's paw liability applicable to an effort to hold a nondecisionmaker liable. *Jett*'s 'causal link' standard sets the causation requirement for a suit against an individual defendant with retaliatory motives who does not make the final employment decision. Although today's decision clarifying that *Jett* controls means the law will no longer be 'unsettled' in this area, . . . it provides no recourse to Sims. That is because of the second part of the qualified immunity inquiry, which requires a plaintiff to show that any violation of rights was clearly established at the time the conduct occurred. . . When Sims was terminated in July 2012 the inconsistency in our law on whether First Amendment liability can attach to a public official who did not make the final employment decision had not been resolved. Indeed, three years after that *Culbertson* recognized the tension in affirming a grant of summary judgment on qualified immunity grounds in favor of a defendant who made a recommendation to fire the plaintiff but did not have the authority to make the ultimate decision. . . If judges have mixed up principles of individual and municipal liability in this area and failed to recognize *Jett* as the controlling decision, law enforcement officials should not be expected to have a more nuanced understanding of section 1983 law. We therefore agree with the district court's holding that Sims's claim is foreclosed by *Culbertson* on immunity grounds.")

Bustillos v. El Paso Cty. Hosp. Dist., 891 F.3d 214, 220-22 (5th Cir. 2018) ("Bustillos argues that the Doctors and Nurses violated her Fourth Amendment right to be free from unreasonable searches and seizures by detaining her in order to conduct x-ray, pelvic, and rectal exams without reasonable suspicion of criminal activity. The district court held those allegations cannot overcome the Doctors' and Nurses' qualified immunity because the right at issue was not clearly-established. We agree and affirm on that ground. Nonetheless, we take this opportunity to clarify the constitutional duties of medical staff when they cooperate with law enforcement searches. . . .The searches conducted at the Hospital were all non-routine. The Doctors and Nurses therefore needed reasonable suspicion of drug smuggling to constitutionally justify those searches. Whether the Doctors and Nurses had reasonable suspicion turns on an issue of first impression in this circuit: Must medical staff establish their own, independent reasonable suspicion where law enforcement officers either state that sufficient suspicion exists or request the search? We conclude they do not. A medical professional has no constitutional duty to independently evaluate the Fourth Amendment determinations of law enforcement officers. Nonetheless, medical staff must, either through their own independent determination or through reliance on law enforcement officials, have sufficient suspicion to justify *each* search in a series of non-routine searches. Though there is no Fifth Circuit case on point, our sister courts have held that medical professionals do not violate the Constitution where they rely on law enforcement officers' Fourth Amendment determinations. . . .However, in each of these cases, the officers presented the medical professionals with either a warrant, direct request for a specific search, or other articulation of adequate suspicion. . . .A different set of facts is presented where an 'examining physician conduct[s] a [search] without a request to do so by the customs agent; and neither the physician nor the [law enforcement] agents ... ha[ve] real suspicion [the individual] [is] concealing narcotics.'. . .Accordingly, Bustillos' allegations could potentially assert a constitutional violation.

The complaint is, however, ambiguous on critical factual allegations. For instance, it is unclear who Bustillos alleges actually ordered the various searches. Further, it is unclear what the CBP officers told medical staff regarding their basis for requesting the various searches. . . .Regardless, we need not determine the sufficiency of Bustillos' allegations. Even if the complaint sufficiently alleges a Constitutional violation, the violated right was not clearly established under our law at the time of the searches. . . . 'It is the plaintiff's burden to find a case in [her] favor that does not define the law at a "high level of generality."'. . .Appellant has not carried her burden of pointing this panel to any case that shows, in light of the specific context of this case, that the Doctors' or Nurses' conduct violated clearly established law. Further, our independent review has uncovered only one case, *Huguez*. Though we find the analysis in *Huguez* persuasive, and adopt it above, we are not persuaded that a single, fifty year old case from another circuit is sufficient in this instance to have 'placed the ... constitutional question [at issue] beyond debate.'. .The district court did not err in granting the Doctors and Nurses qualified immunity.")

Rayborn v. Bossier Parrish School Bd., 881 F.3d 409, 418 (5th Cir. 2018) ("Rayborn contends that the notes of her encounters with HDC, in which she detailed the 'red flags' that turned Bourgeois and Hughes against her, were subpoenaed in connection with HDC's parents' lawsuit against BPSB and that under Supreme Court precedent those notes should receive First Amendment protection. In *Lane v. Franks*, the Supreme Court considered testimony given by an individual pursuant to a subpoena and concluded: 'Truthful testimony under oath by a public employee *outside the scope of his ordinary job duties* is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.' . . It was undisputed in *Lane* that 'Lane's ordinary job responsibilities did not include testifying in court proceedings.'. . In *Garcetti v. Ceballos*, however, the Supreme Court held that 'when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'. . . The district court correctly concluded that all of Rayborn's actions that she claims are protected by the First Amendment, including offering her notes in accordance with the subpoena requests, were made according to her official duties. The test is not whether she was required to engage in the speech, but rather whether she made the speech 'pursuant to [her] "official responsibilities"' and whether that speech is 'ordinarily within the scope of [her] duties.'. . The district court observed that Rayborn's job responsibilities were 'maintaining complete records on all school nurse activities' and these include 'assessment and evaluation of individual student health and behavior patterns; conferences with teachers and parents; and routine follow-up on reported health concerns of students.' Rayborn stresses the Supreme Court's caution about over-reliance on written job descriptions, . . but she fails to create any genuine issue of material fact as to whether this speech was made pursuant to her official duties as school nurse. Rayborn has not shown that Hughes and Bourgeois violated her first amendment right as an employee 'to speak as a citizen addressing matters of public concern.'. . Thus, Hughes and Bourgeois's qualified immunity defense prevails, and Rayborn's § 1983 claim against them fails.")

Turner v. Lieutenant Driver, 848 F.3d 678, 685-90 (5th Cir. 2017) ("The district court's analysis rested on the second, 'clearly established,' prong, so we begin there. . . .At the time in question, neither the Supreme Court nor this court had determined whether First Amendment protection extends to the recording or filming of police. . . Although Turner insists, as some district courts in this circuit have concluded, that First Amendment protection extends to the video recording of police activity in light of general First Amendment principles, . . . the Supreme Court has 'repeatedly' instructed courts 'not to define clearly established law at a high level of generality': 'The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.' . . Thus, Turner's reliance on decisions that 'clarified that [First Amendment] protections ... extend[ ] to gathering information' does not demonstrate whether the specific act at issue here—video recording the police or a police station—was clearly established. . . The district court stated that circuit courts 'are split as to whether or not there is a clearly established First Amendment right to record the public activities of police.' The circuit courts are not split, however, on whether the right exists. The First and Eleventh Circuits have held that the First Amendment protects the rights of individuals to videotape police officers performing their duties. . . In *American Civil Liberties Union v. Alvarez*, the Seventh Circuit explained that the First Amendment protects the audio recording of the police and concluded that an Illinois wiretapping statute, which criminalized the audio recording of police officers, merited heightened First Amendment scrutiny because of its burdens on First Amendment rights. . . No circuit has held that the First Amendment protection does *not* extend to the video recording of police activity, although several circuit courts have explained that the law in their respective circuits is not clearly established while refraining from determining whether there is a First Amendment right to record the police. . . We cannot say, however, that 'existing precedent ... placed the ... constitutional question *beyond debate*' when Turner recorded the police station. . . Neither does it seem that the law 'so clearly and unambiguously prohibited [the officers'] conduct that "*every* reasonable official would understand that what he is doing violates [the law]."'. . In light of the absence of controlling authority and the dearth of even persuasive authority, there was no clearly established First Amendment right to record the police at the time of Turner's activities. All three officers are entitled to qualified immunity on Turner's First Amendment claim. . . . Although the right was not clearly established at the time of Turner's activities, whether such a right exists and is protected by the First Amendment presents a separate and distinct question. . . Because the issue continues to arise in the qualified immunity context, . . we now proceed to determine it for the future. We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions. . . .We agree with every circuit that has ruled on this question: Each has concluded that the First Amendment protects the right to record the police. . . .This right, however, 'is not without limitations.'. . Like all speech, . . filming the police 'may be subject to reasonable time, place, and manner restrictions.'. . In this case, however, we need not decide which specific time, place, and manner restrictions would be reasonable. . . Nonetheless, we note that when police departments or officers adopt time, place, and manner restrictions, those restrictions must be 'narrowly tailored to serve a significant governmental interest.'. . That said, to be constitutionally

permissible, a time, place, and manner restriction 'need not be the least restrictive or least intrusive means of serving the government's interests.'")

Turner v. Lieutenant Driver, 848 F.3d 678, 696-97 (5th Cir. 2017) (Clement, J., dissenting as to Parts III.A.2 & III.B.1.b) ("I respectfully dissent from the majority's dicta purporting to clearly establish a First Amendment right to film the police and from the majority's reversal of the district court's grant of qualified immunity to Officers Grinalds and Dyess regarding Turner's unlawful arrest claim. . . .The majority does not determine that the officers here violated Turner's First Amendment rights—perhaps because it would be reasonable for security reasons to restrict individuals from filming police officers entering and leaving a police station. Because the majority does not hold that the officers actually violated the First Amendment, 'an officer acting under similar circumstances' in the future will not have violated any clearly established law.")

Griggs v. Brewer, 841 F.3d 308, 315-16 (5th Cir. 2016) ("In assessing Brewer's conduct under the defense of qualified immunity, we need not determine whether an actual constitutional violation occurred. The question for us is whether Brewer's conduct was unreasonable in the light of clearly established law. In this instance, Griggs points to no authority establishing that it was unreasonable for an officer to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect. Griggs actively resisted and refused to comply with the officers' clear and audible commands. Although the officers might have used less forceful conduct, there was no settled authority to put Brewer on notice that his use of force in such circumstances violated Griggs's constitutional rights. . . . Although the parties have different 'spins' on the facts, the pertinent objective facts, demonstrated by testimony and the video, are undisputed. In the light of this evidence, we conclude that no material fact issue exists and that none of Officer Brewer's conduct in effecting Griggs's arrest was objectively unreasonable in the light of clearly established law.")

Zimmerman v. Cutler, 657 F. App'x 340 (5th Cir. 2016) ("Like the officers in *McKenney* and *Cockrell*, Harris used a single Taser shot to stop a fleeing person reasonably suspected of a misdemeanor. Although the crimes Zimmerman was suspected of committing were relatively minor, 'Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'. . We conclude that at the time of Zimmerman's arrest it was not clearly established (so as to give Harris notice) that a single shot or use of a Taser to halt a fleeing misdemeanor suspect would amount to excessive force.")

Howell v. Town of Ball, 827 F.3d 515, 520, 523-26 (5th Cir. 2016), *cert. denied,* 137 S. Ct. 815 (2017) ("Although we hold that Howell asserts a violation of his right of free speech, we further hold that the right at issue was not 'clearly established' at the time of his discharge. . . . Howell contends here that the defendants violated his First Amendment rights by firing him for cooperating with the FBI investigation into the FEMA fraud. Howell emphasizes that, under the Supreme Court's recent decision in *Lane*, the relevant question is whether the speech at issue is ordinarily within the scope of an employee's duties. . . According to Howell, his ordinary

professional obligations as a police officer for the town of Ball did not include secretly providing information to an outside law enforcement agency regarding crimes committed by coworkers and other municipal employees, or secretly participating in an external agency's investigation into municipal corruption. Howell has offered evidence that his involvement in the FBI investigation was outside the ordinary scope his professional duties. Under *Garcetti* and *Lane*, the 'proper inquiry is a practical one,' and focuses solely on whether the speech at issue is *ordinarily* within the scope of the employee's professional duties. . . Howell's statements to the FBI were made outside the normal chain of command and without the knowledge or permission of anyone else in the police department. . . . [W]e decline to infer solely from a Louisiana law enforcement officer's non-specific duty to 'detect and prevent crime' that Howell, as a local police officer, had an ordinary duty to participate secretly in an FBI investigation of coworkers' and superiors' illegal conduct. In sum, Howell asserts that it was never part of his normal job duties, secretly and without departmental authorization, to aid in an FBI investigation of coworkers and superiors, much less to record surreptitiously coworkers' conversations at the FBI's request. The defendants offer no evidence to the contrary, other than the all-encompassing, judicially established general description of a police officer's professional responsibilities in the state of Louisiana, which, as we have stated, cannot be considered dispositive. Accordingly, the district court erred in finding that Howell's involvement in the FBI investigation was in furtherance of his ordinary job duties, and thus was not entitled to First Amendment protection. . . .But we must move further down the road to consider whether the district court's *Garcetti* error ultimately affects Howell's claims. . . .At the time that Howell was fired, *Garcetti*'s distinction between speech made pursuant to official duties and speech made as a private citizen was relatively new, and this court had not considered it in the context of an action involving a police officer's statements to an outside law enforcement agency, or in the context of a law enforcement officer's assistance with an outside agency's investigation. *Garcetti*, by its own admission, did not 'articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.'. . Furthermore, the Supreme Court did not emphasize that only speech made in furtherance of an employee's 'ordinary' job duties is not protected until nearly three years after Howell was discharged. *See Lane*, 134 S. Ct. at 2369; *see also Gibson*, 773 F.3d at 668 (acknowledging that, although *Lane*'s insertion of the qualifier "ordinary" did not meaningfully alter *Garcetti*'s original test, it does provide additional guidance regarding what speech falls within an employee's official duties); *Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014) ("In particular, the use of the adjective 'ordinary'—which the [C]ourt repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*."). The lack of the application of *Garcetti* to similar facts at the time of Howell's discharge, coupled with the Supreme Court's only recent clarification of *Garcetti*'s citizen/employee distinction in *Lane*, compels us to hold that the Board defendants did not violate a 'clearly established' constitutional right when voting to fire Howell. . . We thus affirm the district court's grant of qualified immunity to the Board defendants.")

Jackson v. Ladner, 626 F. App'x 80, 87-89 (5th Cir. 2015) ("At the time Hill requested and obtained access to M.J.'s Facebook messages—in September 2007—no precedent had held that the Fourth Amendment proscribed Hill's actions, *viz.*, the search of a student's electronic

communications pertaining to school activities based on a reasonable belief that those communications directed threats and offensive language to another student about school activities and where those communications were a continuation of a quarrel that began during a school-related activity. To the contrary, as explained above, the Supreme Court's 1985 decision in *T.L.O.* held that a public school official ordinarily may search a student (and in the circumstances of that case, the student's purse) if, at the inception of the search, the official has a reasonable suspicion 'that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.'. . The Court qualified that rule by stating that '[s]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'. . It was not until 2009 that the Court clearly established that the Fourth Amendment prohibited the strip search of a 13–year–old female student upon reasonable suspicion that she had brought forbidden prescription and over-the-counter medications to school. . . However, in light of the uncertainty about the scope of schools' authority to conduct strip searches pursuant to *T.L.O.*, the Court in *Redding* granted qualified immunity to the school officials notwithstanding the fact that the strip search in that case violated the Fourth Amendment. . . Similar reasoning compels the grant of qualified immunity here. . . .Accordingly, while we express no opinion regarding whether the individual defendants' conduct violated the Fourth Amendment, we conclude that the defendants are nevertheless entitled to qualified immunity with respect to M.J.'s constitutional privacy claim because the right asserted by plaintiffs was not 'clearly established' as of September 2007 in light of the particular facts of this case. . . .[W]hile these general First Amendment principles were firmly established in 2007, this is not dispositive of our inquiry into whether M.J.'s First Amendment rights were 'clearly established' at the time of defendants' conduct given the unique facts of this case. . . Rather, consistent with our preceding Fourth Amendment analysis, we also must determine whether or not it 'would be clear' to a reasonable school official in the defendants' position that punishing M.J. for the content of her Facebook messages would violate the First Amendment given the particular circumstances here. . . .[W]hile the speech at issue in *Porter* occurred entirely outside the school environment, . . . the off-campus speech at issue here arose during and in the course of school-related activities and was a continuation of a quarrel that began on the bus ride home from a school-related event. Moreover, unlike in *Porter*, the undisputed summary-judgment evidence shows that M.J. was not suspended *from school* on the basis of her speech but rather suspended from her participation on the cheer squad. Our careful review of relevant case law has uncovered no intervening precedent between *Porter* and the underlying events here that would provide 'every reasonable [school] official' with sufficient notice that the defendants' actions violated the First Amendment. . . Thus, while we express no opinion as to whether the defendants' conduct conflicted with the First Amendment, we nevertheless conclude that the district court erred in denying the defendants qualified immunity on M.J.'s free-speech claim given the unique factual circumstances of this case.")

Carroll v. Ellington, 800 F.3d 154, 172-73 (5th Cir. 2015) ("The Supreme Court recently held that, as of 2013, 'federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a

warrant while in hot pursuit of that suspect.' *Stanton v. Sims,* 134 S.Ct. 3, 5 (2013) (per curiam). The Court held that an officer who entered a home in 2008 in hot pursuit of a suspected misdemeanant was therefore entitled to qualified immunity because the law was not clearly established at the time of the officer's conduct. . . The Court specifically noted that '[i]t is especially troubling that the Ninth Circuit would conclude that Stanton was plainly incompetent—and subject to personal liability for damages—based on actions that were lawful according to courts in the jurisdiction where he acted,' referring to state courts in California. . . Here, like the California courts mentioned in *Stanton,* Texas courts have upheld warrantless entries in hot pursuit of persons suspected of committing the misdemeanor offense of evading detention or arrest. . . The Carrolls do not point to authority that the law on hot pursuit of misdemeanor suspects was any clearer in 2006, when Viruette entered the residence, than in 2008, when the Supreme Court ruled the law was not then clearly established. . . Therefore, the Carrolls have not met their burden, . . . and Viruette is entitled to qualified immunity—though we express no view on whether Viruette's entry into Barnes's home was constitutional.")

Carroll v. Ellington, 800 F.3d 154, 174-77 (5th Cir. 2015) ("[T]he *initial* application of the Taser to the seated and unarmed Barnes on suspicion of vandalism and trespass presents a difficult question whether a reasonable jury could find this first use of force to be clearly and objectively excessive. We decline to reach the close constitutional question and instead decide the case on the second prong of qualified immunity. . . The issue, then, is whether an officer's application of a Taser to an unarmed, seated suspect who fails to comply with an order to get on the ground is 'objectively unreasonable in light of clearly established law.'. . We conclude that it is not. Testimony at trial and case law establish that officers are trained to use nonlethal force to gain compliance if a subject actively resists arrest and does not comply with verbal task directions to get on the ground. . . . Whether a Taser could be used to gain compliance in this circumstance was not clearly established in 2006. The en banc Ninth Circuit confronted a similar situation in *Mattos v. Agarano,* 661 F.3d 433 (9th Cir.2011). . . .The court held that the use of force was excessive, but concluded that, as of 2004, the law was not clearly established and granted qualified immunity. . . . Similarly, the Sixth Circuit held that 'it was [not] clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force.' *Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 509 (6th Cir.2012). We agree with the Ninth Circuit's and the Sixth Circuit's conclusion that, as of October 2006, the law was not clearly established that using a Taser to gain compliance of a unarmed, seated suspect for resisting arrest and failing to follow verbal commands was clearly excessive and objectively unreasonable. . .The Carrolls point to no case clarifying the law between 2005 (when the Ninth Circuit found the law to be unclear) and the tasing in this case in October 2006. . . and we are aware of none. Therefore, we conclude that Deputy Viruette is entitled to qualified immunity on the Carrolls' excessive-force claim. . . .The law was clearly established at the time of the deputies' conduct that, once a suspect has been handcuffed and subdued, and is no longer resisting, an officer's subsequent use of force is excessive. . . Thus, the deputies are not entitled to qualified immunity as a matter of law for injuries Barnes sustained after he was handcuffed and restrained and after he stopped resisting arrest.")

De La Paz v. Coy, 786 F.3d 367, 369, 371-72, 375, 377-78, 380 (5th Cir. 2015), *rehearing and rehearing en banc denied by De La Paz v. Coy*, 804 F.3d 1200 (5th Cir. 2015) ("On appeal, both cases present the same fundamental question: can illegal aliens pursue *Bivens* claims against CBP agents for illegally stopping and arresting them? This question has not been squarely faced in our circuit, although two other circuits have held in the negative. *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir.2011) (no *Bivens* claim for constitutionally invalid immigration detention); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir.2009) (en banc) (no *Bivens* claim regarding extraordinary rendition of alien). Like those courts, we conclude that *Bivens* actions are not available for claims that can be addressed in civil immigration removal proceedings. Accordingly, we **REVERSE** and **REMAND** with instructions to dismiss both actions against the individual officers. . . . Our jurisdiction over qualified immunity appeals extends to 'elements of the asserted cause of action' that are 'directly implicated by the defense of qualified immunity [,]' including whether to recognize new *Bivens* claims. . . On appeal from a motion to dismiss, this court accepts all well-pleaded facts as true and views them in the light most favorable to the plaintiff. . . When this court reviews a denial of qualified immunity at the summary judgment stage, it does not assess the district court's factual findings, but decides whether those facts are material and whether, based on the undisputed material facts, the agents have qualified immunity. . . . On appeal, the agents present two issues. First, they argue that the INA and special factors bar *Bivens* claims in the immigration context. Alternatively, the agents assert qualified immunity, not for the traffic stops (at this stage), but only for the aliens' arrests and detentions. Because we hold that aliens involved in civil immigration enforcement actions cannot sue the arresting agents for simply stopping and detaining them, we need not decide whether the agents have qualified immunity. . . .The Supreme Court's later cases have disavowed that a *Bivens* suit is 'an automatic entitlement;' in fact, it is disfavored. . . . The Court has not created a new *Bivens* remedy in the last thirty-five years, although 'it has reversed more than a dozen appellate decisions that had created new actions for damages.'. . .We conclude that there is both an alternative process for protecting the Fourth Amendment rights of illegal aliens subjected to unconstitutional traffic stops and arrests, and special factors require denying a *Bivens* remedy for their claims arising out of civil immigration enforcement proceedings. . . .The absence of monetary damages in the alternative remedial scheme is not ipso facto a basis for a *Bivens* claim. . . .Once the legislature has chosen a remedial scheme, federal courts are not free to supplement it. Here, the implicit but emphatic message from Congress requires this court to abstain from subjecting immigration officers to *Bivens* liability for civil immigration detention and removal proceedings. . . . It is an easy exercise for aliens, even without an attorney, to file suit alleging, as in these cases, that there was no reasonable suspicion for their stops, arrests or detentions. Extending *Bivens* actions to millions of illegal aliens could cripple immigration enforcement with the distraction, cost, and delay of lawsuits, even as it exposed enforcement officers to personal liability simply for doing their job. In the final tally, the costs of judicially creating a new *Bivens* remedy significantly outweigh any largely conjectural benefits. On the second prong of the *Bivens* analysis, this is not a hard case. Were we a common law court empowered to craft a remedy for the alleged illegal traffic stops and arrests here (which we are not

as a result of the analysis on the first *Bivens* prong), we would desist for all the reasons recited above.")

Rice v. ReliaStar Life Ins. Co., 770 F.3d 1122, 1131-33 (5th Cir. 2014) ("This is not the first time we have encountered a tragic factual scenario like the one present here: a police officer, in an attempt to aid a potentially suicidal individual, entered without a warrant and killed the person the officer was trying to help. . . In these cases, we have resolved the case on the second prong of the qualified immunity analysis, holding that the officer was entitled to qualified immunity because, at the time of the incident, the law was not clearly established that it was unreasonable for an officer to enter without a warrant to address the threat an individual posed to himself. . . Having only held that the law was not clearly established, our Court has not yet resolved the constitutional question these cases present: whether the exigent circumstances exception to the warrant requirement may allow for a warrantless entry based on the threat an individual poses to himself. Today we reach that issue and hold that the threat an individual poses to himself may create an exigency that makes the needs of law enforcement so compelling that a warrantless entry is objectively reasonable under the Fourth Amendment. . . . Our decision is consistent with the decisions of our sister circuits. [collecting cases] Turning to the facts of this case, we hold that Arnold did not violate Rice's Fourth Amendment rights when he entered Rice's home without a warrant because he had an objectively reasonable belief that Rice would imminently seriously injure himself. After Craig's 911 call, Arnold knew the following: Rice was suicidal; Rice had a gun; and Rice had been drinking and was sitting in his truck holding a gun to his head. Based on these facts, it was objectively reasonable for Arnold to believe he needed to protect Rice from imminent injury. . . .Finally, the fact that Arnold's entry into Rice's home may have violated departmental policies does not deprive him of qualified immunity. Admittedly, the fact that Arnold allegedly failed to follow departmental policy makes his actions more questionable, because it is questionable whether it is objectively reasonable to violate such a departmental rule. . . .Violating a departmental regulation, on its own, is not sufficient to deprive Arnold of qualified immunity. . . .Thus, we hold the district court did not err in granting Arnold's motion for summary judgment on the warrantless entry claim because Arnold is entitled to qualified immunity.")

Velasquez v. Audirsch, 574 F.3d 476, 480-83 & n.3 (5th Cir. 2014) ("The district court's analysis was arguably correct in evaluating the merits of the Velasquezes' underlying constitutional claim . . . . We express no opinion on the first step, whether the plaintiff has shown a violation of a constitutional right. . . . [H]owever, this analysis misconstrues qualified immunity doctrine. As discussed above, the ultimate question is not whether the Officers' actions were reasonable under the Fourth Amendment; the question is whether *the law* at the time of the Officers' entry into the Velasquezes' home *clearly established* that their actions were unreasonable. The Supreme Court's decision in *Ryburn v. Huff,* 132 S.Ct. 987 (2012) (per curiam) leads us to the inescapable conclusion that the law was not clearly established in the circumstances here. . . .Applying the Court's guidance from *Ryburn* to the facts here, the law at the time of the Officers' entry into the Velasquezes' home did not clearly establish that the officers were unreasonable in believing the threat Efrain posed to himself or others constituted exigent circumstances. . . . The Velasquezes

do not direct this Court to precedent clearly establishing the Officers' conduct here was unlawful, and we are aware of none. The Velasquezes do not respond to *Ryburn* or even cite it. Thus, accepting the Velasquezes' version of all disputed facts, 'reasonable police officers in [the Officers'] position could have come to the conclusion that the Fourth Amendment permitted them to enter the [house based on the] objectively reasonable basis for fearing that violence was imminent.'. . Therefore, the Officers are entitled to qualified immunity.")

Doe v. Robertson, 751 F.3d 383, 388-92 & n.14 (5th Cir. 2014) ("We conclude that the Complaint contains well-pleaded factual allegations that Robertson and Rosado had actual knowledge both of the Service Agreement violations and of the violated provision's objective of preventing sexual assault. . . . Stated simply, the Complaint alleged that Robertson and Rosado were aware both of violations of the Service Agreement provision requiring at least one transport officer to be the same gender as that of transported detainees, and of the provision's assault-preventing rationale. . . . Plaintiffs *did* allege that Robertson and Rosado had actual, subjective knowledge of the Service Agreement violations. . . And as already explained, this allegation is not a mere 'naked assertio [n]'; it is supported—though not *proven*—by the additional factual allegations recounted above. . . .We accordingly conclude that Plaintiffs properly alleged that Robertson and Rosado had actual knowledge both of the violations of the Service Agreement provision and of that provision's assault-preventing objective. . . .Accepting the truth of the facts as alleged, we next consider whether these facts are sufficient to nudge the *Bivens* claim across the 'plausibility' threshold. . . That is, we must decide whether Robertson and Rosado's knowledge of violations of the Service Agreement provision prohibiting a lone male officer from transporting female detainees, where they also knew the provision aimed to prevent sexual assault, . . . make plausible Plaintiffs' claim that Robertson and Rosado were deliberately indifferent to a substantial risk of serious harm, in violation of 'clearly established' law. . . Even presuming the truth of their factual allegations, we conclude that Plaintiffs' claim is not plausible because no clearly established law provides that violations of contractual terms that aim to prevent sexual assault are 'facts from which the inference could be drawn that a substantial risk of serious harm exists.'. . .Here, even if Robertson and Rosado knew of the Service Agreement violations, no clearly established law demonstrates that these contractual violations are sufficiently proximate to a substantial risk of serious harm. . . . Although Robertson and Rosado were allegedly aware of ICE's past struggles with sexual assault in general, the Complaint fails to allege any 'longstanding, pervasive, well-documented, or expressly noted' risk of assaults either at Hutto or during detainee transports. . . Here, we simply cannot equate knowledge of the Service Agreement violations with the violation of a 'clearly established' constitutional right. . . .Accepting the truth of Plaintiffs' factual allegations, we hold that no clearly established law provides that an official's knowledge of contractual breaches and of the breached provision's aim to prevent sexual assault of detainees, standing alone, amounts to deliberate indifference in violation of a detainee's Fifth Amendment rights, because no controlling authority provides that such breaches are 'facts from which the inference could be drawn that a substantial risk of serious harm exists.'. . Accordingly, because the Complaint did not plausibly allege the violation of a 'clearly established' constitutional right, Robertson and Rosado are entitled to qualified immunity . . . and the district court erred in denying their motion to dismiss. .

. . We hold only that it is not clearly established that *Farmer* extends to the facts alleged here, and do not decide whether this case presents any constitutional violation.")

Stauffer v. Gearhart, 741 F.3d 574, 584, 586, 587 (5th Cir. 2014) ("We need not decide whether Stauffer's rights were actually violated, because even if they were, Stauffer has not proven that those rights were clearly established at the time of the alleged violations. . . .Even assuming the applicability of *Mann* and *Green*, Stauffer has not shown that the contours of his right to receive the magazines was 'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'. . . In sum, Stauffer did not have a clearly established right to receive the magazines at the time that they were confiscated. He has not pointed to any case law indicating that Defendants should have reasonably known that he had a right to the magazines. His claim for damages therefore fails.")

Whitley v. Hanna, 726 F.3d 631, 649, 653-55 (5th Cir. 2013) (Elrod, J., concurring only in the judgment) ("I write separately to address Whitley's § 1983 deliberate-indifference claim against Ranger Hanna. Taking Whitley's allegations as true, Hanna made a conscious decision to allow a fifty-five-year-old law enforcement official to engage in predictable, preventable, and yet repeated sexual assaults on a fifteen-year-old participant in a law-enforcement-learning program. Thus, at this early stage of the case, I would hold that Whitley states a plausible § 1983 claim. I concur in the judgment, however, because Whitley cannot overcome Hanna's assertion of qualified immunity. . . . The implicit message in the majority opinion's deliberate-indifference analysis is that an officer can escape § 1983 liability for a conscious endangerment of a victim's constitutional rights, provided that he acted with good intentions. . . . No matter how well-intended, investigatory and prosecutorial strategies must yield to the inviolable constitutional rights of those involved (typically the defendant, but here the victim). . . .In short, while Hanna may have preferred perfect proof of Ariaz's sexual abuse, video or eyewitness evidence was by no means a mandatory prerequisite to Whitley's rescue. I would hold at this preliminary stage that Hanna's alleged deliberate choice to prioritize Ariaz's eventual prosecution over Whitley's immediate safety plausibly constitutes deliberate indifference to a known risk of constitutional violations. . . . I would hold that Hanna lacked fair notice that his conduct would amount to a constitutional violation. . . Although there is no debate that a child has an inviolable right to bodily integrity, . . .our case law regarding an individual's obligation to intervene in incidents of child sexual abuse arises almost exclusively in the context of school officials. . . The other analogous body of law arises in bystander-liability cases, in which we require both actual presence at and acquiescence in the underlying constitutional violation. . . There simply is not enough controlling or persuasive authority to conclude that every reasonable official in Hanna's position would understand that what he was doing violated the law. For that reason, Hanna is entitled to qualified immunity. . . .This case is about a state actor's knowing, deliberate choice not to intervene despite a substantial risk of continued statutory rape by a public official, in hopes of obtaining direct evidence for a conviction. While the underlying law-enforcement goal may be laudable, it must bend where a constitutional right is in play. Therefore, I would hold that Whitley states a plausible deliberate-

indifference claim under § 1983. Nevertheless, I concur in the judgment because Hanna is entitled to qualified immunity.")

Carty v. Rodriguez, No. 11–40253, 2012 WL 851622, at *2-*4 (5th Cir. Mar. 14, 2012) (not reported) ("Recent decisions suggest that the Supreme Court continues in its retreat from the old *Saucier* two-step analysis. In *Camreta v. Greene*, . . . using stronger language than before, the Court clarified that lower courts '*should* address *only* the immunity question' in the circumstances outlined in *Pearson.* The *Camreta* Court further cautioned that lower courts should 'think hard, and then think hard again' before unnecessarily deciding the merits of a constitutional issue, and thus risk 'turning small cases into large ones.'. . Then, only days later, in *Ashcroft v. al-Kidd*,. . . the Court cautioned that we should 'think carefully before expending "scarce judicial resources" to resolve difficult and novel questions of constitutional or statutory interpretation that will "have no effect on the outcome of the case."'. . On appeal, Defendants contend that Plaintiff failed to show (1) a violation of a constitutional right and (2) that the alleged constitutional right was clearly established at the time of the incident. We address the second question first. . . The district court found that a constitutional right was clearly established at the time of the Defendants' alleged misconduct, generally relying on a clearly established constitutional right to bodily integrity and life recognized in cases involving the sexual abuse of children. To support her position that Defendants' deliberately indifferent conduct caused Carty's death and thus violated his substantive due process right to bodily integrity and life, Plaintiff relies principally on Fifth Circuit decisions recognizing a student's right to be free from physical abuse by school employees. . . The court has grounded this right in the student's substantive due process right to bodily integrity. . . Under the second prong of the qualified immunity analysis, it cannot be said that this line of authority provides clearly established law for Plaintiff's position. These cases are not 'sufficiently similar' to the facts here [My note: plaintiff's husband died as result of injury sustained during training exercise at academy for state police] to have given the Defendants 'fair warning' that their conduct violated constitutional rights. . . That these cases typically involved sexual abuse, and an adult intentionally taking advantage of a child under his or her care, sufficiently demonstrates their inadequacy for giving 'reasonable warning' to the Defendants in this case. . . Plaintiff fails to persuade us that Defendants violated a clearly established right.")

Sama v. Hannigan, 669 F.3d 585, 592, 594, 595 (5th Cir. 2012) ("Exercising our discretion under *Pearson v. Callahan*, we may analyze and resolve this issue under the 'clearly established' prong of the qualified immunity test. Because Sama did not meet her burden of demonstrating Benoit's and Hannigan's conduct was not objectively reasonable in light of clearly established law, the district court did not err in dismissing the case. Raising a fact issue as to whether she consented to removal of her ovary did not suffice to meet her burden regarding clearly established law. . . .In light of all of these circumstances, we cannot say that the law is, or was at the time of the defendants' conduct, clearly established such that a reasonable official in Benoit's and Hannigan's position would understand that their conduct violated Sama's Fourteenth Amendment due process rights. Sama had the burden to negate qualified immunity. Accepting her assertions as true, and considering the other undisputed facts in the record before us, Sama has not cited, and we have not

located, a Supreme Court or circuit court decision holding that a violation occurred under similar circumstances, in which an inmate had consented to at least part of the treatment provided, the additional treatment was deemed medically necessary as well as necessary to complete the consented-to procedure that was underway, and the attending physicians determined that it would be potentially life-threatening to end the surgery without removing the ovary and completing the radical hysterectomy. The few circuit and district court cases involving somewhat similar factual situations provide support for the position that an inmate's liberty interest in such circumstances is outweighed by the state's interests and that a reasonable person in the defendants' position could not have believed his actions violated the Fourteenth Amendment. . . . We are not presented with a proceeding in which Sama is seeking to prevent the State from going forward with treatment against her will. We are looking in hindsight at physicians' actions to determine if the law was so clearly established in this area that it 'compel[s] ... the conclusion for every like-situated, reasonable government agent that what [the] defendant [was] doing violate[d] federal law *in the circumstances*.' This is a question of law and one which this court routinely answers in qualified immunity cases, even if the district court did not reach it. It was Sama's burden to negate the applicability of qualified immunity. She did not satisfy that burden. . . .In sum, the law governing Fourteenth Amendment claims involving unwanted medical treatment in the prison context is far from certain. Given the dearth of case law and the existence of at least some case law supporting the position that Hannigan's and Benoit's conduct was not contrary to clearly established law, Sama has failed to rebut the defendants' entitlement to qualified immunity on her Fourteenth Amendment claim, and summary judgment was appropriate." footnotes omitted)

Morgan v. Swanson, 659 F.3d 359, 371, 382-90 (5th Cir. 2011) (en banc) (opinion of Benevides, J., holding for majority that "the principals are entitled to qualified immunity because clearly established law did not put the constitutionality of their actions beyond debate. . . . The principals are entitled to immunity because the general state of the law in this area is abstruse, complicated, and subject to great debate among jurists. At the time of the incidents in question, neither a single 'controlling authority' nor a 'robust consensus of persuasive authority' had held that the First Amendment prohibits school principals from restricting the distribution of written religious materials in public elementary schools. Nor had a single federal court of appeals definitively held that *Tinker*-based speech rights inhere in public elementary schools, let alone defined the scope of those rights with a high degree of particularity. The generalized prohibition against viewpoint discrimination is far too abstract to clearly establish the law in this case, and the circuits are divided over its application in public elementary schools. The speech rights asserted in this case cannot be said to be 'clearly established' when balanced against competing Establishment Clause concerns that inhere in public elementary schools. . . .The defendants in this case are entitled to qualified immunity because existing precedent failed to place the constitutionality of their conduct 'beyond debate.' Like other educators to have contended with religious speech in public schools, Swanson and Bomchill had to make on-the-ground decisions balancing constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. The law tasked them with maintaining the most delicate of constitutional balances:

between students' free-speech rights and the Establishment Clause imperative to avoid endorsing religion. But it failed to provide any real, specific guidance on how to do so. Moreover, almost all of the federal courts of appeals to have to considered speech restrictions in this area have found no constitutional violation in the first instance, including one case with facts nearly identical to those now before us. And no federal court of appeals has *ever* denied qualified immunity to an educator in this area. We decline the plaintiffs' request to become the first." [footnotes omitted])

Morgan v. Swanson, 659 F.3d 359, 396, 401-09 (5th Cir. 2011) (en banc) (opinion of Elrod, J., holding for the majority on prong one of the qualified immunity analysis that "this right–to engage in private, non-disruptive, student speech–is protected from viewpoint discrimination under the First Amendment, and that the right extends to elementary-school students. . . . Under *Pearson v. Callahan*, courts have discretion to decide which of the two prongs of qualified immunity to tackle first. . . Although courts should 'think hard' before exercising this discretion, 'it remains true that following the two-step sequence–defining constitutional rights and only then conferring immunity–is sometimes beneficial to clarify the legal standards governing public officials.'. . Here, the students argue that the principals violated their First Amendment rights by discriminating against their speech because of its religious viewpoint. Based on the facts alleged, we agree. . . . In short, whatever latitude school officials may have with respect to school-sponsored speech under *Hazelwood*, or with government-endorsed speech under the Establishment Clause–that is, speech that could be erroneously attributed to the school–outside of that narrow context, viewpoint discrimination against private, student-to-student, non-disruptive speech is forbidden by the First Amendment.")

Morgan v. Swanson, 659 F.3d 359, 413, 414 (5th Cir. 2011) (en banc) (opinion of Eldrod, J., concluding for minority that "the principals had fair, unmistakable warning that private, non-disruptive student speech is protected from viewpoint discrimination, and that any attempts to censor student speech should be undertaken only on the firmest of grounds. Even if the Supreme Court's unbroken line of decisions were somehow not enough to give school districts fair warning that the First Amendment prohibits viewpoint discrimination against non-disruptive, private student speech, moreover, the Department of Education (DOE) has made clear to schools that viewpoint discrimination against religious speech in schools is prohibited. In sum, the Supreme Court, the Fifth Circuit, and the United States government all provided fair warning to the principals that elementary school students have a right to be free from viewpoint discrimination. That school officials nonetheless discriminated based on viewpoint under the facts alleged is not a failure of our precedent or that of the Supreme Court, but rather of the officials themselves.")

Kovacic v. Villarreal, 628 F.3d 209, 213-15 (5th Cir. 2010) ("In light of the Supreme Court's decision in *Pearson v. Callahan*, we are permitted to consider the question of whether a defendant is entitled to qualified immunity without determining whether or not the plaintiff's constitutional rights were violated. . . .The plaintiffs argue that a 'special relationship' existed between Kovacic and the defendant officers because he had been in their custody at *one point* in *time* and thus the officers should be liable for the private violence perpetrated against him by the hit-and-run driver.

Plaintiffs have not referenced a single case in either the district courts or the court of appeals of this circuit in which state actors were held liable for private harm caused to an individual after he was released from custody. . . . As stated above, once a defendant invokes qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity. The plaintiffs in this case have not presented any evidence to contradict Rubio's and Villarreal's affidavits that Kovacic demanded to be let out of the squad car in the Speedy Stop parking lot and thus was released from their custody at his request. There is also no evidence in the record that shows that the officers had any reason to think that Kovacic likely would not call his wife to pick him up as he indicated, or that the officers were aware that Kovacic was lacking the resources to secure another way home. . . . A number of courts have interpreted *DeShaney* to allow a second exception to the rule against state liability for violence committed by private actors in situations where 'the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury.'. . The Fifth Circuit has not adopted the 'state-created danger' theory of liability. . . . Given the lack of any contrary precedent, we hold that reasonable, competent officers would not conclude that it would violate Kovacic's constitutional rights to honor his request that he be let out at the Speedy Stop. No such constitutional law was then, or is now, clearly established. The defendant officers are entitled to qualified immunity, and the district court's denial of their motion for summary judgment is reversed.")

Morgan v. Hubert, 335 F. App'x 466, 2009 WL 1884605, at *4 (5th Cir. July 1, 2009) ("Federal courts now have the discretion to sidestep the preliminary inquiry-whether plaintiff has sufficiently alleged the violation of a constitutional right-and proceed directly to consider the right's clarity. . . In the context of the Eighth Amendment issue presented here, the order is of less importance because the obligation of prison officials to protect prisoners from violence at the hand of other inmates is clear. . .Thus, we will proceed directly to consider whether Morgan has alleged a substantial risk of serious harm of which Hubert was deliberately indifferent. If he has, then he has alleged the violation of a clear constitutional right.") [*See also Morgan v. Hubert*, 459 F. App'x 321 (5th Cir. 2012) (holding that because warden was not deliberately indifferent, warden was entitled to qualified immunity with respect to inmate's § 1983 Eighth Amendment claim.]

Pasco ex rel. Pasco v. Knoblauch, 566 F.3d 572, 579 (5th Cir. 2009) ("Until recently, we resolved government officials' qualified immunity claims under the strict two-part test mandated by the Supreme Court in *Saucier v. Katz*, deciding (1) whether facts alleged or shown by plaintiff make out the violation of a constitutional right, and (2) if so, whether that right was clearly established at the time of the defendant's alleged misconduct. . .However, the Supreme Court has revisited this rule and determined that the rigid two-step structure is no longer mandatory. . . Accordingly, as the Court did in *Pearson*, we will first consider whether the officer's conduct violated clearly established law. . . If we determine that the answer is no, qualified immunity will shield Knoblauch from suit.").

Ontiveros v. City of Rosenberg, Tex., 564 F.3d 379, 382, 385 (5th Cir. 2009) ("For several years, the Supreme Court required that the first of these criteria–whether plaintiffs' facts allege a

constitutional violation–must be decided at the outset. . .Recently, however, the Court reversed course, holding that 'courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . The district court's decision, rendered before *Pearson,* principally addressed the merits question whether Lt. Logan's use of deadly force was unconstitutional. We see no reason, post-*Pearson,* to alter that approach here. . . .[W]e agree with the district court that 'an officer could have reasonably believed that Ontiveros posed a threat of serious physical harm to himself or other officers' and that Lt. Logan's actions were reasonable under the circumstances as he described them. Because we hold that Lt. Logan did not violate Ontiveros's constitutional rights, we need not determine whether Lt. Logan would have had qualified immunity or whether the City of Rosenberg would have been liable had Lt. Logan's use of force violated the Fourth Amendment.").

SIXTH CIRCUIT

Brennan v. Dawson, No. 17-2210, 2018 WL 4961332, at *4-5, *7-8 & n.4 (6th Cir. Oct. 15, 2018) (not reported) ("We recently held in *Morgan v. Fairfield County* that the area five to seven feet from the home was part of the home's curtilage. . . The dashcam video from Dawson's police cruiser shows that he was within an arm's length from the home when he set out from the porch and began to walk the perimeter. And he remained within the curtilage as he continued around the home's perimeter, knocking on and peering into windows. Although the Fourth Amendment protects the curtilage, a police officer has an implied license to enter the curtilage and attempt to speak with the home's occupant, even if the officer lacks a search warrant. . . And until recently, this Court, along with the Third, Fourth, and Eighth Circuits, also recognized special circumstances under which a police officer may travel to the rear of the home without a warrant during a 'knock and talk' investigation. . . In *Hardesty*, we explained that when 'circumstances indicate that someone is home' and an officer's knocking at the front door goes unanswered, 'an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage.'. . We held that an officer may travel to the rear of the home when he has reason to believe that the occupant is inside but does not answer the front door. . . *Hardesty*, however, set no specific limitation on how long officers could continue to search for an occupant who they suspected was inside but was not answering the door. . . .This Court recently considered the viability of *Hardesty* and a related decision, *Turk v. Comerford*, 488 F. App'x 933 (6th Cir. 2012), and concluded that *Jardines* and *Collins v. Virginia*, 138 S. Ct. 1663 (2018), overruled both decisions. . . *Morgan*, 903 F.3d at 565. ("[I]n light of recent Supreme Court decisions, neither *Hardesty* nor *Turk* remains good law"). Thus, law enforcement officials cannot linger on the curtilage once they have exhausted the 'implied invitation extended to all guests,' even if they suspect that someone is inside. . . Here, even if *Hardesty* were still good law, Dawson arguably violated the Constitution. . . But regardless, that conclusion is now clear in light of *Morgan*. To be sure, Dawson's initial approach to the home and knocking on the front door to administer the breath test fell squarely under his implied license as established in *Jardines*. But Dawson overextended his stay. . . . A police officer simply cannot linger and continue to search the curtilage

of the home if his knocking at the front door goes unanswered. . . Those actions are inconsistent with the limits of the implied license recognized in *Jardines*. As a result, we hold that Dawson exceeded his implied license when he repeatedly entered and traveled through Brennan's curtilage over the course of ninety minutes and thus violated Brennan's Fourth Amendment rights. . . . Brennan argues that *Jardines* clearly establishes that Dawson could not linger on the curtilage for more than ninety minutes after no one inside the home answered the door. True, recent developments in our case law—including our decision to overturn *Hardesty* and *Turk* because of *Jardines*—leave no room for doubt that Dawson violated Brennan's constitutional rights. But the law was not so clear on February 21, 2015, which is the reference point we must use to determine whether Dawson is entitled to qualified immunity. To be sure, this is a close question. As discussed above, the court's decision in *Nyilas*, which found conduct like Dawson's unconstitutional, determined that the law was not clearly established largely because the Supreme Court did not decide *Jardines* before the conduct in that case. . . But the Court decided *Jardines* before Dawson's conduct, so that impediment to Brennan's recovery does not exist here. That said, we still hold that the law was not clearly established. When this Court affirmed the trial court's decision in *Nyilas*, we offered no view on the constitutionality of the conduct or the continuing viability of *Hardesty* and *Turk*. Instead, we held that the officers 'did not violate clearly established rules of constitutional law in these circumstances.'. . Thus, as of the time of the actions here, we cannot conclude that Dawson's conduct was clearly prohibited. . . .Because we continued to treat *Hardesty* as good law when the violation occurred, it was not clearly established that *Jardines* governed situations in which a police officer had reason to believe that someone was inside the home. . . .Thus, we hold that the law governing the scope of Dawson's implied license was not clearly established at the time of the violation and affirm the district court's decision to grant Dawson qualified immunity on Brennan's unlawful search claim. . . .The dissent takes issue with our conclusion regarding whether the law was clearly established at the time of the incident. To be sure, the dissent makes some good points and we agree with many of them. Our conclusion, however, is compelled by the standard for determining whether a legal principle is clearly established as set forth in *Wesby*. Here, the constitutionality of the officer's conduct was not 'beyond debate.'").

Brennan v. Dawson, No. 17-2210, 2018 WL 4961332, at *10-12 (6th Cir. Oct. 15, 2018) (Moore, J., dissenting) (not reported) ("The majority today determines that although Brennan's constitutional rights under the Fourth Amendment were violated, Officer Dawson is entitled to qualified immunity because Brennan's specific right to be free from a prolonged intrusion into his curtilage was not clearly established in February 2015. Although I emphatically concur that Brennan's Fourth Amendment rights were violated when Dawson walked into and around Brennan's curtilage for over an hour in an attempt to give him a breathalyzer test, I dissent from the majority's affirmance because I believe Brennan's constitutional rights were clearly established at the time of Dawson's conduct. The majority poses the question at issue in this case as 'whether it was clearly established that a police officer could not repeatedly enter and pass through the curtilage of the home when: (1) the officer had reasonable grounds to believe that someone was inside of the home; and (2) the officer was trying to conduct a probation check.'. .

However, in answering this inquiry, the majority primarily relies on *Hardesty v. Hamburg Twp.*, 461 F.3d 646 (6th Cir. 2006), and *Turk v. Comerford*, 488 F. App'x 933 (6th Cir. 2012), cases that the majority agrees did not consider the central question at issue here: the ability of an officer to *linger* in the curtilage of an individual's home while conducting a knock and talk. . . Rather than address Dawson's conduct specifically, these cases merely held that, when an officer has a reasonable belief that a suspect is at home and has not answered the door, the officer is permitted to 'take *reasonable steps* to speak with the person being sought out even where such steps require an intrusion into the curtilage,' including walking to the back door. . . . Neither *Hardesty* nor *Turk* suggests that an officer can linger in a suspect's curtilage for over an hour when investigating a suspect who the officer has reason to believe is home. At most, *Hardesty* and *Turk* put officers on notice that they are permitted to take '*reasonable* steps' to talk with the individual in the house. . . Under this correctly limited view of *Hardesty* and *Turk*, it is clear that the Supreme Court's decision in *Florida v. Jardines* (decided in 2013) prohibited Dawson's conduct in February 2015. . . Specifically, *Jardines* necessarily limited the temporal parameters of the 'reasonable steps' discussed in *Hardesty* and *Turk*. . . . [E]ven if Dawson understood that, under *Hardesty* and *Turk*, he was permitted to go to the back of Brennan's home, he was still allowed to take only the 'reasonable steps' necessary to confront Brennan, namely knocking, briefly waiting, and then leaving. Stated differently, just because our Circuit may not have explicitly stated until 2018 that the primary holding in *Hardesty* and *Turk* (if an officer has a reasonable belief that a suspect is at home and is refusing to answer the door, the officer is permitted to enter the curtilage and knock on the back door) could not survive *Jardines* or *Collins v. Virginia*, 138 S. Ct. 1663 (2018), does not mean that the validity of the secondary holding (officers may take only "reasonable steps") was similarly reliant on our decision in *Morgan*. . . . I conclude that in February 2015 the law was clearly established that, even if an officer was arguably permitted to walk to the back of a suspect's house to knock on their door, this authority was temporally limited by *Jardines* to a reasonably brief period and certainly could not be extended to over ninety minutes. Put simply, no reasonable officer could have concluded that, following the Supreme Court's decision in 2013 in *Jardines*, Dawson engaged in actions that 'any private citizen might do' while conducting a knock and talk for a probationer. . . Consequently, Dawson is not entitled to qualified immunity, and I respectfully dissent.")

Morgan v. Fairfield County, Ohio, 903 F.3d 553, 560-65 (6th Cir. 2018) ("Government officials sued in their individual capacities for constitutional violations are free from liability for civil damages unless (1) they violate a constitutional right that (2) was clearly established at the time that it was violated. . . Courts can address these two elements in any order. . . And although this decision turns on the second element—whether the law was clearly established—we have the ability, if not the responsibility, to clarify the state of the law in this circuit so that government agents can understand the limits of their power and that citizens will be protected when those limits are transgressed. For that reason, we address both parts of the qualified-immunity analysis. . . . Because the area surrounding Morgan's and Graf's house was curtilage, and curtilage is treated as part of the home for Fourth Amendment purposes, the officers' entry onto the curtilage could be justified only by a warrant or one of the recognized exceptions to the warrant requirement. It is

undisputed that the SCRAP unit had no warrant. As for exceptions to the warrant requirement, the county argues that the entry was justified for three reasons. None, however, is convincing. . . .The SCRAP unit was concerned about general drug activity at Morgan's and Graf's house. But the Fourth Amendment prohibited them from entering the property: they had no warrant, no exigent circumstances, and no other exception to the warrant requirement. A "knock and talk" by police was permitted 'precisely because that is "no more than any private citizen might do."'. . Thus, the officers' right to enter the property like any other visitor comes with the same limits of that 'traditional invitation': 'typically ... approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.'. . Certainly, '[a] visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.'. . Neither can the police. By doing so here, the SCRAP unit violated Morgan's and Graf's Fourth Amendment rights. . . . In determining the contours of the right, there is a tension between defining the right at too high a level of generality, on one hand, and too granular a level, on the other. There does not need to be 'a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate.'. . . In all, the most important question in the inquiry is whether a reasonable government officer would have 'fair warning' that the challenged conduct was illegal. . . For centuries, the common law has protected the curtilage of the house. . . And the Supreme Court long has held that the curtilage is 'considered part of the home itself for Fourth Amendment purposes.'. . That means that the police can enter the curtilage on the same terms that they can enter the rest of the home—no more, no less. . . Under those long-settled principles, warrantless searches 'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'. . A reasonable officer thus would understand that without a warrant or an exception to the warrant requirement, entering the curtilage violates a clearly established right. Despite these long-settled standards, one case from this circuit, although incorrectly decided, requires that we grant qualified immunity. That case, *Turk v. Comerford*, decided within a month of the "knock and talk" in this case, found that the law was not clearly settled against a factual background that was, in every material way, the same as here. . . Central to *Turk*'s analysis was our published decision in *Hardesty*, in which we held that '[if] knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage.'. . *Hardesty*'s extension of the knock-and-talk doctrine was, by its terms, limited to particular circumstances. . . And if our case law ended there, qualified immunity here would be improper. But in *Turk*, this court read *Hardesty* more broadly and reasoned that because some limited intrusions of the curtilage were allowed, it was not clearly established that surrounding a house for a "knock and talk" was in the category of unacceptable intrusions. . . Although *Hardesty* and *Turk* are outliers, Morgan and Graf cannot overcome their burden of showing that the law was clearly established at the time of the search in this case. In those two cases, this court should have reaffirmed long-settled Fourth Amendment principles. . . But it did not. And although unpublished cases do not upset the state of the law, in rare instances they can show that members of this court, during the same time period, facing the *exact* same question, did not think the law to be clearly established. And '[i]f judges ... disagree

on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'. . For that reason we affirm the district court's grant of qualified immunity to the officers in their individual capacities. Nevertheless, in light of recent Supreme Court decisions, neither *Hardesty* nor *Turk* remains good law. . . *Jardines* and, more recently, *Collins* made clear that, outside of the same implied invitation extended to all guests, if the government wants to enter one's curtilage it needs to secure a warrant or to satisfy one of the exceptions to the warrant requirement. . . Our acknowledgment that those cases are no longer good law does not affect the qualified-immunity analysis here, which looks to the law at the time of the challenged action. . . But it does put officers on notice that principles of *Jardines* and *Collins*—and not *Hardesty* or *Turk*—should guide their actions going forward.")

Carter v. Carter, 728 F. App'x 419, 423 (6th Cir. 2018) ("Carter argues that the force employed by the officer was per se excessive because the earlier strikes had incapacitated him such that he was, at most, passively resisting. . . Our precedents do suggest that officers cannot continue using force against an arrestee who has stopped resisting. . . . But the fact remains that the officers had the lawful authority to arrest Carter, and it is undisputed that his 'balling up' left the officers unable to place him in handcuffs because they did not have access to his hands. . . . That means that *some* amount of force was necessary to secure Carter's arrest, and the officer's decision to apply three to four modest punches, rather than, for instance, rolling him over or pulling his arms out from under him, was not constitutionally infirm. . . In other words, that the officers' use of force may not have been the only—let alone the best—method to secure Carter's arrest does not make it a constitutionally impermissible method of so doing. . . . Here the governmental interest in securing Carter's arrest outweighs Carter's interest in being free from a few modest strikes. Thus, even though we assume that Carter was merely passively resisting, the officer's use of force was still an objectively reasonable way to arrest him.")

Stanfield v. City of Lima, 727 F. App'x 841, 850-51 (6th Cir. 2018) ("Stanfield has cited no case that 'clearly establishes' that it is a violation of the law for an officer to 'take down' a suspect who is resisting arrest. Therefore, despite the fact that Montgomery violated Stanfield's constitutional rights, he is nevertheless entitled to qualified immunity on the excessive force claim because Stanfield has not demonstrated that it was 'clearly established' that such conduct was in violation of the law. . . .Garman fractured Stanfield's rib in an attempt to secure his hands, even as Montgomery was on top of Stanfield's back and Stanfield was saying that he was incapable of removing his arms from under himself. Of the cases Stanfield cited to demonstrate that the unlawfulness of this conduct was 'clearly established,' the most analogous is *Lawler*. . . . However, *Lawler* is readily distinguishable from the instant case because its reasoning was premised on the fact that the force took place 'in a booking room—beyond the point at which any threat could have been reasonably perceived.' . . As such, a reasonable officer would not be on notice that the reasoning in *Lawler* applied to situations outside of a booking room or in a context in which 'any threat could have been reasonably perceived.' Therefore, despite the fact that Garman violated Stanfield's constitutional rights, he is nevertheless entitled to qualified immunity on the excessive force claim. . . .Rode struck Stanfield in the leg twice with

his flashlight in an attempt to coerce Stanfield into giving Montgomery and Garman his hands. Of the cases Stanfield cited to demonstrate that the unlawfulness of this conduct was 'clearly established,' the most analogous is *Harris v. City of Circleville*, 583 F.3d 356 (6th Cir. 2009). . . .The important distinction here is the fact that the plaintiff in *Harris* was clearly subdued when the second officer administered the peroneal strikes. In the instant case, from the perspective of Rode, there was still a struggle taking place between the other two officers and Stanfield. As such, a reasonable officer would not be on notice that the reasoning in *Harris* applied to situations where a suspect was not subdued, or at least in handcuffs, like the plaintiff in *Harris*. Therefore, despite the fact that Rode violated Stanfield's constitutional rights, he is nevertheless entitled to qualified immunity on the excessive force claim.")

Stanfield v. City of Lima, 727 F. App'x 841, 852 (6th Cir. 2018) (Kethledge, J., concurring in part and concurring in the judgment) ("For substantially the reasons stated by the majority, I agree that the officers here did not violate Stanfield's clearly established rights. But I would also hold that they did not violate Stanfield's rights at all. The officers received a report that Stanfield was driving an RV around the city while intoxicated. They approached Stanfield in an unlit vacant lot, late at night. Stanfield was in fact obviously drunk and kept putting his hand in his jeans pocket, despite the officers' repeated demands that he not do that. Finally they told him they were going to pat him down. At that point—as the cruiser's dash-cam video makes clear—Stanfield resisted the pat-down search and then forcibly resisted the officers' attempts to handcuff him. In my view that resistance continued well past the point that the majority thinks it stopped, since for another 20 seconds the video shows Stanfield rolling around on the ground and trying to keep the officers from controlling his arms. And it was only after the fourth or fifth time that the officers told Stanfield to "put your hands behind your back," that he responded, "I can't." Under these circumstances, the officers' force—a knee to the ribs and a flashlight strike on his calf—was as calibrated as it needed to be. *See, e.g.*, *Rudlaff v. Gillispie*, 791 F.3d 638, 641 (6th Cir. 2015).")

Thornton v. City of Columbus, 727 F. App'x 829, 836-38 (6th Cir. 2018) ("In this circuit, the court 'consider[s] the officer's reasonableness under the circumstances he faced at the time he decided to use force.'. . Accordingly, '[w]e do not scrutinize whether it was reasonable for the officer to create the circumstances.'. . '[A] different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.'. .Lastly, in the use-of-force context, 'once the relevant set of facts is determined and all reasonable inferences are drawn in favor of the plaintiffs, to the extent supported by the record, the question of whether the [officers'] actions were objectively unreasonable is "a pure question of law."'. . But '*if* there is some evidence – more than a mere scintilla of evidence – that [the appellant], through his conduct, judged from the perspective of reasonable officers on the scene, did not give the officers probable cause to believe that he posed a serious threat of harm, a genuine fact dispute is created.'. . Analyzing the use of force from the perspective of a reasonable officer on the scene, we hold that the use of deadly force by the Officers in this instance was justified even though there are issues of fact concerning (1) whether Thornton saw or heard the Officers, (2) whether Thornton had time to comply with the Officer's orders, and (3) whether Thomson was actually facing or walking towards the Officers.

This is so, because what is undisputed is that the Officers responded to a report of a man threatening others with a gun while standing on a front porch of a residence. Further, as the Officers exited their police cruiser, several individuals informed the officers that Thornton had run inside the residence while possessing a firearm. After moving to the porch, the Officers witnessed Thornton emerge from the back of the house with a shotgun, in addition to seeing an armchair in the living room with an assault rifle resting on it. Moreover, there is no dispute that the Officers could have reasonably believed that the man with the shotgun was the same man who had, only moments earlier, threatened another person with a gun. Officers repeatedly ordered Thornton to drop the shotgun but Thornton failed to comply with the Officers' orders, and whether Thornton actually heard the commands has no bearing on this court's analysis. . . And though Thornton never pointed the shotgun at the Officers before they fired their weapons, the undisputed manner in which Thornton was holding the weapon combined with the short distance between himself and the Officers further leads this court to conclude that any reasonable police officer would believe that Thornton posed a serious physical threat that required a use of deadly force. Additionally, because the deadly threat posed by Thornton could have easily and quickly transformed into deadly action in a split-second, any reasonable police officer in the Officer's position would know that a decision to use deadly force would need to be rendered quickly. The Officers . . . did not have to wait for Thornton to raise his weapon before employing deadly force. . . Relatedly, this court has recently rejected a 'categorical rule that force can only be reasonable if a suspect raises his gun.'. . Accordingly, for the aforementioned reasons, the Officers did not violate Thornton's constitutional rights by utilizing force on him on April 21, 2013. Therefore, the district court properly granted summary judgment in favor of the Officers on Thornton's excessive force claim because the Officers were entitled to qualified immunity. We need not discuss the 'clearly established' prong of qualified immunity analysis on this claim either, because Thornton has failed to establish the violation of a constitutional right.")

Peffer v. Stephens, 880 F.3d 256, 264-66 (6th Cir. 2018) ("We need not address. . . whether there was a Fourth Amendment violation on the grounds that the affidavit did not properly allege that a crime had been committed. That is because we are convinced that there was no clearly established constitutional violation and therefore qualified immunity applies. Although we generally determine whether a constitutional violation occurred before we determine whether qualified immunity applies, we need not follow this order of inquiry when determining whether a constitutional violation occurred would require interpreting unsettled state law. . . .It is an open question of Michigan law whether a private citizen writing under the guise of a police officer to request an official to perform an official action constitutes an attempt to 'compel' action under § 750.215(1)(c). . . We therefore cannot say that it is clear that Michigan courts would find that a request from a (purported) police officer to assist minor children in (imagined) danger is not, as a matter of Michigan law, an attempt to 'compel' the recipient of the request to act. Accordingly, we hold that even if the sending of the letters were not criminal under Mich. Comp. Laws §§ 750.122(3)(a) and 750.215(1)(c), the law on this point was not clearly established. Sergeant Stephens thus would be protected by qualified immunity from liability for executing an otherwise valid search warrant seeking evidence that Mr. Peffer violated those criminal statutes.")

Thomas v. City of Eastpointe, 715 F. App'x 458, 460-62 (6th Cir. 2017) ("Before asking whether Officer Barr violated Thomas's rights, it makes sense to ask whether those rights were clearly established at the time of the incident. The reason is simple: If Thomas's rights were not clearly established, Officer Barr is entitled to qualified immunity. So we turn first to a 'particularized' determination based on the facts at hand. . . May an officer tase someone he reasonably perceives to be ignoring his commands and walking away? This circuit—and several others—have drawn the line at the suspect's 'active resistance.'. . If the suspect was actively resisting, use of a taser to subdue him was reasonable. If not, then tasing was unreasonable. . .We have found active resistance where a suspect physically struggles with police, threatens or disobeys officers, or refuses to be handcuffed. . . But when a suspect is 'compliant or ha[s] stopped resisting,' the law is clearly established that using a taser constitutes excessive force. . . This case does not fit cleanly into either camp. Officer Barr arrived on the scene to respond to emergency calls reporting an assault. He did not personally witness any violence. But following the officers' arrival, Thomas walked away from the officers without saying a word. The dash-cam video shows that Officers Barr and Menzer told Thomas to 'get on the ground' several times prior to tasing him. . . And though Thomas claims he never heard the officers' commands, we review only those facts that were 'knowable' to Officer Barr at the time of the incident. . . Officer Barr's commands were clearly audible, and Thomas's purported inability to hear him was not knowable. So we are left to consider whether, under the circumstances as they appeared to Officer Barr, clearly established law made it unreasonable for him to tase Thomas. . . On the one hand, Thomas was not verbally or physically aggressive toward Officer Barr. So this case differs from the active-resistance cases in which we found that tasing the suspect did not constitute excessive force. On the other hand, the facts indicate that Thomas was not entirely compliant either: He appeared to ignore police commands to get on the ground and instead walked away. Thomas's actions thus fall somewhere in the middle. We do not stand in this gray area alone. In *Cockrell*, this court concluded that nonviolent flight does not fit neatly into the active-resistance camp. . . One might argue that Thomas was not fleeing—he was simply walking in a direction opposite the officers. But a suspect who ignores an officer's order to stop and walks away can 'reasonably' be considered to flee, even where the suspect does not run. . . So even though Thomas's actions may not look like flight in the ordinary sense of the word, they constitute 'flight' under the law. And this court has not yet addressed whether tasing a suspect in flight violates his clearly established rights. . . This unresolved question provides all the answer that we need: How the law applied to this set of facts was not 'beyond debate' in May 2013. . .Thomas argues that Officer Barr should have warned him prior to deploying the taser. But however prudent it may have been for Officer Barr to warn Thomas, no clearly established law required him to do so. . . And in the absence of clearly established law, Officer Barr is entitled to qualified immunity. . . .The law is not clearly established that an officer cannot tase a suspect who refuses to comply with a police officer's commands and walks away. We cannot say then that 'every "reasonable official would have understood"' that tasing Thomas under these circumstances would violate his Fourth Amendment rights. . . Officer Barr is entitled to qualified immunity on this claim.")

Smith v. City of Wyoming, 821 F.3d 697, 714 (6th Cir. 2016) ("[W]e have found no cases holding that preventing the closure of the door to a home to briefly extend a consensual interview violates the Constitution. Smith cites no case law that clearly establishes this proposition. Surveying the opinions of our sister circuits, we have found only one—loosely—analogous case. . . . We disagree that existing Supreme Court precedent clearly establishes the law on this question. The relevant cases deal with intrusions that were unauthorized *ab initio,* not those that prolong an otherwise consensual encounter. . . And while an 'occupant ... may refuse to answer questions at any time' during a knock-and-talk, . . . Officer Riggs did not persist in questioning Smith after she attempted to close the door. Further, the facts of the Tenth Circuit case are starkly different from those here. In *Dalcour,* an officer kept her foot in the doorway of a home despite the occupant repeatedly attempting to slam the door shut, long enough for reinforcements to arrive. . . Here, by contrast, Smith's own deposition testimony shows that the entire encounter was consensual until Officer Riggs 'put his foot in the door,' causing Smith to 'pause[ ] briefly,' before Riggs removed his foot and allowed the door to close. Hence, we need not decide whether a police officer briefly prolonging a consensual 'knock and talk' by placing a foot in a doorway offends the Fourth Amendment. It is sufficient to hold that, even viewing the facts in the light most favorable to Smith, Officer Riggs did not violate clearly established law, and he therefore was protected by qualified immunity. Appellee was entitled to summary judgment on this claim.")

Goode v. Berlanga, 646 F. App'x 427, 430-31 (6th Cir. 2016) ("[W]e define the question this case presents as whether at the time of the incident it was clearly established that the Eighth Amendment forbids a prison guard, who had observed a prisoner sleeping in his bunk only minutes earlier, from delaying five to seven minutes in checking on that prisoner after being asked by other inmates to attend to the prisoner because he appeared to be seriously ill. Because neither Supreme Court precedent, our precedents, nor those of our sister circuits would have put every reasonable officer on notice that Berlanga's conduct violated the Eighth Amendment in April 2011, we hold that Berlanga is entitled to qualified immunity even if he did act with deliberate indifference to Goode's serious medical condition. We need not decide the separate 'deliberate indifference' question.").

Peatross v. City of Memphis, 818 F.3d 233, 240-47 (6th Cir. 2016) ("Courts have discretion to decide which prong of the analysis to address first, *Pearson,* 555 U.S. at 236, and the plaintiff 'bear[s] the burden of showing that a clearly established right has been violated and that the official's conduct caused that violation,' *Essex v. Cty. of Livingston,* 518 F. App'x 351, 357 (6th Cir.2013). For the purposes of this appeal, we find it appropriate to first address whether Armstrong's conduct violated Vanterpool's constitutional rights. . . . Although Officers Dunaway and McMillen shot Vanterpool, the Estate seeks to hold Armstrong liable in his individual capacity under a claim of supervisory liability. It is important to note at the outset that a § 1983 *individual*-capacity claim differs from a § 1983 *official*-capacity claim. . . . [fn. 3 Since *Iqbal,* the circuits have grappled with the precise contours of § 1983 supervisory liability, and while the claim of supervisory liability has not been altogether eliminated, the requirements for sustaining such a claim vary by circuit]. . . . We have long held that supervisory liability requires some 'active unconstitutional behavior' on the part of the supervisor. . . However, 'active' behavior does not

mean 'active' in the sense that the supervisor must have physically put his hands on the injured party or even physically been present at the time of the constitutional violation. . . . '[A] supervisory official's failure to supervise, control or train the offending individual is not actionable *unless* the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it.'. . We have interpreted this standard to mean that 'at a minimum,' the plaintiff must show that the defendant 'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'. . As part of this inquiry, this court also considers whether there is a causal connection between the defendant's wrongful conduct and the violation alleged. . . A close reading of § 1983 affirms this point. The statute states that every person acting under color of law who 'subjects, or *causes* [a person] to be subjected' to deprivation of constitutional rights 'shall be liable to the party injured[.]' 42 U.S.C. § 1983 (emphasis added). Accordingly, where an official's execution of his or her job function causes injury to the plaintiff, the official may be liable under the supervisory-liability theory. . . In the instant case, the Complaint sufficiently alleges that Armstrong violated Vanterpool's constitutional rights because: (1) the facts plausibly allege that Armstrong knowingly acquiesced in the unconstitutional conduct of his subordinates through the execution of his job function; . . . and (2) the facts plausibly allege that there is a causal connection between Armstrong's 'acts and omissions' and Vanterpool's death[.] . . . Taken as true, these facts and the inferences drawn therefrom . . . support the plausible inference that in the execution of his job functions, Armstrong at least knowingly acquiesced in the unconstitutional conduct of Officers Dunaway and McMillen. . . .For the foregoing reasons, the Complaint sufficiently alleges that Armstrong 'at a minimum, knowingly acquiesced' in the unconstitutional conduct of his subordinates through the execution of his job functions. . . . [fn. 6 To be clear, we do not suggest that every time an MPD officer violates the constitutional rights of a citizen, Armstrong can be held liable for the conduct in his individual capacity. Qualified immunity is a fact-intensive analysis and will, therefore, turn on the particular circumstances of each case. Here, the Complaint sufficiently pleads that Armstrong *knowingly acquiesced* to the conduct that proximately caused the injury alleged, and we have long held that this behavior is enough.]. . . . [T]he Complaint here alleges that Armstrong essentially allowed the officers to 'do whatever they want, whenever they want, to whomever they want, irrespective of the United States Constitution.' It alleges that Armstrong was involved at least in part in creating and enforcing all department policies; that he did not punish officer misconduct, including the use of excessive force; that he failed to take action in the face of the growing use of excessive force by officers and admonishment from the Mayor on the issue; and that he 'rubber stamped' officer misconduct. . . .Armstrong's alleged conduct of 'rubber stamping' the behavior of officers who shot and killed individuals with increasing frequency 'could be reasonably expected to give rise to just the sort of injuries that occurred'—Vanterpool's unfortunate death. . . Accordingly, the Complaint sufficiently pled a causal connection between Armstrong's acts and omissions and Vanterpool's death. . . . We next examine whether the right alleged to have been violated was clearly established at the time of the violation. As an initial matter, Armstrong argues that the Estate failed to allege a clearly established right because the Estate seeks to hold Armstrong liable under a theory of supervisory liability, and Vanterpool did not have a constitutional right to additional police training. Armstrong's argument evinces a misunderstanding of this prong of the

qualified immunity analysis. The Estate need not show that Vanterpool had a constitutional right to additional training or adequate supervision from Armstrong; it need only show that the right that Officers McMillen and Dunaway violated was clearly established at the time of the violation. . . . Armstrong admits that Vanterpool's 'Fourth Amendment rights are clearly established insofar as the alleged misconduct of Officer's Dunaway and McMillen are concerned.'. . Based on Armstrong's concession, which is consistent with this court's precedent, *see Smith v. Cupp,* 430 F.3d 766, 774 (6th Cir.2005), the right is clearly established. Viewing the allegations in the light most favorable to the Estate and accepting the facts and drawing all reasonable inferences from those facts in favor of the Estate, the Complaint 'adequately alleges the commission of acts that violated clearly established law.'. . .In discussing what is now known as § 1983 in the late 1800s, Congressman Hoar of Massachusetts summed up the need for a 'duty of protection':

[For example,] [i]f every sheriff in South Carolina refuses to [hold persons accountable for wrongs allegedly committed against] a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their *failure of duty* can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are [tasked with affording] the equal protection of the laws ... has denied that protection.

Carter, 409 U.S. at 427 (emphasis added).

The words of Congressman Hoar capture the essence of the issue before the Court today, well over a century later. This fact is both ironic and disappointing. There is no doubt that several cities in this nation today are in a state of crisis regarding civilian and police relations. Here, we have allegations that a government official with supervisory responsibility ratified the conduct of officers who shoot first and make judgments later, evincing a brazen disregard for human life. Ratification of such conduct is abhorrent. It not only flouts accountability, but it undermines the integrity of our justice system. Where internal investigations repeatedly yield only 'rubber stamps' of approval for unconstitutional conduct, it sends the message that human beings are not being killed by accident—they are being killed by design. The law simply does not allow government officials to use qualified immunity to escape liability for such wrongs. At this stage of the proceedings, it is not known whether the Estate will be able to sustain these allegations, but it is clear that the facts alleged in the Complaint set forth a plausible claim of supervisory liability. The sufficiency of the complaint requires rejection of Armstrong's claim of qualified immunity at the dismissal stage. Importantly, the law does not impose too heavy a burden on the litigant at this early stage of the proceedings. It would be a perversion of justice to allow a person who might be crippled by officials acting under color of state law to then be crippled by the courts during the infancy of his or her case.")

Pennington v. Terry, 644 F. App'x 533, 544-47 (6th Cir. 2016) ("The issue thus becomes whether Pennington had a clearly established right as of March 2, 2012 not to be tased when, on the one hand, he did not threaten the officers, was not resisting arrest, and was not attempting to flee, but on the other hand, was attempting to destroy evidence, disobeying police orders to spit out the pills, and potentially putting himself at risk of harm. As the district court observed, Sixth Circuit precedent clearly establishes that using a Taser on a non-resistant, non-threatening person violates the Fourth Amendment. . . The district court, however, identified two governmental interests

making the use of a Taser constitutional in this case: (1) prevention of a potential drug overdose, and (2) preservation of evidence. While we reserve judgment on the constitutional question, an examination of controlling and persuasive case law demonstrates that it was not clearly established as of March 2, 2012 that using a Taser in furtherance of these two legitimate governmental interests violated the Fourth Amendment. . . .No Sixth Circuit case or lower court case within the Sixth Circuit . . . has addressed the specific balance between a subdued, non-threatening individual's right not to be tased and the governmental interest in preventing a potential drug overdose. One lower, out-of-circuit case has ruled, on facts similar to this case, that multiple applications of a Taser to force a suspect to spit out a bag of cocaine was a reasonable use of force to thwart a potentially fatal overdose. . . Several lower courts and at least one state supreme court have also upheld law enforcement's use of force, including Tasers and mace, to prevent the destruction of evidence. . . . Other courts have found use of a Taser to prevent destruction of evidence objectively unreasonable, particularly where the facts featured multiple tasings or where the destruction of evidence was unlikely. . . . But as of March 2012, no Sixth Circuit cases, and only one unpublished district court case within the Sixth Circuit, had addressed whether any measure of force was objectively reasonable to preserve evidence in the process of being destroyed. The case at hand implicates both of these legitimate governmental interests: preventing a potential drug overdose and preserving evidence. . . . The dearth of Sixth Circuit precedent and case law in general addressing—much less condemning—the use of force to prevent a drug overdose or to preserve evidence would not put a reasonable officer on notice that discharging a Taser to accomplish these goals violated constitutional rights. Without deciding the underlying constitutional issue of whether tasing Pennington constituted excessive force, we hold that it was not clearly established as of March 2, 2012 that tasing an arrestee attempting to swallow illegally possessed drugs constituted excessive force. Because we cannot say every reasonable official would have known it was excessive force to tase an individual attempting to destroy evidence and potentially endangering him or herself in the process, Sergeant Harris and Officer Long would be entitled to qualified immunity even if there were a genuine issue of material fact as to whether Sergeant Harris tased Pennington.")

Barber v. Miller, 809 F.3d 840, 844-48 (6th Cir. 2015) ("In *Pearson*, the Supreme Court detailed a range of circumstances in which courts should address only the clearly established prong. . . . Several of those circumstances apply here. First, 'it is plain' that the constitutional right that Barber seeks to enforce is not clearly established but it is 'far from obvious whether in fact there is such a right.'. . Second, because the question of qualified immunity arose at the pleading stage, 'the parties have provided very few facts to define and limit any [constitutional] holding.'. . Third, Barber's briefing on the constitutional question lacks clarity and detail, posing a risk that we will decide the issue incorrectly. . . We therefore confine our inquiry to the clearly established prong of the qualified-immunity analysis. . . .We find that J.B.'s Fourth Amendment right to avoid warrantless, in-school interviews by social workers on suspicion of child abuse not to have been clearly established in January 2011, when Miller interviewed J.B. . . . .*Andrews* and *Kovacic* instruct that, by 2008, social workers entering a home without a warrant violated no clearly established rights, but those removing a child from a home without a warrant did. Inasmuch as

both decisions turned on the greater constitutional concerns surrounding government intrusion into a citizen's home, . . .they offer Barber little support in arguing that the *in-school* interviews violated J.B.'s clearly established Fourth Amendment rights. . . .In the end, Barber falls short of demonstrating that J.B.'s Fourth Amendment rights in the context of warrantless, in-school interviews by social workers on suspicion of child abuse were clearly established in our circuit at the time of the interviews. Given the lack of guidance in this area, we are hard pressed to say that a 'reasonable social worker, facing the situation in the instant case, would have known that [his] conduct violated clearly established law.'. . Accordingly, Miller enjoys qualified immunity from these Fourth Amendment claims. . . . Barber points to no Supreme Court or Sixth Circuit case law clearly establishing J.B.'s right to avoid removal from school under the circumstances here. And his reliance on *Kovacic* again proves unhelpful. The social workers there effectuated a *warrantless* removal of the children *from their home.* . . . In contrast, Miller obtained a court order *before* removing J.B. *from school.* Barber's general assertions that 'the Fourth Amendment was violated as to J.B. when he was seized pursuant to the order' that he claims 'was based on false statements and otherwise lacked probable cause' invoke no clearly established right.")

Ondo v. City of Cleveland, 795 F.3d 597, 608-10 (6th Cir. 2015) ("First, Plaintiffs cannot demonstrate that the state action of which they complain burdens a fundamental right. When the Supreme Court held that state laws against sodomy violate the Due Process Clause, it did so using the language of rational-basis review, rather than any form of heightened scrutiny. *See Lawrence v. Texas,* 539 U.S. 558, 574–78 (2003). The Court did not hold that the Constitution includes a fundamental right to homosexual conduct. Whether the Court's recent decision in *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015), recasts engaging in homosexual acts as a fundamental right is irrelevant, because the decision by the police relevant here does not impair Plaintiffs' ability to engage in such conduct. Nor can Plaintiffs establish that homosexuals are a suspect or quasi-suspect class. The Court has never held that homosexuals satisfy the criteria for such classification. . . The Court has further explained that the rationale underlying these factors is that heightened scrutiny may be justified if a group requires 'extraordinary protection from the majoritarian political process.'. . The Supreme Court has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so. Moreover, the Court has never defined a suspect or quasi-suspect class on anything other than a trait that is definitively ascertainable at the moment of birth, such as race or biological gender. In *Obergefell,* the Court was explicitly asked by the petitioners and various amici to declare that homosexuals are a specially protected class, and thus that government actions that disfavor homosexuals are subject to heightened scrutiny. . . But the Court held only that the Equal Protection Clause was violated because the challenged statutes interfered with the fundamental right to marry, not that homosexuals enjoy special protections under the Equal Protection Clause. . .We have always applied rational-basis review to state actions involving sexual orientation. . . Under the law-of-the-circuit doctrine, an issue decided by a panel of this court can be reconsidered only by the full court sitting en banc, or if there has been a supervening decision by the Supreme Court. . . Plaintiffs have not offered any argument as to why heightened scrutiny should apply to state actions involving homosexuals, and indeed failed even to explore the relevant cases. And as we have

already explained, *Obergefell* did not abrogate those prior cases. We therefore have no basis for reviewing Plaintiffs' equal-protection claim on any basis more stringent than rational-basis review. Applying the rational-basis test here, viewing the admitted evidence in the light most favorable to Plaintiffs and drawing all inferences in their favor, we hold that a police officer's decision to keep Plaintiffs in their boxer shorts does not violate the Constitution. Plaintiffs have not shown that our precedents recognize as an equal-protection violation the decision to keep suspects in their current state of dress—including boxer shorts—so long as the person is attired such that his appearance is not obscene and the police officer provides an explanation that satisfies the rational-basis test. Sergeant Galmarini's explanation here of concern for officers' safety—whether subjectively true or not—is presumed valid and rationally related to a legitimate public interest. Therefore Plaintiffs' grievance regarding being kept in their boxer shorts until the police could issue them jumpsuits, even if motivated in part by sentiments regarding homosexual behavior, still does not violate the Constitution.")

Pollard v. City of Columbus, Ohio, 780 F.3d 395, 402-04 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 217 (2015) ("Because we conclude Bynum's constitutional rights were not violated, we reach only step one of the analysis. . . .Ultimately, her claim fails because she assumes Bynum was shot to prevent his escape. But as the officers explain in affidavits and deposition testimony, their concern was not that Bynum would escape. To the contrary, the officers *knew* Bynum would not escape, given his injuries and the damage to the Cadillac. . . They shot because, after Bynum repeatedly made a shooting gesture, they thought he had a gun and considered him a threat. . . .Here, the totality of the circumstances clearly gave the officers probable cause to believe Bynum threatened their safety. The officers knew from police radio that Bynum was wanted on serious rape charges and was potentially armed, and they were told he had a concealed-carry permit. That Bynum was actually unarmed and did not have a permit is beside the point; what matters is the reasonableness of the officers' belief as they 'did not and could not have known' otherwise. . . .Because the undisputed record shows the officers had probable cause for believing that Bynum posed a threat of serious harm, the use of deadly force was constitutionally permissible. Accordingly, we reverse the district court's denial of qualified immunity.")

Occupy Nashville v. Haslam, 769 F.3d 434, 441-46 (6th Cir. 2014) ("[W]e agree with the State Officials that the claimed right must be defined as one of indefinite occupation of a public park, and that, even if the Protesters had a First Amendment right to occupy the Plaza indefinitely, that right certainly was not, and is not, clearly established. . . .To avoid potentially 'difficult questions that have no effect on the outcome of the case,'. . . and being mindful of the unusual circumstances under which we preside [All of the judges of the Sixth Circuit have recused themselves in this appeal], . . . we will focus on *Saucier's* second step—whether the alleged constitutional right was clearly established at the time of the Use Policy's adoption. . . .The State Officials here define the right claimed by the Protesters as a '24–hour occupation' of the public square, which they argue is not a 'right' at all. . . The Protesters, by contrast, argue that the constitutional right at issue is not a right to 'occupy' the Plaza, but a 'clearly established First Amendment right to be present on the Plaza to air their grievances against the government.'. . The more specific and accurate framing of

the issue is the one provided by the State Officials. . . . It was neither 'plainly incompetent'. . . nor was it 'beyond debate'. . . to read *Clark* as permitting a curfew and to take steps to implement that policy. Then and now, the Supreme Court's analysis can be read that way. The *Clark* Court's 'serious[ ] doubt' about the kind of right claimed here is the antithesis of being 'clearly established.' The few precedents available are generally contrary to the existence of the 'right' at issue. . . .In light of the sanitation problems, the violent assaults, the damage to state property, and the generally unsafe and deteriorating conditions, the State Officials were not objectively unreasonable in believing that they could promptly adopt a 10:00 p.m. curfew that would allow them to clean the Plaza and ensure the safety of the public in general and the Protesters in particular. The State Officials are thus entitled to qualified immunity for their actions. Our qualified immunity conclusion also necessarily extends to the Protesters' claims that their Fourth and Fourteenth Amendment rights were violated. Again, the most that can be said for the Protesters' argument is that it is unclear whether they had a right to indefinitely occupy the Plaza for their demonstration. It is therefore also unclear that the law forbade their arrest and that they had any liberty interest that could be infringed by an alleged failure to provide adequate procedural protections.")

Robertson v. Lucas, 753 F.3d 606, 621, 622 (6th Cir. 2014) ("To the extent the failure to disclose this evidence can be attributed to appellees, as it must be, . . . their alleged misfeasance was in failing to inform the prosecutor of *Brady* material in their possession before the prosecutor made the disclosure. On this score, appellees are entitled to qualified immunity. Whatever rights appellants had to receive exculpatory evidence prior to entering their pleas was not clearly established. The Supreme Court recently stated that 'the contours of a right are sufficiently clear [where] every reasonable official would have understood that what he is doing violates that right.'. . . *Ruiz* established that *impeachment* material need only be disclosed for trial. . . Appellants contend that the evidence at issue was *exculpatory* and therefore not covered by the rule set forth in *Ruiz.* We have not yet had occasion to determine whether *Ruiz* applies to exculpatory *Brady* material, a question that has caused some disagreement among our sister circuits. [collecting cases]Nor does our own caselaw support appellants' argument that they had a clearly established right to receive exculpatory *Brady* material prior to plea bargaining. We have held that '[i]n general, the principles announced in *Brady* do not apply to a tardy disclosure of exculpatory information, but to a complete failure to disclose. If previously undisclosed evidence is disclosed ... during trial, no *Brady* violation occurs unless the defendant has been prejudiced by the delay in disclosure.'. . Therefore, every reasonable officer in appellees' positions would know that they were under an obligation to present *Brady* material to the prosecutors 'in time for its effective use at trial.'. . And in *Campbell v. Marshall*, we held that a prosecutor's failure to disclose arguably exculpatory *Brady* material prior to plea bargaining did not render the defendant's guilty plea involuntary where a factual basis for the plea was established at the plea proceeding. . . Accordingly, we hold that appellees were under no clearly established obligation to disclose exculpatory *Brady* material to the prosecutors in time to be put to effective use in plea bargaining. We do not decide whether appellants have a constitutional right to receive exculpatory *Brady* material from law enforcement prior to entering into a plea agreement.")

Bray v. Planned Parenthood Columbia-Willamette Inc., 746 F.3d 229, 236-39 (6th Cir. 2014) ("For the reasons that follow, the marshals' alleged actions violated the Brays' Fourth Amendment rights, but the marshals are nonetheless protected by qualified immunity. . . .Under a 'scrupulous' application, the Fourth Amendment was violated by the detention of Michael Bray for four hours with no access to outside communications while armed, flak-jacketed U.S. Marshals worked with an organization Mr. Bray despised to seize his books and manuscripts (including books and manuscripts of insignificant market value) for the ostensible purpose of satisfying a debt. . . . Adding further support to the conclusion that the marshals' actions violated the Constitution, the presence of multiple unauthorized representatives of PPCW served no valid purpose under the writ. Although the Fourth Amendment does not require that all conduct by an officer within a home be expressly authorized by a court order, it does demand that actions relate to the lawful objectives of the order. . . PPCW had no articulated expertise in satisfying the ostensible purpose of the writ, identifying valuable goods to satisfy a monetary judgment. Moreover, because the presence of additional representatives of PPCW was not authorized, and because the writ made no provision for the use of a camera, it was a violation of the Fourth Amendment to permit the organization to film the home. . . . Nonetheless, the officers are protected from suit by the doctrine of qualified immunity, because these constitutional rights were not clearly established at the time of the violations. . . . Because the legal and factual scenario presented in this action is not identical to any the Sixth Circuit or the Supreme Court has previously addressed, the rights the marshals violated were not clearly established at the time of the alleged misconduct, and a reasonable officer could have believed that his conduct was lawful. For one thing, the prolonged detention of Michael Bray might have been permissible in the distinct but more common context of executing a warrant for criminal contraband. The Supreme Court has approved of confinement by officers of the occupants of a house to minimize the risk of bodily harm during the execution of a criminal warrant, to facilitate the orderly completion of the search, and to prevent flight and the improper disposal of evidence. . . The right to detain in the somewhat analogous, albeit different, case of a search for contraband, is 'categorical,' with no relationship to the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' . . Moreover, although the Supreme Court has questioned whether detention is permissible in the context of a search for evidence other than contraband, . . . the Court has not examined the Fourth Amendment implications of a search or a seizure under a civil writ of execution. It is true, though, that our court has held in the civil judgment enforcement context that absolute quasi-judicial immunity may apply if detention is specifically authorized in a valid court order. . . Accordingly, in the absence of specific guidance to the contrary, a reasonable officer could have interpreted existing precedent to permit the detention of Michael Bray. The marshals might also reasonably have believed that it was acceptable to invite additional representatives of PPCW to join the raid, because outside involvement in the execution of a court order is sometimes permissible. . . . Although here the writ of execution identified the number of PPCW representatives who were authorized to be present, a marshal might nonetheless have concluded that it was permissible to invite additional representatives of PPCW to execute the writ, because officers may sometimes seek the aid of third parties in executing court orders. Further buttressing this conclusion, the marshals' actions in

seeking outside assistance were distinct from those in which this circuit has recognized a possible constitutional violation. . . . .An officer who was unaware that the additional representatives of PPCW were not authorized to be present might also have reasonably concluded that the individuals could film the home. Other circuits have assumed without deciding that videotaping the execution of a valid search warrant is lawful. . . In addition, several circuits have held that warrantless filming does not violate the Constitution if the cameramen are authorized to be present in the home. . . Although here the cameraman was not authorized to be present in the Brays' home, reasonable officers who were mistaken about the lawfulness of inviting additional representatives of PPCW to join the raid might likewise have been mistaken about whether those representatives could film the home, particularly in light of the camera's utility in capturing the condition of the property prior to its sale. Therefore, the rights the marshals breached were not clearly established at the time of the violations.")

T.S. v. Doe, 742 F.3d 632, 635-41 (6th Cir. 2014) ("To restate the plaintiffs' constitutional argument as a basic syllogism, they assert the following: Every reasonable officer should know that it is unconstitutional to conduct suspicionless strip searches of adult detainees held on minor offenses. Every reasonable officer should also know that juveniles enjoy the same, if not greater, protection under the Fourth Amendment than adults. Therefore, every reasonable officer should know that it is unconstitutional to conduct suspicionless strip searches of juvenile detainees held on minor offenses. To prevail, the plaintiffs must establish that both the major and minor premises of this syllogism were clearly established as of June 2009. . . .The reasoning of our prior holding in *Masters* contemplates that prison officials must do exactly what the Supreme Court held they need not—screen out detainees from a blanket strip-search policy based upon the seriousness of their offense. It is simply not possible to square our decision in *Masters* with that in *Florence. Masters* is therefore abrogated. . . Were the searches of J.S. and K.S. to occur today, the defendants would certainly be entitled to immunity. Setting aside misgivings that juvenile and adult detainees are subject to the same rules, *see infra* section III.D, the major premise of the plaintiffs' argument is clearly and unquestionably wrong. They argue, however, that we must put on judicial blinders and ignore *Florence* because it was rendered nearly three years after the conduct at issue and, thus, cannot displace the prevailing law of June 2009. We admittedly face a unique situation. If this case involved adult detainees, *Florence* clearly holds that there would be no constitutional violation. Here, however, *Florence* does not squarely address the constitutional issue, so that we could dispose of the merits of this case with nothing more than a citation. In the interest of avoiding an advisory constitutional ruling, we should first look to whether the rule that the plaintiffs advocate here was clearly established at the time, so as to trigger liability for any potential constitutional violation. . . This raises a question that we have not addressed before: In a § 1983 qualified-immunity case, may officials benefit from a subsequent Supreme Court case that would cause a reasonable official to have at least a good-faith doubt that a given practice is prohibited? The law can have a good deal of arbitrariness in its temporal development. Courts may not resolve a legal question until it is presented in a real case or controversy. Thus, neither we nor public officials have any control over when a particular rule is clearly established or (in this case) clearly rejected. We note, however, that the touchstone of qualified immunity in general, and the clearly-

established-law inquiry in particular, is objective good faith. . . . For the purpose of establishing that an official has acted in objective good faith, the most recent pronouncement of the Supreme Court on the issue will often serve as the best analytical starting point, regardless of when the case was decided. *Florence* provides an excellent example of this. . . . Citation to *Florence* is, in large respect, a shorthand for the fundamental shift in the law that has taken place over the past three decades and that so weakened the foundation of *Masters* as to bring about its final collapse in *Florence.* By June 2009, a reasonable official could have consulted the numerous Supreme Court opinions cited above, or the more recent opinions of our sister circuits, and, in objective good faith, concluded that *Masters* was no longer good law. *Florence* did nothing more than articulate this fact. It is thus wholly consistent with the principles of qualified immunity to give the defendants the benefit of the Court's ruling. Accordingly, the defendants are entitled to qualified immunity against the plaintiffs' federal claims. . . . In sum, the plaintiffs have failed to meet their burden of demonstrating that every reasonable official in June 2009 would have known that conducting a suspicionless strip search of a juvenile detainee during his or her intake into a detention facility violated the Fourth Amendment. Without this, their federal claims cannot survive the defendants' assertion of qualified immunity. We need not, and do not, opine on the constitutionality of the strip searches. The district court erred in denying summary judgment to the defendants on the plaintiffs' § 1983 claims, and we therefore reverse.")

Ortega v. U.S. Immigration and Customs Enforcement, 737 F.3d 435, 439, 440 (6th Cir. 2013) ("A transfer from home confinement to prison confinement, it seems to us, amounts to a sufficiently severe change in conditions to implicate due process. . . .What process is due will vary from setting to setting and may well turn on the notice given to the individual before he was allowed to serve a prison sentence at home. Happily for us, we need not answer these more difficult questions today. In a qualified-immunity case, a court may reject the constitutional claim on either of two grounds—either because no such constitutional right existed or because the constitutional right was not clearly established at the time of the incident. . . .A clearly established constitutional violation requires on-point, controlling authority or a 'robust consensus of cases of persuasive authority.'. . As of March 2011, no controlling authority or consensus of persuasive authority established that Ortega had a liberty interest in remaining on home confinement. The relevant Supreme Court precedent at the time dealt only with traditional confinement and probation or parole. . . Ortega's case falls somewhere between traditional confinement and probation/parole, and the Supreme Court has not addressed such a case. The Sixth Circuit has not addressed an in-between case like Ortega's either. The closest case, *Ganem v. U.S. Immigration and Naturalization Serv.,* 825 F.2d 410 (6th Cir.1987) (per curiam) (unpublished), hurts rather than helps Ortega's cause. It involved a federal prisoner whose prison classification changed because of an immigration detainer. The court held that a 'detainer which adversely affects a prisoner's classification and eligibility for rehabilitative programs does not activate a due process right.'. . Even then, *Ganem* does not speak to the question here—whether a home confinee should be thought of as a prisoner without a liberty interest in avoiding a transfer to prison or as a probationer/parolee with such a liberty interest. In the absence of Supreme Court or Sixth Circuit authority, Ortega points to three cases as evidence of a 'robust consensus' of persuasive authority

establishing a liberty interest in home confinement. [discussing cases] These three cases are neither robust in their relevant analyses nor evidence of an on-point consensus. The decisions from both circuits undermine the central premise of Ortega's claims by noting that today's question—whether initial home confinement gives rise to a protected liberty interest—is an open one.")

Ortega v. U.S. Immigration and Customs Enforcement, 737 F.3d 435, 439, 441-43 (6th Cir. 2013) (Keith, J., dissenting) ("Because I disagree with the majority's view that Ortega did not have a 'clearly established' liberty interest in home confinement, I respectfully dissent. . . . The facts of this case are such that the unlawfulness of Metro Defendants' conduct is readily apparent, even in the absence of clarifying case law. Metro Defendants seized Ortega, an American-born, United States citizen, from his home and took him to jail for four days, based upon an improper detainer, without a warrant or any semblance of process. In doing so, Metro Defendants did not allow him to produce any documentation that he was an American citizen. . . . Not only should the officers have known that removing someone from their home and taking them to jail requires a certain minimum level of process, but in my view, the relevant case law clearly establishes that criminal defendants have a constitutional due process right to remain in home confinement. . . .Clearly established rights include not only those specifically adjudicated, but also those that are established by general applications of core constitutional principles. . . . Here, the core constitutional principle—that an officer must provide some process before seizing an individual from his home and taking him to jail—is unquestionably enshrined in our case law. Admittedly, the Supreme Court and this Court have only explained this principle in the probation and parole contexts. . . Surely, however, the test for determining whether a constitutional right was clearly established does not require a plaintiff to demonstrate that 'the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.'. . Indeed, in this case, the unlawfulness of Metro Defendants' actions clearly was apparent. The majority's cursory dismissal of analogous cases from the First and Seventh Circuits, *see Gonzales–Fuentes v. Molina,* 607 F.3d 864 (1st Cir.2010); *Domka v. Portage Cnty.,* 523 F.3d 776 (7th Cir.2008); and *Paige v. Hudson,* 341 F.3d 642 (7th Cir.2003), as 'neither robust in their relevant analyses nor evidence of an on-point consensus' misses the point. At a minimum, those decisions firmly establish that an individual serving a sentence outside of prison is entitled to some minimum amount of process before being arrested and taken to jail. . .The majority's holding allows an officer to blatantly violate the Fourth, Fifth, and Fourteenth Amendment rights of an American citizen—so long as it was done in a manner that neither this Court nor the Supreme Court has directly opined on before—with impunity. This cannot be the intent of the qualified immunity doctrine.")

Yoder v. University of Louisville, No. 12–5354, 2013 WL 1976515, *6 (6th Cir. May 15, 2013) ("We exercise our discretion to focus on the second prong of the qualified immunity inquiry—whether, assuming Yoder had a First Amendment right to post the Blog that was violated by her dismissal from the SON [School of Nursing], this right was clearly established. . . .We find dispositive the absence of controlling authority that specifically prohibits Defendants' conduct. Because neither the Supreme Court nor a panel of our circuit has considered whether schools can

regulate off-campus, online speech by students, Yoder relies on *Layshock ex rel. Layshock v. Hermitage School District,* where the Third Circuit held that 'the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline.'. . We first observe that *Layshock* was not decided until June 2011—over two years after Yoder's dismissal—and thus cannot stand as clearly established law at the time of the incident. . . More important, other circuits have come to conflicting conclusions and permitted schools to regulate off-campus, online student speech where such speech could foreseeably cause a material disruption to the administration of the school. . . Indeed, Yoder herself acknowledges that student internet communications present an 'enigmatic issue, since these are communications available on campus, off campus, or anywhere else.' In addition, both parties rely heavily on Supreme Court cases that govern student speech standards, . . . none of which considers the unique circumstances posed here. Yoder has not identified any case—nor are we aware of any—that undermines a university's ability to take action against a nursing (or medical) student for making comments off campus that implicate patient privacy concerns. Defendants have legal and ethical obligations to ensure that patient confidentiality is protected, and that nursing students are trained with regard to their ethical obligations. . . Yoder gained access to the Patient through the SON's clinical program, and patients allow SON students to observe their medical treatment in reliance on the students' agreement not to share information about their medical treatment and personal background. Under such circumstances, Defendants could not 'fairly be said to "know" that the law forb [ids] [discharging a student under these circumstances].'")

Hearring v. Sliwowski, 712 F.3d 275, 279 (6th Cir. 2013) ("In this case, as we explain below, 'it is plain that a constitutional right [wa]s not clearly established but far from obvious whether in fact there is such a right.'. . Because the constitutional-interpretation question of whether B.H.'s Fourth Amendment rights were violated 'will have no effect on the outcome of the case,' we need not resolve it. . .Accordingly, we will assume that Hearring has alleged a violation of a Fourth Amendment right and address whether that right was clearly established. . . . The district court concluded, following the strip-search cases, that 'the fundamental dignity of a young person's body is *so obvious*' that school officials had fair notice that a strip-search of a student 'without justification' is improper. . . We do not disagree. Nonetheless, a critical factor distinguishes this case from the more typical strip-search cases: namely, it is clear that Sliwowski's visual inspection of B.H.'s genital area was not an investigation for contraband, but rather was an attempt to assess B.H.'s medical condition. . . And what is not obvious from existing authority is whether this kind of medically motivated visual examination constitutes a search subject to the Fourth Amendment standards developed in the strip-search case law. This legal question, whether a visual examination conducted for medical purposes by a medical professional falls within the definition of 'search' for Fourth Amendment purposes, is critical, because the Fourth Amendment's protections are not triggered until a search occurs. . . Accordingly, we must determine whether it was clearly established that the Fourth Amendment applies to the actions of a school nurse when she attempts to provide medical care to a student. There is no Supreme Court precedent directly answering the question of whether the Fourth Amendment applies to school nurses in their provision of medical care. This court has not taken a definitive position on whether the Fourth Amendment's protection

against unreasonable searches applies to the provision of medical services by government-employed health-care professionals. . . . Given that there is no direct precedent from this court holding that the Fourth Amendment applies to visual examinations conducted by medical professionals for medical purposes and some precedent indicating that the Fourth Amendment does not apply in such circumstances, we cannot say that it is clearly established under our precedent that the conduct of a school nurse giving medical aid to students is subject to the standard of reasonableness imposed by the Fourth Amendment. . . .In sum, existing precedents did not give Sliwowski fair warning that her medical assessments were subject to the Fourth Amendment's reasonableness requirement, and accordingly the right at issue was not clearly established. . . Sliwowski is thus entitled to qualified immunity regardless of whether her conduct amounted to a violation of B.H.'s Fourth Amendment rights, and we express no opinion as to whether there was a constitutional violation in this case.")

Embody v. Ward, 695 F.3d 577, 581, 582 (6th Cir. 2012) ("Noting that state law authorized him to carry this gun in the park, he argues that temporarily disarming him necessarily was a '*per se* Second Amendment violation.'. . But § 1983 claims are designed to vindicate federal law, not state law. He offers no explanation why the officers' alleged failure to comply with state law itself violates the United States Constitution in general or the Second Amendment in particular. . . To the extent Embody means to argue that the Second Amendment prevents Tennessee from prohibiting certain firearms in state parks (and thus prohibited Ward from detaining Embody on suspicion of possessing an illegal firearm), qualified immunity is the answer. . . No court has held that the Second Amendment encompasses a right to bear arms within state parks. . . Such a right may or may not exist, but the critical point for our purposes is that it has not been established—clearly or otherwise at this point. That suffices to resolve this claim under the Court's qualified-immunity precedents. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).")

Hagans v. Franklin County Sheriff's Office, 695 F.3d 505, 508-10 (6th Cir. 2012) ("This qualified-immunity case, like all qualified-immunity cases, presents two questions: (1) whether the officer (Ratcliff) violated the claimant's (Hagans') constitutional (Fourth Amendment) rights (by repeatedly tasing him after he actively resisted arrest); and, if so, (2) whether that constitutional right was clearly established at the time of the incident (in May 2007, when the tasing occurred). The first question raises some complications. The second one does not. We opt to answer the easier of the two questions, saving the harder one for another day. [citing *Pearson*] . . . . In deciding whether a right has been clearly established, the Supreme Court has 'repeatedly' warned lower courts not to define the right at 'a high level of generality.'. . Hagans proposes a lofty definition of the right ('the right to be free from excessive force,' R. 63 at 9), one floor down from the words of the Fourth Amendment itself ("the right to be free of 'unreasonable ... seizures' ") and two floors down from the highest level of generality possible ('the right to be free from a constitutional violation'). Yet these types of inquiries do little to answer the question. . . . It is sometimes worse than that: If a court does not carefully define the right, it risks collapsing the two qualified-immunity inquiries into one, permitting the constitutional-violation inquiry *always* to answer the clearly established inquiry. Precedent demands instead that we go down the stairs of abstraction to

a concrete, particularized description of the right. Though not too far down: just as a court can generalize too much, it can generalize too little. If it defeats the qualified-immunity analysis to define the right too broadly (as the right to be free of excessive force), it defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas). . . . Defined at the appropriate level of generality—a reasonably particularized one—the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force. The answer is no. Cases from this circuit and others, before and after May 2007, adhere to this line: If a suspect actively resists arrest and refuses to be handcuffed, officers do not violate the Fourth Amendment by using a taser to subdue him. . . .One decision bucks this trend—kind of. In two consolidated cases, the en banc Ninth Circuit held that officers used excessive force by tasing suspects who offered minimal resistance. *Mattos v. Agarano,* 661 F.3d 433 (9th Cir.2011) (en banc). . . . Whatever glimmer of hope the Ninth Circuit's holdings on the constitutional issue offer Hagans is closed by the reality that the court held the officers were entitled to qualified immunity because the right was not clearly established at the time of the encounters. . . If it did not violate clearly established law to tase a pregnant mother who refused to sign a traffic citation in November 2004, how could it violate clearly established law to tase an out-of-control, shirtless man strung-out on drugs who was thrashing about with two officers on the ground in May 2007? Hagans has not shown any changes in the law over that period or for that matter any law specific to the Sixth Circuit that would clearly establish the illegality of this far more reasonable use of a taser.")

Hoover v. Walsh, 682 F.3d 481, 500, 501 & n. 57 (6th Cir. 2012) ("We resolve Mr. Hoover's § 1983 claim on the first prong of the qualified immunity analysis, holding that his constitutional rights were not violated because the officers acted with the requisite justification at all stages of their encounter with Mr. Hoover. Consequently, Mr. Hoover's § 1983 claim cannot survive summary judgment. . . . Because we resolve the issue of qualified immunity by concluding that there was no constitutional violation, we need not address the second prong of the analysis to determine whether Mr. Hoover's rights were clearly established.")

Cockrell v. City of Cincinnati, No. 10–4605, 2012 WL 573972, at *4-*7 & n.6 (6th Cir. Feb. 23, 2012) (not published) ("[W]e define the question this case presents as whether a misdemeanant, fleeing from the scene of a non-violent misdemeanor, but offering no other resistance and disobeying no official command, had a clearly established right not to be tased on July 3, 2008. Because neither case law, nor external sources, nor '[t]he obvious cruelty inherent' in taser use. . . would have put every reasonable officer on notice that Hall's conduct violated the Fourth Amendment in July 2008, we hold that Hall is entitled to qualified immunity, even if he did use excessive force. . . . Because we resolve this case on the 'clearly established' element of qualified immunity, we express no opinion on the constitutionality of Hall's actions. . . . Cases addressing qualified immunity for taser use fall into two groups. The first involves plaintiffs tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers. In the face of such resistance, courts conclude either that no constitutional violation occurred, or that the

right not to be tased while resisting arrest was not clearly established at the time of the incident. [collecting cases] In the second group of cases, a law-enforcement official tases a plaintiff who has done nothing to resist arrest or is already detained. Courts faced with this scenario hold that a § 1983 excessive-force claim is available, since 'the right to be free from physical force when one is not resisting the police is a clearly established right.' [collecting cases] This case does not fit cleanly within either group. At no point did Cockrell use violence, make threats, or even disobey a command to stop. [footnote omitted] He simply fled. Yet flight, non-violent though it may be, is still a form of resistance. . . Neither line of cases, then, dictates a particular result in this scenario; both apply in some measure. The most we can draw from today's case law, in summary, is this: in no case where courts denied qualified immunity was the plaintiff fleeing, and in at least some of these cases, the court specifically referred to the fact of non-flight. . . By contrast, in all cases where a plaintiff fled from police, the court held that qualified immunity was appropriate, and some courts referred specifically to the plaintiff's flight. . . . These broad principles do not establish the contours of the right Hall allegedly violated so clearly that every reasonable officer would know his actions were unconstitutional, even today. It certainly did not do so in July 2008. . . . Finally, there is no 'obvious cruelty inherent' in the use of tasers . . . which would render Hall's conduct objectively unreasonable. . . .In short, it is not clear whether tasing a suspect who fled from the scene of a nonviolent misdemeanor constituted excessive force, as of July 2008. Nor is there consensus that taser use is categorically improper, unsafe, or cruel. We cannot, therefore, say that 'every reasonable official would have understood that what [Hall was] doing' violated Cockrell's Fourth–Amendment rights.")

Cockrell v. City of Cincinnati, No. 10–4605, 2012 WL 573972, at *7 (6th Cir. Feb. 23, 2012) (Cole, J., concurring) (not published) ("I am persuaded that Cockrell, as of July 3, 2008, did not have a clearly established right not to be tased for fleeing from a non-violent misdemeanor. I write separately because, given the totality of the circumstances, I believe that Officer Hall's use of force was excessive. In several of the cases cited by the majority, in which courts found that the use of a taser against a resisting arrestee constituted excessive force, the courts placed great weight on the officer's failure to warn the suspect prior to deploying the taser. [citing cases] Likewise, the City of Cincinnati's use-of-force policy advises officers to 'give the subject a verbal warning that the TASER will be deployed unless exigent circumstances exist that would make it imprudent to do so.'. .Here, Hall does not allege that he warned Cockrell of the impending use of his taser—or even that he ordered him to stop—nor does he allege that exigent circumstances prevented him from doing so. Thus, I would find that his use of a taser under these circumstances violated Cockrell's Fourth Amendment right to be free from excessive force.")

Wheeler v. City of Lansing, 660 F.3d 931, 938-40 (6th Cir. 2011) ("[W]e can hold that an official is entitled to qualified immunity without determining whether a constitutional violation has actually occurred. . . This is exactly what we do here. Even assuming that Wirth violated Wheeler's Fourth Amendment rights, Wheeler has not shown that it was a clearly established violation for Wirth to rely on the warrant issued to search Wheeler's apartment. . . . [W]e can assume for the sake of this qualified-immunity analysis that Wheeler's Fourth Amendment rights were violated

when officers seized items that were identified in the warrant but not supported by probable cause in the warrant affidavit. . . . Regardless, such a deficiency is unusual, and thus it was reasonable for Wirth to fail to recognize it, especially considering the fact that the warrant affidavit and the warrant were drafted by a prosecuting attorney and that the warrant was approved by the state magistrate. Much of the problem Wheeler alleges here is not with the warrant, but with the warrant affidavit. Moreover, unlike in most cases dealing with a defective warrant affidavit, this affidavit is clearly not deficient in establishing probable cause to *search,* and Wheeler acknowledges that the affidavit obviously provides such probable cause. Instead, the deficiency alleged is in establishing probable cause to *seize* certain items listed in the warrant, an error that would not be apparent to the reasonable police officer. . . . The basis for the warrant, in Wirth's view, was the commission of the home invasions in both Ingham County and Eaton County. Thus, it was reasonable for him to believe that, as long as the search warrant established probable cause for the search, which it clearly did, he could seize any items he encountered that constituted evidence of the commission of the home invasions, which stolen property clearly does. Wirth is thus entitled to qualified immunity from this aspect of Wheeler's Fourth Amendment claim. Even though Wirth urges us to determine whether the warrant affidavit failed to establish probable cause for the seizure of certain items in the warrant, we need not do so for purposes of granting qualified immunity and do not have jurisdiction to do so for purposes of Wirth's cross-appeal. In his cross-appeal, Wirth challenges the district court's determination that Wirth violated Wheeler's Fourth Amendment rights, even though the district court ultimately held that he was immune from suit pursuant to this violation. Because Wirth was ultimately successful in his motion for summary judgment, we lack jurisdiction to consider this cross appeal. There is generally no appellate jurisdiction when the appellant does not seek a change in the relief ordered by the judgment appealed from. . . . We acknowledge the Supreme Court's recent holding in *Camreta v. Greene,* 131 S.Ct. 2020, 2032 (2011), that the Supreme Court has jurisdiction to review a lower court's holding that a party violated the Constitution even though the party prevailed on qualified immunity grounds in the lower court. The Court based this conclusion on the fact that the lower court's ruling would be considered to settle a question of constitutional law and thereby guide the conduct of officials in the future. . . The 'purpose and effect' of such a ruling, the Supreme Court reasoned, permits its being reviewed at the behest of the prevailing immunized official. . . The Court emphasized in *Camreta,* however, that its holding 'addresse[d] only [the Supreme Court's] authority to review cases in this procedural posture.'. . It did not address whether lower courts of appeals must hear appeals brought by similarly prevailing parties. Moreover, the Court recognized that 'the considerations persuading [it] to permit review of petitions in this posture may not have the same force as applied to a district court decision,' because such decisions by a district court are not binding precedent in any future matters. . . In light of this difference, at least one court of appeals has noted that prevailing immunized parties cannot appeal a district court's 'newly declared constitutional right in the higher courts.' *Horne v. Coughlin,* 191 F.3d 244, 247 (2d Cir.1999); *but see Kalka v. Hawk,* 215 F.3d 90, 96 (D.C.Cir.2000) (assuming that when plaintiffs in *Bivens* cases appeal adverse immunity rulings, 'the winning officials can cross-appeal the ruling against them regarding the constitutionality of their actions'). Permitting review of a prevailing party's claim creates tension with Article III's prohibition against issuing advisory opinions. . .

This is because the prevailing party has already obtained a judgment in his or her favor, and thus is not asking the court to review the lower court's judgment on appeal but instead a basis or reason for that judgment. 'The duty of this court ... is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' *Mills v. Green*, 159 U.S. 651, 653 (1895). This consideration, and the fact that the district court's decision below does not present the sort of concern with the creation of precedent that the Supreme Court confronted in *Camreta,* lead to the conclusion that we are without jurisdiction to review Wirth's cross-appeal. Further, as explained above, we need not determine on Wheeler's appeal whether the warrant affidavit failed to establish probable cause for the seizure of certain items in the warrant in order to hold that Wirth is entitled to qualified immunity. Thus, we state no opinion as to whether a constitutional violation occurred from the execution of the warrant with respect to items not identified as stolen in the crime descriptions supporting the existence of probable cause.")

Holzemer v. City of Memphis, 621 F.3d 512, 519, 520, 527, 528 (6th Cir. 2010) ("Although we are not bound to follow the sequence of this inquiry, *see Pearson v. Callahan*, 129 S.Ct. 808, 813 (2009), we believe that this case would benefit from the traditional sequence outlined in *Saucier v. Katz*, 533 U.S. 194 (2001), and *Feathers.* Because of the nature of the constitutional right at issue, 'there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong' because it would be 'difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be.'. . Therefore, we first address whether Holzemer's conversation with Peete constitutes constitutionally protected petitioning, and, finding that it is, we then examine whether that right was clearly established at the time the events took place. . . . We find that requesting assistance from a city councilman–whether in writing or in person–constitutes petitioning activity entitled to the protection of the Petition Clause of the First Amendment. Consequently, Holzemer and Downtown Buggy have a right to be free from retaliation for exercising that right. Because we find no constitutional distinction between an oral and written petition for redress, we also find that a reasonable city official would have known that retaliation for seeking such assistance from a local, elected official is unlawful. . . . We find that the case law of this court and of the Supreme Court demonstrates that the right to petition a local, elected representative for assistance in dealing with local government agencies was clearly established at the time that the relevant events took place and that a reasonable local official would have known that retaliating against a citizen exercising that right is unlawful. Moreover, a reasonable city official would have known that the Constitution prohibits retaliation for a citizen's exercise of his First Amendment right to Free Speech, whether that speech takes written, oral, or another form.")

Aldini v. Johnson, 609 F.3d 858, 863 (6th Cir. 2010) ("Until recently, courts used the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), to address an assertion of the qualified immunity defense. Under *Katz*, a court first asked whether, viewed in the light most favorable to plaintiff, the facts show that the officer's conduct violated a constitutional right. . . If

the answer to this first question was 'no,' the analysis proceeded no further and the officer need not even seek the protection of qualified immunity. . . If, however, the pleadings establish that there is a genuine issue of material fact as to a violation, *Katz* mandated that the next step was to determine whether the constitutional right was 'clearly established' at the time of the violation. If not, the officer would be entitled to qualified immunity. . . Under the 'clearly established' inquiry, the question is whether the right was 'so "clearly established" that a reasonable official would understand that what he is doing violates that right.'. . Previously, this Court has included a third inquiry to 'increase the clarity' of the *Katz* analysis: 'whether the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'. . However, in *Pearson v. Callahan*, __ U. S. __, 129 S.Ct. 808 (2009), the Supreme Court recently abandoned *Katz's* requirement that courts must address the qualified immunity inquiries sequentially. . . However, because *Pearson* left in place *Katz's* core analysis, all pre-*Pearson* case law remains good law.")

Stanley v. Vining, 602 F.3d 767, 771 (6th Cir. 2010) ("We understand that a *pro se* prisoner is unlikely to understand the complexity of federal law regarding prisoner rights, and hence we read a prisoner's complaint liberally. . . Having done so in this case, we are unable to derive from the complaint any set of facts or legal theory that would give rise to a valid, federal, § 1983 cause of action. Although Stanley does not specify with clarity what constitutional provisions–Due Process, First Amendment, or Sixth Amendment–his claims rest on, we have treated his allegations under all reasonable theories we can imagine. Our dissenting colleague melds together and confuses several theories and comes up with a theory that seems to depend on local differences in how prisons internally interpret a wide variety of regulations from state to state. Our ruling here is that there must be uniform federal constitutional theory from state to state as to each constitutional provision and that no constitutional provision flatly prohibits as unlawful censorship a prison from opening and reading a prisoner's mail unless it can be shown that the conduct interferes with the prisoner's right to counsel or access to the courts or violates his rights of equal protection or procedural due process. We find no per se constitutional rule that such conduct automatically violates a broad, general rule prohibiting censorship, as our dissenting colleague seems to imagine.")

Stanley v. Vining, 602 F.3d 767, 771 (6th Cir. 2010) (Cole, Circuit Judge, concurring in part and dissenting in part) ("Plaintiff-Appellant Aubrey Stanley alleges that Defendant-Appellee Randy Vining violated his constitutional rights by reading his legal mail on two separate occasions. Although I concur in the majority opinion to the extent that it affirms the dismissal of Stanley's retaliation and supervisor-liability claims, I respectfully dissent from the rest of the majority opinion because I believe Stanley has made out a cognizable legal-mail claim.")

Binay v. Bettendorf, 601 F.3d 640, 647, 652 (6th Cir. 2010) ("Because the *Saucier* sequence is appropriate here, we first ask whether, under the facts that Plaintiffs have alleged, a constitutional violation occurred. Specifically, the relevant question is whether Plaintiffs have alleged sufficient facts to show that Defendants violated Plaintiffs' Fourth Amendment rights by using excessive

force in the execution of a valid search warrant at Plaintiffs' apartment. The use of excessive force in the execution of a search warrant constitutes a Fourth Amendment violation. . . . [T]he law is clearly established that the authority of police officers to detain the occupants of the premises during a proper search for contraband is 'limited' and that officers are only entitled to use 'reasonable force' to effectuate such a detention. Thus, based on the caselaw that existed on January 10, 2007, the date of the alleged use of excessive force in executing the search warrant, Defendants were on notice that their detention of Plaintiffs during the search using means that were more forceful than necessary would constitute a Fourth Amendment violation.")

Koubriti v. Convertino, 593 F.3d 459, 472 (6th Cir. 2010) ("Whether Koubriti's allegation, when characterized as a more general due process claim, amounts to a constitutional violation has not been developed in the lower court record, nor has it been briefed to this Court. Therefore, it would be improper to reach the merits of this question. . . Since the Supreme Court's decision in *Pearson v. Callahan*, however, we are no longer required to address the constitutionality of the alleged conduct first and can resolve the issue by determining whether such a violation was clearly established. . . In the instant case, even if the claim were to be characterized as one alleging that Convertino violated Koubriti's right to due process by ordering agents not to memorialize the Hmimssa interviews, we could not say that it was clearly established that such behavior is unconstitutional. . . . Here, we can find no case law to support the conclusion that a reasonable official would have understood that the complained of action violated Koubriti's rights. Although Convertino's directive may be questioned, it cannot be said that its unlawfulness is apparent, particularly when reviewing the existing case law. While such behavior is in tension with the policy judgments underlying *Brady*, . . . it would indeed go well beyond the reasonable limits of the *Brady* non-disclosure doctrine to say that it also requires memorialization of interviews. Additionally, cases analyzing sets of facts more similar to the instant case than those in *Brady* have suggested that it is not a constitutional violation. . . Thus, Convertino's behavior, were it to be ruled as a constitutional violation, was not clearly established as a violation at the time Convertino acted.").

Jones v. Byrnes, 585 F.3d 971, 975, 978 (6th Cir. 2009) ("[I]n *Pearson v. Callahan*, __ U.S. __, 129 S.Ct. 808 (2009), the Supreme Court recently abandoned *Katz's* requirement that courts address all qualified immunity inquiries sequentially. . . The Court recognized that the lower courts had complained that the sequential mandate was cumbersome and often forced courts to decide constitutional questions unnecessarily, and also recognized that the sequential mandate was impossible to force on any given judge's thought process. On the other hand, the Court found that the *Katz* inquiry was still appropriate and a correct statement of the test for qualified immunity. . . . However, because *Pearson* left in place *Katz's* core analysis, all pre-*Pearson* case law remains good law. . . . Neither side has cited any case, from any circuit or district court, in which an officer's actions in a police chase have ultimately been found to shock the conscience, nor are we aware of any such case. . . As a result, although *Lewis* established in 1998 that an officer's conduct in a police chase could theoretically shock the conscience, there have been no examples of what specific kinds of conduct rise to that level. The 'clearly established' inquiry 'must be undertaken in consideration of the specific context of the case, not as a broad general proposition....' *Katz*, 533

U.S. at 201. Thus, at present, it would be exceedingly difficult for an officer to be aware of what specific actions violate the clearly established general right of suspects and third parties to be free from arbitrary deprivation of life and liberty in police-pursuit scenarios. Certainly Officers Lentine and Byrnes had no guidance from this Court or the Supreme Court on what *would* shock the conscience, just what *would not.* The officers, therefore, would be entitled to qualified immunity even had we found that their actions shocked the conscience.")

Jones v. Byrnes, 585 F.3d 971, 978-80 (6th Cir. 2009) (Martin, J., concurring) ("I concur in the Court's disposition of this case. Mr. Jones's death, though truly terrible, was not the result of a constitutional violation. I write separately, however, to discuss a troubling problem highlighted by this case and to suggest an approach to apply in future cases that addresses this problem. As the Court notes, neither party has cited a single example of a case, from any circuit or district court, in which an officer's actions in a police chase have ultimately been found to shock the conscience, and I am aware of no such case. Thus, it appears that the set of examples of constitutionally impermissible police-pursuit behavior is currently an empty one. Although surprising, this was not especially troubling under the mandatory analytical regime set forth in *Saucier v. Katz,* 533 U.S. 194 (2001). Under *Katz,* even if a given police-pursuit case did not amount to a constitutional violation, the court would still have to go through the exercise of explaining why the police officer's actions did not shock the conscience. However–at least in theory–sometime in the future a district court will find, and an appellate court will agree, that a police-pursuit case transgressed the Fourteenth Amendment threshold. . . And if *Katz* still controlled, the court confronted with this future case would, as a matter of law, have to confront the constitutional question head on, finally establishing a positive data point announcing that this police action, whatever it is, crosses the line. But *Katz* is no longer the law of the land; *Pearson v. Callahan,* 129 S.Ct. 808 (2009), is. Under *Pearson,* courts are now generally free to address the two questions set forth in *Katz* in whichever order they deem appropriate in a particular case. In practice, this means that a court may avoid deciding whether a constitutional violation occurred if the court is of the belief that, even assuming a violation, it was not clearly established at the time of the incident that the officer's actions crossed whatever constitutional line is at play in a given case. Usually, traditional constitutional avoidance policies would counsel in favor of doing just that. These avoidance policies are why the Supreme Court's decision in *Pearson* makes sense now. In short, *Katz* generally served its purpose–in most section 1983 cases there are now sufficient data points to define the scope of constitutionally impermissible behavior. Thus, there is less of a need to continue developing the body of constitutional precedent, so the constitutional avoidance policies can come back into play. However, police-pursuit cases do not fall within the group of section 1983 cases for which *Katz* accomplished its goal of developing constitutional precedent because the set of examples of impermissible police-pursuit behavior remains empty. I am therefore concerned about applying *Pearson* in future police-pursuit cases. Except in the most overwhelmingly egregious case, an officer that crosses the Fourteenth Amendment's threshold likely still would be entitled to qualified immunity because it was not clearly established that his specific actions were of the kind that crossed the line. Under *Pearson,* the court confronted with this officer's actions could avoid the constitutional question entirely and resolve the case on the clearly established prong. And so too

could all subsequent courts. This, of course, results in a self-perpetuating cycle in Fourteenth Amendment police-pursuit cases: district courts will skip the constitutional inquiry in favor of disposing of cases on the 'clearly established' prong, so there will never be an actual finding that an officer's conduct shocks the conscience, so courts will continue to be able to dispose of cases on the "clearly established" prong, and so on. We could see a string of cases with the same refrain: 'Even if the officer violated the Fourteenth Amendment in continuing this pursuit, it was not clearly established at the time of the incident that his actions violated plaintiff's constitutional rights. We therefore pass on the question whether a constitutional violation actually occurred, because we have discretion to do so under *Pearson,* and find that the defendant is entitled to qualified immunity.' The set of conscience-shocking fact patterns could remain empty, and no body of case law will develop to define the parameters of what police conduct in a pursuit case could shock the conscience. This is a troubling potential because reflexive exercise of *Pearson* discretion in police-pursuit cases could result in essentially writing that cause of action off the books. Thankfully, I believe *Pearson* anticipates this very scenario and provides a safeguard against the extinction of difficult, but nonetheless valid, constitutional tort claims. As I understand *Pearson,* the Supreme Court merely lifted the requirement that lower courts implement the *Katz* analytical sequence in all qualified immunity cases. However, *Pearson* 'continue[d] to recognize that [the *Katz* protocol] is often beneficial.' 129 S.Ct. at 818. Furthermore, Justice Alito's opinion explicitly addresses this very situation, where the body of constitutional law is thin or non-existent: 'In addition, the *Saucier* Court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent *and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.' Id.* (emphasis added). I therefore read *Pearson* to encourage and support continued development of the constitutional law using a more targeted approach in small subsets of qualified immunity cases, such as police-pursuit cases, where the body of law still needs fattening. . . I believe this to be the proper approach and applaud the Court's decision to address the constitutional question in this case even though not required under *Pearson.* I further encourage the district courts and future panels of this Court to follow suit in these kinds of cases by continuing to employ *Katz's* analytical sequence.").

Chappell v. City Of Cleveland, 585 F.3d 901, 916 (6th Cir. 2009) ("In sum, plaintiff has failed to present a genuine issue of material fact on her claim that defendants violated McCloud's Fourth Amendment right to freedom from unreasonable seizure. At best, plaintiff has presented grounds for speculation that defendants misread her grandson's innocent intentions when he came out of the closet and advanced toward them with knife in hand. Yet, qualified immunity protects officers from liability for mistakes of law and fact. Plaintiff has failed to adduce facts demonstrating that defendants, in potentially misinterpreting McCloud's actions, were plainly incompetent or deliberately violated his rights when they acted in self-defense. Plaintiff has thus failed to carry her burden under the first prong of the qualified immunity analysis of demonstrating that defendants violated McCloud's constitutional rights. She has failed to demonstrate that they are not entitled to qualified immunity. Moreover, there being insufficient evidence of a constitutional

violation, defendants, in effect, have no need of qualified immunity and are actually entitled to summary judgment as matter of law.").

Waeschle v. Dragovic, 576 F.3d 539, 544, 550 (6th Cir. 2009) (amended opinion) ("Our qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established. . . .In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal. Not a single case instructed Dragovic to treat the brain in any manner other than the way he did. Nor did any Michigan statute unambiguously instruct Dragovic on how to dispose of individual body parts retained for forensic examination as opposed to dealing with the body as a whole. Waeschle's alleged constitutionally protected property right to her mother's brain is therefore not clearly established because the underlying state-created property interest is not "sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . . [W]hether to recognize such a right is a task that the Michigan legislature and courts are better equipped to handle than this court, which is why we are exercising our discretion under *Pearson* to not further explore the first prong of the qualified-immunity test as set forth in *Saucier v. Katz*, 533 U.S. 194 (2001).")

Grawey v. Drury, 567 F.3d 302, 309 (6th Cir. 2009) ("Some panels of the Sixth Circuit have employed a third step requiring the court to determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional right. . . In excessive force cases, however, because the defendant's conduct must have been objectively unreasonable to find a constitutional violation, *Graham v. Connor*, 409 U.S. 386, 395 (1989), the third step is redundant. Thus, qualified immunity in excessive force cases is a two-step analysis. . . . While excessive force qualified immunity claims should proceed under a two-step rather than a three-step analysis, we note that the Supreme Court, in *Pearson v. Callahan*, 128 S.Ct. 808, 818 (2009), recently granted lower courts the discretion to conduct their two-step analysis in the manner most appropriate to the case before them. We will apply the traditional analysis, examining first whether Grawey has presented evidence of an excessive force constitutional violation and then whether the constitutional right violated was clearly established at the time of the incident.").

Dominguez v. Correctional Medical Services, 555 F.3d 543, 549, 552 (6th Cir. 2009) ("Determining whether the government officials in this case are entitled to qualified immunity generally requires two inquiries: 'First, viewing the facts in the light most favorable to the plaintiff, has the plaintiff shown that a constitutional violation has occurred? Second, was the right clearly established at the time of the violation?'. . cf. *Pearson v. Callahan*, No. 07-751, 2009 U.S. LEXIS 591, (Jan. 21, 2009) (holding that the two-part test is not longer considered mandatory; thereby freeing district courts from rigidly, and potentially wastefully, applying the two-part test in cases that could more efficiently be resolved by a modified application of that framework). . . . As applied to this case, Dominguez's right to adequate medical care has long been clearly established.

Therefore, we conclude that Dominguez has satisfied both requirements for overcoming Fletcher's qualified immunity defense.")

Weinberger v. Grimes, No. 07-6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) ("While Weinberger had a right to a kosher diet while in prison–subject to reasonable restrictions–it is less clear whether that right was violated by being served a non-kosher meal on a single occasion. We therefore assume without deciding that it was, and proceed to determine whether Tomberlin is nevertheless entitled to qualified immunity. *See Pearson,* 2009 WL 128768. . . . Here, there is no evidence that Tomberlin acted knowingly in serving Weinberger a non-kosher meal. The evidence tends to establish instead that FCI Manchester was an accredited provider of kosher meals and that Tomberlin was not personally involved in food preparation. Therefore, Tomberlin held a reasonable belief that the Passover meal presented to Weinberger was kosher. Likewise, there is no evidence that Tomberlin was incompetent. Accordingly, Tomberlin was entitled to qualified immunity, as the district court correctly concluded.")

Long v. Cnty. of Saginaw, No. 12-CV-15586, 2014 WL 5460630, at *9 (E.D. Mich. Oct. 27, 2014) ("In summary, existing precedents did not give jail officials fair warning that their surveillance of Long's meeting with his client was subject to the Fourth Amendment's reasonableness requirement, and accordingly the right at issue was not clearly established. . . Sixth Circuit precedent has indicated that visual surveillance may constitute a Fourth Amendment search, but never has it addressed the more specific issue of whether visual surveillance of an attorney-client meeting in prison may violate the Fourth Amendment. Officer Federspiel is thus entitled to qualified immunity regardless of whether the jail officials' conduct amounted to a violation of Long's Fourth Amendment rights. Accordingly, Sheriff Federspiel's motion for summary judgment with respect to his individual liability will be granted because he is immune from suit.")

Perrea v. Cincinnati Public Schools, 709 F.Supp.2d 628, 649, 650 (S.D. Ohio 2010) ("This Court already has determined that if the facts alleged are true then Hahn violated Perrea's right to equal protection under the Fourteenth Amendment to the Constitution. . .The issue, therefore, is whether the right was clearly established. . . . In this case, it would not have been sufficiently clear to a reasonable person that Hahn violated Perrea's equal protection rights if she surplussed Perrea on the basis of the staff racial balance provisions. The staff racial balance provisions in the collective bargaining agreement arose out of the *Bronson v. Board of Education of Cincinnati,* No. 1:74-cv-205 (S.D.Ohio), school desegregation case. The staff racial balance provisions previously had been upheld by the Sixth Circuit in *Jacobson v. Cincinnati Board of Education,* 961 F.2d 100 (6th Cir.1992). This Court has concluded that today the Sixth Circuit would apply strict scrutiny analysis and find that the provisions are unconstitutional, but no court had so found in February 2008 when Perrea was surplussed. For these reasons, the Court concludes that Hahn did not violate a clearly established right and she is entitled to qualified immunity on Perrea's equal protection claim.")

New v. Perry, No. 2:07-cv-723, 2009 WL 483341, at *4, *12 (S.D. Ohio Feb. 25, 2009) ("Although *Saucier* also held that the questions must be decided in this exact order, the Supreme Court recently retreated from that requirement and now allows the lower courts to decide the questions is either order. [citing *Pearson*]However, the Supreme Court recognized that this framework will often continue to be beneficial in many cases involving qualified immunity. . . Here, the Court sees no reason to depart from the traditional approach. Accordingly, the Court will first turn to whether the facts, as alleged by the plaintiffs and taken in the light most favorable to them, show that one or more of the defendants violated a right protected by the Fourth Amendment. . . . Mr. New's allegations concerning his being dragged to the lab, kneed in the back, and slammed to the ground create a triable issue of fact concerning whether the force used was reasonably related to the goal of having his palms printed. Having found that Mr. New has asserted a viable constitutional violation, the Court must determine whether the right alleged to have been violated was clearly established at the time of the defendants' conduct. Generally speaking, a suspect has a clearly-established right to be free from the use of excessive force. . . . Reasonable officers would have been aware that this level of force could not be justified solely on the basis of the officers' perceived right to take Mr. New's palm prints, especially given the fact that he was not under arrest for a crime at the time the force was applied.")**.**

Hysell v. Thorp, No. 2:06-cv-170, 2009 WL 262426, at *14 n.11, *20, *21 (S.D. Ohio Feb. 2, 2009) ("The Supreme Court very recently held that courts are no longer required to consider these two questions in this particular order. *Pearson v. Callahan*, __ S.Ct. __, 2009 WL 128768, at *9 (U.S. Jan. 21, 2009). However, it also noted that this sequence is still 'often appropriate.' *Id.* In this case, the Court sees no reason to vary the standard approach. . . . To summarize, the Court finds that Sergeant Carson violated Plaintiff's Fourth Amendment rights when he used the arm bar hold and leg sweep to take Plaintiff to the ground. The Court also finds that Sergeant Carson and Deputy Kimble violated Plaintiff's Fourth Amendment rights when they subsequently forced Plaintiff's arms up behind his back in order to handcuff him. Having found that these officers engaged in excessive force, the Court turns next to the second prong of the qualified immunity analysis, *i.e.*, whether the constitutional right was clearly established. . . . In this case, Plaintiff was accused of committing two misdemeanors. He was not actively resisting arrest and posed no immediate threat to the officers or anyone else. . . .It is clearly established that when an arrestee is not violent and poses no immediate threat to the safety of the officers or others, officers are not entitled to inflict unnecessary pain. . . . In the Court's view, the law of this circuit, as it existed on the date of Plaintiff's arrest, put Defendants on fair notice that their conduct in effecting his arrest was unlawful. Because the law was clearly established, the Court concludes that Deputy Kimble and Sergeant Carson are not entitled to qualified immunity.").

SEVENTH CIRCUIT

Mason-Funk v. City of Neenah, 895 F.3d 504, 507-10 (7th Cir. 2018) ("We have discretion to choose which prong to address first, . . . and since the second prong is dispositive here, we address

only whether the right at issue was clearly established. . . .[S]ince these two decisions, the Supreme Court has made clear that '*Garner* and *Graham* do not by themselves create clearly established law outside an obvious case.' . . Mason-Funk argues that existing case law put Officers Hoffer and Ross on notice that their conduct and use of deadly force was unconstitutional. More specifically, she contends that the officers were on notice (1) that they had a constitutional obligation in hostage situations to protect innocents and distinguish between the suspect and innocents; (2) that Funk's conduct did not create an imminent threat justifying the use of deadly force; and (3) that deadly force may not be used without providing a warning, except in extraordinary circumstances. We first examine Supreme Court precedent and precedent from this Circuit to determine whether a right was clearly established at the time of violation. . . Mason-Funk relies on *Garner* for the second and third propositions above—deadly force is only permissible when the suspect poses a threat of imminent harm to the officers or others, . . . and deadly force may be used to prevent an escape only 'if, where feasible, some warning has been given.'. . But Mason-Funk admits that *Garner* alone does not create clearly established precedent and that this is far from the obvious case where it might create such precedent. . . . No existing precedent squarely governs the facts and circumstances that confronted Officers Hoffer and Ross. . . Consequently, the officers were not on notice that their use of deadly force on an armed individual, without warning in a dangerous and chaotic hostage situation, violated any clearly established right. Funk fails to cite to any precedent, outside of a vacated Ninth Circuit opinion and a handful of district court cases, which involved a hostage situation. On this basis alone, the remaining cases cited by Funk are factually distinct and incapable of giving the officers any fair warning that they violated a clearly established right. In the circuit cases cited by Funk, the individuals armed with guns did not pose an imminent threat to the officers based on the context of those confrontations. However, the backdrop here to the officers' use of deadly force was an active and dangerous hostage situation, one in which they had been shot at by the hostage-taker. These circumstances, absent in *Garner*, *Weinmann*, *Cooper*, or *Baker*, posed a unique and serious threat to the officers, undermining comparisons to the aforementioned cases. To drive home the point, it is worth recounting what occurred in the short span of six minutes. Flatoff had continuously made threats that he would kill the hostages, which prompted the hasty team to act. When the hasty team encountered Flatoff inside the shop, Officers Hoffer and Ross were met with a barrage of gunfire, including a shot that struck Officer Hoffer's helmet in what he believed was not a hostage situation, but rather an ambush. Within minutes of being shot at, the officers heard more gunfire coming from the rear entrance. When Funk appeared in their line-of-sight holding a gun, the officers, in a matter of seconds, concluded that Funk was one of the people inside the shop who had shot at them only minutes ago. Simply put, the facts in this case and existing precedent failed to put Officers Hoffer and Ross on notice that their use of deadly force, without a warning, on an armed individual in a dangerous hostage situation, was unlawful. The officers did not violate a clearly established right and they are entitled to qualified immunity.")

Sebesta v. Davis, 878 F.3d 226, 234-35 (7th Cir. 2017) ("As the plaintiff, she bears the burden of showing that there is a case 'on point or closely analogous' that allows us to conclude that a reasonable government employee would or should know that her conduct is unlawful. . . Sebesta

cites multiple cases to support her position that the three individual defendants should have known they were violating Sebesta's right to familial integrity. But, as is often the case, these cases fail to meet the specificity criteria that the Supreme Court has established. . . Though earlier decisions need not be 'directly on point,'. . . a look at the four cases on which Sebesta relies demonstrates that none would have alerted a reasonable official to the possibility that her conduct in the situation she confronted was unlawful. . . .Sebesta needed to show that 'it would have been clear to [Davis, Childs, and Bean] that the alleged conduct "was unlawful in the situation [they] confronted."'. . She has not done so. *Brokaw*, *Doe*, and *Dupuy II* establish only that the state actors needed evidence supporting a *reasonable* suspicion of abuse or neglect in order to report, investigate, and 'indicate' Sebesta. Nothing in these cases would have put Davis, Childs, or Bean on notice that their suspicions were unreasonable or their actions unlawful. To the contrary, Davis, Childs, and Bean had a significant amount of evidence supporting a reasonable suspicion of future harm to the baby. . . . Because Sebesta presents no cases clearly establishing that Davis, Childs, and Bean knew that they were acting unlawfully by reporting, investigating, and 'indicating' her, we need not consider whether there was any violation of her constitutional right to familial integrity. The individual defendants are entitled to qualified immunity on her claim under section 1983.")

Howell v. Smith, 853 F.3d 892, 897-900 (7th Cir. 2017) ("We may rest our decision on either prong of the qualified immunity doctrine. . . Here, in the hope that our decision will provide meaningful additional guidance to police officers operating in the field, we address the first prong and determine whether Mr. Howell suffered a deprivation of a federal constitutional right. . . . Although the record is replete with evidence of Mr. Howell's earlier difficulties with his shoulder and of his difficulties after this encounter, we must focus on what Officer Smith knew at the time of the incident. During the arrest, and while placed in handcuffs, Mr. Howell at most told Officer Smith that he recently had surgery that limited the mobility of his arm; he never stated explicitly that he was in pain or actively suffering in any way. . . .The crux of the matter is that, *from Officer Smith's perspective*, he was dealing with an individual suspected of committing a felony involving the discharge of a firearm on the public way. . . Although '[a] person has the right to be free from an officer's knowing use of handcuffs in a way that would inflict *unnecessary* pain or injury,' that right is tempered by the attendant 'risk of flight or threat of injury.'. . Here, although Officer Smith had a duty to *consider* the information that Mr. Howell had given him about his condition, . . . he had very little information to evaluate. That information, moreover, clearly did not outweigh the very concrete information about the crime and the circumstances under which it was allegedly committed. Officer Smith's decision did not violate the Fourth Amendment.")

Werner v. Wall, 836 F.3d 751, 759-66 (7th Cir. 2016) ("In some situations, adherence to the traditional two-step approach is appropriate. . . . Nevertheless, the circumstances of the present case make it advisable to avail ourselves of the latitude now afforded us. . . Indeed, there are several reasons that counsel that we not address definitively the constitutional issue. First, the underlying administrative directive is no longer operable. Secondly, the appropriate analysis for claims of detained individuals not subject to sentences of incarceration is a difficult question, and it is easy for an intermediate appellate tribunal to lose its footing on the shifting sands of present-day case

authority. For a long time, we have recognized that the treatment of a detained person not serving a sentence of incarceration is governed by the Due Process Clause, . . . but we often have borrowed Eighth Amendment standards as a rule of decision. . . We also have recognized, of course, that a person serving a sentence of probation or parole has a limited liberty interest in his freedom that cannot be curtailed without the procedural protections of notice and hearing. . . Yet, when confronted with the failure to release a person because of an error in the computation of his sentence, we have relied on the principles of the Eighth Amendment. . . Other circuits have employed a variety of approaches invoking Eighth Amendment and due process protections. . . Recently, however, the Supreme Court held that the treatment of a pretrial prisoner is governed by the substantive standards of the Due Process Clause. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). . . . Another consideration further convinces us that we should not attempt to reconcile these governing principles here. Mr. Werner has presented the due process argument to us solely as a matter of procedural due process, but we think that *Kingsley*, *McNeil*, and *Baker* suggest that substantive due process principles are implicated here. Rather than resolve definitively that question in a case in which counsel has not squarely raised the issue, we believe the proper course is to focus on the second prong of the qualified immunity inquiry and to determine whether the contours of the right involved were clearly established at the time of the defendants' actions. . . . For the reasons set forth below, we conclude that a reasonable official would not have known that detaining Mr. Werner pursuant to AD 02-10 was legally impermissible. . . . The Wisconsin Supreme Court's reasoning in *Riesch* confirms that *Olson* and *Allen* had not put the precise situation addressed by AD 02-10 'beyond debate' in Wisconsin. . . *Riesch* marked the first time that a Wisconsin court had focused on the inherent conflict between a sex offender's right to timely release to supervision and the rules and restrictions governing that release. The Wisconsin Supreme Court's treatment of this dilemma demonstrates that 'the right's contours were [not] sufficiently definite that' the defendants in this case would have been on notice that AD 02-10's procedure was unlawful. . . *Riesch* made clear that the DOC's inability to locate appropriate housing does not afford it a blank check to detain indefinitely an individual set for release from imprisonment. However, the Wisconsin Supreme Court was cognizant of the practical difficulties that can arise when release itself conflicts with the 'substantial discretionary authority' that DOC has 'to develop the rules and conditions for releas[ing]' a person to supervision. . . Rather than prohibit absolutely the DOC from detaining individuals caught in this predicament, *Riesch* endorsed a narrow exception: 'Where inmates violate these terms immediately and simultaneously with their scheduled mandatory release dates, the DOC should be able to maintain continuous custody.'. . *Riesch* therefore can be read plausibly as acknowledging that, under Wisconsin law, the DOC may 'maintain continuous custody' in the unique circumstance where release from imprisonment to a lesser level of restraint would violate the terms of release due to an inability to make practical arrangements for the implementation of that lesser restraint. . . Here, although Mr. Werner's probation violation was not, in strict terms, 'immediate [ ] and simultaneous[ ],' it was, as a practical matter, an imminent certainty. . . And although his infraction was not, like Riesch's, the product of his recalcitrance, releasing Mr. Werner to probation equally would have 'elevate[d] form over substance' to require 'a ritual where the DOC releases [noncompliant] inmates just outside the prison walls on their mandatory release dates before subsequently' detaining them. . .

To be sure, the length of deferral of release from imprisonment in this case may well have been a fairly aggressive reading of *Riesch*. . . However, given the lack of clarity with respect to *Riesch*'s outer limits, 'we cannot say that only someone plainly incompetent or who knowingly violate[s] the law would have ... acted as [the defendants] did.'. . . Because clearly established law at the time would not have notified the defendants in this case that the procedures set forth in AD 02-10 were unlawful, we conclude that they are entitled to qualified immunity on Mr. Werner's claims.")

Werner v. Wall, 836 F.3d 751, 766-70 (7th Cir. 2016) (Hamilton, J., dissenting in part) ("I respectfully dissent from my colleagues' decision to grant qualified immunity to the policy-making defendants, Hamblin, Snyder Spaar, and Symdon. They adopted and enforced Administrative Directive 02-10. That policy was unconstitutional as applied to someone like Werner, who had reached his mandatory release date and who, through no fault of his own, was unable to find housing that satisfied both local laws and state parole officials. Pursuant to that policy, Werner spent 54 weeks in a county jail when that custody was clearly not authorized by state law. Werner was deprived of his liberty without due process of law. . . .For more than a year neither Werner nor anyone helping him could find lawful and suitable housing for him. Werner was kept in custody pursuant to the policy that the defendants adopted and enforced. That policy was unconstitutional and contrary to state law even when it was issued in 2002. To extend qualified immunity to these defendants, though, the majority errs by relying upon a more recent decision by the Wisconsin Supreme Court, *State ex rel. Riesch v. Schwarz*, 692 N.W.2d 219 (Wis. 2005). As explained below, the state court in *Riesch* took care to distinguish its decision from cases like Werner's, in which offenders who reach their release dates are cooperative with efforts to supervise them. Plaintiff Werner committed serious crimes and was punished severely for them. As a plaintiff, he is singularly unsympathetic. He earned his designation as a 'Special Bulletin Notification' offender by committing multiple sex offenses against children. Both during and after the period in question here, he has repeatedly violated the law. He is now back in prison after another crime. Nevertheless, the legal issues in his case extend beyond Mr. Werner and his crimes. Under the state law governing his conviction and punishment, when Werner reached his mandatory release date, he was entitled to be released from custody, subject to conditions of parole. As the majority opinion recounts, he was not released but was instead locked up in a county jail. He was kept in jail 148 out of 168 hours each week. The remaining 20 hours he was allowed to leave the jail with a chaperone to accomplish the nearly impossible job of finding housing that would comply with all the local laws applicable to convicted sex offenders and with the state's conditions of parole. More than a year after his initial 'release' to the county jail, he finally found housing that satisfied all the criteria. . . . Werner's continued custody in the county jail—and 'custody' is the only way to describe those 148 hours per week—was not authorized by state law or by a court judgment after due process of law. He was quite simply deprived of his liberty without due process of law. Executive branch officials are not authorized to lock people up indefinitely without prior court authorization. The ability to seek a writ of habeas corpus later does not mean the initial deprivation occurs with due process of law. And even a parolee, whose liberty is conditional and constrained, cannot have his parole revoked and his liberty taken away without due process of law. . . I recognize that the combination of local laws in Brown County and the needs of effective parole

supervision placed the defendants at all levels of the Wisconsin parole system in a tough spot. If they had faced Werner's situation without guidance from state law, a defense of qualified immunity would have more merit. But the slate was not clean. Similar problems had arisen before. The state courts had squarely rejected the solution of keeping offenders like Werner in custody past their mandatory release dates. . . .The Wisconsin Court of Appeals held not only that Allen had stated a claim for violation of his constitutional rights but that the violation was so clearly established that defendants were not entitled to qualified immunity: 'We agree with Allen that *Woods* and *Olson* clearly established' that Allen was entitled to release on parole on his mandatory release date. . .The *Allen* court then rejected a further qualified immunity argument that is echoed in this case. The argument is that because some cases found unauthorized continued custody violated the Eighth Amendment while others found it violated the Due Process Clause of the Fourteenth Amendment, the controlling law was not 'clearly established.' The Wisconsin Court of Appeals correctly found in *Allen* that the unlawfulness of the continued custody was clearly established in 2000 despite doctrinal arguments about whether it violated one or both amendments. The application of two basic liberties does not weaken the case. It strengthens it. The *Allen* court concluded, as we should, 'that no reasonable public official could have believed that such continued detention was constitutionally permissible.'. .The qualified immunity presents an unusual wrinkle here. Qualified immunity doctrine often indulges in the legal fiction of assuming that official defendants are aware of applicable court decisions. Here, there was no fiction at all. The policy-making defendants issued AD 02-10 after both *Woods* and *Olson* had been decided. The policy even cited both decisions, yet purported to authorize continued custody in the teeth of those decisions. To avoid reversing the judgment for the policy-making defendants, the majority invokes qualified immunity based on the Wisconsin Supreme Court's 2005 decision in *Riesch*, 692 N.W.2d 219, or, more precisely, based on what the majority generously calls 'a fairly aggressive reading' of *Riesch*. A qualified immunity defense is supposed to be based upon objectively reasonable interpretations of existing law. . . Using *Riesch* as a qualified immunity lifeline for the policy-making defendants is not objectively reasonable. The majority first overlooks the critical distinction drawn by the *Riesch* court itself and then attributes to the Wisconsin Supreme Court in *Riesch* an internal contradiction and confusion that simply are not present. In fact, *Riesch* expressly agreed with *Woods* and *Olson* and took care to distinguish Riesch's case on grounds that apply directly here. It is no surprise that neither the district court nor the defendants, in their brief to this court or in letters to plaintiff, relied on *Riesch* to justify qualified immunity. Like Werner, Riesch was a sex offender who was nearing his mandatory release date. Unlike Werner, though, Riesch did not cooperate with the release and supervision process. He announced that he would not participate in the sex offender treatment program that was required as a condition of parole. He refused to provide medical information or his signature on his fingerprint record. His behavior was such that the assigned parole agent was unwilling to meet with him unless he were shackled, and he refused. Riesch had his parole revoked without ever actually leaving state custody. In his challenge to the revocation, he relied on *Woods* and *Olson* to argue that he had never actually been paroled, so that his parole could not be revoked and he should be released. The Wisconsin Supreme Court affirmed the denial of relief, but on narrow grounds that distinguished both *Woods* and *Olson* on grounds that apply directly here. The *Riesch* court explained: '*Woods* and *Olson* are

unlike the present case because *the inmates in those cases did nothing to warrant their continued detention at the time of their mandatory release date*. In contrast, the inmate in the *Macemon* cases, like Riesch, violated the conditions of his parole immediately and simultaneously with his mandatory release date.' . . At least after *Woods*, *Olson*, and *Allen*, and certainly in light of the distinction drawn in *Riesch*, reasonable policy-making officials could not have believed that they were authorized to keep offenders like Werner in jail after their mandatory release dates. Instead, they doggedly stuck to the policy, even telling Werner that 'Case law upholds the procedures' of AD 02-10, without identifying the case law. . . The policy-making defendants should have known that AD 02-10 would result in unconstitutional deprivations of liberty in cases like Werner's, where the parolee did not deliberately fail to comply with parole conditions. I would allow the qualified immunity defense for the local parole agents and their supervisors who had been ordered to implement AD 02-10, but we should reverse for trial on the claims against the policy-making defendants.")

> *See also* ***Murphy v. Madigan***, No. 16 C 11471, 2017 WL 3581175, at *7-8 (N.D. Ill. Aug. 18, 2017) ("*Werner* acknowledged, but never resolved, the 'difficult question' as to whether the treatment of detained individuals not subject to sentences of incarceration, like the Plaintiffs in this case, is appropriately analyzed under the Eighth Amendment or substantive due process. . . For example, an error in the computation of a sentence implicates the Eighth Amendment while treatment of a pretrial prisoner is governed by substantive standards of Due Process. . . Ultimately, the appellate court found defendants were entitled to qualified immunity and never attempted to reconcile the constitutional tension. Nevertheless, *Werner* contemplates that the same factual nucleus might raise both Eighth Amendment and substantive due process principles. Certainly at this early stage of litigation, Plaintiffs' claims are not sufficiently developed to determine whether the claims fit more properly under substantive due process or the Eighth Amendment. A plaintiff is allowed to plead duplicative claims or claims in the alternative: '[a] party may set out 2 or more statements of a claim … alternatively or hypothetically, either in a single count … or in separate ones.' Fed. R. Civ. P. 8(d)(2). The argument the claim is duplicative holds no water and Plaintiffs' may proceed on their substantive due process claims. . . .According to the Complaint, Defendants knew that Plaintiffs did not have financial resources to find housing, that there are no halfway houses that take sex-offenders in Illinois, and still rejected proposed host sites leading to indefinite incarceration. Based on these allegations, it is hard to envision an acceptable host site for an indigent prisoner: to find a house in 2017 without a smart phone is in it of itself a near impossible task. Taken together with the wide discretion Defendants have in making their housing determinations, the rejections of host sites which results in Plaintiffs' indefinite incarceration may constitute deliberate indifference. . . These allegations are therefore sufficient to support their Eighth Amendment claim.")

Dibble v. Quinn, 793 F.3d 803, 807, 814 (7th Cir. 2015) ("We have discretion to decide a case under the second step 'without resolving the often more difficult question whether the purported

right exists at all.'. . We take that approach here. . . .Here, we have found no case clearly establishing that motive is relevant to determining whether a validly enacted statutory amendment eliminating an employee's property interest complies with procedural due process requirements. While *Schulz* suggested that such a pretext inquiry might be appropriate for a 'purportedly legislative decision,' it did not grapple with *Bogan* or cases like it, which tend to bar this type of judicial inquiry because of the special nature of legislative action. The dictum in *Schulz* falls well short of placing the 'constitutional question beyond debate.'. .None of this is to say, however, that there is no support for a distinction between bona fide legislation and an adjudicative determination dressed up in legislative clothing. Drawing this line can be difficult and can have broad implications. . . .We express no view on whether a plaintiff in other circumstances might be able to make out a constitutional claim. We hold only that plaintiffs have failed to demonstrate a clearly established right that was violated by legislation ending their six-year terms as arbitrators. Defendants are entitled to qualified immunity.")

Locke v. Haessig, 788 F.3d 662, 667-73 (7th Cir. 2015) ("Here we take the unusual step of beginning with the second prong because our discussion of the state of the law in 2007 and 2008 provides helpful context for analysis of later developments in the law. . . . If we accept the facts asserted by Locke, Haessig's actions violated clearly established law at time of the violation. In 2007 and 2008, when the events took place, it was well established that sexual harassment by a state actor under color of state law violated the Equal Protection Clause and was actionable under § 1983. *Valentine v. City of Chicago,* 452 F.3d 670, 682 (7th Cir.2006); *Bohen v. City of East Chicago,* 799 F.2d 1180, 1185–86 (7th Cir.1986). It was also clear that a supervisor could be held liable for a subordinate's sexual harassment if the plaintiff could show either intentional sex discrimination or a conscious failure to protect the plaintiff from abusive conditions created by subordinates amounting to intentional discrimination. *Valentine,* 452 F.3d at 683–84; *Bohen,* 799 F.2d at 1187; see also *T.E. v. Grindle,* 599 F.3d 583, 588 (7th Cir.2010) . . . .By 2007, we had recognized that males who were sexually harassed could bring equal protection claims if they could show intentional discrimination on the basis of their sex. We reversed a grant of summary judgment where a male plaintiff presented evidence that school officials ignored his complaints of sexual harassment by male classmates but consistently punished the harassers when similar complaints were made by girls. *Nabozny v. Podlesny,* 92 F.3d 446, 454–56 (7th Cir.1996). It was also well established in 2007 and 2008, however, that a supervisor was not liable under a *respondeat superior* theory for constitutional torts committed by a subordinate. . . And a merely negligent failure to intervene was not enough to show discrimination that violated the Equal Protection Clause. . . A reasonable official in Haessig's position would have known that her alleged conduct was unconstitutional. . . Accepting Locke's version of the facts, Haessig was more than merely negligent. She failed to intervene or investigate in response to Locke's complaint, and she then threatened to retaliate against him for complaining of harassment. . . . As in *Valentine,* a jury could infer that Haessig had 'consciously chosen not to protect' Locke from the sexual harassment and on that basis hold Haessig liable for intentional sex discrimination. . . After *Valentine,* it should have been clear to a reasonable officer that Haessig's alleged conduct was unlawful in this situation. . . Haessig cannot claim the protection of qualified immunity on the ground that she had

no notice that her actions were unlawful. . . .Haessig could still be entitled to qualified immunity if the undisputed facts show that her conduct violates no constitutional right under current law. In other words, if developments in constitutional law since 2008 mean that Haessig's conduct did not violate any constitutional right, she would be entitled to summary judgment even if her conduct was unlawful under prevailing law in 2008. Haessig contends that her conduct violated no constitutional right because the facts show that she did not have the intent to discriminate that *Ashcroft v. Iqbal,* decided in 2009, now requires for supervisory liability for constitutional violations. . . .For discrimination claims like those at issue in *Iqbal* and here, where the state of mind of purposeful discrimination is an element of the violation, a supervisor is liable only if she had the specific intent to discriminate. . . For these claims, the plaintiff must show 'more than "intent as volition or intent as awareness of consequences."'. . . The supervisor is liable for undertaking a course of action only because of, not merely in spite of, the action's adverse effects upon an identifiable group. . . Although *Iqbal* involved a claim of invidious discrimination, the Court's discussion shaped the law of supervisory liability for constitutional violations more generally. Before *Iqbal,* most circuits required that a supervisor act (or fail to act) with the state of mind of deliberate indifference to be liable, no matter the underlying constitutional violation. . . .After *Iqbal,* we re-examined the state of mind required for supervisory liability for sexual harassment in *T.E. v. Grindle,* 599 F.3d 583 (7th Cir.2010). . . . Haessig argues that *Iqbal* and *Grindle* together mean that there is a constitutional difference between action and inaction—that purposeful discrimination may be inferred from the former but not the latter. She contends the district court erred as a matter of law in holding that a jury could find Haessig liable for an equal protection violation for purposefully ignoring Locke's complaint of harassment. . .We have doubts about this argument. For one, there is little support in these cases for a distinction between action and inaction. Haessig points us to the Supreme Court's statement that purposeful discrimination 'involves a decisionmaker's undertaking a course of action because of ... the action's adverse effects upon an identifiable group.'. . Haessig seizes on one phrase, 'course of action,' as implying that a supervisor who takes no action cannot, as a matter of law, intend discrimination. We reject such an expansive reading of *Iqbal.* Haessig's argument conflicts with the principle that a supervisor could be liable for ignoring complaints from one identifiable group while acting on similar complaints from those of another group. . . . Short perhaps only of a confession of intentional discrimination, selective inaction can be strong evidence of discriminatory intent. In any event, Locke has provided evidence that tends to show that Haessig's response was more than mere inaction. A reasonable jury could infer that Haessig had the requisite intent to discriminate because she threatened to retaliate against Locke after he complained of sexual harassment. . . . Locke may submit his evidence to a jury and can prevail if he can convince the jury that Haessig treated Locke's complaint differently because he was a man complaining of sexual harassment. Locke does not need to prove that Haessig was motivated solely by his sex in the way that she responded to his complaint, but he must show that she chose her course of action at least in part because of his sex.")

Gerhartz v. Richert, 779 F.3d 682, 687-89 & n.10 (7th Cir. 2015) ("Following *Schmerber,* several courts read the Supreme Court's decision as endorsing a per se exigency rule in blood-alcohol

cases—that is, that the natural dissipation of alcohol from the blood constitutes a per se exigency. . . Notably, the Supreme Court of Wisconsin was among those that took this view, declaring in *State v. Bohling,* 494 N.W.2d 399 (Wis.1993), that the exigency identified in *Schmerber* 'was caused solely by the fact that the amount of alcohol in a person's blood stream diminishes over time.'. . The Supreme Court rejected this understanding of *Schmerber* in *McNeely.* In *McNeely,* the Court clarified that, 'while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber,* it does not do so categorically.'. . Thus, the Court explained, '[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.'. . Mr. Gerhartz contends that the district court awarded summary judgment based on the same per se exigency theory rejected in *McNeely* and that, under *McNeely,* summary judgment was improper because there existed a genuine dispute as to whether exigent circumstances were present. In response, Deputy Richert and Sergeant Tyson contend, as they did before the district court, that their decision to order a blood draw on Mr. Gerhartz was lawful and that, in any event, they are entitled to qualified immunity. . . .Here, because of the undeveloped nature of the factual record, we start (and end) our analysis with the clearly-established prong. During the parties' briefing of this case, we decided a similar issue. In *Seiser v. City of Chicago,* 762 F.3d 647 (7th Cir.2014), we held that, prior to the Supreme Court's decision in *McNeely,* the law was not clearly established on the issue of whether the natural dissipation of alcohol from the bloodstream constitutes a per se exigency. . . In arriving at this conclusion, we noted that, prior to *McNeely,* courts were split over this issue and that many jurisdictions—like Illinois, where the search in *Seiser* took place—had adopted a per se exigency rule in blood-alcohol cases. . . Given these circumstances, the court determined that a reasonable officer in the defendant's position 'would have believed ... that so long as there was probable cause to justify a breathalyzer examination, there was no need to consider seeking a warrant first.'. . Although the intrusiveness of a search is certainly relevant to its reasonableness under the Fourth Amendment, Mr. Gerhartz has not identified any clearly established authority that would have put the defendants on notice that their decision to order a warrantless blood draw (as opposed a breathalyzer test) was unlawful. Nor could he. At the time *McNeely* was decided, the law regarding exigent circumstances in blood-alcohol cases was just as unclear with regard to blood draws as breathalyzer tests. Indeed, both *McNeely* and *Schmerber* concerned warrantless blood draws rather than breathalyzer tests. . . .Rather, we conclude that *Seiser* is controlling in this case. Here, the search at issue took place in Wisconsin on February 16, 2006. At this time, approximately seven years before *McNeely,* Wisconsin case law recognized a per se exigency rule in blood-alcohol cases. *See Bohling,* 494 N.W.2d at 402. . . Thus, Deputy Richert and Sergeant Tyson faced the same lack of clearly established law that confronted the defendants in *Seiser.* As such, they are entitled to qualified immunity. . . .Having decided that Deputy Richert and Sergeant Tyson's conduct did not contravene any clearly established law, we need not decide whether their actions in fact violated Mr. Gerhartz's Fourth Amendment rights. Because the defendants are entitled to qualified immunity, the judgment of the district court is affirmed. . . .In highlighting the defendants' reasonable reliance on *State v. Bohling,* 494 N.W.2d 399 (Wis.1993), we do not mean to suggest that a state supreme court decision always will prove sufficient to demonstrate the absence of clearly established law. Crucially, at the time of the defendants' actions in this case,

neither this court nor the Supreme Court had addressed whether *Schmerber v. California*, 384 U.S. 757 (1966), created a per se exigency rule in blood-alcohol cases.")

Mordi v. Zeigler, 770 F.3d 1161, 1165-67 (7th Cir. 2014) ("There was a time when lower courts were required to follow a prescribed sequence when they considered the two questions pertinent to qualified immunity, always deciding first if the alleged facts described a legal violation, and only if they did, moving on to the question whether the law was clearly established. . . The Court thought better of this requirement in *Pearson,* however, and it is now permissible to reach the second question first, if that is more efficient. . . The present case, we conclude, is one that benefits from the flexibility afforded in *Pearson.* We thus move directly to the question whether Officers Zeigler, Chance, and Healey should have realized that, by failing to inform Mordi of his Article 36 rights, they were violating his rights. . . .At a high level of generality, one might think that federal, state, and local officials all should know the laws of the United States, including its treaties, and thus all should be held accountable if they fail to discharge 'known' duties like this one. But the Supreme Court has told us that this is not the correct perspective. Instead, for purposes of the present case, we must ask at least the following more specific questions: (1) does Article 36 impose a duty on an arresting officer like Zeigler to ascertain nationality at the moment of arrest; (2) does it require an arresting officer like Zeigler to notify the arrestee of possible Convention rights before it is necessary to give *Miranda* warnings, or before he knows whether the arrestee is from a Convention country; (3) does the treaty require an Article 36 notification prior to booking, by any and all officers who have contact with the arrestee; and (4) does the treaty require notification before an interview can take place? A common theme runs through these questions: what does it mean to inform someone 'without delay'? A second general issue relates to personal responsibility. The Supreme Court has repeatedly held that section 1983 'will not support a claim based on a *respondeat superior* theory of liability.'. . Do Convention responsibilities attach to persons like the Officers here, who simply arrested, transported, and briefly interrogated the suspect? If so, then liability is at least possible; but if not, then these defendants cannot be held vicariously responsible for the failure of another party (perhaps the booking officer or the arraigning magistrate) to convey the required information. Existing opinions do not offer much guidance on the answers to the questions we just posed. It appears, however, that 'without delay' does not mean 'instantly.'. . .It is impossible, in light of all this, to say that the law that Officer Zeigler faced was 'clearly established' such that he should have known that he had a personal duty to ascertain Mordi's citizenship and then to notify Mordi about his right to consular notification under Article 36 of the Convention at the moment of arrest, or at least by the time he delivered Mordi to the police station and left him in the interrogation room. . . .Officers Chance and Healey's role was different, but the bottom line is the same. . . . If Mordi had sued the booking officers, we might need to consider this question in greater detail, but they are no longer in the case. The interpretation and implementation of the Convention touch on the diplomatic relations of the United States, and so we think it prudent to tread carefully here. All we need to say to resolve this case is that the details of how to implement the Article 36 duty to inform the arrestee of his rights without delay have yet to be fixed. There is no clearly established law that the three Officers before us violated, and thus they are entitled to qualified immunity from suit.")

Gibbs v. Lomas, 755 F.3d 529, 539-42 (7th Cir. 2014) ("Subsection 947.01(2) was enacted in 2011 as part of a larger act that expanded concealed carry rights in Wisconsin. . . The Wisconsin courts have not yet answered important questions about this subsection, such as whether the type of conduct at issue here is 'carrying' or 'going armed' or is more properly categorized as unprotected conduct punishable under the disorderly conduct statute. . . . We think it would be imprudent to base our decision on speculation about the appropriate scope of the Wisconsin statute. In our view, the second section of the disorderly conduct statute poses significant interpretative problems that are best answered by the Supreme Court of Wisconsin. Including the conduct at issue here within the scope of subsection 947.01(2) would no doubt have significant ramifications on issues of state and municipal governance in matters of public safety. In this age of 'road rage' and similar motorist misbehavior, an individual's driving around at a high speed while holding an unholstered weapon in plain view of other motorists raises serious issues of public safety. Whether such activity constitutes merely 'carrying[ ] or going armed' should be decided, if at all possible, by a state court far more familiar with the exigencies of state and local governance and far more familiar with the legislative practice of its state. If it were necessary to construe the problematic statutory language in order to resolve this case, we well might consider using the certification privilege accorded to us by the Wisconsin legislature. . . However, such a necessity is not upon us since the second prong of the established qualified immunity analysis affords a solid basis for decision. '[I]t is apparent that the alleged right at issue [was] not clearly established' at the time Officer Lomas acted. . . .We are convinced that Mr. Gibbs did not meet his burden of refuting Officer Lomas's qualified immunity defense either by 'identifying a closely analogous case or by persuading the court that the [officer's] conduct [wa]s so egregious and unreasonable that, notwithstanding the lack of an analogous decision, no reasonable officer could have thought [s]he was acting lawfully.'. . Instead of identifying an analogous case, Mr. Gibbs—like the district court—points to an informal Advisory Memorandum by the Wisconsin Attorney General. . . . The Advisory Memorandum is not, of course, the sort of definitive statement of the law by the courts that would make a constitutional violation 'clearly established.'. . . Nor is this the sort of case where Officer Lomas's conduct was so egregious as to be recognized universally by law enforcement officers as unlawful. Rather, as we have suggested earlier, a reasonable police officer—indeed, a reasonable court—could believe that, under the facts described above, far more than the statutorily exempted activity of 'loading, carrying, or going armed with a firearm' was taking place. Despite Mr. Gibbs's repeated contentions that he was 'just driving,' he obviously was doing more than that. Indeed, his conduct also was sufficient for a reasonable officer to conclude—in the absence of any guidance from the Wisconsin courts—that a criminal or malicious intent was present, thus removing any protection that subsection 947.01(2) would otherwise have given Mr. Gibbs. . . .Based on the facts known to Officer Lomas about Mr. Gibbs's behavior, it would have taken no more than an adjustment of his hand position before the gun was pointed out the window of his vehicle or even at himself. A reasonable officer in Officer Lomas's shoes could have interpreted Mr. Gibbs's conduct as motivated by an intent to harm himself or others. In sum, even if Officer Lomas was mistaken in believing that she had probable cause to arrest Mr. Gibbs, such a mistake was reasonable in light of the facts and circumstances of this case and in light of the undeveloped case

law regarding subsection 947.01(2). Consequently, contrary to the conclusion of the district court, Officer Lomas was entitled to qualified immunity for her arrest of Mr. Gibbs.")

White v. Stanley, 745 F.3d 237, 241, 242 (7th Cir. 2014) ("[P]olice who simply smell burning marijuana generally face no exigency and must get a warrant to enter the home. But the lack of an exigency does not end the inquiry in this case, for the deputies still prevail if the right they violated was not clearly established at the time of the violation. . . .The necessary inquiry in this case is whether it was clearly established on March 9, 2010 that the smell of burning marijuana, standing alone, was no exigency. During the court's discussion of whether or not the smell of burning marijuana established an exigency, it noted that 'courts who have addressed [the issue] have answered that question in varied and conflicting ways, and there does not appear to be a universal, or even majority, approach to this question.' The district court was right—federal and state courts have been all over the map on this issue. . . .In light of this fractured case law, we cannot say that 'at the time of the challenged conduct, the contours of [White's] right [were] sufficiently clear' such that 'every reasonable official would have understood' that entering the home after smelling the burning marijuana violated the right. . . It follows that the deputies are entitled to qualified immunity. Future police officers faced with a situation like the one confronting Stanley and Morrison should not feel emboldened to act as the deputies did here. Henceforth, officers who make a warrantless entry under the circumstances found in this case should expect no shelter from liability.")

Findlay v. Lendermon, 722 F.3d 895, 899, 900 (7th Cir. 2013) ("*Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009), encouraged courts to begin with the substantive constitutional violation, but we remain free to consider first whether the right is clearly established if doing so will conserve judicial resources. We find it economical to do so here and thus consider only whether Findlay has shown that the alleged constitutional violation—tackling a suspect under the circumstances presented in this case—was clearly established. . . . Because he has neither identified a sufficiently analogous case nor adequately explained how Lendermon's actions were so plainly excessive that any reasonable officer would know it violated the constitution, he cannot defeat Lendermon's qualified immunity defense. . . .In reaching this conclusion, we do not suggest that no 'plainly excessive' argument could ever be made from the facts as Findlay presents them. But the burden to make this showing rests squarely on Findlay. He has not done so and therefore cannot prevail.")

Thayer v. Chiczewski, 705 F.3d 237, 249-51 (7th Cir. 2012) (granting panel rehearing, amending opinion to recognize assertion of *Monell* claims, and remanding for further proceedings on *Monell* claims) ("Lyttle was acquitted of the offense of disorderly conduct, but the question is not whether he violated the ordinance, it's whether an officer at the time could reasonably believe he was committing an offense. To require dispersal under subsection (d), officers had to reasonably believe that three or more persons in the immediate vicinity were causing disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm. We don't have to decide whether officers had probable cause to arrest, however, because we find that they had *arguable* probable cause to order dispersal and arrest Lyttle for his failure to comply. *See Pearson v.*

Callahan, 555 U.S. 223, 235–36 (2009) (holding that we do not need to address whether a constitutional right was violated before addressing whether the right in question was sufficiently well established). . . . We further find that although it is questionable whether officers had probable cause to arrest Lyttle, they are nonetheless entitled to qualified immunity. Lyttle denies that he pushed any officer or blocked the sidewalk and at the time he was arrested, there was no indication that other protestors were attempting to follow him; in fact, most of the protestors had started dispersing in the other direction, and the sidewalk was clearing. No city ordinance requires a permit for an individual to walk down the sidewalk with a protest sign. Officer Chiczewski and Officer Killacky even testified that there was nothing illegal about people walking down Michigan Avenue carrying signs and that the protestors could disperse in any direction. *Cf. Weiss,* 281 N.E.2d at 315 (officers could order defendant to disperse in certain direction when attempting to block a group of 3,000 demonstrators from marching into a densely populated area). The officers, however, did not violate clearly established rights of which a reasonable person would have known. Officers could reasonably (again, even if mistakenly) believe that based on their announcements and conduct in forming a line to advance the crowd west that protestors were prohibited from breaking through the police line. In fact, most protestors at the time obeyed by heading west. Lyttle was part of the group of protestors ordered to disperse and Officer Killackey could reasonably believe that Lyttle heard the dispersal order. *Cf. Vodak,* 639 F.3d at 746. When Lyttle attempted to cross the police line, he was told he could not continue and he responded that he had the right to proceed. A reasonable officer under this chaotic and fluid situation could have believed that Lyttle was failing to follow their orders. Officers did not have to wait for Lyttle to actually break through the police line. At the time of Lyttle's arrest, the officers were still trying to manage the crowd; forming a police line and ordering dispersal toward the permitted location of the march was the most logical way to accomplish this goal. . . . Under these circumstances, we cannot find that it would have been clear to every reasonable officer that no probable cause existed to arrest Lyttle for disobeying their order. . . . The existence of arguable probable cause to arrest Lyttle is an absolute bar to his § 1983 claim for unlawful arrest and false imprisonment.")

Thayer v. Chiczewski, 705 F.3d 237, 252, 253 (7th Cir. 2012) (granting panel rehearing, amending opinion to recognize assertion of *Monell* claims, and remanding for further proceedings on *Monell* claims) ("Thayer does not dispute that Officer Chiczewski had probable cause for his arrest. Probable cause, if not a complete bar to Thayer's First Amendment retaliatory arrest claim, provides strong evidence that he would have been arrested regardless of any illegitimate animus. *See Reichle v. Howards,* 132 S.Ct. 2088, 2095–97 (2012); *see also Hernandez v. Cook Cnty. Sheriff's Office,* 634 F.3d 906, 915 (7th Cir.2011) ("[E]vidence of probable cause may act as highly valuable circumstantial evidence that the complained-of conduct would have occurred even without a retaliatory motive.") (quotations omitted). The record shows that Thayer's refusal to disperse, not his speech, was the 'but for' cause of his arrest. But even if the record permitted a competing inference in favor of Thayer, Officer Chiczewski is entitled to qualified immunity. . . . The case law is unsettled on whether probable cause is a complete bar to First Amendment retaliatory *arrest* claims. The Supreme Court has said that it is a bar to retaliatory *prosecution* claims. *See Hartman,* 547 U.S. at 261. We have not resolved the issue, *see Hernandez,* 634 F.3d

at 915 (citing a 2002 case from this circuit), and other circuits are split, *see, e.g., Skoog v. Cnty. of Clackamas,* 469 F.3d 1221, 1232 & n. 31 (9th Cir.2006) (setting forth circuit split). . . . Based on the Court's decision in *Reichle,* Officer Chiczewski is entitled to qualified immunity. . . . A clearly established right is one that is sufficiently clear such that 'every reasonable official would have understood that what he is doing violates that right.'. . As the Supreme Court held in *Reichle,* the 'clearly established' standard is not met in this case because neither our circuit nor the Supreme Court has 'recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'. . . Lyttle similarly argues that Officers Killackey and Shields arrested him in retaliation for exercising his free speech rights to march down the sidewalk of Michigan Avenue with an anti-war sign. We found that the officers had *arguable* probable cause to arrest Lyttle under subsection (d) and we see no reason to distinguish *Reichle* on that basis. In any event, the record is void of evidence showing that the officers acted with retaliatory animus in arresting him.")

Thayer v. Chiczewski, 705 F.3d 237, 254-56 (7th Cir. 2012) (granting panel rehearing, amending opinion to recognize assertion of *Monell* claims, and remanding for further proceedings on *Monell* claims) ("Unfortunately, the class-of-one standard in this circuit is in flux. Thayer must show that he was intentionally treated differently from other similarly situated individuals and that there was no rational basis for this difference in treatment. . . But some of our cases also require a showing of improper motive (sometimes referred to as 'illegitimate animus'). . . Our recent attempt to clarify the standard in *Del Marcelle v. Brown Cnty. Corp.*, 680 F.3d 887 (7th Cir.2012) (en banc) resulted in a tie vote with no controlling opinion. We therefore remain divided over the appropriate standard for a class-of-one equal protection claim against law enforcement personnel. . . .We do not need to decide what standard announced in *Del Marcelle* is correct because we find that Officer Chiczewski is entitled to qualified immunity. As we have already alluded to, this protection gives officers 'breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.'. . We ask whether every reasonable officer would have understood that what he was doing violates that right. . . .Even considering all the facts in favor of Thayer, we cannot conclude that every reasonable officer would have understood that by arresting Thayer, the perceived 'chief" of the group, and not Massey and Jakes that Officer Chiczewski was violating Thayer's right to equal protection. . . Given the uncertainly in the law and the unique factual situation at issue here, the constitutional question was not beyond dispute. . . . Rather, a reasonable officer could have believed that arresting Thayer was the most effective way to gain compliance with the dispersal order.")

Miller v. Harbaugh, 698 F.3d 956, 962, 964 (7th Cir. 2012) ("We are . . . free to decide first whether the right that Miller has alleged was clearly established. In undertaking this analysis, it is critical to find the correct level of specificity. It is not enough, for instance, to say that it is clearly established that those operating detention facilities must not engage in cruel or unusual punishment. The way that the right is translated into the particular setting makes a difference. The plaintiff must show that the contours of the right are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . .Even if IYC St. Charles's decision

to use the metal bunk beds in rooms occupied by mentally disturbed, but not imminently suicidal, residents amounted to deliberate indifference, and thus amounted to a violation of Jamal's constitutional rights, the law in this area was not clearly established enough to defeat the supervisory defendants' claim of qualified immunity.")

Alexander v. McKinney, 692 F.3d 553, 555, 557 & n.2, 558 (7th Cir. 2012) ("[T]he district court found that McKinney was entitled to qualified immunity because Alexander did not allege that he was deprived of a cognizable constitutional right. The only constitutional right that Alexander identified, his 'due process rights to not be deprived of his liberty premised upon manufactured false evidence,' was insufficient to state a claim under our circuit's case law. . . . On appeal, Alexander argues that the district court erred in finding that McKinney was entitled to qualified immunity because his complaint adequately alleged a deprivation of a constitutional right, namely that the manufacturing of false evidence resulting in his arrest and charges being brought against him deprived him of liberty in violation of his substantive due process rights. . . For the following reasons, we disagree. . . .In both *Zahrey* and *Whitlock*, the alleged liberty deprivation came not from the initial arrest, but from the time spent in confinement *after* arrest—the eight months Zahrey spent in jail after having his bail revoked and the numerous years Whitlock and Steidl spent in prison after being wrongfully convicted. . . *Zahrey* and *Whitlock* are inapposite because the only liberty deprivation Alexander alleges stems from his initial arrest—he was released on bond that same day. . . . Nor does the burden of appearing in court and attending trial, in and of itself, constitute a deprivation of liberty. [citing cases] It would be anomalous to hold that attending a trial deprives a criminal defendant of liberty without due process of law, when the purpose of the trial is to *effectuate* due process. . . .The Fourth Amendment, not the due process clause, is the proper basis for challenging the lawfulness of an arrest. . . . Alexander cannot recast his untimely Fourth Amendment claim, thereby circumventing the statute of limitations, by combining it with a state law malicious prosecution claim and simply changing the label of the claim to substantive due process.")

Paine v. Cason, 678 F.3d 500, 509, 510 (7th Cir. 2012), as amended on denial of rehearing and rehearing en banc (May 17, 2012) ("[W]e need not and do not decide whether—and, if so, when—there is a constitutional right to have custody prolonged so that more or better medical care may be provided. This is a qualified-immunity appeal, and the critical question is whether plaintiff's claim rests on a 'clearly established' right. See *Messeschmidt v. Millender*, 132 S.Ct. 1235, 1244–45 (2012). Paine relies principally on decisions such as *Farmer* and *Ortiz* that concern medical care during custody. She has not cited, and we did not find, cases establishing (clearly or otherwise) a right to be kept in custody, beyond the time when release otherwise would occur, so that medical care can be provided. . . . We arrive at Paine's third theory. The police arrested Eilman at Midway Airport, where she was safe, and let her go 7.3 miles away, just before nightfall, in a dangerous neighborhood. Data in the record show that sexual assaults are 15 times more common, per capita, in the precinct where Eilman was released than around Midway Airport. . . . It is clearly established that state actors who, without justification, increase a person's risk of harm violate the Constitution. . . . A detainee does not have a clearly established constitutional right that release be

delayed pending mental-health treatment, but it *is* clearly established that the police may not create a danger, without justification, by arresting someone in a safe place and releasing her in a hazardous one while unable to protect herself, and it is also clearly established that police must arrange for medical treatment of serious conditions while custody continues.")

Gonzalez v. Village of West Milwaukee, 671 F.3d 649, 658-60 (7th Cir. 2012) ("Officers Krafcheck, Donovan, and Young were acting at a time of significant legal uncertainty about how to draw a difficult constitutional line; as such, qualified immunity applies. . . Although Gonzalez vigorously argues to the contrary, the right to openly carry a firearm was hardly well established under the state constitution at the time of his arrests. Until the 2011 amendment to section 947.01, the legal landscape was uncharted. Gonzalez also relies on the Second Amendment, but this argument is not well developed. Invoking *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008), he argues that the core Second Amendment right to bear arms for self-defense must include the right to openly carry a holstered handgun. But *Heller* was decided *after* Gonzalez's arrest in West Milwaukee. And *McDonald,* 130 S.Ct. at 3050, which applied the Second Amendment to the States, was decided after *both* arrests. Whatever the Supreme Court's decisions in *Heller* and *McDonald* might mean for future questions about open-carry rights, for now this is unsettled territory. . . .The 'clearly established' inquiry in qualified-immunity analysis asks whether the unlawfulness of the officer's conduct would have been apparent to a reasonable officer in light of *pre-existing law*. . . Here, the most that can be said is that the officers failed to make a sensitive judgment about the effect of the state constitutional right to bear arms on the disorderly conduct statute and failed to predict *Heller* and *McDonald.* To the extent that any mistakes about probable cause were made, they were entirely understandable; state law was in flux, and the meaning and application of the Second Amendment was then under consideration by the Supreme Court. . . . Because open-carry rights were not clearly established under the state or federal constitutions at the time of Gonzalez's arrests, the officers are entitled to qualified immunity." footnotes omitted)

Marcavage v. City of Chicago, 659 F.3d 626, 636 (7th Cir. 2011) ("Although the constitutionality of the Policy remains in question, the arresting officer's objectively reasonable reliance on the permit requirement in effect at the time of the arrest is sufficient to shield him from liability under the doctrine of qualified immunity.")

Van den Bosch v. Raemisch, 658 F.3d 778, 786, 787, 789-91 (7th Cir. 2011) ("The Supreme Court has made clear that courts are free 'to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.'. . In this case, we need only reach the question of whether the relevant facts 'make out a constitutional violation at all.'. . We hold they do not." Court went on to hold that (1) officials' decision to bar distribution of newsletter to prisoners did not violate the First Amendment; (2) officials' refusal to deliver copies of article that state prisoner had written to newsletter did not violate prisoner's First Amendment rights; and (3) DOC policy restricting prisoner's access to third-party mail did not violate First Amendment.)

Brooks v. City of Aurora, Ill., 653 F.3d 478, 486, 487 (7th Cir. 2011) ("Courts often have held that it is reasonable to use pepper spray against a suspect who is physically resisting arrest; . . . conversely, when the use of pepper spray is gratuitous or unprovoked, courts often have considered it excessive. . . As we have stated, a reasonable police officer could have believed that Mr. Brooks was resisting arrest. Although, at this stage of the litigation, we must believe Mr. Brooks when he says that he had communicated his willingness to submit to arrest, his actions readily could be construed to belie his words; indeed, Mr. Brooks employed a number of moves designed to thwart Officer Lill's attempts to take him into custody. Additionally, given the unique risks that effecting an in-home arrest warrant poses to the arresting officers, Officer Lill had a recognized interest in taking Mr. Brooks into custody outside his apartment. . . An officer, faced with a suspect fleeing toward his home and ignoring police commands, is not obliged to give that suspect an opportunity to retreat into his home and, perhaps, to fortify himself or to escape before the officer employs reasonable means of incapacitation. . . Mr. Brooks contends, however, that the pepper spray was not applied until he had ceased backtracking and was passively facing the officers, and this description of events at least arguably squares with the video. According to Mr. Brooks, pepper spray therefore was not needed to effect his arrest. We need not decide whether a constitutional violation occurred because we believe that it would not have been obvious to a reasonable police officer in Officer Lill's position that the application of pepper spray was unlawful. To be sure, whether and how much force is reasonable in a given situation can change as the situation develops, and what is appropriate at one point may be unnecessary later on. . . Yet controlling law would not have communicated to a reasonable officer the illegality of applying pepper spray to an arrestee who has ceased active, physical resistance for a couple of seconds but has not submitted to the officer's authority, has not been taken into custody and still arguably could pose a threat of flight or further resistance. Prior cases have charted only clearer waters.")

Hernandez v. Cook County Sheriff's Office, 634 F.3d 906, 915, 916 (7th Cir. 2011) ("We are able to determine as a matter of law, based purely on the undisputed facts presented to the district court, that the defendants are entitled to qualified immunity as to the plaintiffs' claim of retaliation based on workplace complaints. As noted, the district court reviewed the facts and concluded that based on the undisputed facts, the plaintiffs were acting as public employees when they complained about unsafe conditions at the jail. Specifically, in complaining about overcrowding, the lack of supervision and the need for Plexi-glas, the plaintiffs were acting pursuant to their duties as set forth in the CCSO's General Orders. Therefore, consistent with *Spiegla* I. . . the district court concluded that the plaintiffs did not enjoy First Amendment protections. The conclusion based on undisputed fact that the plaintiffs acted as public employees in complaining, which the district court found to be dispositive of the merits, is equally dispositive of the qualified immunity question that the district court might have been asking. The district court properly determined that there was no violation of a constitutional right; therefore, the defendants are entitled to qualified immunity on this claim as a matter of law.")

Atkins v. City of Chicago, 631 F.3d 823, 829 (7th Cir. 2011) ("[T]here is no need to decide in this case whether there might be a constitutional entitlement to a judicial hearing in cases of alleged

mistaken identity of parole violators. For even if the question were answered in the plaintiff's favor, it would not warrant any relief. The question is novel, and the defendants therefore protected from liability for damages for possibly answering it incorrectly by the doctrine of qualified immunity.")

Atkins v. City of Chicago, 631 F.3d 823, 832, 833, 837-39 (7th Cir. 2011) (Hamilton, J., concurring in part and concurring in the judgment) ("I join the majority opinion in affirming the dismissal of Atkins' claims regarding his arrest and the conditions of his detention. I would resolve differently, however, Atkins' due process claim against the individual state officials. In my view, Atkins alleged sufficiently that he was deprived of liberty without due process of law when he was held by the state for more than 48 hours without a hearing before a judge. He was entitled to a hearing in which he could have shown that he was not the same William Atkins sought on the parole violation warrant or, if perhaps he was indeed the William Atkins sought (we cannot tell from the sparse record), that he was no longer on parole at the time of the alleged violation. I agree with my colleagues, however, that the individual defendants are entitled to qualified immunity on that claim because the law was not and still is not sufficiently clear to impose individual liability under 42 U.S.C. § 1983. I therefore concur in the judgment to affirm dismissal of the claim. . . . My colleagues ultimately decline to decide the merits of Atkins' due process claims but rely on the defense of qualified immunity to affirm the dismissal. I agree that qualified immunity applies and therefore concur in that portion of the opinion and in the judgment. But I believe that we should address the merits, for both substantive and procedural reasons. The substantive reasons are those I have explained above. My colleagues suggest, however, that we should know more about the relative merits of judicial and administrative decision-making before reaching the conclusion on the merits. After all, perhaps these identification issues are straightforward and suitable for administrative decision-making. Both judges and parole officials can make mistakes. The same argument could have been made in *Gerstein* and *McLaughlin*, however. The Supreme Court weighed the relevant constitutional interests in *Gerstein* and *McLaughlin*, and it chose judicial decision-making for good reasons. *Gerstein* and *McLaughlin* tell us that persons in the United States cannot be held in custody for more than 48 hours without requiring executive branch officials–like police or parole officers–to convince a judicial officer that there is good reason to hold the person. That rule does not disparage the abilities of executive decision-makers. The rule simply insists that executive branch actions to deprive a person of basic liberty must be subject to immediate and independent review. The rule recognizes human and institutional fallibility, as well as the value of review and accountability. . . If my conclusion on the merits of Atkins' claim is not correct, then an innocent, law-abiding person could be sent to prison without ever having a fact-finding hearing before a judge, let alone a jury trial. . . .There are also sound procedural reasons for deciding the merits before deciding qualified immunity here. After *Pearson v. Callahan*, 129 S.Ct. 808 (2009), we are not required to decide the merits before we decide qualified immunity, but the choice is left to our sound discretion. . . . Unless and until this view of the merits is accepted, law-abiding citizens who are not on parole remain vulnerable to lengthy deprivations of liberty without due process of law and without effective remedy. Individual defendants will be protected from damages liability by qualified immunity, while state governments are protected from

damages liability by the limits of 42 U.S.C. § 1983 and the Eleventh Amendment. . . . For these reasons, although the district court's dismissal was correct based on qualified immunity, I would also hold that Atkins alleged sufficiently that his right not to be deprived of his liberty without due process of law was violated when he was held for so long without being brought before a judge to determine whether there was probable cause to believe he was in fact on parole and wanted under the parole violation warrant.")

Estate of Escobedo v. Bender (Escobedo I), 600 F.3d 770, 778-80, 783, 786 (7th Cir. 2010) ("Up until the day before this case was argued, *Saucier v. Katz* maintained a sequential procedure for considering whether an officer is entitled to qualified immunity. . . . The Supreme Court recently reconsidered *Saucier* and decided 'that while the sequence set forth [in *Saucier]* is often appropriate, it should no longer be regarded as mandatory.' [citing *Pearson*] . . . . Here, the Defendants limit their argument on appeal to the second prong of the *Saucier* qualified immunity analysis, that is: whether the law was clearly established as of July 19, 2005, that the use of tear gas and flash bang devices in these unique circumstances violates an individual's Fourth Amendment right to be free from the use of excessive force. . . . They do not contest the district court's finding that taking the facts in the light most favorable to the Estate, a reasonable jury could find that their decision to use tear gas and flash bang devices against Escobedo, a suicidal, armed, barricaded person, was an excessive use of force under the Fourth Amendment. Accordingly, for purpose of the present appeal, we turn to the second prong of the *Saucier* qualified immunity analysis and assume that a reasonable jury could conclude that the Defendants' conduct violated Escobedo's Fourth Amendment rights. . . . The Defendants claim that they are entitled to qualified immunity because the law was not clearly established on July 19, 2005, to place them on notice that the use of tear gas and flash bang devices in these particular circumstances was unconstitutional. The Estate has the burden of establishing that the constitutional right at issue was clearly established. . . .The Estate can demonstrate that the right was clearly established by presenting a closely analogous case that establishes that the Defendants' conduct was unconstitutional or by presenting evidence that the Defendant's conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court. . . .Based on controlling precedent from this Circuit and the clear trend in the law from our sister circuits, the clearly established law as of July 19, 2005, established that the use of tear gas is unreasonable when: (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual threat; (3) when the individual is not holding hostages; (4) when the individual has not committed a crime and the officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police; and (7) when the individual is incapacitated in some form. . . . Based on the pre-existing case law, it was clearly established as of July 19, 2005, that throwing a flash bang device blindly into an apartment where there are accelerants, without a fire extinguisher, and where the individual attempting to be seized is not an unusually dangerous individual, is not the subject of an arrest, and has not threatened to harm anyone but himself, is an unreasonable use of force. Therefore, taking the facts as presented

to us from the district court, the Defendants are not entitled to qualified immunity and the issue of the officers' decisions must be presented to a jury.")

Estate of Escobedo v. Bender, 600 F.3d 770, 787 (7th Cir. 2010) (Manion, J., concurring in part and dissenting in part) ("Although I question whether the cases cited by the court clearly established that the officers' use of tear gas violated the Fourth Amendment, I do believe that reasonable officials would have known that using twelve times the incapacitating quantity of tear gas to extricate a person at home alone who had only threatened to harm himself and was not suspected of committing a crime 'was unconstitutional without guidance from courts.'. . For that reason, I concur with the court's conclusion that the defendants' use of tear gas was not protected by qualified immunity. I disagree, however, with the court's conclusion that the defendants are not entitled to qualified immunity for their use of the flash-bang devices. The majority opinion holds that on the date of the incident it was clearly established that the defendants' employment of the flash-bang devices was an excessive use of force. In reaching its conclusion, the court relies upon six cases that involved the use of such devices by law enforcement. But as explained below, those cases neither separately nor collectively clearly established that the defendants' conduct was unconstitutional. And because the defendants' use of the flash-bang devices–unlike their use of the tear gas– was not obviously in violation of the decedent's constitutional rights, they are entitled to qualified immunity on this issue.")

Whitlock v. Brown, 596 F.3d 406, 408 (7th Cir. 2010) ("Under *Pearson v. Callahan*, 129 S.Ct. 808 (2009), we are permitted to skip directly to the second question, and we do so here. Although it is clearly established Fourth Amendment law that an officer may not intentionally or recklessly withhold material information from a warrant application, it is not clear under Indiana law that the information Brown allegedly withheld was material to the probable-cause determination for a charge of criminal conversion. Brown is therefore entitled to qualified immunity. . . . Given the breadth of Indiana's criminal-conversion statute and the apparent absence of an implied-consent defense, the Whitlocks' excuse was irrelevant to the probable-cause determination–or at least of such questionable relevance that Brown is entitled to qualified immunity. At best, Indiana law is undeveloped in this area.")**.**

Hanes v. Zurick, 578 F.3d 491, 496 (7th Cir. 2009) ("But under any view we have taken, arrests motivated by personal animus are unconstitutional. Second, the officers argue that the right announced in *Hilton* is dicta. *Hilton* states, 'If the police decided to withdraw all protection from Hilton out of sheer malice, or because they had been bribed by his neighbors, he would state a claim under *Olech.*' *Hilton,* 209 F.3d at 1007. Although we described that statement as dicta in a later case, . . . even dicta may clearly establish a right, see *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). When a court holds that certain conduct violates a constitutional right but that the right was not clearly established, the constitutional ruling is arguably dicta, see *Pearson,* 129 S.Ct. at 818, but it still may clearly establish the law for future conduct, *id.* at 819. As Judge Calabresi has explained, 'lucid and unambiguous dicta concerning the existence of a constitutional right can without more make that right Aclearly established" for purposes of a qualified immunity analysis.'

Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir.1999) (Calabresi, J., concurring). *Hilton's* statement could not be more lucid and unambiguous. Since the conduct alleged here is almost identical to the requirements set out in *Hilton,* a reasonable officer was on notice that such conduct violates the constitution.").

Chaklos v. Stevens, 560 F.3d 705, 711, 716 (7th Cir. 2009) ("Deciding the constitutional question first is beneficial when courts are able to clarify or elaborate on the law in a manner that promotes its development. . . But where 'the constitutional question is so fact-bound that the decision provides little guidance for future cases,' a forced resolution of the constitutional question is neither necessary nor prudent. *Pearson,* 129 S.Ct. at 819. This case presents a paradigmatic example of such a case. As discussed further below, the quirky facts of this case complicate the constitutional inquiry. It is far from obvious whether the speech in this case is constitutionally protected and we do not think resolving the First Amendment issue serves any jurisprudential purpose. Because defendants did not violate clearly established law, we do not decide whether the facts established a constitutional violation. . . . Should it have been sufficiently clear to defendants that they could not punish Chaklos and Wist for their letter without violating the Constitution? We think not. It is clear, as plaintiffs maintain, that a public employer may not retaliate against an employee who exercises his First Amendment speech rights. . . But, as this discussion demonstrates, the letter's entitlement to First Amendment protection is not obvious. If the letter's only purpose was to lodge a complaint against the no-bid contract, we would have no difficulty concluding, in this case, that defendants should have known their actiopostns were unconstitutional. But in light of the unusual circumstances of this case, which include the dual nature of the letter at issue, the State's split-the-baby approach toward secondary employment, and defendants' questionable enforcement of the State's policies, we think it unnecessary to determine whether this letter is constitutionally protected, and thus whether defendants' actions were unconstitutional. In so holding, we emphasize that plaintiffs did not need to present a case involving a 'protest/proposal letter.' The question is not whether there is a prior case 'on all fours' with the current claim. . . But plaintiffs' cases regarding the impropriety of First Amendment retaliation in general do not provide fair warning to defendants that their conduct was unconstitutional.")

Akande v. Grounds, 555 F.3d 586, 590 n.3, 592 (7th Cir. 2009) ("The Supreme Court has recently clarified that the *Saucier* sequence is not an inflexible requirement. *See Pearson v. Callahan,* __ U.S. __, __ S.Ct. __, 2009 WL 159429, *9 (Jan. 21, 2009). However, courts are still free to follow the *Saucier* protocol where, as here, it facilitates the expeditious disposition of a case. . . . Because Akande has failed to show that he was subjected to a constitutional deprivation, we need not inquire whether the right he invokes was clearly established at the time of the alleged violation.")

Posey v. Miro, 11 CV 5660, 2014 WL 3843940, *3, *4 (N.D. Ill. Aug. 5, 2014) ("This case may be one of those 'closer calls' where a government actor could violate substantive due process and shock the conscience even though his culpability follows from something less than intentional conduct. Miro was not involved in a high-speed chase, and may have had time to make an

unhurried judgment (indeed, he claims he was driving conservatively). Miro testified that when traveling the wrong way on a one-way street, he would normally turn on his lights or siren, and that there is no reason not to do so. . . But he didn't do so here. . . A dispute exists as to how fast he was traveling at the time of impact. . . And a dispute exists as to whether he saw K.M. before impact and had time to stop. . . These facts, like those in *Carter v. Simpson,* 328 F.3d 948 (7th Cir. 2003), would allow a reasonable jury to find the officer's conduct to have been 'willful and wanton,' meaning that it 'show[ed] an utter indifference to or conscious disregard for the safety of others.'. . I need not decide whether Miro's conduct, if it were unintentional, violated K.M.'s due process rights because (as explained next) no such right was clearly established at the time, and Miro is entitled to qualified immunity. *See Pearson,* 555 U.S. at 236 (courts may resolve qualified immunity on the second step, without resolving the first step). . . .According to Posey, (*dicta* in) *Lewis* clearly establishes that 'deliberate indifference' shocks the conscience in all situations in which deliberation is practical. . . Given the 'close calls' and 'exact analyses' that *Lewis* prescribed, I disagree. Summary judgment is therefore granted on Count III, on the basis of qualified immunity.")

EIGHTH CIRCUIT

Schaffer v. Beringer, 842 F.3d 585, 592 (8th Cir. 2016) ("[W]e need not decide whether the officers had *actual* probable cause. Rather, following *Habiger v. City of Fargo*, we need only address whether the officers had *arguable* probable cause and are thus entitled to qualified immunity. . . Because a determination that the officers had arguable probable cause would end the inquiry, we will assume that Callissa was arrested when she was placed in handcuffs. . .The legal drinking age in South Dakota is twenty-one. . . South Dakota's general DUI statute prohibits anyone from operating a motor vehicle if their BAC is .08 or higher. . . However, South Dakota's minor DUI statute prohibits drivers under the age of twenty-one from operating a motor vehicle with a BAC of .02 or higher. . . Thus, the legal BAC limit for drivers under the age of twenty-one is significantly lower than the permissible level for drivers over twenty-one. Notably, no judicial decisions have addressed what circumstances would provide officers with probable cause to arrest a driver under the age of twenty-one for a violation of the minor DUI statute. In qualified immunity cases, this 'absence of judicial guidance can be significant.'. . .Given the totality of these circumstances, the relatively low .02 BAC limit under the minor DUI statute, and the absence of judicial decisions interpreting that statute, we find that the officers had at least arguable probable cause to believe that Callissa Schaffer had violated SDCL § 32–23–21. Because the officers had arguable probable cause, they are entitled to qualified immunity with respect to this claim. . . .[W]hen officers have 'at least arguable probable cause' to perform an arrest, they cannot be held liable for performing a search incident to that arrest. . . Because we have already determined that the officers had arguable probable cause to arrest Callissa, they are entitled to qualified immunity on this claim as well.")

Shultz v. Buchanan, 829 F.3d 943, 950 (8th Cir. 2016) ("We may assume for the sake of analysis that Shultz has presented a genuine issue of fact concerning whether Buchanan's use of the Taser was unreasonable under the Fourth Amendment. As of March 2011, however, it was not clearly established that an officer violated the rights of an arrestee by applying force that caused only *de minimis* injury. *LaCross v. City of Duluth*, 713 F.3d 1155, 1158 (8th Cir. 2013); *Chambers*, 641 F.3d at 908. Before our June 2011 decision in *Chambers* clarified the analytical distinction between *de minimis* force and *de minimis* injury, 'a reasonable officer could have believed that as long as he did not cause more than *de minimis* injury to an arrestee, his actions would not run afoul of the Fourth Amendment.'. . Although a Taser has a 'unique capability to cause high levels of pain without long-term injury, "we have not categorized the Taser as an implement of force whose use establishes, as a matter of law, more than *de minimis* injury."'. . The evidence presented by Shultz about consequences of the tasing are consistent with effects that we have characterized as *de minimis* injury. Shultz sustained temporary marks on his arms and legs, but suffered no permanent scarring. He did not miss any work. Shultz argues that he experienced anxiety, nervousness, and distrust of the police as a result of the incident, but acknowledged that he had not seen a doctor or taken any medication for these symptoms. Accordingly, Shultz has not shown that he suffered more than *de minimis* injury as a result of Buchanan's actions.")

Greenman v. Jessen, 787 F.3d 882, 887-90 (8th Cir. 2015) ("The district court addressed whether it was clearly established at the time of Greenman's arrests that a reasonable police officer would have known that probable cause did not exist to arrest an intoxicated person operating a Segway for DWI. But we choose to address the defendants' alternative argument: that they are entitled to qualified immunity because there was probable cause, or at least arguable probable cause, to arrest and prosecute Greenman on all three occasions for operating his Segway in violation of Minnesota traffic laws other than DWI. . . If the officers had probable cause to arrest, then Greenman has failed to 'make out a violation of a constitutional right' in the first instance. . . .Officer Jessen had probable cause to arrest Greenman both the first and second times Greenman was operating his Segway on a roadway. Accordingly, we conclude all three police officers—Officer Jessen, Sergeant Nelson, and Chief Belland—are entitled to qualified immunity in connection with both the August 17, 2010, and the February 4, 2012, arrests. Regarding the third and final arrest, Greenman contends Sergeant Nelson did not have probable cause to believe that Greenman was operating a Segway without due care because Sergeant Nelson did not actually observe him driving the Segway but instead found him lying on the sidewalk next to his Segway shortly after 8:00 p.m. Greenman asserts the evidence supported his explanation that a 'crater' in the sidewalk, rather than his lack of due care, caused the crash. Even if Greenman is correct that a fault in the sidewalk caused him to crash his Segway, the statute requires, '[e]very person operating an electric personal assistive mobility device on a ... sidewalk ... [to be] responsible for becoming and remaining aware of the actual and potential hazards then existing on the ... sidewalk and [to] use due care in operating the device.'. . That Greenman failed field sobriety tests after being found on the sidewalk only adds to the 'totality of circumstances' that would lead a reasonable person to determine Greenman was not operating his Segway with due care prior to crashing. . . Sergeant Nelson had

at least arguable probable cause to arrest Greenman for failing to operate his Segway with due care.")

De Boise v. Taser Int'l, Inc., 760 F.3d 892, 896-98 (8th Cir. 2014) ("Courts have discretion to decide which part of the inquiry to address first. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009). Here, we begin with second inquiry. Though the outcome of this encounter was tragic, and even if the reasonableness of the officers' actions was questionable, Appellants cannot defeat the officers' defense of qualified immunity unless they are able to show that a reasonable officer would have been on notice that the officers' conduct violated a clearly established right. . . . Although we have determined that non-violent, non-fleeing subjects have a clearly established right to be free from the use of tasers, . . . we have yet to determine whether a violent subject, acting aggressively toward officers, has a clearly established right to be free from multiple tasings. . . . And, Appellants point to no previous case that could be said to have clearly established the unconstitutionality of the officers' actions here. Accordingly, the state of the law would not have placed 'an officer on notice that he must limit the use of his taser in certain circumstances, even though the subject continues to struggle and resist.'. . .Although *Oliver* and the case before us both involve the tasing of an emotionally disturbed individual, the facts of the two cases are not sufficiently aligned. Similar to Oliver, De Boise suffered from a mental illness of which the officers were aware. However, unlike in *Oliver,* the officers in this case observed De Boise aggressively approaching one of the officers, his continued noncompliance with the officers' instructions to lie on the ground, and his violent and aggressive behavior, which included kicking and swinging his arms at the officers once they approached to subdue him. These important distinctions lead us to conclude that no reasonable officer, observing De Boise's behavior, would have understood the actions taken to be so disproportionate and unnecessary as to amount to a violation of De Boise's rights.")

De Boise v. Taser Int'l, Inc., 760 F.3d 892, 899, 900 (8th Cir. 2014) (Bye, J., dissenting) ("First, construing the facts in the light most favorable to De Boise, I would find a sufficient showing has been made to present to a jury whether the officers violated De Boise's constitutional rights by continuing to tase him until his eventual death. The use of a taser is not unlimited in scope when dealing with a suspect, even one who is actively resisting. De Boise disobeyed officers' orders and made some threatening moves. However, De Boise was not carrying a visible or concealed weapon, did not make advances at the officers, and was naked. A jury could conclude, with six armed officers at the scene, it was an unreasonable use of force to continuously tase De Boise rather than handcuff him during the time period De Boise was debilitated during and after each tase. Particularly because De Boise did not have shod feet or any other weapon, a jury could conclude the officers were unreasonable to not make further effort to handcuff De Boise, even if he were swinging his arms or kicking his legs. Second, I would find the officers were put on notice in 2008 that continuously tasing a suspect until his death was unlawful. . . .In this case, the officers were on notice they should have attempted to handcuff De Boise as a safer alternative to tasing De Boise with fifty seconds of electrical shock in just over two minutes of time. It would be clear to a reasonable officer that failing to seize De Boise with reasonable force was unlawful. Because the officers' actions are not protected by qualified immunity, I would remand this case for trial where

a jury can determine whether it was reasonable the officers continued to tase De Boise until his death and seemingly without taking the available opportunities to handcuff and restrain De Boise.")

Gladden v. Richbourg, 759 F.3d 960, 967, 968 (8th Cir. 2014) ("Gladden's level of intoxication is the dispositive issue in this case. If Gladden appeared to the officers to be sober enough to walk to the guard shack and make a rational, informed decision, then the officers are entitled to qualified immunity. But they are not so entitled if Gladden was so intoxicated that Richbourg and Imhoff, in leaving Gladden at the Remington Road exit, acted recklessly in conscious disregard of an obvious risk of harm to Gladden such that their actions evince deliberate indifference to Gladden's constitutional rights. It is not enough under this analysis that Gladden be mildly or even moderately intoxicated; he must have been so intoxicated that it would have been obvious to the officers that he was incapable of walking to the guard shack at the factory or of making decisions for himself. . . .In short, Gladden's mild signs of intoxication were not enough to alert the officers to the possibility that Gladden might not be able to make decisions for himself and might not be able to find his way to a guard shack a short distance away from where Richbourg dropped him off. While it may have been negligent for the officers to leave a mildly intoxicated man at a rural intersection on a cold night, their conduct in doing so was not so reckless that it shocks the conscience of the court. Because of our conclusion that Richbourg and Imhoff did not violate Gladden's constitutional rights, we need not reach the question whether these rights were clearly established at the time of their alleged violation.")

Peterson v. Kopp, 754 F.3d 594, 600, 601 (8th Cir. 2014) ("The defendants argue, and the district court held, that even if pepper spraying Peterson was unreasonable under the circumstances, Kopp is entitled to qualified immunity because Peterson only suffered 'de minimis injury' as a result. . . . [U]ntil our June 2011 decision in *Chambers*, it was 'an open question in [the Eighth Circuit] whether an excessive force claim require[d] some minimum level of injury.' *Chambers*, 641 F.3d at 904. Because Peterson's arrest occurred two months before we decided *Chambers*, Kopp could have reasonably believed his actions were constitutionally permissible as long as they did not cause more than de minimis injury. In short, Kopp would be entitled to qualified immunity if Peterson's injuries were de minimis. Though we agree the use of force here may have been unreasonable, and acknowledge that Peterson described being pepper sprayed as a painful experience, Peterson has not presented sufficient evidence that he suffered more than de minimis injury. Viewing the facts in the light most favorable to Peterson, he was sprayed directly in the face with pepper spray for just a few seconds, and suffered some pain, discomfort, and peeling under his eyes for several days after the incident. He did not seek medical care and his injuries resolved themselves without medical intervention. We do not make light of the use of pepper spray nor ignore the discomfort and skin irritation Peterson endured; nonetheless, we have not held that the use of pepper spray necessarily causes more than de minimis injury.")

Bishop v. Glazier, 723 F.3d 957, 962 (8th Cir. 2013) ("As of December 2010, when Glazier encountered Bishop, 'a reasonable officer could have believed that as long as he did not cause

more than *de minimis* injury to an arrestee, his actions would not run afoul of the Fourth Amendment.'. . Even if we assume for the sake of analysis that Glazier grabbed Bishop by the throat for 45–60 seconds, and that Bishop's breathing and speaking were restricted during that time, Bishop's only injury was a 'light cut' on his neck that did not bleed and for which he did not seek any treatment. The amount of force that Glazier allegedly used did not cause more than *de minimis* injury. . . Glazier is thus entitled to qualified immunity, because he did not violate Bishop's then clearly established constitutional rights under the Fourth Amendment.")

LaCross v. City of Duluth, 713 F.3d 1155, 1157-59 (8th Cir. 2013) ("Determining the question of qualified immunity involves a two-part inquiry: whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and whether that right was clearly established at the time of the defendant's alleged misconduct. . . We have discretion to decide which part should be addressed first . . . and have decided to address the latter. In *Chambers v. Pennycook,* we considered whether a plaintiff's showing of 'only *de minimis* injury necessarily forecloses a claim of excessive force under the Fourth Amendment[,]' and concluded that it did not. . . We determined that '[t]he appropriate inquiry is "whether the force used to effect a particular seizure is 'reasonable.'" So although a *de minimis* use of force is insufficient to support a claim, a *de minimis* injury does not necessarily foreclose a claim. . . The distinction between *de minimis* force and *de minimis* injury, however, was not clear until *Chambers* was decided. In September 2006, when Mark deployed his Taser, 'a reasonable officer could have believed that as long as he did not cause more than *de minimis* injury to an arrestee, his actions would not run afoul of the Fourth Amendment.'. . LaCross has not set forth sufficient evidence to show that Mark's application of the Taser caused more than *de minimis* injury. Accordingly, Mark is entitled to qualified immunity because he did not violate LaCross's then clearly established constitutional rights. LaCross contends that the Taser is different from other implements of force in that it can cause excruciating pain without lasting physical effects. Because it is different in kind, the argument goes, the Taser should not be judged by the physical injury it causes. LaCross argues that our post- *Chambers* opinion in *Shekleton v. Eichenberger,* 677 F.3d 361 (8th Cir.2012), establishes that '*de minimis* injury is effectively irrelevant where an officer uses a taser on a nonresistant misdemeanant suspect.'. . In other words, he argues that *Chambers* does not apply to excessive force claims involving Tasers. We disagree. *Shekleton* did not consider the extent of the plaintiff's injuries, beyond noting that the plaintiff sustained minor head injuries and was treated at a hospital. . . The decision thus did not address whether the plaintiff suffered only *de minimis* injury, and if so, whether that injury is viewed differently because it was caused by a Taser. . .While mention has been made of 'the unique nature of this type of weapon[,]' *McKenney v. Harrison,* 635 F.3d 354, 361 (8th Cir.2011) (Murphy, J., concurring), we have not categorized the Taser as an implement of force whose use establishes, as a matter of law, more than *de minimis* injury. In *Chambers,* we said that 'the nature of the force applied cannot be correlated perfectly with the type of injury inflicted.'. . This observation may be of special relevance regarding Taser-inflicted injuries, some of which are only minor in nature, but others sometimes severe and unexpected. . . Though it offers no aid to LaCross, the degree of injury is not dispositive after *Chambers,* and it is now clearly

established that an officer is not entitled to qualified immunity if his use of force is excessive in the circumstances, even if the injury inflicted was minor.")

Livers v. Schenck, 700 F.3d 340, 359, 360 (8th Cir. 2012) ("Our sister circuits disagree over whether pretrial detainees such as Livers and Sampson have a right to disclosure of exculpatory evidence. The Fifth Circuit concluded a police officer's 'deliberate failure to disclose ... undeniably credible and patently exculpatory evidence to the prosecuting attorney's office' violates a clearly established constitutional right, *Sanders v. English*, 950 F.2d 1152, 1158, 1160–62 (5th Cir.1992). The Fourth Circuit reached the opposite result in *Taylor v. Waters*, 81 F.3d 429, 435–37 (4th Cir.1996). The Fourth Circuit determined a police officer's failure 'to disclose exculpatory evidence after a determination of probable cause has been made by a neutral detached magistrate' neither violates the Fourteenth Amendment's Due Process Clause nor 'render[s] the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment.'. . Given the split of authority, we cannot say a pretrial right to disclosure of exculpatory evidence, if it exists, was clearly established in 2006. . . Appellants are entitled to qualified immunity on Livers' and Sampson's claims based on any failure to disclose evidence. . . . A law enforcement officer who knows another officer is using excessive force has a duty to intervene. . . We have not recognized a duty to intervene to prevent other constitutional violations. Though other circuits have recognized a duty to intervene outside of the excessive force context, *see Randall v. Prince George's Cnty., Md.*, 302 F.3d 188, 204 (4th Cir.2002); *Reid v. Wren*, Nos. 94–7122, 94–7123, 94–7124, 1995 WL 339401, at *2 (10th Cir.1995) (unpublished); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir.1994); *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir.1994), the Eleventh Circuit refused to find a clearly established duty to intervene to stop other constitutional violations, *see Jones v. Cannon*, 174 F .3d 1271, 1286 (11th Cir.1999). . . Assuming law enforcement officers have a constitutional duty to intervene outside of the excessive force context, such a duty was not clearly established in 2006. Where, as here, the federal circuits disagree on whether conduct violates the Constitution, and our court has not addressed the question, that conduct does not violate clearly established law because 'it is unfair to subject police to money damages for picking the losing side of the controversy.' *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Appellants are entitled to qualified immunity on Livers' failure-to-intervene claim.")

Burke v. Sullivan, 677 F.3d 367, 372 (8th Cir. 2012) ("Because the instant matter concerns a claim of qualified immunity, not a motion to suppress evidence, we need not reach the issue of whether the officers violated the dictates of the Fourth Amendment. . . .Based on the several facts known to the officers, it was reasonable for them to conclude their warrantless entry into Burke's home was lawful under either the emergency aid exception or the community caretaker exception. Jay had become highly intoxicated. Jay refused to leave the neighbor's party. Jay would not cooperate with Burke when she tried to take him home and was verbally abusive to Burke. Jay forcefully pushed Burke against a wall. Jay was involved in a physical altercation with one of the party guests, seriously biting him. Jay kicked and broke a table. Jay was known to use illegal drugs and may have been under the influence of illegal drugs. Jay went into Burke's house across the street immediately before the officers' arrival. There was no response when the officers attempted to

contact Burke by knocking on her door, shouting, shining a flashlight inside, and telephoning the residence. Burke, who had been thrown against a wall by Jay, was now in the home alone with a violent suspect. When viewed collectively, these facts could lead a reasonable police officer to conclude there was either a threat of violence or an emergency requiring attention. . . . Contrary to Burke's assertion, *Smith v. Kansas City, Mo. Police Department*, 586 F.3d 576 (8th Cir.2009) does not dictate a different result. In *Smith*, we determined a police officer was not entitled to qualified immunity when the officer entered the home of an unarmed domestic violence suspect without a warrant. . . In reaching our decision, we gave significant weight to the fact the officer had no information any victim or potential victim was inside the home. . . In Burke's case, the officers had specific information a potential victim, Burke, was inside the home with Jay, the violent suspect, whose erratic behavior generated the domestic disturbance call. Jay had already been involved in violent encounters with Burke and LaRose. Given these facts, it was reasonable for the officers to conclude their warrantless entry into Burke's home was lawful. . . In addition, our court did not decide *Smith* until November 2009, over four months after the officers entered Burke's home. As such, *Smith* was not part of the established law when the officers entered Burke's home.")

Harrington v. City of Council Bluffs, Iowa, 678 F.3d 676, at 679, 680 (8th Cir. 2012) ("If malicious prosecution is a constitutional violation at all, it probably arises under the Fourth Amendment. . . The dispositive issue on appeal is whether the officers are entitled to qualified immunity on the appellees' Fourth Amendment claims based on malicious prosecution. . . . Our sister circuits have taken a variety of approaches on the issue of whether or when malicious prosecution violates the Fourth Amendment. . .We need not enter this debate now. . . Assuming a Fourth Amendment right against malicious prosecution exists, such a right was not clearly established when the appellees were prosecuted in 1977 and 1978.")

Sisney v. Reisch, 674 F.3d 839, 844, 847 (8th Cir. 2012) ("We think it is clear the district court granted qualified immunity because it found Sisney had failed to allege violation of a constitutional right that was clearly established. We therefore find it prudent to begin our qualified immunity analysis at the second prong. . . . [W]e cannot agree that it was apparent the contours of a prison inmate's right to reasonable dietary and meal accommodations extended to the use of a succah. As a result, the SDSP Officials did not have fair notice it was unlawful to deny Sisney's project applications. We therefore conclude the district court did not err in granting these Officials qualified immunity on Sisney's claims for denial of his 2004, 2005, and 2006 project applications.")

Bernini v. City of St. Paul, 665 F.3d 997, 1004-06 (8th Cir. 2012) ("[A] reasonable officer could have concluded that the individuals at the intersection were acting together and that they intended to break through the police line in an attempt to access downtown St. Paul. It was reasonable, therefore, for an officer to believe that the group, as a whole, was committing one or more offenses under state law, including third degree riot and unlawful assembly. . . We thus conclude that the police did not violate the clearly established rights of sixteen plaintiffs who were both present at

the intersection and arrested at the park. . . . The walk from Jackson Street to the park caused the group to expand and enveloped people who were not present at the intersection. But unlike the officer in *Barham v. Ramsey,* 434 F.3d 565 (D.C.Cir.2006), who directed an indiscriminate mass arrest of about 400 persons in a park based on the unlawful acts of a small group of protestors, the police in this case attempted to discern who had been part of the unit at the intersection and released approximately 200 people, including seven of the plaintiffs, at the park. The police did not violate the clearly established rights of the seven plaintiffs who were among those released at the park. These people were detained only while the officers sought to determine who were the members of the group at the intersection. . . . The nine remaining plaintiffs allege that they were arrested and taken into custody even though they were not present at the Shepard–Jackson intersection. They further contend that the group at the intersection numbered no more than thirty to forty people, and that the officers did not have probable cause (or even arguable probable cause) to arrest more than this number. The video footage, however, shows that the group was much larger. Approximately fifty people clustered closely together directly across from the officers. Another fifty or so people can be seen standing on either side of the group, along the sidewalk. Qualified immunity 'protects all but the plainly incompetent or those who knowingly violate the law.'. . In the circumstances of this case, we conclude that the arrest of 160 people in the park (including the nine plaintiffs) was within the range of objectively reasonable police conduct in light of the law that was clearly established and the information available to the officers. It was reasonable for the officers to believe they could arrest those who were acting as a unit with the protestors who attempted to break through the police barrier at the Shepard–Jackson intersection. The videos depict approximately 100 people present at the intersection. The eleven officers were positioned under an overpass, making it difficult for them to see how far the crowd extended to the west. From the officers' vantage point, it appeared as if "people were continuously arriving from the west." The officers, especially without the benefit of the videos, could not have been sure of the precise number. They did release approximately 200 people at the park in an attempt to avoid custodial arrests of innocent bystanders. Given the situation at the intersection, the officers' allegedly mistaken belief at the park that 160 people were part of a unit that had gathered to enter downtown at the Shepard–Jackson intersection was objectively reasonable. We therefore affirm the district court's conclusion that the officers are entitled to qualified immunity for the seizures. . . . We conclude . . . that Henry is entitled to qualified immunity. In our view, the use of force was reasonable under the Fourth Amendment. At a minimum, it was not objectively unreasonable for Henry to authorize the force deployed in light of clearly established law. The circumstances led officers reasonably to believe that a growing crowd intended to penetrate a police line and access downtown St. Paul. Henry's use and authorization to use non-lethal munitions to direct the crowd away from the intersection and toward a park where the crowd could be controlled did not violate clearly established rights. The plaintiffs contend that it was unreasonable for the officers to continue to use force as the crowd moved west on Shepard Road, because the crowd was 'complying with the movement of the officers and posed no threat to the officers.' The video footage reveals, however, that some people would not leave the roadway and that some turned east and faced the officers. It was reasonable for the officers to deploy non-lethal munitions to keep all members of the crowd moving west. Some plaintiffs assert that they were directly targeted by

officers—one, for example, testified that an officer sprayed a chemical irritant on his face, neck, ears, and back. But there is no evidence that Henry authorized this type of force against a compliant individual. His implicit authorization occurred at the intersection and involved force deployed against a noncompliant crowd. The plaintiffs have not identified any defendant who used gratuitous force. The evidence, therefore, does not support the conclusion that Henry or any other defendant violated clearly established rights under the Fourth Amendment. The district court properly granted summary judgment on this claim.")

Chambers v. Pennycook, 641 F.3d 898, 901, 904-09 (8th Cir. 2011) ("We now conclude that a citizen may prove an unreasonable seizure based on an excessive use of force without necessarily showing more than *de minimis* injury, but we hold that the officers here are entitled to qualified immunity , because their alleged actions did not violate clearly established law. . . . While we have discretion to decide which question should be addressed first, . . . we think it best in this case to start with the constitutional question. This court has said several times, over the course of more than fifteen years, that '[i]t remains an open question in this circuit whether an excessive force claim requires some minimum level of injury.'. . Continued postponement of that question has resulted in uncertainty about the rights of citizens and the responsibilities of law enforcement officers under the Fourth Amendment. One aspect of the recurring 'open question' is squarely presented in this case: whether a plaintiff must demonstrate greater than *de minimis* injury to establish a use of excessive force that violates the Fourth Amendment. Resolution of that issue will give guidance to officials about how to comply with legal requirements and will allow an avenue of redress for wronged citizens in appropriate circumstances. The question is unlikely to be resolved in the context of a criminal case or in litigation over municipal liability. . . And none of the factors that typically counsel against a decision on the constitutional question are present here. . . Having thought hard twice about how to exercise our discretion, *see Camreta v. Green*, No. 09-1454, 2011 WL 2039369, at *9 (U.S. May 26, 2011), and having ordered supplemental briefing and devoted substantial resources to considering the constitutional question in this case, we will proceed to decide it. . . . We are not convinced. . . that evidence of only *de minimis* injury necessarily forecloses a claim of excessive force under the Fourth Amendment. . . . The dispositive question is whether the officer's conduct was objectively reasonable under the circumstances, as judged from the perspective of a reasonable officer on the scene at the time the force was applied. . . . The gratuitous use of force alleged by Chambers was not reasonable under the circumstances. . .The second step in the qualified immunity analysis is to determine whether the right that was violated was 'clearly established' at the time of the defendant's alleged misconduct. . . . It was not clearly established . . . that an officer violated the rights of an arrestee by applying force that caused only *de minimis* injury. . . . Given the state of the law in August 2005, a reasonable officer could have believed that as long as he did not cause more than *de minimis* injury to an arrestee, his actions would not run afoul of the Fourth Amendment. . . . We reject in this decision a constitutional rule that turns on the arrestee's degree of injury, but given the law prevailing at the time of the incident, we conclude that the officers are entitled to qualified immunity.")

Baribeau v. City of Minneapolis, 596 F. 3d 465, 474, 478-80 (8th Cir. 2010) ("The Supreme Court recently made it clear that we are allowed to exercise our 'sound discretion' to decide which qualified immunity prong we address first, 'in light of the circumstances in the particular case at hand.' *Pearson*, 129 S.Ct. at 818. In this case, we find it most beneficial to first address whether the facts, when considered in the plaintiffs' favor, establish a violation of the plaintiffs' Fourth Amendment rights. . . . [B]ecause the plaintiffs' conduct was expressive conduct and did not amount to fighting words, their conduct clearly did not fall within the narrowed reading of the disorderly conduct statute. Thus, there was no probable cause to believe the plaintiffs' expressive conduct violated the statute. Accordingly, we hold that Merkel and Weber violated the plaintiffs' Fourth Amendment rights. . . . [A]n objectively reasonable person would not think probable cause exists under the Minnesota disorderly conduct statue to arrest a group of peaceful people for engaging in an artistic protest by playing music, broadcasting statements, dressing as zombies, and walking erratically in downtown Minneapolis during a week-long festival. Merkel and Weber arrested the plaintiffs in 2006–well after the Minnesota Supreme Court's decisions in *S.L.J.* and *Machholz.* Thus, the Minnesota Supreme Court's cases in *S.L.J.* and *Machholz* provided Merkel and Weber with a fair warning that the arrests were unconstitutional. . . . The Minnesota Supreme Court has not interpreted this [the WMD] statute. . . . We agree with the district court that there was no probable cause to arrest the plaintiffs for displaying simulated WMD. However, we do not agree that arguable probable cause existed to arrest the plaintiffs. . . . [T]he facts in this case did not require officers to parse code language. As a part of their artistic anti-consumerism protest, the plaintiffs carried four bags of sound equipment. The bags contained an iPod, a radio transmitter, an antenna, a wireless phone handset, radio receivers, and speakers. Some of the sound equipment, including wiring and an on/off switch for the music, was visible on the outside of the bags. The plaintiffs were clearly using this equipment to broadcast anti-consumerism statements and music. Though we recognize the seriousness of WMD offenses, we cannot say that displaying and using portable sound equipment for its natural purpose–i.e., to transmit and broadcast sound waves–even remotely satisfies the statute's definition of displaying simulated WMD. Therefore, even if the WMD statute did not require the plaintiffs to display biological, chemical, or radioactive elements, a reasonable person would not have believed probable cause existed to arrest the plaintiffs for displaying simulated WMD. Accordingly, the defendants are not entitled to qualified immunity because they violated the plaintiffs' clearly established rights when they arrested the plaintiffs without arguable probable cause that the plaintiffs had displayed simulated WMDs.").

Baribeau v. City of Minneapolis, 596 F. 3d 465, 474, 478-80 (8th Cir. 2010) (Colloton, J., concurring in part and dissenting in part)("The defendant police officers Timothy Merkel and Roderic Weber had probable cause to arrest the plaintiffs for a violation of the Minnesota disorderly conduct statute, Minn.Stat. ' 609.72, subd. 1. Nonetheless, the majority reverses the district court's grant of qualified immunity to these officers on the plaintiffs' Fourth Amendment claim, holding that the officers acted contrary to a 'narrowing construction' of the disorderly conduct statute–a construction that has never been adopted by the Supreme Court of Minnesota, and that has been expressly rejected by the Minnesota Court of Appeals. The majority's decision, therefore, is contrary to established principles of qualified immunity, which ensure that public

officials are not subjected to suit unless they are on notice, through clearly established law, that their conduct is unlawful. I would affirm the judgment of the district court in its entirety.").

Norman v. Schuetzle, 585 F.3d 1097, 1111 (8th Cir. 2009) ("Existing caselaw in 2005 did not sufficiently put Wrolstad on notice that his actions of showing the kites to other inmates put Norman at a substantial risk of harm from other inmates. Norman fails to cite to cases other than the snitch labeling cases to support his claim that it was clearly established that Wrolstad's actions violated his constitutional rights. As in *Pearson*, we look to the specific actions of the officer to determine whether it was clearly established that his actions violated the inmate's rights. We conclude that whether or not it violated Norman's right to be protected from harm when Wrolstad showed his grievances to other inmates under the circumstances of this case, it was not clearly established at the time that doing so would have violated Norman's rights.")**.**

Nelson v. Correctional Medical Services, 583 F.3d 522, 528, 531-34 (8th Cir. 2009) (8th Cir. 2009) (en banc) ("We conclude that it is appropriate in this case to start with the question of whether the allegations and evidence, when considered in Nelson's favor, establish any constitutional violation. . . . Having determined that there is sufficient evidence in the record to permit a reasonable factfinder to determine that Turensky's actions violated the Eighth Amendment, the question remains whether such a constitutional right was clearly established in September 2003. . . . A reasonable factfinder could determine from the record in this case that Officer Turensky, like the *Hope* officials, was not facing an emergency situation but nevertheless 'subjected [Nelson] to a substantial risk of physical harm, to the unnecessary pain caused by the [shackles] and the restricted position of confinement ... [and] created a risk of particular discomfort and humiliation.'. . . The general responsibilities of state officers with regard to an inmate's medical needs were also clearly established before September 2003. In 1976 the Supreme Court had decided *Estelle v. Gamble*, 429 U.S. 97 (1976), a leading case in the development of Eighth Amendment law. *Estelle* was a § 1983 action brought against prison officials for providing an inmate inadequate medical care. . . The Court concluded that either interference with care or infliction of 'unnecessary suffering' establishes deliberate indifference in medical care cases in violation of the Eighth Amendment. . . . Moreover, the precise issue under consideration here was decided years ago by a federal district court in the District of Columbia. In 1994 that court held that '[w]hile a woman is in labor ... shackling is inhumane' and violates her constitutional rights. *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 877 F.Supp. 634, 668-69 (D.D.C.1994), *modified in part on other grounds*, 899 F.Supp. 659 (D.D.C.1995). . . . Since Nelson produced sufficient evidence to demonstrate that Officer Turensky violated her clearly established Eighth Amendment rights by shackling her during labor, 'the basic concept underlying the Eighth Amendment [being] nothing less than the dignity of [wo]man,' *Hope*, 536 U.S. at 738 (quotation omitted), the judgment of the district court denying Officer Turensky qualified immunity is affirmed.")**.**

Howard v. Kansas City Police Dept., 570 F.3d 984, 988, 991 (8th Cir. 2009) ("In the instant case, we elect to proceed under the traditional framework and decide first whether the facts demonstrate

a violation of Howard's constitutional rights before determining whether such rights were clearly established. . . . We have already concluded the Officers used excessive force in seizing Howard because they acted unreasonably in responding to the dangers posed by the hot asphalt. We similarly conclude a reasonable official would understand that such conduct constitutes excessive force.")

Mussa v. Abdulkadir, No. 11–CV–1967 (PJS/JJG), 2013 WL 4780955, *2 (D. Minn. Sept. 5, 2013) ("Abdulkadir argues that, because he inflicted only de minimis injuries on Mussa, he is entitled to qualified immunity on Mussa's excessive-force claim under *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir.2011). In *Chambers*, the Eighth Circuit held that a plaintiff need not show more than de minimis injuries in order to prevail on a claim of excessive force. . . But because the Eighth Circuit's previous case law had not been clear on this point, the police officers who had been sued in *Chambers*—and who had inflicted only de minimis injuries on the plaintiff—were found to be entitled to qualified immunity. . . Abdulkadir argues that, because the incident in this case took place before *Chambers* was decided, and because he inflicted only de minimis injuries on Mussa, he too is entitled to qualified immunity. The Court agrees. This case is squarely controlled by *Chambers.* Mussa does not dispute that Abdulkadir had the right to detain him for not having a light on his bicycle. Because Abdulkadir had the right to detain Mussa, he had the right to use some degree of force. . . This sets Mussa's case apart from cases in which, under the plaintiff's version of the facts, the officer did not have the right to make an arrest or otherwise detain the plaintiff. . .Mussa argues that, even though Abdulkadir had the right to detain him, Abdulkadir had no right to use force against him once Mussa was handcuffed and secured in the squad car. The problem with this argument, though, is that the very same situation was present in *Chambers.* After Chambers was handcuffed and on the floor, an officer kicked him and pressed his foot on Chambers's back. . . Chambers was then placed in a squad car, where another officer choked him and kicked the back of his seat. . . The officers also adjusted Chambers's seat so that Chambers's head was nearly touching the dashboard and then drove erratically so that Chambers was jerked back and forth (presumably causing Chambers's head to hit the dashboard). . . All of this happened after Chambers had been handcuffed and brought under control. Yet the Eighth Circuit nevertheless found that the officers were entitled to qualified immunity. . . In short, the fact that Mussa was handcuffed and in the squad car does not distinguish this case from *Chambers.* So long as Mussa's injuries were de minimis, *Chambers* dictates that Abdulkadir is entitled to qualified immunity.")

NINTH CIRCUIT

Whalen v. McMullen, No. 17-35267, 2018 WL 5530736, at *4, *8-9 (9th Cir. Oct. 30, 2018) ("Because of the important questions presented in this case, we address both prongs of the qualified immunity analysis. We first discuss whether McMullen's warrantless entry into Whalen's home under false pretenses was an unreasonable search under the Fourth Amendment, and we then turn to consideration of whether it was clearly established that such an entry was a Fourth Amendment violation. . . . McMullen's purpose was to gather evidence for the fraud

investigation, which he did by making observations and video recordings of Whalen and her home. Because he entered the home while using a ruse and not while undercover, it is immaterial that he stayed within Whalen's presence in the home and did not conduct a broader search. He did not have consent to be in the home for the purposes of his visit. . . And he did not have consent—under any terms—to videotape Whalen or her home. By observing and videotaping Whalen inside her home without her consent, McMullen conducted a 'search' within the meaning of the Fourth Amendment. . . . McMullen searched Whalen's home without a warrant to gather evidence for an investigation of her potentially fraudulent application for benefits. Thus, even if this was an 'administrative' search, it served general law enforcement purposes and not a 'special need.'. . .For the foregoing reasons, we conclude that McMullen's entry into Whalen's home without consent or a warrant in the course of a CDIU civil fraud investigation related to Whalen's benefits claim was an unreasonable search under the Fourth Amendment. . . .

Although we conclude that McMullen's warrantless ruse-entry into Whalen's home was an unreasonable search, we cannot say it was clearly established that his conduct, in the context of a civil or administrative investigation related to a determination of benefits eligibility, was a search or was unreasonable. Whalen does not have to identify a controlling case finding a constitutional violation on the exact facts of her case for her asserted right to be clearly established, but she relies only on *Bosse* and other criminal ruse entry cases. In light of *Wyman* and *Sanchez*, *Bosse* would not have provided McMullen with notice that his actions—which were common practice for CDIU investigators—violated the Fourth Amendment. McMullen knew he was conducting a civil investigation, not a criminal investigation, and that it was related to Whalen's eligibility for social security benefits. Additionally, McMullen did not initially seek to enter Whalen's home but rather to engage her in front of her house; Whalen limited her constitutional challenge to McMullen's actions once he crossed the threshold. As the district court noted, there was no authority requiring McMullen to retreat from [Whalen's] home' as the conversation moved inside, nor was there authority 'clearly proscribing McMullen's conduct in this situation.' We agree that it would not have been clear to a reasonable officer that his conduct, in the context of this civil investigation related to a determination of benefits eligibility, was unlawful. The right Whalen asserts was not clearly established, and McMullen is entitled to qualified immunity from this suit.")

Ioane v. Hodges, 903 F.3d 929, 933, 936-38 (9th Cir. 2018) ("While we have discretion to begin our analysis with either part of the test, . . . it is nevertheless beneficial to begin with the first part of the test because it 'promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . .We begin with the first part of the qualified immunity test. While the Ninth Circuit never has articulated a standard for when an officer's intentional viewing of an individual's naked body is constitutionally permissible under the Fourth Amendment, '[t]he touchstone of the Fourth Amendment is reasonableness.'. . . Weighing the scope, manner, justification, and place of the search, a reasonable jury could conclude that Agent Noll's actions were unreasonable and violated Shelly's Fourth Amendment rights. Agent Noll's general interests in preventing destruction of evidence and promoting officer safety did not justify the scope or manner of the intrusion into Shelly's most basic subject of

privacy, her naked body. . . We therefore affirm the district court on this issue. . . . The second part of the qualified immunity test requires us to determine whether, at the time of Agent Noll's actions in June 2006, the law was clearly established. . . . Taken together, the holdings from *York*, *Grummett*, *Sepulveda*, and *Ybarra* put the unlawfulness of Agent Noll's conduct beyond debate. . . .In sum, a reasonable officer in Agent Noll's position would have known that such a significant intrusion into bodily privacy, in the absence of legitimate government justification, is unlawful. . . We therefore conclude that Agent Noll is not entitled to qualified immunity.")

Ioane v. Hodges, 903 F.3d 929, 938-39, 941-42 (9th Cir. 2018) (Bea, J., concurring in judgment) ("I agree with the majority's ultimate conclusion that the district court did not err in denying Agent Noll's motion for summary judgment regarding Shelly Ioane's claim that Agent Noll violated Shelly's clearly established constitutional rights. However, because I disagree with the majority's holding that Agent Noll's actions violated Shelly's clearly established right to bodily privacy, I write separately. . . . Here, the majority concludes that Agent Noll was not entitled to qualified immunity as a matter of law, in part because Agent Noll violated Shelly's clearly established Fourth Amendment right to bodily privacy when Agent Noll searched Shelly and viewed her naked body during the course of executing a search warrant at the Ioanes' residence. In order to reach that conclusion, it is necessary for the majority to hold that a female law enforcement officer violates a clearly established right to bodily privacy when she unreasonably views the naked body of a female suspect. The majority cites three of our prior cases regarding bodily privacy to support the existence of such a clearly established right. But the cases cited by the majority are distinguishable from the instant case in significant ways. Most problematically, none of the cases cited by the majority state that there is a constitutional right to bodily privacy that is violated by same-sex observation. . . .Most notably, the majority asserts (in a footnote) that, although every bodily privacy case this circuit has decided involved cross-sex observation, 'gender was not central' to the analysis in any of those cases. . . Thus, the majority concludes, '[the fact t]hat Agent Noll and Shelly both are women does not change that Agent Noll violated Shelly's privacy rights.'. .Gender is not central? It is impossible to square this conclusion with our precedent. Every bodily privacy case cited by the majority involved cross-sex observation and every case noted that the cross-sex nature of the observation was a significant part of the court's analysis. No case cited by the majority discusses whether same-sex observation is subject to the same sort of analysis or scrutiny. In fact, language from *York* and *Sepulveda*—and the result from *Grummett*—strongly suggest that same-sex observations *are not* subject to the same sort of scrutiny as cross-sex observations. The majority is likely correct that Agent Noll's actions were unreasonable, and Agent Noll may have violated Shelly's constitutional right to bodily privacy during the search. But the existence of a constitutional violation alone is insufficient to deny qualified immunity—we must find that the right at issue was 'clearly established.' Our precedent at the time of the alleged violation in this case did not put the issue of whether same-sex observation violates the right to bodily privacy 'beyond debate.'. . The majority could have used this case to clarify the law regarding the right to bodily privacy and announced that the right applied in both same-sex and cross-sex situations alike. Perhaps that is the correct result. But the

majority cannot, in one fell swoop, both announce for the first time that the scope of the bodily privacy right includes same-sex observations and, at the same time, hold that the right was clearly established at the time of the violation. . .Nonetheless, I concur in the majority's ultimate conclusion that the district court did not err in denying Agent Noll's motion for summary judgment. Drawing all factual inferences in favor of Shelly, as we must, Agent Noll's actions violated Shelly's Fourth Amendment rights under the Supreme Court's decision in *Ybarra v. Illinois*. . . . Agent Noll had no individualized probable cause to search Shelly. Consequently, there was no basis to conduct an evidence search of Shelly's person. Additionally, Agent Noll likely lacked any reasonable belief that Shelly was armed and dangerous. Although Agent Noll knew there were firearms in the house, those firearms did not belong to Shelly and there was no other basis on which to conclude that Shelly was armed and dangerous. Regardless, even if Agent Noll had a reasonable basis to believe Shelly was armed and dangerous, her actions in this case plainly exceeded the limits of the sort of weapons pat-down authorized by the Supreme Court in *Terry v. Ohio*. . . . As a result, I would hold that Agent Noll's actions violated Shelly's Fourth Amendment rights as clearly established in *Ybarra*.")

Recchia v. City of Los Angeles Dep't of Animal Servs., 889 F.3d 553, 559-60 (9th Cir. 2018) ("If all the birds maintained by Recchia had been unhealthy or sick in appearance, we think their entire seizure would pose no significant constitutional issue, and clearly would not offend the Fourth Amendment because of the scope of the emergency exception to the warrant requirement and the need to seize the birds to end their suffering and prevent transmission of illness. However, the crux of the problem here is that not all of the birds appeared to be sick, in fact eight birds appeared outwardly healthy. And so we are confronted with a factual issue about whether the exigent circumstances exception applies as to the seizure of the healthy-looking birds kept by Recchia in this case. . . .We hold that there is a genuine factual dispute about whether the healthy-looking birds posed any meaningful risk to other birds or humans at the time they were seized. Therefore, although we affirm the dismissal in part as to the seizure of the birds that appeared sick, we vacate and remand in part as to the seizure of any birds that were wholly healthy in outward appearance. . . .On remand, we instruct the district court to consider in the first instance whether the Officers are entitled to qualified immunity for any potential constitutional violation because it was not 'clearly established' at the time of the seizure that the warrantless seizure of the birds could be a violation of Recchia's constitutional rights.")

Isayeva v. Sacramento Sheriff's Dep't, 872 F.3d 938, 945-53 (9th Cir. 2017) ("In *Maropulos v. County of Los Angeles*, we encouraged district courts to help us evaluate our jurisdiction by 'articulat[ing] the basis upon which they deny qualified immunity.'. . Here, the district court stated in its order denying summary judgment that genuine disputes of material fact existed regarding whether the tasing and shooting were reasonable uses of force, and that those disputes of fact precluded ruling that Deputy Barry was entitled to qualified immunity. Then, in an order certifying this appeal as frivolous, the district court characterized its summary judgment ruling as resting on the determination that there are genuine issues of material fact, and concluded that Deputy Barry's appeal was frivolous. But the district court misapplied the law on qualified immunity. We must

accept the district court's determination that there is a genuine dispute as to the circumstances under which Deputy Barry tased and shot the decedent. But, contrary to the district court's reasoning, the existence of a genuine dispute about the reasonableness of an officer's use of force does not preclude granting qualified immunity or eliminate any basis for an immediate appeal of denial of qualified immunity. *See, e.g.*, *Mattos v. Agarano*, 661 F.3d 433, 446 (9th Cir. 2011) (en banc). Qualified immunity involves two questions: (1) whether the defendant violated a constitutional right, and (2) whether that right was clearly established at the time of the alleged violation. . . Thus, as we recently explained, an officer may be denied qualified immunity at summary judgment in a Section 1983 case 'only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation.'. . Either prong can be adjudicated on appeal by taking the facts as most favorable to the plaintiffs and applying the pertinent legal standards to those facts. . . .Deputy Barry contends that his use of both (a) the taser, and (b) deadly force, against Tereschenko did not violate clearly established law. We assume the facts most favorable to the plaintiff, and have jurisdiction to address (1) whether Deputy Barry violated clearly established law when he tased Tereschenko; and (2) whether Deputy Barry violated clearly established law when he fatally shot Tereschenko. . . .Here, Deputy Barry stresses the second prong, whether Tereschenko's rights not to be subject to the tasing and to the shooting were 'clearly established' on February 18, 2013. We address that prong first and, given our conclusion, need not address the other. . . .The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'. . This question must be answered 'not as a broad general proposition,' but with reference to the facts of specific cases. . . . As of February 18, 2013, the date of the incident, three key published cases from the Ninth Circuit established when the use of a taser was unreasonable under the Fourth Amendment. . . . [N]either *Brooks* nor *Mattos* clearly established on February 18, 2013 that tasing Tereschenko would violate the Fourth Amendment. Nor do the two cases in combination with each other or with *Bryan* put the constitutionality of Deputy Barry's actions 'beyond debate.'. . Viewing the facts in the light most favorable to the plaintiff Isayeva, we hold that Tereschenko did not have a clearly established right violated by Deputy Barry's use of the taser. Deputy Barry is therefore entitled to qualified immunity for the tasing. We need not and do not reach the first prong of qualified immunity, asking whether Deputy Barry's use of the taser was reasonable under the Fourth Amendment. . . It is sufficient for purposes of qualified immunity merely to conclude that no clearly established law was violated by Deputy Barry in connection with his use of a taser against the resisting Tereschenko. . . .The standards from *Garner* and *Graham* 'are cast at a high level of generality,' so they ordinarily do not clearly establish rights. . . Rather, it is the facts of particular cases that clearly establish what the law is. . . .There is an exception to the rule that the *Garner* standard does not clearly establish the law governing when the use of deadly force is lawful. In an 'obvious case,' *Garner*'s general test can ' "clearly establish" the answer, even without a body of relevant case law.'. . .Unlike in *Hughes*, here we conclude that Deputy Barry's use of force was not obviously unlawful. Indeed, construing the facts in Isayeva's favor, there are strong reasons to believe that Tereschenko posed a risk of death or serious injury to the officers or

to the family members in the home. . . .Isayeva cites only one case from our circuit where an officer was involved in hand-to-hand combat with an individual, the officer used deadly force, and we held that the force used was excessive. *See Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992), *as amended* (Mar. 24, 1992) (per curiam). In *Hopkins*, when the record was construed in favor of the plaintiff, the fight involved the decedent hitting the officer once or twice to the arm or head, and the officer suffering only a minor cut on his arm and bruises on his elbow, back, and leg. Yet, without warning, the officer shot the decedent. . . We concluded that the officer 'was never in any serious danger' and that the use of deadly force was unreasonable. . . Unlike the present case, the decedent in *Hopkins* at no point had the upper hand in the fight, and the officer never came close to passing out. The decedent in *Hopkins* posed a much lesser threat to officer and citizen safety than did Tereschenko. *Hopkins*, like *Garner*, does not clearly establish that Deputy Barry's use of deadly force was unlawful. The above discussion shows that not only was it not obvious that Deputy Barry's use of deadly force was excessive, but that there are strong reasons supporting the reasonableness of the shooting. We conclude that under the circumstances of this case, *Garner* does not clearly establish Tereschenko's right to be free from deadly force by Deputy Barry. Though our analysis discussed factors relevant to whether Deputy Barry's use of deadly force was reasonable, we reach no conclusion on that issue. . . Instead, we rest our holding on the second prong of qualified immunity, that Tereschenko held no clearly established right not to be shot by Deputy Barry. . .We hold that Deputy Sean Barry is entitled to qualified immunity for the tasing and fatal shooting of Paul Tereschenko.")

C. V. by & through Villegas v. City of Anaheim, 823 F.3d 1252, 1256-57 (9th Cir. 2016) ("A reasonable jury could draw the following factual conclusions: (1) the officers, responding to a call about a suspected drug dealer armed with a shotgun and loitering in the visitor parking area of an apartment complex, came upon Villegas already holding a long gun; (2) Villegas was ordered to put his hands up, and as he was complying, the officers ordered him to drop his gun; (3) without providing a warning or sufficient time to comply, or observing Villegas pointing the long gun toward the officers or making any move toward the trigger, Bennallack resorted to deadly force. Viewing the facts in this light, deadly force was not objectively reasonable. Thus, the district court erred in holding that Bennallack's use of deadly force was justified as a matter of law and in granting summary judgment on that basis. Our court has rejected summary judgment in cases involving similar degrees of apparent danger, and we must do the same here. That ruling does not end our inquiry. Under the second prong of the qualified immunity test, we ask whether the alleged violation of Villegas's Fourth Amendment right against excessive force 'was clearly established at the time of the officer's alleged misconduct.'. . . We agree with the district court that it was not clearly established on January 7, 2012, that using deadly force in this situation, even viewed in the light most favorable to Plaintiffs, would constitute excessive force under the Fourth Amendment. Bennallack is therefore immune from liability under section 1983 for his use of deadly force, so we affirm the grant of summary judgment on the Fourth Amendment claim." [footnotes omitted])

Thomas v. Dillard, 818 F.3d 864, 871 (9th Cir. 2016) ("We address whether a law enforcement officer has reasonable suspicion to conduct a *Terry* frisk, searching a suspect for weapons, based

solely on the perceived domestic violence nature of the investigation. We hold that, although the domestic violence nature of a police investigation is a relevant consideration in assessing whether there is reason to believe a suspect is armed and dangerous, it is not alone sufficient to establish reasonable suspicion. We therefore hold Dillard violated Thomas' Fourth Amendment rights against unreasonable seizure by detaining him for the purpose of performing a *Terry* frisk. Because it was not clearly established at the time that the perceived domestic violence nature of an investigation was insufficient to establish reasonable suspicion, however, we hold Dillard is entitled to qualified immunity. We further hold Dillard used excessive force when he tased Thomas in order to force him to submit to the *Terry* frisk against his consent. Given the frisk was unlawful and unnecessary, Dillard used unreasonable force. Nonetheless, given the unsettled state of the law regarding the use of Tasers at the time, we again hold Dillard is entitled to qualified immunity. Given the Supreme Court's instructions that we may not define clearly established law at too high a level of generality, it was not clearly established at the time of Dillard's actions that an officer who mistakenly but reasonably believed he had the right to conduct a *Terry* frisk could not deploy a Taser in dart mode to overcome a suspect's resistance to the frisk. Accordingly, without in any way endorsing Dillard's actions or overlooking the indignities those actions caused Thomas to suffer, we reverse the order of the district court and hold Dillard is entitled to summary judgment on the ground of qualified immunity.")

Thomas v. Dillard, 818 F.3d 864, 900-01(9th Cir. 2016) (Bea, J., concurring in part and dissenting in part) ("In my view, the nature of a domestic violence call justifies an officer's formulation of a reasonable suspicion that a suspect may be armed (in the absence of mitigating circumstances). Indeed, a law enforcement officer *should* feel a moral duty to protect victims of domestic violence. And while an officer of course cannot shadow an abuser forever to ensure no future violence befalls the victim, he *can* at least make sure that the 'scene is secure' from possible violence with weapons before he leaves the victim with an abuser. Given that domestic violence assaults account for nearly two-thirds of all fatal shootings of female victims in the United States, *see* Violence Pol'y Ctr. Report, *supra*, I would find that the relatively small incursion on bodily dignity of permitting a *Terry* frisk based on the domestic violence nature of a police call is far outweighed by the strong law enforcement interest—indeed, the broader societal interest—in saving the lives of domestic violence victims. We achieve this interest by assuring that abusers are not armed before the police officer leaves the scene of a domestic violence encounter. Yet the majority today requires a law enforcement officer to face potential liability unless he leaves a domestic violence scene without any assurance that the abuser is not armed and will not again inflict violence on the victim—only next time, with a gun. I cannot endorse a legal rule that places law enforcement officers in such a stressful dilemma. Thus, while I agree with the result reached by the majority today, I cannot join my colleagues to the extent they deny law enforcement officers a tool—the *Terry* frisk—vital for ensuring their own safety, as well as the safety of the domestic violence victims they have a duty to protect.")

Mitchell v. Washington, 818 F.3d 436, 446-47 (9th Cir. 2016) ('Because we hold that strict scrutiny applies, Dr. Bell is required to demonstrate that the use of race in his medical decision

was narrowly tailored to achieve a compelling government interest. . . It is not difficult to imagine the existence of a compelling justification in the context of medical treatment. . . Because, however, Dr. Bell failed to offer *any* compelling justification for the racial classification, let alone a justification that was narrowly tailored; instead, arguing only that Mitchell's equal protection claim fails because race was not the 'primary' consideration in denying treatment, Dr. Bell failed to meet his burden under the strict scrutiny standard. Thus, the district court erred in concluding that no constitutional violation occurred. . . .Despite the fact that we hold that the violation of a constitutional right occurred, Dr. Bell is entitled to qualified immunity if it was not 'clearly established' that his actions would violate Mitchell's constitutional rights. . . .Mitchell 'has not brought to our attention, and our independent research does not reveal, case law involving the particular circumstances presented by this case.'. . Here, the 'particular circumstances' are the use of race-related success-of-treatment data as a factor in making a medical treatment decision. As a result, it was not clearly established that a reasonable official would understand that the use of race-related success-of-treatment data as a factor in a medical treatment decision would be unconstitutional. Dr. Bell is therefore entitled to qualified immunity.")

Mitchell v. Washington, 818 F.3d 436, 447, 454 (9th Cir. 2016) (Clifton, J., concurring in part and concurring in the judgment) ("This court has never addressed whether the Constitution forbids a doctor from considering credible scientific evidence that individuals of a certain race respond poorly to a particular treatment. Nor have we addressed what standard of scrutiny would be used to evaluate such a claim. We do not need to address those questions in order to resolve this case, and I would not do so. . . .I concur in the judgment affirming the district court's summary judgment in favor of Defendants. I agree with the specific conclusions of the majority opinion that the Eleventh Amendment does not bar Mitchell's claim for damages against the Defendants in their individual capacities, that his claims for injunctive and declaratory relief are moot, that the summary judgment dismissing his claims for damages against Kelly Cunningham was appropriate, and that Dr. Bell is entitled to qualified immunity on the claim for damages against him. I would not take up the question of whether Mitchell's constitutional rights were violated, but if required to do so, conclude that they were not. I thus concur in part with the majority opinion and concur in full with its judgment.")

Sjurset v. Button, 810 F.3d 609, 615, 618-19 (9th Cir. 2015) ("We . . . have discretion to apply the second prong of the *Saucier* test at the outset in order to determine whether the law governing the Stayton officers' conduct was clearly established. If indeed the Stayton officers did not violate clearly established law, then we can determine that qualified immunity is appropriate and may thus dispose of the case without undertaking an analysis of whether a constitutional violation occurred in the first instance. In sum, we will heed the Supreme Court's admonition against prematurely attempting to define the particular constitutional violation in question in this case. . . . *Wallis* falls short of clearly establishing that reasonable officers in the Stayton officers' situation would have understood that they had a constitutional responsibility to second-guess DHS's protective-custody determination. Such second-guessing would have required the officers either to disrupt or to refuse to take part in the entry and removal of Sjurset's children. To be sure, if the Stayton officers had

participated in the decision to take protective custody of Sjurset's children, then our precedent in *Wallis* and similar cases would clearly establish that the officers could not do so without a reasonable basis for believing that the children were in imminent danger. . . .But here the police officers did not participate in such a decision; they instead relied on DHS's determination. Sjurset further contends that the Stayton officers' role as 'integral participants' in the entry and removal is enough to trigger their liability for any violations of Sjurset's constitutional rights. To support this theory, Sjurset relies on *Boyd v. Benton County*, 374 F.3d 773 (9th Cir.2004). . . . But Sjurset's reliance on *Boyd* is misplaced both factually and legally. As a factual matter, the officers in *Boyd* acted as a collective team and were carrying out a preplanned search operation. . . . In contrast, no facts in this case suggest that the Stayton officers were privy to any discussions, briefings, or collective decisions made by DHS in its protective-custody determination. . . . *Boyd* . . . involved a collective decisionmaking process among the officers, with the result that all of them could be considered 'integral participants' in the execution of the plan. . . It does not squarely address the case at hand, wherein an entirely separate agency—DHS—made a protective-custody determination over which the Stayton officers had no input. . . . In sum, neither *Wallis* nor *Boyd* clearly establishes that the Stayton officers violated Sjurset's constitutional rights when they acted in reliance on DHS's protective-custody determination. We must therefore look elsewhere to decide whether the officers were on notice that their conduct violated clearly established law. Neither statute nor precedent, however, squarely addresses the circumstances of this particular case.")

Shinault v. Hawks, 782 F.3d 1053, 1058-60 & n.6 (9th Cir. 2015) ("Given Shinault's substantial interest, the risk of erroneous deprivation, and the ability to provide a hearing without compromising a significant government interest, we hold that a state must provide a hearing prior to freezing a significant sum in the inmate's account. . .Thus, we conclude that Shinault received insufficient due process as the result of Oregon's actions. . . . Given the absence of precedent establishing a state's obligation to provide a pre-deprivation hearing in these circumstances, the right was not clearly established at the time of the conduct. *Quick* is distinguishable enough from this matter, and several decisions from our sister circuits have held that post-deprivation process suffices, even for final withdrawals of assets. . . . The most recent appellate court decision on point required a pre-deprivation hearing, but that case was decided long after ODOC officials froze Shinault's assets. *Montanez v. Sec'y Pa. Dep't of Corr.,* 2014 WL 5155040, at *7–8 (3d Cir. Aug. 15, 2014).")

Powell v. Slemp, 585 F. App'x 427, 427-28 (9th Cir. 2014) ("Here, the district court defined the clearly established right at issue too broadly, without reference to Sgt. Slemp's particular actions in this case. Unless existing law would have made it 'sufficiently clear' to a reasonable officer in Sgt. Slemp's position that attempting to restrain Powell with his gun drawn violated her Fourth Amendment rights, Sgt. Slemp was entitled to qualified immunity. *See Anderson v. Creighton,* 483 U.S. 635, 639–40 (1987). Because no such case law exists, and because the illegality of his actions was not otherwise 'beyond debate,' *al-Kidd,* 131 S.Ct. at 2083, Sgt. Slemp must prevail on his

motion for summary judgment. Exercising our discretion under *Pearson v. Callahan*, we decline to reach the question whether Sgt. Slemp's actions violated Powell's Fourth Amendment rights.")

Brown v. Oregon Dept. of Corrections, 751 F.3d 983, 989-90 (9th Cir. 2014) ("Although we conclude that a [twenty-seven month confinement in the IMU] without meaningful review may constitute atypical and significant hardship, our case law has not previously so held, and we cannot hold defendants liable for the violation of a right that was not clearly established at the time the violation occurred.")

Demers v. Austin, 746 F.3d 402, 406, 411, 412, 417 (9th Cir. 2014) (denying pet. for reh'g and reh'g en banc) ("We hold that *Garcetti* does not apply to "speech related to scholarship or teaching." Rather, such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968). In Demers's case, we conclude that the short pamphlet was related to scholarship or teaching, and that it addressed a matter of public concern under *Pickering.* We conclude, further, that there is insufficient evidence in the record to show that the in-progress book triggered retaliation against Demers. Finally, we conclude that defendants are entitled to qualified immunity, given the uncertain state of the law in the wake of *Garcetti.* . . .Demers presents the kind of case that worried Justice Souter. Under *Garcetti,* statements made by public employees 'pursuant to their official duties' are not protected by the First Amendment. . . But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are 'a special concern of the First Amendment.'. . We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. One of our sister circuits agrees. *See Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir.2011) ("We are ... persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case."). . . .We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering.* . . .Until the decision in this case, our circuit has not addressed the application of *Garcetti* to teaching and academic writing. . . .[B]ecause there is no Ninth Circuit law on point to inform defendants about whether or how *Garcetti* might apply to a professor's academic speech, we cannot say that the contours of the right in this circuit were 'sufficiently clear that every reasonable official would have understood' that this conduct violated that right. . . We therefore hold that defendants are entitled to qualified immunity.")

> *Compare* ***Brown v. Chicago Bd. of Educ.,*** 824 F.3d 713, 714-16 (7th Cir. 2016) ("The Chicago Board of Education has a written policy that forbids teachers from using racial epithets in front of students, no matter what the purpose. Lincoln Brown, a sixth grade teacher at Murray Language Academy, a Chicago Public School, caught his students passing a note in class. The note contained, among other things, music lyrics with the offensive word 'nigger.' Brown used this episode as

an opportunity to conduct what appears to have been a well–intentioned but poorly executed discussion of why such words are hurtful and must not be used. The school principal, Gregory Mason, happened to observe the lesson. Brown was soon suspended and brought this suit under 42 U.S.C. § 1983 against the Board and various school personnel. . . . In the case before us, Brown himself has emphasized that he was speaking as a teacher—that is to say, as an employee—not as a citizen. . . . The question remains whether the *Garcetti* rule applies in the same way to 'a case involving speech related to scholarship or teaching.'. . The Supreme Court had no need to address that issue, and so left it for another day. This is not our first opportunity, however, in which to confront that question. See *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007). In *Mayer*, we concluded that a teacher's in–classroom speech is not the speech of a 'citizen' for First Amendment purposes. . . The core of the teacher's job is to speak in the classroom on the subjects she is expected to teach. This meant, we thought, that in–classroom instruction necessarily constitutes 'statements pursuant to [the teacher's] official duties.'. . Here, Brown gave his impromptu lesson on racial epithets in the course of his regular grammar lesson to a sixth grade class. His speech was therefore pursuant to his official duties. That he deviated from the official curriculum does not change this fact. . . .Brown argues that we should ignore *Mayer* and instead follow the Ninth Circuit by understanding the Supreme Court's reservation as a hint that *Garcetti* should not apply 'in the same manner to a case involving speech related to scholarship or teaching.' *Garcetti*, 547 U.S. at 425; see *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). But *Demers* addressed speech in a university setting, not a primary or secondary school. It relied on the long–standing recognition that academic freedom in a university is 'a special concern of the First Amendment' because of the university's unique role in participating in and fostering a marketplace of ideas. . . In fact, in the primary and secondary school context, the Ninth Circuit follows *Mayer*'s approach. See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 962–63 (9th Cir. 2011) (holding in–classroom instruction is pursuant to teacher's official duties and unprotected employee speech). So do the Third and Sixth Circuits. *Evans–Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010); *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998) (Alito, J.) (pre–*Garcetti*). Only the Fourth Circuit has adopted the position that Brown advocates, and it did so without analysis. *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). We see no reason to depart here from our decision in *Mayer*. Brown made his comments as a teacher, not a citizen, and so his suspension does not implicate his First Amendment rights.")

Acosta v. City of Costa Mesa, 718 F.3d 800, 824-26 & n.14 (9th Cir. 2013) ("Acosta presents two arguments that the officers are not entitled to qualified immunity for seizing or arresting him: (1) he was arrested in retaliation for questioning the officers about why his time to speak was cut short and why he was asked to leave the council meeting; and (2) the officers lacked the requisite level

of suspicion to seize or arrest him. Resolution of both contentions turns on whether probable cause existed to seize Acosta. Assuming Acosta's contention accurately reflects why he was arrested, Acosta's claim still fails under prong two of *Saucier*. . . In *Reichle,* the Supreme Court held that it had never recognized, nor was there a clearly established First Amendment right to be free from a retaliatory arrest that is otherwise supported by probable cause. . . Furthermore, at the time of the Council meeting, our precedent had previously upheld restrictions on speech at city council meetings where the speech was actually disruptive and this remains the law. . . Thus, if Acosta's seizure and arrest were supported by probable cause, the officers are entitled to qualified immunity. . . .[W]e find that probable cause existed to arrest Acosta for a violation of § 2–61 and summary judgment was properly granted in favor of the officers on this claim. . . Thus, even assuming that Acosta was arrested in retaliation for his remarks, because probable cause existed for a violation of § 2–61, the officers are still entitled to qualified immunity, not only for the removal of Acosta from the chambers, but also for his subsequent arrest. Summary judgment was properly granted in favor of the officers. . . . We note that if we were to find that no probable cause existed, the officers would still be entitled to qualified immunity. An officer is entitled to immunity where a reasonable officer would believe that probable cause existed, even if that determination was a mistake. . . Here, given the Mayor's repeated directives to cease speaking, the fact that the council meeting was now in recess, and the undisputed fact that Acosta remained at the podium addressing both the audience and the council, a reasonable officer would have believed that probable cause existed to arrest Acosta for a violation of § 2–61.")

Mueller v. Auker, 700 F.3d 1180, 1188 (9th Cir. 2012) ("Idaho law permits a police officer to place a child in shelter care *without a court order* when necessary to prevent serious physical injury. I.C. § 16–1612(since renumbered as I.C. § 16–1608). The Muellers' late assertion in their reply brief that this law is 'obviously unconstitutional' is of no help to them on this issue, because at the time the disputed decisions were made, no clearly established law existed to that effect. Moreover, the existence of a state statute authorizing an official's disputed conduct weighs in that official's favor, so long as the statute itself does not offend the Constitution, and I.C. § 16–1612 does not.")

Padilla v. Yoo, 678 F.3d 748, 750, 755, 757-68 & n.16 (9th Cir. 2012) ("Under recent Supreme Court law . . . we are compelled to conclude that, regardless of the legality of Padilla's detention and the wisdom of Yoo's judgments, at the time he acted the law was not 'sufficiently clear that every reasonable official would have understood that what he [wa]s doing violate[d]' the plaintiffs' rights. . . We therefore hold that Yoo must be granted qualified immunity, and accordingly reverse the decision of the district court. . . . [W]e reach this conclusion for two reasons. First, although during Yoo's tenure at OLC the constitutional rights of convicted prisoners and persons subject to ordinary criminal process were, in many respects, clearly established, it was not 'beyond debate' at that time that Padilla—who was not a convicted prisoner or criminal defendant, but a suspected terrorist designated an enemy combatant and confined to military detention by order of the President—was entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal. . . Second, although it has been clearly established for decades that torture of an

American citizen violates the Constitution, and we assume without deciding that Padilla's alleged treatment rose to the level of torture, that such treatment *was* torture was not clearly established in 2001–03. . . . The crux of the district court's decision for purposes of this appeal is its assumption that any reasonable official would have understood in 2001–03 that *United States citizen enemy combatants in military detention must be afforded at least the constitutional and statutory rights afforded to ordinary prison inmates.* . . . The outcome of this appeal is governed by the Supreme Court's decision in *Ashcroft v. al-Kidd*, 131 S.Ct. 2074 (2011), decided subsequent to the district court's ruling against Yoo. . . . Significant here, under the second prong, a 'Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right[are] sufficiently clear" that every "reasonable official would have understood that what he is doing violates that right."'. . . Padilla and Lebron acknowledge that at the time Yoo served as Deputy Assistant Attorney General at OLC, there did not exist a 'single judicial opinion,'. . . holding that a United States citizen held in military detention as an enemy combatant possessed rights against the kind of treatment to which Padilla was subjected. They argue, however, that it was clearly established that Padilla possessed such rights because any reasonable official would have understood during 2001 to 2003 that a citizen detained as an enemy combatant had to be afforded at least the constitutional protections to which convicted prisoners and ordinary criminal suspects were entitled. That argument is foreclosed by *al-Kidd*, which compels us 'not to define clearly established law at a high level of generality.'. . . Here, of course, the Supreme Court had not, at the time of Yoo's tenure at OLC, declared that American citizens detained as enemy combatants had to be treated at least as well, or afforded at least the same constitutional and statutory protections, as convicted prisoners. On the contrary, the Supreme Court had suggested in *Ex parte Quirin*, 317 U.S. 1 (1942), the most germane precedent in existence at the time of Yoo's tenure at OLC, that a citizen detained as an unlawful combatant could be afforded *lesser* rights than ordinary prisoners or individuals in ordinary criminal proceedings. . . . *Hamdi* . . . was not decided until 2004, so it could not have placed Yoo on clear notice of Padilla's constitutional rights in 2001–03 when Yoo was at the Department of Justice. Even after *Hamdi*, moreover, it remains murky whether an enemy combatant detainee may be subjected to conditions of confinement and methods of interrogation that would be unconstitutional if applied in the ordinary prison and criminal settings. Although *Hamdi* recognized that citizens detained as enemy combatants retain constitutional rights to due process, the Court suggested that those rights may not be coextensive with those enjoyed by other kinds of detainees. . . . In sum, the plaintiffs did not, through their reliance on either *Hamdi* or cases involving ordinary prison and criminal settings, allege violations of constitutional and statutory rights that were clearly established in 2001–03. During that relevant time frame, the constitutional rights of convicted prisoners and persons subject to *ordinary* criminal process were, in many respects, clearly established. But Padilla was not a convicted prisoner or criminal defendant; he was a suspected terrorist designated an enemy combatant and confined to military detention by order of the President. . . . In light of Padilla's status as a designated enemy combatant, . . . we cannot agree with the plaintiffs that he was just another detainee—or that it would necessarily have been 'apparent' to someone in Yoo's position that Padilla was entitled to the same constitutional protections as an ordinary convicted prisoner or accused criminal. . . . The same is true of Padilla's RFRA claim. As the Fourth Circuit held, the

application of RFRA to enemy combatants in military detention was not clearly established in 2001–03. . . . The absence of a decision defining the constitutional and statutory rights of citizens detained as enemy combatants need not be fatal to the plaintiffs' claims. The Supreme Court has long held that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' . . . The plaintiffs invoke this principle here. They argue that, even if there is no specific judicial decision holding that the Fifth Amendment's prohibition on government conduct that 'shocks the conscience' is violated when the government tortures a United States citizen designated as an enemy combatant, torture of a United States citizen is the kind of egregious constitutional violation for which a decision 'directly on point' is not required. *Al– Kidd*, 131 S.Ct. at 2083.[footnote omitted] We agree with the plaintiffs that the unconstitutionality of torturing a United States citizen was 'beyond debate' by 2001. . . . Yoo is entitled to qualified immunity, however, because it was not clearly established in 2001–03 that the treatment to which Padilla says he was subjected amounted to torture. In 2001–03, there was general agreement that torture meant the intentional infliction of severe pain or suffering, whether physical or mental. [footnote omitted] The meaning of 'severe pain or suffering,' however, was less clear in 2001–03. . . . Here, Padilla alleged that he was subjected to prolonged isolation; deprivation of light; exposure to prolonged periods of light and darkness, including being 'periodically subjected to absolute light or darkness for periods in excess of twenty-four hours'; extreme variations in temperature; sleep adjustment; threats of severe physical abuse; death threats; administration of psychotropic drugs; shackling and manacling for hours at a time; use of 'stress' positions; noxious fumes that caused pain to eyes and nose; loud noises; withholding of any mattress, pillow, sheet or blanket; forced grooming; suspensions of showers; removal of religious items; constant surveillance; incommunicado detention, including denial of all contact with family and legal counsel for a 21–month period; interference with religious observance; and denial of medical care for 'serious and potentially life-threatening ailments, including chest pain and difficulty breathing, as well as for treatment of the chronic, extreme pain caused by being forced to endure stress positions.'. . The complaint also alleged, albeit in conclusory fashion, that Padilla 'suffered and continues to suffer severe mental and physical harm as a result of the forty-four months of unlawful military detention and interrogation.'. . It also alleged that Padilla suffered 'severe physical pain' and 'profound disruption of his senses and personality.'. .We assume without deciding that Padilla's alleged treatment rose to the level of torture. [footnote omitted] That it *was* torture was not, however, 'beyond debate' in 2001–03. There was at that time considerable debate, both in and out of government, over the definition of torture as applied to specific interrogation techniques. In light of that debate, as well as the judicial decisions discussed above, we cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture. Thus, although we hold that the unconstitutionality of torturing an American citizen was beyond debate in 2001–03, it was not clearly established at that time that the treatment Padilla alleges he was subjected to amounted to torture. . . . For these reasons, we hold that Yoo is entitled to qualified immunity on the plaintiffs' claims. . . . We have discretion to decide which of the two prongs of qualified immunity analysis to address first. . . Here, we consider only the second prong. . . . Because we reverse on that basis, we do not address Yoo's alternative arguments that

the complaint does not adequately allege his personal responsibility for Padilla's treatment and that a *Bivens* remedy is unavailable.")

Hunt v. County of Orange, 672 F.3d 606, 616 (9th Cir. 2012) ("We conclude, like the district court, that Carona could have reasonably but mistakenly believed that Hunt's demotion was not unconstitutional, given the unique nature of his job as Chief of Police Services for the City of San Clemente. Although Hunt's position had no department-wide policy-making responsibility, influence, or control, as the jury found, Hunt exercised discretion over the implementation of OCSD policy within San Clemente, influenced OCSD policy as it affected San Clemente, and formulated plans to implement OCSD policy in San Clemente. While Hunt had to secure authority before speaking with the public, when he did so, it was on behalf of the OCSD. We have carefully analyzed the development of the policymaker exception, its underlying purpose, the high burden on the government to prove that political fidelity was a necessary requirement of Hunt's job, and balanced the nine-factor *Fazio* analysis that requires a fact-dependent inquiry. Even if Carona engaged in the appropriate analysis and wrongly concluded that Hunt was a policy-maker such that demoting him was constitutional, we cannot say that he acted objectively unreasonably in concluding he could demote Hunt without violating his constitutional rights.")

Hunt v. County of Orange, 672 F.3d 606, 617 (9th Cir. 2012) (Leavy, J., concurring in part and dissenting in part) ("Pursuant to the Supreme Court's decision in *Pearson v. Callahan*. . . we need not decide whether a constitutional violation exists before we reach the question of qualified immunity. Because the majority has chosen to reach the issue whether Carona's conduct violated Hunt's constitutional rights, I am compelled to concur in only Sections II. D., III and IV of the opinion. I dissent from the majority's holding that Hunt was not a 'policymaker.'")

Mattos v. Agarano, 661 F.3d 433, 440, 443-48 (9th Cir. 2011) (en banc) ("Here, we follow the *Saucier* order as recited above, because this 'two-step procedure promotes the development of constitutional precedent' in an area where this court's guidance is sorely needed. . . .We begin by considering the nature and quality of the force used against Brooks: a taser in drive-stun mode. . . . Here, the record is not sufficient for us to determine what level of force is used when a taser is deployed in drivestun mode. We follow the Supreme Court's guidance in *Scott*, however, and need not decide this issue in order to assess the reasonableness of the tasing. . . Instead, we proceed to determine whether Jones's use of the taser against Brooks in this case was reasonable, keeping in mind the magnitude of the electric shock at issue and the extreme pain that Brooks experienced. . . . In sum, Brooks's alleged offenses were minor. She did not pose an immediate threat to the safety of the officers or others. She actively resisted arrest insofar as she refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. Brooks did not evade arrest by flight, and no other exigent circumstances existed at the time. She was seven months pregnant, which the officers knew, and they tased her three times within less than one minute, inflicting extreme pain on Brooks. A reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of force was unreasonable and therefore constitutionally excessive.

. . . In sum, when the defendant officers tased Brooks, there were three circuit courts of appeals cases rejecting claims that the use of a taser constituted excessive force; there were no circuit taser cases finding a Fourth Amendment violation. *Russo, Hinton,* and *Draper* are factually distinguishable from *Brooks.* Indeed we have concluded that–unlike the plaintiffs in those cases–Brooks has alleged a Fourth Amendment violation. We cannot conclude, however, in light of these existing precedents, that '*every* "reasonable official would have understood" ... *beyond debate*' that tasing Brooks in these circumstances constituted excessive force. . . Moreover, the violation was not so obvious that we can 'define clearly established law at a high level of generality,' finding that *Graham* alone renders the unconstitutionality of Brooks's tasing clearly established. . .We therefore follow the example of our court's three-judge panel in *Bryan v. MacPherson,* 630 F.3d 805 (9th Cir.2010). In *Bryan,* we held that the use of a taser constituted excessive force, but we concluded that the defendant officer was entitled to qualified immunity. The tasing in *Bryan* took place in 2005, and we observed that in that year 'there was no Supreme Court decision or decision of our court addressing' the use of a taser in dart mode. . . As a result, we concluded that 'a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances' confronted. . . Thus, we conclude that, although Brooks has alleged an excessive force claim, the law was not sufficiently clear at the time of the incident to render the alleged violation clearly established. Accordingly, the defendant officers are entitled to the defense of qualified immunity against Brooks's § 1983 excessive force claim.")

Mattos v. Agarano, 661 F.3d 433, 451, 452 (9th Cir. 2011) (en banc) ("To summarize, Aikala used the intermediate force of a taser in dart-mode on Jayzel after he and the other officers arrived to ensure her safety. Her offense was minimal at most. She posed no threat to the officers. She minimally resisted Troy's arrest while attempting to protect her own body and to comply with Agarano's request that she speak to him outside, and she begged everyone not to wake her sleeping children. She bears minimal culpability for the escalation of the situation. The officers were faced with a *potentially* dangerous domestic dispute situation in which they reasonably felt that Troy could physically harm them if he chose to, but there was no indication that Troy intended to harm the officers or that he was armed. When Aikala encountered slight difficulty in arresting Troy because Jayzel was between the two men, Aikala tased her without warning. Considering the totality of these circumstances, we fail to see any reasonableness in the use of a taser in dart-mode against Jayzel. When all the material factual disputes are resolved in Jayzel's favor and the evidence is viewed in the light most favorable to her, we conclude that she has alleged a Fourth Amendment violation. That is, a reasonable fact finder could conclude that the officers' use of force against Jayzel, as alleged, was constitutionally excessive in violation of the Fourth Amendment. . . .Even though the facts in *Mattos* are readily distinguishable from the facts in *Russo, Hinton,* and *Draper,* the violation was not so obvious that we can rely on the *Graham* factors and define the contours of clearly established law at a high level of generality. . . Accordingly, we conclude that the officers here are entitled to qualified immunity for tasing Jayzel.")

Mattos v. Agarano, 661 F.3d 433, 453 (9th Cir. 2011) (en banc) (Schroeder, J., concurring) ("[T]he

Supreme Court's opinion in *al-Kidd* appears to require us to hold that because there was no established case law recognizing taser use as excessive in similar circumstances, immunity is required.")

Mattos v. Agarano, 661 F.3d 433, 453, 454 (9th Cir. 2011) (en banc) Kozinski, C.J., joined by Bea, J., concurring in part and dissenting in part) ("By asking police to serve and protect us, we citizens agree to comply with their instructions and cooperate with their investigations. Unfortunately, not all of us hold up our end of the bargain. . . . Brooks and Mattos breached the covenant of cooperation by refusing to comply with police orders. When citizens do that, police must bring the situation under control, and they have a number of tools at their disposal.")

Mattos v. Agarano, 661 F.3d 433, 460 (9th Cir. 2011) (en banc) (Silverman, J., joined by Clifton, J., concurring in part and dissenting in part) ("*Ashcroft v. al-Kidd* instructs courts 'not to define clearly established law at a high level of generality,' 131 S.Ct. 2074, 2084 (2011); however, *al-Kidd* should not be read to require a DNA-match between our precedent and the cases before us. . . Precedent already on the books in August 2006 provided officers and courts with enough guidance to know that a taser in dart mode is not a toy and presents a level of force on par with other implements 'used to subdue violent or aggressive persons.'. . Because the district court correctly found that the circumstances facing Officer Aikala are disputed, summary judgment was properly denied. I would affirm the district court and, therefore, respectfully dissent.")

C.F. ex rel. Farnan v. Capistrano Unified School Dist., 654 F.3d 975, 978, 986 (9th Cir. 2011) ("In this case, a former public high school student alleges that his history teacher violated his rights under the Establishment Clause by making comments during class that were hostile to religion in general, and to Christianity in particular. Mindful that there has never been any prior reported case holding that a teacher violated the Constitution under comparable circumstances, we affirm the district court's conclusion that the teacher is entitled to qualified immunity. Because it is readily apparent that the law was not clearly established at the time of the events in question, and because we may resolve the appeal on that basis alone, we decline to pass upon the constitutionality of the teacher's challenged statements. . . . We have little trouble concluding that the law was not clearly established at the time of the events in question there has never been any reported case holding that a teacher violated the Establishment Clause by making statements in the classroom that were allegedly hostile to religion. Because the district court's judgment must be affirmed on that basis, we decline to consider the constitutionality of Corbett's statements, and we vacate the district court's decision to the extent it decided the constitutionality of any of Corbett's statements.")

Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 648 F.3d 986, 997 (9th Cir. 2011) ("Under the facts alleged, plaintiffs Wilkinson and Sherr have made out a constitutional violation. They had a right to a post-suspension hearing which Defendants denied them. The district court held that this right was not clearly established, however. The court stated that after the California Court of Appeal's decision in *Zuniga,* a reasonable official would have believed that denying jurisdiction over the appeals of retired deputies was lawful. We agree with the district

court as to the individually named Civil Service Commissioners, who after *Zuniga* had no authority to hear Wilkinson's and Sherr's appeals. . . But *Zuniga* does not protect the County Supervisors and the Sheriff. *Zuniga* interpreted the County Charter and Civil Service Rules as denying the Commission jurisdiction. . . Given the holdings of *Loudermill*, *Mallen,* and *Gilbert,* a reasonable official in the position of the Sheriff and the Supervisors should have concluded that, because the Commission was stripped by the state appellate court of its ability to adjudicate the suspensions of retired employees, those suspensions would be constitutionally suspect. The onus would be on County officials to address this constitutional defect, for example by providing an alternative hearing for the retired employees. *Zuniga* merely points out a jurisdictional flaw in the County's civil service procedures; *Zuniga* does not excuse the unconstitutionality of that flaw. Thus, as to the claims brought by Wilkinson and Sherr, we hold that the district court erred in granting qualified immunity to the Sheriff and the Board of Supervisors, but did not err in granting qualified immunity to the Civil Service Commissioners.")

Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 648 F.3d 986, 998 (9th Cir. 2011) ("Under the facts alleged, the hearings Defendants provided for Debs and O'Donoghue may have been unconstitutional. We hold, however, that to the extent Debs and O'Donoghue were entitled to a more substantial hearing, this right was not clearly established at the time of the violation. As the Second Circuit recently noted, it is an unresolved question whether due process is satisfied by a post-suspension hearing that sustains a suspension based solely on the fact of a pending criminal proceeding. *See Nnebe v. Daus,* __ F.3d __, No. 09-4305, 2011 WL 2149924, at *12 (2d Cir. May 31, 2011). Although *Gilbert* and *Mallen* make clear that post-suspension procedures are constitutionally required when employees are suspended after being charged with felonies, those cases do not specifically define what must be included in those procedures. A reasonable official would not necessarily infer from existing case law that a post-suspension hearing limited to the question of whether a felony charge has been filed is unconstitutional. Thus, all individual defendants are entitled to qualified immunity from Debs's and O'Donoghue's claims.")

Noble v. Adams, 646 F.3d 1138, 1142, 1143, 1148 (9th Cir. 2011) ("We conclude pursuant to what is now known as prong 2 of the *Saucier v. Katz,* 533 U.S.194 (2001) test . . . that it was not clearly established in 2002–nor is it established yet–precisely how, according to the Constitution, or when a prison facility housing problem inmates must return to normal operations, including outside exercise, during and after a state of emergency called in response to a major riot, here one in which inmates attempted to murder staff. According to *Norwood,* we defer to prison officials' *judgment* so long as that judgment does not manifest either deliberate indifference or an intent to inflict harm. . . . In summary, in 2002 it would not have been clear to a reasonable officer that his or her conduct vis à vis the declaration of an emergency, the lockdown, or the curtailment of use of the exercise yard was unlawful in the situation he or she confronted.")

Smith v. Almada, 640 F.3d 931, 941-45 (9th Cir. 2011) (Gwin, District Judge, specially concurring) ("With the motion for rehearing, Judge Gould has withdrawn his concurrence in the

holding that a *Brady* claim cannot be made where there has not been a conviction. Some wisdom supports avoiding constitutional questions where cases can be decided on other grounds. . . Until recently, however, we would have been required to address the constitutional issue before addressing any Section 1983 immunity issue. . . And, deciding the materiality issue somewhat begs the question: material to what constitutional right? . . . Because Plaintiff Smith must show both a violation of a constitutional right and that the failure to disclose was material, I believe we should have addressed whether a constitutional right was impaired before moving to whether any violation was material. In addition to finding that the non-disclosed evidence was insufficiently important to undermine confidence in the outcome of Smith's trial, I would also find that Smith cannot make a *Brady* claim where there has been no conviction. . . . Three of our sister circuits have found that a defendant who is ultimately acquitted cannot maintain a *Brady* claim. . . . Moreover, although the Seventh Circuit has not completely foreclosed *Brady*-based § 1983 claims without a conviction, it requires the plaintiff to show that no trial would have occurred if police had disclosed the exculpatory or impeachment evidence. . . . Recognizing *Brady* as a post-conviction right does not foreclose all constitutional remedies where a defendant has been tried but not convicted. Where a criminal defendant believes that withheld exculpatory evidence has caused charges to be brought and maintained against him, but no conviction has resulted, his remedy would flow from a false arrest or malicious prosecution claim, and not from *Brady.* . . . In sum, allowing *Brady*-based § 1983 claims without a conviction is not compelled by our circuit's case law, conflicts with other circuits' case law and the central purpose of *Brady*, would render *Brady's* materiality standard significantly less workable, and lacks a limiting principle. I would therefore not allow § 1983 claims for alleged *Brady* violations by a defendant who is ultimately acquitted.")

Bardzik v. County Of Orange, 635 F.3d 1138, 1144, 1145 & n.6, 1149 (9th Cir. 2011) ("Resolving all factual disputes in Bardzik's favor, we determine whether Carona is entitled to qualified immunity as a matter of law. . . . Under our de novo standard of review and resolving disputes of material fact in Bardzik's favor, Bardzik was a policymaker as Reserve Division Commander. Thus, under *Saucier v. Katz,* 533 U.S. 194, 201 (2001), and *Pearson v. Callahan,* 129 S.Ct. 808, 815-16, 818 (2009), there was no constitutional violation and Carona is entitled to qualified immunity for his allegedly retaliatory demotion of Bardzik. . . . We have the option to address only the clearly-established step of the qualified immunity analysis. . . However, we elect to address whether there was a constitutional violation because the policymaker analysis is fact intensive and unsettled . . . .In these circumstances, it is proper to address *Saucier's* first step first. . . . Because Bardzik was a 'policymaker,' Carona did not violate the Constitution by demoting Bardzik and transferring him to Court Operations, and Carona is entitled to qualified immunity.")

Bryan v. MacPherson, 630 F.3d 805, 825-33 (9th Cir. 2010) (superseding opinon and denial of reh'g en banc) ("We, along with our sister circuits, have held that tasers and stun guns fall into the category of non-lethal force. . . Non-lethal, however, is not synonymous with non-excessive; all force–lethal and non-lethal–must be justified by the need for the specific level of force employed. . . Nor is 'non-lethal' a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are

classified as non-lethal. Rather than relying on broad characterizations, we must evaluate the nature of the specific force employed in a specific factual situation. . . . .We recognize the important role controlled electric devices like the Taser X26 can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. We hold only that the X26 and similar devices when used in dart-mode constitute an intermediate, significant level of force that must be justified by the governmental interest involved. . . . Officer MacPherson relies heavily on the Eleventh Circuit opinion in *Draper v. Reynolds,* 369 F.3d 1270 (11th Cir.2004), which addressed the use of a taser during the arrest of an aggressive, argumentative individual. Although we do not adopt *Draper* as the law of this circuit, the present case is clearly distinguishable from the one before the Eleventh Circuit. . . . [T]he officer in *Draper* was confronting a belligerent, argumentative individual who was angrily pacing within feet of his position. Officer MacPherson, by contrast, was confronted with a half naked, unarmed, stationary, apparently disturbed individual shouting gibberish at a distance of approximately twenty feet. The only similarity to the factual circumstances in *Draper* is that both Draper and Bryan were stopped for a traffic violation, were loud, and were tasered by the police. . . . [T]here was no substantial government interest in using significant force to effect Bryan's arrest for these misdemeanor violations that even the State of California has determined are minor. . . . Officer MacPherson now argues that use of the taser was justified because he believed Bryan may have been mentally ill and thus subject to detention. To the contrary: if Officer MacPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means. . . . Thus, whether Officer MacPherson believed that Bryan had committed a variety of nonviolent misdemeanors or that Bryan was mentally ill, this *Graham* factor does not support the deployment of an intermediate level of force. . . . [W]e have held that police are 'required to consider A[w]hat other tactics if any were available" to effect the arrest.' *Headwaters,* 240 F.3d at 1204 (quoting *Chew,* 27 F.3d at 1443). . . . We do not challenge the settled principle that police officers need not employ the 'least intrusive' degree of force possible. . . . We merely recognize the equally settled principle that officers must *consider* less intrusive methods of effecting the arrest and that the presence of feasible alternatives is a *factor* to include in our analysis. . . . [W]hile by no means dispositive, that Officer MacPherson did not provide a warning before deploying the X26 and apparently did not consider less intrusive means of effecting Bryan's arrest factor significantly into our *Graham* analysis. . . . We thus conclude that the intermediate level of force employed by Officer MacPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle. Officer MacPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer MacPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply 'no immediate need to subdue [Bryan]' before Officer MacPherson's fellow officers arrived or less-invasive means were attempted. . . Officer MacPherson's desire to quickly and decisively end an unusual and tense situation is understandable. His chosen method for doing so violated Bryan's constitutional right

to be free from excessive force. . . .All of the factors articulated in *Graham*–along with our recent applications of *Graham* in *Deorle* and *Headwaters*–placed Officer MacPherson on fair notice that an intermediate level of force was unjustified. . . . However, as of July 24, 2005, there was no Supreme Court decision or decision of our court addressing whether the use of a taser, such as the Taser X26, in dart mode constituted an intermediate level of force. Indeed, before that date, the only statement we had made regarding tasers in a published opinion was that they were among the 'variety of non-lethal "pain compliance" weapons used by police forces.'. . And, as the Eighth Circuit has noted, '[t]he Taser is a relatively new implement of force, and case law related to the Taser is developing.' *Brown v. City of Golden Valley*, 574 F.3d 491, 498 n. 5 (8th Cir.2009). Two other panels have recently, in cases involving different circumstances, concluded that the law regarding tasers is not sufficiently clearly established to warrant denying officers qualified immunity. *Mattos v. Agarano*, 590 F.3d 1082, 1089-90 (9th Cir.2010); *Brooks v. City of Seattle*, 599 F.3d 1018, 1031 n.18 (9th Cir.2010). Based on these recent statements regarding the use of tasers, and the dearth of prior authority, we must conclude that a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July 2005. Accordingly, Officer MacPherson is entitled to qualified immunity.").

Bryan v. MacPherson, 630 F.3d 805, 809, 810 (9th Cir. 2010) (9th Cir. 2010) (Wardlaw, J., joined by Judges Pregerson, Reinhardt, and W. Fletcher, concurring in the denial of rehearing en banc) ("Although the panel's original opinion affirmed the district court's denial of qualified immunity, Officer MacPherson and amici curiae League of California Cities and California State Association of Counties suggested we reconsider given that two other taser cases arising from incidents that occurred about the same time as Bryan's tasing were pending in our circuit. We did so, and, although we did not alter our holding that Officer MacPherson used excessive force on Bryan, we concluded that, based on 'recent statements [in other circuit opinions] regarding the use of tasers, and the dearth of prior authority,' a 'reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July 2005.'. . After the panel filed its amended opinion, only Bryan petitioned for panel rehearing or rehearing en banc. Officer MacPherson opposed Bryan's petition, arguing that the panel had correctly applied the law of qualified immunity. In other words, our current decision is a denial of Bryan's–and not Officer MacPherson's–petition for rehearing en banc. After mischaracterizing the record, misstating our holding, and attacking our opinion for language it does not in fact contain, Judge Tallman ultimately bases his dissent to our decision against rehearing en banc upon the largely unsupported and nonsensical belief that use of a device designed to fire a dart up to one-half inch into bare skin and deliver a 1200 volt charge somehow does not constitute an intermediate use of force. He cites no intra-circuit conflict created by our decision, but instead asserts that we erred by quoting binding circuit precedent. He cites no inter-circuit conflict created by our decision, but instead faults us for joining the growing national judicial consensus that tasers in dart mode constitute an intermediate level of force. More strikingly, he fails to tell the public that our court has simultaneously chosen to rehear the two *other* taser cases en banc–not because those opinions disagreed with the

intermediate-level-of-force conclusion in *Bryan*, for they did *not*–but instead to reconsider how best to balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against 'the countervailing governmental interests at stake' as required by *Graham*, 490 U.S. at 396. *See Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir.2010), *rehr'g en banc granted by* 623 F.3d 911, 2010 WL 3896202 (9th Cir. Sep 30, 2010); *Mattos v. Agarano*, 590 F.3d 1082 (9th Cir.2010), *rehr'g en banc granted by* __ F.3d __, 2010 WL 3931122(9th Cir. Oct 04, 2010).")

Bryan v. MacPherson, 630 F.3d 805, 817, 819 (9th Cir. 2010) (Tallman, J., with whom Judges Callahan and N.R. Smith join, dissenting from the denial of rehearing en banc) ("The panel's revised opinion correctly determines that the law on whether an officer's use of a taser to control an aggressive and noncompliant subject violated the subject's Fourth Amendment rights was not clearly established, and thus holds that Officer MacPherson is entitled to qualified immunity. Having reached that conclusion, the panel's work should have been done. Instead, the panel goes on to examine whether use of the taser constitutes unconstitutional excessive force. In concluding that it does, the *Bryan* panel mischaracterizes the facts, relies on bad law, and uses contested facts to set future use-of-force policy for all law enforcement officers in the Ninth Circuit. . . . In apparent recognition of the fact that the *Deorle* standard is faulty, the panel has again amended its opinion–a single sentence of its opinion–this time to delete the above-quoted language ["[T]he degree of force used by [law enforcement] is permissible only when a strong governmental interest compels the employment of such force." 272 F.3d at 1280.] and to state instead that tasers 'constitute an intermediate, significant level of force that must be justified by the governmental interest involved.' . . The panel's amendment does not go far enough. The mere deletion of a single reference to *Deorle* does not overrule it; we must go en banc to do so. Moreover, the panel's repeated citations to *Deorle* throughout the rest of the opinion suggest that it considers *Deorle* to present a more preferable standard than the one the Supreme Court has chosen. Indeed, by amending its opinion to more accurately reflect the correct standard without actually applying it, the panel attempts to disguise the fact that it has applied *Deorle* yet again. In so doing, it has ensured that the judgment of the officer on the street, who is not afforded the luxury of time, will nearly always be supplanted by the more ponderous judgment of this Court.")

Costanich v. Department of Social and Health Services, 627 F.3d 1101, 1108, 1109 n.12, 1113-16 (9th Cir. 2010) ("We conclude that deliberately fabricating evidence in civil child abuse proceedings violates the Due Process clause of the Fourteenth Amendment when a liberty or property interest is at stake, . . . and that genuine issues of material fact exist on the question of deliberate fabrication. We further conclude, however, that, because it was not clear at the time these events took place that this right applied in the context of proceedings adjudicating a foster care license and termination of guardianship, Duron did not deprive Costanich of a constitutional right that was 'clearly established.' Accordingly, Duron is entitled to qualified immunity for the alleged evidence fabrication and declaration in support of the guardianship termination proceedings. . . . We proceed to apply the *Saucier* two steps in sequence because we have discretion to do so, and because we find such application to be beneficial. . . . We . . . conclude that Costanich had a Fourteenth Amendment due process right to be free from deliberately fabricated evidence in

a civil child abuse proceeding, and that, because genuine issues of material fact exist as to whether Duron deliberately fabricated evidence, which led to the termination proceedings and license revocation, the district court erroneously concluded that 'Plaintiff has not provided evidence showing that Defendants deliberately made false statements and fabricated evidence to make a false finding of abuse.'. . . We agree with the district court's conclusion that Duron did not violate Costanich's 'clearly established' rights. Although we conclude that, going forward, officials who deliberately fabricate evidence in civil child abuse proceedings which result in the deprivation of a protected liberty or property interest are not entitled to qualified immunity, this right had not previously been clearly established in the civil context. . . . Under *Devereaux*, charging an individual with criminal child abuse based on false information violates the Constitution. . . Although *Devereaux* does not specifically address civil child abuse proceedings, the right not to be accused based upon deliberately fabricated evidence is sufficiently obvious, and *Devereaux* is sufficiently analogous to the facts here, that government officials are on notice that deliberately falsifying information during civil investigations which result in the deprivation of protected liberty or property interests may subject them to § 1983 liability. . . . Further, because social workers, like prosecutors, are entitled to absolute immunity for instituting child removal proceedings, social workers, like prosecutors, must refrain from deliberately falsifying evidence during investigations and in sworn testimony or declarations to the court. . . Thus, going forward, reasonable government officials are on notice that deliberately falsifying evidence in a child abuse investigation and including false evidentiary statements in a supporting declaration violates constitutional rights where it results in the deprivation of liberty or property interests, be it in a criminal or civil proceeding. However, given the distinctions between criminal prosecutions and civil foster care proceedings, we cannot say that this right was clearly established as of 2001, when the conduct at issue in this case occurred. The special duties of prosecutors and the unique interests at stake in a criminal action do not parallel the duties and interests at stake in a civil child custody proceeding. Washington's 'paramount concern' for safeguarding and protecting the health and safety of foster children, for example, places a special duty on DSHS officials to vigorously investigate allegations of child abuse. . . Furthermore, it is clear that Washington foster care licensees' and custodial guardians' interests do not rise to the level of a criminal defendant's interests, which are clear and long-established. While these factors do not excuse deliberate fabrication of evidence, there are sufficient distinctions between criminal prosecutions and civil foster care proceedings that the right had not yet been clearly established in the civil context. Because we conclude that the right not to be accused based on deliberately falsified evidence during civil investigations which could result in the deprivation of protected liberty or property interests was not clearly established when the conduct at issue in this case occurred, we affirm the district court's grant of summary judgment on the basis of qualified immunity.")

James v. Rowlands, 606 F.3d 646, 652-56 (9th Cir. 2010) ("First, James contends that the defendants' failure to notify him of the molestation investigation violated his constitutional rights. In support of this claim, James points to no authority establishing that any parent-even a parent with full legal and physical custody-has a constitutional right to be informed when officials investigate allegations that his or her child has been molested. . . Exercising our discretion under

Pearson, we decline to decide here whether parents have such a right, and whether officials have a correlative constitutional duty to notify a minor's parent when they investigate allegations that the minor has been molested. . . Instead, we affirm the grant of summary judgment for the defendants on the ground that such a right, if it exists, was not clearly established at the time of the events in question. . . . Second, James contends that the defendants violated his rights by failing to notify him of the investigation into Blair's alleged attempts to coerce C.J. to change her testimony. Again, James points to no authority suggesting that state actors such as the defendants here have a constitutional duty to inform a minor's parent of such allegations, or more generally of allegations that someone is mistreating the child. We decline to decide here whether or under what circumstances parents have a right to such information. Instead, we affirm the grant of qualified immunity to the defendants on this claim because such a right, if it exists, was not clearly established. . . . [A] reasonable jury could find that the CPS officials violated James's rights by taking C.J. into protective custody and placing her with her grandmother without notifying him or giving him the opportunity to take C.J. into his care. . . . On the factual record, a jury could conclude that the CPS officials' failure to notify James that they were taking C.J. into protective custody was not 'reasonably necessary' to avert any danger to C.J. and that the CPS officials therefore violated James's rights. . . . Thus, James's allegations, taken as true, establish that the CPS officials violated his constitutional rights. Nonetheless, the defendants are entitled to qualified immunity on this claim. *Burke* extended for the first time *Wallis's* rule to protect parents without physical custody. . . *Burke* recognized that, before it addressed the issue, it was not clearly established that detaining a child without notifying a parent who had only shared legal custody would violate that parent's constitutional rights. . . Because James's rights were therefore not clearly established in 2003, the time of the relevant events here, the defendants are entitled to qualified immunity on this claim. . . . We therefore hold that the Fourteenth Amendment's protection of parents' rights requires officials to notify a parent with shared legal custody of a transfer in a minor's physical custody when the officials have encouraged and facilitated that transfer. . . . Following *Wallis's* example, we hold that public officials may encourage and facilitate a transfer of a minor's physical custody without notifying a parent with shared legal custody only if they have reasonable cause to believe that such notification would put the child in imminent danger of serious bodily injury. . . . The defendants are nonetheless entitled to qualified immunity on this claim. As discussed above, *Burke,* decided in 2009, was the first case in this circuit to establish that interfering with a child's physical custody can violate the rights of a parent who does not have physical custody. . . Failing to contact James about the voluntary agreement was therefore not clearly unlawful at the time, and the CPS defendants are entitled to summary judgment on this claim.").

Ewing v. City of Stockton, 588 F.3d 1218, 1231 (9th Cir. 2009) ("[W]e need not determine whether the officers had probable cause to arrest Heather for murder because the officers are entitled to qualified immunity. *See Pearson v. Callahan,* 129 S.Ct. 808, 818 (2009) (authorizing courts to determine whether right at issue was clearly established before deciding whether it was violated). The Ewings do not establish that the unlawfulness of charging Heather with murder on the facts in question was clearly established.") .

Phillips v. Hust, 588 F.3d 652, 654-58 (9th Cir. 2009) (on remand from Supreme Court) ("We are confronted with two questions in this remanded case. First, did Hust's actions violate the Constitution? Second, assuming a constitutional violation, is Hust nevertheless entitled to qualified immunity because the relevant constitutional right was not 'clearly established' at the time she acted? Until this year, the Supreme Court required us to resolve those issues in a rigid two-step 'order of battle.' That is, we were required, first, to determine whether the defendant's actions violated a constitutional right and second, whether that right was clearly established. . . The so-called '*Saucier* two-step' was designed to promote the Constitution's 'elaboration from case to case' and to prevent 'constitutional stagnation,' but generated considerable criticism from academics and judges. . . . Keeping *Pearson* in mind, we turn to the case now before us. This case is about the First Amendment right of access to the courts. . . . Therefore, for Phillips to prevail, he must show that use of the comb-binding machine was necessary to allow him 'meaningful access' to the courts. . . . Before answering that question, however, we pause to discuss *Pearson's* impact on this case. Because the qualified immunity issue is straightforward, this is an appropriate case to bypass the more difficult question of whether Hust violated Phillips's constitutional rights. . . Moreover, this is a case 'in which the constitutional question is so fact-bound that the decision [would] provide [ ] little guidance for future cases.'. . Thus, gladly exercising our newfound authority, we do not decide whether Hust's actions violated Phillips's constitutional rights. Rather, we proceed directly to ask whether Hust is entitled to qualified immunity. . . . [T]he precise question before us is whether a reasonable prison official would believe that denying access to the comb-binding machine would violate an inmate's right of meaningful access to the Supreme Court of the United States. . . .In light of the Supreme Court's flexible rules for pro se filings, which do not require and perhaps do not even permit comb-binding, we have no difficulty concluding that Hust is entitled to qualified immunity.").

Burke v. County of Alameda, 586 F.3d 725, 733, 734 (9th Cir. 2009) ("The intrusion on Farina's right of familial association presents us with a question of first impression because B.F. did not reside with Farina. In *Brittain v. Hansen*, this circuit recognized that non-custodial parents have a reduced liberty interest in the companionship, care, custody, and management of their children. . . . Although Melissa and Farina shared joint legal custody of B. F., the record indicates that Melissa had sole physical custody. However, even if Farina's interest in B.F.'s companionship was somehow reduced, he was not without *any* interest in the custody and management of B.F. We therefore extend the holding in *Wallis* to parents with legal custody, regardless of whether they also possess physical custody of their children. . . . We now expressly extend our holding in *Wallis*, 202 F.3d at 1138, to parents with only legal custody. . . . Against this legal backdrop, we cannot say that failing to contact Farina, who did not have physical custody of B.F., was clearly unlawful. Accordingly, Foster is entitled to immunity, and we affirm the grant of summary judgment in his favor.")**.**

Stoot v. City of Everett, 582 F.3d 910, 918 n.8, 919, 920 (9th Cir. 2009) (amended opinion) ("Before the Supreme Court's recent decision in *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009),

courts addressing an official's claim of qualified immunity were required to follow the two-step sequential inquiry established in *Saucier v. Katz*, 533 U.S. 194, 202 (2001), asking first whether the plaintiff alleged a violation of a constitutional right and, second, whether that right was clearly established at the time of the conduct at issue. *Pearson* relieved courts of their obligation always to follow this sequence. . . . Although rigid adherence to the *Saucier* protocol is no longer required, the Court was careful to note that *Saucier's* two-step procedure is 'often beneficial,' as it 'promotes the development of constitutional precedent.'. . Such is the case here, where we have not previously addressed whether a police officer may rely *solely* on the statements of a very young victim of alleged sexual abuse to establish probable cause to seize a potential suspect. . . . We hold that Jensen could not rely solely on the uncorroborated, inconsistent statements of this very young child to establish probable cause to arrest Paul. Given A.B.'s age at the time of the purported events and at the time she reported them, as well as the inconsistencies noted above, A.B.'s statements, standing alone, were insufficient to establish probable cause to seize Paul. . . . Although we disagree with his assessment of A.B.'s credibility and read the applicable case law as consistent with our conclusion, none of the cases cited by the Stoots put him directly on notice that his decision to rely on A.B.'s statements, without any corroboration, was unlawful. We therefore affirm the district court's judgment that he is entitled to qualified immunity on the Stoots' Fourth Amendment claim.").

Mueller v. Auker, 576 F.3d 979, 994, 995, 1000 (9th Cir. 2009) ("With all respect to the district court's conclusion to the contrary, this kaleidoscopic set of facts and circumstances creates without doubt a classic genuine issue of material fact on the central issue of whether Rogers reasonably perceived imminent danger to Taige. . . . Thus, if a factfinder were to decide that Rogers was indeed confronted with exigent circumstances, his failure to contact Eric would not have violated Eric's rights. On the other hand, a factual decision to the contrary would produce an opposite constitutional result. This case, therefore, presents the type of situation as contemplated by the Supreme Court where a constitutional decision is inappropriate and unwise. . . . Thus we proceed to the next prong. . . . [V]iewing here the facts in the light most favorable to the Muellers, and assuming without deciding that Eric Mueller in the circumstances presented, had constitutional rights to both pre- and post-deprivation notice which were not honored, we determine whether those rights were clearly established. Specifically, was it clearly established that Detective Rogers had to give pre-deprivation notice not only to the parent in the hospital present with and exercising judgment with respect to her child's medical situation, but also to a parent absent from the scene of his decision? Further, was it clearly established that Eric Mueller had a constitutional right to post-deprivation notice, which Detective Rogers had the responsibility to deliver? . . . . Detective Rogers has successfully shown he is entitled to qualified immunity on the claim that he violated Eric Mueller's constitutional right to pre-deprivation notice. It was not clearly established at the time that he removed Taige from her parents' custody that he was required to give Eric Mueller notice of his decision. Thus, we reverse both the district court's denial of summary judgment on Rogers's claim and the district court's grant of summary judgment to Eric Mueller on the underlying issue. In addition, Detective Rogers has successfully shown he is entitled to qualified

immunity on the claim that he violated Eric Mueller's constitutional right to post-deprivation notice. Accordingly, we remand for further proceedings consistent with this opinion.")

Mueller v. Auker, 576 F.3d 979, 1006, 1007 (9th Cir. 2009) (Wallace, J., concurring in part and dissenting in part) ("I disagree with the majority's decision to exercise appellate jurisdiction over the district court's partial summary judgment in favor of Eric on his procedural due process claims. I would instead refrain from hearing the appeal at this interlocutory stage of the proceedings. . . I turn next to Detective Rogers' appeal from the district court's denial of his qualified immunity claim. This appeal is undoubtedly subject to immediate review under *Mitchell,* and I agree that the district court should be reversed. However, I am concerned with how the majority reaches that conclusion. As the majority recounts, the Supreme Court in *Pearson v. Callahan,* 129 S.Ct. 808, 818 (2009) held that courts now have discretion to determine 'which of the two prongs of the qualified immunity analysis [prescribed in *Saucier v. Katz,* 533 U.S. 194 (2001)] should be addressed first in light of the circumstances in the particular case at hand.' In this case, the majority reasons, '[b]ecause we have concluded after reviewing the factual evidence on this issue in the light most favorable to Rogers–or for that matter to Eric Mueller–that there was a genuine issue of material fact as to whether Rogers was confronted with imminent danger to Taige at the time in question, we see no useful purpose in pursuing[the first step of *Saucier*].' The majority's reasoning is deficient in the context of qualified immunity. The first step of *Saucier* asks whether, viewing the evidence in the light most favorable to the allegedly injured party, the record establishes a constitutional violation. 533 U.S. at 201. Nothing about this inquiry requires this court to resolve factual disputes in the record. In fact, the Supreme Court has clarified that the first step of the *Saucier* inquiry in no way requires courts to assume a fact-finding capacity; rather, a court generally just adopts the version of the facts set forth by the party challenging immunity. . . .Thus, contrary to the majority's reasoning, the existence of a factual dispute as to the 'imminent danger' does not justify skipping the first step of *Saucier*. . . . At this stage in the dispute, we are required only to view the evidence in the light most favorable to the injured party–no factual findings are required. The majority's reference to this factual dispute as reason to skip step one of *Saucier* is therefore misplaced. . . . Unlike the majority, I would hold that this is a case where the court can 'rather quickly and easily decide that there was no violation of clearly established law,' while the question at step one of *Saucier* is more difficult. . . . Indeed, the first step inquiry asks us to determine whether due process requires a state official to give an absent parent notice of his decision to assume custody of a child for emergency medical purposes. We need not resolve this complicated constitutional issue, however, because both the majority and the dissent agree that even if such rights existed, they were not clearly established at the time of the relevant conduct. Thus, this case presents a prime example of a case where skipping the first step of *Saucier* is advisable because 'it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'").

Tibbetts v. Kulongoski, 567 F.3d 529, 535, 536, 539, 540 (9th Cir. 2009) ("Under the circumstances of this case, we adopt *Pearson's* more flexible approach and proceed directly to an analysis of *Saucier's* second prong, to determine whether the right asserted in this case was 'clearly

established' when the alleged stigmatizing statements were made. . . . As permitted by *Pearson* and required by *Saucier,* we analyze the merits of the Governor's qualified immunity claim by addressing whether the parameters of Plaintiffs' right to a name clearing hearing were clearly established at the time of the Releases. . . . Although cases need not be 'fundamentally similar' in order to put an official on notice that his conduct violates established law, *Hope v. Pelzer,* 536 U.S. 730, 741 (2002), if the parameters of the right are not clearly established by case law, the official is entitled to qualified immunity. . .Here, it cannot be said that a reasonable person in Governor Kulongoski's position would have known that he was violating Plaintiffs' Fourteenth Amendment due process rights under the circumstances of this case. Even if we assume, *arguendo* that the statements in the Releases were stigmatizing to Plaintiffs, it was not then established whether the stigmatizing statements satisfied the 'temporal nexus' requirement of *Campanelli,* nor that the Governor could be found to have 'caused' Plaintiffs' terminations. Accordingly, we reverse the district court's denial of summary judgment to Governor Kulongoski.").

Ramirez v. City of Buena Park, 560 F.3d 1012, 1022-24 (9th Cir. 2009) ("Because Montez could not have reasonably suspected Ramirez had a weapon, we hold his pat-down of Ramirez violated the Fourth Amendment. Having determined the existence of a constitutional violation, we consider whether the right violated was clearly established at the time of its occurrence. . .At the time of Ramirez's pat-down, it was clearly established that every pat-down is unreasonable unless it is supported by the officer's reasonable suspicion that the person to be frisked is armed and dangerous. . . .Bypassing the constitutional question in the qualified immunity analysis, we exercise our discretion in reaching *Saucier's* second prong first, *see Pearson,* 129 S.Ct. at 818, as it will 'satisfactorily resolve' the arrest issue without having 'unnecessarily to decide difficult constitutional questions.'. . . [W] e conclude that a reasonable officer in Montez's position would not have clearly known that his conduct was unlawful under these circumstances. . . Although we do not decide whether the facts allege a constitutional violation, we do find that Montez's actions were reasonable in light of the qualified immunity analysis. Thus, Montez is entitled to summary judgment on this issue.").

Rodis v. City, County of San Francisco, 558 F.3d 964, 968-70 (9th Cir. 2009) ("In *Saucier v. Katz*, 533 U.S. 194, 200 (2001), the Supreme Court mandated a two step sequence for resolving qualified immunity claims. First, a court must decide whether the alleged facts make out a violation of a constitutional right. . . If the plaintiff satisfies the first step, the court must then decide whether the right at issue was 'clearly established' at the time of the alleged misconduct. . .More recently, however, the Supreme Court revisited *Saucier* and concluded that 'while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.'. . Accordingly, we first turn to the question of whether the right asserted in this case was 'clearly established.' . . .In evaluating the totality of the circumstances in this case, however, we embark on unchartered waters. Defendants assert that they had probable cause as to Rodis's intent based solely on the evidence suggesting that the bill might have been fake. Rodis contends that without specific evidence of his intent to defraud, above and beyond the tender of a potentially counterfeit bill, the arrest was unlawful. This circuit has never addressed this issue. . .All of the other circuits to have

answered this question, however, have found that '[t]he passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note.'. .In *Pearson,* the Supreme Court noted that 'where the divergence of views on ... [the constitutionality of the alleged misconduct] [i]s created by the decision of the Court of Appeals in th[e] case, it is improper to subject petitioners to money damages for their conduct.'. . Thus, regardless of whether we determine that evidence beyond the tender of a counterfeit bill was required, Defendants are entitled to qualified immunity. Were we to decide that there was a violation, we would create a circuit split and Defendants would not have been on notice that their conduct was unlawful. Were we to decide that this evidence was not required, Rodis's claim would fail in the first instance. Because it is unnecessary to disposition of this case, we decline to decide this question.").

Reid v. City of Beverly Hills, No. 07-56059, 2009 WL 367397, at *1 (9th Cir. Feb. 13, 2009) ("We do not decide whether probable cause was lacking, *see Pearson v. Callahan* . . . , for, even assuming the officers were mistaken, there is no law that would have made it clear to a reasonable police officer in these officers' position that their assessment of probable cause violated Reid's constitutional rights. Accordingly, the officers are entitled to qualified immunity based on their objectively reasonable, albeit mistaken, belief that there was probable cause.").

Barnard v. Las Vegas Metropolitan Police Dept., 310 F. App'x 990, 2009 WL 277044, at **1-3 (9th Cir. Feb. 4, 2009) ("Under *Pearson,* the decisional sequence required by *Saucier* is no longer mandatory. . . .We thus proceed in our analysis under the Supreme Court's new guidance. . . .The district court correctly granted summary judgment as to Charles' mistaken arrest claim. For the purposes of our analysis we assume, without deciding, that the mistaken arrest constituted a violation of his constitutional rights. . .Even assuming a constitutional violation, however, we conclude that the officers were entitled to qualified immunity because the right was not clearly established at the time of the alleged violation. . . .The district court erred in granting summary judgment as to Charles' excessive force claim as against the officers. Under *Saucier,* we first analyze whether Charles has alleged a viable claim that his constitutional rights were violated. . . . We now turn to whether a reasonable officer would have known that the use of force here was unlawful, that is, whether the right to be free of excessive force was clearly established at the time of the violation. . . . [A]t the time of the incident at issue here, a reasonable officer would have known that it violated clearly established law to use a choke hold on a non-resisting arrestee who had surrendered, pepper-spray him, and apply such knee pressure on his neck and back that it would cause the collapse of five vertebrae in his cervical spine. Thus, construing the evidence in the light most favorable to the plaintiff, as we must at this stage, we conclude that the officers were not entitled to qualified immunity.").

Nichols v. Brown, 945 F.Supp.2d 1079, 1098-1101 (C.D. Cal. 2013) ("The Court exercises its discretion to address the second prong of the qualified immunity analysis, namely, whether the right Plaintiff asserts to openly carry a firearm, whether loaded or unloaded, in a public park was 'clearly established' under the Second Amendment as of May 21, 2012, when Plaintiff was stopped

by Officer Heywood and Officer Doe. Even assuming, without deciding, for the limited purpose of the qualified immunity analysis only, that a constitutional violation occurred in the warrantless inspection and confiscation of Plaintiff's long gun, the Court concludes that the right to openly carry a firearm in a public park was not 'clearly established' at the time of the alleged violation and that the individually-named Redondo Beach defendants are therefore entitled to qualified immunity from Plaintiff's claim for money damages. . . . In light of the continued uncertainty as to the scope of the rights accorded by the Second Amendment following the Supreme Court's recent decisions in *Heller* and *McDonald*, the Court concludes that the right to openly carry a firearm in a public park was not 'beyond debate' at the time of the alleged violation such that a reasonable official would understand that enforcing a city ordinance that prohibits carrying a firearm in specified public areas was unconstitutional.")

Mann v. County of San Diego, No. 3:11–cv–0708–GPC–BGS, 2013 WL 4046642, *10 (S.D. Cal. Aug. 8, 2013) ("Plaintiff's assert that, notwithstanding the Supreme Court's vacatur of the Fourth Amendment portion of the Ninth Circuit's decision in *Greene*, Cisneros' interview of N.G.P.M. was unconstitutional. While the interview of N.G.P.M. may have been unconstitutional, the Court first addresses whether a right to be free from such interviews was clearly established at the time of the interview. In that regard, Plaintiffs provide no additional authority demonstrating that, at the time of the interview, it was clearly established that a social worker's brief, voluntary interview of a suspected child-abuse victim at school (with the option of having a school official present) violates the Constitution. Thus, the Court finds Defendants are entitled to qualified immunity as to the interview of N.G.P.M. at school.")

Skurdal v. Federal Detention Center, No. C12–706 RSM, 2013 WL 3897772, *1, *2 (W.D. Wash. July 29, 2013) ("[T]he Court declines to adopt Part III(D)(3)(a) of the Report and Recommendation. The Ninth Circuit has not expressly held that a plaintiff can bring a *Bivens* claim for alleged Free Exercise Clause violations. In *Resnick v. Adams*, the Ninth Circuit considered a Free Exercise challenge brought as a *Bivens* claim, but ultimately dismissed it for failure to state a constitutional violation, without holding that *Bivens* was the proper vehicle to bring such a claim if it were valid. . . Therefore, whether or not the *Bivens* claim was proper was immaterial to the decision. . . Although the unpublished decision in *Panagacos v. Towery* allowed a free-speech claim to proceed under *Bivens*, 501 Fed. App'x 620, 623 (9th Cir.2012), this does not mean that *Bivens* also encompasses Free Exercise claims since the Supreme Court considers each type of First Amendment claim on its own merits, rather than the Amendment as a whole when determining whether a *Bivens* action can be brought. . . At least three other circuits have also explicitly reserved this question, assuming without deciding that such a claim can be brought. [citing cases] While the Ninth Circuit may find that such a claim can be brought, the Court finds it more prudent at this time, in the absence of an explicit Ninth Circuit holding, to assume without deciding the issue because it may be unnecessary to answer should the Court grant the individual-capacity defendants' properly supported motion for summary judgment on the basis of qualified immunity.")

Mendez v. City of Scottsdale, Ariz., No. CV–12–285–PHX–GMS, 2012 WL 3870364, *6 (D. Ariz. Sept. 6, 2012) ("Plaintiff alleges that he was arrested in retaliation for questioning Officer Bolin regarding Bolin's demand that Plaintiff show identification, in violation of his speech rights. As Plaintiff concedes in his Response, however, at the time Officer Bolin took action based on Plaintiff's speech, he already had probable cause to arrest Plaintiff for failure to obey his orders. . . . Plaintiff contends, citing *Houston v. Hill*, that the First Amendment 'protects the rights of citizens to criticize and even challenge the police.'. . *Hill*, however, was a case in which the Court reversed the conviction of a defendant who was arrested and convicted solely for verbally challenging police under a statute which the Court deemed unconstitutional. . . In this case, Officer Bolin had probable cause to arrest Plaintiff on independent grounds. And the Supreme Court recently implied that an arrest made in retaliation for one's exercise of protected speech is not unlawful so long as the officer has probable cause for the arrest on other grounds. [citing *Reichle v. Howards*] The Court will dismiss Plaintiff's Fourth Amendment wrongful arrest/imprisonment claim and First Amendment freedom of speech claim.")

Guzman-Martinez v. Corrections Corp. of America, No. CV 11–02390–PHX–NVW, 2012 WL 2873835, *8, *9 (D. Ariz. July 13, 2012) ("Without considering any limitation of Plaintiff's rights under the Fourteenth Amendment because she is a detained alien, housing transgender women inmates among male inmates monitored by male detention officers would violate the Fourteenth Amendment if the practice imposes some harm to the transgender women inmates that significantly exceeds the inherent discomforts of confinement and is not reasonably related to a legitimate governmental objective, such as maintaining security and order and operating the detention facility in a manageable fashion. To determine whether Kane, Scalet, Campbell, and Leal are shielded by qualified immunity, it is not necessary to decide the first prong of the qualified immunity standard, *i.e.*, whether the practice violates the Fourteenth Amendment, because the constitutional standard is not clearly established, which satisfies the second prong for establishing qualified immunity. . . . Plaintiff primarily alleges that Defendants should have known that transgender women inmates are vulnerable to victimization and that housing them with male inmates monitored by male detention officers would subject them to serious risk of substantial harm. Plaintiff also alleges inadequate training and supervision of detention officers and supervision of inmates, but does not allege, even generally, the training and supervision needed to prevent serious risk of substantial harm to transgender women. . . . Plaintiff has not identified any legal authority holding that a transgender woman, who is biologically male, has a constitutional right to be housed in an immigration detention facility for females and to only have contact with female detention officers. . . .Therefore, Plaintiff does not have a clearly established constitutional right to be housed in a women's detention facility or in a single-occupancy cell in a men's detention facility or to be released from detention based solely on her status as a transgender woman.")

J.C. ex rel. R.C. v. Beverly Hills Unified School Dist., 711 F.Supp.2d 1094, 1124-26 (C.D. Cal. 2010) ("Here, although the Court has found that a violation of J.C.'s First Amendment rights has occurred, the second *Saucier* step unequivocally resolves the issue of qualified immunity in Defendants' favor. . . . Here, there is no binding Supreme Court precedent that governs J.C.'s

conduct. The Supreme Court has yet to address whether off-campus speech posted on the Internet, which subsequently makes its way to campus either by the speaker or by any other means, may be regulated by school officials. . . . Additionally, while numerous recent cases have applied the Supreme Court's student speech precedents to cases involving student speech over the Internet, see *Beussink, Emmett, Killion, O.Z., Wisniewski, Doninger,* and *Bethlehem,* none have done so in a factually analogous setting. The Court has yet to find a student-speech case addressing hurtful and embarrassing speech directed at a student's classmate, which emanated outside the school grounds. . . . Certainly, the contours of a student's First Amendment right to make a potentially defamatory and degrading video about a classmate, which is almost immediately thereafter brought to the School's attention, are not clearly established.")

TENTH CIRCUIT

Bishop v. Szuba, No. 17-6136, 2018 WL 3409907, at *2-4 (10th Cir. July 12, 2018) (not reported) ("Here, the district court found that Szuba's conduct satisfied the first prong of the qualified-immunity test. . .We have some doubts about that conclusion. Specifically, we question whether there exists an affirmative link between Bishop's injuries and Szuba's conduct. . . . Nevertheless, we assume without deciding that Szuba indeed violated Bishop's constitutional right 'to be kept reasonably safe from harm.'. . We pursue this route because we conclude, for the reasons discussed below, that Bishop fails to satisfy the second prong of the qualified-immunity test. That is, he fails to show the law was clearly established. Accordingly, we need not resolve the constitutional question. . . .Here, the district court did exactly what the Supreme Court has said not to do: it (1) 'define[d] clearly established law at a high level of generality,'. . . and (2) failed to discuss the '"particularized" ... facts of th[is] case[.]'. . Specifically, it stated that foster children have a clearly established right to 'be kept reasonably safe from harm' while in foster care and that this general right 'has been clearly established since at least 1985.'. . The district court did cite two cases to support this conclusion. But it neither discussed the facts of those cases nor explained whether or how those facts are sufficiently similar to the ones before us to place the constitutional question here 'beyond debate.'. . And our independent review of those two cases convinces us that neither one clearly established the contours of the right at issue. In *Yvonne L. ex rel. Lewis v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992), we held that, as a general matter, foster children indeed have a right 'to protection while in foster care.'. . And we also set forth the standard for determining whether a defendant has violated that right. . . But we didn't apply that standard to the defendants' conduct. . . Instead, we remanded to the district court to determine, in the first instance, whether a constitutional violation occurred. . . Thus, because we didn't find a constitutional violation in *Yvonne L.*, it doesn't clearly establish the contours of the constitutional right at issue here. . . Neither does *Schwartz*, which we decided more than 13 years after Szuba's investigation. . . In short, even if we assume that Szuba violated Bishop's Fourteenth Amendment rights, neither *Schwartz* nor *Yvonne L.*—the only two cases the district court cited below—clearly establishes as much. And Bishop doesn't identify on appeal any additional authorities that might. . . Accordingly, Szuba is entitled to qualified immunity.")

Lincoln v. Maketa, 880 F.3d 533, 537-39, 541-44 (10th Cir. 2018) ("We have discretion to resolve an issue of qualified immunity on either of the two prongs, and we need not decide whether a violation occurred if we conclude that the right was not 'clearly established.'. . Here, we choose to address the second prong, concluding that none of the underlying rights were clearly established at the time of the alleged retaliation. . . . The law was not clearly established on whether Lt. Peck's duties included her discussion with the media. As head of Internal Affairs, Lt. Peck spoke to the media about an Internal Affairs matter at the explicit direction of her supervisor. The speech therefore seems to have been '"commissioned"' by her employer. . . .Lt. Peck contends that her speech was not made in the course of her official duties because

• her job duties did not require her to speak to the media and
• she disobeyed Sheriff Maketa's instructions on what to say.

We reject both contentions.

First, Lt. Peck notes that speaking to the media was not part of her job duties. But an employee's formal job duties are not dispositive; speech can be considered 'official' even when it 'concerns an unusual aspect of an employee's job that is not part of his everyday functions.'. . Second, Lt. Peck spoke to the media because of a directive, but she disobeyed the order to lie. In some circuits, Lt. Peck's disobedience might affect whether she was speaking as part of her official duties. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013) ("[W]hen a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties."); *Jackler v. Byrne*, 658 F.3d 225, 241–42 (2d Cir. 2011) (holding that an employee spoke as a citizen when he disobeyed his superiors' orders to retract a truthful report and substitute a false one). But this approach is not universal. *See Nixon v. City of Houston*, 511 F.3d 494, 498–99 (5th Cir. 2007) (holding that a uniformed officer's media statement constituted official speech regardless of whether it was 'in contravention of the wishes of his superiors'). The Tenth Circuit has not spoken on this issue. In the absence of applicable precedent, Sheriff Maketa lacked clear guidance on whether Lt. Peck was speaking as part of her official duties. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 929 n.9 (10th Cir. 2015) ("A circuit split will not satisfy the clearly established prong of qualified immunity."). As a result, the alleged retaliation would not have violated a clearly established constitutional right. . . .Sgt. Stone and the district court relied only on general standards, noting that an adverse employment action is one that would deter reasonable persons from exercising their First Amendment rights. But the analysis of qualified immunity is based on specific facts, not abstract principles. *White v. Pauly*, —— U.S. ——, 137 S.Ct. 548, 552, 196 L.Ed.2d 463 (2017) (per curiam). Sgt. Stone does not direct us to any on-point cases from this court, the Supreme Court, or other courts; and he has not demonstrated that the criminal investigation would 'obviously' constitute an adverse employment action. . . Thus, Sheriff Maketa is entitled to qualified immunity on this claim. . . . In short, neither we nor other circuits have established any clear guidance on where to draw the line between adverse and non-adverse paid administrative leave. . .Without any guidance, we do not regard placement on paid administrative leave as a clearly established adverse employment action. . .Thus, Sheriff Maketa and Undersheriff Presley were entitled to dismissal of this claim. . . . .Third, general principles are insufficient for a clearly established right. Instead, the Commanders must point to precedent establishing that the particular conduct at issue here is unlawful. . . . And as noted, the

Commanders do not identify any such precedents, relying only on *Annett*'s general standard. Thus, the Commanders have not demonstrated that their alleged humiliation would clearly constitute an adverse employment action. . . .The assertion of qualified immunity imposes a heavy burden on the plaintiffs, requiring them to point to existing precedent or the clear weight of authority establishing the existence of a constitutional violation. None of the plaintiffs has met that burden. Lt. Peck has not demonstrated that her statement to the media was clearly made as a private citizen rather than as a public employee. Nor has Sgt. Stone or the Commanders shown that the defendants' alleged conduct would clearly constitute adverse employment actions. Accordingly, Sheriff Maketa and Undersheriff Presley were entitled to qualified immunity on all of the claims.")

Pyle v. Woods, 874 F.3d 1257, 1263-64 (10th Cir. 2017) ("The matters before this court involve a situation 'in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'. . Accordingly, under the circumstances, we will . . . address only the second prong of the qualified immunity test. . . .Here, Plaintiffs allege Detective Woods violated their Fourth Amendment rights by searching the Database for their prescription drug information without a warrant. Plaintiffs concede that this court has never directly addressed whether a warrantless search by law enforcement of a patient's prescription records in a state database violates the Fourth Amendment but they are correct that 'a case directly on point' is not required. . . Plaintiffs must only identify existing precedent that 'place[s] the ... constitutional question beyond debate.'. . They assert two legal propositions, taken together, provided a clear answer to the Fourth Amendment question at the time Woods conducted the warrantless search of the Database, namely: (1) individuals have a constitutionally protected privacy right in their prescription drug records and (2) warrantless searches violate the Fourth Amendment absent an exception. This argument is unavailing. . . .Because, as we have held, the right to privacy in prescription drug records is not absolute, Plaintiffs' two-part paradigm does not provide an answer to the constitutional question. Instead, resolution of the issue will involve a determination of the scope of the constitutionally protected privacy right. At the time Detective Woods accessed the Database to search Plaintiffs' records, no court had conducted the necessary analysis and no judicial opinion held that a warrantless search of a prescription drug database by state law enforcement officials is unconstitutional. . .Our precedent makes clear that any right to privacy in prescription drug records is not absolute under the circumstances present here. Neither Plaintiffs' two-part paradigm nor existing precedent places the Fourth Amendment question beyond debate. Accordingly, Plaintiffs cannot show Detective Woods acted contrary to clearly established law and Woods is entitled to qualified immunity on the claim he violated Plaintiffs' Fourth Amendment rights by accessing the Database without a warrant.")

Scott v. City of Albuquerque, 711 F. App'x 871, 877 n.6, 879, 882 n.9 (10th Cir. 2017) ("In *A.M.*, where an officer arrested a student under section 30-20-13(D) for 'repeatedly fake-burping, laughing, and (later) leaning into the classroom,' 830 F.3d at 1148, we held in analyzing the clearly-established-law question that there were 'no Supreme Court or published Tenth Circuit decisions' that squarely addressed 30-20-13(D)'s probable-cause requirements in 2011[.] . . The same necessarily must be true for Officer Hensley's violation, which occurred almost two years

before the challenged conduct in *A.M.* . . . In short, Scott has not identified any clearly-established law that would have given Officer Hensley 'fair notice that his conduct would be unlawful in the circumstances he confronted.'. . Accordingly, Scott cannot satisfy the second prong of the qualified-immunity standard; his Fourth Amendment unlawful-arrest claim necessarily fails. . . .And, *second*, our conclusion that Officer Hensley could not claim a reasonable mistake of law does not mean that he cannot demonstrate that he satisfies the qualified-immunity standard on the clearly-established-law element, and indeed we conclude *infra* that he has. In this regard, *Heien* stressed that 'qualified immunity ... depends on an inquiry distinct from whether an officer has committed a constitutional violation' and that 'the [constitutional-violation] inquiry is *not as forgiving* as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation.'. . Therefore, under the less stringent qualified-immunity inquiry, we may conclude (as we do) that Officer Hensley is entitled to qualified immunity because his 'conclusions rest[ed] on an objectively reasonable, even if mistaken, belief that probable cause exist [ed].'. . . We are not blind to the obvious facts: At the time of the arrest, Scott was thirteen years old. The psychological effects of an arrest on somebody that young are bound to be more severe than they would be for an adult. . . However, we have held that there is ' "no case law ... applying a different standard when the victim of the alleged excessive force is a minor."' . . And we are bound to apply the law of excessive force as it is—not as we might wish it to be—even when, as here, the results might seem troubling.")

Dahn v. Amedei, 867 F.3d 1178, 1186-91 & n.12 (10th Cir. 2017) ("The question here is whether a foster child in the custody of one state can, after being placed by a private adoption agency with a foster father in a different state, establish a special custodial relationship with that second state when the second state takes on the duties to investigate evidence suggesting abuse. . . . We decide here only whether Dahn can show that his special relationship with Amedei and Cramer was clearly established under existing law. . . . We do not resolve whether Dahn established a special relationship with Amedei and Cramer; we address only whether that relationship was clearly established under existing precedent. Even if Dahn had a special custodial relationship with Amedei and Cramer—employees of Colorado—*Schwartz* doesn't clearly establish this relationship based on our facts. Here, Dahn was in Oklahoma's custody up until his adoption. The district court extended *Schwartz* in finding that Dahn sufficiently alleged a special relationship with Amedei and Cramer.[8] [Fn 8 Because we conclude under the facts of this case that clearly established law did not create a special relationship between Dahn and the caseworkers, we need not and do not address the remaining factors of his claim. For this reason, we do not comment on whether Amedei and Cramer violated Dahn's constitutional rights under the Fourteenth Amendment's Due Process Clause by failing to exercise their professional judgment.] Whether or not he was correct to do so, the law up to that point did not clearly establish the requisite special relationship. In *Schwartz*, a young foster child, Chandler, died at the hands of his abusive foster family. . . Chandler's biological parents alleged under § 1983 that employees of the Denver County Department of Human Services (DCDHS) violated, among other laws, Chandler's Fourteenth Amendment substantive-due-process rights. . . The employees claimed that they had no special relationship with Chandler because a different county had placed him in foster care. . . We

concluded that the special-relationship doctrine extends beyond the employees in the county that initially placed a child in foster care and reaches county employees actually exercising custody over the child. . . .We also noted that even though the Jefferson County Department of Human Services (JCDHS) initially placed Chandler into foster care, its doing so made him dependent on the state for his basic human needs, not just that one department. . . .Here, Dahn asks us to affirm the district court's extension of *Schwartz* to his claim and hold that even though Oklahoma placed him in foster care and Adoption Alliance monitored his placement, Colorado exercised custody over him because he lived there and because Colorado employees investigated his school's suspected-abuse reports. . . . [T]he second prong of the qualified-immunity analysis determines the outcome of this case. *Schwartz* is the closest case to ours, but no court has extended it so far. In certain circumstances, it would be reasonable and even logical to extend the special-relationship doctrine across state lines as well as county lines, as in *Schwartz*, but our case law doesn't clearly establish this extension. . . . Here, Oklahoma and Colorado are two separate sovereigns. So, Amedei and Cramer argue, it is not enough that Dahn was a ward of *a* state. To overcome qualified immunity and survive their motion to dismiss, Dahn had to allege sufficient facts to show that he had a special relationship with the state whose employees he alleged knew of the danger to him or failed to exercise professional judgment. We can't deem it clearly established under *Schwartz* that a state employee's investigating reports of abuse of a child is enough to create a special custodial relationship with that child. . . .Though *DeShaney* is factually distinct from Dahn's case, it illustrates that the Supreme Court is wary of finding a special relationship whenever a social worker responds to child-abuse reports. So *DeShaney* supports the conclusion that the law doesn't clearly permit extending the special-relationship doctrine to Dahn's circumstances—at least not yet. In sum, the special-relationship doctrine extends beyond just those actors who placed Dahn in Lovato's custody; it includes all state officials in the state with whom he had a special relationship. But, for now, the law doesn't clearly extend constitutional liability under the special-relationship doctrine to employees of a state that didn't deprive Dahn of his liberty or supply his basic needs, even though they were social workers in the county where he resided. . . We note, however, that Amedei and Cramer owed *some* duty to Dahn, and this duty might very well expose them to tort liability. . . .*Schwartz* would not notify Amedei and Cramer that their failure to protect Dahn under the factual circumstances of this case would violate Dahn's Fourteenth Amendment substantive-due-process rights under the special-relationship doctrine. Thus, even accepting all of Dahn's factual allegations as true, Dahn presents no clearly established law creating a special, custodial relationship between him and Colorado or its employees, and therefore the district court should have awarded Amedei and Cramer qualified immunity on Dahn's special-relationship claims against them.[12] [fn12: Because we conclude, based on this case's facts, that Dahn has failed to show clearly established law creating a special relationship between him, Amedei and Cramer, we decline to address whether the special-relationship doctrine could ever cross state borders. We also decline to address the other element of such claims, which is whether Amedei and Cramer acted in an unprofessional and conscience-shocking manner.]")

Estate of Lockett v. Fallin, 841 F.3d 1098, 1107, 1113-15 (10th Cir. 2016) ("When determining whether qualified immunity applies, we may choose 'which of the two prongs of the qualified

immunity analysis should be addressed first.'. . Although Lockett's Estate urges us to decide each of the constitutional-violation questions first, we decline to do so. . . .[W]e see no cases announcing clearly established law that the Eighth Amendment commands, in these circumstances, that Appellees hasten Lockett's death more quickly than the 30 minutes it took. Again, as did the district court, we choose to affirm the dismissal of this claim on the clearly-established-law prong. . . .Although we accept that Lockett's execution was 'unnecessarily prolonged and horribly painful,' . . . the problems during Lockett's execution fit under *Baze*'s 'isolated mishap' exception for events that, 'while regrettable, do[ ] not suggest cruelty, or that the procedure at issue gives rise to a substantial risk of serious harm.'. . Thus, Appellees violated no clearly established law despite Lockett suffering pain during his execution. The IV infiltration was an 'isolated mishap,' not something designed to cause additional pain. Because Oklahoma has changed its execution protocol to incorporate several procedures *Baze* spoke favorably about,. . . we likely will never confront another Oklahoma execution presenting the same circumstances as Lockett's execution. . . .Lockett's Estate claims that 'a reasonable officer would have been on notice that the failure to promulgate basic policies to protect against painful, barbaric, and torturous executions violate[s] the Eighth Amendment.'. . But this provides nothing beyond the 'high level of generality' that the Supreme Court has concluded will not suffice to show clearly established law. . . As in *al-Kidd*, where the plaintiff tried to rely on the 'broad history and purposes of the Fourth Amendment' as clearly established law, Lockett's Estate's general pronouncement is too broad to show clearly established law.")

Estate of Lockett v. Fallin, 841 F.3d 1098, 1118, 1120-21 (10th Cir. 2016) (Moritz, J., concurring) ("[W]hile I agree with the majority's professed intent to resolve the qualified immunity issues on the clearly-established prong, I do not agree with those portions of the opinion that conflict with that professed intent. . . .Because the Estate cites no authority that would have put defendants on notice that their *particular* conduct violated the Eighth Amendment's prohibition on torture, the Estate fails to satisfy the clearly-established prong of the qualified-immunity analysis. Accordingly, I would affirm the district court's conclusion that defendants are entitled to qualified immunity on the Estate's torture claim on that basis alone, without addressing whether defendants violated Lockett's Eighth Amendment right to be free from torture. I therefore do not join the portion of the majority opinion addressing the Estate's torture claim.")

Estate of Reat v. Rodriguez, 824 F.3d 960, 964-67 (10th Cir. 2016) (*amending and superceding opinion on den'l of reh'g en banc*) ("Because there are cases where we can more readily decide the law was not clearly established before reaching the more difficult question of whether there has been a constitutional violation, we may exercise discretion in deciding which prong to address first. . . This is such a case. . . .At the most general level, the parties agree that the state-created danger doctrine is clearly established in this circuit. . . .Though the elements of the state-created danger test are clearly established, it also must be clear to which fact scenarios and government actors we apply the test, and what types of conduct are 'conscience shocking' under the sixth factor. . . .Here, Reat's Estate alleges Rodriguez violated the Fourteenth Amendment by knowingly sending the victims, who had called 911 to report an assault, back into the path of their armed

attackers. It contends Rodriguez knew the attackers last had been seen speeding northward on Sheridan Boulevard only minutes earlier, yet he instructed Pal to stop on that road. He then told Pal to pull over and activate his hazard lights at a location nineteen blocks north of the place of the assault. Even after Rodriguez knew the attackers had brandished a gun, he did not suggest that Pal relocate to a less conspicuous place, nor did he send police protection. The district court held 'these factual allegations, accepted as true, are sufficiently shocking to the conscience to state a plausible claim for violation of plaintiffs' substantive due process rights under the state-created danger theory.'. . For a number of reasons, we conclude Rodriguez's conduct does not violate the clearly defined contours of the state-created danger doctrine. First, Reat's Estate cannot point to a Supreme Court or Tenth Circuit case involving misconduct by 911 operators. . . . In all of [the] cases where we found it appropriate to apply the doctrine of state-created danger, the victims were unable to care for themselves or had had limitations imposed on their freedom by state actors. . . .Rodriguez is unlike any of the defendants in our state-created danger cases. Rodriguez was not a police officer, firefighter, or other similar first responder. . . As a 911 operator, he was not present at the scene of the attack, nor could he take physical action in response to the unfolding event. He did not impose any limitation on Reat's freedom to act. Rodriguez merely informed the victims, however incompetently, that to get help from the police, they would have to return to Denver. It cannot be said that any of Rodriguez's actions, as foolish as they were, 'limited in some way the liberty of a citizen to act on his own behalf.' . . Furthermore, Reat is unlike the victims in other state-created danger cases. He was not in the custody of the state in the way that prisoners are, and thus was not deprived in that manner of his freedom to act. Unlike children in school or under the care of social workers, Reat and his companions were not incapable of acting in their own interest at the time of the shooting. Though the state-created danger doctrine itself may be clearly established, it is far from clear that it applies to Rodriguez's conduct in this particular situation. In sum, all cases cited by Reat's Estate 'are simply too factually distinct to speak clearly to the specific circumstances here.' *Mullenix*, 136 S. Ct. at 312. No reasonable 911 operator could have known that these actions would have resulted in liability under the Fourteenth Amendment."), *cert. denied*, 137 S. Ct. 1434 (2017).

A.M. v. Holmes, 830 F.3d 1123, 1139-43, 1149 (10th Cir. 2016) ("[I]n the qualified-immunity context, Officer Acosta's commission *vel non* of a constitutional violation need not be the focus of our inquiry. This is because A.M. 'must demonstrate on the facts alleged *both* that [Officer Acosta] violated [F.M.'s] constitutional ... rights, *and* that the right was clearly established at the time of the alleged unlawful activity.'. . We elect to center our analysis on the clearly-established-law question. . . .We conclude that A.M. has not demonstrated that, under extant clearly established law, a reasonable officer in Officer Acosta's position would have had fair warning that he lacked probable cause to arrest F.M. for interfering with the educational process in violation of N.M. Stat. Ann. § 30–20–13(D). Put another way, in our view, such an officer could have reasonably believed—even if mistakenly—that the officer possessed probable cause under section 30–20–13(D) to arrest F.M. . . . .At the outset, we note that there are *no* Supreme Court or published Tenth Circuit decisions addressing the contours of probable cause to arrest under New Mexico's interference-with-educational-process statute. . . .A.M. insists that Officer Acosta's arrest of F.M.

for his burping and other horseplay in Ms. Mines–Hornbeck's classroom violated clearly established law because F.M.'s conduct patently did not rise to the level of seriousness envisioned by N.M. Stat. Ann. § 30–20–13(D) and 'no case [was] necessary to alert him [i.e., Officer Acosta] to this fact.'. . .As germane here, in assessing whether Officer Acosta had fair notice that his conduct would be unlawful in the circumstances he confronted (i.e., when he was deciding whether to arrest F.M.), we are guided, first, by the text of N.M. Stat. Ann. § 30–20–13(D) and, then, by any relevant state and federal decisions interpreting its import. . . . We believe the text of N.M. Stat. Ann. § 30–20–13(D) manifests the New Mexico legislature's intent to prohibit a wide swath of conduct that interferes with the educational process. . . .The ordinary meaning of these statutory terms would seemingly encompass F.M.'s conduct because F.M.'s burping, laughing, and leaning into the classroom stopped the flow of student educational activities, thereby injecting disorder into the learning environment, which worked at cross-purposes with Ms. Mines–Hornbeck's planned teaching tasks. More to the point, we cannot conclude that the plain terms of subsection (D) would have given a reasonable law-enforcement officer in Officer Acosta's shoes fair warning that if he arrested F.M. for engaging in his classroom misconduct he (i.e., the officer) would be violating F.M.'s Fourth Amendment right to be free from an arrest lacking in probable cause. . . .The body of relevant caselaw is very limited. . . In making its clearly-established-law argument, A.M. principally relies on a decision of the New Mexico Court of Appeals, *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (N.M. Ct. App. 1974). We conclude, however, that *Silva* does not get A.M. over her clearly-established-law hurdle. . . . In sum, if a reasonable officer in Officer Acosta's shoes had sought guidance from *Silva*, we do not believe that it would have given the officer fair warning that, if he elected to arrest F.M., he would be doing so without probable cause in violation of F.M.'s Fourth Amendment rights. Put another way, even if *Silva* was the controlling touchstone, Officer Acosta's belief that he had probable cause to arrest F.M. under section 30–20–13(D) was objectively reasonable—even if mistaken. Therefore, we conclude that A.M. cannot satisfy her clearly-established-law burden by relying on *Silva*.

A.M. v. Holmes, 830 F.3d 1123, 1151-56 (10th Cir. 2016) ("Although we agree with the district court's ultimate disposition regarding the excessive-force claim—*viz.*, we conclude that the court properly awarded qualified immunity to Officer Acosta—we expressly ground our decision on the *second* prong of the qualified-immunity rubric. Specifically, we conclude that the clearly established law in existence in May 2011 would not have apprised a reasonable police officer similarly situated to Officer Acosta that he could be held liable under § 1983 for a Fourth Amendment violation based on handcuffing a minor pursuant to a lawful arrest. . . . *Graham*, though certainly an excessive-force lodestar, provides no guidance concerning whether an officer, when effecting an arrest supported by probable cause, must refrain from using handcuffs because the arrestee is a minor (lest he open himself up to potential § 1983 liability). . . .In light of these post-*Atwater* decisions, we confidently conclude here that a reasonable officer in Officer Acosta's position would have understood *Atwater*'s general acceptance of handcuffing incident to a lawful arrest to indicate that, in the ordinary course, handcuffing any arrestee—absent some injury specifically caused by the application of the cuffs—is lawful. . . .Of course, we recognize that neither *Atwater* nor *Fisher* involved the distinguishable, critical factor of minor-child status.

However, it appears that no subsequent published Tenth Circuit decision has taken that variable into consideration in the excessive-force calculus. . . .Along these same lines, we have not uncovered any cases extant at the time of F.M.'s arrest that describe the state of the law and the right at issue as A.M. does. In fact, our study of the relevant caselaw cuts against any reasonable conclusion that a minor's purported right to avoid handcuffing during a lawful arrest was clearly established in May 2011. . . . In short, we hold that the then-extant clearly established law would not have apprised a reasonable officer in Officer Acosta's position that F.M.'s minor-child status should have negated his time-honored right to use handcuffs in effecting F.M.'s arrest. For these reasons, we conclude that the district court correctly awarded qualified immunity to Officer Acosta on this Fourth Amendment claim.")

A.M. v. Holmes, 830 F.3d 1123, 1157-61 (10th Cir. 2016) ("A.M. first contends with respect to Ms. Holmes that 'the district court erred in finding that F.M.'s Fourth Amendment rights were not clearly established' under extant caselaw as of November 8, 2011 (the date of the in-school search). . . Although the district court did base this aspect of its ruling on its determination that any constitutional right would not have been clearly established, in the exercise of our discretion, . . . we elect to resolve the issue on the first prong of the qualified-immunity standard. . . We conclude that the court correctly granted qualified immunity to Ms. Holmes on the unreasonable-search claim because, on A.M.'s version of the facts (insofar as they are borne out by the record), the search of F.M. was supported by reasonable suspicion. Thus, we rest our affirmance regarding this claim on our specific conclusion that A.M. has failed to carry her burden of demonstrating that Ms. Holmes committed a Fourth Amendment violation. . . . Though for purposes of qualified immunity we ordinarily do accept the facts that a plaintiff like A.M. alleges, we do so only insofar as those facts have a basis in the record—as relevant here, only insofar as A.M.'s account of the search does not patently conflict with the record's video footage. . . The video demonstrates that F.M. was first asked to remove his shoes and his jeans, leaving him in a short-sleeved shirt, a long-sleeved shirt, two pairs of athletic shorts, and boxer-shorts underwear. He then flipped down the waistband of his *outer pair* of athletic shorts, but he left undisturbed the waistbands of his other pair of athletic shorts and his boxer shorts. Finally, he removed his outer pair of athletic shorts and his outer (short-sleeved) shirt so that when the search concluded, he was still wearing a long-sleeved shirt, a pair of athletic shorts, and underwear. Soon afterward, he got dressed as he had been prior to the search. Based on this sequence of events, we believe A.M. stretches the term 'strip search' beyond recognition in her attempt to apply it here. . . The video unequivocally shows that F.M. was only prompted to remove outer clothing and that he was wearing additional layers of non-intimate street clothing underneath the removed items. Thus, because the scope of the search at all times remained reasonable, the search satisfied the strictures of the Fourth Amendment.")

A.M. v. Holmes, 830 F.3d 1123, 1169-70 (10th Cir. 2016) (Gorsuch, J., dissenting) ("If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just

escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that's so. Respectfully, I remain unpersuaded. The simple fact is the New Mexico Court of Appeals long ago alerted law enforcement that the statutory language on which the officer relied for the arrest in this case does not criminalize 'noise[s] or diversion[s]' that merely 'disturb the peace or good order' of individual classes. *State v. Silva*, 86 N.M. 543, 525 P.2d 903, 907 (N.M. Ct. App. 1974). Instead, the court explained, the law requires 'a more substantial, more physical invasion' of the school's operations—proof that the student more 'substantially interfered' with the 'actual functioning' of the school. . . What's more, other state courts have interpreted similar statutes similarly. They've sustained criminal convictions for students who created substantial disorders across an entire school. [citing cases] But they've also refused to hold students criminally liable for classroom antics that 'momentarily divert[ed] attention from the planned classroom activity' and 'require[d] some intervention by a school official.'. . .Respectfully, I would have thought this authority sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far. In response, my colleagues suggest that *Silva* is distinguishable because it interpreted not the state statute addressing misconduct in public schools on which the officer here relied, *see* N.M. Stat. Ann § 30–20–13(D), but another statute dealing with protests at colleges, *see* N.M. Stat. Ann. § 40A–20–10(C) (1972). And that much is true enough. But the unobscurable fact remains that the relevant language of the two statutes is *identical*—requiring the government to prove that the defendant 'commit[ed] any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions' of a school. *Silva* expressly held that *this* language does *not* criminalize conduct that disturbs 'merely the peace of the school session' but instead requires proof that the defendant more substantially or materially 'interfere[d] with the actual functioning' of the school. . . Neither do my colleagues offer any reason why a reasonable officer could have thought this same language carried an entirely different meaning when applied to public school burps rather than college sit-ins—and the parties supply none. . . My colleagues likewise dismiss the authority from other states interpreting similar statutes similarly. . . But again it's hard to see why. After all, these cases draw the same distinction suggested by *Silva*—between childish pranks and more seriously disruptive behaviors—and hold that only the latter are prohibited by statutes like the one before us today. . . .Often enough the law can be 'a ass—a idiot,' Charles Dickens, *Oliver Twist* 520 (Dodd, Mead & Co. 1941) (1838)—and there is little we judges can do about it, for it is (or should be) emphatically our job to apply, not rewrite, the law enacted by the people's representatives. Indeed, a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels. So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands—and in that I see the best of our profession and much to admire. It's only that, in this particular case, I don't believe the law happens to be quite as much of a ass as they do. I respectfully dissent.")

Cox v. Glanz, 800 F.3d 1231, 1247 (10th Cir. 2015) ("Like Sheriff Glanz does in his arguments before us, we elect to focus on the second prong—wherein we inquire whether, under Ms. Cox's

version of the facts, then-extant clearly established law would have given Sheriff Glanz fair warning that he could be held liable for his conduct under a supervisory-liability theory for violating Mr. Jernegan's Eighth Amendment rights. . . We conclude that the right that Ms. Cox's claim implicates—i.e., generally, an inmate's right to proper prison suicide screening procedures during booking—was not clearly established in July 2009. . . . Significantly, Ms. Cox has not directed our attention to any Supreme Court or Tenth Circuit decision (published or otherwise) that would indicate that this right was clearly established in 2009. . . and the district court likewise did not rely on any such law. Nor, for that matter, has Ms. Cox attempted to shoulder her burden by showing that 'the clearly established weight of authority from other courts ... ha[s] found the law to be as [she] maintains.'. . On this basis alone, we could hold that Ms. Cox has not properly laid the groundwork to defeat Sheriff Glanz's assertion of qualified immunity. In the interest of thoroughness, however, we have surveyed the then-extant caselaw that *would* have guided the Sheriff's endeavors to conform his supervisory conduct to constitutional norms. The results of our survey are detailed *infra.* Viewing the clearly-established-law question in this survey's light, we confidently conclude that the extant clearly established law in July 2009 would not have put a reasonable official in Sheriff Glanz's position on notice that his supervisory conduct would effect an Eighth Amendment violation.")

Moral v. Hagen, 553 F. App'x 839, No. 13–3129, 2014 WL 341440, *1, *2 (10th Cir. Jan. 31, 2014) ("Only recently the Supreme Court explained that it remains unsettled under current law whether an officer violates the Fourth Amendment by initiating an arrest for retaliatory reasons when the arrest itself happens to be supported, as an objective matter, by probable cause. *See Reichle v. Howards,* 132 S.Ct. 2088 (2012). Because this scenario (retaliatory animus but objective probable cause) does not offend clearly established law, the Supreme Court granted qualified immunity to the officers in *Reichle. Id.* We see no lawful way the district court could have reached a different result in this case. . . .Ms. Moral complains that the district court did not resolve the first question in the qualified immunity sequence (whether an arrest objectively supported by probable cause but allegedly made with a retaliatory motive violates the Constitution) before proceeding to the second question in that sequence (whether any such violation was clearly established at the time of Agent Hagen's actions) and resolving it against her. But district courts are generally free to proceed directly to the second step of the qualified immunity analysis where, as here, it is sufficient to dispose of the case.")

Becker v. Bateman, 709 F.3d 1019, 1022-25 (10th Cir. 2013) ("In reviewing the grant of summary judgment to Officer Bateman, we decline to consider whether the district court erred in concluding no constitutional violation occurred and instead opt to address whether the rights at issue were clearly established at the time of the alleged violation. . . .In *Novitsky v. City of Aurora,* 491 F.3d 1244, 1255–56 (10th Cir.2007), this court considered whether an officer's application of a 'twist lock' maneuver to a potentially intoxicated individual found in the backseat of a vehicle constituted a violation of clearly established law. The court concluded a reasonable jury could have concluded the officer's use of the twist lock was unreasonable under the Fourth Amendment. . . The court nonetheless concluded the officer was entitled to qualified immunity, however, because 'the risks

presented by potentially intoxicated individuals are inherently fact-dependent and the extent to which an officer may use force in such situations has not been definitively answered by this circuit.'. . The court reached this conclusion notwithstanding authority in other circuits discussing at greater length 'the extent to which law enforcement officers may use forceful techniques to protect themselves from the risks presented by potentially intoxicated individuals.'. . *Novitsky* thus indicates there was no clearly established law as of 2007 regarding the appropriate level of force which may be used to arrest a potentially intoxicated person during a stop. Accordingly, because the conduct in Becker's complaint took place in 2005, Becker cannot carry his burden under the second prong of the qualified immunity analysis. . . . The only case published before the incident here involving analogous facts is *Santos v. Gates*, 287 F.3d 846, 853–54 (9th Cir.2002). In *Santos*, the Ninth Circuit concluded there existed a disputed issue of material fact whether the police used excessive force in taking an intoxicated plaintiff to the ground and thereby breaking his back. . . This single published decision from another circuit, however, falls short of demonstrating 'the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'. . Moreover, the summary judgment record does not establish Officer Bateman's conduct was so obviously egregious as to diminish the specificity needed from prior case law to clearly establish the violation. . . Because Becker has thus failed to carry his burden to show the law was clearly established at the time of the incident, the district court properly concluded Officer Bateman was entitled to qualified immunity for Becker's excessive force claim.")

Becker v. Bateman, 709 F.3d 1019, 1025-27 (10th Cir. 2013) ("The district court disposed of Becker's claim against both Officer Bateman and the City based on its conclusion that Officer Bateman did not violate Becker's constitutional rights. While it was unnecessary to review that conclusion in reviewing the district court's grant of summary judgment to Officer Bateman, it is necessary to review that conclusion with respect to the City. . . Citing *Mecham v. Frazier*, 500 F.3d 1200, 1203 (10th Cir.2007), the district court concluded there were no disputed issues of material fact because the events giving rise to his claim were recorded on Officer Bateman's dash cam. It therefore undertook to consider whether Officer Bateman's actions were objectively reasonable, considering the severity of the underlying offense, whether Becker posed an immediate threat to the safety of Officer Bateman or others, and whether Becker was actively resisting arrest. . . The district court resolved the first two of these factors in Becker's favor, noting that "'t]he underlying offense—a cracked windshield—was not severe' and 'nothing in the video suggests that [Becker] was going to act violently or intended to flee.'. . The court also concluded, however, that the video made clear Becker was resisting arrest, and Becker's size, obstinance, and intoxication all created a situation 'permeated with unknowns.'. . It therefore concluded Officer Bateman's actions were objectively reasonable and did not violate Becker's constitutional rights. . . .Here, however, notwithstanding the dash cam video, the relevant facts are controverted, and the evidence construed in the light most favorable to Becker would establish a violation of his Fourth Amendment rights. That is, reasonable jurors could conclude Becker was not resisting arrest at the time he was taken to the ground by Officer Bateman. . . To be sure, reasonable jurors could agree with the district court's assessment of the video. That is, reasonable jurors could agree that Becker's language and actions after Officer Bateman told him he was under arrest. . . 'indicate

a clear resistence of arrest' which made the amount of force used objectively reasonable. . . . Because there exist disputed issues of material fact which, when construed in the light most favorable to Becker, establish Officer Bateman used excessive force, the district court erred in concluding as a matter of law Officer Bateman's actions did not violate Becker's Fourth Amendment rights.")

Allstate Sweeping, LLC v. Black, 706 F.3d 1261, 1268(10th Cir. 2013) ("As stated previously, we will assume, without deciding, that hostile-work-environment claims are proper under both § 1981 and the Equal Protection Clause. But Allstate cites to no cases, nor can we find any, holding that the harassment endured by the principals of an artificial entity can give rise to a racial- or gender-discrimination claim on behalf of the entity itself, absent independent injury to the entity. Indeed, it is not clear to us that an artificial entity could ever prevail on a hostile-work-environment claim. Such a claim has a subjective, as well as an objective, component; there must be proof that 'the plaintiff was offended by the work environment.'. . Being *offended* presupposes feelings or thoughts that an artificial entity (as opposed to its employees or owners) cannot experience. Perhaps Allstate had a right not to be injured because of hostility directed at its owners or employees—for example, by losing money because its employees had lower morale or quit. . . But Allstate has made no such claim. Black was therefore entitled to summary judgment on Allstate's hostile-work-environment claim.")

Lynch v. Barrett, 703 F.3d 1153, 1159-63 (10th Cir. 2013) ("The problem with Defendant Officers argument is that at this stage of the litigation we have no jurisdiction to resolve '*fact*-related disputes about the pretrial record, namely, whether ... the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.'. . Yet this is precisely what Defendant Officers propose we resolve. . . . We choose to belabor this matter no further. Instead we now simply *assume* (1) a police cover-up designed to hinder pursuit of a legal claim may violate an individual's constitutional right to court access and (2) the facts set forth in the district court's order are sufficient to warrant a finding that Defendant Officers violated Plaintiff's right in this case. This allows us to broach the more manageable question of whether Plaintiff's right to court access was clearly established in the specific context of this case. . . .To overcome Defendant Officers' claim of qualified immunity, Plaintiff must show the scope of his right to court access was sufficiently clear such that a reasonable officer would have understood Defendant Officers' refusal to name those responsible for exercising excessive force against him was not merely ill-advised, but violated that right. . . . [S]imply to say the Constitution recognizes a right to court access casts too high a level of generality over our inquiry. To show *his* alleged right to court access was clearly established in the proper sense, Plaintiff should identify 'cases of controlling authority ... at the time of the incident ... [or] a consensus of cases of persuasive authority' clearly establishing the scope of the right encompasses the facts presented, 'such that a reasonable officer could not have believed that his actions were [consistent with that right].'. . In 2002, the Supreme Court in *Harbury* 'was careful not to endorse the validity of ... backwards looking [right to access] claims.'. . Henceforth, the Supreme Court has never defined the right of court access to include a backwards looking claim based on a 'conspiracy of silence' aimed at interfering with an individual's ability

to procure evidence of official misconduct. Nor have we ever endorsed such constitutional claim. . . . At least in the Tenth Circuit, the question of whether an evidentiary cover-up by police officials may violate an individual's constitutional right to court access was not clearly established at the time of the alleged violation. A reasonable officer might not have understood what Defendant Officers did (or refused to do) violated that right. . . . In other words, whether the scope of the right to access extended as far as Plaintiff claims was 'far from obvious.'. . What is obvious is that such right as defined by Plaintiff was not clearly established.")

Estate of Bleck ex rel. Churchill v. City of Alamosa, Colo., 540 F. App'x 866 (10th Cir. 2013) ("We ultimately conclude that, even assuming that Officer Martinez's conduct amounted to a seizure of Mr. Bleck under the Fourth Amendment (based on the current state of the law), that legal outcome would not have been forecasted by clearly established law at the time. Consequently, Officer Martinez is entitled to qualified immunity. And, on this basis, we uphold the district court's judgment as to him. . . . *Brower*, and in particular, its gun hypothetical, could not have provided adequate notice to Officer Martinez of the assumed unlawfulness of his conduct. . . . Furthermore, Mr. Bleck has cited no cases—nor have we been able to locate any—where a court, in ruling on a fact pattern like the one at issue here, has found a Fourth Amendment violation. In sum, viewed objectively, we do not believe that it would have been clear and beyond debate to Officer Martinez that, when he elected to keep his gun in his hand as a show of authority, he could be found to have *intentionally* effected a Fourth Amendment seizure of Mr. Bleck when the gun *accidentally* discharged. Accordingly, we conclude that Officer Martinez cannot be found to have violated clearly established law and is entitled to qualified immunity.")

Elwell v. Byers, 699 F.3d 1208, 1213, 1217-19 (10th Cir. 2012) ("The concurrence would not have us address the constitutional question. We conclude that the question is appropriately considered for two reasons. First, the district court's legal ruling was that a protected liberty interest exists, and that is the issue before us on appeal. We can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court. . . The statutory basis of the district court's conclusion does not foreclose our review of the constitutional question. Second, . . . both the Supreme Court in *Smith v. Organization of Foster Families for Equality & Reform,* 431 U.S. 816 (1977) (hereinafter '*OFFER*'), and we in *Spielman v. Hildebrand,* 873 F.2d 1377 (10th Cir.1989), dodged the constitutional issue presented in this case. As the Court recently reaffirmed, addressing the constitutional issue is often 'advantageous' under such circumstances. . . . By passing over the constitutional issue on multiple occasions, courts have failed to clarify the law with the result that these tragedies continue to occur without legal recourse to the victims. Accordingly, we proceed to the constitutional question. . . .We recognize that the typical foster care arrangement generally does not create a liberty interest in familial association. . . But the Elwells, who had cared for T.S. nearly his entire life and were on the verge of adopting him, fall closer to the status of adoptive parents than in the ordinary, temporary foster arrangement. Thus, we do not need to define precisely where the liberty interest threshold falls on this spectrum, but conclude that the Elwells fall on the protected side of that line under the facts of this case. . . . The Elwells claim entitlement to the bare minimum of process—notice. We have no difficulty

concluding that the Elwells' interest entitled them to this 'elementary and fundamental requirement.'. . Accordingly, we affirm the district court's conclusion that the Elwells' constitutional rights were violated when T.S. was removed from their home without any advanced notice. . . . *Spielman* is the only Tenth Circuit decision on point, and given its assumed-but-not-decided conclusion as to whether preadoptive parents possess a liberty interest, . . . it surely cannot have rendered a violation clearly established. The effect of that decision was just the opposite: *Spielman* left the law unclear. The Elwells claim that a single case decided by the Eastern District of Pennsylvania clearly established that certain foster parents possess a liberty interest in maintaining their family structure. . . Although the precise quantum of case law sufficient to clearly establish a violation is a matter of some dispute, we think it quite evident that a single case from an out-of-circuit district court cannot clearly establish the law in the Tenth Circuit. Moreover, *McLaughlin's* holding was grounded in state law, making it inapplicable in light of our conclusion that Kansas law did not give rise to the Elwells' protected interest. The district court concluded that the Kansas statute itself clearly established the constitutional violation. But as explained in § II.B.1, *supra*, we conclude that the statute did not create a constitutionally cognizable liberty interest, let alone clearly establish one. Although Kan. Stat. Ann. § 38–2258 (2007) might have apprised the defendants that their conduct was contrary to state law, it could not have established that removal of T.S. without notice was unconstitutional for qualified immunity purposes. . . A violation of state law does not necessarily violate the constitution. And on the constitutional question, no court had answered whether preadoptive parents in the Elwells' position possessed a liberty interest in familial association. The Elwells suffered a devastating violation of their Fourteenth Amendment rights, and we are not insensitive to their plight. But given the state of the case law, we must reverse the district court's qualified immunity determination.")

Toevs v. Reid, 685 F.3d 903, 910, 914-16 (10th Cir. 2012) ("This is one of those cases in which it is appropriate for the court to exercise its discretion to avoid avoidance. As shown by Mr. Toevs's seven-year placement in the QLLP [Quality of Life Level Program], prison officials' actions here are of a longstanding nature. . . .We are neither mandating the implementation of a stratified behavior- modification program nor imposing any particular structure on any such program. We simply hold that, if a prison system wishes to encourage better behavior by implementing a stratified incentive program that involves an atypical and significant hardship, it must provide meaningful individualized reviews to prisoners to help them progress through the program. . . . In these circumstances (and given that the defendants have waived any argument about the existence of a liberty interest), we have no hesitation in concluding that the failure to give Mr. Toevs any reviews at Levels 4, 5, and 6 violated his right to due process. . . . Even though Mr. Toevs did not receive meaningful periodic reviews, we conclude that defendants are entitled to judgment based on qualified immunity because it was not clearly established in 2005 through 2009 that the review process was inadequate. . . .Since *Hewitt,* it has been clearly established that prisoners cannot be placed indefinitely in administrative segregation without receiving meaningful periodic reviews. . . This court, however, has not previously interpreted 'meaningful' to require officials to inform prisoners placed in a stratified behavior-modification program of the reasons for their continued placement, so as to provide a guide for future behavior. Moreover, this court has never considered

the due-process implications of the QLLP. Accordingly, we cannot conclude that the state of the law from 2005 to 2009 gave defendants fair warning that the QLLP review process was not meaningful, or that the lack of reviews at QLLP Levels 4 through 6 was a due-process violation. Because the law was not clearly established, defendants are entitled to judgment based on qualified immunity.")

Kerns v. Bader, 663 F.3d 1173,1180-82 (10th Cir. 2011) ("[T]he Supreme Court has recently instructed that courts should proceed directly to, 'should address only,' and should deny relief exclusively based on the second element, *Camreta v. Greene,* 131 S.Ct. 2020, 2032 (2011), in seven particular circumstances outlined in [*Pearson*]. . . . With respect to the last consideration, constitutional avoidance, the Supreme Court has told us that courts may 'avoid avoidance'–and so answer the first qualified immunity question before proceeding to the second–in cases involving a recurring fact pattern where guidance on the constitutionality of the challenged conduct is required and the conduct is only likely to be challenged within the qualified immunity regime. . . But the Court has also told us that this should be the exception, not the rule–that as a general matter, constitutional avoidance considerations trump and 'courts should think hard, and then think hard again, before turning small cases into large ones.'. . .[T]he district court's opinion addressed only the *first* part of the *two* part test for qualified immunity. What to do when the district court fails to address the second, clearly established law, element? If it were clear that no constitutional violation took place, as the defendants urge, we might simply reverse the district court and grant qualified immunity. But the answer to that question isn't so clear in this case. Faced with *that* problem we usually do well–as *Pearson* and *Camreta* remind us–to proceed directly to the clearly established law question when we're sure it yields immunity anyway. But there again the answer isn't so obvious in this case. So it is that we are left in a situation without obvious answers to either qualified immunity question and risk confronting difficult constitutional questions without the benefit of a full analysis from the district court. In these circumstances, there remains, however, another course available to us–remanding the matter back to the district court to finish the work of answering the second qualified immunity question. . . That course bears the advantage of allowing the adversarial process to work through the problem and culminate in a considered district court decision, a decision that will minimize the risk of an improvident governing appellate decision from this court. And that course is especially prudent where, as here, the issue is close and the briefing on appeal less than entirely satisfactory. Indeed, many of the same considerations that *Pearson* and *Camreta* identify as counseling in favor of proceeding directly to the second qualified immunity element–the possibility of avoiding a needless constitutional question, the quality of briefing, and the desire to avoid the risk of a poor decision–also counsel in favor of remanding to ensure the district court addresses the second element before we begin to tangle with a case on appeal. And it is for these very reasons that we reserve decision on both aspects of the qualified immunity question in this case until after the district court, on remand, has finished its work on the clearly established law prong.")

Kerns v. Bader, 663 F.3d 1173, 1183-87 (10th Cir. 2011) ("Mr. Kerns submitted only that, whoever owned the records and whatever other laws may say about how and when they might be

shared with law enforcement, he had a constitutionally protected expectation that the hospital would keep its records shielded from the Sheriff absent a warrant. The district court analyzed both aspects of the qualified immunity test before agreeing. On appeal, the Sheriff disputes whether he violated Mr. Kerns's constitutional rights by asking a hospital to share its records voluntarily–and, if he did, whether those rights were clearly established at the time. Because we agree with Sheriff White on the latter (clearly established law) question, we reverse without addressing the former (constitutional violation) question. And we pursue this course because doing so allows us to avoid rendering a decision on important and contentious questions of constitutional law with the attendant needless (entirely avoidable) risk of reaching an improvident decision on these vital questions. . . . Given this court's express recognition of the uncertain state of the law in 2005 regarding the very circumstances we now face, we are hardly in a position to say that the proper resolution of the issue was simultaneously beyond doubt. . . .To be sure, Mr. Kerns cites two cases in which this court held that government officials violated plaintiffs' substantive due process privacy rights by accessing their records without public disclosure. But both of those cases involved another element not present here: the government officials involved accessed the plaintiffs' confidential information as part of an unlawful campaign of sexual harassment. . . . Of course, a case on point isn't required if the impropriety of the defendant's challenged conduct is clear from existing case law. If we could be sure that the distinction between public disclosure or government access without a valid purpose, on the one hand, and more limited government access for otherwise legitimate purposes, on the other, is a trivial one we would rule in Mr. Kerns's favor. . . The difficulty is that the Supreme Court in *Whalen* and *NASA* and the logic of our own cases preclude such a conclusion and acknowledge instead that such a distinction *might* make a constitutional difference. . . . The dissent eloquently argues that if the scope of Mr. Kerns's Fourth and Fourteenth Amendments rights in third party held medical records isn't clear enough then we should use this case to address the matter definitively. But to voice this argument is to confirm that the issue we confront today *hasn't* yet been clearly resolved–and why qualified immunity is unavoidable. The Supreme Court has warned us that small qualified immunity appeals are rarely the right place to decide large new issues of constitutional law. We always do well to abide its warnings. And perhaps especially so here, where the Fourth and Fourteenth Amendment questions surrounding medical records are complex, the third party overlay adds another dimension to the problem, the parties' briefing unhelpfully skates past many of the important issues, and the lack of clearly established law is readily apparent from our case law and that of the Supreme Court. So it is we leave the bigger questions for another day and today rest our decision on a much humbler premise, reversing the district court's entry of summary judgment against Sheriff White and ordering the entry of summary judgment in his favor only because Mr. Kerns has failed to identify clearly established law rendering beyond debate that the Sheriff's conduct was unlawful as of 2005.")

Kerns v. Bader, 663 F.3d 1173, 1198 (10th Cir. 2011) (Holloway, J., dissenting) ("Sheriff White's asking the VA for Mr. Kerns's private medical records in the circumstances existing here is so far out of the realm of constitutional behavior that we should not hesitate to hold that it was unlawful, even if we did not have precedents closely on point that mandate that result. But the precedents

that do exist are easily close enough on point that any reasonable law enforcement officer would have known that constitutionally protected medical records cannot be obtained simply because a possibility exists that the information would be helpful. Constitutional protection means that such records cannot be routinely obtained without a warrant, without consent, without probable cause, and without exigent circumstances.")

[*See also* ***Kerns v. Board of Com'rs of Bernalillo County***, 888 F.Supp.2d 1176, 1222 n.35 (D.N.M. 2012) (Browning, J.) ("While the Court is, of course, obligated to follow faithfully the Supreme Court's decisions and opinions, the Court has always been unenlightened and even troubled by Justice Elena Kagan's comments in *Camreta v. Greene* about 'large' and 'small' cases. . . . As a trial judge, the Court has tried assiduously to avoid thinking about or categorizing some cases as 'large' and some as 'small.' It usually is not mentally healthy for a judge to put all his or her energy into 'large' cases and slight 'small cases'; to the litigants, their case is the most important case on the Court's docket, and it is usually wise for the judge to treat each case on which he or she is working—at that moment—as the most important case at that moment. Getting the decision 'right,' i.e. getting the law and facts correct and accurate, is obviously important, but getting it right is only one-half of a judge's task, particularly a trial judge's job. The other half of dispensing justice is the appearance of justice—did the Court listen to the litigant's arguments, wrestle with those arguments, and deal with them in an intellectually honest way. Americans are pretty good about accepting a judicial decision—even an adverse one—and cease obsessing over an issue, if they are convinced that an authority figure has dressed up, taken them seriously, listened patiently and politely, wrestled with the arguments, addressed them, and accurately stated the facts. The Court believes that, if it starts looking at some cases before it as 'large' and some as 'small,' it begins a slippery slope that does not accomplish both halves of the task of dispensing justice. The justice system depends so much on the nation respecting and accepting the courts' proceedings and decisions, because courts have very little 'power' that does not depend on that acceptance. Thus, Justice Kagan's comments are not only not self-defining, but they are disturbing. If, perhaps, a 'large' case is a Supreme Court case or one that comes from the East Coast or California, rather than one in a district court in New Mexico, then it helps to look at what cases the Supreme Court has decided for the plaintiff. The three most recent qualified immunity cases, the Supreme Court dealt with are: (i) *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012); (ii) *Filarsky v. Delia*, ——U.S. ——, 132 S.Ct. 1657, 182 L.Ed.2d 662 (2012); and (iii) *Messerschmidt v. Millender*, —— U.S. ——, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012). In *Reichle v. Howards*, the Supreme Court determined that secret service agents were entitled to qualified immunity for arresting a protestor who touched the Vice President and held that it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. . . In *Filarsky v. Delia*, the Supreme Court held that a private individual that the government hires to do its work, an internal affairs review, is entitled to seek qualified immunity for Fourth and Fourteenth Amendment violations. . . In *Messerschmidt v. Millender*, the Supreme Court held that police officers in Los Angeles, California were entitled to qualified immunity when they relied on an invalid warrant to search a home, because a reasonable officer would not have realized the error. . . The Supreme Court has not denied qualified immunity since

2004 in *Groh v. Ramirez,* 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), where it held that an officer unreasonably relied on a deficient warrant. . . The Court does not think those presumably 'large' cases (they are Supreme Court cases, after all) are any different—substantively, legally, or factually—than this case involving the search of a citizen's home after someone shot down a police helicopter and then detained that suspect for nine months until the United States realized that J. Kerns could not have shot down the helicopter. On the flip side, treating large cases like they are large cases can create an appearance problem to the public and to the litigants—that only big cases deserve the Court's attention. A trial judge can overwork a 'large' case. It is better to treat even 'large' cases like every other case; large cases and their litigants need to know and appreciate that they are not the only case on the court's docket, and realize that the scarcity of judicial resources applies to them too.")]

Whitington v. Lawson, No. 10-1299, 2011 WL 2144549, at *3, *4 (10th Cir. June 1, 2011) (not published) ("*Penrod* involved a prisoner's allegation that he was denied hygiene items by an intentional and retaliatory decision by prison officials to punish him for filing grievances and for seeking relief in court. Whitington's claim, by contrast, is not presented as a retaliation claim. *Penrod* did not establish a general rule that a prison could never, even without a retaliatory motive, apply existing policies that had the incidental effect of compelling an inmate to choose between hygiene items and payment of litigation costs. As we have now recognized, *see Whitington,* 307 F. App'x at 189, such policies may indeed violate the constitutional rights of inmates, but our case law did not clearly establish that rule during the time period relevant to Whitington's complaint. In sum, we conclude that at the pertinent time the law was not clearly established that prison officials violated the Eighth Amendment by requiring an inmate to use funds in his prison account to purchase hygiene products, even if he did not have sufficient funds to purchase these products because of the payment of expenses for constitutionally protected litigation. Hence, the district court properly granted qualified immunity on Whitington's claims against the defendants in their individual capacities.").

Leverington v. City of Colorado Springs, 643 F.3d 719, 732, 733 (10th Cir. 2011) ("The Supreme Court in *Pearson* made clear that courts have discretion to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . .In this case, it was not clearly established that Ms. Leverington's statement to Peters did not constitute a 'true threat' unprotected by the First Amendment. . . . Here, even drawing all reasonable inferences in favor of Ms. Leverington, it is debatable whether a reasonable officer in Peters's position would have considered her statement to be a threat. Accordingly, Ms. Leverington's free-speech rights in this context were not clearly established, and Peters is entitled to qualified immunity on this basis. In addition, it was not clearly established that Ms. Leverington's statement was 'protected' for another reason–as discussed above, it was not on a matter of public concern. . . . [W]e need not–and do not–decide here whether the public-concern test applies in the context of a *Worrell* inquiry. It is sufficient that the law was not clearly established on this point, and thus that Peters is entitled to qualified immunity on this basis as well.")

PJ ex rel. Jensen v. Wagner, 603 F.3d 1182, 1197, 1198 (10th Cir. 2010) ("The district court concluded that the Jensens failed to show that any defendant violated their right to direct P.J.'s medical care. Because the district court decided this issue under the first prong of the qualified immunity analysis, it did not have occasion to consider whether the Jensens' right to direct P.J.'s medical care in the circumstances presented in this case was clearly established at the time of the alleged violations. Furthermore, on appeal, the Jensens confine their argument to the first prong of the qualified immunity analysis and assume that under the circumstances of this case their right to direct P.J.'s medical care is clearly established. We reject this assumption and conclude that the Jensens' right to direct P.J.'s medical care in this case–if any right indeed exists in such circumstances–was not clearly established at the time the Jensens allege the right was violated. [Discussing case law] Here, the state was endowed with. . . broad authority, and the Jensens do not direct us to a clearly established constitutional line that defines what a state can and cannot do to protect a child whose life is compromised by his parents' refusal to obtain medical care. . . Accordingly, under the circumstances of this case, the Jensens' asserted right to direct P.J.'s medical care was not clearly established at the time of the alleged violations; therefore, they cannot overcome the defendants' claims of qualified immunity. . . . In contrast to the Jensens' purported right to direct P.J.'s medical care in this case, we resolve their claims regarding their substantive due process right to familial association and their procedural due process rights on the first prong of the qualified immunity inquiry–namely, that the Jensens have not shown a violation of their constitutional rights.")

Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708, 713 (10th Cir. 2010) ("When a defendant asserts qualified immunity in a motion for summary judgment, the burden shifts to the plaintiff who must satisfy a heavy two-part burden. . . The plaintiff must show the defendant's conduct violated a constitutional right, and the right was clearly established at the time of the defendant's conduct. *Pearson v. Callahan*, 129 S.Ct. 808, 815-16 (2009). Though it is often helpful, the court need not resolve the inquiry in this particular order. *Id.* at 818. Here, the court opts to proceed with the constitutional inquiry first." (goes on to hold public employee's speech was pursuant to official duties and not protected by First Amendment))**.**

Weise v. Casper, 593 F.3d 1163, 1167, 1170 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010) ("In their discretion, courts are free to decide which prong to address first 'in light of the circumstances of the particular case at hand.'. .The *Pearson* Court recognized that skipping the constitutional violation question may conserve judicial resources in 'cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'. .Some cases are so fact-bound that deciding the constitutional question offers 'little guidance for further cases.'. .Further, proceeding directly to the 'clearly established' question may avoid the risk of deciding a case incorrectly given insufficient briefing on the constitutional violation question. . . Although it is unclear whether Defendants' alleged conduct violated Plaintiffs' constitutional rights, it is obvious that the rights were not clearly established at the time of the violation. . . . In sum, no specific authority instructs this court (let alone a reasonable public

official) how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area. To be sure, in some obvious situations, general authority may put a reasonable public official on notice that his or her conduct is violative of constitutional rights. This is not one of them. Because it is plain that the constitutional right claimed was not clearly established at the time of the alleged violation, Defendants are entitled to qualified immunity. Therefore, we need not reach the question of whether Defendants violated Plaintiffs' constitutional rights.")

Weise v. Casper, 593 F.3d 1163, 1172-74 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7 (2010) (Holloway, J., dissenting) ("I am persuaded that this is a case in which the issue of whether a right has been violated should be addressed at the outset. In recent years there have been several cases across the nation in which citizens have sought redress for alleged infringement of their fundamental liberties under somewhat similar circumstances. . .Because the right of free speech on matters of public concern is so vital to our democracy, these are important cases, and the judiciary has a valid and vital role in our society's response. The importance of the issues raised in this appeal should weigh heavily in favor of our consideration of them on the merits. . . . The issue thus framed is stark: Defendants excluded Plaintiffs from the President's public speech–after they had obtained tickets, cleared security screening and been seated in the audience–due to the protected expression by one of them outside the event. . . The question, then, is whether the Constitution permitted Defendants to take this action against Plaintiffs for this reason. The answer, informed by decades of free speech jurisprudence–must be a resounding 'no.'").

Nielander v. The Board of County Com'rs, 582 F.3d 1155, 1166, 1169 (10th Cir. 2009) ("We are permitted to address whether the law is clearly established before addressing whether a constitutional violation has occurred. *Pearson*, __ U.S. at __, 129 S.Ct. at 818. . . . To make clear, we are not holding that qualified immunity is appropriate whenever there is an underlying question of historical fact (in this case, what Mr. Nielander actually said). Rather, we are holding that where a question of ultimate fact (in this case, whether a reasonable officer would be unreasonable in concluding that statement two was a true threat under clearly established federal law) cannot be resolved as a matter of law, the law is not clearly established and qualified immunity is appropriate. . . . Thus, Deputy Perez is entitled to qualified immunity on Mr. Nielander's First Amendment retaliation claim.")**.**

Swanson v. Town of Mountain View, Colo., 577 F.3d 1196, 1199, 1200, 1203, 1204 (10th Cir. 2009) ("Because we conclude the conduct here did not violate *clearly established* constitutional rights, we take the advice of *Pearson* and address that issue first. . . . Before turning to the relevant precedent, we want to emphasize that the alleged conduct is, to say the least, troubling. The plaintiffs assert the Mountain View police department established a policy of allowing its officers to perform routine traffic stops outside its town boundaries, and then prosecuted the violations as if they had occurred within the town itself. Whether as a matter of administrative convenience or revenue generation, enforcing traffic laws outside city limits where not specifically authorized by state law raises serious legal concerns. . .Nevertheless, for us to rule in this appeal on the precise

contours of the constitutional question raised by the town's policy is unnecessary because Tenth Circuit law did not clearly establish a Fourth Amendment violation at the time of the conduct. . . . [E]ven assuming a constitutional violation, a reasonable police officer would not have known in 2006 that the extra-jurisdictional, but within the same state, traffic stops constituted a violation of clearly established Fourth Amendment law, when no dispute exists that the officer observed traffic violations before effectuating the stops.").

Cordova v. Aragon, 569 F.3d 1183, 1188-95 (10th Cir. 2009) ("[W]e accept the district court's findings that a reasonable juror could find that Officer Aragon was not in immediate danger at the time of the shooting, and we ask only whether the potential risk to third parties created by Mr. Cordova's driving was alone sufficient to justify Officer Aragon's shooting him. . . . *Scott* strongly suggests that the reasonableness balancing must take into account that there is a spectrum of 'deadly force,' and that just because a situation justifies ramming does not mean it will justify shooting a suspect in the head. . . . We are therefore forced to consider whether the substantial but not imminent risk imposed on innocent bystanders and police by a motorist's reckless driving justifies a reasonable officer to use a level of force that is nearly certain to cause the motorist's death. This is not an easy question, or one that any court could feel confident in answering. . . . We do not believe it would be reasonable for an officer to shoot any motorist who ran a red light or swerved through lanes, simply because reckless driving poses some threat of physical harm to a bystander who might be down the road. Car chases inherently risk injury to persons who might happen along their course, and if that risk alone could justify shooting the suspect, every chase would end much more quickly with a swiftly-fired bullet. . . . When an officer employs such a level of force that death is nearly certain, he must do so based on more than the general dangers posed by reckless driving. . . . To the extent that the district court held that the hypothetical risk Mr. Cordova posed to fellow motorists who might happen along was itself enough to render the shooting reasonable, it was in error. The threat must have been more than a mere possibility. . . . The law in our circuit and elsewhere has been vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death. Given that our precedent does authorize the use of deadly force when a fleeing suspect poses a threat of serious harm to others, Officer Aragon was not unreasonable in believing that a potential threat to third parties would justify such a level of force. . . . Because the law was not clear on how high the risk of harm to third parties must be before an officer can use a level of force nearly certain to cause death, however, we **AFFIRM** on qualified immunity grounds the district court's grant of summary judgment as it applies to Officer Aragon.")

Cordova v. Aragon, 569 F.3d 1183, 1204, 1205 (10th Cir. 2009) (O'Brien, J., concurring in part and dissenting in part) ("The majority should have followed the lead of the Supreme Court and stopped with a holding of no violation of clearly established law. We are now unnecessarily committed to a contrary, and in my view, erroneous path. . . . Like the future danger recognized in *Scott*, Cordova's significant risk of future reckless behavior and dangerousness justified immediate action. Regardless of the justification provided by the imminent threat to Officer Aragon, the threat

Cordova posed to the general public also provided an independent justification for the use of deadly force.").

Callahan v. Millard County, 557 F.3d 1140, 1141 (10th Cir. 2009) ("The Supreme Court has now reversed our judgment, holding that courts no longer must decide qualified immunity based upon the sequence required by *Saucier v. Katz* . . . . The Supreme Court also held that the Defendants are entitled to qualified immunity because the law was not clearly established at the time of the incident in question. . . Clearly established law did not show that the Defendants' conduct violated the Fourth Amendment given general acceptance of the 'consent once removed' doctrine in 2002. . . In view of the Supreme Court's disposition, the judgment of the district court is AFFIRMED.")

Christensen v. Park City Mun. Corp., 554 F.3d 1271, 1276-78 (10th Cir. 2009) ("Until very recently, in a case of qualified immunity, district and appellate courts were required to resolve the issue of law before proceeding to whether it was clearly established. . . .Fortunately, very recently, while this opinion was being prepared, the Supreme Court jettisoned its prior holding that courts in qualified immunity cases must determine whether the plaintiff's constitutional rights were violated before turning to whether the asserted right was clearly established. . . .This case is a prime example of when the discretion to avoid the first half of the *Saucier* two-step should be exercised. To attempt to answer *Saucier's* first question would require us to opine on an open and significant issue of constitutional law on an inadequate record, without benefit either of a district court holding or of relevant briefing, even though the issue would have no effect on the outcome of the case. We therefore exercise our newfound discretion and move on. . . . Police officers are not constitutional lawyers, and they should not have to fear personal damages liability when they enforce the plain terms of an ordinance that has not been challenged in court, let alone overturned, unless its unconstitutionality is patent. There is no case law from the Supreme Court or the Tenth Circuit establishing–clearly or otherwise–that the conduct complained of by Mr. Christensen was unconstitutional in 2004, or even today. To be sure, the plaintiff cites a handful of decisions from courts in other circuits that lend support to his claim. Even setting aside the fact that two of the cases he cites post-date the incident, the cited decisions have not been so broadly accepted as to be considered the 'weight of authority.' Indeed, the decisions stand for somewhat different interpretations of the First Amendment as applied to sales of artwork on public property. We think it is too much to expect that law enforcement officers, however reasonable or well-informed, would have known in 2004 that it is unconstitutional to enforce a general ordinance prohibiting unlicensed outdoor business activity on public property against an artist wishing to sell his wares in a park.We therefore affirm the district court's holding that the claims against the individual officers must dismissed on qualified immunity grounds.").

V.W. ex rel. Wybrow v. DaVinci Academy of Science and the Arts, No. 1:09-CV-127 TS., 2001 WL 4001150, at *5, *6 (D. Utah Sept. 8, 2011) ("Whether the strip search in this case was constitutional under the framework established by *Safford* presents a close question. However, the Court need not ultimately determine whether V.W.'s constitutional rights were violated. Determining whether an official is entitled to qualified immunity is a two step process. First, the

court must determine whether the facts make out a constitutional violation. . . Second, the court must decide whether the right at issue as 'clearly established' at the time of the defendant's alleged misconduct. . . .The Supreme Court has made clear that courts have the discretion to determine 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . In this matter, the Court finds it prudent to address whether the constitutional right allegedly violated here was clearly established at the time of the search. The search at issue here occurred in December 2008. *Safford* was not issued until June 2009. The Court in *Safford* acknowledged that lack of uniformity concerning strip searches in the school setting prior to its decision and, as a result of that uncertainty, found that the law had not been clearly established at the time of the search in that case. . . Thus, the school officials in that case were entitled to qualified immunity. The same is true here. There was no controlling case law on the issue of strip searches in the school setting from either the Supreme Court or the Tenth Circuit at the time this search occurred. Therefore, the Court finds that Freeze and Raccuia are entitled to qualified immunity.")

ELEVENTH CIRCUIT

Montanez v. Carvajal, 889 F.3d 1202, 1208-09, 1211-12 & n.7 (11th Cir. 2018) ("[W]e hold that if police have probable cause to suspect a residential burglary—whether they believe the crime is currently afoot or has recently concluded—they may, without further justification, conduct a brief warrantless search of the home to look for suspects and potential victims. . . .Accordingly, whether the first two entries into Montanez's residence were constitutionally permissible turns on whether the officers had probable cause to suspect a burglary. If they did, then they could enter—and it seems clear to us that they did. . . .As already explained in detail, the officers' first two entries—during which they spotted the marijuana and paraphernalia—were justified under the exigent-circumstances doctrine. Once those entries occurred, Montanez lost any reasonable expectation of privacy in the areas already searched. The officers could thereafter enter and re-enter the residence to observe the contraband without separately violating the Fourth Amendment. . . .Because we conclude that the officers' entries didn't violate the Fourth Amendment, it goes without saying that no analogous precedent (or even obviously applicable general legal principle) 'clearly established' that their entries were unlawful. And indeed, the district court's order denying the officers qualified immunity never suggests otherwise. The court went to great lengths to distinguish cases *authorizing* warrantless entries in circumstances like those here, but it never pointed to (nor have we found) any law or precedent that even remotely clearly established a contrary rule. Accordingly, even if a case could be made that the officers' entries here violated the Constitution—and for reasons explained, we're confident that they didn't—the officers would still be entitled to summary judgment under the second prong of the qualified-immunity standard.")

Mikko v. City of Atlanta, 857 F.3d 1136, 1143, 1146-48 (11th Cir. 2017) ("The Supreme Court has told us that a district attorney's decision to hire or fire assistant district attorneys, although often crucial to the efficient operation of the office, is not protected by absolute immunity. . . It

would be passing strange to hold that while a prosecutor is not immune from liability for firing his own employees, he is immune for getting others to fire their employees. . . . The question is: In June of 2013, was it clearly established law in this circuit that it violates the First Amendment for prosecutors to seek to have a government employer fire an employee because he had furnished an expert opinion to, and planned to testify as an expert witness for, the defense in a criminal case in another state? Mikko contends that our predecessor Court's decision in *Rainey* answers that question. *See Rainey v. Jackson State Coll.*, 481 F.2d 347 (5th Cir. 1973). . . . The *Rainey* decision is sufficiently distinguishable from this case that it did not provide the prosecutors with 'fair warning' that their actions violated Mikko's First Amendment rights. For one thing, *Rainey* addressed the obligations that a public employer owes to its own employee. . . It did not address the duties that a governmental official or entity owes to an employee of another governmental entity. In this case, the two prosecutor defendants are not Mikko's employers or his supervisors, nor did they work in the police department with him. Not only that, but in *Rainey* the plaintiff had testified before he was hired by the defendant college that fired him. . . He was terminated for pre-employment conduct. Here, Mikko submitted his expert report and planned to testify while he was serving as an employee of the Atlanta Police Department, which is the entity that fired him. We do not mean to say that Mikko's report or his intended testimony was not protected by the First Amendment, which is an issue we need not decide. What we do mean to say is that the circumstances of the *Rainey* case and this one are different enough that *Rainey* did not put the constitutional issue in this case 'beyond debate.'. . Even if those two distinctions did not exist, we would still know that neither the 1973 *Rainey* decision nor any other decision clearly established at the time the prosecutors acted in June 2013 that their actions violated Mikko's First Amendment rights. We would know that because of the Supreme Court's 2014 decision in the *Lane* case, which arose in our circuit. *See Lane v. Franks*, 573 U.S. __, 134 S. Ct. 2369, 2378 (2014). In that case the Supreme Court held that a public employer did violate an employee's First Amendment rights by firing him because of his truthful sworn testimony that was compelled by subpoena and occurred outside the scope of his ordinary job responsibilities. . .More importantly for present purposes, however, the *Lane* Court also held that at the time the plaintiff in that case was fired in 2009 the law of our circuit did not clearly establish that it was a First Amendment violation to fire him. . . . That means the *Rainey* decision, which our predecessor Court decided in 1973, did not clearly establish that it violates the First Amendment for a government employer to fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities. . . If it had, the Supreme Court would have decided the qualified immunity issue in *Lane* differently. It is true that the prosecutors' conduct in this case occurred in June 2013, which was four-and-a-half years after the January 2009 conduct involved in the Supreme Court's *Lane* decision. But Mikko has not cited, nor have we found, any binding decision issued between January 2009 and June 2013 that clearly establishes that what the prosecutors did in this case violated the First Amendment. . . . In order for the law to be clearly established to the point that qualified immunity does not apply, the unlawfulness of the defendant's actions must be apparent in light of pre-existing law. . . No pre-existing law compelled that conclusion for the prosecutors under the circumstances of this case, and the Supreme Court's *Lane* decision shows

that the law of this circuit was not clearly established enough to do so. As a result, the prosecutors are entitled to qualified immunity.")

Jones v. Fransen, 857 F.3d 843, 851-55 (11th Cir. 2017) ("Here, we address the 'clearly established' inquiry first. Because we conclude that Jones's right was not clearly established in the specific context of the facts in this case, we do not reach the question of whether Defendants violated Jones's constitutional rights. When we consider whether the law clearly established the relevant conduct as a constitutional violation at the time that Defendant Officers engaged in the challenged acts, we look for 'fair warning' to officers that the conduct at issue violated a constitutional right. . . 'Fair warning' comes in the form of binding caselaw from the Supreme Court, the Eleventh Circuit, or the highest court of the state (Georgia, here) that 'make[s] it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates a federal law.'. .A plaintiff may demonstrate in any one of three ways that a defendant had "fair warning" that the right he violated was clearly established. . . . In his complaint, Jones asserts that Defendant Officers violated his Fourth Amendment right to be free from the use of excessive force. . . .The facts in Jones's case land somewhere between those involved in *Priester* and those in *Crenshaw*. The alleged crime arguably was more serious than Priester's yet less so than Crenshaw's. Jones purportedly stole a television from his former girlfriend's residence. And while domestic-related crimes certainly have the potential to be extremely serious and dangerous, nothing about this particular incident indicated that it fell into that category. At the time Jones's ex-girlfriend reported the theft, Jones was already out of the apartment, and his ex-girlfriend gave no indication that he had been violent or armed. On the other hand, when Jones fled police, unlike Priester, he did not ultimately overtly surrender himself. Instead, he led police into physically challenging terrain with brush and boulders, similar to the place where Crenshaw fled, and he did not respond in any way to Fransen's K-9 warnings. . . Like the *Crenshaw* officers, a reasonable officer in one of Defendants' places could have been concerned, at the time Draco was released, about entering the heavy brush to apprehend Jones and being met by a potential ambush. So Jones's case is not directly on all fours with either *Priester* or *Crenshaw*. As a result, neither case alone could have provided Defendant Officers with the type of 'fair notice' necessary to breach qualified immunity. And considering the cases together helps no more since *Priester* and *Crenshaw* reached opposite conclusions concerning whether an excessive-force violation occurred. We therefore turn to the second method for proving that the right in this case was clearly established at the time of the violation. . . The fact that the Fourth Amendment protects against the use of excessive force during an arrest does not provide an officer with any guidance as to what constitutes an excessive use of force. So this general principle is not the type of 'broader, clearly established principle [that] should control the novel facts [of the] situation' here. . . Finally, Jones did not argue—and particularly in light of *Priester* and *Crenshaw*, we cannot find—that Defendants' actions in this case 'lie [ ] so obviously at the very core of what the [Fourth Amendment] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.'. .For these reasons, we must conclude that Jones's constitutional right was not clearly established when Defendant Officers engaged in the challenged behavior. As a result, Defendant

Officers are entitled to qualified immunity, and the district court's ruling to the contrary must be reversed.")

Militello v. Sheriff of Broward Sheriff's Office, 684 F. App'x 809, 812 n.7, 815 (11th Cir. 2017) ("Consideration of the first prong of qualified immunity is unwarranted here as this case presents at least two of the circumstances identified in *Pearson*. First, Militello's failure-to-intervene claim presents a fact-bound Fourth Amendment issue for which a particularized analysis by our court would provide little precedential value. . . Second, we find that the second prong of qualified immunity presents a significantly easier question than the first prong. . . We therefore do not address whether Morel and Polk violated Militello's Fourth Amendment rights by failing to intervene. . . . In sum, nothing in our prior precedent put Morel and Polk on notice that, under these circumstances, they were required to take any particular action that they failed to take after hearing Daly-England's statement. Nor did our precedent inform Morel and Polk precisely of what reasonable actions they should have taken to insulate themselves from liability under these facts. Because all of these factors distinguish this case from those where officers have been found liable for failing to intervene when excessive force was used, we hold that Deputies Morel and Polk did not violate clearly established law. Therefore, they are entitled to qualified immunity. To conclude, we emphasize that we have only addressed whether Deputies Morel and Polk violated clearly established law. We need not (and do not) express any opinion as to whether Deputies Morel and Polk violated Militello's Fourth Amendment rights under the facts presented to the district court.")

Dukes v. Deaton, 852 F.3d 1035, 1042-44 (11th Cir. 2017) ("The facts construed in the light most favorable to Dukes establish that Deaton used excessive force. Deaton's conduct posed a significant risk of harm. He threw a flashbang that can generate heat in excess of 2,000 degrees Celsius into a dark room in which the occupants were asleep. He also failed to inspect the room, as he was trained to do, to determine whether bystanders, such as Dukes, occupied the room or if other hazards existed. And there existed minimal need for Deaton's use of force. True, the warrant stated that an informant advised law enforcement that Ward kept a handgun on his person, and the applying officer attested that drug dealers are known to be violent. Perhaps this record could have supported the use of the two flashbangs contemplated by the operational plan to disorient the occupants of the apartment. We need not decide that question. Even if the record supports the use of the first two flashbangs, these earlier flashbangs made Deaton's deployment gratuitous. The break and rake and the detonation of the flashbang on the exterior wall diverted the attention of Ward and Dukes before Deaton deployed his flashbang. There is no evidence that Deaton was aware that Ward had drawn his gun or that Dukes or Ward resisted the officers. And the suspected crime that prompted the search was possession and sale of marijuana. Deaton deployed a dangerous device into a dark room for a de minimis return. The decisions of our sister circuits support our conclusion that Deaton's conduct was unconstitutional. Our sister circuits have held that an officer's failure to perform a visual inspection before throwing a flashbang into an area weighs against reasonableness. *Estate of Escobedo v. Bender*, 600 F.3d 770, 785 (7th Cir. 2010); *Boyd v. Benton Cty.*, 374 F.3d 773, 779 (9th Cir. 2004). And they have held that the use of a flashbang in an area occupied by bystanders, like Dukes, similarly weighs against reasonableness.

Bender, 600 F.3d at 786; *Boyd*, 374 F.3d at 779; *cf. Krause v. Jones*, 765 F.3d 675, 679 (6th Cir. 2014); *Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 973 (7th Cir. 2003). The totality of the circumstances establishes that Deaton violated the Fourth Amendment. . . . Because no precedent of the Supreme Court, our Circuit, or the Supreme Court of Georgia has addressed the constitutionality of flashbangs, Dukes must establish that 'a general constitutional rule already identified in the decisional law ... appl[ies] with obvious clarity' to Deaton's conduct. . . To satisfy this narrow exception, official conduct must be so egregious that 'every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law.'. . When this exception for obvious clarity is 'properly applied, it protects all but the plainly incompetent or those who knowingly violate the law.'. .We conclude that it was not clearly established that Deaton's conduct was unconstitutional when he acted. Although we recognize that the doctrine of excessive force makes some official conduct off limits even in 'novel factual circumstances,'. . . Deaton's conduct was not so lacking in justification that every reasonable officer would know that what he did constituted excessive force. The operational plan contemplated the use of flashbangs to disorient the residents, and there is no evidence Deaton intended to use his flashbang for any other purpose. And the application in support of the search warrant stated that 'drug dealers,' such as Ward, 'commonly utilize weapons, dogs, and barricades to hinder law enforcement in the execution of their duties.' The application also stated that an informant had advised law enforcement that Ward carried a handgun 'on his person.' To be sure, Deaton should have followed his training and checked the bedroom before he threw. But a reasonable officer could have found it 'difficult ... to determine how the relevant legal doctrine, here excessive force,' would apply. . .Dukes argues that '*no* decisional law is necessary to inform a reasonable officer that he should not blindly throw a [flashbang] grenade into the bedroom of a small apartment, at 5:30 a.m., ... occupied[ ] by people who ... were doing nothing other than sleeping,' but this portrait ignores facts stated in the warrant and the purpose of a flashbang. Ward carried a weapon. The warrant stated that drug trafficking occurred in his apartment. A flashbang is meant to disorient and avoid physical harm. And the operational plan permitted the officers to use a flashbang if needed. In the absence of binding caselaw to the contrary, Deaton, though badly mistaken, could have reasonably believed, based on the facts known to the officers on the morning of the search, that throwing a flashbang into Ward's bedroom was not excessive force. Our conclusion that Deaton violated the Fourth Amendment, but that the contours of the right were not clearly established, also finds support in the decisions of our sister circuits. In *Boyd*, for example, the Ninth Circuit ruled that the detonation of a flashbang in a room with up to eight bystanders without first looking was unconstitutional, but that the right was not clearly established. . . In *Bing ex rel. Bing v. City of Whitehall*, the Sixth Circuit also decided that the use of a second flashbang violated the Fourth Amendment, but that the violation was not obvious. . . Consistent with these decisions, we affirm the ruling that Deaton is entitled to qualified immunity.")

Hart v. Logan, 664 F. App'x 857, 861-62 (11th Cir. 2016) ("Because we may consider the prongs of the qualified immunity test in either order, we proceed directly to examining the qualified immunity test's second prong. . . Plaintiff cites to several cases from this Circuit that she contends clearly establish that Defendant's actions were unconstitutional. In each case, this Court held the

use of deadly force in question was unreasonable. However, we conclude that each case is factually distinguishable because Defendant in this case faced a more dangerous situation than the officers in the cited cases. This is so even after construing the factual disputes in favor of Plaintiff, as required at the summary judgment stage. . . .Unlike in *McKinney* or *Mercado*, Defendant did not have a ten to twenty minute period of time to talk with Mr. Hart and calmly assess how dangerous he was. Instead Defendant faced a tense and rapidly-escalating situation at the time of the shooting, with Mr. Hart standing and then advancing towards Defendant, all the while ignoring Defendant's repeated commands to stop and show his hands. Mr. Hart's conduct rendered him a much more potentially dangerous threat to Defendant than were the seated and stationary victims in *McKinney* and *Mercado*. In addition, given Mr. Hart's repeated demands that Defendant give him the gun, coupled with his approach toward Defendant, a concern by Defendant that Mr. Hart was trying to arm himself, by either getting his own gun back or taking Defendant's gun, was not an unreasonable fear. . . .In sum, Plaintiff has failed to demonstrate that under the above circumstances, Defendant had fair notice that the use of deadly force would be deemed unconstitutional.")

Fish v. Brown, 838 F.3d 1153, 1164-65 (11th Cir. 2016) ("[L]ike the district court, we need not determine whether defendants violated Fish's Fourth Amendment rights by stepping into his sunroom without his explicit consent, because we find that they are entitled to qualified immunity on any such claim. . . Defendants followed Riesco, whom they knew was familiar with Fish's home. She parked her automobile in the rear of the house, next to Fish's SUV. No vehicles were parked in front of the house. Riesco walked confidently from her auto to and through the sunroom door without knocking, or checking to see if it was locked (as though she expected it to be unlocked). She proceeded to walk straight through the sunroom to the interior wood door and knocked. Reisco's authoritative demeanor caused Deputies Harrison and Loucks to conclude that was the customary route taken by guests entering the house, and they followed her lead. . .Those facts lead to a finding of qualified immunity for two reasons. First, the Deputies could reasonably have relied upon a variation of the 'consent-once-removed' doctrine, 'which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.' *Pearson v. Callahan*, 555 U.S. 223, 229 (2009). At the time of the seizure that led to the alleged Fourth Amendment violation in *Pearson*, only courts from a few federal Circuits (not including the Circuit in which the case arose) had considered the doctrine, but all courts that *had* considered it had adopted it. . . In the absence of law from their own Circuit, the officers who conducted the seizure were entitled to rely upon cases from other Circuits that allowed the 'consent-once-removed' doctrine; and, accordingly, they were entitled to qualified immunity. . . This court does not appear to have addressed the 'consent-once-removed' doctrine after the Supreme Court's 2009 decision in *Pearson*. Therefore, the doctrine is no more settled today than it was in 2009. Thus, if the Deputies were entitled to rely upon the doctrine in *Pearson*, they also were entitled to rely upon it here. Second, the Deputies reasonably could have believed that the sunroom was 'impliedly open to use by the public' for the purpose of gaining access to the principal, interior areas of the house. . . . In summary, the law was not sufficiently clearly established at the time of the alleged violation to

give Harrison and Loucks fair warning that their entry into Fish's sunroom under the circumstances of this case would violate his Fourth Amendment rights. *See Carroll v. Carman,* — U.S. —, 135 S. Ct. 348, 349 (2014) (holding that police officers should have been entitled to qualified immunity when they entered onto a ground-level deck on the back of a home to knock on a sliding-glass door, believing the door to be a "customary entryway").")

Moore v. Pederson, 806 F.3d 1036, 1039-40, 1044, 1046-48 (11th Cir. 2015) ("[W]e hold today that, in the absence of exigent circumstances, the government may not conduct the equivalent of a *Terry* stop inside a person's home. We further hold that a person does not consent to entry into his home by an officer outside simply by following an officer's instructions to turn around and be handcuffed, while the person remains inside his home. But because the law on these points was not clearly established in this Circuit before our decision today, we affirm the district court's entry of summary judgment on qualified-immunity grounds to Pederson. . . . Like the officer in *McClish,* Pederson did not have a warrant, and he lacked probable cause, exigent circumstances, and consent. He nonetheless breached Moore's home's threshold for the purpose of arresting Moore when he handcuffed Moore, who was standing inside his apartment's doorway at the time. As a result, Pederson violated Moore's Fourth Amendment right to be free from unreasonable seizures. . . .In the absence of probable cause and without a warrant, Pederson could not have lawfully entered Moore's premises for the purpose of arresting him. Because Pederson reached into Moore's home to arrest him, anyway, Pederson violated Moore's constitutional right to be free from unreasonable seizure. . . Having determined that Pederson violated Moore's Fourth Amendment right to be free from unreasonable seizure, we consider whether, as of November 15, 2008, when Pederson arrested Moore, the parameters of that right as it arose in this case were clearly established. We find that they were not. . . .Moore does not point to a particular Supreme Court, valid Eleventh Circuit, or Florida Supreme Court case that he contends clearly established that *Terry*-like stops may not be conducted in the home. Instead, he asserts that it was clearly established that a *Terry* stop could not occur inside the home because all cases approving of *Terry* stops involve temporary detentions in public places, not in homes. In further support of his argument, Moore points to a vacated Eleventh Circuit case and cases outside this Circuit where courts have opined that a *Terry* stop cannot occur in the home. We disagree that Moore has demonstrated that the law was clearly established in this case as of November 15, 2008, that an officer may not conduct a *Terry*-like stop in the home in the absence of exigent circumstances. First, the mere dearth of binding caselaw holding that a particular activity is constitutional cannot, in and of itself, clearly establish that that activity is unconstitutional or otherwise impermissible. Indeed, that Moore discovered no valid, binding caselaw that holds that a *Terry*-like stop *can* be conducted in a home does not somehow clearly establish the principle that a *Terry*-like stop *cannot* be executed in a home. Nor does Moore find the necessary support in the cases he cites. Moore relies on a vacated Eleventh Circuit case, two Ninth Circuit cases that were issued after November 15, 2008, and a Tenth Circuit case that was issued in May 2008. To state the obvious, *United States v. Tobin,* 890 F.2d 319, 327 (11th Cir.1989), *vacated,* 902 F.2d 821 (11th Cir.1990), the Eleventh Circuit case on which Moore relies, was vacated. That means it has no legal force, so it could not have clearly established the law. While Moore acknowledges as much, he suggests that the

Eleventh Circuit's subsequent *en banc* opinion in *Tobin,* 923 F.2d 1506, 1511 (11th Cir.1991) (en banc) ("*Tobin II* "), clearly established that an in-home *Terry*-like stop violates the Fourth Amendment when it stated that 'reasonable suspicion cannot justify the warrantless search of a house.' Not only does the quotation that Moore cites address warrantless searches, not *Terry*-like stops, but review of the entire quotation—'Reasonable suspicion cannot justify the warrantless search of a house, ***but it can justify the agents' approaching the house to question the occupants,***' 923 F.3d at 1511 (emphasis added) (citation omitted)—does not 'dictate[ ], that is, truly compel[ ], the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiff['s] federal rights in the circumstances.'. . . In fact, a panel of this Court, relying on the same quotation about 'warrantless search[es]' in *Tobin II* on which Moore hangs his hat, said only that '[w]e are skeptical that "reasonable suspicion" is the correct standard for justifying the officers' entry' into the home. . . If, as recently as last year, a panel of this Court was, at worst, 'skeptical' that *Terry*-like stops could occur in the home, we cannot say that the law on that point was 'clearly established' for officers six-and-one-half years ago. For this reason, Moore's argument must fail, regardless of the caselaw from other jurisdictions. And we cannot conclude that in November 2008 the law was clearly established in this Circuit that a *Terry*-like stop cannot be conducted in the home, in the absence of exigent circumstances. As a result, the district court correctly found that Pederson was protected by qualified immunity with respect to the initial *Terry*-like stop. . . . [footnotes omitted])

Moore v. Pederson, 806 F.3d 1036, 1048-55 (11th Cir. 2015) ("It is true that as of November 15, 2008, when the incident in this case occurred, the law was clearly established in this Circuit that an officer may not conduct a warrantless arrest without both probable cause and either exigent circumstances or consent. . . And here, Pederson had no warrant, and he similarly lacked exigent circumstances and consent. But, as discussed above, none of the cases that stand for the principle that a warrantless arrest may not be conducted in the home without both probable cause and either exigent circumstances or consent involved a *Terry* stop. When an officer lawfully conducts a *Terry* stop, Fla. Stat. § 843.02 authorizes the officer to arrest a person who refuses to provide identification in response to requests. . . Neither exigent circumstances nor probable cause is necessary. So Pederson suggests that, had he been correct in thinking that he could execute a valid *Terry* stop in the home, he would not have needed either exigent circumstances or consent to effect the arrest of Moore, even though he had to reach into Moore's home. . . . We need not determine whether Pederson's theory on this particular issue is correct because, in any case, we cannot find that, at the time of the events in this matter, the law was clearly established with respect to the bounds of consent to enter the home for the purpose of effecting an arrest. We recognize, of course, the clearly established general proposition that consent is not freely and voluntarily given when a person merely acquiesces to a claim of lawful authority. . . But '[o]bvious clarity cases' are 'rare.'. . To rely on that "narrow exception," we must find that the officer's acts were 'so egregious that preexisting, fact-specific precedent was not necessary to give clear warning to every reasonable ... officer that what the defendant officer was doing must be "unreasonable" within the meaning of the Fourth Amendment.'. . Here, we cannot do that. . . .[U]nder *McClish,* a reasonable officer would not be on clear notice before today that Moore's actions did not constitute the type of

'surrender' that can qualify as consent for the purpose of entering a home to effect an arrest. . . . [B]efore today, a reasonable officer could have understood Moore's actions in turning around and presenting his hands in response to the officer's instructions as surrender, and consequently, as consent under *McClish*. . . . To be clear, for the reasons we have already described, we strongly reject any suggestion that a person 'surrenders' and therefore 'consents' to arrest in his home simply because he recognizes the officer's authority or 'submit[s] to' or 'acquiesce[s]' in the arresting officer's commands or because he does not close the door of his home in response to an officer's announcement that he is under arrest. Today we clearly establish as the law of this Circuit that merely following an officer's commands—without any separate affirmative act or speech demonstrating *voluntary* and *free* consent—does not constitute 'surrender' and therefore consent to an officer's entry into the home to effect the arrest. Nor does failure to close the door. But we have 'emphasized that *fair and clear notice* to government officials is the cornerstone of qualified immunity.'. . And in light of *McClish* and *Berkowitz*, we cannot say that, as of November 15, 2008, Pederson had 'fair and clear notice' that a person does not 'surrender' and therefore consent to entry of his home for purposes of effecting an arrest, by 'acquiesc[ing]' in or 'submit[ting] to' the arresting officer's announcement that he is under arrest and by turning around and presenting hands for cuffing in response to instructions to do just that (and not closing the door of his home instead). As a result, qualified immunity shields Pederson from liability for his wrongful entry into Moore's home to arrest him. . . .Because the law was not clearly established until today that Pederson lacked probable cause to arrest Moore since he could not conduct a *Terry*-like stop in the home absent exigent circumstances, and further, because the law was not clearly established until today that Moore's actions in acquiescing to Pederson's instructions did not amount to consent to enter the home, the district court properly granted Pederson qualified immunity. . . .Home may be where the heart is, . . . but it cannot be where the government is—at least for purposes of conducting a *Terry*-like stop, in the absence of exigent circumstances. Today we clearly establish this as the law in this Circuit. But since the law was not clearly established on this point when Pederson engaged in the *Terry*-like stop of Moore while Moore was in his home, the district court did not err when it granted qualified immunity to Pederson on this issue. The district court likewise did not err in granting qualified immunity to Pederson regarding his arrest of Moore while Moore was in his home. The law was not clearly established at the time of the arrest that Moore's compliance with Pederson's demands that he turn around and present his hands for cuffing did not constitute consent.")

Denton v. Stokes, 620 F. App'x 712, 714 (11th Cir. 2015) ("At the time that Stokes seized, photocopied, and disclosed Denton's nonlegal correspondence, it was not clearly established that doing so violated the Fourth Amendment. We had held that both the Sixth Amendment and the 'right of access to the courts' limit the reading of correspondence from inmates with their attorneys. . . We had also held that the First Amendment limits efforts to control of the volume of nonlegal, 'general correspondence' that inmates send and receive. . . [W]e had not held (and still have not held) that the Fourth Amendment bars the reading, photocopying, and disclosing of inmates' nonlegal correspondence as part of an ongoing investigation. There are some indications that it may not. . . . In any event, we need not decide the merits of Denton's Fourth Amendment claim to

resolve this appeal, so we express no view on it. It is enough that no precedent of the Supreme Court or this Court would have put Stokes on notice that the Fourth Amendment prohibited him from seizing Denton's nonlegal correspondence while he was incarcerated, photocopying it, and showing those copies to others as part of an ongoing investigation. . . That being the case, Stokes is entitled to qualified immunity from Denton's claim.")

Merricks v. Adkisson, 785 F.3d 553, 559-60, 563 (11th Cir. 2015) ("The salient question for this case, therefore, is whether the state of the law on August 11, 2008 gave Adkisson fair warning that his treatment of Merricks was unconstitutional. . . . Note that in ruling on this case, we will not decide if Adkisson's actions against Merricks amount to a constitutional violation for excessive force against her. Rather, the Court will only consider the clearly established law question as authorized by *Pearson v. Callahan* . . . . [B]ased on the facts in this case, it was reasonable for Adkisson to believe that he could stop Merricks and search her car and her person for contraband. It was also reasonable for him to believe that he could turn off the car, take the keys, and get her out of the car to search it. . . . And although we are not ruling on the reasonableness of the force he used to get her out of the car, Adkisson was in a tense and uncertain situation, faced with a suspect who refused to cooperate and who struggled to keep him from searching her car. . . . There is substantial case authority in the Supreme Court and this Circuit clearly establishing that harming a suspect after that suspect is compliant, cooperative, under control, or otherwise subdued is gratuitous and, therefore, constitutionally excessive. The three cases Merricks cites establish nothing more than that. On the other hand, there is little, if any, authority dealing with the force an officer can use when he has the undisputed right to search a vehicle, and the driver obstructs the search. For that reason, in analyzing excessive force cases, it is important to understand not only what force was applied but when it was applied. If gratuitous force was applied after the suspect was subdued or otherwise cooperating, qualified immunity will likely not apply, unless the force is *de minimis.* . . If, on the other hand, the force was applied when the officer was trying to take control of the suspect or the situation confronting him, the officer can make a much better claim to the qualified immunity defense. Merricks's claim falls into the latter category. Consequently, she has failed to satisfy her burden of showing the clearly established nature of the alleged constitutional violation.")

Mobley v. Palm Beach Cnty. Sheriff Dep't, 783 F.3d 1347, 1356 & n.10 (11th Cir. 2015) (per curiam) ("Our decisions demonstrate that the point at which a suspect is handcuffed and 'pose [s] no risk of danger to the officer' often is the pivotal point for excessive-force claims. We have held a number of times that severe force applied *after* the suspect is safely in custody is excessive. . . But force applied while the suspect has not given up and stopped resisting and may still pose a danger to the arresting officers, even when that force is severe, is not necessarily excessive. . . Mobley has not pointed to any circumstances before he quit resisting and was handcuffed that show the force applied against him was objectively unreasonable. Deputies Yoder, Johnson, and Elliott therefore are entitled to summary judgment on the ground of qualified immunity because under the circumstances their conduct did not violate Mobley's constitutional rights. . . .Because we hold that the officers did not violate Mobley's Fourth Amendment right to be free from

excessive force during his arrest, we need not decide whether they would be entitled to qualified immunity even if they had done so.")

Jay v. Hendershott, 579 F. App'x 948, 950-54 (11th Cir. 2014) ("Here, because we conclude that Plaintiffs' Fourth Amendment claim is one 'in which it is plain that a constitutional right [was] not clearly established,'. . . we address only the second prong of the qualified-immunity analysis and do not reach the issue of whether the complaint sufficiently alleges a constitutional violation. . . .[W]e agree with the district court that no case from the Supreme Court, the Eleventh Circuit, or the Florida Supreme Court is 'on all fours' with the facts alleged in this case. Nor have Plaintiffs identified—and we could not find—any case materially similar to this one. In this Circuit, at one end of the spectrum, we have previously held that the use of a police canine to subdue a suspect is objectively reasonable where the suspect is wanted for the commission of a serious crime, actively flees from police, resists arrest, and is reasonably believed to be armed and dangerous. . . By contrast, at the other end, we have held that such force, when employed against an individual who presents no safety risk and is fully compliant with officers' commands, is excessive under the Fourth Amendment. . . Here, however, we are faced with an individual who, though neither outwardly aggressive nor hostile, failed to comply with *any* instructions from law enforcement, was still actively evading police when the canine was released, and was approaching both an open garage with unknown items inside and a house with people inside. As we have never before addressed whether the deployment of a canine under these particular circumstances is unconstitutional, our case law is insufficient to put officers on notice as to whether the conduct alleged violates the Fourth Amendment. In denying Hendershott qualified immunity, the district court relied primarily on our decision in *Priester,* concluding that clearly established law at the time of Monell's arrest would have informed a reasonable officer that the force allegedly employed was unconstitutional. We do not agree that *Priester,* which was decided on vastly different facts, compels this conclusion. . . . Nor do the facts of this case fall within the scope of the obvious-clarity exception. . . .Plaintiffs appear to suggest that the absence of any overt aggression by Monell, coupled with the fact that Monell suffers from mental illness, somehow nullified this risk, but the facts do not lend themselves quite so easily to that conclusion. The officers on the scene were faced with an individual who led police on a lengthy pursuit, refused to pull over despite the arrival of multiple police cars with lights flashing and sirens blaring, ignored officers' numerous orders to halt, and attempted to enter an open garage that could have contained weapons and a residence that could have held potential hostages. Particularly when viewed against the background of Monell's extended unresponsive and unusual conduct, we cannot say that it should have been obvious to every reasonable officer that Monell's conduct and the potential danger of the situation did not call for the force used. While we do not opine at this juncture as to whether Hendershott's alleged use of force was unconstitutional, we do not believe that the conduct at issue was so 'wholly unnecessary' or 'grossly disproportionate' as to blatantly cross the line of constitutionality in the absence of any case law on point. . . As a result, as the complaint is currently pled, qualified immunity should not have been denied to Hendershott.")

Gilmore v. Hodges, 738 F.3d 266, 269, 273 (11th Cir. 2013) ("Because the significant hearing loss alleged by Weinberg both is a serious medical need and could have been effectively treated with the use of hearing aids, we now hold that Weinberg stated a viable constitutional claim. An uncorrected, substantial inability to hear, much like an inability to see effectively without the aid of a corrective medical device, may place an inmate at risk of serious harm and substantially interfere with the inmate's ability to function in a penal environment. This holding, however, was not clearly established at the time of the alleged constitutional violations—not by this Court, not by the Florida Supreme Court, nor finally by the United States Supreme Court. Thus, because the state of the law did not provide the officers with 'fair warning' that their alleged conduct was unlawful, the officers are entitled to qualified immunity. . . .In order to clarify the law for future cases, we begin with the first prong, although we could resolve the case on the second prong alone. We do so for several reasons. In the first place, as the Supreme Court explained in *Pearson*, although addressing the first prong of the qualified immunity inquiry is no longer required, it is nonetheless 'often appropriate' and 'often beneficial,' particularly 'with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'. . We are plainly confronted with such a question here. A claim of deliberate indifference to a serious medical need in violation of the Eighth or Fourteenth Amendments necessarily arises only where the plaintiff is incarcerated, and a qualified immunity defense is generally available to the public official or officials against whom the plaintiff brings suit. While a qualified immunity defense is not available when a plaintiff seeks prospective injunctive relief, . . . the nature of a deliberate indifference to serious medical needs claim is such that an inmate will almost always be seeking damages to remedy claimed past injuries caused by the official's failure to provide the inmate with constitutionally adequate medical care. Thus, we see precious little reason to delay the resolution of the constitutional question until a later date, since any later case raising this question will almost surely be decided in the same context of qualified immunity. As we see it, addressing the first prong of qualified immunity in this case 'promotes the development of constitutional precedent,'. . . and has the salutary effect of giving clear guidance to those officials entrusted with the important charge of providing medical care to incarcerated individuals. Moreover, the constitutional question at the heart of this case—whether a substantial hearing impairment that can be remedied by a hearing aid may amount to a serious medical need for purposes of the Eighth or Fourteenth Amendments—is a relatively straightforward legal question that we are well equipped to resolve. Although future cases will surely involve factual disputes about whether a particular inmate's hearing impairment is severe enough or poses a substantial enough risk of harm to amount to a serious medical need, or whether a hearing aid actually can remedy the inmate's severe impairment, or indeed whether an official is aware of the inmate's condition, we can provide guidance to courts and officials down the road by answering today the threshold constitutional question of whether a substantial hearing impairment that can be remedied by a hearing aid may present a serious medical need.")

Maddox v. Stephens, 727 F.2d 1109, 1121, 1127 n.19 (11th Cir. 2013) ("A right may be clearly established for qualified immunity purposes in one of three ways: '(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of

principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.'. . It is undisputed that only the third and final category is relevant to this appeal, and thus that Stephens is entitled to qualified immunity *unless* her conduct fits into this third category. This third category, however, is 'narrow' and 'encompasses those situations where "the official's conduct lies so obviously at the very core of what the [relevant constitutional provision] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law."'. . .We stress that, on appeal, only Maddox's substantive due process claim is properly before us. And, after thorough review, we hold that, even assuming *arguendo* that Maddox has established a procedural due process violation and even assuming *arguendo* that Stephens violated Maddox's substantive due process rights, Stephens is entitled to qualified immunity because the law was not clearly established that Stephens' actions were so conscience shocking as to violate Maddox's liberty interest in the care, custody, and management of J.O. . . . Because we hold that there has been no violation of clearly established substantive due process law, we need not decide whether Stephens' behavior actually violated Maddox's substantive due process rights.")

Loftus v. Clark-Moore, 690 F.3d 1200, 1204, 1205 (11th Cir. 2012) ("Because Loftus's complaint is one 'in which it is plain that a constitutional right [was] not clearly established,'. . . our analysis begins and ends with the second inquiry of the test for qualified immunity. . . .'[S]tate officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of "clearly established law,"'. . . so it should come as no surprise that no controlling case law establishes that it is unreasonable for a Florida social worker to interrogate a minor at her school during the course of an investigation of allegations of child abuse. Similarly, no controlling case law requires a showing of probable cause for a Florida social worker to interrogate a minor on school grounds if the minor is suspected of being a victim of child abuse. We have stated instead that a state official may seize a student at a school so long as the seizure is 'justified at its inception' and is 'reasonably related in scope to the circumstances which justified interference in the first place.'. . Although *Gray* involved a police officer who worked at public school officials' behest to ensure the safety of the other students at that school, we have never limited the standard for evaluating the reasonableness of a seizure of a minor at a school. Loftus cites a decision from one of our sister circuits, *Doe v. Heck*, 327 F.3d 492 (7th Cir.2003), to support his argument, but that decision cannot provide 'clearly established' law in this Circuit. Loftus insists that the 'notice of illegality ... should not have to come from cases in the district where the improper incident occurred,' but Clark–Moore, as a Florida official performing a discretionary duty, 'cannot be held to a standard of conduct which is unsettled by the Supreme Court[,] ... this circuit[,]' or 'the highest state court' in Florida. . .Loftus argues too that the warrantless seizure of Savonna violated Florida law, which should have put Clark–Moore on notice that her actions were illegal,. . . but this argument fails because 'section 1983 protects only against violations of federally protected rights.'. . . No controlling case law establishes that a social worker violates a parent's right to due process by making threats to remove his children in the course of an investigation of child abuse that the parent invited, and Loftus fails to explain how Ferguson's conduct otherwise

obviously violated the Constitution. Loftus cites no decision of our Court, the Supreme Court, or the Florida Supreme Court to support his argument that Ferguson's conduct violated his and his children's clearly established constitutional rights.")

Hoyt v. Cooks, 672 F.3d 972, 977-80 (11th Cir. 2012) ("The Supreme Court has stated that we have discretion in deciding which of those two prongs to address first. . . Because we find that the illegality of Cooks's and Harkleroad's behavior was not clearly established at the time, we need not decide whether there was a constitutional violation. . . In this case, there is no precedent that has staked out a bright line. Plaintiffs produce two cases, but both are inapposite. Plaintiffs' first case is *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir.2004), where an officer used a single probe-style Taser stun on a truck driver who was 'hostile, belligerent, and uncooperative.'. . However, *Draper* did not establish that any particular behavior would violate the Constitution. Indeed, it found that the officer's actions were constitutional. . . Also, *Draper* is distinguishable, primarily because the officers in that case were able to handcuff the suspect after just one use of the Taser, whereas Cooks and Harkleroad were unable to fully handcuff Allen even after repeated stuns. . . Accordingly, *Draper* did not give Cooks and Harkleroad fair warning that their behavior would constitute excessive force. . .The only other case Plaintiffs cite to support the argument that the illegality of Cooks's and Harkleroad's actions was clearly established is *Oliver v. Fiorino*, 586 F.3d 898 (11th Cir.2009). However, *Oliver* was issued in October 2009, and thus it cannot have put Cooks and Harkleroad on notice that their behavior in May 2007 could constitute excessive force. . . Accordingly, Plaintiffs have produced no caselaw that put Cooks and Harkleroad on notice that their actions would violate a clearly established right. However, Plaintiffs are correct in arguing that a right can be clearly established even in the absence of caselaw. . . .This would require that every reasonable officer in Cooks and Harkleroad's position would inevitably conclude that the force was unlawful. . . .This combination of an assault, battery, very unusual behavior, and threats to kill Cooks [footnote omitted] would weigh against a conclusion that Cooks's and Harkleroad's behavior was 'so far beyond the hazy border between excessive and acceptable force' that they had to know they were 'violating the Constitution even without caselaw on point.'. . . [T]he facts in *Oliver* are so different from the instant facts that the obvious clarity holding in *Oliver* falls short of indicating obvious clarity in this case.")

Roberts v. Spielman, 643 F.3d 899, 904-06 (11th Cir. 2011) ("Roberts appears to argue on appeal, that viewing the facts in the light most favorable to Roberts, Deputy Spielman exceeded the scope of his authority when he remained on Roberts's property after he saw that she was alive and she asked him to leave. We do not agree. Deputy Spielman acted within his authority in remaining on the property and attempting to speak with and observe Roberts for a brief period of time to ensure that she had not attempted, nor was about to attempt, suicide. . . . We stress the limited scope of Deputy Spielman's entry into the home and encounter with Roberts. Deputy Spielman opened the door and then stood in the doorway of Roberts' home for about five minutes while he spoke with her. Deputy Spielman then escorted Roberts outside to the back steps of her garage, but only after she continued yelling and made her ambiguous 'or I will-' statement that a reasonable officer could have interpreted as a threat or at least as further cause for concern about Roberts's mental state.

Although the record is silent as to precisely how long Deputy Spielman spoke with Roberts as she sat on the steps, it does not appear to have been a very long time. When Deputy Spielman determined that Roberts was not threatening suicide, he determined that there was no longer an exigency justifying further action, and he left the property. We conclude that, under the particular factual circumstances of this case, Deputy Spielman's conduct did not violate the Fourth Amendment, and he is therefore entitled to qualified immunity. Furthermore, even assuming *arguendo* a constitutional violation, a reasonable officer in Deputy Spielman's shoes would not have known that his conduct was unlawful. Roberts has cited no binding precedent that clearly established that probable cause and exigent circumstances immediately evaporate once an officer performing a welfare check for a possibly suicidal person sees that the person is merely alive.")

Coffin v. Brandau, 642 F.3d 999, 1012-18 & n.16 (11th Cir. 2011) (en banc) ("We need not decide in this case whether entering an open garage in order to utilize a passageway to gain access to a visible door to the home is a violation of the Fourth Amendment. We hold, however, that, under the totality of the circumstances, the Deputies' entry into the Coffins' garage was a violation of the Fourth Amendment. The garage here is attached to the home itself, putting it in closer proximity to the home than an unattached garage. . . . Ms. Coffin also attempted to exercise her Fourth Amendment rights. . . . Under these circumstances and in light of Ms. Coffin's indications that she intended to maintain privacy, we hold that entering the garage as Ms. Coffin attempted to close it was a violation of the Fourth Amendment. . . . We must next address whether, on the pertinent date, it was already clearly established by preexisting law that entering the Coffins open garage in the face of Ms. Coffins' attempts to exercise her Fourth Amendment privacy rights, including her request that the Deputies leave the property and her attempt to close the garage door, would violate the Fourth Amendment. We hold that the Deputies did not violate clearly established Fourth Amendment law. [discussing cases] Having concluded that no binding case law clearly established the rule of law for this case, we are left with the question of whether the Deputies' entry of the attached garage was a violation of the Fourth Amendment as a matter of obvious clarity. . . . For a number of reasons, we are unable to conclude that, as a matter of obvious clarity, an open attached garage is either a part of the home, or entitled to the same level of protection as the home. . . . Only cases from the Supreme Court of the United States, the Eleventh Circuit, or the Florida Supreme Court can clearly establish the law in our Circuit, but opinions from other courts can suggest that reasonable jurists would not know that certain factual situations rise to the level of constitutional violations, and therefore reasonable officers would not either. . . . [T]he development of the law in other jurisdictions merely reflects the legal landscape, how reasonable jurists have interpreted relevant precedent, and, thus, how reasonable officers might. . . . Although we conclude that the officers did in fact violate the Fourth Amendment under the facts and circumstances of this case, we cannot conclude, in light of all the foregoing considerations, that the officers have violated clearly-established Fourth Amendment law.")

Coffin v. Brandau, 642 F.3d 999, 1018-29 & n.1 (11th Cir. 2011) (en banc) (Barkett, J., joined by Dubina, C.J., and Martin, J., concurring in part and dissenting in part) ("My concurrence with the majority is limited to its conclusion that the deputies violated the Coffins' constitutional rights. . .

. The majority's opinion today does nothing less than eviscerate the once inviolate protections historically accorded the home by the Fourth Amendment of the United States Constitution. To accomplish this task, the majority ignores the most basic, bright-line principle of the Supreme Court's Fourth Amendment jurisprudence: that warrantless searches and seizures occurring within the unambiguous physical dimensions of the home are presumptively unconstitutional. The majority circumvents this fundamental precept occupying the very core of the Fourth Amendment by concluding, without any explanation, that an enclosed garage physically attached to a home–and sharing the home's roof and walls–does not exist within the unambiguous physical dimensions of the home. This conclusion rests on the faulty premise that ordinary people expect that deliverymen will come into their attached, enclosed garages and that deliverymen have a right to do so, and fails to recognize that an attached, enclosed garage is no different than any other room in the house, and is thus entitled to the same blanket Fourth Amendment protections as a living room, a den, or a bedroom. . . . While the majority finds a Fourth Amendment violation in this case, it does so, not by recognizing the garage's obvious status as another room in the house, but rather by applying, without support and in conflict with Supreme Court precedent, a newly minted 'totality of the circumstances' test which looks to whether its door is open or closed and whether a person has repeatedly told officers to leave it. The majority opinion upends not only the law of search and seizure but the law of qualified immunity as well. . . . *Payton* unambiguously held that the Fourth Amendment prohibits law enforcement officials from entering the unambiguous physical dimensions of the home without a warrant, whether its door is open or shut. . . Because the Coffins' attached garage, like the *Payton* defendant's bedroom, existed within the unambiguous physical dimensions of the home, the Fourth Amendment protected it, as a matter of law, even though the deputies could see inside. The deputies, therefore, violated the Fourth Amendment by crossing its threshold and arresting Mrs. Coffin inside. . . . Not only does the majority erode the protections of the Fourth Amendment, but, in holding that the Coffins' constitutional rights were not clearly established, it also distorts the law of qualified immunity in several ways. First, in relying upon dissents, even from other circuits, as well as opinions from intermediate state appellate courts, . . . the majority appears to abrogate, in a one-sided way, our well-established rule that limits the relevant universe of cases for qualified immunity purposes to those of the United States Supreme Court, Eleventh Circuit, and highest court of the pertinent state. . . While the majority appears to still require § 1983 *plaintiffs* to follow our prior rule to prove that their rights were clearly established, it now permits defendants to rely on the opinions of *any* jurist in *any* jurisdiction to prove that the law was not clearly established. . . This double standard makes no sense. . . . In this case, the applicable binding precedents are even more factually similar to the deputies' conduct than the precedents in *Hope* were to the prison officials' conduct, and thus gave the deputies fair warning that their conduct violated the Coffins' constitutional rights. The *garage,* like every other room in the Coffins' home, was within the confines of the home, and *Payton* says that officers cannot put one foot into the confines of a home without a warrant; *Kyllo* held that a warrantless search of a *garage* violates the Fourth Amendment; and *Kauz, Sokolow,* and *Taylor* held that entering a *garage* without a warrant violates the Fourth Amendment. There is nothing unclear or confusing about the straightforward holdings of these cases. . . . Simply put, the majority does exactly what the Supreme Court chastised this Court for doing in *Hope.* Reading

these cases on their own, ordinary people, and especially reasonable officers, would understand clearly that an attached, enclosed garage is protected by the Fourth Amendment.")

Coffin v. Brandau, 642 F.3d 999, 1029, 1030 (11th Cir. 2011) (en banc) (Hull, J., joined by Martin, J., concurring in part and dissenting in part) ("In my view this is an open-and-shut case, not an 'open garage' case. . . . In short, the deputies violated Mrs. Coffin's Fourth Amendment rights when they entered her closed garage door, and the Fourth Amendment law was clearly established that the deputies could not enter Mrs. Coffin's home after she closed the door.")

Coffin v. Brandau, 642 F.3d 999, 1030 (11th Cir. 2011) (en banc) (Martin, J., joined by Dubina, C.J., concurring in part and dissenting in part) ("I write separately only to emphasize that just as Mr. and Mrs. Coffin have been denied relief for this intrusion into their home, the 'totality of the circumstances' test established in the majority opinion does nothing to protect people in their homes from similar intrusions in the future. Specifically, the indefinite standard established by the court today reduces to one the clearly established circumstances under which a person can prevent law enforcement from entering her garage, attached to her home, even where the officer has no warrant, and where the homeowner actively protests the entry. . . . Before today, our binding precedent, which established that an attached garage is treated as part of the 'house' under the Fourth Amendment, drew a firm and bright line. But rather than apply *Kyllo*'s bright line rule, the majority now sets a standard that relies on a number of context-specific and circumstance-dependent factors. In doing so, this court has stripped the Coffins of the very rights that the Fourth Amendment was intended to protect. . . . The shifting standard established here not only muddles our Fourth Amendment jurisprudence, but threatens to strip the home of its sanctity. Indeed, I fear that this case may present the first of many unconstitutional entries into homes that are no longer prohibited by clearly established law.")

Youmans v. Gagnon, 626 F.3d 557, 562, 563, 565, 566 (11th Cir. 2010) ("Following the Supreme Court's decision in *Pearson*, we are free to consider these elements in either sequence and to decide the case on the basis of either element that is not demonstrated. . . In the present case, it seems best to proceed directly to the question of whether the applicable law was already clearly established when the incident took place. . . Whether or not Defendant's conduct constituted deliberate indifference to a serious medical need in violation of Plaintiff's Fourteenth Amendment rights, . . . the law applicable to these circumstances was not already clearly established at the time of the alleged violation. . . . [E]valuating the 'objective legal reasonableness' of an officer's acts requires examining whether the right at issue was clearly established in a 'particularized' and 'relevant' way. . .When decisional law is required for prior notice, the law can be clearly established by decisions of the U.S. Supreme Court, Eleventh Circuit, or the highest court of the state where the case arose. . . But in the absence of controlling precedent, cases decided outside this Circuit can buttress our view that the applicable law was *not* already clearly established. We must not hold police officers to a higher standard of legal knowledge than that displayed by the federal courts in reasonable and reasoned decisions; where 'judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'. . In the

present case, that this Court had cited cases of longer delays for similar injuries further confirms for us that an objectively reasonable police officer in Defendant's place would not have known that Defendant's conduct would violate Plaintiff's constitutional rights. . . . We conclude that it is not–and most important, was not in June 2007– clear from the preexisting law that all objectively reasonable policemen would have known that a four-hour delay for booking and interviewing a person with injuries of the kind asserted here is a constitutional violation.")

Muhammad v. Sapp, 388 F. App'x 892, 898, 899 (11th Cir. 2010)("Muhammad contends that the defendants violated the Free Exercise Clause of the First Amendment by failing to provide him with his requested Islamic dietary accommodations. We begin our qualified immunity analysis by addressing the second prong–whether the defendants violated a clearly established constitutional right. . . .The FDOC submitted an affidavit establishing that complying with Muhammad's dietary requests was too costly because it would require the operation of special kitchens or food preparation facilities. Under those circumstances and in light of *Martinelli*, we cannot say that it would be it obvious to all reasonable correctional officials that denying Muhammad's dietary request violated federal law.")

Randall v. Scott, 610 F.3d 701, 713-16 (11th Cir. 2010) ("Supreme Court and circuit precedent is not entirely clear regarding the degree of First Amendment protection for candidacy, however, every case addressing the issue has found at least some constitutional protection. . . . Since Scott's interest in firing Randall was, as alleged in the complaint, for purely personal reasons, the state has no interest in preventing Randall from running for office. While we have not decided the level of scrutiny to be applied, Randall's decision to run for office enjoys *some* First Amendment protection. Comparing this level of protection to the state's interest–manifestly none–the dismissal of Randall's complaint cannot be affirmed on the failure to state the denial of a First Amendment right. . . . In the case at hand, based on the scrupulous legal analysis required to determine whether Randall had a First Amendment right violated, we conclude that Randall's rights were not clearly established under broad case law. . . . Since we are aware of no precedential case with similar facts to those described here, we conclude that Randall's rights were not clearly established under materially similar facts. . . .We conclude that Scott's alleged unconstitutional act of working to prevent Randall from running for office was not "obviously" clear. It appears to us that any such right to run for office was not heretofore clearly established. Scott therefore enjoys individual qualified immunity protection for her alleged violation of Randall's First Amendment rights. Accordingly we affirm the district court's judgment on the qualified immunity issue regarding Randall's individual capacity claim against Scott.")

Reed v. Allen, No. 09-14493, 2010 WL 1959526, at *3 (11th Cir. May 18, 2010) (not published) ("We need not consider the constitutional issue. . . Even assuming Reed's complaint states a constitutional violation, the Defendants are entitled to qualified immunity because the right Reed asserts was not clearly established. The state of law at the time the Defendants implemented the wristband policy was that, under *Harris*, complete segregation of HIV-positive prisoners was not a constitutional violation. The current policy at Limestone is less restrictive because it disposes of

segregation, except for residence, and integrates HIV-positive inmates with the rest of the inmates. It was not then 'clearly established' to prison officials that requiring color-coded wristbands violated Reed's constitutional privacy right when full segregation did not. In light of *Harris,* Reed has not shown that his privacy right was 'clearly established.'")

Glenn v. City of Columbus, Ga., 375 F. App'x 928, 2010 WL 1558721, at *3-*7 (11th Cir. 2010) ("In *Pearson*, the Supreme Court recently held that we are no longer obliged to conduct the qualified immunity analysis in the sequence set forth in *Saucier v. Katz,* 533 U.S. 194 (2001). Accordingly, we may now exercise our discretion to decide which prong of the inquiry to address first. . . In this case, we need not address the first question at all because, even if we were to assume that Zachary's shooting violated the Constitution, the plaintiffs cannot demonstrate that the law was so clearly established as to give the officers fair warning that shooting a beanbag gun at Zachary under these circumstances would have been illegal. We, therefore, begin and end our analysis with an examination of the second prong. . . . To begin with, there is no case in either the United States Supreme Court, the Supreme Court of Georgia, or in the United States Court of Appeals for the Eleventh Circuit that comes close to identifying the illegality of the officers' use of force in these factual circumstances. First, there is no case involving beanbag munitions in any of the relevant courts. . . . Nor is there any roughly analogous case law that would suffice to put the officers on notice of the illegality of their conduct in these 'tense, uncertain' circumstances. On April 4, 2005, there were no cases in the relevant jurisdictions on the use of less than deadly force (here a beanbag munition) to subdue a suspect who had threatened to shoot at officers who were in front of his house, spoke about killing children, and threatened suicide. . . . Here, the officers reasonably believed on the basis of the defendant's threats that he was equipped to commit and had contemplated homicide as well as suicide. Beyond that, and perhaps most importantly, the use of a bean bag munition, unlike a firearm, is not characterized as deadly force. The bean bag was classified by the Columbus Police Department as a Level 6, the highest level use of force below deadly force, and was authorized 'when deadly force is not justified, but empty hand control and OC [pepper spray] is not sufficient in effecting an arrest.'. . . Ultimately, this is one of those tragic, mistaken cases in the 'hazy border between permissible and forbidden force.'. . Quite simply, there was no clearly established law at the time that would have put Officer Coats and Sergeants Hudson and Touchberry on notice that the use of a beanbag munition in these circumstances violated the Fourth Amendment.")

Keating v. City of Miami, 598 F.3d 753, 765, 766 (11th Cir. 2010) ("Under the facts alleged in the Protesters' complaint, Timoney, Fernandez, and Cannon violated the Protesters' First Amendment rights in their supervisory capacities by directing the subordinate officers to use less-than-lethal weapons to disperse a large crowd of allegedly peaceful demonstrators and by failing to stop the subordinate officers from doing the same. Timoney, Fernandez, and Cannon argue that their conduct in violation of the First Amendment was not clearly established. . . . Here, the Protesters had a clearly established right to assemble, protest, and demonstrate peacefully, and they sufficiently allege that they engaged in a peaceful demonstration on public property. . . . Timoney, Fernandez, and Cannon violated clearly established law when, in their supervisory capacities, they

directed their subordinate officers to use less-than-lethal weapons to disperse a crowd at a large public demonstration and consequently failed to stop such conduct. The constitutional violation was clearly established because a broader, clearly established principle, that peaceful demonstrators have a First Amendment right to engage in expressive activities, should control the novel facts in this situation. . . Timoney, Fernandez, and Cannon, in directing their subordinates to use less-than-lethal weapons to disperse a crowd of peaceful demonstrators, were aware that their orders to their subordinate officers would violate the Protesters' First Amendment rights. Additionally, Timoney, Fernandez, and Cannon were aware that their failure to stop the use of less-than-lethal weapons to disperse a crowd of peaceful demonstrators would violate the Protesters' First Amendment rights. The direction of unlawful conduct and failure to stop such unlawful conduct in their supervisory capacities caused the violation of the Protesters' clearly established constitutional rights because it should have been obvious to Timoney, Fernandez, and Cannon that their conduct would violate the Protesters' First Amendment rights. Therefore, Timoney, Fernandez, and Cannon are not entitled to qualified immunity as to the Protesters' First Amendment claims for directing unlawful actions and failing to stop unlawful actions under a theory of supervisory liability.").

Corey Airport Services, Inc. v. Decosta, 587 F.3d 1280, 1286, 1287 (11th Cir. 2009) ("The Supreme Court recently changed course . . . and withdrew the requirement of adherence to the *Saucier* protocol. . . . Because we conclude examination of the clearly established law question will 'best facilitate the fair and efficient disposition' of this case, we consider only this prong of the qualified immunity analysis. We do not reach the question whether Corey has presented sufficient evidence to show a constitutional violation. Corey claims to be the victim of political discrimination. It presents evidence purporting to show that the individual Defendants conspired to apply facially neutral procurement laws and policies to favor political-insider Clear Channel to the detriment of and with the intent to discriminate against Corey, a political-outsider. To support its claim that insider-outsider discrimination violates a clearly established constitutional right, Corey relies on three cases: *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1944); *Strickland v. Alderman*, 74 F.3d 260 (11th Cir.1996); and *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir.1987). These cases all note the general proposition that the Equal Protection Clause may be violated by an unequal application of a facially neutral statute. . . . Because the circumstances of this case differ from the circumstances of the cited cases and because the courts in the cited cases did not hold that the defendants violated the Constitution, we cannot conclude that these decisions made it clear that the conduct at issue here violated the Constitution. Nor are we aware of any other relevant cases decided prior to 2002 finding a violation of a constitutional right based on facts similar to those in this case. Therefore, to hold that Defendants violated Corey's clearly established constitutional rights, we must conclude that a court's recitation of the highly general principle–that unequal application of facially neutral law with the intent to discriminate may violate the equal protection clause–in and of itself, offered the defendants 'fair warning that their [treatment of Corey] was unconstitutional.'. . Our precedents cannot support this conclusion. For general principles to clearly establish the law, the case must be an obvious one. . . Because this is not such a case, the Defendants did not violate a clearly established constitutional right and are therefore

entitled to qualified immunity. . . . Corey's claims of insider-outsider political discrimination present not only novel factual circumstances, but also a novel question of law. Corey cites no precedent holding that insider-outsider political discrimination violates the Constitution. Corey does not point to a single decision concerning political discrimination, let alone one that could control, 'with obvious clarity,' these factual circumstances and offer the defendants 'fair warning,' that is, made it clear, that their acts violated the Constitution.").

Poulakis v. Rogers, No. 08-15425, 2009 WL 2447356, at *3-*5 (11th Cir. Aug. 10, 2009) (not published) ("Under *Pearson,* the federal courts are no longer obliged to conduct this qualified immunity analysis in the order articulated by *Saucier v. Katz,* 533 U.S. 194 (2001); rather, we are now 'permitted to exercise [our] sound discretion' to decide which prong of this inquiry to address first. . . On the facts of this case, we begin and end our analysis with the second question–whether the unconstitutionality of the officers' actions was clearly established at the time of the incident. We hold that it was not. . . . In wrongful arrest cases, we have frequently framed the 'clearly established' prong as an 'arguable probable cause' inquiry. In other words, we have said that when an officer violates the Constitution because he lacked probable cause to make an arrest, the officer's conduct may still be insulated under the second prong of qualified immunity *if* he had 'arguable probable cause' to make the arrest. . . . In the instant case, no decision from the United States Supreme Court, this Court, or the Florida Supreme Court has clearly established that a firearm found in a center console of a vehicle is 'securely encased' for the purposes of Florida's penal code, Fla. Stat. ' 790.25(5). . . The question then boils down to whether the statutory text itself is so clear and compelling in permitting Poulakis to maintain a concealed firearm in the closed center console of his automobile that no reasonable officer could have thought there was probable cause to effect an arrest under these circumstances.").

Poulakis v. Rogers, No. 08-15425, 2009 WL 2447356, at *11, *13, *16, *17 (11th Cir. Aug. 10, 2009) (not published) (Quist, District Judge, dissenting) ("I respectfully dissent from the Court's opinion. I agree with the district court that Officer Rogers and Sgt. Stender lacked arguable probable cause to arrest Poulakis for violating Florida's concealed weapons law. I would reverse, however, because in my judgment the district court erred in concluding that advice of counsel could transform a patently unreasonable arrest into a reasonable one. My principal disagreement with the majority's analysis is that it treats arguable probable cause as part of the clearly established prong of the qualified immunity analysis, when both Eleventh Circuit precedent and reason show that whether a federal constitutional right was clearly established is distinct from whether a police officer was objectively reasonable in making an arrest. Because, in my judgment, arguable probable cause is properly considered under the first step of the qualified immunity analysis, or at least separately from whether the law was clearly established, we may consider state intermediate appellate decisions construing the pertinent state statute. I also believe that there is no ambiguity in the statutory definition of 'securely encased.'. . . When a state law is at issue within the larger context of arguable probable cause in a Fourth Amendment claim, it makes good sense for a federal court to consider what *all* courts of that state have to say about that law, just as the police officers, prosecutors, and judges of that state must do. . . . Because I believe that our precedent reveals that

arguable probable cause is part of the first, rather than the second, prong of the qualified immunity analysis, I see no principled basis for ignoring pertinent Florida appellate decisions. . . .Even accepting the majority's argument that arguable probable cause is determined as part of the clearly established inquiry, I would reach the same conclusion based solely upon the plain language of the statute; no reasonable interpretation of the 'securely encased' exception supports Defendants' arrest of Poulakis. . . . That is, a closed center console of a vehicle is plainly a 'container which requires a lid or cover to be opened for access.'. . . My larger concern is that this Court's decision sends a signal to police officers that they are free to ignore the law of the intermediate state appellate courts by which they are otherwise bound, and an unambiguous statute, without concern for violating an individual's federal constitutional rights. Therefore, I would reverse on qualified immunity and remand for consideration of the other defenses Defendants raised in their summary judgment motion.").

Presley v. City of Blackshear, No. 09-10501, 2009 WL 2413061, at *2, *3 (11th Cir. Aug. 7, 2009) ("Because Presley has completely failed to demonstrate that the right she alleges was violated was clearly established at the time of the alleged misconduct, we affirm the district court's grant of summary judgment on the basis of qualified immunity and need not decide whether there was a constitutional violation.. . . Presley cites no particularized case law that establishes that a reasonable police offer would have concluded that Antonio's rights were violated by Officer Evans. Additionally, Presley cites no particularized case law that establishes a reasonable paramedic would have concluded Antonio's rights were violated by Farrior. . .None of the cases Presley cites . . . even address a pre-trial detainee's right to emergency medical care, and thus none of the cases clearly establish the constitutional right at issue in this case.").

Lewis v. City of West Palm Beach, Fla., 561 F.3d 1288, 1290-92 (11th Cir. 2009) ("The exact cause of death is unclear. At the district court level, the defendants relied on the testimony of Dr. Michael Bell, the county medical examiner who performed the autopsy of Lewis. Dr. Bell concluded that the cause of death was 'sudden respiratory arrest following physical struggling restraint due to cocaine-induced excited delirium.' Ms. Lewis offered the expert testimony of Dr. Michael Baden, who testified that the cause of death was asphyxia caused by neck compression. . . . . The Supreme Court recently clarified the *Saucier* two-step process explaining that the order of the inquiry is fluid, providing the Court with the flexibility to focus on the determinative question. [citing *Pearson v. Callahan*] The Supreme Court recognized that discussion of a constitutional violation may become unnecessary for qualified immunity purposes when the right was not clearly established. . .It is therefore not mandated that the Court examine the potential constitutional violation under *Saucier* step one prior to analyzing whether the right was clearly established under step two. Such analytical flexibility is certainly applicable here. Even if the officers' actions violated Lewis's Fourth Amendment rights, the appellant did not demonstrate that the officers' conduct was an intrusion on a clearly established right. A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right . . . ; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right. . . or (3) conduct so egregious

that a constitutional right was clearly violated, even in the total absence of case law. . . Here, case law does not provide the necessary precedent, either specifically or through broad principles, to clearly establish the right. Thus, only if the officers' conduct was so egregious and unacceptable so as to have blatantly violated the Constitution would qualified immunity be unavailable to them. However, to come within this narrow exclusion, 'plaintiff must show that the official's conduct was so far beyond the hazy border between excessive and acceptable force that the official had to know he was violating the Constitution even without case law on point.'. .This standard is met when every reasonable officer would conclude that the excessive force used was plainly unlawful. . . Appellant argues that because the officers further restrained Lewis with the hobble after the need for any use of force had passed and tightened it to form a hogtie, the officers' conduct rose to this level of egregiousness. This is not the case. Even though most of the officers in this case testified that Lewis was not a danger to them and was merely resisting arrest, he was, as the district court described, 'an agitated and uncooperative man with only a tenuous grasp on reality.' Because of his refusal to sit upright and his inability to remain calm, Lewis remained a safety risk to himself and to others. As the district court observed, this was precisely the type of situation where the decisions of the officers confronted with 'circumstances that are tense, uncertain, and rapidly evolving' should not be second-guessed. . . Unlike many of the cases cited by plaintiff, Lewis did not remain compliantly restrained. . . Even though he was not forcefully attacking the officers, Lewis continued to struggle. The application of the hobble may not have been entirely necessary; however, the officers' attempts to restrain Lewis were not so violent and harsh to be considered an egregious violation of a constitutional right, and they are not an obstacle to the application of qualified immunity. Despite the unfortunate result that night, qualified immunity insulates the officers from liability for Lewis's death.").

Fennell v. Gilstrap, 559 F.3d 1212, 1216, 1217 & n.6 (11th Cir. 2009) ("The qualified immunity inquiry usually involves two prongs. First, a plaintiff must show that a constitutional or statutory right has been violated. Second, a plaintiff must show that the right violated was clearly established. . . Although the Supreme Court recently held that lower courts are no longer required to address these prongs in order, it recognized that it is 'often beneficial' to do so. . . *Pearson*, however, has no application in a Fourteenth Amendment excessive-force claim because the qualified immunity analysis involves only the first prong. . . .We agree with Fennell, therefore, that the district court erred in granting summary judgment on the ground that Gilstrap's use of excessive force was not a violation of clearly established law after holding that there was evidence of a violation of the Fourteenth Amendment through the use of excessive force. . . . Nonetheless, the district court's grant of summary judgment is due to be affirmed because, as Gilstrap argues, Fennell has failed to show that Gilstrap's use of force constituted excessive force violating the Fourteenth Amendment. . . . [O]ur precedent permits the use of force even when a detainee is not physically resisting. . . . The undisputed evidence is that Fennell had grabbed Huskey's arm, and Fennell did not let go of Huskey's arm despite being punched by other officers. Gilstrap was in the room for 15 seconds, during which time six officers were unable to secure and handcuff Fennell. Gilstrap's decision to kick Fennell in the arm was not a malicious and sadistic escalation of force, even if the kick accidentally landed on Fennell's face. Accordingly, the relationship

between the need for force created by Fennell's conduct and the force Gilstrap decided to use favors a conclusion that the force in this case was not malicious and sadistic, but rather 'a good faith effort to maintain or restore discipline in a difficult situation.'. . . The undisputed evidence was that Gilstrap intended to kick Fennell in the arm, and not the face. . .No evidence in the record supports a contrary inference. Furthermore, Gilstrap kicked Fennell only once, and did not kick him again after the first kick landed on Fennell's face. . . .In this case, considering all the factors, the undisputed evidence does not show that Gilstrap kicked Fennell maliciously and sadistically. Fennell insists that the kick was unnecessary, that Huskey was never in danger, and that Fennell had stopped struggling. But, Fennell did not testify to this effect, and the statement of every officer in the room during the struggle suggests otherwise. . . . In the absence of evidence that Gilstrap acted maliciously and sadistically, his use of force does not shock the conscience, and thus did not violate the Fourteenth Amendment. Fennell has therefore failed to show any constitutional violation. Gilstrap is entitled to qualified immunity, and summary judgment in his favor was appropriate.")

McCullough v. Antolini, 559 F.3d 1201, 1205-08 (11th Cir. 2009) ("[U]nder *Pearson*, the federal courts are no longer required to conduct this qualified immunity analysis in the order articulated by *Saucier*. . . In this case, we begin and end our analysis with whether the law enforcement officers violated McCullough's Fourth Amendment rights. We hold that they did not. . . . We have had occasion to review many excessive force claims against officers in the context of qualified immunity determinations where the decedent was driving an automobile at the time deadly force was used. In some of the cases, we have found that the officers were not entitled to qualified immunity. In others, we have awarded qualified immunity. We have, however, consistently upheld an officer's use of force and granted qualified immunity in cases where the decedent used or threatened to use his car as a weapon to endanger officers or civilians immediately preceding the officer's use of deadly force. . . . In short, the sheriff's deputies used deadly force in a split-second situation where a suspect late at night refused to pull over, engaged in a high-speed chase, and then, after pulling over, repeatedly refused to show his hands or respond to officers, revved his engine, and then drove his truck toward the deputy standing nearby in a parking lot. . . . Simply put, the force used against McCullough was not excessive under the Fourth Amendment and the officers were entitled to qualified immunity. Because we can discern no constitutional violation, we need not address whether the constitutional right at issue had been clearly established when the incident arose.")

Amnesty Intern., USA v. Battle, 559 F.3d 1170, 1181, 1182, 1184, 1185 (11th Cir. 2009) ("Although this two-step inquiry is no longer mandatory, we think it remains appropriate in this case. . . . The alleged violations of constitutional rights occurred when Amnesty was prevented from (1) distributing literature to people attending the various protests in the area, and (2) conducting a successful demonstration with an audience and media coverage. . . . Supreme Court caselaw makes clear that the First Amendment right to distribute pamphlets was clearly established prior to November 2003. . . Thus, at this stage in litigation, Defendants are not entitled to qualified immunity on Amnesty's claim that its right to distribute leaflets was violated. It is a closer

question whether Amnesty's right to have an audience and be heard at its demonstration was clearly established. All of the caselaw cited above, with the exception of *Citizens for Peace in Space,* is good authority that predates the November 20, 2003 incident. . . None of these cases, however, are on all fours with the instant case, and do not clearly elucidate the fact-specific rule that police may not create a police cordon that makes a protest rally totally ineffective. Prior cases clearly establishing the constitutional violation, however, need not be 'materially similar' to the present circumstances so long as the right is 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . There need not, however, be a prior case wherein 'the very action in question has previously been held unlawful.'. . Here, Defendants had fair warning that Amnesty had a clearly established right to assemble, to protest, and to be heard while doing so.").

Case v. Eslinger, 555 F.3d 1317, 1326, 1327 (11th Cir. 2009) ("Although no longer mandatory, the two-part inquiry of *Saucier* provides the 'better approach to resolving' this appeal. . . Bypassing the first inquiry in our resolution of whether Officer Davis was entitled to summary judgment would not conserve judicial resources because we must still consider the potential liability of Sheriff Eslinger and the City, which hinges on whether Case's rights were violated by Officer Davis. . . .Case failed to present evidence of a constitutional violation because the record, viewed in the light most favorable to him, establishes that Officer Davis had probable cause to arrest Case and seize his property.").

III. HEIGHTENED PLEADING REQUIREMENT

A. The *Leatherman* Decision

Although the majority in ***Siegert*** disposed of the case on grounds that the plaintiff stated no claim for relief, four Justices who did confront the question, approved of the "heightened pleading standard" where the state of mind of the defendant is an essential component of the underlying constitutional claim, but rejected the District of Columbia Circuit's "direct evidence" requirement, instead requiring nonconclusory allegations of subjective motivation supported by *either* direct *or* circumstantial evidence. If this threshold is satisfied, then limited discovery may be allowed.

Plaintiffs attempting to impose ***Monell*** liability upon a governmental unit had been required, in some circuits, to plead with particularity the existence of an official policy or custom which could be causally linked to the claimed underlying violation. *See, e.g.,* ***Strauss v. City of Chicago***, 760 F.2d 765 (7th Cir. 1985).

In ***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit***, 113 S. Ct. 1160 (1993), the Supreme Court unanimously rejected the "heightened pleading standard" in cases alleging municipal liability. The Fifth Circuit had upheld the dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. "While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with

respect to the adequacy (or inadequacy) of the police training." 954 F.2d 1054, 1058 (5th Cir. 1992).

While leaving open the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials," the Supreme Court refused to equate a municipality's freedom from *respondeat superior* liability with immunity from suit. 113 S. Ct. at 1162.

Finding it "impossible to square the 'heightened pleading requirement' . . . with the liberal system of 'notice pleading' set up by the Federal Rules[,]" the Court suggested that Federal Rules 8 and 9(b) would have to be rewritten to incorporate such a "heightened pleading standard." The Court concluded that "[i]n the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id*. at 1163.

B. *Crawford-El v. Britton*

In ***Crawford-El v. Britton***, 118 S. Ct. 1584 (1998), the Court addressed the "broad question [of] whether the courts of appeals may craft special procedural rules" for cases in which a plaintiff's substantive constitutional claim requires proof of improper motive and "the more specific question [of] whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment." *Id.* at 1587. In striking down the D.C. Circuit's "clear and convincing" burden of proof requirement in such cases, a five-member majority of the Court, in an opinion written by Justice Stevens, clarified that the Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 731 (1982), that "bare allegations of malice" cannot overcome the qualified immunity defense, "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." 118 S. Ct. at 1592. The Court noted that "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow*, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation." *Id*. The Court explained that the subjective component of the qualified immunity defense that was jettisoned in *Harlow* "permitted an open-ended inquiry into subjective motivation [with the] primary focus . . . on any possible animus directed at the plaintiff." *Id.* at 1594. Such an open-ended inquiry precluded summary judgment in many cases where officials had not violated clearly established constitutional rights. "When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff . . . or to deter public comment on a specific issue of public importance." *Id*.

Sensitive to the concerns about subjecting public officials to discovery and trial in cases involving insubstantial claims, the Court noted that existing substantive law "already prevents this more

narrow element of unconstitutional motive from automatically carrying a plaintiff to trial[,]" and "various procedural mechanisms already enable trial judges to weed out baseless claims that feature a subjective element . . . ." *Id*.

First, under the substantive law on which plaintiff relies, there may be some doubt as to the whether the defendant's conduct was unlawful. The Court gave as an example the question of whether the plaintiff's speech was on a matter of public concern. Second, where plaintiff must establish both motive and causation, a defendant may still prevail at summary judgment by, for example, showing that defendant would have made the same decision in the absence of the protected conduct. *Id.*

The Court noted two procedural devices available to trial judges that could be used prior to any discovery. First, the district court may order a reply under Fed. R. Civ. P. 7(a), or grant a defendant's motion for a more definite statement under Rule 12(e). As the Court noted, this option of ordering the plaintiff to come forward with "specific, nonconclusory factual allegations" of improper motive exists whether or not the defendant raises the qualified immunity defense. 118 S. Ct. at 1596-97. Second, where the defendant does raise qualified immunity, the district court should resolve the threshold question before discovery.

> To do so, the court must determine whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law. [footnote omitted] Because the former option of demanding more specific allegations of intent places no burden on the defendant-official, the district judge may choose that alternative before resolving the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives these initial hurdles and is otherwise viable, the plaintiff ordinarily will be entitled to some discovery. Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.

Id. at 1597.

The majority opinion concluded that "[n]either the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself." *Id.* at 1595. Instead of the categorical rule established by the Court of Appeals, the Court endorsed broad discretion on the part of trial judges in the management of the factfinding process. *Id*. at 1598.

Chief Justice Rehnquist dissented, and formulated the following test for motive-based constitutional claims:

> [W]hen a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his

> action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

Id. at 1600 (Rehnquist, C.J., joined by O'Connor, J., dissenting).

Justice Scalia, joined by Justice Thomas, dissented and proposed the adoption of a test that would impose "a more severe restriction upon 'intent-based' constitutional torts." *Id.* at 1604. (Scalia, J., joined by Thomas, J., dissenting). Under Justice Scalia's proposed test,

> [O]nce the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican).

Id.

C. ***Swierkiewicz v. Sorema / Hill v. McDonough***

Swierkiewicz v. Sorema, 122 S. Ct. 992, 998 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. [footnote omitted] This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. '1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).").

See also ***Hill v. McDonough***, 126 S. Ct. 2096, 2103 (2006) ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.").

D. ***Jones v. Bock***

Jones v. Bock, 127 S. Ct. 910, 918, 919, 921, 926 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court. . . What is less clear is whether it falls to the prisoner to plead and demonstrate exhaustion in the complaint, or to the defendant to raise lack of exhaustion as an affirmative defense. The minority rule, adopted by the Sixth Circuit, places the burden of pleading exhaustion in a case covered by the PLRA on the prisoner; most courts view failure to exhaust as an affirmative defense. . . We think petitioners, and the majority of courts to consider the question, have the better of the argument. Federal Rule of Civil Procedure 8(a) requires simply a 'short and plain statement of the claim' in a complaint, while Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be

pleaded in response. The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are typically brought under 42 U. S. C. § 1983, which does not require exhaustion at all, see *Patsy v. Board of Regents of Fla.*, 457 U. S. 496, 516 (1982). Petitioners assert that courts typically regard exhaustion as an affirmative defense in other contexts. . . and respondents do not seriously dispute the general proposition. . . The PLRA dealt extensively with the subject of exhaustion, see 42 U. S. C. ''1997e(a), (c)(2), but is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense. In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. [citing *Leatherman, Swierkiewicz* and *Hill*] . . . . We think that the PLRA's screening requirement does not–explicitly or implicitly–justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself . . . . We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints. We understand the reasons behind the decisions of some lower courts to impose a pleading requirement on plaintiffs in this context, but that effort cannot fairly be viewed as an interpretation of the PLRA. 'Whatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute–not to make it better.". . . We are not insensitive to the challenges faced by the lower federal courts in managing their dockets and attempting to separate, when it comes to prisoner suits, not so much wheat from chaff as needles from haystacks. We once again reiterate, however–as we did unanimously in *Leatherman, Swierkiewicz*, and *Hill*–that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.")

Jones v. Bock, 127 S. Ct. 910, 922, 923 (2007) ("The PLRA requires exhaustion of 'such administrative remedies as are available,' 42 U. S. C. '1997e(a), but nothing in the statute imposes a 'name all defendants' requirement along the lines of the Sixth Circuit's judicially created rule. . . . . Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to 'properly exhaust.' The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion. As the MDOC's procedures make no mention of naming particular officials, the Sixth Circuit's rule imposing such a prerequisite to proper exhaustion is unwarranted.")

Jones v. Bock, 127 S. Ct. 910, 924 (2007) ("As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad. '[O]nly the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none.'")

See also ***Albino v. Baca***, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) ("First, although it may be more a matter of a change of nomenclature than of practical operation, we overrule *Wyatt v.*

Terhune, 315 F.3d 1108, 1119 (9th Cir.2003), in which we held that a failure to exhaust under § 1997e(a) should be raised by a defendant as an 'unenumerated Rule 12(b) motion.' We conclude that a failure to exhaust is more appropriately handled under the framework of the existing rules than under an 'unenumerated' (that is, non-existent) rule. Failure to exhaust under the PLRA is 'an affirmative defense the defendant must plead and prove.' *Jones v.. Bock*, 549 U.S. 199, 204, 216 (2007). In the rare event that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6). Otherwise, defendants must produce evidence proving failure to exhaust in order to carry their burden. If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts. Second, we hold that Albino has satisfied the exhaustion requirement of § 1997e(a). Defendants have failed to prove that administrative remedies were available at the jail where Albino was confined. Because no administrative remedies were available, he is excused from any obligation to exhaust under § 1997e(a). We therefore direct the district court to grant summary judgment to Albino on the issue of exhaustion.")

E. *Bell Atlantic Corp. v. Twombly*

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1968, 1969, 1974 (2007) ("Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'. . This 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard . . . . On such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. . . . [A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. [citing cases and commentators] We could go on, but there is no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. . . .*Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. . . . [W]e do not require heightened fact pleading of

specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1978, 1988, 1989 (2007) (Stevens, J., joined by Ginsburg, J., except as to Part IV, dissenting) ("If *Conley*'s 'no set of facts' language is to be interred, let it not be without a eulogy. . . . Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process–a rulemaking process–for revisions of that order. . . . Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.")

F. *Erickson v. Pardus*

Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) ("It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program. . . . The complaint stated that Dr. Bloor's decision to remove petitioner from his prescribed hepatitis C medication was 'endangering [his] life.' . .It alleged this medication was withheld 'shortly after' petitioner had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment. . . This alone was enough to satisfy Rule 8(a)(2). Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings. The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel.")

G. *Ashcroft v. Iqbal*

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942, 1943, 1949-54 (2009) ("This case . . . turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient. . . . Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not

unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'. . In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. . . . We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'. .The complaint alleges that Ashcroft was the 'principal architect' of this invidious policy. . .and that Mueller was 'instrumental' in adopting and executing it. . . .These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim. . .namely, that petitioners adopted a policy ' Abecause of," not merely Ain spite of," its adverse effects upon an identifiable group.'. .As such, the allegations are conclusory and not entitled to be assumed true. . . It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible Apolicy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as Aof high interest.". . To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin. This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of 'of high interest' for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving 'restrictive conditions of confinement' for post-September-11 detainees until they were ' Acleared" by the FBI.' . . Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'. . . [R]espondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8. It is important to note, however, that we express no opinion concerning the

sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners. . . . Our decision in *Twombly* expounded the pleading standard for 'all civil actions'. . .and it applies to antitrust and discrimination suits alike. . . . Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. . . .It is true that Rule 9(b) requires particularity when pleading 'fraud or mistake,' while allowing '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally.' But 'generally' is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid-though still operative-strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.")

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1959-61 (Souter, J., joined by Stevens, J., Ginsburg, J., Breyer, J., dissenting) ("The complaint . . . alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it. Ashcroft and Mueller argue that these allegations fail to satisfy the 'plausibility standard' of *Twombly*. They contend that Iqbal's claims are implausible because such high-ranking officials 'tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.'. . But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here. . . . Iqbal's claim is not that Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed to subject' him to a discriminatory practice that is left undefined; his allegation is that 'they knew of, condoned, and willfully and maliciously agreed to subject' him to a particular, discrete, discriminatory policy detailed in the complaint. Iqbal does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller 'Afair notice of what the Y claim is and the grounds upon which it rests.'"")

H. Post-*Twombly/Iqbal* Cases

U.S. Supreme Court

Johnson v. City of Shelby, Miss., 135 S. Ct. 346, 346-47(2014) (per curiam) ("We summarily reverse. Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . In particular, no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (a federal court may not apply a standard 'more stringent than the usual pleading requirements of Rule 8(a)' in 'civil rights cases alleging municipal liability'); *Swierkiewicz v. Sorema N. A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (imposing a 'heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)'). The Fifth Circuit defended its requirement that complaints expressly invoke § 1983 as 'not a mere pleading formality.'. . The requirement serves a notice function, the Fifth Circuit said, because '[c]ertain consequences flow from claims under § 1983, such as the unavailability of *respondeat superior* liability, which bears on the qualified immunity analysis.'. . This statement displays some confusion in the Fifth Circuit's perception of petitioners' suit. No 'qualified immunity analysis' is implicated here, as petitioners asserted a constitutional claim against the city only, not against any municipal officer. . . Our decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), are not in point, for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. . . For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983. . . .For the reasons stated, the petition for certiorari is granted, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.")

D.C. CIRCUIT

Tooley v. Napolitano 586 F.3d 1006, 1009 (D.C. Cir. 2009) ("We recognize that in a nation of 300 million people, with millions of government employees, some are bound at any given moment to be acting unwisely, foolishly, counterproductively, mistakenly, maliciously, viciously, even inanely. But the particular combination of sloth, fanaticism, inanity and technical genius alleged

here seems to us to move these allegations into the realm of claims 'flimsier than Adoubtful or questionable"–... Aessentially fictitious,"' . . . not realistically distinguishable from allegations of 'little green men' of the sort that Justice Souter recognized in *Iqbal* as properly dismissed on the pleadings.")**.**

Owens v. Republic of Sudan, 531 F.3d 884, 894, 895 (D.C. Cir. 2008) ("Sudan tries to limit the principle expressed in *Swierkiewicz* to merits pleadings . That argument is inconsistent with Rule 8, which, as just noted, expressly applies its 'a short and plain statement' requirement to jurisdictional pleadings . . . Indeed, we have held the standard for assessing the sufficiency of jurisdictional pleadings under the FSIA 'is similar to that of Rule 12(b)(6).'. . Thus no heightened pleading requirement applies here. . . . We only require that the complaint contain 'enough factual matter (taken as true)' to suggest that Sudan's material support of al Qaeda was a cause of the embassy bombings. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). In other words, we require 'enough fact to raise a reasonable expectation that discovery will reveal evidence' of this causal link.").

Aktieselskabet AF 21.November 2001 v. Fame Jeans Inc., 525 F.3d 8, 15-17 (D.C. Cir. 2008) ("[T]he district court interpreted *Twombly* as establishing a new threshold for complaints: enough facts to 'clarify the grounds' on which each claim rests and 'nudge[ ] their claims across the line from conceivable to plausible.'. . Many courts have disagreed about the import of *Twombly*. [collecting cases in footnote] We conclude that *Twombly* leaves the long-standing fundamentals of notice pleading intact. . . . Rule 8 requires, not a specific quantity of facts, but simply 'a short and plain statement of the claim showing that the pleader is entitled to relief.' . . . Over the years, courts have tended to drift away from this standard by imposing various requirements of particularity. . . The Supreme Court has continually pruned back such requirements, with the admonition that we are not to impose heightened pleading requirements. . . After decades of such consistency, we will not lightly assume the Supreme Court intended to tighten pleading standards. Indeed, the Court has indicated quite clearly that it meant no such thing. *Twombly* itself reiterated that a complaint 'does not need detailed factual allegations.'. . . In sum, *Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim. A court deciding a motion to dismiss must not make any judgment about the probability of the plaintiff's success, for a complaint 'may proceed even if it appears Athat a recovery is very remote and unlikely."'").

Ghawanmeh v. Islamic Saudi Academy, No. 09-631 (JMF), 2009 WL 4456328, at *9, *10 (D.D.C. Nov. 27, 2009) ("In order to state a claim under Title VII, a plaintiff must aver that '(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination.'. . In her complaint, plaintiff claims that the ISA discriminated against her in violation of Title VII on the basis of her gender (female) and her national origin (Jordanian). . . She argues that she was unfairly denied leave and ultimately dismissed because there was a 'systemic prejudicial and biased culture favoring males and Saudi Arabian nationals at Defendant ISA, which policies, either express or implied,

are known or constructively known to Defendant KSA and nonetheless allowed to persist.'. . She also makes the following allegations: Due to Defendant's workplace culture of preferential treatment, other employees were granted unpaid leaves of absence for vacations and other reasons, before and during this period. . . Other similarly situated teachers who also happen to be Saudi Arabian nationals were not so dismissed, and were not otherwise unfairly treated. . . Defendant ISA allows and perhaps encourages a culture of Saudi ethnocentrism at the school, with knowledge (actual or constructive) of Defendants KSA, evinced by the disparate way non-Saudi teachers, especially women, are treated. . . Had Plaintiff been male and/or a Saudi Arabian national, she would not have been fired. . . The problem is that plaintiff does not identify the other similarly situated teachers. The question, therefore, is whether her failure to do so merits dismissal. After *Twombly* but before *Iqbal*, the court of appeals for this circuit confronted the argument that *Twombly* required a plaintiff to specify those facts which entitled him to relief. *See Aktieselskabet AF 21 v. Fame Jeans, Inc*., 525 F.3d 8 (D.C. Cir.2008). The court rejected the proposition that a complaint needed detailed factual allegations to survive and rejected the argument that *Twombly* should be read to abrogate the requirement of Rule 8 of the Federal Rules of Civil Procedure that the complaint need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'. . It pointed to a decision by the Supreme Court issued after *Twombly*, that indicated that 'specific facts were not necessary' if the complaint gave fair notice of the claim. *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)) (per curiam). Judged by that standard and construed liberally in plaintiff's favor, the allegations give notice to defendant that plaintiff is asserting that she was treated differently from Saudis and men who applied for the leave she was refused, and who were not fired as a result of seeking that leave, as she was. Thus, even though she does not name the persons who are similarly situated to herself, but who were treated differently, plaintiff's complaint survives defendant's motion to dismiss.").

FIRST CIRCUIT

Medina-Velazquez v. Hernandez-Gregorat, 767 F.3d 103, 111-12 (1st Cir. 2014) ("Under 42 U.S.C. § 1983, '[p]ublic officials may be held liable ... for a constitutional violation only if a plaintiff can establish that his or her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization.'. . .We recognize that 'precise knowledge of the chain of events leading to the constitutional violation may often be unavailable to a plaintiff' when a 12(b)(6) motion to dismiss is filed; therefore, 'we take to heart the Supreme Court's call to "draw on our 'judicial experience and common sense' as we make a contextual judgment about the sufficiency of the pleadings."'. . On its own, the complaint does not specifically connect the appellees to the adverse employment actions. Each appellant, however, does claim that he 'placed in writing his concern' regarding the negative employment actions but that the 'communication went unanswered.' The district court properly requested these letters, which were incorporated by reference into the complaint, and supplemented the allegations with the identity of the recipient defendants. We have recognized that a letter may be used as evidence at trial to show for purposes of § 1983 liability that the named recipient personally knew of the writer's employment situation. . . Whether the addressee actually

received the letter is 'a factual question appropriate for jury determination.'. . Hence, in resolving a motion to dismiss, where the burden is merely demonstrating the plausibility of a claim and all reasonable inferences are drawn in the plaintiff's favor, we can infer that the recipients of the letters were aware of their contents.")

Garcia-Catalan v. U.S., 734 F.3d 100, 104, 105 (1st Cir. 2013) ("[T]he appellant's complaint is plainly modeled on Form 11 of the Appendix to the Federal Rules of Civil Procedure. . .The complaint disclosed the date, time, and place of the alleged tort, and it delineated both the nature of the dangerous condition at the commissary and the resulting injuries to the appellant. At least two courts of appeals have concluded that the standard announced in *Twombly* and *Iqbal* does not undermine the viability of the federal forms as long as there are sufficient facts alleged in the complaint to make the claim plausible. *See K–Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283–84 (Fed.Cir.2013); *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir.2010). We share this view. It pays due homage to Federal Rule of Civil Procedure 84, which declares that '[t]he forms in the Appendix suffice.' Fed.R.Civ.P. 84. Honoring Rule 84 is, in turn, consistent with the Supreme Court's instruction that the Civil Rules may not be amended by 'judicial interpretation.' . . For another thing, 'some latitude may be appropriate' in applying the plausibility standard in certain types of cases. . . Generally speaking, these are cases in which a material part of the information needed is likely to be within the defendant's control. . . This is such a case: it cannot reasonably be expected that the appellant, without the benefit of discovery, would have any information about either how long the liquid was on the floor or whether any employees of the commissary were aware of the spill. . .We add, moreover, that the plausibility inquiry properly takes into account whether discovery can reasonably be expected to fill any holes in the pleader's case. . . Given what the appellant has set forth in her complaint, it is reasonable to expect that 'modest discovery may provide the missing link' that will allow the appellant to go to trial on her claim. . .We need go no further. . For the reasons elucidated above, we hold that the appellant's complaint contains sufficient factual content to support a plausible claim for negligence against the United States. Consequently, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.")

Atieh v. Riordan, 727 F.3d 73, 76 (1st Cir. 2013) ("The plausibility standard is a screening mechanism designed to weed out cases that do not warrant either discovery or trial. . . To this end, the plausibility standard asks whether the complaint 'contain[s] sufficient factual matter ... to "state a claim to relief that is plausible on its face."'. . APA review, however, involves neither discovery nor trial. Thus, APA review presents no need for screening. It follows that the plausibility standard has no place in APA review. This makes perfect sense. The focal point of APA review is the existing administrative record. . . Allowing the allegations of a complaint to become the focal point of judicial review introduces an unnecessary and inevitably unproductive step into the process. The relevant inquiry is—and must remain—not whether the facts set forth in a complaint state a plausible claim but, rather, whether the administrative record sufficiently supports the agency's decision. . . This paradigm dictates the outcome of the instant appeal. We hold that the plausibility standard does not apply to a complaint for judicial review of final agency action and that the district

court therefore erred in invoking it.")

Evergreen Partnering Group, Inc. v. Pactiv Corp., No. 12–1730, 2013 WL 3063902 (1st Cir. June 19, 2013) ("In assessing these allegations, the district court improperly applied a heightened pleading standard in reviewing Evergreen's complaint, and it improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants' conduct and adopted as true allegations made by defendants in weighing the plausibility of theories put forward by the parties. The court went beyond *Twombly*'s pleading requirements when it found Evergreen's complaint deficient as compared to those in other cases that pled 'highly specific details as to how the alleged conspirators communicated with each other, the individuals who were involved, when the communications took place, the substance of their contents, and the dramatic switch in business practices that followed.' *Evergreen*, 865 F.Supp.2d at 142. As discussed earlier, *Twombly* does not require such heightened pleadings for § 1 claims.")

Gianfrancesco v. Town of Wrentham, 712 F.3d 634, 639, 640 (1st Cir. 2013) ("Gianfrancesco's due process claim is of the substantive sort, and alleges executive (rather than legislative) misconduct. . .Thus, he must plausibly allege that the actions taken against him were so egregious as to shock the conscience and that they deprived him of a protected interest in life, liberty, or property. . . He has not done so. Construed in Gianfrancesco's favor, the amended complaint describes a pattern of selective and excessive enforcement of municipal regulations. But it is remarkably vague. The complaint says that Tom's Tavern was subject to 'inapplicable' septic and sprinkler system requirements, but it does not say how or when it was subjected to these requirements, or by whom; it also does not say what makes the requirements excessive. None of these missing facts should be beyond Gianfrancesco's reach. . . In any event, even if Gianfrancesco has established that Tom's Tavern was subjected to unlawful regulation, he has not plausibly alleged that this overreaching was 'a brutal and inhumane abuse of official power,' or 'truly outrageous, uncivilized, and intolerable.'. . The complaint is devoid of allegations actually describing the defendants' conduct, and accusatory adverbs like 'wrongfully,' 'deliberately,' and 'selectively' cannot carry a factually inadequate complaint across the pleading threshold. . . . Gianfrancesco's equal protection claim is similarly deficient. Under the class-of-one rubric, an equal protection plaintiff may press a claim 'that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,' even where he does 'not [show] membership in a class or group. . . But, as we recently explained, a class-of-one plaintiff bears the burden of showing that his comparators are similarly situated in all respects relevant to the challenged government action. . . Gianfrancesco says that he has carried this burden by identifying one similarly situated business (the Anvil Pub), but we do not agree. The complaint makes no effort to establish how or why the Anvil Pub is similarly situated to Tom's Tavern in any relevant way, and does not mention any other putative comparator. It simply says that the regulatory and enforcement measures taken against Tom's Tavern were not also taken against 'similarly situated establishments.' These are 'assertions nominally cast in factual terms but so general and conclusory as to amount merely to an assertion that unspecified facts exist to conform to the legal blueprint.'. . And there is no suggestion that Gianfrancesco lacks the

information needed to identify similarly situated businesses. . . In light of these shortcomings, Gianfrancesco has not pled a plausible class-of-one claim.")

Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 51-57 (1st Cir. 2013) ("The court below ruled, among other things, that the complaint failed to state a claim for relief because it did not assert facts sufficient to establish a prima facie case of political discrimination.The prima facie case is an evidentiary model, not a pleading standard. For this reason, the interaction between the prima facie case and the plausibility standard crafted by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), has created some confusion. We now resolve that confusion and hold that the prima facie case is not the appropriate benchmark for determining whether a complaint has crossed the plausibility threshold. Accordingly, that aspect of the district court's decision must be annulled and the case remanded for further proceedings. . . . [A]n inquiry into plausibility necessitates a two-step pavane. . . First, the court must sift through the averments in the complaint, separating conclusory legal allegations (which may be disregarded) from allegations of fact (which must be credited). . . Second, the court must consider whether the winnowed residue of factual allegations gives rise to a plausible claim to relief. . . .In this case, the district court tested the complaint in a crucible hotter than the plausibility standard demands. It repeatedly faulted the complaint for failing to 'establish a prima facie case of political discrimination.'. . The plaintiffs argue that this laser-like focus on a prima facie case is misplaced at the pleading stage; that requirement, they say, should be reserved for summary judgment and trial. We agree. In *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), the Supreme Court negated any need to plead a prima facie case in the discrimination context and emphasized that the prima facie model is an evidentiary, not a pleading, standard. . . .We recognize that these cases were decided before the Supreme Court effected a sea change in the law of federal pleading in *Iqbal* and *Twombly.* This gives rise to two questions. First, does the hegemony of the *Swierkiewicz/Leatherman/Educadores* line of cases continue in a post-*Iqbal/Twombly* world? Second, what is the role, if any, of the prima facie case in determining plausibility at the pleading stage? We answer the first question in the affirmative: the *Swierkiewicz* holding remains good law. . . It is not necessary to plead facts sufficient to establish a prima facie case at the pleading stage. . . .*Iqbal* does not mention, but is wholly consistent with, *Swierkiewicz;* there, the Court stressed that, notwithstanding the neoteric plausibility standard, no 'detailed factual allegations' are required in a complaint. . . The prima facie standard is an evidentiary standard, not a pleading standard, and there is no need to set forth a detailed evidentiary proffer in a complaint. In answering the first question, we do not write on a pristine page. Several other courts of appeals have considered the question and concluded, as we do, that the *Swierkiewicz* Court's treatment of the prima facie case in the pleading context remains the beacon by which we must steer. *See, e.g., Keys v. Humana, Inc.*, 684 F.3d 605, 609–10 (6th Cir.2012); *Khalik v. United Air Lines*, 671 F.3d 1188, 1191–92 (10th Cir.2012); *Coleman v. Md. Ct. of App.*, 626 F.3d 187, 190 (4th Cir.2010); *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120–21 (2d Cir.2010); *al- Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir.2009), *rev'd on other grounds*, 131 S.Ct. 2074 (2011). This brings us to the second question. With respect to this question, we do not mean to imply that the elements of the prima facie case are irrelevant to a plausibility determination in a discrimination suit. They are not.

Those elements are part of the background against which a plausibility determination should be made. . . .In a nutshell, the elements of a prima facie case may be used as a prism to shed light upon the plausibility of the claim. Although a plaintiff must plead enough facts to make entitlement to relief plausible in light of the evidentiary standard that will pertain at trial—in a discrimination case, the prima facie standard—she need not plead facts sufficient to establish a prima facie case. . . .With this architecture in place, we first examine the district court's conclusion that the complaint failed adequately to establish that Molina (the de facto head of the agency) was aware of the plaintiffs' affiliations with opposing political parties. . . To be sure, the complaint contains only a conclusory statement of Molina's knowledge. For pleading purposes, however, knowledge may be inferable from other allegations in the complaint. . . So it is here. . . . We think that the district court subjected the complaint to an overly stringent pleading standard. An assertion that a defendant was affirmatively seeking information about employees' political affiliations is more than a bare legal conclusion. The plaintiffs' 'witch-hunt' and 'talk[ing] about politics' averments, though general, are factual assertions that must, at the pleading stage, be given credence. . . .The relevant question for a district court in assessing plausibility is not whether the complaint makes any particular factual allegations but, rather, whether 'the complaint warrant[s] dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.'. . There need not be a one-to-one relationship between any single allegation and a necessary element of the cause of action. What counts is the 'cumulative effect of the [complaint's] factual allegations.'. . Here, the factual allegations, taken in their entirety, plausibly support a finding that Molina had acquired knowledge of the plaintiffs' political affiliations. The district court also held that the plaintiffs had failed plausibly to allege Ríos's antagonistic political affiliation. . . . [T]o survive a Rule 12(b)(6) motion, it is not necessary for a plaintiff in a political discrimination case to bring forth evidence that the defendant is a card-carrying member of the opposition party. On this issue, the plaintiffs' factual allegations are adequate for pleading purposes. . . . The last pillar on which the district court's order rests involves what it concluded was the absence of any plausible allegation that political affiliation was a substantial or motivating factor behind the adverse employment actions. . . Once again, it is important to bear in mind that the plaintiffs, for pleading purposes, need not *establish* this element; the facts contained in the complaint need only show that the claim of causation is plausible. . . . The complaint here contains allegations that all of the plaintiffs were affiliated with political parties that opposed the NPP; that none of them ever received a negative evaluation for her work at the AIJ; that each was replaced by an NPP adherent; and that the critical decisions were made by newly appointed officials loyal to the NPP and in a politically charged atmosphere. The record contains no nondiscriminatory explanation for the adverse employment actions. . . .When all is said and done, we think that the array of circumstances described in the complaint suffices to support an inference of political animus.")

Grajales v. Puerto Rico Ports Authority, 682 F.3d 40, 45-47, 49, 50 (1st Cir. 2012) ("Under ordinary circumstances, a court may measure the plausibility of a complaint by means of a motion for judgment on the pleadings. . . We have not, however, spoken to the question of whether it is appropriate to apply the plausibility standard after substantial pretrial discovery has taken place. An obvious anomaly arises in such a situation because a court attempting to determine whether a

complaint should be dismissed for implausibility must decide, on the basis of the complaint alone, if the complaint lacks enough factual content to allow a 'reasonable inference that the defendant is liable for the misconduct alleged.'. . This is, by its nature, a threshold inquiry, and logic strongly suggests that it occur prior to discovery. Ignoring the entire panoply of facts developed during discovery makes little sense. An artificial evaluation of this sort seems especially awkward because one of the main goals of the plausibility standard is the avoidance of unnecessary discovery. . . Applying the plausibility standard to a complaint after discovery is nearly complete would defeat this core purpose. . . Thus, while district courts enjoy broad discretion in managing their dockets, we think that, once the parties have invested substantial resources in discovery, a district court should hesitate to entertain a Rule 12(c) motion that asserts a complaint's failure to satisfy the plausibility requirement. Here, however, we need not decide the difficult question of whether the district court's decision to entertain the defendants' Rule 12(c) motion after nine months of pretrial discovery was an abuse of discretion. As we explain below, this case can readily be resolved on the merits of the plausibility claim. We turn, therefore, to the plaintiff's substantive contention. . . . As a general matter, liability for public officials under section 1983 arises only if 'a plaintiff can establish that his or her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization.'. . Moreover, supervisory liability under section 1983 cannot arise solely on the basis of respondeat superior. . . Such liability requires that the supervisor's conduct (whether action or inaction) constitutes 'supervisory encouragement, condonation or acquiescence[,] or gross negligence of the supervisor amounting to deliberate indifference.'. . Finally, the case law requires a separate assessment of the potential liability of each of the defendants. . .Viewing the pleaded facts in the light most hospitable to the plaintiff, the following picture emerges. In 2008, the plaintiff—who had an exemplary record of service within the PRPA—moved from a trust (policymaking) to a career (non-policymaking) position. Shortly after the change in administration wrought by the 2008 election, the plaintiff began experiencing significant harassment at the hands of persons loyal to an opposing political party (which controlled the new administration). This course of harassment consisted in large part of actions for which there was no legitimate explanation. The harassment culminated in unjustified disciplinary threats, disparate treatment, the loss of the plaintiff's right to carry a sidearm, his involuntary transfer to a remote work station, the elongation of his workday, and a denial of remuneration for the extra time and travel involved. The scenario here is not unfamiliar. Similar claims of political discrimination in the public workplace following a change in administration appear to be increasingly common in the Commonwealth of Puerto Rico. . . In this instance, the close temporal proximity between the regime change and the onset of pervasive cross-party harassment, coupled with the absence of any legitimate reason for much of the offending conduct, permits a plausible inference at the pleading stage that political animus was a motivating factor behind the harassment. . . We hold, therefore, that the factual allegations in the second amended complaint, taken as true and considered as a whole, state a plausible section 1983 claim for political discrimination. We caution, however, that a favorable plausibility determination does not necessarily herald a likelihood of success at subsequent stages of the litigation. Factual allegations must be proven, evidence to the contrary must be factored into the mix, and the merits remain entirely open.")

Pruell v. Caritas Christi, 678 F.3d 10, *1-*5 (1st Cir. 2012) ("The need for pleading specificity in federal complaints has been somewhat unsettled since the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). The Federal Rules of Civil Procedure have long provided for 'notice pleading,' requiring a 'short and plain statement of the claim showing that the pleader is entitled to relief,' Fed.R.Civ.P. 8(a)(2), but the Supreme Court also made clear in *Twombly* that Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests. . .Indeed, well before *Twombly* and *Iqbal*, specificity requirements had been stiffened in many circuit courts, *see Twombly*, 550 U.S. at 562 (collecting cases), redressing what had been a much earlier swing of the pendulum to the other end of its arc, *e.g.*, *Conley v. Gibson*, 355 U.S. 41 (1957); other pressures for tightening up have come from growing dockets, the enormous cost of modern discovery, and the benefits to court and parties of sorting out hopeless claims early on. But, as in any transition, there remain issues of fair warning and elucidation. To allege an employment relationship, plaintiffs in this case state: 'At all relevant times, Ashleigh Pruell and Amy Gordon ('Plaintiffs') were employees under the FLSA, employed by defendants within this district and reside within this District' and to allege underpayment of overtime, the complaint as amended says: 'Throughout their employment with defendants, Plaintiffs regularly worked hours over 40 in a week and were not compensated for such time, including the applicable premium pay.'. . The key statement—'regularly worked hours over 40 in a week and were not compensated for such time'—is one of those borderline phrases. . . . Standing alone, the quoted language is little more than a paraphrase of the statute. . . . Nevertheless, we think the motion to amend should be allowed. The precedents on pleading specificity are in a period of transition, and precise rules will always be elusive because of the great range and variations in causes of action, fact-patterns and attendant circumstances (*e.g.*, warnings, good faith of counsel). . . While specifics as to the named plaintiffs here are lacking, some of the information needed may be in the control of defendants. Plaintiffs certainly know what sort of work they performed and presumably know how much they were paid as wages; but precisely how their pay was computed and based upon what specific number of hours for particular time periods may depend on records they do not have. Complaints cannot be based on generalities, but some latitude has to be allowed where a claim looks plausible based on what is known. . . . Under all of these circumstances we think another amendment should be permitted, and it would be helpful on remand for the district judge to indicate to plaintiffs what deficiencies remain and what the court expects to be supplied in a final amended complaint. The judgment is *affirmed* so far as it finds the complaint inadequate to state an FLSA claim, but the dismissal with prejudice is *vacated*, and the case *remanded* to give the plaintiffs a final opportunity to file a sufficient complaint.")

Schatz v. Republican State Leadership Committee, 669 F.3d 50, 56-58 (1st Cir. 2012) ("Like the district judge, we skip over whether Schatz's complaint plausibly alleges defamation and focus on whether it plausibly alleges actual malice—given that this is the simplest way to pinpoint Schatz's

problem. Not so fast, Schatz says, suggesting that courts cannot take that tack. Unfortunately for Schatz, he cites no case for the point, and we are aware of none, so we need say no more about that. *See Rodríguez v. Municipality of San Juan,* 659 F.3d 168, 175–76 (1st Cir.2011). But before we tangle with the actual-malice issue, we need to clear away some underbrush. . . .His complaint used actual-malice buzzwords, contending that the RSLC had 'knowledge' that its statements were 'false' or had 'serious doubts' about their truth and a 'reckless disregard' for whether they were false. But these are merely legal conclusions, which must be backed by well-pled facts. *See, e.g.*, *Ocasio–Hernández,* 640 F.3d at 12. As for facts, the complaint alleged that the RSLC had basically branded him a criminal, falsely charging him with working with his co-selectmen to 'wrong [ly]' divert $10,000 in 'taxpayer' funds to a 'political organization' and then voting to kill a $10,000 fireworks celebration. The reality, at least according to his complaint, is that town residents had voted in January 2008 to contribute to the Coalition and that he had voted in March 2009 to fund the fireworks display. From these allegations Schatz further insists that the RSLC had portrayed him in a sinister light by connecting the two funding decisions (the one had nothing to do with the other) and by referring to the Coalition as a 'political organization' rather than by its name (leaving the impression that maybe *his* 'political organization' had gotten the 10 grand). Given what the newspapers had reported, which, according to the complaint, were the RSLC's sole sources of information, the RSLC knew the offending statements were false or made them recklessly without any regard for the truth—or so Schatz argues. He also points out that his complaint alleged that the RSLC did not launch 'any additional investigation' to determine whether what it said was true. And, reaching the ultimate crescendo, he contends that the complaint's allegations plausibly show that the RSLC acted with actual malice. We think just the opposite. After comparing what the RSLC proclaimed with what the newspapers disclosed (as everyone agrees we should), we conclude that none of Schatz's points, individually or collectively, can save the day for him. . . . The bottom line, then, is that he has not 'nudged' his actual-malice claim 'across the line from conceivable to plausible,' so the judge rightly dismissed the complaint. . . . As a last-ditch effort to save his case, Schatz suggests that if we do not reverse the judge we will be setting pleading standards higher than what *Twombly* and *Iqbal* require. Not so. Sure, malice is not a matter that requires particularity in pleading—like other states of mind, it 'may be alleged generally.' *See* Fed.R.Civ.P. 9(b). But, to make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred—even in a world with *Twombly* and *Iqbal*.. . Having followed *Twombly* and *Iqbal* to a T, we easily reject Schatz's last line of attack.")

Feliciano-Hernandez v. Pereira-Castillo, 663 F.3d 527, 533-36 (1st Cir. 2011) ("Feliciano-Hernández's complaint fails under *Iqbal* to plead adequately that the individual defendants violated his constitutional rights and so fails the first prong of the qualified immunity analysis. As such, he necessarily fails the second prong as well: an objectively reasonable public official situated as defendants would not be on notice of violations of any constitutional rights. The named defendants are very high-level officials, each of whom, as Secretary of the Department of Corrections, had vast responsibilities. . . . The complaint sets forth a series of conclusions. It alleges that '[i]n keeping the plaintiff confined beyond the term of his sentence, each defendant acted with deliberate indifference and/or reckless disregard of the plaintiff's Eighth Amendment rights and

due process of law' and that '[e]ach defendant [ ] unjustifiabl[y] deprived plaintiff of liberty in violation of his Eighth Amendment rights and due process of law.'. The complaint states as to each of the former-Secretary defendants that he or she 'is being sued on the basis of his [or her] deliberate indifference and/or reckless disregard' of the plaintiff's rights. It alleges among other conclusions that the defendants 'failed in their duty to assure adequate monitoring, disciplining, evaluating, training and supervising any and all personnel under their charge, to assure that all inmates were properly classified and released upon completion of their sentence.' It relatedly alleges that '[h]ad the defendants complied with their supervisory duties, they would have identified those employees that did not properly register the plaintiff's classification and inaccurately categorized the crimes for which he had been sentenced.' None of these conclusory allegations suffice to establish a claim. These are exactly the sort of 'unadorned, the-defendant-unlawfully-harmed-me accusation[s]' that both we and the Supreme Court have found insufficient. . . . There are a number of other specific deficiencies in the complaint. We start (and end) with the failure to plead that any of the named defendants, each a former Secretary of the Department of Corrections, had any individual notice that plaintiff's incarceration beyond 1993 was a violation of his constitutional rights, much less that there was an affirmative link to them or that they were deliberately indifferent to those notices of alleged violations of his rights. Actual or constructive knowledge of a rights violation is a prerequisite for stating any claim. . . .Even beyond failing to show notice to the individual defendants, the complaint fails on other grounds. Feliciano-Hernández 'would still have to go further, for "not every official who is aware of a problem exhibits deliberate indifference by failing to resolve it."'. . . The complaint contains no factual allegations to support even a minimal showing of deliberate indifference.")

Air Sunshine, Inc. v. Carl, 663 F.3d 27, 35 (1st Cir. 2011) ("The bald allegation that Carl refused to accept the inspection Air Sunshine had conducted, pending revision of certain manuals, which Air Sunshine had been waiting for Carl to approve, also does not state a procedural due process claim. The complaint does not state when the private inspection took place, when the results were submitted to Carl, when Carl refused to accept the inspection, why his refusal was improper, and provides no other information that would provide necessary context for a claim of constitutional violation. These and the other 'naked assertion[s]' of procedural due process violations are 'devoid of "further factual enhancement"' and do not survive the motion to dismiss. . . Carl's actions were also entirely consistent with lawful conduct, which is another reason the complaint fails to meet the *Iqbal* standard.")

Soto-Torres v. Fraticelli, 654 F.3d 153, 157 n.2 (1st Cir. 2011) ("The complaint's allegations that Soto-Torres was 'illegally and unreasonabl[y] detained' and that 'excessive force' was used in pushing him to the floor are legal conclusions that are not to be credited.")

Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 13-17, 19 (1st Cir. 2011) ("At issue. . . is the correctness of the district court's conclusion that the plaintiffs' complaint fails to show that the defendants had knowledge of the plaintiffs' political affiliation and that the plaintiffs' political affiliation motivated the defendants' participation in the plaintiffs' terminations. . . . The district

court erred by not affording the plaintiffs' allegations the presumption of truth to which they were entitled. First, as we explained above, the Supreme Court's concerns about conclusory allegations expressed in *Twombly* and *Iqbal* focused on allegations of ultimate legal conclusions and on unadorned recitations of a cause-of-action's elements couched as factual assertions. Allegations of discrete factual events such as the defendants questioning the plaintiffs and replacing the plaintiffs with new employees are not 'conclusory' in the relevant sense. Second, factual allegations in a complaint do not need to contain the level of specificity sought by the district court. . . . Additionally, the district court erred when it failed to evaluate the cumulative effect of the factual allegations. The question confronting a court on a motion to dismiss is whether *all* the facts alleged, when viewed in the light most favorable to the plaintiffs, render the plaintiff's entitlement to relief plausible. . . . Indeed, the Supreme Court has suggested that allegations that would individually lack the heft to make a claim plausible may suffice to state a claim in the context of the complaint's other factual allegations. . . . We also reject the district court's 'lead to the conclusion' formulation to the extent it implies a stronger logical connection than that demanded by plausibility. As we have said previously, '[a] plausible but inconclusive inference from pleaded facts will survive a motion to dismiss.' *Sepúlveda-Villarini,* 628 F.3d at 30. Taking all well-pleaded factual allegations as true, the plaintiffs in this case have pleaded adequate factual material to support a reasonable inference that the four defendants had knowledge of their political beliefs. . . . Because precise knowledge of the chain of events leading to the constitutional violation may often be unavailable to a plaintiff at this early stage of the litigation, we take to heart the Supreme Court's call to 'draw on our "judicial experience and common sense" as we make a contextual judgment about the sufficiency of the pleadings.'. . As we have often emphasized, one rarely finds 'smoking gun' evidence in a political discrimination case. . . Circumstantial evidence must, at times, suffice. Moreover, the requirement of plausibility on a motion to dismiss under Rule 12(b)(6) 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the illegal [conduct].'. . The allegations above plausibly show that each defendant possessed knowledge of and shared some responsibility for the termination of employees at La Fortaleza. . . . Turning to the question of discriminatory motive, we must again conclude that the district court erred. The allegations of the plaintiffs' complaint support the reasonable inference that the defendants' decision to terminate the plaintiffs' employment was substantially motivated by political affiliation. . . . The cumulative weight of the plaintiffs' factual allegations easily nudges their claim of political discrimination 'across the line from conceivable to plausible' as to each defendant. . . Read as a whole, the plaintiffs' complaint unquestionably describes a plausible discriminatory sequence that is all too familiar in this circuit. . . Under the Federal Rules, no more is required to 'unlock the doors of discovery' for these plaintiffs.")

Rios-Colon v. Toledo-Davila, 641 F.3d 1, 2, 5 (1st Cir. 2011) ("Plaintiff Víctor Hugo Ríos-Colón ('Ríos') appeals from the judgment of the United States District Court for the District of Puerto Rico, dismissing his suit alleging racial discrimination in the course of his employment in the Puerto Rico Police Department for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). The complaint alleged that he is black and that his supervisor in the Police Department used racial slurs against him and transferred him to a less desirable position. For the

reasons explained below, we conclude that the complaint plausibly alleged claims of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, made actionable by 42 U.S.C. § 1983. . . . The complaint alleges that Ríos was transferred from a position with the Drug Prevention Division to a less desirable position with the Bureau of Illegal Arms. The position to which he was transferred allegedly offered materially less attractive working conditions and fewer opportunities to earn overtime pay. The complaint furthermore plausibly alleges that the disadvantageous transfer was based on racial discrimination. It alleges that Cordero, the supervisor who caused Ríos to be transferred and who recommended a less qualified white candidate in preference to Ríos when a position in the Drug Prevention Division later became available, had used abusive and derogatory slurs expressing explicit anti-black racial bias. These allegations were sufficient to plead a cognizable claim under the Equal Protection Clause, as they convey a plausible inference that Cordero discriminated against Ríos in official acts, depriving him of significant advantages because of his race.")

Penalbert-Rosa v. Fortuno-Burset, 631 F.3d 592, 595-97 (1st Cir. 2011) ("*Iqbal* could be viewed as emergent law, *see, e.g.,* 129 S.Ct. at 1961 (Souter, J., dissenting), but we ourselves had earlier said a complaint that rests on 'bald assertions' and 'unsupportable conclusions' may be subject to dismissal, *Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir.1996); and our decisions since *Iqbal* have several times found unadorned factual assertions to be inadequate. . . Without trying to lay down a mechanical rule, it is enough to say that sometimes a threadbare factual allegation bears insignia of its speculative character and, absent greater concreteness, invites an early challenge–which can be countered by a plaintiff's supplying of the missing detail. Here, Peñalbert's complaint does allege that personnel decisions in the executive mansion are within the authority of the governor, but nothing beyond speculation supports the further assertion that the governor or his chief of staff participated in the decision to dismiss Peñalbert. Someone denominated the 'administrator' of the governor's mansion might more plausibly be involved, but nothing in the complaint indicates the administrator's actual duties or that the administrator ordinarily passes on the selection or discharge of a receptionist. A defendant could be liable, even without knowing of Peñalbert or her position, if (for example) on some generic basis that defendant authorized the impermissible firing of PDP supporters because of their party membership or beliefs. . . But, again, mere possibility is not enough to state a claim and again no facts are stated in the complaint to show that in this instance any of the three gave such an order or that it is even plausible that they did. If Peñalbert had any basis beyond speculation for charging any one of the named defendants with knowing participation in the wrong, it seems almost certain that this would have been mentioned–if not in the complaint at least in the opposition to the motion to dismiss. Specific information, even if not in the form of admissible evidence, would likely be enough at this stage; pure speculation is not. This may seem hard on a plaintiff who merely suspects wrongdoing, but even discovery requires a minimum showing and 'fishing expeditions' are not permitted. . .However, Peñalbert's position is in one respect different: the complaint adequately alleges–based on the non-conclusory facts already listed–that someone fired Peñalbert based on party membership. Of course, the factual allegations might be later undermined or countered by affirmative defenses . . . but at this stage

the complaint adequately asserts a federal wrong by someone. So while the present complaint does not justify suit against the defendants actually named, an avenue for discovery may be open. A plaintiff who is unaware of the identity of the person who wronged her can sometimes proceed against a 'John Doe' defendant as a placeholder. . . We have previously condoned the device, at least when discovery is likely to reveal the identity of the correct defendant and good faith investigative efforts to do so have already failed. . .Whether Peñalbert could make such a showing is not clear from the face of her complaint, and she has not sought this 'John Doe' alternative. Rarely do we rescue a civil claim–even to the very limited extent now contemplated–on grounds not urged either on the district court or on us. But *Twombly* and *Iqbal* are relatively recent; developing a workable distinction between 'fact' and 'speculation' is still a work in progress; and while upholding the dismissal of the complaint against the named defendants, we think that the interests of justice warrant a remand to give Peñalbert a reasonable opportunity to move to amend the complaint to seek relief against a 'John Doe' defendant.")

Sepulveda-Villarini v. Department of Educ. of Puerto Rico, 628 F.3d 25, 29, 30 (1st Cir. 2010) ("We think that the district court demanded more than plausibility. Each set of pleadings includes two significant sets of allegations. First, for a period of four or five school years the school administration provided the reduced class size in response to the respective plaintiff's request, supported by some sort of medical certification attesting to its legitimacy. In each complaint, those years of requested accommodation are put forward as establishing, in effect, a base-line of adequacy under the statute in response to an implicit acknowledgment that a statutory disability required the provisions that were made. Second, each set of pleadings describes changed facts beginning in the 2007-08 year, in which instructions from the defendant Secretary resulted in raising the class size to 30 (with a young team teacher to share the load with Sepúlveda). Each complaint alleges that the plaintiff's emotional and physical health subsequently deteriorated to the point of requiring treatment, and each concludes that assigning 30 pupils was less than reasonable accommodation under the statute. . . . We . . . see the trial judge's call for allegations explaining 'how' class size was significant and the change in size was actionable as a call for pleading the details of medical evidence in order to bolster the likelihood that a causal connection will prove out as fact. It may even be read as an expression of skepticism that medical evidence would support the causal claim that increased class size damaged health. But *Twombly* cautioned against thinking of plausibility as a standard of likely success on the merits; the standard is plausibility assuming the pleaded facts to be true and read in a plaintiff's favor. . . . A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss, and the fair inferences from the facts pleaded in these cases point to the essential difference between each of them and the circumstances in *Twombly,* for example, in which the same actionable conduct alleged on the defendant's part had been held in some prior cases to be lawful behavior. . . . We therefore *vacate* the portion of the order in each case that found the complaint inadequate to state a Title I violation, and inadequate to state a Rehabilitation Act claim for the same reason.")

Maldonado v. Fontanes, 568 F.3d 263, 273-75 & n.7(1st Cir. 2009) ("[A]nalyzing the pleadings under *Iqbal*, we hold that the allegations of the complaint do not allege a sufficient connection

between the Mayor and the alleged conscience-shocking behavior–the killing of the seized pets–to state the elements of a substantive due process violation.. . . The purported liability of the Mayor for damages for substantive due process violations does not involve a policy of the Municipality for which he is responsible, nor does it rest on his personal conduct. Instead, the allegations against the Mayor are that he promulgated a pet policy for the public housing complexes and was present at and participated in one of the raids. This level of involvement is insufficient to support a finding of liability. . . . Plaintiffs complaint identifies no policy which authorized the killing of the pets, much less one which the Mayor authorized. Second, the complaint does not allege that the Mayor was personally involved in any conscience-shocking conduct during the raids. . . .A government official who himself inflicts truly outrageous, uncivilized, and intolerable harm on a person or his property may be liable; but there is no claim in this complaint the Mayor himself inflicted such harm. . . The allegations against the Mayor thus do not establish that his involvement was sufficiently direct to hold him liable for violations of the plaintiffs' substantive due process rights. Nor do the allegations make out a viable case for supervisory liability, such that the Mayor could, on these pleadings, be held responsible for violations of the plaintiffs' substantive due process rights committed by subordinate municipal employees or workers from ACS. . . . Some recent language from the Supreme Court may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability. . . We need not resolve this issue, however, because we find that the plaintiffs have not pled facts sufficient to make out a plausible entitlement to relief under our previous formulation of the standards for supervisory liability. . . . Here, the Mayor's promulgation of a pet policy that was silent as to the manner in which the pets were to be collected and disposed of, coupled with his mere presence at one of the raids, is insufficient to create the affirmative link necessary for a finding of supervisory liability, even under a theory of deliberate indifference. The Mayor is entitled to qualified immunity on the pleadings on the Fourteenth Amendment substantive due process claims.")

Thomas v. Rhode Island, 542 F.3d 944, 949 (1st Cir. 2008) ("[E]ven if the probable cause theory of the appellants were properly before us, we would reject it. The vague references in the complaint to acts of the defendants that 'are illegal' and 'without lawful authority' were insufficient to apprise defendants that the appellants were asserting a more particular claim that there was a lack of probable cause for the arrests. As we have stated, '[n]otice pleading rules do not relieve a plaintiff of responsibility for identifying the nature of her claim.'. . Our precedent is clear that courts 'must always exhibit awareness of the defendant's inalienable right to know in advance the nature of the cause of action being asserted against him,' because such notice is '[a] fundamental purpose of pleadings under the Federal Rules of Civil Procedure.'. . Here, the generality of the complaint's language did not afford defendants such notice with respect to the probable cause claim.").

Solomon v. Dookhan, No. 13–10208–GAO, 2014 WL 317202, *7, *8 (D. Mass. Jan. 27, 2014) [O'Toole, J. (adopting Magistrate Judge Sorokin's R & R) ("[T]he fact that Keenan is alleged by Solomon to have engaged in unconstitutional misconduct, and then to have engaged in further misconduct in an immunized capacity (*i.e.*, his grand jury testimony) does not serve to immunize

him retroactively with respect to the earlier acts. . . It is also potentially evidence with respect to the allegation plausibly made in the Amended Complaint that Keenan colluded with Dookhan and the ADA, intending to frame Solomon, which would also state a claim for violation of his due process rights. Even where *Brady* is not implicated, state actors nevertheless violate an accused's due process rights when they engage in a 'deliberate deception.'. . As in *Limone,* Solomon's allegations here are broader than a *Brady* claim. . . . Solomon alleges not that Keenan merely disposed of the tested substance, but then was otherwise an unwitting collateral victim of Dookhan's misconduct. Rather, he plausibly alleges that Keenan, along with Dookhan, knowingly sought Solomon's wrongful conviction by: failing to provide the field test materials; attempting to intimidate Solomon's counsel; seeking an indictment of Solomon on the felony charge; and offering false (albeit immunized) testimony and evidence to the grand jury.")

Brace v. Massachusetts, 673 F.Supp.2d 36, 42, 43 (D. Mass. 2009) ("[T]he heightened 'plausibility' pleading standard first articulated in *Twombly* and then re-stated in *Iqbal* might not be as universal as Plaintiff's counsel seemed to contend at oral argument. Regardless of the actual reach of *Twombly* and *Iqbal,* and even assuming, *arguendo,* that the heightened pleading standard applies, Plaintiff in this case has pled sufficient facts to survive Defendant Frey's motion to dismiss. As to the first element needed to establish a violation of Ms. Brace's rights under the Eighth or Fourteenth Amendments, there is little question that Plaintiff's complaint establishes that Ms. Brace's condition while she was in custody constituted a serious medical need. Similarly, Plaintiff's complaint contains enough factual detail to plausibly support a claim that Defendant Frey might have exhibited deliberate indifference to this serious medical need. The complaint alleges that Defendant Frey observed Ms. Brace while she was in obvious medical distress, which would establish that she was subjectively aware of the substantial risk of serious harm. The complaint also avers that Defendant Frey did take the minimal step of making a phone call to the medical unit about Ms. Brace's condition, which is enough to establish that she in fact did actually draw the inference that a risk of harm existed. Given Plaintiff's factual allegations about Defendant Frey's role in the events of August 20, 2005, it is plausible that Plaintiff could establish that Defendant Frey's failure to take any further action could constitute deliberate indifference. The complaint here does not begin and end with a conclusory recitation of the legal elements that must be proved. Rather, Plaintiff has cited to enough specific alleged acts or omissions by Defendant Frey that might support a claim under the Eighth or Fourteenth Amendments, especially given the limited access to information that Plaintiff has had prior to taking discovery in this case.").

Chao v. Ballista, 630 F.Supp.2d 170, 177-79 & n.2 (D. Mass. 2009) ("Plausibility, as the Supreme Court's recent elaboration in *Ashcroft v. Iqbal* makes clear, is a highly contextual enterprise–dependent on the particular claims asserted, their elements, and the overall factual picture alleged in the complaint. . . .Allegations become 'conclusory' where they recite only the elements of the claim and, at the same time, the court's commonsense credits a far more likely inference from the available facts. . .This analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations. Yet in keeping with Rule 8(a), a complaint should only

be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible. . . .Together, [the] factual allegations [of the complaint] raise the plausible inference that, given their supervisory duties and security responsibilities, the Defendants failed to adequately train, supervise, or investigate Ballista's year-long sexual encounters with Chao. They encompass also a failure to adopt policies and procedures within the DOC that would have prevented the sexual abuse alleged in the complaint. . . . Given the public attention devoted to sexual abuse in prisons writ large, and the repetitive, long-lasting abuse alleged in this case, it is a fair inference from the pleadings that prison officials–including Commissioner Dennehey–were deliberately indifferent to the risks and reality of this abuse. . . . Notably, the state of mind required to make out a supervisory claim under the Eighth Amendment–i.e., deliberate indifference–requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit against Ashcroft and Mueller. . . Together with the other contextual factors discussed above, what qualifies as a fair or credible inference from the facts alleged in the pleadings must be calibrated accordingly.. . . While the Defendants' personal involvement will be further tested at the summary judgment stage, Chao's claims have met the crucial threshold of plausibility and survive the Defendants' Motion to Dismiss.")

Farrah v. Gondella , No. 07-12075-RGS, 2008 WL 2788090, at *3, *4 (D. Mass. July 16, 2008) (not reported) ("In Blodgett's view, the supervisory claim is pled so broadly that it would allow civil rights plaintiffs to sweep any superior officer into the ambit of liability simply by using catch-phrases like "knew or should have known" and "failed to act." Blodgett contends that plaintiff is attempting to bootstrap allegations regarding Blanchard's past conduct into the claim of supervisory liability without pleading any link between the alleged conduct and Blodgett personally. According to Blodgett, *Twombly* requires more. Blodgett may in this regard place too much weight on *Twombly*, but there is another consideration. Rule 8 requires a civil rights plaintiff (as it does plaintiffs generally) to set forth factual allegations with respect to each material element necessary to warrant relief, including 'who did what to whom, when, where, and why.' *Educadores Puertorriqueños en Accíon v. Hernández*, 367 F.3d 61, 68 (1st Cir.2004) (affirming the application of Rule 8 to civil rights actions, but rejecting a 'heightened pleading standard'). . . . Plaintiff's supervisory claim against Blodgett, as currently pled, skirts perilously close to an unadorned theory of vicarious liability, a tort concept that has no application in a section 1983 context. . . .While a civil rights plaintiff need not plead encyclopedic facts in order to adequately state a supervisory liability claim, the facts pled should be sufficient to cross the rim of the speculative into the realm of the plausible. This is particularly true where the supervisor against whom the claim is brought is an elected official whose duties run well beyond oversight of one of many components of a government office owing manifold duties to the general public. Perhaps the court is mistaken in permitting plaintiff a second chance as against Blodgett, but at this stage of the proceedings, the rules are appropriately plaintiff-friendly, and Blodgett has not (as yet) raised a claim of qualified immunity. The court will permit plaintiff to conduct discovery from Blodgett limited solely (and strictly) to the issues of: (1) his authority to discipline members of the Drug Task Force for alleged misconduct; and (2) his knowledge of any propensity by Blanchard (or others) to use excessive force.").

Brown v. Sweeney, 526 F.Supp.2d 126, 129, 130 (D.Mass. 2007) ("The United States Supreme Court is the flagship of a vast fleet of courts. Where, as here, it makes a course correction after sailing on a particular tack for a long period of time, it has the right to expect that each of the subordinate units will keep station on the flag, make the identical course correction, and sail on the new course in perfect alignment. At least that is the theory. Here, of course, the metaphor breaks down. Decisions of the Supreme Court do not come with precise orders, such as 'alter course three degrees to starboard.' Rather they carefully decide the specific controversy before the Court and explain the grounds of such decision. Given our strong *stare decisis* tradition, however, every such decision implicitly carries a signal much like Nelson's famous 'England expects ...' flag hoist at Trafalgar, *i.e.* 'that every man shall do his duty' and so we all shall ... at least insofar as we can make out the signal. There is some merit to an argument limiting the reach of *Bell Atlantic* to its antitrust subject matter. Professor Erwin Chermerinsky suggested such a limitation in addressing the District of Massachusetts Judicial Conference in June 2007. The Supreme Court in *Bell Atlantic* noted the imperative of dismissing antitrust claims before embarking your expensive discovery. . . Such an argument is supported by the more recent Supreme Court decision in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007). The Supreme Court, in *Erickson*, addressed a claim for a section 1983 violation and stated that '[s]pecific facts are not necessary.' . . To make matters more confusing, the authority cited for the proposition is *Bell Atlantic*, with an internal quotation citing *Conley*. . . . *Bell Atlantic*, when read together with *Erickson*, and in light of the cases that have addressed this issue, appears neither to be confined to antitrust cases nor to impose a significantly heightened pleading standard. . . The use of the *Bell Atlantic* language and standard in *Erickson* implies that recognizing a heightened (or different) pleading standard only for antitrust cases and therefore distinguishing *Bell Atlantic* on its antitrust subject matter ought fail. . . Still, *Erickson* is instructive in analyzing a motion to dismiss after *Bell Atlantic*. In *Erickson*, the Supreme Court held that a section 1983 claim alleging deliberate indifference to serious medical needs in violation of the Eighth Amendment was properly pled where '[t]he complaint stated that [the doctor's] decision to remove petitioner from his prescribed hepatitis C medication was Aendangering [his] life"' and that 'this medication was withheld Ashortly after" petitioner had commenced a treatment program that would take one year, that he was Astill in need of treatment for this disease," and that the prison officials were in the meantime refusing to provide treatment.'. . These generalized factual allegations were deemed sufficient and demonstrate that a liberal pleading standard as to the 'grounds' of a claim remains. . . The decision in *Bell Atlantic*, therefore, is properly read as undermining only those claims that rest exclusively on conclusory or merely speculative assertions.").

SECOND CIRCUIT

Willey v. Kirkpatrick, 801 F.3d 51, 68 (2d Cir. 2015) ("[W]e find erroneous each of the three apparently independent grounds given by the district court for dismissing Willey's claim for unsanitary conditions of confinement. The first two aim to set a minimum duration and minimum

severity of an exposure for it to reach the level of a constitutional violation. We agree that there are many exposures of inmates to unsanitary conditions that do not amount to a constitutional violation, but we reject the district court's conclusion that there is any bright-line durational requirement for a viable unsanitary-conditions claim. Nor is there some minimal level of grotesquerie required, which goes unmet by an inmate's accumulating human waste that fills a toilet but does not 'overflow[ ] into his cell.'. . Instead, our decisions and those of other circuits evaluate the product of these two components—whether exposure to human waste is cruel and unusual depends on both the duration and the severity of the exposure. . . . The severity of an exposure may be less quantifiable than its duration, but its qualitative offense to a prisoner's dignity should be given due consideration. Here, the district court's analysis did not appear to consider the effect that the cell shields would have in exponentially amplifying the grotesquerie of the odor of the accumulating waste. Another relevant consideration increases the severity of Willey's second alleged exposure, which the district court did not discuss. Over those fourteen days in a filthy cell, Willey alleges that he was kept naked and without access to clothing. We do not mean to set out any precise formula—we do not say, for example, that this 14–day exposure without clothing was more or less grave than the later 28–day exposure with clothing—but any analysis must consider both the duration and the severity of an inmate's experience of being exposed to unsanitary conditions. Finally, the district court's imposition of a third requirement—that an inmate 'claim[ ] that he suffered sickness or other ill effects' to establish a violation, J.A. 676—fares no better. Although the seriousness of the harms suffered is relevant to calculating damages and may shed light on the severity of an exposure, serious injury is unequivocally not a necessary element of an Eighth Amendment claim. . . Even if such harm were required, Willey plainly alleged that his mental-health problems and attempted suicide followed the campaign of retaliation of which the unsanitary conditions of his confinement were a prominent part. For these reasons, independent of the reaching of grounds not raised by the movants without notice and an opportunity to respond, we vacate the dismissal of Willey's claim for unsanitary conditions of confinement.")

Crawford v. Cuomo, 796 F.3d 252, 254 (2d Cir. 2015) ("We write today to clarify the rule set forth in *Boddie:* A corrections officer's intentional contact with an inmate's genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or to humiliate the inmate, violates the Eighth Amendment. Moreover, we recognize that sexual abuse of prisoners, once passively accepted by society, deeply offends today's standards of decency. The proper application of the rule in *Boddie* must reflect these standards. By alleging that Officer Prindle fondled their genitals for personal gratification and without penological justification, Crawford and Corley stated a cognizable Eighth Amendment claim.")

Dolan v. Connolly, 794 F.3d 290, 292, 295 (2d Cir. 2015) ("We hold that action as a member of an ILC, i.e. the filing or voicing of grievances on behalf of a prison population, qualifies as constitutionally protected conduct under the First and Fourteenth Amendments and that retaliation for such conduct is therefore actionable under Section 1983. . . . While we harbor some skepticism

as to whether the complaint, as it stands, adequately pleads a factual basis from which to infer a causal connection between Dolan's protected conduct and the adverse actions allegedly taken by (at least) some defendants, reading the pro se complaint and opposition papers liberally, we cannot conclude that amendment would be futile.")

Drimal v. Tai, 786 F.3d 219, 223-24 (2d Cir. 2015) ("The district court's rulings on the pleadings and on qualified immunity suffer from two deficiencies. First, the district court erred in finding Drimal's complaint sufficient to plead a violation of Title III because Drimal simply asserted in a conclusory fashion that intercepting marital telephone calls violated Title III without any reference to the duty to minimize. Second, in evaluating defendants' claims of qualified immunity, the district court ruled on all the defendants as a single group instead of evaluating Drimal's claims against each defendant individually. Accordingly, we vacate the district court's denial of the motion to dismiss and direct the dismissal of the complaint with leave to replead under Federal Rule of Civil Procedure 15(a)(2) because it appears that amending the complaint would not be futile. . . .In assessing the complaint, the district court read the minimization requirement into the plaintiff's allegations that defendants 'unlawfully' listened to her calls and required no greater specificity as to the facts alleged. However, a simple allegation that defendants behaved 'unlawfully,' unsupported by any factual detail, is precisely the type of legal conclusion that a court is not bound to accept as true on a motion to dismiss, and the district court erred in doing so here.")

Nielsen v. Rabin, 746 F.3d 58, 64 (2d Cir. 2014) ("'Determining whether a complaint states a plausible claim for relief ... requires the reviewing court to draw on its judicial experience and common sense' *Iqbal*, 556 U.S. at 679. We would love to live in a world where it is implausible for a doctor to disregard her oath and refuse to treat a patient she believed had attacked a female officer—just as we would love to live in a world where it is implausible for an employer to be so irrational as to refuse to hire a qualified applicant because of the applicant's skin color. Unfortunately, we do not. . .Taking the allegations in Nielsen's complaint and his opposition brief as true, Nielsen can plausibly allege that Dr. Rabin acted with a sufficiently culpable state of mind. . . If Nielsen's complaint were amended to include the allegations in his opposition to the motion to dismiss, the complaint would sufficiently set forth the mental state element of his deliberate indifference claim. Thus, amendment would not be futile. We therefore **REVERSE** the decision to deny leave to amend and **REMAND** to the District Court for further proceedings consistent with this opinion.")

Nielsen v. Rabin, 746 F.3d 58, 64-67 (2d Cir. 2014) (Jacobs, J., dissenting) ("I respectfully dissent. It is common ground that Nielsen's initial complaint was properly dismissed. It alleged that he received minimal medical treatment for serious injuries after police officers informed his treating physicians that Nielsen had attacked two of the officers. . .The majority and I agree that these allegations, even if proven, cannot sustain a Fourteenth Amendment due process claim for deliberate indifference. . .The holding of the majority is that an amended complaint would survive if augmented by two incremental allegations made in Nielsen's opposition to the motion to

dismiss: that the officers accompanying Nielsen told Dr. Rabin that (1) one of the officers Nielsen attacked was a woman, and (2) Nielsen 'should be ignored and left alone.' I am of the view that these two allegations do not render plausible the claim that Dr. Rabin withheld medical services from a patient with serious visible injuries. . . It is implausible that a doctor would neglect a patient at the request of a malicious policeman. In any event, the claim is defeated by a review of the medical file (attached as an exhibit to the declaration of counsel in support of Dr. Rabin's motion to dismiss). It reflects that Nielsen did not report symptoms indicative of serious injury, that Nielsen was examined by multiple medical professionals, that some treatment was administered, that what was done reflected a medical consensus, and that Nielsen was told to return for follow-up attention. The claim thus becomes that two doctors violated their oaths and that a nurse falsely reported that Nielsen was in a low level of pain at the time of discharge, all at the behest of police officers who told the doctors that their patient should be neglected. This claim, which is absurd, is easily classed as implausible. . . .The majority opinion reflects two fallacies that are indulged with some frequency in our opinions. First, there is insufficient appreciation that this section 1983 action is a personal claim against the individual assets of Dr. Rabin, and that the defense costs of such a claim alone can wipe out a college fund or equity on a home. . . The plausibility test in cases such as this is a safeguard against a financial injustice that can often outweigh the harm claimed by a plaintiff. True, some or many defendants are indemnified by employers or insurers (though insurance may not cover intentional acts); but such an arrangement would be *dehors* the record, and may not be considered by us in deciding whether a claim survives through the expense of discovery and extended motion practice. *See Gonzalez v. City of Schenectady*, 728 F.3d 149, 162 n. 6 (2d Cir.2013). Second, the majority's ruling on plausibility unintentionally implies a certain disrespect for the ethics of doctors and nurses. The majority deems it plausible that each of these medical professionals (and all of them together) would allow a patient's suffering to go unabated at the say-so of policemen expressing hostility to a person in custody. We would never deem such dereliction plausible if alleged against a lawyer.")

Walker v. Schult, 717 F.3d 119, 126, 128, 130 (2d Cir. 2013) ("Walker plausibly alleged that his conditions of confinement at FCI Ray Brook deprived him of the minimal civilized measure of life's necessities and subjected him to unreasonable health and safety risks. He alleged that for approximately twenty-eight months, he was confined in a cell with five other men, with inadequate space and ventilation, stifling heat in the summer and freezing cold in the winter, unsanitary conditions, including urine and feces splattered on the floor, insufficient cleaning supplies, a mattress too narrow for him to lie on flat, and noisy, crowded conditions that made sleep difficult and placed him at constant risk of violence and serious harm from cellmates. Based on these allegations, we conclude that Walker has plausibly alleged cruel and unusual punishment in violation of the Eighth Amendment. . . .In dismissing Walker's complaint, the district court improperly 'assay[ed] the weight of the evidence,'. . . and failed to draw all reasonable inferences in Walker's favor. For example, the district court found that Walker's failure to indicate 'the exact extent or duration of [his] exposure to unsanitary conditions' was fatal to his Eighth Amendment claim. Similarly, the court held that Walker's allegations of inadequate ventilation were insufficient because he did not provide any details about the temperatures in his cell. Such detailed

allegations, however, are not required for a *pro se* complaint to survive a motion to dismiss. Moreover, Walker alleged that he was placed in the six-man cell on November 18, 2008 and was still there when he filed his complaint on March 16, 2011. He also alleged that it was so hot during the summer that he had difficulty breathing, and it was so cold during the winter that ice formed inside the cell windows. Drawing all reasonable inferences in Walker's favor, these allegations plausibly alleged that the conditions persisted for twenty-eight months and that the temperatures were extreme enough to state an Eighth Amendment claim. . . .In so holding, we reaffirm that each prisoner complaint alleging a constitutional violation must be carefully analyzed in light of the particular facts contained therein. Here, the specific facts in Walker's complaint plausibly alleged a violation of the Eighth Amendment. But each complaint is different, and courts have the power and duty to dismiss complaints that contain only conclusory, frivolous, or implausible allegations.")

Ruston v. Town Bd. for Town of Skaneateles, 610 F.3d 55, 59, 60 (2d Cir. 2010) ("District courts in our Circuit differ as to the impact of this pleading standard on a 'class of one' equal protection claim. . .This uncertainty is attributable to the tension between [i] this Court's decision in *DeMuria v. Hawkes,* 328 F.3d 704, 707 (2d Cir.2003), which held under a now-obsolete pleading standard that a 'class of one' claim is adequately pled ('albeit barely' so) even without specification of others similarly situated, and [ii] the Supreme Court's recent clarifications, which require that a complaint allege facts sufficient to establish 'a plausible claim for relief[.]'. . . We hold that the pleading standard set out in *Iqbal* supersedes the 'general allegation' deemed sufficient in *DeMuria,* 328 F.3d at 707. Under *Iqbal,* factual allegations must be sufficient to support necessary legal conclusions. . . . The Rustons' complaint fails to allege facts that 'plausibly suggest an entitlement to relief.' As to the Town defendants, the Rustons' argument appears to be that the Town refused to consider their application while considering applications submitted by those similarly situated. However, the Rustons do not allege specific examples of the Town's proceedings, let alone applications that were made by persons similarly situated. The equal protection claim as to the Town defendants therefore fails for lack of factual allegations to support the legal conclusion. As to the Village, the Rustons argue that other, similarly situated properties were allowed to connect to the Village's sewer system. The Rustons do identify several properties that allegedly were allowed to connect to the Village's sewer system, all of them individual homes or businesses that (like the Rustons' land) were outside the Village but within the Town. We credit, as we must, the factual allegations that these other properties received sewer access while the Rustons' property did not. Nevertheless the complaint fails to state a claim that would support relief. . . . None of these properties is similar to the Rustons' proposed 14-home development, let alone so similar that no rational person could see them as different. . . .As the Rustons fail to allege that properties sufficiently similar to theirs were treated more favorably by either the Village or the Town, they have failed to state a 'class of one' equal protection claim.")

Arista Records, LLC v. Doe 3, 604 F.3d 110, 120, 121 (2d Cir. 2010) ("The *Twombly* plausibility standard, which applies to all civil actions, *see Iqbal,* 129 S.Ct. at 1953, does not prevent a plaintiff from pleading facts alleged 'upon information and belief' where the facts are peculiarly within the

possession and control of the defendant, *see, e.g., Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir.2008), or where the belief is based on factual information that makes the inference of culpability plausible, *see Iqbal,* 129 S.Ct. at 1949 . . . . Concluding that the complaint before it failed to state a plausible claim, the *Twombly* Court stated that '[i]n reaching this conclusion, *we do not apply any A heightened" pleading standard,*' *id.* at 569 n. 14 (emphasis added). Rather, it emphasized that its holding was consistent with its ruling in *Swierkiewicz* that 'a heightened pleading requirement,' requiring the pleading of ' A specific facts" beyond those necessary to state [a] claim and the grounds showing entitlement to relief,' was 'impermissibl[e],' *Twombly,* 550 U.S. at 570. . . . Nor did *Iqbal* heighten the pleading requirements. Rather, it reiterated much of the discussion in *Twombly* and rejected as insufficient a pleading that the Iqbal Court regarded as entirely conclusory. Accordingly, although *Twombly* and *Iqbal* require ' A factual amplification [where] needed to render a claim plausible,"'. . . we reject Doe 3's contention that *Twombly* and *Iqbal* require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.")

Shomo v. State of New York, No. 06-5434-pr., 2010 WL 1628771, at *1, *2 (2d Cir. Apr. 22, 2010) (not published) ("Appellant, *pro se,* appeals from the order of the United States District Court for the Western District of New York ("rcara, *C.J.*), *sua sponte* dismissing Appellant's 42 U.S.C. § 1983 complaint with leave to amend, pursuant to Rules 8 and 10 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1915(e). . . . We conclude that, under either an abuse of discretion or *de novo* standard, the district court erred in dismissing Appellant's complaint, even with leave to amend, because many of Appellant's claims, if true, would be actionable under the Eighth Amendment, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. While the district court afforded Appellant the opportunity to amend his complaint, Appellant's complaint was not so deficient as to require its dismissal at such an early stage of litigation. The jurisprudence involving Rule 8, traced from our decision in *Salahuddin* through the Supreme Court's recent *Iqbal* decision, is difficult to apply to the dismissal of a complaint containing *too much* detail, especially where the complaint is filed by a *pro se* litigant. . . . Notably, even after *Twombly*, where a litigant is proceeding *pro se,* courts remain 'obligated' to construe *pro se* complaints liberally. . . . Notwithstanding the length and detail of Appellant's complaint, his claims enunciate recognizable unconstitutional behavior. The day-to-day events described by Appellant concern the activities of his daily living: his need to be fed, bathed, and aided with toileting. While citing to numerous federal statutes (a practice not uncommon for *pro se* litigants), Appellant's claims centered around his disability and the alleged deliberate indifference to his serious medical needs. He then amplified these claims, as required under *Twombly* and *Iqbal,* by making specific references to events that he claimed were evidence of such deliberate indifference. Insofar as he cited multiple civil rights statutes, '[t]he failure in a complaint to state a statute, or to cite the correct one, in no way affects the merits of a claim. Factual allegations alone are what matters.' *Albert v. Carovano,* 851 F.2d 561, 571 n. 3 (2d Cir.1988). In fact, while not a model of clarity, Appellant's complaint

is neither 'unintelligible' nor 'a labrynthian prolixity of unrelated and vituperative charges that defied comprehension.'").

Turkmen v. Ashcroft, 589 F.3d 542, 546, 547 (2d Cir. 2009) ("We could undertake to decide whether the challenged claims satisfy the pleading standard of *Twombly* and *Iqbal*; however, in the circumstances of this case–where plaintiffs have already announced their intent to file a Fourth Amended Complaint to preserve for the putative class the claims asserted only by the settling plaintiffs-we think it better to vacate that portion of the district court's order denying dismissal of the conditions of confinement claims on the ground that an outdated pleading standard was applied, and to remand the case for further proceedings consistent with the standard articulated in *Twombly* and *Iqbal*. It may be that the district court will grant plaintiffs leave to file the proposed Fourth Amended Complaint to satisfy the heightened pleading standard. . . . If the district court denies leave to file the proposed Fourth Amended Complaint, it should evaluate the sufficiency of the Third Amended Complaint in light of the settlement and the heightened pleading standard. The district court can then address whether, under *Twombly* and *Iqbal*, the Third Amended Complaint fails to state a claim, or inadequately alleges the personal involvement of the moving defendants, or entitles the moving defendants to qualified immunity with respect to the conditions of confinement claims. At this stage of proceedings, we do no more than vacate the order denying the motions to dismiss with respect to the conditions of confinement claims, and remand to the district court for further proceedings.")**.**

Boykin v. KeyCorp, 521 F.3d 202, 213-16 (2d Cir. 2008) ("We agree with the *Iqbal* panel's conclusion that *Twombly* focused on the plausibility of the complainant's claim for relief, although *Iqbal* does not offer much guidance to plaintiffs regarding when factual 'amplification [is] needed to render [a] claim plausible.' . . We need not locate the outer bounds of *Twombly*'s new standard for assessing pleadings under Rule 8(a) here, because no amplification was necessary in this case. After *Twombly*, the Supreme Court issued another decision addressing the sufficiency of a pleading under Rule 8(a), but this time specifically for a complaint filed *pro se*. *See Erickson* v. Pardus, 127 S.Ct. 2197 (2007) (per curiam). The Court reversed the Tenth Circuit's dismissal of a prisoner's Eighth Amendment claim, holding that the court of appeals had 'depart[ed] from the liberal pleading standards' of Rule 8(a). . . The Court reiterated that '[s]pecific facts are not necessary,' and that the complainant 'need only Agive the defendant fair notice of what the ... claim is and the grounds upon which it rests."' . . But *Erickson* also emphasized that the court of appeals' departure from Rule 8(a)'s liberal pleading standard was particularly unwarranted because the complainant was *pro se* . . . . *Twombly* and *Erickson* explicitly disavow that Rule 8(a) requires any plaintiff–let alone a *pro se* plaintiff–to plead 'specific facts.' . . Moreover, as Boykin correctly observes, the names and records, if any, of persons who were not members of the protected classes and were more favorably treated in the loan application process is information particularly within KeyBank's knowledge and control. Pleading on the basis of information and belief is generally appropriate under such circumstances. . . . Boykin is correct that she did not need to allege discriminatory animus for her disparate treatment claim to be sufficiently pleaded. There is no heightened pleading requirement for civil rights complaints alleging racial animus . . .

and this Court has found such claims sufficiently pleaded when the complaint stated simply that plaintiffs 'are African-Americans, describe[d] defendants' actions in detail, and allege[d] that defendants selected [plaintiffs] for maltreatment Asolely because of their color."'. . We have upheld the vitality of this principle since *Twombly*. . . Here, it is sufficient that Boykin's complaint states that she 'is an African American female,' describes KeyBank's actions with respect to her loan application and alleges that she 'was treated differently from similarly situated loan applicants ... because of her race, sex, and the location of the property in a predominantly African-American neighborhood.' In sum, Boykin's allegations, taken as true, indicate the possibility of discrimination and thus present a plausible claim of disparate treatment. The complaint gives KeyBank notice of Boykin's claim and the grounds upon which it rests that is sufficient to satisfy Rule 8(a). We emphasize that we are expressing no opinion regarding the merits of Boykin's claim. And that is precisely the point: even after *Twombly*, dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases. The merits of a claim like Boykin's, which on its face presents a plausible allegation of disparate treatment, should be tested on summary judgment.")**.**

In re Elevator Antitrust Litigation, 502 F.3d 47, 50 (2d Cir. 2007) ("A narrow view of *Twombly* would have limited its holding to the antitrust context, or perhaps only to Section 1 claims; but we have concluded that *Twombly* affects pleading standards somewhat more broadly. [citing *Iqbal*]").

Brown v. City of N.Y., No. 13-CV-06912, 2017 WL 1390678, at *8 (S.D.N.Y. Apr. 17, 2017) ("Brown contends that Deputy Warden Laboriel, Deputy Warden O'Connell, Assistant Deputy Warden Beltz, and Captain Skepple gave gang members special privileges and responsibilities at GMDC. But Brown has not pled any specific facts that, if accepted as true, would establish that these defendants created this policy or allowed it to continue under their watch. For example, Brown does not allege that Deputy Warden Laboriel, Deputy Warden O'Connell, Assistant Deputy Warden Beltz, and Captain Skepple instructed specific correction officers to behave this way, nor does Brown claim that Laboriel, O'Connell, Beltz, and Skepple learned of and ignored specific instances of correction officers condoning attacks by the Bloods. The complaint's conclusory statements that these defendants' created an unconstitutional policy are thus insufficient to demonstrate their personal involvement in this case. . . . Brown's allegations about the false reports, though, are sufficient to establish the personal involvement of Deputy Warden Laboriel, Deputy Warden O'Connell, Assistant Deputy Warden Beltz, and Captain Skepple. Brown contends that Assistant Deputy Warden Beltz and Captain Skepple authored false reports, and that Deputy Warden Laboriel, Deputy Warden O'Connell, and Assistant Deputy Warden Beltz 'signed off' on false reports prepared by others. . . Defendants cite the Second Circuit's decision in *Williams v. Smith*, 781 F.2d 319, 324 (2d Cir. 1986) for the proposition that 'the creation of an inaccurate report alone' does not constitute a constitutional violation. . . Here, however, Brown alleges not only that the incident reports were inaccurate, but also that the Individual Defendants who authored and reviewed them did so to retaliate against him for his complaint about CO James. Although 'a prison inmate has no general constitutional right to be free from being falsely accused in a misbehavior report,' the creation of a false report can infringe on an inmate's constitutional rights

when it is used to retaliate against him for exercising a constitutional right. . . Since the complaint here plausibly suggests that Deputy Warden Laboriel, Deputy Warden O'Connell, Assistant Deputy Warden Beltz, and Captain Skepple had a retaliatory motive, the court cannot dismiss Brown's § 1983 claims against them for lack of personal involvement.")

Doe v. New York, No. 10 CV 1792(RJD)(VVP), 2012 WL 4503409, *10-*12 (E.D.N.Y. Sept. 28, 2012) ("[I]f defendants admittedly promulgated *written* policies which limited or denied altogether Hepatitis treatment for *symptomatic* inmates who *specifically requested* treatment—or, as in several cases, whose treating physicians did so—it is certainly *plausible* that defendants had an unwritten policy to withhold diagnoses and treatment from asymptomatic inmates who did not request testing or treatment. Additionally, courts in this Circuit have repeatedly declined to dismiss allegations concerning similar instances of failing to inform inmates of their Hepatitis diagnosis over long periods of time, including pursuant to policies nearly identical to those alleged by plaintiffs in this case. . .The Court accordingly rejects defendants' plausibility challenge. . . .Thus although plaintiffs' claims against Governor Pataki in his individual capacity may proceed based on his alleged role in creating the Hepatitis policy, plaintiffs' claims brought pursuant to Section 1983 against all individually named DOCS officials are dismissed for failure to adequately allege personal involvement under Section 1983. The fatal flaws identified by the Court may be readily remedied, at least as to some of the individual DOCS defendants. Accordingly, plaintiffs may amend their complaint with respect to these defendants within thirty days of the date of this Order.")

Bradley v. Rell, No. 1:07-CV-0148 (GTS/RFT), 2010 WL 1257868, at *5 (N.D.N.Y. Mar. 26, 2010) ("As have other Circuits, the Second Circuit has recognized that the clarified plausibility standard that was articulated by the Supreme Court in *Twombly* governs *all* claims, including claims brought by *pro se* litigants (although the plausibility of those claims is to be assessed generously, in light of the special solicitude normally afforded *pro se* litigants). . . It should be emphasized that Fed.R.Civ.P. 8's plausibility standard, explained in *Twombly,* was in no way retracted or diminished by the Supreme Court's decision (two weeks later) in *Erickson v. Pardus,* in which (when reviewing a *pro se* pleading) the Court stated, *"Specific* facts are not necessary" to successfully state a claim under Fed.R.Civ.P. 8(a)(2). . .That statement was merely an abbreviation of the often-repeated point of law–first offered in *Conley* and repeated in *Twombly*–that a pleading need not 'set out *in detail* the facts upon which [the claim is based]' in order to successfully state a claim. . . That statement did not mean that all pleadings may achieve the requirement of 'fair notice' without ever alleging any facts whatsoever. Clearly, there must still be enough fact set out (however set out, whether in detail or in a generalized fashion) to raise a right to relief above the speculative level to a plausible level.").

Valenti v. Massapequa Union Free School Dist., No. 09-CV-977 (JFB)(MLO), 2010 WL 475203, at *4 n.5 (E.D.N.Y. Feb. 5, 2010) ("The recent Supreme Court decisions in *Iqbal* and *Twombly* do not obviate this standard. Indeed, the Court in *Twombly* explicitly reaffirmed *Swierkiewicz.* 550 U.S. at 570 (citing *Swierkiewicz,* 534 U.S. at 508); *see also Boykin v. Key Corp.*, 521 F.3d 202,

213 (2d Cir.2008) (noting that the *Twombly* Court "affirmed the vitality of *Swierkiewicz"*); *Gilman v. Inner City Broadcasting Corp.*, No. 08 Civ. 8909(LAP), 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009) (*" Iqbal* was not meant to displace Swierkiewicz's teachings about pleading standards for employment discrimination claims because in *Twombly,* which heavily informed *Iqbal,* the Supreme Court explicitly affirmed the vitality of *Swierkiewicz."*).").

Kregler v. City of New York, No. 08 Civ. 6893(VM), 2009 WL 2524628, at **7-9, *12 (S.D.N.Y Aug. 17, 2009) ("Fundamentally, the 'plausibility' standard that the Supreme Court articulated in *Twombly* and *Iqbal* reflect [sic] one judicial means to part the wheat from the chaff in assessing the sufficiency of pleadings. Yet, as the case at hand illustrates and the law reports amply record, the problem persists, a sign of an intrinsic tension built into the federal rules. Whether in their factual allegations as originally crafted, or upon being granted leave to replead deficient claims, seasoned plaintiffs' counsel know to charge the pleadings with enough adjectives that reverberate of extreme malice, improper motives, and bad faith to raise factual issues sufficient to survive a dispositive motion, thus securing a hold on the defendant strong enough for the duration, however long and costly the ultimate resolution of the claim be. In practical terms, the philosophy of pleading that these rules embody, a one-rule-fits-all principle, defines the scope of the problem engendered by its unintended outcomes. . . . In consequence, the Court's Rule 12(i) hearing represented an effort to employ an infrequently used procedure to bring about speedier and better-informed resolution of a motion to dismiss involving serious accusations of violations of constitutional rights leveled against high-ranking government officials. This endeavor accords with guidance by the Supreme Court and the Second Circuit instructing district courts to exercise their broad discretion to guard public officials from being 'subjected to unnecessary and burdensome discovery or trial proceedings.'. . . As scheduled, the hearing was limited to two threshold issues raised in Defendants' objections to the pleadings in the Amended Complaint: the absence of sufficient allegations of personal involvement by various individual defendants in making the decision to reject Kregler's application, and lack of a causal connection between Kregler's endorsement of Morgenthau and the rejection of his application for appointment as a City Marshal. These questions constitute fundamental aspects of a sufficient claim of First Amendment retaliation, and are thus decisive in any review of whether the pleadings, as amplified by the pertinent record of the preliminary hearing, satisfy the *Twombly/ Iqbal* plausibility standard. To summarize its purpose and scope, Rule 12(i) authorizes the Court to conduct a preliminary hearing to consider and decide before trial a motion raising any defense listed in Rule 12(b)(1)-(7). *See* Fed.R.Civ.P. 12(i). As appropriate, the Court may use that procedure to determine jurisdictional as well as other threshold issues. . . . Here, on repleading to address deficiencies in the original complaint, Kregler described the threshold issues either in conclusory terms or with generalized allegations which still require substantial inferential leaps to make his claims plausible, rather than with well-pleaded facts that, accepted as true, plausibly suggest Defendants' retaliatory misconduct as the likely explanation for their rejection of Kregler's application. The Rule 12(i) hearing, even limiting the Court's consideration solely to Kregler's testimony on direct and cross-examination, confirms the Court's finding in this regard. . . . In terms of time, it took approximately five months from the Court's preliminary decision to order the Rule 12(i) hearing to the disposition

of the case by the instant ruling. Thus, the Court was able to resolve this matter in a far shorter time than would have been required if it had denied Defendants' original motion to dismiss by reason of the closeness of the call at the initial review and thereby permitting the litigation to proceed into lengthier discovery and probably more time-consuming summary judgment motions– a process which, given the type of case involved, in this District would ordinarily consume as much as two years of litigation to conclude with the Court's determination.").

THIRD CIRCUIT

Hildebrand v. Allegheny County, No. 13–1321, 2014 WL 2898527, *11 (3d Cir. June 26, 2014) ("The District Court erred by applying *Iqbal* and *Twombly* to Hildebrand's pleading of the conditions precedent to filing suit under the ADEA. *Iqbal and Twombly* interpreted Federal Rule of Civil Procedure 8(a), which governs the standard for pleading a claim for relief. The pleading of conditions precedent is governed by Rule 9(c), not Rule 8(a). Neither *Iqbal* nor *Twombly* purport to alter Rule 9. We see no indication that those cases sought to override the plain language of Rule 9(c), and we therefore conclude that the pleading of conditions precedent falls outside the strictures of *Iqbal* and *Twombly*.")

Lawal v. McDonald, 546 F. App'x 107, 113, 114 (3d Cir. 2014) ("As the District Court observed, the repeated and collective use of the word 'Defendants' 'fail[ed] to name which specific Defendant engaged in the specific conduct alleged.'. . As a result, the Amended Complaint is ambiguous about each Defendant's role in the operation and whether he committed the act himself or supervised other agents in doing so. In using the collective 'Defendants,' Plaintiffs alleged that *each* of the Defendants: (a) directed the PPA to send the letters to Plaintiffs advising them that they were entitled to a refund, to be picked up at the PPA facility; (b) attacked each driver, throwing him against a wall and handcuffing him; (c) was told by Plaintiffs that Plaintiffs were citizens; (d) interrogated each Plaintiff for more than one hour; (e) acknowledged to each Plaintiff that he 'had been mistakenly detained,' but (f) told them they were not permitted to leave; (g) held the Plaintiffs for several additional hours; and (h) prohibited them from speaking or standing. There is a serious question as to whether it is plausible that each of the three defendants committed all of the acts ascribed to them, particularly given the number of other individuals brought to the facility during the operation and the affidavits submitted with Defendants' motion to dismiss. . . In light of these ambiguities, the Amended Complaint may fail to meet *Iqbal's* directive that 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'. .Moreover, given the very narrow potential claim upon which relief may be granted, it is difficult for Defendants to determine which of them are alleged to have held or directed others to hold Plaintiffs after their U.S. citizenship was verified and they were no longer suspected of violating the immigration laws. To the extent Plaintiffs seek to proceed on a theory of supervisory liability, the pleading likely requires further factual assertions linking the direction or act of an individual defendant to the alleged unconstitutional conduct. . .Thus, to resolve the ambiguity regarding the precise actions each individual Defendant allegedly took, we will provide Plaintiffs a final opportunity to file a pleading that provides the factual enhancements that specify

the acts each individual Defendant . . . allegedly took, explains whether each Defendant personally engaged in the acts or if the actions were taken at the specific Defendant's direction, and includes facts concerning the reasonableness of Plaintiffs' detention. Of course, such a pleading must comply with Fed.R.Civ.P. 11. If Plaintiffs choose to file a Second Amended Complaint, the District Court will be free to entertain another motion to dismiss before permitting any discovery and determine whether Plaintiffs have alleged facts that demonstrate a specific Defendant plausibly engaged in an unreasonable seizure after they verified Plaintiffs' citizenship status, and, even if sufficiently alleged, whether the specific Defendant is entitled to qualified immunity.")

James v. City of Wilkes-Barre, 700 F.3d 675, 680-682 (3d Cir. 2012) ("Mrs. James's assertion that she 'justifiably and reasonably believ[ed] herself compelled by law' to comply with Officer Marshall's request does not alter our conclusion. . . . By crediting these allegations, the District Court assumed that Mrs. James was 'compelled' to accompany her daughter to the hospital. This was error because whether she was in fact 'compelled' to do so is a legal conclusion. At the motion to dismiss stage, we accept as true all factual assertions, but we disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements. . . Although Mrs. James asks us to accept as fact her assertion that she 'justifiably and reasonably believ[ed] herself compelled by law,' in reality it is a legal conclusion artfully pleaded as a factual assertion, which is not entitled to a presumption of truth. . . As far as relevant factual averments go, the Complaint pleads only that the officers 'insisted' that one parent accompany Nicole. As we have explained, insistence alone is insufficient to constitute a seizure under the Fourth Amendment. . . . The only fact that might point toward a seizure is Officer Marshall's threat that Mr. and Mrs. James would be charged with assisted manslaughter if they prevented Nicole from going to the hospital and she actually committed suicide. But that threat was not made in connection with Mrs. James's decision to accompany Nicole to the hospital; rather, it was made in the context of the parents agreeing to send Nicole to the hospital in the first place, which does not implicate a restriction on Mrs. James's freedom of movement. . . .For the reasons stated, we hold that Mrs. James was not seized in violation of the Fourth Amendment. Having found no constitutional violation, we hold that Officer Marshall is entitled to qualified immunity.")

Bistrian v. Levi, 696 F.3d 352, 368-71(3d Cir. 2012) ("After stripping away conclusory allegations not entitled to the presumption of truth, we conclude that Bistrian states a plausible failure-to-protect claim against the ten Prison Management Defendants, Lts. Rodgers and Robinson, and Sr. Officer Bowns based on Bistrian's placement in the recreation yard with Northington and his gang. First, Bistrian alleges that putting him in a locked recreation area with Northington *et al.* posed a substantial risk of serious harm because (a) Northington and others knew of Bistrian's cooperation with prison officials plus (b) Northington had a violent criminal past and had previously threatened to attack Bistrian in the recreation yard because of that cooperation. Second, Bistrian alleges that officials were deliberately indifferent to the obvious risk posed because they made no attempt to prevent his placement in the yard with Northington despite the fact that he (Bistrian) repeatedly advised the officials responsible for the photocopying operation of the threats Northington and others made. Third, Bistrian pleads causation: Northington and two other inmates violently

attacked him on June 30, 2006 in the recreation yard because he cooperated with prison officials, not for some other reason. We consider the supporting factual allegations in further detail. . . . [T]he alleged number of tortfeasors in this case does not undermine the plausibility of the underlying torts. In *Young v. Quinlan*, we allowed an inmate's failure-to-protect claim to proceed past summary judgment when, among other things, he claimed to have 'told [ten named prison officials] several times that he was concerned for his safety and needed to be placed in protective custody,' and each of these ten officials had failed to respond reasonably to stop the assaults by other inmates. . . Here too the fact that Bistrian claims to have specifically warned eight officials of the risks he faced does not transform his allegations into impermissible 'group pleading.'. . . In sum, Bistrian has stated a plausible claim that thirteen officials violated their constitutional duty to protect him from inmate violence by being deliberately indifferent to the risk posed by his placement in the recreation yard with Northington and others who knew of his prior complicity with prison authorities. If this claim fails to survive a motion to dismiss, little does.")

Green v. New Jersey, No. 12–1517, 2012 WL 3641995, *1, *2 (3d Cir. Aug. 27, 2012) (not published) ("We agree with the District Court that, as drafted, the complaint fails to state a claim on which relief may be granted. To avoid dismissal, a complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'. . The complaint 'must not be "so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by [Fed.R.Civ.P. 8]"'. . . Green's complaint fails to satisfy these standards. . . Nevertheless, prior to dismissing a pro se complaint under § 1915(e), a District Court must give the plaintiff an opportunity to amend his pleading to cure the defect unless such an amendment would be inequitable or futile. . . The District Court neither informed Green that he could amend his complaint, nor did it determine that any amendment would be inequitable or futile. On the current record, we cannot exclude the possibility that Green, who is litigating his case pro se, might plead additional facts in an amended complaint that will state a claim for relief. Thus, while we express no view as to whether Green will ultimately plead any meritorious claims, we conclude that the District Court erred in dismissing the complaint without providing Green leave to amend. Accordingly, we will summarily vacate the District Court's order dismissing the case with prejudice and remand for further proceedings consistent with this opinion.")

Burtch v. Milberg Factors, Inc., No. 10-2818, 2011 WL 5027511, at *5 (3d Cir. Oct. 24, 2011)("To determine the sufficiency of a complaint under *Twombly* and *Iqbal*, we must take the following three steps: First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'")

Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 72, 74-77 (3d Cir. 2011) ("[W]e assume for purposes of this appeal that a federal supervisory official may be liable in certain circumstances even though he or she did not directly participate in the underlying

unconstitutional conduct. The District Court specifically concluded that a Fourth Amendment claim does not require a showing of a discriminatory purpose and that Plaintiffs could therefore proceed under a 'knowledge and acquiescence' theory. Plaintiffs acknowledge that the 'terminology' used to describe 'supervisory liability' is 'often mixed.'. . They contend that a supervisor may be held liable in certain circumstances for a failure to train, supervise, and discipline subordinates. . . . We accordingly stated in a § 1983 action that '[p]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence.' *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). . . We further indicated that a supervisor may be liable under § 1983 if he or she implements a policy or practice that creates an unreasonable risk of a constitutional violation on the part of the subordinate and the supervisor's failure to change the policy or employ corrective practices is a cause of this unconstitutional conduct. . . . Having addressed the legal elements that a plaintiff must plead to state a legally cognizable claim, we turn to the remaining steps identified by *Iqbal:* (1) identifying those allegations that, because they are no more than conclusions, are not entitled to any assumption of truth; and (2) then determining whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. . . We acknowledge that Plaintiffs filed an extensive and carefully drafted pleading, which certainly contained a number of troubling allegations especially with respect to alleged unconstitutional behavior on the part of lower-ranking ICE agents. Plaintiffs are also correct that, even after *Iqbal*, we must continue to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and then determine whether a reasonable inference may be drawn that the defendant is liable for the alleged misconduct. . . .[W]e ultimately conclude that, like Iqbal, Plaintiffs failed to allege a plausible *Bivens* claim against the four Appellants. Initially, certain allegations in the Second Amended Complaint were conclusory in nature and merely provided, at best, a 'framework' for the otherwise appropriate factual allegations. . . For instance, the broad allegations regarding the existence of a 'culture of lawlessness' are accorded little if any weight in our analysis. . . We further note that the relevant counts in the pleading contained boilerplate allegations mimicking the purported legal standards for liability, which we do not assume to be true. We also must reject certain broad characterizations made by the District Court, which were not supported by either the actual factual allegations in the Second Amended Complaint or reasonable inferences from such allegations. Most significantly, the District Court went too far by stating that Myers and Torres 'worked on these issues everyday.'. . Turning to the non-conclusory factual allegations in the Second Amended Complaint, we begin with the critical issue of notice. Plaintiffs did reference an impressive amount of documentation that allegedly provided notice to Appellants of their subordinates' unconstitutional conduct. However, these alleged sources of notice were fatally flawed in one way or another. Broadly speaking, we must point out the typical 'notice' case seems to involve a prior incident or incidents of misconduct by a specific employee or group of employees, specific notice of such misconduct to their superiors, and then continued instances of misconduct by the same employee or employees. The typical case accordingly does not involve a 'knowledge and acquiescence' claim premised, for instance, on reports of subordinate misconduct in one state followed by misconduct by totally different subordinates in a completely different state. . . . Second, we observe that allegations specifically directed against Appellants themselves (unlike the allegations directed at the agents who actually

carried out the raids) described conduct consistent with otherwise lawful behavior. . . In other words, a federal official specifically charged with enforcing federal immigration law appears to be acting lawfully when he or she increases arrest goals, praises a particular enforcement operation as a success, or characterizes a home entry and search as an attempt to locate someone (i.e., a fugitive alien). In fact, the qualified immunity doctrine exists to encourage vigorous and unflinching enforcement of the law. . . .We also agree with Appellants' assertion that Plaintiffs themselves did not really identify in their pleading what exactly Appellants should have done differently, whether with respect to specific training programs or other matters, that would have prevented the unconstitutional conduct. . . . We also cannot overlook the fact that Appellants themselves occupied relatively high-ranking positions in the federal hierarchy. . . .[T]he context here involved, at the very least, two very high-ranking federal officials based in Washington D.C. who were charged with supervising the enforcement of federal immigration law throughout the country (as well as two other officials responsible for supervising such enforcement throughout an entire state). . . . [W]e wish to emphasize that our ruling here does not leave Plaintiffs without any legal remedy for the alleged violation of the United States Constitution. Chavez, Galindo, and W.C. are still free to pursue their official capacity claims for injunctive relief against any further intimidation or unlawful entry into their home. Also, we do not address Plaintiffs' individual capacity claims for damages against the lower-ranking ICE agents named in the Second Amended Complaint.")

Santiago v. Warminster Tp., 629 F.3d 121, 128-34 & n.8, n.10 (3d Cir. 2010) ("While we conclude that the Third Amended Complaint can be read as alleging liability based on the Supervising Officers' own acts, we will nevertheless affirm the District Court's ruling because those allegations fail to meet the pleading requirements set forth by the Supreme Court in *Twombly* and *Iqbal***.** . . . [A]ny claim that supervisors directed others to violate constitutional rights necessarily includes as an element an actual violation at the hands of subordinates. In addition, a plaintiff must allege a causal connection between the supervisor's direction and that violation, or, in other words, proximate causation. . . . Therefore, to state her claim against Chief Murphy and Lt. Donnelly, Santiago needs to have pled facts plausibly demonstrating that they directed Alpha Team to conduct the operation in a manner that they 'knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights.'. . .As to her claim against Lt. Springfield, Santiago must allege facts making it plausible that 'he had knowledge of [Alpha Team's use of excessive force during the raid]' and 'acquiesced in [Alpha Team's] violations.'. . . Numerous courts, including this one, have expressed uncertainty as to the viability and scope of supervisory liability after *Iqbal***.** . . . Because we hold that Santiago's pleadings fail even under our existing supervisory liability test, we need not decide whether *Iqbal* requires us to narrow the scope of that test. . . . Santiago alleges that the plan developed and authorized by Chief Murphy and Lt. Donnelly 'specifically sought to have all occupants exit the Plaintiff's home, one at a time, with hands raised under threat of fire, patted down for weapons, and then handcuffed until the home had been cleared and searched.' Because this is nothing more than a recitation of what Santiago says the Alpha Team members did to her, it amounts to a conclusory assertion that what happened at the scene was ordered by the supervisors. While the allegations regarding Alpha

Team's conduct are factual and more than merely the recitation of the elements of a cause of action, the allegation of supervisory liability is, in essence, that 'Murphy and Donnelly told Alpha team to do what they did' and is thus a 'formulaic recitation of the elements of a [supervisory liability] claim,' *Iqbal,* 129 S.Ct.. at 1951 (internal quotation marks omitted)–namely that Chief Murphy and Lt. Donnelly directed others in the violation of Santiago's rights. Saying that Chief Murphy and Lt. Donnelly 'specifically sought' to have happen what allegedly happened does not alter the fundamentally conclusory character of the allegation. . . Our conclusion in this regard is dictated by the Supreme Court's decision in *Iqbal.* . . . In short, Santiago's allegations are 'naked assertion[s]' that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in the allegedly excessive manner that they did and that Lt. Springfield acquiesced in Alpha Team's acts. As mere restatements of the elements of her supervisory liability claims, they are not entitled to the assumption of truth. However, it is crucial to recognize that our determination that these particular allegations do not deserve an assumption of truth does not end the analysis. It may still be that Santiago's supervisory liability claims are plausible in light of the non-conclusory factual allegations in the complaint. We therefore turn to those allegations to determine whether the claims are plausible. . . . In summary, the allegations against Alpha Team are that the officers ordered everyone to exit the house one at a time; that Santiago exited first under threat of fire; that Santiago was patted down in a demeaning fashion, found to be unarmed, and subsequently handcuffed; that the remaining occupants of the home then exited, some of whom were handcuffed while others were not; that Santiago's daughter was coerced into consenting to a search of the home; and that Santiago was left restrained for thirty minutes while her home was searched, during which time she had a heart attack. The question then becomes whether those allegations make it plausible that Chief Murphy and Lt. Donnelly directed Alpha Team to conduct the operation in a manner that they 'knew or should reasonably have known would cause [Alpha Team] to deprive [Santiago] of her constitutional rights,'. . . or that Lt. Springfield 'had knowledge [that Alpha Team was using excessive force during the raid]' and 'acquiesced in [Alpha Team's] violations.'. . . [T]here is no basis in the complaint to conclude that excessive force was used on anyone except Santiago. Even if someone else had been subjected to excessive force, it is clear that the occupants were not being treated uniformly. Thus, Santiago's allegations undercut the notion of a plan for all occupants to be threatened with fire and handcuffed. While it is possible that there was such a plan, and that Alpha Team simply chose not to follow it, 'possibility' is no longer the touchstone for pleading sufficiency after *Twombly* and *Iqbal.* Plausibility is what matters. Allegations that are 'merely consistent with a defendant's liability' or show the 'mere possibility of misconduct' are not enough. . . Here, given the disparate treatment of the occupants of the home, one plausible explanation is that the officers simply used their own discretion in determining how to treat each occupant. In contrast with that 'obvious alternative explanation' for the allegedly excessive use of force, the inference that the force was planned is not plausible. Where, as here, an operation results in the use of allegedly excessive force against only one of several people, that use of force does not, by itself, give rise to a plausible claim for supervisory liability against those who planned the operation. To hold otherwise would allow a plaintiff to pursue a supervisory liability claim anytime a planned operation resulted in excessive force, merely by describing the force used and appending the phrase 'and the Chief told them to do it.' *Iqbal* requires more. . . . We next ask whether the

allegation that Lt. Springfield was placed in charge of the operation, coupled with what happened during the operation, makes it plausible that Lt. Springfield knew of and acquiesced in the use of excessive force against Santiago. Again, we conclude that it does not. The complaint implies but does not allege that Lt. Springfield was present during the operation. Assuming he was present, however, the complaint still does not aver that he knew of the allegedly excessive force, nor does it give rise to the reasonable inference that he was aware of the level of force used against one individual. . . . In sum, while Santiago's complaint contains sufficient allegations to show that the Supervising Officers planned and supervised the operation and that, during the operation, Alpha Team used arguably excessive force, her allegations do nothing more than assert the element of liability that the Supervising Officers specifically called for or acquiesced in that use of force. . . . The Third Amended Complaint was filed after the close of discovery. Consequently, there is no reason to believe that Santiago's conclusory allegations were simply the result of the relevant evidence being in the hands of the defendants. Under *Iqbal***,** however, the result would be the same even had no discovery been completed. We recognize that plaintiffs may face challenges in drafting claims despite an information asymmetry between plaintiffs and defendants. Given that reality, reasonable minds may take issue with *Iqbal* and urge a different balance between ensuring, on the one hand, access to the courts so that victims are able to obtain recompense and, on the other, ensuring that municipalities and police officers are not unnecessarily subjected to the burdens of litigation. . . The Supreme Court has struck the balance, however, and we abide by it.")

West Penn Allegheny Health System, Inc. v. UPMC, 627 F.3d 85, 98 (3d Cir. 2010) ("The District Court opined that judges presiding over antitrust and other complex cases must act as 'gatekeepers,' and must subject pleadings in such cases to heightened scrutiny. The District Court's gloss on Rule 8, however, is squarely at odds with Supreme Court precedent. Although *Twombly* acknowledged that discovery in antitrust cases 'can be expensive,' . . . it expressly rejected the notion that a ' "heightened" pleading standard' applies in antitrust cases. . . and *Iqbal* made clear that Rule 8's pleading standard applies with the same level of rigor in ' "all civil actions[]"'. . . . It is, of course, true that judging the sufficiency of a pleading is a context-dependent exercise. . . Some claims require more factual explication than others to state a plausible claim for relief. . . For example, it generally takes fewer factual allegations to state a claim for simple battery than to state a claim for antitrust conspiracy. . . But, contrary to the able District Court's suggestion, this does not mean that *Twombly's* plausibility standard functions more like a probability requirement in complex cases. We conclude that it is inappropriate to apply *Twombly's* plausibility standard with extra bite in antitrust and other complex cases.")

In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, 319 n.17 (3d Cir. 2010 ("Although *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir.2009), stated that *Twombly* and *Iqbal* had 'repudiated' the Supreme Court's earlier decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), *see Fowler*, 578 F.3d at 211, we are not so sure. Clearly, *Twombly* and *Iqbal* inform our understanding of *Swierkiewicz*, but the Supreme Court cited *Swierkiewicz* approvingly in *Twombly*, *see* 550 U.S. at 555-56, 127 S.Ct. 1955, and expressly denied the plaintiffs' charge that *Swierkiewicz* 'runs counter' to *Twombly*'s plausibility standard,

id. at 569-70, 127 S.Ct. 1955. As the Second Circuit has observed, *Twombly* 'emphasized that its holding was consistent with [the Court's] ruling in *Swierkiewicz* that "a heightened pleading requirement," requiring the pleading of "specific facts beyond those necessary to state [a] claim and the grounds showing entitlement to relief," was "impermissibl[e]."' *Arista Records,* 604 F.3d at 120 (quoting *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955 (alterations in *Arista Records).*) In any event, *Fowler's* reference to *Swierkiewicz* appears to be dicta, as *Fowler* found the complaint before it to be adequate. 578 F.3d at 212; *see also id.* at 211 ('The demise of *Swierkiewicz,* however, is not of significance here.')").

Fowler v. UPMC Shadyside, 578 F.3d 203, 209, 210 (3d Cir. 2009) ("Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), continuing with our opinion in *Phillips, supra.*, and culminating recently with the Supreme Court's decision in *Ashcroft v. Iqbal,* __ U.S. __, 129 S.Ct. 1937, 1955, 173 L.Ed.2d 868 (2009), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss. . . . The Supreme Court's opinion in *Iqbal* extends the reach of *Twombly,* instructing that all civil complaints must contain 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'. . Therefore, after *Iqbal,* when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. . . Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'. . Inasmuch as this is an employment discrimination case, we asked the parties to comment on the continued viability of the Supreme Court's decision in *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). In *Swierkiewicz,* the Supreme Court held that a complaint alleging unlawful employment discrimination did not have to satisfy a heightened pleading requirement. The complaint in that case was said to be sufficient because it 'detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.'. . The Supreme Court in *Swierkiewicz* expressly adhered to *Conley*'s then-prevailing 'no set of facts' standard and held that the complaint did not have to satisfy a heightened standard of pleading. . . *Swierkiewicz* and *Iqbal* both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss, but *Swierkiewicz* is based, in part, on *Conley,* which the Supreme Court cited for the proposition that Rule 8 'relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'. .We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal,* so too has *Swierkiewicz,* at least insofar as it concerns pleading requirements and relies on *Conley*. . . The demise of *Swierkiewicz,* however, is not of significance here. We had already extended our holding in *Phillips,* to the employment discrimination context. In *Wilkerson v. New Media Technology Charter School, Inc.*, 522 F.3d 315 (3d Cir.2008), a terminated charter-school teacher brought an action claiming that she was fired

for retaliation and her religious beliefs. The teacher pleaded that she was fired because of her ' AChristian religious beliefs," her refusal to engage in the Alibations ceremony," and her Acomplaints related to the ceremony."'. . We held that the 'plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination.'").

Wilkerson v. New Media Technology Charter School Inc., 522 F.3d 315, 322 (3rd Cir. 2008) ("Today, we extend our holding in *Phillips* to the employment discrimination context. The plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination.").

Phillips v. County of Allegheny, 515 F.3d 224, 230-34 (3rd Cir. 2008) ("What makes *Twombly's* impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new 'plausibility' paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley's* 'no set of facts' language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. . . . In determining how *Twombly* has changed this standard, we start with what *Twombly* expressly leaves intact. The Supreme Court reaffirmed that Fed.R.Civ.P. 8 ' Arequires only a short and plain statement of the claim showing that the pleader is entitled to relief," in order to Agive the defendant fair notice of what the ... claim is and the grounds upon which it rests,"' and that this standard does not require 'detailed factual allegations.' . . . [T]he *Twombly* decision focuses our attention on the 'context' of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case–some complaints will require at least some factual allegations to make out a 'showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' *Twombly*, 127 S.Ct. at 1964. Indeed, taking *Twombly* and the Court's contemporaneous opinion in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), together, we understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8. . . . The second important concept we take from the *Twombly* opinion is the rejection of *Conley's* 'no set of facts' language. In rejecting the *Conley* language, the Supreme Court was careful to base its analysis in pre-existing principles. . .The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. . . Indeed, the Court cited *Twombly* just days later as authority for traditional Rule 8 and 12(b)(6) principles. *See Erickson*, 127 S.Ct. at 2200. Thus, under our reading, the notice pleading standard of Rule 8(a)(2) remains intact, and courts may generally state and apply the Rule 12(b)(6) standard, attentive to context and an showing that 'the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' *Twombly*, 127 S.Ct. at 1964. . . . The more difficult question raised by *Twombly* is whether the Supreme Court imposed a new 'plausibility' requirement at the pleading stage that materially alters the notice pleading regime. . . The answer to this question is difficult to divine. Numerous references to

'plausibility' in *Twombly* seem to counsel reliance on the concept as a standard for notice pleading. . . . Yet, the *Twombly* decision repeatedly indicated that the Court was not adopting or applying a 'heightened pleading standard.'. . . The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come. Therefore, we decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context. Reading *Twombly* to impose a 'plausibility' requirement outside the § 1 context, however, leaves us with the question of what it might mean. 'Plausibility' is related to the requirement of a Rule 8 'showing.' In its general discussion, the Supreme Court explained that the concept of a 'showing' requires only notice of a claim and its grounds, and distinguished such a showing from 'a pleader's Abare averment that he wants relief and is entitled to it."' *Twombly*, 127 S.Ct. at 1965 n. 3. . . . The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element. *Id.* This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element. . . . That is to say, there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation. The complaint at issue in this case clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of Phillips' claims.")**.**

Mitchell v. Township of Willingboro Municipality Government, 913 F.Supp.2d 62, 67, 68, 72 (D.N.J. 2012) ("The Third Circuit has cautioned against dismissing a case based on qualified immunity on a Rule 12(b)(6) motion because 'it is generally unwise to venture into a qualified immunity analysis at the pleading stage as it is necessary to develop the factual record in the vast majority of cases.' *Newland v. Reehorst*, 328 F. App'x 788, 791 n. 3 (3d Cir.2009). While the issue of whether a right is clearly established and whether a reasonable officer could have believed his actions were lawful are questions of law for the court to decide, the Court does not consider facts outside the pleadings in assessing these issues. The Third Circuit has clearly held that 'qualified immunity will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint.' *Thomas v. Independence Township*, 463 F.3d 285, 291 (3d Cir.2006). In this case, the court confirms its previous holding that the Plaintiff has sufficiently pled a violation of his Fourth Amendment rights by Defendant Perez. . . Plaintiff's complaint alleges that Officer Perez received a 9–1–1 dispatch call to pull over a blue Honda Accord with no license plates that had been speeding down a nearby road. Plaintiff alleges his car was a green Honda Accord with a Pennsylvania license plate and that he was not committing any traffic violations at the time he was pulled over by Officer Perez. Plaintiff further argues his Honda Accord had a rear Pennsylvania license plate and that Pennsylvania does not require a license plate on the front of the car. Plaintiff maintains Defendant Perez used the 9–1–1 dispatch call as a pretext to make the stop and Plaintiff avers the only reason he was pulled over was because he is an African American male. This sufficiently alleges a deprivation of a constitutional right and plausibly states a claim under the Fourth Amendment. With regard to the second prong of the qualified immunity analysis, it is well established that an officer must have an articulable and reasonable suspicion that the driver has committed a motor vehicle offense in order to conduct an investigatory stop. . . Defendant Perez

does not argue that Plaintiff's Fourth Amendment rights in this case were not clearly established. Consequently, the Plaintiff's complaint satisfies the second prong of the qualified immunity analysis. Therefore, the court concludes it is inappropriate to dismiss this case on qualified immunity grounds at the pleading stage. Here, the immunity is not established on the face of the complaint. The Plaintiff adequately alleges a violation of his Fourth Amendment rights and these rights were clearly established at the time of the incident. . . . Therefore, since the law was clear at the time of the incident that reasonable suspicion was required to conduct an investigatory stop, Defendant Perez can be granted qualified immunity only if his conduct in stopping Plaintiff's car was a violation a reasonable officer could have committed. Viewing the facts in the light most favorable to Plaintiff as the non-moving party, the court concludes a reasonable officer would not have conducted an investigatory stop of the Plaintiff in this situation and a jury could conclude reasonable suspicion did not exist.")

Zenquis v. City of Philadelphia, 861 F.Supp.2d 522, 529 (E.D. Pa. 2012) ("To support the inference of an agreement among the officer defendants and the private individuals who assaulted him, Zenquis relies principally on the allegation that the private individuals 'had spoken to at least one or more of the individual [police] defendants, and were told ... that they should detain [Zenquis] and that they would be permitted to use force against [Zenquis].'. . This is consistent with and buttressed by the allegations, earlier in the amended complaint, that at least some of the officer defendants were canvassing the Kensington neighborhood for several hours prior to the assault, advising private citizens (including both the perpetrators of the alleged assault and others) to use force to detain Zenquis. . . Finally, the amended complaint alleges that 'civilians who spoke with the individual defendants ... received the clear message from the officers that they would be free to assault the plaintiff with impunity.'. . .Taken together, these allegations are adequate to state a claim for conspiracy. According to the complaint, the private individuals who assaulted Zenquis were urged by the police to do so, were told they could use force to do so, and understood this to mean that they could assault Zenquis "with impunity." That is a sufficient basis, at the pleading stage, to ground an inference that there was an agreement between at least some of the officer defendants and the private actors to violate Zenquis's Fourth Amendment right against unreasonable seizure. In context, it is not implausible that the police would commit themselves to such an agreement during the frenetic search for a suspect wanted for a sensational crime; the plausibility of the conspiracy allegation is further bolstered by the allegation that the police licensed similar behavior in capturing the actual rapist the following day. At the very least, Zenquis has put the defendants on notice of the nature of the conspiracy claim with sufficiently detailed factual allegations to justify discovery.")

Morris v. Philadelphia Housing Authority, No. 10-5431, 2011 WL 1661506, at **3-5 (E.D. Pa. Apr. 28, 2011) ("District Court Judges have experienced difficulty in interpreting the Supreme Court's intent in *Twombly* and *Iqbal.* Particularly in the civil rights context, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* the Supreme Court specifically held that notice pleading under Rule 8 was proper. . . The difficulty in following *Leatherman* is that its holding appears to be significantly undermined by *Iqbal,* yet *Leatherman* is not cited in either the

majority or dissenting opinions of *Iqbal*. Further, before *Twombly* and *Iqbal*, the Third Circuit expressly held that the complaint in a civil rights case is subject to the liberal notice pleading standard of Rule 8(a). . . The Third Circuit has not yet issued a precedential opinion squaring its holding in *Evancho* with those of *Twombly* and *Iqbal.* but it did discuss the implications of *Twomblv* in *Phillips,* a § 1983 case. . . The undersigned, formerly a member of the Advisory Committee on Civil Rules, knows that many practitioners and judges share in the confusion resulting from *Iqbal'*s seemingly strong requirement of factual pleadings in the absence of any specific overruling of prior cases allowing traditional notice pleading. The Court concludes that notice pleading is still the rule, because Rule 8 is still in effect, but that the concept of notice pleading has changed and must be accompanied by either factual or legal assertions satisfying the elements of the claims made. . . In other words, 'notice pleading' now requires 'notice' of at least those facts necessary to raise an inference that Plaintiff has a claim. . . .The plausibility standard calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements of the claims. . . . Plaintiff's Complaint in its current form does not raise this reasonable expectation.")

RHJ Medical Center, Inc. v. City of DuBois, 754 F.Supp.2d 723, 731 -733 (W.D. Pa. 2010) ("While the Third Circuit has not definitively resolved this issue, a number of district courts within the Third Circuit, . . . as well as other Courts of Appeals . . . have applied the *Iqbal* standard to motions filed under Fed.R.Civ.P. 12(c). This Court is inclined to agree, though this decision will have several consequences that may not have been discussed elsewhere. For decades, granting a motion for judgment on the pleadings was only appropriate where the movant 'clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'. . Generally, federal courts were reluctant to grant a Rule 12(c) Motion for Judgment on the Pleadings, because it provides for summary disposition of a party's claim on the merits before discovery. . . These prior standards mirrored the previous notice pleading standard articulated in *Conley* . . . but *Iqbal* changed the game. . . *Iqbal* effected not only motions to dismiss, but has also impacted motions for judgments on the pleading, and imported the higher burden of 'plausibility.' Applying the *Iqbal* standard will likely make it tougher for complaints to survive motions under Fed.R.Civ.P. 12(c). Yet, to do otherwise would frustrate *Iqbal* In many cases, motions filed under Fed.R.Civ.P. 12(c) and 12(b)(6) are complimentary and largely interchangeable–the key difference being that the right to file motions under Fed.R.Civ.P. 12(b)(6) is waived if an answer is filed. A plaintiff should not be able to benefit from a weaker standard and higher probability of success under Fed.R.Civ.P. 12(c) than he would under Fed.R.Civ.P. [12](b)(6). The burden of proof on the Plaintiff should increase at each stage of litigation. . . . *Iqbal* has also impacted the manner in which courts must assess subject matter jurisdiction, even when considering a motion for judgment on the pleadings. Historically, when considering whether to dismiss a case for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the Court generally 'must accept the allegations in the complaint as true and determine whether they are sufficient to invoke its jurisdiction.'. . Now, the Plaintiff 'has the burden of establishing that subject matter jurisdiction exists within the parameters of the "plausibility" standard established by *Twombly* and *Iqbal* when confronted with Defendant's 12(b)(1) motion to dismiss.'").

Major Tours, Inc. v. Colorel, 720 F.Supp.2d 587, 605, 606 (D.N.J. 2010) ("The Complaint contains abundant allegations of racially-motivated discrimination, which are summarized at the beginning at the first paragraph: 'Because of Plaintiffs' race, Defendants and their associates have targeted their buses for improper, illegal, and unreasonably burdensome stops, inspections, and seizures.' (Compl.¶ 1) Plaintiffs allege, among other things, that Defendants and their agents gathered near certain casinos known to have primarily African American clienteles in order to stop buses in a racially discriminatory manner (*Id.* ¶ 26); that Defendants exercised their discretion with racially discriminatory intentions, targeting Plaintiffs' buses for towing because of Plaintiffs' race (*Id.* ¶ 30); and that Defendants often require Plaintiffs–on account of their race–to have their buses towed away (*Id.* ¶ 34). Each of these is a specific allegation of a discriminatory act taken for racially discriminatory reasons, and supported by further allegations of white owned buses being subjected to differential treatment. Defendants maintain that these statements are too conclusory, but they are not. . . . Unlike the defendants in *Iqbal***,** Defendants in this case have offered no nondiscriminatory reason for any of the racially discriminatory behavior specifically alleged in the Complaint, nor is there any obvious nondiscriminatory explanation for the disparate treatment alleged by Plaintiffs. There is no obvious and lawful purpose that explains, for example, why inspectors would target casinos frequented by African Americans for bus safety inspections, or why they would permit white operated buses to repair violations on-site while requiring Plaintiffs to be towed. Rule 8 does not require plaintiffs who are pleading a pattern of racially discriminatory conduct to include all of the evidence that suggests that the conduct was a result of racially discriminatory intentions rather than the byproduct of some legitimate purpose. . . . Instead, they must simply allege enough facts to nudge the claim into the realm of the plausible. Therefore, the factual allegations in the current complaint regarding racially discriminatory purpose are sufficiently concrete with respect to the investigator defendants.")

Southersby Development Corp. v. Borough of Jefferson Hills, No. 09-208, 2010 WL 1576465, at *4 (W.D. Pa. Apr. 20, 2010) ("The Defendants initially challenged the sufficiency of the substantive due process claim made in Southersby's original Complaint. Before those first Motions to Dismiss could be considered, Southersby filed the Amended Complaint (Doc. 21), adding four paragraphs clearly intended to rectify any deficiencies in pleading the 'shocks the conscience' requirement: 22. Defendants' unequal and unlawful actions ... were motivated by bias against the plaintiff as a non-resident developer and intended to financially injure plaintiff in retaliation for exercising its constitutionally-protected right to contest Jefferson Hill's [sic] attempts to charge and collect certain legal escrow fees and storm and sanitary sewer tap fees relative to the development of Patriot Pointe. 23. Upon information and belief, McVicker and other agents of Jefferson Hills have personal or business relationships with land developers or individuals who reside in the Borough and who stand to gain a profit or benefit from the failure of the Patriot Pointe development or from the plaintiff [halting] further land development. 24. The defendants engaged in corruption and self-dealing such that their unlawful actions ... were motivated by an intent to harm the plaintiff and interfere with the development of Patriot for the purpose of benefitting, financially or otherwise, the defendants or resident land developers or individuals associated with

the defendants, by deterring the plaintiff from seeking to develop other land within the Borough and causing the failure or foreclosure of Patriot Pointe. 38. Defendants' arbitrary and irrational actions ... involve corruption, self-dealing, gross abuse of official power, and interference with constitutionally protected activities of the plaintiff, and are so egregious that it shocks the conscience.The Defendants contend that these modifications, even considered against the background of the remaining allegations, constitute unsubstantiated conclusions that do not meet the *Twombly/ Iqbal / Fowler* plausibility standard. Thus, they say, Southersby has failed to allege conduct sufficiently egregious to shock the conscience, and its substantive due process claim fails. The Court agrees. Surviving a motion to dismiss requires more than raising a *possibility* of unlawful action. 'Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.'. . Though Fed.R.Civ.P. 8 'makes a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, ... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'. . Measured against this standard, Southersby's allegations fall short. It is as though Southersby had stated that it is a cold day in Pittsburgh, without providing a basis for its conclusion. How do we know it is cold? Are passersby wearing heavy coats and turning up their collars? Is there snow in the air or frost on the windows? Similarly, here, Southersby states, without supporting facts, that the Defendants engaged in 'corruption' and 'self dealing,' two of the factors identified in *Eichenlaub* that may amount to 'conscience shocking' behavior. The allegations in the Amended Complaint raise, at most, the *possibility* of corruption and self dealing. The same is true with respect to facts regarding the Defendants' interference with other of Southersby's constitutional rights. . . As a result, it is impossible for the Court to find plausible the assertion of conscience shocking behavior. . . . Here, just as in *Eichenlaub,* the facts alleged support a claim based on improper motive, but are insufficient to state a substantive due process claim.").

FOURTH CIRCUIT

Clatterbuck v. City of Charlottesville, 708 F.3d 549, 560 (4th Cir. 2013) ("It is not implausible that the City singled out requests for immediate donations in an attempt to target the particular nuisance of beggars' speech but allow other types of solicitation to continue. We find Appellants' allegation a reasonable one, and must accept it as true at this stage. . . Thus, we find that Appellants have nudged their claim that the City enacted a content-based regulation, which is not the least restrictive means of furthering a compelling government interest, across the line from conceivable to plausible.")

De'lonta v. Johnson, 708 F.3d 520, 524-26 (4th Cir. 2013) ("De'lonta contends she has stated a valid constitutional claim because the Appellees' 'denial of consideration for sex reassignment surgery, when viewed against the backdrop of her medical history and circumstances, constitutes a deliberate indifference to her serious medical needs in violation of the Eighth Amendment.'. .Appellees counter that De'lonta's complaint fails to satisfy *Twombly's* plausibility requirement. While conceding that De'lonta's need for protection from self-mutilation is a serious medical need,

Appellees assert that because De'lonta has never been prescribed sex reassignment surgery, she cannot allege that sex reassignment surgery is a serious medical need for the purposes of the Eighth Amendment. . . .Applying this two-prong Eighth Amendment standard, we first resolve that De'lonta has alleged an objectively serious medical need for protection against continued self-mutilation. . . .Next, we conclude that De'lonta's complaint sufficiently alleges Appellees' deliberate indifference to her serious medical need, and consequently, that the district court's dismissal was in error. . . .De'lonta alleges that, despite her repeated complaints to Appellees alerting them to the persistence of her symptoms and the inefficacy of her existing treatment, she has never been evaluated concerning her suitability for surgery. Instead, despite their knowledge that De'lonta's therapy sessions with Psychologist Lang actually *provoked* her 'overwhelming' urges to self-castrate, VDOC's medical staff's only response to De'lonta's requests for surgery was a 'request that you continue to work with Ms. Lang in individual therapy at this time.' These factual allegations, taken as true, state a plausible claim that Appellees 'actually kn[e]w of and disregard[ed]' De'lonta's serious medical need in contravention of the Eighth Amendment. . . .We wish to be clear about our holding. We hold only that De'lonta's Eighth Amendment claim is sufficiently plausible to survive screening pursuant to 28 U.S.C. § 1915A. We do not decide today the merits of De'lonta's claim. Nor, for that matter, do we mean to suggest what remedy De'lonta would be entitled to should she prevail. In our view, the answers to those questions have no bearing on whether De'lonta has stated a claim that Appellees have been deliberately indifferent to her serious medical need by refusing to evaluate her for surgery, consistent with the Standards of Care.")

Tobey v. Jones, 706 F.3d 379, 385, 386 (4th Cir. 2013) ("The district court opined that Mr. Tobey's complaint 'is devoid of any facts suggesting that [Appellants]—neither of whom are law enforcement officers with the power of arrest—made any such assertion or otherwise indicated to the RIC police that Plaintiff should be arrested.'. . The district court further noted that 'Plaintiff's counsel conceded that the Complaint "doesn't say directly that [Plaintiff's arrest] was at the instruction of the TSA."'. . Fortunately for Mr. Tobey, he was not required to state these precise magical words in order to plausibly plead that Appellants caused his arrest. The Supreme Court reiterated in *Bell Atlantic Corp. v. Twombly* that a 'formulaic recitation of the elements of a cause of action will not do.'. . Allegations have facial plausibility 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. .As the Supreme Court explained, Section 1983 (and by association *Bivens*) anticipates that a government official will be 'responsible for the natural consequences of his actions.'. . It is an undoubtedly natural consequence of reporting a person to the police that the person will be arrested; especially in the scenario we have here, where TSA and RIC police act in close concert. So long as Mr. Tobey's complaint rendered it plausible that Appellants helped effectuate his arrest, the district court should have factored the arrest into its decision as to whether Mr. Tobey alleged plausible *Bivens* claims against Appellants. When looking at Mr. Tobey's complaint and drawing all reasonable inferences in his favor, it is logical to assume that Appellants had a hand in his arrest. Mr. Tobey announced to Appellants his desire to peacefully protest TSA screening measures, and at that point, Appellants 'radioed for assistance.' Immediately thereafter,

RIC police 'seized and handcuffed' Mr. Tobey from behind without further inquiry. It is reasonable to infer that whatever Appellants told RIC police caused Mr. Tobey's arrest. This inference is bolstered by the fact that Appellants silently stood by and watched RIC police arrest Mr. Tobey. The fact that Appellants do not have the power of arrest does not hurt Mr. Tobey, but helps him, as one can infer that Appellants radioed RIC police to arrest Mr. Tobey as they could not do it themselves. It may bear out after further discovery that Appellants radioed for assistance for innocuous reasons. It may also bear out that Appellants indicated to RIC police that they should arrest Mr. Tobey. Mr. Tobey's complaint raises a plausible inference that Appellants caused his arrest, and thus it was improper for the district court to find otherwise at the 12(b)(6) phase of litigation. The district court should have considered the entire course of events up to arrest when deciding whether to dismiss Mr. Tobey's *Bivens* actions against Appellants.")

Tobey v. Jones, 706 F.3d 379, 402, 403 (4th Cir. 2013) (Wilkinson, J., dissenting) ("Tobey's suit fails for another, independent reason, and in rejecting this reason, the majority manages to flout a second body of Supreme Court precedent. In a recent line of decisions, the Court has held that a plaintiff must allege enough factual content in his complaint to render his legal claim for relief 'plausible on its face' in order to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). . . Tobey's complaint falls well short of this requirement, for it conclusorily asserts that defendants engaged in viewpoint discrimination without pleading so much as a single factual allegation that supports this conclusion. In short, by announcing a near-categorical rule that every complaint survives a motion to dismiss, the majority proceeds as if *Twombly* and *Iqbal* were purely advisory. The rules of pleading assume particular importance in the context of a damages action against a public official, especially one alleging that the official acted with an impermissible motive. The doctrine of qualified immunity and the rules of pleading are therefore mutually reinforcing: the former ensures that officials cannot be subjected to damages suits for making close judgment calls where the governing law was unclear, while the latter ensure that this defense cannot be defeated by a bare allegation of impermissible motive. . . . In light of these principles, it becomes clear that Tobey's complaint fails to allege a 'plausible' claim of viewpoint discrimination against defendants. . . . Tobey's allegation of viewpoint discrimination is barely distinguishable from the allegation of religious and racial discrimination that the Supreme Court rejected as conclusory in *Iqbal*. . . . Stripped of the conclusory allegation of viewpoint discrimination, Tobey's First Amendment claim 'stops well short of the line between possible and plausible.'")

Brown v. North Carolina Dept. of Corrections, 612 F.3d 720, 722-24 (4th Cir. 2010) ("Brown's complaint alleges the following facts. On May 9, 2008, an ACI staff member instructed him to enter the 'Housing Block' to retrieve a number of cleaning supplies. The staff member gave the instruction despite having knowledge that another inmate in the Housing Block harbored a grudge against Brown. While gathering the cleaning supplies, Brown was assaulted and brutally beaten by that inmate. As a result of that assault, a steel plate was inserted into Brown's jaw and he received 'ongoing' medical care for 'permanent' injuries. Brown's complaint further alleges that Officer Simms was in 'the Block' when the assault occurred, that Officer Teague observed the

assault, and that the 'staff officers in question were [n]egligent and placed [Brown] in a dangerous and vulnerable position.' In an administrative grievance form attached to his complaint, Brown specified that Officer Winkler was the staff member who was aware of the other inmate's grudge against Brown but nonetheless sent him to pick up cleaning supplies. The administrative grievance form also alleges that Officer Teague admitted to Brown that he witnessed the assault but chose not to intervene. . . . The state contends that no reasonable person could infer from the complaint that Officer Simms knew of the assault in time to intervene, yet deliberately and indifferently failed to do so. We disagree with that reading of the record. Brown's complaint alleges that Officer Simms was in 'the Block' when the assault occurred. A reasonable person could infer from that statement that Officer Simms was aware of the attack, and that his failure to intervene represented deliberate indifference to a serious risk of harm. Similarly, Brown's complaint states that 'staff members' were aware of the other inmate's grudge, that the staff members knew there were prior problems between that inmate and Brown, and that they placed Brown 'in a [d]angerous and vulnerable position.' Because there were only three ACI correction officers designated in the complaint, it is reasonable to assume that Brown was naming Officer Simms when he described the staff members who were deliberately indifferent to the serious harm posed by his fellow inmate. Accordingly, the district court should not have dismissed Brown's claim against Officer Simms.")

Francis v. Giacomelli, 588 F.3d 186, 192 n.1 (4th Cir. 2009) ("The standard that the plaintiffs quoted from *Swierkiewicz* . . . was explicitly overruled in *Twombly*.")

Francis v. Giacomelli, 588 F.3d 186, 192-94 (4th Cir. 2009) ("[T]he 'notice pleading' characterization may itself be too simplistic, failing to recognize the many other provisions imposing requirements that permit courts to evaluate a complaint for sufficiency early in the process. Rule 8 itself requires a *showing of entitlement* to relief. Rule 9 requires that allegations of fraud, mistake, time, place, and special damages be specific. Rule 11 requires that the pleading be signed and provides that the signature 'certifies' (1) that the claims in the complaint are not asserted for collateral purposes; (2) that the claims asserted are 'warranted'; and (3) that the factual contentions 'have evidentiary support.' And Rule 12(b)(6) authorizes a court to dismiss any complaint that does not state a claim 'upon which relief can be granted.' The aggregation of these specific requirements reveals the countervailing policy that plaintiffs may proceed into the litigation process only when their complaints are justified by both law and fact. In recent years, with the recognized problems created by 'strike suits,'. . . and the high costs of frivolous litigation, the Supreme Court has brought to the forefront the Federal Rules' requirements that permit courts to evaluate complaints early in the process. [discussing *Twombly* and Iqbal] With these principles in hand, we now turn to the complaint in this case to determine whether, on its face, it states a plausible claim for relief. . . . Count I of the complaint, where the plaintiffs most fully articulate a claim, alleges that members of the Baltimore City Police Department, under the direction of Mayor O'Malley and City Solicitor Tyler, 'broke into and entered' the Police Commissioner's offices, seized personal property, and 'detained, held in custody and seized' the Police Commissioner and his deputies while ordering them to 'surrender their weapons, badges, identification cards' and similar property–all without the benefit of criminal charges or a warrant. The complaint concludes

that this conduct violated the plaintiffs' Fourth and Fourteenth Amendment rights against unreasonable searches and seizures. Considered in their context, these allegations describe the conduct of Mayor O'Malley taken in furtherance of his decision to terminate the plaintiffs' employment, directing members of the Baltimore City Police Department to seize police department property and escort the plaintiffs from the police building. . . . Taking the facts in the complaint as true, we agree with the district court that Count I nonetheless fails to set forth a plausible claim for relief. While the Commissioner and his deputies conclusorily alleged that the searches and seizures violated their constitutional rights because no charges had been filed against them, nor had any warrant issued, their complaint did not allege that the defendants were engaged in a law-enforcement effort. Indeed, the facts show to the contrary, that the defendants' actions against the plaintiffs were employment actions based on the Mayor's perceived right to fire the Police Commissioner without cause, as stated in the Memorandum of Understanding between Commissioner Clark and Baltimore City.).

McLean v. U.S., 566 F.3d 391, 399, 400 (4th Cir. 2009) ("Although the Supreme Court has subsequently made clear that the factual allegations in a complaint must make entitlement to relief plausible and not merely possible, *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-63 (2007), '[w]hat Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations,' *Neitzke,* 490 U .S. at 327; *see also Twombly,* 550 U.S. at 556. 'District court judges looking to dismiss claims on such grounds must look elsewhere for legal support.' *Neitzke,* 490 U.S. at 327. '[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely.' *Twombly,* 550 U.S. at 556. . . *Neitzke* makes clear that a dismissal for frivolousness is of a qualitatively different character than a dismissal for failure to state a claim. As a result, our holding today should not be read to indicate that a dismissal for frivolousness that is rendered without prejudice should avoid a strike designation.").

Ray v. Amelia County Sheriff's Office, 302 F. App'x 209, 2008 WL 5155257, at *1 (4th Cir. Dec. 9, 2008) ("The district court erred in dismissing Ray's ADEA claim based upon its finding that her own complaint produced a legitimate, non-discriminatory reason for the defendants' termination of her employment that rebutted her prima facie case, while failing to demonstrate that the reasons stated in her own complaint were a pretext for discrimination. Ray was not required to plead specific facts establishing a prima facie case of discrimination in her complaint, let alone to plead facts showing that the non-discriminatory reason for termination suggested by her own complaint was pretextual. Ray was required only to state her claim so as to give the defendants fair notice of its nature and the grounds upon which it rests, with enough factual allegations to state a claim to relief that is plausible, not merely speculative. Ray alleges in her complaint that she is a member of a protected class (she is forty-five years old), she suffered an adverse employment action (her employment was terminated), and she was replaced by a substantially younger employee who is less qualified for the position than Ray. Ray states several possible reasons for the termination of her employment that are related to her age: Sheriff Jimmy E. Weaver's desire to have younger-looking employees at the front of the Amelia County Sheriff's Office; Weaver's

desire to hire a replacement who was less familiar with official policies and procedures; and a problem with Ray's desire to utilize her accrued annual leave benefits. Taken together, these allegations provide the defendants with fair notice of the nature of her claim and the grounds upon which it rests, and state a claim to relief that is plausible, not merely speculative. Although Ray's complaint indicates that there were other ostensible reasons why her employment was terminated, the inclusion of those stated reasons in her complaint does not establish at the pleadings stage that she is not entitled to relief on her stated discrimination claim.").

In re Mills, 287 F. App'x 273, 2008 WL 2937850, at *6 (4th Cir. July 29, 2008) ("Mills' argument on appeal is simply that the allegations in the complaint, even if taken as true, are too vague and conclusory to demonstrate the violation of constitutional rights. . . We disagree. A complaint need only give 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed.R.Civ.P. 8(a)(2). . . There is no heightened pleading standard for qualified-immunity cases.")**.**

Giarratano v. Johnson, 521 F.2d 298, 304, 305 (4th Cir. 2008) ("Giarratano's complaint alleges that '[t]he exclusion of inmates from the protections of the Freedom of Information Act is not rationally related to any legitimate government interest.' This conclusory assertion is insufficient to overcome the presumption of rationality that applies to the VFOIA prisoner exclusion. . . Thus, the district court's dismissal of the facial challenge was appropriate. The conclusion that dismissal is appropriate comports with *Twombly*, 127 S.Ct. 1955 (2007), which requires pleading 'enough facts to state a claim to relief that is plausible on its face.'. . In *Twombly*, the Supreme Court, noting that 'a plaintiff's obligation to provide the Agrounds" of his Aentitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do,' *id*. at 1964-65, upheld the dismissal of a complaint where the plaintiffs did not 'nudge [ ] their claims across the line from conceivable to plausible.'. . Here, Giarratano's conclusory allegation about the lack of a rational relationship between VFOIA's prisoner exclusion and any legitimate state interest is insufficient . . . to plausibly state a claim for relief in light of the strong presumption in favor of the legislation's rationality and the readily apparent justification for the legislation. . . . In holding that Giarratano could not meet his burden, the district court cited a variety of rational reasons for the VFOIA prisoner exclusion. . . . Giarratano, on the other hand, failed to allege any set of facts that would indicate the classification at issue violated any fundamental rights, was irrational, or otherwise failed to serve a legitimate state interest. Simply put, Giarratano has alleged no facts to support a claim much less a 'plausible' claim.").

Mitchell v. Lewis, C/A No. 0:11–2860–CMC–PJG, 2012 WL 137471, at *5 n.4 (D.S.C. Jan. 4, 2012) ("The Supreme Court in *Iqbal,* and the Fourth Circuit in *Trulock*, addressed pleading standards in the procedural context of a Rule 12(b)(6) motion. However, this court finds that those standards also apply in the court's initial screening of a complaint pursuant to §§ 1915(e)(2) and 1915A, since *Iqbal* discusses the general pleading standards of Rule 8, which apply in all civil actions. . . Moreover, §§ 1915(e)(2) and 1915A(b) permit *sua sponte* dismissal of a complaint that fails to state a claim upon which relief can be granted, which is essentially the same standard found in Rule 12(b)(6).")

Williams v. Family Service of Roanoke Valley, No. 7:09cv00227, 2009 WL 3806333, at *5, *6 (W.D. Va. Nov. 13, 2009) ("Ms. Williams believes that her supervisors intended for her reassignment to be permanent and an effort to force her to retire, and she believes that they were motivated to discriminate against her on account of her age and race. Her personal beliefs and speculation, however, are no substitute for proof. At the pleading stage, it is necessary to state a plausible claim for relief that raises the right to recover beyond the speculative level. Stripped of its speculation and personal belief, Ms. Williams' complaint shows only this: she was performing satisfactorily, her supervisors asked her to work temporarily as a receptionist with no loss of pay or benefits because of a legitimate need, a younger white female was to cover for her temporarily, and another employee that was approximately Williams' age voluntarily resigned. These facts fall far short of raising a plausible claim for relief that discriminatory animus motivated an adverse employment action. In short, nothing Ms. Williams has said in her pleadings, or in open court in support of her pleadings, and ultimately her claim, raises her right to relief above the speculative level. In reaching this conclusion, the court notes that it does not view this as a technical pleading failure that disadvantages a *pro se* plaintiff. To the contrary, the Court has assumed the veracity of her relevant factual allegations, including her amplification of them in open court, and concluded that they do not 'plausibly give rise to an entitlement to relief.' *Iqbal*, 129 S.Ct. at 1950.")

FIFTH CIRCUIT

Lincoln v. Turner, 874 F.3d 833, 839 n.11 (5th Cir. 2017) ("Many difficulties of determining the adequacy of pleadings could be avoided by the district court's ordering a plaintiff to 'file a reply tailored to an answer pleading the defense of qualified immunity.' *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995). *See also Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016) (noting that when a defendant asserts a qualified immunity defense, the court must first "apply[ ] [the] general pleading standard to the complaint" and "*may* [*then*], *in its discretion*, insist that a plaintiff file a reply"). The district court may require particularized pleading of facts responsive to the defendant's plea of immunity. Officer Turner filed a Motion to Dismiss and, in the Alternative, for a Rule 7(a) Reply to Immunity Defense. The district court granted the motion to dismiss without ordering a Rule 7 reply.")

Doe v. United States, 831 F.3d 309, 321 (5th Cir. 2016) ("In this appeal, we set aside the objective 'clearly established law' requirement, which is traditionally confined to the qualified immunity context. The analytical task before us today is to determine whether the complaint contains sufficient factual information showing that the same ICE officials under scrutiny in *Robertson* acted with deliberate indifference in relation to the transport policy violations and detainees' safety. . . We are mindful of our prior conclusion that the plaintiffs sufficiently pled that these officials 'had actual knowledge' of transport policy violations and of the transport policy's 'assault-preventing objective.'. . Thus, the specific question is whether that information alone renders the officials' alleged culpability greater than 'gross negligence,' or whether more is required to make a plausible assertion that the officials knew of a '*substantial* risk of serious harm'

and consciously disregarded it. . . A complaint must include 'facts to state a claim to relief that is plausible on its face' to survive a Rule 12(b)(6) motion. . . We agree with the Government that some of our other conclusions in *Robertson* are relevant to that determination. For example, we discussed that the plaintiffs' complaint did not include 'any *concrete facts* betray[ing] a heightened risk of sexual assault during ... transports ....' *Robertson,* 751 F.3d at 391. The plaintiffs do not allege that ICE officials knew of prior incidents of sexual assaults connected with detainee transports, of detainee 'fears' of sexual assault during transport, or of Dunn's crimes '(in time to prevent them).'. . There also is no claim that ICE officials knew 'of Dunn's dangerous proclivities.'. . The detention center's history of sexual assault, moreover, consists primarily of the 2007 incident between a detainee and guard which was unrelated to detainee transport. . . The guard's employment was terminated. . . In short, the plaintiffs failed to plead that ICE officials were aware of facts from which the inference could be drawn that known violations of the transport policy created a '*substantial* risk' that detainees would be sexually assaulted. . . Our ruling should not be interpreted as setting a standard that requires 'a completed attack or confirmed potential victims or aggressors' to make a successful deliberate indifference claim. . . Still, mere knowledge of another party's contractual violation is not enough to allege culpability beyond gross negligence in this case. . . We have held that 'observ[ing] questionable behavior' and an awareness of lack of 'compliance' with the terms of a settlement agreement were not enough to show deliberate indifference. . . The plaintiffs have not plausibly asserted that ICE officials acted with deliberate indifference. We affirm the district court's dismissal of the plaintiffs' FTCA claims against the United States.")

Williams-Boldware v. Denton County, Tex., 741 F.3d 635, 643, 644 (5th Cir. 2014) ("Williams–Boldware did not plead this cause of action with the requisite specificity to defeat a motion to dismiss based upon qualified immunity. 'One of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time consuming, and intrusive.' . . Before allowing discovery in a matter where qualified immunity is alleged, the district court must first find 'that the plaintiff's pleadings assert facts which, if true, would overcome' a qualified immunity defense. . . Here, Williams–Boldware's failure to promote claim did not plead facts that would overcome a qualified immunity defense because her allegations are conclusory statements based almost wholly upon speculation. . .Williams–Boldware speculates that Susan declined to recommend or approve her for more challenging assignments, but provides no facts to support her allegation. She also speculates that Cary Piel and Ryan Calvert were involved in selecting misdemeanor prosecutors for coveted assignments, but provides no factual support for that allegation. Most notably, Williams–Boldware failed to even allege that she applied for a promotion and was rejected. Under certain circumstances, a failure to promote claim is viable even when the employee never applied for a position. . . However, the employee must demonstrate that applying 'would have been a futile gesture.' . . Williams–Boldware made no such showing. Because Williams–Boldware failed to plead facts sufficient to survive a motion to dismiss on her failure to promote claim, the district court did not err by denying discovery and dismissing the suit against the Individual Defendants.")

Rogers v. Boatright, 709 F.3d 403, 408, 409 (5th Cir. 2013) ("The district court erred in *sua sponte* dismissing at the initial screening stage Rogers's claim that Jose Garcia acted with deliberate indifference to his safety. Rogers alleged in his complaint that he was not provided with a seatbelt and that he could not protect himself when the prison van stopped abruptly because he was shackled in leg irons and handcuffs. He alleged that Jose Garcia knew that other prisoners had been injured when the prison van in which they were riding stopped abruptly. Notwithstanding that knowledge, Garcia drove the van recklessly and Rogers sustained serious injuries when Garcia had to brake suddenly to avoid hitting another vehicle. . . .Rogers alleged that he sustained a serious injury because Jose Garcia operated the prison van recklessly, knowing that there was a substantial risk that Rogers would be injured if the van stopped abruptly because Rogers was shackled in leg irons and handcuffs and was not provided with a seatbelt. Rogers's allegation that Jose Garcia told another officer that other inmates similarly had been injured the prior week and during other incidents, which 'happen [ ] all the time,' states more than mere negligence. Garcia's alleged statement, if true, is sufficient to demonstrate that he knew of the risk to Rogers. . . Rogers has a nonfrivolous argument that Jose Garcia violated his Eighth Amendment right to freedom from cruel and unusual punishment by acting with deliberate indifference to his safety. . . Thus, the district court abused its discretion in *sua sponte* dismissing this claim against Jose Garcia at the initial screening stage and before the filing of any responsive pleadings, and we remand for further proceedings not inconsistent with this opinion.")

Rogers v. Boatright, 709 F.3d 403, 411, 412 (5th Cir. 2013) (Edith H. Jones, J., dissenting) ("With due respect to my colleagues, I dissent from the holding that Rogers' conclusory statements about reckless driving by Officer Jose Garcia suffice to plead an Eighth Amendment claim for deliberate indifference. My concerns may be easily listed. First, there is no constitutional requirement that inmates be buckled with seatbelts during transportation. Nearly all courts have rejected such claims, because the use of seatbelts on shackled prisoners presents inevitable, non-trivial security concerns for other passengers and the guards. . .Second, this prisoner's allegations of 'reckless driving' are factually insufficient to meet the demanding constitutional standard and pleading requirements. To establish deliberate indifference, the prisoner must show that the prison official knew of and disregarded an excessive risk to inmate health or safety. . . The prisoner must show both that the official was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that the official actually drew the inference. . . The prisoner's pleadings, moreover, must allege 'sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.'. . Rogers' allegations of Garcia's excessive speed, reckless driving, and darting in and out of traffic are conclusory, because he was seated in the back of a prison van, where his view of surrounding traffic had to be obstructed: the majority explain that he was seated perpendicular to oncoming traffic. Unlike the prisoner in the *Brown* case, relied on by the majority, he neither requested a seatbelt nor urged Jose Garcia to drive slower or more carefully. That Garcia 'recklessly' caused the collision is even more doubtful, as Rogers states in his appellate brief that 'Garcia was forced to slam on the transport van's brakes to avoid rear-ending a vehicle stopped in the freeway early morning traffic.' Taking this statement as an addendum to Rogers's pleadings, two implications are possible. Either Garcia, even though

negligent in his driving, responded to an unusual, unanticipated situation, negating the inference that he knew a serious risk of substantial harm to Rogers existed; or Rogers's allegations lack sufficient factual detail from which an inference of recklessness can fairly be drawn. Similarly lacking are factual allegations that Garcia was actually aware of a substantial risk of serious harm to Rogers in these circumstances. The only alleged corroboration to Rogers' conclusion is Garcia's statement that prisoners have been injured during transportation in other instances. This statement, however, says nothing about whether Garcia was the driver on those occasions, nothing about whether actual reckless driving occurred, nothing about the type or extent of injuries sustained, nothing about driving conditions, and nothing about the use of seatbelts. Thus, I disagree that Garcia's statement can be taken to indicate the heightened state of culpability inherent in a constitutional violation. . . . Lack of seatbelts alone, as the majority concede, does not pose 'an excessive risk to inmate health or safety.' Further, because all driving in the congested and unpredictable traffic of the Houston metropolitan area poses some risk, the line between negligence and unconstitutional deliberate indifference must be securely drawn so that the Constitution does not simply become a 'font of tort law.'. . The only way to preserve this distinction is to insist on careful factual allegations. Third, the majority's reliance on *Brown* is misplaced for two reasons. First, allegations of reckless driving were supported in that case by facts. The facts were that the convoy drove at speeds up to 75 miles per hour; the guards had refused multiple requests for seatbelts as the prisoners were being loaded into the vans; the guards 'taunted' the inmates about safety concerns; the vans followed each other too closely; the vans were passing other cars when road signs 'suggested otherwise.'. . No such facts are pled by Rogers. . . . The majority's decision to allow this complainant to proceed is unfortunate, but Rogers must prove far more to overcome Garcia's likely defense of qualified immunity and actually sustain his assertions of a constitutional violation.")

Wilson v. Birnberg, 667 F.3d 591, 599, 600 (5th Cir. 2012) ("Wilson alleged that Birnberg intentionally deprived him of ballot access by, as the complaint states, 'rejecting Wilson's application out of retaliation for Wilson's exercise of free speech.' Specifically, Wilson claimed that during a prior election he had distributed flyers critical of the successful Democratic mayoral candidate, Annise Parker. This is 'factual content' supporting Birnberg's liability 'for the misconduct alleged.'. . The election for which Wilson was denied a place on the ballot was a primary to select the Democratic Party's nominee for Harris County Commissioner's Court, Precinct No. 4. Birnberg chairs the Harris County Democratic Party and the county seat is Houston. There were no other Democratic candidates. Wilson filed his application for candidacy in the last hour of the last possible day, which meant that had his filing been accepted, he would have become the Democratic Party nominee by default. The facts pled are that a political-party chairman denied an application on an improper basis in order to prevent a critic of the mayor from receiving her party's nomination. 'The plausibility standard [for a complaint] is not akin to a "probability requirement"....' . . . Rule 12(b)(6) does not permit us to affirm the district court's dismissal of this claim unless we determine 'it is beyond doubt' that Wilson 'cannot prove a plausible set of facts' to support his allegations.")

Rhodes v. Prince, 360 F. App'x 555, 559, 560 (5th Cir. 2010) ("Our inquiry 'is an objective one, asking whether a reasonable person in the position of [Rhodes] would believe he was the subject of a criminal or an administrative investigation by the department.'. . The question is fact-intensive. . . Rhodes points us to the events of December 9, 2003 to establish a Fourth Amendment violation. We must first, however, identify the allegations in his complaint that are entitled to a presumption of truth. . . Rhodes alleges that Defendant Roach 'intentionally and falsely arrested' him, 'when he knew such conduct was a violation of [his] Fourth Amendment right to be free from unlawful search and seizures,' and that Defendant Roach did so with the support of the other Defendants. Because an 'arrest' is a legal conclusion under the Fourth Amendment and a necessary element of a false arrest claim, . . .Rhodes's allegation of 'arrest' is 'nothing more than a Aformulaic recitation of the elements" of a constitutional ... claim .... and [is] not entitled to be assumed true.' *Iqbal*, 129 S.Ct. at 1951 (quoting *Twombly*, 550 U.S. at 555). Rhodes describes Defendant Roach's questioning as an 'interrogation.' 'Interrogation' is a word with mixed connotations in the law, typically used to describe the questioning of a person while in custody. . . . Rhodes's use of 'interrogation' to describe the questioning by Defendant Roach does not necessarily equate to an arrest because, absent facts indicative of a Fourth Amendment seizure, Rhodes's description amounts to little more than a matter of word choice, without additional legal weight. *Cf. Iqbal*, 129 S.Ct. at 1951. Some of the alleged facts in Rhodes's Rule 7(a) reply are, however, entitled to a presumption of truth. Rhodes alleges that on December 4, 2003, Defendants Krohn, Carroll, and Roach notified him that he was a suspect in the burglary, and that he asserted his Fifth Amendment right to remain silent. Defendant Roach advised Rhodes that he would head a criminal investigation into the matter. The Department then informed Rhodes that he was subject to an internal affairs investigation, placed him on administrative leave and conducted an interview on the matter. Rhodes further alleges that he was fingerprinted and palm printed 'without consent' before Defendant Roach questioned him. Rhodes alleges that the questioning lasted approximately two hours. Although it is not clear from the Rule 7(a) reply, Rhodes's counsel appears to have been present during the questioning. Viewing the pleadings in the light most favorable to Rhodes, we find that he has not sufficiently pled that he was 'seized' under the Fourth Amendment. The district court required Rhodes to come forward with sufficient factual allegations in his Rule 7(a) reply to overcome the Defendants' claim to qualified immunity. . . Rhodes thus had the burden to demonstrate that an objective person would not have felt free to leave the exchange with Defendant Roach. . . Rhodes has not carried his burden. Significantly, Rhodes never alleged that he appeared at the Eastside Police Station involuntarily or felt that he was being detained. Rhodes also does not allege any show of force by the police. The taking of fingerprints and palm prints traditionally accompany an arrest, but standing alone, they do not suffice to establish an arrest. Rhodes was aware of both the criminal and administrative investigations and, in his Rule 7(a) reply, Rhodes had the burden to distinguish between his compliance with workplace obligations and a show of police force sufficient to demonstrate a Fourth Amendment arrest. . . Rhodes failed to do so. Even viewing the pleadings in the light most favorable to Rhodes, we find that a reasonable person would have felt free to leave the encounter. Thus, Rhodes has not sufficiently alleged that he was 'seized' under the Fourth Amendment.").

Floyd v. City of Kenner, La., No. 08-30637, 2009 WL 3490278, at *2 & n.2, *4 (5th Cir. Oct. 29, 2009) (unpublished) ("Caraway, Congemi, Cunningham, and Deroche have asserted a qualified immunity defense. In reviewing those claims, we are guided both by the ordinary pleading standard and by a heightened one. . . We emphasize that this heightened pleading standard applies only to claims against public officials in their individual capacities. The Supreme Court's decision in *Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit,* 507 U.S. 163 (1993), made clear that a heightened pleading standard was inapplicable to suits against municipalities. Further, the heightened standard is inapplicable to claims against public officials in their official capacity, for we have 'explained that official-capacity lawsuits are typically an alternative means of pleading an action against the governmental entity involved....' *Baker v. Putnal,* 75 F.3d 190, 195 (5th Cir.1996). . . . *Schultea* explained that, once a defendant asserts the defense of qualified immunity, a district court may order the plaintiff to submit a reply after evaluating the complaint under the ordinary pleading standard. . . We held that more than mere conclusions must be alleged, stating specifically that 'a plaintiff cannot be allowed to rest on general characterizations, but must speak to the factual particulars of the alleged actions, at least when those facts are known to the plaintiff and are not peculiarly within the knowledge of defendants.'. . 'Heightened pleading requires allegations of fact focusing specifically on the conduct of the individual who caused the plaintiff's injury.'. . . In *Schultea,* we adopted the rationale that, 'in some cases, such as in search cases, probable cause and exigent circumstances will often turn on facts peculiarly within the knowledge of the defendants. And if there are conflicts in the allegations regarding the actions taken by the police officers, discovery may be necessary.'. . Here, the Defendants ask us to accept that Deroche entered the property for the sole purpose of determining if relief items were present. At the time, Deroche alleged he entered because of the alarm. Floyd asserts that Deroche knew that Floyd was not misappropriating relief items; instead, the entry into the property was all about embarrassing Floyd because of his past run-ins with then-Chief of Police Congemi. This is the type of conflict that warrants discovery. The district court should not have dismissed the claim.").

Floyd v. City of Kenner, La., No. 08-30637, 2009 WL 3490278, at *6 (5th Cir. Oct. 29, 2009) ("Floyd does not complain that Caraway himself filed the alleged unlawful affidavit in support of the warrants. Instead, he claims that Caraway, in his capacity as chief investigator, directed and approved the applications filed by Cunningham. This is an alleged Fourth Amendment violation under *Franks,* as we stated in addressing the claim against Cunningham. 'Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Iqbal,* 129 S.Ct. at 1948. Liability under Section 1983 for a supervisor may exist based either on personal involvement in the constitutional deprivation or 'a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.' *Thompkins v. Belt,* 828 F.2d 298, 304 (5th Cir.1987). We must determine whether Floyd alleged the 'factual particulars' necessary to state a valid Fourth Amendment claim against Caraway. . .The relevant allegation is that Caraway 'participated in, approved and directed' the filing of false and misleading affidavits. In analyzing the issue, we turn to the Supreme Court's recent decision in *Iqbal*. . . . Certainly our precedents have acknowledged that some limited discovery may at times be needed before a ruling

on immunity is proper. As an example, we referred to 'search cases, [because] probable cause and exigent circumstances will often turn on facts peculiarly within the knowledge of the defendants.'. . In such a case, 'if there are conflicts in the allegations regarding the actions taken by the police officers, discovery may be necessary.'. . The importance of discovery in such a situation is not to allow the plaintiff to discover if his or her pure speculations were true, for pure speculation is not a basis on which pleadings may be filed. Rule 11 requires that any factual statements be supported by evidence known to the pleader, or, when specifically so identified, 'will *likely* have evidentiary support' after discovery. Fed.R.Civ.P. 11(b)(3) (emphasis added). There has to be more underlying a complaint than a hope that events happened in a certain way. Instead, in the 'short and plain' claim against a public official, 'a plaintiff must at least chart a factual path to the defeat of the defendant's immunity, free of conclusion.' *Schultea,* 47 F.3d at 1430. Once that path has been charted with something more than conclusory statements, limited discovery might be allowed to fill in the remaining detail necessary to comply with *Schultea*. . . Under these standards, Floyd's allegations against Caraway amount to nothing more than speculation. The conclusory assertion that Caraway 'participated in, approved and directed' the filing of false and misleading affidavits is consistent with finding a constitutional violation, but it needed further factual amplification. *See Iqbal,* 129 S.Ct. at 1949. Floyd might not know everything about what occurred, but the bare allegation does not make it plausible that he knows anything. Unlike his allegations against Cunningham, this bare assertion does not provide any detail about what Caraway, as chief of investigations, did to seek to control Cunningham's filing of an affidavit. Put differently, the conclusion presents nothing more than hope and a prayer for relief. An example of a situation that falls squarely within the kind of case justifying limited discovery is discussed in a recently released but non- precedential opinion by a panel of this court. *Morgan v. Hubert,* No. 08- 30388, 2009 WL 1884605 (5th Cir. July 1, 2009). In *Morgan,* a plaintiff who was in protective custody before Hurricane Katrina was transferred to a general prison population following the storm. . . After being beaten and stabbed, the plaintiff filed a Section 1983 suit against the prison warden. . . The complaint presented sufficient detail to demonstrate a highly plausible allegation of an Eighth Amendment violation. . . The events cited were so clear, the practical effects of such conduct so obvious, that the defendants' responsibility under Section 1983 for the plaintiff's harm simply needed the detail that limited discovery would either provide or deny. . . Unlike in *Morgan,* Floyd has shown nothing in his complaint to indicate a basic plausibility to the allegation. His Section 1983 claim premised on a Fourth Amendment violation therefore fails.").

Morgan v. Hubert, 335 F. App'x 466, No. 08-30388, 2009 WL 1884605, at *5, *6 (5th Cir. July 1, 2009) ("In his amended complaint and reply, Morgan alleges the following facts regarding Hubert's personal actions: (1) that Hubert created policies that placed Morgan in substantial risk of harm; (2) that he failed adequately to house, feed, and provide medical care for inmates evacuated from OPP, and particularly failed to provide protection to inmates in protective custody and to provide medical care to those assaulted; (3) that Hubert knew or should have known that transfers from OPP would include prisoners in protective custody; (4) that Hubert knew or should have known of the need to segregate these prisoners; (5) that Hubert failed to follow the policies he had in place for the segregation and protection of prisoners, and that he failed to ensure that his

staff followed the policies; (6) in the alternative that Hubert failed to enact any policies and was thus deliberately indifferent to Morgan's rights; and (7) that Hubert had a personal duty to create and implement these policies or to oversee those who created and implemented the policies. The difficulty with these allegations is that they fail to state specifically such important facts as when Hubert knew of the transfers and what his policies were regarding them, including the handling of prisoners in protective custody. *See Schultea,* 47 F .3d at 1434 (requiring the plaintiff to support a Aclaim with *sufficient precision and factual specificity* to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts" (emphasis added)). The time line from Hubert's planning for the hurricane to Morgan's arrival at EHCC is crucial to the deliberate indifference analysis, directly bearing on Hubert's knowledge of the events. The failure of specificity is no fault of Morgan's, however, because he has not yet had the benefit of discovery, and is bound by Rule 11 to allege only those facts for which he has or will likely have evidentiary support. As we said in *Schultea,* we do not require a plaintiff to plead facts 'peculiarly within the knowledge of defendants,' *id.* at 1432, and the facts omitted fall squarely within that category. We are mindful that the protection afforded by qualified immunity applies to the lawsuit itself, and not merely to liability, and thus the issue should be resolved as early as possible. . .Thus, we are reluctant to allow the case to proceed to full discovery with important questions regarding qualified immunity left unanswered. *Schultea* points the way forward. We noted there the district court's ability to tailor discovery to the defense of qualified immunity: 'The district court may ... limit any necessary discovery to the defense of qualified immunity.' 47 F.3d at 1434. Such a course is called for here. Because key facts are unknown, and because these facts are solely within Hubert's possession, we do not consider the parties' remaining arguments regarding deliberate indifference. Instead, we vacate the district court's denial of qualified immunity and remand for discovery limited to that issue. We instruct the district court to carry the issue of qualified immunity and decide it anew once that discovery is complete. Additional facts establishing the time line are particularly important when evaluating the second prong of the qualified immunity test-the reasonableness of Hubert's actions in light of the clearly established constitutional right. While the fact of Hurricane Katrina is unquestionably relevant to this inquiry, so too are the facts noting when Hubert learned of impending transfers and what steps he took to prepare for them. Several days of notice versus hours or even minutes of notice greatly changes the reasonableness calculus. Under such circumstances, remand for limited discovery is appropriate."). [*See also Morgan v. Hubert,* 459 F. App'x 321 (5th Cir. 2012) (holding that because warden was not deliberately indifferent, warden was entitled to qualified immunity with respect to inmate's § 1983 Eighth Amendment claim.]

Mohamed for A.M. v. Irving Indep. Sch. Dist., 252 F.Supp.3d 602, ___ (N.D. Tex. 2017) ("The threshold question that the court must decide is whether, viewed in the light most favorable to Plaintiff, the Complaint sufficiently alleges that Principal Cummings violated A.M.'s constitutional right to equal protection of the laws under the Fourteenth Amendment. If the allegations fail to state a claim for an underlying constitutional violation, Principal Cummings is entitled to qualified immunity without the necessity that the court reach the other aspects of the qualified immunity inquiry. . . .Viewing all well-pleaded allegations as true and drawing all

reasonable inferences in favor of Plaintiff, the court determines that the Complaint fails to plead facts from which the court can reasonably infer that Principal Cummings's complained-of conduct was motivated by unlawful racial or religious animus. To the extent the Complaint alleges that Principal Cummings intentionally discriminated against A.M. based on his race or religion, the allegations are wholly conclusory and fail to 'raise a right to relief above the speculative level...[even] on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'. . The Complaint contains no factual allegation that supports a showing that Principal Cummings removed A.M. from the classroom, ordered him to write a statement, or decided to temporarily suspend him from McArthur, based on his religion or race. Plaintiff's reliance on nothing more than conclusory, speculative, and sweeping allegations of constitutional violations and intent is insufficient to overcome Principal Cummings's qualified immunity defense. . . .Further, the Complaint fails to state an equal protection violation against Principal Cummings because it does not allege that he treated A.M. differently than other similarly situated students, and that the unequal treatment was based on religion or race. . . .Finally, allegations that the IISD has a pattern of disciplining African–American students more harshly than other students, that the IISD generally had an anti-Muslim bias, that Principal Cummings was aware of TEA reports reflecting such disparity, or that other school officials displayed racial animus, are insufficient as a matter of law to impute liability to Principal Cummings. To overcome Principal Cummings's qualified immunity defense, Plaintiff must, at a minimum, allege facts from which the court may infer that Principal Cummings was *himself* personally motivated by discriminatory animus. . . . Even assuming that Plaintiff had met the threshold requirement of alleging an underlying constitutional violation, the court concludes that Principal Cummings is, nevertheless, entitled to qualified immunity because Plaintiff has failed to allege facts from which the court can conclude that Principal Cummings acted in an objectively unreasonable manner. Principals are responsible for the safety of students and others on campus and, as part of that responsibility, often have to make decisions quickly and with little information. The court acknowledges that A.M. repeatedly stated that the device in question was an alarm clock and not a bomb; however, in light of well-documented incidents in this country of students bringing weapons and other prohibited devices to school, one in Principal Cummings's position cannot rely on or accept such assertions without at least conducting some level of investigation or sufficient inquiry to ensure that the device does not pose a risk to the safety of students and others on campus. . . .A principal's fate is not so hapless that, on the one hand, by not taking action he is faced with the gruesome prospect of death or serious injury of persons had the device actually been a bomb and exploded; and, on the other hand, he is faced with a federal lawsuit for denial of a student's constitutional rights because the device turned out not to be a bomb. *Woe unto the principal who fails to act on a potential threat that later becomes a reality!* To hold Principal Cummings, or any other administrator, to this standard places him between the dreaded Scylla and Charybdis. . . As earlier stated, qualified immunity is designed to protect from civil liability 'all but the plainly incompetent or those who knowingly violate the law.'. . Principal Cummings's alleged conduct falls into neither category. The court simply cannot go so far as to say, based on the allegations presented, that Principal Cummings was 'plainly incompetent' or 'knowingly violate[d] the law' or A.M.'s constitutional rights. Moreover, the Complaint contains no allegations from which the court can reasonably infer

that Principal Cummings would have acted differently if the student bringing the device to school and showing it to others in violation of a teacher's orders had been non-African American or non-Islamic. For these reasons, the allegations in the Complaint regarding Principal Cummings are inadequate to overcome his defense of qualified immunity. Accordingly, the court will grant Principal Cummings's Motion to Dismiss based on qualified immunity.")

Huff v. Refugio County Sheriff's Dept., No. 6:13–CV–00032, 2013 WL 5574901, *2, *3 (S.D. Tex. Oct. 9, 2013) ("Defendants take the principle requiring a plaintiff to identify individual conduct attributable to each public official too far. That rule typically results in dismissals when individual policymakers are named as defendants without any allegation about their specific role in formulating the challenged policy. . . .Here we are not dealing with allegations against policymakers, but allegations that two individuals had direct involvement in applying excessive force. The allegation is that both were present in the cell when the force was applied. This is more than sufficient at the pleading stage, even under the heightened standard applied to public officials sued in their individual capacity. . . Discovery can flesh out the remaining detail of which officer slammed Huff to the floor and which officer brought his arm behind his back.")

SIXTH CIRCUIT

Johnson v. Moseley, 790 F.3d 649, 654-57 (6th Cir. 2015) ("There can be no doubt that the Sixth Circuit recognizes a 'constitutionally cognizable claim of malicious prosecution under the Fourth Amendment.'. . 'Yet, that is not enough.'. . To avoid the qualified immunity defense, plaintiff was required to plead *facts* making out a violation of a constitutional right clearly established in a 'particularized sense.' That is, the right said to have been violated must be defined 'in light of the specific context of the case, not as a broad general proposition.'. . Although neither plaintiff nor the district court has defined the right to freedom from malicious prosecution in such a particularized sense, both have relied on our analysis in *Sykes v. Anderson.* Indeed, *Sykes* is instructive. In *Sykes,* we recognized that a showing of 'malice' is not necessarily essential to a malicious prosecution claim under the Fourth Amendment. . . But we also observed that the requisite participation in the decision to prosecute after probable cause has ceased to exist must amount to 'aiding' the decision in more than a passive or neutral way. . . And there must be some element of blameworthiness or culpability in the participation—albeit less than 'malice.' That is, truthful participation in the prosecution decision is not actionable. . . The requisite blameworthiness was made out in *Sykes* by evidence that both defendant officers testified for the prosecution and each made false statements, made flagrant misrepresentations, or failed to disclose key items of evidence. . .We further clarified the point in *Robertson,* 753 F.3d at 617, holding that even false testimony is not actionable as malicious prosecution unless deliberate-i.e., given with knowledge of, or reckless disregard for, its falsity. . . Even more recently, the rule was succinctly stated in *Newman v. Township of Hamburg,* 773 F.3d 769 (6th Cir.2014). A police officer violates a suspect's clearly established right to freedom from malicious prosecution under the Fourth Amendment 'only when his deliberate or reckless falsehoods result in arrest and prosecution without probable cause.'. . Again, we see that a defendant's participation must be marked by some

kind of blameworthiness, something beyond mere negligence or innocent mistake, to satisfy the elements of a malicious prosecution claim under the Fourth Amendment. . . . [A]lthough the district court noted that plaintiff's allegations lacked details, it accepted them as sufficient to meet the notice pleading requirements of Rule 8(a) and warrant further discovery proceedings. Fed.R.Civ.P. 8(a). Despite the insufficiency of plaintiff's allegations, the court withheld dismissal based on the possibility that discovery might disclose specific facts substantiating the claim. This ignores the fact that plaintiff, having sued defendant officers for violation of his civil rights, to overcome their assertion of qualified immunity, was obliged to allege facts describing how each defendant's conduct violated a federally protected right under clearly established law. . . Because, as explained above, plaintiff's complaint does not set forth facts meeting this requirement, the claim is subject to dismissal. To be clear, we are not enforcing a 'heightened pleading requirement' that would run afoul of *Crawford–El v. Britton,* 523 U.S. 574 (1998); *see Goad v. Mitchell,* 297 F.3d 497, 501–04 (6th Cir.2002). Rather, consistent with *Crawford–El's* admonition that 'firm application of the Federal Rules of Civil Procedure is fully warranted' where qualified immunity is asserted, we enforce the non-controversial requirement that plaintiff 'put forward specific, nonconclusory factual allegations' establishing a cognizable injury in order to withstand a prediscovery motion to dismiss. . . The district court's ruling that plaintiff is entitled to discovery notwithstanding his conclusory allegations flies in the face of qualified immunity's purpose of resolving insubstantial claims as early as possible so as to avoid unnecessarily subjecting government officials to the disruptive burdens of litigation. . . The court's ruling, allowing plaintiff to conduct discovery that *may* uncover substantiating facts, also undercuts counsel's Rule 11 obligation to conduct a reasonable investigation and uncover evidentiary support for fact allegations *before* filing the complaint. Fed.R.Civ.P. 11(b)(3). Had counsel undertaken such an investigation and uncovered facts facially substantiating the malicious prosecution claims—facts inadvertently omitted from the original complaint—counsel would naturally have moved the district court for leave to amend the complaint so as to augment the allegations. That counsel made no such motion is telling. And no less telling is it that plaintiff's appellate briefing is also devoid even of argument attempting to put flesh on his 'bare bones' allegations. He maintains simply that his allegations, conclusory though they be, are sufficient. We are not persuaded.")

Shively v. Green Local Sch. Dist. Bd. of Educ., 579 F. App'x 348, 354 (6th Cir. 2014) ("Given the number and variety of ways the Shivelys allege they contacted school officials, the Shivelys notification of police, medical care professionals, and the guidance counselor, and the Superintendent's knowledge of the ongoing harassment, the complaint plausibly alleges that Brown, Miller, and Wells, as the Principals and Assistant Principal of schools attended by T.S., knew about the ongoing student-on-student bullying and, given their positions of authority, were involved in making decisions regarding how it would be addressed. This conclusion is also supported by the procedural posture of this case, where litigation has continued during the pendency of this appeal and Brown, Miller, and Wells are proper Defendants before this court on the Shivelys' state-law claims. We conclude that the district court did not err in finding that the Shivelys' complaint meets the standard necessary to comply with Rule 8. *See Iqbal,* 556 U.S at 683–84.")

LaFountain v. Harry, 716 F.3d 944, 951(6th Cir. 2013) ("Under Federal Rule of Civil Procedure 15(a), '[a] party may amend its pleading once as a matter of course within 21 days after serving it' and, '[i]n all other cases, ... [t]he court should freely give leave [to amend] when justice so requires.' In *McGore,* however, we held that, when the Prison Litigation Reform Act requires dismissal of a prisoner's claim, a district court cannot grant leave to amend. . . .Every other circuit to have reached the issue disagrees.[collecting cases] Meanwhile, in *Jones v. Bock,* 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007), the Supreme Court held that 'the PLRA's screening requirement does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself.'. . The Court reasoned that, 'when Congress meant to depart from the usual procedural requirements, it did so expressly.'. . *Jones* controls here. The PLRA's screening requirements—28 U.S.C. §§ 1915A(b)(1) & 1915(e)(2)(B); 42 U.S.C. § 1997e(c)(1)—say nothing about whether a district court can allow a prisoner to amend his complaint. Thus, *McGore* is flatly inconsistent with *Jones.* We therefore overrule *McGore;* and we hold, like every other circuit to have reached the issue, that under Rule 15(a) a district court can allow a plaintiff to amend his complaint even when the complaint is subject to dismissal under the PLRA.")

Marcilis v. Township of Redford, 693 F.3d 589, 596, 597 (6th Cir. 2012) ("Though we have not yet addressed this issue in a published opinion, we have found, in an unpublished opinion, that a complaint failed where a plaintiff 'did not allege that particular defendants performed the acts that resulted in a deprivation of [plaintiff's] constitutional rights. This is a requirement in *Bivens* actions such as this one.'. . .The complaint mentions Doyle and Livingston only in paragraph six, for the purposes of identifying them as employees of the Drug Enforcement Administration. Otherwise, the complaint makes only categorical references to 'Defendants.' We conclude that the district court did not err in dismissing the claims against Doyle and Livingston for failing to 'allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right.'")

Davis v. Prison Health Services, 679 F.3d 433, 439, 440 (6th Cir. 2012) ("[E]ven if Davis had failed to include allegations about similarly-situated prisoners, his complaint still should not have been dismissed at the pleadings stage. [citing *Swierkiewicz*] Davis's complaint. . .contains allegations that, if accepted as true, would constitute direct evidence that his removal from the public-works program was improperly motivated by anti-gay animus. By dismissing his claim because he had purportedly failed to identify any similarly situated prisoners, the district court mistakenly required Davis 'to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.' . . In sum, Davis has alleged sufficient facts that, accepted as true, state a plausible claim for relief. Accordingly, Davis 'deserves a shot at additional factual development, which is what discovery is designed to give him.' *Fabian v. Fulmer Helmets, Inc.,* 628 F.3d 278, 281 (6th Cir.2010). Dismissal under 28 U.S.C. §§ 1915(e)(2), 1915A and 42 U.S.C. § 1997e(c) for failure to state a claim was improper.")

Center for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 378, 379 (6th Cir. 2011) ("Plaintiffs have failed to state a claim against Defendants, in either their official or individual capacities, under the First Amendment. To the extent Plaintiffs seek to challenge the constitutionality of the alleged RWE Policy, Plaintiffs have failed to plausibly allege the existence of such a policy. And to the extent Plaintiffs seek to challenge the alleged retaliation by Defendants on account of Plaintiffs' protected activities, Plaintiffs' allegations are likewise deficient. Plaintiffs have failed to plausibly allege that any actions by Defendants injured Plaintiffs in a way that would deter a person of ordinary firmness from further participation in constitutionally protected activity. Nor have Plaintiffs plausibly alleged that any adverse action by Defendants was motivated at least in part by Plaintiffs' constitutionally protected activity.")

New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046, 1050, 1051, 1053 (6th Cir. 2011) ("This new 'plausibility' pleading standard causes a considerable problem for plaintiff here because defendants Scag and Louisville Tractor are apparently the only entities with the information about the price at which Scag sells its equipment to Louisville Tractor. This pricing information is necessary in order for New Albany to allege that it pays a discriminatory price for the same Scag equipment, as required by the language of the Act. This type of exclusive distribution structure makes it particularly difficult to determine whether discriminatory pricing exists. Before *Twombly* and *Iqbal*, courts would probably have allowed this case to proceed so that plaintiff could conduct discovery in order to gather the pricing information that is solely retained within the accounting system of Scag and Louisville Tractor. It may be that only Scag and Louisville Tractor have knowledge of whether Scag exercises control over the terms and conditions of Louisville Tractor's sales to retailers, including the retail operations of Louisville Tractor. The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed to establish a claim of discriminatory pricing is solely within the purview of the defendant or a third party, as it is here. . . .By foreclosing discovery to obtain pricing information, the combined effect of *Twombly* and *Iqbal* require plaintiff to have greater knowledge now of factual details in order to draft a 'plausible complaint.'. . Without discovery, pricing information or any fact that would support an allegation of illegal economic collusion becomes far harder to obtain. Under the new *Twombly* standard set forth by the Supreme Court in an antitrust case, even though a complaint need not contain detailed factual allegations, its '[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.'. . In this case that means, as the district court held, that plaintiff must allege specific facts of price discrimination even if those facts are only within the head or hands of the defendants. The plaintiff may not use the discovery process to obtain these facts after filing suit. The language of *Iqbal*, 'not entitled to discovery,' is binding on the lower federal courts. . . . Without discovery, the plaintiff may have no way to find out the facts in the hands of competitors, but *Iqbal* specifically orders courts, as quoted above, to refuse to order further discovery. If the plaintiff should be able to find out the facts it needs to state a

claim, it will have to file another complaint. For the foregoing reasons, we affirm the judgment of the district court.")

Frank v. Dana Corp., 646 F.3d 954, 961 (6th Cir. 2011) ("In the past, we have conducted our scienter analysis in section 10(b) cases by sorting through each allegation individually before concluding with a collective approach. . . However, we decline to follow that approach in light of the Supreme Court's recent decision in *Matrixx Initiatives, Inc. v. Siracusano,* __ U.S. __, 131 S.Ct. 1309, __ L.Ed.2d __ (2011). There, the Court provided for us a post-*Tellabs* example of how to consider scienter pleadings 'holistically' in section 10(b) cases. . . Writing for the Court, Justice Sotomayor expertly addressed the allegations collectively, did so quickly, and, importantly, did not parse out the allegations for individual analysis. . . This is the only appropriate approach following *Tellabs's* mandate to review scienter pleadings based on the collective view of the facts, not the facts individually. . . Our former method of reviewing each allegation individually before reviewing them holistically risks losing the forest for the trees. Furthermore, after *Tellabs,* conducting an individual review of myriad allegations is an unnecessary inefficiency. Consequently, we will address the Plaintiffs' claims holistically.")

Rondigo, L.L.C. v. Township of Richmond, 641 F.3d 673, 683, 684 (6th Cir. 2011) ("Although plaintiffs' amended complaint contains 250 paragraphs and occupies 54 pages, it contains precious little factual support for the theory that the state defendants' more favorable treatment of Minard demonstrates they were victims of unlawful discrimination. Although plaintiffs conclusorily allege that Minard is similarly situated, exhibits attached to their complaint substantiate undisputed and facially legitimate reasons for the state defendants' complained-of actions in regulating plaintiffs' compost operation at 32 Mile Road–reasons that appear to be unique to that property. Although plaintiffs make various allegations that the state defendants, acting in concert with Richmond Township and its residents, have been unfairly demanding in their enforcement of agricultural and environmental standards, no inference of unlawful discrimination can legitimately arise where the only asserted comparable, Minard, is shown by plaintiffs' own pleadings to be *dissimilarly* situated in several relevant respects. In short, plaintiffs' allegations that Minard is similarly situated and that his more favorable treatment by defendants evidences unlawful discrimination are exposed as little more than 'legal conclusions couched as factual allegations' and need not be accepted as true under Rule 12(b)(6) scrutiny. . . Plaintiffs' *factual* allegations fail to 'raise the right to relief above the speculative level.'. . They fail to warrant a 'reasonable inference that [defendants are] liable for the misconduct alleged.'. . When the allegations are viewed in light of the exhibits attached to the complaint, they fall far short of making out a 'plausible claim of entitlement to relief' under either equal protection theory. . . As such, plaintiffs' 'insubstantial' equal protection claim was ripe for dismissal under the doctrine of qualified immunity at the earliest possible stage in the litigation. . . The district court's contrary ruling is based in part on a failure to apply the Supreme Court's teaching in *Twombly* and *Iqbal.* The district court expressly recognized the applicability of *Twombly,* recognized that legal conclusions need not be accepted as true, and recognized that the complaint must set forth 'some factual basis' for the claims asserted. Yet, the court accepted plaintiffs' alleged legal conclusions that Minard was similarly situated and that they were treated

differently because of gender-based discrimination without requiring supporting factual allegations. . . . Nothing but legal conclusions suggests that the state defendants acted with unlawful discriminatory animus. . . . Based on the foregoing analysis, we conclude the district court erred by denying the state defendants' motion to dismiss based on qualified immunity. The factual allegations in the complaint, viewed in conjunction with the exhibits attached to the complaint, are insufficient to make out a valid equal protection claim under the 'plausibility standard' prescribed by the Supreme Court in *Twombly* and *Iqbal.*")

Hill v. Lappin, 630 F.3d 468 (6th Cir. 2010) (holding that the *Twombly/ Iqbal* plausibility standard applies to dismissals of prisoner cases for failure to state claim under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(ii)).)

Nali v. Ekman, 355 F. App'x 909, 2009 WL 4641737, at *3 (6th Cir. Dec. 9, 2009) ("In order to plead a cognizable § 1985 claim, Nali must allege specific facts that, taken together, plausibly suggest that (1) two or more individuals 'conspire[d] ... for the purpose of depriving [him] of the equal protection of the laws,' (2) they acted to further that conspiracy and (3) he was injured as a result. . . As the magistrate and district court recognized, Nali failed to plead sufficient facts to state a cognizable Equal Protection Clause claim. In connection with this requirement, he alleged that '[d]efendants' motives were racially based [and] supported by animosity towards plaintiff.' But, as the Supreme Court recently held, a complaint that includes conclusory allegations of discriminatory intent without additional supporting details does not sufficiently show that the pleader is entitled to relief. *See Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1950-51 (2009). Nali's claim can survive only if he pleaded facts supporting that conclusion. He has not done so. The fact that 'defendants are caucasian' and that Nali 'is non-caucasian' does not by itself show that defendants were motivated to discriminate against him on the basis of his race or ethnicity. Although Nali adds that 'no one else was ticketed' for similar conduct (being in the chow hall at the wrong time), that fact does not show discrimination unless accompanied by some evidence that the people *not* disciplined were similarly situated and of a different race, *see Coker v. Summit County Sheriff's Dept.*, 90 F. App'x 782, 790 (6th Cir.2003) (unpublished disposition)–facts he does not allege in his complaint. The district court properly dismissed this claim.").

In re Travel Agent Com'n Antitrust Litigation, 583 F.3d 896, 912-15 (6th Cir. 2009)(Merritt, J., dissenting) ("The Supreme Court majority has made clear that it is not making a major change in the law of pleading with *Twombly* and its progeny. . . As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple 'plausibility,' but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial

evidence. . . . The antitrust cases decided in both courts of appeals and district courts since *Twombly* and *Iqbal* are few, and most of the cases decided by district courts have yet to reach the courts of appeals. . . The uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims. . . . There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Using the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence.").

Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 609 n.4 (6th Cir. 2009) ("The Supreme Court has recently clarified that its decision in *Twombly*'expounded the pleading standard for Aall civil actions,"' despite the fact that *Twombly* itself arose in the context of an antitrust suit. . . The Court's decision in *Iqbal* made clear that the *Twombly* standard is not limited to 'sprawling, costly, and hugely time-consuming' litigation, *Twombly*, 550 U.S. at 560 n. 6,dispelling such speculation by courts both within and outside this circuit.").

Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009) ("Courts in and out of the
Sixth Circuit have identified uncertainty regarding the scope of *Twombly* and have indicated that its holding is likely limited to expensive, complicated litigation like that considered in *Twombly.*")

Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008) ("This Court has cited the heightened pleading of *Twombly* in a wide variety of cases, not simply limiting its applicability to antitrust actions. *See, e.g., Tucker v. Middleburg-Legacy Place,* 539 F.3d 545 (6th Cir.2008) (Family & Medical Leave Act); *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426 (6th Cir.2008) (antitrust); *McKnight v. Gates,* 282 F. App'x 394 (6th Cir.2008) (age discrimination); *Gilles v. Garland,* 281 F. App'x 501 (6th Cir.2008) (violation of First and Fourteenth Amendment rights); *B. & V. Distrib. Co., Inc. v. Dottore Cos., L.L. C.,* 278 F. App'x 480 (6th Cir.2008) (breach of contract); *Ferron v. Zoomego, Inc.,* 276 F. App'x 473 (6th Cir.2008) (violation of Ohio Consumer Sales Act); *Bishop v. Lucent Tech., Inc.,* 520 F.3d 516 (6th Cir.2008) (breach of fiduciary duty in ERISA context); *Eidson v. Tenn. Dep't of Children's Servs.,* 510 F.3d 631 (6th Cir.2007) (42 U.S.C. § 1983); *NicSand, Inc. v. 3M Co.,* 507 F.3d 442 (6th Cir.2007) (antitrust); *League of United Latin Am. Citizens v. Bredesen,* 500 F.3d 523 (6th Cir.2007) (equal protection). However, some cases have questioned the scope of *Twombly. See, e.g., United States v. Ford Motor Co.,* 532 F.3d 496, 503 n. 6 (6th Cir.2008);1827;1827; *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291 (6th Cir.2008); *Midwest Media Prop., L.L.C. v. Symmes Twp.,* 512 F.3d 338, 341 (6th Cir.2007) (Martin, Moore, Cole, Clay, JJ., dissenting from denial of request for *en banc* hearing). For an exhaustive collection and analysis of over 3,000 district court decisions applying *Twombly,* see Note, *Much Ado About* Twombly, 83 NOTRE DAME L.REV. 1811 (2008).")

National Business Development Services, Inc. v. American Credit Educ. and Consulting, Inc.., 299 F. App'x 509, 2008 WL 4772074, at *2, *3 (6th Cir. Oct. 31, 2008) ("Plaintiff asked this court to determine whether *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007), rather than *Bell Atlantic,* should be used to determine the specificity with which a complaint must be filed. Plaintiff specifically asserted that *Erickson*, which was issued by the Supreme Court after *Bell Atlantic*, set forth a more liberal standard. The district court correctly applied *Bell Atlantic*, as the facts of the instant case are more akin to those at issue in *Bell Atlantic*. *Erickson* concerned a *pro se* litigant, 'and Aa *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."' . . *Bell Atlantic,* however, concerned an anti-trust matter, where the case emphasized the heightened possibility for abuse among lawsuits of this specie. . . . Copyright infringement, like anti-trust actions,lends itself readily to abusive litigation, since the high cost of trying such a case can force a defendant who might otherwise be successful in trial to settle in order to avoid the time and expenditure of a resource intensive case. Therefore, greater particularity in pleading , through showing 'plausible grounds,' is required.").

Back v. Hall, 537 F.3d 552, 558 (6th Cir. 2008) ("Hall and Schrader separately argue that Back has failed to establish a *prima facie* case of political-affiliation dismissal. Were this appeal before us in the context of the denial of a summary judgment motion, we might entertain their argument. But it is not. Because we are at the pleading stage of this case, and because there is no 'heightened pleading requirement ... for civil rights plaintiffs in cases in which the defendant raises the affirmative defense of qualified immunity,' . . . Back was not required to plead her *prima facie* case . . . . But for now, at the pleading stage, it suffices that Back alleged that she 'was terminated by defendants Hall and Schrader by reason of her political affiliation as a Democrat.'").

Lambert v. Hartman, 517 F.3d 433, at 439, 440, 442, 445, 446 (6th Cir. 2008) ("Although the factual allegations in a complaint need not be detailed, they 'must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief.' *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir.2007) (emphasis in original) (*citing Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1964-65 (2007)). . . . [T]his court has recognized an informational-privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm (*Kallstrom*), and (2) where the information released was of a sexual, personal, and humiliating nature (*Bloch*). . . . Lambert's first argument is a request for us to adopt a new approach to assessing informational privacy claims– one that does not require the court to first determine whether the privacy interest implicates a fundamental right. The reasonable-expectation-of-privacy standard that Lambert proposes is in many ways similar to the more fluid approach that other circuits have adopted for assessing claims of informational privacy. . . . Employing this standard, Lambert argues that she has a reasonable expectation of privacy in her Social Security number, and that the district court therefore erred in failing to balance that interest against the Defendants' interest in publishing unredacted public records on the internet. Lambert is of course correct in pointing out that both Congress and the courts have recognized the privacy interest in one's Social Security number. . . . The Sixth Circuit, however, has developed and applied a different approach to assessing informational privacy

claims. As discussed above, that approach requires that the asserted privacy interest implicate a fundamental right. . . . We are bound by those decisions unless this court sitting *en banc* or the Supreme Court holds otherwise, and Lambert's argument must fail for that reason. . . . Lambert has undoubtedly shown that, as a policy matter, the Clerk's decision to provide unfettered internet access to people's Social Security numbers was unwise. This much is evidenced by the fact that the Defendants have subsequently removed the citations in question from the website and changed the local rules to better protect sensitive personal information. But to constitutionalize a harm of the type Lambert has suffered would be to open a Pandora's box of claims under 42 U.S.C. § 1983 , a step that we are unwilling to take. . . . Indeed, absent a showing of an infringement of a right that is 'fundamental or implicit in the concept of ordered liberty,' this court's precedents bar an action under 42 U.S.C. § 1983 from proceeding any further.").

Midwest Media Property, L.L.C. v. Symmes Tp., Ohio, 503 F.3d 456, *472 & n.3 (6th Cir. 2007) ("Admittedly, the notice pleading requirement was amended slightly by the Supreme Court's recent decision in *Bell Atlantic Co. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which held that 'a plaintiff's obligation to provide the Agrounds" of his Aentitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do....' . . . *Twombly* does not apply here, however, because Plaintiff has coupled its allegations with facts which suggest that Defendant has deprived it of its alleged right to post signs. . . . *Twombly* involved a claim under ' 1 of the Sherman Antitrust Act, which requires the plaintiff to prove that the defendants engaged in a 'contract, combination ... or conspiracy, in restraint of trade or commerce.'. . Rather than alleging that such collusion existed, however, the *Twombly* plaintiff merely alleged that the defendants were operating their businesses in a manner which is consistent with collusion, and then invited the courts to conclude that a conspiracy must follow from this circumstantial evidence. . . . The Supreme Court held that, under ' 1 of the Sherman Act, a 'bare assertion of conspiracy' is not sufficient to state a claim. . . Instead, the *Twombly* plaintiff was also required to plead facts which 'raise[ ] a suggestion' of actual collusion. . . In other words, *Twombly* was a case where the plaintiff invoked a statute banning collusion, but failed to actually state any facts suggesting collusion. This stands in stark contrast to the instant case. Here, Plaintiff alleges a violation of the First Amendment's Free Speech Clause, and supports its allegation with specific examples of instances where the challenged regulations denied it the ability to speak freely. Plaintiff expressly states that it has been unable to post signs '[a]s a result of the Township's enforcement of its Sign Regulations.'. . It cites nine specific examples where it was denied its alleged rights as a direct result of the Township's denial of Plaintiff's applications to post signs.").

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007) ("The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Court stated that 'a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'. . Additionally, the Court emphasized that even

though a complaint need not contain 'detailed' factual allegations, its '[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.'. . In so holding, the Court disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, . . . characterizing that rule as one 'best forgotten as an incomplete, negative gloss on an accepted pleading standard.'").

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 555 (6th Cir. 2007) (Moore, J., concurring in part and dissenting in part) ("The majority cites *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), but if there was any doubt whether *Twombly* altered the pleading requirements, the Supreme Court put that doubt to rest in *Erickson v. Pardus*, __ U.S. __, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). . . .").

Weisbarth v. Geauga Park Dist., 499 F.3d 538, 542 (6th Cir. 2007) ("*Iqbal* thus held that *Twombly's* plausibility standard did not significantly alter notice pleading or impose heightened pleading requirements for all federal claims. Instead, *Iqbal* interpreted *Twombly* to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief. . . *see also Collins v. Marva Collins Preparatory Sch.*, No. 1:05cv614, 2007 WL 1989828, at *3 n.1 (S.D.Ohio July 9, 2007) (noting that eight federal district courts in the Sixth Circuit have thus far applied *Twombly* in the manner described in *Iqbal*, while only one has restricted *Twombly* to the antitrust-conspiracy context).Ultimately, as explained below, our disposition of Weisbarth's claim does not depend upon the nuances of *Twombly's* effect on the dismissal standard. We therefore need not resolve the scope of that decision here.")**.**

Lindsay v. Yates, 498 F.3d 434, 440 n.6 (6th Cir. 2007) ("*Swierkiewicz* was discussed extensively by the dissent in the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). *Twombly* addressed requirements for pleading an antitrust claim under ' 1 of the Sherman Act. The dissent argued that the *Twombly* majority had devised a 'new pleading rule' that called into question the continued vitality of *Swierkiewicz*. 127 S.Ct. at 1974 (Stevens, J., dissenting). Because the Supreme Court majority distinguished *Swierkiewicz* and nowhere expressed an intent to overturn it, we have no basis for concluding that *Swierkiewicz* is no longer good law. Moreover, although this case does not present the question of if, or exactly how, *Twombly* has changed the pleading requirements of Federal Rule of Civil Procedure 8(a), we note that in *Erickson v. Pardus*, __ U.S. __, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), decided after *Twombly*, the Supreme Court reaffirmed that Rule 8(a) 'requires only a short and plain statement of the claim showing that the pleader is entitled to relief.'").

Gudenas v. Cervenik, No. 1:09CV21692010, 2010 WL 987699, at *3 n.2 (N.D. Ohio Feb. 22, 2010) ("Presumably, certain of the Forms provided in accordance with Civil Rule 84 will be eliminated or modified. See, e.g., *Fed.R.Civ.P. 84,* Appendix, Form 11 ("On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff") and Form 15 ("On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff"). Although these Forms 'illustrate the simplicity and brevity,' *Fed.R.Civ.P. 84*, that the Rules

formerly contemplated, the allegations as set forth in Forms 11 and 15 would surely fail as 'legal conclusions [of negligence and conversion] couched as factual allegation [s],' under Twombly and Iqbal.")**.**

Spencer v. Oldham, No. 12–2519–JDT–tmp, 2013 WL 3816620, *4, *5 (W.D. Tenn. July 22, 2013) ("The Sixth Circuit recently held that a district court may allow a prisoner to amend his complaint to avoid a *sua sponte* dismissal under the PLRA. [*LaFountain v. Harry*] . . . Leave to amend is not required where a deficiency cannot be cured. . . The deficiencies in Plaintiff's complaint cannot be cured by amendment because the claims asserted are entirely lacking in merit.")

Bell v. City of Cleveland, 548 F.Supp.2d 444, 448-50 (N.D. Ohio 2008) ("In an excessive force action, involving the question of qualified immunity , the officer's intent or motive is not determinative. . .Rather, the issue regarding Officer Delvecchio will be the objective legal reasonableness of his action in view of the circumstances he confronted, assessed in light of clearly established legal rules. . . Thus, *Crawford-El* and *Goad* are inapposite, and do not support the application of Rule 7(a) to require a reply in this case. . . Delvecchio's motion seeks to move the complaint beyond the 'short and plain statement' requirements of Civil Rule 8(a). . . He requests that the court order a reply which sets forth 'specific facts (not conclusory allegations) that demonstrate a genuine issue of fact regarding Officer Delvecchio's right to qualified immunity at this time.'. . Essentially, Delvecchio seeks to impose a summary judgment standard under Rule 56 onto the initial pleadings of this case. Moreover, Delvecchio implies that the complaint is insufficient in that it does not reflect the version of facts as set forth in his answer. . . The court reads the complaint as alleging specific facts, not merely conclusory allegations. . . While those alleged facts are (not surprisingly) contested at this early stage of the litigation, it is not accurate to say that the complaint contains merely 'conclusory allegations.'. . [T]he allegations of the complaint in this case are specific in setting forth a factual scenario (albeit contested) of the shooting. . . The Supreme Court has consistently rejected heightened pleading standards not required by the Federal Rules themselves. Last year, the Court rejected the Sixth Circuit's requirement that prisoners plead and demonstrate exhaustion in complaints under the Prison Litigation Reform Act. . . . Although the court must look to the complaint when evaluating an assertion of qualified immunity in an excessive force action, 'there is no heightened pleading requirement for such claims.' . . . In summary, *Crawford-El* and *Goad* do not support the application of Rule 7(a) to require a reply in this case.").

Rice v. Wells Fargo Home Mortg., 2007 WL 4126525, at *4 (E.D.Mich. Nov. 19, 2007)("The Sixth Circuit has not expressly ruled on the scope of *Twombly*, but several cases have mentioned it. On August 15, 2007, the Sixth Circuit noted that in *Erickson v. Pardus*, __ U.S. __, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), decided after *Twombly*, the Supreme Court reaffirmed that Rule 8(a) 'requires only a short and plain statement of the claim showing that the pleader is entitled to relief.' *Lindsay v. Yates*. . . .. *Lindsay*, however, did not require that the court decide the question of if or how *Twombly* changed the pleading requirements of Fed. R. Civ. Pro. 8(a). On August 24,

2007, the Sixth Circuit noted the uncertainty of *Twombly*' s effect. *Weisbarth v. Geauga Park District*, 499 F.3d 538, 2007 WL 2403659 at *3 (6th Cir. August 24, 2007). On August 28, 2007, the Sixth Circuit applied, without comment, the standard from *Twombly*. *League of United American Citizens v. Bredesen*, 500 F.3d 523, 2007 WL 2416474 at *2 (6th Cir. August 28, 2007). On September 25, 2007, the Sixth Circuit applied *Twombly*, which it found 'requires that the factual allegations of a complaint Abe enough to raise a right to relief above the speculative level."'*Association of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 2007 WL 2768285 at *3, (6th Cir. September 25, 2007) while the dissent argued that *Twombly* did not alter the federal pleading requirements.").

Carrasquillo v. City of Cleveland, No. 1:10-CV-219, 2010 WL 3893616, at *2 (N.D. Ohio Sept. 27, 2010) ("Although the plaintiff's complaint sets forth sparse factual allegations, the *Iqbal* standard does not require more to survive a motion to dismiss. The facts Carrasquillo alleges sufficiently support his wrongful arrest and imprisonment claims at this stage of litigation. Carrasquillo correctly points out that much of the information demanded by the defendants' motion rests in their own hands. Without further discovery, this Court will not require the plaintiff to allege with detail the methodology the defendants used to conduct their investigation, the manner by which that investigation unfolded, or the precise role each defendant played in the investigation and arrest. Similarly, this Court will not require detailed factual allegations regarding the existence and validity of an arrest warrant still undisclosed to the plaintiff. Though Rule 8 'does not unlock the doors of discovery', neither does it require plaintiffs to allege facts that only discovery could reveal. In addition, if this Court accepts Carrasquillo's allegations as true, which it must in evaluating a motion to dismiss for failure to state a claim, it is plausible that the plaintiff has suffered false arrest and imprisonment. The plaintiff states that he was arrested, briefly jailed, and released without charge. All parties identify the plaintiff's 17-year-old son as the correct target of the arrest. According to the plaintiff, he was 44 years old at the time of his arrest. The plaintiff also says that he repeatedly asserted his innocence during the arrest. . . and that he repeatedly identified himself. . . . Taken as true, these facts could plausibly suggest either that probable cause did not support the arrest, or that the defendants incorrectly executed a warrant against someone they could not reasonably mistake for 17-year-old Nelson Carrasquillo, Jr.").

SEVENTH CIRCUIT

Felton v. City of Chicago, 827 F.3d 632, 635-37 (7th Cir. 2016) ("Felton's allegations—that when he fled officers along an expressway, they chased him, rammed his car, and used stun guns on him—were not frivolous. . . If the judge dismissed the suit as *factually* frivolous, he abused his discretion. A claim is *legally* frivolous if it is 'based on an indisputably meritless legal theory.'. . Felton's theory is familiar: he says officers used excessive force in arresting him, which violates the Fourth Amendment (applicable to the states through the Fourteenth). As an initial matter, Felton's suit would lack 'even an arguable basis in law' if his injuries were self-inflicted and the officers caused him no harm. That may be what the district judge concluded after reading the newspapers. But when screening for frivolousness, 'the complaint is the entire record of the case.'.

. The 'frivolousness determination, frequently made *sua sponte* before the defendant has even been asked to file an answer, cannot serve as a factfinding process for the resolution of disputed facts.'. . Felton says the judge relied on the newspapers to dismiss his suit. And though the City did not file a brief, it sent a letter to the court, agreeing with Felton that the district court dismissed the suit 'based on the court's independent research into newspaper accounts of the underlying incident.' If the judge did so, that is unjustifiable, no matter how deferential our review. In our analysis, we credit Felton's allegation that the officers caused his injuries. Felton argues that the legal viability of his suit depends on facts that could not have been determined at the screening stage. For example, he asks 'whether the police were justified in chasing [him] in the first place.' But that's irrelevant because 'pre-seizure conduct is not subject to Fourth Amendment scrutiny.' *Carter v. Buscher*, 973 F.2d 1328, 1332–33 (7th Cir. 1992); *see also California v. Hodari D.*, 499 U.S. 621, 626–27 (1991). . . Felton also questions whether the officers had 'some other purpose,' aside from stopping his flight. But the Fourth Amendment analysis is objective, so the officers' intentions do not matter. . . Objectively, at least one part of Felton's complaint was legally viable: his allegation that he was shot by multiple stun guns. Nothing in the complaint says that this happened *during* the car chase. A reasonable inference is that it happened afterward. And nothing in the complaint says whether Felton was subdued, passively resisting, or actively resisting at the time. Discovery may reveal that he was actively resisting, but at the screening stage the judge was required to draw the reasonable inference that Felton was subdued or only passively resisting. In that case, shooting him with stun guns could violate clearly established law. . . Dismissing these allegations as frivolous was an abuse of discretion. As to the legal effect of Felton's allegations that officers rammed his car, the parties were correct to focus on the objective dangerousness of the car chase. Officers are allowed to end a highly dangerous car chase by ramming the fleeing car. . . But, as Felton stresses, the complaint does not say that the chase was dangerous. Felton's chase might have been like O.J. Simpson's: low-speed, on a deserted expressway, with officers following at a safe distance. If Felton posed no danger but officers rammed his car, a Fourth Amendment claim would not be frivolous. . . It might be fair to say that a car chase along an expressway is usually dangerous, so the inference that the chase was O.J.like is not *reasonable*. And if the chase in this case was *not* dangerous, Felton should have said that in his complaint. But even if that was the case, when a plaintiff—especially a *pro se* plaintiff—fails to state a claim in his first complaint, he should ordinarily be given a chance to amend. . . And because Felton's stun gun allegations stated a claim, the case must be returned to the district court. Because Felton did not name the specific officers involved in his arrest, he must amend his complaint, so he will have the opportunity to add detail to his car chase allegations. On remand, the parties should know that in *Scott v. Harris*, the Supreme Court refused to accept the non-movant's version of the facts at summary judgment because that version was clearly contradicted by a video of the chase. . . If video exists that clearly contradicts Felton's story, an early and cost-efficient motion for summary judgment might be appropriate. Of course, as the *Scott* dissent noted, . . . video may not tell the whole story and reasonable people can sometimes draw different conclusions from the same video. If the defendants move for summary judgment, the parties should know that Federal Rule of Civil Procedure 56(d) allows non-movants to argue that further discovery is necessary to resolve the motion.")

Herron v. Meyer, 820 F.3d 860, 863-64 (7th Cir. 2016) ("If Meyer set out to punish Herron for his grievances, then a price has been attached to speech. The district court thought otherwise in part because Herron had not attached his grievances to the complaint, but that was not necessary; a complaint narrates a claim and need not supply the proof. That comes later. . . And if, as we doubt, an amendment to the complaint was required, the district court should have allowed it rather than dismissing the claim. . . Whether a penalty has been attached to *protected* speech is potentially more difficult. Many decisions assume that essentially everything a prisoner says in the grievance system—if not everything a prisoner says to a guard—is protected by the First Amendment. See, e.g., *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir.2000); *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir.2006). These decisions do not discuss a parallel line of cases about grievances that public workers make about the conditions of their employment. That line of cases attempts to distinguish statements on topics of public importance (protected) from personal gripes (unprotected) and statements that disrupt the workplace (also unprotected). . . The decisions in the prison-grievance line do not explain why the First Amendment offers greater protection to prisoners than to public employees. We do not get into that here, because the subject has not been addressed in the briefs. It is enough to flag the subject as worth attention, either in some future litigation or in this case if, contrary to our expectations, the First Amendment theory turns out to matter. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.")

Childress v. Walker, 787 F.3d 433, 440-41 (7th Cir. 2015) ("[A]llegations that a prison administrator knew that the conditions of a prisoner's mandatory release included a ban on computer-related material, but nevertheless instituted, condoned, or willfully turned a blind eye to a practice that placed computer-related material among prisoners' possessions, state a claim for relief under the Eighth Amendment. These are the precise allegations that Mr. Childress sets forth in his complaint. He alleges that there is a regular practice of placing computer disks with inmates' property. . . Moreover, he alleges that prison administrators knew of this practice and knew that this practice put at least some recently released prisoners in jeopardy of losing their freedom, but nevertheless did not alter, change, or otherwise intervene to prevent the harm. Specifically, on his return to BMRCC in November 2010, Assistant Warden Bates admitted to Mr. Childress that two other inmates had been re-incarcerated on the basis of 'the same policies, practice, and procedures regarding floppy disk[s] associated with institutional programs being placed in the outgoing property of inmates by IDOC Employees.'. . . To survive dismissal, a plaintiff's complaint 'need only "give the defendant fair notice of what the ... claim is and the grounds upon which it rests."'. . Here, Mr. Childress alerts Assistant Warden Bates to his claim and to the basis of that claim: Assistant Warden Bates, as 'Assistant Warden of Programs,'. . was familiar with the practices of the Lifestyle Redirection Program; he knew that the practices of the Lifestyle Redirection Program, or of similar programs, were causing recently released inmates to lose their freedom, but did nothing to prevent this harm; indeed he 'continued to adhere to[ ] and follow these same policies, practices, and procedures all to the detriment and deprivation of the plaintiff[']s Constitutional

Rights.'. .These allegations satisfy the notice pleading requirement of Federal Rule of Civil Procedure 8(a)(2).")

Adams v. City of Indianapolis, 742 F.3d 720, 733 (7th Cir. 2014) ("For all its heft, the amended complaint alludes to disparate impact in wholly conclusory terms. In several places the complaint uses the words 'disproportionate' and 'impermissible impact' and other synonyms, but those are bare legal conclusions, not facts. We reiterate that '[t]hreadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice' to state a plausible claim for relief. . . Moreover, '[t]his is a complex discrimination claim, and we have observed that under *Iqbal* and *Twombly*, "[t]he required level of factual specificity rises with the complexity of the claim."'. . In a complex disparate-impact case like this one, we would expect to see some factual content in the complaint tending to show that the City's testing process, or some particular part of it, caused a relevant and statistically significant disparity between black and white applicants for promotion. The amended complaint contains no factual allegations of this sort. We are told that the promotion-testing process during this period had several component parts, but the plaintiffs do not identify which part they are attacking. Perhaps they could try to demonstrate that the different elements of the testing process are not capable of separation for analysis, *see* 42 U.S.C. § 2000e–2(k)(1)(B)(i); this flaw alone might not be fatal. The far more serious problem is the complete lack of factual content directed at disparate-impact liability. There are no allegations about the number of applicants and the racial makeup of the applicant pool as compared to the candidates promoted or as compared to the police or fire department as a whole. There are no allegations about the racial makeup of the relevant workforce in the Indianapolis metropolitan area or the supervisory ranks in the police and fire departments. There are no factual allegations tending to show a causal link between the challenged testing protocols and a statistically significant racial imbalance in the ranks of sergeant, lieutenant, or captain in the police department or battalion chief, lieutenant, or captain in the fire department. Disparate-impact plaintiffs are permitted to rely on a variety of statistical methods and comparisons to support their claims. At the pleading stage, some basic allegations of this sort will suffice. But the amended complaint contains no allegations of the kind, nor any other factual material to move the disparate-impact claims over the plausibility threshold. Accordingly, these claims were properly dismissed on the pleadings.")

Turley v. Rednour, 729 F.3d 625, 651, 652 (7th Cir. 2013) ("*Twombly* and *Iqbal* direct us to consider whether the plaintiff's claims are plausible. However, it is important to keep in mind that even after *Twombly* and *Iqbal*, *pro se* complaints like Turley's are to be construed liberally. *See, e.g., Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (per curiam); *Munson v. Gaetz*, 673 F.3d 630, 632–33 (7th Cir.2012). Here, Turley survives dismissal because his claims are plausible and his complaint sets out more than conclusory statements. . . Turley argues that frequent lockdowns for substantial periods of time have deprived him of exercise and caused him various health issues. The State's response is that Turley has failed to allege a constitutionally sufficient injury, especially since no individual lockdown exceeded 90 days, and the defendants were not deliberately indifferent to Turley's or the other inmates' situation. The district court dismissed this claim because it thought that Turley had not listed specific periods of confinement, but this

conclusion is incorrect. The State relies heavily on *Pearson v. Ramos,* 237 F.3d 881, 886 (7th Cir.2001), for the notion that there exists an ironclad rule that a denial of yard privileges shorter than 90 consecutive days cannot be the basis for an Eighth Amendment claim. However, the State has misconstrued this rule. In *Pearson,* we stated that we thought 'it a reasonable rule that a denial of yard privileges for no more than 90 days at a stretch is not cruel and unusual punishment.'. . However, we were careful to explain that the 'norm of proportionality' would guide the acceptable duration of lockdown. Even a lockdown not exceeding 90 days could violate that norm if it were 'impos [ed] ... for some utterly trivial infraction of the prison's disciplinary rules.'")

Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1021-25 & n.5, 1027, 1028 (7th Cir. 2013) ("IFP plaintiffs have the same right as other plaintiffs to amend a timely filed complaint at least once as a matter of course pursuant to Federal Rule of Civil Procedure 15(a) and to make further amendments with leave of court. The only difference regarding IFP and fee-paying plaintiffs arises in section 1915(e), which directs courts to screen all complaints filed with requests to proceed IFP and provides that 'the court shall dismiss the case at any time' if, among other things, the action is frivolous or malicious or 'fails to state a claim on which relief may be granted....' 28 U.S.C. § 1915(e)(2). If a district court's *sua sponte* dismissal in such cases were without leave to amend, we would face serious questions about fair access to the courts. Without at least an opportunity to amend or to respond to an order to show cause, an IFP applicant's case could be tossed out of court without giving the applicant any timely notice or opportunity to be heard to clarify, contest, or simply request leave to amend. . . . District courts must allow IFP plaintiffs leave to amend at least once in all circumstances in which such leave would be granted to feepaying plaintiffs under Rule 15(a). . . . We therefore join the majority of other circuits in interpreting section 1915(e) not only to permit granting IFP plaintiffs leave to amend complaints dismissed for failure to state a claim but also to require granting IFP plaintiffs leave to amend their complaints at least once when Rule 15(a) would allow amendment in the case of fee-paying litigants. . . .We have previously recognized an additional interpretive question regarding section 1915's use of the word 'case,' leaving as an open question whether or not section '1915(e)(2)'s requirement that "the case" be dismissed necessitates the dismissal of the entire action or merely the complaint....' *Furnace v. Bd. of Trustees of Southern Illinois Univ.,* 218 F.3d 666, 669 (7th Cir.2000). Today we also resolve that issue: Section 1915 requires the district court to dismiss only the complaint, not the entire action, and the court should grant leave to amend in all cases in which a fee-paying plaintiff would enjoy leave to amend under Rule 15(a). . . . On the merits, we conclude that the district court erred in dismissing Luevano's original complaint for failure to state a claim upon which relief may be granted. . . .The original complaint stated claims for relief. As a preliminary matter, the pleading standards for pro se plaintiffs are considerably relaxed, *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam), even in the wake of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). . . . Neither *Iqbal* nor *Twombly* overruled *Swierkiewicz,* and it is our duty to apply the Supreme Court's precedents unless and until the Supreme Court itself overrules them.")

Engel v. Buchan, 710 F.3d 698, 699, 708-10 (7th Cir. 2013) ("A *Bivens* cause of action is available for violations of *Brady.* Although the Supreme Court has cautioned against extending *Bivens* to new contexts, this case meets the Court's requirements for doing so and is materially indistinguishable from *Bivens* itself. And Engel's complaint contains enough factual specificity to state a plausible claim for violation of his due-process rights under *Brady.* Because the *Brady* obligation was well established at the time of the events at issue here (Buchan does not argue otherwise), qualified immunity does not apply. . . . [S]haky or no, *Bivens* remains the law, and we are not free to ignore it. As recently as last year, the Supreme Court reaffirmed the standards for resolving new *Bivens* questions. *Minneci,* 132 S.Ct. at 621. Applying those standards here, we conclude, consistent with our decision in *Manning I,* that a *Bivens* cause of action is available for a *Brady* violation committed by a federal law-enforcement agent in connection with a state criminal prosecution. . . . Buchan also argues that even if Engel has a cause of action under *Bivens,* qualified immunity applies because the complaint does not contain sufficiently specific factual allegations to plausibly state a claim for violation of Engel's due-process rights. . . . It is beyond dispute that the *Brady* right was well established at the time of the events set forth in Engel's complaint. . . Buchan does not argue otherwise. Instead, he maintains that Engel's complaint lacks sufficient factual content to state a claim for a *Brady* violation under the pleading standard announced in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). . . .Buchan argues that Engel makes only conclusory allegations with respect to his central claim of wrongdoing—as, for example, when he alleges that '[a]ll of the evidence introduced against Plaintiff at his trial was the product of intentional misconduct by the Defendants, who fabricated evidence, manipulated witnesses, and withheld exculpatory evidence.' Were this the entirety of the factual allegations in the complaint, Buchan might have a point. . . .But *Iqbal* makes clear that 'legal conclusions can provide the framework of a complaint' so long as they are 'supported by factual allegations,'. . . and that is the case here. Read as a whole, Engel's complaint easily contains enough specific factual allegations to state a plausible claim for violation of his due-process rights under *Brady.* [court reviews factual allegations] These allegations, read in context with the rest of the complaint, surpass the plausibility threshold of *Twombly* and *Iqbal.*")

Richards v. Mitcheff, 696 F.3d 635, 638 (7th Cir. 2012) ("This suit. . . could not properly be dismissed under either Rule 12(b)(6) or Rule 12(c). The claim is sound in theory (see *Farmer* and *Gamble*); the complaint's allegations make an eighth-amendment recovery plausible. Indiana allows tolling because of physical incapacity—and, far from pleading that he was capable of suing throughout the two years after his first surgery, Richards pleaded incapacity, again plausibly. The district judge had this to say: 'Richards' explanations for the delay are unpersuasive.' That's it. No other analysis. The court did not identify a *legal* obstacle to the suit; the judge just deemed the allegations 'unpersuasive.' But a judge cannot reject a complaint's plausible allegations by calling them 'unpersuasive.' Only a trier of fact can do that, after a trial. For their part, defendants seem to be unaware that state law supplies the principles of tolling in litigation under § 1983; neither of the two briefs filed by appellees mentions Indiana's tolling rules. We appreciate the judicial desire to resolve cases as swiftly as possible. Litigation is costly for both sides, and a doomed suit should be brought to a conclusion before costs are needlessly run up. *Twombly* designed its plausibility

requirement as a partial antidote to the high costs of discovery and trial. But neither *Twombly* nor *Iqbal* has changed the rule that judges must not make findings of fact at the pleading stage (or for that matter the summary-judgment stage). A complaint that invokes a recognized legal theory (as this one does) and contains plausible allegations on the material issues (as this one does) cannot be dismissed under Rule 12. See *Erickson v. Pardus*, 551 U.S. 89 (2007). Judges should respect the norm that complaints need not anticipate or meet potential affirmative defenses. If the facts are uncontested (or the defendants accept plaintiffs' allegations for the sake of argument), it may be possible to decide under Rule 12(c); if the parties do not agree, but one side cannot substantiate its position with admissible evidence, the court may grant summary judgment under Rule 56. But this case has not reached the stage where Richards's allegations of physical incapacity are put to the test. Once Richards has had an opportunity to produce evidence material to the tolling question, its sufficiency under Indiana law can be tested by a motion for summary judgment. Before proceeding further, however, the district court should consider carefully whether to assist Richards in finding a lawyer who can muster the facts and, if necessary, secure medical experts.")

Norfleet v. Walker, 684 F.3d 688, 691 (7th Cir. 2012) ("There are unanswered questions about the statutory claim, and if the plaintiff were represented we might deem the complaint insufficient under the enhanced pleading standard imposed by *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81 (2009). But as a pro se (as well as a prisoner and thus severely limited in his ability to conduct the kind of precomplaint investigation required by *Iqbal*), the plaintiff has pleaded enough to avert dismissal.")

Geinosky v. City of Chicago, 675 F.3d 743, 745 n.1, 748 n.3 (7th Cir. 2012) ("The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6). A motion under Rule 12(b)(6) can be based only on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice. . . .A plaintiff, however, has much more flexibility in opposing a Rule 12(b)(6) motion and in appealing a dismissal. A party appealing a Rule 12(b)(6) dismissal may elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings. . . In the district court, too, a party opposing a Rule 12(b)(6) motion may submit materials outside the pleadings to illustrate the facts the party expects to be able to prove. . . . In the turmoil concerning civil pleading standards stirred up by *Ashcroft v. Iqbal* . . .and *Bell Atlantic Corp. v. Twombly* . . . a plaintiff who is opposing a Rule 12(b)(6) or Rule 12(c) motion and who can provide such illustration may find it prudent to do so. (It may also be prudent to explain to the district court that the materials are being submitted for illustrative purposes and should not be used to convert the motion into a Rule 56 motion for summary judgment.) . . . . Even in a case where a plaintiff would need to identify a similarly situated person to prove his case, like the *McDonald* case cited by the district court on this point, we see no basis for requiring the plaintiff to identify the person *in the complaint. McDonald* was decided on summary judgment, not on the pleadings. . . Rule 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Even the more demanding pleading requirements under *Iqbal* and *Twombly* do not require a plaintiff to

identify specific comparators in a complaint.")

McCauley v. City of Chicago, 671 F.3d 611, 616-19 (7th Cir. 2011) ("Though the district court's analysis was faulty, the equal-protection claim against the City was properly dismissed. To state a *Monell* claim against the City for violation of Mersaides's right to equal protection, McCauley was required to 'plead[ ] factual content that allows the court to draw the reasonable inference' that the City maintained a policy, custom, or practice of intentional discrimination against a class of persons to which Mersaides belonged. . . . He did not meet this burden. . . . We have interpreted *Twombly* and *Iqbal* to require the plaintiff to 'provid[e] some specific facts' to support the legal claims asserted in the complaint. . . The degree of specificity required is not easily quantified, but 'the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.'. . The required level of factual specificity rises with the complexity of the claim. . . . This case is more like *Brooks* than *Swanson.* Many of the alleged 'facts' are actually legal conclusions or elements of the cause of action, which may be disregarded on a motion to dismiss. . . For example, McCauley alleges that the City 'has an unwritten custom, practice and policy to afford lesser protection or none at all to victims of domestic violence' and that '[t]here is no rational basis' for this purported policy. Similarly, McCauley alleged the following:
[The City], through its agents, employees and/or servants, acting under color of law, at the level of official policy, practice, and custom, with deliberate, callous, and conscious indifference to McCauley's constitutional rights, authorized, tolerated, and institutionalized the practices and ratified the illegal conduct herein detailed, and at all times material to this Complaint, [the City] had interrelated *de facto* policies, practices, and customs.
These are the legal elements of the various claims McCauley has asserted; they are not factual allegations and as such contribute nothing to the plausibility analysis under *Twombly/Iqbal*.Once the legal conclusions are disregarded, just one paragraph of factual allegations remains:
Defendant violated McCauley's constitutional rights under 42 U.S .C. § 1983 by:
a. failing to provide adequate security and promptly arrest Martinez;
b. failing to promulgate any policy to ensure the prompt arrest of individuals guilty of violating protective orders;
c. maintaining a policy or custom of failing to timely arrest violators of protective orders;
d. maintaining a custom and practice of failing to adequately train officers concerning the necessity of promptly arresting individuals guilty of violating protective orders;
e. maintaining a policy or custom of failing to have safeguards in place to ensure that violators of protective orders were timely arrested;
f. failing to have a custom, practice and policy in effect to verify whether someone who is arrested for domestic violence is on parole;
g. failing to have a custom, practice and policy to communicate with state officials and law enforcement officials regarding domestic violence arrests;
h. failing to have a custom, practice and policy in effect in order to communicate with parole agents on domestic violence arrests;
i. failing to have a custom, practice and policy in effect to verify whether an arrestee of a domestic violence offense is on parole prior to issuing an order of protection; and

j. maintaining a custom, practice and policy of ignoring the seriousness of domestic violence arrests.

McCauley maintains that these allegations are sufficient to state a *Monell* equal-protection claim against the City. We disagree. In order to state a facially plausible equal-protection claim under *Monell,* the factual allegations in McCauley's complaint must allow us to draw the reasonable inference that the City established a policy or practice of intentionally discriminating against female victims of domestic violence in the provision of police protection. That is, McCauley needed to allege enough 'by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."' Because the Equal Protection Clause is 'concerned ... with equal treatment rather than with establishing entitlements to some minimum of government services, [it] does not entitle a person to adequate, or indeed to any, police protection.'. . . 'On the other hand, selective withdrawal of police protection, as when the Southern states during the Reconstruction era refused to give police protection to their black citizens, is the prototypical denial of equal protection.'. . The allegations in the paragraph quoted above do not plausibly suggest that the City maintained a policy or practice of selective withdrawal of police protection. To the contrary, the complaint alleges that the City failed to have particularized practices in place for the *special* protection of domestic-violence victims. In essence, the complaint alleges that the City failed to promulgate specific policies for this particular class of crime victims, not that the City denied this class of victims *equal* protection. At most, the factual allegations in the complaint plausibly suggest the uneven allocation of limited police-protection services; they do not plausibly suggest that the City maintained an intentional policy or practice of *omitting* police protection from female domestic-violence victims as a class. Just as in *Brooks,* McCauley's factual allegations are entirely consistent with lawful conduct–here a lawful allocation of limited police resources. . . And the complexity of McCauley's equal-protection claim distinguishes this case from *Swanson.*")

McCauley v. City of Chicago, 671 F.3d 611, 620, 622-25, 627-29 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("I agree with my colleagues that plaintiff has failed to state a claim against defendant Walker. I respectfully dissent from the rejection of plaintiff's equal protection claim against the City of Chicago. I am skeptical about plaintiff's ability to prove the claim, but his complaint should be sufficient to survive a motion to dismiss for failure to state a claim, even under the new and subjective pleading standards announced in *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009). I explain first my skepticism, then some of the problems raised by *Iqbal,* and finally why the complaint should survive the motion to dismiss. Mr. McCauley's suit seeks to enforce the Fourteenth Amendment's equal protection requirements on the decisions of a major city police force about how to allocate its resources. Plaintiff's only viable equal protection theory is that the Chicago police department made a deliberate decision to minimize the police protection available to victims of domestic violence, and that the police did so because of an intentional animus against women, who make up the vast majority of adult victims of domestic violence. . . . As a subordinate federal court, it is our responsibility to do our best to apply the law as stated in *Iqbal.* My colleagues do so here, and the *Iqbal* standard is clearly decisive for the panel majority. The problem here is that it also our responsibility to do our best to apply other Supreme Court decisions involving

pleading standards, including *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163 (1993); *Erickson v. Pardus,* 551 U.S. 89 (2007); and *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002), as well as the Federal Rules of Civil Procedure as adopted by the Court and approved by Congress, and the form pleadings that are part of the Federal Rules of Civil Procedure and that were also approved by the Court and Congress. *Iqbal* is in serious tension with these other decisions, rules, and forms, and the Court's opinion fails to grapple with or resolve that tension. I do not believe it is an exaggeration to say that these decisions, rules, and forms simply conflict with *Iqbal.* As a result of this unresolved tension, since *Iqbal* was decided, the lower federal court decisions seeking to apply the new 'plausibility' standard are wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court. . . .First, *Iqbal's* reasoning and holding conflict with Rule 9(b), which requires that a party alleging fraud or mistake 'state with particularity the circumstances constituting fraud or mistake.' As for other states of mind, however, the rule provides: 'Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.'. . . Second, *Iqbal* conflicts with other recent Supreme Court decisions. *Iqbal* did not overrule or question a number of the Court's prior cases on notice pleading. . . . Third, *Iqbal* conflicts with the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure. Rule 84 provides that the forms in the appendix 'suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.' *Iqbal* did not purport to overrule or amend Rule 84 or the forms, but it is difficult to reconcile the new 'plausibility' standard with those forms. Many of the approved forms require virtually no explanation of the underlying facts as long as the defendant is informed of the event or transaction that gave rise to the claim, according to the broad notice purpose of the rules. . . . Unless one can plausibly explain away the tension between *Iqbal* and Rule 9(b) and the Rule 84-endorsed form complaints, then *Iqbal* conflicts with the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.,* and the prescribed process for amending the Federal Rules of Civil Procedure. . . . Fourth, *Iqbal's* reliance on the fact/conclusion dichotomy is highly subjective, and returns courts to the long disapproved methods of analysis under the regime of code pleading. . . . *Iqbal's* reliance on the fact/conclusion dichotomy makes the difference indeterminate. Application of the dichotomy is leading to judge-specific and case-specific differences in outcome that confuse everyone involved. . . . Fifth, *Iqbal's* reliance on 'judicial experience and common sense' invites the highly subjective and inconsistent results that have been observed. The *Iqbal* concept of plausibility is 'context-specific.'. . As a practical matter, the concept invites district judges to exercise their individual views of the likely merits of the case at the outset, when the only information available is the complaint. Worse still, an uncritical reading of the Court's 'obvious alternative explanation' reasoning seems to invite judges to weigh competing explanations for alleged conduct and dismiss cases merely because they believe one explanation over another. . . In application, this standard bears a striking resemblance to the most stringent pleading requirement in American civil law, for pleading scienter in securities fraud claims, pursuant to the specific direction of Congress in the Private Securities Litigation Reform Act. See 15 U.S.C. § 78u-4(b)(2) (requiring plaintiff to 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind'); accord, *Tellabs, Inc. v. Makor Issues and Rights, Ltd.,* 551 U.S. 308, 323-24 (2007) (explaining that a 'strong inference' must be 'cogent and compelling, thus strong in light of other

explanations' for the defendant's actions). Congress has not imposed such a demanding standard for pleading in any other context–including civil rights and employment discrimination cases, which often turn on whether a defendant's explanation for a decision is legitimate or merely a pretext covering for unlawful bias. Rule 9(b) and the Supreme Court decisions in *Swierkiewicz* and *Leatherman* permit plaintiffs to plead intent generally, meaning without the sort of specifics required under the PSLRA. But if the *Iqbal* pleading standard is applied in the district court, plaintiffs who already face the uphill battle of proving secret intent must now contend with the possibility of pre-discovery dismissal whenever the alleged pretext asserted by defendants in their motion to dismiss sounds plausible to the common sense of the particular judge. The potential harm of *Iqbal* in this context is that outcomes will vary based on how different judges view the plausibility of, for example, a police policymaker harboring and acting on improper motives toward women who complain of domestic violence. . . . In the face of all these problems, what are the lower federal courts to do? . . . . The first thing we can do is recognize the uncertainty that litigants, their lawyers, and district courts now face. As a result of that uncertainty, the courts of appeals should insist that in all but the most unusual situations, a party whose pleading is dismissed based on the *Iqbal* plausibility standard should be entitled to an opportunity to amend the pleading after the court has made its decision. . . . We should exercise caution to avoid punishing parties for imperfect predictions as to how the subjective and inconsistent *Iqbal* standard might be applied in their case. . . .But where that approach is not enough to resolve the case, I believe we must take care not to expand *Iqbal* too aggressively beyond its highly unusual context–allegations aimed at the nation's highest-ranking law enforcement officials based on their response to unprecedented terrorist attacks on the United States homeland–to cut off potentially viable claims. *Iqbal* exemplifies the old adage about hard cases. The failure of the Supreme Court to address all of the law that would conflict with broad application of the case should weigh heavily against that broad application, at least until the Supreme Court provides clearer guidance about how to reconcile *Iqbal* with its prior cases, the Federal Rules of Civil Procedure, and their accompanying forms. Reading the present complaint as a whole, plaintiff McCauley has alleged the particulars of a plausible *Monell* claim. As the majority points out, McCauley has alleged the elements of such a claim using the relevant legal language. While some of these statements are conclusory in nature, they serve to notify defendants and the court of the type of claim being brought. There can be no doubt that the complaint provides sufficient notice of the circumstances that gave rise to the claims. McCauley made factual allegations that Chicago police failed to arrest Martinez despite knowledge of his harassment and violations, ¶ 25, and that this failure resulted from a custom of untimeliness and indifference with regard to the seriousness of domestic violence, ¶ 125(c) and (j). McCauley alleges 'deliberate indifference' generally, see ¶ 126, but elsewhere describes numerous specific failures to act that are factually consistent with such an intent. See, *e.g.*, ¶ 51. It is difficult to imagine what more McCauley might allege on the crucial question of intent without reciting a list of specific states of mind that Chicago police policy-makers might have. We did not require such a recital in *Swanson* and we should not do so here. By extending *Iqbal* to dismiss plaintiff McCauley's equal protection *Monell* claim against the City of Chicago, the majority runs afoul of *Leatherman*, Rule 9(b), and the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure. Perhaps the Supreme Court majority intended *Iqbal*

to work such a revolution in federal civil practice, but if so, the Court failed to grapple with the conflicts and did not express any direct rejection of these other governing sources of law. Under these circumstances, therefore, I would reverse the dismissal of plaintiff's equal protection claim against the City of Chicago and give him an opportunity to pursue discovery. Even if I agreed that the current version of the complaint failed to state a claim, I would remand with instructions to give plaintiff an opportunity to file an amended complaint to try to comply with the new and uncertain standards of *Iqbal*.")

In re Text Messaging Antitrust Litigation, 630 F.3d 622, 625-27, 629 (7th Cir. 2010) ("The interlocutory appeal that we are asked to authorize in this case does not seek to overturn any findings of fact. The defendants are arguing rather that even if all the factual allegations of the complaint are true, the complaint is insufficiently plausible to satisfy *Twombly***.** They are asking us to apply a legal standard–the pleading standard set forth in *Twombly* –to a set of factual allegations taken as true for purposes of the appeal. . . . [W]hen the question presented by an appeal is whether *Twombly* requires dismissal of a complaint, the concerns underlying that decision argue for empowering the district court and the court of appeals to authorize an interlocutory appeal. *Twombly***,** even more clearly than its successor, *Ashcroft v. Iqbal***,** 129 S.Ct. 1937 (2009), is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand. When a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp–'that Serbonian bog ... where armies whole have sunk' (*Paradise Lost* ix 592-94)–and by doing so create irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert. Such appeals should not be routine, and won't be, because as we said both district court and court of appeals must agree to allow an appeal under section 1292(b); but they should not be precluded altogether by a narrow interpretation of 'question of law.'. . . [I]n this case there is no question of hunting through a record or immersing ourselves in a complicated contract, and moreover we *do* have a question of the meaning of a common law doctrine–namely the federal common law doctrine of pleading in complex cases, announced in *Twombly***.** Decisions holding that the application of a legal standard is a controlling question of law within the meaning of section 1292(b) are numerous. . . . Not that routine applications of well-settled legal standards to facts alleged in a complaint are appropriate for interlocutory appeal. But *Twombly* is a recent decision, and its scope unsettled (especially in light of its successor, *Iqbal* –from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired). This court has only twice discussed the application of *Twombly* to antitrust violations, and in both cases only in passing. . . Pleading standards in federal litigation are in ferment after *Twombly* and *Iqbal***,** and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of section 1292(b). . . The previous cases do not address the relation of *Twombly* to the standards for interlocutory appeals under that section, and that is a further novelty that justifies the conclusion that the appeal presents a genuine question of law. So we grant the application for interlocutory appeal, and, since the merits of the appeal have

been fully briefed in the parties' submissions and would not, we think, be illuminated by oral argument, we proceed to the merits. . . . [W]e agree with the district judge that the complaint alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of *Twombly***.** . . . The Court said in *Iqbal* that the 'plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.'. . This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote. The plaintiffs have conducted no discovery. Discovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability. All that we conclude at this early stage in the litigation is that the district judge was right to rule that the second amended complaint provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery.")

Atkins v. City of Chicago, 631 F.3d 823, 832 (7th Cir. 2011) ("So suppose some of the plaintiff's factual allegations are unrealistic or nonsensical and others not, some contradict others, and some are 'speculative' in the sense of implausible and ungrounded. The district court has to consider all these features of a complaint en route to deciding whether it has enough substance to warrant putting the defendant to the expense of discovery. . . or, in a case such as this (like *Iqbal* itself), burdening a defense of immunity. . . We are left in darkness as to whether the plaintiff is actually alleging that Atkins was denied food or water for four days, or for a lesser, but still constitutionally significant, length of time. The plaintiff's lawyer has had four bites at the apple. Enough is enough. . . All this is apart from the futility of the suit. Atkins is the only witness for the plaintiff, and Atkins is dead. His widow would be happy to testify to what he told her had happened to him, but her testimony would be inadmissible hearsay. There is no other evidence to support the charge of unconstitutional conditions of confinement, and no suggestion that any defendants, or other members of the prison staff, are prepared to support the plaintiff's version of the facts–or, should we say, any one of the plaintiff's versions. The district court was correct to dismiss the suit.")

Bausch v. Stryker Corp., 630 F.3d 546, 558, 561 (7th Cir. 2010) ("There are no special pleading requirements for product liability claims in general, or for Class III medical device claims in particular. The federal standard of notice pleading applies, so long as the plaintiff alleges facts sufficient to meet the new 'plausibility' standard applied in *Iqbal* and *Twombly***.** . . In applying that standard to claims for defective manufacture of a medical device in violation of federal law, moreover, district courts must keep in mind that much of the product-specific information about manufacturing needed to investigate such a claim fully is kept confidential by federal law. Formal discovery is necessary before a plaintiff can fairly be expected to provide a detailed statement of the specific bases for her claim. Accordingly, the district court erred in this case by dismissing plaintiff's original complaint and by denying her leave to amend her complaint. . . . As Judge

Melloy noted in *Medtronic Leads:* 'If plaintiffs must allege that the defendant violated a particular FDA-approved specification before discovery, then it is difficult to appreciate how any plaintiff will ever be able to defeat a Rule 12(b)(6) motion.' [*In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation,* 623 F.3d 1200, 1212 (8th Cir.2010) (Melloy, J., dissenting)] We think Judge Melloy said it well in suggesting that, in analyzing the sufficiency of pleadings , 'a plaintiff's pleading burden should be commensurate with the amount of information available to them.' *Id.* Here, Bausch pled sufficiently given the amount of information to which she had access.")

Swanson v. Citibank, N.A., 614 F.3d 400, 403-05 (7th Cir. 2010) ("The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly,* but also *Erickson v. Pardus,* 551 U.S. 89 (2007), and *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009). This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a 'plausibility' standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b)(2). . . . As we understand it, the Court is saying . . . that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. . . The Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which was cited with approval in *Twombly,* 550 U.S. at 556, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an entirely plausible scenario, whether or not it describes what 'really' went on in this plaintiff's case. A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected. . . . Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint.")

Swanson v. Citibank, N.A., 614 F.3d 400, 407-12 (7th Cir. 2010) (Posner, J., dissenting in part) ("I join the majority opinion except with respect to reversing the dismissal of the plaintiff's claim of housing discrimination. I have difficulty squaring that reversal with *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009), unless *Iqbal* is limited to cases in which there is a defense of official immunity–especially if as in that case it is asserted by very high-ranking officials (the Attorney General of

the United States and the Director of the FBI)– because the defense is compromised if the defendants have to respond to discovery demands in a case unlikely to have merit. . . . The majority opinion does not suggest that the Supreme Court would limit *Iqbal* to immunity cases. . . . There is language in my colleagues' opinion to suggest that discrimination cases are outside the scope of *Iqbal,* itself a discrimination case. The opinion says that 'a plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else.' Though this is not a promotion case, the opinion goes on to say that 'Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home equity loan). This is all that she needed to put in the complaint.'. . . Suppose this *were* a promotion case, and several people were vying for a promotion, all were qualified, several were men and one was a woman, and one of the men received the promotion. No complexity; yet the district court would "draw on its judicial experience and common sense," *Ashcroft v. Iqbal, supra,* 129 S.Ct. at 1950, to conclude that discrimination would not be a plausible explanation of the hiring decision, without additional allegations. This case is even stronger for dismissal because it lacks the competitive situation–man and woman, or white and black, vying for the same job and the man, or the white, getting it. . . . There is no allegation that the plaintiff in this case was competing with a white person for a loan. It was the low appraisal of her home that killed her chances for the $50,000 loan that she was seeking. . . . The Supreme Court would consider error the plausible inference in this case, rather than discrimination. . . . The majority opinion relies heavily on *Swierkiewicz v. Sorema N .A.,* 534 U.S. 506 (2002) [but] *Swierkiewicz* is distinguishable. . . . Title VII cases are not exempted by *Swierkiewicz* from the doctrine of the *Iqbal* case. *Iqbal* establishes a general requirement of 'plausibility' applicable to all civil cases in federal courts. . . . But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible. Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation . . . . In most suits against corporations or other institutions, and in both *Twombly* and *Iqbal*–but also in the present case–the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant's records (and, through depositions, the minds of the defendant's employees) to obtain evidence of wrongdoing. With the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant's operations. If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff. It is true, as critics of *Twombly* and *Iqbal* point out, that district courts have authority to limit discovery. . . But especially in busy districts, which is where complex litigation is concentrated, the judges tend to delegate that authority to magistrate judges. And because the magistrate judge to whom a case is delegated for discovery only is not responsible

for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it, the magistrate judge is likely to err on the permissive side. "One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it. . . . . This structural flaw helps to explain and justify the Supreme Court's new approach. It requires the plaintiff to conduct a more extensive precomplaint investigation than used to be required and so creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery. . . . The plaintiff has an implausible case of discrimination, but she will now be permitted to serve discovery demands that will compel elaborate document review by Citibank and require its executives to sit for many hours of depositions. . . . The threat of such an imposition will induce Citibank to consider settlement even if the suit has no merit at all. That is the pattern that the Supreme Court's recent decisions are aimed at disrupting. We should affirm the dismissal of the suit in its entirety.")

Santiago v. Walls, 599 F.3d 749, 758, 759 (7th Cir. 2010) ("Mr. Santiago alleged that he submitted a grievance to Warden Walls's office, asking that the inmate with whom he was being housed be placed on his enemy list and that he be given a cell change. The grievance claimed that the prison officials were following a practice of placing him in cells with inmates with whom there was bound to be a confrontation. He further alleged that the Warden 'knew or should have known' that Castro was dangerous. We think that this allegation is sufficient, at the pleading stage, to state a claim that Warden Walls actually knew or consciously turned a blind eye toward an obvious risk. Mr. Santiago cannot know for certain what Warden Walls knew without discovery. Consequently, the district court should not have dismissed this count of the complaint. The dissent suggests two infirmities with Mr. Santiago's pro se complaint. First, it would require a much greater level of specificity in both the complaint and in the appended grievance form. With respect to the grievance, neither this court nor any other American court has imposed the requirements of fact or code pleading on such a document. The purpose of a grievance is, quite simply, to advise prison management of a situation that could harm the good order and discipline of the institution so that remedial steps can be taken by the officer who is responsible for such remedies. Here, the warden was informed that personnel under his command were undermining the good order and discipline of the institution by placing Mr. Santiago in situations where violence was inevitable. Although the dissent apparently takes the contrary view, we believe that any warden worth his or her salt would consider such an allegation sufficient to commence an aggressive investigation. Most wardens would not fail to meet their responsibilities simply because the complaining prisoner, while alleging retaliation, failed to name names. The maintaining of prison discipline does not depend on prisoners naming names. To the extent that the dissent is asserting that the complaint itself lacked sufficient specificity, it is asking for a return to the days before the Supreme Court eliminated that impermissible gloss on the Federal Rules in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). It is clear that this complaint conforms to the standards set out by the Supreme Court in

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).").

Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009) ("The Court's specific concern in *Bell Atlantic* was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement that would spare the defendant that burden. In *Iqbal* it was with the inroads into the defense of official immunity–which is meant to protect the officer from the burden of trial and not merely from damages liability–that allowing implausible allegations to defeat a motion to dismiss would make. *Smith v. Duffey*, 576 F.3d 336, 339-40 (7th Cir.2009). Thus, as the Court said in *Iqbal*, 'determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' 129 S.Ct. at 1950 . . . In other words, the height of the pleading requirement is relative to circumstances. We have noted the circumstances (complexity and immunity) that raised the bar in the two Supreme Court cases. This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid pro se litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy; and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility.").

Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009) ("Any doubt that *Twombly* had repudiated the general notice-pleading regime of Rule 8 was put to rest two weeks later, when the Court issued *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). . . . This court took *Twombly* and *Erickson* together to mean that 'at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.'. . This continues to be the case after *Iqbal*. That case clarified that *Twombly's* plausibility requirement applies across the board, not just to antitrust cases. In addition, *Iqbal* gave further guidance to lower courts in evaluating complaints. . .We understand the Court in *Iqbal* to be admonishing those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims, that they must do more. These are the plaintiffs who have not provided the 'showing' required by Rule 8. So, what do we take away from *Twombly*, *Erickson*, and *Iqbal?* First, a plaintiff must provide notice to defendants of her claims. Second, courts must accept a plaintiff's factual allegations as true, but some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim. Third, in considering the plaintiff's factual allegations, courts should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements.").

Burks v. Raemisch, 555 F.3d 592, 593 (7th Cir. 2009) ("Plaintiffs need not lard their complaints with facts; the federal system uses notice pleading rather than fact pleading. See *Erickson v. Pardus*, 551 U.S. 89 (2007). Knowledge and intent, in particular, need not be covered in detail; Fed.R.Civ.P. 9(b) provides that '[m]alice, intent, knowledge, and other conditions of a person's

mind may be alleged generally.' It is enough to lay out a plausible grievance. A prisoner's statement that he repeatedly alerted medical personnel to a serious medical condition, that they did nothing in response, and that permanent injury ensued, is enough to state a claim on which relief may be granted–if it names the persons responsible for the problem. Doing nothing *could* be simple negligence, but it does not stretch the imagination to see that it might also amount to deliberate indifference.").

Tamayo v. Blagojevich, 526 F.3d 1074, 1082, 1083, 1085, 1090, 1091 (7th Cir. 2008) ("Since *Bell Atlantic*, we cautiously have attempted neither to over-read nor to under-read its holding. We have stated that the Supreme Court in *Bell Atlantic* 'retooled federal pleading standards,' and retired 'the oft-quoted *Conley* formulation.'. . We also have cautioned, however, that *Bell Atlantic* 'must not be overread.'. . Although the opinion contains some language that could be read to suggest otherwise, the Court in *Bell Atlantic* made clear that it did not, in fact, supplant the basic notice-pleading standard. . . . The task of applying *Bell Atlantic* to the different types of cases that come before us continues. In each context, we must determine what allegations are necessary to show that recovery is 'plausible.'. . For complaints involving complex litigation–for example, antitrust or RICO claims–a fuller set of factual allegations may be necessary to show that relief is plausible. . . The Court in *Bell Atlantic* wished to avoid the 'in terrorem' effect of allowing a plaintiff with a 'largely groundless claim' to force defendants into either costly discovery or an increased settlement value. . . . [W]e conclude that Ms. Tamayo's complaint included enough facts in support of a claim of sex discrimination under Title VII and the Equal Pay Act to survive dismissal at this stage of the proceedings. . . . Similarly, we conclude that Ms. Tamayo's complaint alleged enough facts to state a claim for retaliation. . . .The pleading standard is no different simply because qualified immunity may be raised as an affirmative defense. . . . In any event, the right to be free from sex discrimination is clearly established. Taking all facts pleaded in Ms. Tamayo's complaint as true, the defendants violated a clearly established constitutional right; therefore, a grant of qualified immunity is inappropriate at this point in the proceedings.")**.**

Limestone Development Corp. v. Village of Lemont, Ill., 520 F.3d 797, 803, 804 (7th Cir. 2008) ("Under *Bell Atlantic*, the complaint in a potentially complex litigation, or one that by reason of the potential cost of a judgment to the defendant creates the '*in terrorem*' effect against which *Blue Chip* warned, must have some degree of plausibility to survive dismissal. It is true that the narrowest holding in *Bell Atlantic* is merely that an antitrust complaint charging an agreement between firms not to compete must contain 'enough factual matter (taken as true) to suggest that an agreement was made.... An allegation of parallel conduct and a bare assertion of conspiracy will not suffice.'. .The Court was concerned lest a defendant be forced to conduct expensive pretrial discovery in order to demonstrate the groundlessness of the plaintiff's claim. . . But the concern is as applicable to a RICO case, which resembles an antitrust case in point of complexity and the availability of punitive damages and of attorneys' fees to the successful plaintiff. RICO cases, like antitrust cases, are 'big' cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim. *Bell Atlantic* must not be overread. The Court denied 'requir[ing] heightened fact pleading of specifics,' 127 S.Ct. at 1974; 'a complaint ... does not need

detailed factual allegations.' . . Within weeks after deciding *Bell Atlantic*, the Court reversed a Tenth Circuit decision for requiring fact pleading . *Erickson v. Pardus*, 127 S.Ct. 2197 (2007) (per curiam). A prisoner, proceeding *pro se*, had complained that he had Hepatitis C, that he was on a one-year treatment program for it, that shortly after the program began the prison officials withheld treatment, and that his life was in danger as a result. That was the context in which the Court said that 'specific facts' need not be pleaded. . . A complaint must always, however, allege 'enough facts to state a claim to relief that is plausible on its face,'. . . and how many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'largely groundless.' *Phillips v. County of Allegheny*, 515 F.3d 224, 231-32 (3d Cir.2008). If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim.")

Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007) ("In *Bell Atlantic Corp. v. Twombly*, . . . the Supreme Court wrote that '[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... a plaintiff's obligation to provide the Agrounds" of his Aentitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do....' . . . Two weeks later the Court clarified that *Twombly* did not signal a switch to fact- pleading in the federal courts. See *Erickson v. Pardus*, 127 S.Ct. 2197 (2007). To the contrary, *Erickson* reaffirmed that under Rule 8'[s]pecific facts are not necessary; the statement need only Agive the defendant fair notice of what the ... claim is and the grounds upon which it rests."'. . . Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.").

Padron v. Wal-Mart Stores, Inc., No. 10 C 6656, 2011 WL 1760229, at *4 (N.D. Ill. May 9, 2011) ("Notwithstanding the facial inadequacy of Counts I through III, Plaintiffs argue that those counts should not be dismissed because of 'informational asymmetry' favoring Defendant. Plaintiffs claim that Defendant possesses the facts that Plaintiffs need to plead their case and that Plaintiffs are powerless to obtain information without access to the discovery process. Plaintiffs contend that as *pro se* complainants who do not speak English and who are unfamiliar with the legal process, they have little choice but to rely on the EEOC's investigation and findings, much of which is redacted. According to Plaintiffs, if Defendant's motion to dismiss is granted, 'informational asymmetry' unfairly would protect the Defendant from liability. Plaintiffs also rely on *In re Text Messaging* to support their informational asymmetry argument. There, the court recognized that discovery could reveal 'the smoking gun or bring to light additional circumstantial evidence that *further* tilts the balance in favor of liability.' *In re Text Messaging*, 630 F.3d at 629 (emphasis added). However, the court made that statement after determining that the plaintiffs already had alleged sufficient circumstantial evidence to infer plausibly that the defendants engaged in price fixing. . . The court found that circumstantial evidence was sufficient at the pleading stage and

noted that direct evidence could emerge during discovery. . . As discussed above, Plaintiffs have not already alleged circumstantial evidence that plausibly gives rise to an inference of discriminatory practices by Defendant. Therefore, *In re Text Messaging* is distinguished and does not support Plaintiffs' argument that discovery should be permitted. I also note that Plaintiffs have not established the existence or extent of any purported 'informational asymmetry.' Plaintiffs worked for Defendant for between five and six years. They had opportunity to observe Defendant's practices and discuss with other co-workers the terms and conditions of their employment. Presumably, such experiences prompted Plaintiffs to file EEOC charges in the first place. Yet, Plaintiffs allege few facts based on their tenure working for Defendant. Moreover, Plaintiffs could have performed an investigation to obtain additional information about Defendant's practices. Although Defendant may have exclusive access to certain types of evidence, Plaintiffs had their own ways of collecting information that could make their claims plausible. Yet, such facts are not pleaded in their complaint. Defendant argues that Plaintiffs' complaint is precisely what *Twombly* sought to guard against: conclusory allegations made in the hope of obtaining discovery that potentially could support Plaintiffs' claim. Defendant is correct that preventing meritless lawsuits and needless, costly discovery was an important concern in *Twombly*. . . The Court stated that 'it is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process.'. . If courts granted discovery in those circumstances, risk-averse defendants would settle even weak claims before subsequent proceedings could dispose of them. . . *Twombly* discourages correcting perceived informational asymmetry through discovery, which is the approach advocated by Plaintiffs. Accordingly, Counts I through III are dismissed.")

Santana v. Cook County Bd. of Review, No. 09 C 5027, 2011 WL 1549240, at *7 (N.D. Ill. Apr. 25, 2011) ("Before *Iqbal* our own Court of Appeals, in *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 667 (7th Cir.2007) described *Twombly* and *Erickson* as establishing 'only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.' And more recently *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir.2009) has confirmed that the *Airborne Beepers* reading of pleading law post-*Twombly* and post-*Erickson* remains accurate after *Iqbal*. *Brooks, id.* describes *Iqbal* as 'admonishing those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone can do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims, that they must do more.' Familiar Rule 12(b)(6) principles–still operative under the new pleading regime–require this Court to accept as true all of Santana's well-pleaded factual allegations, with all reasonable inferences drawn in his favor (*Christensen v. County of Boone*, 483 F.3d 454, 457 (7th Cir.2007)(per curiam)). . . . With no plausible claim having been alleged by Santana after his fifth effort to do so, the figurative severance of the 4AC and cauterization of the fatal wound, both accomplished by this opinion, have to preclude any hydra-like effort by his counsel to grow still another head through a fifth amended complaint. Enough is enough. Defendants are entitled to a judgment as a matter of law on all of Santana's claims. Their Rule

12(b)(6) motion is granted, and this action is dismissed with prejudice.")

Kitchen v. Burge, 781 F.Supp.2d 721, 728, 734, 735, 738 (N.D. Ill. 2011) ("Bryne is not alleged to have directly participated in Kitchen's torture. Rather, the complaint simply alleges that Byrne was Burge's 'right hand man,' and that, like Burge, Bryne 'engaged in a pattern and practice of torture and brutality himself, and also supervised, encouraged, sanctioned, condoned and ratified brutality and torture by other detectives, including the Police Officer Defendants named herein.'. . These generic and conclusory allegations are not sufficient to assert a claim against Byrne. Accordingly, I grant the officer defendants' motion to dismiss Byrne from the complaint. . . . Given the nature of the information that the municipal defendants are alleged to have suppressed, the possibility of establishing a causal link with Kitchen's incarceration is at least minimally plausible. For example, Martin is alleged to have hindered OPS investigations into Burge's and others' use of torture at Area 2 and 3 Headquarters; and when findings of torture were made, Shines attempted to 'secret' or suppress them. Although none of the suppressed information had specifically to do with Kitchen's case, it is not unreasonable to infer that awareness of other instances of torture could have drawn attention to the problem more generally, causing Kitchen's case to come to light sooner. In Daley's case, however, judicial experience and common sense do not permit such a reasonable inference based on Daley's decision to promote Dignan, for example, or to provide Burge's legal defense. For these reasons, Daley's motion to dismiss Count I is granted. . . .The Seventh Circuit has made clear that conspiracy claims under § 1983 are not subject to a heightened pleading standard. *See, e.g., Srivastava v. Cottey*, 83 Fed. App' x. 807, 810 (7th Cir.2003). Rather, a complaint need only provide 'notice of time, scope, and parties involved.' *Id.* Kitchen's complaint easily satisfies this requirement. Defendants argue that Kitchen's § 1985 and § 1986 conspiracy claims fail because there must be an underlying predicate violation of constitutional rights. As already explained, Counts I and IV are sufficient to state a claim. Defendants also argue that plaintiff has failed to allege an 'underlying equal protection claim or any specific facts tying Defendant Officers to any racially motivated intent to deprive Plaintiff of his equal protection rights.' The complaint alleges that the conspiracy was formed 'with the knowledge and purpose of depriving Plaintiff, who is African-American, and numerous other African American torture victims of the equal protection of the laws and/or of equal privilege and immunities under the law, and with racial animus toward the Plaintiff and the other victims of this racially motivated conspiracy.'. . Accordingly, I deny the defendants' motions to dismiss Count V.")

Wiek v. Keane, No. 09 CV 920, 2010 WL 1976870, at *3 (N.D. Ill. May 12, 2010) ("Wiek's amended complaint sets forth the following well-pleaded facts: (i) that the officers entered his home without a warrant, (ii) conducted a search and (iii) placed him under arrest. Nevertheless, the Defendants contend that because Wiek did not allege that the officers entered his home without probable cause, exigent circumstances, or his consent, he failed to state a claim under § 1983. The Court is persuaded that Wiek's amended complaint rises above speculation and states more than naked assertions or conclusions of law. Unlike in his original complaint, Wiek now alleges that the officers entered his home without a warrant and conducted a search. . . He further alleges that the officers then placed him under arrest and transported him to the police station. . . The core of

the Fourth Amendment is the fundamental concept that any governmental invasion into one's home or expectation of privacy must be strictly circumscribed. . . As a result, warrantless searches of one's home are presumptively unconstitutional, absent consent or exigent circumstances. . . Wiek does not bear the burden of showing a lack of probable cause or exigent circumstances. . . In addition, the circumstances of this case justify a relatively low pleading standard. This case is not as factually complex as *Twombly* or *Iqbal.* As a result, the pleading standard is not as high as what the courts used in those cases. . . Additionally, in a case such as this, Wiek may not be aware of any viable reasons that the officers had for their conduct. As such, Wiek may not be able to assert any more facts. Consequently, despite the fact that Wiek has set forth notably sparse allegations even in his amended complaint, the Court denies the Defendants' motion to dismiss Wiek's § 1983 claim against the officers.")

McDaniel v. Elgin, No. 209-CV-119, 2010 WL 339082, at *4 (N.D. Ind. Jan. 22, 2010) ("Here, Plaintiff has made specific factual allegations that he was subjected to repeated, consistent sexual harassment, including unwelcome touching of his person, by his supervisor, Harvey, and that this has created a 'hostile work environment.' McDaniel alleges that after refusing Harvey's advances, his work was 'scrutinized down to the letter,' he was threatened with 'work-ups', that he was looked over for raises and promotions, and that his employment was terminated. These factual allegations stand in contrast to the'[t] hreadbare recitals of the elements of a cause of action' that amount to 'legal conclusions' that concerned the Supreme Court in *Iqbal.* Rather than merely making bare-boned assertions that he was 'harassed' or suffered an 'adverse employment action,' McDaniel has provided specific factual detail that would support a plausible inference of unlawful discrimination. He noted that he was inappropriately touched and that he suffered adverse treatment as a result of his gender. This is all that is required by McDaniel at this early stage of the litigation. Similarly, McDaniel has provide sufficient factual material to support a plausible inference that he was improperly subjected to unlawful retaliation in response to his filing a complaint with the Indiana Human Rights Commission and giving his deposition in another matter where Elgin is the defendant. Again, these are specific, factual allegations, not mere legal conclusions. McDaniel has alleged that he was fired in retaliation for these activities and that is sufficient to satisfy the requirements of the Rule 8 pleading standard as described in *Iqbal.* This is not to say that McDaniel's allegations are to be believed or that there is sufficient evidence to successfully resist a motion for summary judgment. Rather, McDaniel has pleaded sufficient specific factual matter that satisfies the relatively low hurdle required by the Rule 8 liberal pleading standard and therefore dismissal of Plaintiff's claims is not warranted.")**.**

Kyle v. Holina, 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) ("I agree with defendants that my conclusion must be revisited in light of *Iqbal,* which extended the pleading standard enunciated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), to encompass discrimination claims and implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion. . . . Under the Supreme Court's new standard, an allegation of discrimination needs to be more specific.")

EIGHTH CIRCUIT

Whitney v. City of St. Louis, Missouri, 887 F.3d 857, 860 (8th Cir. 2018) ("The district court correctly concluded that the complaint fails to allege facts establishing the subjective prong of the deliberate indifference claim. The incorporated medical examiner's report mentions that an unnamed medical practitioner at the Justice Center knew that Whitney was having suicidal thoughts, but nowhere does the complaint allege that this information was relayed to Sharp. The complaint contains a legal conclusion that Sharp was deliberately indifferent but fails to make any allegation about Sharp's knowledge. This conclusory statement does not save the complaint absent any allegation of knowledge.")

Hager v. Arkansas Dept. of Health, 735 F.3d 1009, 1015 (8th Cir. 2013) ("Hager relies primarily on *Swierkiewicz.* However, her complaint has far fewer factual allegations than the complaint there. In *Swierkiewicz,* the complaint for age and nationality discrimination alleged: the plaintiff was demoted and replaced by a younger employee of the employer's nationality; the replacement was inexperienced; in promoting the younger, inexperienced employee, the employer wanted to 'energize' the department; the employer excluded and isolated plaintiff from business decisions and meetings; plaintiff sent a memo outlining his grievances and tried to meet with the employer to discuss his discontent; and plaintiff was fired. . .Hager makes only two conclusory allegations of gender discrimination: (1) she 'is a victim of gender discrimination;' and (2) she 'was discharged under circumstances summarily [sic] situated nondisabled males ... were not.' She does not allege any gender-related comments or conduct before her termination. . . She also does not allege facts showing that similarly situated employees were treated differently. . .In sum, Hager does not state a § 1983 claim for gender discrimination. Hager's allegation that she is the victim of gender discrimination fails to give Dr. Zohoori fair notice of the claim and the grounds upon which it rests. . . Hager's conclusory assertion that she was discharged under circumstances similarly situated men were not imports legal language couched as a factual allegation and fails to raise a right to relief above the speculative level. . . The district court erred in denying Dr. Zohoori's motion to dismiss the § 1983 claim.")

Hamilton v. Palm, 621 F.3d 816, 817, 818 (8th Cir. 2010) ("The only element of this claim here at issue is whether Hamilton's complaint sufficiently alleged that the Palms were his employers. Thus, we must consider how the general principles of *Twombly* and *Iqbal* apply to the pleading of a recurring common law issue–whether a party was an employee or an independent contractor at the time in question. We conclude that, to answer this question, we need look no further than Rule 84 of the Federal Rules of Civil Procedure, which provides, 'The forms in the Appendix [to the Rules] suffice under these rules....' The rules referred to obviously include Rule 8(a)(2). The Appendix includes Forms 11-13, which set forth prototypes of various negligence complaints. Form 13, entitled 'Complaint for Negligence Under the Federal Employers' Liability Act,' includes the following allegation: '4. During this work, the defendant, *as the employer,* negligently put the plaintiff to work....' (Emphasis added.) The district court considered Form 13 irrelevant because it applies to F.E.L.A. claims by railroad workers. But that overlooks Form 13's broader

significance. As incorporated by Rule 84, Form 13 makes clear that an allegation in *any* negligence claim that the defendant acted as plaintiff's 'employer' satisfies Rule 8(a)(2)'s notice pleading requirement for this element. Here, consistent with Form 13, Hamilton alleged that he was 'employed' by the Palms. Rule 84 and Form 13 may only be amended 'by the process of amending the Federal Rules, and not by judicial interpretation.' *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quotation omitted), distinguished in *Twombly*, 550 U.S. at 569-70. Therefore, the district court erred in concluding that Hamilton's allegation of employee status, however facially conclusory it might appear to be in the abstract, failed to satisfy Rule 8(a)(2).")

Gregory v. Dillard's, Inc., 565 F.3d 464, 473 (8th Cir. 2009) ("Even before the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), we held that a civil rights complaint 'must contain facts which state a claim as a matter of law and must not be conclusory.'. .*Twombly* confirmed this approach by overruling *Conley v. Gibson*, 355 U.S. 41 (1957), and establishing a plausibility standard for motions to dismiss. . . After *Twombly*, we have said that a plaintiff 'must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims ..., rather than facts that are merely consistent with such a right.' *Stalley v. Catholic Health Initiative*, 509 F.3d 517, 521 (8th Cir.2007); *see Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315, 321-22 (3d Cir.2008). While a plaintiff need not set forth 'detailed factual allegations,' *Twombly*, 127 S.Ct. at 1964,or 'specific facts' that describe the evidence to be presented, *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (per curiam), the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. . . A district court, therefore, is not required 'to divine the litigant's intent and create claims that are not clearly raised,' *Bediako*, 354 F.3d at 840, and it need not 'conjure up unpled allegations' to save a complaint. *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir.2006) (internal quotation omitted).").

Brown v. City of Ferguson, Mo., No. 4:15CV00831 ERW, 2015 WL 4393960, at *3 (E.D. Mo. July 16, 2015) ("Defendants' Motion to Dismiss regarding Plaintiffs' Equal Protection claims will be denied. The Equal Protection Clause of the Fourteenth Amendment protects against discrimination on the basis of race. . . Plaintiffs' must include allegations of intentional discrimination showing discriminatory racial purpose to establish a violation. . . 'When the claim is selective enforcement of traffic laws or a racially-motivated arrest, the plaintiff must normally prove that similarly situated individuals were not stopped or arrested in order to show the requisite discriminatory effect and purpose.'. . Plaintiffs included numerous allegations supporting their claims Defendant City violated the Equal Protection Clause. Although Plaintiffs did not use the exact phrase 'similarly situated individuals,' they did include several allegations stating African–Americans were treated differently than others. . . Additionally, Plaintiffs specifically alleged Defendant City's actions were driven by intentional discrimination. . . Plaintiffs have sufficiently pled a violation of the Equal Protection Clause; Defendants' Motion to Dismiss on this point will be denied. . . . In their complaint, Plaintiffs have included allegations Defendant Wilson deprived them of their right to a familial relationship with their son. . . Plaintiffs also alleged Defendant Wilson's conduct shocked the conscience of the community, and Defendant Wilson acted with

deliberate indifference to the constitutional rights of Plaintiffs and their son. . . Although the Court may later determine Plaintiffs' claimed liberty interest is neither an interest deeply rooted in this Nation's history and tradition nor clearly established, and thus find qualified immunity to apply,[4] Plaintiffs have included sufficient allegations to satisfy the pleading standard in FRCP 8(a)(2).")

Zumwalt v. City of Wentzville, No. 4:10CV561RWS, 2010 WL 2710496, at *8, *9 (E.D.Mo. July 7, 2010) ("Defendants have apparently confused the plausibility standard of *Twombly* and *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009) with the fact pleading standard used in the Missouri state courts. . . . Neither *Twombly* nor *Iqbal* changed the Rule 8 pleading notice pleading requirement to fact pleading. Specific facts are not necessary; the plaintiff must only allege facts sufficient to give fair notice of what the claim is and the grounds upon which it rests. . . In this case, Zumwalt alleges he was elected to the Local 1032 bargaining unit team. On July 6, 2009, as a Local 1032 representative, Zumwalt met in the union's initial bargaining session with the City and its agents, servants and employees. On August 3, 2009, the bargaining team again met with the City. Zumwalt alleges that on August 6, 2009, he was notified in writing that an off-duty Foristell police officer had filed a complaint against him regarding an incident that occurred on August 1, 2009. Zumwalt also alleges that city personnel actively procured the filing of a formal complaint against him. He believes their decision to do so was based on his status as a "vocal advocate" for collective bargaining rights and his position as a member or Local 1032's bargaining team. Based on the timing of the complaint against Zumwalt in relation to his collective bargaining negotiation activities, I find it is plausible that the reason the city employees actively procured or solicited the off-duty officer to file a complaint against Zumwalt was his participation in the collective bargaining negotiations.")

Arias v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec, Civ. No. 07-1959 ADM/JSM, 2008 WL 1827604, at *14 (D. Minn. Apr. 23, 2008) (not reported) ("The Court rejects the City Defendants' argument that the potential availability of a qualified immunity defense imposes a heightened pleading requirement on Plaintiffs.").

NINTH CIRCUIT

Byrd v. Phoenix Police Dep't, 885 F.3d 639, 642 (9th Cir. 2018) ("We disagree with the district court that the allegation that the officers 'beat the crap out of" Byrd was 'too vague and conclusory' to support a legally cognizable claim. Byrd's use of a colloquial, shorthand phrase makes plain that Byrd is alleging that the officers' use of force was unreasonably excessive; this conclusion is reinforced by his allegations about the resulting injuries.")

Rosati v. Igbinoso, 791 F.3d 1037, 1039-40 (9th Cir. 2015) ("Rosati's complaint plausibly alleges that she has severe gender dysphoria, citing repeated episodes of attempted self-castration despite continued hormone treatment. . . Rosati also alleges that the medically accepted treatment for her dysphoria is SRS, supporting that allegation with copious citations to the World Professional Association for Transgender Health ("WPATH") Standards of Care. . . Rosati plausibly alleges

that prison officials were aware of her medical history and need for treatment, but denied the surgery because of a blanket policy against SRS. Indeed, the state acknowledged at oral argument that no California prisoner has ever received SRS. . . .Even absent such a blanket policy, Rosati plausibly alleges her symptoms (including repeated efforts at self-castration) are so severe that prison officials recklessly disregarded an excessive risk to her health by denying SRS solely on the recommendation of a physician's assistant with no experience in transgender medicine. . . .Although Rosati lacks a medical opinion recommending SRS, she plausibly alleges that this is because the state has failed to provide her access to a physician competent to evaluate her. . . .We express no opinion on whether SRS is medically necessary for Rosati or whether prison officials have other legitimate reasons for denying her that treatment. But, like other courts that have considered similar actions, we hold that the allegations in Rosati's complaint are sufficient to state a claim.")

Knapp v. Hogan, 738 F.3d 1106, 1110, 1111 (9th Cir. 2013) ("We hold that dismissals following the *repeated* violation of Rule 8(a)'s 'short and plain statement' requirement, following leave to amend, are dismissals for failure to state a claim under § 1915(g). While past cases have found that this type of strike is accrued by a Rule 12(b)(6) dismissal, they do not hold that this is the only possible way. . . We find the reasoning of the Seventh Circuit to be persuasive: after an incomprehensible complaint is dismissed under Rule 8 and the plaintiff is given, but fails, to take advantage of the leave to amend, 'the judge [is] left with [ ] a complaint that, being irremediably unintelligible, [gives] rise to an inference that the plaintiff could not state a claim.' *See Paul v. Marberry*, F .3d 702, 705 (7th Cir. 2011). When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply *cannot* state a claim. Such a narrow expansion of the definition of 'failure to state a claim' beyond Rule 12(b)(6) dismissals is fully in harmony with the purposes of the Prison Litigation Reform Act. . . .Complaints that are filed in repeated and knowing violation of Federal Rule 8's pleading requirements are a great drain on the court system, and the reviewing court cannot be expected to 'fish a gold coin from a bucket of mud.'. .Knapp accrued two strikes for the Ninth Circuit dismissals, and three additional strikes for the district court dismissals. He has more than met the requirement for a revocation of in forma pauperis status under the Prison Litigation Reform Act.")

Panagacos v. Towery, Nos. 11–35527, 11–35538, 2012 WL 6573787, *1, *2 (9th Cir. Dec. 17, 2012) (not reported) ("The TAC alleges that Towery infiltrated plaintiffs' peaceful anti-war protest group in order to spy on and disrupt plaintiffs' activities. The TAC alleges, for example, that Towery identified plaintiffs to others in order to facilitate their arrest without probable cause. Rudd allegedly directed Towery's efforts and compiled Towery's intelligence in reports that he disseminated to other government actors. Both men allegedly coordinated with law-enforcement agencies to plan and implement strategies designed to silence the protestors. The district court correctly determined that these allegations are plausibly supported by sufficient factual detail and must be presumed true. *See Iqbal*, 556 U.S. at 678. The TAC gives examples of specific times and places that Towery spied on plaintiffs' meetings. It alleges that defendants met with specifically

identified law-enforcement officers and agencies, and identifies specific time frames when these meetings occurred. These factual allegations are sufficient to 'give fair notice and to enable the opposing party to defend itself effectively.' *Starr v.. Baca,* 652 F.3d 1202, 1216 (9th Cir.2011). As the district court noted, Towery and Rudd's direct involvement in information gathering and reporting distinguishes this case from *Iqbal,* where conclusory allegations about the high-level government defendants' involvement were 'not entitled to be assumed true.'. . Plaintiffs have pled a plausible violation of their clearly established First Amendment rights. Plaintiffs have alleged that defendants 'deterred or chilled the plaintiff's political speech' and that such deterrence motivated defendants' conduct. . . As a result of defendants' information sharing and coordination with local law enforcement, plaintiffs were allegedly arrested without probable cause. These arrests allegedly disrupted plaintiffs' peaceful protests and deterred their political speech. The TAC's allegations also support a plausible inference that defendants were motivated by an impermissible intent to disrupt plaintiffs' speech activities. Given plaintiffs' strong anti-war message and defendants' alleged illegal actions in purposefully facilitating a campaign of false arrests, it is plausible that Towery and Rudd were motivated by a desire to silence the protesters and not just by a desire to protect military shipments. . . Finally, it is clearly established that intentionally enabling arrests without probable cause in order to suppress speech violates the First Amendment. . .Plaintiffs have also pled plausible violations of their clearly established Fourth Amendment rights. It is clearly established that facilitating arrests without probable cause violates the Fourth Amendment. *See, e.g., Beck,* 527 F.3d at 863–64. The district court also correctly determined that the TAC's allegations that Towery coordinated with local police to covertly break into a private listserve plausibly describe an unconstitutional search.")

Lacey v. Maricopa County, 693 F.3d 896, 924 (9th Cir. 2012) (en banc) ("Given the detail in the complaint and the seriousness of the allegations, we are reluctant to dismiss the false arrest claim against Arpaio on the basis of the pleadings. *Iqbal* demands more of plaintiffs than bare notice pleading. . . , but it does not require us to flyspeck complaints looking for any gap in the facts. Lacey has spun a long and sometimes repetitive narration of Arpaio's determination to silence the *New Times* by any means necessary. It is a short step to infer that Arpaio was well aware of the flaws in Wilenchik's prosecution, but welcomed the excuse to have Lacey and Larkin arrested immediately, even if he lacked probable cause. We think this is all *Iqbal* requires at this stage.")

Wilhelm v. Rotman, 680 F.3d 1113, 1121, 1122 (9th Cir. 2012) ("Plaintiff filed his complaint pro se. 'We construe pro se complaints liberally and may only dismiss a pro se complaint for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Silva v. Di Vittorio,* 658 F.3d 1090, 1101 (9th Cir.2011) (internal quotation marks omitted). *Iqbal* did not alter the rule that, 'where the petitioner is *pro se,* particularly in civil rights cases, [courts should] construe the pleadings liberally and ... afford the petitioner the benefit of any doubt.' *Hebbe v. Pliler,* 627 F.3d 338, 342 (9th Cir.2010) (internal quotation marks omitted).")

Henry A. v. Willden, 678 F.3d 991, 1003-05 (9th Cir. 2012) ("[T]he State defendants argue that plaintiffs have failed to state a claim against them for supervisory liability. We recently reaffirmed that a plaintiff may state a claim under § 1983 against a supervisor for deliberate indifference. *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011). . . . After thoroughly examining the plaintiffs' complaint, we agree that there are few specific allegations against the State defendants. Most of the allegations in the complaint simply reference 'Defendants,' without specifying whether the conduct at issue was committed by the named State officials, County officials, or the 'John Doe' supervisors or caseworkers. . . .The allegations that do expressly reference the State defendants are too general to state a claim for supervisory liability. In *Starr v. Baca*, the plaintiff alleged that Sheriff Baca himself had been given clear notice by the Department of Justice of the specific unconstitutional conditions in the jails; that the Sheriff received numerous reports documenting inmate violence caused by the unconstitutional conduct of his deputies; and that the Sheriff ultimately acquiesced in these constitutional violations. . . In contrast, the allegations here claim that the agencies directed by Willden and Comeaux have oversight responsibility for Clark County's foster care system and are required to ensure that Clark County is complying with state and federal law. The complaint also alleges that all of the defendants had knowledge of independent reports documenting the systemic failures of foster care in Nevada. But it does not allege that Willden or Comeaux had any personal knowledge of the specific constitutional violations that led to Plaintiffs' injuries, or that they had any direct responsibility to train or supervise the caseworkers employed by Clark County. The allegations that come closest to pleading personal involvement by Willden and Comeaux concern the failure to provide medical records to the children and their foster parents in order to facilitate their medical care. . . .When read together, these allegations suggest that there may be a causal connection between the State defendants' failure to share these medical records and the injuries suffered by plaintiffs such as Henry, who received a dangerous combination of prescription drugs because his medical records were not given to his treatment providers. But even if the complaint in its current form fails to state a claim against the State officials for substantive due process violations, the district court abused its discretion by failing to give the plaintiffs an opportunity to amend their complaint. . . . Here, Plaintiffs offered to amend their complaint if necessary in their response to the motion to dismiss, but the district court did not grant leave to amend and did not provide any reasons for its decision. As we have already concluded, the complaint adequately pleads violations of Plaintiffs' clearly established substantive due process rights, and it plausibly suggests an entitlement to relief from at least some of the defendants. Where the complaint falls short in some places is tying its factual allegations to particular defendants. But this type of deficiency can likely be cured by amending the complaint, and there is certainly no evidence to suggest that allowing amendment would be futile. Therefore, on remand, Plaintiffs should be given an opportunity to amend their substantive due process claims. We note that in any future proceedings in the district court, each defendant's liability must be analyzed individually using the proper standard, whether that individual is a line-level caseworker, a supervisory official, or a municipality.")

Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Nos. 09-16181, 09-16607, 09-177102011 WL 1053366, at *4 & n.6 (9th Cir. Mar. 24, 2011) ("Until now, we have not had

occasion explicitly to confirm that *Iqbal's* plausibility requirement applies to claims subject to Rule 9(b). We have, however, said that 'complaints alleging fraud must comply with both [Federal Rules of Civil Procedure] 8(a) *and* 9(b).'. . Because Rule 8(a) requires the pleading of a plausible claim, *Iqbal,* 129 S.Ct. at 1949- 50, we hold that claims of fraud or mistake–including FCA claims–must, in addition to pleading with particularity, also plead plausible allegations. . . *Iqbal* and its 'plausibility' standard have been the subject of serious and thoughtful criticism. . . Also, at least one state court has disagreed with the wisdom of *Iqbal* and declined to adopt its plausibility standard for state court pleadings. *McCurry v. Chevy Chase Bank, FSB,* 233 P.3d 861, 863-64 (Wash. 2010). Nonetheless, pleading requirements for the federal courts have departed from the traditional Rule 8 standard under *Conley v. Gibson,* 355 U.S. 41, 47-48 (1957); under *Iqbal,* the pleading standard has changed and plausibility is required.")

Hydrick v. Hunter, 669 F.3d 937, 939-42 (9th Cir. 2012) (on remand from the Supreme Court for reconsideration in light of *Ashcroft v. Iqbal*) ("As discussed in more detail below, after reviewing the Supreme Court's decision in *Iqbal,* the parties' supplemental briefs, and our court's recent decision in *Starr v. Baca,* 652 F.3d 1202 (9th Cir.2011), we now hold that Defendants are entitled to qualified immunity on Plaintiffs' claims for money damages. The conclusory allegations in Plaintiffs' Second Amended Complaint are insufficient to establish Defendants' individual liability for money damages. Our holding, however, is limited. Qualified immunity is only an immunity from a suit for money damages, and does not provide immunity from a suit seeking declaratory or injunctive relief. . . Accordingly, on remand, the Plaintiffs may proceed with their claims for declaratory and injunctive relief. . . .As discussed in greater detail below, in the case before us, the factual allegations in Plaintiffs' complaint resemble the 'bald' and 'conclusory' allegations in *Iqbal,* instead of the detailed factual allegations in *Starr*. . . Accordingly, Plaintiffs pleaded insufficient facts to establish 'plausible' claims against the Defendants in their individual capacities and the Defendants are entitled to qualified immunity. . . .The Plaintiffs' complaint proceeds under two theories of liability against the Defendants in their individual capacities. Plaintiffs allege that the Defendants are: (a) liable for their own conduct because they created policies and procedures that violated the Plaintiffs' constitutional rights; and, (b) liable because they were deliberately indifferent to their subordinates' constitutional violations. . . Plaintiffs' allegations fail to state claims against Defendants in their individual capacities under either theory of liability. Plaintiffs' complaint is based on conclusory allegations and generalities, without any allegation of the specific wrong-doing by each Defendant. For example, Plaintiffs' Fourth Amendment claim alleges that Defendants' 'policies, practices and customs subject [Plaintiffs] to unreasonable searches; searches as a form of punishment; degrading public strip searches; improper seizures of personal belongings; and the use of unreasonable force and physical restraints.' But there is no allegation of a *specific* policy implemented by the Defendants or a *specific* event or events instigated by the Defendants that led to these purportedly unconstitutional searches. Plaintiffs' remaining claims suffer from the same infirmities. Plaintiffs' First Amendment retaliation claim alleges that 'Defendants have personal knowledge of retaliation against [the Plaintiffs] for participation in lawsuits, but Defendants' policies, practices and customs permit and encourage retaliation.' But there is no allegation of a *specific* policy or custom, nor are

there specific allegations regarding each Defendant's purported knowledge of the retaliation. The remainder of Plaintiffs' claims are likewise devoid of specifics. The absence of specifics is significant because, to establish individual liability under 42 U.S.C. § 1983, 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.' *Iqbal,* 129 S.Ct. at 1948. Even under a 'deliberate indifference' theory of individual liability, the Plaintiffs must still allege sufficient facts to plausibly establish the defendant's 'knowledge of' and 'acquiescence in' the unconstitutional conduct of his subordinates. *Starr,* 652 F.3d at 1206–07. In short, Plaintiffs' 'bald' and 'conclusory' allegations are insufficient to establish individual liability under 42 U.S.C. § 1983.")

Starr v. Baca, 652 F.3d 1202, 1215-17 (9th Cir. 2011), *reh'g en banc denied by* ***Starr v. County of Los Angeles***, 659 F.3d 850 (9th Cir. 2011) and *cert. denied by* ***Baca v. Starr***, 132 S. Ct. 2101 (2012) ("The juxtaposition of *Swierkiewicz* and *Erickson,* on the one hand, and *Dura, Twombly,* and *Iqbal,* on the other, is perplexing. Even though the Court stated in all five cases that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard in *Dura, Twombly* and *Iqbal.* The Court in *Dura* and *Twombly* appeared concerned that in some complex commercial cases the usual lenient pleading standard under Rule 8(a) gave too much settlement leverage to plaintiffs. That is, if a non-specific complaint was enough to survive a motion to dismiss, plaintiffs would be able to extract undeservedly high settlements from deep-pocket companies. In *Iqbal,* by contrast, the Court was concerned that the usual lenient standard under Rule 8(a) would provide too little protection for high-level executive branch officials who allegedly engaged in misconduct in the aftermath of September 11, 2001. To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard. But whatever the difference between these cases, we can at least state the following two principles common to all of them. First, allegations in a complaint or counterclaim must be sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it. Second, the allegations must be sufficiently plausible that it is not unfair to require the opposing party to be subjected to the expense of discovery. . . . Viewed in the light of all of the Supreme Court's recent cases, we hold that the allegations of Starr's complaint satisfy the standard of Rule 8(a). We do not so hold merely because Starr's complaint, like the complaint in *Erickson,* alleges deliberate indifference in violation of the Eighth and Fourteenth Amendments. Rather, we so hold because his complaint complies with the two principles just stated. First, Starr's complaint specifically alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca. The complaint specifically alleges that Sheriff Baca was given notice of all of these incidents. It specifically alleges, in addition, that Sheriff Baca was given notice, in several reports, of systematic problems in the county jails under his supervision that have resulted in these deaths and injuries. Finally, it alleges that Sheriff Baca did not take action to protect inmates under his care despite the dangers, created by the actions of his subordinates, of which he had been made aware. These allegations are neither 'bald' nor 'conclusory.'. . Rather, they are sufficiently detailed to give notice to Sheriff Baca of the nature

of Starr's claim against him and to give him a fair opportunity to defend against it. . . . Second, the factual allegations in Starr's complaint plausibly suggest that Sheriff Baca acquiesced in the unconstitutional conduct of his subordinates, and was thereby deliberately indifferent to the danger posed to Starr. There is no 'obvious alternative explanation,' within the meaning of *Iqbal*, for why Sheriff Baca took no action to stop his subordinates' repeated violations of prisoners' constitutional rights despite being repeatedly confronted with those violations, such that the alternative explanation requires us to conclude that Starr's explanation 'is not a plausible conclusion.'. . If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *implausible.* The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only 'plausibly suggest an entitlement to relief.'. . As the Court wrote in *Twombly*, Rule 8(a) '*does not impose a probability requirement at the pleading stage;* it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' to support the allegations. . . Starr's complaint satisfies that standard. . . . We hold that the Supreme Court's decision in *Iqbal* did not alter the substantive requirements for supervisory liability claims in an unconstitutional conditions of confinement case under the Eighth and Fourteenth Amendments where deliberate indifference is alleged. We further hold that Starr has sufficiently alleged under Rule 8(a) a supervisory liability claim of deliberate indifference against Sheriff Baca. We therefore reverse the district court's dismissal of Starr's claim against Sheriff Baca and remand for further proceedings.")

Starr v. Baca, 652 F.3d 1202, 1218, 1219, 1221 (9th Cir. 2011) (Trott, J., dissenting), *reh'g en banc denied by* ***Starr v. County of Los Angeles***, 659 F.3d 850 (9th Cir. 2011) and *cert. denied by* ***Baca v. Starr***, 132 S. Ct. 2101 (2012) ("Alleging that the Sheriff '*could*' have known, '*should*' have known, and '*should*' have become aware is tantamount to admitting that Starr had no facts to support his allegations. The test that governs this case consists of two words, not one. Indifference is not enough. For indifference to be actionable, it must be deliberate. Starr's conclusory allegations amount to no more than formulaic flak fired into the sky in an attempt to bring down the squadron leader. When we cease to look at the Los Angeles Sheriff's Department (LASD) as an abstraction and look at the reality, we see good reasons for requiring facts before permitting lawsuits against the Sheriff himself: the agency is gigantic. The LASD is the largest Sheriff's Department in the world. It covers 3,171 square miles, 2,557,754 residents, and by contract 42 of the 88 incorporated cities in Los Angeles County. The Department employs 8,400 law enforcement officers and 7,600 civilians and is responsible for 48 courthouses and 23 substations. The Men's Central Jail alone houses a revolving population of 5,000 inmates. In addition, the Department operates the Twin Towers Correctional Facility, the Mira Loma Detention Facility, the Pitchess Detention Center, and the North County Correctional Center. Persons charged with or convicted of crimes are in over one hundred different locations. The layers of administration and management between what happens in a jail are many and they are complex. To infer that specific incidents which occur in a jail are necessarily known by the Sheriff is to engage in fallacious logic.

This complexity does not absolve the Department of responsibility for respecting the constitutional rights and general well-being of its charges, but it does show how inappropriate it is to sue the Sheriff individually *unless* in terms of causation the Sheriff can be personally tied to the actionable behavior at issue. Just being a disappointing or even an insufficiently engaged public servant is not enough. Those issues are for the ballot box and the County Board of Supervisors, not the courts. . . . The days of pleading conclusions without factual support accompanied by the wishful hope of finding something juicy during discovery are over. Wisely, we have moved up judgment day to the complaint stage rather than bog down the courts and parties with pre-summary judgment combat. This conclusion, of course, does not leave Starr without redress. He may sue the Sheriff in his official capacity, which is the same as suing the County of Los Angeles and the Sheriff's Department, and he may pursue his lawsuit on the ground of official policy or longstanding custom and practice–but he may not sue the Sheriff individually just because he is the Sheriff.")

Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) ("Because Hebbe is an inmate who proceeded *pro se,* his complaint 'must be held to less stringent standards than formal pleadings drafted by lawyers,' as the Supreme Court has reaffirmed since *Twombly***.** *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). *Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings; accordingly, we continue to construe *pro se* filings liberally when evaluating them under *Iqbal.* . . . We therefore join the five other circuits that have determined that *pro se* complaints should continue to be liberally construed after *Iqbal. See McGowan v. Hulick*, 612 F.3d 636, 640-42 (7th Cir.2010); *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461-62 (5th Cir.2010); *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 n. 2, 1125 (10th Cir.2010); *Capogrosso v. Sup.Ct. of N.J.*, 588 F.3d 180, 184 & n. 1 (3d Cir.2009); *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir.2009) (noting that even following *Twombly* and *Iqbal*, 'we remain obligated to construe a pro se complaint liberally'). . . . While the standard is higher, our 'obligation' remains, 'where the petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.' *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir.1985) (en banc).").

Krainski v. Nevada ex rel. Board of Regents of Nevada System of Higher Educ., 616 F.3d 963, 969 (9th Cir. 2010) ("Krainski failed to allege in her complaint or at oral argument any facts suggesting that any of the officers had a reason to suspect the falsity of the statements made by the victim and two other university employees; instead, she merely alleged in a conclusory fashion that the officers 'knew, or should have known, that the allegations ... were false' and that they failed to conduct an adequate investigation. The record does not contain any information that would create a genuine issue of material fact as to whether the officers had facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and that Krainski was the perpetrator. We conclude that qualified immunity applies, as 'a reasonable police officer could have believed that his or her conduct was lawful' when arresting a suspect following a report from two university employees and a student alleging an attack. We thus affirm the district court's dismissal of Krainski's Amendment Fourth cause of action against the UNLV Employees based on the defendants' entitlement to qualified immunity.").

Krainski v. Nevada ex rel. Board of Regents of Nevada System of Higher Educ., 616 F.3d 963, 972 (9th Cir. 2010) (B. Fletcher, J., concurring in part and dissenting in part) ("The district court erred by dismissing Krainski's Fourth Amendment claim and abused its discretion by dismissing the complaint without leave to amend. I therefore respectfully dissent from the portion of the majority's opinion that affirms the district court's decision in those respects. If the UNLV police officers who arrested Krainski knew or should have known that the allegations against her were false, the police officers would have violated the Fourth Amendment's clearly established prohibitions. . .The majority, however, deems Krainski's Fourth Amendment claim too conclusory to survive. Krainski's complaint is more than 'legal conclusions' or a 'recital[ ] of the elements of a cause of action,' *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 1950 (2009), because she alleges more than simply that UNLV police lacked probable cause to arrest her. She alleges in some detail the factual circumstances under which the arrest took place. . . She also alleges facts that explain *why* the police lacked probable cause– namely, that the police 'knew, or should have known, that the allegations [against her] were false.' That allegation is enough to satisfy Federal Rule of Civil Procedure 8(a) and to survive a motion under Rule 12(b)(6). The Supreme Court has expressly approved as adequate an analogous complaint alleging negligence. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n. 4 (2002) (quoting Fed.R.Civ.P. app. Form 9 (2000)). . . . Krainski has adequately stated a claim for a violation of the Fourth Amendment.").

Alvarez v. Hill, 518 F.3d 1152, 1159 (9th Cir. 2008) ("Appellees' rigid insistence that RLUIPA claims must be specifically pled in the plaintiff's complaint is without support in our precedent and frankly puzzling in view of the lenience traditionally afforded *pro se* pleadings and of RLUIPA's manifest purpose of protecting 'institutionalized persons who are unable freely to attend to their religious needs.' . . The 'simplified pleading standard applies to all civil actions, with limited exceptions' provided for by rule or by statute. . . Accordingly, we hold that RLUIPA claims need satisfy only the ordinary requirements of notice pleading , and that a complaint's failure to cite RLUIPA does not preclude the plaintiff from subsequently asserting a claim based on that statute. Under this pleading standard, it is sufficient that the complaint, alone or supplemented by any subsequent filings before summary judgment, provide the defendant fair notice that the plaintiff is claiming relief under RLUIPA as well as the First Amendment.")**.**

Walker v. Wechsler, No. 116CV01417JLTPC, 2016 WL 5930420, at *2 (E.D. Cal. Oct. 12, 2016) ("While 'plaintiffs [now] face a higher burden of pleadings facts ...,' . . . the pleadings of *pro se* inmates and detainees are still construed liberally and are afforded the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). . . . If he chooses to file a first amended complaint, Plaintiff should endeavor to make it as concise as possible. He should merely state which of his constitutional rights he feels were violated by each named defendant and its factual basis. Plaintiff need not and should not cite legal authority for his claims in a first amended complaint. His factual allegations are accepted as true and need not be bolstered by legal authority at the pleading stage. If Plaintiff files a first amended complaint, his factual allegations will be screened under the legal standards and authorities stated in this order.")

Perez v. United States, 13CV1417-WQH-BGS, 2014 WL 4385473, *15 (S.D. Cal. Sept. 3, 2014) ("The conclusory allegation that the Rocking Policy was implemented and carried out on persons 'on the basis of their Hispanic descent and perceived Mexican origin' is not entitled to an assumption of truth. The same is true for the allegation that the Agents shot Yañez 'on the basis of his Hispanic descent and Mexican origin.' Although the FAC alleges that the Rocking Policy is only carried out along the Southern Border and only against Mexicans and persons of Hispanic descent, there is an 'obvious alternative explanation' for this perceived discrimination. . . On the facts alleged, '[i]t should come as no surprise that a ... policy directing [Border Patrol agents to treat instances of rock throwing at the Southern Border as deadly force] would produce a disparate, incidental impact on [Mexican nationals and persons of Hispanic descent], even though the purpose of the policy was to target neither [Mexican nationals or persons of Hispanic descent].'. . The Court concludes that Plaintiffs have failed to state an Equal Protection claim for intentional discrimination.")

Sablan v. A.B. Won Pat Intern. Airport Authority, Guam, Civil No. 10-00013, 2010 WL 5148202, at *4 (D. Guam Dec. 9, 2010) ("Now, when evaluating employment discrimination complaints in the context of a Rule 12(b)(6) motion to dismiss, district courts in the Ninth Circuit are proceeding on the premise that although it may not be *necessary* that the complaint have facts constituting all the elements of a *prima facie* in order to survive the motion to dismiss, those elements are nonetheless *relevant* to the court's analysis of the sufficiency of the complaint. [collecting cases] Common to all these cases is the recognition that although the elements of a *prima facie* employment discrimination case constitute 'an evidentiary standard, not a pleading requirement' (*Swierkiewicz,* 534 U.S. at 514), *Twombly* and *Iqbal* have indisputably pushed pleading standards a bit back in the direction of fact pleading. Courts therefore *must* look at a complaint in light of the relevant 'evidentiary standard,' in order to decide whether it 'contain [s] sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."'. . The idea, then, is not that *Swierkiewicz* has been overruled, but rather that, after *Twombly* and *Iqbal,* an employment discrimination plaintiff must get closer to alleging a *prima facie* case than was necessary a few years ago.")

Microsoft Corp. v. Phoenix Solutions, Inc., 741 F.Supp.2d 1156, 1159 (C.D. Cal. 2010) ("This Court agrees with the Federal Circuit and those district courts that have held that a party alleging direct infringement need only comply with Form 18. A patentee 'need only plead facts sufficient to place the alleged infringer on notice as to what he must defend.'. . This Court additionally reasons that minimal pleading of direct infringement is sufficient because this Court requires the prompt filing of infringement contentions, which put the party accused of infringement on detailed notice of the basis for the allegations against it. Correspondingly, the Court finds that a declaratory judgment claim of no direct infringement need only plead facts to put the patentee on notice and need not be subject to the heightened pleading standards of *Twombly* and *Iqbal*. . . . All other claims, counterclaims and affirmative defenses in a patent case are subject to the requirements of Federal Rule of Civil Procedure 8(a) as interpreted by the Supreme Court in *Twombly* and *Iqbal*, except

for inequitable conduct.")

Lucas v. City of Visalia, No. 1:09-CV-1015 AWI DLB, 2010 WL 2867287, at *4, *5 (E.D. Cal. July 21, 2010) ("If Lucas intends to allege a manufacturing defect, he must *identify/explain how* the taser weapon either deviated from Taser Int.'s intended result/design or *how* the taser weapon deviated from other seemingly identical taser models. . . A bare allegation that the taser weapon had 'a manufacturing defect' is an insufficient legal conclusion. *Iqbal,* 129 S.Ct. at 1949-50. If Lucas intends to allege a design defect claim, he should identify which design defect theory he wishes to utilize. Under the consumer expectations test, Lucas 'should *describe how* the [taser weapon] failed to meet the minimum safety expectations of an ordinary consumer' of taser weapons… Under the risk-benefits test, Lucas should allege that the risks of the design outweigh the benefits, and then *'explain how* the particular design of the [taser weapon] caused [Lucas] harm.'. .Again, a bare allegation that the taser weapon suffered from a 'design defect' is an insufficient legal conclusion…Dismissal of tenth cause of action is appropriate because the complaint contains no factual allegations that identify what aspect of the subject taser's design and manufacture made it defective. Since it is not clear that amendment would be futile, the Court will dismiss the SAC with leave to amend.")

Ernst v. Cate, No. 1:08-cv-01940-OWW-GSA, 2009 WL 3818227, at *4 (E.D. Cal. Nov. 13, 2009) ("Plaintiff's second cause of action is the only claim in which plaintiff contends that the defendants, including Cate, acted intentionally. First, plaintiff alleges, 'The defendants decided to punish [plaintiff] for the crime he was convicted of by placing him in his wheelchair, unrestrained, in a van traveling 70 miles per hour, and then applying the brakes' (doc. 16, & 33). Later, plaintiff claims, 'Defendants discriminated against plaintiff because of his disability-willfully and indifferently ignored his need to be restrained within the van transporting him to a facility he needed to visit for medical reasons' (doc. 16, & 36). Because plaintiff provides no factual support for these legal conclusions, he fails to satisfy the pleading standards set forth in *Iqbal* and *Twombly.* Although a court evaluating a Rule 12(b)(6) motion to dismiss is instructed to assume the truth of all factual allegations of the plaintiff and the reasonable inferences to be drawn from them, it need not accept as true unreasonable inferences or conclusory allegations masquerading as facts. . . .That the CDCR Secretary and Assistant Director acted in concert with two corrections officers 'to punish [plaintiff] for the crime he was convicted of by placing him in his wheelchair, unrestrained, in a van traveling 70 miles per hour, and then applying the brakes' strains credulity. Similarly, the underlying facts offer nothing to suggest that Cate 'discriminated against plaintiff because of his disability-willfully and indifferently ignored his need to be restrained within the van transporting him to a facility he needed to visit for medical reasons.'").

Doe ex rel. Gonzales v. Butte Valley Unified School Dist., No. CIV. 09-245 WBS CMK, 2009 WL 2424608, at *8, *9 (E.D. Cal. Aug. 6, 2009) ("Although *Iqbal'* s majority opinion itself did not intimate any seachange, jurists and legal commentators have observed that the decision marks a striking retreat from the highly permissive pleading standards often thought to distinguish the federal system from " 'the hyper-technical, code-pleading regime of a prior era,' 129 S.Ct. at 1949.

. .Prior to *Iqbal*, many courts–including this court and, apparently, the Supreme Court itself–read Rule 8 to express a 'willingness to Aallow [ ] lawsuits based on conclusory allegations ... to go forward,"'. . . . Indeed, for over half a century, district courts had been instructed that the 'short plain statement' required by Rule 8 'must simply Agive the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."'. . . Now, however, even the official Federal Rules of Civil Procedure Forms, which were touted as 'sufficient under the rules and ... intended to indicate the simplicity and brevity of the statement which the rules contemplate,' Fed. R. Civ. Proc. 84, have been cast into doubt by *Iqbal*. . . Accordingly, although the court will grant in part defendants' motion to dismiss, the court will also permit plaintiff leave to amend. Plaintiff, however, is admonished to thoroughly and carefully set forth his allegations in any subsequent amended complaint, as both judicial resources and fairness to defendants preclude unlimited opportunities to amend the pleadings.").

Ibrahim v. Department of Homeland Sec., No. C 06-00545 WHA, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009) ("Ibrahim has not pleaded that defendants took action because of and not merely in spite of her being Muslim and a Malaysian citizen. That plaintiff was Muslim and detained is not enough to draw an inference of discrimination under the *Iqbal* standard. No additional facts, such as derogatory statements, are alleged. Accordingly, as pled, the discrimination claims against San Francisco officers or Bondanella are insufficient. A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court. Yet, the harshness is mitigated here. Counsel for the San Francisco defendants and Bondanella admit that plaintiff's Fourth Amendment claim can go forward. This means that discovery will go forward. During discovery, Ibrahim can inquire into facts that bear on the incident, including why her name was on the list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.").

TENTH CIRCUIT

Matthews v. Bergdorf, 889 F.3d 1136, 1144-45, 1149-50 (10th Cir. 2018) ("In its order denying the caseworkers' motion to dismiss, the district court opined that the caseworkers, rather than making any individualized arguments, 'collectively' asserted the defense of qualified immunity. . . The caseworkers, according to the court, argued only that the complaint's factual allegations were not 'conscience shocking.'. . Therefore, instead of asking whether the complaint stated a claim under the special relationship exception as to *each* caseworker, the district court only asked whether the complaint alleged 'any possible claims' that shocked the conscience. . . .The district court's approach constituted error because it shifted the burden to the caseworkers to establish their entitlement to qualified immunity. Perhaps the advocacy of the caseworkers' trial counsel in the district court was less than stellar. But where multiple state actors raise a qualified immunity defense in a motion to dismiss, 'good as to one, good as to all' is *never* the proper approach to adjudicating the sufficiency of the complaint. . . . Before a court may undertake

the proper analysis, the complaint must 'isolate the allegedly unconstitutional acts of each defendant'; otherwise the complaint does not 'provide adequate notice as to the nature of the claims against each' and fails for this reason. . . Here, the caseworkers' assertion of qualified immunity in their motion, an assertion they made multiple times therein, gave rise to a presumption that they were immune from suit. . . This presumption operated such that when the caseworkers raised the defense of qualified immunity, the burden shifted to Plaintiffs to demonstrate the complaints' factual allegations established their right to recover against *each* caseworker. . . If Plaintiffs then failed to establish either prong of the qualified immunity analysis as to any caseworker, that caseworker was entitled to prevail on his or her defense. . . In sum, the burden was on Plaintiffs to overcome the presumption of immunity that arose as to each individual caseworker once the caseworkers raised the qualified immunity defense. *Pahls* tells us exactly this. There we explained that to state a viable § 1983 claim *and* overcome a qualified immunity defense, plaintiffs 'must establish that each defendant ... [violated] plaintiffs' clearly established constitutional rights.... *Plaintiffs must do more than show ... that "defendants," as a collective and undifferentiated whole, were responsible for those violations*.'. . What this means for our purposes is that every named Plaintiff had the burden of adequately pleading every element of his or her claim under the special relationship exception—including the existence of a special relationship between himself or herself and the State—against one or more named caseworkers. Whether a plaintiff has adequately pled a special relationship with the State should be the first inquiry in cases like this. 'The existence of the special relationship is the pivotal issue.'. . In its absence, an ODHS caseworker cannot be held liable under the special relationship exception to a Plaintiff suffering injuries at the hands of Jerry and Deidre Matthews—no matter how shocking the complaint's factual allegations. . . .Discovery may proceed on Plaintiff M.S.'s claim against Defendant Bergdorf because in 2005 the law was well established such that a reasonable caseworker cognizant of the governing law would have understood Bergdorf's failure to protect M.S. in light of child abuse and neglect allegations might give rise to constitutional liability under the special relationship exception. . . Thus, the district court properly denied caseworker Bergdorf's defense of qualified immunity as to M.S.'s particular claim against her. To the extent the complaint otherwise purports to state any cause of action under the special relationship exception, however, the district court, for the reasons stated, erred in denying the caseworkers qualified immunity.")

Ghailani v. Sessions, 859 F.3d 1295, 1304-06 (10th Cir. 2017) ("The district court dismissed Mr. Ghailani's religious freedom claim with prejudice on the basis that he failed to meet the requirements of *Gee* in his complaint, i.e., that he did not include facts showing the regulations restricting his ability to pray Jumu'ah were not related to a legitimate penological interest. We agree with this analysis as applied to Mr. Ghailani's First Amendment claim. However, Mr. Ghailani also pled that the restriction on his ability to pray was a violation of RFRA. The district court erred in applying the same pleading requirement to the RFRA claim as it did to the constitutional religious freedom claim. . . . Because the *Turner* standard does not apply to a RFRA claim, a prisoner-plaintiff clearly need not plead facts showing 'that the actions of which he complains were *not* reasonably related to legitimate penological interests,' as *Gee* required for

First Amendment claims. Accordingly, while the district court properly dismissed Mr. Ghailani's First Amendment claim alleging that the prison violated his free exercise rights by not allowing him to pray Jumu'ah, it erred in dismissing his RFRA claim. Moreover, just as Mr. Ghailani did not need to plead facts showing the government lacked a legitimate penological interest, he also did not need to plead facts showing that the restrictions were not in 'furtherance of a compelling governmental interest' and were not 'the least restrictive means of furthering that compelling governmental interest.' 42 U.S.C. § 2000bb-1(b)(1)-(2). Subsection (b) of RFRA is an 'affirmative defense,' and 'the burden is placed squarely on the Government by RFRA.'")

Vega v. Davis, 572 F. App'x 611, 618-19 (10th Cir. 2014) ("In his response brief, the plaintiff essentially argues that the warden could be liable for any suicide by a mentally ill person in the Control Unit because of his knowledge that there were mentally ill people in the Control Unit that were not receiving mental health services. However, the complaint's only non-conclusory fact supporting the inference that Davis knew about the lack of treatment in the Control Unit was his single visit there. Although it is certainly *possible* that on his tour he witnessed enough in the Control Unit to make it obvious that there was a systematic denial of mental health care, we conclude from our 'judicial experience and common sense' that a single visit does not 'plausibly suggest' that Davis knew enough to be deliberately indifferent to Control Unit inmates. . . . Certainly, there is much in this complaint that, if true, is deeply concerning. However, we are counseled by *Iqbal* to remember that 'each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.'. . The fact that allegations in this complaint, if true, expose significant shortcomings in the treatment of mentally-ill prisoners at ADX cannot negate that requirement.")

Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1219, 1220 (10th Cir. 2011) ("[I]n the wake of *Twombly* and *Iqbal*, and consistent with our cases establishing a more refined analytical framework for class-of-one claims, we must apply the plausibility standard with care. As at least one circuit has found, in light of *Iqbal*, a generalized pleading in the mold of *Olech* is no longer sufficient to state a class-of-one claim. *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55 (2d Cir.2010), *cert. denied*, 131 S.Ct. 824 (2010). In that case, for example, the Second Circuit upheld the dismissal of plaintiffs' claim against the defendant town, for failure to set out specific examples of similarly situated individuals and differing treatment. . . We likewise dismissed a class-of-one claim on similar grounds in an unpublished but representative opinion. *See Glover v. Mabrey*, 384 F. App'x 763, 778 (10th Cir.2010) ("[Plaintiff] has failed to allege, as it must, the identity or characteristics of other, similarly situated contractors and how those similarly situated contractors were treated differently."). . . With these principles in mind, and consistent with our holdings in *Robbins*, 519 F.3d at 1247, 1253 and *Smith*, 561 F.3d at 1098, plaintiffs must offer enough specific factual allegations to 'nudge[ ] their claims across the line from conceivable to plausible.'. . . As we discussed above, after *Twombly* and *Iqbal*, it is insufficient to simply allege that other, unidentified properties have 'comparable' or 'similar' conditions–the claim must be supported by specific facts plausibly suggesting the conditions on the properties and the properties themselves are similar in all material respects. These cursory allegations are inadequate to support

any class-of-one claim. But they are particularly problematic here, where the complaint addresses the inherently subjective and individualized enforcement of health and safety regulations. Unlike *Olech,* this is not a case where the regulatory decision is a simple, one-dimensional inquiry, resolved with a tape measure. Rather, Kansas Penn challenges an act of regulatory enforcement that implicates a 'multiplicity of relevant (nondiscriminatory) variables,' 'from the relative culpability of the defendants to the optimal deployment of prosecutorial resources,' making it 'correspondingly more difficult to bring an equal protection claim.'. . Because Kansas Penn has failed to allege facts suggesting that other property owners were similarly situated in all material respects, the district court did not err in dismissing the complaint.")

Gee v. Pacheco, 627 F.3d 1178, 1185,1186 (10th Cir. 2010) ("Although the plausibility standard has been criticized by some as placing an improper burden on plaintiffs, denying them proper access to the courts, that criticism ordinarily would not apply to the restrictions on prisoner complaints described above. One of the chief concerns of critics is that plaintiffs will need discovery before they can satisfy plausibility requirements when there is asymmetry of information, with the defendants having all the evidence. But prisoners claiming constitutional violations by officers within the prison will rarely suffer from information asymmetry. Not only do prisoners ordinarily know what has happened to them; but they will have learned how the institution has defended the challenged conduct when they pursue the administrative claims that they must bring as a prerequisite to filing suit. . . Of course, if the complaint alleges that the prisoner received no explanation in the grievance process (or was coerced into not pursuing a grievance), the claim that an officer's conduct lacked justification may become plausible. To be sure, a pro se prisoner may fail to plead his allegations with the skill necessary to state a plausible claim even when the facts would support one. But ordinarily the dismissal of a pro se claim under Rule 12(b)(6) should be without prejudice, . . . and a careful judge will explain the pleading's deficiencies so that a prisoner with a meritorious claim can then submit an adequate complaint[.]")

Mink v. Knox, 613 F.3d 995, 1002 (10th Cir. 2010) (amended complaint "plausibly asserted the requisite casual connection between [prosecutor's] conduct and the search and seizure that occurred at [plaintiff's] home.")

Smith v. U.S., 561 F.3d 1090, 1104, 1105 (10th Cir. 2009) ("To state an Eighth Amendment *Bivens* claim, Smith had to allege that each defendant official. . . acted with deliberate indifference–that he or she both knew of and disregarded an excessive risk to inmate health or safety. . . . As the litigation progresses, it is possible the government will produce evidence showing that some or all of the individual defendants did not know that the 1994 Ramsey-Schilling survey disclosed the presence of asbestos in the closet, or more generally, that an individual defendant did not know of the presence of asbestos in the closet, based on simple lack of knowledge or intervening circumstances. However, these are matters to be determined at a later point in this case. Smith has satisfied the standard enunciated in *Robbins*–the defendants are on fair notice of who is alleged to have done what to whom, *Robbins,* 519 F.3d at 1249–as to all defendants named in their individual

capacities other than Alberto Gonzales and H. Lappin (the director of the Federal Bureau of Prisons).").

Choate v. Lemmings, Nos. 07-7099, 07-7100, 08-7010, 2008 WL 4291199, at *5 (10th Cir. Sept. 22, 2008) (not reported) ("The Supreme Court made clear in *Gomez* that there is no basis for imposing on a § 1983 plaintiff the obligation to anticipate and plead around the qualified immunity defense. . . More recently, in the wake of *Crawford-El v.. Britton*, 523 U.S. 574 (1998), this court specifically rejected a heightened pleading standard for civil rights plaintiffs facing the immunity defense. *See Currier v. Doran*, 242 F.3d 905, 916-917 (10th Cir.2001). A § 1983 complaint needs but two allegations to state a cause of action: (1) that the plaintiff was deprived of a federal right; and (2) that the person who deprived him acted under color of state law. . . Moreover, these allegations need not be pled with specificity. All that is required are 'sufficient facts, that when taken as true, provide plausible grounds that discovery will reveal evidence to support plaintiff's allegations.'").

Briggs v. Johnson, No. 07-6037, 2008 WL 1815721, at *4-*6(10th Cir. Apr. 23, 2008) (not published) ("Construing his complaint in the light most favorable to him, Briggs has alleged that Defendants, Jean Bonner, and Carla Lynch, acting in concert, instructed at least one person to cease reporting ongoing abuse perpetrated against Kelsey. Clearly, this conduct was directed specifically at Kelsey, not the public at large. Further, it is evident from a reading of the entire complaint that Kelsey's guardian, her paternal grandmother, was involved in reporting that Kelsey was being abused during her unsupervised visits with Smith. As we recognized in *Currier*, the act of instructing individuals to cease reporting abuse has the effect of impeding access to protective services or other sources of assistance otherwise promptly available to the victim at the time of the abuse. . . Thus, if true, Defendants' actions imposed an immediate threat of harm to Kelsey which was limited in range and duration. Accordingly, we conclude Briggs has sufficiently alleged that Defendants created or increased Kelsey's vulnerability to abuse by their alleged act of discouraging the reporting of additional incidents of abuse. . . . Briggs's complaint differs from the complaint we concluded was insufficient in a recent case also involving allegations of substantive due process violations by state employees. *See Robbins*, 2008 WL 747132, at *5-*8. In contrast to the complaint in *Robbins*, Briggs's allegation that Defendants discouraged the reporting of additional incidents of abuse is specific enough to give Defendants fair notice of the grounds on which he claims entitlement to relief. Based on this allegation, the district court had no difficulty applying *Currier* to determine that the constitutional right asserted was clearly established. . . . We affirm the denial of Defendants' motion to dismiss to the extent they assert an entitlement to qualified immunity on Briggs's danger creation claim predicated on their act of discouraging the reporting of additional incidents of abuse.")

VanZandt v. Oklahoma Dept. of Human Services, 276 F. App'x 843, 2008 WL 1945344, at *3 (10th Cir. May 5, 2008) ("This Court, in *Robbins*, stated that plausibility serves two purposes: (1) to weed out claims that, absent additional pleadings, do not have a reasonable prospect of success, and (2) to inform the defendants of the actual grounds of the claim against them. . . A court,

therefore, must review a complaint with these purposes in mind. Not surprisingly, the *Twombly* Court is critical of complaints that do not mention specific times, places or people involved. . . This Court also acknowledged that the degree of specificity necessary to establish plausibility and fair notice is dependant on the context of the case involved. . . Although we apply the same standard in evaluating dismissals in qualified immunity cases as to dismissals generally, complaints in § 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants. . . The *Twombly* standard has greater 'bite' in these contexts, 'reflecting the special interest in resolving the affirmative defense of qualified immunity Aat the earliest stage of a litigation.'". . Therefore, in § 1983 cases, a plaintiff must 'make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her....'. . . Of course, neither *Twombly* nor *Robbins* requires, and we do not demand, the sort of specificity required in claims subject to Fed.R.Civ.P. 9(b). . . . To carry their burden, plaintiffs under the *Twombly* standard must do more than generally use the collective term 'defendants.'. . This Court, in *Robbins*, placed great importance on the need for a plaintiff to differentiate between the actions of each individual defendant and the actions of the group as a whole. . . This is because the purposes of plausibility, notice and gatekeeping, are best served by requiring plaintiffs to directly link an actual individual with the alleged improper conduct.")**.**

Robbins v. Oklahoma, 519 F.3d 1242, 1247-50 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid. *See Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir.2007) (referring to the 'conflicting signals' in the *Twombly* opinion); *Phillips v. County of Allegheny*, 2008 WL 305025, at *3 (3d Cir. Feb. 5, 2008) (calling the opinion 'confusing'). As best we understand it, however, the opinion seeks to find a middle ground between 'heightened fact pleading ,' which is expressly rejected . . . and allowing complaints that are no more than 'labels and conclusions'or 'a formulaic recitation of the elements of a cause of action,' which the Court stated 'will not do.' . . The most difficult question in interpreting *Twombly* is what the Court means by 'plausibility.' The Court states that the complaint must contain 'enough facts to state a claim to relief that is plausible on its face.' . . But it reiterates the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven. . . . Thus, 'plausible' cannot mean 'likely to be true.' Rather, 'plausibility' in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.' . . The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief. . . This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them. 'Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.' . . . The *Twombly* Court was particularly critical of complaints that 'mentioned no specific time, place, or person involved in the alleged conspiracies.' . . . The Third

Circuit has noted, and we agree, that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context: 'Context matters in notice pleading . Fair notice under Rule 8(a)(2) depends on the type of case....' [citing *Phillips*] . . . . The context of this case is a claim of qualified immunity by state officials or employees who were sued for damages in their personal capacity for injuries to a child inflicted by a third party. . . .To 'nudge their claims across the line from conceivable to plausible,' *Twombly*, 127 S.Ct. at 1974, in this context, plaintiffs must allege facts sufficient to show (assuming they are true) that the defendants plausibly violated their constitutional rights, and that those rights were clearly established at the time. . . . Although we apply 'the same standard in evaluating dismissals in qualified immunity cases as to dismissals generally,'. . . complaints in § 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants. The *Twombly* standard may have greater bite in such contexts, appropriately reflecting the special interest in resolving the affirmative defense of qualified immunity 'at the earliest possible stage of a litigation.'. . . Given the complaint's use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed. . . . In addition to the failure of Count I to satisfy the standard of fair notice required by Rule 8, the plaintiffs do not allege facts sufficient to render their [state-created-danger and equal protection] claim[s] plausible.")

Dorf v. City of Evansville, No. 11–CV–351–S, 2012 WL 1440343, at *4, *5 & n.2 (D. Wyo. Apr. 22, 2012) ("In noting that Plaintiff's allegations are made 'upon information and belief,' the Court does not suggest that such allegations made are improper under *Iqbal* and *Twombly.* As the Sixth Circuit recently observed, the plausibility standard of *Iqbal* and *Twombly:*

> does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.

Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir.2010) (internal quotation marks and citations omitted). Here, however, even though Plaintiffs' allegations are made 'upon information and belief,' there is simply no '*factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . Nor is the nature of Officer Pena's alleged prior misconduct a matter that is 'peculiarly within the possession and control' of defendants.")

ELEVENTH CIRCUIT

McCullough v. Finley, No. 17-11554, 2018 WL 5318146, at *6-8 (11th Cir. Oct. 29, 2018) ("The jailees allege that the mayor and chiefs, government officials 'at the highest level,'. . . created and implemented an unlawful scheme and intentionally subjected them to that scheme, but *Iqbal* illustrates why the jailees are 'armed with nothing more than conclusions[.]. .Substitute

the mayor for the attorney general and the chiefs for the FBI director in *Iqbal*, and the comparison is uncanny. Like the complaint in *Iqbal*, which labeled the attorney general as the 'principal architect' and the FBI director as the 'instrument[ ]' behind an unlawful detention policy, the jailees' complaint alleges that the mayor 'adopted' and the chiefs 'administered' an unlawful scheme to increase municipal revenue. The complaint in *Iqbal* alleged that the attorney general and the FBI director 'knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy.'. . Similarly, the jailees allege that the mayor and chiefs 'adopted, ratified[,] and administered policies, practices[,] or customs' that were 'part of a scheme designed to increase municipal budgets ... through imprisonment for nonpayment [of fines] ... and the use of coerced jail labor.' And the jailees allege that the mayor and chiefs acted 'intentionally and unlawfully,' as well as 'recklessly, wantonly, willfully, maliciously, or in bad faith.' We must discard the conclusory allegations that the mayor and chiefs created and implemented a scheme. As the Supreme Court has explained, allegations that government officials were the 'principal architect' and instrument[ ]' behind an unlawful policy, without supporting allegations, are conclusory. The allegations that the mayor 'adopted' and the chiefs 'administered' an unlawful scheme to increase municipal revenue, without more, are 'not entitled to be assumed true.'. . And the allegations that the mayor and chiefs intended to subject jailees to the scheme are conclusory. The district court ruled that the jailees' allegations are 'very much tied to bad faith,' but it ignored that these allegations merely recite the legal elements that the jailees must establish to overcome state-agent immunity. . . The jailees cannot overcome the mayor's and chiefs' immunity with conclusory allegations that 'carry no weight.'. .The absence of allegations about any individual acts of the mayor or chiefs reinforces the conclusory nature of the jailees' complaint. The jailees allege that the mayor and chiefs are 'individually liable for their acts or omissions,' but the complaint fails to 'provid[e] the facts from which one could draw such a conclusion.'. . The complaint alleges the mayor's and chiefs' names and titles, but nothing about 'the significance of their titles, their individual roles in the [scheme], their personal interactions or familiarity with [jailees], their length of service, their management policies, or any other characteristics that would bear on whether they knew about' the scheme that they allegedly operated. . . We cannot even infer from the complaint when either chief was in office. Nor can we infer that the mayor or chiefs were ever present in a municipal courtroom when jailees were sentenced or in a municipal jail when jailees were forced to work. After we discard conclusory allegations, the second step in our evaluation of a complaint is to assume that any remaining factual allegations are true and determine whether those allegations state a plausible claim. . . To state a plausible claim, factual allegations must 'allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . That is, a complaint must contain factual allegations that are 'enough to raise a right to relief above the speculative level.'. . Factual allegations, although consistent with a plaintiff's theory, may fail to state a plausible claim 'given more likely explanations.'. . The jailees argue that their complaint contains 'great factual detail,' but we disagree. After discarding their conclusory allegations, we struggle to find factual allegations left in the complaint, and the few factual allegations that remain do not state a plausible claim. The jailees allege that the City of Montgomery collected more fines and court costs than the City of Huntsville, which has a similar population, but even if true, the difference in municipal

revenues does not 'nudge[ ] [the jailees'] claims across the line from conceivable to plausible.'. . Perhaps there is more crime in Montgomery. This lone factual allegation does not support a plausible inference of a scheme by the mayor and chiefs, 'given more likely explanations' for the difference in municipal revenues. . . The alleged difference in revenues fails to raise the jailees' 'right to relief above the speculative level.'. .The jailees' complaint contains factual allegations about misconduct in the municipal court, but as we explained, that misconduct concerns judicial acts. And any connection between the judicial acts and the mayor and chiefs is 'too chimerical to be maintained.'. . The jailees do not allege that the mayor or chiefs presided over any proceedings in which they could have informed a defendant of his rights, appointed counsel, or considered alternative sentences. And certainly, the mayor and chiefs did not sentence jailees to sit-out their fines. No factual allegations in the complaint plausibly connect the mayor or chiefs to these judicial acts, and without any 'factual enhancement,' the complaint 'stops short of the line between possibility and plausibility.'")

Carollo v. Boria, 833 F.3d 1322, 1330, 1332 (11th Cir. 2016) ("It is not appropriate at the motion to dismiss stage for us to interpret the Municipal Charter's ambiguous job description for the City Manager. . . Discovery will illuminate exactly which laws Carollo had the responsibility to enforce or administer and, in fact, enforced or administered in the ordinary course of his job responsibilities. Nonetheless, with respect to the only question before us under Rules 8(a) and 12(b)(6) — whether, taking the factual allegations in the complaint as true, the complaint states a claim — we find it plausible under *Iqbal* and *Twombly* that Carollo spoke as a citizen and not pursuant to his ordinary job duties as City Manager when he made statements to law enforcement and other agencies about how Boria and Ruiz violated Florida's campaign finance laws. . .Carollo's status as a supervising public official does not alter our conclusion that he has plausibly alleged that he spoke as a citizen about violations of Florida's campaign finance laws. . . . Under these circumstances, we believe that justice requires giving Carollo an opportunity to file an amended complaint that resurrects those portions of his complaint that we dismiss by pleading facts that support the claim — if true — that he spoke as a citizen and not pursuant to his ordinary job responsibilities. The district court should then proceed directly to discovery, which will reveal, among other things, what precisely were Carollo's ordinary job responsibilities. Indeed, each of the relevant cases from the Supreme Court and this Circuit to undertake *Garcetti's* 'practical inquiry' concerning whether a plaintiff spoke pursuant to ordinary job responsibilities or as a citizen did so at the summary judgment stage or later in the life of the case.")

Hoefling v. City of Miami, 811 F.3d 1271, 1276 (11th Cir. 2016) ("We expressly held in *Randall,* and reaffirm today, that 'whatever requirements our heightened pleading standard once imposed have since been replaced by those of the *Twombly–Iqbal* plausibility standard .... [which] applies to *all* civil actions....' . . . Accordingly, the district court should not have placed a 'heightened pleading' burden on Mr. Hoefling for his § 1983 claims.")

Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1321-28 (11th Cir. 2015) ("*T.D.S.* was this Court's first shot in what was to become a thirty-year salvo of criticism aimed at shotgun

pleadings, and there is no ceasefire in sight. . .Some of our shooting, which has mostly been done with nonlethal dicta, has at times been nearly as lacking in precision as the target itself. At times we have used the term 'shotgun pleading' to mean little more than 'poorly drafted complaint.'. . In the hope that we could impose some clarity on what we have said and done about unclear complaints, we have examined more than sixty published decisions issued since the *T.D.S.* decision in 1985. One thing we looked for is how many types of shotgun pleadings have been used, wittingly or unwittingly, by attorneys and litigants. [court discusses four categories of shotgun pleadings] [W]e conclude that the district court abused its discretion when it dismissed Weiland's count one and count three claims against Fleming and Johnson on the ground that those counts did not comply with Rules 8(a)(2) and 10(b). In concluding that the court should not have dismissed those two counts, we are not retreating from this circuit's criticism of shotgun pleadings, but instead are deciding that, whatever their faults, these two counts are informative enough to permit a court to readily determine if they state a claim upon which relief can be granted. The district court implicitly recognized as much when it observed in the orders dismissing counts one and three that they actually do state claims upon which relief can be granted. Whether those observations are correct is a question to which we now turn. . . . Deputies Johnson and Fleming did not argue in their motion to dismiss Weiland's third amended complaint, or in their brief to this Court, that they are entitled to qualified immunity. We limit our analysis to whether the allegations in Weiland's complaint are sufficient to state a claim upon which relief can be granted without regard to the qualified immunity defense. . . .Construing the allegations in the light most favorable to the plaintiff, as we are required to do, count one alleges that Deputy Johnson shot Weiland without warning when he was not posing a threat to the deputies or anyone else; that while he was on the ground bleeding from the gunshot wound and not offering any resistance or threat, Deputy Fleming tasered Weiland; and that while he was on the ground seriously injured by both the shooting and the tasering and not offering any resistance or threat, both deputies beat him without cause. Count one states an excessive force claim upon which relief can be granted against both deputies. . . . Weiland claims that he was detained improperly and prosecuted for charges based on evidence fabricated by the deputies and lies contained in their police reports. . . . Because count three specifies a causal connection between the alleged cover up and the specific deprivation of Weiland's constitutional rights, it sufficiently alleges 'an underlying actual denial of his constitutional rights,' which is required to state a claim for conspiracy under § 1983. . . For these reasons, we will reverse the part of the district court's judgment dismissing count three as to Deputy Johnson and Deputy Fleming.")

Franklin v. Curry, 738 F.3d 1246, 1251, 1252 (11th Cir. 2013) (per curiam) [Note Judge Ripple from 7th Cir. sitting by designation] ("Franklin's repeated allegations the Supervisory Defendants were deliberately indifferent or their actions constituted or resulted in deliberate indifference carry no weight. Similarly, by alleging Appellants 'knew or should have known' of a risk, Franklin has merely recited an element of a claim without providing the facts from which one could draw such a conclusion. The district court found these allegations sufficient. Had the district court followed the Supreme Court's 'twopronged approach' of first separating out the complaint's conclusory legal allegations and then determining whether the remaining well-pleaded factual allegations,

accepted as true, 'plausibly give rise to an entitlement to relief,' the insufficiency of Franklin's allegations would have been obvious. . . .Stripping away Franklin's conclusory allegations leaves only a handful of properly pleaded facts—specifically, (1) that Gay verbally harassed Franklin and told her 'there is nothing you can do,' (2) that Gay sexually assaulted Franklin, (3) that Gay had previously sexually assaulted another female detainee, and (4) that Gay had previously had sexual relations with a third female detainee. Given only these facts, Franklin's complaint is insufficient to state a plausible claim that each of the Supervisory Defendants should have known of a substantial risk that Gay would sexually assault Franklin, much less that each defendant was subjectively aware of the risk and knowingly disregarded it. Franklin states that Sheriff Curry 'failed to promulgate, to adopt, to implement or to enforce policies, rules, or regulations to safeguard female inmates,' but she does not describe any of the policies that were in place, the sort of policies that should have been in place, or how those policies could have prevented Gay's harassment. Similarly, Franklin alleges the names and titles of the other Supervisory Defendants. . . but alleges nothing about the significance of their titles, their individual roles in the jail, their personal interactions or familiarity with Gay, their length of service, their management policies, or any other characteristics that would bear on whether they knew about but were deliberately indifferent to Gay's conduct and the risk he posed. . . From Franklin's allegations, a finder of fact could not even conclude that all of the Defendants were ever in the jail, much less that each of their individual actions constituted deliberate indifference to the risk Gay would abuse Franklin. Subjecting Appellants to the full 'panoply of expensive and time-consuming pretrial discovery devices,'. . . and forcing them to defend this action based on Franklin's inadequate allegations not only runs counter to the general rules of pleading, it also undermines qualified immunity's fundamental purpose of protecting 'all but the plainly incompetent or those who knowingly violate the law' from the costs of suit.")

AFL-CIO v. City of Miami, 637 F.3d 1178, 1186 (11th Cir. 2011) ("The plaintiffs have made conclusory statements that they were deprived of property without due process, but this is not even a 'formulaic recitation of the elements of a cause of action.'. . Nothing in the complaint–directly, inferentially, or otherwise–says how Florida's procedures for recovering wrongfully taken property violated due process, or that the plaintiffs even attempted to use those procedures. Nor do the plaintiffs allege that the defendants' pre-deprivation procedures, if they were even required, were somehow inadequate. Given the absence of any information in the complaint about a material element of their claim, the plaintiffs have failed to state a claim upon which relief can be granted.")

Randall v. Scott, 610 F.3d 701, 708 n.2, 709 (11th Cir. 2010) ("We now say explicitly what *Keating* implied: whatever requirements our heightened pleading standard once imposed have since been replaced by those of the *Twombly-Iqbal* plausibility standard. . . . Thus, like complaints in all other cases, complaints in § 1983 cases must now '"contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."' . . . While *Swann, GJR,* and *Danley* reaffirm application of a heightened pleading standard for § 1983 cases involving defendants able to assert qualified immunity, we agree with Randall that those cases were effectively overturned by the *Iqbal* court. Pleadings for § 1983 cases

involving defendants who are able to assert qualified immunity as a defense shall now be held to comply with the standards described in *Iqbal*.")

Harrison v. Benchmark Electronics Huntsville, Inc., 593 F.3d 1206, 1214, 1215 (11th Cir. 2010) ("The district court concluded that Harrison failed to plead his medical inquiry claim in his complaint, a determination Harrison contests on appeal. We only require that a plaintiff provide 'a short and plain statement of the claim showing that [he] is entitled to relief.' Fed.R.Civ.P. 8(a)(2). 'The point is to Agive the defendant fair notice of what the claim is and the grounds upon which it rests."'. . . Harrison satisfied our liberal pleading standard. His complaint alleged that BEHI questioned him about his seizures following a pre-employment drug test, and he claimed damages for these allegedly prohibited medical inquiries. Thus, BEHI had fair notice that Harrison sought relief under ' 12112(d)(2), and his allegations, which specifically referred to pre-employment medical inquiries, were more than speculative. . . To the extent that the district court concluded otherwise, it erred.")

Harper v. Lawrence County, Ala., 592 F.3d 1227, 1234, 1235 (11th Cir. 2010) ("Here, there are two main ways Plaintiff alleges Defendants knew of Harper's serious medical needs. First, Plaintiff claims that they 'had full knowledge that Harper was an alcoholic who would experience delirium tremens (DT's) due to alcohol withdrawal if left untreated,' because he had been arrested before and placed in the Lawrence County Jail on various alcohol-related charges. Compl. at 8. She also alleges that during the course of one or more of his prior arrests Harper 'informed the defendants that he had a history of seizures due to alcohol withdrawal.' *Id.* at 9. However, these allegations do not meet the Rule 8 standard, much less the heightened pleading standard. Plaintiff did not offer any facts to suggest why *these* Defendants in particular (a sheriff, two jail administrators, and two jailers) would know of Harper's specific medical history, nor did she offer any specific facts regarding Harper's past arrests. Moreover, even if those Defendants did know of Harper's history of alcoholism and/or past alcohol-related arrests, they would still have needed to know that Harper was in serious need of medical attention during the time period in question, April 24, 2007 to April 28, 2007. In our view, Plaintiff does not 'raise [her] right to relief above the speculative level' in this instance. *Twombly,* 550 U.S. at 555. Second, Plaintiff claims Defendants were aware of Harper's condition because of his symptoms and behavior at the jail. Specifically, Plaintiff alleges that several days after his initial incarceration Harper was hallucinating, slurring his words, physically weak, and incoherent. According to the Complaint, Reed and/or Robinson told both Taylor and Fike that Harper was displaying erratic and strange behavior. Compl. at 7-8. The Complaint also alleges that other inmates informed Reed and Robinson that Harper was acting strangely, losing his balance, and had urinated on himself. *Id.* at 9. Based on these allegations we hold that Plaintiff adequately alleged Reed and Robinson had 'actual knowledge' of the risk of serious harm to Harper if left untreated. However, the Complaint does not allege how the other three Defendants, Sheriff Gene Mitchell and administrators Kenneth Mitchell and Brown, could possibly have had such actual knowledge. Thus, the court should have dismissed the 'personal participation' claims as to those three Defendants based on qualified immunity, and we reverse the district court's order in that respect.").

Amnesty Intern., USA v. Battle, 559 F.3d 1170, 1179, 1180 (11th Cir. 2009) ("Since *Leatherman*, this court has determined that heightened pleading still applies where the defendants are individuals for whom qualified immunity may be available. . . .Here, the district court conflated the issues of satisfying the heightened pleading with the need to overcome qualified immunity. To satisfy even the heightened pleading standard for § 1983 claims, Amnesty need plead only 'some factual detail' from which the court may determine whether Defendants' alleged actions violated a clearly established constitutional right. . . The heightened pleading standard does not require a complaint to cite cases demonstrating that the defendant is not entitled to qualified immunity. . . . [T]he complaint makes clear Amnesty's allegation that its First and Fourteenth Amendment rights were violated because it was unable to have a successful protest rally and unable to pass out Amnesty literature as a result of Defendants' creation of a police cordon. These facts provide sufficient detail for Defendants to understand what alleged rights were violated (the right to hold a peaceful protest with an audience and the right to pass out leaflets) and which of their actions allegedly violated those rights (Defendants' actions ordering their subordinates to create a police cordon which interfered with the rally and the distribution of leaflets). These facts also provide enough information for the court to determine whether those facts indeed set out a violation of rights and whether those rights were clearly established when these incidents occurred.").

A.P. ex rel. Bazerman v. Feaver, 293 F. App'x 635, 2008 WL 3870697, at *10 (11th Cir. Aug. 21, 2008) ("While Rule 8 allows a plaintiff a great deal of latitude in the manner in which a complaint presents a claim, . . .this court has implemented more stringent pleading requirements in § 1983 actions in which qualified immunity is likely to be raised as a defense. . . . This heightened specificity is necessary so that the court has sufficient factual allegations to allow it to assess whether a defendant's actions violated a clearly established right. . . If it is impossible to make this determination from the face of the plaintiff's complaint, the purpose of the qualified immunity defense– shielding government officials from the demands of defending oneself from damages suits–may well be frustrated.").

Davis v. Coca Cola Bottling Co. Consol., 516 F.3d 955, 974 n.43 (11th Cir. 2008) ("We understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of all claims brought pursuant to Rule 8(a). In that case, the Court retired the oft-cited standard that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957), saying it 'is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.' *Twombly*, 127 S.Ct. at 1969. The main Rule 8(a) standard now seems to be whether the 'allegations plausibly suggest[ ] ([and are] not merely consistent with)' a violation of the law.").

Weissman v. National Ass'n of Securities Dealers, Inc., 500 F.3d 1293, 1309 n.6 (11th Cir. 2007) (Tjoflat, J., dissenting) ("Although I believe Weissman's complaint is due to be dismissed on absolute immunity grounds under even the basic Rule 8 pleading standard, I would suggest that our explicit heightened pleading requirement for some § 1983 suits might properly be applied in the SRO [Self Regulating Organization] immunity context, as well. A few words about heightened pleading may be helpful here. The panel in *Swann* read the Supreme Court's decision in *Leatherman* as having abrogated two of our earlier decisions suggesting a broad application of the heightened pleading requirement in § 1983 cases. . . In describing the effect of *Leatherman* on our circuit's precedent, *Swann* purported to limit the application of heightened pleading to only those cases in which qualified immunity is a potential defense. . . To be sure, *Leatherman* abrogated our heightened pleading precedent to the extent that our cases applied the more stringent standard to claims against municipalities. I do not believe, however, that *Leatherman* precludes the application of a heightened pleading requirement in absolute immunity cases.").

Washington v. Albright, 814 F.Supp.2d 1317, 123, 1324 (M.D. Ala. 2011) (After setting out history of "heightened pleading standard" in Eleventh Circuit, court goes on : "Further muddying the waters, is the fact that decisions since *Randall* have not uniformly rejected heightened pleading in § 1983 cases. A number of courts within the Eleventh Circuit have relied upon *Randall* and held that there is no longer any heightened pleading standard for § 1983 claims against individuals entitled to qualified immunity. [collecting cases] However, at least one panel decision from the Eleventh Circuit decided after *Randall* makes no mention of it and employs the heightened pleading standard. *See, e.g., Heflin v. Miami-Dade County*, 393 F. App'x 658, 659-60 (11th Cir.2010). This Court is persuaded that the appropriate course is to follow the holding of *Randall* and reject heightened pleading. The Court notes that this may not be a case in which the applicable standard makes a difference. For the reasons set forth below, the Court finds that Washington's pleading fails to satisfy the pleading standards announced in *Iqbal, Twombly*, and their progeny. Logically, if the pleading is insufficient to me[e]t that lesser standard, it would also be insufficient under the heightened pleading standard which this Court declines to apply in this case.")

Pressley v. Madison, No. 2:08-CV-0157-RWS, 2009 WL 3878260, at *2, *3 (N.D. Ga. Nov. 17, 2009) ("Plaintiff sues Joel Robinson, a former Barrow County Sheriff, and three officials of the Barrow County Jail (the Jail)–Captain Mike Katsegianes, Sergeant M. Walker, and Officer Connor. ("m.Compl. & 3.) Plaintiff presents the following allegations. On January 2, 2007, she was transferred from state prison to the Jail, where Officer Connor removed her hijab in the presence of several men, in violation of Plaintiff's Muslim religious beliefs and practices. Officer Connor then told Plaintiff that 'she is not allowed to cover her hair in the jail, even for prayer.' Plaintiff claims that without her hij ab she cannot 'practice Islam through 5 daily obligatory prayers, for which her hair must be covered.' When Plaintiff grieved this alleged violation, Captain Katsegianes informed her that she did 'not have the right to wear anything that is or could be a safety or security issue.' Plaintiff's hij ab was not returned to her until she was transferred back to state prison on January 4, 2007. (*Id.* & IV.) Plaintiff alleges that the four named Defendants violated her rights under the Religious Land Use and Institutional Persons Act (RLUIPA), the First

Amendment's Free Exercise Clause, and the Fourteenth Amendment's Equal Protection Clause. (*Id.*) Plaintiff seeks an injunction to prohibit Barrow County Jail from depriving Muslim women of their hij abs and also seeks several million dollars in damages. (*Id.* & V.) . . . . Court finds that Plaintiff has alleged a viable cause of action under § 1983 based on the deprivation of her hijab at the Barrow County Jail. That claim is **ALLOWED TO PROCEED** as in any other civil action. However, because Plaintiff has not set forth any action taken by Joel Robinson in violation of her legal rights, Mr. Robinson is **DISMISSED** from this action.").

Frye v. Escambia County Bd. of Educ., No. 08-0340-WS-N, 2009 WL 3336917, at *1 (S.D. Ala. Oct. 13, 2009) ("The plaintiff does not directly address this standard but instead insists the complaint satisfies Rule 8 as construed by the Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). . . The heightened pleading requirement, however, does not spring from Rule 8 but from the needs of individual governmental defendants for sufficient information to allow them to effectively assert qualified immunity (which is immunity from suit, not merely from judgment) at the outset of litigation. . . Although the Supreme Court has repeatedly questioned the imposition of pleading requirements in excess of those inherent in Rule 8, . . . the Eleventh Circuit continues to enforce its heightened pleading requirement. . .The plaintiff's invocation of Rule 8 is thus unresponsive to the defendants' challenge.")**.**

Rhodes v. MacDonald, No. 4:09-CV-106 (CDL), 2009 WL 2997605, at *4 (M.D. Ga. Sept. 16, 2009) ("For a complaint to be facially plausible, the Court must be able 'to draw the reasonable inference that the defendant is liable for the misconduct alleged' based upon a review of the factual content pled by the Plaintiff. . . The factual allegations must be sufficient 'to raise a right to relief above the speculative level.' *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiff's complaint is not plausible on its face. To the extent that it alleges any 'facts,' the Complaint does not connect those facts to any actual violation of Plaintiff's individual constitutional rights. Unlike in *Alice in Wonderland*, simply saying something is so does not make it so. The weakness of Plaintiff's claim certainly weighs heavily against judicial review of the deployment order, and in fact, would authorize dismissal of Plaintiff's complaint for failure to state a claim.").

Glenn v. Brumby, No. 1:08-CV-2360-RWS, 2009 WL 1849951, at *3 n. 2 (N.D. Ga. June 25, 2009) ("The Court notes that Defendants contend a higher pleading standard applies to § 1983 cases like the one before the Court, but Plaintiff is correct that the Eleventh Circuit has rejected such a pleading requirement and has clarified that to the extent that such a requirement still exists, it applies only in cases where qualified immunity is an available defense.")

Burge v. Ferguson, No. 8:07-cv-2217-T-23MSS, 2008 WL 5246306, at *3 (M.D. Fla. Dec. 16, 2008) ("Although controversial, the heightened pleading requirement permits a potentially immune defendant to frame a fact-specific qualified immunity defense at an early stage and enables the court to conduct the fact-specific inquiry contemplated by *Saucier v. Katz*, 533 U .S. 194 (2001). Absent a heightened pleading requirement, a meaningful *Saucier* inquiry is often impossible. Accordingly, some courts rejecting a heightened pleading requirement as inconsistent

with Rule 8(a)'s notice pleading standard have adopted a rule that effectively reproduces the requirement. *See, e.g., Thomas v. Independence Twp.,* 463 F.3d 285, 300-302 (3d Cir.2006); *cf. Schultea v. Wood,* 47 F.3d 1427, 1433-34 (5th Cir.1995).")

Pete's Towing Co. v. City of Tampa, Fla., No. 8:08-cv-209-T-23EAJ, 2008 WL 4791821, at *3 (M.D. Fla. Oct. 29, 2008) ("Although controversial, the Eleventh Circuit's heightened pleading requirement enables a potentially immune defendant to frame a fact-specific qualified immunity defense at an early stage and enables the court to conduct the fact-specific inquiry contemplated by *Saucier v. Katz,* 533 U.S. 194 (2001). Absent a heightened pleading requirement, a meaningful *Saucier* inquiry is often impossible. Accordingly, some courts rejecting a heightened pleading requirement as inconsistent with Rule 8(a)'s notice pleading standard have adopted a rule that effectively reproduces the requirement. *See, e.g., Thomas v. Independence Twp*., 463 F.3d 285, 300-302 (3d Cir.2006); *cf. Schultea v. Wood,* 47 F.3d 1427, 1433-34 (5th Cir.1995).").

Brown v. Pastrana, No. 08-20631-CIV., 2008 WL 4097615, at *5 n.2 (S.D. Fla. Sept. 4, 2008) ("The *Jones v. Bock, Twombly* and *Erickson* Courts have once again reiterated, as the Supreme Court unanimously held in *Leatherman, Swierkiewicz,* and *Hill,* that adopting a different and more onerous pleading standard in particular types of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts. . . . Some district courts in the Eleventh Circuit continue to apply a 'heightened pleading' standard, justifying its use on the flawed premise that the Supreme Court specifically ruled that district courts may not impose a heightened pleading requirement for claims pursuant to 42 U.S.C. § 1983 against municipal entities but declined to reach the issue of whether a similar holding was warranted in such cases against individual government entities. . . The 'flaw' in this logic is the fact that the Supreme Court has not indicated that qualified immunity might warrant an exception to the general approach, the explicit disclaimer of a heightened pleading standard in *Twombly*, and *Erickson*'s reversal of the Tenth Circuit's use of a heightened pleading standard in case against individual state actors who might be entitled to qualified immunity.")

Fleming v. Barber, No. 3:07cv279/MCR/MD, 2008 WL 2790194, at *3 (N.D. Fla. July 17, 2008) ("The Supreme Court has stated that a heightened pleading standard–which requires the facts of a claim to be alleged with some specificity–contravenes the notice pleading requirements set forth in Fed.R.Civ.P. 8. . . . Nonetheless, with respect to claims brought pursuant to § 1983, this circuit has recognized that a heightened pleading requirement in fact is applicable. . . In particular, this circuit has consistently held that the decision in *Leatherman* does not apply to defendants who may be entitled to qualified immunity . . . In such cases, 'more than mere conclusory notice pleading is required.... [A] complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory.'")

Walling v. City of Largo 2008 WL 2782687, at *4 (M.D. Fla. July 16, 2008) ("Plaintiff alleges that *Bell Atlantic* raises a clear question of the Eleventh Circuit's position with regard to heightened pleading standards and that this question has not been addressed by the Eleventh Circuit

subsequent to the *Bell Atlantic* ruling. . . Plaintiff relies primarily on Federal Rule of Civil Procedure 12(b)(6) as support for his argument that he has plead sufficient facts to state a claim. . . . This Court finds that it is not clear that the Eleventh Circuit has upheld a heightened pleading requirement for Section 1983 claims. Thus, this Court finds a heightened pleading standard an improper lense through which to analyze the First Amended Complaint.")

Bouyer v. Rounsoville, No. 1:08-CV-0856-RWS, 2008 WL 2787484, at *4 (N.D. Ga. July 15, 2008) ("Plaintiff's conclusory allegations regarding the City's policy fail to satisfy the pleading requirements under *Twombly*. *Reyes v. City of Miami Beach*, No. 07-22680-CIV, 2008 W.L. 686958, at *14 (S .D. Fla. March 13, 2008).")

Hawkins v. Eslinger, No. 6:07-cv-1261-Orl-19GJK, 2008 WL 2074409, at *1 n.4 (M.D. Fla. May 15, 2008) ("Plaintiff relies heavily on two cases from the Second Circuit which have rejected the position that 'class of one' claims are subject to a heightened pleading requirement. . . Although the Eleventh Circuit has not explicitly adopted a heightened pleading requirement, it does require a plaintiff to include 'key factual details' in alleging the existence of a similarly-situated person. . . To the extent the Second Circuit has determined otherwise, the Court must disregard its reasoning in favor of binding case law from the Eleventh Circuit.").

I. Note: Motion to Dismiss v. Summary Judgment Standard

SUPREME COURT

Sause v. Bauer, 138 S. Ct. 2561, 2563 (2018) (per curiam) ("As the case comes before us, it is unclear whether the police officers were in petitioner's apartment at the time in question based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. Petitioner's complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze petitioner's free exercise claim. In considering the defendants' motion to dismiss, the District Court was required to interpret the *pro se* complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim. We appreciate that petitioner elected on appeal to raise only a First Amendment argument and not to pursue an independent Fourth Amendment claim, but under the circumstances, the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved. Thus, petitioner's choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address these matters.")

D.C. CIRCUIT

Moore v. Hartman, 388 F.3d 871, 876 (D.C. Cir. 2004) ("[A]lthough the inspectors conceded in the appeal from their motion to dismiss that Moore's claim stated a violation of clearly established law, they are free to assert qualified immunity now: the 'legally relevant factors bearing upon the [qualified immunity] question will be different on summary judgment than on an earlier motion to dismiss,' because the court now conducts the immunity inquiry based on 'the evidence before it,' rather than the pleadings."), *rev'd on other grounds*, 126 S. Ct. 1695 (2006).

FIRST CIRCUIT

Velez-Rivera v. Agosto-Alicea, 437 F.3d 145, 151 (1st Cir. 2006) ("Plaintiffs allege that the district court applied the heightened pleading standard in two separate instances. First, when it granted summary judgment for Agosto because Pena had failed to allege any material fact showing 'deliberate indifference,' an element of 'supervisory liability.'. . Second, when the district court found that Agosto was protected under the doctrine of qualified immunity because his actions with regard to Velez were 'objectively reasonable.' We see no evidence that the heightened pleading standard was applied. Under the overruled standard, the district court would have required heightened specificity at the pleading stage, which did not occur in this case. By contrast, the district court correctly applied the appropriate standard of review to defendants' summary judgment motion when it found no genuine issue as to any material fact. The court's analysis of supervisory liability and qualified immunity relied upon the appropriate standards because, although specificity is not required at the pleading stage, it is required at the summary judgment stage. *Swierkiewicz* specifically distinguished the two doctrines, explaining that '[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.' . . In other words, notice pleading is sufficient for a claim to survive a motion to dismiss, but plaintiffs bear a heavier burden at the summary judgment stage.").

Jenkins v. City of Taunton, No. CV 15-10003-MBB, 2018 WL 326462, at *5 (D. Mass. Jan. 8, 2018) ("[A]lthough mindful that qualified immunity is an immunity from suit as well as monetary damages, the denial of qualified immunity at the summary judgment stage does not foreclose the responding officers from raising the defense in a post-trial motion based on the facts in evidence at trial. . . Thus, the responding officers retain the ability to move for judgment as a matter of law before the case is submitted to the jury and after a verdict based on qualified immunity in order to avoid any monetary damages. . . ' "[O]nce trial has been had, the availability of official immunity"' is ascertained based on ' "the trial record, not the pleadings nor the summary judgment record."'")

SECOND CIRCUIT

Garcia v. Does, 779 F.3d 84, 93-97 (2d Cir. 2015) ("Plaintiffs were part of a large group that had gathered on a vehicular ramp approaching the Bridge and on the street behind it, locations generally reserved for vehicular traffic, making it impossible for vehicles to proceed. They do not challenge the conclusion that it would be reasonable for a police officer to infer that plaintiffs either intended to block traffic on the Bridge as part of their protest, or at a minimum were aware of a 'substantial and unjustifiable risk' that they were doing so. . . Rather, they contend that reasonable officers in defendants' position would also have been aware, or should have been aware, that plaintiffs had a reasonable belief that they had been authorized to cross the Bridge on the vehicular roadway, based on the fact that police officers who had been blocking their progress subsequently retreated and 'led the march across the bridge,' which they construed as 'an actual and apparent grant of permission to follow.'. . We are not concerned with whether plaintiffs' asserted belief that the officers' behavior had given them implied permission to violate traffic laws otherwise banning pedestrians from the roadway would constitute a defense to the charge of disorderly conduct; that issue would be presented to a court adjudicating the criminal charges against plaintiffs. Instead, we are faced with the quite separate question of whether any such defense was so clearly established as a matter of law, and whether the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs. . .We cannot answer that question in the affirmative. . . .It cannot be said that the officers here disregarded known facts clearly establishing a defense. In the confused and boisterous situation confronting the officers, the police were aware that the demonstrators were blocking the roadway in violation of § 240.20(5). They were also certainly aware that no official had expressly authorized the protesters to cross the Bridge via the roadway. To the contrary, the officers would have known that a police official had attempted to advise the protestors through a bullhorn that they were required to disperse. While reasonable officers might perhaps have recognized that much or most of the crowd would be unable to hear the warning due to the noise created by the chanting protesters, it was also apparent that the front rank of demonstrators who presumably *were* able to hear exhibited no signs of dispersing. The Complaint and videotapes are devoid of any evidence that any police officer made any gesture or spoke any word that unambiguously authorized the protesters to continue to block traffic, and indeed the Complaint does not allege that any of the plaintiffs observed any such gesture. . . . Most importantly, no plaintiff alleges in the Complaint that he or she heard any statement from any police officer authorizing the protestors to cross the Bridge via the vehicular roadway, or observed any unambiguous indication from any police officer inviting the protesters to cross the Bridge in that manner. Nor is any such statement or gesture recorded in the videotapes submitted by the parties and incorporated into the Complaint by reference. Indeed, most of the plaintiffs allege that they did not see *anything* the police officers did, and simply 'followed the march' as it proceeded across the Bridge. . . Plaintiffs nevertheless insist that, by ceasing to block the demonstrators' advance and instead turning and walking toward the Brooklyn side of the Bridge, the officers implicitly gave them permission to proceed. That action, however, is inherently ambiguous. It is certainly true that, by removing themselves from the demonstrators' path, police 'allowed' the protesters to advance, in the sense that they stopped physically blocking them. But such an action does not convey, implicitly or explicitly, an invitation to 'go ahead.' The

failure of a thin line of police officers to physically impede a large group that—based on the actions of those immediately on the front line—would reasonably be understood to be intent on advancing across the Bridge even absent permission does not suggest that those officers understood that the conduct they had ceased physically blocking was lawful, or had been affirmatively authorized by the police. . .Even conceding that a majority of police officers would not reasonably have understood the retreat as inviting the demonstrators to enter the roadway, plaintiffs suggest that we cannot dismiss the Complaint so long as *any* officer who participated in the arrests may reasonably have anticipated some protestors to reasonably interpret it as such. The essential flaw in plaintiffs' logic, and in that of the prior panel opinion, is the extent to which it requires police officers to engage in an essentially speculative inquiry into the potential state of mind of (at least some of) the demonstrators. Neither the law of probable cause nor the law of qualified immunity requires such speculation. Whether or not a suspect ultimately turns out to have a defense, or even whether a reasonable officer might have some idea that such a defense could exist, is not the question. . . An officer still has probable cause to arrest, and certainly is entitled to qualified immunity, so long as any such defense rests on facts that are so unclear, or a legal theory that is not so clearly established, that it cannot be said that any reasonable officer would understand that an arrest under the circumstances would be unlawful. . . On the face of the Complaint, the officers were confronted with ambiguities of fact and law. As a matter of fact, the *most* that is plausibly alleged by the Complaint and the supporting materials is that the police, having already permitted some minor traffic violations along the marchers' route, and after first attempting to block the protesters from obstructing the vehicular roadway, retreated before the demonstrators in a way that some of the demonstrators may have interpreted as affirmatively permitting their advance. Whether or not such an interpretation was reasonable on their part, it cannot be said that the police's behavior was anything more than—at best for plaintiffs—ambiguous, or that a reasonable officer would necessarily have understood that the demonstrators would reasonably interpret the retreat as permission to use the roadway. As a matter of law, *Cox* establishes that, under some circumstances, demonstrators or others who have been advised by the police that their behavior is lawful may not be punished for that behavior. The extent of that principle is less than clear, and we need not decide here how far it might extend. It is enough to say that no clearly established law would make it 'clear to a reasonable officer,'. . .that it would be unlawful to arrest individuals who were in prima facie violation of a straightforward statutory prohibition because those individuals may have believed, based on inferences drawn from ambiguous behavior by the police, that they were authorized to violate the statute. . . .Finally, plaintiffs argue that the Complaint may not be dismissed on the pleadings on qualified immunity grounds. It is certainly true that motions to dismiss a plaintiff's complaint under Rule 12(b)(6) on the basis of an affirmative defense will generally face a difficult road. . . .But that does not mean that qualified immunity can never be established at the pleading stage. To the contrary, every case must be assessed on the specific facts alleged in the complaint. The Supreme Court has made clear that qualified immunity *can* be established by the facts alleged in a complaint, *see Wood v. Moss,* —— U.S. ——, 134 S.Ct. 2056 (2014), and indeed, because qualified immunity protects officials not merely from liability but from litigation, that the issue should be resolved when possible on a motion to dismiss, 'before the commencement of discovery,'. . . to avoid subjecting public officials to time consuming and

expensive discovery procedures. In this case, the facts alleged in the Complaint, and those depicted in the videos, do not bear out plaintiffs' legal conclusion that the officers' actions constituted 'an actual and apparent grant of permission' to the demonstrators to utilize the roadway. . . Still less do those facts plausibly describe a situation in which reasonable officers would have clearly understood that their actions were interpreted by the demonstrators as a grant of permission, such that arresting the demonstrators would violate clearly established law. Accordingly, dismissal of the Complaint is required.")

Velez v. Levy, 401 F.3d 75, 101 (2d Cir. 2005) ("We emphasize that this qualified immunity determination is made in view of the procedural posture of this case. Though Levy is not, as a matter of law, entitled to qualified immunity at this stage of the proceedings, a factual basis for qualified immunity may arise as the proceedings develop. It may be, after discovery, that Velez cannot adduce the facts necessary to show that Levy based his actions 'on irrational and non legitimate considerations and pressures and having no rational [connection] to a legitimate state purpose,' as she alleges in her complaint. But the plaintiff's assertions that they were so based are not merely conclusory, as can be seen from the Board of Education's findings, attached to the complaint, which state that the Chancellor's decision was 'arbitrary and capricious' and 'irrational,' given that the investigation was 'grossly flawed' and 'could not rationally be relied upon.' At this stage of the case, we therefore cannot say that, as to the procedural due process claim, qualified immunity based on the Chancellor's good faith is appropriate.").

McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004) ("[W]e see no reason why even a traditional qualified immunity defense may not be asserted on a Rule 12(b)(6) motion as long as the defense is based on facts appearing on the face of the complaint. . . . Of course, a defendant presenting an immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept the more stringent standard applicable to this procedural route. Not only must the facts supporting the defense appear on the face of the complaint, . . . but, as with all Rule 12(b)(6) motions, the motion may be granted only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.'. . Thus, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense. On the other hand, with a motion for summary judgment adequately supported by affidavits, the party opposing the motion cannot rely on allegations in the complaint, but must counter the movant's affidavits with specific facts showing the existence of genuine issues warranting a trial. . . A party endeavoring to defeat a lawsuit by a motion to dismiss for failure to state a claim faces a 'higher burden' than a party proceeding on a motion for summary judgment.").

Butler v. Hesch, No. 1:16-CV-1540, 2018 WL 922187, at *18 (N.D.N.Y. Feb. 15, 2018) ("On a motion to dismiss, however, a qualified immunity defense based on arguable probable cause ' "faces a formidable hurdle ..." and is usually not successful.' *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006) (quoting *McKenna v. Wright*, 386 F.3d 432, 434 (2d Cir. 2004)). This case is no exception. In support of qualified immunity, Defendants merely summarize

their version of the facts and assert that their actions were objectively reasonably and not patently incompetent. At the summary judgment stage, they will have the opportunity to try to demonstrate this by submitting evidence showing that reasonably competent officers in their situation could have at least disagreed on whether probable cause existed. Based solely on the complaint, however, the Court cannot conclude that this must have been the case.")

Marlin v. City of New York, No. 15 CI V. 2235 (CM), 2016 WL 4939371, at *1, *6, *16-17 (S.D.N.Y. Sept. 7, 2016) ("Because Defendants have also brought a motion for summary judgment dismissing the complaint on the ground of qualified immunity, the Plaintiff has been deposed, in order to fully flesh out his story. To the extent that the deposition testimony elicited Plaintiff's version of the events pleaded in the FAC, it is deemed true for purposes of this pre-answer motion for summary judgment. *Stephenson v. John Doe* 332 F.3d 68 (2d Cir. 2003); *see* Individual Practices and Procedures for Judge McMahon, Rule IV.E.3. It seems that a number of questions were put at the deposition seeking to undermine the truth of what Plaintiff asserted. That is all very well and good, but as will be discussed below, it is irrelevant to a qualified immunity motion made at this early stage of proceedings. At this pre-answer stage, a court considering a motion for summary judgment on the ground of qualified immunity properly takes the plaintiff's story as true and asks whether a reasonable police officer standing in the shoes of each of the defendants could have thought that his actions, as described by the plaintiff, were constitutionally compliant. This is not the time for asserting that Plaintiff's story is not true, or that things did not happen as Plaintiff described them, or for establishing that the police officers did nothing wrong (which the City has a lamentable habit of confusing with qualified immunity). . . . In deciding the issue of qualified immunity, 'the defendants' version of the facts is absolutely irrelevant.' . . Accordingly, this Court does not take testimony from defendants or otherwise consider their version of events. . . Pursuant to this Court's Individual Rules, when any defendant raises a qualified immunity defense, I insist that the plaintiff amplify the 'short, plain statement' in the complaint with testimony that fully fleshes out his story. For purposes of this aspect of the motion (which is really a motion for summary judgment), the Court relies on evidence in the FAC as amplified by Plaintiff's deposition testimony. Time and time again, this Court finds that municipal defendants conflate qualified immunity with arguments relating to the merits of a claim. In many cases, defendants file a notice of motion for summary judgment on the ground of qualified immunity and proceed to make arguments for dismissal of Plaintiff's claims that have nothing to do with qualified immunity. For instance, defendants may argue that the plaintiff fails to plead facts sufficient to make out a constitutional violation, or that things did not happen in quite the way the Plaintiff says they did. The instant motion raising the qualified immunity defense is no exception. Thus, the Court finds it necessary to remind Defendants that an official is often entitled to dismissal or summary judgment 'not because of qualified immunity, but because he did nothing wrong.'. . And indeed, as we shall see, only one of plaintiff's many claims is dismissible on the ground of qualified immunity. . . .In the excessive force context, the analysis required to determine whether an officer deserves qualified immunity converges with the analysis used to determine whether force was excessive under the Fourth Amendment: both inquiries hinge on a determination of objective reasonableness. . . Both analyses require asking: 'Whether in the particular circumstances faced

by the officer, a reasonable officer would believe that the force was lawful.'. .In cases involving the 'sometimes hazy border between excessive and acceptable force,' it may be appropriate to afford the defendants an 'extra layer of protection.'. . This is not one of those 'hazy' cases. No reasonable officer could possibly believe that he needed to use so much force to subdue a non-resisting arrestee as to dislocate and fracture his elbow, causing long-lasting damage. Taking Plaintiff's account of events as true, Defendants' pre-answer motion for summary judgment on the ground of qualified immunity is denied.")

Higginbotham v. City of New York, 105 F.Supp.3d 369, 375 (S.D.N.Y. 2015) ("On a motion to dismiss. . . a qualified immunity defense based on arguable probable cause ' "faces a formidable hurdle ..." and is usually not successful.' *Field Day, LLC v. Cnty. of Suffolk,* 463 F.3d 167, 191–92 (2d Cir.2006) (quoting *McKenna v. Wright,* 386 F.3d 432, 434 (2d Cir.2004)). This case is no exception. In support of qualified immunity, the defendants merely summarize their version of the facts and assert that 'the officers were objectively reasonable and patently not incompetent.'. . At the summary judgment stage, they will have the opportunity to try to demonstrate this by submitting evidence showing that reasonably competent officers in their situation could have at least disagreed on whether probable cause existed. Based solely on the complaint, however, the Court cannot conclude that this must have been the case. Because the complaint plausibly alleges that there was no probable cause to arrest Higginbotham for a violation of any of the four statutes suggested by the defendants, and because the defendants are not at this stage entitled to qualified immunity, Higginbotham has adequately stated a section 1983 false arrest claim.")

But see ***Higginbotham v. Sylvester***, No. 14-CV-8549 (PKC), 2016 WL 6496253, at *3–5 (S.D.N.Y. Nov. 2, 2016) ("All fact discovery has been completed and the determination of whether probable cause existed is ripe for determination. . . The summary judgment record includes the size of Higginbotham and his camera, the dimensions of the phone booth, and a visual depiction of the crowd surrounding the phone booth. The Court concludes that probable cause existed to arrest Higginbotham pursuant to New York Penal Law §§ 120.20. . . The undisputed facts surrounding Higginbotham's ascent of the phone booth demonstrate that a person of reasonable caution would infer that Higginbotham acted recklessly in creating a substantial risk of serious physical injury to another person. It can reasonably be inferred that Higginbotham was aware of the risk of climbing atop the phone booth based on the fact that he was only able to do so by first climbing on top of police barricades. . . Higginbotham was also aware of the large crowd that was tightly packed around the phone booth in question when he climbed to the top of it. . . Indeed, the video recording and pictures of Higginbotham atop the phone booth show that protestors and other camerapersons stood directly below Higginbotham while he filmed from above. . . Nevertheless, Higginbotham climbed more than seven feet above the tightly-packed crowd and filmed the protest, all while balancing a 30-pound camera on his shoulder. . . And because Higginbotham had climbed atop of the phone booth once before, he knew that the roof was not flat, but curved. . . Based on Higginbotham's position above the crowd atop a phone booth with a curved roof, probable cause existed for a reasonable person to believe that Higginbotham consciously disregarded the risk of losing his balance and falling or dropping his camera from more than seven

feet in the air. . . .Because the Court concludes that there was probable cause for Higginbotham's arrest, 'a fortiori, [defendants] would be entitled to qualified immunity on this claim.'. . However, even if probable cause was lacking, defendants would nevertheless be entitled to qualified immunity. Officers are entitled to qualified immunity for false arrest claims if they can establish that they had '"arguable probable cause" to arrest the plaintiff.'. . Here, the evidence is sufficient to support a finding of arguable probable cause to arrest Higginbotham pursuant to New York Penal Law § 120.20. That is to say, it was objectively reasonable for the arresting officers to believe that probable cause existed, or at the very least, for officers of reasonable competence to disagree on whether probable cause existed.")

THIRD CIRCUIT

Bonilla v. City of York, No. 1:14-CV-2238, 2015 WL 1525483, at *7 (M.D. Pa. Apr. 2, 2015) ("The present case is one of the 'vast majority of cases' in which a determination of qualified immunity is inappropriate at the pleading stage. When viewing the facts in the light most favorable to Plaintiff, the complaint alleges a plausible violation of Bonilla's Fourth Amendment rights through the use of excessive force. As this court has previously stated, 'the protections of the Fourth Amendment are sufficiently clear that [the officers] should have known that shooting [the decedent] to death violated those protections.' *Williams,* 30 F.Supp.3d at 314. The question therefore becomes, once again, whether the officer responsible for firing the fatal shot was objectively reasonable in doing so. Because there are unresolved issues of historical fact material to the reasonableness of Officer Roosen's and Officer Jordan's actions, including if and when they knew Bonilla was unarmed or had surrendered, it is premature at the motion to dismiss stage for the court to determine that either Officer Roosen or Officer Jordan is entitled to qualified immunity as a matter of law.)

FOURTH CIRCUIT

Cloaninger ex rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324, 331 (4th Cir. 2009) ("The procedural framework for evaluating a claim of qualified immunityis therefore clear: when the defendant in a § 1983 action raises a qualified immunity defense, the court ordinarily assesses whether the plaintiff's complaint states sufficient factual allegations that, if true, show a violation of clearly established constitutional rights. To do so, the plaintiff's complaint must allege conduct a reasonable officer would know to be unlawful. However, when there has been discovery and the defendants challenge through a motion for summary judgment the sufficiency of the plaintiff's evidence to support the allegations of his complaint, including his description of their conduct, an evaluation of the complaint's sufficiency is unnecessary and may unduly prolong the defendants' entanglement in litigation if the court can determine that the plaintiff's evidence does not support his allegations. In that circumstance, the familiar standard for summary judgment under Rule 56 applies.").

Quigley v. City of Huntington, W. Virginia, No. 3:17-CV-01906, 2017 WL 4998647, at *6 (S.D.W. Va. Nov. 2, 2017) ("The United States Supreme Court has made clear that a ruling on qualified immunity should be made early in the proceedings. . . Qualified immunity acts 'as an immunity from suit rather than a mere defense to liability.'. . Therefore, the entitlement to the immunity is 'effectively lost if a case is erroneously permitted to go to trial.'. .But where qualified immunity is presented in a Rule 12(b)(6) motion, 'the defense faces a formidable hurdle and is usually not successful.'. . Only if the plaintiff fails to state a plausible claim on its face, may a Court dismiss a claim under Rule 12(b)(6). . . But the Court will not dismiss a complaint where the plaintiff supplies sufficient detail regarding the claim to demonstrate a 'more-than-conceivable chance of success on the merits.'. . Applying that standard to this case, it must be apparent on the face of the complaint that the officer is entitled to qualified immunity. But, from the facts alleged, Plaintiff could plausibly demonstrate the officer violated a clearly established right, and thus is not entitled to the protective cloaking of qualified immunity, at this stage. This does not mean, however, that Plaintiff's objection is correct. Plaintiff's contention that qualified immunity should be denied as a matter of law fails to persuade this Court. Consistent with the applicable standard for a motion to dismiss, this Court has assumed the factual allegations in Plaintiff's complaint are true. To rule, as Plaintiff wants, that, based upon that assumption of truth, the officer is stripped of his qualified immunity protection would be a fool's errand. That simply would not comport with the sound reasoning and judgment that is required of this Court.").

FIFTH CIRCUIT

Ristow v. Hansen, No. 17-50121, 2018 WL 671150, ___ n.12 (5th Cir. Feb. 1, 2018) (not reported) ("Ristow insists that the officers should not be allowed to raise a qualified immunity defense in their motion to dismiss, but instead must wait to raise that defense until they file their answer. We have previously urged that '[q]ualified immunity questions should be resolved "at the earliest possible stage in litigation."'. . According to this principle, the district court was correct in addressing the officers' claims to qualified immunity at this stage in the litigation. *See, e.g., Turner v. Lieutenant Driver*, 848 F.3d 678, 683 (5th Cir. 2017) (addressing qualified immunity defense raised in a motion to dismiss).")

Castillo v. City of Weslaco, 369 F.3d 504, 506, 507 (5th Cir. 2004) ("The Supreme Court has recognized that the second step of the *Harlow* test is different at the summary judgment stage than it is when the defendant asserts qualified immunity after the initial pleadings. [citing *Behrens*] 'At the earlier stage, it is the defendant's conduct as alleged in the complaint that is scrutinized....' . . . On summary judgment, 'the plaintiff can no longer rest on the pleadings' and the court must look 'to the evidence before it (in the light most favorable to the plaintiff) in conducting the *Harlow* inquiry.' . . . Consequently, the court must highlight evidence that, if interpreted in the light most favorable to the plaintiffs, identifies conduct by the defendant that violated clearly established law. . . By outlining this factual scenario the court does not make a determination that the alleged conduct occurred. Rather, it concludes that there is evidence in the record that, when interpreted

in the light most favorable to the plaintiff, establishes conduct by the defendant that violated clearly established law. . . Ordinarily the district court in denying the summary judgment motion will outline 'the factual scenario it believes emerges from viewing the summary judgment evidence in the light most favorable' to the plaintiff. . . It will also highlight the evidence in the record supporting its conclusions, and it will determine whether the defendant's conduct, as outlined in the factual scenario, was 'objectively reasonable' in light of the relevant clearly established law. . . In cases where the district court failed to outline the relevant factual scenario and the evidence in the record establishing the relevant conduct, the Supreme Court has authorized 'the court of appeals [to] undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . We, however, have determined that there is another option in these situations. In certain cases, rather than combing through the record ourselves and concluding what factual scenario the district court likely assumed in applying the *Harlow* test, we will remand to the district court so that it can outline the factual scenario it assumed in making its decision. . . Although we are not required to make such a remand, in some cases it may provide a 'more efficient alternative.' . . In this case, the district court did not outline the factual scenario it assumed in construing the summary judgment evidence in the light most favorable to the Officers. In fact, it appears that it rested its ruling solely on the allegations made by the Officers in their Third Amended Complaint. This would be improper in light of the Supreme Court's instructions in *Behrens*. Considering it is not clear that the district court assumed a factual scenario supported by summary judgment evidence in applying the *Harlow* test, and if it did, what that factual scenario is, the more 'efficient alternative' in this case is to remand to the district court for it to outline the factual scenario it assumed in making its decision."), *on remand to Castillo v. City of Weslaco*, 2004 WL 2402439 (S.D. Tex. Aug. 10, 2004), *vacated and remanded*, 388 F.3d 464 (5th Cir. 2004).

Alfred v. Collins, No. Civ.A. H-03-2904, 2006 WL 492355, at *9 n.6 (S.D. Tex. Feb. 28, 2006) ("There is an implicit divergence of authority in this Circuit about the procedure for assessing the first prong of a qualified immunity defense in response to a summary judgment motion. Many appellate panels state that the issue is whether the plaintiff has 'alleged' facts establishing a constitutional violation, thus suggesting that the district court should not consider uncontroverted evidence presented by a defendant in the summary judgment motion. The *Linbrugger* case is the only case the Court can locate in which the issue is addressed. It is possible that the terminology focusing on what the plaintiff 'alleges' stems from the early practice that qualified immunity would be addressed on motions to dismiss. 'Qualified immunity is Aan entitlement not to stand trial or face the other burdens of litigation." ' . . Courts are to make the qualified immunity analysis 'early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.'. . Nevertheless, as a practical matter, defendants often, in an effort to develop the facts in the hopes of obtaining favorable rulings on the second qualified immunity prong, willingly engage in discovery and then seek qualified immunity rulings through summary judgment motions.").

SIXTH CIRCUIT

Osberry v. Slusher, No. 17-4242, 2018 WL 4360979, at *3-4 (6th Cir. Sept. 13, 2018) (not reported) ("[T]he Officers—not Osberry—filed the motion for judgment on the pleadings. We review de novo a judgment on the pleadings, using the same standard as a motion to dismiss under Rule 12(b)(6). . . This means that 'all well-pleaded material allegations of the pleadings *of the opposing party* must be taken as true.'. . Here, Osberry is the party opposing the motion—so we construe the complaint in the light most favorable to Osberry, accept her allegations as true, and draw all reasonable inferences in her favor. . . In contrast, we do not accept the Officers' allegations as true. But at oral argument, the Officers asked us to accept some allegations in the answer as true because Osberry's complaint fails to contradict all the Officers' counter-allegations. For example, Osberry's complaint is silent on whether there was an 'active crime scene'—which the Officers first raised in their answer. The Officers' argument lacks any merit. Under Rule 7(A), a 'plaintiff is not required to reply to affirmative defenses or new matter appearing in the answer.'. . And under Rule 8(b)(6), where new allegations are in a pleading to which no responsive pleading is required, the court must consider the new allegations as denied. . . In other words, because Osberry did not have to respond to the Officers' answer, we must assume that Osberry denies any new allegations in the answer. And when considering the Officers' motion, we rely on the general Rule 12 standard. . . .Here, our review of the video tracks the district court's finding that the video does not 'so blatantly and conclusively contradict' the allegations in the complaint that 'no reasonable jury could find in [Osberry's] favor.'. . For example, the video does not conclusively show that Osberry resisted arrest, hit the Officers, or that she—and not the Officers—provoked the brief scuffle. Likewise, the video does not necessarily show an 'active crime scene' or 'a barricaded subject.' There are no police vehicles, no caution tape, and no blockades or barriers visible in the video that would suggest that Osberry was in an active crime scene. Indeed, the presence of other individuals and vehicles, including several people riding bicycles nearby, would suggest the opposite. And while the presence of many police officers may suggest an ongoing investigation, as could Officer Frysinger instructing Osberry that 'you need to leave this is a crime scene,' these facts alone do not 'utterly discredit' Osberry's version of the arrest. In sum, at this stage, we can rely on the well-pleaded allegations in the complaint and leave further evaluation of the video to either the district court at summary judgment or the jury at trial. This is consistent with our previous warnings 'that it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.'. . Instead, we clarified that '[a]lthough an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12.'. . This is especially true where, as is the case here, 'the fact-intensive nature of the applicable tests make it "difficult for a defendant to claim qualified immunity on the pleadings *before discovery*."'")

Osberry v. Slusher, No. 17-4242, 2018 WL 4360979, at *3 n.2 (6th Cir. Sept. 13, 2018) (not reported) ("Our ability to consider video evidence at the pleading stage apparently finds its roots in Rule 10(c), which instructs that '[a] copy of a *written instrument* that is an exhibit to a pleading is a part of the pleading for all purposes.' Fed. R. Civ. P. 10(c) (emphasis added). *See also Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (explaining that Rule 10(c) allows a court to consider 'certain pertinent documents' as part of the pleadings); *Brownmark Films, LLC v.*

Comedy Partners, 682 F.3d 687, 691 (7th Cir. 2012) (explaining that it would make 'eminently good sense' to extend the Rule 10(c) incorporation-by-reference doctrine to videos). This case, however, does not require us to determine the appropriateness (or limits) of reviewing videos under Rule 10 and Rule 12. *See, e.g.*, Aimee Brown, Comment, *Pleading in Technicolor: When Can Litigants Incorporate Audiovisual Works Into Their Complaints?*, 80 U. Chi. L. Rev. 1269, 1278–1306 (2013).")

Wesley v. Campbell, 779 F.3d 421, 428 (6th Cir. 2015) (***Wesley II***) ("Before proceeding to the merits of the motion to dismiss, we note a critical threshold error in the district court's opinion. Instead of the 'plausibility' standard our precedent clearly requires, the district court improperly held Wesley to a novel and significantly higher standard. The district court determined—indeed, emphasized—that Wesley was required to make 'a *substantial* showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth' in order to survive Rule 12 dismissal. . . Such a 'substantial' pleading burden at the Rule 12 stage is plainly inappropriate in light of *Iqbal* and *Twombly*—cases that the district court cited but failed to apply—as well as this circuit's settled precedent. The district court's error apparently stems from its reliance on *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir.2003), a case that does speak of the 'substantial showing' plaintiffs must make when faced with dismissal. *Vakilian*, however, is a summary judgment case, as is every other case cited by the district court in support of its 'substantial showing' standard. . . Other than the district court's own decision, no published opinion within the Sixth Circuit has ever imported *Vakilian's* 'substantial showing' language into the Rule 12 context. At oral argument before this court, Rigney conceded that *Vakilian's* 'substantial showing' standard was inappropriate at the Rule 12(b)(6) stage. We agree. Moreover, review of the pleadings and applicable case law leaves us convinced that Wesley has satisfied his initial pleading burden.")

Hoskins v. Knox County, Kentucky, No. CV 17-84-DLB-HAI, 2018 WL 1352163, at *19–20 (E.D. Ky. Mar. 15, 2018) ("[T]he Supreme Court has repeatedly 'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'. . The Sixth Circuit, however, has clarified that only truly 'insubstantial claims against government officials should be resolved ... prior to broad discovery,' *Johnson*, 790 F.3d at 653, and has cautioned that 'it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.' *Wesley*, 779 F.3d at 433. Thus, '[a]lthough an officer's entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12.'. . With respect to the second prong of the qualified-immunity analysis, the KSP Defendants have not argued that the constitutional rights allegedly violated were not clearly established at the time of the Defendant Officers' actions. Nor could they. At the time of Plaintiffs' arrest and pretrial detention, they had a clearly established right to be free from malicious prosecution and fabricated evidence under the Fourth Amendment. . . Therefore, despite the lack of any developed argument, the Court assumes that the Defendants' qualified-immunity argument rests on the first prong—whether the facts alleged make out a constitutional violation. As this Court has explained in detail above, the Plaintiffs have sufficiently stated plausible claims for malicious prosecution, fabrication of evidence, supervisor liability,

failure to intervene, and conspiracy under § 1983. Accordingly, the KSP Defendants are not entitled to qualified immunity.")

SEVENTH CIRCUIT

Reed v. Palmer, No. 18-1429, 2018 WL 4870351, at *5–6, *9 (7th Cir. Oct. 9, 2018) ("[T]he district court acted prematurely in deciding Palmer's entitlement to qualified immunity at the motion to dismiss stage. The court found that, during the time period alleged in the complaints, no law clearly established 'what the [C]onstitution requires of a government official in [Palmer's] position under similar circumstances.' Palmer's position is determined with reference to the well-pleaded factual allegations in plaintiffs' complaints, which are taken as true and considered in the light most favorable to plaintiffs on a Rule 12(b)(6) motion to dismiss. . . According to the complaints, Palmer contracted with the state of Wisconsin to place juveniles, including plaintiffs, in the Copper Lake facility. The complaints further allege that both plaintiffs were in Palmer's custody pursuant to state court orders. Moreover, Palmer monitored and received reports concerning Reed's and Ray-Cluney's conditions of confinement at Copper Lake. Based on these reports, plaintiffs allege Palmer 'knew or should have known of the systemic and excessive use of isolation cells at Copper Lake,' and '[d]espite such knowledge, Palmer failed to remove the Iowa girls placed at Copper Lake and acted with deliberate indifference in doing so.' These allegations are sufficient to withstand a Rule 12(b)(6) motion to dismiss. Plaintiffs have sufficiently alleged that their constitutional rights were violated through excessive use of isolation cells at Copper Lake. Supreme Court precedent is not clear about whether state juvenile detention facility conditions should be judged under the Eighth Amendment's Cruel and Unusual Punishment Clause or the Fourteenth Amendment's Due Process Clause. . . In a case over forty years ago, we applied the Eighth Amendment's cruel and unusual punishment standard to evaluate the use of corporal punishment and tranquilizing drugs at a juvenile correctional institution. . . . Meanwhile, other circuits have applied the Fourteenth Amendment's 'more protective' Due Process Clause in evaluating juvenile detention center conditions. . . . At the time plaintiffs were allegedly in Palmer's custody, isolation of pre-trial juvenile detainees not 'reasonably related to a legitimate governmental objective,' *Bell*, 441 U.S. at 539, 99 S.Ct. 1861, could rise to the level of a constitutional violation. Here, plaintiffs' complaints plausibly allege that they were kept in isolation at Copper Lake for excessive amounts of time. Caselaw clearly establishes that such conduct could violate the Fourteenth and/or the Eighth Amendment. On the present record, however, it is impossible to determine whether such a constitutional violation occurred in plaintiffs' cases. We know the respective complaints allege plaintiffs spent an inordinate amount of time at Copper Lake in isolation. However, we do not know the reasons behind their seclusion. We therefore cannot evaluate, under the Fourteenth Amendment, whether Palmer—or the other defendants—acted reasonably pursuant to a 'legitimate governmental objective or instead unlawfully 'punished' plaintiffs. . . Nor can we determine, under the Eighth Amendment, whether Palmer had a 'sufficiently culpable state of mind.'. . . Such a result does not condemn the district court to unnecessary litigation or impede Palmer's potential right to be free from suit. The district court has a variety of means ... to move the case incrementally forward in order to address

the qualified immunity issue at the earliest possible stage.'. . For instance, '[t]he Rule 12(e) motion for a more definite statement is perhaps the best procedural tool available to the defendant to obtain the factual basis underlying a plaintiff's claim for relief.'. . Alternatively, if additional evidence is needed to develop the factual record, the district court may 'limit the timing, sequence, frequency, and extent of that discovery under Rule 26.'")

[While the following case involved a motion to dismiss for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), the reasoning would clearly apply to dismissal of a prisoner's complaint where dismissal is based on the grounds that the plaintiff "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(iii).]

Coleman v. Labor & Indus. Review Comm'n of Wisconsin, 860 F.3d 461, 465-66, 470-71, 474-75 (7th Cir. 2017) ("[M]ay an Article I judge dismiss an action for failure to state a claim on which relief can be granted, if that dismissal is part of the initial screening that occurs in IFP cases and thus takes place before the defendants are served? Although the statute does not say this in so many words, we have understood section 1915(e) to 'direct [ ] courts to screen all complaints filed with requests to proceed IFP.' *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1022 (7th Cir. 2013). It instructs 'the court' to 'dismiss the case at any time' if, among other things, the action 'fails to state a claim on which relief may be granted.' 28 U.S.C. § 1915(e)(2)(B)(ii). The magistrate judge in our case followed that command and entered a final judgment for the as-yet-unserved defendant. We must decide whether this was permissible. . . .[A]lthough the consent requirement is carved in stone, the identity of 'the parties' whose permission section 636(c)(1) demands is less clear. Is it all of the parties? Some of the parties? Only any party who must be before the court for purposes of the ruling in question? The circuits have come to different conclusions about this question, and unfortunately, so have we. The Fifth Circuit, in *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995), and our opinion in *Hains v. Washington*, 131 F.3d 1248, 1249 & n.2 (7th Cir. 1997) (*per curiam*), take the position that an unserved defendant is not one of the 'parties' for purposes of section 636(c)(1), and thus the defendant's consent is not required in order to permit a magistrate judge to issue a dispositive order when screening a complaint for IFP purposes. On the other side, the Eighth Circuit, in *Henry v. Tri-Services, Inc.*, 33 F.3d 931, 933 (8th Cir. 1994), and our court in *Geaney v. Carlson*, 776 F.2d 140, 142 (7th Cir. 1985), hold that the magistrate cannot finally dispose of the case, on screening or otherwise, without the defendant's consent. No matter what the rules concerning consent are, there is a substantial role for the magistrate judge to play in the screening process. Under the rule of *Neals* and *Hains*, the magistrate judge enters a final judgment on the case, while under the approach of *Henry* and *Geaney*, he evaluates the complaint, takes any nondispositive actions that are appropriate (*e.g.*, further investigation of indigence), and recommends an action for the district court. . . If the action recommended is dismissal, the district court can enter that final judgment (after considering any properly filed objections) without bothering the defendants. Under either view, to the extent that section 1915(e)(2) involves nondispositive issues, such as the truthfulness of the allegation of poverty, nothing in the Magistrate Judges' Act prevents the magistrate judge from resolving the issue. That is because a conclusion that the plaintiff is not indigent does not foreclose further legal proceedings—it just

means that the plaintiff must pony up the required filing fee. . . . The conclusion we draw is that a dismissal under section 1915(e)(2)(B)(ii) for failure to state a claim is covered by the language in the Magistrate Judges Act that prevents the district court from designating a magistrate judge to 'hear and determine' a motion 'to dismiss for failure to state a claim upon which relief can be granted.' 28 U.S.C. § 636(b)(1)(A). That rule is not absolute, however. It yields when, as section 636(c)(1) puts it, the magistrate judge is acting with 'the consent of the parties.' Packed into that short phrase are two questions: what does it take to signify consent, and which parties (one, some, or all) have to consent? Typically, both parties file written consents to the magistrate judge's jurisdiction and the case proceeds without a hitch. And as Judge Posner's dissent emphasizes, consent need not be explicit. No dispute there: consent may be implicit, as the Supreme Court recognized in *Roell v. Withrow*, 538 U.S. 580, 586–91, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003). But even implicit consent requires *some* action from the party whose consent must be found. . . . With the idea of presumed consent out of the way, the question remains whether the statute permits the consent of only one party. We think not. To begin with, that is not what the statute says; it speaks instead of the consent of the 'parties,' plural. The Commission sees no problem in the use of the plural: at the time of screening, it notes, only one party has come before the court. It should be enough, the Commission says, to obtain only the consent of the party that is actually present. This would require us to treat the unserved defendant as a nonparty to the case for this purpose. Such a step would ignore the general use of the term 'parties' throughout the rules of civil procedure. At the time of filing any civil complaint, only one party is ever before the court. . . .The fact that it is the plaintiff who commences the suit does not mean that the other parties named in the complaint do not count as 'parties' prior to service of process. And our case differs in one critical respect from the hypotheticals that concern Judge Easterbrook. . . All of his examples involve a case that has at least one plaintiff and at least one defendant. And in all of his examples, at least one plaintiff and one defendant have consented to the authority of the magistrate judge. That is the crucial element missing here: in our case, only one side of the 'v' has consented to the magistrate judge, and under the statute, that is not enough. . . .This court, unfortunately, has not been consistent in its approach to the issue we have been discussing. . . . We see no principled way of reconciling *Geaney* and *Hains*, even though *Hains* dealt with the prisoner-specific section 1915A, whereas Coleman's case was dismissed under section 1915(e). The relevant language and structure of these two statutes are identical. . . . In the end, *Hains* stands alone in this circuit. Our consistent emphasis on the importance of consent strongly supports *Geaney*'s analysis. . . We conclude that *Geaney*, *Brook*, and *Stevo* are more consistent with the language of the statute and better respect the constitutional line between Article III judges and other adjudicators. We thus overrule *Hains*. Because this resolves an internal circuit conflict and overrules one case, we have circulated this opinion to all judges in regular active service. See Cir. R. 40(e). A majority of the judges did not wish to hear this case *en banc*. Judge Easterbrook, joined by Judge Sykes, voted in favor of an *en banc* hearing. Judge Posner dissents on the merits. As we stressed earlier, this does not mean that the work of the magistrate judge in this type of case is wasted. The role of the magistrate judges in conducting screening of prisoner and *in forma pauperis* actions is of great assistance to the district court. But unless all parties to the action have consented to the magistrate judge's authority to resolve the case finally, the role of the magistrate judge must parallel that of

the bankruptcy judges after *Stern*. Rather than entering final judgments, they must 'issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court.'. . We realize that this adds one extra step, but it is not a particularly burdensome one, and it does not mean that parties in the Commission's position must be served before the case can be resolved. It just means that the district judge must enter any post-screening orders that dispose of the entire case. Fears that the district court judges will drown beneath a deluge of IFP applications are overblown. The *Stern* dissent expressed similar fears, but this has not come to pass. . . The magistrate judges' screening is among those 'additional duties as are not inconsistent with the Constitution and laws of the United States.'")

NINTH CIRCUIT

Hernandez v. City of San Jose, 897 F.3d 1125, 1137-38 (9th Cir. 2018) (" 'Whatever the merits of the decision[s] in [*Wood* and *Kennedy*], the differences [in the facts of those] case[s] and [this] case ... leap from the page.' [citing *Kisela*] Without more, *Wood* and *Kennedy* did not place these Officers on notice that their actions were unlawful 'in light of the specific context of [this] case.'. .But the Attendees have also cited *Johnson*, a case that clearly establishes the state-created danger doctrine applies to the crowd-control context. . . .Based on the allegations in the FAC, which we take as true at this stage of the proceedings, we also find that this is 'one of those rare cases' in which the constitutional violation 'is so "obvious" that we must conclude ... qualified immunity is inapplicable, even without a case directly on point.'. . Here, the Attendees allege the Officers shepherded them into a violent crowd of protesters and actively prevented them from reaching safety. The Officers continued to implement this plan even while witnessing the violence firsthand, and even though they knew the mob had attacked Trump supporters at the Convention Center earlier that evening, and that similar, violent encounters had occurred in other cities. Viewed in the light most favorable to the Attendees, these allegations establish 'with obvious clarity' that the Officers increased the danger to the Attendees and acted with deliberate indifference to that danger, pursuant to the state-created danger doctrine. . . We therefore hold 'that the operative complaint alleges facts that allow us "to draw the reasonable inference that the [Officers are] liable for the misconduct alleged,"'. . and that the district court properly denied the Officers qualified immunity at this stage of the proceedings. This, of course, 'does not mean that th[e] case must go to trial,'. . . or that the Officers are now precluded from ever asserting a claim for qualified immunity in this litigation. As we have noted time and again, '[o]nce an evidentiary record has been developed through discovery, [the Officers] will be free to move for summary judgment based on qualified immunity.'")

Keates v. Koile, 883 F.3d 1228, 1234-35, 1237-38, 1240 (9th Cir. 2018) ("This appeal raises an additional wrinkle because the district court granted the motion to dismiss largely on the ground that defendants were entitled to qualified immunity. Determining claims of qualified immunity at the motion-to-dismiss stage raises special problems for legal decision making. . . On the one hand, we may not dismiss a complaint making 'a claim to relief that is plausible on its face.'. . But on the other hand, defendants are entitled to qualified immunity so long as 'their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . The Supreme Court has emphasized that this is a low bar, explaining that '[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.'. . .Balancing these competing rules, when a district court dismisses a complaint for failure to state a claim based on a qualified immunity defense, we consider whether the complaint alleges sufficient facts, taken as true, to support the claim that the officials' conduct violated clearly established constitutional rights of which a reasonable officer would be aware 'in light of the specific context of the case.'. . If the operative complaint 'contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right,' then plaintiffs are 'entitled to go forward' with their claims. . .But our decision at the motion-to-dismiss stage sheds little light on whether the government actors might ultimately be entitled to qualified immunity 'were the case permitted to proceed, at least to the summary judgment stage' and the court is presented with facts providing context for the challenged actions. . . Because the operative complaint here was dismissed on qualified immunity grounds, we must determine whether Keates and A.K.'s complaint pleads a plausible claim that withstands a qualified immunity defense. . . .In sum, our case law clearly establishes that the rights of parents and children to familial association under the Fourteenth, First, and Fourth Amendments are violated if a state official removes children from their parents without their consent, and without a court order, unless information at the time of the seizure, after reasonable investigation, establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury, and the scope, degree, and duration of the intrusion are reasonably necessary to avert the specific injury at issue. . . . [B]ased solely on the facts alleged in the complaint construed in favor of Keates and A.K., a reasonable official in Koile's position would know the available information did not establish reasonable cause to believe that A.K. was in imminent danger of attempting to commit suicide, or that it was necessary to separate her from her mother, transfer her to ABHS, and continue to detain her after medical professionals at ABHS concluded she was a low suicide risk. Therefore, we conclude that the operative complaint alleges facts that allow us 'to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . The district court therefore erred in dismissing the familial association claim against Koile and Pender on the basis of qualified immunity. However, '[o]ur denial of qualified immunity at this stage of the proceedings does not mean that this case must go to trial.'. . As we have previously noted, '[o]nce an evidentiary record has been developed through discovery, defendants will be free to move for summary judgment based on qualified immunity.'")

Butler v. San Diego District Attorney's Office, 370 F.3d 956, 958, 964 (9th Cir. 2004) ("We hold that the district court applied an incorrect evidentiary standard in denying summary judgment. It incorrectly understood the law to require it to assume that factual allegations in a plaintiff's § 1983 complaint are true when a defendant moves for summary judgment based on official immunity. Based on that understanding of the law, the district court did not rule on the admissibility of evidence proffered by plaintiffs at summary judgment, but rather simply assumed that the factual allegations in the complaint were true without regard to whether they had evidentiary support. The district court was misled by a brief (and incorrect) statement by this court

in *Fletcher v. Kalina*, 93 F.3d 653, 654 (9th Cir.1996), and a repetition of that statement by the Supreme Court on review of our decision in *Kalina v. Fletcher*, 522 U.S. 118, 122 (1997). We hold that these brief statements were inadvertent and erroneous statements of the law. A correct statement of the law is that when a defendant makes a properly supported motion for summary judgment based on official immunity, the plaintiff has an obligation to produce evidence of his or her own. In such a case, the district court is not required (or even allowed) simply to assume the truth of challenged factual allegations in the complaint. In other words, a motion for summary judgment based on official immunity is governed by Federal Rule of Civil Procedure 56, just like all motions for summary judgment in civil suits in federal district court. . . . Thus, in the usual case where a defendant asserts an official immunity defense, the district court first decides whether the facts alleged in the complaint, assumed to be true, yield the conclusion that the defendant is entitled to immunity. This is the analysis under Rule 12(b)(6) on a motion to dismiss. If, taking the facts as stated in the complaint, the defendant is entitled to immunity, no discovery should be permitted and the case should be dismissed. . . If a plaintiff passes this initial hurdle, he or she is entitled to enough discovery to permit the court to rule on a defendant's subsequent summary judgment motion brought under Rule 56. . . . The Supreme Court has clearly, and repeatedly, admonished that official immunity is immunity from suit rather than merely immunity from liability. . . It would therefore be extremely odd if, in ruling on a defendant's motion for summary judgment based on official immunity, a district court were required to assume that the allegations in plaintiff's complaint are true. If that were the law, the defendant would effectively be deprived of the protection afforded by a motion for summary judgment, and would be given only the protection afforded by a motion to dismiss. That is, the defendant would always be obliged to go to trial if the plaintiff's allegations (as distinct from the plaintiff's evidence) would overcome a claim of official immunity. If this were the law, a defendant moving for summary judgment based on official immunity would have to go to trial more, rather than less, often than a defendant moving for summary judgment on some other basis. Given that the very purpose of official immunity is to provide immunity from trial, this cannot be the law. . . . Because the district court misunderstood the evidentiary standard in ruling on defendants' motions for summary judgment based on official immunity, we vacate the district court's ruling and remand for further proceedings consistent with this opinion. We recognize that the district court's misunderstanding of the evidentiary standard may have led it to be more restrictive in the discovery it allowed to plaintiff than it would have been if it had properly understood the standard, and that the court may have led plaintiffs to seek to discover and introduce less evidence than they otherwise would have done. We leave it to the district court on remand to allow additional discovery, if appropriate, based on the evidentiary standard plaintiff must meet in responding to a properly supported motion for summary judgment.").

Thompson v. Lampert, No. CV-02-135-HU, 2004 WL 1673102, at *15 n.3 (D. Ore. July 27, 2004) ("While the qualified immunity cases indicate that the first inquiry as to whether a constitutional right has been violated is based on a review of the facts alleged taken in the light most favorable to plaintiff, this does not mean that the court's analysis of a qualified immunity defense in the context of a summary judgment motion is limited to the allegations in the complaint

or those put forth only by the plaintiff. . .Rather, the inquiry is whether upon review of the evidence in the record, there is a disputed issue of fact. If so, *Saucier* requires that the court conduct the first prong of the qualified immunity analysis assuming the truth of the facts as alleged by the plaintiff and in a light most favorable to the plaintiff. . . . If, however, the record reveals only undisputed facts and those facts do not support a constitutional violation, the inquiry ends.").

IV. STATE OF MIND AND QUALIFIED IMMUNITY

D.C. CIRCUIT

Daugherty v. Sheer, 891 F.3d 386, 390-92 (D.C. Cir. 2018) ("Regardless of whether a court expressly has declared certain conduct unlawful, a government official is not entitled to qualified immunity where 'every "reasonable official would have understood that what he is doing violates th[e] right."'. . Accordingly, 'we look to cases from the Supreme Court and this court, as well as to cases from other courts exhibiting a consensus view—if there is one.'. . The proponent of a purported right has the 'burden to show that the particular right in question ... was clearly established' for qualified-immunity purposes. . . .In their claim now on appeal, Daugherty and LabMD assert that Sheer and Yodaiken violated their rights by prosecuting an enforcement action in retaliation for Daugherty's speech, despite the undisputed data-security breach underlying the FTC's investigation and regardless of ultimate control over the decision to bring a complaint residing with the FTC board. Because no such right was clearly established, Sheer and Yodaiken are immune from this suit. . . .Our task, then, is to determine whether there is a clearly established right to be free from an enforcement action where retaliatory motive was allegedly present, but was not plausibly alleged to be the but-for cause of the enforcement. . . . Supreme Court precedent shows that there is no such clearly established right. If anything, the leading cases cut the other way: they show that retaliatory motive does not automatically imbue the conduct in question with an unconstitutional air, where the official's actions have a legitimate basis. . . .Because the FTC enforcement action against LabMD had an alternative cause—the undisputed data-security breach by which the 1718 File was publicly available from a LabMD computer—the alleged actions by Sheer and Yodaiken did not violate Daugherty's or LabMD's clearly established rights, even assuming retaliatory motive. Sheer and Yodaiken accordingly are entitled to qualified immunity, and the District Court's decision concluding otherwise is REVERSED.")

Richardson v. D.C., 322 F. Supp. 3d 175, 184-86 (D.D.C. 2018) ("It may seem odd to speak of qualified immunity in the context of the Eighth Amendment. After all, to hold an officer liable for deliberate indifference, a court must find that the officer disregarded a risk of harm that he subjectively knew about. Moreover, it was clearly established in *Farmer v. Brennan* that disregarding a risk of inmate-on-inmate sexual assault amounts to unconstitutional deliberate indifference. So if the record were to support a jury finding that Warden Smith disregarded the risk that an inmate like Richardson might be assaulted if placed in a cell with a heterosexual male, wouldn't the record *necessarily* also support a finding that Smith violated clearly established law? Not necessarily. *Farmer* put correctional officers on notice that they cannot house together a

transgender female inmate who they know faces a particularly high risk of assault with a male inmate. . . But the case leaves open what exactly a higher-level *supervisor* or *policymaker* must do when dealing not with particularized evidence of risk, but rather with the ever-present, generalized risk of sexual assault that transgender inmates face at the hands of their cellmates. In other words, *Farmer* does not hold that transgender female inmates, notwithstanding their own housing preferences, may *never* be celled with male inmates. In fact, *Farmer* says nothing whatsoever about general procedures for housing transgender inmates. And, equally importantly, *Farmer* laid down a principle that officers who reasonably respond to known risks cannot be held liable for deliberate indifference, . . . which leaves open the possibility that an official's unreasonable response was not *clearly* unreasonable under existing law. The Supreme Court's unanimous decision in *Taylor v. Barkes* . . . helps explain why *Farmer*'s holding—clear as it may be with respect to certain conduct—does not automatically vitiate Smith's immunity here. In *Barkes*, the widow of a former inmate who committed suicide in prison had sued the commissioner of the state department of corrections and the prison's warden. . . She claimed that the officials had displayed deliberate indifference toward his risk of suicide 'by failing to supervise and monitor the private contractor that provided the medical treatment—including the intake screening—at the [prison].'. . The court of appeals had found that the officers were not entitled to qualified immunity on her Eighth Amendment claim because, at the time of the inmate's death, there were cases on the books putting officers on notice that they could not behave with reckless indifference to a particular inmate's known 'vulnerability to suicide.'. . The Supreme Court disagreed. In its view, those prior decisions did not clearly establish the unlawfulness of the officials' purported conduct—failing to implement adequate screening procedures—because the cases 'did not say ... that detention facilities must implement procedures to identify such vulnerable inmates, let alone specify what procedures would suffice.'. . By the same token, *Farmer* does not dictate the outcome here. The clearly established right to be free from deliberate indifference to sexual assault does not mean that it is clearly established what procedures a supervisor must put in place to prevent assault. And the Court finds that, as a matter of undisputed fact, Warden Smith's actions did not violate clearly established Eighth Amendment law. It is undisputed that Smith played a limited role in the chain of events that led to Richardson's purported assault. He testified that he did not participate in creating or implementing the two policies that Richardson takes issue with—the one that allowed transgender inmates to be housed in the general male prison population, . . . or the one that presumptively double-celled inmates, including transgender inmates, absent a specific finding that they belonged in protective custody[.]Richardson identifies no evidence undermining that testimony, and indeed she concedes that the policies were instituted not by Smith, but by the Department's Director. . . . Nor is there any evidence suggesting that Smith selected Glover as Richardson's cellmate or was aware of Richardson's concerns about Glover, which she claims to have expressed to several prison guards after being moved into his cell. Rather, the record, read in the light most favorable to Richardson, supports the following narrative with respect to Warden Smith's state of mind: Smith knew that, pursuant to Department of Corrections policy, an inmate could circumvent the Transgender Housing Committee's hearing process by signing a form agreeing to be housed according to her birth sex. . . Smith could override any initial determination related to housing—including the inmate's election of birth-sex housing—by making a

recommendation to the Director in writing. . . Smith also knew that any transgender female inmate who was housed in the general male population would presumptively be double-celled based on a suicide-prevention policy instituted by the Director. . . Smith could register disagreement with that policy but could not unilaterally change it. . . A jury could also infer that Smith knew generally that transgender female inmates—particularly those exhibiting traditionally feminine characteristics—faced a higher risk of sexual assault when celled with male inmates. There is no evidence, however, that Smith had any information indicating that Richardson faced a particularly high risk of abuse. Nor is there evidence that Smith knew that Glover, beyond his substantial criminal history, posed an especially high threat of sexual assault. Obviously, Richardson need not point to a case finding liability under that *exact* set of facts in order to overcome qualified immunity. . . But she still must persuade the Court that, in 2014, Smith was on clear notice that the foregoing conduct and associated state of mind amounted to a constitutional violation. She cites no authority, nor is the Court is aware of any, that provided such notice. The right to be free from deliberate indifference to the risk of assault does not necessarily imply that Smith needed to categorically prevent transgender female inmates from being celled with male inmates who exhibited no particularized red flags when it came to sexual violence. And an officer in Smith's position could reasonably—not necessarily correctly, but reasonably—believe that the D.C. jail's system for housing transgender inmates properly balanced inmate safety against avoiding mandatory isolation of transgender inmates, especially because it is undisputed that the double-celling policy was enacted to mitigate the risk of suicide. Smith is therefore entitled to qualified immunity on Richardson's Eighth Amendment claim against him in his individual capacity.")

FIRST CIRCUIT

Martinez-Velez v. Rey-Hernandez, 506 F.3d 32, 46 (1st Cir. 2007) ("[I]n political discrimination cases–where wrongful motive is an element of the claim–the case law has regularly rejected this objective-reasonableness argument.")

Rosario-Urdaz v.Velazco, 433 F.3d 174, 178 & n.2, 179 (1st Cir. 2006) ("Traditionally–search and seizure is the best example–the Supreme Court has said that private motive is irrelevant if the defendant had objective probable cause or, for qualified immunity purposes, a reasonable officer might have so believed, even if wrongly. . . By contrast, in cases involving first amendment rights, some of our decisions have left open the possibility that an objectively reasonable action could still be denied qualified immunity if improperly motivated. [citing *Mihos* and *Tang*] . . . . These cases note, without resolving, the tension between specific-intent constitutional violations and the requirement that qualified immunity be decided on a purely objective basis. . . . In all events, even if the existence of a political motivation underlying an objectively reasonable employment decision were enough to preclude qualified immunity, Rosario-Urdaz must make a threshold showing that she was adversely affected by these personnel decisions. . . .The personnel decisions of which Rosario-Urdaz complains do not rise to this level.").

Tejada-Batista v. Morales, 424 F.3d 97, 102 , 103 (1st Cir. 2005) ("[T]he problem in this case is not one of a single actor with multiple motives, but of sequential actors having different motives– the first actor's motive being unlawful and the second actor's motive at least permissible. In such a case, the first actor may be (and here was) a but-for cause of the firing. The question is whether the intervening step–a final decision maker acting on a permissible ground–should as a matter of policy (not lack of causation) insulate the wrongdoer from liability. We have found only a few circuits that have addressed this sequence-of-actors issue in the present context, and they are nominally in conflict. [citing cases] The interplay between qualified immunity and First Amendment violations is a difficult subject, partly because the former normally employs an objective standard and the latter–in contrast to the ordinary Fourth Amendment claim– turns heavily upon motive. This does not mean that qualified immunity can never succeed in a First Amendment case, *see Dirrane v. Brookline Police Dept.*, 315 F.3d 65, 69-71 (1st Cir.2002), but only that the opportunities may be narrowed. On appeal, appellants' brief describes qualified immunity doctrine in general terms but makes no effort to apply it to the facts of this case. An argument not seriously developed in the opening brief is forfeit,. . .and that rule certainly applies in this case. Given that the jury almost surely found that appellants' purpose was improper retaliation, it is not clear how a qualified immunity defense could easily have prevailed.")

Tejada-Batista v. Morales, 424 F.3d 97, 105-08 (1st Cir. 2005) (Carter, J., dissenting) ("[T]he conduct and motivation of Ms. Morales and Mr. Alverez cannot be, as a matter of law, any part of a legally sufficient causative factor in Secretary Fuentes' employment action. Even though the evidence might be construed to establish that their termination recommendations were potentially driven by some unconstitutional motivation, they cannot be liable under section 1983 without some evidence of causation between that motivation and the decision by Secretary Fuentes to discharge the Plaintiff. . . . .Without at least being able to impute appellants' unlawful motives to Secretary Fuentes, those wrongful motives cannot be found to be a motivating factor in the adverse employment action. . . . As a matter of law, there simply cannot be any causal link here between any supposed improper motives of the minions and the discharge implemented by Secretary Fuentes' solitary decision to discharge plaintiff for a proper, stated reason. . . . *Webber v. International Paper Co.*, 417 F.3d 229 (1st Cir.2005). . . . is a clear application of the *Mt. Healthy* rule requiring the presence of causational linkage between the conduct of those who are found to harbor discriminatory motivation and the making of the actual, challenged employment decision. It is, I suggest, not proper for this panel to depart from this holding. In this Circuit, each panel of the Court is bound by prior panel decisions directly on point. . . The seminal holding of *Webber*, for present purposes, is that where the evidence fails to show that the final decision-maker is influenced adversely by the motivation of lower level actors, the type and level of causation required by *Mt. Healthy* is absent and must be recognized. A).

Mihos v. Swift, 358 F.3d 91, 103-07(1st Cir. 2004) ("Given the importance of Swift's motivation for firing Mihos for his vote, we must pause to address Swift's argument in her brief that 'the state of mind of the public official is not relevant to the question of qualified immunity,' citing to *Harlow v. Fitzgerald*. . . . This argument, along with citations to *Harlow*, is often made in First

Amendment retaliation cases when defendants raise the qualified immunity defense. We are mindful that the Supreme Court in *Harlow* changed qualified immunity doctrine to emphasize the objective, not subjective, nature of that inquiry. However, *Harlow* does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the *first step* of the qualified immunity analysis in assessing whether an intent-based constitutional violation has been alleged. . . . *Harlow,* then, did not affect the *first step* of the qualified immunity analysis: whether plaintiff's allegations, if true, establish a constitutional violation. Certain constitutional violations, including First Amendment retaliation claims, include defendant's motivations as a foundational element of the tort: Mihos's First Amendment retaliation claim 'has no meaning absent the allegation of impermissible motivation.' . . . While the Supreme Court has removed from the qualified immunity analysis inquiries into whether a defendant knew that he was violating plaintiff's constitutional rights or acted maliciously to that end, this jurisprudence has not suggested that the 'objectification' of the qualified immunity inquiry somehow removes the intent element in the 'subset of constitutional torts [in which] motivation or intent is an element of the cause of action .' . . . In *Crawford-El v. Britton*. . . the Supreme Court confirmed that although *Harlow* eliminated inquiries into the defendant's subjective state of mind in the third step of the qualified immunity analysis, it did not eliminate inquiries into the defendant's subjective state of mind in the first step of the qualified immunity analysis when plaintiff alleges an intent-based constitutional tort. . . . With its careful attention to the ways in which trial courts can control the examination of an official's state of mind pre-trial, the Supreme Court acknowledged in *Crawford-El* that the adoption of an objective standard for qualified immunity in *Harlow* did not foreclose all state of mind inquiries during the pre-trial consideration of qualified immunity when state of mind is an element of the constitutional tort. Swift misreads *Harlow* in asserting that its reformulation of the qualified immunity defense makes her motivation in firing Mihos irrelevant to the qualified immunity analysis. Therefore, if the qualified immunity defense proffered in her motion to dismiss does not identify proper grounds apart from motive for dismissing the case, and if the thrust of her motion to dismiss is simply to deny that she acted with the constitutionally proscribed motive, she is unlikely to succeed." [footnotes omitted]).

Orekoya v. Mooney, 330 F.3d 1, 11(1st Cir. 2003) ("Orekoya next erroneously argues that Judge Young could not have granted qualified immunity because 'national origin discrimination precludes the availability of qualified immunity as a defense,' citing to *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 31, 37 (1st Cir.2001). The assertion is flatly wrong. *DiMarco* applied the usual rules of qualified immunity and concluded, on the facts there, that immunity was not available. There is no per se rule that national origin discrimination is exempt from qualified immunity analysis.").

Tower v. Leslie-Brown, 326 F.3d 290, 296 (1st Cir. 2003) ("Certainly, the unlawfulness of entering a person's home to effectuate a warrantless arrest in the absence of exigent circumstances was clearly established at the time of Tower's arrest in January 2001. . . But the qualified immunity inquiry demands that we ask a second, more specific question: would a reasonable officer have known that it was unlawful to enter the home under the specific circumstances faced?

. . Maine law largely answers this question. By statute, an arresting officer 'need not have the warrant in [his] possession at the time of the arrest.' Me. R.Crim. P. 4(c)(3). It is uncontested that Peary was told by a court employee that a valid warrant had issued. The district court concluded, as do we, that it was reasonable for defendants to rely on the representation of a district court official, and that a reasonable actor would have believed that the warrant had issued. The Towers argue that the district court improperly failed to engage in an analysis of the defendants' subjective intent and absence of 'good faith.' In evaluating the officer's conduct, 'we do not focus on the official's subjective state of mind, such as bad faith or malicious intention ... we [must instead] make an objective analysis of the reasonableness of conduct in light of the facts actually known to the officer and not consider the individual officer's subjective assessment of those facts. Nor are actual motives for conduct to be considered in evaluating a qualified immunity defense.' *Sheehy v. Town of Plymouth,* 191 F.3d 15, 19 (1st Cir.1999) (internal quotations omitted) (quoting *Floyd v. Farrell,* 765 F.2d 1, 4-6 (1st Cir.1985)); *see also Harlow,* 457 U.S. at 818, 102 S.Ct. 2727. Because objectively reasonable officers would not have known they were violating the Towers' Fourth Amendment rights by entering their home, the defendants enjoy qualified immunity.").

Tang v. State of Rhode Island, 120 F.3d 325, 327, 328 (1st Cir. 1997) ("We think that the *Harlow-Anderson* objective test does not automatically resolve a qualified immunity defense in favor of the defendant in a case of alleged racial discrimination or retaliation. The essence of such claims, or at least one standard version, is that official actions that might otherwise be defended as reasonable become illegitimate when taken out of racial bias or in revenge for a prior complaint. . . . To employ a wholly objective test would wipe out many, if not most, of these claims. The objective test focuses on the reasonableness of the official's conduct independent of motive. It is rarely going to be manifestly unreasonable, judged apart from motive, to assign particular tasks to an employee, move her file cabinet, alter her parking arrangements or do most of the things of which Tang complains. But because of special constitutional or statutory protections, some motives can convert relatively minor slights into causes of action. . . . An unresolved tension exists between such specific-intent torts and the objective *Harlow-Anderson* qualified immunity test. That test was designed to meet, not claims of racial bias or retaliation, but rather ill- founded allegations that an official action was "malicious" or taken "in bad faith"– characterizations that defeated qualified immunity at common law. . . In all events, the circuit courts have almost uniformly refused to apply a strictly objective test of qualified immunity in racial and retaliation cases.")

Broderick v. Roache, 996 F.2d 1294, 1297-98 (1st Cir. 1993) (holding that the district court did not err in taking into consideration defendant's intent in course of qualified immunity analysis, where state of mind was an essential component of plaintiff's underlying constitutional claim).

Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 46 (1st Cir. 1988) ("*Harlow* will not bar inquiry into a defendant's state of mind when the applicable law makes the defendant's state of mind . . . an essential element of plaintiff's constitutional claim.).

Facey v. Dickhaut, No. CA 11-10680-MLW, 2014 WL 8105164, at *21-22 (D. Mass. Sept. 30, 2014) ("Some courts have found that the qualified immunity analysis and the Eighth Amendment deliberate indifference analysis fold into each other, reasoning that a reasonable officer would know that conduct amounting to deliberate indifference violates the Eighth Amendment. [collecting cases] However, neither the First Circuit nor the Supreme Court has decided whether qualified immunity poses a discrete question from deliberate indifference. Assuming, without deciding, that the question of whether a prison official's conduct violates 'clearly established law' for purposes of qualified immunity is a question distinct from whether the officer acted with deliberate indifference under the Eighth Amendment, the defendants are not entitled to qualified immunity. Viewing the evidence in the light most favorable to the plaintiff, a reasonable official in the defendants' position would have known that his conduct violated the plaintiff's clearly established Eighth Amendment rights. As of 2010, when Facey was attacked, it was clearly established that prison officials violate a prisoner's Eighth Amendment rights when they knowingly place him at a substantial risk of attack from other inmates. [citing cases] Most significantly, in 1994, in *Farmer*, 511 U.S. at 842–44, the Supreme Court held that prison officials violate the Eighth Amendment when they knowingly place a prisoner in a setting that puts the prisoner at a substantial risk of violent assault from another inmate. . . . Like *Farmer*, Facey has presented evidence that would allow a reasonable jury to find that the defendants knowingly placed him at a substantial risk of being attacked by other inmates and that they violated Facey's clearly established Eighth Amendment rights. Therefore, the defendants are not entitled to qualified immunity.")

Thayer v. Dion, No. 2: 09-cv-00435-DBH, 2010 WL 4961739, at * 16 (D. Me. Nov. 30, 2010) ("I agree with the defendants that there is a potential for an entitlement to qualified immunity under the Fourth Amendment standard even though there is sufficient evidence to warrant a trial on the *Saucier v. Katz*-esque [footnote omitted]excessive force claim in the absence of the immunity defense. [footnote omitted] However, it baffles me how a court could reach a conclusion that even though there was sufficient evidence that the force was applied impermissibly because it *was motivated by a desire to punish or was malicious or sadistic* the defendants are still entitled to summary judgment because 'the contour of the right' was not sufficiently clear and objectively a reasonable officer would not have understood that applying force *to punish* contravened the clearly established law. . . . The defendants' argument on this score comes very close to a suggestion that given the misbehavior of Thayer, they thought a reasonable officer would think he or she could get away' with the application of a little punitive, rights-violating force.")

Hrichak v. Kennebec County Sheriff, No. 06-59-B-W, 2007 WL 1170778, at **6-8 (D.Me. Apr. 18, 2007) ("[T]he defendants argue that the absence of probable cause for an arrest is a required element of a claim alleging retaliatory arrest, just as it is for a claim alleging retaliatory prosecution as indicated in *Hartman v. Moore*, 547 U.S. 250, __, 126 S.Ct. 1695, 1706-07 (2006). . . . There is a Circuit split on the question of whether or not, what is now the *Hartman* rule, of pleading and proving the absence of probable cause applies to retaliatory arrests. [citing cases] I am simply not

convinced that the rationale of *Hartman* applies to a claim such as Hrichak's against the arresting officers involved in a spur-of-the-moment, warrantless arrest. . . . Even if Pion and Durham, under one version of the facts, were motivated by a desire to retaliate against Hrichak because of his threat to complain to federal authorities, they still claim they are entitled to qualified immunity for their actions because of the probable cause for the arrest. . . . . *Tatro v. Kervin*, 41 F.3d 9 (1st Cir.1994) and the 'but-for' test has been the clearly established law regarding retaliatory arrests in this circuit for over ten years. . . . As explained above, if the court considers the deposition testimony cited in his memorandum, there is a genuine dispute of material fact as to whether there was violation of a clearly established constitutional right. The difficult analysis occurs under the third prong of the First Circuit qualified immunity standard as it requires the court to determine whether 'it would have been clear to an objectively reasonable official, situated similarly to [these defendants], that the actions taken or omitted contravened the clearly established right.'. . Thus, I find myself in the uncomfortable situation of assessing whether a police officer who under one version of the facts made a decision to arrest an individual because he wanted to prevent that individual from exercising his First Amendment rights, acted as an objectively reasonable police officer given the indisputable probable cause for the arrest. . . . .The propriety of conferring *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) qualified immunity in this sort of 'intent-based' constitutional tort is anything but clear based upon the majority opinion in *Crawford-El*. . . . I conclude however, under the facts and circumstances of this case, even if there is some evidence which would support a finding of improper motive, given the indisputable probable cause for the arrest and subsequent guilty plea by Hrichak, Pion and Durham are entitled to qualified immunity.").

See also Ligeri v. Rhode Island , 2007 WL 3072061, at *9 (D.R.I. Oct. 19, 2007) ("In *Tatro v. Kervin*, 41 F.3d 9, 18 (1st Cir.1994), the First Circuit opined on the standard of proof in a § 1983 action alleging First Amendment violations by a police officer. It held that the plaintiff in such a case 'need only show that the officer's intent or desire to curb the [protected] expression was the determining or motivating factor in making the arrest, in the sense that the officer would not have made the arrest Abut for" that determining factor.' . . . The Cranston Defendants also neglect to address the application to this case of the Supreme Court's holding in *Hartman v. Moore*, 547 U.S. 250, 255-56 (2006), that a plaintiff in a § 1983 retaliatory prosecution claim must prove a lack of probable cause. In *Hrichak v. Kennebec County Sheriff*, No. 06-59-B-W, 2007 WL 1229404 (D. Me. April 24, 2007), the District Court considered the question of whether the *Hartman* probable cause rule extended to a claim of First Amendment retaliatory arrest. The Court noted that the First Circuit had not yet addressed the question and that there is currently a Circuit split on the question. *Id.* at *7 (collecting cases). The Cranston Defendants have simply not sufficiently addressed any of the legal issues arising out of Plaintiff's First Amendment retaliation claim. An additional complicating issue is that Plaintiff's claim is one for a retaliatory ticket rather than a retaliatory arrest or criminal prosecution. The bottom line is that the Cranston Defendants have not adequately briefed the issue and thus have not met their burden under Fed.R.Civ.P. 12(b)(6) of demonstrating a failure to state a claim.")

Pelletier v. Magnusson, 195 F. Supp.2d 214, 241 (D. Me. 2002) ("Because the deliberate indifference standard is subjective, asking whether the defendant consciously disregarded a substantial risk of serious harm, . . . it cannot be said that should Pelletier demonstrate that the defendants acted with a deliberate indifference to Ronald's medical care and physical safety that the defendants nonetheless reasonably believed that their conduct was lawful.").

SECOND CIRCUIT

Hogan v. Fischer, 738 F.3d 509, 515, 516 (2d Cir. 2013) ("Assuming, as we must, that the factual allegations of the complaint are true, three prison officials wearing masks approached Hogan's cell and proceeded to spray him with a mixture of feces, vinegar, and 'some type [of] machine oil.' The substance burned Hogan's eyes and left Hogan with other physical injuries. We are unwilling to accept, as a matter of law, the proposition that spraying an inmate with a mixture of feces, vinegar, and machine oil constitutes a *de minimis* use of force. . . .Moreover, even if we were to assume *arguendo* that the physical force allegedly used was *de minimis*—though it was not—spraying an inmate with vinegar, excrement, and machine oil in the circumstances alleged here is undoubtedly 'repugnant to the conscience of mankind' and therefore violates the Eighth Amendment. . . .We therefore hold that the district court erred in concluding that the prison officials' alleged use of force was *de minimis* and not of the sort repugnant to the conscience of mankind. . . The conduct alleged in Hogan's complaint is undoubtedly a form of cruel and unusual punishment proscribed by the Eighth Amendment.")

DiStiso v. Cook, 691 F.3d 226, 240, 241, 245-50 (2d Cir. 2012) ("Since *Gant*, it has been clearly established law in this circuit that claims of intentional race discrimination can be based on the 'deliberate indifference' of school boards, administrators, and teachers to invidious 'harassment, in the school environment, of a student by other children or parents.' *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d at 140 (holding that 'only deliberate indifference to such [racial] harassment can be viewed as [intentional] discrimination by school officials themselves'). . . . Consistent with our obligation to consider a qualified immunity defense 'in light of the specific context of the case, not as a broad general proposition," *Saucier v. Katz*, 533 U.S. at 201, we separately consider the claims that defendants Uccello and Cook were indifferent to racial name-calling directed at Nicholas in kindergarten and the claims that all defendants were indifferent to racially motivated physical misbehavior directed at Nicholas in both kindergarten and first grade. We conclude that qualified immunity is not available to defendants Uccello and Cook in the first context on the evidentiary record set forth by the district court. We conclude, however, that qualified immunity is available as a matter of law in the second context. . . . In sum, there are disputed issues of fact as to each element of plaintiff's claims that Uccello and Cook were deliberately indifferent to kindergarten students' repeated use of racial epithets to belittle Nicholas. Because the district court found the record evidence sufficient to allow each of those elements to be decided in favor of plaintiff, and because we must accept that sufficiency determination on this appeal, Uccello and Cook are not entitled to judgment on the ground of qualified immunity. . . . We reach a different conclusion with respect to plaintiff's claims that defendants were each

deliberately indifferent to students' racially motivated physical misbehavior toward Nicholas. In so doing, we identify legal error in the district court's analysis, which appears not to have meaningfully distinguished the second element of a deliberate indifference claim as established by *Gant, i.e.,* a defendant's actual knowledge of student-on-student racial harassment, *see Gant ex rel. Gant v. Wallingford Bd. of Educ.,* 195 F.3d at 141 & n. 6, from the first element, *i.e.,* students' racial harassment of a peer, *see id.* at 141. Rather, the district court largely elided consideration of the actual knowledge element by relying on an assumption as to the racial harassment element that is not clearly established in law: that evidence of student-on-student racial harassment in any respect can, without more, support an inference that any further student misbehavior directed to the same peer is also racially motivated. That assumption gave rise to another, also not clearly established in law: that evidence of a school official's knowledge of the initial racial harassment is enough, by itself, to permit a finding of his actual knowledge that any further misbehavior was also racially motivated. As we will explain herein, this mistakenly transformed the actual knowledge requirement established by *Gant* into an imputed knowledge requirement, and imputed knowledge is insufficient as a matter of law to support a claim for deliberate indifference. Where, as in this case, the subsequent misbehavior is of a type routinely engaged in by school children of the age at issue without regard to motivation, there must be some objective evidence linking initial racially hostile acts to such subsequent misbehavior to support a finding that a school official has actual knowledge that the latter behavior, like the former, is racially motivated. . . . To date, no Supreme Court or Second Circuit law clearly establishes that evidence of prior racial name-calling by unidentified kindergarten or first-grade students suffices to demonstrate that *any* subsequent physical misbehavior directed at the same classmate is also racially motived. Indeed, we conclude that something more is necessary to support an inference that a teacher or school official actually knew such subsequent misconduct was racially motivated. . . . In sum, because the record evidence is insufficient, as a matter of law, to support a finding that Uccello actually knew that her kindergarten students' routine physical misbehavior toward Nicholas was racially motivated, Uccello is entitled to an award of summary judgment based on qualified immunity for this part of plaintiff's deliberate indifference claim. . . . For the same reasons already discussed with respect to Uccello and Couture, *see supra* Part II.D.2.a.(1), no clearly established law permits an inference that Cook had actual knowledge that the complained-of physical misbehavior toward Nicholas in kindergarten or first grade was racially motivated in the absence of some objective evidence connecting the latter misbehavior to the earlier racial name-calling. . . . Because plaintiff's claims of deliberate indifference to physical misbehavior fail at the actual knowledge step of *Gant* analysis, we need not consider defendants' arguments for qualified immunity based on the final, reasonable response, element of a deliberate indifference claim. . . Any such inquiry would of course require us to assume that plaintiff could prove both that the physical misbehavior was racially motivated and that defendants had actual knowledge of that fact.")

Reuland v. Hynes, 460 F.3d 409, 419, 420 (2d Cir. 2006) ("Because previous cases have recognized and defined the First Amendment right of public employees to be free from retaliation for speech on matters of public concern with reasonable clarity, Hynes would be entitled to qualified immunity only if it was objectively reasonable for him to believe that he could demote

an assistant district attorney for making a hyperbolic statement regarding the crime rate without violating that right. . . . Because it would not have been objectively reasonable for Hynes to believe he could demote Reuland in retaliation for his hyperbolic statement to New York magazine, and he did not request that the jury decide if he was motivated by disruption rather than retaliation, Hynes is not entitled to qualified immunity.").

Reuland v. Hynes, 460 F.3d 409, 421 (2d Cir. 2006)(Winter, J. dissenting) (" I respectfully dissent. A prosecutor's statement to a magazine about homicide rates within his jurisdiction is not protected by the First Amendment when it was admittedly false, admittedly made without any belief of a basis in fact, and made to promote sales of the prosecutor's novel. . . . Labeling false speech 'hyperbole' does not render it protected. A government employee who purposefully or recklessly misinforms the public about a fact specifically related to his area of employment responsibility in order to profit monetarily should not be rewarded by a money judgment from a federal court when he is demoted. Established First Amendment doctrine provides no support for placing the mantle of victimhood upon such an employee.").

Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003) ("Where specific intent of a defendant is an element of plaintiff's claim under clearly established law, and plaintiff has adduced sufficient evidence of that intent to defeat summary judgment, summary judgment on qualified immunity grounds is inappropriate. . . In the present case retaliatory intent is an element of plaintiff's claim, and we have already noted that plaintiff's evidence of retaliatory animus is sufficient to make defendants' motivation a triable issue of fact. Until that issue is resolved by a factfinder, therefore, the retaliation claim against defendant [police commissioner] cannot be dismissed on qualified immunity grounds.").

Locurto v. Safir, 264 F.3d 154, 168, 169 (2d Cir. 2001) ("Defendants further urge upon us that subjective intent is per se irrelevant to the inquiry into objective reasonableness. But this argument betrays a fundamental misconception of the application of the qualified immunity doctrine to constitutional claims for which intent is an element. In the usual case where intent is not an element, bare allegations of malice coupled with otherwise legitimate government action do not yield a viable constitutional claim. In such a case, the qualified immunity doctrine focuses only on whether the government official's actions were objectively reasonable in light of clearly established law, without regard for possible subjective malice. . . But where a more specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law.").

Sheppard v. Beerman (Beerman II), 94 F.3d 823, 828 (2d Cir. 1996) ("Sheppard asserts that qualified immunity is not available where he has alleged that Beerman had an actual unconstitutional motive in firing him. To a limited extent, we agree. Contrary to the district court's decision, the employer's actual (subjective) motive is not irrelevant in a qualified immunity inquiry. Rather, where the subjective state of mind of the actor is part of the constitutional mix, we have developed a rule that balances the interests of the official claiming immunity against the

interests of the employee asserting unconstitutional motive: Upon a motion for summary judgment asserting a qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts ... supporting the claim of an improper motive in order to avoid summary judgment. [citing *Blue*] This standard allows an allegedly offending official sufficient protection against baseless and unsubstantiated claims, but stops short of insulating an official whose objectively reasonable acts are besmirched by a prohibited unconstitutional motive.").

Blue v. Koren, 72 F.3d 1075, 1083-84 (2d Cir. 1995) ("The so-called heightened standard has been applied to address the problem of applying the test of "objective reasonableness" prescribed in *Harlow* [cite omitted] in circumstances where the constitutional claim asserted contains a subjective component. . . . By imposing that standard, courts have sought to reconcile the goal that led to the adoption of the objective test–permitting the dismissal of insubstantial claims involving objectively reasonable official conduct–with the goal of allowing plaintiffs to present claims that depend upon proof of unconstitutional motive. We believe that imposition of a similar standard is an appropriate way to accommodate these competing interests. . . . We agree that plaintiffs must offer specific evidence of improper motivation, but confess considerable doubt as to whether the "heightened" standard is really heightened or is simply an application of the rule that conclusory assertions are insufficient to defeat a motion for summary judgment. [cite omitted] When such a motion is based on assertion of qualified immunity, the first issue is whether a clearly established right is at stake. [cite omitted] If it is, the court must then address whether the conduct was objectively reasonable. If not, the motion must be denied. If the conduct was objectively reasonable, a conclusory proffer of an unconstitutional motive should not defeat the motion for summary judgment. The reasonableness of the conduct is itself substantial evidence in support of the motion and requires in response a particularized proffer of evidence of unconstitutional motive. . . . Accordingly, whether the description heightened is accurate or not, we hold: upon a motion for summary judgment asserting a qualified immunity defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts . . . supporting the claim of an improper motive in order to avoid summary judgment. In our view, the particularized evidence of improper motive may include expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken.").

Williams v. Koenigsmann, No. 03 Civ. 5267(SAS)**,** 2004 WL 315279, at *6 (S.D.N.Y. Feb. 18, 2004) ("Suffice it to say that this is not a case where qualified immunity is an appropriate defense. The right to be free from cruel and unusual punishment is a clearly established constitutional right and this Court cannot find, as a matter of law, that it was objectively reasonable for defendants to believe that withholding pain medication and treatment did not violate that right. Defendants either were deliberately indifferent to plaintiff's serious medical needs or they were not. Qualified immunity simply does not come into the picture.").

Rodriguez v. Ghoslaw, No. 98 CIV. 4658(GEL), 2001 WL 755398, at *8, *9 (S.D.N.Y. July 5, 2001) (not reported) ("A conscientious and diligent public officer should not have to fear that his objectively reasonable decisions will subject him to burdensome litigation, and the risk of actual liability, based on the attribution of subjective bad motives inferred from the testimony of hostile parties. Accordingly, the proper inquiry is whether it was objectively reasonable, under the circumstances facing Ghoslaw, for a corrections officer to decide to refrain from immediate action to separate the fighting inmates. If it was, an officer who chose that course of action should be protected from suit by qualified immunity, even if the particular officer might be found by a jury, if the case were tried, to have acted from unconstitutional motives. . . . [C]ertainly, it would not have been 'clear to a reasonable officer that [waiting for backup before attempting to separate struggling inmates] was unlawful in the situation he confronted.' [citing *Saucier*] The only factual issue for a jury to resolve in assessing whether the action violated the constitution would be not the reasonableness of Ghoslaw's actions, but whether the apparent reasonableness of Ghoslaw's conduct masked a nefarious motive for inaction. While the defendant's motive is crucial to finding a violation of the Eighth Amendment, it is irrelevant to the issue of qualified immunity. The availability of qualified immunity turns upon the objective reasonableness of Ghoslaw's decision to wait for backup, an issue which may be resolved as a matter of law on summary judgment.")

THIRD CIRCUIT

Monteiro v. City of Elizabeth, 436 F.3d 397, 404, 405 (3d Cir. 2006)("Thus, if Perkins-Auguste acted with an intent to suppress Monteiro's speech on the basis of viewpoint, she violated clearly established law and is not entitled to qualified immunity. In cases in which a constitutional violation depends on evidence of a specific intent, 'it can never be objectively reasonable for a government official to act with the intent that is prohibited by law .' *Locurto v. Safir*, 264 F.3d 154, 169 (2d Cir.2001). Accordingly, the District Court did not err in holding that whether Perkins-Auguste's conduct violated clearly established law depended upon her motivation for ejecting Monteiro from the meeting. Furthermore, it was not error to submit this question to the jury because there was sufficient evidence from which a reasonable jury could conclude that Perkins-Auguste acted with a motive to suppress Monteiro's viewpoint. Although qualified immunity is a question of law determined by the Court, when qualified immunity depends on disputed issues of fact, those issues must be determined by the jury. . . . Motive is a question of fact that must be decided by the jury, which has the opportunity to hear the explanations of both parties in the courtroom and observe their demeanor. . . Monteiro adduced sufficient evidence at trial from which a reasonable jury could conclude that Perkins-Auguste acted with a motive to suppress Monteiro's speech based upon his opposition to the budget.").

Monteiro v. City of Elizabeth, 436 F.3d 407-12 (3d Cir. 2006) (Fisher, J., dissenting) ("The majority characterizes the jury's finding of improper intent as the dispositive inquiry in assessing both the existence of a constitutional violation and entitlement to qualified immunity. This reflects,

in my view, a fundamental misunderstanding of the relationship of motive to the First Amendment and the doctrine of qualified immunity. I respectfully dissent. . . . The second stage of the qualified immunity analysis is whether, given the existence of a constitutional violation, a reasonable person should have recognized it under 'clearly established' law. The hypothetical 'reasonable person' is an objective observer, who is aware of the facts known to the official but possesses an independent knowledge of governing legal precepts. . . . Subjective intent plays a limited role in this analysis. It is considered as an element of the underlying claim when the right at issue is predicated on the official's motive, but the presence of improper motive does not preclude qualified immunity. *Grant v. City of Pittsburgh*, 98 F.3d 116, 124 (3d Cir.1996). An official who has committed a constitutional violation, even one evincing improper intent, will nevertheless be immune from liability if an objective observer in the same position, given the same facts and knowing of the official's improper motive, would not have recognized a constitutional violation under clearly established law. . . The opinion of the majority defines the right at issue in this case too broadly. It states that a public official in Perkins-Auguste's position 'must conform her conduct to the requirements of the First Amendment' and that 'viewpoint-based restrictions violate the First Amendment.' Maj. Op. at 16. These platitudes bear no relationship to the particular circumstances of this case and do little to define the standard governing Perkins-Auguste's conduct. . . The majority cites to no cases discussing whether and when a member of a legislative body may be removed from a public meeting. This failure is understandable, given the dearth of precedent on the issue. . . . I cannot conclude, on this backdrop, that a reasonable official in Perkins-Auguste's position should have realized that her conduct exceeded constitutional bounds. There is no doubt that Monteiro was being disruptive during the meeting and failed to comply with Perkins-Auguste's rulings. . . . His conduct was, in short, antithetical to the legitimate goals of the forum. A reasonable official in the same position as Perkins-Auguste could have concluded, under existing caselaw, that the decision to remove Monteiro was constitutionally justified, regardless of her actual underlying intent. . . She is thus entitled to qualified immunity. . . This conclusion does not cast doubt on the jury's verdict, or its findings that Perkins-Auguste was motivated by a desire to retaliate against Monteiro and that a constitutional violation did occur. That an official is granted qualified immunity does not mean that he or she acted laudably or even constitutionally. To the contrary, an official may act in a morally and legally culpable fashion and yet be entitled to immunity if an objective observer, in the same position, would not have recognized a constitutional infringement . . . The mantle of qualified immunity will be denied to a public official only when a reasonable person in the same situation would have recognized a constitutional infringement. Perkins-Auguste's conduct, even if violative of Monteiro's civil rights, was not so patently unconstitutional under existing caselaw as to deny her immunity. The majority concludes to the contrary. It does so based on a fundamental misinterpretation of the relationship of subjective intent to the First Amendment and the doctrine of qualified immunity. This error will, I fear, have unfortunate ramifications for our jurisprudence in these fields. I respectfully dissent.").

Beers-Capitol v. Whetzel, 256 F.3d 120, 142 (3d Cir. 2001) ("We have determined, however, that the plaintiffs have raised a genuine issue of material fact as to whether Burley was deliberately indifferent. Because deliberate indifference under *Farmer* requires actual knowledge or awareness

on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent; a reasonable YDC worker could not believe that her actions comported with clearly established law while also believing that there is an excessive risk to the plaintiffs and failing to adequately respond to that risk. Conduct that is deliberately indifferent to an excessive risk to YDC residents cannot be objectively reasonable conduct.").

Larsen v. Senate of the Commonwealth of Pennsylvania, 154 F.3d 82, 94, 95 (3d Cir. 1998) ("The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful. . . In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory. Even assuming that this could be demonstrated under a certain set of facts, it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations, and thus cannot properly be resolved on the face of the pleadings, but rather can be resolved only after the plaintiff has had an opportunity to adduce evidence in support of the allegations that the true motive for the conduct was retaliation rather than the legitimate reason proffered by the defendants. . . . In reaching this result we are not suggesting that a bare allegation of retaliatory motive necessarily is sufficient to defeat an assertion of qualified immunity as to a retaliation claim. In some circumstances, the legitimate basis for the actions might be so apparent that the plaintiff's allegations of retaliatory motive could not alter the conclusion that under the circumstances alleged in the pleadings, the defendants would have been compelled to reach the same decision even without regard for the protected First Amendment activity.").

Grant v. City of Pittsburgh, 98 F.3d 116, 124 (3d Cir. 1996) ("The City Defendants claim that under *Harlow* their subjective 'political or personal motives' are irrelevant to the qualified immunity analysis. The plaintiffs counter that the City Defendants' formulation of the qualified immunity standard would effectively prevent any plaintiff whose constitutional claim has as an essential element the state of mind of the public officials from ever getting past qualified immunity. Although we have not directly addressed this issue, . . . several of our sister circuits have. Those courts have held, with virtual unanimity, that, despite the broad language of *Harlow*, courts are not barred from examining evidence of a defendant's state of mind in considering whether a plaintiff has adduced sufficient evidence to withstand summary judgment on the issue of qualified immunity, where such state of mind is an essential element of the constitutional violation itself. . . . We therefore join our sister circuits in adopting the narrower view of *Harlow*. Accordingly, in evaluating a defense of qualified immunity, an inquiry into the defendant's state of mind is proper where such state of mind is an essential element of the underlying civil rights claim.").

FOURTH CIRCUIT

Scinto v. Stansberry, 841 F.3d 219, 236 n.9 (4th Cir. 2016) ("Although we need not reach the issue here, we note once again the 'special problem' of ' "applying an objective qualified

immunity standard in the context of an Eighth Amendment claim that is satisfied only by a showing of deliberate indifference"-that is, a knowing violation of the law.'. .Some Circuits have resolved this problem by concluding that qualified immunity is unavailable when the plaintiff presents a genuine dispute of material fact regarding the defendant's deliberate indifference. The Seventh Circuit, for example, has held that the subjective prong of the *Farmer* test and the objective, clearly established prong of the qualified immunity test 'effectively collapse into one' when the plaintiff raises genuine factual disputes regarding the defendant's deliberate indifference. *Walker v. Benjamin,* 293 F.3d 1030, 1037 (7th Cir. 2002). That court explained that when a plaintiff raises genuine disputes of fact on *Farmer*'s subjective prong, 'a defendant may not avoid trial on the grounds of qualified immunity' even though qualified immunity protects covered government officials from suit, not merely from liability. . . *see also, e.g., Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) ("[T]o the extent that the plaintiffs have made a showing sufficient to overcome summary judgment on the merits [of their deliberate indifference claim], they have also made a showing sufficient to overcome any claim to qualified immunity."). *But see Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049–50 (9th Cir. 2002) (rejecting the view that the deliberate indifference and clearly established inquiries merge).")

Cox v. Quinn, 828 F.3d 227, 238 n.4 (4th Cir. 2016) ("Although we need not reach the issue here, we note that some courts have concluded that it is not necessary to consider the objective reasonableness prong of the qualified immunity inquiry at all when summary judgment is denied on deliberate indifference. *See, e.g., Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002); *Beers-Capitol v. Whetzel,* 256 F.3d 120, 142 n.15 (3d Cir. 2001). Prison officials violate the Eighth Amendment through deliberate indifference if they are aware of a substantial risk of serious harm to an inmate, *Farmer*, 511 U.S. at 837, yet disregard that risk by taking action that they know to be inappropriate, *Parrish*, 372 F.3d at 303. In other words, for purposes of deliberate indifference, the Eighth Amendment violation must have been committed knowingly. As we have noted in the past, 'applying an objective qualified immunity standard in the context of an Eighth Amendment claim that is satisfied only by a showing of deliberate indifference' — that is, a knowing violation of the law — presents a 'special problem.' *Rish v. Johnson*, 131 F.3d 1092, 1098 n.6 (4th Cir. 1997). Accordingly, some of our sister circuits have concluded that deliberately indifferent conduct can never be objectively reasonable for purposes of qualified immunity. *See Walker*, 293 F.3d at 1037 (holding that deliberate indifference and qualified immunity inquiries 'effectively collapse into one' and that '[i]f there are genuine issues of fact concerning' a defendant's deliberate indifference, the 'defendant may not avoid trial on the grounds of qualified immunity'); *Beers-Capitol*, 256 F.3d at 142 n.15 ('Conduct that is deliberately indifferent to an excessive risk to [juvenile detention center] residents cannot be objectively reasonable conduct.'). *But see Estate of Ford v.Ramirez-Palmer*, 301 F.3d 1043, 1049–50 (9th Cir. 2002) (rejecting approach that 'collapses the deliberate indifference part of the constitutional inquiry into the qualified immunity inquiry').")

Williams v. Hansen, 326 F.3d 569, 581 (4th Cir. 2003) ("[W]e are dealing with an alleged equal protection violation predicated on the circumstance that Hansen caused only black officers to be

initially interviewed with respect to possible discrimination. In applying *Anderson* we recognize that cases need not be identical for a public officer to be charged that on the basis of precedent he should have recognized that his conduct violated a right that was clearly established. . . But still it would be a remarkable extension of equal protection principles to hold that the very act of questioning the members of a racial group as to whether they perceived discrimination against the members of that group was in itself unlawful. We are not aware of any case from the Supreme Court or this court that comes close to making such a holding and, in fact, the plaintiffs and the amici curiae do not supply us with any from other jurisdictions. In the circumstances, we cannot reasonably hold that Hansen objectively should have known that his conduct was unlawful when he directed Moyd and Shambley to question only black officers about discrimination against blacks. A reasonable person in Hansen's position was entitled to obtain his legal guidance from law books rather than a crystal ball. Thus, the equal protection right that plaintiffs advance was not clearly established when Hansen directed that the black officers be interviewed and he is entitled to summary judgment on this ground . . . .").

Williams v. Hansen, 326 F.3d 569, 587 (4th Cir. 2003) (King, J., dissenting) ("When Hansen instituted this investigation almost a quarter of a century after the Supreme Court rendered its decision in *Arlington Heights*, it was eminently well established that a facially neutral administrative action that is undertaken with an intent to discriminate against a particular racial group is forbidden by the Constitution. Accordingly, the district court did not err in denying Hansen qualified immunity from the plaintiffs' equal protection claims. . . . [A] reasonable person in Hansen's position could make no mistake that to adopt with discriminatory animus a facially neutral policy that subjected all and only the African- Americans in his Department to investigation, would be to violate the equal protection rights of the targeted officers.").

Pritchett v. Alford, 973 F.2d 307, 315 (4th Cir. 1992) ("Illegal motive on the officer's part need not also be shown...to defeat a qualified immunity defense to a Fourth Amendment claim which itself has no motive element.").

Blankenship v. Warren County, Va., 918 F. Supp. 970, 975-76 (W.D. Va. 1996) ("The instant civil action alleges that the Sheriff impermissibly terminated the plaintiff based upon gender-based animus, and consideration of the Sheriff's subjective motivation is an integral component to the plaintiff's claim. The Sheriff is not entitled to a dismissal based upon the defense of qualified immunity at this stage in the proceeding. . . . The court believes that where the substantive claim requires inquiry into the subjective motivation of the public official, then a defense on the ground of qualified immunity is best decided on a motion for summary judgment after full discovery has been completed.").

Harris v. Wood, No. CIV A 92-0108, 1994 WL 162556, *5 (W.D. Va. April 22, 1994) (not reported) ("In *Collinson*, Judge Phillips acknowledged the difficulty encountered by other courts in applying the objective component of the test for qualified immunity because a First Amendment claim turns on both the defendant's subjective intent and on the objective reasonableness of his

beliefs. *Id*. at 1001. The court agrees with Plaintiffs that a genuine issue of material fact surrounds [defendant's] motive in discharging Plaintiffs and that the parties disagree as to the reasons behind the decision. Plaintiffs have provided specific evidence of Defendant's improper motive, and Defendant has failed to convince this court that he would have made the decision regardless of Plaintiffs' speech. Consequently, resolution of this issue shall be in the hands of the reasonable fact-finder. . . .").

FIFTH CIRCUIT

Heaney v. Roberts, 846 F.3d 795, 802 n.3 (5th Cir. 2017) ("Roberts argues that the district court was wrong to assume, as a factual matter, that Roberts acted with improper motive because the 'test for the application of qualified immunity does not involve a look into the subjective intent of the official, but instead looks at what a reasonable official would know or think.' The Supreme Court addressed the issue of unconstitutional motive in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The Court explained that 'although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case.' *Id.* at 589. While Roberts is correct that qualified immunity presents a question of law to be determined by the court, 'when qualified immunity depends on disputed issues of fact, those issues must be determined by the jury.' *Monteiro v. City of Elizabeth*, 436 F.3d 397, 405 (3d Cir. 2006). Indeed, *Crawford-El* recognized that that there is a 'wide array of different federal law claims for which an official's motive is a necessary element' and that there should be no heightened burden on plaintiffs at the summary judgment phase to prove improper motive.")

Bird v. Regents of New Mexico State Univ., 619 F. App'x 733, 744 (10th Cir. 2015) ("'When the qualified immunity inquiry turns on a subjective element, as it does when examining motive, the qualified immunity analysis is modified slightly.'. . In this context, '[t]he defendant must do more than merely raise the qualified immunity defense; he must make a prima facie showing of the objective reasonableness of the challenged conduct.'. . If the defendant carries this burden, 'the plaintiff must then produce specific evidence of the defendant's culpable state of mind to survive summary judgment.'")

Lauderdale v. Texas Dept. Of Criminal Justice, Institutional Div., 2007 WL 4465204, at *6 (5th Cir. Dec. 21, 2007) ("Given that actionable sexual harassment under title VII must be 'objectively ... offensive,' . . . such behavior cannot be 'objectively reasonable' for purposes of the qualified immunity inquiry. Thus, qualified immunity can never offer protection for sexual harassment because, if it is actionable at all, the harassment is by definition objectively offensive and unreasonable, and qualified immunity protects only the 'objectively reasonable,' *County of Comal*, 400 F.3d at 289 (*citing Hare*, 135 F.3d at 325). Because we have already determined that Arthur's alleged behavior is actionable under title VII and § 1983, we have necessarily determined that such behavior was objectively offensive and, therefore, not objectively reasonable. Thus, he is not entitled to qualified immunity.").

Kinney v. Weaver, 367 F.3d 337, 372, 373 (5th Cir. 2004) (en banc) ("We close our discussion of qualified immunity by noting that, contrary to the position asserted by the Police Officials, the district court's review of the reasons for the Police Officials' boycott does not mean that the lower court, or this court, has engaged in a 'subjective' analysis of the type condemned in *Harlow*. The Police Official's position, apparently, is that they are entitled to qualified immunity as long as there exists some conceivable set of reasons that would have made their actions appropriate. Such factual scenarios doubtless exist. It would have been permissible for the Police Officials to pull their students out of Kinney's and Hall's classes if (for instance) the Police Officials learned that the instructors were unskilled. Therefore, the Police Officials suggest, we necessarily engage in a forbidden 'subjective' inquiry if we take cognizance of a genuine dispute over the reasons for their actions against the instructors. What the defendants' approach would mean, of course, is that there can never be liability for any violation for which the elements include the official's intent or reasons for action. Most § 1983 claims do not include such an element, but First Amendment retaliation claims do: The First Amendment protects employees only from 'termination because of their speech on matters of public concern,'. . . not from termination simpliciter. Similarly, the Constitution forbids officials from discriminating on the basis of race only when their discrimination is intentional. . . In such cases, reading *Harlow* as forbidding all discussion of intent would allow the qualified immunity defense to preclude recovery even when the law was clearly established, for plaintiffs would be barred from proving an essential legal element of their case.").

Cantu v. Jones, 293 F.3d 839, 845 (5th Cir. 2002) (To extent that jury determined that prison officials had deliberately allowed another prisoner to escape and to perpetrate assault upon plaintiff in retaliation for his act of filing complaints about certain guards, officials were not entitled to qualified immunity from civil rights liability.)

Thompson v. Upshur County, 245 F.3d 447, 459, 460 (5th Cir. 2001) ("At the outset, we highlight the importance of appreciating the difference between the objective reasonableness standard for qualified immunity set forth in Part II, supra, and the subjective deliberate indifference standard for section 1983 liability set forth in Part IV, supra. These standards are often confused. *See Hare III*, 135 F.3d at 327- 28. Examples of behavior that does (and does not) constitute deliberate indifference are relevant in assessing the scope of clearly established law and, therefore, are relevant in determining whether the defendants' actions were objectively reasonable. *Id*. However, when the defendant moves for summary judgment based on qualified immunity, it is the plaintiff's burden to demonstrate that all reasonable officials similarly situated would have then known that the alleged acts of the defendants violated the United States Constitution. . . . That is different from the burden of establishing a genuine issue as to the defendant's deliberately indifferent subjective state of mind.When assessing the scope of clearly established law for step two, it is necessary to articulate the asserted constitutional right more specifically.").

Jacobs v. West Feliciana Sheriff's Dep't, 228 F.3d 388, 394 (5th Cir. 2000) ("In *Hare III*, we explained the somewhat confusing relationship between the deliberate indifference and objective reasonableness standards . . . . [W]e are to determine whether, in light of the facts as viewed in the

light most favorable to the plaintiffs, the conduct of the individual defendants was objectively unreasonable when applied against the deliberate indifference standard.").

Mendenhall v. Riser, 213 F.3d 226, 231 (5th Cir. 2000) ("[W]e are compelled by our case law that clearly dictates subjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law.").

Tompkins v. Vickers, 26 F.3d 603, 607 (5th Cir. 1994) ("Every Circuit that has considered the question has concluded that a public official's motive or intent must be considered in the qualified immunity analysis where unlawful motivation or intent is a critical element of the alleged constitutional violation." *citing* cases).

SIXTH CIRCUIT

Bishop v. Hackel, 636 F.3d 757, 772 (6th Cir. 2011) ("A government official performing a discretionary function is entitled to qualified immunity on summary judgment unless the facts, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established. . . An inmate's right to be free from violence at the hands of other prisoners was clearly established at the time of the alleged constitutional violation. . . Thus, the main issue in this case is whether any of the Deputies violated Bishop's constitutional rights. To raise a cognizable constitutional claim for deliberate indifference to an inmate's safety, an inmate must make a two-part showing: (1) the alleged mistreatment was objectively serious; and (2) the defendant subjectively ignored the risk to the inmate's safety. . . Bishop was young, small, and mentally ill; and he was incarcerated with Floyd, who was jailed for violent felonies including sexual assault. Viewing the facts in the light most favorable to Bishop, he raises an issue of fact as to whether the alleged mistreatment was objectively serious. Because Bishop raises an issue of fact as to whether Stanley subjectively ignored a risk to his safety, the district court's denial of qualified immunity to him is **AFFIRMED.** However, because Bishop fails to raise an issue of fact as to whether Harrell, Anderman, or Cantea subjectively ignored a risk to his safety, the district court's denial of qualified immunity to them is **REVERSED.**")

Center for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807, 831 n.16 (6th Cir. 2007) ("As a general rule, a claimant cannot defeat qualified immunity merely by leveling 'bare allegations of malice' against government officials. . . However, 'an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated.' *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). Where improper motivation constitutes an element of the claim–as in the case of Plaintiffs' First Amendment retaliation claims–and the claimant has shown all other elements, a question of fact remains as to the official's intent, thereby precluding summary judgment on the basis of qualified immunity. Post *Crawford-El*, it remains an open question whether inquiry into motive 'unrelated to the knowledge of the law' in the Fourth

Amendment context can similarly be taken to preclude summary judgment. Because we need not explore Defendants' motivations in detaining Plaintiffs to find that Defendants do not merit the protection of qualified immunity, we leave that question for another day.").

McKee v. Turner, No. 96-3446, 1997 WL 525680, *4 (6th Cir. Aug. 25, 1997) (unpublished) (concluding "that *Farmer's* deliberate indifference analysis precludes the application of qualified immunity to this case.").

Wright v. Jefferson County Police Department, 14 F.3d 603 (Table), 1993 WL 503748, *3 (6th Cir. 1993) ("The subjective views of the officers are irrelevant for purposes of determining qualified immunity to a section 1983 action based on an unreasonable search and seizure. However, when intent is an element of the substantive claim, the court must examine the officer's intent under a qualified immunity analysis to determine if he has violated 'clearly established' law. . . . Plaintiff's allegation that the officers impounded his van in violation of his equal protection rights requires an analysis of the officers' intent when they impounded the van because intent is an element of an equal protection violation.").

SEVENTH CIRCUIT

Riccardo v. Rausch, 375 F.3d 521, 526 (7th Cir. 2004) (amending and superseding prior opinion) ("The first two matters (the objective and subjective components of the eighth amendment) are for the jury in the first instance, with appellate review limited to the question whether any reasonable juror could have found that the requisite level of risk existed, and that Rausch knew it. Immunity, however, is a matter of law for the court, to be decided without deference to the jury's resolution–and preferably before the case goes to the jury. . .The district court brushed aside Rausch's invocation of immunity, writing that a guard cannot benefit from immunity if the action taken was not a reasonable response to a risk actually foreseen. That approach, which merges immunity and the merits, is incompatible with *Saucier* and its predecessors. . . . Immunity protects officials who act at the 'hazy border' . . . between the lawful and the forbidden. That Rausch may have overstepped the line does not mean that every reasonable officer would have been bound to know that Rausch acted improperly. We need not pursue the immunity defense, however, because *Saucier* calls on appellate courts to address the merits first . . . and Rausch is entitled to prevail outright: no reasonable juror could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk..")**.**

Walker v. Benjamin, 293 F.3d 1030, 1037 (7th Cir. 2002) ("[A] plaintiff claiming an Eighth Amendment violation must show the defendant's actual knowledge of the threat to the plaintiff's health or safety, the defendant's failure to take reasonable measures, and the defendant's subjective intent to harm or deliberate indifference. . . If there are genuine issues of fact concerning those elements, a defendant may not avoid trial on the grounds of qualified immunity.")

Hill v. Shelander, 992 F.2d 714, 717 (7th Cir. 1993) ("[D]espite *Harlow*'s focus on a purely objective inquiry, the plaintiff must be afforded an adequate opportunity to establish intent when it is an element of the alleged constitutional violation. . . . Because [plaintiff] has thus asserted a constitutional claim requiring proof of intent, he must adduce specific factual support for his allegation of bad intent to survive a motion for summary judgment.").

Fiorenzo v. Nolan, 965 F.2d 348, 351-52 (7th Cir. 1992) ("In *Wade v. Hegner*. . . we held that *Harlow* requires the district court to conduct a two-part analysis when state of mind is at issue: '(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? ' *Id*. at 70. Intent is relevant to the first inquiry.").

Auriemma v. Rice, 910 F.2d 1449, 1453 (7th Cir. 1990) (en banc) ("[W]hen intent is crucial to a party's claim...the court's consideration of intent is relevant to the determination of whether a constitutional violation exists but not in deciding if the constitutional standard was clearly established.").

Olech v. Village of Willobrook, No. 97 C 4935, 2002 WL 31317415, at *23, *24 (N.D. Ill. Oct. 10, 2002) (not reported) ("[T]he law establishing class of one equal protection claims was clearly established in 1995. At the time of the alleged actions, both the United States Supreme Court and the Seventh Circuit had held that a municipality could violate an individual's equal protection rights by intentional and different treatment of others who are similarly situated. . . The only question is whether the clearly established right in this Circuit required actions motivated by ill will before a constitutional violation could be established. Although the Supreme Court cases established a 'basic intent' standard, *Esmail* interpreted those cases to require 'ill will.' However, as explained above, there are disputed fact questions that require a trial on the issue of ill will. Thus, even if the law in 1995, read most favorably to defendants, required ill will as part of a class of one equal protection claim, there is evidence for which a jury could find ill will. Qualified immunity could not be granted at this time because to do so would require the Court to resolve fact questions that are for the jury. . . The only remaining question . . .is whether *Saucier* applies to this case, as defendants claim (*i.e.*, defendants argue they are entitled to qualified immunity if their decisions were based on 'reasonable mistakes'). We find that the 'reasonable mistake' exception carved out in *Saucier* cannot be used to establish qualified immunity at this time. If a jury finds intentional 'ill will' based on the disputed issues outlined above, then there can be no 'reasonable mistake' defense to support a qualified immunity defense. Thus, since we have found that there are genuine issues of material fact on the ill will issue, we must find that the defendants' reasonable mistake argument cannot support a qualified immunity defense at this time.").

EIGHTH CIRCUIT

Jackson v. Gutzmer, 866 F.3d 969, 976-78 (8th Cir. 2017) ("Qualified immunity is an affirmative defense governed by an objective standard in which 'the defendant's subjective intent is simply

irrelevant.'. . 'The immunity standard in *Harlow* itself eliminates all motive-based claims in which the official's conduct did not violate clearly established law.'. . Thus, just as an arresting officer with probable cause to arrest for a particular violation is entitled to qualified immunity even if that was not his motive at the time of arrest, . . . Gutzmer is entitled to qualified immunity if the totality of the circumstances justified use of the restraint board even if Gutzmer erred in believing Jackson was self-injurious when placed on the board. In addition, the district court erred in construing *Walker* as equating 'punishment' of an inmate with an excessive use of force. 'The punishment of incarcerated prisoners ... effectuates prison management and prisoner rehabilitative goals.... Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law.' . . A typical punishment for inmate misconduct is punitive segregation, as in *Sandin*. But here, because of Jackson's prior misconduct, he was already in the most segregated living unit in the Minnesota prison system. If Jackson's additional misconduct on May 13, 2014 warranted additional discipline, no Eighth Circuit case, and certainly no Supreme Court case, has ever held that such 'punishment' violates the Eighth Amendment. Turning to the merits of the alleged Eighth Amendment violation, the issue of intent that is an element of Jackson's claim is whether undisputed facts establish that force was applied 'in a good-faith effort to maintain or restore discipline,' or whether Lt. Gutzmer applied force 'maliciously and sadistically to cause harm.'. . We have jurisdiction to review whether, viewing the facts in the summary judgment record most favorably to Jackson, he 'identif[ied] affirmative evidence from which a jury could find that [he] carried his ... burden of proving' that Gutzmer's actions reflected a malicious and sadistic motive. . . This issue turns on consideration of far more than whether use of the restraint board was unreasonable because Jackson was not self-injurious. . . As in *Burns*, we conclude that Jackson presented no evidence whatsoever that Gutzmer's actions 'evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.'. . Jackson argues that, when he was placed on the restraint board, there was no longer a risk of self-injurious behavior, so the evidence demonstrates that Gutzmer placed Jackson on the restraint board 'as punishment for seeking medical attention,' thereby violating the Eighth Amendment. But punishing an inmate 'to preserve internal order and discipline and to maintain institutional security' does not violate the Eighth Amendment . . . unless the punishment or force used is 'repugnant to the conscience of mankind,'. . . like the 'degrading and dangerous' hitching post restraint at issue in *Hope v. Pelzer*, 536 U.S. 730, 745, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Nor is there evidence of prior contacts or relations between Jackson and Gutzmer that would be specific evidence of a malicious motive to harm. . . For these reasons, we conclude that we have jurisdiction over this appeal and the denial of qualified immunity to Lt. Gutzmer must be reversed because the record fails to establish the alleged Eighth Amendment excessive force violation.")

Cullor v. Baldwin, 830 F.3d 830, 837-39 (8th Cir. 2016) ("[W]e have yet to address a deliberate-indifference claim, as in the present case, in which an inmate alleges that prison officials were deliberately indifferent to his objective medical need for dental care by failing to address a shortage of dentists in the prison, thereby subjecting the inmate to needless pain. Other courts, however, have addressed similar claims and granted qualified immunity to prison officials. [surveying cases]

For purposes of this appeal, we will assume that Cullor suffered from an objectively serious medical need. . . But Cullor has failed to establish that Director Baldwin and Dr. Deol deliberately disregarded his need for dentures. . . .Contrary to Cullor's argument, this is not a case in which the defendants are attempting to use costs as a reason for denying constitutionally required medical care. . . .Nor does Cullor dispute that Dr. Deol always offered the maximum salary permitted and sought an increased salary for new dentists with special skills. In that way, Dr. Deol and Director Baldwin 'neither created the ... shortage of dentists nor the general issues with recruitment and retention.'. . As a result, we hold that Director Baldwin and Dr. Deol are entitled to qualified immunity on Cullor's deliberate-indifference claim.")

Borgman v. Kedley, 646 F.3d 518, 523, 524 (8th Cir. 2011) ("Arguable probable cause exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is 'objectively reasonable.'. . . Kedley's subjective motivations in arresting Borgman are irrelevant to the qualified immunity analysis. . . For that reason, even if Kedley had been subjectively motivated to arrest her for refusing to sign the readvisement form, it would not affect the arguable probable cause analysis.")

Gardner v. Board of Police Com'rs, for Kansas City, Mo., 641 F.3d 947, 953 (8th Cir. 2011) ("Given th[e] legal landscape, we think it was not clearly established as of September 2007 that an officer in Missouri could effect a seizure under the Fourth Amendment without subjectively intending to do so. Ritchie was therefore not on clear notice that he must conform his conduct–including conduct that was a foreseeable consequence of his medical condition–to a rule that might result in liability under the Fourth Amendment for actions that he did not subjectively intend. He is entitled to qualified immunity if the state of the law did not allow him reasonably to anticipate that his conduct may give rise to liability for damages. . . For these reasons, we conclude that the district court erred in denying Ritchie's motion for summary judgment on Gardner's Fourth Amendment claim without considering Ritchie's subjective intent. The district court should determine whether the evidence, viewed in the light most favorable to Gardner, would support a finding by a reasonable jury that Ritchie subjectively intended to effect a seizure of Gardner by firing his weapon. If not, then Ritchie is entitled to qualified immunity. The portion of the district court's order denying Ritchie's motion for summary judgment on the § 1983 claim is vacated, and the case is remanded for further proceedings.").

Mathers v. Wright, 636 F.3d 396, 401 (8th Cir. 2011) ("Wright complains that the district court erred in emphasizing her subjective intent in its qualified immunity analysis, particularly with respect to its finding of malice. The subjective intent of the actor is generally irrelevant to the objective reasonableness test at the heart of the qualified immunity analysis. . . Here, however, the actor's subjective intent is relevant to determine whether the mistreatment was intentional, as required to state a cognizable class-of-one claim. . . To the extent that the district court considered Wright's subjective intent, it did so in determining whether a constitutional violation occurred, not whether the right at issue was clearly established. Accordingly, Wright's objection that the district court improperly emphasized subjective intent fails.")

McClendon v. Story County Sheriff's Office, 403 F.3d 510, 515 (8th Cir. 2005) ("An officer's subjective intent is irrelevant to the question of whether her or his conduct violated a constitutional right by exceeding the scope of a warrant. Indeed, an officer's subjective intent is never relevant under a Fourth Amendment analysis, so long as an objective basis for the seizure exists. . . Yet, the district court found a genuine issue as to whether a constitutional violation occurred based solely on the Defendants' possible subjective intent. . . Even if we assume, arguendo, that McCaskey and Rogers seized the entire herd solely to punish McClendon for attempting to thwart the seizure, this cannot negate the uncontested fact that two professionals, Dr. Houlding and Nicole Snider, recommended removal of all the horses. On this basis alone, the decision of the district court warrants reversal.").

Coleman v. Parkman, 349 F.3d 534, 538 n.2 (8th Cir. 2003) (noting Athe difficulty courts have experienced when evaluating *Saucier*'s second step in deliberate indifference cases. *E.g., Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049-1053 (9th Cir.2002); *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir.2002); *see, e.g., Jacobs v. West Feliciana Sheriff's Dep't*, 228 F.3d 388, 394 (5th Cir.2000).").

Thomas v. Talley, 251 F.3d 743, 746 (8th Cir. 2001) ("The Supreme Court has recently made it clear . . . that the subjective intent that *Harlow* eliminated from consideration differs from intent that is 'an essential component of [a] plaintiff's affirmative case,' *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998). In considering a qualified immunity defense, a court cannot disregard evidence of the intent that is an element of the plaintiff's case because if it did so the plaintiff could not show that the defendant violated clearly established law. . . Because evidence of improper motive is an essential component of Mr. Thomas's affirmative case, we conclude that when ruling on Captain Talley's motion for summary judgment based on qualified immunity, the district court was indeed required to consider the evidence of Captain Talley's intent to discriminate.").

NINTH CIRCUIT

Rodriguez v. County of Los Angeles, 891 F.3d 776, 796-97 (9th Cir. 2018) ("The deputies who used tasers. . . contend that they are entitled to qualified immunity because the law governing the use of tasers was not clearly established in 2008. We disagree. 'An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.'. . This statement applies with particular strength in the context of the Eighth Amendment. A plaintiff cannot prove an Eighth Amendment violation without showing that force was employed 'maliciously and sadistically' for the purpose of causing harm. . . Even if particularized notice, specific to tasers, were needed at the time Deputies Sanford, Vazquez, and Delgado acted, . . . controlling circuit and Supreme Court case law provided it. [collecting cases] Deputies Sanford, Vazquez, and Delgado argue that limits on the proper use of tasers were still unclear as of 2008, relying on two Fourth Amendment cases decided after the cell extractions at

issue in this case: *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), and *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010). *Mattos* and *Bryan* clarified the circumstances under which taser use would violate the Fourth Amendment and granted qualified immunity to the officers who acted without the benefit of this clarification. . . However, the deputies' argument fails to acknowledge the respective standards for Fourth and Eighth Amendment violations. . . We determine whether the Fourth Amendment has been violated by assessing the objective reasonableness of the force used, balancing the degree of intrusion against the government's interest. . . By contrast, subjective intent is critical in an Eighth Amendment analysis. More than *de minimis* force applied for no good faith law enforcement purpose violates the Eighth Amendment. . . Objective reasonableness may inform the Eighth Amendment inquiry, providing evidence of good faith or of malice. . . But once a jury has determined on the basis of sufficient evidence that 'prison officials maliciously and sadistically use[d] [more than *de minimis*] force to cause harm, contemporary standards of decency,' and thus the Eighth Amendment, 'always are violated.'. . Here, the evidence amply supported the jury's finding that the deputies acted maliciously and sadistically.")

Chism v. Washington State, 661 F.3d 380, 393 & n.15 (9th Cir. 2011) (amending panel opinion and denying reh'g en banc) ("In light of *Branch*, *Liston*, and *Hervey*, we conclude that 'every "reasonable official would have understood"' that the Chisms had a constitutional right to not be searched and arrested as a result of judicial deception. . . We therefore hold that the officers are not entitled to qualified immunity. . . . In judicial deception cases, our qualified immunity analysis at the summary judgment stage is swallowed by the question of reckless or intentional disregard for the truth. . . We have explained that this 'merger' is sensible because 'no reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant. Accordingly, should a factfinder find against an official on this state-of-mind question, qualified immunity would not be available as a defense.'").

Norse v. City Of Santa Cruz, 629 F.3d 966, 974, 977 (9th Cir. 2010) (en banc) ("A mayor's entitlement to qualified immunity for ejecting a person from a city council meeting 'depends on whether a reasonable person in his position, acting on his information *and motivated by his purpose*, would have known that ejecting [the attendee] violated his clearly established rights.'. . The DVDs show triable issues of fact as to whether Norse was impermissibly ejected because of his viewpoint rather than his alleged disruptiveness. . . . In this case, we are dealing with city officials who ejected one individual from City Council meetings. . . . [T]he decisions to expel Norse were administrative, not legislative, so the defendants are not entitled to absolute immunity.")

Norse v. City Of Santa Cruz, 629 F.3d 966, 979 (9th Cir. 2010) (en banc) (Kozinski, CJ., joined by Reinhardt, J., concurring) ("I join Judge Thomas's opinion because it's clearly right. I write only to observe that, even after the procedural irregularities that deprived Norse an opportunity to present evidence, it's clear that the council members aren't entitled to qualified immunity. In the Age of YouTube, there's no need to take my word for it: There is a video of the incident that I'm

'happy to allow ... to speak for itself.' *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007); *see* http://www.youtube.com/watch?v' ZOssHWB6WBI (last visited Nov. 16, 2010). This video (also found in the record) clearly shows that Norse's sieg heil was momentary and casual, causing no disruption whatsoever. It would have remained entirely unnoticed, had a city council-man not interrupted the proceedings to take umbrage and insist that Norse be cast out of the meeting. Councilman Fitzmaurice clearly wants Norse expelled because the 'Nazi salute' is 'against the dignity of this body and the decorum of this body' and not because of any disruption. But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech.")

Prison Legal News v. Lehman, 397 F.3d 692, 703 (9th Cir. 2005) ("The district court correctly held that the DOC regulation prohibiting mail that could create a risk of violence and physical harm to any person is constitutional on its face. . .The question presented in this case is whether the prison officials applied this rule in a fashion that is unconstitutional. Because we must, for purposes of this appeal, accept the facts as laid out by PLN, we cannot determine on this record whether the prison officials are entitled to qualified immunity. PLN contends that the DOC's policy was applied by the prison officials in a manner that singled out PLN for discriminatory treatment, while allowing other publishers to deliver similar material. PLN challenges the DOC's refusal to deliver more than one hundred specific legal documents. PLN suggests that the real motive of the prison officials who prevented third-party legal materials from being delivered was to suppress materials that embarrass the DOC and educate inmates on how to file their claims. Although an improper motive ordinarily will not defeat a request for qualified immunity, . . . if the policy were applied in a discriminatory fashion based on the content of the material, this would clearly violate PLN's First Amendment rights. . . Accordingly, we hold that the prison officials are not entitled to qualified immunity regarding PLN's claim that they violated its constitutional rights in banning the receipt of the third-party legal materials.").

Covington v. Fairman, No. 03-17003, 03-17004, 2004 WL 2823307, at * 6, *7 (9th Cir. Dec. 9, 2004) (Brunetti, J., dissenting) (not published) ("Because I do not believe that the extraction officers used excessive force in violation of Covington's Eighth Amendment rights, the supervisors therefore cannot be held liable.. . . Even if I assume that under the facts of this case all Defendants engaged in conduct that violated Covington's Eighth Amendment rights, all Defendants would still be entitled to qualified immunity under the second step of Saucier. . . . I do not dispute that as of September 2, 1998, it was clearly established that a wanton beating by a prison official amounted to a violation of a prisoner's Eighth Amendment rights. However, under this step, the inquiry is whether it was clearly established that the force applied during a cell extraction under these circumstances would have been known by a reasonable officer to be wanton and unnecessary. While it was clearly established in September 1998 that prisoners were entitled to be free from wanton beatings, it was equally clearly established in September 1998 that at times prison officials may have to apply force to prisoners in order to restore or maintain discipline. . . It was certainly not clearly established at this time that kicking and punching during a cell extraction, especially when the use of force was necessary, would be characterized as a wanton

beating and an Eighth Amendment violation. Under the circumstances detailed above, a reasonable officer would have believed that force was necessary and lawful to extract Covington from his cell. A reasonable officer would also suspect that this force might include punching and kicking. Importantly, the extraction officers did not use weapons such as tasers or guns to subdue Covington. Further evidence that the force applied was reasonable under the circumstances is that the injuries resulting from these punches and kicks were very minor. Under the *Hudson* and *Whitley* parameters, which allow prison officials certain leeway in order to maintain prison discipline, I cannot conclude that the extraction officers acted unreasonably and beyond those parameters. . . .The majority relies on Covington's allegations that he was repeatedly hit in his groin to bolster the conclusion that the force applied was excessive. However, neither the Supreme Court nor this court have ever held that a prison official's punching or kicking in the groin is a per se Eighth Amendment violation. Indeed, this conduct must be considered in light of the entire factual context. The groin allegations occurred in the heat of a cell extraction, with punches and kicks inevitably flying. The panel may decide today that that type of force should never be allowed. However, we have yet to reach such a conclusion. Because the officers were not put on notice that any physical force applied to the groin would be considered per se excessive force, the officers were reasonable in their actions. . . . Even if I were to agree that some of the minimal force used in this cell extraction was unnecessary, the conduct of the extraction officers and the supervisors demonstrates that they acted in good faith and any mistake made by the officers as to the amount of force necessary was reasonable, in light of all of the circumstances. By the time the extraction officers entered the cell, events had escalated such that it was probable that force would be used to remove Covington from the cell. Force was in fact used, but Covington's injuries suggest it was minimal and did not exceed the amount that was necessary. If there was some punching or kicking that could conceivably be considered excessive, this conduct would be a reasonable mistake made in the furtherance of restoring discipline and was not done to maliciously harm Covington.").

Torres v. Runyon, No. 02-15273, 2003 WL 22598339, at *1, *2 (9th Cir. Nov. 6, 2003) (unpublished) ("In a recent case, *Marquez v. Gutierrez, supra*, we applied *Saucier* to an excessive use of force claim and underscored the significance of analyzing the constitutional right apart from qualified immunity. . . Specifically, even if Torres might establish an excessive use of force, Runyon still may be entitled to qualified immunity for reasonable conduct under the circumstances he faced. . . . Accepting Torres' version of the facts, which placed him on the ground as a victim of other inmates' assaults, a reasonable fact finder might view Runyon's use of deadly force against Torres as an act that violated Torres' Eighth Amendment right. . . However, there is no evidence that Runyon knew Torres nor carried any animus toward him. At most, Runyon may have been negligent in shooting the wrong person. But we need not resolve this issue because we find Runyon's conduct was reasonable under the following analysis. . . . From his viewpoint in the observation tower, Runyon believed that the inmates on the ground were defenseless as they received kicks and blows from other inmates. And the evidence is uncontradicted that Runyon aimed at and intended to shoot the inmate whom he saw kicking an unconscious inmate to death, whether or not he hit the wrong person or was mistaken about which person was hit. . . . We cannot say that Runyon's conduct was unreasonable under the circumstances. Therefore, Runyon is

entitled to qualified immunity from the Torres estate's claims arising out of the prison yard shooting.")

Marquez v. Gutierrez, 322 F.3d 689, 692, 693 (9th Cir. 2003) ("To shoot a passive, unarmed inmate standing near a fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm, would inflict unnecessary and wanton pain. . . Even though there would be a constitutional violation if Marquez were to prove the facts that he posits, Gutierrez may nevertheless be entitled to qualified immunity if a reasonable officer could have believed his conduct was lawful. . . . Marquez argues that a prison official cannot act maliciously and sadistically while, at the same time, reasonably believing that his actions conform to clearly established law. However, this argument is the same argument that the Supreme Court rejected in *Saucier*, and that we rejected in *Estate of Ford*. . . . Accordingly, Gutierrez's claim of qualified immunity is not defeated simply because a triable issue of fact exists as to whether his decision to shoot Marquez was malicious. Even if Gutierrez's beliefs that Marquez was involved in the kicking incident and that Perez was in danger of serious harm were mistaken, he can still be entitled to qualified immunity. A reasonable official standing where Gutierrez was standing–that is, in a tower located 360 feet away from the disturbance–could perceive that both Marquez and another inmate were kicking Perez and threatening Perez with serious injury or death, and that Perez was not capable of protecting himself, even if no kick was actually administered by Marquez. The scenario may look different when gauged against the "20/20 vision of hindsight," but we must look at the situation as a reasonable officer in Gutierrez's position could have perceived it. . . In that light, we believe that a reasonable officer could believe that shooting one inmate in the leg to stop an assault that could have seriously injured or killed another inmate was a good faith effort to restore order, and thus lawful.").

Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1045 (9th Cir. 2002) (*Hamilton* has been undermined by *Saucier*; AEven though the constitutional issue turns on the officers' state of mind (here, deliberate indifference to a substantial risk of serious harm), courts must still consider whether–assuming the facts in the injured party's favor–it would be clear to a reasonable officer that his conduct was unlawful.")

Clement v. Gomez, 298 F.3d 898, 906 (9th Cir. 2002) (" The general law regarding the medical treatment of prisoners was clearly established at the time of the incident. . . Furthermore, it was also clearly established that the officers could not intentionally deny or delay access to medical care. . . While a resolution of the factual issues may well relieve the prison officials of any liability in this case, if the prisoners' version of the facts were to prevail at trial, a jury might conclude that the officers were deliberately indifferent to such needs during the four-hour period after the incident. Various supervisory officials may also have been deliberately indifferent to obvious risks of injury. Under such circumstances, the officials' actions are not protected by qualified immunity.").

Butler v. Elle, 281 F.3d 1014, 1024 (9th Cir. 2002) ("[O]ur cases effectively intertwine the qualified immunity question (1) whether a reasonable officer should have known that he acted in violation of a plaintiff's constitutional rights with (2) the substantive recklessness or dishonesty question. This merger is ultimately appropriate because, as *Branch* and *Hervey* recognize, no reasonable officer could believe that it is constitutional to act dishonestly or recklessly with regard to the basis for probable cause in seeking a warrant. Accordingly, should a factfinder find against an official on this state-of-mind question, qualified immunity would not be available as a defense. On the other hand, should the fact-finder find at trial in the officer's favor, i.e., that he did not act dishonestly or recklessly, that officer's conduct would not have violated any clearly established statutory or constitutional rights. In this regard, because the two issues merge, there need be no separate inquiry at trial, and no discrete instructions, on whether Elle is entitled to qualified immunity. If he was reckless or deceitful in preparing the warrant affidavit, then he both violated Butler's rights and is not entitled to qualified immunity.").

Meeks v. Gomez, No. 96-15625, 1997 WL 51518, at *2 (9th Cir. Feb. 21, 1997) (unpublished) ("A public official cannot both be 'deliberately indifferent'. . . and at the same time reasonably believe that his conduct conforms to clearly established law. . . . The district court correctly concluded that the existence of a triable issue of fact as to deliberate indifference precluded granting defendants' motion for summary judgment on qualified immunity grounds.").

Alexander v. City and County of San Francisco, 29 F.3d 1355, 1364 (9th Cir. 1994) ("Defendants have not shown that a reasonable officer could have believed that entry with intent to arrest would not violate clearly established law. Thus summary judgment on the basis of qualified immunity would be inappropriate if the intent was to arrest or if facts as to intent are in dispute. A genuine dispute exists as to whether or not defendants ordered the storming of the house primarily for the purpose of arresting [decedent]. The fact that this dispute turns on an essentially subjective element (the officers' purpose), while qualified immunity involves an inquiry into 'objective reasonableness' does not mean that qualified immunity is any more or less available in this context than it would otherwise be. . . In short, the factual issues in this case must be decided by a jury before any determination of qualified immunity can be made.").

Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992) ("A finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who deliberately ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law.").

Vaden v. Summerhill , No. CIV S-06-1836 GEB KJM P, 2008 WL 4370061, at *10 (E.D. Cal. Sept. 24, 2008) ("Because the point at which a risk to an inmate becomes a substantial risk of serious harm for Eighth Amendment purposes is ill-defined and because St. Andre's actions fall into this hazy area, he is entitled to qualified immunity.").

Coyle v. Cambra, No. C 02-1810 SBA PR, 2005 WL 2397517, at *15 (N.D. Cal. Sept. 27, 2005) ("Plaintiff alleges that Defendants were responsible for the over six-month delay in his receiving an orthopedic consultation, in violation of his Eighth Amendment rights. Although the law was clearly established that delay and interference with medical care can violate an inmate's Eighth Amendment rights, the law does not specifically state the exact amount of delay that would rise to the level of an Eighth Amendment violation. . . . And though it is not necessary to find a case with the exact same fact pattern (e.g., six-month delay in receiving an orthopedic consultation) to hold that Defendants breached a clearly established duty, more specificity as to the amount of delay in receiving an orthopedic consultation must be shown, before the Court could find that Defendants violated clearly established law. Applying *Estate of Ford* here, it would not have been clear to a reasonable prison official that a six-month delay in Plaintiff receiving an orthopedic consultation would expose Plaintiff to a substantial risk of serious harm. The circumstances in the instant case include a temporary suspension of the Orthopedic Specialty Clinic, however, reasonable alternatives were available for Plaintiff's routine medical care, including specialty medical care through the use of Telemedicine. Therefore, a reasonable prison officer would not necessarily have drawn the inference that Plaintiff would not be able to receive adequate medical care with the aforementioned plan for emergency medical care that was implemented in place of the Orthopedic Specialty Clinic. Because the law did not put Defendants on notice that their conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.").

Moreno v. City of Sacramento, No. CIV-S-01-0725DFLDAD, 2005 WL 2016910, at *3, *4 (E.D. Cal. Aug. 19, 2005) ("[D]efendants argue that even though the Ninth Circuit found violations of clearly established constitutional law, that does not foreclose a finding by the court that a reasonable officer would not understand that his conduct violated the law on the specific facts presented in this case. . . Additionally, they assert that the individual defendants' personal knowledge of the relevant law is pertinent to this qualified immunity inquiry. . .They seek to introduce additional testimony from Pino, Vanella, and Fernandez on the following topics: (1) their general reliance on the city attorney for their knowledge of the law; (2) their efforts to keep up with developments in the law; and (3) their understanding and reading of the relevant case law. Defendants' arguments are premised on a misunderstanding of the qualified immunity inquiry. The qualified immunity analysis contains only two steps: (1) was there a constitutional violation? and (2) if so, was the violation clearly established? . . . Although defendants correctly note that a court must analyze whether a reasonable officer would understand that his actions were unconstitutional on the facts of the present case, that inquiry is subsumed within the 'clearly established' analysis. As the Supreme Court has held, 'the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . Therefore, when the Ninth Circuit held that the constitutional violations were clearly established, it found that a reasonable officer, confronted with the alleged facts of this particular case, would be on notice that his actions were unconstitutional. Accordingly, defendants' assertion that a reasonable officer would not have understood that his actions were unconstitutional on the specific facts is foreclosed by the Ninth Circuit's ruling. Defendants' request for additional testimony is equally misplaced. The qualified

immunity analysis is objective, not subjective. . . . Thus, the individual defendants' personal knowledge of the law and their efforts to stay abreast of changes in the law is irrelevant to this constitutional inquiry. In fact, the Supreme Court rejected a subjective component of the qualified immunity inquiry for the very purpose of preventing the need for testimony from individual officers as to their state of mind, subjective motivation, and knowledge of the law.").

Nelson v. California DOC, No. C 02-5476 SI(PR), 2004 WL 569529, at **8-10 (C.D. Cal. Mar. 18, 2004) ("Applying *Estate of Ford* here, it would not have been clear to a reasonable prison official when the risk of harm from being required to live in and exercise in just underwear-changed from being a risk of some (or even any) harm, to a substantial risk of serious harm to the inmate's health. Although the law was clearly established that depriving an inmate of outdoor exercise on a long-term basis violated the Eighth Amendment, and although the law was clearly established that depriving an inmate of adequate clothing violated the Eighth Amendment, the law was not very well fleshed out on amount of clothing required to avoid an Eighth Amendment violation. Although the court earlier in this decision found that requiring an inmate to live in his underwear for five months was sufficiently serious to establish the first prong of an Eighth Amendment claim, the court recognizes the dearth of authority on the specific point of how much clothing must be given to an inmate. . . . A reasonable prison official understanding that he could not be deliberately indifferent to a serious risk to inmate health could know that Nelson spent five months in no clothes other than boxer shorts and a t-shirt and know that he had only those clothes to wear when he exercised in the occasionally cold weather but reasonably perceive that Nelson's exposure to any harm was not that high when (1) Nelson spent the vast majority of his time in a climate- controlled environment, (2) Nelson was allowed, but not required, to go outside for an exercise period for up to 3-1/2 hours at a time, (3) the temperature was in the 34-50 degree range on some days, (3) notwithstanding his complaints that it was cold and he was in bad health, Nelson continued to choose to go outside for the exercise period even though he had the option to remain indoors. . . . The information available to defendants did not make it so clear that Nelson would be in pain or face a serious risk to his health while inside his cell or during the six hours of exercise each week that no reasonable officer would have let him remain in just his underwear. Because the law did not put defendants on notice that their conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate").

Mooring v. San Francisco Sheriff's Dep't., 289 F.Supp.2d 1110, 1120 (N.D. Cal. 2003) ("Applying *Estate of Ford* here, it would not have been clear to a reasonable prison official when the risk of harm from housing an inmate in a cell containing Soreno gang members when the inmate said he had 'gang affiliation' concerns but did not identify himself as a Norteno gang member specifically and was not known to the official to be from the Norteno gang changed from being a risk of some (or even any) harm, to a substantial risk of serious harm from one of those inmates. A reasonable prison official understanding that he could not recklessly disregard a serious risk to inmate safety could know that Mooring said he had gang affiliation concerns and objected to the cell placement but reasonably perceive that Mooring's exposure to any harm was not that high when there was no evidence of a specific threat from the inmates in cell E to Mooring.

Because the law did not put Gonzalez on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. . . Gonzalez met his burden of proof in his moving papers. Mooring did not introduce *evidence* to show the existence of a genuine issue of fact on the defense. Gonzalez is entitled to judgment as a matter of law on the qualified immunity defense.").

TENTH CIRCUIT

Cox v. Glanz, 800 F.3d 1231, 1248-54 (10th Cir. 2015) ("The requisite showing of an 'affirmative link' between a supervisor and the alleged constitutional injury has '[come] to have three related prongs: (1) personal involvement, (2) sufficient causal connection, and (3) culpable state of mind.'. .Admittedly, '[t]he contours of ... supervisory liability are still somewhat unclear after [the Supreme Court decided] *Iqbal*, which "articulated a stricter liability standard for ... personal involvement."'. . . Our clearly-established-law analysis centers on whether the controlling cases 'show that [Sheriff Glanz] took the alleged actions with the requisite state of mind.' . . This state of mind '"can be no less than the *mens rea* required" of [any of his] subordinates [i.e., Jail employees] to commit the underlying constitutional violation.'. . Importantly, as our discussion of the pertinent governing caselaw . . . demonstrates, this is a *particularized* state of mind: actual knowledge by a prison official of an individual inmate's substantial risk of suicide. . . .Our review of relevant caselaw postdating *Hocker* and *Barrie* indicates that the foregoing state of the law in our circuit—which required prison officials to possess knowledge that a specific inmate presents a substantial risk of suicide—had not changed in material respects by July 2009. We are not aware of any controlling Supreme Court or Tenth Circuit decisions that directly answer this clearly-established-law inquiry. However, our view of the requirements of the clearly established law extant when Mr. Jernegan committed suicide (July 2009) does find some support in the Supreme Court's recent decision in *Taylor v. Barkes*, —— U.S. ——, 135 S.Ct. 2042 (2015) (per curiam), where the Court resolved a deliberate-indifference dispute on the clearly-established-law prong of the qualified-immunity standard. There, the Court held that, as of November 2004, there was no clearly established 'right' of an inmate to be adequately screened for suicide. . . The *Taylor* Court emphatically stated that '[n]o decision of this Court even discusses suicide screening or prevention protocols.'. . *Taylor* teaches us that, as of November 2004, there was no constitutional right to such screening or protocols. . .Consequently, in November 2004, a jail's nonexistent or deficient suicide-screening measures would not have necessarily indicated that an individual prisoner's suicide was the product of deliberate indifference in violation of the Eighth Amendment. In light of *Taylor*, our reading of the contours of the law a short five years later should not be surprising. That is, irrespective of the alleged deficiencies in the Jail's suicide-screening protocols, in order for any defendant, including Sheriff Glanz, to be found to have acted with deliberate indifference, he needed to first have knowledge that the specific inmate at issue presented a substantial risk of suicide. Moreover, though not dispositive, our limited corpus of nonprecedential jail-suicide decisions supports our reading of the state of the law when Mr. Jernegan committed suicide. . . .At bottom, when confronting individual-capacity § 1983 claims, our 'focus must always be on the *defendant*—on the ... injury *he* inflicted or caused to be inflicted, and on *his* motives. This is

because § 1983 isn't a strict liability offense.'. . As noted, Sheriff Glanz had no personal interaction with Mr. Jernegan or direct and contemporaneous knowledge of his treatment in July 2009. Therefore, insofar as he had knowledge sufficient to form the requisite mental state, it would have had to necessarily come from his subordinates, notably Ms. Taylor or Ms. Sampson. Because they did not possess such knowledge, the conclusion inexorably follows that Sheriff Glanz could not have possessed such knowledge. Accordingly, though we have not ignored Ms. Cox's strong assertions regarding the systemic failings of the Jail's mental-health screening and treatment protocols, which quite understandably troubled the district court, we conclude that Ms. Cox has nevertheless failed to establish that Sheriff Glanz acted as to Mr. Jernegan with the requisite mental state to constitute deliberate indifference. In other words, she has not carried her burden regarding the essential subjective component of the deliberate-indifference standard. In sum, for the reasons stated, we cannot conclude that Sheriff Glanz's conduct constituted an Eighth Amendment violation under the law that was clearly established at the time of Mr. Jernegan's death. Therefore, Ms. Cox cannot satisfy the clearly-established-law component of the qualified-immunity standard. We must accordingly reverse the district court's denial of qualified immunity to the Sheriff on Ms. Cox's individual-capacity claim under § 1983.")

Shrum v. City of Coweta, Oklahoma, 449 F.3d 1132, 1145 (10th Cir. 2006) ("Chief Palmer does not dispute that it was clearly established that non-neutral state action imposing a substantial burden on the exercise of religion violates the First Amendment. If Officer Shrum's factual allegations are correct–that he was singled out precisely because of Chief Palmer's knowledge of his religious commitment–then Chief Palmer's claim of qualified immunity must fail. Only if the finder of fact ultimately concludes, as a matter of fact, that Chief Palmer had a neutral basis for his personnel actions, does he have a defense. This is thus a case where the claim of qualified immunity collapses into the merits. The district court was correct to hold that it should proceed to trial on the free exercise claim.").

Mimics v. Village of Angel Fire, 394 F.3d 836, 848 (10th Cir. 2005) ("In the context of a summary judgment motion on a qualified immunity defense to a claim involving the defendant's state of mind, the defendant must first show that the challenged conduct was objectively reasonable. . . Because this court has determined that there is evidence Hasford's entries into MIMICS on December 20, 1996 and January 16, 1997 were not objectively reasonable, we need not conduct any further analysis. Construing the evidence in the Wildgrubes' favor, as we must do on summary judgment, Hasford has failed, at least at this point in the proceedings, to establish that he is entitled to qualified immunity on the Wildgrubes' First Amendment claim.").

Beard v. City of Northglenn, 23 F.3d 110, 114-15 (10th Cir. 1994) (White, Associate Justice (Ret.)) ("If the court had addressed itself to the proper Fourth Amendment question, it would have found its resolution of that question would have also dictated its conclusion on the second portion of the qualified immunity test. If, after all, a claimant is able to prove the necessary deliberate falsehood or reckless disregard to impeach a facially valid warrant, the reasonableness inquiry has to be resolved against the defendant since no reasonably competent officer could believe an arrest

legal where it was his deliberate or reckless deception that led the magistrate into issuing the warrant. Conversely, if a plaintiff cannot prove a Fourth Amendment violation, there is no need to proceed any further; the case ends in defendant's favor. It is clear from this analysis that the trial court's conclusion that the officers violated appellant's Fourth Amendment rights and still acted reasonably is untenable. To reach such a conclusion under the correct Fourth Amendment standard would require a court to hold the knowing or reckless disregard of the truth in an arrest affidavit–the ultimate act of unreason– reasonable as a matter of law.").

Gallegos v. City and County of Denver, 984 F.2d 358, 363-64 (10th Cir. 1993) ("The 'objective reasonableness' standard set forth in *Harlow* often rests on a determination of whether the defendant's conduct can be traced to the subjective element of impermissible motive or intent."), *cert. denied*, 113 S. Ct. 2962 (1993).

Estate of Dixon v. Bd. of Cty. Commissioners of Crowley Cty., No. 15-CV-02727-NYW, 2017 WL 1684134, at *3 (D. Colo. May 3, 2017) ("Nor does the court's ruling on the Motions to Dismiss otherwise dispose of the qualified immunity analysis on summary judgment. The qualified immunity inquiry at the motion to dismiss phase and at the summary judgment phase are separate and distinct—notably, Plaintiffs carry different burdens. On a motion to dismiss, the court determines whether the complaint's factual allegations state a plausible constitutional claim, not whether the complaint contains all the necessary factual allegations to sustain a conclusion that Defendants violated clearly established law. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008). At summary judgment, 'the record must clearly demonstrate the plaintiff[s] ha[ve] satisfied [their] heavy two-part burden,' *i.e.*, that Defendants violated Mr. Dixon's *clearly established* constitutional rights. . . Accordingly, the court's conclusion at the motion to dismiss phase that dismissal is not warranted based on the pleadings does not necessarily translate into a determination that Plaintiffs have carried their burden to overcome qualified immunity on summary judgment.")

Richard v. City of Wichita, No. 15-1279-EFM-KGG, 2016 WL 5341756, at *6 (D. Kan. Sept. 23, 2016) ("The Court takes these three cases with similar facts to show that the question of reasonableness is a very fact-specific inquiry. As alleged, the instant case is a close one. And usually in close cases such as this, reasonableness is properly a question for a jury. . . In *Allen*, *Hastings*, and *Bleck*, the Tenth Circuit determined whether summary judgment was appropriate. But here, Defendants are not arguing that this close case should be decided in their favor on summary judgment. Rather, they are arguing that Plaintiff fails to state a plausible claim upon which relief can be granted. Accordingly, their motion must be denied. Stacy was emotionally disturbed and considering suicide. His wife had called for help. He was alone in the house. Officers entered his home and issued forceful commands. It is plausible that these commands caused Stacy to become more distressed. Stacy was not suspected of committing a crime, and he did not pose any immediate danger to others when he was alone in his house. Given these facts, Plaintiff has stated a plausible claim for relief. The Court recognizes that Defendants may have colorable

arguments as to why their actions were reasonable, but these arguments do not belong in a 12(b)(6) motion. They are better suited for a motion for summary judgment or a jury determination.")

Freeman v. Knight, No. 04CV00148MSKPAC, 2005 WL 1896245, at *4 (D. Colo. Aug. 8, 2005) ("The 'clearly established' prong of the analysis is often described as inquiring whether a 'reasonable official would understand' that his or her behavior violated the constitution. . . In this Court's view, this description of the test has resulted in imprecise analysis, as it suggests that the focus of the analysis is on the official's subjective or objective state of mind. This is incorrect. The 'clearly established' prong does not actually examine state of mind; rather, it merely inquires whether, at the time of the challenged act, there was binding legal authority recognizing the existence of a constitutional right in the particular circumstances.").

ELEVENTH CIRCUIT

Mitchell v. City of Jacksonville, 734 F. App'x 649, ___ (11th Cir. 2018) ("To the extent Defendants argue they are entitled to qualified immunity on Plaintiff's race discrimination claim because a reasonable official under the circumstances could have believed that Defendants' conduct was lawful, we have jurisdiction to review that legal issue on appeal. Viewed in the light most favorable to Plaintiff, . . . the record establishes that Plaintiff was treated less favorably than his non-minority co-workers. Plaintiff has also proffered some evidence that his treatment was racially motivated. Defendants, on the other hand, contend that a lawful basis existed for utilizing a liaison to communicate with Plaintiff: that it was 'easier' for Chief Loput. That Defendants may have acted, in part, with discriminatory motive does not necessarily defeat their entitlement to qualified immunity. *See Foy v. Holston*, 94 F.3d 1528, 1534-35 (11th Cir. 1996). When improper motive is part of the underlying constitutional tort -- and where evidence exists of mixed motives -- a defendant is still entitled to qualified immunity if 'the record indisputably establishes that the defendant in fact was motivated, *at least in part*, by lawful considerations.' *Stanley v. City of Dalton*, 219 F.3d 1280, 1296 (11th Cir. 2000) (emphasis in original). Here, the record does not establish 'indisputably' that Defendants' conduct was in fact motivated at least in part by their proffered reason. Instead, evidence in the record demonstrates that the use of a 'liaison' to communicate within a single division was atypical and that the use of a lower-ranking 'liaison' to relay orders to a higher-ranking officer would violate the JFRD's chain-of-command policy. We also note that Defendants have proffered no legitimate, non-discriminatory reason for the other conduct alleged by Plaintiff: that Chief Loput avoided one-on-one contact with Plaintiff, excluded Plaintiff from a department-wide email, assigned Plaintiff menial tasks, and denied Plaintiff's travel leave. At this stage in the proceedings, the district court concluded properly that Defendants were unentitled to qualified immunity on Plaintiff's claim for race discrimination. Because Defendants' remaining arguments on appeal attack the sufficiency of the evidence supporting Plaintiff's substantive claims for race discrimination and retaliation -- and are not pertinent to the core qualified immunity analysis -- we lack jurisdiction to consider them in this interlocutory appeal.")

Joseph v. Gee, No. 17-12185, 2018 WL 345323, at *1 (11th Cir. Jan. 10, 2018) (not reported) ("Officers Echenique, Clark, Jones, and Chester moved to dismiss Mr. Joseph's second amended complaint, arguing that it failed to state a claim upon which relief could be granted, and that they were entitled to qualified immunity. The officers appeal the district court's denial of these motions. Upon *de novo* review, . . . and after careful consideration of the record and the parties' briefs, we vacate the orders denying the officers' motions to dismiss and remand to the district court. The district court's orders denying the officers' motions state that the motions were denied because '[i]t is premature to determine ... whether [the officers] are entitled to Qualified Immunity based on the facts of this case. The Court finds that discovery is needed to make this determination.'. . This was error. As we recently explained, the district court's order requiring discovery 'before the court ruled on the immunity defenses is ... inconsistent with [our] decisions which establish that immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted.'. . When presented with the officers' motions to dismiss, both our precedent and precedent from the Supreme Court instruct the district court to analyze whether, taking Mr. Joseph's allegations as true, the second amended complaint asserted a violation of a clearly established constitutional right. . . Because the district court failed to conduct this analysis, we vacate its orders on the officers' motions to dismiss and remand for further proceedings consistent with this opinion.")

Wall-DeSousa v. Florida Dep't of Highway Safety and Motor Vehicles, 691 F. App'x 584, 592-93 & n.5 (11th Cir. 2017) ("Here, the allegations of the second amended complaint, taken with the text of the November 5, 2014 letter canceling the Wall-DeSousas' driver's licenses based on § 741.212, show substantial lawful intent without ruling out some unlawful intent, too. It is undisputed that, at the time of the November 5, 2014 letter, the enforcement of § 741.212 was not enjoined. Florida law did not recognize out-of-state same-sex marriages and driver's licenses based on the Wall-DeSousas' out-of-state marriage license. Once enforcement of § 741.212 was enjoined on January 6, 2015, the requested driver's licenses were issued shortly thereafter. . .Given our precedent, the circumstances alleged, and the state of the Florida law at the time, we cannot say that the district court erred in dismissing this case against the defendants based on qualified immunity. . . This is not a case where no legitimate reason in fact motivated the defendants' conduct. Importantly too, at the time of the conduct here, it was not clearly established federal law that the defendants could not act as they did. . . .The dissent suggests that a partial lawful motivation can never be decided on a motion to dismiss. But this ignores the allegations in the Wall-DeSousas' second amended complaint, the text of the defendants' letter which is properly before the Court (see n.3, infra), and the fact that § 741.212 remained the law at the time the letter was sent. Although qualified immunity defenses are sometimes resolved at the summary judgment stage, district courts may grant motions to dismiss on the basis of qualified immunity if the undisputed facts in the plaintiffs' own complaint show that the defendants acted lawfully. . .The dissent suggests that the Wall-DeSousas need discovery. But the text of the letter is evidence of at least one of the defendants' motivations. . . And even if the Wall-DeSousas could show an improper motive too in discovery, here we have assumed that fact in the Wall-DeSousas' favor.")

Wall-DeSousa v. Florida Dep't of Highway Safety and Motor Vehicles, 691 F. App'x 584, 594 (11th Cir. 2017) (O'Malley, J., dissenting) ("Reading *Foy* broadly would effectively immunize all defendants who luck into lawful post-hoc explanations for otherwise illegally-motivated behavior. Even where flagrant smoking guns exist, plaintiffs will never be able to discover them. And where, by sheer providence, the plaintiffs already have a smoking gun in hand, how can they use it to rebut a motion to dismiss if its contents are disputed? . . . I acknowledge wholeheartedly that the Wall-DeSousas' complaint is not a model of clarity, replacing concrete and particularized allegations with conclusory generalities. Had the district court rejected their complaint as failing outright to provide 'sufficient factual matter' to satisfy the straightforward requirements of *Iqbal* and *Twombly*, I would have few qualms in affirming. . . By relying instead on *Foy*, the district court's analysis begins a dangerous practice, which today's opinion ratifies. I respectfully dissent.")

Brown v. Davis, 684 F. App'x 928, ___ (11th Cir. 2017) ("In the employment discrimination context, the 'clearly established' requirement provides that a state official 'can be motivated, in part, by a dislike or hostility toward a certain protected class to which a citizen belongs and still act lawfully' where 'the record shows they would have acted as they, in fact, did act even if they had lacked discriminatory intent.' *Rioux v. City of Atlanta*, 520 F.3d 1269, 1283 (11th Cir. 2008) (quoting *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996)). 'Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct—despite his having adequate lawful reasons to support the act—was the result of his unlawful motive, the defendant is entitled to immunity.' *Foy*, 94 F.3d at 1535. 'Where the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity.' *Id.*")

Jackson v. Humphrey, 776 F.3d 1232, 1241-42 (11th Cir. 2015) ("The District Court should have granted the Corrections officials' motion for summary judgment on Mrs. Jackson's claims. Here, the Corrections officials made just one decision with respect to Mrs. Jackson's visitation privileges, the decision found in the July 19, 2012 letters. With respect to this decision, the Corrections officials' entitlement to the protections of qualified immunity should have been determined 'at the time' that they sent the letters to Mr. and Mrs. Jackson. . . This is the case even though the decision, like many decisions made by public officials, had consequences in the future. The purpose for qualified immunity is to permit officials to act without fear of harassing litigation as long as they can reasonably anticipate before they act whether their conduct will expose them to liability. . . . Thus, the entitlement to the protections of qualified immunity is judged based on the facts and the law present at the time that public officials make their decisions and does not take into account later facts or changes in the law. [citing cases] Therefore, the District Court erred in its characterization of the Corrections officials' decision to terminate Mrs. Jackson's visitation privileges as having '*continued* [to] den[y Mrs. Jackson] visitation long after the end of the hunger strike.' Rather, the record establishes that the decision to terminate. . . Mrs. Jackson's visitation privileges was lawfully made when the letters were sent on July 19, 2012, and that the Corrections

officials were therefore entitled to qualified immunity from suit for their decision. Accordingly, the Corrections officials are entitled to qualified immunity for both the period during the hunger strike and for the period after the hunger strike ended.")

Jackson v. Humphrey, 776 F.3d 1232, 1244-45 (11th Cir. 2015) (Hinkle, District Judge, concurring) ("On the primary opinion's view of the facts, the Corrections officials revoked Ms. Jackson's visitation privileges for both a lawful motive (preventing the security risk and harm to the institution that come with hunger strikes) and an unlawful motive (punishing Ms. Jackson for free speech for reasons unrelated to security and institutional harm). The primary opinion says, '[T]he law of this Circuit is that, where, as here, the facts assumed for summary judgment show both a lawful and unlawful motivation for the decision made by a government official, the official is entitled to qualified immunity.' For this proposition the primary opinion cites *Foy v. Holston*, 94 F.3d 1528, 1535 (11th Cir.1996). Another case supporting the statement is *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280 (11th Cir.2000). This indeed seems to be the law of the circuit. But it should not be. In a proper case, when it makes a difference, the issue should be revisited. . . .In my view, summary judgment is improper when (1) a plaintiff asserts that an officer took action based on a factor that, as a matter of clearly established law, could not constitutionally be considered, and (2) the record presents a genuine dispute over whether that prohibited factor was a but-for cause of the officer's challenged action. In asserting the contrary, *Foy* and *Stanley* confuse the subjective standard that governs the merits (what was the officer's actual motivation for taking the challenged action?) with the objective standard that applies to qualified immunity (would a reasonable officer have known that taking action for that reason was unconstitutional?). An officer's actual thought process does not always line up with what a reasonable officer could have thought. None of this calls into question the primary opinion's conclusion that the Corrections officials are entitled to summary judgment here. The record establishes without genuine dispute that in prohibiting Ms. Jackson from visiting her husband, the Corrections officials were motivated at least in part by legitimate concern for institutional security and resources. No clearly established law suggested that acting on that basis was unconstitutional. On this record, a reasonable jury could find that Ms. Jackson's protected activities were a motivating factor in the decision to prohibit her from visiting, but a reasonable jury could *not* find that her protected activities were a *but-for* cause of the decision.")

Jackson v. Humphrey, 776 F.3d 1232, 1245-47 (11th Cir. 2015) (Martin, J., dissenting) ("The majority awards qualified immunity to three Georgia Department of Corrections officials for their complete and permanent termination of Delma Jackson's visitation privileges with her inmate husband. The officials first revoked Mrs. Jackson's privileges based on her purported role in a prison hunger strike. But they did not restore her privileges when the strike ended on July 26, 2012. Neither did they reinstate her privileges when they returned visitation privileges to all others who had been denied visitation for the same reason. Indeed, by all accounts they have not restored her privileges to this day, nearly thirty months later. Because I am convinced that any stated legitimate penological purpose for revoking her privileges vanished sometime after the end of the hunger strike, and because qualified immunity cannot extend to protect the officials if their sole remaining

motivation was to retaliate against Mrs. Jackson for her protected speech, I respectfully dissent. I am not persuaded by the majority's conclusion that our qualified immunity analysis can only look to the initial revocation communicated by the July 19, 2012 revocation letters. Specifically, I reject the idea that we are permitted to consider only the July 19, 2012 communication of the decision (which did not include an end-date for the action, as required by GDOC operating procedures), and must ignore the ongoing impact of that decision which still prevents Mrs. Jackson from seeing her husband now almost three years later. While certainly we must consider the letters, Mrs. Jackson's First Amendment retaliation claim is not so limited. As the District Court correctly noted, Mrs. Jackson challenged the *permanent* suspension of her privileges. The officials have the authority at any point to reinstate Mrs. Jackson's visitation privileges. Their continued failure to do so perpetuates the permanent suspension and should be considered as part of the qualified immunity analysis. The District Court was right in observing that the officials did not offer any valid motivation for the permanent suspension of Mrs. Jackson's privileges once the hunger strike ended. The officials returned visitation privileges to every other prison visitor whose rights had been revoked during the hunger strike. They suggest that Mrs. Jackson's privileges were not restored due to incomplete paperwork. But even if that were true, Mrs. Jackson made clear her request to be able to visit her husband when she sought an injunction for reinstatement of her privileges nearly a year before her husband was allegedly given the proper paperwork. The officials knew then that Mrs. Jackson wanted her privileges back, but did not reinstate them. The majority points out that qualified immunity is 'judged based on the facts and the law present at the time that public officials make their decisions,' not 'tak[ing] into account later facts or changes in the law.'. . While that may be true, all the cases they rely upon stand for the unremarkable principle that an officer who performs a single act which does not violate the law when performed, will not be stripped of that immunity just because of a later change in the law. . . I do not read those holdings to apply here so as to prevent us from considering the officers' ongoing decisions to revoke and refuse to reinstate Mrs. Jackson's privileges. Neither do those cases stop us from evaluating whether the scope of the deprivation was reasonable at the time it was made.

The majority acknowledges that a decision that would warrant qualified immunity at the time it is made can have ongoing consequences. . . And I understand that qualified immunity can attach to inaction just as it does to actions. . . Our precedent does not require us to turn a blind eye when defendants' ongoing inaction causes harm, especially where, as here, it was the same defendants' earlier action that created the harm in the first place. Our analysis should begin anew once changing circumstances do away with the justification first given. . . . Even if the majority were correct that the officials 'made just one decision with respect to Mrs. Jackson's visitation privileges, the decision found in the July 19, 2012 letters,'. . . I would not hold that the decision is entitled to complete qualified immunity. The letters imposed a permanent revocation of Mrs. Jackson's visitation privileges. GDOC Standard Operating Procedures require notice of the 'reason for and length of the [revocation].' The officers' stated reason for revocation was related to the hunger strike, but the letters contained neither a date on which the revocation would end nor a statement that the privileges would be reinstated when the hunger strike was over. In light of those facts, I do not believe that defendants have offered a lawful motive for the breadth of the letters for

purposes of qualified immunity. I would affirm the District Court's partial grant of qualified immunity.")

Sherrod v. Johnson, 667 F.3d 1359, 1364 (11th Cir. 2012) ("A proper analysis of Johnson and Crutchfield's entitlement to qualified immunity is not whether they knew that terminating Sherrod in retaliation for protected speech was lawful, but rather whether terminating him based upon all the information available to them at the time, to include any knowledge of his protected speech, was objectively reasonable. *See Stanley, supra,* at 1294. In *Foy,* we noted that the presence of a jury issue about a defendant's improper intent does not necessarily preclude qualified immunity. *Foy,* 94 F.3d at 1533. . . .The facts in the record show lawful justifications for recommending Sherrod's termination. On May 16, 2002, Plaintiff received an unsatisfactory evaluation at Olympic Heights from Vice–Principal Christine Hall, with seven areas of concern. As a result, Sherrod was placed on a remedial teaching performance plan. While at Roosevelt Middle School, Crutchfield began to receive complaints from parents about excessive work assignments and deviations from the curriculum. Further, on one occasion, Crutchfield observed unsupervised students standing outside Sherrod's classroom. After consulting with Sherrod, Crutchfield gave him another unsatisfactory evaluation. Plaintiff failed to present any precedent, and the Court is aware of none, to suggest that a reasonable principal and superintendent armed with the knowledge they possessed, to include the unsatisfactory performance reviews, would know they could not recommend and/or adopt a recommendation to terminate Sherrod. Accordingly, Johnson and Crutchfield are entitled to qualified immunity.")

Danley v. Allen, 540 F.3d 1298, 1308, 1309 (11th Cir. 2008) ("Although the initial pepper spraying itself was not excessive force, this is not a case in which a jailer simply sprayed an inmate who had repeatedly failed to obey commands. Danley's complaint groups together the initial spraying and the subsequent twenty-minute confinement as a single instance of excessive force. Although less common than the direct application of force, subjecting a prisoner to special confinement that causes him to suffer increased effects of environmental conditions–here, the pepper spray lingering in the air and on him–can constitute excessive force. . . . Reading the complaint in the light most favorable to Danley, the pepper spray had its intended effect; it disabled Danley before the jailers pushed him back into the small cell. Given that he was disabled, there was no need for the jailers to continue using force after spraying him. The use of force in the form of extended confinement in the small, poorly ventilated, pepper spray filled cell, when there were other readily available alternatives, was excessive. . . . Having established a constitutional violation, the next step in the qualified immunity analysis usually is to determine whether the right was clearly established. . . However, we have held that 'there is no room for qualified immunity ' in Eighth and Fourteenth Amendment excessive force cases because they require a subjective element that is 'so extreme' that no reasonable person could believe that his actions were lawful. . . As a result, we conclude that the district court did not err by denying the defendants' motions to dismiss Danley's excessive force claim on qualified immunity grounds.")**.**

Rioux v. City of Atlanta, 520 F.3d 1269, 1282-85 (11th Cir. 2008) ("If the trier of fact believed Rioux's showing of pretext, and disbelieved Appellees' proffered legitimate reason, then a violation of the Equal Protection Clause would be shown. The 'other' evidence from which a jury might infer discriminatory animus on the part of Rubin and COO Young, which we have summarized above, constitutes that showing by Rioux, at the summary judgment stage, of the violation of a constitutional right. The trial court below addressed the next step in the qualified immunity analysis by noting that there was no real dispute that the right to be free from employment discrimination was clearly established at the time of Rioux's demotion. As a general principle, we can all agree with that statement. . . . However, the 'clearly established' prong of the qualified immunity analysis asks the question 'in light of the specific context of the case, not as a broad general proposition.' . . . Rioux must demonstrate at this step in the qualified immunity analysis that a reasonable fire chief and a reasonable chief operating officer of a city would know that demoting a high-ranking, subordinate, discretionary officer in the factual circumstances presented here violated clearly established law. . . And it is this that he cannot show. . . . The events of May 2, 2004 are largely undisputed, and the results of the OPS and Law Department investigations confirmed that Rioux violated department rules. Viewing the facts in the light most favorable to Rioux, Appellees had adequate lawful reasons to support their decision to demote Rioux, and may have had improper race-based motives to take the challenged action as well. What Rioux has presented, then, is a 'mixed-motives' case, which is governed by the analysis set out in *Foy*. . . . Tracking the reasoning used in *Foy* to reverse the denial of summary judgment where qualified immunity was interposed as a defense, here no jury could find that it would have been unlawful for a fire chief and the city's chief operating officer to do as Appellees did if they had lacked discriminatory intent. . . No jury could find that a reasonable fire chief and chief operating officer would never have demoted Rioux but for a discriminatory intent. . . The record here, as in *Foy*, undisputably establishes that Appellees were motivated at least in part by lawful justifications, supported by the independent investigations conducted by OPS and the Law Department, investigations which these two decisionmakers were not a part of and which there is no evidence they manipulated.. . . . The *Foy* analytical framework was applied in *Stanley* to a mixed motives case, following the Supreme Court pronouncement in *Crawford-El v. Britton*, 523 U.S. 574 (1998). In *Crawford-El*, the Court rejected a rule that would have required a heightened burden of proof from plaintiffs in unconstitutional-motive cases. . . The *Crawford-El* decision did not address how courts should apply the objective reasonableness test after a plaintiff creates a jury question on improper motive, where improper motive is an element of the claim, as it is here. *Stanley* concluded that *Foy* was the correct approach and remained the law of this circuit. . . And so *Stanley* reiterated that a defendant is entitled to qualified immunity only where 'the record undisputably establishes that the defendant in fact was motivated, at least in part, by lawful considerations.' . . . Because pre-existing law did not provide fair warning to Appellees that demoting Rioux under these circumstances would violate clearly established federal law, Appellees are entitled to qualified immunity . . . . If Rioux had presented his claims under the provisions of Title VII, he would be entitled to have his claims of discrimination heard by a jury. The result we reach here is compelled by the remedy Rioux chose, that is, section 1983 claims against individual decisionmakers rather than his employer, for which the law recognizes the right

to qualified immunity. Again, because Rioux has not been able to present any evidence that Appellees' decisions were not motivated, at least in part, by lawful justifications, Appellees are entitled to qualified immunity.")

McMillan v. DeKalb County, Georgia, No. 05-17110, 2006 WL 3204829, at *2, *3 (11th Cir. Nov. 6, 2006) (not published) ("Drew misapprehends the analytical framework applicable to qualified immunity in mixed motive cases. The district court observed correctly that the right to be free from racial discrimination in the public workplace was a clearly established constitutional right of which a reasonable official would have known. The district court also recognized correctly that the payroll abuse attributed to Plaintiff could objectively justify Plaintiff's termination. Qualified immunity was denied at this stage because the pretrial record failed to establish that Drew's termination decision indisputably was actually motivated at least in part by the payroll incident. Drew takes issue with the district court's conclusions on the evidentiary sufficiency of her lawful motives. We have jurisdiction to review evidentiary sufficiency issues when core qualified immunity issues also are raised. . . Viewing the pre-trial record in the light most favorable to Plaintiff–as we and the district court are required to do–the record fails to show indisputably that Drew was motivated (at least in part) by the legitimate reason she proffered.")

Bozeman v. Orum, 422 F.3d 1265, 1273, 1274 (11th Cir. 2005) ("'[A]n official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay.' . . This general statement of law ordinarily does not preclude qualified immunity in cases involving a delay in medical treatment for a serious injury. The cases are highly fact-specific and involve an array of circumstances pertinent to just what kind of notice is imputed to a government official and to the constitutional adequacy of what was done to help and when. Most cases in which deliberate indifference is asserted are far from obvious violations of the Constitution. But the assumed circumstances here are stark and simple, and the decisional language from cases such as *Lancaster* obviously and clearly applies to these extreme circumstances: the officers knew Haggard was unconscious and not breathing and–for fourteen minutes–did nothing. They did not check Haggard's breathing or pulse; they did not administer CPR; they did not summon medical help. Given these circumstances, we conclude that the Officers were fairly warned by our case law and that the Officers' total failure to address Haggard's medical need during the fourteen-minute period violated Haggard's constitutional rights, which violation should have been obvious to any objectively reasonable correctional officer.").

Bozeman v. Orum, 422 F.3d 1265, 1274, 1275 (11th Cir. 2005) (Edmondson, C.J., concurring) ("I concur in the judgment. And I concur in the opinion; I believe it accurately presents the current law of the Circuit. I write separately to say that I question whether the law of this Circuit on Eighth Amendment claims of excessive force is correct. Briefly stated, I am inclined to believe that the excessive-force tort created by the Eighth Amendment has an important objective element: The correctional officer's physical conduct (force) used must be objectively unreasonable under the circumstances. So, if the conduct (force) is not outside of the borders of objectively

reasonable conduct given the circumstances, the prisoner's Eighth Amendment right would not be violated no matter what the particular officer's subjective state of mind might be. Put differently, the constitutional tort–I suspect–requires objectively unreasonable action (force) plus a subjective, bad faith motive or intent to cause unnecessary suffering. If the officer's act in applying force is objectively reasonable, no need would exist to consider state of mind. Because I am inclined to believe an Eighth Amendment violation based on excessive force requires objectively unreasonable force, I expect that the defense of qualified immunity can apply in cases based on Eighth Amendment excessive force claims. If the force used was not force that the preexisting law had clearly established to be unreasonable given the circumstances, the defendant correctional officer seemingly should be entitled to the defense of qualified immunity on that account. After all, qualified immunity is available in most constitutional torts, including other kinds of excessive force cases. Correctional officers are due considerable deference in how they deal with violent inmates. Our Circuit's law makes it too hard for correctional officers–who have a tough (at times, dangerous) job and are surrounded by hostile witnesses–to avoid suit and trial because our law focuses on the particular correctional officers' subjective motive or intent. I stress that I do not believe that the Supreme Court's decisions compel our Circuit's law to be as it seems to be now. The question I raise here was not briefed in this case. I am also uncertain that, if the Circuit's law operated in the way that I think is likely more correct, the result for this appeal would be different on the excessive force claim. Therefore, I see no point in elaborating or sharpening or finalizing my views at this time; it seems prudent to wait for a case where we have pertinent briefing and where the outcome would doubtlessly be impacted and then to test in that context the ideas advanced for consideration today. But I do hope that this Court and the Bar will keep the ideas that I have raised today under active review. In some cases, I am pretty sure the outcome would be affected if the law of excessive force under the Eighth Amendment was set out differently than we seem to do now, that is, if we took a tack giving real attention to an objective element (unreasonable force) as well as the subjective mental element.").

Snow v. City of Citronelle, 420 F.3d 1262, 1270 (11th Cir. 2005) ("Viewing the facts in the light most favorable to Snow, a jury could find that Chennault subjectively believed that there was a strong risk that Poiroux would attempt suicide and deliberately did not take any action to prevent her suicide. Those facts, if found by a jury, would establish a constitutional violation. Because, at the time of Poiroux's death, it was clearly established that an officer's deliberate indifference to the risk of serious harm to a detainee is a violation of the Fourteenth Amendment, the district court erroneously granted summary judgment on Snow's claim against Chennault.").

Carter v. Galloway, 352 F.3d 1346, 1350 n.10 (11th Cir. 2003) ("The district court also addressed Defendants' qualified immunity defense. Because Plaintiff's deliberate indifference claim fails, Defendants have no need for qualified immunity. If Plaintiff has stated a good deliberate indifference claim, Defendants are entitled to qualified immunity for the law was not clearly established in Plaintiff's favor.")

Bogle v. McClure, 332 F.3d 1347, 1356 (11th Cir. 2003) ("Viewing the facts in the light most favorable to the Librarians, the record evidence does not undisputably indicate that Appellants were in fact motivated, at least in part, by objectively valid reasons. Therefore, Appellants were not entitled to qualified immunity under *Foy*.").

Skrtich v. Thornton, 280 F.3d 1295, 1301 (11th Cir. 2002) ("In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force 'maliciously and sadistically to cause harm' is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* and *Whitley*. *See Johnson v. Breeden,* __ F.3d __ (11th Cir.2002). There is simply no room for a qualified immunity defense when the plaintiff alleges such a violation. *Id.* The only question, then, is whether the plaintiff has alleged facts sufficient to survive a motion to dismiss or a motion for summary judgment. If he has done so, that is the end of the inquiry.").

Johnson v. Breeden, 280 F.3d 1308, 1321, 1322 (11th Cir. 2002) ("We are aware of *Saucier v. Katz* . . . but think that case is distinguishable, because it did not involve a constitutional tort with a subjective intent element. Instead, *Saucier* involved a Fourth Amendment claim of use of excessive force against an arrestee, and such claims are purely objective. They turn solely on the objective reasonableness of the amount of force used in the circumstances, regardless of the intent or other subjective state of mind of the defendant officer. . . It makes perfect sense to conclude, as the Supreme Court did in *Saucier,* that with such claims the merits issue and the qualified immunity issue are distinct, so that the existence of a valid Fourth Amendment excessive force claim is not inconsistent with qualified immunity. In other words, a defendant officer could use force in making an arrest that is later judged to be excessive enough that it violates the Fourth Amendment, but if prior decisions did not clearly establish that the use of that amount of force in those circumstances was constitutionally excessive, the defendant officer would be entitled to qualified immunity. That is what *Saucier* holds. It is different with claims arising from the infliction of excessive force on a prisoner in violation of the Eighth Amendment Cruel and Unusual Punishment Clause. In order to have a valid claim on the merits of excessive force in violation of that constitutional provision, the excessive force must have been sadistically and maliciously applied for the very purpose of causing harm. Equally important, it is clearly established that all infliction of excessive force on a prisoner sadistically and maliciously for the very purpose of causing harm and which does cause harm violates the Cruel and Unusual Punishment Clause. So, where this type of constitutional violation is established there is no room for qualified immunity. It is not just that this constitutional tort involves a subjective element, it is that the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* and *Whitley.* This is a different situation entirely from the one in *Saucier,* . . . where the Supreme Court said that, 'neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule.'").

Marsh v. Butler County, 268 F.3d 1014, 1031 n.8 (11th Cir. 2001) (en banc) ("In *Hill v. DeKalb Regional Yourth Detention Center*, 40 F.3d 1176, 1186 (11th Cir.1994), we see some dicta: 'a finding of deliberate indifference necessarily precludes a finding of qualified immunity'. We reject that dicta because it incorrectly jumbles the merits of an Eighth Amendment violation with the separate concept of an immunity defense.").

Stanley v. City of Dalton, 219 F.3d 1280, 1296 & n.26 & n.29 (11th Cir. 2000) ("We conclude that Chadwick is due qualified immunity under *Foy*. A defendant is entitled to qualified immunity under the *Foy* rationale only where, among other things, the record indisputably establishes that the defendant in fact was motivated, at least in part, by lawful considerations. . . . In this case–viewing the record in the light most favorable to Stanley, as we must at the summary judgment stage–we can say that the record undisputably establishes (a) that objectively valid reasons did exist for the step Chadwick took, and (b) that Chadwick was motivated, at least in part, by these lawful considerations. Thus, even at the summary judgment stage, we can say that this case is undisputably one of mixed motives. Therefore, *Foy* commands qualified immunity on mixed-motive grounds in this case. . . .*Crawford-El* did not separately propose its own analysis for unconstitutional-motive cases, much less reject the kind of analysis we used in *Foy*. And, because *Foy* is based on well-settled principles of summary judgment and qualified immunity, we think that the approach taken in *Foy* is consistent with the Supreme Court's words and holding in *Crawford-El*. We, therefore, conclude that *Foy* remains the law of this Circuit. . . . We emphasize that it is not sufficient for Chadwick to establish that there exists a lawful basis for a reasonable police chief to have terminated Stanley. Rather, in order for the *Foy* analysis to apply, Chadwick himself must have been actually motivated, at least in part, by that lawful basis.").

Macuba v. DeBoer, 193 F.3d 1316, 1321 n.8 (11th Cir. 1999) ("The parties devote significant space in their briefs to the Supreme Court's recent decision in *Crawford-El v. Britton*, . . .which rejected a requirement that a plaintiff in a § 1983 case produce clear and convincing proof of improper motive when motive is an essential element of the constitutional claim. The apparent disagreement between the parties is whether, after *Crawford-El*, a district court may consider a government official's intent or motive in determining if the official is entitled to qualified immunity, when the claim is for First Amendment retaliation. We have not decided what effect, if any, *Crawford-El* has on our holdings, such as *Mencer v. Hammonds*, 134 F.3d 1066, 1070-71 (11th Cir.1998), and *Walker v. Schwalbe*, 112 F.3d 1127, 1132-33 (11th Cir.1997), which concluded that a district court should consider, for qualified immunity purposes, evidence of improper motive, but only when motive is part of the constitutional claim. We decline to address this issue here because, even if Macuba has shown that appellants dislike him, he has not produced sufficient evidence to establish they caused him not to be hired.").

Brown v. Cochran, 171 F.3d 1329, 1333 (11th Cir. 1999) ("The dispute lies in whether a reasonably objective trier of fact could find racial animus on Cochran's part in light of all the facts. In other words, the issue is whether or not Brown has created a genuine issue of fact that Cochran acted out of racial animus and that Cochran's proffered reason (Brown's poor performance record)

was merely a pretext for discrimination. After reviewing the record, we are persuaded that Brown has not created a genuine issue of fact in this regard, and that a trier of fact would find Cochran's actions objectively reasonable. Therefore we conclude that Brown has failed to establish a deprivation of a constitutional right at all, and a fortiori has not established a violation of any clearly established constitutional right.").

Johnson v. City of Ft. Lauderdale, 126 F.3d 1372, 1379-80 (11th Cir. 1997) ("The holding in *Foy* rested primarily on the existence of an indisputable and adequate lawful motive on the part of the social service employees such that reasonable officials would disagree as to the legality of their conduct in light of the *Mt. Healthy* and *Arlington Hts.* doctrines. Here, the transcripts of the disciplinary hearings against Johnson offer conclusive support for the defendants' claimed adequate lawful motives for demoting and discharging Johnson. . . . Even assuming that the defendants acted with some discriminatory or retaliatory motives in demoting and discharging Johnson, the law did not clearly establish that a reasonable official faced with the same evidence of disobedience and deception should not have disciplined Johnson in the same manner. We therefore reverse the district court's denial of summary judgment on Johnson's § 1981 and § 1983 claims. . . . We do not, however, reverse the district court's denial of summary judgment on Johnson's § 1985(3) claim. . . . We have squarely held that qualified immunity is not available as a defense to a § 1985(3) claim, *see Burrell v. Board of Trustees of Ga. Military College*, . . .and are not swayed by the defendants' argument that *Burrell* is no longer legally viable in light of *Lassiter* . . . . *Lassiter* does not undermine *Burrell*'s central rationale: that the narrow intent element of § 1985(3) erects a significant hurdle for § 1985(3) plaintiffs, thereby obviating the need for granting public officials qualified immunity with respect to a § 1985(3) claim.").

Walker v. Schwalbe, 112 F.3d 1127, 1132 (11th Cir. 1997) ("Defendants are correct that there is generally no subjective component to qualified immunity analysis and that the test is based on objective legal reasonableness. . . However. . . [w]here the official's state of mind is an essential element of the underlying violation, the state of mind must be considered in the qualified immunity analysis or a plaintiff would almost never be able to prove that the official was not entitled to qualified immunity. We hold, as every Circuit that has considered this issue has held, that where subjective motive or intent is a critical element of the alleged constitutional violation the intent of the government actor is relevant. . . . Defendants argue that denial of qualified immunity here would be equivalent to the court's holding that once an employee has engaged in First Amendment speech he may no longer be punished for valid reasons. This argument misses the point. An employee may still be punished for valid reasons. However, when the employee can establish a genuine issue of material fact that the true reason for the punishment was actually the speech, then the case must go to trial.").

Walker v. Schwalbe, 112 F.3d 1127, 1137 n.3 (11th Cir. 1997) (Birch, J., concurring in part and dissenting in part) ("I note that our precedent is ambiguous regarding the correct analytical framework in a qualified-immunity context when intent is an element of the cause of action. *Compare McMillian*, 88 F.3d 1554, in which the court assumed, for purposes of

qualified-immunity analysis, that the defendants possessed an intent to punish the plaintiff, regardless of possible evidence of a lawful motive on the part of the defendants, *with Foy*, 94 F.3d at 1534-35 ('[W]hen an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field ... Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendants' conduct–despite his having adequate lawful reasons to support the act–was the result of his unlawful motive, the defendant is entitled to immunity.'). There are other contexts in which the role of evidence of subjective intent of a state actor complicates the qualified-immunity question. Some courts have found, for instance, that a finding of a genuine issue of fact with respect to a defendant's subjective intent necessarily precludes entitlement to qualified immunity when the claim advanced is deliberate indifference to medical needs under the Eighth Amendment. [*citing* cases] The claim of deliberate indifference obviously is not at issue in this case. An examination of this claim does serve to highlight, however, the unsettled state of the law as it pertains to the court's basis for jurisdiction–as well as its analytical approach– in qualified-immunity cases when subjective intent is raised as a disputed predicate question of fact.").

McMillian v. Johnson, 101 F.3d 1363, 1368-69 (11th Cir. 1996) (On Petition For Panel Rehearing and Suggestion of Rehearing en banc) (Propst, Senior District Judge, specially concurring) ("Since this case, unlike *Jenkins* and *Wright*, implicates subjective intent or motive, the issue remains as to how such intent claims are to be considered during the course of a qualified immunity analysis. . . . An issue is whether claims involving subjective intent are appropriate for summary judgment based upon qualified immunity if a legitimate motive is simply posited. I find it difficult to see how such cases can be determined at the summary judgment stage if there is any substantial evidence of an illegal motive in view of the established law which precludes a trial court's making credibility determinations, weighing the evidence, and interfering with a jury's drawing of legitimate inferences from the evidence. . . . I suggest that the qualified immunity issues cry out for further en banc consideration, especially as to the claims involving intent or motive as an element vis a vis those which do not.").

Foy v. Holston, 94 F.3d 1528, 1533-35 & n.9 (11th Cir. 1996) ("Our former decisions . . . must not be understood to rule out qualified immunity wherever discriminatory intent appears in the summary judgment record even if discriminatory intent is an element of the underlying constitutional tort. Qualified immunity is too important a right of public servants and too important a public policy to be nullified so easily. The Supreme Court has not instructed us to drop qualified immunity . . . from cases in which discriminatory intent is an element of the underlying tort. . . . So, whenever a public officer is sued for money damages in his individual capacity for violating federal law, the basic qualified immunity question looms unchanged: Could a reasonable officer have believed that what the defendant did might be lawful in the circumstances and in the light of the clearly established law? . . . . [S]tate officials act lawfully despite having discriminatory intent, where the record shows they would have acted as they, in fact, did act even if they had lacked discriminatory intent. [citing *Mt. Healthy v. Doyle*, 429 U.S. 274, 286-87 (1979)] The *Mt. Healthy* doctrine is part of the law and, when the concept is presented by a defendant's argument, must not

be overlooked in the qualified immunity analysis. . . . One trigger to the doctrine's application depends upon whether the record establishes that the defendant, in fact, did possess a substantial lawful motive for acting as he did act. At least when an adequate lawful motive is present, that a discriminatory motive might also exist does not sweep qualified immunity from the field even at the summary judgment stage. Unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct–despite his having adequate lawful reasons to support the act–was the result of his unlawful motive, the defendant is entitled to immunity. Where the facts assumed for summary judgment purposes in a case involving qualified immunity show mixed motives (lawful and unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor, the defendant is entitled to immunity. . . . Here the record, in fact, shows substantial lawful intent, while not ruling out some unlawful intent, too. Unlike *McMillian* and *Ratliff* (which involved pointed district court fact findings–that we did not review–about the intent of the defendants and in which the *Mt. Healthy* doctrine was not discussed), we are deciding the qualified immunity question based on circumstances which include indisputable and sufficient lawful motivations on the part of Defendants.").

McMillian v. Johnson, 88 F.3d 1554, 1566 (11th Cir. 1996) ("Like every other circuit that has considered the issue, we have held that intent or motivation may not be ignored when intent or motivation is an essential element of the underlying constitutional violation." citing *Edwards v. Wallace Community College*, 49 F.3d 1517, 1524 (11th Cir.1995)).

Ratliff v. DeKalb County, Ga., 62 F.3d 338, 341 (11th Cir. 1995) ("In considering a motion for summary judgment based on qualified immunity, the Supreme Court has held that courts should pay no attention to the subjective intent of the government actor. [*citing Harlow*] *Harlow* was intended to make a fundamental change in the law of immunity. And the strict meaning of the words used in *Harlow* for the immunity standard would protect public officials from personal liability when the pertinent substantive law makes the official's state of mind an essential element of the alleged constitutional violation. Despite *Harlow*'s words, we have said that in one kind of qualified immunity case–where discriminatory intent is an element of the tort–intent remains relevant. [footnote and cites omitted] We are bound by our earlier holding that, in qualified immunity cases, intent is a relevant inquiry if discriminatory intent is a specific element of the constitutional tort; and, we follow that rule here.").

Hansen v. Soldenwagner, 19 F.3d 573, 578 (11th Cir. 1994) ("For qualified immunity purposes, the subjective motivation of the defendant-official is immaterial . . . . *Harlow's* objective standard would be rendered meaningless if a plaintiff could overcome a summary judgment motion based on qualified immunity by injecting the defendant's into the pleadings.").

Crowley v. Scott, No. 5:14-CV-326 (MTT), 2016 WL 2993174, at *7 (M.D. Ga. May 23, 2016) ("It is undisputed that Scott was acting within his discretionary authority, and the Court has concluded that a reasonable jury could find that Scott violated Crowley's constitutional rights by using excessive force. Thus, Scott is entitled to qualified immunity only if the law was not clearly

established that his conduct was unlawful. To overcome Scott's qualified immunity defense, Crowley cites the former rule for Fourteenth Amendment excessive force cases: a plaintiff can overcome the defense of qualified immunity simply by establishing the violation of his constitutional rights. . . This *was* the rule because 'the subjective element required to establish [a Fourteenth Amendment excessive force claim was] so extreme that every conceivable set of circumstances in which this constitutional violations occurs is clearly established to be a violation of the Constitution.'. . However, because the Supreme Court's decision in *Kingsley* eliminated the subjective element in Fourteenth Amendment excessive force claims, a plaintiff asserting the claim must establish a constitutional violation *and* that the defendant violated clearly established law. . . Scott argues 'the law was not clearly established that the amount of forced used was excessive in response to the resistance [Crowley] offered in response to the directions Scott had given him.'. . At the time of the events in this case, the law was clearly established that a handcuffed, non-resisting, and otherwise compliant person has a 'right to be free from excessive force.'. . Therefore, if a jury credits Crowley's version that Scott used a leg sweep while Crowley was handcuffed, non-resistant, and otherwise not creating the disturbance that Scott described, then no reasonable officer in Scott's position could have believed that Scott's use of force was lawful. . . . Accordingly, Scott is not entitled to qualified immunity.")

V. DISCOVERY

In some cases, limited discovery may be needed on the qualified immunity issue to properly establish the contours of the right in question. A court may defer its decision on the immunity question, allow limited discovery to achieve the requisite factual development and decide the issue on summary judgment.

In ***Crawford-El v. Britton***, 523 U.S. 574 (1998), the Court noted:

> Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery. *Harlow* sought to protect officials from the costs of 'broad-reaching' discovery. . . and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.

523 U.S. at 593 n.14.

But see ***Ashcroft v. Iqbal***, 129 S.Ct. 1937, 1953, 1954 (2009) ("We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their

duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

D.C. CIRCUIT

Hinojosa v. Livingston, No. 14-40459, 2015 WL 7422990, at *3-6, *9-11, *14 (5th Cir. Nov. 18, 2015) ("[T]o determine whether we have jurisdiction over this interlocutory appeal, we must determine whether the district court's order complied with our precedent for issuing such orders. . . . First, the district court must determine 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.'. . . When reviewing a complaint that meets this standard, the district court may defer its qualified immunity ruling and order limited discovery if 'the court remains "unable to rule on the immunity defense without further clarification of the facts."'. . Such a discovery order must be 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. . .We first ask whether the complaint pleads facts that, if true, would permit the inference that Defendants are liable under § 1983 for an Eighth Amendment violation and would overcome their qualified immunity defense. We conclude that it does. . . .Here, the complaint alleges an Eighth Amendment violation. The complaint alleges that Defendants subjected Hinojosa to dangerous heat conditions in conscious disregard of the serious risk that the heat posed for prisoners who, like Hinojosa, suffered from certain medical conditions, took certain medications, and had recently been transferred from air-conditioned jails to non-climate-controlled facilities. . . . Prison officials cannot escape liability in a conditions-of-confinement case like this one by arguing that, while they allegedly were aware of and consciously disregarded a substantial risk of serious harm to a discrete class of vulnerable inmates, they were not aware that the particular inmate involved in the case belonged to that class. . . . In sum, then, the complaint adequately alleges an Eighth Amendment violation based on Hinojosa's conditions of confinement. . . . Having determined that the complaint's factual allegations, if true, would establish Defendants' liability for an Eighth Amendment violation and overcome a qualified immunity defense, we next ask whether further clarification of the facts was necessary for the district court to rule on the qualified immunity defense. We easily conclude that it was. When reviewing a well-pleaded complaint and a defendant's motion to dismiss on the basis of qualified immunity, a district court may defer its qualified immunity ruling and order limited discovery when 'the court remains "unable to rule on the immunity defense without further clarification of the facts."'. . In other words, a district court may elect the defer-and-discover approach 'when the defendant's immunity claim turns at least partially on a factual question' that must be answered before a ruling can issue. . . Here, the district court held that it was unable to rule on Defendants' qualified immunity claim because factual development was needed as to their 'knowledge, actions, omissions and/or policies in regards to TDCJ prison operations in times of extreme heat.'. . .The factual questions of what Defendants knew, when they knew it, and whether they investigated and considered possible remedial measures, are undoubtedly necessary to answer before determining whether Defendants acted reasonably in light of clearly established law. Of course, as detailed above, Defendants' knowledge is central to the deliberate indifference element of Plaintiff's Eighth Amendment claim.

However, their knowledge is also highly relevant to qualified immunity, because it bears heavily on the reasonableness of their actions. . . . The reasonableness analysis must be different from the deliberate-indifference analysis, because '[o]therwise, a successful claim of qualified immunity in this context would require defendants to demonstrate that they prevail on the merits, thus rendering qualified immunity an empty doctrine.'. . 'In light of these complexities, we have observed that "[a]dditional facts ... are particularly important when evaluating the [reasonableness] prong of the qualified immunity test."'. . That holds true in this case. The district court did not err in determining that factual development was needed to rule on Defendants' qualified immunity defense. . . Our foregoing discussion establishes that the district court was empowered to defer its qualified immunity ruling and issue a discovery order. However, the breadth of the ordered discovery is critically important. Qualified immunity is immunity not only from judgment, but also from suit . . . . We therefore must determine whether the discovery that the district court ordered was "narrowly tailored to uncover only those facts needed to rule on the immunity claim." *Id.* (quoting *Lion Boulos,* 834 F.2d at 507–08). While this presents a somewhat close question, we conclude that the district court's discovery order was appropriately tailored. . . . Because, as set forth above, the district court's order complies with our precedent, we DISMISS this interlocutory appeal for want of jurisdiction. We express no opinion on how the district court should rule on Defendants' qualified immunity defense.")

Navab-Safavi v. Glassman, 637 F.3d 311, 317, 318 (D.C. Cir. 2011) ("Having established that the complaint set forth a violation of right requiring a *Pickering* balancing against the appellants' assertion of qualified immunity, we now face a question similar to that determined by the Fifth Circuit in *Kinney v. Weaver,* 367 F.3d 337 (5th Cir.2004): That is, given the function of qualified immunity in protecting government officials against not only civil liability, but the burden of litigation, did its assertion by the appellants require the district court to terminate the litigation at the motion stage without further resolution of the factual questions underlying the determination of the *Pickering* balance? Upon review of the record, we conclude as did the district court that it is not possible to determine at this stage as a matter of law that Navab-Safavi has not alleged a violation of clearly established law. . . .[W]here the interests underlying the *Pickering* balancing are as fact-dependent as those in this case, the district court appeared to correctly determine that this decision could not be made at the 12(b)(6) stage and should properly await some evidentiary development. We do not suggest that the determination can never be made on allegations–the relative weight of governmental interest and established constitutional rights on other facts may often be quite evident from the pleadings–but only that it cannot be done on the record before the court in this case.")

FIRST CIRCUIT

Irish v. State of Maine, 849 F.3d 521, 523-29 (1st Cir. 2017) ("As to qualified immunity, we recognize the Supreme Court's admonitions that it is 'an immunity from suit rather than a mere defense to liability,' and should thus be decided early in litigation. . . But we are reluctant to make

law in the absence of more facts. We thus send the case back to the district court for some development of facts material to those issues. We vacate the district court's ruling as to the individual defendants and remand the case with instructions that the parties be permitted to conduct discovery on relevant facts. The discovery should include facts on whether there was any departure from established police protocol or training on, inter alia, the manner in which the police should notify the accused of allegations filed against him or her; what exactly the State Police officers knew about the risk that Lord posed to Irish and when exactly they knew it; and what message they left for Lord. Whether or not the officers followed proper procedure and how much they knew about the attendant risks of leaving a casual voice message, in turn, may bear on the questions of whether Irish has a due process claim that can withstand a 12(b)(6) motion and whether the officers are entitled to qualified immunity. . . .At least eight sister circuits have recognized the existence of the state-created danger theory. . . While this circuit has discussed the possible existence of the state-created danger theory, we have never found it applicable to any specific set of facts. In addition to alleging a sufficient state-created danger, the plaintiff must meet 'a further and onerous requirement' to prove a substantive due process violation: "'he state actions must shock the conscience of the court.'. . To meet this standard, the state actions must be 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'. . Although the circumstances of each case impact whether the state action at issue meets this standard, 'where actors have an opportunity to reflect and make reasoned and rational decisions, deliberately indifferent behavior may suffice.'. . Finally, we 'may elect first to address whether the governmental action at issue is sufficiently conscience shocking' before considering the state-created danger element. . . .In our view, the bare-bones nature of the complaint and the record at this early stage of litigation makes vacating the appropriate course. To be sure, our concern is not that the State Police sought to interview Lord for 'his side of the story.' Nor is our concern that they identified Irish as the complainant. After all, even had they not identified her by name, her identity might have been clear to Lord, given the one-on-one nature of the crime of rape. What we do question, however, is whether there are standard police protocols that were violated when the officers decided not to be present when they alerted Lord to Irish's allegations but instead opted to leave Lord a voice message on his phone -- notwithstanding Irish's specific warning that such notification would 'incite Lord to terrible violence.' Assuming the voice message was left on Lord's cell phone, it is likely that he received immediate notification and was left free to immediately do violence. And given the timeline presented in Irish's complaint, the police had apparently not taken any prior steps to evaluate Irish's allegations or Lord's propensity for violence before leaving him the voice message. Or if they did, the actions are not documented in the record. Neither party at oral argument could provide any detail on acceptable police procedures or training, if any, on how and when to notify the accused of the allegations that have been filed against him or her under similar circumstances. Our developing caselaw in this area helps explain why we pause. . . .[B]ased on this record, we do not know the steps, if any, that officers should take when they have reason to believe that an alleged perpetrator is violent and is likely to retaliate against a victim who reports such serious crimes. And as *Stamps* and *Marrero-Rodríguez* illustrate, violation of protocol and training is relevant both to the substantive due process and qualified immunity inquiries. Beyond the dearth of facts on police procedure and training, the record also offers no

facts on exactly what the officers knew about the veracity of the allegations that Irish had made, about Lord's propensity for violence, and about the risk that Lord would act on that propensity to harm Irish. . . .If discovery reveals that the officers' actions violated accepted norms of police procedure or that they acted despite foreseeing the harm to Irish, it may strengthen the plaintiffs' argument that the officers exacerbated the danger that Lord posed. It may also directly speak to whether the officers acted in deliberate indifference to Irish's safety, so much so that their conduct shocks the conscience. By contrast, if discovery reveals that no protocols were violated, then the plaintiffs may have a harder time surviving a 12(b)(6) motion. While the fact that the officers did not take further discretionary steps to ensure Irish's safety may amount to negligence, mere negligence would be insufficient to maintain a claim of substantive due process violation. . . Similarly, if no or few protocols were violated, then the officers' chance of successfully asserting qualified immunity may increase, as a reasonable officer may not have known that acting in line with their own standard procedures and training would violate a private citizen's constitutional rights. . . But we cannot reach any of these conclusions without a fuller development of the facts. We vacate the district court's ruling as to the individual defendants and remand the case with instructions for discovery not inconsistent with this opinion.")

Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994) ("On May 9, 1994, we entered an order granting the officers' emergency request to stay district court discovery pending their appeal of the denial of qualified immunity. The request was granted 'pending further order of this court.' We now elaborate the basis for our May 9 order and extend the stay of discovery pending our determination of these appeals. A qualified immunity defense is an immunity from suit and the rationale for allowing an immediate appeal from the denial of qualified immunity is that the immunity from suit is effectively lost if a case is erroneously permitted to go to trial ... The immunity from suit includes protection from the burdens of discovery. 'Until this threshold immunity question is resolved, discovery should not be allowed.'... We recognize that *Harlow's* reference to staying discovery was in the context of the district court's resolution of the immunity question. But in light of the Court's later determination that a denial of qualified immunity is entitled to immediate appellate review, . . . we believe that the stay of discovery, of necessity, ordinarily must carry over through the appellate court's resolution of that question, so long as the appeal is non-frivolous. The rationale for staying discovery applies with no less force while the appeal, to which the officers are entitled, proceeds. It is important to note what is not involved here. As the officers concede, the district court, prior to its ruling on the issue of qualified immunity, properly ordered some discovery limited to that issue . . . . What the district court thereafter authorized, and what we have stayed pending these appeals, is more extensive discovery directed at the merits of the case.").

SECOND CIRCUIT

Castro v. United States, 34 F.3d 106, 112 (2d Cir. 1994) ("Where the claimant's description of the events suggests that the defendants' conduct was unreasonable, and the facts that the defendants claim are dispositive are solely within the knowledge of the defendants and their collaborators,

summary judgment can rarely be granted without allowing the plaintiff an opportunity for discovery as to the questions bearing on the defendants' claims of immunity.").

Golio v. City of White Plains, No. 06 CIV. 1691 CM/GAY, 2006 WL 3199140, at *3 (S.D.N.Y. Nov. 2, 2006) ("In short, this is the rare case in which the fact record needs to be more fully developed before the court can rule on the question of qualified immunity in the context of the false arrest claim against Officer Suggs. The motion is denied with leave to renew, either at the close of discovery or at trial.").

Burns v. Citarella, 443 F.Supp.2d 464, 468, 469 (S.D.N.Y. 2006) ("Plaintiff claims that she is unable to fully and effectively oppose defendants' motion for summary judgment in the absence of discovery–in particular, the opportunity to depose the individual defendants. Accordingly, plaintiff asserts that the present motion should be either stayed until discovery is completed or treated as a Rule 12 motion to dismiss. The court rejects this contention. . . . In keeping with the Supreme Court's observation that, in deciding the issue of qualified immunity, the court must assume plaintiff's version of the facts to be true (rendering defendants' story irrelevant), . . . this Court's Individual Practice Rules require that any defendant claiming qualified immunity (1) file a pro forma motion for summary judgment on that sole ground with his answer; (2) depose the plaintiff and file papers in support of the motion within thirty days thereafter; and (3) obtain a decision on the motion before conducting any further discovery. . . Granting plaintiff discovery about defendants' version of events before deciding the motion is not consistent with the goal of 'resolving immunity questions at the earliest possible stage in litigation,' by assuming plaintiff's version of the facts to be true.")

Elmaghraby v. Ashcroft, No. 04 CV 1409 JG SMG, 2005 WL 2375202, at *13, *21 (E.D.N.Y. Sept. 27, 2005) ("In sum, *Crawford-El*, *Swierkewicz*, and *McKenna* suggest the following principles when evaluating qualified immunity at the motion to dismiss stage: (1) a complaint must meet Rule 8(a)'s requirements: fair notice of the claims asserted and the grounds upon which they rest; (2) the plaintiff is entitled to all reasonable inferences from the facts alleged in the complaint, including those that defeat the immunity defense; (3) where there is a factual dispute bearing on the qualified immunity question, that dispute should be resolved at the earliest opportunity; and (4) to resolve such a dispute, it may be appropriate to limit discovery in scope (to issues that bear on the qualified immunity defense) and manner. . . . The issue of qualified immunity should be addressed at the earliest appropriate stage. Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly. . . The personal involvement, if any, of the non-MDC defendants should be the subject of the initial stage of discovery. Accordingly, discovery concerning Ashcroft, the FBI Defendants (Mueller, Maxwell, and Rolince), and the BOP Defendants (Sawyer, Cooksey, and Rardin) will be generally limited to inquiries into their involvement in the alleged denials of due process. Appropriate topics will include whether the individual defendant participated in the creation and implementation of the policy or policies under which plaintiffs were detained, whether he or she had knowledge of the conditions under which plaintiffs were detained, and the defendant's involvement in or

knowledge of the clearance process and the alleged bypassing of BOP procedures for challenging administrative segregation of pretrial detainees.").

Torres v. Village of Sleepy Hollow, 379 F.Supp.2d 478, 484 n. 4 (S.D.N.Y. 2005) (S.D.N.Y. 2005) ("Under this Court's rules, the plaintiff is deposed before a rule 12(c) motion on qualified immunity grounds is made, so that the plaintiff's complete story–not just the minimal allegations required of a pleader under Fed.R.Civ.P. 8–is before the Court. No other discovery (including depositions of the defendants) is permitted prior to the determination of the qualified immunity motion, however, because none would be relevant at the commencement of the lawsuit, when the Supreme Court and the Second Circuit require this issue to be decided.")

Williams v. County of Sullivan, 157 F.R.D. 6, 9 (S.D.N.Y. 1994) ("Neither the reasonableness of ... the defendants' conduct in light of information available to them nor the liability of each defendant can be resolved until all material issues of fact pertaining to these matters have been fleshed out. [cite omitted] A stay of all discovery under such circumstances is inconsistent with expeditious adjudication of the issue of qualified immunity .... Discovery dealing with the most obviously pertinent sources of information can be permitted to proceed initially, holding in abeyance questions regarding controverted further discovery until the results of initial discovery are known.").

THIRD CIRCUIT

P.F. v. Mendres, 21 F. Supp.2d 476, 483, 484 (D.N.J. 1998) ("We do not perceive our conclusion to be inconsistent with the Supreme Court's mandate that the immunity issue be resolved at the earliest possible stage of the litigation. The Court's opinion in *Crawford-El* indicates approval of the possibility that limited discovery may be necessary where the underlying substantive legal theory requires the Court to engage in some factual analysis to determine whether the defendant's conduct rises to the level of a constitutional violation. . . . In light of our conclusion that we cannot resolve the immunity issue at this juncture, we must next address how this particular litigation should proceed. The Supreme Court's opinion in *Crawford-El* teaches that we may tailor discovery narrowly and dictate the sequence of discovery so as to protect the defendant's immunity defense. . . . We must make it clear that this initial discovery phase is limited only to gathering information which bears upon our qualified immunity inquiry. In the context of this case, the initial discovery will be limited to gathering information pertaining to the inquiry that we must undertake in determining if defendant's conduct rises to the level of a constitutional violation of the plaintiffs' right to privacy. . . [O]nce this information is gathered, defendant may file a motion for summary judgment which raises the immunity defense again in light of the factual development gained through this initial discovery phase. Accordingly, we will deny the motion to dismiss without prejudice to the defendant's right to assert a qualified immunity defense in a properly supported motion for summary judgment.").

FOURTH CIRCUIT

Raynor v. Pugh, 817 F.3d 123, 130 n.5 (4th Cir. 2016) ("Raynor also argues that the district court erred in denying him any discovery. Generally, a court should not grant summary judgment when, as here, outstanding discovery requests on material issues exist. *See Ingle ex rel. Estate of Ingle v. Yelton,* 439 F.3d 191, 196–97 (4th Cir.2006). The district court stayed Raynor's discovery requests pending resolution of Pugh's qualified immunity defense, in accord with *Crawford–El v. Britton. See* 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). But, without ruling on the (meritless at this stage) qualified immunity claim, the court granted summary judgment on evidentiary grounds, faulting Raynor for 'not provid[ing] any evidence, other than his own affidavit, to support his allegations.' In so doing, the court erred. On remand the district court should permit appropriate discovery before entertaining any additional motions for summary judgment.")

Tobey v. Jones, 706 F.3d 379, 389 (4th Cir. 2013) ("Based on Mr. Tobey's complaint, it is unclear whether Appellants' behavior was reasonably motivated by Mr. Tobey's 'disruptive' conduct or unreasonably motivated by his protected protest. What is reasonable in this context, therefore, requires greater factual development and is better decided once discovery has been conducted. *See Martin,* 980 F.2d at 952; *DiMeglio v. Haines,* 45 F.3d 790, 795 (4th Cir.1995) ("[W]here there is a material dispute over what the defendant did ... it may be that the qualified immunity question cannot be resolved without discovery .").")

McMillian v. Wake County Sheriff's Dept., No. 10-1576, 2010 WL 4366478, at *3, *4 (4th Cir. Oct. 28, 2010) (unpublished) ("McMillian has consistently asserted that, after he was handcuffed and subdued, Defendants knocked him to the ground, repeatedly struck him, and kneed him in the head, causing his eye to bleed and injury to his neck. In granting summary judgment to Defendants, the district court accepted Defendants' assertions that they handcuffed McMillian due to his disruptive conduct, and that their use of force was limited to accomplishing that objective. Neither the magistrate judge nor the district court squarely addressed McMillian's allegation that the complained-of use of force occurred *after* he was handcuffed. Accepting McMillian's allegations and evidence as true, as we must at this procedural juncture, *see Jones v. Buchanan,* 325 F.3d 520, 524 n. 1 (4th Cir.2003), we conclude the district court erred in finding there was no issue of material fact as to the need for the use of force and the extent of force Defendants used. Crediting McMillian's version of the events, we cannot say, as a matter of law, that knocking down, punching, and kicking an arrestee while he is in handcuffs are actions taken in good faith to restore order. . . Adjudication of this issue is complicated by the fact that the district court denied McMillian's repeated requests for discovery of any videotapes and photographs from the night in question. We review the denial of a request for discovery for an abuse of discretion. . . McMillian has steadfastly maintained that the jail's surveillance cameras captured the events at issue. The court denied McMillian's request for discovery of any such evidence, finding it was not relevant to Defendants' assertion of qualified immunity. We disagree. In evaluating whether a police officer is entitled to qualified immunity, the district court must assess whether there was a constitutional

violation. . . Certainly, evidence that would have confirmed (or dispelled) McMillian's allegations pertaining to the events that form the subject of this lawsuit is highly probative of that issue. . . Because we conclude the denial of McMillian's discovery requests substantially prejudiced him, we hold the district court abused its discretion in denying these requests. For these reasons, we conclude the district court's grant of summary judgment on the basis of qualified immunity was premature, particularly in light of the erroneous evidentiary ruling. Accordingly, we vacate the district court's order granting Defendants summary judgment on the basis of qualified immunity.")

Ingle v. Yelton, 439 F.3d 191, 195, 196 (4th Cir. 2006) ("In holding that the defendant officers were entitled to qualified immunity, the district court relied almost exclusively on the officers' assertions that Christopher aimed his weapon at them. Ingle, of course, has no way to directly contradict the officers' statements. Because this is a deadly force case, 'the witness most likely to contradict [the officers'] story–the person shot dead– is unable to testify.'. . In such circumstances, 'a court must undertake a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.' . . . Given the facts of this case, the district court could not conduct a thorough assessment of the officers' statements without allowing discovery as to whether videotapes exist and, if so, what they depict. Ingle presented compelling reasons to allow the requested discovery. She alleged that the officers' account–that the decedent aimed the gun at them through the open window of the truck–conflicts with the physical evidence suggesting that the window was closed when the officers shot it out. She even submitted an expert affidavit concluding that the 'shards of glass visible around the entire perimeter of the driver's side window' constitute 'proof that the driver's window was broken when the window was in a complete rolled-up position.' The State Bureau of Investigation echoed that view in its report on the incident, noting that the window was 'in an upward position' when it was shot out. Moreover, Ingle presented a plausible argument that such videotapes may actually exist. She asserted, and defendants' counsel confirmed at oral argument, that the APD instituted a policy of installing cameras in its vehicles in April 2001, several months before the shooting. While it may be that at the time of the shooting no cameras had yet been installed or were operative in any of the six APD vehicles at the scene, or the three additional APD vehicles located along Holiday Inn Drive, this policy clearly distinguishes Ingle's Rule 56(f) motion from cases where 'the evidence sought was almost certainly nonexistent or was the object of pure speculation.'").

Ingle v. Yelton, 2008 WL 398327, at *3 (4th Cir. Feb. 14, 2008) ("[T]he defendants and APD provided numerous affidavits, depositions, and evidence of two thorough investigations. All evidence confirmed that the APD had not produced a videotape and did not possess one. We cannot conclude that the district court abused its discretion in limiting discovery at this point and denying Ingle's motion to compel.")

DiMeglio v. Haines, 45 F.3d 790, 795 (4th Cir. 1995) ("A district court may deny a motion for summary judgment based on qualified immunity and allow discovery to proceed only if it has addressed the threshold immunity question, and concluded (1) that the plaintiff alleged a violation

of a clearly established right, but (2) that there existed a material factual dispute over what actually occurred, and (3) under the defendant's version, a reasonable official could have believed that his conduct was lawful. In instances where there is a material dispute over what the defendant did, and under the plaintiff's version of the events the defendant would have, but under the defendant's version he would not have, violated clearly established law, it may be that the qualified immunity question cannot be resolved without discovery. In such circumstances, it simply may be impossible to protect the defendant from all of the burdens that attend the pretrial process. Of course, after discovery and upon a proper motion, the district court may reconsider the question of qualified immunity.")

H.H. v. Chesterfield County School Bd., 2007 WL 4246487, at *5 (E.D.Va. Nov. 29, 2007) ("Having determined that plaintiffs' complaint does allege the violation of a constitutional right, and that the right was clearly established at the time of the alleged violation, the Court now must inquire as to whether any facts material to defendants' claim of qualified immunity are in dispute. The parties dispute whether defendants kept H.H. restrained in her wheelchair for long periods of time, and this disputed issue of material fact is central to defendants' qualified immunity claim. The Fourth Circuit has held that 'ordering discovery on the issue of immunity ... [is] well within the discretion of the district court.' *American Civil Liberties Union, Inc. v. Wicomico County*, 999 F.2d 780, 787 (4th Cir.1993). The Court finds that it must permit plaintiffs to conduct discovery to obtain the facts from Moffett and Minguzzi necessary to resolve the disputed issue of material fact before it can rule on defendants' qualified immunity claim. Accordingly, the Court will deny defendants' motion for protective order.").

Delph v. Trent, 86 F. Supp.2d 572, 575-77 (E.D. Va. 2000) ("[T]here is a complex intersection between qualified immunity and supervisory liability. If a plaintiff can establish the requisite indifference in the face of a policy or widespread and pervasive abuses caused by a policy, the plaintiff may hold the responsible official liable in a supervisory capacity. However, if the official can respond that a reasonable person would not have known of the effects of the policy or that the policy violated clearly established laws, then that official is entitled to qualified immunity from suit. . . . To permit the plaintiff to seek discovery would expose an official to the types of abuses qualified immunity was intended to prevent. . . .[T]he Court has constructed two hurdles the plaintiff must overcome to win the right to discovery. First, the trial court must insure that plaintiff has alleged a cognizable injury with sufficient specificity that officials are not subject to burdensome or unnecessary discovery. . . The trial court may require the plaintiff to make specific factual allegations or may grant motions by defendant for more definite statements under Rule 12(e). Second, once plaintiff has made a sufficient allegation, the trial court must then resolve the threshold issue of immunity before proceeding to discovery. In doing so, the trial court must determine whether the officials violated clearly established law, assuming the plaintiff's allegations as true. If so, plaintiff may be entitled to discovery, subject to the discretion of the trial court and the limits of Rule 26. . . . After he receives the requested information, plaintiff will either be able to establish supervisory liability or he will not find sufficient proof of widespread abuse. If plaintiff cannot prove supervisory liability, there is no need to reach the issue of

qualified immunity and plaintiff's action may be dismissed. If plaintiff can prove supervisory liability, then the Court may proceed to determine defendants' qualified immunity defense.").

FIFTH CIRCUIT

Collie v. Barron, No. 17-10935, 2018 WL 4182173, at *4 (5th Cir. Aug. 30, 2018) (per curiam) (not reported) ("Contending that the district court abused its discretion in denying him the opportunity to take discovery before it entered summary judgment, Collie decries that practice. He fears it will furnish 'rogue officers and poorly managed police departments' a 'virtual how-to booklet' to shield themselves from accountability. Collie asserts other Fort Worth Police officers had more information about the events that took place before Officer Barron shot Collie. Thus, discovery would have permitted him to prove Officer Barron either knew or should have known Collie did not fit the description of the robbery suspects and could not be the armed suspect. As relevant here, the goals of qualified immunity counsel no more than a minimum of necessary discovery before the court determines whether the defense attaches: 'Until this threshold immunity question is resolved, discovery should not be allowed.'. . This court has previously recognized '[o]ne of the most salient benefits of qualified immunity is protection from pretrial discovery.'. . The Supreme Court has emphatically directed, 'qualified immunity is an immunity from suit rather than a mere defense to liability.'. .Collie's position fails in several ways – beginning with the fact that he failed to preserve this argument for appeal. Federal Rule of Civil Procedure 56(d) requires a non-movant to present affidavits and evidence if he feels he needs discovery to properly defend against a summary judgment motion. . . Collie never sufficiently invoked Rule 56(d) in the trial court. Further, '[w]hen a defendant pleads the defense of qualified immunity, the district court may ban discovery at this threshold pleading stage and ... need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts.'. . Here, the parties' competing evidence convinced the court that Collie could not overcome the defense of qualified immunity. The court did not abuse its discretion or misapply the law when denying additional discovery.")

Patel v. Texas Tech University, No. 17-11234, 2018 WL 3045463, at *1 (5th Cir. June 19, 2018) (not reported) (" '[T]his court has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.' *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). The plaintiff 'must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.'. . '*After* the district court finds a plaintiff has so pled, if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim."'. . 'An order that simultaneously withholds ruling on a qualified immunity defense while failing to constrain discovery to develop claimed immunity is by definition not narrowly tailored.'. .It appears that the district court did not follow this court's

'careful procedure.' The record shows that the court held that the qualified immunity defense had been improperly raised in a Rule 12(b)(6) motion to dismiss, and should instead be raised in a later motion for summary judgment. Whether this decision intimated further that Appellants' motion was not well taken, because Plaintiff sufficiently carried his pleading burden, we cannot discern. In any event, the district court further failed 'to constrain discovery to develop claimed immunity' after apparently refusing to pass on qualified immunity in the first instance. . . The record, in sum, does not demonstrate that the court followed the procedures laid out in *Backe v. LeBlanc* and *Lion Boulos v. Wilson*. It must do so on remand.")

Bustillos v. El Paso Cty. Hosp. Dist., 891 F.3d 214, 223 (5th Cir. 2018) ("Both motions for protective orders noted that the Doctors had asserted qualified immunity. 'One of the most salient benefits of qualified immunity is protection from pretrial discovery ....' *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). Thus, '[b]efore allowing discovery in a matter where qualified immunity is alleged, the district court must first find "that the plaintiff's pleadings assert facts which, if true, would overcome" a qualified immunity defense.'. . Because Bustillos' claims could not overcome the clearly-established prong of the qualified immunity defense, the district court did not err by declining to grant Bustillos' discovery requests.")

Randle v. Lockwood, 666 F. App'x 333, ___ & nn. 5, 6 (5th Cir. 2016) ("The district court's failure to address the question of qualified immunity violated the tenet that '[q]ualified immunity questions should be resolved "at the earliest possible stage in the litigation."'. . Regardless of the pleading standard applicable to Randle's claims, the district court was required to address whether the jailers were entitled to qualified immunity because the jailers asserted this defense in both their motions to dismiss and their objections to the magistrate judge's report and recommendation. By failing to address qualified immunity, the district court's order undercuts the doctrine of qualified immunity's goal of shielding public officials from 'unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.'. . As a result, the jailers will likely be exposed to 'costly, time-consuming, and intrusive' pre-trial discovery before Randle is required to demonstrate that his allegations defeat the jailers' qualified immunity defense. . . . While the district court's order did not explicitly allow any discovery, discovery is the next logical step in the litigation process following the denial of a motion to dismiss. And the magistrate judge's report explicitly references the need for discovery before 'passing on the merits' of Randle's claim. Therefore the district court's denial of the motions to dismiss, if left undisturbed, is likely to lead to discovery. . . . For these reasons, we conclude that the district court erred by failing to address the jailers' qualified immunity defense when denying their motions to dismiss. . . . Nor does the district court's order satisfy the narrow exception to the general rule that qualified immunity should be decided as early in the litigation as possible. Under this exception, 'a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of [the qualified immunity] defense.'. . But in order to properly defer the decision on qualified immunity, the district court must follow the 'careful' two-step procedure that we have established. . . First, it must 'determine "that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity."'. . Second, if the district court finds a plaintiff

has so pleaded, it can then 'defer its qualified immunity ruling and order limited discovery if "the court remains unable to rule on the immunity defense without further clarification of the facts.'"' Here, the district court did not complete either step of this procedure.")

Mendez v. Poitevent, 823 F.3d 326, 336-37 (5th Cir. 2016) ("Plaintiffs also contend that the district court abused its discretion in ruling on defendants' motions for summary judgment before discovery, implicitly denying plaintiffs' request for a continuance to conduct discovery. Plaintiffs bore a heavy burden below because they sought discovery 'to disprove the applicability of an immunity-derived bar to suit because immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery.'. . Courts are authorized under Rule 56(d) to defer ruling on a summary judgment motion and allow discovery, but 'Rule 56 does not require that *any* discovery take place before summary judgment can be granted.'. . And under Rule 56(d), deferring summary judgment and ordering discovery is appropriate only if the 'nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.'. . A party 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.'. . Plaintiffs' affidavit here fell short. Plaintiffs' counsel alleged that they had no opportunity to depose Poitevent and the witnesses to the shooting. In support of the motion, counsel asserted that '[t]he testimony of these witnesses and others bear[s] upon the acts and omissions of Taylor Poitevent, and the reasonableness of his conduct in shooting Juan Mendez, Jr.' But plaintiffs did not identify below any reason why it could not obtain the testimony of the witnesses to the shooting through, for example, affidavits; indeed, plaintiffs submitted a declaration from one of them. And the witnesses' accounts were already incorporated into the record through the Texas Rangers' investigation report. In addition, Poitevent himself submitted his own testimony. Plaintiffs presented no reason why either Poitevent's affidavit or the witness accounts in the investigation report were insufficient, and their contention that summary judgment was inappropriate before they were able to depose Poitevent is unsupported. . . Plaintiffs did not, moreover, identify specific facts below that would alter the district court's analysis. . . Instead, they vaguely assert before this court that deposing the witnesses would have 'permitted [plaintiffs] to further discover the facts from the witnesses who saw the scuffle.' In other words, plaintiffs did not demonstrate below 'how the additional discovery [would] likely create a genuine issue of material fact.'. . Instead, the result of the discovery they sought was 'wholly speculative.'. .We thus hold that the district court did not abuse its discretion in implicitly denying plaintiffs' motion for a continuance to conduct discovery.")

Zantiz v. Seal, 602 F. App'x 154, 159-63 (5th Cir. 2015) ("We generally lack jurisdiction to review discovery orders. . . But we have jurisdiction to review certain discovery orders in cases involving the qualified immunity defense. . . In particular, we have jurisdiction to review such a discovery order if the district court does not first determine whether the plaintiff's pleadings, taken as true, are sufficient to overcome the qualified immunity defense. . . We also have jurisdiction to consider a discovery order that has not been 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. . We review such orders for abuse of discretion. . . We have jurisdiction to review such an order if it does not follow the two-step procedure that we have mandated in

qualified immunity cases. . . First, the district court must determine that the plaintiff's well-pleaded facts, taken as true, would overcome the qualified immunity defense. . . Second, 'if the court remains unable to rule on the immunity defense without further clarification of the facts, it may issue a discovery order narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. . Such an order must 'identify any questions of fact [the district court] need[s] to resolve before it would be able to determine whether the defendants [are] entitled to qualified immunity.'. . We conclude that we have jurisdiction to review the discovery order here because it did not fulfill either step of this analysis. First, the order did not explicitly hold that Zantiz's pleadings, taken as true, overcame the qualified immunity defense. While some of the language in the discovery order implies that the magistrate judge thought that the pleadings overcame the qualified immunity defense, we have held that this holding must be made explicitly. . . The discovery order also fails the second step of *Zapata.* Even a 'limited discovery' order does not satisfy the second step if 'he district court [does] not identify any questions of fact it need[s] to resolve before it would be able to determine whether the defendants [are] entitled to immunity.'. . Here, the discovery order fails under this standard because it does not identify the questions of fact that needed to be resolved before the qualified immunity issue could be addressed. Thus, we conclude that the magistrate judge abused his discretion in issuing a discovery order that did not perform either of the steps described in *Zapata.*")

Doe v. Robertson, 751 F.3d 383, *7 (5th Cir. 2014) ("Plaintiffs claim that assessing the Service Agreement violations *in isolation* is not our task, as discovery has not been taken. In Plaintiffs' view, focusing solely on the contractual violations presumes that no other evidence could support their *Bivens* claim. Plaintiffs accordingly assert that they have a 'right to seek discovery ... to build the necessary record in the case at hand.' Plaintiffs misunderstand our standard of review at the motion to dismiss stage. We recognize that the question of whether an official 'had the requisite knowledge of a substantial risk is a question of fact' generally best resolved by discovery and fact-finding, should a claim survive a motion to dismiss. . . But here, at the motion to dismiss stage, we are tasked with deciding whether Plaintiffs have stated a plausible 'claim upon which relief can be granted.'. . In so doing, we cannot accept Plaintiffs' invitation to apply the 'no set of facts' test, which the Supreme Court has firmly rejected. *Twombly* . . . . It is, of course, conceivable that some set of facts could make Plaintiffs' claim plausible. Hypothetically, for example, Robertson and Rosado might have known of Dunn's dangerous proclivities, or they might have ignored contemporaneous distress calls from victims of or witnesses to the assaults. But 'a plaintiff armed with nothing more than conclusions' cannot 'unlock the doors of discovery.'. . Here, Plaintiffs have proffered a legal conclusion that Robertson and Rosado were deliberately indifferent, and for the reasons detailed above, their factual allegations, even assumed as true, do not make this conclusion plausible. . . Accordingly, the Complaint gives Plaintiffs no right to discovery.")

Morgan v. Hubert, 335 F. App'x 466, 2009 WL 1884605, at *5, *6 (5th Cir. July 1, 2009) ("The failure of specificity is no fault of Morgan's, however, because he has not yet had the benefit of discovery, and is bound by Rule 11 to allege only those facts for which he has or will likely have evidentiary support. As we said in *Schultea,* we do not require a plaintiff to plead facts 'peculiarly

within the knowledge of defendants,'. . . and the facts omitted fall squarely within that category. We are mindful that the protection afforded by qualified immunity applies to the lawsuit itself, and not merely to liability, and thus the issue should be resolved as early as possible. . .Thus, we are reluctant to allow the case to proceed to full discovery with important questions regarding qualified immunity left unanswered. *Schultea* points the way forward. We noted there the district court's ability to tailor discovery to the defense of qualified immunity . . . . Such a course is called for here. Because key facts are unknown, and because these facts are solely within Hubert's possession, we do not consider the parties' remaining arguments regarding deliberate indifference. Instead, we vacate the district court's denial of qualified immunity and remand for discovery limited to that issue. We instruct the district court to carry the issue of qualified immunity and decide it anew once that discovery is complete.") [*See also Morgan v. Hubert*, 459 F. App'x 321 (5th Cir. 2012) (holding that because warden was not deliberately indifferent, warden was entitled to qualified immunity with respect to inmate's § 1983 Eighth Amendment claim.]

Dreyer v. Yelverton, No. 07-10970, 2008 WL 3911072, at *5 (5th Cir. Aug. 25, 2008) ("Contrary to Dreyer's assertions, *Schultea* does not expressly preclude a district court's rendering summary judgment without discovery. Dreyer is correct, however, that district courts may be required to allow discovery before ruling on a summary-judgment motion. On the other hand, it is incumbent upon counsel to properly move, under Rule 56(f), for such discovery. Restated, 'if a party cannot adequately defend [against a summary-judgment] motion, Rule 56(f) is his remedy'. *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir.1990) (citations omitted). But, 'Rule 56(f) does not require that any discovery take place before summary judgment can be granted.' *Id.*")

Hinojosa v. Johnson, No. 07-20030, 2008 WL 1924216, at *6 n.12 (5th Cir. May 1, 2008) ("Although qualified immunity is immunity from suit, including discovery, discovery may proceed against a government official where 'the plaintiff's allegations state a claim of violation of clearly established law,' *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), as long as such discovery is ' Anarrowly tailored" to the question of qualified immunity.' *Maxey by Maxey v. Fulton*, 890 F.2d 279, 283 (10th Cir.1989).").

Alice L. v. Dusek, 492 F.3d 563, 565 (5th Cir. 2007) ("Dusek argues that her appeal of the district court's denial of qualified immunity is so broad as to divest the district court of jurisdiction to compel her compliance with discovery requests made related to the Title IX claims against Eanes ISD. We disagree. . . . Even though the factual basis of the Title IX claims and the § 1983 claim overlap, the claims are legally distinct–notably, Dusek does not and cannot assert qualified immunity from the Title IX claim against Eanes ISD. To the extent that Dusek is subject to discovery requests on claims for which she does not or cannot assert qualified immunity, such discovery requests do not implicate her right to qualified immunity . The district court may compel discovery disclosures related to the plaintiffs' Title IX claims because doing so does not interfere with any aspect of Dusek's appeal.")**.**

Heitschmidt v. City of Houston, 161 F.3d 834, 840 (5th Cir. 1998) ("Heitschmidt argues on appeal that he should have been allowed limited discovery before the district court granted defendant's motion for qualified immunity. The district court dismissed Heitschmidt's claims on the basis that his pleadings did not state facts sufficient to overcome the qualified immunity defense. Qualified immunity is a defense from both liability and suit. . . Our Court has held that '[e]ven limited discovery on the issue of qualified immunity must not proceed until the district court first finds that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.' . . Heitschmidt's motion for limited discovery was denied before the district court's decision on the defendants' motion to dismiss. There was, therefore, no error in that decision. Now that Heitschmidt's pleadings have been judged adequate to at least potentially state a claim, however, discovery can proceed on remand. We do not hold that Heitschmidt will eventually be able to establish a violation of his Fourth Amendment rights, but rather, that his pleadings are sufficient to create that possibility. . . Should further discovery lead to the conclusion that there is no genuine issue of fact which could support such a claim, there will be no procedural or substantive barrier to the filing of a motion for summary judgment on the issue of qualified immunity.").

Lion Boulos v. Wilson, 834 F.2d 504, 507, 508 (5th Cir.1987) ("*Harlow*, *Mitchell* and *Jacquez* make clear that qualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad. Discovery designed to flesh out the merits of a plaintiff's claim before a ruling on the immunity defense or discovery permitted in cases where the defendant is clearly entitled to immunity would certainly fall within this category. Immediate appeal would lie from these orders because *Mitchell*, *Harlow* and *Jacquez* require that immune defendants be exempt from avoidable, burdensome pretrial matters. However, a second class of discovery permitted before a ruling on a defendant's motion to dismiss does not encroach upon his qualified immunity claim. Discovery orders entered when the defendant's immunity claim turns at least partially on a factual question; when the district court is unable to rule on the immunity defense without further clarification of the facts; and which are narrowly tailored to uncover only those facts needed to rule on the immunity claim are neither avoidable nor overly broad. Such orders are not immediately appealable. The instant case falls within the latter category, not the former.").

Dyer v. City of Mesquite, Texas, No. 3:15-CV-2638-B, 2017 WL 118811, at *10–11 (N.D. Tex. Jan. 12, 2017) ("Above, the Court found that Plaintiffs satisfied the first part of the Fifth Circuit's "careful procedure" in that they pled facts which, if true, overcome the Officer Defendants' defense of qualified immunity. . . The Court, however, remains unable to rule on the Officer Defendants' immunity defense without further clarification of the facts because the facts provided do not allow the Court to analyze qualified immunity as to each individual defendant. . . As discussed above, Courts must examine each public official's actions independently to determine whether he or she is entitled to qualified immunity. . . While Plaintiffs recognize that they can name each Officer Defendant who was involved during the night, they cannot identify which individual engaged in what specific conduct. . . Consequently, the Court determines that the Officer Defendants'

identities in relation to each action alleged—who did what that night—is a question of fact that can be resolved only with additional information through discovery. This information is essential before the Court can determine if each Officer Defendant is entitled to qualified immunity from the independent, unlawful actions alleged by Plaintiffs. Other courts have faced a similar qualified immunity dilemmas where plaintiffs cannot identify which of several responding police officers engaged in what specific conduct without discovery. . . . Here, Plaintiffs have demonstrated that, even with their independently-obtained redacted video and police report, they cannot supply the necessary information to ascertain which of the Defendant Officers did which of the alleged unlawful acts. Compounding the problem is that Graham, the only eye-witness aside from the officers, is deceased. And despite their insistence to the contrary, the Officer Defendants' reliance on their version of events contained in their Answer is unavailing to them at this stage of the case, where the Court, to the extent plausible, must accept the Plaintiffs' version of events. . . Therefore, similar to the courts in *Khansari* and *Crisp*, the Court finds that discovery is appropriate, albeit narrowly tailored to the limited issue of which of the individual officers were involved in the specific acts of alleged excessive force and denial of medical care and whether those officers are correspondingly entitled to qualified immunity. The specific and narrow scope of that discovery will be defined, with input from the parties, at a hearing before this Court, on a date to be set shortly. . . In the meantime, the Court does not deny but **DEFERS** its ruling on the Officer Defendants' qualified immunity defense, finding that limited discovery is necessary to resolve qualified immunity through summary judgment briefing.")

Sanders v. Vincent, No. 3:15-CV-2782-D, 2016 WL 5122115, at *13 (N.D. Tex. Sept. 21, 2016) ("The court denies . . . Sanders' requests that he be permitted to conduct discovery. First, with regard to his request to conduct discovery as to qualified immunity, such discovery should not be permitted until Sanders can satisfy the applicable heightened pleading. *See Morin*, 77 F.3d at 120 ("Public officials are entitled to qualified immunity from suit under § 1983 unless it is shown by specific allegations that the officials violated clearly established law."); *Schultea*, 47 F.3d at 1434 ("The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity[.]"). And he does not need discovery to the extent the court holds that qualified immunity is not available to Officer Bagley on Sanders' excessive force claim.Second, as for his request that he be permitted to conduct discovery regarding policies of the Town of Addison, Sanders has not demonstrated why he needs discovery to ascertain policies that—assuming they exist—should be determinable from public sources.")

Martone v. Livingston, 4:13-CV-3369, 2014 WL 3534696, *9, *13 (S.D. Tex. July 16, 2014) ("The Fifth Circuit delineated 'a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.' *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir.2012). The Court must find that the plaintiff has pled 'specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.'. . '[I]f the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those

facts needed to rule on the immunity claim."'. . In this case, Plaintiff has pled specific facts that allow this Court to draw the reasonable inference that the TDCJ [Texas Dep't of Criminal Justice] Defendants are liable under § 1983 for violations of Mr. Martone's Eighth and Fourteenth Amendment rights, and that defeat the TDCJ Defendants' assertion of qualified immunity. The Court remains unable to rule on the second prong of the qualified immunity defense given outstanding factual questions. Pursuant to the procedure established in *Backe,* the Court **DEFERS** ruling on qualified immunity and allows limited discovery to resolve the issue. Discovery is limited to the personal knowledge and personal conduct of each Defendant as it relates to Mr. Martone and the circumstances that led to his death. . . . As with the TDCJ Defendants, the Court remains unable to rule on the immunity defense without further clarification of the facts, particularly as they relate to the reasonableness question. In addition, the Court requires more information as to the delay resulting from Dr. Murray's policy of leaving the Huntsville Unit's infirmary unstaffed overnight. Pursuant to the procedure established in *Backe,* the Court **DEFERS** ruling on qualified immunity and allows limited discovery. Discovery is limited to the personal knowledge and personal conduct of Dr. Murray as it relates to Mr. Martone and the circumstances that led to his death.")

Khansari v. City of Houston, 14 F.Supp.3d 842, 861 (S.D. Tex. 2014) ("The Fifth Circuit has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of [the qualified immunity] defense. *See Backe v. LeBlanc,* 691 F.3d 645, 648 (5th Cir.2012) . . . As explained in *Backe,* once a district court has found that, if true, plaintiffs' factual allegations are sufficient to overcome defendants' assertions to qualified immunity, 'if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim."'. . .Absent further clarification of the facts to show which, if any, officers other than Officer Rutherford deployed their tasers against Corey, or which, if any, of the other officers had an opportunity to prevent, but chose not to prevent, the use of excessive force against Corey Khansari, the court is not able to rule on the defendant officers' assertions of qualified immunity to the plaintiffs' claims for the use or failure to prevent the use of excessive force against Corey. Limited discovery will be able to flesh out the remaining details of which officer or officers tasered Corey or wrongfully failed to prevent their fellow officers from tasering Corey. . . Since the court has concluded that plaintiffs' pleadings are adequate to at least potentially state a claim, discovery may proceed on the limited issue of which of the individual officers tasered Corey and whether those officers are entitled to qualified immunity. The court has not concluded that plaintiffs will eventually be able to establish a violation of Corey's Fourth Amendment rights, but only that the pleadings are sufficient to create that possibility. Should discovery lead to the conclusion that there is no genuine issue of fact that could support such a claim, there will be no procedural or substantive barrier to the filing of a motion for summary judgment on the issue of qualified immunity.")

Jones v. Tyson Foods, Inc., 971 F.Supp.2d 648, 655 (N.D. Miss. 2013) ("As a preliminary matter, the Court addresses Plaintiff's contention in his response that the Court should allow

discovery prior to ruling on these Defendants' qualified immunity motion. The Court has freely allowed immunity-related discovery throughout this litigation; the only stay imposed on discovery was for discovery on the merits. . . Qualified immunity is 'both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation. Provided it turns on an issue of law, a district-court order denying qualified immunity conclusively determines that the defendant must bear the burdens of discovery and is conceptually distinct from the merits of the plaintiff's claim.'. . Thus, engaging in discovery on the merits is not necessary, nor is it proper, prior to a ruling on the present qualified immunity motion. In fact, the United States Supreme Court has stated: 'Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.'. . For these reasons, the Court finds that it should rule on the present qualified immunity summary judgment motion at this time, but the Court will note if merits-discovery is needed to resolve certain issues presented in the motion.")

O'Dwyer v. Louisiana, No. 06-7280, 2008 WL 4452106, at *1 (E.D. La. Sept. 25, 2008) ("Without some clear legal authority, the Court finds that it is unjust for all parties to enjoy the benefits of the stay for those claiming qualified immunity . The Court's previous order limiting the scope of discovery will be rescinded and the matter referred to the magistrate judge for the formulation of a discovery plan.").

Gilbert v. City of Dallas, No. Civ. 3:99CV1463X, 2000 WL 748153, at **1-3 (N.D. Tex. June 8, 2000) ("In order to ensure the utmost protection from broad-reaching discovery, qualified immunity should be treated as a threshold issue which acts as a bar to a court's ability to hear the petitioner's claim. . . .[D]iscovery must not proceed until the District Court first finds that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity. . . . If the complaint sufficiently alleges facts to surmount the qualified immunity defense, the court must then determine whether discovery is necessary to 'clarify those facts upon which the immunity defense turns.' *Wicks*, 41 F.3d at 995. . . . After meeting the heightened pleading requirement, the court may permit discovery to enable Gilbert to ascertain only the facts that could overturn the defendants' right to qualified immunity. . . . The City of Dallas is not entitled to qualified immunity status. Therefore, discovery directed by the plaintiff against the City should be allowed to proceed. Individual defendants argue that if discovery is permitted against the City it will require their involvement and threaten the protections provided through qualified immunity. . . . However, 'parties who may be entitled to qualified immunity are not necessarily exempt from discovery when called as a witness to claims against a non-immune defendant.' *Sorrells*, 192 F.R.D. at 210 n. 8").

Estate of Sorrells v. City of Dallas, 192 F.R.D. 203, 207-09 (N.D. Tex. 2000) ("This case is a prime example of a troubling trend in civil rights cases. Time after time, individual defendants seek a stay of all discovery until the issue of qualified immunity is resolved. Yet these defendants do not seek a ruling on their immunity defense until they move for summary judgment. Invariably, the summary judgment motion is not limited to the issue of qualified immunity but covers the

underlying substantive claims as well. Such maneuvering perverts the purposes of the discovery stay, creates inefficiency and confusion in the resolution of qualified immunity cases, and unfairly blind-sides plaintiffs by forcing them to respond to evidence before they have an opportunity to conduct discovery. The Court intends to end this practice today. . . . [T]he defendant should promptly move for dismissal under Rule 12(b)(6) if the complaint and Rule 7(a) reply fail to allege sufficient facts to overcome the immunity defense. . . . Only if more time is needed to develop the facts through discovery or otherwise should a defendant wait until the summary judgment stage to seek dismissal on the grounds of immunity. . . . Defendants never asked plaintiffs to file a Rule 7(a) reply. Nor did they move for dismissal under Rule 12(b)(6). Undoubtedly, this is because defendants realize that plaintiffs have alleged facts which, if proved, would overcome their immunity defense. Defendants themselves recognize the importance of the underlying historical facts because their pending summary judgment motion is supported by the affidavits of six police officers who participated in the events giving rise to this suit. Yet they vigorously oppose plaintiffs' efforts to conduct any discovery until the issue of qualified immunity is decided. The absurdity of this scenario should be plain. The only reason the question of qualified immunity is still unresolved is because defendants chose not to engage it as a threshold matter. Instead, defendants first raised the issue in a fact-intensive motion for summary judgment. They now hide behind the shield of qualified immunity to deny access to evidence solely within their control while using that same evidence against plaintiffs. Limiting discovery in these circumstances is inherently unfair.").

Jones v. City of Grand Prairie, No. Civ. 3:97-CV-1907-H, 1998 WL 119532, *2 (N.D. Tex. Mar. 6, 1998) (not reported) ("Jones surpassed *Schultea's* heightened threshold. However, Jones erroneously believes because he met this standard, he is entitled to full discovery. After meeting the heightened pleading requirement, the court may permit discovery to enable Jones to ascertain only the facts that could overturn the defendants' right to qualified immunity. [*citing Wicks*] In Jones' response, he requests discovery in order to 'investigate his case.'. . Before subjecting officials to broad and far-reaching discovery, the defendant's qualified immunity defense must be overturned. Jones may not develop his case against the individual defendants until the qualified immunity issue has been resolved. Jones' argument is devoid of any indication as to why he needs discovery to resolve factual disputes regarding defendants' qualified immunity defense.").

Cassanova v. Marullo, No. CIV. A. 94-376, 1995 WL 448005, *2 (E.D. La. July 27, 1995) (not reported) ("Because the issues for the defendants relating to their defense of qualified immunity and the issues relating to their defense on the merits are so similar, it would be impossible to separate discovery on the question of whether the defendants acted reasonably so as to be entitled to immunity from discovery on the question of whether 'they would have fired [Mr. Cassanova] even had [he] not exercised [his] right to free speech.' ... [T]his ruling does not violate the principles of qualified immunity. While the defendants may still be able to prevail on their defense of qualified immunity before trial, they may no longer rely on that defense to excuse them from the costs of broad-reaching discovery.").

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Robertson v. Lucas, 753 F.3d 606, 623, 624 (6th Cir. 2014) ("In the context of qualified immunity, deferential review of a district court order limiting discovery is imperative. . . .Discovery is disfavored in this context, but 'limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.' *Crawford–El v. Britton,* 523 U.S. 574, 593 n. 14, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). In *Crawford–El,* after noting the 'many options' a district court judge has in conducting discovery in a qualified immunity case, the Supreme Court explained: 'Of course, the judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible.'. .Appellants assert that the district court erred when it permitted the appellants to depose certain appellees but limited the depositions to the qualified immunity issue. The district court, after briefing on the issue, authorized three-hour depositions of Verhiley, Cross, Mayer, Faith, Metcalf, and two non-defendant law enforcement officers. This was after appellees had voluntarily disclosed a tremendous number of documents. . . .The district court followed the Supreme Court's dictates on discovery in qualified immunity cases precisely. . . .Because a plaintiff cannot sustain a § 1983 or *Bivens* claim without a showing of personal responsibility on the part of the defendant, . . . appellants' Fourth Amendment claims—and the accompanying qualified immunity defenses—turned in large part on the individual actions of the defendants in this case. The same is true for the alleged *Brady* violations. Finally, as to appellants' argument that the conspiracy claims necessitated information about the wider investigation, no conspiracy can exist without the appellees' participation. The district court therefore did not err when it limited discovery to information pertaining to appellees' conduct.")

Reilly v. Vadlamudi, 680 F.3d 617, 628 (6th Cir. 2012) ("The district court understandably struggled with granting Defendants immunity at an early stage in the litigation. However, as previously emphasized, the purpose of qualified immunity is 'to ensure that insubstantial claims against government officials are resolved at the earliest possible stage in litigation.'. . For that reason, district courts in some cases 'will be able to establish entitlement to qualified immunity ... even before discovery.'. . This is one of those cases. A thorough review of the pleadings reveals that Dr. Vadlamudi and nurse Payne may have been negligent in diagnosing or treating Plaintiff. However, neither negligent medical care, nor the delay in providing medical care, can rise to the level of a constitutional violation absent specific allegations of sufficiently harmful acts or omissions reflecting deliberate indifference.").

Alspaugh v. McConnell, 643 F.3d 162, 168 (6th Cir. 2011) ("We . . . note that it is not proper to grant summary judgment without giving Alspaugh an opportunity to engage in discovery merely because the state defendants asserted qualified immunity as a defense. While we held in *Summers v. Leis,* 368 F.3d 881, 886 (6th Cir.2004), that a district court must address the question of qualified immunity prior to discovery, we did not hold that any time qualified immunity is asserted it is proper to dismiss on that ground prior to allowing any discovery. Rather, we merely instructed the district court to scrutinize the plaintiff's complaint to determine whether a violation of a clearly

established constitutional right was alleged. . . In *Adams v. Metiva,* 31 F.3d 375, 387 (6th Cir.1994), we made clear that where the issue of qualified immunity turns on contested issues of fact, its determination is not one for summary judgment.")

Short v. Oaks Correctional Facility, No. 03-2089, 2005 WL 1002011, at *5 (6th Cir. Apr. 29, 2005) (unpublished) ("The plaintiff in *Skousen* failed to respond to the defendants' motion for summary judgment on the issue of qualified immunity and failed to file a Rule 56(f) affidavit explaining her inability to file affidavits in opposition to the defendants' motion. Faced with similar circumstances in the present case, the district court found that there were no facts material to Plaintiff-Appellant's claims that were genuinely at issue and, therefore, it was proper to consider the motions prior to discovery.").

Summers v. Leis, 368 F.3d 881, 886, 887(6th Cir. 2004) ("This Court has held on multiple prior occasions that, when faced with a motion based on qualified immunity, a district court can not avoid ruling on the issue. . . In the case of *Skousen v. Brighton High School*, we concluded that a district court committed legal error in dismissing a motion for summary judgement based on qualified immunity solely because discovery was not complete . . . We held that, because the defense of qualified immunity is a threshold question, if the defense is properly raised prior to discovery, the district court has a duty to address it. . . Rather than dismiss the [summary judgment] motion because discovery was not complete, the district court was required to determine–prior to permitting further discovery–whether [Plaintiff's] complaint alleged the violation of a constitutional right at all, and if so, whether that right was clearly established at the time of the alleged violation. . . Only after the court inquires into whether any facts material to Plaintiff's claims are genuinely at issue, and only upon a finding that material facts are in fact in dispute is a court at liberty to hold a motion for summary judgment in abeyance pending additional discovery. . . Because the order denying summary judgment was premised on the legal question of qualified immunity rather than the existence of a genuine issue of material fact, the Court retained jurisdiction and found that an interlocutory appeal was proper. . . As mentioned above, the district court's denial of Leis's summary judgment motion was based on an apparent belief that any decision regarding qualified immunity was premature and should await the close of discovery. When a motion for summary judgment is filed, the party opposing the motion may, by affidavit, explain why he is unable to present facts essential to justify the party's opposition to the motion. . . The burden is on the party seeking additional discovery to demonstrate why such discovery is necessary. . .In this instance, in order to adequately oppose Leis's motion for summary judgment, Summers should have filed a Fed.R.Civ.P. 56(f) affidavit explaining his need for additional discovery.")

Wallin v. Norman, 317 F.3d 558, 563, 564 (6th Cir. 2003) ("This court has recently held that a district court's failure to rule on a motion for summary judgment until discovery was complete was legal error. [citing *Skousen v. Brighton High School*] Even though the defendants are free to renew their motion later, they would in the meantime be forced to go through a large part of the litigation process that the qualified immunity doctrine seeks to avoid. By failing to elaborate on

why further discovery was necessary to properly decide the motion, the district court erroneously denied the defendants the benefit of their defense from suit (if that defense is, indeed, meritorious). We therefore conclude that the district court's refusal to address the merits of the defendants' motion based on qualified immunity was a conclusive determination for the purpose of allowing an interlocutory appeal. . . . Pursuant to Rule 56(f), a party opposing a motion for summary judgment is allowed to state that he or she is unable to present facts essential to justify the party's opposition. In that situation, the district court may permit further discovery so that the nonmoving party can adequately oppose the motion for summary judgment. But it is up to the party opposing the motion to state why more discovery is needed. . . . Wallin did not file such an affidavit. In its absence, there is no justification for the district court's blanket statement that a motion for summary judgment will be premature until the close of discovery.").

Skousen v. Brighton High School, 305 F.3d 520, 527 (6th Cir. 2002) ("The district court's failure to rule on the merits of Rambo's summary judgment motion was legal error. Rather than dismiss the motion because discovery was not complete, the district court was required to determine–prior to permitting further discovery–whether Skousen's complaint alleged the violation of a constitutional right at all, and if so, whether that right was clearly established at the time of the alleged violation. At that point, the court should have turned to the question of whether any facts material to Skousen's claims were genuinely at issue, an inquiry that required the court to review the motion and its supporting documents as well as the plaintiff's opposition and its supporting documents. Only then, and only on a finding that material facts were in dispute, was the court at liberty to hold the motion in abeyance pending discovery.").

Mcmillen v. Windham, No. 3:16-CV-558-CRS, 2018 WL 652830, at *2–3 (W.D. Ky. Jan. 31, 2018) (Federal Magistrate Judge Colin Lindsay) ("The Court acknowledges the position taken by Movants and the language in the Supreme Court and Sixth Circuit decisions that they cite. Indeed, the Sixth Circuit has stated broadly that '[t]he entitlement to qualified immunity involves immunity from suit rather than a mere defense to liability.'. . 'The philosophy behind the doctrine of qualified immunity "is a desire to avoid the substantial costs imposed on government, and society, by subjecting officials to the risks of trial."'. . 'Thus, when a defendant seeks dismissal on the basis of qualified immunity, "[a] stay of discovery is properly granted until the issue of immunity is resolved."'. . .While cognizant of that background, the Court emphasizes that it is not *required* to grant Movants' motion to stay. As the Sixth Circuit has noted, 'its prior holdings should not be interpreted as standing for the proposition that "any time qualified immunity is asserted it is proper to dismiss on that ground prior to allowing any discovery."'. . 'Thus, discovery may be permitted, even where qualified immunity is raised, if it is appropriate to frame the immunity issue.'. . In a 2013 decision from this district, *Locke v. Mooney*, 2013 U.S. Dist. LEXIS 102473 (W.D. Ky. July 22, 2013), for example, the Court permitted limited discovery when a motion for summary judgment based on qualified immunity was pending. . . . In *Locke*, the Court also permitted discovery to proceed on certain other claims that would survive regardless of the resolution of the motion to dismiss on the basis of qualified immunity. . . In this case, the Court is persuaded that discovery should not be stayed pending resolution of Movants' motion to dismiss. As Plaintiffs

emphasize, arguments regarding qualified immunity are typically resolved at the summary judgment stage, rather than by a Rule 12(b)(6) motion to dismiss. . . In this case, Movants seek to resolve the issue through a motion to dismiss and argue that the qualified immunity issue is solely a question of law that does not require any discovery. Plaintiffs, on the other hand, argue in response to the motion to stay that qualified immunity is a fact-intensive issue that turns on the particular circumstances of each case. . . This argument is consistent with Plaintiffs' position in response to the motion to dismiss, in which they argue that the motion to dismiss should be converted to a motion for summary judgment and more discovery permitted prior to resolving the qualified immunity issue. . . Moreover, while they argue that discovery should be stayed, Movants concede that they served written discovery requests on Plaintiffs and participated in a deposition of Plaintiffs' expert witness. . . Based on the foregoing, the Court concludes that Movants are more amenable to participating in discovery during the pendency of their motion to dismiss than they profess to be in the motion to stay.")

Doe v. Ohio State Univ., No. 2:15-CV-2830, 2016 WL 6581843, at *14 (S.D. Ohio Nov. 7, 2016) (" 'Although an officer's "entitle[ment] to qualified immunity is a threshold question to be resolved at the earliest possible point," that point is usually summary judgment and not dismissal under Rule 12.' *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) . . . The concern at the Rule 12 stage is whether the plaintiff has alleged 'facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known.' *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir. 1986). Even if the plaintiff has done so, the defendant may still be entitled to summary judgment on the basis of qualified immunity 'if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.'. . Doe cites a Fifth Circuit case for authority that 'a district court "may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.' *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). The Sixth Circuit has not been explicit, like the Fifth Circuit has, about adopting a plan of narrowly tailored discovery to determine the issue of qualified immunity, but such a plan is consistent with the purposes of qualified immunity, namely, that 'insubstantial claims against government officials be resolved....at the earliest possible stage in litigation.'. . But whether the Court defers its ruling or simply denies Defendants' motion to dismiss, the Court will not make a final ruling on the issue of qualified immunity until after limited discovery. Here, the Court will grant in part and deny in part the motion to dismiss and permit limited discovery. If discovery fails to uncover sufficient evidence that the Administrators violated Doe's due process rights, then the Administrators may be entitled to qualified immunity.")

Porter v. City of Dyersburg*, *TN, No. 07-2638 B/P, 2008 WL 2222693, at *2 (W.D. Tenn. Apr. 2, 2008) ("[A]lthough 'limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity ,'. . . neither the motion for leave to permit discovery nor the affidavits from Porter and attorney Richardson set forth with any particularity the 'limited' discovery that Porter needs to address the qualified immunity defense. Instead, Porter asks that the court allow him to proceed to engage in discovery relating essentially

to all issues in this litigation. . . . . For these reasons, the motion for leave to permit discovery is DENIED, and all discovery in this matter is STAYED until the court decides the issue of qualified immunity.")

Mcmillen v. Windham, No. 3:16-CV-558-CRS, 2018 WL 652830, at *2–3 (W.D. Ky. Jan. 31, 2018) (Federal Magistrate Judge Colin Lindsay) ("The Court acknowledges the position taken by Movants and the language in the Supreme Court and Sixth Circuit decisions that they cite. Indeed, the Sixth Circuit has stated broadly that '[t]he entitlement to qualified immunity involves immunity from suit rather than a mere defense to liability.'. . 'The philosophy behind the doctrine of qualified immunity "is a desire to avoid the substantial costs imposed on government, and society, by subjecting officials to the risks of trial."'. . 'Thus, when a defendant seeks dismissal on the basis of qualified immunity, "[a] stay of discovery is properly granted until the issue of immunity is resolved."'. . .While cognizant of that background, the Court emphasizes that it is not *required* to grant Movants' motion to stay. As the Sixth Circuit has noted, 'its prior holdings should not be interpreted as standing for the proposition that "any time qualified immunity is asserted it is proper to dismiss on that ground prior to allowing any discovery."'. . 'Thus, discovery may be permitted, even where qualified immunity is raised, if it is appropriate to frame the immunity issue.'. . In a 2013 decision from this district, *Locke v. Mooney*, 2013 U.S. Dist. LEXIS 102473 (W.D. Ky. July 22, 2013), for example, the Court permitted limited discovery when a motion for summary judgment based on qualified immunity was pending. . . . In *Locke*, the Court also permitted discovery to proceed on certain other claims that would survive regardless of the resolution of the motion to dismiss on the basis of qualified immunity. . . In this case, the Court is persuaded that discovery should not be stayed pending resolution of Movants' motion to dismiss. As Plaintiffs emphasize, arguments regarding qualified immunity are typically resolved at the summary judgment stage, rather than by a Rule 12(b)(6) motion to dismiss. . . In this case, Movants seek to resolve the issue through a motion to dismiss and argue that the qualified immunity issue is solely a question of law that does not require any discovery. Plaintiffs, on the other hand, argue in response to the motion to stay that qualified immunity is a fact-intensive issue that turns on the particular circumstances of each case. . . This argument is consistent with Plaintiffs' position in response to the motion to dismiss, in which they argue that the motion to dismiss should be converted to a motion for summary judgment and more discovery permitted prior to resolving the qualified immunity issue. . . Moreover, while they argue that discovery should be stayed, Movants concede that they served written discovery requests on Plaintiffs and participated in a deposition of Plaintiffs' expert witness. . . Based on the foregoing, the Court concludes that Movants are more amenable to participating in discovery during the pendency of their motion to dismiss than they profess to be in the motion to stay.")

Hagan v. City of Cleveland, 2007 WL 893825, at **6-8 (N.D. Ohio Mar. 22, 2007) ("Thus, the court finds that 'limited discovery' is necessary before the merits of Franko's motion for summary judgment on qualified immunity grounds can be resolved. . . The Supreme Court has instructed that such discovery should be tailored specifically to the question of the officer's qualified immunity. . . The court should limit discovery to those issues that bear upon the qualified immunity

defense, 'such as the actions that the official actually took.'. . . The constitutional violation alleged here is excessive (deadly) force, not an improper pursuit, nor an arguably ill-advised decision to enter a building in pursuit, without backup assistance. . . . Here, the crime suspected by the police was possession or sale of drugs, and Renshaw was apparently attempting to evade further investigation or arrest by flight. What is contested is whether Renshaw posed an immediate threat to the safety of Officer Franko, or whether he was actively resisting arrest, at the time of their confrontation on the apartment building stairway. No eyewitnesses (other than Franko) to the shooting itself are known to exist. The specific discovery as sought by Hagan cannot be characterized as 'limited.' Although Hagan acknowledges that an investigation into the shooting resulted in a Use of Deadly Force Investigation Team report, Hagan apparently seeks to reconstruct that entire investigation step-by-step. Thus, he seeks to depose at least 23 individuals, but only after 'complete responses to interrogatories and document requests because that information will be used during the depositions.'. . . Hagan acknowledges that he has already received relevant evidence from the defendants through an open records act request. . . . The court finds that limited discovery into facts underlying the assertion of qualified immunity is appropriate. That discovery shall be limited to that evidence which would directly relate to the disputed events on the stairway that led to Renshaw's death. In other words, discovery shall be limited to that which would shed light on the factual basis supporting (or not) Officer Franko's assertion of the necessity of the use of force at that point, such as the forensic evidence, the autopsy, evidence that would indicate the location of the parties at the time of the shooting, and so forth. Hagan is directed to narrow his discovery requests in light of this ruling, and to propound such amended requests to the defendants.")**.**

O'Neil v. Kiser, Civil No. 03-CV-10001-BC, 2005 WL 579719, at *3, *4 (E.D. Mich. Mar. 8, 2005) ("It is true that the purpose of the qualified immunity defense is to protect government officials from 'the broad-ranging discovery that can be peculiarly disruptive of effective government.'. . However, the issue of qualified immunity requires an exploration of the contours of the constitutional rights in issue in the context of the specific facts of the case. . . Those questions, in turn, will involve exploration of 'the circumstances with which the official is confronted, and often on the information that he possesses.'. . The critical inquiry is 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted.'. .All the dimensions of that 'situation,' therefore, are the proper subject of discovery. . . .The matter has been referred to the magistrate judge for pretrial case management, where it soon will return. The Court has no doubt that the magistrate judge is more than equal to the task of managing discovery within the proper framework as outlined by circuit precedent.").

SEVENTH CIRCUIT

Hansen v. Cannon, No. 01-3076, 2001 WL 1637660, at *2 (7th Cir. Dec. 18, 2001) (Not published) ("On appeal the Hansens first argue that the district court improperly stayed discovery pending the outcome of the defendants' motions for summary judgment on the basis of qualified

immunity. As the district court observed, one purpose of qualified immunity is to protect public officials from 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.' . . . But qualified immunity does not shield public officials from discovery entirely. If the Hansens' allegations stated a claim that the defendants violated a clearly established law, and the parties disagreed as to what actions the law enforcement officers took, discovery may be appropriate for the limited purpose of addressing the issue of qualified immunity.")

Trombetta v. Bd. of Education, Proviso Township High School District 209, No. 02 C 5895, 2004 WL 868265, at **2-5 (N.D. Ill. Apr. 22, 2004) ("In their present motion, the District and Jackson seek reconsideration of the Court's denial of their motions *in limine* nos. 4 and 10. In those motions, defendants sought an order barring questioning of any School Board members at trial regarding their motivations for what they characterize as the reorganization (plaintiff characterizes it as a termination of his employment) on the grounds of legislative immunity from suit, as well as any comment about those motivations by Trombetta or his attorneys (motion # 4), and any reference to their motives regarding the 'termination' (motion # 10). . . . Defendants' request to preclude any inquiry or mention of their motives amounts to a request for entry of summary judgment. Were the Court to grant what defendants request, the case would be over. A claim of retaliation for the exercise of First Amendment rights requires the plaintiff to prove that he suffered adverse action *because of* his exercise of protected rights, or, to put it another way, that 'the defendants' actions [were] *motivated by* [the plaintiff's] constitutionally protected speech.'. . The plaintiff cannot conceivably prevail without introducing evidence of, and arguing, the motivation of those who made the decision he attacks–in this case, Superintendent Jackson, Mayor Serpico, and the Board as a whole. Thus if defendants prevail on their motion for reconsideration, they are entitled to judgment in their favor. This request amounts to a motion for summary judgment which is not made in timely fashion. . . . There is another significant reason why defendants' claim is without merit. The District and Jackson argue that the Board members' legislative role entitles them to a testimonial privilege against inquiry about their reasons for acting. Even were this a viable claim, it is beyond question that the Board members have waived any such privilege. Each of the Board members appeared, without objection, for a deposition (nearly a year ago) and testified fully and completely about all of the events surrounding the termination / reorganization, including inquiries about their motives in acting as they did. If a testimonial privilege existed, it existed when the depositions were taken. Yet the Board members testified at their depositions about their reasons for acting, and they made no effort to seek a protective order barring inquiries about their reasons for acting as they did. . . . Finally, other than citing a plethora of cases, most of them either state-law decisions or non-controlling decisions of other district courts, defendants have made no effort to focus the Court in on any cases like this one in which the decision under attack is an employment-related decision by a public body and the plaintiff's claim is one that, as noted earlier, *requires* inquiry into the motivating factors for the decision. Based on our quick review, most of the cases appear to concern zoning matters, not the termination of a person's employment. If the purported evidentiary privilege proposed by the District and Jackson barred inquiry into the motivations of the members of a public entity that made employment decisions, it effectively would amount to a grant of immunity not just to the

entity's individual members, but to the entity as a whole. If accepted, this would not only contravene *Owen v. City of Independence*, 445 U.S. 622 (1980), in which the Supreme Court held that municipal bodies sued under 42 U.S.C. § 1983 are not entitled to the immunities from suit available to government officials, but would also effectively abrogate prohibitions against employment discrimination (Title VII, the ADEA, the ADA) for any municipal body whose "legislative" members are given decision making authority over employment matters. Defendants have marshaled no support for such a sweeping rule.").

Kaufman v. Saari, 889 F. Supp. 1105, 1113 (E.D. Wis. 1995) ("The plaintiffs state that they have been prevented from engaging in discovery due to stays on discovery imposed by the court prior to resolution of the issue of qualified immunity. They contend that summary judgment is inappropriate because they have not had an opportunity to engage in discovery . . . . The plaintiffs ignore the instruction of the Supreme Court in *Mitchell v. Forsyth* that the doctrine of qualified immunity is intended to protect government officials from the burdens of litigation and the corresponding burden of discovery where a plaintiff has failed sufficiently to demonstrate a violation of clearly established law. [cite omitted] While I found the allegations of the plaintiffs' complaint sufficient to meet the minimal pleading standards imposed by Rule 8(a), Federal Rules of Civil Procedure, I reserved judgment on the question of qualified immunity. The limited information presented by the plaintiffs in response to the defendant's motion shows that their claims are the type of 'insubstantial claims' which should be resolved under the doctrine of qualified immunity prior to the commencement of discovery. [cite omitted] The plaintiffs are expected to have some factual support for their claims prior to commencing their action.").

EIGHTH CIRCUIT

Johnson v. Moody, 903 F.3d 766, 772-74 (8th Cir. 2018) ("The Supreme Court has repeatedly emphasized that qualified immunity is an immunity from suit that should be resolved 'at the earliest possible stage in litigation' to ensure that insubstantial damage claims against government officials are resolved 'prior to discovery.'. . When plaintiff has asserted a § 1983 claim requiring proof of wrongful motive, and defendant asserts a pre-discovery claim of qualified immunity, the district court 'may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive,' 'should give priority to discovery concerning issues that bear upon the qualified immunity defense,' and has 'broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.'. . . To defeat a motion for summary judgment based on qualified immunity, the plaintiff must put forth facts showing that the officer's conduct violated a constitutional right, *and* that the right was clearly established at the time of the alleged misconduct. . . The district court has discretion to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . Thus, when Defendants moved for summary judgment based on qualified immunity for Moody and Mathis, supported by their testimony at the state court suppression hearing and the state court's finding—however limited—of no bad faith, Plaintiffs were required to respond with affirmative evidence of bad faith if bad faith was an essential

element of their Count I claims. . . . Here, in response to Defendants' qualified immunity motion, Plaintiffs presented no evidence tending to refute or contradict Defendants' strong evidence from the state court proceedings that their conduct in investigating C.P.'s serious allegation of sexual misconduct, however questionable or incomplete, was not conscious-shocking behavior as a matter of law. Rather, Plaintiffs asked the district court to defer ruling on qualified immunity until after they subjected Moody and Mathis to extensive, burdensome discovery. The district court did not abuse its discretion in denying this request, consistent with the teaching of *Crawford-El v. Britton* and other Supreme Court and circuit court precedents. Based on the summary judgment record, the district court concluded, as *Pearson v. Callahan* expressly authorized, that Moody and Mathis were entitled to qualified immunity from the Count I claims, not simply because the law was not clearly established, but because their conduct in investigating did not violate Johnson's constitutional rights. This ruling was consistent with our decision in *Akins v. Epperly*, and Plaintiffs do not challenge it on appeal. Evidence that investigators ignored factual inconsistencies in the evidence, negligently failed to look into leads, and did not question the alleged victim's credibility is insufficient to establish that they investigated in a reckless, conscience-shocking manner. . . . Plaintiffs did not request additional discovery focused on the qualified immunity issue. The district court's determination that Plaintiffs presented no evidence refuting Defendants' showing of no bad faith or conscience-shocking investigation was essential in resolving the threshold qualified immunity issue. And that determination proved to be fatal to all of Plaintiffs' claims against the City and the Police Department Defendants as a matter of law. Plaintiffs requested time to conduct wide-ranging discovery into all aspects of the investigation and numerous Police Department policies. But they made no showing (i) that any sought-after facts are essential to resist summary judgment on any of their claims, or (ii) that any such evidence actually exists. Therefore, the district court did not abuse its discretion in denying Plaintiffs' Rule 56(d) request to defer its ruling until additional discovery was completed and in granting summary judgment dismissing all claims.")

Janis v. Biesheuvel, 428 F.3d 795, 800, 801 (8th Cir. 2005) ("Janis further argues that she could prove that a genuine issue of material fact exists if she is permitted to engage in discovery. Qualified immunity is an immunity from suit, not simply from liability. . .Its purpose is to 'avoid Asubject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.'. . Accordingly, '[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before commencement of discovery.'. . Janis claims to be seeking the following additional information: 1) what was demonstrated by the tape recordings of radio traffic between the people involved in the incident; 2) what the officers remember regarding the incident that is not contained in the police reports; 3) what Richards stated to officers at the scene; 4) what movements Richards made within his vehicle other than grabbing the steering wheel; 5) how long it took for officers to remove Richards; 6) whether the other officers involved remember the incident the same way as the two primary two officers; 7) what the training of each involved officer was; and 8) whether these officers required to participate in additional training because of other

past incidents of excessive force. However, Janis already possessed police reports of the incident, a transcript of the radio traffic between a highway patrol trooper who was involved in the pursuit and the dispatcher, and the daily activity report from the Fall River County Dispatcher. Janis also had affidavits from both officers involved in removing Richards from his vehicle. Finally, Janis had a videotape from one of the officers' vehicles that provided a partially obstructed view of the events that transpired when Richards was pulled over. Thus, the district court reasonably concluded that Janis already had much of the information she might have found with further discovery. Accordingly, Janis failed to meet her burden of establishing that the amount of force used was objectively unreasonable. Therefore, the officers' actions do not constitute a violation of a constitutional right.")

Lovelace v. Delo, 47 F.3d 286, 287 (8th Cir. 1995) ("[I]f the plaintiffs' allegations state a claim of violation of clearly established law and the parties disagree as to what actions the law enforcement officers took, discovery may be appropriate for the limited purpose of addressing the issue of qualified immunity.").

McCabe v. Macaulay, 450 F.Supp.2d 928, 935, 936 (N.D. Iowa 2006) ("In sum, for the court to make a determination as to whether the Individual Federal Defendants are entitled to qualified immunity, Plaintiffs are entitled to know what facts the Individual Federal Defendants were presented with at the time of Plaintiffs' arrests. . . The mere fact that the Individual Federal Defendants have asserted a qualified immunity defense does not completely eviscerate the Plaintiffs' right to conduct discovery. . . For the defense of qualified immunity to have meaning, however, discovery in this case must be narrowly tailored to only those facts essential to deciding whether the Individual Federal Defendants are entitled to that defense. . . . For example, in granting Plaintiffs' Rule 56(f) Motion, the court does not grant Plaintiffs the right to conduct far-reaching discovery to pursue their theory that a nationwide conspiracy existed within the highest levels of the Secret Service to suppress dissent at President Bush's re-election rallies. Whether or not such a conspiracy existed is immaterial to the qualified immunity defense presently before the court. . . Accordingly, the court shall grant in part Plaintiffs' Rule 56(f) Motion. Plaintiffs are entitled to limited discovery, that is, to know the circumstances surrounding their arrests, insofar as those facts might reveal what information the Individual Federal Defendants possessed at the time each acted. . . In other words, only discovery that is 'essential' to resolve the Individual Federal Defendants' qualified immunity defenses shall be permitted.").

NINTH CIRCUIT

Costa v. County of Ventura, 680 F. App'x 545, ___ (9th Cir. 2017) ("The district court abused its discretion by denying all discovery after the defendants' assertion of qualified immunity. '[L]imited discovery, tailored to the issue of qualified immunity, will sometimes be necessary before a district court can resolve a motion for summary judgment.' *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 973 (9th Cir. 2009) (first citing *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987);

then citing *Crawford–El v. Britton*, 523 U.S. 574, 593 n.14 (1998) (plurality opinion)). Specifically, if the actions alleged by the plaintiff are such that no reasonable officer could have believed them lawful, and if the officer alleges that she took actions different from those alleged by the plaintiff, 'then discovery may be necessary before [the plaintiff]'s motion for summary judgment on qualified immunity grounds can be resolved.' *Anderson*, 483 U.S. at 646 n.6. Here, the Estate alleged the violation of a clearly established right under 42 U.S.C. § 1983, namely the excessive force allegedly used by an officer, who the Estate claims shot Costa while Costa was immobilized by the officer's dog. This version of events conflicts with the officer's declaration that the dog did not succeed in immobilizing Costa. The district court denied the Estate the opportunity to conduct discovery, then granted summary judgment based on exhibits tendered by the defendants. In particular, it relied on the officer's affidavit and the unsworn interview of the other eyewitness. Under *Anderson*, the defendants' claim of qualified immunity did not prohibit the district court from allowing the Estate to obtain discovery. The district court therefore abused its discretion by precluding the Estate from taking the depositions of the only living individuals who witnessed the shooting and instead relying exclusively on the defendants' declarations supporting their version of the events. At a minimum, the denial of such discovery deprived the Estate of any opportunity to test the defendants' declarations through depositions, and it thereby prejudiced the Estate.")

Committee for Immigrant Rights of Sonoma County v. County of Sonoma, No. C 08-4220 PJH, 2009 WL 2382689, at *27, *28 (N.D. Cal. July 31, 2009) ("The parties argue at length about the applicability of *Iqbal* to this case in general and to discovery in particular. As should be apparent from the court's citation to *Iqbal* throughout this order, the court finds that notwithstanding the factual distinctions, the Supreme Court's latest pronouncement on pleading standards applies to this case, just as does *Twombly*. A quick Westlaw search reflects that *Iqbal* has been cited nearly 1000 times by district and appellate courts in the few months since its issuance, so the court's conclusion is no stretch. There is little case law, however, in the wake of *Iqbal* elucidating the relationship between the adequacy of the pleadings and the plaintiff's right to engage in discovery and the court has not yet determined exactly how it will apply the reasoning of that case to this and the hundreds of other pending cases on the court's docket. For now the court relies on Rule 26(c) under which County Defendants have brought their motion for a protective order, while looking to *Iqbal* for guidance. In attempting to reach an appropriate balance the court has considered several factors. Like *Iqbal*, this case raises significant issues of qualified immunity. Given that the purpose of a qualified immunity defense is not only to permit the accused government official to avoid liability, but also to free that official from the disruptions, inconvenience and expense of discovery, a goal that would be defeated if discovery were permitted. The court has already found that qualified immunity is a viable defense for the individual federal defendants and County defendants have indicated an intent to raise the defense after the claims are clarified in an amended complaint. On the other hand, this case, unlike *Iqbal* involves, in addition to government officials, government agencies which are not subject to qualified immunity. Given the sheer scope of the claims and the rulings in favor of plaintiffs that the court has made in this order, it is unlikely that this case will be entirely disposed of on any number of motions to dismiss. Thus, discovery is

inevitable. On balance, the court finds that good cause exists to impose a limited stay of discovery. Thus, County Defendants' motion for a protective order is granted and plaintiffs' motion to compel is denied. County defendants need not respond to the outstanding discovery and no new discovery may be propounded pending plaintiffs' filing of the first amended complaint and County Defendants' response. Following the court's review it will be determined whether discovery should proceed against either the government agencies or the individual defendants or both.").

Tubar v. Clift, No. C05-1154JCC, 2006 WL 521683, at **2-4 (W.D. Wash. Mar. 2, 2006) ("The seemingly broad prohibition on discovery announced in *Harlow* has not gone unqualified, however. First, qualified immunity is available only to individual government officials, not governmental entities. . . Second, where there is a dispute as to both the reasonableness of the official's actions and the factual characterization of those actions, the U.S. Supreme Court has acknowledged that a plaintiff may be permitted to carry out a limited amount of discovery 'tailored specifically to the question of [an official's] qualified immunity.'[citing *Anderson*] In effect, the defense of qualified immunity only protects government officials from 'broad-reaching' discovery. . . With respect to the first and second categories of discovery requests that Defendants seek to stay, the Court finds that Defendant Clift is entitled to protection against discovery requests propounded to him personally. However, because there appears to be a factual dispute as to the underlying events in this case, Defendant Clift should be required to answer any discovery seeking information relating to the actual events giving rise to his qualified immunity defense. Therefore, Clift individually is required to provide responses to requests for written discovery and documents if those requests specifically relate to the parties' factual disputes concerning the shooting incident at issue in the present case. Further, Defendant Clift may be deposed, but the scope of the deposition must be strictly limited to questioning regarding the events giving rise to his qualified immunity defense. Any discovery that is outside this limited inquiry will be stayed. . . The Court must undertake a more detailed analysis with respect to the written discovery requests propounded to Defendant City. At the outset, the Court notes that Defendants' motion to stay has been filed on behalf of both Officer Clift and the City. However, Defendant City is not permitted to assert a defense of qualified immunity and is accordingly not entitled to a stay of discovery on the written discovery enumerated in the motion, even if such requests seek personal information concerning Defendant Clift . . . . Although the Court is mindful of the various policy justifications for the *Harlow* rule, the Court does not read *Harlow* so broadly as to necessarily prohibit any and all discovery relating to a government official asserting a defense of qualified immunity. . . . Accordingly, a stay on Plaintiff's written discovery requests to Defendant City merely because the information concerns Defendant Clift would exceed the proper reach of a stay justified by Defendant Clift's assertion of qualified immunity in this case. Defendant City argues, however, that certain items of discovery directed to it can only be answered by Defendant Clift and that the mere fact that Plaintiff has directed discovery to the City in name only should not undermine Defendant Clift's protection from discovery in this matter. . . This argument has merit, because allowing such conduct would circumvent the policy underlying *Harlow*. Accordingly, the Court finds that Defendant City is required to answer Plaintiff's requests for written discovery. However, in keeping with the protection from discovery of Defendant Clift himself, the Court makes the

following exception to the City's requirement to answer discovery. To the extent that an answer to any of Plaintiff's requests (1) legitimately would require Defendant Clift's personal knowledge or consultation of documents exclusively under his control, and (2) bears upon matters beyond an inquiry into the actual events giving rise to the qualified immunity defense, Defendant City need not include that information in its responses. However, as to requests that do bear upon the actual events giving rise to the qualified immunity defense, Defendant City must provide answers, even if such answers require consulting Defendant Clift, because Defendant Clift is not protected from such discovery. Further, in the event that Defendant Clift's qualified immunity defense is denied, Defendant City will be required to supplement its responses in accordance with the discovery rules. The limited stay on discovery ordered here is not an invitation for Defendants to avoid legitimate discovery requests by trumpeting Defendant Clift's qualified immunity defense. Accordingly, Defendants are advised to review written discovery responses to ensure that they are consistent with the dictates of Federal Rules of Civil Procedure 26(g) and 37(g).").

TENTH CIRCUIT

Stonecipher v. Valles, 759 F.3d 1134, 1148, 1149 (10th Cir. 2014) ("The Stoneciphers make one last procedural argument. They contend the district court abused its discretion when they were denied the opportunity for additional discovery before it granted the defendants' motions for summary judgment. . .But because qualified immunity protects against the burdens of discovery as well as trial, a district court may stay discovery upon the filing of a dispositive motion based on qualified immunity. . . The court may grant pre-discovery summary judgment on the basis of qualified immunity if the plaintiffs cannot explain 'how discovery will enable them to rebut a defendant's showing of objective reasonableness.'. . If, however, the district court determines it cannot rule on the immunity defense without clarifying the relevant facts, the court 'may issue a discovery order narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. .The district court concluded, and we agree, that Valles possessed arguable probable cause for the arrest and charging decision. The Stoneciphers do not explain how discovery would enable them to rebut this showing. In their reply brief, the Stoneciphers mention that discovery would allow them to obtain the complete correspondence between Valles and Jennings, but they do not explain how this material would rebut the finding of arguable probable cause. . . Both Valles and Jennings averred that Jennings independently reviewed Mr. Stonecipher's file. Because the Stoneciphers do not explain how discovery will allow them to rebut the finding of objective reasonableness, the district court did not err in granting summary judgment for the defendants without allowing for discovery.")

Jones v. Hernandez, 2007 WL 4269052, at *3, *4 (10th Cir. Dec. 6, 2007) ("While a ruling on qualified immunity 'should be made early in the proceedings,' . . . discovery as to evidence central to the qualified immunity analysis must be allowed. . . On the record before the district court, there was doubt as to whether the scoring protocol employed by the interview panel was subjective or objective. The district court should not have granted summary judgment while that factual dispute was still unresolved. . . . For the same reason, the court's dismissal of Ms. Jones' claims against

Sheriff Hernandez was erroneous. Ms. Jones has alleged and may be able to prove that she had a property interest in promotion, based on a nondiscretionary mode of selection. Ms. Jones' claims against Sheriff Hernandez cannot be resolved in his favor as a matter of law, but require factual development, along with the claims against the other defendants.")**.**

Mee v. Ortega, 967 F.2d 423, 430 (10th Cir. 1992) (factual disputes required more development before district court could rule on qualified immunity).

Lewis v. City of Ft. Collins, 903 F.2d 752, 754, 758 (10th Cir. 1990) ("Qualified immunity is not a shield from all discovery. . . In some cases, discovery may be necessary to determine whether the defendants' challenged conduct violated clearly established law and thus, whether defendants are entitled to qualified immunity. However, until the threshold immunity question is determined, discovery shall be limited to resolving that issue alone. [cites omitted] Based on the record before us, the order of the district court does not limit discovery to the resolution of the qualified immunity issue. As such, defendants have been denied their entitlement to be free from the burden of overbroad discovery. Accordingly, we have jurisdiction over this appeal. . . . Liberal application of rule 56(f) should not be allowed to subvert the goals of *Harlow* and its progeny. [cite omitted] Accordingly, in response to a summary judgment motion based on qualified immunity, a plaintiff's 56(f) affidavit must demonstrate 'how discovery will enable them to rebut a defendant's showing of objective reasonableness' or, stated alternatively, demonstrate a 'connection between the information he would seek in discovery and the validity of the [defendant's] qualified immunity assertion.' [cite omitted] To that end, it is insufficient for the party opposing the motion to merely assert that additional discovery is required to demonstrate a factual dispute or 'that evidence supporting a party's allegation is in the opposing party's hands.'" [cites omitted]).

Lowery v. County of Riley, 2008 WL 3562061, at *1, *2 (D. Kan. Aug. 12, 2008) ("There are three alternatives available to the Court concerning the scheduling of discovery in this case while awaiting a ruling by the Supreme Court on a Petition for Writ of Certiorari: (1) allow only discovery on the *Monell* claims to proceed; (2) stay all discovery; or (3) allow all discovery to proceed. The alternative to allow only *Monell* discovery presents problems that the Court has previously discussed. It would be very difficult, if not impossible, to delineate precisely the scope of any discovery that could take place during pendency of the Petition for Writ of Certiorari on the *Monell* claims so that it did not include evidence related to the qualified immunity claims Defendants are attempting to vindicate. . . It was this blurred line between discovery related to *Monell* claims and discovery related to the Defendants' qualified immunity claims which concerned the Court during the Tenth Circuit appeal. As previously stated in the December 27, 2007 Memorandum and Order, if the Court were to allow 'limited' discovery to proceed (only on the *Monell* claims), there was a very real possibility that there would be a duplication of discovery in the future, particularly if the decision denying qualified immunity were affirmed. This would be both expensive and inefficient. Defendants argue that this fact justifies the second alternative– the continued stay of all discovery in this case pending decision by the U.S. Supreme Court. The Court might agree had there been a dissenting opinion in the Tenth Circuit appeal or some

indication that the decision by the Tenth Circuit was in conflict with those of other circuits or was a case of first impression. None of these circumstances are present in this case. There was no dissenting opinion, and only one judge out of the thirteen judges who considered the Petition for Rehearing En Banc voted to grant the motion. Nothing in the Tenth Circuit opinion indicates that it presents a case of first impression on a unique issue of law or that it is contrary to decisions of other circuits. While this is no guarantee that the Supreme Court will deny a petition for certiorari, it is a major indication of the difficulty Defendants face in convincing the Supreme Court that discretionary review is justified in this case. . . Thus, the present circumstances are significantly different than they were at the time this court previously refused to allow discovery to proceed during the Tenth Circuit appeal.Considering all the facts, the Court believes that the third alternative is the appropriate result. It is now time to move forward and complete all discovery so that there will be no further delays in setting a trial on the merits of Plaintiffs' claims. The case has been on file since March 2004, and Defendants have had ample opportunity to make their case for a finding of qualified immunity on the major claims brought by Plaintiffs. While there is still a chance that Defendants will prevail on their claim of qualified immunity in the Supreme Court, weighing that chance against the continued delay to Plaintiffs from their day in court leads the Court to deny the motion for any continued stay of discovery.").

Howse v. Atkinson, No. Civ.A. 04-2341GTV-DJW, 2005 WL 994572, at *2 (D. Kan. Apr. 27, 2005) (not reported) ("The Court recognizes that staying discovery as to all Defendants has consequences to Plaintiff in that there are risks that witnesses' memories will fade, witnesses may relocate, and documents may get misplaced or destroyed. The Court, however, finds that in this case the risk is slight because Defendants are only seeking to [sic] a temporary stay of discovery until the Court rules on the Motion to Dismiss, filed on February 25, 2005 and fully briefed on April 11, 2005. The Court finds that Defendant KUPI would be prejudiced from having to proceed with bifurcated discovery while the Court resolves the immunity issues raised by Defendants Atkinson and Hagedorn. The Court further finds that bifurcation of discovery would be inefficient. Although Defendant KUPI has not asserted an immunity defense that would warrant staying discovery pending a ruling on a dispositive motion, the Court finds that the risk of prejudice to Defendant KUPI from proceeding with bifurcated discovery while the Motion to Dismiss is pending outweighs any risk of prejudice to Plaintiff from a temporary stay of discovery as to all parties.")

Rome v. Romero, 225 F.R.D. 640, 643, 644 (D. Colo. 2004) ("Although the Supreme Court recognizes that a well-supported claim of qualified immunity should shield a defendant from 'unnecessary and burdensome discovery,' *Crawford-El*, 523 U.S. at 598, invocation of the defense is not a bar to all discovery. . . . Even where a qualified immunity defense is asserted, some limited discovery is still permitted. As the Supreme Court in *Crawford-El* observed, qualified immunity does not protect an official from *all* discovery, but only from that which is 'broad-reaching.' . . Limited discovery may be necessary when the doctrine is asserted in a motion for summary judgment on contested factual assertions. . . . A plaintiff faced with a defense of qualified immunity in a motion for summary judgment may also be entitled to conduct discovery to explore facts

essential to justify opposition to the motion as provided for by Fed.R.Civ.P. 56(f). . . . In addition, discovery up to the point when the qualified immunity issue is presented for adjudication may be appropriate. The protection of the governmental actor is best served when the issue of qualified immunity is raised at the earliest possible stage of the litigation. . . Because the official controls when the issue is presented for adjudication, he cannot be said to be *unduly* burdened if he foregoes an opportunity to address the issue prior to the commencement of discovery, and instead waits to assert it until some point later in the litigation. In such circumstances, it may be appropriate to stay discovery only after the official presents the issue, and to require responses to existing discovery requests. . . .The foregoing discussion explores the type of discovery that the individual Defendants should be protected against: namely, discovery requests (i) directed against the individual Defendants, (ii) in support of a claim for monetary damages,[footnote omitted] (iii) which seek information other than that relating to disputed factual issues regarding the actual events giving rise to the qualified immunity defense. By contrast, discovery requests directed at the institutional Defendants; relating to any claim for declaratory or injunctive relief; or seeking information regarding the individual Defendants' version of the incidents in question are properly made, notwithstanding the pendency of the Motion for Summary Judgment.").

Sonnino v. University of Kansas Hospital Authority, 220 F.R.D. 633, 639 (D. Kan. 2004) ("In this case, the Individual Hospital Defendants have filed neither a motion to dismiss nor a motion for summary judgment. They have only raised qualified immunity as a defense in their answer to Plaintiff's Complaint. . . By failing to assert the defense in a dispositive motion, the Individual Hospital Defendants have failed to place the issue of qualified immunity before the Court. While the Court recognizes that defendants are generally entitled to have the Court determine the issue of qualified immunity prior to their being subjected to discovery, they must take the necessary steps to bring the issue before the Court for resolution. Defendants are not entitled to an indefinite suspension of discovery while they ponder whether and when to file a motion to dismiss or for summary judgement. . . . In light of the above, the Court overrules the qualified immunity objections that the Individual Hospital Defendants have asserted in response to many of Plaintiff's discovery requests."), *reconsidered in part*, 221 F.R.D. 661 (D. Kan. 2004).

Quinn v. City of Kansas City, No. Civ.A. 98-2236-KHV, 1998 WL 919129, at *2, *3 (D.Kan. Nov. 6, 1998) (unpublished) ("[W]hile qualified immunity is a powerful defense in other contexts, in excessive force cases the substantive inquiry is the inquiry that decides whether the qualified immunity defense is available to the government actor. . .If plaintiff alleges that police used excessive force in violation of the Fourth Amendment, the qualified immunity inquiry becomes indistinguishable from the merits of the underlying claim. Whether police used excessive force in a case under Section 1983 has always been seen as a factual inquiry best answered by the fact finder.").

Van Deelen v. City of Eudora, No. 96-4040-SAC, 1997 WL 445821, at *2, *3 (D. Kan. May 8, 1997) (not reported) ("The defendant Diehl offers no authority for his argument that he cannot be compelled to participate in discovery as a witness to the claims against the other defendants. His

protection from discovery extends only to the claims which are brought against him and to which he has properly asserted an immunity defense. Diehl does not contest the magistrate judge's finding that his deposition 'is necessary in order to complete discovery against the other defendants.'. . Consequently, the magistrate judge correctly permitted the deposition of Diehl to proceed as to the claims against the other defendants. The magistrate judge also allowed the deposition to 'include the claims against Diehl since these claims may be factually intertwined with the other claims.' The defendant Diehl does not contest the possibility of a factual relationship between the claims against him and the claims against the other defendants. Diehl simply sets up his right to avoid discovery on claims against him until the district court finally resolves his immunity defenses. In Diehl's opinion, any intrusion denies him immunity. In this situation, the district court would agree that the deposition of the party asserting an immunity defense generally should proceed subject to the following conditions. The witness may be asked questions which relate to matters that are relevant to the claims against the other defendants or which are likely to lead to matters that are relevant to the claims against the other defendants. The witness may not be asked questions which do not satisfy either of the above relevance standards and which are related to the claims which the witness has asserted an immunity defense. The magistrate judge here avoided this more involved approach in favor of permitting Diehl's deposition to proceed without a subject-matter limitation but with a time limitation. The magistrate judge balanced the interests of the other parties against the interests of Diehl in avoiding discovery. The magistrate judge found that a deposition limited to two hours was a minor intrusion to Diehl in contrast to the other parties' interests in moving the litigation forward on the other claims.The district court finds that the magistrate judge did not clearly err in allowing Diehl's deposition to proceed on certain conditions.").

ELEVENTH CIRCUIT

R.F.J. v. Fla. Dep't of Children & Families, No. 16-17560, 2018 WL 3752227, at *2–3 (11th Cir. Aug. 7, 2018) (not published) ("Brady and Perry argue that the district court erred by deferring its ruling on their qualified-immunity defenses until after discovery is completed. . . We agree. Qualified immunity is not a last exit before liability. Instead, qualified immunity is a right to be free from litigation altogether once the defense is established. . . . Otherwise, parties could be required to expend significant time, money, and energy only to go 90 miles down the road of a dead-end drive. . . The district court's deferral of its decision violates these principles. And it is not in keeping with our prior precedent in *Howe*. Like in this case, the district court in *Howe* delayed ruling on the officers' qualified immunity and directed them to commence discovery. . . We vacated that order and directed the district court to resolve the immunity defense 'before requiring that the parties litigate Howe's claims any further.'. . .Although we understand the district court's decision below, given the flurry of facts from outside the complaint, Brady and Perry are entitled to a ruling sooner rather than later. Consequently, we must vacate the district court's order of November 18, 2016, and remand for the district court to take one of two actions: (1) enter a substantive ruling on Brady's and Perry's pending motion to dismiss or (2) grant Plaintiffs' motion for leave to file a third amended complaint. . . and deny as moot Brady's and

Perry's pending motion to dismiss. Should the district court make the latter choice and should Brady and Perry again move to dismiss on qualified-immunity grounds, the district court should resolve those motions before requiring the parties to litigate the claims any further.")

Howe v. City of Enterprise, 861 F.3d 1300, 1302-03 (11th Cir. 2017) ("In the present case, the district court's order not only reserved ruling on the defendants' claims to immunity until after Howe filed a second amended complaint, it also instructed the parties to confer and develop their Rule 26(f) report. Under Rule 26(f), the parties must confer and develop a proposed discovery plan, and '[i]n conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case ....' . . . The part of the order requiring the parties to confer and discuss settlement before the court ruled on the defendants' motion to dismiss on immunity grounds is inconsistent with our decision in *Bouchard Transportation*. And the part of the order requiring the parties to develop their Rule 26(f) report before the court ruled on the immunity defenses is also inconsistent with *Bouchard Transportation* and other decisions which establish that immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted. The district court's order of March 31, 2016, is vacated except to the extent that it denies without prejudice the motion to dismiss on immunity grounds and directs Howe to amend his complaint again. After Howe has filed his second amended complaint, the defendants may file another motion to dismiss that includes assertions of immunity from suit. . . If they do so, the district court should decide those immunity issues before requiring that the parties litigate Howe's claims any further.")

S.D. v. St. Johns County School Dist. No., 3:09-cv-250-J-20TEM, 2009 WL 4349878, at **1-4 (M.D. Fla. Nov. 24, 2009) ("In *Iqbal*, the primary issue resolved by the Supreme Court related to the pleading requirements under Rule 8 and Rule 9(b) of the Federal Rules of Civil Procedure, not whether discovery *must* be stayed pending a motion to dismiss on qualified immunity grounds. [discussing *Iqbal, Siegert, Harlow, Mitchell, Anderson*] The Court notes that the Eleventh Circuit Court of Appeals has used language that discovery should be delayed 'if possible' while dispositive motions are resolved to decrease costs to the litigants and save judicial resources. [discussing Eleventh Circuit cases] In the instant matter, unlike many of the aforementioned cases (if not all), the dispositive motion by the lead defendant, St. Johns County School District, has been resolved against it. Thus, the case will proceed. While the defense of qualified immunity with respect to the Individual Defendants have not yet been resolved, their knowledge of the underlying facts regarding this case would appear relevant to the claim against the School District. . . . Although the Court acknowledges that discovery should likely be stayed in situations where the granting of the motion to dismiss could dispose of the entire action, the facts that pertain to the instant matter are unique in the sense that Plaintiffs' claims against the School District have survived the motion to dismiss stage of the proceedings . . . . Unless the Court stays all discovery, the Individual Defendants will nevertheless be subject to pretrial discovery as fact witnesses. . . . [T]he Court will amend its Order to the extent that any discovery sought from the Individual Defendants shall be limited to factual issues relevant to the suit against the School District. Discovery of facts relevant *only* to individual liability as to the named Individual Defendants is

premature at this juncture; therefore, the Individual Defendants shall not be subject to such discovery. . . unless their motion to dismiss based on qualified immunity grounds is denied.”**).**

Martinez v. McCord, No. 1:06-CV-636-WKW, 2008 WL 2003789, at *6 n.9 (M.D. Ala. May 8, 2008) (“The court is mindful of the broad scope of qualified immunity and frequently faces pre-discovery motions to dismiss in § 1983 cases involving law enforcement actions. As the Eleventh Circuit has acknowledged in *dicta*, it is important to ‘purs[ue] discovery to a reasonable extent so as to permit appropriate factual showings [because] anything less may result in grants of summary judgment solely because of inadequate discovery.’. . With that in mind, however, the court is vested with ‘broad discretion to tailor discovery narrowly and to dictate the sequence of discovery,’ and expects to hear motions to ‘limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects,’ . . . so as to ‘ Aprotect [ ] the substance of the qualified immunity defense.”‘)

Marshall v. West, 2007 WL 1540231, at *9 (M.D. Ala. May 24, 2007) (“[T]he critical question is whether West and/or Hutson were aware of facts which arguably would have justified a reasonable suspicion of illegal activity. . . Plaintiff essentially has argued that, without the benefit of discovery, it is impossible for him to allege those facts because he does not know what, if any, information Defendants possessed when they initiated the traffic stop. . . . Given the unique circumstances of this case, the court finds that it is appropriate to deny the motion to dismiss because the qualified immunity inquiry turns on facts which are within the knowledge and control of Defendants. . . . No proper purpose would be served by penalizing Plaintiff and dismissing his claim prior to discovery because he failed to plead facts of which he says he is unaware. As recited in the margin, other courts have denied qualified immunity at the Rule 12(b)(6) stage on similar grounds.[collecting cases]”).

K.M. v. Alabama Department of Youth Services, 209 F.R.D. 493,495 (M.D. Ala. 2002) (“The defendants [argue] that the claims against all of the defendants are so intertwined that allowing discovery to proceed against one is tantamount to allowing discovery to proceed against them all. According to the defendants, to preserve their immunity, should that immunity be found to exist on appeal, requires the prohibition of all discovery for all defendants during the pendency of the appeal. The court agrees that the discovery stay should generally extend to all discovery in this case, as there is no ascertainable line between that discovery needed in the case of the claims against Ziegler and Aseme and the claims of the other defendants. However, there is also equity in saying that this discovery stay should not result in unfair prejudice to the rights of the plaintiffs and their claims against Ziegler and Aseme, from the loss of records or witnesses occasioned by the delay on appeal by the other defendants. . . Therefore, some leeway is appropriate to give the plaintiffs the assurance that this passage of time will not irrevocably prejudice their claims against the non-appealing defendants. They should be allowed to collect limited information in order to identify potentially critical witnesses and to preserve documents that may well be central to their litigation as to the non-appealing defendants. Because the parties are in the best position to advise the court as to how to achieve this goal with the interest of all taken into consideration,

the court will order that the parties confer and submit to the court a joint "preservation" plan that satisfies the goals expressed in this order.").

VI. WHEN IS RIGHT "CLEARLY ESTABLISHED?"

A. What Law Controls?

U.S. SUPREME COURT

District of Columbia v. Wesby, 138 S. Ct. 577, 591 n.8 (2018) ("We have not yet decided what precedents--other than our own-- qualify as controlling authority for purposes of qualified immunity. See, *e.g., Reichle v. Howards*, 566 U. S. 658, 665-666 (2012) (reserving the question whether court of appeals decisions can be 'a dispositive source of clearly established law'). We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them. See *City and County of San Francisco v. Sheehan*, 575 U. S. ___, ___, n. 4 (2015) (slip op., at 14, n. 4). Instead, we address only how a reasonable official 'could have interpreted' them. *Reichle*, *supra*, at 667.")

Taylor v. Barkes, 135 S. Ct. 2042, 2044-45 (2015) (per curiam) ("No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols. And 'to the extent that a "robust consensus of cases of persuasive authority"' in the Courts of Appeals 'could itself clearly establish the federal right respondent alleges,'. . . the weight of that authority at the time of Barkes's death suggested that such a right did *not* exist. [collecting cases] The Third Circuit nonetheless found this right clearly established by two of its own decisions, both stemming from the same case. Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue.")

> *See also* ***Weishaar v. County of Napa***, No. 14-CV-01352-LB, 2016 WL 7242122, at *11 (N.D. Cal. Dec. 15, 2016) ("Combining all this — the general rules on qualified immunity, the Supreme Court's decision in *Taylor*, and the Ninth Circuit's in *Van Orden* — the pivotal question in this case might be phrased thus: On the 'particular facts' of this case, in this 'specific context,' did Mr. Foster pose a 'serious risk of suicide' so that any 'reasonable,' 'competent' officer would have known that they could not be 'deliberately indifferent' to his plight, and that by failing to do more than they did to protect him from suicide — because what is in question is 'the violative nature of [the defendants'] particular conduct,' *Hamby*, 821 F.3d at 1091 — they were clearly violating his constitutional rights? Viewing the evidence most favorably to the plaintiff, the court thinks that a jury question exists on this point. A reasonable juror could conclude that Mr. Foster presented a

> 'serious risk of suicide,' which would have triggered the 'clearly established right' that the Ninth Circuit recognized in *Van Orden.* On the one hand, when asked directly, Mr. Foster repeatedly denied being suicidal. . . On the other, one of Mr. Foster's intake forms related that, after being arrested, he told the transporting officers that 'he wished he would die.'. . Prison officials also knew that he had a history of psychiatric illness, for which he was then on medication, and that he had previously attempted suicide. . . The court cannot summarily hold Commander Wilson immune on these facts. The question must be put to the fact-finder. The court thus declines to grant summary judgment to Commander Wilson on the ground that she is qualifiedly immune from suit. The court recognizes that this holding reflects a tension in the law. On the one hand, in *Taylor* the Supreme Court has said that, at the time of Mr. Foster's death in November 2012, through to June 1, 2015 (when *Taylor* was released), nothing in its precedent established a clear constitutional right to suicide-screening or -prevention protocols. *Taylor,* 135 S. Ct. at 2044 45. On the other hand, in a decision that followed *Taylor* by about a month, the Ninth Circuit held that, since 'at least' 2005, there has been a clearly established constitutional right that protects inmates from deliberate indifference when they present a serious risk of suicide. *Van Orden*, 609 F. App'x at 475. This would suggest that if inmates exhibit a serious suicide risk, then they have a constitutional right guaranteeing that corrections officers attend to their needs. As precedent stands, reading both *Taylor* and *Van Orden,* this court holds that a reasonable jury could find that Mr. Foster presented a 'serious risk of suicide' that triggered his 'clearly established right' to something more than 'deliberate indifference.'")

City & Cnty. of San Francisco, Calif. v. Sheehan, 135 S. Ct. 1765, 1776 (2015) ("[E]ven if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' *Carroll v. Carman,* 574 U.S. ——, ——, 135 S.Ct. 348, 350, 190 L.Ed.2d 311 (2014) (*per curiam*), it does not do so here.")

Carroll v. Carman, 135 S. Ct. 348, 350 (2014) ("Here the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity—*Estate of Smith v. Marasco,* 318 F.3d 497 (C.A.3 2003). Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances, see *Reichle v. Howards,* 566 U.S. ——, ——, 132 S.Ct. 2088, 2094, 182 L.Ed.2d 985 (2012), *Marasco* does not clearly establish that Carroll violated the Carmans' Fourth Amendment rights.")

Reichle v. Howards, 132 S. Ct. 2088, 2094 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here.")

Wilson v. Layne, 526 U.S. 603, 615, 616 (1999) (The Court concluded general Fourth Amendment principles did not apply with obvious clarity to the officers' conduct in this case. Furthermore,

A[p]etitioners [had] not brought to [the Court's] attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely, nor [had] they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.").

United States v. Lanier, 520 U.S. 259, 269 (1997) [**Note: case involved criminal prosecution under 18 U.S.C. § 242**] ("[I]n applying the rule of qualified immunity under 42 U.S.C. § 1983 and *Bivens* . . . we have referred to decisions of the Courts of Appeals when enquiring whether a right was 'clearly established.'. . . Although the Sixth Circuit was concerned, and rightly so, that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it.").

Elder v. Holloway, 114 S. Ct. 1019, 1023 (1994) ("Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.' [cites omitted] That question of law, like the generality of such questions, must be resolved *de novo* on appeal. [cite omitted] A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'").

D.C. CIRCUIT

Bame v. Dillard, 637 F.3d 380, 384, 386 (D.C. Cir. 2011) ("In this case the principle of constitutional avoidance counsels that we turn directly to the second question. As the Court recognized in *Pearson* itself, 'There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.'. . This is such a case. Therefore the first and, as it happens, only question we address is whether it was clearly established in September 2002 that strip searching an arrestee before placing him in a detention facility without individualized, reasonable suspicion was unconstitutional. To answer this question, 'we look to cases from the Supreme Court and this court, as well as to cases from other courts exhibiting a consensus view,' *Johnson v. District of Columbia*, 528 F.3d 969, 976 (D.C.Cir.2008)–if there is one. . . . We conclude the law in 2002 did not clearly establish that strip searching all male arrestees prior to placement in holding cells at the Superior Court violated the Fourth Amendment. The governing precedent was then, as it is now, *Bell v. Wolfish,* and nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility. . . . We are aware of no Supreme Court case . . . that suggests a reasonable officer could not have believed his actions were lawful despite a consensus among the courts of appeals when a precedent of the Supreme Court supports the lawfulness of his conduct. A different reading of *Bell* by the several circuits to have considered the issue before 2002 could not 'clearly establish' the unconstitutionality of strip searches in this context. That *Powell* and *Bull* came down after 2002 is

of no moment; those opinions simply accord with our own understanding that *Bell* did not establish the unconstitutionality of a strip search under conditions like those present here. . . . Because there was in 2002 no clearly established constitutional prohibition of strip searching arrestees without individualized, reasonable suspicion, we need not consider whether Dillard had individual suspicion as to each of the plaintiffs.")

Dormu v. District of Columbia, Civil Action 08-00309(HHK), 2011 WL 2632330, at *8 (D.D.C. June 7, 2011) ("This case presents the question of whether, at the time of Dormu's arrest, an individual had a clearly established right to be free from a police officer's injury-inducing application of handcuffs after the individual complained that the cuffs were too tight. Neither the D.C. Circuit nor the Supreme Court have specifically addressed this question. The consensus among other courts, however, is overwhelming. Almost every Court of Appeals has held that overly tight handcuffing can constitute excessive force, where the handcuffing has resulted in injury or where an individual complains about the overly-tight cuffing. [collecting cases] Thus, it was clearly established at the time of Dormu's arrest that he had the right to be free from injury-inflicting handcuffing where Dormu complained about the tightness of the cuffs.")

Afifi v. Lynch, 101 F.Supp.3d 90, (D.D.C. 2015) ("The Court finds that the individual defendants are entitled to qualified immunity on both of the plaintiff's *Bivens* claims because, as discussed more fully below, neither the Fourth Amendment nor First Amendment rights he seeks to vindicate in this suit were clearly established at the time and in the place where the challenge conduct occurred. . . . The plaintiff argues that at the time the individual defendants employed the GPS device, such warrantless use was deemed unconstitutional by this Circuit in *United States v. Maynard*, 615 F.3d 544, 555–56 (D.C.Cir.2010) . . . . The plaintiff also notes that for purposes of the qualified immunity analysis, a court ordinarily looks to 'cases of controlling authority in [its] jurisdiction.'. . As a result, the plaintiff argues that the individual defendants' warrantless use of a GPS device was squarely in violation of binding Circuit precedent and therefore violated clearly established law. This argument ignores two salient features of the present dispute. First, the Circuits were split regarding the constitutionality of the warrantless use of a GPS device at the time of the conduct at issue. . . Second, the warrantless use of a GPS device was lawful under Ninth Circuit precedent at the time of its use in the present case. In other words, the individual defendants' warrantless use of the GPS device was valid in California, the jurisdiction in which the individual defendants used the GPS device. . . Thus, not only were the Circuits split at the time of the individual defendants' conduct, but the conduct was lawful in the jurisdiction in which it occurred. Both factors favor the grant of qualified immunity to the individual defendants. . . . To avoid the implication of the Circuit split, the plaintiff seizes upon *Youngbey v. March* for the proposition that '"[i]n determining whether the legal rules at issue are clearly established,"' a court must look only to cases of controlling authority in its own jurisdiction. . . Yet, *Youngbey* did not address the issue of qualified immunity where the defendants acted in a jurisdiction different from the forum of the lawsuit. In such situations, '[w]hen faced with inconsistent legal rules in different jurisdictions, national officeholders should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction

where the action is taken.'. . Indeed, the Supreme Court has described the refusal to grant qualified immunity as 'especially troubling' where a defendant's actions 'were lawful according to courts in the jurisdiction where he acted.'. . A contrary rule would permit plaintiffs to forum shop and might otherwise deter 'national officeholders ... from full use of their legal authority.'. . Such deterrence warrants 'caution by the Judicial Branch' in refusing to grant qualified immunity, 'particularly in the area of national security.'. . Applying these principals to the present case, the individual defendants are entitled to qualified immunity as their actions, in following the binding precedent of the relevant jurisdiction, were not 'plainly incompetent' and did not violate clearly established law. . . .The plaintiff has failed to cite a single case from any Circuit holding that the warrantless use of a GPS device violates an individual's First Amendment rights. To be sure, the qualified immunity analysis does not require a 'case directly on point,' *Al–Kidd,* 131 S.Ct. at 2083, but a court must take caution in properly defining the scope of the right violated . . . . In this regard, the plaintiff's silence is telling as 'existing precedent must have placed the statutory or constitutional question beyond debate.'. .The plaintiff's inability to cite a single case in support of his contention that the warrantless use of a GPS device violated his First Amendment rights dooms his claim. . .The Court need not decide whether the individual defendants' warrantless use of a GPS device violated the plaintiff's First Amendment rights because the law regarding the issue was not clearly established at the time of the conduct. . . As a result, qualified immunity shields the individual defendants from the plaintiff's First Amendment *Bivens* claim.")

FIRST CIRCUIT

Alfano v. Lynch, 847 F.3d 71, 76, 79 (1st Cir. 2017) ("In applying the test for clearly established law, the focus must be on federal precedents. . . Courts may consider state precedents, though, to the extent that they analyze the relevant federal issue. . . . Federal courts of appeals typically look only to precedents from the United States Supreme Court, federal appellate courts, and the highest court of the state in which a case arises to gauge whether a particular right is clearly established. . . . To say more about the clearly established nature of the law would be to paint the lily. We hold that, in July of 2014, controlling and persuasive authority combined to give a reasonable officer fair and clear warning that the Fourth Amendment required probable cause to take an individual into protective custody, handcuff him, transport him to a police station miles away, and confine him in a jail cell")

McCue v. City of Bangor, 838 F.3d 55, 61-65 (1st Cir. 2016) ("After reviewing de novo all of the magistrate judge's determinations, the district court adopted the Recommended Decision in full. This appeal followed. The only issue before us is the pretrial denial of qualified immunity as to the plaintiff's allegation that the officers used excessive force after McCue had ceased resisting, as well as the corresponding denial of immunity under the MTCA for the state law assault claim. . . . Johnson and its progeny foreclose assertion of appellate jurisdiction over the defendants' interlocutory appeal. The magistrate judge's opinion, fully affirmed by the district court, denied summary judgment precisely '[b]ecause the record includes factual disputes regarding Plaintiff's claim that Defendants used excessive force after Mr. McCue allegedly ceased resisting.'. . In

particular, the record contains facts that, when viewed most favorably to the plaintiff, could support a finding that McCue stopped resisting at some point during his encounter with the officers, and that the officers should have realized that he had stopped resisting, but that the officers 'continued to exert significant force ... no longer necessary to subdue Mr. McCue or to reduce the threat that he posed to himself or others.'. . And they continued to use such force after McCue told them that they were hurting his neck. In light of these remaining factual issues, we cannot assume jurisdiction over the defendants' interlocutory appeal. Maintaining that they do not dispute the facts for the purposes of their appeal, the defendants argue that we have appellate jurisdiction notwithstanding the district court's identification of material factual disputes. They repeatedly assert that they construe the facts in the light most favorable to the plaintiff and that even so construed, 'the videotape evidence conclusively establishes that there is at most a timeframe of 66 seconds for which the trial court could have concluded that Mr. McCue may have stopped resisting arrest and the Defendants may have continued to apply force.' They further argue that 'this momentary continuance of force' for up to 66 seconds did not violate McCue's Fourth Amendment right to be free from unreasonable seizure. Plaintiff disagrees and says that the record supports a finding that 4 minutes and 25 seconds is the true period involved. As a matter of law, our circuit has assumed interlocutory appellate jurisdiction where the defendant 'accepted as true all facts and inferences proffered by plaintiffs, and [where] defendants argue[d] that even on plaintiffs' best case, they [we]re entitled to immunity.' *Mlodzinski*, 648 F.3d at 28. Even 'a defendant who concedes arguendo the facts found to be disputed is not barred by *Johnson* from taking an interlocutory appeal on a legal claim that the defendant is nevertheless entitled to qualified immunity on facts not controverted.' . . But this avenue is not available to the defendants here because, contrary to their protests, they have not in fact accepted the version of the facts most favorable to the plaintiff. In at least four different places in their brief, the defendants stress that, construing the Car 22 video in the most plaintiff-favorable light, there was at most 66 seconds in which they might have continued to apply force after McCue had stopped resisting. The defendants appear to have arrived at this number by misconstruing a statement of fact by the magistrate judge. Explaining why Blanchard punched McCue's lower back, buttocks, or thigh region after the officers had secured both his wrists and ankles, the magistrate judge observed that Blanchard might have done so because McCue 'squeezed' Blanchard's injured hand 'extremely hard' or, alternatively, in order to 'facilitate bringing together Mr. McCue's ankles and wrists to complete the five-point restraint.'. . The defendants inaccurately characterize this observation, asserting that the magistrate judge found that Blanchard could have punched McCue because 'McCue was resisting the Defendants' efforts to put him in a five-point restraint.' Pinpointing this moment when Blanchard punched McCue as the last moment in which the magistrate judge found that McCue had resisted, the defendants count 66 seconds from that point to the point when McCue is lifted off the ground. This insistence on 66 seconds both mischaracterizes the magistrate judge's statements about the facts and fails to present those facts in the light most favorable to the plaintiff. First, neither reason that the magistrate judge cited to account for Blanchard's punch (to prevent McCue from squeezing his hand or to facilitate the five-point restraint) necessarily equates to resistance by McCue. At this point, McCue's wrists and ankles had already been cuffed, thus minimizing his range of movements and the danger that he posed to his own and others' safety. Simply put, there is no

indication in the Recommended Decision that the hand squeeze should be construed as continued resistance, much less resistance justifying the force used. The defendants' inference as such, of course, also demonstrates their failure to accept the version of facts most favorable to the plaintiff. Second, our independent assessment of the Car 22 video, construed in the light most favorable to the plaintiff, discredits the defendants' 66-seconds theory. . .The video, from 2:18 to 2:22, captures McCue resisting detainment by kicking his legs, thrashing his torso, and shouting an expletive at the officers. In contrast, from 2:22 until the officers lift him off the ground at 7:08, McCue periodically growls and makes other noises but does not kick or thrash his body again. He also complains that the officers are hurting his neck, but we cannot ascertain from the video if the officers adjusted their positions in response. Viewed in the light most favorable to the plaintiff, McCue's noises and slight movements after the 2:22 mark -- and even his squeezing of Blanchard's hand – 'may not constitute resistance at all, but rather a futile attempt to breathe while suffering from physiological distress.'. . In short, McCue's movements after 2:22 of the Car 22 video are not dispositive of whether he continued resisting. And from this perspective, there could be close to five minutes -- not 66 seconds -- during which the officers continued to exert force on a nonresisting McCue. Because the defendants have not, in fact, accepted the plaintiff's best version of the facts, we hold that there remains a genuine dispute of fact that precludes appellate jurisdiction over the denial of summary judgment. Finally, this factual dispute is material to the question on the merits. Depending on the amount of time for which the officers exerted force on McCue after he had ceased resisting, a jury could find that the officers' actions were unconstitutional under law that was clearly established in September 2012, the month of McCue's fatal encounter with the officers. The defendants argue that they should win because there was no clearly established law on this point. They are wrong. We 'adhere[ ] to a two-step approach to determine whether a defendant is entitled to qualified immunity.' *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016). First, we ask whether the facts as alleged by the plaintiff make out a violation of a constitutional right. If so, we next ask whether that right was 'clearly established' at the time of the alleged violation. . . In determining whether the law was clearly established, we 'ask "whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right," and then consider "whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right."'. . Here, we focus on the 'clearly established' prong of the qualified immunity analysis. This circuit has recognized that a 'First Circuit case presenting the same set of facts' is not necessary to hold that defendants 'had fair warning that given the circumstances, the force they are alleged to have used was constitutionally excessive.'. . We have also looked to the case law of sister circuits in determining whether a right was clearly established. . . Even without particular Supreme Court and First Circuit cases directly on point, it was clearly established in September 2012 that exerting significant, continued force on a person's back 'while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.' *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (quoting *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004)). At least four circuits had announced this constitutional rule before the events in question here. . . .[A]s the abundant case law demonstrates, a jury could find that a reasonable officer would know or should have known about

the dangers of exerting significant pressure on the back of a prone person, regardless of any lack of formal training. In sum, the disputed factual issue -- when McCue ceased resisting and for how long after that moment the officers continued to apply force on his back -- is material to the question of whether qualified immunity is proper.")

Maldonado v. Fontanes, 568 F.3d 263, 270, 271 (1st Cir. 2009) ("An individual's interest in his pet cat or dog does fall within the Fourth Amendment's prohibition of unreasonable seizures, though we have not addressed the question before. . . . We reject the Mayor's argument that this law was not clearly established because *this* court had not earlier addressed the questions of effects and seizure. Against the widespread acceptance of these points in the federal circuit courts, the Mayor's argument fails. These are principles of law, and the law was sufficiently recognized by courts to be clearly established. . . . We cannot say on the basis of the pleadings alone that an objective official in the Mayor's position, as a matter of law, would have reasonably concluded his actions in implementing and executing the pet policy were not a violation of the Fourth Amendment. The district court was correct to deny the Mayor qualified immunity on the Fourth Amendment claims based on the pleadings.")

Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 143-45 (1st Cir. 2001) ("When determining whether a constitutional right is clearly established for purposes of qualified immunity, state, as well as federal, decisions can be considered. . . . In turning to both the state and federal case law in this instance, we find a potential conflict. In *Trailer Marine,* as noted, we held that the dormant Commerce Clause applies to Puerto Rico; the Puerto Rico Supreme Court took a different view in the *R.C.A.* case. . . . We conclude that the applicability of the dormant Commerce Clause to Puerto Rico is disputed, and, thus, appellees' attendant constitutional right is not clearly established. Our holding is consistent with and respects the role of state systems in identifying and defining federal constitutional rights on a parallel basis with the federal courts with ultimate supervisory authority to harmonize any potential conflicts residing in the United States Supreme Court.").

Hatch v. Dep't for Children, Youth and Their Families, 274 F.3d 12, (1st Cir. 2001) ("To determine the contours of a particular right at a given point in time, an inquiring court must look not only to Supreme Court precedent but to all available case law.").

Brady v. Dill, 187 F.3d 104, 115 (1st Cir. 1999) ("The Supreme Court recently held that an asserted right was not clearly established where the plaintiffs were unable to cite 'any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they [sought] to rely,' and equally failed to 'identif[y] a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' [citing *Wilson*] The *Wilson* Court's reasoning is perfectly tailored to the circumstances here. *Thompson*, which represents the governing law of this circuit, plainly did not render the troopers' actions unlawful, and the tenuous status of *Gay* falls far short of the 'persuasive authority' that *Wilson* envisions.").

Lynch v. City of Boston, 180 F.3d 1, 13, 14 (1st Cir. 1999) ("We assume, without deciding, that the opportunity to serve as a volunteer could constitute the type of valuable governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny. . . .However, neither the Supreme Court nor this court has ever held that the rule forbidding denial of valuable governmental benefits in reprisal for protected speech announced in *Perry v. Sindermann* and its progeny extends to the denial of non-compensated positions on voluntary boards. Scant authority in support of such an extension of the doctrine currently exists. Lynch relies primarily upon a Ninth Circuit decision in which the court, applying its own precedents, held that volunteer status is a valuable governmental privilege that cannot be denied on the basis of protected speech. *See Holland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir.1992). . .A single decision from another court of appeals applying its own precedents is plainly insufficient to meet the requirement 'that in the light of pre-existing law the unlawfulness must be apparent' to a reasonable government official.").

El Dia, Inc. v. Rossello, 165 F.3d 106, 110 n.3 (1st Cir. 1999) ("[W]e are not inclined to adopt either a hard-and-fast rule that precedent from another circuit is always determinative of whether a law is clearly established . . . or a rule that such precedent is always irrelevant . . . . Among other factors, the location and level of the precedent, its date, its persuasive force, and its level of factual similarity to the facts before this Court may all be pertinent to whether a particular precedent 'clearly establishes' law for the purposes of a qualified immunity analysis." *citing Johnson-El v. Schoemehl*, 878 F.2d 1043, 1049 (8th Cir.1989).).

Begin v. Drouin, No. 1:16-CV-00092-JCN, 2017 WL 1411470, at *8 n.11 (D. Me. Apr. 20, 2017) ("While '"the salient question ... is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional,"'. . . Plaintiff is not required to identify a First Circuit case with the same or similar facts to provide notice to Defendants of Plaintiff's rights. *McCue v. City of Bangor, Maine*, 838 F.3d 55, 64 (1st Cir. 2016) ("We have also looked to the case law of sister circuits in determining whether a right was clearly established."); *Mlodzinski v. Lewis*, 648 F.3d 24, 38 (1st Cir. 2011) ("Even without a First Circuit case presenting the same set of facts, defendants would have had fair warning that given the circumstances, the force they are alleged to have used was constitutionally excessive.").")

Masonoff v. Dubois, No. CIV.A.94-10133-RCL, 2004 WL 2137369, at *8 (D. Mass. Sept. 17, 2004) ("Here, the plaintiffs seek redress for the defendants' failure to maintain reasonably adequate, non-toxic, and sanitary means to dispose of human waste. The right to 'adequate and hygienic means to dispose of [a prisoner's] bodily wastes' was clearly established at the time of the violation, which began. . . in 1991. . . Although I can find no First Circuit authority holding unlawful the precise conduct at issue in this case, the First Circuit long ago held that 'the prison administration must see to it that unsanitary conditions do not continue unabated [just] because the conditions were first caused by the inmates themselves.'. . Furthermore, a chorus of courts in other jurisdictions had held by 1991 that prisons must provide reasonably sanitary facilities, especially when the inmates are confined for long periods of time. . . . By 1983, the Supreme Judicial Court of Massachusetts had held that when prisoners must 'eat and sleep next to buckets into which they

must urinate and defecate,' the prison conditions, including the procedure for emptying the buckets, constituted cruel and unusual punishment. . . The Supreme Court of the United States had also made it clear that the conditions of confinement may not deprive inmates of 'the minimal civilized measure of life's necessities.' . . Consequently, I think it too plain to be reasonably questioned that, by 1991 it was clearly established that reasonably adequate 'sanitation is one of the basic human needs guaranteed by the [E]ighth [A]mendment.'").

Rodriguez Esteras v. Solivan Diaz, 266 F. Supp.2d 270, 282 (D.P.R. 2003) ("In light of the near unanimity among the Circuits and the factual support found in the persuasive authority, we believe that a reasonably prudent state actor would have realized that failing to divulge exculpatory evidence at the arraignment and other preliminary hearings, thereby causing the detention of a criminal defendant, would violate the Fourth Amendment. Since the parameters of the right to be free from malicious prosecution were sufficiently clear at the time of the alleged incident, Defendants are not entitled to qualified immunity.")

Soto v. Bzdel, 223 F.Supp.2d 332**,** 333 (D. Mass. 2002) ("This court does not believe that the *Hope* elaboration, recently echoed by the First Circuit in *Suboh v. District Attorney's Office of the Suffolk District*, 298 F.3d 81, 92-94 (1st Cir.2002), so fundamentally changes the qualified immunity analysis as to necessitate a different result here. First, unlike the situation in *Hope*, the facts alleged by Plaintiff do not form the basis of an 'apparent' constitutional violation. Second, the court neither now nor at the time it issued its summary judgment decision believes that the 'state of the law' in October of 1999 gave Defendants 'fair warning' that their alleged treatment of Plaintiff 'was unconstitutional.' In reaching this conclusion, the court did not rigidly confine itself, as Plaintiff contends, to either 'published precedent on all fours' or even to cases with 'materially similar' facts. . . In addition to addressing cases having facts similar to the case at bar, the court, as indicated, considered whether there was 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' . . The court also examined case law which was indirectly on point and still found scant support for Plaintiff's position. . . Finally, the court specifically addressed the affidavit of the clerk- magistrate of the Northampton District Court, urged upon the court again, and found it wanting. . . The court determined that the affidavit, while informative as to the system concerning recalled warrants, insufficiently demonstrated that any constitutional right was clearly established in October of 1999. . . Unfortunately for him, Plaintiff's preference that the 'state of the law' be statutory, not constitutional, cannot win the day.").

Rodriguez v. Penobscot County Jail, No. 00-253-B-S**,** 2001 WL 376453, at **3-5 (D. Me. Apr. 11, 2001) (not published) ("The First Circuit has yet to address whether the *Sandin* analysis applies to pre-trial detainees. The Ninth and the Seventh Circuits have concluded that *Sandin* does not apply to disciplinary procedures of pre-trial detainees when disciplinary segregation is the imposed punishment. In those cases the liberty interest in not being punished without the full procedural protections requires adherence to rigorous procedures. [citing cases] Other circuits, albeit in unpublished opinions, have determined that the *Sandin* analysis is appropriate to apply to pretrial

detainee complaints concerning disciplinary sanctions. [citing cases] While such cases have questionable value as precedent on the underlying issue of whether or not *Sandin* should be applied to pretrial detainees, they do form the basis for determining the first element of the defendants' asserted claim of qualified immunity. The law in this regard is not clearly established. . . . Given the lack of 'clearly established' post-*Sandin* case-law regarding the procedural due process issues raised by Rodriguez and the clear First Circuit precedent which authorizes reasonable disciplinary sanctions against pre-trial detainees, Defendants in this case are entitled to qualified immunity as to any civil damage claim").

SECOND CIRCUIT

Garcia v. Does, 779 F.3d 84, 95 n.12 (2d Cir. 2015) ("Plaintiffs also cite two out-of-circuit cases denying qualified immunity to officers who arrested protesters after arguably sanctioning their traffic violations through their own directives. *See Vodak v. City of Chicago,* 639 F.3d 738, 743–44 (7th Cir.2011); *Buck v. City of Albuquerque,* 549 F.3d 1269, 1283 (10th Cir.2008). We have not been altogether unequivocal as to the relevance of out-of-circuit cases in our assessment of whether a right is clearly established for the purposes of qualified immunity. *Compare, e.g., Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir.2010) ("Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue, even if those decisions come from courts in other circuits.") (internal quotation marks omitted), *with Pabon v. Wright,* 459 F.3d 241, 255 (2d Cir.2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."). But we need not resolve that tension here, because the out-of-circuit precedent cited by plaintiffs has not placed the question at issue in this case 'beyond debate.'. . Extending *Cox* beyond its due process holding, and agreeing on neither the constitutional right at stake nor its contours, *Vodak* and *Buck*—even assuming *arguendo* that their holdings might otherwise be relevant in the specific factual context of this case—do not foreshadow the law of which a reasonable officer in this circuit should be aware.")

Terebesi v. Torreso, 764 F.3d 217, 231 & n.12 (2d Cir. 2014) ("To determine whether the relevant law was clearly established, we consider the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law. . . Even if this Court has not explicitly held a course of conduct to be unconstitutional, we may nonetheless treat the law as clearly established if decisions from this or other circuits ' "clearly foreshadow a particular ruling on the issue."'. . . We do not think that, as some decisions in this Circuit have suggested, '*[o]nly* Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established.' *Moore v. Vega,* 371 F.3d 110, 114 (2d Cir.2004) (emphasis added) (citing *Townes v. City of New York,* 176 F.3d 138, 144 (2d Cir.1999), *cert. denied*, 528 U.S. 964). (The author of this opinion was a member of the panel in *Moore.*) *Townes* correctly stated

that we consider "whether the Supreme Court or the Second Circuit had affirmed the existence of the right," *Townes,* 176 F.3d at 144, but the opinion also made clear that, "[e]ven in the absence of binding precedent, a right is clearly established if the contours ... are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (citing *Anderson,* 483 U.S. at 640) (internal quotation marks and brackets omitted). Though not directly binding on this Court, the decisions of other circuits may reflect that the contours of the right in question are clearly established.")

Scott v. Fischer, 616 F.3d 100, 105 (2d Cir. 2010) ("Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts 'clearly foreshadow a particular ruling on the issue,' *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir.1997) (internal quotation marks omitted), even if those decisions come from courts in other circuits, *see, e.g., id.; Weber v. Dell*, 804 F.2d 796, 801 n. 6, 803-04 (2d Cir.1986) (relying on decisions by seven other circuits finding similar searches unconstitutional, even though this Circuit had not yet reached the issue, in concluding that the defendant was not entitled to immunity), *cert. denied*, 483 U.S. 1020 (1987).")

Pabon v. Wright, 459 F.3d 241, 254, 255 (2d Cir. 2006) ("At the time of Pabon's Hepatitis C treatment, it was clearly established that the Fourteenth Amendment confers the right to refuse medical treatment. . . The concomitant right to medical information was not clearly established, however, because neither this court nor the Supreme Court had recognized such a right at that time. Thus, no official would have been aware that the failure to provide Pabon with such information as a reasonable patient would find necessary to make an informed decision regarding treatment was a violation of his substantive due process rights. We do not agree with Pabon that *White*, *Benson*, and *Clarkson* render this right to medical information clearly established. When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit.").

Hanrahan v. Doling, 331 F.3d 93, 98 n.6 (2d Cir. 2003) ("We note that the extent to which district court decisions may be taken into account in evaluating whether a right is clearly established for qualified immunity purposes is far from clear.")

Anobile v. Pelligrino, 303 F.3d 107, 125, 126 (2d Cir. 2002) ("We believe that the issue presented in this case, whether dormitories located on the premises of a highly regulated business deserve the same Fourth Amendment protections afforded to private residences, was hardly clearly established in December 1997. At the time of the search, competing Supreme Court and Second Circuit precedent potentially applied to this issue. On one hand, some cases hold that warrantless administrative searches are permissible where the regulatory scheme concerns an important government interest, and the scheme provides notice to the proprietors of commercial premises of the likelihood of searches. . . On the other hand, some cases hold that homes, and even private

rooms, are accorded the highest Fourth Amendment protections. . . As of the time of the search at issue, no decision of this Court had addressed, even generally, the permissibility of searching residential rooms on the grounds of a highly regulated commercial enterprise. We therefore agree with the district court that the law governing the searches of dormitories on racetrack grounds was not clearly established at the time of this search.").

African Trade & Information Center, Inc. v. Abromaitis, 294 F.3d 355, 361 (2d Cir. 2002) ("[T]he question before us is whether, as of September 1998, a bidder or applicant for a new government contract who lacked a preexisting commercial relationship with the government had a clearly established right not to be denied the contract in retaliation for his or her protected speech. Neither the Supreme Court nor this Court has yet addressed that question, and thus the right asserted by plaintiffs has not been established by decisions of those courts. This is not necessarily an insurmountable barrier to a finding that the right exists, as the Supreme Court has left open the possibility that a right may be 'clearly established' by decisions of other lower courts. . . Although we have consistently held that our own decisions may support the existence of the right in question, as we recently observed in *Poe v. Leonard*, 282 F.3d 123 (2d Cir.2002), our decisions send conflicting signals as to whether the decisions of other circuits may do so as well. . . We need not resolve the issue in this case because the right has not been clearly established by any court.").

Poe v. Leonard, 282 F.3d 123, 142 n.15 (2d Cir. 2002) ("It is unclear the extent to which we may rely on the case law of other circuits to determine whether the law was clearly established. The Supreme Court cases, *Anderson* and *Harlow,* from which the 'clearly established' rule derives do not provide a clear answer, as the *Anderson* Court does not discuss the issue, 483 U.S. at 639-40, and the *Harlow* Court expressly avoids deciding the question, *see Harlow v. Fitzgerald,* 457 U.S. 800, 818 n. 32 (1982). Our opinions have differed on this issue. [citing cases] . . . . Given that the factual situation presented here is unusual in the sense that Pearl was not performing the police functions we usually encounter in such cases and that Leonard, who is indirectly implicated in Pearl's violation, is the individual whose understanding needs to be evaluated, we rely primarily on our cases to ascertain whether the law was clearly established but discuss other circuits' cases because they are instructive.").

Charles W. v. Maul, 214 F.3d 350, 353, 360, 361 (2d Cir. 2000) ("A right may be said to be clearly established when it has been recognized either by the Supreme Court or by the applicable Circuit Court. Whether a right recognized only by a trial court or by a state court is clearly established presents a closer question. . . . The district court held that a single state trial court decision can 'clearly establish' the relevant constitutional right in a case such as this one. It reasoned that when the government defendants are the very ones who litigated and lost the relevant state court case, they should not later be permitted to plead ignorance of its holding. We see no need to reach this somewhat problematic question. . . . Although *Ritter* defined a right with reasonable specificity, the right it posited was at odds with this Circuit's applicable law. In claiming the existence of a constitutional right, plaintiff may not exploit a lower state court opinion–inconsistent with this Circuit's precedent–as clearly establishing that right sufficient to

deprive state officials, regardless of the level of their positions, of a qualified immunity defense. As a consequence, the right upon which McGhie relies can not be said to have been clearly established. We therefore dismiss McGhie's equal protection claim against defendant Sarkis.").

Russell v. Selsky, 35 F.3d 55, 60 (2d Cir. 1994) ("We conclude that in the absence of Supreme Court or Second Circuit precedents prescribing a right to have separate review and hearing officers in a state prison disciplinary hearing, there is no such clearly established right . . . .").

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991) ("In determining whether a particular right was clearly established at the time defendants acted, this Court has considered three factors: (1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question, and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.").

Soto v. City of New York, No. 12-CV-6911 RA, 2015 WL 3422155, at *3 n.1 (S.D.N.Y. May 28, 2015) ("There does not appear to be Supreme Court precedent directly on point and, to date, the Supreme Court has left open the question of whether, in the absence of controlling Supreme Court precedent, controlling circuit precedent constitutes clearly established federal law. *See Sheehan,* 2015 WL 2340839, at *9 (citing *Carroll v. Carman,* 135 S.Ct. 348, 350 (2014) (*per curiam*)). The Second Circuit, however, has instructed courts to 'look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation.' *Garcia,* 779 F.3d at 92 (quoting *Okin v. Vill. of Cornwall–On–Hudson Police Dep't,* 577 F.3d 415, 433 (2d Cir.2009)). Moreover, the ' "absence of a decision by [the Second Circuit] or the Supreme Court directly addressing the right at issue will not preclude a finding that the law was clearly established" so long as preexisting law "clearly foreshadow[s] a particular ruling on the issue."' *Id.* (quoting *Tellier v. Fields,* 280 F.3d 69, 84 (2d Cir.2000)).")

Franklin v. County of Dutchess, 225 F.R.D. 487, 494 (S.D.N.Y. 2005) ("The Second Circuit has held that the law cannot be 'clearly established' for qualified immunity purposes by district court opinions, but only by the decisions of the applicable circuit court or the Supreme Court. . . Therefore, this Court's decision in *Murcia* is not sufficient to put Sheriff Anderson on notice, as of the date of that decision, that the indiscriminate strip searching of newly-arrived felony detainees was unlawful, nor is the law 'clearly established' for qualified immunity purposes. That being so, I conclude that, until the Court of Appeals clearly extends the reach of *Weber/Walsh/Wachtler/Shain I* to a new class of persons–felony detainees–reasonable law enforcement officials in Sheriff Anderson's position could come to different conclusions about what the law permits with respect to on-arrival strip searches of such individuals. Thus, to the extent that Ramona Franklin seeks to hold the sheriff liable for enforcing a policy that required the strip searching of accused felons who arrived at the DCJ, the Sheriff is entitled to qualified immunity.").

THIRD CIRCUIT

Hubbard v. Taylor, 538 F.3d 229, 236, 238 (3d Cir. 2008) (Neither the Supreme Court nor the Third Circuit has Aestablished a right of pretrial detainees to be free from triple-celling or from sleeping on a mattress placed on the floor. . . . In the absence of direct authority from the Supreme Court or this Court, the Defendants in this case were not obliged to familiarize themselves with, and adhere to, the decisions of district courts outside their jurisdiction when the very court to whose jurisdiction they were subject repeatedly approved of their practices at Gander Hill.").

Williams v. Bitner, 455 F.3d 186, 194 (3d Cir. 2006) ("In sum, we hold that the Prison Officials are not entitled to qualified immunity from Williams's First Amendment claim. Although we had not yet addressed the issue raised here at the time of the incident, the Fifth, Seventh, and Eighth Circuits had addressed First Amendment claims similar to Williams's and held that prison officials must respect and accommodate, when practicable, a Muslim inmate's religious beliefs regarding prohibitions on the handling of pork. Moreover, decisions from the Supreme Court and this Court support the principles underlying the right asserted by Williams. We therefore conclude that the state of the law at the time the violation occurred gave the Prison Officials 'fair warning' that their alleged treatment of Williams was unconstitutional.").

Doe v. Delie, 257 F.3d 309, 321 (3d Cir. 2001) ("District court opinions may be relevant to the determination of when a right was clearly established for qualified immunity analysis. [footnote surveying circuits in terms of weight afforded district court opinions in clearly-established-law analysis] However, in this case, the absence of binding precedent in this circuit,. . . the doubts expressed by the most analogous appellate holding, together with the conflict among a handful of district court opinions, undermines any claim that the right was clearly established in 1995.").

Pro v. Donatucci, 81 F.3d 1283, 1291-92 (3d Cir. 1996) ("We agree with the district court that Pro's right to respond to the subpoena without fear of retaliation was clearly established at the time Donatucci acted. . . . *Bieregu* [*v. Reno*, 59 F.3d 1445, 1459 (3d Cir. 1995)]found law to be clearly established despite a circuit split, as long as 'no gaping divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule' to the contrary. . . Thus, the split between the Courts of Appeals for the Fifth and the Fourth [footnote omitted] Circuits at the time of Donatucci's actions does not preclude our deciding that Pro's right to respond to the subpoena was clearly established.").

Brown v. Grabowski, 922 F.2d 1097, 1118 (3d Cir. 1990) ("We believe that *Thurman*,. . . a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim . . . to enable reasonable officials to '"anticipate [that] their conduct [might] give rise to liability for damages."' [cites omitted]).

Brothers v. Lawrence County Prison Bd., 2008 WL 146828, *13 & n.10 (W.D.Pa. Jan.14, 2008) ("Defendants argue that the law of the United States Supreme Court and the Third Circuit did not

clearly establish that Plaintiff had a First Amendment right not to be strip searched by a female nor was any other constitutional right not to undergo a cross gender strip search clearly established. The Defendants appear to assume, at least in part, that when this court conducts a clearly established analysis, the only proper precedent to look to is that emanating from either the Supreme Court or from within the Third Circuit. However, this court is not convinced that there are such limitations. [reviewing cases] In light of this, and in light of the fact that the Court of Appeals for the Fifth Circuit held as early as 1999 in *Moore v. Carwell*, 168 F.3d 234 (5th Cir.1999), that a cross gender strip search could violate the constitution where no exigent circumstances required a cross gender, as opposed to a same gender strip search, Defendants have not carried their burden at this stage to show the law was not clearly established. . . . .Because the Defendants relied upon their mistaken view of the proper analysis to be undertaken to find 'clearly established' they simply stated that there were no Supreme Court or Third Circuit cases establishing the right not to be stripped searched. Now that they are relieved of their mistaken belief, any denial of their motion to dismiss based upon a claim of qualified immunity is without prejudice to them reasserting their qualified immunity at the summary judgment stage, by making the argument that they are entitled to qualified immunity based on the state of the law even outside this Circuit. It may be that the Fifth Circuit's decision in *Moore v. Campbell* is aberrational, or that there is a great deal of conflicting Circuit Court opinion but this will be for the Moving Defendants to ferret out, not this court.").

FOURTH CIRCUIT

Booker v. South Carolina DOC, 855 F.3d 533, 539-46 (4th Cir. 2017), *cert. denied*¸ 138 S. Ct. ___ (U.S. Jan. 16, 2018) ("The Supreme Court, in an opinion authored by Chief Justice Rehnquist, articulated that courts may rely on 'a consensus of cases of persuasive authority' to determine whether a 'reasonable officer could not have believed that his actions were lawful.'. . Since *Wilson*, the Supreme Court has reaffirmed that 'qualified immunity is lost when plaintiffs point either to "cases of controlling authority in their jurisdiction at the time of the incident" or to "a consensus of cases of persuasive authority."'. . . And in evaluating whether a right is clearly established in a given circuit, the Supreme Court has looked to precedent from other circuits. [citing *Pearson* and *Brosseau*] . . . . At the outset, we preempt a possible point of confusion—Booker did *not* allege in his complaint that he has an absolute right to file prison grievances pursuant to the First Amendment. Rather, Booker alleged that he has a First Amendment right to be free from retaliation when he does file a grievance pursuant to an existing grievance procedure. . . More particularly, Booker asserts that this right is rooted in the First Amendment's Petition Clause, which guarantees individuals the right 'to petition the Government for a redress of grievances.'. . Booker contends that an inmate's right to petition is violated when he is retaliated against for filing a grievance. . . . Booker's detailed factual allegations and his reference to the First Amendment provide a more-than-sufficient basis for us to analyze whether the right was clearly established under the Petition Clause. . . .The clearly established inquiry asks whether the state of the law gave a reasonable prison official 'fair warning' that retaliating against an inmate who files a prison grievance was unconstitutional. It is 'well established' in this Circuit that a 'public official may not misuse his

power to retaliate against an individual for the exercise of a valid constitutional right.'. . . Thus, if an inmate exercises his First Amendment right when he files a prison grievance, retaliation against him for doing so is unconstitutional. The pertinent question in this appeal, then, is whether it was clearly established that an inmate exercises a First Amendment right to petition for redress of grievances when he files a prison grievance. Framed differently, we must determine whether it was clearly established that an inmate's right to petition is violated when he is retaliated against for filing a grievance. . . . *Adams* [*v. Rice*, 40 F.3d 72 (4th Cir. 1994)] establishes a clear rule: inmates have no constitutional entitlement or due process interest in access to a grievance procedure. An inmate thus cannot bring a § 1983 claim alleging denial of a specific grievance process, for example. But *Adams* is entirely silent on the issue in this case—whether an inmate's First Amendment right is violated when he is *retaliated against* for submitting a grievance pursuant to an existing grievance procedure. That a prison is not required under the Constitution to provide access to a grievance process does not mean that prison officials who retaliate against inmates for filing grievances do not violate the Constitution. . . .The Eighth Circuit is not alone in finding that although inmates do not have a constitutional entitlement to and/or due process interest in accessing a grievance procedure, they have a First Amendment right to be free from retaliation when they do file. [collecting cases from other Circuits] In short, *Adams* concerns whether inmates have a constitutional entitlement to or liberty interest in accessing grievance procedures. It says nothing about whether a prison official violates an inmate's First Amendment rights by retaliating against the inmate for submitting a grievance. Therefore, contrary to Appellees' suggestion, *Adams* does not speak to the right at issue. As such, neither party has cited cases from courts of controlling authority—the Supreme Court, this Court, or the Supreme Court of South Carolina—that explicitly address an inmate's First Amendment right to be free from retaliation for filing a prison grievance. . . .We therefore agree with the district court's conclusion that no published decision from the Supreme Court, this Court, or the Supreme Court of South Carolina squarely addresses whether filing a grievance is protected First Amendment conduct. The district court, after determining there were no binding cases that squarely established the specific First Amendment right, concluded that the right was not clearly established. . . But the clearly established inquiry was not complete: as this Court has stated, and as Booker recognizes, the 'absence of controlling authority holding identical conduct unlawful does not guarantee qualified immunity.'. . The district court failed to consider whether, despite the lack of directly on-point, binding authority, the right was clearly established based on general constitutional principles or a consensus of persuasive authority. We now proceed to that task. . . .In the absence of controlling authority that specifically adjudicates the right in question, a right may still be clearly established in one of two ways. A right may be clearly established if 'a general constitutional rule already identified in the decisional law [ ] appl[ies] with obvious clarity to the specific conduct in question.'. . A right may also be clearly established based on a ' "consensus of cases of persuasive authority" from other jurisdictions.'. . Here, Booker argues that his First Amendment right was clearly established in both ways. Arguably, the prohibition on retaliating against inmates for filing grievances was obviously unconstitutional given longstanding principles articulated in controlling authority. It is beyond dispute that prison officials cannot retaliate against inmates for exercising a constitutional right. . . And Booker presents a logical and compelling argument that, in light of binding Supreme Court

precedent, he exercised his constitutional right to petition the government for redress of grievances when he filed an administrative grievance seeking redress for what he believed was the improper handling of his legal mail. . . In addition to Supreme Court precedent, this Court has long held that prison officials may not retaliate against prisoners for exercising their right to access the courts, . . . which is a component of the right to petition for redress of grievances [.] . . . Given the close relationship between an inmate filing a grievance and filing a lawsuit—indeed, the former is generally a prerequisite for the latter—our jurisprudence provided a strong signal that officials may not retaliate against inmates for filing grievances. Regardless of whether Booker's right was obvious or 'manifestly apparent' from broader principles in the decisional law, we find that it was clearly established based on a robust 'consensus of persuasive authority.' The Second, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have all recognized in published decisions that inmates possess a right, grounded in the First Amendment's Petition Clause, to be free from retaliation in response to filing a prison grievance. . . .The Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have likewise recognized that inmates possess a First Amendment petition right to be free from retaliation for filing grievances. [collecting cases] Even more, the Third, Fifth, and Tenth Circuits have recognized an inmate's right to be free from retaliation for filing a grievance under the First Amendment (albeit without referencing a particular clause). [collecting cases] Given the decisions from nearly every court of appeals, we are compelled to conclude that Booker's right to file a prison grievance free from retaliation was clearly established under the First Amendment. Consistent with fundamental constitutional principles and common sense, these courts have had little difficulty concluding that prison officials violate the First Amendment by retaliating against inmates for filing grievances. Rarely will there be such an overwhelming consensus of authority recognizing that specific conduct is violative of a constitutional right. The unanimity among our sister circuits demonstrates that the constitutional question is 'beyond debate,' and therefore we find that the right at issue was clearly established. . . . Our 'conclusion that "a reasonable person would have known," *Harlow* [*v. Fitzgerald*, 457 U.S. 800, 818 (1982)], of the violation is buttressed by' the South Carolina Department of Correction's internal policies. . . Although officials 'do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision,'. . . the Supreme Court has analyzed prison regulations in combination with case law to determine whether an individual had fair warning[.] [citing *Hope*] Here, the SCDC's detailed policy document concerning the 'Inmate Grievance System'. . .expressly provides that '[n]o inmate will be subjected to reprisal, retaliation, harassment, or disciplinary action for filing a grievance or participating in the resolution of a grievance.'. . The record further indicates that this prohibition was communicated to prison officials. . . . Again, the fundamental inquiry for purposes of qualified immunity is whether a reasonable official in Jones's position had 'fair warning' that the alleged conduct was unconstitutional. . . The unequivocal language of SCDC's own policies provides additional support for our finding that Jones had such warning here. In sum, given the authority discussed above, we conclude that a reasonable prison official had fair warning that retaliating against an inmate who filed a prison grievance was unlawful. Because an inmate's First Amendment right to be free from retaliation for filing a grievance was clearly established, we find that Appellees are not entitled to qualified immunity on that basis and therefore the district court erred in granting their motion for summary judgment.")

Booker v. South Carolina DOC, 855 F.3d 533, 547-53 (4th Cir. 2017) (Traxler, J., dissenting), *cert. denied*, 138 S. Ct. ___ (U.S. Jan. 16, 2018) ("Relying on decisions from other circuits, the majority concludes that a prisoner's right to be free from retaliation for filing a grievance was clearly established in 2010, when the actions giving rise to this lawsuit took place. Even assuming that that right may have been clearly established in *other* circuits, the case law from *this* circuit in 2010 could reasonably be understood as foreclosing that claim. *See Adams v. Rice*, 40 F.3d 72 (4th Cir. 1994). Because the controlling law in this circuit did not put the prison officials on notice that their conduct violated Booker's constitutional rights, I believe the prison officials are entitled to qualified immunity. Accordingly, I respectfully dissent. . . . I do not disagree that the weight of authority outside this circuit holds that the First Amendment is violated when prison officials retaliate against an inmate for filing a grievance under an established grievance system. Where I disagree with the majority is in its conclusion that case law from this circuit was silent on the relevant First Amendment question. In my view, this court's decision in *Adams v. Rice* could reasonably be understood as holding that an inmate's use of a prison grievance system does not implicate the First Amendment and that grievance-based retaliation against the inmate likewise does not implicate the First Amendment. Because *Adams* can reasonably be understood to permit the actions of the prison officials at issue in this case, the majority erred by looking outside the circuit to conclude otherwise. . . .[I]f filing a grievance implicates no constitutional right, then retaliation against the inmate because of the grievance does not violate the Constitution. . . . I simply see no basis for concluding, as the majority apparently does, that the act of filing a grievance -- an act that is *not* constitutionally protected -- somehow imbues the filing with constitutional protections. Accordingly, it seems to me that this court's decision in *Adams* affirmatively closes the door to the retaliation claim being asserted here. . . .In my view, *Adams* directly, though not explicitly, forecloses Booker's retaliation claim. But even if the distinction between this case and *Adams* that the majority apparently embraces were viable, a reasonable prison official could still conclude that the actions alleged in this case were permissible under this court's decision in *Adams*. . . . I therefore believe that the defendants are entitled to qualified immunity. . . .In *Adams*, this court held that 'there is no constitutional right to *participate* in grievance proceedings.' 40 F.3d at 75 (emphasis added). Because inmates participate in grievance proceedings by *filing a grievance*, our decision in *Adams* must be understood as holding that inmates have no constitutional right to file a grievance. The filing of a grievance therefore implicates no constitutional right of the inmate and cannot support a retaliation claim against prison officials. . . .*Adams* is binding authority that directly rejects the constitutional right asserted in this case. The majority errs by ignoring *Adams* and relying instead on out-of-circuit cases that are inconsistent with our holding in *Adams* in order to declare that an inmate's right to be free from retaliation for filing a grievance was clearly established. Accordingly, for the foregoing reasons, I believe that the defendants are entitled to qualified immunity, and I therefore respectfully dissent from the majority's contrary conclusion.")

Owens by and through Owens v. Lott, 372 F.3d 267, 279, 280 (4th Cir. 2004) ("Whether a right has been specifically adjudicated or is manifestly apparent from broader applications of the

constitutional premise in question, we look ordinarily to 'the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.'. . When there are no such decisions from courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists. . . There is no controlling authority that informs our analysis in this case. As we have already noted, the Supreme Court has not addressed the circumstances, if any, under which an 'all persons' provision in a search warrant is constitutional, . . . nor has this court done so. The vast majority of the decisions from other jurisdictions considering the validity of 'all persons' warrants–mostly state decisions–conclude that a search warrant authorizing the search of 'all persons' found on the premises does not violate the Fourth Amendment per se. Beyond that broad conclusion, however, courts impose different requirements for what is necessary to sustain the validity of such a warrant. . . . Moreover, these decisions provide no clear view, let alone a consensus, regarding what factors are most significant in deciding whether sufficient probable cause exists to support the search of 'all persons' found in a private residence being searched for drugs. . . . We conclude that at the time of the search, the law was not sufficiently clear to strip defendants of qualified immunity.")

Rogers v. Pendleton, 249 F.3d 279, 287, 288 (4th Cir. 2001) ("In determining whether a right is clearly established, we may rely upon cases of controlling authority in the jurisdiction in question, or a 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' *Wilson*, 526 U.S. at 617. While a consensus of cases of persuasive authority may clearly establish a right for qualified immunity purposes, the inverse is also true: if there are no cases of controlling authority in the jurisdiction in question, and if other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established for qualified immunity purposes. . . Therefore, having determined that the United States Supreme Court has, in *Oliver* and *Dunn*, established the right to be free of searches of the curtilage based merely on reasonable suspicion, we must survey the cases cited by the officers to determine whether these cases could cause a reasonable officer to believe that the search planned by the officers in this case was constitutional. . . . Because the officers do not claim to have had a warrant, exigent circumstances, or probable cause, it follows that their contemplated search was illegal, and it was plainly so based upon clearly established law at the time of the search.").

Snyder v. Ringgold, 133 F.3d 917 (Table), 1998 WL 13528, *3 (4th Cir. Jan. 15, 1998) ("The right for which plaintiff contends has not been clearly established by specific adjudication. No Supreme Court or Fourth Circuit case has held that reporters have a constitutional right of equal or nondiscriminatory access to government information that need not otherwise be made available to the public. In fact, the district court opinion below relied only on three, relatively old federal district court decisions and one state court of appeals decision in support of its holding that Ringgold had violated Snyder's First Amendment rights. . . .On appeal, the plaintiff has cited cases from the First, Second, and District of Columbia Circuit Courts of Appeals that consider issues that she believes to be analogous to the issue in this case. . . . The plaintiff's resort to these

out-of-circuit cases merely underscores the lack of Fourth Circuit and Supreme Court law establishing the right for which she contends.").

FIFTH CIRCUIT

Vincent v. City of Sulphur, 805 F.3d 543, 548-51 (5th Cir. 2015) ("The cited cases, however, do not reflect clearly established law in this circuit under these facts. . .Although the Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes, none comes near the level of specificity needed to put 'beyond debate' the related but distinct proposition that a person under investigation for threatening deadly violence against city officials has a right to notice and a hearing before being banned from entering city buildings. . . None of the Supreme Court cases mirrors the facts or the district court's legal reasoning—in fact, none of them addresses an *Eldridge*-type procedural-due-process claim at all. The cases from the Sixth and Eleventh Circuits and the Texas intermediate court come somewhat closer—they at least address procedural-due-process claims in the context of the right to enter or remain on government property. But two out-of-circuit cases and a state-court intermediate appellate decision hardly constitute persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit. A review of the decisions on which the district court relied demonstrates their insufficiency for a 'clearly established' finding. . . . The district court also relied on three out-of-jurisdiction lower-court decisions to support its conclusion that the procedural-due-process right was clearly established. Unlike the Supreme Court cases cited above, those three cases—two from our sister circuits and one from an intermediate Texas state court—do deal specifically with procedural due process in the context of the right to go about lawfully in public areas. And *Kennedy,* . . . even goes so far as to find that a procedural-due-process right in this context is clearly established. But those decisions, taken together, cannot support a finding of a clearly established right here. First, two cases from other circuits and one from a state intermediate court do not, generally speaking, constitute persuasive authority defining the asserted right at the high degree of particularity that is necessary for a rule to be clearly established despite a lack of controlling authority. In any event, those three cases address matters that are sufficiently legally or factually distinguishable as to make a finding of clearly established law improper. . . .In summary, as we have explained, the alleged constitutional right was not clearly established, so the officers are entitled to qualified immunity. We need not reach the question whether the officers in fact committed a procedural-due-process violation. We therefore REVERSE the order denying summary judgment and REMAND for further proceedings as needed.")

Breen v. Texas A & M University, 485 F.3d 325, 339, 340 (5th Cir. 2007) ("Applying the principles of *McClendon* to this case, we conclude that the state-created danger theory was not clearly established law in this circuit, with respect to the specific facts here or otherwise, by November 18, 1999, and, accordingly, the defendants are entitled to qualified immunity from plaintiffs' section 1983 claims. . . . .In light of this court's historical reticence towards adopting the state-created danger theory. . . neither this court's discussions of the theory nor our sister circuits' adoption of it convinces us that a reasonable official in any of the defendants' shoes would

have had fair notice on or before November 18, 1999 that his conduct with respect to the danger created by the Texas A & M bonfire stack could violate the students' constitutional rights. Because this court's pre-November 1999 decisions evince substantial uncertainty as to the existence of even the general right that the plaintiffs claim has been violated, those decisions cannot be said to have given defendants fair warning that any of their actions or omissions with respect to the 1999 Texas A & M bonfire construction could violate the affected students' constitutional rights. Moreover, similar to the situation in *McClendon*, any consensus of the other federal circuits in adopting various formulations of the state-created danger theory is insufficient for this court to find that the theory was clearly established in this circuit as applied to these cases. Although a majority of federal circuits had approved of the state-created danger theory in a general sense by November 18, 1999, there was not a consensus among those courts as to the contours of the underlying substantive due process right, . . . and the plaintiffs have not pointed to (and this court has not found) any pre-collapse cases in which an appellate court applied the state-created danger theory on facts even remotely analogous to the facts of these cases. Accordingly, we find that the adoption of the state-created danger theory in other circuits before November 1999 was insufficient to give the University officials fair notice that their conduct violated the students' constitutional rights.").

McClendon v. City of Columbia (McClendon II), 305 F.3d 314, 329-31 (5th Cir. 2002) (en banc)("[L]anguage in *Wilson* clearly suggests that, in the absence of directly controlling authority, a 'consensus of cases of persuasive authority' might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful. . . . Because the Supreme Court's method of analysis in *Wilson* is inconsistent with the rule predicated in *Shipp, Shipp*'s statement that 'we are confined to precedent from our circuit or the Supreme Court' in analyzing whether a right is clearly established for the purposes of qualified immunity analysis, *see* 234 F.3d at 915, is overruled. . . . As we have recognized on numerous subsequent occasions, our decision in *Salas* did not address the viability of the state-created danger theory or define the contours of an individual's right to be free from state-created dangers. . . . *Salas* simply held that, even under the most expansive articulations of the state-created danger doctrine sanctioned by other courts at that time, the plaintiffs had not stated a cognizable claim. This discussion in *Salas* would not have provided a reasonable officer with 'fair warning' that creating or increasing a danger to a known victim with deliberate indifference towards that victim violates the victim's substantive due process rights. Furthermore, our *Salas* decision was certainly insufficient to provide a reasonable officer with 'fair warning' that Detective Carney's particular actions in loaning Loftin a gun would violate McClendon's substantive due process rights. Turning to the law of our sister circuits, we note that six circuits had sanctioned some version of the state-created danger theory in July of 1993, at the time of Detective Carney's allegedly unlawful actions. . . . Moreover, as McClendon correctly points out, no circuit had explicitly rejected the state-created danger theory in July of 1993. While both of these factors are relevant to our determination whether there was a 'consensus of cases of persuasive authority' sufficient to provide Detective Carney with 'fair warning' that his acts were unlawful, the mere fact that a large number of courts had recognized the existence of a right to be free from state-created danger in some circumstances as of July, 1993 is insufficient to clearly establish the

unlawfulness of Detective Carney's actions. The Supreme Court has recognized on numerous occasions that the operation of the 'clearly established' standard depends substantially upon the level of generality at which the relevant legal rule is defined.").

Doe v. State of Louisiana, 2 F.3d 1412, 1416 n.8 (5th Cir. 1993) ("In examining preexisting law, [a]s a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. [citations omitted]. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions." [quoting *Melear v. Spears*, 862 F.2d 1177, 1184 n. 8 (5th Cir.1989)]).

Strickland v. City of Crenshaw, Miss., 114 F. Supp. 3d 400, 417-18 (N.D. Miss. 2015) ("[T]he court concludes that plaintiffs have presented insufficient authority to 'clearly establish' the parameters of any permissible 'pointing of weapons' at occupants of a home during the execution of a search warrant, so as to overcome the qualified immunity defense raised by each individual defendant in this case. As quoted above, plaintiffs cite a single decision from a different circuit, *Holland v. Harrington,* 268 F.3d 1179, 1192–93 (10th Cir.2001) on this issue, but this is plainly insufficient to clearly establish the law in this regard. . . Plaintiffs' reliance upon a single decision from another circuit is particularly lacking in light of the fact that the Supreme Court has stated that, to overcome a qualified immunity defense, the defendant must have violated 'clearly established statutory or constitutional rights *of which a reasonable person would have known.*'. . While it may be rather fictional to assume that officers would even be aware of Fifth Circuit authority on this issue, plaintiffs have a particularly poor argument on this point in relying on a single decision from another circuit. Some indication of the quantum of authority which might suffice in this regard can be gleaned from recent U.S. Supreme Court precedent, where the Court has suggested that either a decision from that Court or a 'robust consensus of cases of persuasive authority in the Courts of Appeals' would be necessary to 'clearly establish the federal right respondent alleges' in qualified immunity cases. . .Clearly, a single decision from one circuit court does not constitute a 'robust consensus' among the federal circuits, and plaintiffs have therefore failed to 'clearly establish' the parameters of the legal duty which they claim was violated in this case. Even assuming that there are other federal circuits which reached a similar result as the Tenth Circuit in *Holland,* it is clear that, in the qualified immunity context, plaintiffs have the burden of finding and citing that authority, and they have failed to do so. It appears likely to this court that any 'robust consensus' of federal appellate authority which might arise on this issue would need to take account of a number of difficult factors to ensure that the rights of plaintiffs and police officers are appropriately balanced. Courts would likely have to grapple, for example, with the seeming ease with which fact issues in this regard could be manufactured, if it were sufficient for a plaintiff to allege that a gun was pointed at him or a family member and that an emotional injury

resulted. Indeed, it is difficult to discern how fact issues in this regard could ever be found lacking in such a legal context, if a plaintiff simply offered his own self-serving testimony in this regard. In the court's view, courts seeking to establish standards in this context would also likely need to consider the issue of whether an officer in question had reason to have drawn his weapon at all. In cases where an officer had such a reason (as when executing a search warrant of a suspected drug dealer's house), then it should seemingly be much more difficult for plaintiffs to establish that his actions in 'pointing' his weapon in a particular direction were objectively unreasonable than if he had no good reason to have pulled his weapon at all. That brings this court to a final weakness in plaintiffs' qualified immunity arguments. As discussed previously, the Supreme Court in *Anderson v. Creighton* emphasized that a central part of the qualified immunity analysis involves determining whether a reasonable officer in the position of the defendant *could have believed* that his actions were lawful. . .This necessarily requires the plaintiff to demonstrate that the *specific circumstances* which the officer encountered would have led a reasonable officer to understand that his actions were unlawful, in light of clearly established authority of which a reasonable officer would have known. In their arguments quoted above, plaintiffs do not offer either sufficient factual context or legal arguments to allow this court to make a determination in this regard, with regard to Linzy or any of the other defendants. Indeed, plaintiffs' qualified immunity arguments as a whole are quite brief and conclusory and do not reflect the facts that 1) they have the burden of proving that qualified immunity is inapplicable and 2) they are seeking to impose the expense and stress of trial upon officers whom the law does not lightly consider to be either 'plainly incompetent' or willful constitutional violators. In light of the foregoing, the court finds plaintiffs' proof and arguments insufficient to overcome a qualified immunity defense, and defendants' motion to dismiss the excessive force claims asserted against them will therefore be granted.")

Davis v. Southerland, No. Civ.A. G-01-720**,** 2004 WL 1230278, at *6 (S.D. Tex. May 21, 2004) ("The Circuit has not merely declined to recognize the state-created danger theory of substantive due process; it has scrupulously avoided it for more than ten years. The Fifth Circuit's reluctance to adopt the state-created danger theory is therefore not a mere neutral factor to be considered against the general consensus among other circuits, but a caution that the Fifth Circuit might not join that consensus. [footnote omitted] This Court therefore most respectfully concludes that the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire-related activities. Because Plaintiffs' theory had not been adopted as a viable avenue to a substantive due process claim, a reasonable school official would not have been aware that the Fourteenth Amendment's Due Process Clause provided a constitutional right to be free from state-created danger, much less than an injury caused by a school administrator's failure to exercise control over an activity such as Bonfire would violate that right. Accordingly, Defendants are entitled to qualified immunity from Plaintiffs' § 1983 claims.").

SIXTH CIRCUIT

Brown v. Battle Creek Police Dep't., 844 F.3d 556, 566-67, 572 (6th Cir. 2016) ("Based on the precedent set forth by a large number of this Court's sister circuits, we hold that as a matter of first

impression there is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized. . . .As to Defendants' argument that it was not clearly established in 2013 that the seizure of a dog was a Fourth Amendment event, we hold that Defendants had reasonable notice that unreasonably shooting Plaintiffs' dogs would constitute the 'seizure' of an 'effect' within the meaning of the Fourth Amendment. . . . Every circuit that has considered this issue has concluded that the unreasonable killing of a dog constitutes an unconstitutional 'seizure' of personal property under the Fourth Amendment. . . .The Supreme Court and this Circuit have yet to decide this issue. Nevertheless, given the fact that every sister circuit that has confronted this issue has concluded that an individual has a property right in their dog, and that a district court within this Circuit has concluded the same, we hold that this right was clearly established in 2013 when the conduct in this action occurred. Therefore, we must next determine whether the seizures of the two dogs in the instant case were reasonable under the Fourth Amendment. . . .[T]he standard we set out today is that a police officer's use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the Fourth Amendment when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety. . . .Similar to *Altman*, the officers here confronted two large pit bulls for the first time in an unsupervised environment where they were unleashed and in an enclosed space with the officers. Given Jones' criminal history, gang affiliations, the types of drugs he was suspected of distributing, the fact that the officers had no time to plan for the dogs, in addition to the officers' unrebutted testimony that the dogs either lunged or were barking aggressively at the officers, the nature and size of the dogs, the fact that the dogs were unleashed and loose in a small residence, all culminate into a finding that the officers acted reasonably when they shot and killed the two dogs. Viewing the facts and all reasonable inferences in the light most favorable to Plaintiffs, we find that a jury would conclude that Officer Klein, Officer Young, and Officer Case acted reasonably in shooting and killing Plaintiffs' dogs. Summary judgment was therefore appropriate.")

Hall v. Sweet, 666 F. App'x 469, ___ & n.9 (6th Cir. 2016) ("A single district court opinion is not enough to pronounce a right is clearly established for purposes of qualified immunity. While a district court opinion may be *persuasive* in showing there is a clearly established right—perhaps by exposing a trend in non-precedential case law—it is not *controlling* on its own. . . . The same is true in other circuits. [collecting cases]; *but see Tarabochia v. Adkins*, 766 F.3d 1115, 1125 (9th Cir. 2014) ("[i]n the absence of binding precedent clearly establishing the constitutional right, we look to whatever decisional law is available including decisions of state courts, other circuits, and district courts") (internal quotations removed). . . .Further, even were we to consider *O'Donnel,* the proposition for which plaintiffs cite the case was extinguished by this circuit's directly contrary holding in *Andrews*. It cannot be said *O'Donnel* placed a constitutional question 'beyond debate' when later, in *Andrews*, this circuit found the very same question did not have a clear answer. In short, decisions from this court stand for the proposition that, between 2008 and 2011, it was not clearly established in any district of this circuit that the Fourth Amendment applied to social workers conducting a search of a home relating to the wellbeing of children. . . This uncertainty in

whether the Fourth Amendment applies to investigations related to child wellbeing contributes to a finding that defendants were not on clear notice whether their conduct violated the law.")

Hall v. Sweet, 666 F. App'x 469, ___ (6th Cir. 2016) (White, J., concurring in part and dissenting in part) (not published) ("I disagree with the majority's conclusion that the law was not clearly established as to whether social workers are subject to the Fourth Amendment's warrant requirements. The majority correctly identifies *Andrews* as the controlling precedent on this issue. There, this court reaffirmed that to determine whether there was a clearly established right, 'a district court looks to binding precedent by the Supreme Court, its court of appeals or itself.' *Andrews v. Hickman Cty., Tenn.*, 700 F.3d 845, 862 n.7 (6th Cir. 2012). '[W]e look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal.'. . As the majority notes, the Western District of Michigan, where this case originated, held in 2004 that 'the Fourth Amendment applies to [social workers], as it does to all other officers and agents of the state[.] ... There is ... no social worker exception to the strictures of the Fourth Amendment.' . . Since *O'Donnel* predated the challenged searches, it is sufficient to create a clearly established constitutional right in this context. This is especially true considering many other circuits had already decided that social workers are not exempt from the Fourth Amendment. [collecting cases] This large body of circuit authority, coupled with at least one case from the Western District of Michigan, clearly established at the time of the searches that social workers are subject to the Fourth Amendment's strictures. Because the second search violated Hall's clearly established Fourth Amendment rights, I would affirm the district court's denial of qualified immunity as to that search and remand for further proceedings.")

Brent v. Wenk, 555 F. App'x 519, 526, 527 (6th Cir. 2014) ("Collectively, *Andrews* and *Kovacic* indicate that before this court decided *Andrews* in 2012, a social worker entering a home without a warrant did not violate clearly established law, but a social worker removing a child without a warrant did. Brent does not allege that his children were removed in violation of the Fourth Amendment; he instead challenges the warrantless entry into his home. *Andrews* therefore controls this case, meaning that the social workers are entitled to qualified immunity on Brent's Fourth Amendment claim. Brent does not challenge this interpretation of *Andrews,* but instead argues that *Andrews* was wrongly decided. He relies on decisions of district courts within this circuit and the decisions of other circuits to establish that there has never been a social-worker exemption to the Fourth Amendment. Brent's argument is without merit. First, *Andrews* belies Brent's argument by holding that there was no clearly established law regarding a social worker exemption in 2008, when the events in *Andrews* took place. And Brent cites no case that would indicate a change in this circuit's law between 2008 and 2010, when the events of this case took place. Second, and relatedly, '[w]hen determining whether a constitutional right is clearly established, we look first to decisions of the Supreme Court, then to our own decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal.' *Andrews,* 700 F.3d at 853. Brent's reliance on district court cases within this circuit and on the law of other circuits is therefore unavailing. Because our circuit in *Andrews* held that there was no clearly established law regarding the Fourth

Amendment's applicability to social workers in 2008, that determination controls this case. We therefore reverse the judgment of the district court and grant the social workers qualified immunity on Brent's Fourth Amendment claims.")

Toms v. Taft, 338 F.3d 519, 527 n.5 (6th Cir. 2003) ("Although courts engaging in qualified immunity analyses often consider only case law when determining whether the right at issue was clearly established, the Supreme Court in *Hope* also considered a Department of Justice report and an Alabama Department of Corrections regulation in deciding whether the officials were on notice that their conduct violated the plaintiff's rights. . . In this case, therefore, while not dispositive, it is appropriate to consider the ODRC's policy, on which Brigano apparently relied, that 'all preparatory obligations, such as securing a marriage license, are the sole responsibility of the couple to wed,' in determining whether he knowingly violated plaintiffs' rights.").

Heggen v. Lee, 284 F.3d 675, 687 (6th Cir. 2002) ("Defendant's reliance on *Cope* is misplaced. This Court in *Cope* expressly stated that the parties had pointed to no law from the Sixth Circuit or the United States Supreme Court that would have put the county clerk on notice that her actions were unconstitutional. Defendant is foreclosed from arguing the same in the instant case because of *Hall.* The record shows that the actual duties of deputies in Hopkins County are essentially the same type of nonpolicymaking duties performed by the plaintiff in *Hall.* It is undisputed that Defendant informed Plaintiffs that they would not be rehired in late December 1998, more than a year after *Hall* was decided in October 1997. We believe that the right of these Plaintiffs to be free from patronage dismissals was 'sufficiently clear,' such that after *Hall,* a reasonable official would have understood that taking such an action against them for political reasons was unconstitutional.").

Risbridger v. Connelly, 275 F.3d 565, 569, 572 (6th Cir. 2002) ("A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point. . . . . Given the Supreme Court's express reservation of the question of whether a Fourth Amendment right to refuse to provide identification during a valid *Terry* stop renders invalid an arrest that is based on probable cause to believe the individual has violated a presumptively valid state or local law, as well as the lack of clear precedent from our circuit, we join the Seventh, Eighth, and Tenth Circuits and find that the contours of such a right were not sufficiently clear that the unlawfulness of plaintiff's arrest must have been apparent at the time.").

Williams v. Commonwealth of Kentucky, 24 F.3d 1526, 1537 (6th Cir. 1994) ("The First and Fifth Circuits have indicated in dicta without discussion that they would apply *Loudermill* to demotions. . . Two published opinions of district courts from other circuits have balanced the competing interests and found that a tenured public employee is entitled to a *Loudermill* hearing before being demoted. . . Therefore, the only authorities that clearly recognize a right to predemotion notice and hearing are the two district court opinions. . . . These decisions are not 'so clearly foreshadowed by' *Loudermill* or opinions in this circuit 'as to leave no doubt in the mind

of a reasonable officer that' not giving a tenured employee notice and hearing before a demotion would violate the employee's due process rights.").

Long v. Norris, 929 F.2d 1111 (6th Cir. 1991) (look first to decisions of Supreme Court, then to decisions of this court and other courts within circuit, and finally to decisions of other circuits).

Ohio Civil Service Employees Association v. Seiter, 858 F.2d 1171, 1177 (6th Cir.1988) ("[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct. . . would be found wanting.").

XXL of Ohio, Inc. Commerce v. City of Broadview Heights, No. 1:01CV2514, 2003 WL 23219809, at *44 (S.D. Ohio Feb. 24, 2003) (not reported) ("In the instant case, qualified immunity cannot protect the mayor and city council members of Broadview Heights from liability. On January 21, 2000 the Federal District Court for the Northen District of Ohio issued its decision in *North Olmsted*. XXL offers evidence to support, and defendants do not deny, that attorneys for Broadview Heights drew defendants' attention to the decision in *North Olmsted* and warned that the decision indicated that Broadview Heights' sign code was problematic. The city began issuing citations to XXL for violations of the sign ordinance on August 20, 2000. Any reasonable official in the position of the mayor and city council members of Broadview Heights would have known in light of *North Olmsted* that enforcement of Broadview Heights' sign ordinance against XXL violated XXL's clearly established rights under the First Amendment.").

Coy v. Bd. of Education of the North Canton City Schools, 205 F. Supp.2d 791, 805, 806 (N.D. Ohio 2002) ("The defendants say that because neither the Sixth Circuit nor courts within the Sixth Circuit have addressed the issue of student websites and the First Amendment, the constitutional right at issue was not clearly established. . . . The Court disagrees. As discussed above, *Tinker* applies to this case. The Sixth Circuit has discussed and applied *Tinker* on numerous occasions. . . . And while the Sixth Circuit has not directly dealt with the issue of a student website and the First Amendment, other courts have. . . . Once it is determined that the right is clearly established, the Court must determine whether the plaintiffs have alleged facts supported by sufficient evidence to indicate Stanley's and Shoup's actions were objectively unreasonable in light of the clearly established constitutional right. . . . As discussed above, there are material issues of genuine fact as to the motivation behind Stanley's and Shoup's decision to discipline Jon Coy. Therefore, the Court holds that Defendants Stanley and Shoup are not entitled to qualified immunity.").

SEVENTH CIRCUIT

Estate of Clark v. Walker, 865 F.3d 544, 551-52 (7th Cir. 2017) ("Clark's right to be free from deliberate indifference to his risk of suicide while he was in custody was clearly established at the time of his death in 2012. . . .Walker responds to this substantial body of case law in several ways. First, he argues that it is 'doubtful' whether circuit precedent can clearly establish law for purposes of qualified immunity. He cites two Supreme Court cases, but both cases leave this question unanswered. See *Taylor v. Barkes*, 579 U.S. —, —, 135 S. Ct. 2042, 2045 (2015); *City & County of San Francisco v. Sheehan*, 575 U.S. —, —, 135 S. Ct. 1765, 1776 (2015). Other Supreme Court cases indicate circuit precedent is adequate for these purposes. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely."). In addition, we have exercised this authority for decades, including in this specific context of prison and jail suicides. See *Hall*, 957 F.2d at 404–05; see also *Werner v. Wall*, 836 F.3d 751, 762 (7th Cir. 2016). We see no reason to depart from these precedents.")

Werner v. Wall, 836 F.3d 751, 762 & n.28 (7th Cir. 2016) ("In conducting the clearly established inquiry, our first task is to consider controlling Supreme Court and Seventh Circuit precedent. . . Our earlier discussion makes evident that the precedent of the Supreme Court and of our court certainly did not provide adequate guidance to permit the defendants to understand their responsibilities in the face of the tangle of overlapping laws and regulations that Wisconsin had created. . . We therefore must 'cast a wider net' and look to whether 'all relevant case law' demonstrates "such a clear trend ... that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'. . In this respect, Mr. Werner identifies a line of Wisconsin state court decisions. . . .We are not alone in looking to trends in the decisional law of other jurisdictions once we are satisfied that controlling precedent in our own circuit does not clearly establish a particular legal right. [collecting cases]")

Sutterfield v. City of Milwaukee, 751 F.3d 542, 551, 573-79 (7th Cir. 2014) ("It will no doubt be frustrating to Sutterfield and to the reader that we do not reach firm conclusions as to the merits of all of the claims she has asserted and instead, like the district court, resolve the case in part based on the doctrine of qualified immunity. We recognize the significant role that resolving the merits of each claim plays in the development of precedent and clarifying the boundaries of constitutional rights. . . But given the importance of the interests at stake, the lack of clarity in the case law, and the shallowness of the briefing as to the alternatives available to the police on the facts presented here, we believe that the tentative nature of some of our analysis is appropriate. . . .Sutterfield contends that because Wisconsin precedent would not bind this court on the merits of her claims, and because in particular we, in contrast to the Wisconsin courts, have refused to extend the community caretaking doctrine to anything but automobile searches, the Wisconsin cases are irrelevant in terms of whether the defendants have qualified immunity. Not so. Although it is true that in this court, the Wisconsin cases have persuasive value only on the merits of Sutterfield's federal claims, they remain relevant as to what the defendants might have thought the law, including the federal constitution, permitted them to do in executing the emergency statement of

detention. Federal courts do not possess exclusive authority to decide Fourth Amendment issues; state courts resolve such issues every day. . . In the absence of a controlling decision by the United States Supreme Court, the Wisconsin cases are thus as relevant as our own precedents in evaluating what a Milwaukee police officer might have thought the law permitted in responding to a report that the occupant of a private dwelling was in danger of harming herself. . . . Although our decision in *Pichany* refused to extend the community caretaking exception recognized by the Supreme Court in *Cady* beyond the automobile context, Wisconsin courts have given the exception a much broader reach. They have relied on the community caretaking doctrine to justify warrantless entries into the home when the police have reason to believe that the occupant may be injured or otherwise in danger of harm. . . . Based on these decisions, the officers who forcibly entered Sutterfield's home could have believed that their entry was justified by the community caretaking doctrine as understood and applied by the Wisconsin courts. . . .The decision to forcibly open and search the locked compact disc case discovered in the course of the protective sweep presents a closer question in terms of the officers' qualified immunity, just as it does on the merits of Sutterfield's Fourth Amendment claim. No Wisconsin case that has been cited to us or that we have found has relied on the community caretaking doctrine to justify any search of the premises more intrusive than the sort of limited, protective sweep envisioned by *Buie*—that is, a search of places within the home that another person might be found. . .The gun, having been secured within a locked, opaque case, obviously was not in plain view, in contrast to the drugs found in both *Horngren* and *Pinkard.* Opening the case was a substantial step beyond the standard protective sweep, and constituted a more substantial intrusion on Sutterfield's privacy interests in her personal effects. . . . [T]he defendants are entitled to qualified immunity for the warrantless entry into Sutterfield's home, the search of the locked compact disc case, and the temporary seizure of the gun found inside of the case. The police were faced with a difficult situation in which they had reason to believe, based on her physician's report, that Sutterfield might pose a danger to herself, they were implementing an emergency detention of her person for evaluation pursuant to section 51.15, and they were logically attempting to find the firearm they had reason to believe Sutterfield possessed and to secure that firearm while Sutterfield was undergoing a mental health evaluation. Notwithstanding the uncertainty as to which legal framework best applies to the warrantless actions of the police in these circumstances, the police could have believed that Wisconsin precedents, if not the federal cases, authorized them to take these actions in order to protect Sutterfield's wellbeing as well as the well-being of anyone else, including her son, who might have access to her home in her absence. . . .Based on the Supreme Court's decision in *Brigham City* and this court's decision in *Fitzgerald,* we conclude that the warrantless entry into Sutterfield's home was justified. Under the circumstances confronting the defendant police officers, they had an objectively reasonable basis for believing that Sutterfield posed an imminent danger of harm to herself; the circumstances thus constituted an emergency which dispensed with the need for a warrant under the exigent circumstances exception to the Fourth Amendment's warrant requirement. Alternatively, even if the entry into Sutterfield's home was inconsistent with the Fourth Amendment, a reasonable person would not have known that the entry violated Sutterfield's clearly established rights; the officers would therefore be entitled to qualified immunity on the unlawful entry claim. Similarly, although we have assumed *arguendo* that both

the search of the compact disc case in Sutterfield's home and the seizure of the (lawfully-possessed) gun found inside of that case were contrary to the Fourth Amendment, we conclude that the defendant officers are entitled to qualified immunity on the unlawful search and seizure claims.")

Burgess v. Lowery, 201 F.3d 942, 944-46 (7th Cir. 2000) ("Even if our court had decided that strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion, there might be enough doubt about the soundness of the decision, whether in light of decisions by other circuits before or after our decision or of intimations in Supreme Court decisions not squarely on point that our view might be erroneous, to justify the state in believing that the plaintiff's right was not yet 'clearly established' within the meaning of the cases on immunity. . . The Fifth Circuit has held the contrary, *Brady v. Fort Bend County*, 58 F.3d 173, 175 (5th Cir.1995); *Boddie v. City of Columbus*, 989 F.2d 745, 748 (5th Cir.1993), but with all respect we cannot believe that its view is correct. Suppose the only relevant case the Fifth Circuit had decided was very old, and every other circuit since had rejected the position taken in the Fifth Circuit's decision. It would be odd in such circumstances to suppose that right clearly established even in the Fifth Circuit, given that courts can and not infrequently do overrule decisions that seem clearly out of step with the rest of the legal universe. Equally, however, the absence of a decision by the Supreme Court or this court cannot be conclusive on the issue whether a right is clearly established in this circuit. There might be no decision in either court simply because the existence of the right was so clear, as a matter of the wording of a constitutional or statutory provision or decisions in other circuits or in the state courts, that no one thought it worth while to litigate the issue. . . To rule that until the Supreme Court has spoken, no right of litigants in this circuit can be deemed established before we have decided the issue would discourage anyone from being the first to bring a damages suit in this court; he would be certain to be unable to obtain any damages. . . . .The test, formulated with particular application to this case, ought to be whether a reasonable official in the position of these defendants, considering all relevant sources of guidance to the law, might have thought it reasonably possible that this court or eventually the U.S. Supreme Court would hold that strip searches of prison visitors are proper even without reasonable suspicion.").

McDonald v. Haskins, 966 F.2d 292, 294 (7th Cir. 1992) (plaintiff could rely on precedent from Third Circuit).

EIGHTH CIRCUIT

Jacobson v. McCormick, 763 F.3d 914, 918 (8th Cir. 2014) ("To overcome qualified immunity, a plaintiff typically must identify either 'cases of controlling authority in their jurisdiction at the time of the incident' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Neither criterion is satisfied here. . . . In our view, two decisions from other circuits did not place the issue beyond debate, and a reasonable correctional officer in Minnesota could have believed—like the district court in this very case—that Jacobson's admission that he recently smoked a bowl

of marijuana gave reasonable suspicion to believe that he could be secreting contraband in private areas of his body. McCormick and Voltaire are thus entitled to qualified immunity.")

Galarnyk v. Fraser, 687 F.3d 1070, 1076 (8th Cir. 2012) ('In *McCabe*, we held the '[l]ack of probable cause is a necessary element of' a First Amendment retaliatory arrest claim. . . In *Reichle v. Howards*. . . the Supreme Court determined 'two federal law enforcement agents [were] immune from suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime.' The Supreme Court concluded 'that, at the time of [the defendant's] arrest [in 2006], it was not clearly established that an arrest supported by probable cause could violate the First Amendment.'. . The Supreme Court declined to decide 'whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest,'. . . leaving our conclusion in *McCabe* intact. Accordingly, the district court did not err in holding the presence of probable cause to arrest Galarnyk for trespass defeated Galarnyk's First Amendment retaliatory arrest claim.')

Irving v. Dormire, 519 F.3d 441, 451 (8th Cir. 2008) ("It is true that we have on occasion afforded the protection of qualified immunity in situations in which a split of authority exists on the constitutional question at issue. . . . Nevertheless, and notwithstanding the lack of a decision squarely on point within our circuit, we conclude that, given the clear weight of authority in the circuits that have ruled on the question, Brigance was on fair notice that to falsely label an inmate a snitch is to unreasonably subject that inmate to the threat of a substantial risk of serious harm at the hands of his fellow inmates. After all, who better knows the opprobrium and consequent effect thereof that attaches to the label of snitch than those who work daily within the inmate population. Thus, we hold that a reasonable prison guard in Brigance's position would have known that to label Irving a snitch would violate his constitutional right to protection from harm.").

Hill v. McKinley, 311 F.3d 899, 910 (8th Cir. 2002) (Hansen, J. , dissenting) ("In examining our own case law, as well as that of the Supreme Court and other circuits, I conclude that at the time of Ms. Hill's arrest and detention, the officers had 'fair warning' that their treatment of Ms. Hill was unconstitutional.").

Turner v. Arkansas Insurance Dep't., 297 F.3d 751, 758 (8th Cir. 2002) ("When making the determination of whether the law was 'clearly established' at the time the alleged violation occurred, we are obligated to include the decisions of the district courts. . . A thorough review of these decisions show that the overwhelming majority of cases reaching the issue concluded that an employee's at-will status did not preclude the maintenance of an action under ' 1981. . . . This leads us to the question whether one Supreme Court case, which strongly implies that Turner's position is the correct one, plus two courts of appeals cases and fifteen district court opinions that expressly state that Turner's position is the correct one, is enough to show the law in question was 'clearly established.' We hold that it does. Determining whether the law is 'clearly established' is not a precise science. The determination is, however, a balancing of all available precedential decisional law on point, with the greatest effect given to decisions of the United States Supreme

Court. Next, we look within our own circuit, and where there is no law on point we then canvass the other courts of appeals, the district courts, and state courts, [footnote omitted] giving each decision on point its requisite weight. In our view, the fact that two circuit cases and fifteen district court cases directly support a proposition and the Supreme Court implicitly supports that same position is sufficient to demonstrate that the law was 'clearly established' as of September 23, 1999.").

Turner v. Arkansas Insurance Dep't., 297 F.3d 751, 758 (8th Cir. 2002) (Bye, J., dissenting) ("The court deduces 'clearly established' law from a Supreme Court decision overruled by Congress, four evenly-divided circuit court decisions, and fifteen district court decisions against four. The court's approach (and its nose count) conflict with earlier cases in our circuit, and I can only wonder what the government and municipal lawyers practicing in our circuit will take from this case.").

Vaughn v. Ruoff, 253 F.3d 1124, 1129, 1130 (8th Cir. 2001) ("We subscribe to a broad view of the concept of clearly established law, and we look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit. . . . Even in the complete absence of any decisions involving similar facts, a right can be clearly established if a reasonable public official would have known her conduct was unconstitutional. . . . We have not found any cases with facts similar to those in this case. This does not, however, carry the day for Ruoff. Numerous pre-1994 cases show that minimum procedures regularly precede state compelled sterilizations, and some clearly establish that pre-sterilization procedures are constitutionally required. [citing cases from other jurisdictions]. . . Furthermore, any reasonable social worker–indeed, any reasonable person, social worker or not–would have known that a sterilization is compelled, not voluntary, if it is consented to under the coercive threat of losing one's children, and hence unconstitutional.").

Buckley v. Rogerson, 133 F.3d 1125, 1129-31 (8th Cir. 1998) ("[Defendant] bears the burden of proving that this right [a constitutional right to specific medical approval of segregation and restraint for prison mental patients] was not clearly established. As we have noted in previous cases, this court has taken a 'broad view' of what constitutes clearly established law for purposes of qualified immunity." Court relies on federal district court decisions from Missouri, Michigan and New York to find right clearly established.).

Johnson-El v. Schoemehl, 878 F.2d 1043, 1049 (8th Cir. 1989) (taking into consideration identity of a court, its geographical proximity, dissemination of information within the pertinent profession and frequency of similar litigation when determining whether reasonable official would be aware of the law).

Konop v. Northwestern School District, 26 F. Supp.2d 1189, 1194-96, 1201 (D.S.D. 1998) ("The defendants assert, and correctly so, that there is apparently no case decided by the United States Supreme Court, by the United States Court of Appeals for the Eighth Circuit, by any District Court

in the Eighth Circuit, or by the South Dakota Supreme Court involving strip searches in a school setting. They then argue that the law in the Eighth Circuit therefore cannot be 'clearly established.' Defendants rely on *Jenkins By Hall v. Talladega City Board of Education* . . . in arguing that the law can be clearly established in the District of South Dakota only by decisions from the United States Supreme Court, the United States Court of Appeals for the Eighth Circuit, U.S. District Courts in the District of South Dakota, or the South Dakota Supreme Court. The Court rejects this contention, relying on Eighth Circuit precedent. [*citing Johnson-El v. Schoemehl*, 878 F.2d 1043, 1049 (8th Cir.1989)] . . . . Taking the argument of defendants to its logical conclusion would tell us that there must be factual identity between a prior case and the case under consideration. This would result in 'absolute immunity', not 'qualified immunity.' In other words, any school official would receive one 'bite of the apple', regardless of the nature of the conduct. . . . The implication of *Lanier* is that to possibly establish civil rights liability (i.e. to 'get past' the qualified immunity defense and to allow the jury as the finder of the facts to decide the facts), there must be 'fair warning' of the constitutional right or rights and there is no requirement that this warning be found in prior Supreme Court precedent or factually similar precedent elsewhere. *Lanier* also stands for the proposition that general principles of law can provide fair warning. . . . Plaintiffs' Fourth Amendment right to be free of unreasonable searches in the school setting was clearly established at the time of the searches. . . *T.L.O.* established in 1985 that a search in the school setting must be justified and reasonably related in scope to the circumstances which are claimed to have justified the search. . . . *T.L.O.* has been applied time and time again and certain rules are clear: (1) a strip search is not justified absent individualized suspicion unless there is a legitimate safety concern (e.g.weapons); (2) school officials must be investigating allegations of violations of the law or school rules and only individual accusations justify a strip search; and (3) strip searches must be designed to be minimally intrusive, taking into account the item for which the search is conducted. The reasonableness standard set forth in *T.L.O.* was clearly established and should have been applied by defendants. It was in fact applied time after time by various Circuit and District Courts to factual scenarios having some similarity to the present case.").

NINTH CIRCUIT

Moonin v. Tice, 868 F.3d 853, 868, 870, 872 , 875 (9th Cir. 2017) ("We first look to binding precedent to determine whether a right is clearly established. . . 'In the absence of binding precedent clearly establishing the constitutional right, "we look to whatever decisional law is available,"' including relevant decisions of other circuits, state courts, and district courts. . . As an initial matter, it was clear in 2011 that some of the speech impacted by Tice's edict was protected by the First Amendment. As early as *Pickering*, it was clear that employees' opinions about the proper way to administer government agencies, when conveyed in that employee's capacity as a private citizen, constituted protected speech. . . Controlling precedent also made clear in 2011 that it was generally unconstitutional to punish a police officer for speaking out about malfeasance or mismanagement in the department. . . Tice was therefore clearly on notice that a policy precluding *all* sorts of speech by officers, to whomever communicated, about the K9 program was subject to limits imposed by the First Amendment. Moreover, it was abundantly clear in 2011 that ex ante

restrictions on employee speech are more constitutionally problematic than after-the-fact decisions to punish a particular employee for his speech. . . Without more, the marriage of these two precepts in large part resolves this case. Tice's policy was written so broadly as to promise punishment for some speech that, as of 2011, clearly received constitutional protection. In light of the Supreme Court's emphasis on identifying clearly established law '"particularized" to the facts of the case,'. . . however, we consider in detail cases addressing analogous employer prior restraints on speech. These cases demonstrate that the First Amendment right Tice violated was clearly established at the time he sent his email. . . . Controlling case law addressing flat prohibitions on employee speech is, and was in 2011, limited. But Supreme Court and Ninth Circuit precedent emphatically signaled that a policy prohibiting public discussion of matters of public concern by employees of a particular government program, without a countervailing showing of substantial workplace disruption, was much too broad to be constitutional. . . . Because there is limited controlling precedent on point, we turn to persuasive authority. . . We conclude that persuasive cases addressing more closely analogous regulations would have made reasonable government officials quite aware, had they any doubt, that Tice's edict ran afoul of the First Amendment. . . .In short, a 'robust consensus' of prior cases made clear at the time Tice issued his edict that an employer ordinarily. . . may not prohibit its employees from all public discussion relating to a particular department or government program. . . Tice's policy did just that, making punishable any direct communication 'regarding the [NHP] K9 program or interdiction program,' with no attempt to tailor the speech restrictions to NHP's legitimate interests. Accordingly, we hold that Tice is not entitled to qualified immunity. . . .Government employers have significant and legitimate interests in managing the speech of their employees, particularly where the employees' speech pertains to their work. And policies explaining how sensitive information ordinarily should be handled benefit both employers and employees. We make clear today, however, that a public employer generally may not subject *all* employee speech regarding a particular government program—whether fact or opinion, and whether liable to disrupt the workplace or not—to a blanket ban. A government employer's policies imposing prior restraints on their employees' speech as citizens on matters of public concern must bear a 'close and rational relationship' to the employer's legitimate interests, and the broad policy Tice announced did not meet this standard. This conclusion was compelled by prior case law at the time Tice sent his missive. We therefore hold that Tice is not entitled to qualified immunity[.]")

Jones v. Cnty. of Los Angeles, 802 F.3d 990, 1005 n.6 (9th Cir. 2015) ("The dissent suggests that our cases, such as *Rogers, Mabe,* and *Wallis,* cannot furnish clearly established law because other circuits disagree with them. . . However, this court regularly finds a principle to be clearly established based solely on its own decisions. *See Kirkpatrick,* 2015 WL 4154039, at *9–*10 (finding an infant's right not to be seized from his mother's custody at the hospital clearly established based on *Rogers*); *Rogers,* 487 F.3d at 1297 (finding the law governing removal of children from the home without judicial authorization clearly established based on *Mabe, Wallis,* and *Ram v. Rubin,* 118 F.3d 1306 (9th Cir.1997)). We must continue to rely on our own cases to determine whether the law is clearly established until this court sitting en banc or the Supreme Court tells us that we may not.")

Carrillo v. Cnty. of Los Angeles, 798 F.3d 1210, 1221 n.13 (9th Cir. 2015) ("In recent cases, the Supreme Court has assumed for the sake of argument without explicitly holding that 'controlling Court of Appeals' authority could be a dispositive source of clearly established law.' *Reichle v. Howards*, 132 S.Ct. 2088, 2094 (2012); *see also Carroll v. Carman*, 135 S.Ct. 348, 350 (2014). None of these cases has overruled *Hope* or called its exclusive reliance on circuit precedent into question.")

Prison Legal News v. Lehman, 397 F.3d 692, 701, 702 (9th Cir. 2005) ("In determining whether PLN's rights in this case were clearly established, and whether a reasonable person would have known his or her actions violated these rights, we may look at unpublished decisions and the law of other circuits, in addition to Ninth Circuit precedent.").

Boyd v. Benton County, 374 F.3d 773, 781-83 (9th Cir. 2004) ("The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury. . . In the Ninth Circuit, we begin our inquiry by looking to binding precedent. . . If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end. On the other hand, when 'there are relatively few cases on point, and none of them are binding,' we may inquire whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results. . . Thus, in the absence of binding precedent, we ' Alook to whatever decisional law is available to ascertain whether the law is clearly established" for qualified immunity purposes, Aincluding decisions of state courts, other circuits, and district courts."'. . In October 1997, neither the Supreme Court nor this Circuit had provided any guidance as to when the use of flash-bangs constitutes a Fourth Amendment violation. Thus, we must ask whether, despite the absence of binding precedent, there was sufficient non-binding authority to place the officers on notice that using a flash-bang in these circumstances would be excessive. By October 1997, two circuit courts and one state court had addressed the use of flash-bangs within the context of the Fourth Amendment. . . . Taken together, *Baker*, *Garner*, and *Myers*, in October 1997, failed to provide the officers in this case with the requisite level of guidance to put them on notice that using the flash-bang in these circumstances violated Boyd's Fourth Amendment rights. In fact, *Baker*, *Garner*, and *Myers* all hold that the use of flash-bang devices was reasonable under their respective facts. . . . In sum, we conclude that without any guidance from this Circuit and an absence of non-binding authority that otherwise clearly establishes the right, the officers here were not put on sufficient notice that using a flash-bang in these circumstances was unconstitutional.").

Bahrampour v. Lampert, 356 F.3d 969, 977 (9th Cir. 2004) ("When Mr. Bahrampour's subscription to the Green Lantern comic book was rejected in January 2000, there was no appellate decision that held that restrictions on the receipt of bulk mail were unconstitutional. One federal district court decision from a different district had held that a similar regulation was unconstitutional. Two unpublished decisions from the United States District Court for the District of Oregon, however, had held that the ODC bulk mail regulations at issue were constitutional.

Thirteen months after ODC rejected the Green Lantern comic book, we held that prohibiting inmates' receipt of non-profit bulk mail was unconstitutional, noting that '[t]he speech at issue is core protected speech, not commercial speech or speech whose content is objectionable on security or other grounds.' We also held in *Prison Legal News* that '[b]ecause the contours of [the constitutional right at issue] were not sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right, the law in this case was not clearly established.'. . . Reasonable prison officials would have no basis for assuming that regulations prohibiting bulk mail were unconstitutional in the face of two district court decisions from the district in which the prison is located which had concluded that the precise regulations at issue were not unconstitutional. The fact that there was a conflict in the views of district court judges on the issue demonstrates that the constitutionality of the regulations was not clearly established until this court held, eighteen months later, that prohibiting the receipt of commercial bulk mail is unconstitutional. The district court did not err in its determination that the prison officials are entitled to qualified immunity because prison inmates had no clearly established right to receive commercial bulk mail at the time of the rejection of the Green Lantern comic book subscription." [internal citations omitted])

Rivero v. City and County of San Francisco, 316 F.3d 857, 864, 865 (9th Cir. 2002) ("We now hold that it was clearly established in 1993 that state employees could not cause the termination of a two-year for-profit government contract in retaliation for the contracting party's exercise of his First Amendment rights to speak out on a matter of public concern. Although we had not specifically held prior to 1993 that such a contract was a 'valuable governmental benefit' for purposes of First Amendment retaliation law, a reasonable person would have known from *Pickering, Perry* and *Hyland I* that this was the law in this circuit. . . . [T]he fact that there was a circuit split does not mean that the law was not clear in this circuit prior to the Court's decision in *Umbehr*. It was clear, and the Supreme Court's decision in *Umbehr* merely confirmed what was already the law in this circuit. The issue is not what the law was or might have been in other circuits in 1993. It is, rather, what the 'controlling authority in [the defendants'] jurisdiction[was] at the time of the incident.'").

Sorrels v. McKee, 290 F.3d 965, 970, 971 (9th Cir. 2002) ("The existence of binding precedent holding unconstitutional a prison policy requiring inmates to pay for publications received would easily dispose of prong two. The law would be clearly established and defendants' qualified immunity defense would fail. However, neither the district court, nor the parties, nor our own research has unearthed Ninth Circuit or Supreme Court caselaw on point predating our 1999 decision in *Crofton v. Roe*. We next look to the decisions of our sister Circuits, district courts, and state courts. . . However, either Washington's policy was unique among state prisons, or no other state's prisoners had seen fit to challenge similar policies, as there appear to be no published decisions on point prior to 1999 in any jurisdiction, at any level, concerning the constitutionality of a prison regulation requiring inmates to pay for publications they receive. Still this does not end our inquiry. In deciding the second prong of qualified immunity, '[i]t is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of

defendants' actions] was apparent in light of preexisting law' . . . In other words, while there may be no published cases holding similar policies constitutional, this may be due more to the obviousness of the illegality than the novelty of the legal issue. . . . Considering the complete lack of published decisions on point and the fact that defendants reasonably could have believed that the 'no gift publication' policy was constitutional, it cannot be said that the law was clearly established until we decided *Crofton v. Roe* in 1999. Sorrels also urges us to consider two unpublished district court decisions in determining whether the law was clearly established . . . . We have held that unpublished decisions of district courts may inform our qualified immunity analysis. See *Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (9th Cir.2001) (relying on unpublished district court cases). The district court rulings in *Ocanaz* and *Spalding* do not change our conclusion that the law was not clearly established. At most, they show that the law was in the process of becoming established. This is not surprising, as it will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, we can conclude that the law was clearly established on the basis of unpublished decisions only.").

Carey v. Nevada Gaming Control Board, 279 F.3d 873, 881, 882 & n.8 (9th Cir. 2002) ("As discussed above, there are two Ninth Circuit cases directly on point, *Lawson* and *Martinelli*, which unambiguously hold that compelling an individual to identify himself during a *Terry* stop violates the Fourth Amendment. Those cases invalidated state statutes that authorized arrests based on the detained individual's refusal to identify himself. In addition, *Lawson* and *Martinelli* are in accord with Supreme Court pronouncements on this issue. . . . Based on the foregoing, we conclude that a reasonable officer in Spendlove's position would have known that Carey had a clearly established Fourth Amendment right not to identify himself, and that the Nevada statutes at issue, like the statutes in *Lawson* and *Martinelli*, were unconstitutional to the extent they allowed Carey to be arrested for exercising his rights. . . . We note that some federal courts in other circuits have concluded there is no clearly established right to refuse to identify oneself during an investigative stop. [citing cases] These courts relied on the fact that the Supreme Court has twice declined to decide whether a person can be compelled to identify himself during a lawful investigatory stop. If we had only the Supreme Court's precedents to guide us, we might also conclude that the right was not clearly established. However, unlike our sister circuits, we have the benefit of two precedents on point in our own circuit, in addition to Supreme Court dicta that supports these precedents. We think this is sufficient to clearly establish the right in our circuit."). [*But see Hiibel v. Nevada*, 59 P.3d 1201 (Nev. 2002) (holding same Nevada statute did not violate constitutional right to privacy]

P.B. v. Koch, 96 F.3d 1298, 1304 (9th Cir. 1996) ("In light of the Supreme Court's holding that students are protected from unjustified intrusions on personal security and out-of-circuit cases holding that arbitrary corporal punishment is unconstitutional, no reasonable principal could think it constitutional to intentionally punch, slap, grab, and slam students into lockers.").

Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991) (in absence of binding precedent, court should look at all available decisional law, including decisions of state courts, other circuits, and district courts).

TENTH CIRCUIT

Grissom v. Roberts, 902 F.3d 1162, 1168 (10th Cir. 2018) ("The role of an unpublished nonprecedential opinion in this enterprise depends on whether the opinion is being used to show that the plaintiff's proffered proposition is clearly established law or to show that the proposition is unsettled. We have held that '[a]n unpublished opinion ... provides little support for the notion that the law is clearly established on [a] point.'. . But an unpublished opinion can be quite relevant in showing that the law was *not* clearly established. If we make the collegial, and quite legitimate, assumption that panels of this court render reasonable decisions, we would be hard pressed to say that a proposition of law was clearly established at a time when an unpublished opinion by a panel of this court said the opposite. To do so we would have to say that the panel's decision was contrary to clearly established law at the time it was rendered. Our assumption does not require us to credit the unpublished opinion as being correct, only as being debatably correct. And there is perhaps a more important reason to presume that an unpublished decision was not contrary to clearly established law at the time. The purpose of the qualified-immunity test is to limit liability to those public officials who are 'plainly incompetent or ... knowingly violate the law.'. . This purpose would be ill served if liability were imposed on an official for conduct that had been held to be lawful, even in an unpublished opinion, by the federal appellate court with jurisdiction over the conduct, at least in the absence of later contrary authority issued before the official acted. Could we properly say that an official was plainly incompetent for taking guidance from an unpublished appellate opinion? . . . The argument favoring consideration of an unpublished opinion is particularly compelling if the same alleged victim and same defendant conduct are involved.")

Grissom v. Roberts, 902 F.3d 1162, 1174-75 (10th Cir. 2018) ("Grissom alleges he was subjected to cruel and unusual punishment because (1) 20 years in solitary created a substantial risk of serious harm, and (2) the defendants knew of but disregarded that harm. Pointing to various academic literature and government reports (both domestic and international), he appeals to us to recognize '[s]ociety's evolving standards of decency.'. . To overcome the defense of qualified immunity, however, Grissom must point to clearly established law. . . That, he has failed to do. He states, 'A growing number of courts have concluded denying the basic human needs of social interaction and environmental stimulation can violate the Eighth Amendment, especially when the deprivation lasts for years.'. . But the cited courts are four federal district courts, none from this circuit. That does not suffice to clearly establish the law. . . Indeed, the most recent relevant decision by this court is an unpublished opinion rejecting an Eighth Amendment claim brought by a prisoner who had been in solitary confinement for 30 years under conditions not markedly different from those here. *See Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 741 (10th Cir. 2014). . . .Grissom, similar to the prisoner in *Silverstein*, has regularly communicated with other inmates and staff and has been afforded regular exercise (including outdoor recreation) and regular access

to reading materials and to medical and mental-health care. We conclude that the Prison Officials are entitled to qualified immunity on this claim.")

Sandberg v. Englewood, Colorado, 727 F. App'x 950, 961-62 (10th Cir. 2018) ("There is no case from the Tenth Circuit or the Supreme Court holding that *Heller*'s articulation of a right to keep and bear arms inside the home must necessarily extend to a right to keep and bear arms outside the home. If anything, we have indicated the Second Amendment has some limitations when applied to conduct outside the home. . . In response to the paucity of authority on point from this court or the Supreme Court, Sandberg directs us to Justice Thomas's dissent from the denial of certiorari in *Peruta v. California*, 137 S. Ct. 1995 (2017). In *Peruta*, a litigant asked the Court to address whether a local municipality may place restrictions on firearm possession, such as requiring a particularized reason for a concealed carry permit. The Court declined to hear the case. . . Justice Thomas and Justice Gorsuch dissented, with Justice Thomas writing that he believes '[t]he most natural reading of [the Second Amendment] encompasses public carry.'. . Yet, a dissent from a denial of certiorari is not binding authority that would create clearly established law. Further, the dissent in *Peruta* was issued more than three years after the events of this case. Therefore, the dissent in *Peruta* does not clearly establish that as of May 14, 2014, a citizen had an absolute right to openly carry a firearm in public. Without a Supreme Court or Tenth Circuit case on point, Sandberg relies upon the Seventh Circuit's opinion in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). In *Moore*, two separate plaintiffs sought declaratory and injunctive relief against the application of an Illinois statute that prohibited the carrying of a firearm in many public places. . . Relying on its interpretation of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Seventh Circuit held that '[t]he Supreme Court has decided that the [Second A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside,' because the Second Amendment is focused on 'promot[ing] self-defense.'. . Of the cases Sandberg cites, *Moore* is the only circuit court opinion to hold that the Second Amendment guarantees a citizen the right to carry a firearm in public. Other circuits have stated the same principle in dicta, but have not articulated the rule in a holding. [collecting cases] We conclude that *Moore* does not provide a 'clearly established weight of authority from other courts.'. . That one other circuit has issued an opinion which would support Sandberg's claim does not in itself create a clearly established weight of authority. . . Instead, this court generally looks to whether a 'majority of courts' have adopted the rule in question, thereby making it 'sufficiently clear that a reasonable officer' would understand the rule and be expected to apply it. . . Thus, when the events at issue in this case occurred it was not clearly established that the Second Amendment guaranteed a citizen the right to openly carry a firearm in public without risk of facing police action. The district court did not err in dismissing Sandberg's Second Amendment claim.")

Leek v. Miller, 698 F. App'x 922, 928-29 (10th Cir. 2017) ("We address whether the asserted right—a protected property interest in prison accounts triggering procedural due process—was clearly established. In *Clark*, this circuit held that the atypical-and-significant-hardship evaluation announced in *Sandin v. Conner*, 515 U.S. 472 (1995), applied 'to protected property interest inquiries.'. . In doing so, we overruled an earlier case holding that prisoners have a protected

property interest in the funds in their prison trust accounts. . . Consequently, the *Gillihan* holding 'is no longer good law and, hence, not "clearly established" in this circuit.'. .After *Clark*, in several unpublished decisions this circuit found it unnecessary to resolve whether a prisoner has a protected property interest in his prison accounts. [collecting decisions] As these cases demonstrate, the law in this circuit is not clearly established whether a prisoner has a protected property interest in his prison accounts. Mr. Leek relies on a case from the Third Circuit holding 'the Department of Corrections' assessment of [the prisoner's] institutional account constituted the deprivation of a protected property interest for purposes of procedural due process.' *Burns v. Penn. Dep't of Corr.*, 544 F.3d 279, 291 (3d Cir. 2008). 'Normally, a single recent case from one circuit is not sufficient to make the law clearly established in another circuit.' *Woodward v. City of Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992) . . . Mr. Leek has not cited any Supreme Court or published Tenth Circuit case, or case law from any circuits other than the Third Circuit, to support his constitutional claim. Therefore, we conclude that the district court properly granted summary judgment on qualified-immunity grounds.")

Mayfield v. Bethards, 826 F.3d 1252, 1259 (10th Cir. 2016) ("[E]ven assuming more specificity is needed, the clear weight of authority from other jurisdictions provided Deputy Bethards adequate notice that the conduct here implicated the Mayfields' Fourth Amendment rights. *See Thomas*, 765 F.3d at 1194 (stating that a right is clearly established "if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains" (internal quotation marks omitted)). Indeed, seven federal circuits had addressed the issue prior to Detective Bethards's conduct, each holding that killing a pet dog is a Fourth Amendment seizure.")

Van Deelen v. Johnson, 497 F.3d 1151, 1158, 1159 (10th Cir. 2007) ("We believe Mr. Van Deelen has overcome both qualified immunity hurdles. As we have already indicated, Mr. Van Deelen has alleged facts from which a reasonable jury could (though need not necessarily) conclude that a violation of the First Amendment took place. And the right at issue–to petition the government for the redress of tax grievances–has been with us and clearly established since the Sons of Liberty visited Griffin's Wharf in Boston. Defendants respond by pointing us again to the line of cases from Kansas district courts . . . arguing that it 'muddied the water' sufficiently that a reasonable official would not have known that private citizens have a First Amendment right to petition on private as well as public matters. But every case discussing the public concern test in the Supreme Court has made pellucid that it applies only to public employees. . . The same is true of our own precedent. . . And none of our published opinions concerning the right of petition by private citizens has even hinted at a public concern requirement. . . The same is true of our sister circuits. . . Reliance on district court and unpublished decisions in the face of such uniform governing authority from the Supreme Court, as well as this circuit and every other circuit to have addressed the question, is not sufficient to avoid liability . . . .Put simply, and taking as true Mr. Van Deelen's version of the facts as we must, we hold (unremarkably, we think) that a reasonable government official should have clearly understood at the time of the events at issue that physical and verbal intimidation intended to deter a citizen from pursuing a private tax complaint violates that citizen's First Amendment right to petition for the redress of grievances.").

Gonzales v. City of Castle Rock, 366 F.3d 1093, 1117, 1118 (10th Cir. 2004) (en banc) ("In the instant case, we cannot hold that a reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest. No Supreme Court or Tenth Circuit case has so held. Nor have we found any other circuit court cases addressing this specific question. Somewhat analogous cases from the Sixth and Eleventh Circuits have held that comprehensive state child welfare statutes created liberty interests in personal safety and the freedom from harm which gave rise to procedural due process protections. . .Likewise, two district courts, addressing facts similar to those in the present case, held that protective orders or their supporting statutes created a property interest in enforcement. . . Nevertheless, this precedent is insufficient to clearly establish the law for this circuit. Officers Ahlfinger, Brink and Ruisi are thus entitled to the affirmative defense of qualified immunity."), *rev'd on other grounds,* ***Town of Castle Rock v. Gonzales***, 125 S. Ct. 2796 (2005).

Roska v. Peterson, 304 F.3d 982, 998, 1000 (10th Cir. 2002) ("Defendants are quite correct that there is no case directly on point, either in the Supreme Court or in this circuit. As we noted above, however, this is unnecessary. [citing *Hope*] A requirement of a case that is directly on point would quickly transform the qualified immunity standard into an absolute immunity standard in the vast majority of cases. . . Instead, we recognize that if the authority from other courts is heavily weighted toward plaintiff's interpretation, or if it is clear that doctrine points toward plaintiff's interpretation, we will still hold that the law was clearly established. . . . [W]e conclude that it was clearly established in May 1999 that the warrantless, no-knock entry into the Roska home, the warrantless seizure of Rusty, and the removal of Rusty without pre-deprivation procedures violated the Constitution.").

Herring v. Keenan, 218 F.3d 1171, 1176, 1178, 1179 (10th Cir. 2000) ("A plaintiff need not demonstrate that the specific conduct in this case had previously been held unlawful, so long as the unlawfulness was 'apparent.'. . . A plaintiff may satisfy his or her burden by showing that there is a Supreme Court or Tenth Circuit opinion on point, or that his or her proposition is supported by the weight of authority from other courts. . . . while *Eastwood*, *Lankford*, and *Mangels* indicate that under some circumstances, a release of personal information regarding a person by a government officer may violate a constitutionally protected right to privacy, none of the cases discuss the question whether the right to privacy protects a probationer who may be HIV positive from a limited disclosure by his or her probation officer to persons whom the probation officer believed might be affected by their contact with the probationer. The cases, therefore, did not clearly establish such a right in 1993. . . . The plaintiff asserts that no less than seven federal courts outside of the Tenth Circuit have 'recognized the existence of a constitutionally protected privacy interest in maintaining the confidentiality of an individual's HIV status.' None of these cases, however, address the question we must decide. . . . None of the cases identified by the plaintiff involved a limited disclosure by a probation officer to a probationer's sister and restaurant employer of voluntarily exposed information that the probation officer believed was necessary to

protect them from the possibility of an inadvertent exposure to HIV. Though a plaintiff is not required to show that the specific conduct was previously found to have been held unlawful, there must be a substantial correspondence so that the unlawfulness was apparent. . . In the present case, the plaintiff has shown that there is 'a clearly established right in the abstract' to privacy from disclosure of personal information by government officials. . . The plaintiff has not shown, however, that the district court cases cited amount to a sufficient weight of authority establishing a clearly established right of privacy in this case. The plaintiff has further failed to demonstrate that the contours of that right were sufficiently clear in late 1993 so that a reasonable probation officer would understand that he or she could not disclose to a probationer's close relative or restaurant employer that the probationer had tested positive to HIV. The plaintiff has failed to demonstrate a substantial correspondence between Keenan's disclosures and conduct that has been held to violate the right to privacy in prior decisions.") .

Herring v. Keenan, 218 F.3d 1171, 1181, 1182, 1186 n.8 (10th Cir. 2000) (Seymour, Chief Judge, dissenting) ("In holding that a probationer's constitutional privacy right to non-disclosure of his confidential medical information by his probation officer was not clearly established in late 1993, the majority extrapolates from the Supreme Court's bare holding in *Griffin v. Wisconsin*, . . . without addressing the underlying analysis and reasoning used therein, ignores other circuit precedent on point, and requires an inappropriately exacting factual similarity between prior cases and the case at bar. In my judgment, at the time of the events at issue, the law was clear that Mr. Herring enjoyed constitutional privacy protection against involuntary disclosures of personal information because there was no legitimate governmental interest in the disclosure, and Ms. Keenan's disclosure of such information was objectively unreasonable. For these reasons, I respectfully dissent. . . . To demonstrate a clearly established right, a plaintiff need not identify a case holding unconstitutional the exact conduct in question. Rather, 'this circuit requires only Asome but not precise factual correspondence."' . . . While the majority gives lip service to this standard, it then turns *Griffin* on its head and rejects Mr. Herring's claim because he has not cited a federal court of appeals case with exactly the same type of plaintiff and defendant, and precisely the same type of disclosure. In so doing, the majority relieves government officials of their 'incumbent' duty 'to relate established law to analogous factual settings.'").

Anaya v. Crossroads Managed Care Systems Inc., 195 F.3d 584, 595 (10th Cir. 1999) ***("***[B]y 1995, when the alleged conduct occurred, six circuits had considered the issue; all of them definitively held that probable cause is required for civil seizures of persons premised on self-protection or protection of the public; the earliest of those decisions dates back to 1971 . . . The weight of authority was strong enough in light of the well-established principles of Fourth Amendment jurisprudence, to find the right was 'clearly established.' Furthermore, when considered in terms of whether a reasonable official would know what he is doing violates a right, it seems incredible to suggest that officers, well aware of the restrictions on their ability to deprive persons of liberty without probable cause, would not know that detaining for 'potential' intoxication infringes a constitutional right.").

Guffey v. Wyatt, 18 F.3d 869, 872 (10th Cir. 1994) ("While defendant contends that state decisional law is relevant to the qualified immunity inquiry, the role of state law remains unsettled. . . . [W]e note because state courts seldom examine federal constitutional claims, few federal courts have found state decisional law to be dispositive. . . . Accordingly, in the face of Supreme Court precedent articulating substantive constitutional rights, the defendant's claim these two Oklahoma cases somehow obscured otherwise clearly established law is simply not persuasive.").

Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity ....Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. Our analysis leads us to conclude that it was not clearly established in 1986 (1) that recklessness could give rise to liability under section 1983 or (2) that a police officer could be liable under section 1983 for an injury caused not by the officer but by a suspect being chased by the officer.").

Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) ("The law may be found to be clearly established by reference to decisions from other circuits....We consider the law to be 'clearly established' when it is well developed enough to inform the reasonable official that his conduct violates that law.").

Compare Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (relied on analogous precedent in Seventh Circuit, ***White v. Rochford***, 592 F.2d 381 (7th Cir. 1979), to find right clearly established) and ***Hilliard v. City and County of Denver***, 930 F.2d 1516 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 656 (1991) (two cases from other circuits did not "clearly establish" that personal security guarantee was viable in noncustodial setting).

Conner v. Rodriguez, 891 F.Supp.2d 1228, 1238, 1239 & n.9 (D.N.M. 2011) ("After evaluating the *Henry* and *Torres* cases, the Court acknowledges that the Fourth and Ninth Circuits have concluded that conduct similar to Defendant's could potentially violate the Fourth Amendment. However, these two circuit decisions do not suffice to clearly establish that Defendant's conduct violated Plaintiff's Fourth Amendment rights. . . As an additional, and purely factual matter, the Court notes that the mistake made by Defendant and those of the officers in *Purnell* and *Torres* are not entirely equivalent. Tasers and pistols, as the circuit courts observed, have significant shape, feel, and operational differences; Defendant's two shotguns were the same model of Remington shotguns, and functioned in the exact same way. In the other two cases, neither situation was particularly high-stress or dangerous, while Defendant was involved in a high-speed chase with a felon who had already been shot by police, had assaulted police officers with his vehicle, and was known to be armed and to have a mental imbalance. Thus even if the Fourth and Ninth Circuit cases applied strictly as precedent, Defendant would still likely be owed qualified

immunity, because an application of the legal tests used by those two circuits, the facts in this case likely would come out the other way. . . . These two cases do not suffice to show that 'the clearly established weight of authority from other courts' agrees with them. . . Instead, if there is any weight of authority, it appears still to lean in the opposite direction: that unintentional negligent conduct cannot establish a Fourth Amendment claim. The Court finds this result amenable to the purposes of qualified immunity. In light of the public interest of having officials who are free to vigorously carry out their duties without the need to look over their shoulders at the looming specter of personal liability, an official should be shielded from the imposition of personal liability for an honest, yet sloppy and negligent mistake made during the course of a tense and highly stressful police confrontation. . . . Because the law was not clearly established at the time of the events in question that unintentionally but negligently discharging a lethal shotgun instead of a less-lethal shotgun violated Plaintiff's rights, Defendant is entitled to qualified immunity.")

Prison Legal News v. Simmons, No. Civ.A. 02-4054-MLB, Civ.A. 00-3370-MLB, Civ.A. 01-3017-MLB, 2005 WL 3118043, at **7-9 (D. Kan. Nov. 22, 2005) ("[T]he question of whether a right is clearly established in the Tenth Circuit in an interesting one. All the Tenth Circuit cases to address this question in the last decade agree that the law is clearly established when there is a Supreme Court or Tenth Circuit case on point. . . By contrast, there has been a change in the language used to describe the standard to be applied when neither a Supreme Court case nor a Tenth Circuit case addresses the matter. The original standard was first articulated in *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir.1992), where the court said,

> Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.

. . . In the years following *Medina*, this statement was frequently quoted as the proper standard to apply when determining whether a right was clearly established. . . Then, in *Murrell v. School District No. 1, Denver, Colo.*, 186 F.3d 1238 (10th Cir.1999), the circuit purported to quote the operative language from *Medina*; however, there was an apparent misquote, and the language in the standard was changed to read,

> In order for the law to be clearly established, 'there must be a Supreme Court or other Tenth Circuit decision on point, or the clearly established weight of authority from other circuits must have found the law to be as the plaintiff maintains.' [citing *Medina*]

. . . Read literally, the emphasized language shrinks the scope of the 'clearly established' inquiry from looking at the weight of authority from 'other courts' to looking only at the weight of authority from 'other circuits.' Since *Murrell* was issued, subsequent opinions from the Tenth Circuit have been inconsistent in the language used. Some opinions use the language from *Murrell*. . . Conversely, other Tenth Circuit opinions have continued to use the language from *Medina*. . . Analysis of the post-*Murrell* cases that used the *Medina* 'other courts' language shows that they not only quoted the broader language, but applied it as well. . . . Taken collectively, the court concludes that the Tenth Circuit never intended *Murrell* to change the standard for determining when a right is clearly established in the absence of controlling Supreme Court or Tenth Circuit

authority. Given that *Murrell* purported to quote *Medina*, but inserted an error into the quote, along with the fact that *Murrell* never discussed changing the *Medina* standard, the court finds that the misquote was merely a scrivener's error. This conclusion is bolstered by the fact that subsequent cases from our circuit occasionally look beyond other circuit courts when evaluating whether a right was clearly established. That conclusion notwithstanding, the fact that this error has not been discussed in a reported case from the Tenth Circuit suggests that the error may not be very significant. In other words, although the circuit may be willing to consider cases from courts beyond the federal appellate courts, the focus should normally be on cases decided by other circuits. Thus, a district court may consider any source of judicial precedent, state or federal, when making the clearly established inquiry in the absence of controlling authority; however, as a practical matter, it will require far fewer circuit court cases to make a right clearly established than it will district court or even state court cases. Moreover, this approach is only sensible in light of the controlling inquiry in all qualified immunity cases–'whether it would be clear to a reasonable officer [in the defendant's position] that his conduct was unlawful in the situation he confronted.'. . The court finds that it is not reasonable to expect police officers and prison guards to stay abreast of the latest opinions out of federal district courts and state courts outside of their own jurisdiction. While a growing multitude of rulings from these lower courts might ultimately suffice to clearly establish a right not passed upon by the circuit courts, this would be a rarity. Even one or two cases from other circuits should not normally be sufficient to make a right 'clearly established' for qualified immunity purposes unless the right is so patently obvious that the only reason it has not been recognized by more federal appellate courts is because it has never been litigated.")

ELEVENTH CIRCUIT

Benjamin v. City of Miami, 727 F. App'x 635, ___ (11th Cir. 2018) ("Federal courts may rely on a state court decision to decide whether a plaintiff has demonstrated a violation of his clearly established rights. . . But for this reliance to be proper, the state court decision must pertain to a violation of *federal* law. . . Since *Haliburton*'s due process holding was expressly confined to state law, it cannot clearly establish a federal due process right.")

Rachel v. City of Mobile, Ala., 112 F. Supp. 3d 1263, 1281-83 (S.D. Ala. 2015), *aff'd sub nom.* ***Rachel v. McCann***, 633 F. App'x 784 (11th Cir. 2016) (affirming denial of qualified immunity as to claim that officers repeatedly kicked and beat Rachel while he lay prone and non-resisting on ground) ("The plaintiff asserts that McCann and Jackson 'provoked a violent situation' by needlessly approaching a person known to be emotionally disturbed, 'essentially precipitating the violence instead of heading it off.'. . The Court need not consider whether such conduct would reflect a constitutional violation, because the plaintiff has failed to show it was clearly established before May 2012 that such conduct would violate Greg's constitutional rights. The plaintiff does not suggest that the very language of the Fourth Amendment clearly establishes that provoking a confrontation with an emotionally disturbed felon is unconstitutional. Instead, she asks the Court to look to Ninth Circuit precedent indicating that such conduct can be unconstitutional. . . 'Our

Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation.'. . .The plaintiff also discusses several Eleventh Circuit cases discussing the use of excessive force in effecting an arrest, . . . but none of them speak to the constitutionality of the antecedent act of approaching the suspect or 'provoking' a confrontation. . . Finally, the plaintiff repairs to *Hope v. Pelzer,* . . . which she believes stands for the proposition that 'fair warning could come from ... non-decisional authority,' such that, '[w]here an officer, by training and by internal policy, is advised as [to] the potential danger of a particular type of excessive force, they are on notice that their conduct violates clearly established law.'. . . It is true that the *Hope* Court stated that, 'in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated' the petitioner's clearly established constitutional rights. . . But the Supreme Court did not say or suggest that a plaintiff can meet her burden of demonstrating the existence of a clearly established constitutional right by relying on 'non-decisional authority.'. . .In short, the *Hope* Court's discussion of non-decisional authority does not support the proposition that such authority can carry a plaintiff's burden of showing the violation of a clearly established constitutional right in the absence of any decisional authority doing so. Certainly nothing in *Hope* can be construed as overriding the Eleventh Circuit rule that constitutional rights can be clearly established only by binding precedent, . . . or by the very words of a statute or constitutional provision. . . Within the past few days, the Supreme Court has plainly torpedoed the plaintiff's argument. The plaintiff in *City and County of San Francisco v. Sheehan,* —— U.S. ——, 135 S.Ct. 1765, 191 L.Ed.2d 856 (2015), supported her Fourth Amendment claim with expert testimony that the defendant law enforcement officers 'fell short of their training by not using practices designed to minimize the risk of violence when dealing with the mentally ill.'. . The Court canvassed the case law and concluded that 'the officers' failure to accommodate [the plaintiff's] illness [did not] violat[e] clearly established law.'. . The Court then rejected the plaintiff's reliance on her expert's opinion: 'Even if an officer acts contrary to her training, however, ... that does not itself negate qualified immunity where it would otherwise be warranted.'. . There thus can be no doubt that training and policy cannot substitute for appropriate judicial precedent in the 'clearly established' analysis. In summary, McCann and Jackson are entitled to qualified immunity with respect to any claim of excessive force based on provocation.")

Williams v. Hudson, 602 F. App'x 769, 772-73 (11th Cir. 2015) ("In the light most favorable to Mrs. Williams, the evidence fails to show that the Officers violated a clearly established constitutional right of Mrs. Williams. In *Coffin v. Brandau,* we determined that entry into an open garage can constitute a search under the Fourth Amendment under certain circumstances. . . We also determined that, prior to the date *Coffin* was decided, this right was not clearly established. . . The incident in this case occurred prior to our decision in *Coffin.* However, clearly established law may differ from state to state. . . *Coffin* involved an incident in Florida. This case involves an incident in Georgia. Thus, we are bound by our determination in *Coffin* that this right was not clearly established in 2010 under Eleventh Circuit law or United States Supreme Court law, but

we must determine whether this right was clearly established under Georgia Supreme Court law. Mrs. Williams only cites one Georgia Supreme Court case on this issue. *See Landers v. State,* 250 Ga. 808 (Ga.1983). The question in *Landers* was whether a warrant for the search of a dwelling allowed for the search of a vehicle on a neighboring lot. . . The case does not address the issue before us, and Mrs. Williams has failed to demonstrate that the Officers violated a clearly established constitutional right. The district court properly concluded that the Officers were entitled to qualified immunity on the illegal search claim.")

Trammell v. Thomason, 335 F. App'x 835, 2009 WL 1706591, at *5-*7 & n.7 (11th Cir June 18, 2009) ("Trammell argues that he is not required to point to 'materially similar' case law from this circuit after the Supreme Court's decision in *Hope,* 536 U.S. at 739. We cannot agree. *Hope* states that a plaintiff need not point to a prior case holding that the exact conduct in question was impermissible. It is silent in regard to the issue of whether case law from another circuit alone may be sufficient to put an officer on notice of the impermissibility of his conduct. Accordingly, we remain bound by our circuit law on this issue. . . . While there was case law in July of 2003 from the Fourth Circuit finding a constitutional violation where a police dog similarly trained was released without an adequate warning, . . . we have found no case from our Court, the Supreme Court of the United States, or the Supreme Court of Florida which so holds. . . . We are unpersuaded that Dorough's conduct lies so far beyond the border of permissive and excessive conduct that every reasonable officer in Dorough's position would have concluded that his behavior was unlawful. Accordingly, we will affirm the District Court's determination that Dorough is entitled to qualified immunity for his conduct in allegedly releasing Yacco without a warning.").

Grayden v. Rhodes, 345 F.3d 1225, 1251 n.4 (11th Cir. 2003) (Birch, J., concurring in part and dissenting in part) ("It is true that thus far we look only to our own precedent and the decisions of the United States Supreme Court and the supreme court of the relevant state in this Circuit to determine whether law is clearly established. . . Language in a number of fairly recent Supreme Court opinions, however, has signaled a different approach. [citing *Hope, Wilson, Lanier, Elder, Anderson*] Under 'current American law,' the rule in *Memphis Light* is unmistakable. Sister courts have held that those summarily evicted through condemnation procedures are entitled to contemporaneous notice of their right to appeal.").

Cagle v. Sutherland, 334 F.3d 980, 989, 990 n.15 (11th Cir. 2003) (per curiam) ("Because we presume that Jailer Cole was aware of Butler's suicide threats, we must look to see whether Jailer Cole's acts were deliberately indifferent to this risk. We conclude that–under the facts of this case– Jailer Cole's allowing one hour and forty minutes to elapse between jail checks was not deliberately indifferent. [The consent decree] required the jailor to check the cells every hour. But [consent decree] did not establish a constitutional right to hourly jail checks, and [decree] was not focused on preventing suicide. . . . Even if Jailer Cole had violated the Constitution, he likely would be entitled to qualified immunity, having violated no clearly established constitutional rights. We are not aware of any of our cases or any case from the United States or Alabama

Supreme Courts that would have put Jailer Cole on notice that his acts, given the circumstances, were clearly unconstitutional. [Consent decree] does not do the job; a consent decree like *Praytor* cannot establish constitutional rights, and obviously it cannot *clearly* establish constitutional rights. A precedent with materially similar facts is not always required; but for a federal right to be clearly established, the applicable law 'Amust be sufficiently clear that a reasonable official would understand that what he is doing violates that right."' . . . Here, if Jailer Cole examined the precedents he could reasonably conclude that his conduct–monitoring via TV cameras (and visiting the cell, at least once, during each hour of the night) an inmate who had been stripped of his belt, shoelaces and so on and confined in a stripped cell–was reasonable and was not nearly deliberately indifferent.").

Vinyard v. Wilson, 311 F.3d 1340, 1348 & n.11 (11th Cir. 2002) ("While the parties do not cite and we have not located Supreme Court, Eleventh Circuit, or Georgia Supreme Court decisions regarding pepper spray use in the course of an arrest, other courts have addressed its use. Courts have consistently concluded that using pepper spray is excessive force in cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else. . . . Although we cite and examine other circuits' and district courts' decisions under the first prong of *Saucier*, we point out that these decisions are immaterial to whether the law was 'clearly established' in this circuit for the second prong of *Saucier*.").

Marsh v. Butler County, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001) (en banc) ("When case law is needed to 'clearly establish' the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state. . . We do not understand *Wilson v. Layne*, . . . to have held that a 'consensus of cases of persuasive authority' from other courts would be able to establish the law clearly. . . Each jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon. We do not expect public officials to sort out the law of every jurisdiction in the country.")

Gonzalez v. Lee County Housing Authority, 161 F.3d 1290, 1301-03 (11th Cir. 1998) ("Ordinarily, a plaintiff who seeks to overcome a state official's affirmative defense of qualified immunity must cite case law, in force at the time of the defendant's actions, that would have made it absolutely clear that the defendant's conduct violated federal law. There is no case from the U.S. Supreme Court, this Circuit, or the relevant state Supreme Court, that would have established that a person violates section 3617 by firing an employee for refusing to discriminate against potential tenants on the basis of race. . . . The absence of such a case is not fatal to Gonzalez's claim, however, because this case differs from the typical qualified immunity case in which the plaintiff sues a public official pursuant to 42 U.S.C. § 1983 and asserts the violation of some (often generally worded) constitutional right. Although the assertion of such broadly conceived rights, without the benefit of sufficiently illuminating case law, may fail to overcome the hurdle of qualified immunity, . . . we have acknowledged the possibility that some federal statutory provisions will be sufficiently clear on their own to provide defendants with fair notice of their

obligations under the law. . . . Section 3617 provides just such an explicit statement of what the Fair Housing Act demanded of the defendant in this case. Section 3617 renders it unlawful to 'interfere with any person ... on account of his having aided or encouraged any other person in the exercise or enjoyment of ... any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.' Section 3604, in turn, bars racial discrimination in the 'terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith....' 42 U.S.C. § 3604(b). Section 3617, read in conjunction with section 3604, therefore, straightforwardly states the unsurprising (and presumably uncontroversial) proposition that the Fair Housing Act prohibits 'interfering' with any person because she 'aided or encouraged' another person's exercise of her right to rent property free from racial discrimination. Any reasonable public official, having read the plain terms of this statute, certainly would have understood that federal law makes it unlawful to terminate an employee for refusing to discriminate against potential tenants on the basis of race. To the extent any federal statute, standing alone, can provide a potential defendant with concrete notice, 'that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [she] is doing violates federal law,' we believe that section 3617 provides such notice in the circumstances of this case. . . . Alternatively, even if a public official credibly could argue that the language of the statute provided insufficient notice, its implementing federal regulation, adopted in 1989, removes all doubt about whether federal law makes it illegal to fire an employee for refusing to discriminate on the basis of race. . . . A public official forfeits qualified immunity by violating the clear command of a federal regulation that, like section 100.400(c)(3), reinforces a statute and thus helps to provide the basis for a cause of action.").

Hamilton v. Cannon, 80 F.3d 1525, 1532 & n.7 (11th Cir. 1996) ("It would take much creativity and imagination to glean from the factually distinguishable cases upon which the plaintiffs rely a clearly established rule of law that an unsuccessful, negligent, or reckless rescue attempt, or interference with a bystander's rescue attempt, amounts to a constitutional violation. We decline to exercise such creativity and imagination, because qualified immunity doctrine prohibits it. . . . The case that most strongly lends support to plaintiffs' position is the Seventh Circuit decision in *Ross v. United States*. . . . However, even if *Ross* were indistinguishable, Seventh Circuit decisions can not clearly establish the law for purposes of qualified immunity in this circuit.").

Kelly v. Curtis, 21 F.3d 1544, 1551 n.6 (11th Cir. 1994) ("By distinguishing these two out-of-circuit decisions that [plaintiff] has cited, we do not mean to imply that the law can be clearly established for qualified immunity purposes by non-binding precedent. *See Hansen v. Soldenwagner*, 19 F.3d 573, 578 n. 6 (11th Cir.1994) ("[T]he case law of one other circuit cannot settle the law in this circuit to the point of it being 'clearly established.'"). Even if out-of-circuit decisions could clearly establish the law in this Circuit, a distinguishable, non-binding case does not clearly establish anything.").

Hansen v. Soldenwagner, 19 F.3d 573, 576 (11th Cir. 1994) ("Because *Pickering* requires a balancing of competing interests on a case-by-case basis, our decisions tilt strongly in favor of

immunity by recognizing that only in the rarest of cases will reasonable government officials truly know that the termination or discipline of a public employee violated 'clearly established' federal rights.").

Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993) ("The nonexistence of a decision specifically addressing the alleged right is a significant consideration in determining whether the right is clearly established . . . . In addition the existence of Supreme Court cases or cases in this circuit that recognize the alleged right is particularly important in determining whether the law is sufficiently clear to a reasonable official.").

Courson v. McMillian, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991) ("[C]learly established law in this circuit may include court decisions of the highest state court in the states that comprise this circuit as to those respective states, when the state supreme court has addressed a federal constitutional issue that has not been addressed by the United States Supreme Court or the Eleventh Circuit.").

B. Defining the Contours of the Right

U.S. SUPREME COURT

Kisela v. Hughes, 138 S. Ct. 1148, 1152-54 (2018) (per curiam) ("Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity. . . .Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remitthe case for a trial on the question of reasonableness. An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.' [*citing Plumhoff*] That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way. Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment. . . . [N]ot one of the decisions relied on by the Court of Appeals—*Deorle v. Rutherford,* 272 F.3d 1272 (C.A.9 2001), *Glenn v. Washington County,* 673 F.3d 864

(C.A.9 2011), and *Harris v. Roderick*, 126 F.3d 1189 (C.A.9 1997)—supports denying Kisela qualified immunity." [majority discusses and distinguishes *Deorle, Glenn,* and *Harris*])

Kisela v. Hughes, 138 S. Ct. 1148, 1155, 1158-62 (2018) (per curiam) (Sotomayor, J., joined by Ginsburg, J., dissenting) ("Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared 'composed and content,' . . . and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he 'wanted to continue trying verbal command[s] and see if that would work.'. . But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured. If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no 'clearly established' law. . . I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent. . . .Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the 'clearly established' prong of the qualified-immunity analysis. . . To be ' "clearly established" ... [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, . . . this Court has long rejected the notion that 'an official action is protected by qualified immunity unless the very action in question has previously been held unlawful[.]'. . '[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . At its core, then, the 'clearly established' inquiry boils down to whether Kisela had 'fair notice' that he acted unconstitutionally. . .The answer to that question is yes. This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer 'has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others.'. . It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. . . Consistent with those clearly established principles, and contrary to the majority's conclusion, Ninth Circuit precedent predating these events further confirms that Kisela's conduct was clearly unreasonable. . . Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity. . . . [T]he majority asserts that Hughes was 'within striking distance' of Chadwick, . . but that stretches the facts and contravenes this Court's repeated admonition that inferences must be drawn in the exact opposite direction, *i.e.,* in favor of Hughes.

[citing *Tolan*] The facts, properly viewed, show that, when she was shot, Hughes had stopped and stood still about six feet away from Chadwick. Whether Hughes could 'strik[e]' Chadwick from that particular distance, even though the kitchen knife was held down at her side, is an inference that should be drawn by the jury, not this Court. . . . Both *Curnow* and *Harris* establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force. . . . If all that were not enough, decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is merely holding a knife but not threatening anyone with it. [collecting cases] In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the 'clearly established' standard. . . It is enough that governing law places 'the constitutionality of the officer's conduct beyond debate.'. . Because, taking the facts in the light most favorable to Hughes, it is 'beyond debate' that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity. . . .For the foregoing reasons, it is clear to me that the Court of Appeals got it right. But even if that result were not so clear, I cannot agree with the majority's apparent view that the decision below was so manifestly incorrect as to warrant 'the extraordinary remedy of a summary reversal.'. . . The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear. This unwarranted summary reversal is symptomatic of 'a disturbing trend regarding the use of this Court's resources' in qualified-immunity cases. . . As I have previously noted, this Court routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but 'rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.'. . see also Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 82 (2018) ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials"); Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L.Rev. 1219, 1244–1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment. The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.")

District of Columbia v. Wesby, 138 S. Ct. 577, 589-91 & n.7 (2018) ("Our conclusion that the officers had probable cause to arrest the partygoers is sufficient to resolve this case. But where, as here, the Court of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, 'we have discretion to correct its errors at each step.'. . We exercise that

discretion here because the D. C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.'. . .We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim. . . We addressed the merits of probable cause here, however, because a decision on qualified immunity alone would not have resolved all of the claims in this case. . . . The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' *Saucier v. Katz*, 533 U. S. 194, 202 (2001). This requires a high 'degree of specificity.' [citing *Mullenix*] We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.' [citing *Plumhoff*] A rule is too general if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.' [citing *Anderson*] In the context of a warrantless arrest, the rule must obviously resolve "whether 'the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.'". . We have stressed that the 'specificity' of the rule is 'especially important in the Fourth Amendment context.' [citing *Mullenix*] Probable cause 'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules.'. . . Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered.' [citing *Ziglar*] Thus, we have stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment.' [citing *Pauly*] While there does not have to be 'a case directly on point,' existing precedent must place the lawfulness of the particular arrest 'beyond debate.' [citing *al-Kidd*] Of course, there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. [citing *Brosseau*] But 'a body of relevant case law' is usually necessary to ' 'clearly establish' the answer' with respect to probable cause. . .Under these principles, we readily conclude that the officers here were entitled to qualified immunity. . . . The officers found a group of people in a house that the neighbors had identified as vacant, that appeared to be vacant, and that the partygoers were treating as vacant. The group scattered, and some hid, at the sight of law enforcement. Their explanations for being at the house were full of holes. The source of their claimed invitation admitted that she had no right to be in the house, and the owner confirmed that fact. Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'. . Tellingly, neither the panel majority nor the partygoers have identified a single precedent--much less a controlling case or robust consensus of cases--finding a Fourth Amendment violation 'under similar circumstances.'. . And it should go without saying that this is not an 'obvious case' where 'a body of relevant case law' is not needed. . . The officers were thus entitled to qualified immunity.")

Hernandez v. Mesa, 137 S. Ct. 2003, 2007 (2017) ("With respect to petitioners' Fifth Amendment

claim, the en banc Court of Appeals found it unnecessary to address the *Bivens* question because it held that Mesa was entitled to qualified immunity. In reaching that conclusion, the en banc Court of Appeals relied on the fact that Hernández was 'an alien who had no significant voluntary connection to ... the United States.'. . It is undisputed, however, that Hernández's nationality and the extent of his ties to the United States were unknown to Mesa at the time of the shooting. The en banc Court of Appeals therefore erred in granting qualified immunity based on those facts. . . 'The doctrine of qualified immunity shields officials from civil liability so long as their conduct "does not violate clearly established ... constitutional rights of which a reasonable person would have known."'. . The 'dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . The qualified immunity analysis thus is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question. *White v. Pauly,* 580 U.S. ——, ——, 137 S.Ct. 548, 550, 196 L.Ed.2d 463 (2017) (*per curiam*). Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant. Mesa and the Government contend that Mesa is entitled to qualified immunity even if Mesa was uncertain about Hernández's nationality and his ties to the United States at the time of the shooting. The Government also argues that, in any event, petitioners' claim is cognizable only under the Fourth Amendment, and not under the Fifth Amendment. This Court declines to address these arguments in the first instance. The Court of Appeals may address them, if necessary, on remand.")

Ziglar v. Abbasi, 137 S. Ct. 1843, 1868-69 (2017) ("To be sure, this Court has not given its approval to [the intracorporate-conspiracy] doctrine in the specific context of § 1985(3). . . There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies. . . Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust context. Yet the fact that the courts are divided as to whether or not a § 1985(3) conspiracy can arise from official discussions between or among agents of the same entity demonstrates that the law on the point is not well established. When the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability. See *Wilson v. Layne,* 526 U.S. 603, 618, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (noting that it would be "unfair" to subject officers to damages liability when even "judges ... disagree"); *Reichle v. Howards,* 566 U.S. 658, 669–670, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012) (same). In addition to the concern that agents of the same legal entity are not distinct enough to conspire with one another, there are other sound reasons to conclude that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under § 1985(3). . . .These considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities. Whether that contention should prevail need not be decided here. It suffices to say that the question is

sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions. Thus, the law respondents seek to invoke cannot be clearly established. It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by law. . . Petitioners are entitled to qualified immunity with respect to the claims under 42 U.S.C. § 1985(3).")

White v. Pauly, 137 S. Ct. 548, 551-53 (2017) (per curiam) ("Officer White did not violate clearly established law on the record described by the Court of Appeals panel. . . . In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. See, *e.g., City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, n. 3 (2015) (slip op., at 10, n.3) (collecting cases). The Court has found this necessary both because qualified immunity is important to '"society as a whole,"'. . . and because as '"an immunity from suit,"' qualified immunity '"is effectively lost if a case is erroneously permitted to go to trial,"' *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009). Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.' *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011). As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. . . Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'. . The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, 'general statements of the law are not inherently incapable of giving fair and clear warning' to officers, *United States* v. *Lanier*, 520 U. S. 259, 271 (1997), but 'in the light of pre-existing law the unlawfulness must be apparent,' *Anderson* v. *Creighton*, *supra*, at 640. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.' *Brosseau* v. *Haugen*, 543 U. S. 194, 199 (2004) (*per curiam*); see also *Plumhoff* v. *Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 13) (emphasizing that *Garner* and *Graham* 'are "cast at a high level of generality"'). This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that White's conduct—such as his failure to shout a warning—constituted a run-of-the-mill Fourth Amendment violation. Indeed, it recognized that 'this case presents a unique set of facts and circumstances' in light of White's late arrival on the scene. . . This alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here. On the record described by the Court of Appeals, Officer White did not violate clearly established law. The Court notes, however, that respondents contend Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes before Daniel's

shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force. . . This Court expresses no position on this potential alternative ground for affirmance, as it appears that neither the District Court nor the Court of Appeals panel addressed it. The Court also expresses no opinion on the question whether this ground was properly preserved or whether—in light of this Court's holding today—Officers Truesdale and Mariscal are entitled to qualified immunity. For the foregoing reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is vacated; and the case is remanded for further proceedings consistent with this opinion. It is so ordered.")

White v. Pauly, 137 S. Ct. 548, 553 (per curiam) (2017) (Ginsburg, J., concurring) ("I join the Court's opinion on the understanding that it does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal. See 814 F. 3d 1060, 1068, 1073, 1074 (CA10 2016) (Court of Appeals emphasized, repeatedly, that fact disputes exist on question whether Truesdale and Mariscal 'adequately identified themselves' as police officers before shouting 'Come out or we're coming in' (internal quotation marks omitted)). Further, as to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly.")

City & Cnty. of San Francisco, Cal. v. Sheehan, 135 S. Ct. 1765, 1775-78 (2015) ("The real question. . . is whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan,* 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. . . Rather, we simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not. To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham v. Connor,*. . . but *Graham* holds only that the ' "objective reasonableness"' test applies to excessive-force claims under the Fourth Amendment. . . That is far too general a proposition to control this case. 'We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures. Even a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an

innocent person who is suffering from an insulin reaction. . . and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter. Moving beyond *Graham,* the Ninth Circuit also turned to two of its own cases. But even if 'a controlling circuit precedent could constitute clearly established federal law in these circumstances,' *Carroll v. Carman*, 574 U.S. —— —, —— (2014) (*per curiam*) (slip op., at 4), it does not do so here. The Ninth Circuit first pointed to *Deorle v. Rutherford*, 272 F.3d 1272 (C.A.9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue 'an emotionally disturbed' person who 'was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense.'. . The officer there, moreover, 'observed Deorle at close proximity for about five to ten minutes before shooting him' in the face. . . Whatever the merits of the decision in *Deorle,* the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, law-breaking, and out of sight. The Ninth Circuit also leaned on *Alexander v. City and County of San Francisco,* 29 F.3d 1355 (C.A.9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home 'for the primary purpose of arresting him' even though they lacked an arrest warrant. . . Quade, in response, fired a handgun; police officers 'shot back, and Quade died from gunshot wounds shortly thereafter.'. . The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no 'exigent circumstances' excusing their entrance. . .*Alexander* too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. . . Under Ninth Circuit law. . . an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'. . Courts must not judge officers with 'the 20/20 vision of hindsight.'. . When *Graham, Deorle,* and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases 'would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.'. . But even assuming that is true, *no precedent clearly established that there was not 'an objective need for immediate entry' here.* No matter how carefully a reasonable officer read *Graham, Deorle,* and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that 'fair notice,' an officer is entitled to qualified immunity. . . Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. . . .Even if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be

warranted. Rather, so long as 'a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'. . . Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified. Finally, to the extent that a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right respondent alleges, . . . no such consensus exists here. . . .In sum, we hold that qualified immunity applies because these officers had no 'fair and clear warning of what the Constitution requires.'. . . Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness. * * * For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.")

[**Note:** The Court dismissed the writ of certiorari on the question of whether Title II applies to "on-the-street responses to reported disturbances" as "improvidently granted." *See* ***Clark v. Colbert***, 895 F.3d 1258, 1265 (10th Cir. 2018) ("[W]e have never squarely held the ADA applies to arrests. *See J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255, 1260–61 (10th Cir. 2015); *cf. Gohier*, 186 F.3d at 1221 (noting, in dicta, that the arrest context is not categorically beyond the ADA's scope). Likewise, we have never held a municipality incurs liability under the ADA for failing to adequately train its employees. *See J.V. ex rel. C. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1297 (10th Cir. 2016). . . But we need not confront either of those open questions to resolve this appeal, as Clark has failed to rebut the district court's conclusion that the ADA does not transfer liability through the Broken Arrow officers to the Wagoner County Board in this case."); ***Haberle v. Troxell***, 885 F.3d 170, 178-82 (3d Cir. 2018) ("As a threshold matter, we consider whether the ADA applies when police officers make an arrest. Although the question is debatable, we think the answer is generally yes. . . . The first question, then, is whether arrestees can be 'qualified individuals' under the ADA, and the best response is that they can, for there is nothing to categorically exclude them from the statute's broad coverage. . . . The second question is whether arrestees may have disabilities covered by the ADA, and the answer to that is clearly 'yes.'. . .Saving the third qualifying question for last, we next note that the fourth requirement, that the claimant has been excluded from a service, program, or activity or discriminated against by reason of his disability, is also one that can be satisfied in the context of an arrest. If the arrestee's 'disability "played a role in the ... decisionmaking process and ... had a determinative effect on the outcome of that process[,]"' *i.e.*, if the arrestee's disability was a 'but for' cause of the deprivation or harm he suffered, then the fourth element of an ADA claim has been met. . . .The most controversial question pertinent to whether the ADA applies when police officers are making arrests comes in the context of the statute's third requirement. We must consider whether arrests made by police officers are 'services, programs, or activities of a public entity,' or alternatively, whether police officers may be liable under the ADA for

'subject[ing a qualified individual] to discrimination' while effectuating an arrest. . . . [C]ourts across the country are divided on whether police fieldwork and arrests can rightly be called 'services, programs, or activities of a public entity....'. . .Fortunately, we do not need to resolve that issue in this case, because § 12132 is framed in the alternative and we can look instead to the second phrase, namely, to whether the arrestee was 'subjected to discrimination' by the police. . . .The 'subjected to discrimination' phrase in Title II is 'a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.'. . .It follows, then, that police officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee's disability, thus subjecting him to discrimination. Given that catchall, we believe that the ADA can indeed apply to police conduct during an arrest. That conclusion, which is suggested by the wide scope of the ADA's text, has support from our sister circuits. *See, e.g.*, *Sheehan*, 743 F.3d at 1217 ("Title II of the [ADA] applies to arrests."); *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA ... appl[ies] to law enforcement officers taking disabled suspects into custody."). Even though there is some disagreement concerning the point during a law enforcement encounter at which the ADA applies to police conduct, no court of appeals has held that the ADA does not apply at all. *See, e.g.*, *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (holding "that Title II does not apply to an officer's on-the-street responses to reported disturbances or other incidents ... prior to the officer's securing the scene and ensuring that there is no threat to human life"); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II ... is not the law."). . . . Even though the ADA generally applies in the arrest context, Haberle's claim for money damages against the Borough fails as a matter of law because she has not adequately pled that the Borough acted with deliberate indifference to the risk of an ADA violation. She seeks compensatory damages from the Borough under the ADA, but that remedy is not available absent proof of 'intentional discrimination.' *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 261 (3d Cir. 2013) ("[C]laims for compensatory damages under ... § 202 of the ADA also require a finding of intentional discrimination."). To prove intentional discrimination, an ADA claimant must prove at least deliberate indifference, . . . and to plead deliberate indifference, a claimant must allege '(1) knowledge that a federally protected right is substantially likely to be violated ... and (2) failure to act despite that knowledge.'. . Haberle, however, fails to allege that the Borough was aware that its existing policies made it substantially likely that disabled individuals would be denied their federally protected rights under the ADA. . . . She relies on general allegations that the Borough has 'a history of violating the civil rights of residents[,]'. . offering only hazy support for that statement. Even if she could ultimately prove a generalized history of civil rights violations, that would not necessarily demonstrate 'a pattern of past occurrences of injuries *like the plaintiff*[*'s*.]. . .Because those other vaguely referenced violations have not been adequately alleged to be 'similar to the violation at issue here, they could not have put [the Defendant] on notice' that policies, practices, and procedures had to be changed. . . Nevertheless, with respect to that defect, Haberle should be given an opportunity to amend her complaint, if possible, to salvage her

ADA claim against the Borough, since this failure in her complaint is not one as to which we can say definitively that amendment would be futile. . . .Haberle likewise fails to allege that the risk of harm was 'so great and so obvious,' as to obviate the need for her to allege facts pertaining to the Borough's knowledge. . . At most, she claims that the Borough's conduct falls 'beneath the nationally recognized standards for police department operations' with regard to those with mental illness. . . But, assuming that is true, falling below national standards does not, in and of itself, make the risk of an ADA violation in such circumstances 'so patently obvious that a [municipality] could be held liable' without 'a pre-existing pattern of violations.'")

Haberle v. Troxell, 885 F.3d 170, 183-86 (3d Cir. 2018) (Greenaway, Jr., J., concurring) ("I join the majority opinion and agree that Title II of the Americans with Disabilities Act (ADA) applies to arrests when the arrestee is 'subjected to discrimination' by the police. . . However, I would also hold that—based on the text of Title II, the Department of Justice's interpretations of Title II, and the Supreme Court's holding in *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998)—that arrests constitute 'services, programs, or activities of a public entity' under the ADA. 42 U.S.C. § 12132. . . .[T]he majority's holding only allows an arrestee to succeed on an ADA claim if he or she can prove discrimination by a public entity, leaving open the question of whether an arrestee can recover under the ADA for being 'denied the benefits of the services, programs, or activities of a public entity.' 42 U.S.C. § 12132. This is significant because '[c]ases charging discrimination are uniquely difficult to prove and often depend upon circumstantial evidence.'. .In my estimation, the statutory text of the ADA makes clear that arrests can qualify as a 'service[ ], program[ ], or activit[y]' of the police, and I therefore see no reason to hang a cloud of doubt over an arrestee's right to recovery under this alternate theory. . . .[T]he majority is reluctant to determine whether an arrest qualifies as a service, program, or activity under Title II because—according to it—this is an issue that 'courts across the country are divided on ....'. . . Two of our sister circuits have addressed this precise issue to date. In *Sheehan v. City and Cty. of S.F.*, the Ninth Circuit held that arrests are covered by Title II because '[t]he ADA applies broadly to police "services, programs, or activities."'. . Conversely, the Fourth Circuit in *Rosen v. Montgomery Cty. Md.* concluded that arrests are not services, programs, or activities because '[t]he terms "eligible" and "participate" imply voluntariness on the part of an applicant who seeks a benefit from the State.' 121 F.3d 154, 157 (4th Cir. 1997) (quoting *Torcasio v. Murray*, 57 F.3d 1340, 1347 (4th Cir. 1995)). The Supreme Court, however, squarely rejected *Rosen*'s reasoning in *Yeskey*. . . Accordingly, '[c]ourts across the country have called *Rosen*'s holding into question in light of the Supreme Court's decision in [*Yeskey*].' *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 337 (4th Cir. 2012) (collecting cases). . . Indeed, in *Seremeth*, the Fourth Circuit declined to rely on *Rosen* and held that Title II applies to police interrogations based on the phrase 'services, programs, or activities' in addition to the catch-all antidiscrimination phrase. . . We therefore need not be troubled by declining to follow *Rosen* and its logic. Rather, we

should be cognizant that no court of appeals has held that arrests are not 'services, programs, or activities of a public entity,' 42 U.S.C. § 12132, since the Supreme Court decided *Yeskey* twenty years ago. . . .The statutory text, the Department of Justice's interpretations of the text, and the Supreme Court's broad interpretation of the ADA in *Yeskey* establish that arrests are 'services, programs, or activities of a public entity' under Title II. 42 U.S.C. § 12132. I therefore see no reason to be less than plain that an arrestee with a disability has two paths to vindicate his or her disability rights.")

See also ***Roell v. Hamilton Cty., Ohio***, 870 F.3d 471, 489-90 (6th Cir. 2017) ("Neither the Supreme Court nor this circuit has squarely addressed whether Title II of the ADA applies in the context of an arrest. Nancy Roell urges us, however, to adopt the reasoning of several of our sister circuits that have found Title II applicable to law-enforcement activities, including arrests. A few opinions have indeed indicated that arrestees might be able to bring cognizable claims under Title II. But, in doing so, they have also noted that the exigent circumstances inherent in an arrest inform the reasonable-accommodation analysis. [collecting cases] We need not decide whether Title II applies in the context of arrests because, even if Nancy Roell's failure-to-accommodate claim is cognizable, Hamilton County is entitled to summary judgment based on the facts of this case. This circuit has previously held that 'the "determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry."'. . Deputies Alexander, Dalid, and Huddleston unquestionably faced exigent circumstances while attempting to restrain and arrest Roell. As detailed above, they responded to an unsecured scene to find an individual who had committed, at the very least, a series of property crimes and who posed a continuing threat to the deputies and to others. In fact, almost immediately after the deputies arrived, Roell swiftly approached them brandishing a hose with a metal nozzle and a garden basket. The deputies, in other words, were required to make a series of quick, on-the-spot judgments in a continuously evolving environment. Nancy Roell's proposed accommodations—that the deputies use verbal de-escalation techniques, gather information from the witnesses, and call EMS services before engaging with Roell—were therefore 'unreasonable ... in light of the overriding public safety concerns.'. . In the context of the exigent circumstances surrounding Roell's arrest, Nancy Roell cannot make out a viable ADA claim under her failure-to-accommodate theory. Nor has she presented any evidence that Hamilton County intentionally discriminated against Roell based on his disability. The district court therefore did not err in granting summary judgment in favor of Hamilton County on Nancy Roell's ADA claim.")

See also ***Taylor v. Ambrifi***, No. 115CV03280NLHKMW, 2018 WL 3377155, at *5 (D.N.J. July 11, 2018) ("The Third Circuit recently clarified, 'Even though there is some disagreement concerning the point during a law enforcement encounter at which the ADA applies to police conduct, no court of appeals has held that the ADA does not apply at all.' *Haberle v. Troxell*, 885 F.3d 170, 181 (3d Cir. 2018). . . .Here, the Court will deny without prejudice Defendants' motion for summary judgment on Plaintiff's ADA violation

claims for two reasons. First, despite Defendants' arguments to the contrary, a police officer and a municipality may violate a person's rights under the ADA during a law enforcement encounter, and such a claim is actionable in this Circuit. Second, the factual basis for Plaintiff's ADA claims is the same as for his constitutional violation claims. Because a jury must assess the facts to determine what occurred during Plaintiff's encounter with Ambrifi, along with Delanco Township's training practices of its officers, the Court cannot conclude as a matter of law whether Defendants violated the ADA on the present record. Defendants, however, may renew their motion on Plaintiff's ADA claims at the appropriate time during or after trial, if appropriate."); ***McHenry v. City of Ottawa***, No. 16-2736-DDC-JPO, 2017 WL 4269903, at *12-13 (D. Kan. Sept. 26, 2017) ("Defendants contend that the ADA does not apply in situations where police officers face violent conduct. . . No Supreme Court or Tenth Circuit precedent addresses this question directly. . . Every circuit that has reached this issue has held that an arrest is a public benefit that falls within the scope of the ADA. *See, e.g.*, *Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211, 1231–32 (9th Cir. 2014) (cataloging cases), *rev'd on other grounds*, 135 S. Ct. 1765 (2015). The difference among the circuits is the rule that applies to when exigent circumstances exist. Most circuits hold that an exigency is a circumstance that courts must take into account when deciding which reasonable accommodations a public entity must make. *See, e.g.*, *Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1084 (11th Cir. 2007). The Fifth Circuit takes a different approach, holding that the ADA does not apply to police officers making an on-the-street response until they have secured the scene. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (holding ADA did not apply to an officer encounter where the individual was walking towards an officer with a knife and did not drop the knife when told to do so). The Sixth Circuit also follows a slightly different path, holding a disabled individual's disability was not the cause of an officer shooting. *Thompson v. Williamson Cty., Tenn.*, 219 F.3d 555, 558 (6th Cir. 2000). Instead, the Sixth Circuit reasoned, the individual's failure to disarm was the cause. *Id.* Our court has faced this question in a case where an individual approached officers while holding a knife. *Sudac v. Hoang*, 378 F. Supp. 2d 1298, 1306 (D. Kan. 2005) (granting summary judgment). These circumstances led the officers to shoot the individual. . . Judge Lungstrum reasoned that the officers did not owe an ADA duty to accommodate the individual in this situation because of the threatening manner he presented. . . He thus applied the logic of *Hainze* and *Thompson*. . . The court finds *Sudac* persuasive and concludes that it applies the rule that our Circuit, if faced with the question, would adopt. The court thus holds that the ADA applies to arrests unless an exigency exists. Applying that rule here, plaintiff has alleged sufficient facts that, if supported by evidence and accredited by the factfinder, could support a finding that Mr. Jennings did not present an imminent threat to himself or others. These allegations prevent the court from granting a Motion to Dismiss the ADA claim against Ottawa and Franklin County."); ***Adle, on behalf of Gerken v. Maine State Police Dep't***, No. 1:15-CV-458-NT, 2017 WL 3902859, at *16-21 (D. Me. Sept. 6, 2017) ("On the undisputed facts, Mr. Gerken had established himself as an unusually resilient individual. After pepper spray, Taser fire, an attempt by a game

warden to wrest the knife from his grip, a blast from a fire hose, and being shot, Mr. Gerken still had hold of the knife. The light in the woods was dimming. Sgt. Grass was less than thirteen feet from Mr. Gerken. Despite orders to stop moving and stay down, the officers saw Mr. Gerken sitting up and making a lunging motion with the knife. The situation had been unfolding quickly, and now each officer was called on to make a split-second judgment. All three officers made the decision to shoot until Mr. Gerken was incapacitated. . . Under *Berube*, the law was established that an officer need not perfectly calibrate the amount of force required to protect himself in an emergency situation. On these facts, under this law, the Plaintiff has not shown that no reasonable officer, confronted with this situation, would have made the same choice that Sgt. Grass, Sgt. Shead, and Det. Mitchell each made. Accordingly, I find that the individual Defendants are entitled to qualified immunity on the excessive force claims under § 1983. . . . There is division within the Circuits over whether Title II of the ADA applies *at all* to encounters with violent, mentally ill individuals. The Fifth Circuit has held that:Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). In contrast, the Fourth Circuit takes the view that exigent circumstances factor into whether the requested modification is reasonable under the totality of the circumstances. *Waller ex rel. Estate of Hunt v. Danville*, 556 F.3d 171, 175 (4th Cir. 2009); . . . *cf. Bircoll v. Miami-Dade Cty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) (holding exigent circumstances surrounding an arrest "go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance," where a nonviolent, deaf individual requested an accommodation); *Gohier*, 186 F.3d at 1221 ("[A] broad rule categorically excluding arrests from the scope of Title II ... is not the law."). As for controlling authority on the question, the Supreme Court has yet to decide the issue. . . The First Circuit noted in 2006 that '[i]t is questionable whether the ADA was intended to impose any requirements on police entering a residence to take someone into protective or other custody beyond the reasonableness requirement of the Fourth Amendment.'. . Courts within this District have long referred to an 'exigent circumstances exception' or have followed *Hainze*. [collecting cases] Regardless of whether there is a per se rule that the ADA does not apply in exigent circumstances or whether exigency is one factor among many to determine whether a requested accommodation is reasonable, the threshold question is whether exigent circumstances existed. The Plaintiff argues that exigent circumstances did not exist leading up to the execution of the tactical plan and that the MSP's militaristic response unreasonably exacerbated Mr. Gerken's mental health crisis. The Plaintiff's experts opined that, under the totality of the circumstances, the collective law enforcement conduct. . . caused Mr. Gerken's condition to deteriorate and ultimately led to his death. . . . On the facts before me, taken in the light most favorable to the Plaintiff, no reasonable juror could conclude that the situation faced by the MSP did not involve exigent circumstances and a threat to human safety. The MSP did not have the option of packing up and going home when it got dark. There is no dispute that Mr. Gerken was

armed with a knife, that he was disturbed, that he had earlier told an 8-year-old to stop looking at him or he would kill her, that he had refused to drop the knife for the first responders, that he had resisted Sgt. Dunham's attempt to disarm him, and that he had withstood pepper spray and an attempt to Taser him. Except for the odd outburst, Mr. Gerken remained unresponsive, for over six hours of attempted negotiations, and he never once let go of the knife. It is undisputed that shortly before the tactical plan was executed, Mr. Gerken said, 'I will cut you' as he waved his knife in the air. Although the Plaintiff points out that everybody was safe as long as Mr. Gerken lay on the ground, no one knew if and when Mr. Gerken would get up. To say that Mr. Gerken might still be there today if the police had not used the fire hose is speculative. On these facts, no reasonable juror could conclude that there was no exigency. Many of the Plaintiff's accommodations were tried without success or rejected as unworkable. There is no dispute that negotiations extended over six hours. The Plaintiff offers no facts to suggest that lights were available that could have effectively lit the forest and allowed for further negotiations. . . . Even under the totality of the circumstances test set forth in *Waller*, the record indicates that the officers on the scene provided Mr. Gerken with reasonable accommodations. . . The MSP conducted a lengthy, personalized negotiation by experienced officers. The officers shifted away from negotiations only when they perceived an increased risk to themselves and the public. As discussed above, Sgt. Grass's decision to use the fire hose as an alternative, non-lethal tool was objectively reasonable in these circumstances. Once Mr. Gerken rose to his feet and began to run, knife in hand toward Det. Mitchell's advance, exigent circumstances certainly curtailed any duty to accommodate Mr. Gerken's disability."); ***Williams v. City of New York***, 121 F.Supp.3d 354, 364-65 & n.12, 369-71 (S.D.N.Y. 2015) ("There is no dispute that Plaintiff is a qualified individual with a disability. . . or that the City is a public entity and is subject to the ADA and Rehabilitation Act. The City concedes that NYPD actions fall within the scope of Title II of the ADA and the Rehabilitation Act generally but argues that 'on the street' interactions between police officers and 'qualified individuals with a disability' are excluded from coverage until the crime scene has been secured and the arrestee has been transported to the stationhouse. . . In other words, the City argues that the NYPD bears no burden to provide *any* accommodation to disabled individuals until after the individual has been arrested and booked. The City advances two theories to support its position: first, 'on-the-street encounters' are not covered 'services, programs, or activities;' and, second, exigent circumstances and overriding public safety concerns make it unreasonable to require police officers to accommodate disabled individuals before making an arrest. . . The City's crabbed interpretation of Title II's coverage of police activity simply does not comport with the language of Title II and its implementing regulations, particularly in light of the remedial purpose of the statute and the weight of authority that has considered the issue. . . .The Second Circuit has yet to address the question whether and to what extent Title II of the ADA applies during an on-the-street interaction leading to an arrest. . . The Supreme Court granted certiorari in *City & Cnty. of San Francisco, Cal. v. Sheehan*, 135 S.Ct. 702 (2014), to consider the question whether Title II of the ADA applies 'to an officer's on-the-street responses to reported disturbances

or other similar incidents ... prior to the officer's securing the scene and ensuring that there is no threat to human life,' 135 S.Ct. 1765, 1773 (2015). The Court dismissed the question presented as improvidently granted, however, because the petitioner, respondent, and United States as *amicus curiae* all conceded on the merits that 42 U.S.C. § 12132 applies to arrests. . . The issue, therefore, remains undecided. . . .The City argues that a plaintiff has no remedy under § 1983 for alleged violations of Title II of the ADA because Congress adopted a comprehensive private remedial scheme that displaced private rights of action under § 1983. . . Because the remedial scheme of Title II of the ADA derives from the same source as the remedial scheme of Title IX, the Supreme Court's conclusion that parallel and concurrent § 1983 claims and implied private causes of action are available under Title IX applies with equal force to Title II of the ADA. Accordingly, a plaintiff can bring a cause of action under § 1983 to enforce rights protected by Title II of the ADA."); ***Lookabill v. City of Vancouver***, No. 13-5461 RJB, 2015 WL 4623938, at *8-9 (W.D. Wash. Aug. 3, 2015) ("The principle case that Plaintiffs rely upon, *Sheehan v. City and Cnty. of San Francisco,* 743 F.3d 1211 (9th Cir.2014), was before the U.S. Supreme Court in 2015. *City & Cnty. of San Francisco, Calif. v. Sheehan,* ––U.S. ––––, ––––, 135 S.Ct. 1765, 1772, 191 L.Ed.2d 856 (2015). (In *Sheehan,* the Ninth Circuit held that the ADA applies to arrests.) The *Sheehan* defendants initially requested certiorari on the question of whether the ADA 'requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody,' arguing that there was a split in the circuits as to whether the ADA applies to arrests. *City & Cnty. of San Francisco, Calif. v. Sheehan,* ––U.S. ––––, ––––, 135 S.Ct. 1765, 1772, 191 L.Ed.2d 856 (2015). The U.S. Supreme Court 'dismissed' [sic] the question, holding that certiorari was improvidently granted because the defendants failed to brief the question to the Court (arguing instead that under 28 C.F.R. §§ 35.139(a) and 35.104, 'a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA') and failed to adequately raise that new issue in the Ninth Circuit. *Id.* The ADA claim was remanded to the Ninth Circuit and the Ninth Circuit remanded the ADA claim to the district court. Accordingly, the Ninth Circuit's holding in *Sheehan,* that the ADA applies to arrests, is still binding on this Court. . . . The City also advances the same argument here that the *Sheehan* defendants raised with the Supreme Court, but the Supreme Court did not reach. It argues that Mr. Lookabill was not a 'qualified individual with a disability' requiring accommodation. . . .In the circumstances presented here, Mr. Lookabill was not a 'qualified individual with a disability' because he posed a 'direct threat' to the 'health or safety of others.' The officers were called to the scene to deal with Mr. Lookabill, who appeared to be intoxicated and had threatened people with a gun. He was armed, non-compliant, and acting erratically. He begged the police to come get the gun from him and then would ask them to shoot him. He threatened to shoot himself. Mr. Lookabill would say he wanted to be a policeman but then would scream obscenities at them. Mr. Lookabill kept 'target glancing' the officers. All present were aware he had military training and had served in Iraq. Further, the undersigned has already held that '[a]t the time they opened fire, the officers had probable cause to believe that Mr.

Lookabill posed an immediate threat to the officers or others. Mr. Lookabill moved quickly and deliberately for his gun without provocation. He had been repeatedly warned not to do so by several policemen with their guns drawn.'. . Mr. Lookabill posed a significant threat to the officers, other civilians, and to himself. He was not a qualified individual with a disability under the ADA. Plaintiffs argue that certain accommodations should have been implemented, for example that the officers should not have ordered Mr. Lookabill to the ground, but should have him 'put his hands above his head and turn around' and that the officers should not have been positioned so closely to Mr. Lookabill, and that way would not have felt threatened. Plaintiff does so without any evidence to support these suppositions. Aside from bare assertions, Plaintiffs fail to show that these actions would have mitigated the risk posed by Mr. Lookabill when the officers encountered him or afterward. There is no showing that any modification of policy, practice, or procedure or the provision of auxiliary aids or services would have mitigated the risk. 28 C.F.R. § 35.139(b). In addition to failing to show that Mr. Lookabill was a 'qualified individual with a disability,' Plaintiffs failed to show that the officers' alleged discrimination or failure to accommodate was 'by reason of" his disability."); ***Jones v. Lacey***, No. 14-CV-10384, 2015 WL 3579282, at *17 n.1 (E.D. Mich. June 5, 2015) ("Defendants do not appear to dispute that the ADA applies to Lacey's conduct during this incident. While the Court is not inclined to address an issue that neither party briefed, the Court notes that in this circuit, '[c]ase law addressing whether or how Title II of the ADA is applicable to police conduct related to effectuating an arrest or an investigation is limited.' *Scozzari v. City of Claire,* 723 F.Supp.2d 945, 970 (E.D.Mich.2010); *see also Everson v. Leis,* 412 F. App'x 771, 774 (6th Cir.2011) ("[W]hether Title II applies to arrests is an open question in this Circuit ...."). However, the Sixth Circuit has decided ADA cases with similar fact patterns as the present case without questioning the statute's applicability in those situations. *See, e.g., Wolfanger v. Laurel Cty., Ky.*, 308 F. App'x 866 (6th Cir.2009); *Tucker v. Tenn.*, 539 F.3d 526, 532 (6th Cir.2008); *Dillery v. City of Sandusky,* 398 F.3d 562 (6th Cir.2005); *Thompson v. Williamson Cty.*, 219 F.3d 555, 556 (6th Cir.2000). Other circuits have declined to exclude police conduct during arrest from Title II's reach, *see, e.g., Gohier v. Enright,* 186 F.3d 1216, 1221 (10th Cir.1999) ("[A] broad rule categorically excluding arrests from the scope of Title II ... is not the law.") or have recognized that there is a potential claim under Title II, *see, e.g., Waller ex rel. Estate of Hunt v. Danville, VA,* 556 F.3d 171, 174 (4th Cir.2009) ("In the context of arrests, courts have recognized two types of Title II claims...."). *See also City & Cnty. of San Francisco, Calif. v. Sheehan,* —— U.S. ——, ——, 135 S.Ct. 1765, 1773, —— L.Ed.2d ——, —— (2015) (dismissing writ of certiorari on the question of whether Title II applies to "on-the-street responses to reported disturbances" as "improvidently granted" given the lack of adversarial briefing on the issue).")]

Stanton v. Sims, 134 S. Ct. 3, 5, 7 (2013) (per curiam) ("There is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was 'plainly incompetent' in entering Sims' yard to pursue the fleeing

Patrick. . . The Ninth Circuit concluded that he was. It did so despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. . . .To summarize the law at the time Stanton made his split-second decision to enter Sims' yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided. We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.' *al–Kidd, supra,* at ——, 131 S.Ct., at 2083. Stanton may have been mistaken in believing his actions were justified, but he was not 'plainly incompetent.'")

Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084, 2085 (2011) ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'. . We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. . . The constitutional question in this case falls far short of that threshold. At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional. . . . [Ashcroft] deserves qualified immunity even assuming. . . that his alleged detention policy violated the Fourth Amendment.")

Weise v. Casper, 131 S. Ct. 7, 7, 8 (2010) (Ginsburg, J., joined by Sotomayor, J., dissenting from denial of certiorari) ("I cannot see how reasonable public officials, or any staff or volunteers under their direction, could have viewed the bumper sticker as a permissible reason for depriving Weise and Young of access to the event. Nevertheless, the Court of Appeals held respondents entitled to qualified immunity because 'no specific authority instructs this court ... how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area.' 593 F.3d 1163, 1170 (C.A.10 2010). No 'specific authority' should have been needed. . . . I see only one arguable reason for deferring the question this case presents. Respondents were volunteers following instructions from White House officials. The Volunteer Protection Act of 1997, 111 Stat. 218, 42 U.S.C. § 14501 *et seq.*, had respondents invoked it in the courts below, might have shielded them from liability. Federal officials themselves, however, gain no shelter from that Act. Suits against the officials responsible for Weise's and Young's ouster remain pending and may offer this Court an opportunity to take up the issue avoided today.")

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643, 2644 (2009) ("[T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.

The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions. . . . *T.L.O.* directed school officials to limit the intrusiveness of a search, 'in light of the age and sex of the student and the nature of the infraction,'. . . and as we have just said at some length, the intrusiveness of the strip search here cannot be seen as justifiably related to the circumstances. But we realize that the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to such searches. [collecting cases] We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.").

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2644 (2009) (Stevens, J., joined by Ginsburg, J., concurring in part and dissenting in part) ("This is, in essence, a case in which clearly established law meets clearly outrageous conduct. . . .The strip search of Savana Redding in this case was both more intrusive and less justified than the search of the student's purse in *T.L.O.* Therefore, while I join Parts I-III of the Court's opinion, I disagree with its decision to extend qualified immunity to the school official who authorized this unconstitutional search.").

Brosseau v. Haugen, 125 S. Ct. 596, 598, 599 (2004) (per curiam) ("We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity. . . *Graham* and *Garner,* following the lead of the Fourth Amendment's text, are cast at a high level of generality. . . . Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law. [citing *Hope v. Pelzer*]. . . . The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision. . . . We therefore turn to ask whether, at the time of Brosseau's actions, it was ' Aclearly established"' in this more ' Aparticularized"' sense that she was violating Haugen's Fourth Amendment right. . . The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. . . .These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the ' Ahazy border between excessive and acceptable force."' . . The cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment.").

Groh v. Ramirez, 124 S. Ct. 1284, 1293, 1294 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that

plainly did not comply with that requirement was valid. . . . [E]ven a cursory reading of the warrant in this case–perhaps just a simple glance–would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal.")

Hope v. Pelzer, 122 S. Ct. 2508, 2514-18 (2002) ("We agree with the Court of Appeals that the attachment of Hope to the hitching post under the circumstances alleged in this case violated the Eighth Amendment. . . . In assessing whether the Eighth Amendment violation here met the *Harlow* test, the Court of Appeals required that the facts of previous cases be ' 'materially similar' to Hope's situation.' . . This rigid gloss on the qualified immunity standard, though supported by Circuit precedent, [footnote omitted] is not consistent with our cases. . . . Our opinion in *Lanier* . . . makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be 'fundamentally similar.' Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts. Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional. . . . The use of the hitching post as alleged by Hope 'unnecessar[ily] and wanton [ly] inflicted pain,' . . . and thus was a clear violation of the Eighth Amendment. . . Arguably, the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution. Regardless, in light of binding Eleventh Circuit precedent, an Alabama Department of Corrections ("DOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post, we readily conclude that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . [F]or the purpose of providing fair notice to reasonable officers administering punishment for past misconduct, [there is no] reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours. The Court of Appeals' conclusion to the contrary exposes the danger of a rigid, overreliance on factual similarity. . . . The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity–he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct. Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful. The 'fair and clear warning,' . . . that these cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage. . . .We did not take, and do not pass upon, the questions whether or to what extent the three named officers may be held responsible for the acts charged,

if proved. Nothing in our decision forecloses any defense other than qualified immunity on the ground relied upon by the Court of Appeals.").

Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").[*See* discussion of *Saucier, infra*]

Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

United States v. Lanier, 520 U.S. 259, 269-72 (1997) [**Note: case involved criminal prosecution under 18 U.S.C. § 242**] ("Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar' at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights. [citing cases] But even putting these examples aside, we think that the Sixth Circuit's 'fundamentally similar' standard would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling. This danger flows from the Court of Appeals' stated view . . . that due process under § 242 demands more than the 'clearly established' law required for a public officer to be held civilly liable for a constitutional violation under § 1983 or *Bivens*. [cites omitted] This, we think, is error. In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,'. . . by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' [citing *Anderson*] So conceived, the object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242. The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes. To require something clearer than 'clearly established' would, then, call for something beyond 'fair warning.' This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. . . But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,'. . . . In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, 'in the

light of pre-existing law the unlawfulness [under the Constitution is] apparent,' [citing *Anderson*] Where it is, the constitutional requirement of fair warning is satisfied.").

Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.....in light of pre-existing law the unlawfulness must be apparent.")

D.C. CIRCUIT

Hedgpeth v. Rahim, 893 F.3d 802, 807-11 (D.C. Cir. 2018) ("Although there is a dearth of decisions interpreting D.C.'s public intoxication law in relevant respects, decisions from other courts applying comparable public-intoxication laws in similar circumstances support the reasonableness of the officers' belief of probable cause. . . We therefore conclude that the officers could have reasonably believed Hedgpeth was intoxicated and posed a danger to himself or others. As a result, the officers are entitled to qualified immunity on Hedgpeth's claim of an unlawful arrest. . . .Here, the district court considered the reasonableness of Officer Rahim's use of a forcible takedown maneuver under the assumed facts to be a close question, in light of, among other things, the misdemeanor nature of the suspected offenses. The court, though, did not decide that underlying Fourth Amendment question, instead concluding that Officer Rahim is entitled to qualified immunity. We agree. Even if there is a genuine dispute about the reasonableness of an officer's use of force, he is protected by qualified immunity unless his force violated clearly established law. . . . The pertinent question here is whether 'any competent officer,' in light of '[p]recedent involving similar facts,'. . . would consider it unlawful to use a takedown maneuver against a suspect who was shouting repeatedly and belligerently at the officers, who refused their orders to put his hands behind his back, and who had been described by a person with him as 'hard to handle.' We conclude that this is not 'an obvious case in which any competent officer would have known that' the use of a takedown maneuver in those circumstances 'would violate the Fourth Amendment.'. . . This does not mean an officer invariably has authority to forcibly take down a suspect in the course of a routine arrest. But here, in light of the circumstances of this case and the applicable precedent, this case is not one in which 'the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'. . That conclusion is fortified by decisions from other courts sustaining an arresting officer's use of an analogous level of force against a noncomplying suspect.")

Corrigan v. District of Columbia, 841 F.3d 1022, 1034-38 (D.C. Cir. 2016) ("Because the Supreme Court's reasoning in *Cady* focused on attributes unique to vehicles, some circuits have confined the community caretaking exception to automobiles. *See, e.g.*, *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 207–09 (7th Cir. 1982). The Fifth and Eighth Circuits have extended the exception to warrantless searches of the home, *see United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990); *United States v. Quezada*, 448 F.3d 1005, 1007–08 (8th Cir. 2006), but the authorized scope of the searches has

been quite limited. The Sixth Circuit appears to have equivocated. *Compare United States v. Rohrig*, 98 F.3d 1506, 1521–25 (6th Cir. 1996), *with Goodwin v. City of Painesville*, 781 F.3d 314, 331 (6th Cir. 2015) and *United States v. Williams*, 354 F.3d 497, 508–09 (6th Cir. 2003). Neither this court nor the D.C. Court of Appeals has held that the community caretaking exception applies to a home. *United States v. Proctor*, 489 F.3d 1348, 1353 (D.C. Cir. 2007); *Hawkins v. United States*, 113 A.3d 216, 222 (D.C. 2015). The instant case does not require the court to decide whether the community caretaking doctrine applies to a home because even assuming it may, the officers point to no authority as would justify the EOD [Explosive Ordnance Disposal Unit] search. In cases where this doctrine justified a warrantless search of a home, the police officers were presented with circumstances requiring immediate action if they were to fulfill their caretaking function, and the ensuing searches were characterized by brevity and circumspection. . . Here, the MPD had been on the scene for five hours and fully secured the area prior to the EOD entry and search, and Corrigan was in MPD custody after surrendering peacefully. There was ample time and opportunity for the MPD to investigate further and, as appropriate, to seek a search warrant. Yet, instead of doing so, the officers conducted another, more invasive search of Corrigan's home. . . . [U]pon viewing the evidence in the light most favorable to Corrigan as the non-movant, . . . we conclude that the officers fail to demonstrate that the extensive EOD search of Corrigan's home was justified by any plausible exigency. And assuming, without deciding, that the community caretaking doctrine applies to a home, the officers lacked probable cause to believe that there was a risk to the community demanding the kind of swift, warrantless response that doctrine would authorize. We therefore hold that the EOD search violated Corrigan's rights under the Fourth Amendment. . . .For the brief and limited warrantless ERT 'sweep' of Corrigan's home, the officers had a sufficiently reasonable basis for believing there was probable cause to look for a potentially injured and incapacitated person as to entitle them to qualified immunity. . . .Although a close question, the information known to Glover suggested that a reasonable officer on the scene could have believed that there was probable cause to order a brief "sweep" to check whether the ex-girlfriend was injured and remained incapacitated inside Corrigan's home. . . Consistent with that belief, the ERT 'sweep' was limited to spaces large enough to contain an individual, . . . and thus was not more intrusive than necessary to address the claimed exigency. By contrast, based on the facts known to the officers at the time, no reasonable officer could have believed that an exigency continued to exist as would justify a second warrantless break in of Corrigan's home to search for explosives. The evidence shows only that the MPD officers were presented with a potentially suicidal military veteran who possessed 'military items' and had IED training, but no information about actual or reported threats by him to others, much less that he had IED materials at home or would commit suicide in a manner that threatened others. . . .The unfocused nature of the EOD search underscores its patent unreasonableness, both in terms of its scope and the lack of a reasonable basis for it. . . .Clearly established law foreclosed the broad and invasive search that was executed. And even assuming, without deciding, that the community caretaking doctrine could justify the warrantless search of a home, it cannot shield the officers from liability. It is clearly established that this doctrine encompasses only police searches that are occasioned by, and strictly circumscribed by, the need to perform caretaking functions 'totally divorced from the detection, investigation, or acquisition of evidence related to' a crime. . . That is, the police must be lawfully

inside a home for a reason unrelated to ferreting out crime. . . . Finally, the wide berth for reasonableness that the Supreme Court has accorded officers involved circumstances in which they must make split second judgments. . . . In Corrigan's case, the MPD had more than five hours, between the Fifth District's officers' arrival on the scene and the MPD's first contact with Corrigan himself, to gather information about a possible threat and apply for a warrant upon probable cause. . . . The more intrusive EOD search was conducted after the ERT 'sweep' revealed no injury to others or suspicious items in plain view. Corrigan had peacefully submitted to MPD custody. As such, this was not a case in which officers had to make a split-second decision that, judged with the benefit of hindsight, is revealed to be mistaken. . . Rather, this is a case in which officers disregarded the long-established 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'. . They thereby contravened established law clearly putting them on fair notice that warrantless searches of a home based on an exception to the warrant requirement must be supported by a reasonable belief based on objective facts and narrowly circumscribed to the specific exigency claimed. Our dissenting colleague parts company with our analysis only as to qualified immunity. As to that issue she acknowledges that 'there can be "an obvious case" where a more generalized test of a Fourth Amendment violation "clearly establish[es]" the answer, even without a body of relevant case law' articulated at a high level of specificity. . . This is that 'obvious case.' A few clear propositions, all well established at the time of the search, admit of no relevant legal uncertainty in the context the EOD faced: The Fourth Amendment prohibits warrantless searches of a home, . . .unless an exception to the warrant requirement applies, . . . the exigent circumstances exception requires 'genuine exigency,'. . . and the community caretaking exception, which no binding precedent has applied to the search of a home, is, in any event, limited to police functions that are 'totally divorced' from criminal investigation[.]. . . As general as these propositions may be, their application here is straightforward, implicating no 'hazy border' between acceptable and unacceptable conduct by trained law enforcement officers. . . . Nothing in *Mullenix v. Luna,* 136 S. Ct. 305, 308 (2015), where the police were attempting to execute an arrest warrant, calls our conclusion into doubt. . . . Given the lack of any exigency in the instant case, *Mullenix*, like the entire run of recent cases granting qualified immunity, is relevant only insofar as it reinforces the familiar, objective immunity standard that we apply.")

Corrigan v. District of Columbia, 841 F.3d 1022, 1039-47 (D.C. Cir. 2016) (Brown, J., dissenting) ("As *Law and Order* reminds us every evening, the police are the ones 'who investigate crime.' Nowadays, though, we demand much more from them. The series of unfortunate events presented by Matthew Corrigan's lawsuit is distressing, and I agree with the conclusion that the second search of Corrigan's apartment violated the Fourth Amendment. Nevertheless, given the varied role played by police officers, and its effect on the standard Corrigan must meet to pierce the officers' qualified immunity, I respectfully dissent. . . .Properly applied, the qualified immunity analysis shows the officers' initial actions were not only responsible, but commendable. When the officers' actions transgressed the Fourth Amendment, Corrigan's rights were protected by the district court granting his motion to suppress and entering a *nolle prosequi* on all charges against him. Now, when Corrigan seeks half-a-million dollars in a § 1983 lawsuit, a different issue is in

play: whether controlling law was 'sufficiently clear that *every* reasonable official would have understood that what [t]he[y] [did] violate[d]' Corrigan's Fourth Amendment rights. . . The court concludes it was, but I am at a loss to understand how this holding can be squared with the simple fact that neither the Supreme Court's precedent, nor ours, nor a robust consensus of our sister circuits clearly answered the legal questions faced by the officers in this case. There is much on which the majority and I agree. Under the circumstances of this case, the first search was permissible; the second search was not; and the information the police garnered from the first search and further investigation changed the calculus. However, on the question of how these issues impact the scope of qualified immunity, we part company. First, by imposing an artificially high burden on police conduct in exigent circumstances, the court conflates the 'probable cause' normally required to search a person's home and the 'objectively reasonable basis' used to evaluate intrusions based on exigent circumstances. . . .This conflation signals the majority opinion's fundamental flaw: grafting general Fourth Amendment standards from the criminal investigation context on to the exigency context. Related to this first problem is the second—and more significant—issue with today's opinion: The metric for measuring what law is 'clearly established' is more protean than my colleagues concede. . . .The standard for law to be 'clearly established' is quite demanding. The Supreme Court's most recent pronouncement on the issue confirms '[a] clearly established right is one that is sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but *existing precedent* must have placed the statutory or constitutional question *beyond debate*. Put simply, qualified immunity protects all but the *plainly incompetent* or those who *knowingly violate* the law. . . . The source of 'clearly established' law is quite constrained as well. Controlling precedent from the Supreme Court, the applicable state supreme court, or from the applicable circuit court, constitutes 'clearly established' law—but it is unclear what else, if anything, does. . . .If there is no controlling authority in the plaintiff's jurisdiction at the time of the incident, 'a *robust* consensus of cases of persuasive authority' 'is necessary' to show 'clearly established' law. . . This makes sense. It is simply not reasonable to ask police departments around the country to keep abreast of *every* circuit court's latest 'clearly established' pronouncement and parse its application to the myriad factual permutations officers encounter on a daily basis. . . Accordingly, the Supreme Court is circumspect about the use of out-of-circuit cases to compose 'clearly established' law. Since *al-Kidd, it is only assumed for sake of argument* that 'a right can be "clearly established" by circuit precedent despite disagreement in the courts of appeals.' *See Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (*per curiam*); *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (*per curiam*); *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012). . . .Finally, characterizing the appropriate law as 'clearly established' is quite exacting. . . .To be sure, there can be 'an obvious case' where a more generalized test of a Fourth Amendment violation ' "clearly establish[es]" the answer, even without a body of relevant case law.'. . But, that circumstance is inapposite when a case is 'one in which the result depends very much on the facts.'. . In that latter circumstance, a more 'particularized' inquiry into the applicable law is required. . . There, we ask whether a prior case 'squarely governs the case here,' *not* whether a prior case puts this one in a 'hazy border' between acceptable and unacceptable conduct[.] . . . Behavior on the border is still behavior protected by

qualified immunity. . . . The majority cites no Supreme Court case and no D.C. Circuit case squarely governing Corrigan's claim. Indeed, the majority all but concedes there is no such case when justifying its review of both the 'constitutional violation' and 'clearly established' prongs of the qualified immunity analysis; doing so 'to avoid "leav[ing] the standards of official conduct permanently in limbo."'. . The majority finds 'clearly established' law by reasoning the facts of this exigent circumstances case back to the general principles of warrantless home searches in the criminal investigation context. This is inappropriate in Corrigan's case, where the officers were not searching for criminal activity but responding to a potentially-suicidal suspect with 'military items.'. . But even if this was appropriate, the majority's analysis rests on 'legal facts,' not law. . . The facts aid the analysis, but only to the extent they are closely aligned (or are obviously distinguishable from) controlling authority or persuasive authority. The 'clearly established' inquiry is its own question, not a rehash of the facts giving rise to a constitutional-rights violation. . . The factual regurgitation is telling, however, because it confirms Corrigan's claim is one where the existence of 'clearly established' law 'depends very much on the facts of [this] case.'. . 'Clearly established' law in this context thus depends upon a prior case 'squarely govern[ing]' this one. . . Since the majority can point to no clearly analogous case prohibiting the officers' conduct, that should end the inquiry. . . . At the time—with no Supreme Court or D.C. Circuit case squarely governing the emergency situation faced here—a reasonable officer could read *Mora*, *Sutterfield*, and *Hendrix* and conclude that the warrantless searches conducted in Corrigan's apartment might be within the realm of the officer's authority to abate public safety concerns posed by possession of military equipment by an individual with IED training. This is so even as the second search was a 'substantial step beyond the standard protective sweep.'. . . But determining whether the law was 'clearly established' is not an exercise in Monday-morning quarterbacking—law enforcement officers should not be subject to personal liability simply because the judiciary has not precisely defined the rules of the road. . . .It is therefore insufficient to apply, retrospectively, criminal investigation limitations on police conduct to the exigent circumstances context simply because these limitations have long existed in the investigatory context. Ultimately, the court's analysis rests on the 'Fourth Amendment standard' of reasonableness. . . The 'inquiry' of 'objective reasonableness' as to a Fourth Amendment violation, however, 'is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation.' . . The fact that the officers violated the Fourth Amendment in searching Corrigan's apartment a second time without a warrant is, for purposes of finding the 'particular' issue faced by the officers answered by 'clearly established' law, a *non sequitur*. What "every reasonable" official would have understood to be 'clearly established' in case law is not the same question as what is 'objectively reasonable' for purposes of determining a Fourth Amendment violation. . . . It does not take six pages to explain why law is 'clearly established' unless the case is 'one in which the result depends very much on the facts.'. . . But the majority will not—and indeed, cannot—admit this. If the majority did admit this, it would then have to concede no case 'squarely governed' at the time the officers entered Corrigan's apartment. . . . We do not need to make 'bad law' just because 'bad facts' are often accused of doing so. There is much to regret about the procedures police continued to pursue here—especially in light of the many observations and revelations which objectively decreased the imminence of any dire threat.

Good intentions, however, are no substitute for good reasons. 'Because of the importance of qualified immunity to society as a whole, the [Supreme] Court often corrects lower courts when they wrongly subject individual officers to liability.'. . *Indeed, if this decision were affirmed by the Supreme Court on the ground that the officers violated clearly established law, it would mark the first time in more than a decade that the Supreme Court has ruled in favor of a § 1983 plaintiff on the question*. *See Groh v. Ramirez,* 540 U.S. 551, 565 (2004); *Hope,* 536 U.S. at 745–46. Yet the Supreme Court's exacting standard to identify 'clearly established' law does not play even a supporting role in the court's analysis, which, at most, strings together generalized statements and some out-of-circuit cases, affixes the label 'clearly established' onto the newfangled 'rule' drawn from them, and then employs this 'rule' to deny qualified immunity. If we want to join the game of second-guessing first responders, we will find ourselves at the end of a long queue. But flouting the clear trend of controlling authority is both unwarranted and unwise, so I respectfully dissent.")

Dukore v. D.C., 799 F.3d 1137, 1144-45 (D.C. Cir. 2015) ("In reviewing a grant of qualified immunity, we must consider the right asserted 'not as a broad general proposition, but in a particularized sense so that the contours of the right are clear[.]'. . So the right we must consider in this case is 'not the general right to be free from retaliation for one's speech,' but rather 'the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.'. . The Supreme Court has 'never held that there is such a right.'. . Nor was there in February 2012 (nor is there now) any settled consensus view in this court or other federal courts of appeals such that 'the statutory or constitutional question' has been placed 'beyond debate.' . . Quite the opposite, in July 2011, this court recognized that the federal courts of appeals were split on whether a plaintiff claiming retaliatory arrest had to show that the arrest lacked probable cause, and expressly declined to take sides. *See Moore,* 644 F.3d at 423 n. 8. That means that, at the time of the arrests in this case, precedent in this and other circuits was either inconclusive or actively in conflict on whether the existence of probable cause precluded an arrest from being deemed 'retaliatory.' That is a far cry from placing the question beyond debate. Dukore and Canavan argue that the right to be free from retaliation under the First Amendment is clearly established. And they argue that the only confusion in the law concerned retaliatory *prosecutions,* as discussed in *Hartman v. Moore,* 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). Dukore and Canavan further contend that any ripples of uncertainty generated by *Hartman* in other jurisdictions did not unsettle this circuit's law, because we have recognized that 'retaliatory arrest and retaliatory prosecution are distinct constitutional violations[.]' *Moore v. Hartman,* 704 F.3d 1003, 1004 (D.C.Cir.2013). The absence of confusion in this jurisdiction, they conclude, left as governing law for the officers the clearly established background right to be free from retaliation under the First Amendment. That argument turns the qualified immunity burden upside down. It is Dukore's and Canavan's burden to show that the particular right in question—narrowly described to fit the factual pattern confronting the officers . . . was clearly established. It was not the District's burden to show that the right had been called into question. The generality of Dukore's and Canavan's constitutional principle and the widespread instability in the law on the precise question of probable-cause arrests prevent them from discharging that duty.)

Doe v. D.C., 796 F.3d 96, 104-05 (D.C. Cir. 2015) ("The parties do not dispute that in an exigency the state may, consistent with the Constitution, seize children without a court order or a pre-deprivation hearing. But the precise contours of when an exigency exists to justify removal without a warrant or pre-deprivation hearing are not settled, as the other Circuits' varied formulations demonstrate. Given the uncertainty regarding when exactly an exigency exists and the lack of our own controlling precedent, the law in question was not 'clearly established' at the time of the seizure. The individual defendants are thus entitled to qualified immunity as the district court held.")

Fox v. Gov't of D.C., 794 F.3d 25, 30-31 (D.C. Cir. 2015) ("Certainly, a plausible argument can be made that the officer's conduct in the present case crossed that constitutional line. That, however, is not good enough to pierce the officer's claim of qualified immunity. Under *Saucier* and *Pearson* and their progeny, the piercing requires a violation of a constitutional right clearly established at the time of the incident. Not only has Mrs. Fox not established that her right not to be seized in the circumstances of this case was 'clearly established,' she did not even argue this matter in her opening brief. As also noted above, where a litigant has forfeited an argument by not raising it in the opening brief, we need not reach it. In short, we need not decide the constitutional issue because Mrs. Fox has not properly brought it before us. Given the circumstances of Mrs. Fox's alleged seizure, nothing in her brief shows that existing precedent has placed her Fourth Amendment right beyond debate. . . Consequently, Mrs. Fox has not shown that Officer Boyd violated her clearly established Fourth Amendment right when he ordered her to get out of the car and put her hands on the hood during her husband's traffic stop.")

Mpoy v. Rhee, 758 F.3d 285, 293-95 (D.C. Cir. 2014) ("Mpoy argues . . . that the context of the statement suggests he was speaking as a citizen rather than an employee because he sent the email outside the 'chain of command'—by sending it directly to Chancellor Rhee rather than to his principal's immediate superiors. As noted above, we held in *Winder* that 'a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command.'. . But granting that whether speech is made inside or outside a chain of command may be a contextual factor in determining *whether* the employee made it to report interference with his job responsibilities, . . . there is little doubt that Mpoy was using the email to Rhee as an internal channel through which he could, in his capacity as a teacher, report such interference. . . . Accordingly, we conclude that, under the *Winder* test, Mpoy's email constituted employee speech unprotected by the First Amendment. . . *Winder*, however, is not the last word on this subject. In June of this year, the Supreme Court decided *Lane v. Franks*, in which it held that the First Amendment 'protects a public employee who provided truthful sworn testimony, compelled by subpoena,' at least where testifying was outside the scope of the employee's 'ordinary job responsibilities.' . . . In so holding, the Court focused particularly on the nature of compelled testimony. . . Moreover, because it was 'undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings,'. . . the Court, as in *Garcetti*, had no occasion to consider how the scope of such responsibilities should be determined in other circumstances. As a consequence, *Lane* does not

directly or necessarily contradict *Winder's* application of *Garcetti*. . . Nonetheless, it is possible that *Winder's* broad language, interpreting *Garcetti* as leaving an employee unprotected when he reports conduct that 'interferes with his job responsibilities,'. . . could be in tension with *Lane's* holding that an employee's speech is unprotected only when it is within the scope of the employee's 'ordinary job responsibilities,'. . . or 'ordinary job duties[]'. . . . In particular, the use of the adjective 'ordinary'—which the court repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by *Garcetti.* Neither *Garcetti* nor any other previous Supreme Court case had added 'ordinary' as a qualifier. . . But we need not resolve that question today. As the Court noted in *Lane*—and went on to hold in that case—even if speech is protected by the First Amendment, a court must dismiss claims against a government official in his personal capacity if the official is entitled to qualified immunity. . . . In *Lane,* the Court found that precedent in the Eleventh Circuit, in which the case was brought, 'did not preclude [the defendant] from reasonably holding that belief. And no decision of this Court was sufficiently clear to cast doubt on the controlling Eleventh Circuit precedent.'. . As we held in Part II.B, under this circuit's *Winder* test, Mpoy's email constituted unprotected employee speech. (And no Supreme Court case at the time 'cast doubt' on that precedent.) A fortiori, the defendants could reasonably have believed that they could fire Mpoy on account of that email. . .Indeed, even if we are wrong in concluding as a matter of law that the email 'report[ed] conduct that interfere[d] with his job responsibilities,'. . . it surely would not have been unreasonable for the defendants to believe that it did, and hence that it was lawful to fire Mpoy under *Winder.* There is one further wrinkle to consider. The question under the qualified immunity doctrine is whether the official violated a right that was 'clearly established at the time of the challenged conduct,' and thus whether the defendants 'could reasonably have believed, at the time [they] fired' Mpoy that his speech was unprotected. . . *Winder* was decided approximately a year after the defendants fired Mpoy, and hence could not itself have been the basis for reasonable belief on the part of the defendants. But *Winder* said that the test it was articulating was the consistent holding of 'our cases applying *Garcetti,*'. . . and all of the cases *Winder* cited were decided before Mpoy was fired. Accordingly, because this court read its preexisting law as yielding the test we announced in *Winder,* it could not have been unreasonable for the defendants to do so as well. Presswood and Rhee are therefore entitled to qualified immunity.")

Amobi v. District of Columbia Dept. of Corrections, 755 F.3d 980, 993 (D.C. Cir. 2014) (" '[M]alicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably "seized" without probable cause, in violation of the Fourth Amendment." *Pitt,* 491 F.3d at 511. Nevertheless, because the relevant conduct at issue in this case occurred before we issued our decision in *Pitt [v. District of Columbia,* 491 F.3d 494 (D.C. Cir. 2007)], clearly establishing malicious prosecution as a violation of constitutional rights, qualified immunity is appropriate here.")

Moore v. Hartman, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (per curiam) ("The Supreme Court has directed this court to determine whether our decision in *Moore v. Hartman,* 644 F.3d 415 (D.C.Cir.2011) ("*Moore V* "), holding that 'probable cause is not an element of the First

Amendment right allegedly violated' in a retaliatory prosecution suit, *id.* at 423, remains good law in light of *Reichle v. Howards,* —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). There, in examining whether the law governing retaliatory *arrest* claims was clearly established *in the Tenth Circuit* in 2006, the Court expressly declined to decide whether the absence-of-probable-cause requirement identified in *Hartman v. Moore,* 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), is 'best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery.' *Reichle,* 132 S.Ct. at 2096 n. 6. Instead, the Court hinged its decision in *Reichle* on the fact that *Hartman* unsettled Tenth Circuit precedent that had conflated retaliatory arrest *and* retaliatory prosecution claims. *See id.* at 2094–96. Because it was uncertain whether the Tenth Circuit's retaliatory arrest law remained clearly established, the defendants in *Reichle* were entitled to qualified immunity. The Court in *Reichle* was thus agnostic on the issue central to our holding in *Moore V.* Because retaliatory arrest and retaliatory prosecution are distinct constitutional violations and because the precedent in *this* Circuit clearly established in 1988, when the challenged conduct by the Postal Inspectors took place, the contours of the First Amendment right to be free from retaliatory prosecution, nothing in *Reichle* changes our conclusion that the absence-of-probable-cause requirement is not 'an element of a First Amendment retaliation violation.' *Moore V,* 644 F.3d at 424. If the Postal Inspectors believe that the Court in *Reichle* meant to decide what it refused to decide in *Hartman* and bring to a halt this three decades old case involving evidence that, unlike in *Reichle* where probable cause was conceded, 'comes close to the proverbial smoking gun,' *Moore v. Hartman,* 388 F.3d 871, 884 (D.C.Cir.2004) (" *Moore III* "), they are free to once again petition for certiorari and ask the Supreme Court if it wishes to end this saga.")

Moore v. Hartman, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("In its recent decision in *Reichle v. Howards,* —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012), the Supreme Court indicated that it is not clear whether the absence-of-probable-cause requirement identified in *Hartman v. Moore,* 547 U.S. 250, 252, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), is 'best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery.' *Reichle,* 132 S.Ct. at 2096 n. 6. Because the First Amendment law on this point is not clear, the defendants in this case cannot be said to have violated 'clearly established' First Amendment law. Therefore, the defendants are entitled to qualified immunity, and the suit may not proceed. I respectfully dissent.")

> [Post-mortem on *Moore*: ***Moore v. Hartman***, No. CV 92-2288, 2015 WL 1812852, at *90-91 (D.D.C. Apr. 17, 2015) ("After a 'herculean effort,' *see Moore V,* 644 F.3d at 427, and a 'procedural history portending another *Jarndyce v. Jarndyce,*' *Hartman,* 547 U.S. at 256, 126 S.Ct. 1695, the plaintiff received his days in court. While the plaintiff's claims may have been sufficient to survive the pleadings, the trial evidence revealed the plaintiff's claims to lack any persuasive force. . . .In sum, rather than produce a smoking gun, the plaintiff's trial evidence produced much hot air that was insufficient to sustain his claims. As a result, and for the reasons explained above, the Court again—as two other Judges on this Court previously held—denies the plaintiff's FTCA claim and enters judgment in favor

of the United States. As a consequence of the plaintiff's failed FTCA claim, the plaintiff's request for a new trial on his *Bivens* claim is rendered moot. In any event, having received one jury trial on his claim for retaliatory inducement to prosecution, the plaintiff presents no grounds that would justify a second jury trial. Thus, even if the plaintiff's *Bivens* claim were not otherwise barred, the plaintiff would not be entitled to a new trial.

* * *

As the Supreme Court noted over sixty years ago, '[t]here must be an end to litigation someday....' *Ackermann v. United States,* 340 U.S. 193, 198, 71 S.Ct. 209, 95 L.Ed. 207 (1950). While this has no doubt been a long and arduous journey for the plaintiff, the journey was no shorter or any easier for the defendants. For the past twenty-five years, this litigation has cast a shadow over the careers, retirements, and estates, of the Postal Inspectors targeted by the plaintiff in this suit—only to have their long ago actions and motives vindicated at trial by two separate fact-finders. At trial, the plaintiff requested approximately one-quarter billion dollars in damages, an 'astronomical' award based on his inflated career aspirations and the profound sense of wrong the plaintiff believes himself to have suffered for what he discounts as merely 'look[ing] like we made some bad decisions on people.'. . Having examined the totality of the evidence presented at trial, the plaintiff not only made 'bad decisions,' but those bad decisions helped fund a corrupt scheme that cost taxpayers millions of dollars. The indictment at issue in this case was not premised on retaliation or malice, but resulted from a diligent and comprehensive investigation following the corrupt payments back to their source. In this case, the evidence led directly to the plaintiff. For the reasons set forth above, the plaintiff's claims are denied. An appropriate Order accompanies this Memorandum Opinion.")]

Atherton v. District of Columbia Office of the Mayor, 706 F.3d 512, 515, 516 (D.C. Cir. 2013) ("We agree with the District Court in substance. Assuming *arguendo* that *Mathews* requires a judicial determination and formal process prior to dismissal from a grand jury, no reasonable official in Appellees' position would have understood those requirements to be 'clearly established' as a constitutional matter. . . . Here, the procedural due process owed a grand juror seems as unclear today as it was over a decade ago when Atherton was dismissed from jury service on April 11, 2001. The parties have cited no cases directly on point and this Court has found just one of passing resemblance.")

International Action Center v. United States, 365 F.3d 20, 25 (D.C. Cir. 2004) ("It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been 'clearly established' in this country since 1791. Instead, courts must 'define the right to a degree that would allow officials Areasonably [to] anticipate when their conduct may give rise to liability for damages"....' The district court ruled that the MPD supervisors were not entitled to qualified immunity on plaintiffs' inaction theory because plaintiffs had alleged that 'it was 'highly likely,' given the circumstances at the Navy Memorial on January 20, 2001, that the MPD officers would violate citizens' constitutional rights.' . . But applying a basis for liability at such a level of generality – a duty dependent upon 'the circumstances of the case' or arising 'from

the surrounding circumstances' – is not faithful to the teaching of the Supreme Court in *Anderson* or this court in *Butera*.").

Butera v. District of Columbia, 235 F.3d 637, 647, 652, 654 (D.C. Cir. 2001) ("Under the first stage of the *Wilson* inquiry–whether the plaintiff has asserted the relevant constitutional rights at the appropriate level of specificity–we conclude, consistent with the Supreme Court's instructions in *Anderson* and *Wilson*, that the district court erred by defining the constitutional rights as Eric Butera's right to life, bodily integrity, personal security, and personal privacy, and as Terry Butera's 'liberty interest' in the companionship of her son. Although courts have acknowledged the existence of these general rights in certain circumstances, . . . they are overly broad where a qualified immunity defense is asserted. Applying the standards of *Wilson* and *Anderson*, we conclude that the relevant inquiries are (1) whether Eric Butera has a constitutional right to protection by the District of Columbia from danger that it created or enhanced that resulted in harm by third parties, and (2) whether Terry Butera has a liberty interest in the society and companionship of her independent adult child. This narrower definition of the rights allows a reasonable police officer to anticipate whether his actions amount to a constitutional violation. . . . Upon examining relevant case law on the 'State endangerment' exception to *DeShaney*, we conclude that, in December 1997, Eric Butera's constitutional right to protection by the District of Columbia from third-party violence was not clearly established within the meaning of *Anderson*. . . . Terry Butera's claim of a constitutional right to the companionship of her 31-year-old son has a more difficult hurdle to overcome: It fails the first prong of the *Wilson* test. The Supreme Court has not spoken to the precise issue, and the precedent in this and nearly all of the other circuits suggests that no such right exits.").

Harris v. District of Columbia, 932 F.2d 10 (D.C. Cir. 1991) (Rejecting argument that *Estelle v. Gamble*, *Revere v. Massachusetts Gen. Hosp.*, and *Youngberg v. Romeo*, created clearly established right to medical care for someone taken into police custody for purpose of obtaining medical care, but not formally committed, either by conviction, involuntary commitment, or arrest, to the charge of the District).

Goolsby v. D.C., 317 F.Supp.3d 582, ___, ____ (D.D.C. 2018) ("Both sets of individual defendants have argued that their actions are protected by qualified immunity. As to the Officers, the Court agrees in full and will dismiss the section 1983 claims against them. But as to the Dispatchers, the Court concludes that a genuine issue of material fact precludes summary judgment on the Fourth Amendment claims and that Goolsby has pled an alternative Fifth Amendment theory. . . .In sum, case law suggests that, at the very least, a reasonable officer could have believed that he could permissibly temporarily detain Goolsby since he matched the suspect from a 911 call seeming to report criminal activity and fled when ordered to stop by the police. . . . Finally, a reasonable officer, having observed Goolsby flee, could have believed that he could place Goolsby in handcuffs during the detention without turning the *Terry* stop into a full-blown arrest requiring probable cause. . . .As with the false arrest claims, Goolsby points to no specific cases with similar facts to rebut the Officers' assertion of qualified immunity. Rather, his primary argument is that 'a

reasonable officer would have known that applying any force would be excessive because there was not even a reasonable suspicion to justify an investigatory stop.'. . But as noted, Goolsby has pled that the Officers reasonably believed they were responding to an attempted robbery. As a result, they could have reasonably believed they could temporarily detain Goolsby. And even if that conclusion were erroneous, the simple fact that a detention was impermissible does not automatically make the use of force to effectuate that detention excessive. . . .As to the level of force itself, the Court takes as true the facts as pled by Goolsby. According to his complaint, the officers 'violently slamm[ed] [him] to the ground and twist[ed] [his] arm to a gut-wrenching degree while [he] screamed in pain.'. . While this issue presents a somewhat closer question than in the false arrest claims, the Court ultimately concludes that qualified immunity is appropriate here, too. For one, Goolsby nowhere points to a case with similar facts holding the officers used excessive force. This disregards the Supreme Court's counsel that in the context of excessive force claims, 'police officers are entitled to qualified immunity unless existing precedent "squarely governs" the *specific facts at issue*.'. ._. And this omission is particularly problematic since the level of force, as pled, does not rise to the level that the Supreme Court or the D.C. Circuit has clearly established as a constitutional violation, namely the use of force *after* an individual has already been placed in handcuffs or otherwise subdued. . . . Nor does Goolsby point to cases from other courts of appeals that would suggest any injury here clearly rendered the use of force excessive. Given this absence of cases with similar facts indicating force similar to that used here resulting in 'severe injuries' was excessive, any constitutional violation was not clearly established. To conclude, the Officers' conduct alleged here falls within a gray area between clearly-sanctioned uses of force from cases such as *Wasserman*, *Oberwetter*, and *Scott* and clearly-excessive uses of force from cases such as *Johnson*. As such, and given the similarity of these facts to those in *Wasserman* and *Scott*, a reasonable officer could have concluded the use of force alleged here was reasonable. The Court therefore must accord the Officers qualified immunity for their alleged conduct. . . . Since the Dispatchers are not alleged to have authorized the Officers' conduct or approved of it—indeed, they were not physically present during any of the events that occurred and have no supervisory or other authority over the Officers—the argument is simply that the Dispatchers' affirmative act of providing false or misleading information to the Officers set in effect a chain of events leading to Goolsby being unlawfully arrested and subjected to excessive force. . . The Dispatchers respond that they should be granted summary judgment because their actions are protected by qualified immunity. . . In their view, no cases put them on notice that 'in providing incorrect information to police officers [they] could be held liable for the constitutional torts of the officers.'. . The Court ultimately concludes that qualified immunity is appropriate as to Goolsby's excessive force claims against the Dispatchers, but that a genuine issue of material fact precludes summary judgment as to his false arrest claims. . . .Beginning with the false arrest claims, the Court will again start with the second prong of the qualified immunity analysis: whether any violation by the Dispatchers was clearly established. Goolsby once more cites no relevant cases, here ones involving dispatchers held liable for false arrest under section 1983. The only relevant court of appeals decisions the Court is aware of—all of which reviewed summary judgment grants to dispatchers—held the dispatcher not liable because he acted negligently or within the scope of his discretion. . . . That said, though neither

side points to it, there is a common law tradition—albeit one that does not specifically involve dispatchers—that suggests a scenario under which a violation might be clearly established. The Supreme Court has recognized that when section 1983 was passed, 'the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.'. . This is in line with the general tort law principle that one who instigates a false arrest, such as by directing a police officer to arrest someone without any suspicion of wrongdoing, is also liable for false arrest or imprisonment. . . Combined, these rules would seem to put any reasonable dispatcher on notice that certain kinds of false reports might violate the Fourth Amendment, namely maliciously misleading police officers without suspicion of wrongdoing in a manner that leads to another's detention. . . In light of this legal background, the Court concludes that a genuine issue of material fact precludes summary judgment at this juncture. . . . The most natural explanation for the erroneous information passed along is simply negligence or confusion on the part of the dispatcher. But it could also be the case that the dispatcher intentionally misdirected the patrol officers for some nefarious purpose. . . . Since the dispatcher's mental state is relevant to whether a section 1983 claim has been stated or a clearly established violation occurred, the current factual record yields a genuine issue of material fact that precludes summary judgment at this juncture. . . . Goolsby also raises excessive force claims against the Dispatchers. As with the false arrest claim, Goolsby cites no case law that has ever found a dispatcher liable for a police officer's use of force. Nor is the Court aware of any. While the cases discussed above might support possible *false arrest* claims against the Dispatchers, they provide no indication that the Dispatchers might be liable for *excessive force* claims. In the absence of any case law suggesting that a dispatcher can be held liable for a police officer's use of excessive force, the Court concludes that any constitutional violation here is not clearly established. Dismissal of the excessive force claims against the Dispatchers is thus appropriate on the basis of qualified immunity.")

Young v. D.C., 107 F.Supp.3d 69, 80 (D.D.C. 2015) ("In this case, the plaintiff has not alleged that any requests from medical personnel to remove any restraints were made, let alone ignored by the police, or that the restraints applied to the plaintiff hindered his medical treatment or exacerbated any pain he suffered. Without deciding whether the use of handcuffs and shackles on a pretrial detainee, who has been shot by the police and is being treated at the hospital, amounts to a due process violation on these bare allegations, the Court concludes that the absence of a clear legal consensus on the constitutionality of such restraints in these circumstances leads inexorably to the conclusion that defendant Powell is entitled to qualified immunity on the claim set out in Count II.")

Kenley v. D.C., 83 F.Supp.3d 20, 39 (D.D.C. 2015) ("Plaintiff . . . has not cited any cases in which the Supreme Court or the D.C. Circuit has addressed police officers' constitutional duty under the Due Process Clause to disclose exculpatory information to the prosecution *long before* trial. Looking to other circuits, in fact, it appears that there is disagreement about whether the due-process rights articulated in *Brady* are implicated *at all* where plaintiffs were not convicted in their criminal cases – *e.g.*, if they were acquitted at trial or if the charges were dismissed prior to trial.

[citing cases and Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence,* 13 Temp. Pol. & Civ. Rts. L.Rev. 1, 2 (2003)] The Court is, consequently, not persuaded that there was a clearly established *due-process* right under which police officers who were aware of potentially exculpatory information had to disclose it to the prosecution when the case was first papered or within a short time after. The officers, therefore, are immune from any Fifth Amendment claim based on their nondisclosure.")

Patterson v. United States, 999 F.Supp.2d 300, (D.D.C. 2013) ("Given the clearly established law that governs free speech and permissible arrests for disorderly conduct, and also taking the facts alleged in Patterson's complaint as true and drawing all inferences in Patterson's favor, . . . no reasonable officer could conclude that Patterson's conduct was likely to produce violence or otherwise cause a breach of the peace, as required to justify either punishing his speech under the First Amendment or arresting him for disorderly conduct. . .There is a significant body of jurisprudence that addresses the confluence of these First and Fourth Amendment violations in the context of arrests for disorderly conduct under the D.C.Code, and these cases outline the parameters of permissible police action in circumstances that are similar to those at issue here. . . . In short, because no reasonable officer could conclude that there was probable cause to believe that Patterson was committing disorderly conduct on the facts as alleged in the complaint, the complaint ably supports the claim that Patterson was arrested in retaliation for his protected speech and that the individual officers therefore violated Patterson's clearly established First and Fourth Amendment rights. . . Consequently, the individual defendants have not satisfied *Saucier's* qualified immunity test. . . .Undaunted, the individual defendants strenuously dispute the 'clearly established' nature of Mr. Patterson's alleged First Amendment right to be free from retaliatory arrest under the circumstances presented in the complaint. . . But this argument plainly puts the cart before the horse because the constitutional right that Defendants deem unclear and unestablished is the right to be free from a retaliatory arrest that is *otherwise supported by probable cause*. . . Plaintiffs make no such allegation here, and Defendants do not address whether the right to be free of retaliatory arrest in the *absence* of probable cause is clearly established. Moreover, as explained above, it is clear from the D.C. Circuit's *Dellums* opinion that the right to be free from a retaliatory arrest in the absence of probable cause is clearly established in this jurisdiction. In other words, in the D.C. Circuit, a police officer is unquestionably on notice that arresting a speaker solely based on the content of his speech and without probable cause to believe that he has committed a crime is a violation of the First Amendment.")

Shaw v. District of Columbia, 944 F.Supp.2d 43, 57-59 (D.D.C. 2013) ("In the end, the ultimate question for purposes of qualified immunity is whether a reasonable officer would have known that the searches of plaintiff were unreasonable. Based on the alleged facts, which must at this stage be accepted as true, the Court concludes that a reasonable officer would have known that a cross-gender search of a female detainee by male USMS employees that included intimate physical contact, exposure of private body parts, and verbal harassment, all in front of male detainees and male USMS employees in the absence of an emergency, was unreasonable. . . . Accordingly, the Court concludes that plaintiff has alleged a violation of clearly established Fourth Amendment

rights and, therefore, that the USMS defendants are not entitled to have those claims dismissed on the ground of qualified immunity. . . . Defendants argue that they are entitled to qualified immunity because plaintiff's due process right not to be held in the alleged conditions of confinement is not clearly established. Specifically, defendants rely on the absence of any cases specifically holding that a female transgender detainee has the right not to be held with male detainees or otherwise treated as if she were male. . . .Defendants' arguments again miss the significance of the fact that plaintiff is legally a female and that defendants are alleged to have known that. Thus, the absence of transgender cases is not itself dispositive. . . . [A]s with the Fourth Amendment claim, plaintiff's 'clearly established' rights include the same rights as any other female detainee. Accordingly, the cases involving the sexual harassment of female prisoners are not, as defendants suggest, 'irrelevant.' And those cases establish that a female detainee has the right not to be sexually harassed, verbally or physically, by other detainees or guards. . . . Considering the allegations in the complaint, applicable MPD policies, and existing caselaw, the Court concludes that a reasonable officer would know that treating a female detainee as plaintiff was treated (*i.e.* holding her with male detainees and otherwise treating her as if she were male) exposed her to a substantial risk of serious harm. . . and, therefore, would know that those actions violated her constitutional rights.")

Brown v. Short, 729 F.Supp.2d 125, 141 (D.D.C. 2010) ("[A]t the time of the search at issue, the law was clearly established that strip searches of arrestees charged with minor offenses would, absent individualized suspicion, be held unreasonable under *Bell* even where the arrestee was to be intermingled with the general prison population and especially where the official conducting the search did not take reasonable efforts to protect the privacy of the party being searched. Thus, it should have been "clear to a reasonable [official]" that a partial strip search of Ms. Brown, a detainee charged only with civil contempt, without individualized suspicion, and without regard to her privacy, would be considered unreasonable under *Bell*.").

In re Iraq and Afghanistan Detainees Litigation, 479 F.Supp.2d 85, 108 -109 (D.D.C.,2007) ("Determining whether the defendants' acts violated clearly established constitutional rights need not require extended explication in this case because, as discussed at some length above, Supreme Court precedent at the time the plaintiffs were injured established that the Fifth Amendment did not apply to nonresident aliens outside the sovereign territory of the United States. . . . The plaintiffs seek to avoid this result by recasting the issue as whether it was clearly established that torture was unlawful, not whether it was clearly established that the constitutional right existed. . . But the cases make clear that what must be 'clearly established' is the constitutional right. . . . At the time the defendants committed the alleged violations, no constitutional right could be invoked by the plaintiffs; as a result, no reasonable official could have understood that what he was doing violated the Fifth Amendment as it applied to them, regardless of whether the defendants' conduct otherwise was illegal under some other source of law. Similarly, it also was not clearly established that the Eighth Amendment applied to nonresident aliens who were detained by the military but never convicted of a crime.")**.**

Freeman v. Fallin, 310 F.Supp.2d 11, 15, 16 (D.D.C. 2004) ("In their motion, the defendants contend that '[i]t was not clearly established during 1999-2000[ ] that manipulation of random drug testing procedures to gather evidence of alleged drug use in criminal proceedings was a Fourth Amendment violation.' . . . Specifically, the defendants argue that there is no case law addressing whether manipulation of random drug testing procedures violates the Fourth Amendment. . . . The court concludes that there is no intervening change of law, new evidence, or need to correct a clear error or prevent manifest injustice that would warrant granting the defendants' motion. . . At the time of the defendants' alleged actions in 1999-2000, there was no question that agencies could subject federal employees engaged in certain safety-sensitive tasks to suspicionless drug testing under the 'special needs' doctrine. . . At the same time, the Supreme Court had made clear through a string of decisions issued in 1989, 1995, and 1997 that special-needs testing could not be undertaken for purposes of criminal prosecution. . . . The defendants argue, however, that this case law does not define the constitutional right at the 'appropriate level of specificity.' . . . Accepting the plaintiffs' allegations as true, the court concludes that here, the state of the law certainly would have given the defendants fair warning that their actions were unconstitutional. . . In its string of decisions, the Court–whose binding precedent clearly 'establishes' the law–made clear that the special-needs doctrine permits suspicionless drug testing of certain employees by agencies as long as the testing is performed for reasons unrelated to law enforcement.").

Polk v. District of Columbia, 121 F. Supp.2d 56, 69, 71 (D.D.C. 2000) ("Although no reported case has addressed the precise conduct at issue here, *Lanier* indicates that the law nonetheless may be 'clearly established' if general statements of Fourth Amendment law gave fair and clear warning to Det. Valdes that he could not delegate his authority to detain a suspect. . . . In the instant case, there can be little doubt that the Constitution forbids police officers to share their authority to conduct searches and seizures with unauthorized civilians. . . . The court determines that it would not be unfair to hold Det. Valdes liable for allegedly deceiving the plaintiffs into believing his companion was an officer, and having perpetuated this fraud, allowing the civilian to detain one of the plaintiffs.").

United States v. Edelin, 76 F. Supp.2d 1, 4 (D.D.C. 1999) ("[E]ven if a court was to find 'perp walks' unconstitutional, the defendant would still have to show the law to have been clearly established at the time of his booking in order to overcome the government officials' qualified immunity. In *Wilson*, although the Supreme Court agreed with the *Ayeni* court that the practice of 'media ride-alongs' was unconstitutional, it abrogated the *Ayeni* court's holding that the government was liable for its actions. . . The Supreme Court found that the government officials were entitled to qualified immunity because the law regarding 'media ride-alongs' was not clearly established prior to the Supreme Court ruling. . . Given that the Supreme Court found the law pertaining to 'media ride-alongs' to be uncertain at the time of the defendant's booking in January of 1999, it stands to reason that the law regarding 'perp walks', as an extension of that law, was also not clearly established. Therefore, the government officials would most likely be entitled to qualified immunity for their actions with regard to the defendant.").

FIRST CIRCUIT

Perry v. Spencer, No. 16-2444, 2018 WL 4182452, *3-5 (1st Cir. Aug. 29, 2018) (per curiam) (not reported) ("Perry claims that defendants violated his right to procedural due process by confining him in the SMU without adequate justification, opportunity to be heard, meaningful periodic review, or avenue for appealing his placement. He contends that the stated reasons for his placement in the SMU were used as a pretext for indefinite confinement in restrictive segregation, and that the periodic reviews by defendants were perfunctory. To prevail on this claim, Perry must demonstrate (1) that defendants deprived him of a cognizable liberty interest, (2) without constitutionally sufficient process. . . Inmates do not have a protected liberty interest in avoiding restrictive conditions of confinement unless those conditions ' "impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."'. . . As the Court recognized in *Wilkinson*, however, 'the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.'. . The *Wilkinson* Court found it unnecessary to define 'atypical and significant hardship' because it found that the conditions in that case met that standard 'under any plausible baseline.'. . .In 2012, the Massachusetts Supreme Judicial Court considered whether ten months in the SMU at SBCC on awaiting action status satisfied the 'atypical and significant hardship' standard. *LaChance v. Commissioner of Correction*, 463 Mass. 767, 776-77 (2012). Noting that the restrictive conditions in the SMU were substantially similar to those described in *Wilkinson*, and far more restrictive than the conditions in the general population unit, the SJC concluded that the ten-month period of confinement was sufficient to satisfy the standard and implicate a protected liberty interest subject to due process protections, and further held that the interest attaches after ninety days. . . However, the Court acknowledged that it was announcing a new rule, and that up to that point, no federal or state court decision had clearly articulated the point at which a liberty interest in avoiding segregated confinement arose. . .Noting that Perry was released from the SMU just after *LaChance* was decided, the district court here reached the same conclusion as the SJC, and found that defendants were entitled to qualified immunity because it would not have been obvious to prison officials in 2010 whether or at what point Perry's confinement in the SMU on awaiting action status became 'atypical and significant.' We agree. While the restrictive conditions in the SMU were substantially similar to those described in *Wilkinson*, other circumstances were arguably distinguishable and, while a number of courts had, prior to 2010, held that periods of solitary confinement shorter than Perry's were sufficient to give rise to a liberty interest, . . . other courts had found comparable periods insufficient. . . Given the varying approaches to measuring atypicality and the absence of any bright-line rule or consensus as to what combination of conditions and duration of confinement in administrative segregation was sufficient to implicate a liberty interest and trigger due process, or at what point that interest arose, the contours of the liberty interest were not sufficiently defined as to place the constitutional question 'beyond debate[.]'. . Further, even assuming that defendants should have known that due-process requirements attached to Perry's placement in the SMU at some point during his extended period of confinement, the level of process due in the circumstances was not clearly established.

In *Wilkinson*, the Supreme Court endorsed 'informal, nonadversary procedures' consistent with those set forth in *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex,* 442 U.S. 1 (1979), and *Hewitt v. Helms,* 459 U.S. 460 (1983), where the liberty interest in avoiding indefinite placement in a supermax prison was at stake. . . . Perry asserts that the periodic reviews were perfunctory, noting that he received the same boilerplate notice at every review, and suggests that they were pretextual, as he was never interviewed in connection with any investigation into his STG status, was not advised of its progress or outcome, and was not told when or why his status shifted from awaiting action pending investigation to awaiting action pending out-of-state placement. In *LaChance*, the SJC concluded that these procedures were insufficient to provide meaningful review and safeguard the inmate's interest in avoiding arbitrary confinement in severe conditions, and held that segregated confinement on awaiting action status for longer than 90 days required notice of the basis for the placement, a hearing at which the inmate could contest the asserted rationale for the placement, and a post-hearing written notice explaining the reviewing authority's decision. . . But the SJC acknowledged that it was announcing these requirements for the first time, and Perry was released into the general population shortly after that decision issued. Perry suggests that, even if defendants could not have been expected to anticipate the precise requirements outlined in *LaChance*, it was clearly established after *Wilkinson* that the 'informal, adversary procedures' required where an inmate's interest in avoiding atypical and significant hardship was at stake had to include some sort of meaningful periodic review. But *Wilkinson* did not set any standards for such review in this context. . . . In the absence of any authority more specifically defining the review requirements in these circumstances, Perry cannot show that no official could reasonably have believed the review was adequate. . . . In sum, at the time Perry was confined in the SMU on awaiting action status, it was not clearly established whether or at what point a protected liberty interest arose, and the procedural protections required in that circumstance had been defined only at a high level of generality. Defendants were therefore entitled to qualified immunity.")

McKenney v. Mangino, 873 F.3d 75, 81-83 (1st Cir. 2017) ("[D]efendants who invoke our limited power of interlocutory review to redress denials of qualified immunity must be prepared to accept the facts in the light most favorable to the plaintiff and 'develop the argument that, even drawing all the inferences as the district court concluded a jury permissibly could, they are entitled to judgment as a matter of law.'. . In other words, an appellant must explain why he is entitled to qualified immunity even if one assumes that the district court properly analyzed the facts. . . .Here, the defendant concentrates on the second step of the qualified immunity paradigm and faults the district court for failing to identify a sufficiently similar case that would have served to place him on notice that his use of deadly force violated clearly established Fourth Amendment law. . . In his view, the contours of the relevant Fourth Amendment law were so blurred at the time that he shot McKenney that he is deserving of qualified immunity. We have jurisdiction to consider this purely legal asseveration. . . Jurisdiction notwithstanding, this argument lacks force. Although the district court frankly acknowledged that it could not find '[a] case presenting a nearly identical alignment of facts,'. . . such an exacting degree of precision is not required to thwart a qualified immunity defense. To be sure, 'the clearly established law' employed in

a qualified immunity analysis 'must be particularized to the facts of the case.'. . This instruction fits hand in glove with the Supreme Court's warning that, when dealing with qualified immunity, we should not over-rely on precedents that are 'cast at a high level of generality.'. . . Even so, there need not be 'a case directly on point' to satisfy the second step of the qualified immunity paradigm. . . The test is whether existing case law has 'placed the statutory or constitutional question beyond debate.'. . In some cases, 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. . What counts is whether precedents existing at the time of the incident 'establish the applicable legal rule with sufficient clarity and specificity to put the official on notice that his contemplated course of conduct will violate that rule.'. .The Court's landmark decisions in *Graham* and *Garner*, which articulate generalized standards for excessive force liability under the Fourth Amendment, 'do not by themselves create clearly established law outside an obvious case.'. . But taking the facts and the reasonable inferences therefrom in the light most favorable to the plaintiff, the threat presented lacked immediacy and alternatives short of lethal force remained open. Seen in that light, this was a case in which the feasibility of a more measured approach was apparent. Moreover, the district court did precisely what the Supreme Court has instructed courts to do: it focused on 'the specific context of the case.'. . With that context in mind, it relied on well-settled precedents addressing the lawfulness of using deadly force against an individual who was suicidal, armed, slow in gait, some distance away from the officer, and had received no commands or warnings for several minutes. . . . We conclude, without serious question, that the precedents identified by the district court and those discussed *supra* gave the defendant fair warning that, if the facts were as the plaintiff claimed them to be, his use of deadly force against McKenney offended clearly established Fourth Amendment law—and an objectively reasonable officer would have realized as much. Therefore, the district court properly concluded that the absence of a precedent on all fours was not dispositive.")

Morse v. Cloutier, 869 F.3d 16, 27-30 (1st Cir. 2017) ("Given the two determinations we have thus far reached — that the district court's exigent circumstances assessment is unreviewable at this juncture and that Morse (unlike the suspect in *Santana*) was not in a public place at the critical time — we hold that the facts, taken in the light most favorable to the plaintiffs, make out a violation of a constitutional right. . . Accordingly, we proceed to the next step of the qualified immunity paradigm and consider whether the applicable law was so clearly established that no reasonable officer would have entered the plaintiffs' home without a warrant. . . .*Payton* and its progeny clarify a matter of Fourth Amendment law that *Joyce*, which relied on the 'clearly established' prong of the qualified immunity paradigm, left unaddressed: namely, the doorway arrest exception recognized in *Santana* does not apply in a case in which a door was never opened, the person behind the door (screen door though it was) was first observed by law enforcement while he was behind that door, and no exigent circumstances existed. Of greater relevance here, this steadily growing stockpile of precedent makes pellucid that *Payton*, by 2009, constituted both a firm line and a bright line. Put simply, it constituted clearly established law. That clearly established law was sufficient to give reasonable police officers fair and clear warning that using force to enter the plaintiffs' home to effectuate Morse's arrest — without either a warrant or a

reasonable basis for believing that exigent circumstances existed — would violate his Fourth Amendment rights. The fact that the Supreme Court has not yet considered the precise factual scenario that the defendants faced does not demand a different conclusion. After all, the Court has recognized that 'general statements of the law are not inherently incapable of giving fair and clear warning.'. . The Court added that 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. . This is such a case. In all events, this case differs in material respects from *Joyce*. At the very least, those distinctions should have signaled to reasonable officers that their conduct did not fall within the same zone of uncertainty identified in *Joyce*. . . .The short of it is that the situation that existed when Morse closed the interior door to his home was such that a reasonable police officer, in the absence of exigent circumstances, should have realized that forcibly breaking into the house without any sort of warrant would offend Morse's Fourth Amendment right to be free from an unreasonable seizure inside his own home. Merely because arrests near doorways may present close calls in some cases does not mean that they present close calls in all cases. Here, the defendants invite us, in effect, to cheapen the currency of *Payton* and its progeny and to award them qualified immunity. In the circumstances of this case, honoring their request would require us to 'disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'. . We thus decline the defendants' invitation. Morse was subjected to a warrantless arrest inside his home, and we agree with the district court that, on this scumbled record, the officers involved in that arrest are not entitled to qualified immunity at the summary judgment stage.")

López-Erquicia v. Weyne-Roig, 846 F.3d 480, 484-87 (1st Cir. 2017) ("The preferred approach is to decide the merits question first, reaching the reasonableness question only if the merits question is resolved against the defendant. . . In this case, though, we face an unusual twist: in her answer to the complaint, Weyne admitted that party affiliation was not an appropriate requirement for López's position. Hence, the district court deemed the merits question 'uncontested.' And on appeal, while protesting that she could not have conceded a point of law, Weyne offers no developed argument for why that is so. Like the district court, then, we also treat the merits question as 'uncontested.' This concession nevertheless does little to narrow the scope of our inquiry. To answer the reasonableness question-whether a reasonable official at the time could have understood López's job to be unprotected--we pretty much have to run through the entire merits analysis anyhow. We do so not to answer the uncontested merits question, but rather to see how close a question it is. Furthermore, the test we apply in assessing the closeness of the question 'is objective, rather than subjective; we focus on what a reasonable [official] could have believed, not on allegations about what [the official] actually believed.'. . Though qualified immunity does not shield 'the plainly incompetent or those who knowingly violate the law,'. . . an official cannot 'fairly be said to "know" that the law forbade conduct not previously identified as unlawful[.]' . . . With this twist explained, we turn to examining López's job to see how a reasonable official could have viewed it. . . .We need not precisely locate López's AFSI Director position on the spectrum established by the foregoing precedent. Rather, we need determine only whether that precedent 'placed the ... constitutional question beyond debate,' Ashcroft v. al-Kidd, 563 U.S. 731,

741 (2011), i.e., whether it clearly established the position's constitutionally protected status. . . .To be sure, López's position was not classified as a trust position, and 'a legislature's classification system is ... entitled to some deference.'. . Nevertheless, our precedent makes clear that '[a]ctual functions of the job ... control' our analysis. . . Here, those actual functions preclude us from finding that a reasonable official, even one familiar with the law, . . . would have found it clear that López's position fell inside the First Amendment's protective ambit. That, in turn, means that Weyne is immune to a federal claim for damages under § 1983, even if the reorganization was targeted at López because of her political affiliation.")

Miranda-Rivera v. Toledo-Davila, 813 F.3d 64, 70-73 (1st Cir. 2016) ("The Supreme Court has historically reserved the question of whether the Fourth Amendment standard of objective reasonableness or a Fourteenth Amendment substantive due process standard requiring a defendant to have a 'sufficiently culpable state of mind,' . . . applies to persons who have been arrested but who are not yet 'pretrial detainees' because they have not yet gone before a magistrate judge for a probable cause hearing. . . At the time of the district court's decision, other circuits were split over this question. [collecting cases]The First Circuit has not yet answered the question, although some district courts within the First Circuit have applied the majority rule. . . Since then, the Supreme Court has held that the appropriate standard for a pretrial detainee's Fourteenth Amendment excessive force claim is simply objective reasonableness. . . . Since *Kingsley* has extended the objective reasonableness standard for use of force from the arrest stage through the probable cause hearing, whether the Fourth or Fourteenth Amendment standard applies presents less of a problem in cases like this one than before. In this case, the district court 'identif[ied] the specific constitutional right allegedly infringed by the challenged application of force,'. . . as the Fourth Amendment's protection against unreasonable seizures. The parties do not challenge that holding, and we have no reason to do so as the alleged use of excessive force here occurred while Officers Pérez and Rivera were transporting Rojas to the police station and then to a jail cell. Given these facts, and given the authority favoring the application of the Fourth Amendment to similar factual scenarios, we apply the Fourth Amendment standard to Rojas's excessive force claim. . . . Since there is sufficient evidence to make out an excessive force claim, Pérez is not entitled to qualified immunity on the first ground. Nor is Officer Pérez entitled to qualified immunity on the 'clearly established' ground. The district court stated in a footnote that Defendants may be entitled to qualified immunity because it was unclear in 2007 which constitutional standard governed arrestees' excessive force claims in the First Circuit. We are not persuaded. The main difference between the Fourth and Fourteenth Amendment excessive force standards prior to *Kingsley* was whether, in retrospect, we inquire into an officer's subjective mindset. However, at their core, both the Fourth and Fourteenth Amendments are concerned with whether an officer's actions depart from what a reasonable officer would do, and whether those actions serve some legitimate governmental purpose. . . A reasonable officer faced with the question of what to do with Rojas would have known that using more force than necessary violated both of those standards and therefore a clearly established constitutional rule to use force in the way that the officers here appear to have done. Here, during the entire time period in which the officers are alleged to have applied excessive force to Rojas (i.e., from Rojas's arrest to his death in the holding cell), Rojas

was handcuffed and did not pose a great physical threat to the officers. The record suggests that Rojas initially appeared paranoid, screaming incoherently, and that, while handcuffed, he attempted to resist being transported to the police station and being incarcerated. There is sufficient evidence for a reasonable jury to conclude that the officers used force that resulted in disproportionately severe injuries to Rojas—e.g., multiple lacerations, contusions, and abrasions throughout his body—and ultimately in his death. We therefore conclude that, regardless of whether the Fourth or Fourteenth Amendment applied after his arrest, a reasonable officer would have known that using force in the way that the officers here appear to have done in the particular factual circumstances that they encountered violated Rojas's constitutional rights. . . Accordingly, Pérez is not entitled to qualified immunity on the excessive force claim.")

Matalon v. Hynnes, 806 F.3d 627, 634-36 (1st Cir. 2015) ("Although we do not decide the question, we assume, favorably to O'Neill, that the community caretaking exception may apply to warrantless residential searches. Even on this favorable assumption, O'Neill's claim founders. In *MacDonald*—the case upon which O'Neill primarily relies—local police responded to a telephone call from a person concerned that her neighbor's door was open though he was not home. . . Unable to contact the resident, the police entered the home and, once inside, found evidence of marijuana cultivation. . .We concluded that the officers were entitled to qualified immunity because their entry into the home was arguably within the scope of the community caretaking exception. . .Wresting from their contextual moorings our statements in *MacDonald* that the doctrine was 'nebulous' and surrounded by 'rampant uncertainty,'. . . O'Neill submits that this lack of certitude shields her actions. But this uncertainty does not assist O'Neill's cause: while the parameters of the community caretaking exception are nebulous in some respects (such as whether the exception applies at all to residential searches), the heartland of the exception is reasonably well defined. Some attempts to invoke the exception plainly fall outside this heartland. This is such a case. As we explain below, a reasonable officer standing in O'Neill's shoes should have known that her warrantless entry was not within the compass of the community caretaking exception and, thus, that her intrusion into the plaintiff's home abridged his constitutional rights. . . .Here, the record establishes beyond hope of contradiction that O'Neill was engaged in a quintessential criminal investigation activity—the pursuit of a fleeing felon in the immediate aftermath of a robbery—when she ordered the search of the plaintiff's home. O'Neill testified at trial that she arrived at the plaintiff's residence after being directed there by a witness to the crime and that she believed the suspect had fled into the dwelling. Thus, her actions fall far beyond the borders of the heartland of the community caretaking exception. . . . In sum, the contours of both the plaintiff's right to enjoy the sanctity of his home and the heartland of the community caretaking exception were sufficiently clear to alert O'Neill that her plan of action—a warrantless entry—would infringe the plaintiff's constitutional rights. Put another way, an objectively reasonable officer should have known that a warrantless entry into the plaintiff's home could not be effected on the basis of the community caretaking exception. Though the precise dimensions of the community caretaking exception are blurred, that circumstance does not mean that every attempt to resort to the exception must be regarded as arguable. . . What matters here is that the exception is sufficiently defined to place O'Neill's conduct well outside its heartland and, thus, to render qualified immunity inapplicable.

. . . We summarize succinctly. In the circumstances of this case—where the officer was indisputably engaged in an ongoing criminal investigation when the warrantless search occurred—the community caretaking exception does not apply. There was no lack of clarity on this point at the time the search took place. Consequently, a reasonable officer in O'Neill's position should have known that her intrusion into the plaintiff's home would transgress his constitutional rights. She was, therefore, not entitled to qualified immunity, and the district court appropriately denied O'Neill's motion for judgment as a matter of law.")

Morales v. Chadbourne, 793 F.3d 208, 215-17 (1st Cir. 2015) ("It was thus clearly established well before Morales was detained in 2009 that immigration stops and arrests were subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention. Moreover, there could be no question in 2009 that detention authorized by an immigration detainer would require more than just reasonable suspicion. Although the line between an arrest that requires probable cause and a temporary detention for interrogation which does not is not always clear, pre–2009 cases did clearly show that 48 hours of imprisonment—which is what the detainer requests, *see* 8 C.F.R. § 287.7(d)—falls well on the arrest side of the divide. . . . .Based on the 'robust consensus of cases [and] persuasive authority' discussed above, *al-Kidd*, 131 S.Ct. at 2084, it is beyond debate that an immigration officer in 2009 would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status.")

[*See also* ***Morales v. Chadbourne***, 235 F. Supp. 3d 388, 400–01 (D.R.I. 2017) ("The fact that there is not a case precisely on point to provide notice that, in order for an officer's reliance on information in a database to be deemed objectively reasonable, he is obligated to conduct such an electronic search thoroughly, keeping in mind the limitations inherent in such databases does not automatically qualify Agent Donaghy with immunity. . . .A recent United States Supreme Court decision does not change that axiom. Relying on long-standing authority, the Supreme Court ruled last week that '[o]f course, "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, but "in the light of pre-existing law the unlawfulness must be apparent."' [citing *White v. Pauly*] The Court has already determined that Agent Donaghy did not have probable cause to issue the detainer for Ms. Morales. . . . Agent Donaghy turns the focus of his argument on the fact that in 2009, there were no published cases holding that an officer did not have probable cause to issue a detainer after a fruitless search of an electronic database for immigration information. Essentially, he argues that he could not have known in 2009 that he should not have relied on the database. In taking this position, he places the blame on the database itself (and, as to INFACTS, on the state law enforcement officers who maintain it) and argues that it was reasonable for him to rely on the information (or lack thereof) contained in the database. . . . Agent Donaghy is not entitled to qualified immunity because it was not objectively reasonable for him to assume or to draw an inference from the INFACTS database that Ms. Morales was not a citizen because the citizenship field was blank. As for the second database, Agent Donaghy testified that he knew CIS was incomplete and that he knew it was possible that Ms. Morales could have naturalized under her maiden name. Moreover, it was also not reasonable to assume that his

failure to find a match in CIS using her married name meant that she was not a citizen. It is undisputed that ICE expected its agents to search by social security numbers when they are available; Agent Donaghy had her social security number and he did not use it to determine Ms. Morales' status. . . . It was most certainly beyond debate in 2009 that an ICE officer should not issue a detainer without probable cause, *see Morales II*, 793 F.3d at 216–17, and should not conduct an investigation that was so obviously deficient. His act in issuing the detainer without probable cause after a clearly insufficient search was obviously unconstitutional. The cases that Agent Donaghy cites where a court allowed qualified immunity when an officer relied on incorrect, as opposed to incomplete information in a database is [sic] not persuasive. . . A database search is only successful and its results are only reliable under a probable cause analysis if the information contained in the database is complete and if the search is thorough and based on available identifiers. ICE statistics from 2009 show that Agent Donaghy personally issued 77 detainers, 31 of which were later cancelled and only 2 led to an individual being taken into ICE custody. According to Director Chadbourne, a cancelled detainer indicates that the individual subject to the detainer is either a United States citizen or a lawful permanent resident. In other words, almost 50% of the detainers he issued that year were ultimately erroneous. Agent Donaghy cannot argue that his unlawful behavior would not have been apparent to an objectively reasonable officer. Where an individual's liberty is at stake, a 50/50 success rate is not acceptable. Agent Donaghy's conduct in issuing a detainer on an obviously incomplete investigation was unlawful and that unlawfulness would have been apparent to an objectively reasonably officer. . . He is not entitled to qualified immunity.") and ***Morales v. Chadbourne***, 235 F. Supp. 3d 388, 407–08 (D.R.I. 2017) ("Director Wall is entitled to qualified immunity if a reasonable corrections director in May 2009 would not have understood that his conduct violated Ms. Morales' constitutional rights. In light of that definition, the Court looks at the law and policy in May 2009 to determine whether Director Wall would have been on notice that his conduct in honoring the ICE detainer constituted an unlawful seizure. It is important to note at the outset that even Ms. Morales concedes that RIDOC officials are not equipped or required to make citizenship and/or removability determinations. Her position seems inconsistent with her argument that Director Wall and/or his corrections employees should have independently assessed Ms. Morales' citizenship both when she was processed initially at the ACI on the state charges and when she returned from court, held solely on the ICE detainer, to somehow ensure that the detention was constitutional. And while the law across the circuits is clear today that the RIDOC was not required to detain Ms. Morales pursuant to the ICE investigatory detainer, it was not so clearly established in 2009 such that Director Wall acted unreasonably in honoring the detainer. *See Orellana v. Nobles Cty.*, No. CV 15–3852 ADM/SER, 230 F.Supp.3d 934, 939–41, 2017 WL 72397, at *4 (D. Minn. Jan. 6, 2017) (legality *408 of ICE detainers has shifted, citing several 2014 court decisions that held a detainer was a mere request rather than a mandatory requirement); *Galarza v. Szalczyk*, Civil Action No. 10–cv–06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), vacated and remanded by *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Rios–Quiroz v. Williamson Cty., TN*, No. 3–11–1168, 2012 WL 3945354 (M.D. Tenn. Sept. 10, 2012). The Court has previously found, and the First Circuit confirmed, that there could be no question in 2009 that immigration detainers had to be issued based on probable cause. *Morales II*, 793 F.3d at 211. Therefore, when the State was confronted in 2009 with an ICE-issued

detainer, it would have been reasonable for it to assume that ICE had probable cause to issue it. Director Wall has consistently maintained and the facts established that he believed that RIDOC's long-standing policy of honoring ICE detainers was legal and not capable of violating any individual's constitutional rights. Moreover, in 2009 it was reasonable to assume that honoring the ICE detainer was mandatory. This is especially true here where the language of the detainer itself, citing federal law, stated that it was mandatory. *See* 8 C.F.R. § 287.7 (section "requires that you detain the alien for a period not to exceed 48 hours ... to provide adequate time for DHS to assume custody of the alien."). Indeed, before 2009, most state and local law enforcement in New England, honored ICE detainers without independently assessing probable cause, and it was ICE's expectation that the states would hold individuals when ICE issued a detainer. . . Therefore, the Court finds that it was reasonable for Director Wall and RIDOC to conclude in 2009 that the ICE detainer it received was valid, supported by probable cause, and mandatory. His 'reasonable, although mistaken, conclusion about the lawfulness of [his] conduct' does not subject him to personal liability. . . . In light of the facts and the law, the Court finds that based on the totality of the circumstances and undisputed facts, Director Wall is entitled to qualified immunity on this claim.")]

Gericke v. Begin, 753 F.3d 1, 5-10 (1st Cir. 2014) ("The issue before us is whether it was clearly established that Gericke was exercising a First Amendment right when she attempted to film Sergeant Kelley during the traffic stop. If she was not exercising a First Amendment right, or, on her facts, a reasonable officer could have concluded that she was not, then the officers are entitled to qualified immunity. . . . On appeal, the officers argue both that there was no First Amendment right to film law enforcement officers during the late-night traffic stop, when Hanslin had a gun and Kelley faced two cars and four individuals, and that, even if such a right existed, it was not clearly established at the time of the traffic stop in this case. . . .Gericke attempted to videotape Sergeant Kelley during the traffic stop of Hanslin. Thus, the threshold question here is whether the occasion of a traffic stop places Gericke's attempted filming outside the constitutionally protected right to film police that we discussed in *Glik.* It does not. . . .A traffic stop, no matter the additional circumstances, is inescapably a police duty carried out in public. Hence, a traffic stop does not extinguish an individual's right to film. This is not to say, however, that an individual's exercise of the right to film a traffic stop cannot be limited. . . .The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film. Such an order, even when directed at a person who is filming, may be appropriate for legitimate safety reasons. However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties. *Glik's* admonition that, '[i]n our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights' will bear upon the reasonableness of any order directed at the First Amendment right to film, whether that order is given during a traffic stop or in some other public setting. . . .Importantly, an individual's exercise of her First Amendment right to film police

activity carried out in public, including a traffic stop, necessarily remains unfettered unless and until a reasonable restriction is imposed or in place. . . . Such a restriction could take the form of a reasonable, contemporaneous order from a police officer, or a preexisting statute, ordinance, regulation, or other published restriction with a legitimate governmental purpose. Under Gericke's version of the facts, no such restriction was imposed or in place. . . According to Gericke, she immediately complied with all police orders: she returned to her car with her camera when Sergeant Kelley asked her to do so, he never ordered her to stop filming, and once she pulled into the parking lot, he never asked her to leave the scene. Therefore, under Gericke's version of the facts, her right to film remained unfettered, and a jury could supportably find that the officers violated her First Amendment right by filing the wiretapping charge without probable cause in retaliation for her attempted filming. . . .Gericke's attempt to film Sergeant Kelley during the traffic stop was unmistakably an attempt to film a law enforcement officer in the discharge of his duties in a public space. Therefore, as the events in *Glik* occurred well over two years before the events here, Gericke's right to film the traffic stop was clearly established unless it was reasonably restricted. Under Gericke's account, no order to leave the area or stop filming was given. Hence, we need not analyze whether a reasonable officer could have believed that the circumstances surrounding this traffic stop allowed him to give such an order. That hypothetical scenario involving a possible restriction on the right to film is irrelevant to this interlocutory appeal. In the absence of a reasonable restriction, it is self-evident, based on first principles, that Gericke's First Amendment right to film police carrying out their duties in public remained unfettered. . . Under Gericke's account, she was permissibly at the site of the police encounter with Hanslin. It would be nonsensical to expect Gericke to refrain from filming when such filming was neither unlawful nor the subject of an officer's order to stop. In the absence of such restrictions, a reasonable police officer necessarily would have understood that Gericke was exercising a clearly established First Amendment right. . . .Under Gericke's version of the facts, where there was no police order to stop filming or leave the area, a jury could supportably find that the officers violated her First Amendment right by filing the wiretapping charge against her because of her attempted filming of Sergeant Kelley during the traffic stop. It was clearly established at the time of the stop that the First Amendment right to film police carrying out their duties in public, including a traffic stop, remains unfettered if no reasonable restriction is imposed or in place. Accordingly, we hold that the district court properly denied qualified immunity to the officers on Gericke's section 1983 claim that the wiretapping charge constituted retaliatory prosecution in violation of the First Amendment.")

Hernandez-Cuevas v. Taylor, 723 F.3d 91, 97 n.7 (1st Cir. 2013) (*Hernandez* I) ("Though the question of whether the Fourth Amendment provides substantive protection during the pretrial period is a question of first impression in this circuit, it cannot be seriously argued that an objectively reasonable officer in Martz and Taylor's position would have been ignorant of the fact that fabricating evidence was constitutionally unacceptable. Indeed, we have previously concluded that it is 'self-evident' that 'those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.' *Limone v. Condon,*

372 F.3d 39, 44–45 (1st Cir.2004) (concluding that 'the right not to be framed by law enforcement agents was clearly established in 1967').")

Drumgold v. Callahan, 707 F.3d 28, 43 & n.10 (1st Cir. 2013) ("The essence of Callahan's argument is that the affirmative disclosure obligation *Brady* imposed on prosecutors in 1963 was not expanded to include law enforcement officers until *Kyles* was decided in 1995. That is true, so far as it goes. . . As we have said, though, this case also involves the deliberate suppression aspect of *Brady.* There can be no doubt that, under the line of cases running from *Mooney* and *Pyle* to *Brady,* the law was firmly settled at the time of Drumgold's criminal trial that a law enforcement officer may not deliberately suppress material evidence that is favorable to a defendant. . . Moreover, to the extent that Callahan acted deliberately, a reasonable officer in his position plainly would have appreciated the wrongfulness of his conduct. Callahan claims that a reasonable officer would not have recognized the evidence in question as material because Drumgold's lawyer had not bothered to cross-examine another prosecution witness, Travis Johnson, on the fact that the district attorney's office paid for his accommodations during the criminal trial. However, Johnson had to travel to Boston from another state to testify, and the benefits he received were tailored to facilitate his appearance at the trial. By contrast, viewed in the light most favorable to Drumgold, *see Walden,* 596 F.3d at 52, the benefits Evans received had little to do with ensuring his availability to testify or, for that matter, his safety as a cooperating witness. Evans was permitted to remain in the Howard Johnson hotel for eight months, he was free to come and go as he pleased, and no one monitored his whereabouts. A reasonable officer would have discerned the difference between the open-ended benefits Evans received and the far more limited benefits Johnson received. As a result, there is no basis for awarding Callahan judgment as a matter of law on qualified immunity grounds. . . . We do not mean to suggest that a law enforcement officer can be liable today in a damages action under 42 U.S.C. § 1983 only for deliberately suppressing evidence. Non-disclosure with a less culpable state of mind might suffice. . . This is a difficult question that has engendered a range of views. [collecting cases] We do not reach this question here. Our holding is limited to the law as it was clearly established in 1989, when Callahan engaged in the conduct at issue here.")

San Geronimo Caribe Project, Inc. v. Acevedo-Vila, 687 F.3d 465, 499-501 (1st Cir. 2012) (Lipez, J., concurring) ("The qualified immunity inquiry in the context of a procedural due process claim cannot turn on whether it was clear that the circumstances fit the mold of *Zinermon* rather than *Parratt–Hudson.* The constitutional violation at issue is the denial of predeprivation process, and to assess the reasonableness of the defendant's conduct, we logically must focus on the clarity of the law concerning the plaintiff's entitlement to a hearing. It has been clearly established for more than a half-century that 'a deprivation of life, liberty, or property [ordinarily must] "be preceded by notice and opportunity for hearing appropriate to the nature of the case."'. . . Hence, if we had determined that any of the defendants in this case had violated SGCP's due process rights by failing to hold a meaningful hearing before suspending their permits, the only basis for qualified immunity should be the defendant's reasonable uncertainty about whether the circumstances presented an 'extraordinary situation[ ]' in which a valid governmental interest justified

postponing the hearing until after the challenged action. . . Uncertainty about the applicability of *Parratt–Hudson* is irrelevant to the qualified immunity analysis because the *Parratt–Hudson* has nothing to do with the rationale for protecting officials from damages liability: to eliminate the risk that, in areas where the law is not clearly established, officials will refrain from independently acting in the public interest for fear of being sued. . . In sum, the qualified immunity doctrine in the procedural due process context must be applied consistently with its purpose to shield well-meaning and reasonable public officials from the burden of damages while holding accountable those officials who 'exercise power irresponsibly,' *Glik,* 655 F.3d at 81. The *Parratt–Hudson* doctrine itself denies a federal remedy to individuals harmed by the random and unauthorized conduct of state actors; the uncertainty surrounding the doctrine's scope should not be used to further extend the immunity of rogue state officials. . . . Under standard qualified immunity principles, the only pertinent question when an unconstitutional denial of predeprivation process has occurred is whether the defendant should have known that the Constitution required such predeprivation process.")

Glik v. Cunniffe, 655 F.3d 78, 85, 88 (1st Cir. 2011) ("In summary, though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment. Accordingly, we hold that the district court did not err in denying qualified immunity to the appellants on Glik's First Amendment claim. . . . Simply put, a straightforward reading of the statute and case law cannot support the suggestion that a recording made with a device known to record audio and held in plain view is 'secret.' We thus conclude, on the facts of the complaint, that Glik's recording was not 'secret' within the meaning of Massachusetts's wiretap statute, and therefore the officers lacked probable cause to arrest him. Accordingly, the complaint makes out a violation of Glik's Fourth Amendment rights. . . .The presence of probable cause was not even arguable here. The allegations of the complaint establish that Glik was openly recording the police officers and that they were aware of his surveillance. For the reasons we have discussed, we see no basis in the law for a reasonable officer to conclude that such a conspicuous act of recording was 'secret' merely because the officer did not have actual knowledge of whether audio was being recorded. We thus agree with the district court that, at this stage in the litigation, the officers are not entitled to qualified immunity from Glik's Fourth Amendment claim.")

Decotiis v. Whittemore, 635 F.3d 22, 30-38 (1st Cir. 2011) ("At the time of the district court's order, this Court had not yet had occasion to consider the application of *Garcetti,* and particularly the question of what it means to speak 'pursuant to' one's employment duties. We recently considered the application of *Garcetti* in two cases, *Foley v. Town of Randolph,* 598 F.3d 1 (1st Cir. 2010), and *Mercado-Berrios,* 611 F.3d 18, both of which inform the analysis. . . . The instant case presents what may be a not uncommon scenario: a public employee who is hired to perform certain specific functions believes her employer is not complying with the law and suggests to constituents a method to exert pressure on the public agency to encourage compliance. The question presented by such a case is: when does the public employee take off her employee hat and put on her citizen hat? . . .Although no one contextual factor is dispositive, we believe several

non-exclusive factors, gleaned from the case law, are instructive: whether the employee was commissioned or paid to make the speech in question, *Garcetti,* 547 U.S. at 421; the subject matter of the speech, *id.* at 421 (citing *Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 414 (1979)); whether the speech was made up the chain of command, *see id.* at 420; whether the employee spoke at her place of employment, *see Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1205 (10th Cir.2007); whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it "official significance"), *Foley,* 598 F.3d at 7-8 & n.9; whether the employee's speech derived from special knowledge obtained during the course of her employment, *see Williams v. Dallas Ind. Sch. Dist.,* 480 F.3d 689, 694 (5th Cir.2007); and whether there is a so-called citizen analogue to the speech, *Garcetti,* 547 U.S. at 423. . . .In short, while we cannot conclusively say that Plaintiff's speech was made as a citizen, the scope of our review on a motion to dismiss does not demand as much; it is sufficient that the complaint alleges facts that plausibly set forth citizen speech. *See Sepulveda-Villarini v. Dep't. of Educ. of P.R.,* 628 F.3d 25, 30 (1st Cir.2010) (Souter, J.) ("A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss...."). We conclude that Decotiis has surmounted this bar, and therefore the district court's dismissal for failure to state a claim was in error. . . . At the time of Whittemore's alleged retaliatory action, the Supreme Court's decision in *Garcetti* was the only controlling case in the First Circuit, and even *Garcetti* stated that its analysis was not to be mistaken for 'a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.'. . There were no decisions in this circuit explaining the scope of a public employee's employment duties and what it means to speak pursuant to those duties, nor was there a body of decisions from other circuits that could be said to have put Whittemore on clear notice. Even though the broad constitutional rule, as set forth in *Garcetti,* may have been clearly established, the contours of the right were still cloudy. . . . Furthermore, though we conclude that Decotiis stated a plausible claim for relief, the district court's opinion was a well-reasoned exposition reflecting a thoughtful analysis of the law as it existed at the time. This lends support to the conclusion that the state of the law at the time of the alleged constitutional violation was not clear enough in the circuits generally, and in this circuit particularly, to put Whittemore on fair notice that her actions constituted a constitutional deprivation. . . . We therefore hold that regardless of whether Whittemore did in fact violate Plaintiff's First Amendment rights, which is yet to be determined, a reasonable person in Whittemore's position could have believed that she was not violating Decotiis's constitutional rights by not renewing her contract. As such, qualified immunity is available to Whittemore in her individual capacity.")

Mosher v. Nelson, 589 F.3d 488, 495, 496 (1st Cir. 2009) ("For purposes of qualified immunity, we must decide, given the state of the law in 2004, whether a reasonable official in Nelson's position, with his knowledge of the circumstances that existed in Max 2 when Burns killed Mosher, would have understood that the practice of allowing patients to visit in other patients' rooms following morning count presented a substantial risk of serious harm to the patients. The district court concluded that, given the circumstances in *Burrell,* the law was not clearly established that failure to change the visiting practice would constitute a violation of Mosher's constitutional

rights. The district court held that Nelson was entitled to qualified immunity. We agree. No case had held that the same circumstances that occurred at BSH or materially similar circumstances constituted a Fourteenth Amendment violation. In addition, the cases addressing a detainee's right to be free of punishment before conviction did not clearly apply to the circumstances that existed in Max 2 in August of 2004. It was not clearly established law that in the absence of a history of violence or individualized threats, a prison official's failure to discontinue a long practice of a brief period of unsupervised visits was deliberate indifference to a substantial risk of harm to a patient. A reasonable official in Nelson's place, given the circumstances and the legal standard, could have believed that allowing the practice to continue would not lead to events that would violate a patient's rights. Therefore, Nelson is entitled to qualified immunity.")**.**

Lopez-Quinones v. Puerto Rico Nat. Guard, 526 F.3d 23, 27, 28 (1st Cir. 2008) ("The crucial question here is whether a reasonable official acting at the time of Lopez' termination should have known on what side of the *Elrod/Branti* line Lopez' own position fell. . . Largely for prudential reasons, the test is not subjective but asks what a reasonable official would have thought. . . On the present facts, this is a close call but the issue is treated as one of law, . . . and, in disagreement with the able district judge, we believe that as the law stood when the decision was made a reasonable official could (albeit mistakenly) have deemed Lopez outside *Elrod/Branti's* protection. . . . Those reading our past decisions like *Duriex-Gauthier* could reasonably have believed that in general, middle managers with impressive sounding titles and duties were generally outside the protected category. . . . . Some of our precedents may suggest that even if an official has significant policymaking responsibility, he is still protected unless it is also established that the policy judgments are those for which 'partisan' political motivations or judgments are appropriate . . . . [B]y contrast, other language from our case law indicates that involvement in policy or matters implicating political disagreement is sufficient. . . It is conceivable that there are rare cases where the distinction might matter-say, a high official whose duties were nonetheless entirely technical. . . But for the most part policymaking is in the nature of things the basis for preserving the right of the democratic political process to operate; civil service protections can be afforded by statute but the Constitution does not require them. The reference to 'partisan' politics comes from *Branti* but it is far from clear that it comprised a separate test. . . And for his part, plaintiff has not cited any analogous First Circuit cases that would have put defendants on notice of jeopardy. Given past precedent, we cannot say it was clearly established that Lopez, a director of a significant unit within the Puerto Rico National Guard, was insulated from political dismissal. Accordingly, while Lopez may seek injunctive relief for his termination, he may not obtain monetary relief from the individual defendants in their personal capacities.")**.**

DeMayo v. Nugent, 517 F.3d 11, 18, 19 (1st Cir. 2008) ("The district court essentially mandated that, to avoid dismissal, DeMayo find a case involving a violation of an individual's constitutional rights under the exact same set of circumstances. The proper inquiry is more abstract: whether Nugent and Lugas were on notice that 'police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.' *Kirk v. Lousiana*, 536 U.S. 635, 638 (2002); *see also Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth

Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). In our view, the 'firm line' drawn by *Kirk* and *Payton* provided Nugent and Lugas with sufficient notice that their entry into DeMayo's home was in violation of clearly established law. The defendants contend that the doctrine of exigent circumstances is an expanding area of law, the contours of which are not clearly established. The fact that the doctrine of exigent circumstances is evolving, however, does not necessarily mean that every situation implicating the subject touches upon the supposed nebulous borderline of acceptable conduct. Regardless of whether the outer boundaries of the doctrine are clearly defined, the defendants' conduct fell squarely outside the realm of legitimate uncertainty. . . . As explained above, the record is utterly bereft of specific facts that could have justified the officers' entry. Thus, without disputing the premise, it is a *non sequitur* for Nugent and Lugas to argue that because the precise quantum or nature of evidence that gives rise to exigent circumstances is not fully fleshed out in the case law, they are entitled to qualified immunity. Law enforcement officers may not violate constitutional rights, then expect qualified immunity when a court refuses to craft an unprecedented exception to a clearly established rule of law. . . . In this situation, there were no factual ambiguities or close calls that would render the defendants' conduct objectively reasonable.").

Jordan v. Carter, 428 F.3d 67, 74-76 (1st Cir. 2005) ("If we simply considered whether the law clearly established that a public employer may not penalize an employee for speech about a matter of public concern, it would be beyond debate that ample legal precedent existed to guide appellant's conduct. But using such a broad formulation to deny immunity is precisely what we have been told not to do. . . Appellant, however, urges us to *award* him immunity based on a similarly generic argument. He emphasizes the abundant case law recognizing that it is rare for immunity to be denied when the constitutional right at issue involves weighing various factors. . . . Appellant claims that this cannot be the rare case because the complaint depicts disciplinary conduct imposed for a mixture of protected and unprotected speech, a combination that would engender uncertainty in any attempt to balance interests. . . . Although *Dirrane* also presented an appeal of a motion to dismiss, it provides limited support for appellant's immunity request. We described the complaint there as 'very lengthy,'. . . and we noted allegations detailing the statements that plaintiff made, to whom, and, at least to some extent, their timing. We have none of those particulars here. Appellant could have, but did not, move for a more definite statement. *See* Fed.R.Civ.P. 12(e); *Educadores Puertorriquenos En Accion v. Hernandez,* 367 F.3d 61, 67 (lst Cir.2004). We therefore cannot eliminate the possibility that the facts once developed will show a violation of clearly established law. As we have intimated above, if plaintiffs' criticism consisted of serious expressions of concern, voiced in an appropriate manner, about the effect of their supervisors' poor performance on public safety or other public matters, and appellant's retaliation was primarily aimed at silencing their criticism for his own advantage, precedent would have clearly established that the balance of interests tipped decisively in plaintiffs' favor. Appellant is thus not entitled to immunity based on prong two. . . In the third step of the qualified immunity analysis, we consider whether an objectively reasonable officer in the defendant's position would have understood his action to violate the plaintiff's rights. . . At this stage, as we

have noted, the record requires us to look upon plaintiffs' speech as significantly involving matters of public concern. Similarly, we must assess and balance the interests of the parties, favoring plaintiffs in our reading of the allegations. And, since appellant concedes that the allegations establish that plaintiffs' speech was the motivating factor for imposing sanctions, the required inquiry leads to but one result. We cannot award immunity to appellant on the basis that a reasonable officer would not have realized the impropriety of his conduct. . . . We are fully aware that the doctrine of qualified immunity is intended to protect government officials not only from personal liability but also from the burdens of litigation, *see Saucier*, 533 U.S. at 200-01, and that immunity is often appropriate in cases involving public employee speech. It is not an automatic entitlement, however, and a court may not cut off a plaintiff's claims based simply on the odds. Here, the record is insufficiently developed to permit a reasoned assessment of either the speech or conduct at issue, and we accordingly must draw all inferences in the plaintiffs' favor. From that perspective, we conclude that the district court properly denied appellant's motion for dismissal of the individual claims based on the defense of qualified immunity. We do not mean to imply any likely outcome as this case further proceeds.")

Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 54, 55 (1st Cir. 2005) ("O'Neill focuses on the second step in the analysis, and he argues that in August 1998 there was no clearly established duty for officers to intervene in situations of excessive use of force by other officers except those involving an actual arrest or pretrial detention. . . This argument is simply wrong. *Davis* and the case law do not distinguish an officer's duty to intervene during an 'investigatory stop' from that during an arrest or pre-trial detention. The Fourth Amendment duty applies here where Ernid was seized. . . . In keeping with these principles, no reasonable officer would have concluded that this stop was outside of these Fourth Amendment obligations. . . . Further, the alternate basis of joint participant liability in the failure to intervene claim against O'Neill was clearly established in 1998. . . . O'Neill does not make any argument that this theory of liability was unclear at the time of the beating. O'Neill is not entitled to qualified immunity because the law was clearly established in 1998 that an officer in O'Neill's circumstances had a duty to intervene.").

Burke v. Town of Walpole, 405 F.3d 66, 85-88 (1st Cir. 2005) ("Uniquely among the defendant police officers, Trooper McDonald argues that he had no constitutional duty to disclose exculpatory evidence to anyone because he was neither an affiant for the arrest warrant nor technically an arresting officer (merely a searching officer). Thus, we must ask 'whether the state of the law at the time of the putative violation afforded [Trooper McDonald] fair warning that his ... conduct was unconstitutional.'. . Just as a police officer who seeks an arrest warrant despite the lack of probable cause may not 'excuse his own default by pointing to the greater incompetence of [a] magistrate' who erroneously issues a warrant, [citing *Malley*], a police defendant who acts intentionally or with reckless disregard for the truth may not insulate himself from liability through the objectively reasonable conduct of other officers. . . Thus, Trooper McDonald's argument that he had no constitutional duty to disclose exculpatory evidence to anyone prior to Burke's arrest because he was neither an affiant for the arrest warrant nor technically an arresting officer is unavailing. However Trooper McDonald chooses to characterize or minimize his role, the

summary judgment record establishes that he was centrally involved in the collection of evidence to be used to secure an arrest warrant for Burke. . . At the time of Burke's arrest, his constitutional right to be free from arrest pursuant to a warrant that would not have issued if material exculpatory evidence had been provided to the magistrate was clearly established, as was Trooper McDonald's concomitant constitutional duty of full disclosure of exculpatory information to fellow officers seeking warrants based on probable cause. . . . When viewed in Burke's favor, the facts in the record reveal that Trooper McDonald knew the DNA analysis had excluded Burke as a suspect on the morning of December 10, but failed to communicate that information to the officers preparing applications for search and arrest warrants despite his awareness of their ongoing preparation and ample opportunity to communicate the newly acquired information. . . . Given the clearly established prohibition on material omissions by officers central to an investigation from an arrest warrant application, and given Trooper McDonald's knowledge of the crucial facts, we cannot say, as a matter of law, that a reasonable, similarly situated officer would feel free to communicate only inculpatory bite mark evidence to fellow officers seeking warrants on probable cause while withholding his knowledge of directly contradictory DNA results. Accordingly, Trooper McDonald was not entitled to a favorable summary judgment ruling on his qualified immunity defense.").

Wagner v. City of Mount Holyoke, 404 F.3d 504, 509 (1st Cir. 2005) ("The general right invoked by Wagner–to engage in speech on matters of public concern without retaliation–was clearly established prior to 1994. But qualified immunity requires that the general right be placed in a reasonably specific context; and given the facts surrounding Wagner's discipline, this is not a case in which reasonable officers, in light of clearly established law, 'must have known that [they were] acting unconstitutionally.' . . To the contrary, Wagner's broad range of complaints (some consisting of unprotected and antagonistic speech), coupled with his disregard of confidentiality protocols and his disobedience in following the department's chain of command, would have permitted a reasonable superior officer to believe that he was entitled to discipline Wagner regardless of the content of his speech, consistent with the protections of the first amendment. Even if this reasoning were mistaken, it would not have been egregiously so and, accordingly, qualified immunity is available.")

Whalen v. Massachusetts Trial Court, 397 F.3d 19, 27, 28 (1st Cir. 2005) ("We believe an objectively reasonable Massachusetts official could have drawn the conclusion–albeit incorrectly–that a budget-driven layoff effectuated by reference to performance is nonetheless a budget-driven layoff, and thus exempt from the procedural requirements applicable to terminations for cause. Although we have now clarified that due process requires that an employee who holds a property right in his job be given notice and opportunity to respond whenever he is terminated in a 'person-directed rather than position-directed personnel action[ ],' . . . a reasonable official could have taken into account the possibly (and ultimately) temporary nature of Whalen's termination and the financial crisis that triggered it to conclude that the *Loudermill* line of cases was not implicated. Certainly, in terms of future employment, a budgetary layoff is likely to have less drastic consequences than a classic termination-for-cause; an official focusing on the "layoff" label

and the nature of the harm, against the backdrop of the "reorganization exception," reasonably may have miscalculated in weighing the competing interests. . . . In sum, because we believe an objectively reasonable official in the defendants' position would not necessarily have understood that his action violated the plaintiff's rights, we hold that the district court properly granted qualified immunity to the individual defendants.").

Whalen v. Massachusetts Trial Court, 397 F.3d 19, 30 (1st Cir. 2005) (Stahl, J., dissenting) ("At the time Whalen was targeted for layoff based on performance-related factors, the law was such that a reasonable officer, when selecting an employee for removal based on such factors, was on notice that such an employee was entitled to due process. The fact that budgetary constraints prompted the officials to evaluate Whalen's performance is irrelevant–even in this 'novel factual circumstance[ ],' the 'officials [were] still on notice' that Whalen was entitled to some form of due process as soon as factors other than seniority were considered in his being selected for removal. . . . In their search through our precedent for a perfect factual match to the facts of this case, my brethren ignore the Supreme Court's clear direction in *Hope v. Pelzer* that '[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.' *Id.* Indeed, this same error was made by four members of this court sitting en banc in *Savard v. Rhode Island*, 338 F.3d 23 (1st Cir.2003) (en banc) (opinion of Selya, J.), when this Court evenly divided over the propriety of such a search for the perfect precedential match. The proper inquiry is 'whether the state of the law [at the time of the action] gave [Appellees] fair warning that their alleged treatment of [Whalen] was unconstitutional.' . . And here, the answer is unequivocally yes.").

Riverdale Mills Corp. v. Pimpare, 392 F.3d 55, 66 (1st Cir. 2004) ("The district court below erred by posing the second prong as whether 'the law regarding the necessity for a search warrant is clear.'. . This is too abstract an inquiry, at either the first or the second prong. . . The proper question is whether an officer on October 21, 1997, should have understood based on prior law that it was unlawful, without a warrant or consent, to take industrial wastewater from underneath a manhole cover on a privately-owned street, but headed irretrievably to a public sewer 300 feet away. . . .The law did not clearly establish any such Fourth Amendment right. We have found no court decisions holding that there is a reasonable expectation of privacy in industrial wastewater on its way to a public sewer. The law goes the other way. . . The most obvious analogy, as we have noted, is between solid waste left out for the trash collector, for which there is usually no reasonable expectation of privacy, and liquid waste flowing into the public sewer system. . . . Even if Riverdale had a reasonable expectation of privacy in its wastewater at Manhole 1, prior law would not have put an officer on notice that producers of industrial wastewater located underneath a manhole on a private street but headed for a public sewer 300 feet away enjoyed a reasonable expectation of privacy in the wastewater. The officers are entitled to immunity on the second prong of the qualified immunity analysis as well." [footnotes omitted]).

Limone v. Condon, 372 F.3d 39, 46-48(1st Cir. 2004) ("The appellants resist this impressive array of authority on two fronts. First, they accuse the plaintiffs and the district court of having

defined the right in question too broadly. In their view, modeling the right as a right to be free from a contrived conviction–a right not to be framed by the government–casts too wide a net. They suggest instead that the plaintiffs' allegations should be squeezed into a more circumscribed mold and read as setting forth a *Brady* violation. . . Having erected this straw man, the appellants then shred it: although *Brady* was decided prior to 1967, they assert that it was not clearly established then (indeed, it may not be clearly established today) that the duties imposed by *Brady* apply to law enforcement officers under circumstances in which the prosecutor is unaware of the contrivance. . . . It is certainly true that the manner in which a right is defined can make or break a qualified immunity defense. Courts must be careful not to permit an artful pleader to convert the doctrine of qualified immunity into a hollow safeguard simply by alleging a violation of an exceedingly nebulous right. . . . . Courts must be equally careful, however, not to permit a defendant to hijack the plaintiff's complaint and recharacterize its allegations so as to minimize his or her liability. Here, the amended complaints, fairly read, are not susceptible to the appellants' animadversions. The right defined by the plaintiffs and recognized by the district court does not even approach the level of generality thought to be impermissible. . . . Nor does the plaintiffs' inability to identify a pre-1967 scenario that precisely mirrors the scandalous facts of this case ensure the success of the appellants' claims of qualified immunity. There is no requirement that the facts of previous cases be materially similar to the facts sub judice in order to trump a qualified immunity defense. . . General statements of the law are capable of conveying fair warning. . . It follows logically that, in some situations, 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. . . We conclude, without serious question, that *Mooney* and its pre-1967 progeny provided reasonable law enforcement officers fair warning that framing innocent persons would violate the constitutional rights of the falsely accused.")

Mihos v. Swift, 358 F.3d 91, 110 (1st Cir. 2004) ("Given the facts alleged in the complaint, as described in Part I.A. *supra,* we have no trouble finding that a reasonable official similarly situated to Swift would have known that terminating Mihos for his vote violated his constitutional rights. Taking the allegations in the complaint as true, Mihos exercised his best judgment as to the proper course of action, cast his vote, and was fired in retaliation for that vote for reasons unrelated to legitimate governmental interests. No reasonable public official could have failed to realize that a member of a public instrumentality cannot be terminated on such grounds for voting on matters of public concern within his authority.").

Fabiano v. Hopkins, 352 F.3d 447, 457, 458 (1st Cir. 2003) ("The nature of Fabiano's First Amendment claim makes it extremely difficult for him to prove that this right was clearly established at the time his employment was terminated. 'Because *Pickering*'s constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered 'clearly established' for purposes of qualified immunity. . . The facts of this case do not present the sort of unusual circumstances that would support the finding of a clearly established right notwithstanding *Pickering*. As we noted supra, there is a very close question as to whether Fabiano's allegations made out a constitutional claim. Fabiano's supervisors had, on at least one formal occasion, stated

a basis for distrusting his judgment, . . . and were reasonably concerned about the potential conflict of interest (and the appearance of such conflict) that his Zoning Board lawsuit entailed. We cannot say that they knew or should have known that firing Fabiano under these circumstances was unlawful. Accordingly, we conclude that Joyce and Hopkins are entitled to qualified immunity on Fabiano's First Amendment claims.").

Acevedo-Garcia v. Monroig, 351 F.3d 547, 563, 564 (1st Cir. 2003) ("Defendants contend that the court erroneously characterized the 'constitutional right' at issue as plaintiffs' right not to be discriminated against on the basis of their political beliefs during the implementation of the layoff plan. They decry the excessive abstractness of this 'right,' citing language from the Supreme Court's decision in *Anderson v. Creighton,* 483 U.S. 635 (1987). . . . It is difficult to divine from defendants' briefs how they would articulate the right at issue–the pertinent discussion is geared exclusively to demonstrating the absence of any clearly established rule regulating the implementation of seniority-based layoff plans. Of course, this approach commits the *Anderson* fallacy in reverse by construing the relevant rights/rules with such specificity that the predictably scant jurisprudence on point would never satisfy the 'clearly established' threshold. In the end, their argument is unavailing. The clearly established law both in this circuit and beyond precludes government officials from discharging civil or 'career' employees for politically-motivated reasons.").

Savard v. State of Rhode Island, 338 F.3d 23, 27, 28, 30, 32, 33 (1st Cir. 2003) (evenly divided en banc opinion) (Selya, J., joined by Boudin, Lynch, and Howard, JJ.) ("We acknowledge that strip searches are intrusive and degrading (and, therefore, should not be unreservedly available to law enforcement officers). The *Roberts* decisions exemplify this thinking; they hold unequivocally that the ACI's policy of strip-searching persons arrested for non-violent, non-drug-related misdemeanors, in the absence of particularized suspicion, violated the Constitution. . . The questions on which this appeal turns, therefore, involve the second and third branches of the qualified immunity algorithm. We must determine whether the law was clearly established, prior to March 17, 2000, to the effect that prison officials need at least reasonable suspicion before subjecting misdemeanant arrestees to strip searches when introducing them into the general population of a maximum security prison, and whether a reasonable prison official, situated similarly to the defendants, would have understood at that time that the policy in place at the ACI transgressed the Constitution. . . . In conducting our appraisal, we have endeavored to take into account all the decisional law, in and out of our own circuit, that was on the books at the time of the events in question. . . . In the end, we recognize that both *Swain* and *Arruda* offer valuable insights, but that neither is a very exact match. While *Swain* makes clear that strip searches ought not lightly to be indulged, the factual context of the case presented rather minimal security concerns. And while *Arruda* makes clear that institutional security needs may require intrusive measures in a maximum security setting, that case dealt not with persons arrested for relatively innocuous misdemeanors, but, rather, with hardened criminals. So long as the facts in these cases are distinguishable in a fair way from the facts at hand–and we believe that they are–then neither of them can be said to have clearly established the law for purposes of a qualified immunity

determination in the instant case. . . . The plaintiffs . . . go beyond *Swain* and *Arruda* in an effort to convince us that reasonable correctional officials should have realized the unconstitutionality of the ACI's strip search policy prior to March 17, 2000. They point to a line of cases stating that blanket strip searches of misdemeanant arrestees, conducted without particularized suspicion, are unconstitutional. . . . The short of the matter is that, throughout the last quarter of the twentieth century, courts had pursued two divergent lines of precedent. This case, as we said in *Roberts II*, 239 F.3d at 111, fell along neither axis, but, rather, into the tenebrous middle. We are mindful that there is a distinction for qualified immunity purposes between an unconstitutional but objectively reasonable act and a blatantly unconstitutional act. . . Here, the lack of any direct precedent and the undulating contours of the law during the relevant period combine to persuade us that the constitutional violation was not obvious; the defendants reasonably could have thought, prior to *Roberts I*, that there was room in the law for the ACI's strip search policy. . . . Our brethren suggest that we require an exact match with the facts of previously decided cases before we will deny a defendant the shield of qualified immunity. That is simply not so. What is so is that '[t]he meaning of reasonableness [of a search] for Fourth Amendment purposes is highly situational' and requires 'a balancing of the need to search against the invasion which the search entails.'. . The cases that our brethren cite in an effort to show that reasonable suspicion was clearly established as a condition precedent to a strip search of a person in custody are no more on point than the cases, cited above, that authorize various exceptions to that generality. Given this cacophony of voices, a reasonable prison official, faced with the novel factual situation that confronted those who were in charge of the ACI, had no way of knowing which voice should guide him in drawing the Fourth Amendment balance. It is the absence of clear guidance, not the absence of a perfect precedential match, that makes qualified immunity appropriate here.").

Savard v. State of Rhode Island, 338 F.3d 23, 41, 42 (1st Cir. 2003) (evenly divided en banc opinion) (Bownes, J., joined by Coffin, Torruella, and Lipez, JJ.) ("We are deeply troubled by the weight our colleagues give to our statement in *Roberts II* that institutional security concerns in this case 'fall somewhere between' those exhibited in *Swain* and *Arruda.* 239 F.3d at 111. Our colleagues describe this statement as an acknowledgment that the ACI's strip search policy fell into a 'gray area' of the law. We respectfully disagree. The *Roberts II* statement merely recognizes the obvious: that the facts of the present case fall somewhere between those of *Swain* and *Arruda.* Such an observation is not surprising. Indeed, most cases will fall somewhere between *Swain* and *Arruda* because those two cases represent the opposite ends of the spectrum. *Swain* was a case involving an arrestee who was placed in a cell in a local police station. In contrast, *Arruda* involved extraordinarily violent convicted felons who were confined to a special security section of a maximum security prison. What our colleagues have done is to construe a dictum probably intended to soften criticism of the prison officials into a sweeping carte blanche, protecting officials for a wide swath of conduct elsewhere long since forbidden. Placing so much weight on the *Roberts II* statement runs the risk of creating an impenetrable defense for government officials. Our colleagues' reliance on the *Roberts II* statement implies that qualified immunity will only be denied in this circuit when the facts of the case at bar are the same as those in previously decided cases. This risk is compounded by our colleagues' statement that *Swain* could not give the

defendants fair warning because it is not 'a very exact match' to the facts of this case. Such reasoning flouts the Supreme Court's holding in *Hope v. Pelzer* . . . .In short, they reject *Swain* as giving 'clear guidance' because of factual differences, while claiming allegiance to *Hope's* ruling that 'fundamentally similar' facts are not necessary. This seems to us an attempt to have it both ways. Our colleagues may well be correct that the strip search policy at issue in this case, and others like it, are 'dead and buried.' But their qualified immunity analysis will live on; it will undoubtedly be used in future cases involving other important constitutional rights.").

Dwan v. City of Boston, 329 F.3d 275, 280-82 (1st Cir. 2003) ("Given the objective circumstances of this case, we see nothing unreasonable about the actions taken by the defendants. It is beyond dispute in this case that unidentified policemen on the scene badly beat a black undercover police officer, mistakenly believing him to have shot another policeman, and it is almost certain that some of the other officers present knew who had done it, denied having knowledge, and supported each other's stories. The individual defendants, to their credit, were trying to penetrate this familiar wall of silence and bring the wrongdoers to justice. Dwan may or may not have had such knowledge. But what the defendants knew was that he had told a story as to why he did not see what happened, admittedly supported by one of Dwan's fellow officers but contradicted in substance by two others (who had no obvious motive to lie), and Dwan then declined to testify about the matter before a grand jury without immunity. On this basis, the defendants were perfectly entitled to begin an investigation into whether Dwan's original claims constituted false reporting and other violations of departmental regulations. Nor was there anything unreasonable in placing him on administrative leave with pay pending this investigation even though this meant he was not eligible for extra duty which would have meant more pay. Administrative leave, for one reasonably suspected of serious misconduct, is a routine measure–here mitigated by continued pay. That Dwan suffered some disadvantage–as does any innocent citizen who is lawfully but mistakenly arrested–does not make it a constitutional violation. . . . Because the individual defendants did not violate Dwan's Fifth Amendment rights, the first prong of the *Saucier* inquiry is decisive in their favor. And, as to the second prong, a violation of the Fifth Amendment in these circumstances is not 'clearly established' or readily apparent. Whether a Fifth Amendment right exists in the 'abstract'–as it obviously does–is not the question. . . Thus, there is qualified immunity here even if we are wrong in finding that Dwan's constitutional rights were not violated.").

Suboh v. District Attorney's Office of the Suffolk District, 298 F.3d 81, 90, 93, 94 (1st Cir. 2002) ("The district court based its ruling on an abstract right to 'familial integrity' inherent in the substantive component of the Due Process Clause of the Fourteenth Amendment. . . . There is a danger in the use of broad abstract terms such as 'familial integrity'. The Supreme Court has warned against using generalized definitions of constitutional rights in the qualified immunity setting. . . . Articulating the right as one of 'familial integrity' casts too broad a net. The inquiry into whether a right is clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' . . . The constitutional right at issue here is the right to procedural and substantive due process before the state takes a child away from his or her parent.

. . . One tried and true way of determining whether this right was clearly established at the time the defendants acted, is to ask whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights. . . This inquiry encompasses not only Supreme Court precedent, but all available case law. . . A parent's liberty interest in the care and custody of her child was established long before the facts of this case arose. . . . We have no doubt that there is a clearly established constitutional right at stake, although we have found no case exactly on all fours with the facts of this case. The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist.").

Hatch v. Dep't for Children, Youth and Their Families, 274 F.3d 12, 21-25 (1st Cir. 2001) ("The Court has not had occasion to formulate the contours of the constitutional rule under which a state official lawfully may take temporary custody of a child during an investigation of abuse or neglect, nor has this court dealt definitively with the issue. Other courts have grappled with it, however, and most of them have concluded that a case worker–we use that term generically–may place a child in temporary custody when he has evidence giving rise to a reasonable and articulable suspicion that the child has been abused or is in imminent peril of abuse. . . . . We hold . . . that the Constitution allows a case worker to take temporary custody of a child, without a hearing, when the case worker has a reasonable suspicion that child abuse has occurred (or, alternatively, that a threat of abuse is imminent). It follows, therefore, that a parent's right to the care, custody, and control of a minor child is inviolate unless a case worker has such a suspicion. In this instance, the appellant's complaint (though it unsuccessfully espouses a broader statement) sufficiently identifies this clearly established constitutional right. Thus, the appellant satisfies the first prong of the tripartite test. . . . We now must determine whether the contours of the constitutional right that we have identified–a parent's right to custody in the absence of a case worker's reasonable suspicion of child abuse–were clearly established at the time of the critical events. . . The appellant contends that the right here was sufficiently defined at the time of Brown's actions. Brown disagrees, maintaining that our previous decisions, *e.g.*, *Watterson*, 987 F.2d at 8; *Frazier*, 957 F.2d at 930-31, highlight the amorphous nature of the constitutional interest involved and thus compel the conclusion that the contours of the right were not clearly established. The critical inquiry here is whether the dimensions of the right were sufficiently well-defined that a reasonable official would have understood that his actions violated that right. . . This does not mean that a court must already have outlawed similar conduct; the test is satisfied if, viewed in the light of preexisting jurisprudence, the unlawfulness of the conduct is apparent. . . . To determine the contours of a particular right at a given point in time, an inquiring court must look not only to Supreme Court precedent but to all available case law. . . . Several years elapsed between the dates on which *Frazier* and *Watterson* were decided and the date on which Brown took temporary custody of the appellant's son. During that interval, an emerging body of decisional law outside our own circuit has shed a brighter light on the contours of the constitutional right asserted by the appellant. Although our sister circuits have reached different conclusions on the constitutional standard to be applied when a state actor takes a child into temporary custody, those decisions share a common denominator: at an irreducible minimum, a case worker must have no less than a reasonable suspicion of child abuse (or imminent danger of abuse) before taking a child into

custody prior to a hearing. . . . Recent district court decisions have hewed to the same line. . . Given the widespread agreement that has developed as to the applicable legal regime, we conclude that, in the spring of 2000, an objectively reasonable case worker surely would have believed that taking temporary custody of a child prior to a hearing would violate the parents' interest in the child's care, custody, and control if he acted without a reasonable suspicion of child abuse (actual or imminent). That conclusion has important implications for this case: since clearly established law gave reasonable warning to Brown that he risked liability for violating the appellant's constitutional rights if he took custody of John without a reasonable basis for his suspicions of child abuse, the appellant has survived the second step of our inquiry. . . . While the first two steps in the qualified immunity pavane deal with abstract legal principles, the final step deals with the facts of the particular case. The question here is whether Brown had reliable information, sufficient to support a reasonable suspicion of abuse, when he removed John from his father's custody. . . . We hold that the information known to Brown when he took temporary custody of John met both the qualitative and quantitative requirements of the reasonable suspicion standard. . . Consequently, the appellant falters at the third step of the qualified immunity inquiry.").

Davis v. Rennie, 264 F.3d 86, 114 (1st Cir. 2001) ("The question is whether it would be clear to a reasonable supervising nurse or mental health worker who saw another MHW use excessive force against a patient that he or she had a legal duty to intervene. . . . The cases involving police and prison guards clearly established at least the same duty for mental hospital staff at a state institution. . . . Nurse Wiegers's argument that she had no duty to intervene because Plesh, a security officer, was also present draws too fine a distinction between the facts here and existing case law. [citing *Lanier*] As we have said, Nurse Wiegers could have tried to stop Bragg by calling out rather than physically intervening. As Bragg's supervisor, she had the responsibility to do so, and it is reasonable to expect her to have known that.").

Brady v. Dill, 187 F.3d 104, 115 (1st Cir. 1999) ("To determine a defendant's eligibility for qualified immunity, courts must define the right asserted by the plaintiff at an appropriate level of generality and ask whether, so characterized, that right was clearly established when the harm-inducing conduct allegedly took place. . .This does not mean that a right is clearly established only if there is precedent of considerable factual similarity. . . It does mean, however, that the law must have defined the right in a quite specific manner, and that the announcement of the rule establishing the right must have been unambiguous and widespread, such that the unlawfulness of particular conduct will be apparent ex ante to reasonable public officials.")

Rivera-Ramos v. Roman, 156 F.3d 276, 279-81 (1st Cir. 1998) ("This court has made it crystal clear, on a number of occasions, that identifying some abstract constitutional right extant at the time of the alleged violation does not itself show that the conduct alleged is a violation of 'clearly established' law. Instead, the focus must be upon the particular conduct engaged in by (or attributed to) the defendants; immunity is forfeited only if a reasonable official would clearly understand that conduct to be a violation of the Constitution. The need to focus on specific facts is so well- settled that the issue need not be discussed further. . .The closest First Amendment

precedents are Supreme Court cases, circa the 1960s, that involved government action taken against individuals because of their supposed radical political beliefs or associations. These cases involve employment as a school teacher or state-university faculty member, admission to the bar, and even nonsensitive work in a defense plant. These cases provide general language helpful to the plaintiffs, but none of them involves constitutional standards for the denial or revocation of a gun dealer license. Assuming that police officer defendants 'caused' the license revocation or weapons seizure, the Supreme Court cases as of 1969-70 clearly forbade such action based on anyone's general beliefs that Puerto Rico should have independence, or on their membership in organizations devoted to securing such independence by peaceful means. Conversely, we do not think that it would have been a violation of 'clearly established law' for police officers to have sought to deny or revoke a firearms dealer license to individuals who had expressed a commitment to violence and who were members of an organization that was reasonably perceived to be committed to violence. . . In sum, we conclude that the district court's denial of qualified immunity rested upon a mistakenly abstract view of what is clearly established law and that the case must be remanded for further consideration of the qualified immunity issue consistent with this opinion.").

Camilo-Robles v. Hoyos, 151 F.3d 1, 5, 6 (1st Cir. 1998) ("We have not had occasion to address the question whether, to be liable under section 1983, a supervisor must have violated an independent, 'clearly established' right, or whether a supervisor may be liable based only on his proximity to a subordinate's violation of a 'clearly established' right. Other circuits, however, have addressed this interplay between the 'clearly established' requirement and supervisory liability. We follow their lead and adopt an approach that comports with the core principle of qualified immunity by protecting supervisory officials from suit when they could not reasonably anticipate liability. When a supervisor seeks qualified immunity in a section 1983 action, the 'clearly established' prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. . . . In other words, for a supervisor to be liable there must be a bifurcated 'clearly established' inquiry–one branch probing the underlying violation, and the other probing the supervisor's potential liability.").

See also ***Doan v. Bergeron***, No. 15-CV-11725-IT, 2016 WL 5346935, at *8-9 (D. Mass. Sept. 23, 2016) ("When a plaintiff seeks to hold liable a defendant based on his supervisory role over others who allegedly violated the plaintiff's constitutional rights, the 'clearly established' prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context. In other words, for a supervisor to be liable there must be a bifurcated 'clearly established' inquiry—one branch probing the underlying violation, and the other probing the supervisor's potential liability. . . As to the first step of the 'clearly established' inquiry, the violations of Gallagher's subordinates—CPS and the Bristol County Sheriff's Office defendants—were violations of clearly established constitutional rights. Doan's right to be free from involuntary medication—implicated by the allegations that

CPS defendants gave Doan Haldol even though she was incapable of giving informed consent and they did not have a court order to do so, . . . was clearly established, as the Supreme Court has stated that prisoners 'possess[ ] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs.'. . Doan's right to be free from harm—implicated by Gallagher's failure to protect Doan from the involuntary medication of Haldol—was also clearly established in Supreme Court case law. . . .As to the second step of the analysis, it was clearly established that a supervisor would be liable for the violations of his subordinates in this context, where Gallagher was alleged to have known about the constitutional violations. A supervisor can be liable for the actions of his subordinates if he or she 'is on notice' to 'ongoing violations' and 'fails to take corrective action.'. . Here, Doan has alleged that Gallagher was aware of the ongoing constitutional violations that she was suffering, had the power to alleviate those violations by relocating Doan, but failed to take corrective action. Gallagher relies on cases from other circuits holding that non-medical jail or prison officials such as Gallagher are entitled to rely on the expertise of medical personnel. *See Arnett v. Webster*, 658 F.3d 742, 755 (7th Cir. 2011) (stating that "if a prisoner is under the care of medical experts, a non-medical prison official will generally be justified in believing that the prisoner is in capable hands"); *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (same). However, 'non-medical officials can be chargeable with ... deliberate indifference where they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.' *Arnett*, 658 F.3d at 755. This is what Doan alleges; that Gallagher knew that CPS was involuntarily medicating Doan and failed to take any corrective action. Accordingly, Gallagher is not entitled to qualified immunity at this stage of the litigation.")

Roldan-Plumey v. Cerezo-Suarez, 115 F.3d 58, 65, 66 (1st Cir. 1997) ("In earlier political discrimination cases, we found defendants entitled to qualified immunity because their allegedly unconstitutional actions took place prior to the development of clearly established law in this area. [cites omitted] This case is different. Appellees discharged Roldan on May 6, 1994. The contours of the law regarding discharge based on party affiliation grew much clearer in the late 1980s and early 1990s. By 1993, this circuit had decided two waves of political discrimination cases. At the time appellees discharged Roldan, this circuit's law regarding discharge based on political discrimination was indeed clearly established. To be sure, the law may still be blurred around the edges. But this is not a borderline case. In determining entitlement to the qualified immunity defense in the political discrimination context, we look only to the inherent duties of a position and ask whether the defendant could reasonably believe the position in question was one that '"potentially concerned matters of partisan political interest and involved at least a modicum of policymaking responsibility, access to confidential information, or official communication."'").

Joyce v. Town of Tewksbury, 112 F.3d 19, 22 (1st Cir. 1997) (en banc) (per curiam) ("The Supreme Court cases, with *Steagald* at one pole and *Santana* at the other, do not definitively resolve our own case. Even a quick review of lower court cases reveals that there is no settled answer as to the constitutionality of doorway arrests. [citing cases] Circuit court precedent is also divided, with some decisions helpful to the police in this case and others less so. Given the

unsettled state of the law, we have no hesitation in concluding that the officers in this case are protected by qualified immunity which protects public officials against section 1983 liability so long as they acted reasonably.").

Joyce v. Town of Tewksbury, 112 F.3d 19, 26 (1st Cir. 1997) (en banc) (Seyla, J., dissenting) ("In sum, I believe that the officers' entry into a third party's home in the absence of consent, a search warrant, or exigent circumstances plainly violated *Steagald* and thus violated the homeowner's clearly established Fourth Amendment rights. [cite omitted] By hedging on this point, the en banc court not only denies the plaintiff her day in court but also invites the proliferation of such incidents. Since we will be seen as sanctioning that which we are unwilling to condemn, I respectfully dissent.").

Soto v. Flores, 103 F.3d 1056, 1065 (1st Cir. 1997) ("While this history would appear to militate in favor of finding that there is clearly established law in this area, in 1991 the First Circuit had not yet addressed the issue of state-created dangers. . . . Of course, a violation of clearly settled law may be found even where the Supreme Court and the circuit in question have not specifically addressed the question. . . However, we cannot extract a clearly established right from a somewhat confusing body of caselaw through the use of hindsight, or 'permit claims of qualified immunity to turn on the eventual outcome of a hitherto problematic constitutional analysis.'" citing *Martinez-Rodriguez*).

St. Hilaire v. City of Laconia, 70 F.3d 20, 27-28 (1st Cir. 1995) ("Plaintiff contends that in executing a search warrant, the Fourth Amendment's prohibition against 'unreasonable searches' requires the police to identify themselves as police and state their purpose. . . . It falls to the court to determine whether this right allegedly violated was 'clearly established' at the time of the incident. . . . Plaintiff relies on the Supreme Court's recent decision in *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), which held that the reasonableness of the search of a dwelling depended in part on whether law enforcement officers announced their presence and authority prior to entering, thus incorporating the common law 'knock and announce' rule into the Fourth Amendment. Assuming arguendo that the *Wilson* rule supports plaintiff's case, [footnote omitted] plaintiff's argument succeeds only if *Wilson* merely restated what was already clearly established constitutional law at the time of the shooting in 1990. . . . Plaintiff's argument fails because at the time of the shooting the notice requirement was not clearly of constitutional dimension.").

Martinez-Rodriguez v. Colon-Pizarro, 54 F.3d 980, 988 (1st Cir. 1995) ("When used in [qualified immunity] context, the phrase 'clearly established' has a well-defined meaning. It denotes that at the time the challenged conduct occurred the contours of the right were sufficiently plain that a reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right. The inquiry into the nature of a constitutional right for the purpose of ascertaining clear establishment seeks to discover whether the right was reasonably well settled at the time of the challenged conduct and whether the manner in which the right related to the conduct was apparent. In mounting this inquiry, courts may neither require that

state actors faultlessly anticipate the future trajectory of the law. . .nor permit claims of qualified immunity to turn on the eventual outcome of . . . problematic constitutional analysis.")

Penate v. Kaczmarek, No. CV 3:17-30119-KAR, 2018 WL 4654708, at *12–13 (D. Mass. Sept. 27, 2018) ("As of 1985, the law was clear that information encompassed within the *Brady* obligation included evidence that was either exculpatory or impeaching. . . In 1995, the Court extended this obligation to evidence known only to law enforcement officers. . . Thus, 'law enforcement officers have a correlative duty to turn over to the prosecutor any material evidence that is favorable to a defendant.' [citing *Drumgold*] Defendant Officers assert that at the time of Plaintiff's trial, the law was not clearly established that they had an obligation to disclose their 'suspicions' of Burnham's malfeasance. However, it is not the defendant who defines the claims, but the plaintiff. . . As is set forth above, Plaintiff's complaint, fairly read, paints a far more damning picture of the SPD Officers' general knowledge about Burnham's thefts and specific knowledge about Burnham's misconduct in Plaintiff's case. A reasonable inference from Plaintiff's allegations is not that the SPD Officers had a mere suspicion of Burnham's malfeasance, but that they had actual knowledge of it, and knowledge that he had stolen money from the cash submitted as evidence in Plaintiff's case. When the constitutional violation alleged by Plaintiff is defined as a failure to turn over impeachment evidence regarding a witness whose testimony was important to the criminal case, it is evident that the state of law in 2013, when Plaintiff was tried, put police officers on notice that *Brady* obliged them to tell prosecutors that their witness, Burnham, had stolen money from the evidence room in the past and, in Plaintiff's case in particular. The law was firmly established at the time of Plaintiff's trial that *Brady* required the government to 'disclose impeachment evidence that could have been used to impugn the credibility of a "key' witness.'. . Moreover, the state of the law in this circuit, from 2005 onward, was that an officer's *Brady* obligation extended to evidence that could be used to impeach a fellow law enforcement officer. . . . Plaintiff's allegations of reckless or knowing violations of Plaintiffs' due process rights may not be born out on a more complete record. However, at the motion to dismiss stage, the court cannot find that the SPD Officers are entitled to qualified immunity.")

Davis v. Murphy, No. 13-CV-11900-IT, 2018 WL 1524532, at *9 (D. Mass. Mar. 28, 2018) ("Qualified immunity focuses on the particular conduct at issue. If courts have held 'certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.' *Saucier v. Katz*, 533 U.S. 204, 202-203 (2001). This means there is a difference between articulating a precise cause of action that a plaintiff may bring and establishing that certain conduct violates the Constitution. *See King v. Harwood*, 852 F.3d 568, 580 n.4 (6th Cir. 2017) (distinguishing "recognition of § 1983 *claims* from . . . articulation of whether a given right is *clearly established*"); *see also Estate of Booker v. Gomez*, 745 F.3d 405, 428 (10th Cir. 2014) (holding right to be free from excessive force was clearly established despite uncertainty about whether claim arose under Fourth, Fifth, Eighth, or Fourteenth Amendment). While courts have struggled at times to identify the precise cause of action for malicious prosecution, it has long been

established that a police officer violates the Constitution by intentionally or recklessly making false statements in, or omitting true exculpatory statements from, materials submitted to a magistrate in support of probable cause. *See Franks v. Delaware*, 438 U.S. 154, 171 (1978). *Hernandez-Cuevas* recognized that no reasonable officer 'would have been ignorant of the fact that fabricating evidence was constitutionally unacceptable.'. . As of 2004, the First Circuit had held that it is 'self-evident' that 'those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.'. . Such conduct did not first become unconstitutional in 2004. *Limone* even held that 'the right not to be framed by law enforcement agents was clearly established in 1967.'. . 'The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."' *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Viewing the evidence in the light most favorable to Davis, McManus *knew* Sheridan was setting up Davis and even watched this setup occur on video. Then, despite knowing Sheridan's narrative was false, McManus presented it to a magistrate to secure a criminal complaint and to a grand jury to secure an indictment. If these facts are true, no reasonable officer in 2010 would think such conduct was lawful. Of course, it remains in dispute whether this is what occurred. A jury could find McManus did not act with such knowledge or recklessness. But McManus has not shown that, as a matter of law, his conduct did not violate a clearly established right. Accordingly, he is not entitled to qualified immunity on this claim.")

Frazier v. Bailey, 957 F.2d 920 (1st Cir. 1992) (relying on ***Myers v. Morris***, 810 F.2d 1437, 1462 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987) and ***Benson v. Allphin***, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986), in concluding that a right subject to a balancing test can rarely be found 'clearly established'; finding the right of familial integrity to be such a right).

Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir. 1987) ("[W]hen the law requires a balancing of competing interests, it may be unfair to charge an official with knowledge of the law in the absence of a previously decided case with clearly analogous facts.").

Allen v. Town of East Longmeadow, No. 17-CV-30041-MGM, 2018 WL 1152098, at *7 (D. Mass. Feb. 9, 2018) ("Regardless of whether the individual defendants were implicated in a release of personal information about Plaintiff that was improper under state law, Plaintiff has offered 'no support for the proposition that, as of [March 2014], this provision had a clear basis in *federal* constitutional or statutory law. "Mere violations of state law do not, of course, create constitutional claims."'. . Where, as here, Plaintiff has failed to satisfy her burden to identify controlling or persuasive precedent that clearly established the constitutional right to equal protection she claims was violated by the individual defendants, they are protected by qualified immunity.")

Castagna v. Edwards, No. 15-CV-14208-IT, 2018 WL 651318, at *6, *8 (D. Mass. Jan. 31, 2018) ("Plaintiffs' claims are barred under the second and third prong of the qualified immunity defense

even if a jury could find the second wave officers' warrantless entry here in response to an officer's request for assistance to rise to the level of a constitutional violation. The facts do not indicate that a reasonable officer, similarly situated to Troy, Tully, Bizzozero, and Pritchard, would have understood that warrantless entry in response to an officer's request for assistance to contravene Plaintiffs' constitutional rights. Accordingly, summary judgment is GRANTED as to Count 1(a) with respect to both Christopher and Gavin Castagna's claims against Defendants Troy, Tully, Bizzozero, and Pritchard. . . .Based on this evidence, a reasonable jury viewing the evidence in the light most favorable to Plaintiffs could conclude that the Defendants engaged in a joint venture to seize Plaintiffs' cell phones and destroy the videos on them. Accordingly, summary judgment is DENIED as to Counts 1(f) and 1(g) with respect to both Plaintiffs' claims against all Defendants.")

Echavarria v. Roach, No. 16-CV-11118-ADB, 2017 WL 3928270, at *8, *11 (D. Mass. Sept. 7, 2017) ("The individual defendants also contend that the malicious prosecution claim is barred by qualified immunity, and they appear to be correct. In *Hernandez-Cuevas v. Taylor*, the First Circuit chronicled the long history of cases that addressed whether the Constitution affords a right to be free from malicious prosecution. . . The court went on to hold that the Fourth Amendment guarantees the right to be free from malicious prosecution, and thus 'ma[de] explicit what has long been implicit in our case law.'. . Prior to the *Hernandez-Cuevas* decision, the First Circuit had described it as an ' "open question whether the Constitution permits the assertion of a section 1983 claim for malicious prosecution on the basis of an alleged Fourth Amendment violation,"' and accordingly, held that '[s]uch uncertainty in the legal landscape entitles state actors to qualified immunity.'. . Since the Fourth Amendment right to be free from malicious prosecution was not clearly established until 2013, the individual defendants are entitled to qualified immunity from Plaintiff's § 1983 claim that Defendants engaged in malicious prosecution of him in violation of his constitutional rights in or before 1996. . . . Defendant Cooney additionally implies that he is entitled to qualified immunity from the failure to intervene claim because the right was not clearly established in cases not involving excessive force. Plaintiff responds that failure to intervene is a pathway to liability, not the underlying constitutional violation, and it is the constitutional right itself that must be clearly established at the time of the deprivation. While this theory has its merits, the First Circuit has reasoned in the excessive force context that 'the law was clearly established in 1998 that' an officer who was a bystander 'had a duty to intervene' where another officer was using excessive force. . . Thus, it appears that the duty to intervene itself must be clearly established. . . . As discussed *supra*, within the First Circuit, it remains uncertain whether an officer has a duty to intervene in cases that do not concern excessive force. Accordingly, the individual defendants are entitled to qualified immunity on the failure to intervene claim.")

Thomas v. Town of Chelmsford, No. 16-11689-PBS, 2017 WL 3159979, at *14–15 (D. Mass. July 25, 2017) ("In recent years, the Supreme Court has published a number of per curiam reversals of denials of qualified immunity, emphasizing that 'clearly established law' should not be defined 'at a high level of generality.'. . While it does not require 'a case directly on point' for law to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . The question is 'whether the violative nature of particular conduct is clearly

established,'. . . and it must be answered 'in light of the specific context of the case, not as a broad general proposition[.] . . .Two constitutional violations adequately pleaded against the individual defendants are: (1) violation of the First Amendment by public school teachers by singling out and mocking a student in front of a class, giving him an unjustifiably low grade, or giving him mean looks on multiple occasions in retaliation for that student having previously made a report of student-on-student sexual assault, and (2) violation of the First Amendment by public school administrators by ignoring a student's reports of bullying by other students and teachers, in retaliation for that student having previously made a report of student-on-student sexual assault. With respect to the first theory, the case law is clear that the teachers' harassment against a student in retaliation for reporting a sexual assault is impermissible retaliation in violation of the student's First Amendment rights. *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1238–39 (10th Cir. 1996) (holding that student's reporting of sexual hazing was entitled to First Amendment protection, and school officials were not entitled to qualified immunity when they punished him by throwing him off the football team). The second theory is harder because the parties have cited no case law directly on point that supports the theory that deliberate indifference by school officials to sexual harassment and bullying by fellow students can be a retaliatory adverse action under the First Amendment. In other words, it is not clear under the existing case law whether inaction can be an adverse action rising to the level of retaliation in violation of the First Amendment. Accordingly, the Court finds that qualified immunity applies to the claim that Dean Doherty, Superintendent Tiano, Principal Caliri, and A.D. Moreau engaged in First Amendment retaliation against Matthew by taking no action in response to his complaints about harassment by other students. The Court denies qualified immunity for the claim that Siragusa, Kender, and Cole engaged in First Amendment retaliation against Matthew by themselves harassing Matthew following the Camp Robindel incident.")

Goodhile v. Gribbons, 186 F. Supp. 3d 4, 13 (D. Mass. 2016) ("As explained above, the facts present a colorable claim that Gribbons violated Mr. Goodhile's constitutional rights by using unreasonable force. The issue is whether the legal contours of the right were sufficiently clear, and whether the violation would have been clear to a reasonable officer under the circumstances. . . The pertinent question in this regard is whether prior existing case law or general Fourth Amendment principles gave Gribbons notice that it was unconstitutional for a police officer to repeatedly strike an unresponsive seventy-six-year-old man who was holding a sheathed knife and who had not been accused of committing a crime. . . The First Circuit has held that a reasonable officer who has been trained on a use-of-force continuum does not need prior case law on point to recognize that it is unconstitutional to use substantial force on an individual who does not pose a significant threat. . .Here, Gribbons was operating with the benefit of a use-of-force protocol to be applied to situations involving resisting suspects. This policy provided guidance for reasonable behavior and cited to *Graham v. Connor*, . . . the case in which the Supreme Court established the applicable standard for Fourth Amendment excessive force claims. According to the policy, an officer is not entitled to use a baton on a suspect unless the suspect is assaultive, meaning that the suspect is engaged in behavior that is 'likely to result in bodily harm to the member, to others at the scene or to the suspect himself.'. . Considering the facts as alleged by Plaintiff, Gribbons's

conduct departed from this standard. Accordingly, he is not entitled to qualified immunity. Thus, I find that Gribbons is not entitled to summary judgment on count III. Based on the record before me, a rational jury could conclude that Gribbons's conduct was objectively unreasonable under the circumstances, in violation of Mr. Goodhile's Fourth Amendment rights. A jury could further find that a sensible officer would have known that his behavior was unreasonable and in violation of applicable law.")

Sanchez v. Mitchell, No. CV 16-10415-LTS, 2016 WL 6780289, at *2 (D. Mass. Nov. 15, 2016) ("Sanchez's damages claims against Defendants in their individual capacities fail to overcome qualified immunity. . . .Here, the law has not been clearly established that Defendants cannot restrict an inmate's access to a religious diet under the First Amendment. The First Circuit has not spoken. Cases from other circuits indicate that reasonable restrictions on an inmate's access to religious diets are acceptable, particularly where the inmate has not complied with procedures that call into question the sincerity of his belief. . . Additionally, the law has not been clearly established that Defendants cannot restrict an inmate's access to a religious diet under RLUIPA. Other courts have recognized that the law in this area is not well settled and that courts have disagreed on what RLUIPA requires. . . In short, '[i]t seems unlikely that claims on the current theory of denial of a religious diet due to claimed disciplinary infractions would be considered a violation of a clearly established right, particularly since this is a claim that appears to be the subject of an emerging circuit split.' Denson v. Gelb, Civ. A. No. 14-14317-DPW, 2015 WL 4271481, at *3 (D. Mass. July 13, 2015). Thus, Sanchez's claims for monetary damages against Defendants in their individual capacities fail.")

Mattei v. Dunbar, 217 F.Supp.3d 367, 379-81 (D. Mass. 2016) ("[W]hile there is not First Circuit law on point, other circuits have recognized that the denial of good-time credits can form the basis of a retaliation claim under § 1983 when done in retaliation for the exercise of constitutional rights. . . Finally, prior to the alleged retaliatory act, it was also well-established that mere threats of retaliation can violate First Amendment rights. . . . Thus, a reasonable official would have understood that soliciting another inmate to physically harm Mattei in retaliation for filing grievances violated his First Amendment rights even though no actual physical harm resulted. . . .The First Circuit has not yet directly addressed the question whether § 1997e(e) precludes compensatory damages in § 1983 actions raising constitutional claims. . . However, most circuits have held that § 1997e(e) does apply to § 1983 actions alleging constitutional violations, so that Mattei cannot recover damages for mental or emotional injuries resulting from constitutional violations absent a showing of physical injury. . . Because the statutory language '[n]o Federal civil action'—does not allow for exceptions, this Court concludes that § 1997e(e) precludes compensatory damages for mental and emotional injuries absent a showing of physical injury, regardless of whether the claims at issue are of a constitutional nature or not. Mattei, therefore, cannot recover compensatory damages for mental or emotional injuries suffered as a result of his alleged First Amendment violation. That, however, does not end the inquiry. Section 1997e(e) does not preclude either nominal damages or punitive damages. . . Nominal damages are appropriate to vindicate certain constitutional rights absent any showing of actual injury. . . In

other words, nominal damages vindicate the deprivation of a constitutional right itself, not any specific injury suffered as a result. Thus, nominal damages are not claims for mental or emotional injury and are therefore not barred by § 1997e(e). Punitive damages, too, are unrelated to claims for mental or emotional injury. . . Claims for punitive damages are premised on the nature of the constitutional violations itself rather than on the nature of the injury inflicted. Such claims serve to punish and deter egregious constitutional violations; they are not claims based on mental or emotional injury and are therefore no precluded by § 1997e(e). . . Thus, to the extent Mattel's *pro se* complaint can be read to include requests for nominal and punitive damages, he may be legally entitled to relief.")

Perry v. Spencer, No. CV 12-12070-MPK, 2016 WL 5746346, at *13–16 (D. Mass. Sept. 30, 2016) ("Neither the Supreme Court nor the First Circuit has established a baseline against which the parameters of 'an atypical and significant hardship' are to be measured. . . In *Skinner*, the First Circuit found that immediate transfer to solitary confinement after an inmate had just killed another inmate did not give rise to a due process clause claim, given the authorities' pressing need to isolate the inmate from other prisoners. . . The inmate's 'more colorable' claim was that he was kept there for 40 days without process, but the court found that in the circumstances of the case, a 40-day placement without a hearing was not unconstitutional. . . While noting that there was disagreement among the circuits concerning to what the confinement conditions of a segregation unit should be compared for purposes of *Sandin's* 'hardship test,' the court did not decide the issue. . . As for other circuits' holdings, the Court of Appeals for the District of Columbia recently surveyed 'the current state of the law[.]' [examining *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016)] Notwithstanding the lack of clarity concerning to what 'baseline' one should compare the conditions of a segregation unit, in *Skinner*, the First Circuit suggested that a placement of excessive duration could mean that a liberty interest was implicated. . . Other courts agree that the length of time an inmate spends in isolation is relevant to whether a liberty interest is triggered. [collecting cases] There is, however, no consensus regarding what length of time in segregated confinement is required to implicate a liberty interest. [examining cases] There is no question that Perry's two placements in SMUs, which lasted approximately fifteen months and five months, (with a six-month hiatus in the Connecticut DOC inbetween), were prolonged. Defendants contend that Perry's placements in the SMU were not 'indefinite' in the sense that they would end upon a particular occurrence, i.e., an out-of-state placement or reclassification, but it seems a misnomer to claim that a time period is not 'indefinite' when in fact it is so protracted. Although the conditions on the SMUs were significantly more restrictive than those in general population, and Perry spent a very long time housed in SMUs, the law is simply unclear as to whether Perry had a liberty interest in not being placed there. Even assuming a liberty interest was triggered, the DOC asserts that Perry was provided with adequate process. As set out above at great length, the DOC certainly had many rules and regulations pertaining to placing and keeping inmates on SMUs, and for the most part, at least, followed these rules with regard to Perry: reviews were held regularly; the Classification Board reexamined Perry's situation periodically with updated intelligence received from OIS and SBCC IPS; Perry received written notifications that he was on awaiting action status and that administrative reviews of his placement had taken place; Perry filed a number

of grievances concerning his placement in SMU, all of which were addressed, as were the concerns of his family and attorney. . . Perry asserts that the DOC did not follow its regulations, and that was entitled to a hearing to contest the reasons for his placement (#111 at 10). With no clear guidance from the courts prior to his placement, however, as to whether his placement even triggered a liberty interest, never mind what process was due, it cannot have been a violation of his due process rights for the DOC to have followed the procedures they did. . . . The court need not rule here on the question of whether a liberty interest was implicated and what process was due because defendants are entitled to qualified immunity. Whether a constitutional right not to be held in SMUs for extended periods of time without proper procedure was clearly established at the time of the defendants' purported violation is a question of law for the court to decide. . . The First Circuit has parsed the issue into two elements: Whether the right was clearly established such that reasonable DOC employees in defendants' shoes would have understood that their actions violated that right and, on the facts of this case, whether reasonable DOC employees would have understood that their actions violated that right. . . In conducting the analysis, the court must consider both 'the clarity of the law in general at the time of the alleged violation; and [ ]the clarity of the law as applied to the case – in other words, whether a reasonable person in the defendant's shoes "would have understood that his conduct violated the plaintiff['s] constitutional rights."'. . . The Supreme Court has cautioned that 'clearly established law' should not be defined at a 'high level of generality,' and that the 'dispositive question is "whether the violative nature of the *particular* conduct is clearly established."'. . In sum, during the time period at issue here, the state of the law with regard to whether an inmate in Perry's circumstances, i.e., an inmate held in administrative segregation, had a federal constitutional liberty interest at stake was murky. Neither the Supreme Court nor the First Circuit has squarely ruled on the issue. Given the variety of approaches employed by circuit courts in analyzing the question, as well as the wide range of different decisions that have resulted, it cannot be said that the liberty interest, and, therefore, 'the [constitutional] right was clearly established at the time of the challenged conduct.'. . Reasonable DOC employees in defendants' shoes would not have known that plaintiff had a liberty interest and, consequently, a constitutional right, at stake. Accordingly, defendants are entitled to qualified immunity on the procedural due process claim in Count I.")

Holloman v. Clarke, No. 14-12594-NMG, 2016 WL 5339721, at *2–3 (D. Mass. Sept. 22, 2016) ("[C]ases before 2012, when the conduct here allegedly occurred, clearly establish that an officer has a duty to intervene when another officer uses excessive force against a pretrial detainee. . . Even though the Supreme Court held in 2015 that the Fourteenth Amendment objective standard applies to pretrial detainees in excessive force cases, both the Fourteenth Amendment and the standard for failure to intervene turn on the reasonableness of the circumstances. As a result, the standard was clearly established in 2012. . . Because Holloman has alleged a constitutional violation that was clearly established at the time of the alleged conduct of Ferrarra and Maine, they are not entitled to qualified immunity.")

Doe v. Town of Wayland, 179 F.Supp.3d 155, 170-71 (D. Mass. 2016) ("Following the Supreme Court's admonition in *Mullenix*, the Court examines whether Moskowitz-Dodyk's particular

conduct regarding her repeated encouragement of a friendship between Coe and Philip violated John's constitutional rights, as clearly established between 1998 and 2000. Without ascending to too-high levels of abstraction, the First Circuit's most apposite discussion of the state-created danger doctrine was the 1999 case *Hasenfus*, in particular its discussion of the factually-similar *Armijo*. And the same dicta which enabled this Court to hold that John suffered a constitutional rights violation also provides enough flexibility to preclude finding sufficient clarity to overcome Moskowitz-Dodyk's qualified immunity. *Hasenfus* specifically mentioned that 'the facts in [*Armijo*] go a step beyond the typical endangerment cases cited by the Tenth Circuit, cases that involve manifestly outrageous behavior by the authorities certain to cause harm.'. . This distinguishing of *Armijo* from 'typical endangerment cases,' combined with the expressed equivocation on *Armijo*'s correctness, . . . underscore, at least within the First Circuit between 1998 and 2000, that the law did not clearly establish that Moskowitz-Dodyk acted unconstitutionally towards John. A reasonable officer could read that portion of *Hasenfus* and conclude that Moskowitz-Dodyk's conduct was not unlawful. . . . In opposition, John first argues that, for several decades, courts have recognized a right to bodily integrity, that sexual abuse infringes this right, and that state-created dangers may violate the Fourteenth Amendment. . . As discussed, however, these broad statements discuss Fourteenth Amendment rights at too high a level of generality. . . John next cites *Billingsley v. Franklin Area Sch. Dist.*, C.A. No. 11-160, 2012 WL 259992 (W.D. Pa. Jan. 27, 2012) as an example of a court denying qualified immunity when a defendant "gave a known perpetrator of sexual abuse access to" the victim plaintiff. . . However, *Billingsley* relied exclusively on Third Circuit case law, and thus did not face anything similar to *Hasenfus*'s ambiguous dicta. . . Accordingly, it has little persuasive value here.)

Morse v. Commonwealth of Massachusetts Executive Office of Pub. Safety Dep't of State Police, 123 F.Supp.3d 179, (D. Mass. 2015) ("A reasonable juror could conclude that seizing Charles Morse at gunpoint and detaining Lesa Morse with handcuffs was unreasonable under the circumstances. . . Nonetheless, the Court finds that the officers are entitled to qualified immunity on the excessive force claim because Plaintiffs' rights, in the context of this specific case, were not clearly established. . . . Charles Morse's asserted right is the right to not be handcuffed at gunpoint while under arrest for serious crimes. Lesa Morse's asserted right is the right of an innocent bystander to not be handcuffed while officers effect the arrest of another individual in the residence. Yet Plaintiffs cite no cases that would have given Defendants clear notice that the specific type of force used against each Plaintiff was unconstitutional, and the Court is aware of none. To the contrary, case law suggests that aiming guns at Morse during his arrest at least arguably fell within the realm of reasonableness. . . Lesa Morse was handcuffed by Sergeant Cloutier due to concerns about officer safety after she began yelling and did not obey commands to hang up the phone. . . Again, cases suggest that such a use of force was at least arguably reasonable. . . Accordingly, the Court must apply qualified immunity on Plaintiffs' excessive force claim. . . The Court underscores that this finding applies only to the use of force employed by Defendants *after* they entered the home, which Plaintiffs assert gives rise to a constitutional violation independent from the warrantless entry and arrest. For the reasons stated above,

Plaintiffs' claims of a Fourth Amendment violation will survive summary judgment based on the warrantless entry and arrest."), *aff'd on other grounds*, 2017 WL 3667648 (1st Cir. Aug. 25, 2017)

Johnson v. Han, No. CV 14-CV-13274-IT, 2015 WL 4397360, at *6-8 (D. Mass. July 17, 2015) ("O'Brien further argues that Counts I through IV should be dismissed under the doctrine of qualified immunity because there is no clearly established law that supervisors violate a criminal defendant's constitutional rights by allowing subordinates to withhold exculpatory evidence and to fabricate inculpatory evidence, or by failing to train and supervise their subordinates in conducting drug-analysis tests and disclosing results. . . . Prior to 2009, it was clearly established by the First Circuit that a police officer could not withhold exculpatory evidence. . . The prohibition on fabricating inculpatory evidence was also well-established before 2009. . . The First Circuit has not expressly ruled that it is clearly established that a state-employed chemist similarly cannot withhold exculpatory evidence from prosecutors or present false inculpatory evidence at trial. However, in 2005 the First Circuit held that '[t]he intentional or reckless fabrication of inculpatory evidence or omission of material exculpatory evidence by a forensic examiner in support of probable cause may amount to a constitutional violation.' *See Burke v. Town of Walpole*, 405 F.3d 66, 89 (1st Cir.2005). The court sees no reason to distinguish between a forensic report used to support probable cause and a drug-analysis report used to support conviction. . . This court has similarly held that it was clearly established before 2009 that a forensic analyst could not withhold exculpatory information. . . Other Courts of Appeals have held the same. [collecting cases] Accordingly, the court finds that a reasonable state-employed chemist would have known in 2009 that she had a duty not to withhold exculpatory test results and that she could not knowingly present fabricated evidence of guilt in support of a criminal defendant's conviction. Even if such a rule was not established in case law, the court further finds that this rule is an obvious extension of the principle that a police officer cannot withhold exculpatory evidence or fabricate inculpatory evidence. . . Accordingly, the court reaches the same conclusion under either method of demonstrating that a law is clearly established. Having found the law proscribing a state-employed lab chemists from withholding exculpatory evidence and presenting fabricated evidence of guilt to be clearly established, the court must determine if, in 2009, a reasonable supervisor would understand that she 'would be liable for constitutional violations perpetrated by her subordinates in that context.'. . Although the court has not identified extensive case law expressly treating supervisory liability in this context, the court finds that no reasonable supervisor could fail to grasp that liability would attach for exhibiting deliberate indifference towards the falsification and withholding of evidence by her subordinates. The prohibition of such unconstitutional behavior applies with obvious clarity to the acts of supervisors who condone or deliberately turn a blind eye to these acts.")

Cavanagh v. Taranto, 95 F.Supp.3d 220, 234-39 (D. Mass. 2015) ("Although the right Cavanagh alleges is clearly established, to avoid qualified immunity the bounds and contours of a violation of that right must also be sufficiently clear such that *no* reasonable official could believe that the conduct of these officers at the time constituted deliberate indifference and therefore a violation of Ms. Scopa's constitutional right. . . . Under this standard, the question is whether *any* reasonable

officer in the position of each of the defendants at the time would have reasonably believed that 'his actions, or willful failure to act, amounted to 'deliberate indifference' to the serious risk' that Ms. Scopa would harm herself. . . I consider each of the identified violations—viewing the record in the light most favorable to the plaintiff—in turn. . . . Cavanagh has not adduced any evidence that would permit a reasonable fact-finder to conclude that these defendants had actual knowledge of Ms. Scopa's risk of suicide or were willfully blind to that risk. Under these circumstances, a reasonable official in the shoes of these defendants would not believe that his or her failure to identify Ms. Scopa as presenting a risk of harming herself constituted a violation of her constitutional right. . . .A reasonable officer under the circumstances here would understand that cell checks are for the purpose of ensuring inmate safety, but would be unaware that Ms. Scopa had any suicidal predisposition and would not be looking for specific signs of self-harm. . . .A reasonable officer in Coppinger's position would not necessarily think that his failure to take action in response to the looped shoelace was 'so inadequate as to shock the conscience' or in reckless disregard of Ms. Scopa's safety and therefore would rise to the level of a violation of Ms. Scopa's right. . . Accordingly, at the time of Ms. Scopa's death it was not 'beyond debate' that failing to take action in response to viewing a looped shoelace on the floor of a detainee's cell, absent any other indicators of suicidal tendencies, was so clear a violation of the detainee's Eighth or Fourteenth Amendment right that 'every "reasonable official would have understood"' that this inattention violates that right.")

Cocroft v. Smith, 95 F.Fupp.3d 119, 127-28 (D. Mass. 2015) ("Officer Smith argues that he is entitled to qualified immunity because the right to be free from a retaliatory arrest was not clearly established at the time. It is true that Cocroft asserted that Officer Smith arrested her in retaliation for exercising her First Amendment rights. On this issue, Officer Smith may very well be correct that it is an unsettled question of law whether a retaliatory arrest otherwise supported by probable cause is unlawful. However, the Court need not resolve this question because the jury found for Officer Smith on Cocroft's retaliatory arrest claim. Therefore, the Court will focus on Officer Smith's argument that he is entitled to qualified immunity on Cocroft's claim that her arrest was not supported by probable cause. Officer Smith argues that he is entitled to qualified immunity on this claim because a reasonable officer in his position would have believed that probable cause existed to believe that Cocroft committed the crime with which she was charged—disorderly conduct, or that she had committed the crime of interfering with a police officer in the exercise of his duties. The doctrine of qualified immunity protects a state actor from liability for damages under section 1983 as long as his conduct did not violate clearly established constitutional or federal statutory rights. The official's actions are gauged by a standard of objective reasonableness. To obtain the benefit of qualified immunity, a police officer need not follow an unquestionably constitutional path. The case at hand exemplifies this point; where, as here, a section 1983 action rests on a claim of false arrest, the qualified immunity standard is satisfied 'so long as the presence of probable cause is at least arguable.'. . . In the preceding section, I found that there are no grounds to disturb the jury's finding that Cocroft's arrest was unlawful, *i.e* ., that Officer Smith lacked probable cause to arrest her for committing a crime. I find that the presence of probable cause for the arrest is not arguable. Furthermore, a reasonable officer in Officer Smith's position would have

known that his conduct violated Cocroft's rights. Accordingly, Officer Smith is not entitled to qualified immunity.")

Meagher v. Andover Sch. Comm., 94 F.Supp.3d 21, 42-44 (D. Mass. 2015) ("Although this court finds that McGrath deprived Meagher of her right of free speech, it concludes that the contours of this right were not clearly established at the time of Meagher's termination. Therefore, McGrath is immune from liability under the doctrine of qualified immunity. . . .This court finds that a reasonably competent official in McGrath's position could have believed that she was not violating the First Amendment by terminating Meagher under the circumstances of this case. As an initial matter, there is no dispute that McGrath obtained the advice of counsel before she decided to terminate the plaintiff's employment. . . More importantly, at the time of the termination in 2012, the Supreme Court had not had occasion to clarify 'the scope of a public employee's employment duties and what it means to speak pursuant to those duties' following its decision in *Garcetti.* . . As evidenced by the differing interpretations given by the plaintiff and defendants in this case to the post-*Garcetti* decisions, the parameters of the First Amendment privilege remained murky. . . It was not until 2014, when the Supreme Court decided *Lane,* that the Court explained that 'the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech[,]' and that the 'critical question' for purposes of the First Amendment analysis 'is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.'. . Moreover, both before and after *Lane,* as the First Circuit has emphasized, each case must turn on the specific factual context in which the speech at issue was made. . . Therefore, 'the contours of the [First Amendment] right were still cloudy' and not clearly established at the time of the events in question in this case. . . Even if this court were to assume that no reasonable official could have believed that Meagher was speaking pursuant to her official duties as a teacher, McGrath would still be entitled to qualified immunity because the outcome of the balancing of interests in this case, as required by the Supreme Court in *Pickering,* 'was not so clear as to put all reasonable officials on notice that firing [Meagher] would violate the [Constitution].'. . As the First Circuit has cautioned, '[b]ecause *Pickering*'s constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered clearly established for qualified immunity purposes.'. . Consequently, it is 'only in the extraordinary case' that qualified immunity will not apply. . . This is not such a case. . . . Accordingly, this court finds that McGrath could have reasonably determined that Meagher's actions were disruptive to the operation of the school system, and 'could have reasonably concluded that firing [the plaintiff] would not violate her First Amendment rights.'. . Therefore, McGrath is entitled to qualified immunity.")

O'Connor v. Spain, 84 F.Supp.3d 60, 66-67(D. Mass. 2015) ("[T]his Court finds that a reasonable official in Defendant's position could have believed that suspending Plaintiff for her comments did not violate her constitutional rights. The legal contours of the First Amendment rights of a public employee are, for better or worse, inherently murky. In *Decotiis,* for example, the First Circuit observed that the cases governing whether public employees speak as private citizens 'reveal the muddiness of this area of the law,' and concluded that it was not clearly established

that Plaintiff's criticism of her employer was protected speech. . . Plaintiff does not cite a single case that would have put Defendant on notice that suspending Plaintiff for her election-related comments violated the First Amendment, and this Court is aware of none. The boundary between speaking as a private citizen and a public employee has not been drawn with such certainty that it clearly protects Plaintiff's right to endorse municipal election candidates while at work. This conclusion gains further support in the context of this specific case. Defendant was told by multiple individuals that Plaintiff had expressed her support for certain candidates by making an announcement in the dining room at the Senior Center during work hours. . . At least one senior told Defendant that she felt Plaintiff was telling the seniors how to vote. . . In an effort to be thorough and deliberate in his response, Defendant appointed the Chief of Police to investigate the complaints. The investigator concluded that Plaintiff did in fact make statements in support of certain candidates while on the job, and that the majority of those present believed Plaintiff was trying to influence their votes. . . A reasonable town manager could conclude from the available information that Plaintiff's speech was not protected because she was not speaking as a private citizen, and because the town has a significant interest in preventing its employees from using their official positions to endorse candidates in municipal elections. Indeed, this result is all but compelled by the totality-of-the-circumstances and interest-balancing nature of the First Amendment test for public employees. . . . Because a reasonable town manager could conclude that suspending Plaintiff would not violate her free speech rights, Defendant is entitled to qualified immunity. Therefore, no material fact dispute exists that would preclude summary judgment on Plaintiff's § 1983 claim against Defendant in his individual capacity.")

Williams v. City of Brockton, 59 F.Supp.3d 228, 243-44 (D. Mass. 2014) ("At the time of the alleged violations, it was 'clearly established in this circuit and the Supreme Court' that 'retaliatory action in employment, involving a public employee's speech on a question of public concern' constituted a violation of the First Amendment. . . Therefore, the individual Police Defendants have not established that they are immune from liability on Williams' surviving claims against them under the doctrine of qualified immunity.")

Baggett v. Ashe, CA 11-30223-MAP, 2014 WL 4252442, *12, *13 (D. Mass. Aug. 26, 2014) ("At the time of this constitutional violation, clearly established law prohibited a male officer from viewing a female inmate during a strip search. *Cookish*, 945 F.2d at 447. It was also plainly unconstitutional to require a female inmate to expose herself, particularly to the extreme degree required during a strip search, in the presence of a male officer. *Cofield,* 391 F.3d at 337. Given these cases, any reasonable official would have recognized the unreasonableness of requiring a female inmate to strip in the presence of a male officer holding a video camera and pointing it at her. The unconstitutionality of such a policy was, quite simply, 'a foregone conclusion.' *Bonitz,* 804 F.2d at 173 n. 10. Given the clarity of the law at the time the policy was put in place, a reasonable official would have been properly on notice that the policy would inevitably result in an unconstitutional search. Moreover, even if the state of the law were ambiguous—which it was not—this policy was so clearly 'antithetical to human dignity' that qualified immunity would still be inappropriate. *Hope v. Pelzer,* 536 U.S. 730, 741 (2002). Any reasonable official viewing the

policy would have concluded that it had the potential to humiliate and demean the female inmates. However sincere Defendants' attempts to comply with the law may have been, it was unreasonable for them to neglect the obvious ramifications of their policy. Ultimately, a reasonable individual in Defendants' position could *not* have concluded that permitting male officers to videotape female inmates during strip searches—even if the officers looked away—was constitutional. Therefore, Defendants are not entitled to the protections of qualified immunity, and Plaintiff is entitled to judgment as a matter of law.")

Jones v. Han, 993 F.Supp.2d 57, 65-67 (D. Mass. 2014) ("State drug analysts are as much an arm of the government as are police officers, and can also inflict constitutional injury if they fail to disclose material exculpatory or impeachment information to the prosecution. Therefore, it seems clear that defendants can be found liable for failing to provide exculpatory or impeachment information to the prosecutor for disclosure to the defendant. The alleged exculpatory or impeachment evidence in this case concerns the reliability of the testing performed by Dookhan. Dookhan testified at plaintiff's trial. Plaintiff alleges that Dookhan's supervisors, including defendants, knew that she often tested up to five times more samples per month than other chemists; that they were aware of complaints about Dookhan from Peter Piro and Michael Lawler; and that they ignored the fact that Dookhan circulated several different versions of her resume within the office. None of that information was disclosed to plaintiff during his criminal prosecution. Assuming the facts alleged in the complaint are true, defendants knew about material impeachment evidence concerning Dookhan and failed to disclose it to the prosecutor in plaintiff's case. The complaint therefore states a claim under § 1983. . . Defendants nonetheless contend that the complaint should be dismissed because they are entitled to qualified immunity . . . .The complaint here alleges that defendants knew that Dookhan performed five times as many tests as other chemists, that they had received complaints that she forged quality-control tests, and that they ignored the fact that she circulated different copies of her resume. An objectively reasonable crime-laboratory supervisor would have understood that such information should be reported to prosecutors, because fabricated or unreliable drug-analysis results would affect the outcomes and, indeed, the basic fairness, of the affected criminal cases. At the very least, an objectively reasonable laboratory supervisor would have done something to investigate the alleged irregularities to see if there was a problem to disclose. As alleged by plaintiff, the 2010 audit of Dookhan's work was insufficient to address those issues because, among other things, it did not include re-testing of samples. As noted, no case law directly on point has imposed civil liability on state laboratory officials for *Brady* violations. However, '[i]t follows logically that, in some situations, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question."'. . It was well-established that a police officer could be held liable for not disclosing exculpatory information. It would have been obvious that the same principle would extend to state drug-laboratory chemists and supervisors. Accordingly, defendants were on reasonable notice that the information they knew about Dookhan should have been disclosed. . . Defendants are therefore not entitled to qualified immunity at this stage of the proceedings. In the context of a motion to dismiss, the Court must accept the plausible factual allegations in the complaint as true. . . The complaint alleges that defendants knew about serious

concerns over the accuracy of Dookhan's chemical testing and did not disclose that information to prosecutors in his case. That is sufficient to defeat a claim of qualified immunity at the pleadings stage.")

Jones v. Han, 993 F.Supp.2d 57, 69 (D. Mass. 2014) ("Defendants contend they are entitled to qualified immunity as to plaintiff's claims for supervisory liability under § 1983. 'When a supervisor seeks qualified immunity in a § 1983 action, the "clearly established" prong of the qualified immunity inquiry is satisfied when (1) the subordinate's actions violated a clearly established constitutional right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context.'. .Again, although there is no direct authority for holding state crime laboratory supervisors liable for their deliberate indifference to constitutional violations by their subordinates, the constitutional rights and supervisory liability doctrine that underlie plaintiff's claims are clearly established. . . The qualified immunity analysis here therefore turns on whether, in the particular circumstances confronted by defendants, they should have reasonably understood that their conduct jeopardized the constitutional rights of criminal defendants subject to the laboratory testing procedures. . .Reasonable officials in defendants' position, as alleged in the complaint, would have known their conduct could violate a criminal defendant's rights to due process and a fair trial. Assuming the allegations in the complaint are true, defendants were 'put on notice of behavior which was likely to result in the violation of the constitutional rights of citizens.'. . Whether plaintiff can prove those claims is a question for another day.")

Solomon v. Dookhan, No. 13–10208–GAO, 2014 WL 317202, *10, *11 (D. Mass. Jan. 27, 2014) (O'Toole, J. (adopting Magistrate Judge Sorokin's R & R) ("In *Hernandez–Cuevas,* the First Circuit explicitly joined with those circuits employing the constitutional approach, and held that a plaintiff may bring a malicious prosecution claim under § 1983 if he or she can establish that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in the plaintiff's favor. . . Although it did so in 2013, the Court nevertheless noted that

'[t]his holding makes explicit what has long been implicit in our case law. In the past we have held that 'some truths are self-evident.... [I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.'

Id. at 100 (quoting *Limone v. Condon,* 372 F.3d 39, 44–45 (1st Cir.2004)).
Although qualified immunity presents a legal issue, courts analyzing the issue must be careful 'not to permit a defendant to hijack the plaintiffs complaint and recharacterize its allegations so as to minimize his or her liability.'. . A fair reading of the Amended Complaint is that Solomon alleges that Keenan joined with Dookhan and others in a scheme to falsify evidence, destroy and withhold exculpatory evidence, obstruct justice and offer false testimony. At no point could a reasonable

police officer have believed that such conduct would be permissible. Qualified immunity does not bar any of the claims asserted against Keenan.")

Abrami v. Town of Amherst, No. 09–30176–DPWJ, 2013 WL 3777070, *8, *9 (D. Mass. July 16, 2013) ("The contours of an officer's authority and a suspect's rights in the context of a doorway seizure are not well defined. Some courts, for example, have found that a suspect opening the door to the police does not relinquish his right of privacy in the home unless he acquiesces in detention, while others have found that acquiescence is not required. . . Some courts have also indicated that a suspect's rights may differ when the door is opened to law enforcement, as opposed to a lay invitee. . . But the various approaches to doorway seizures only serve to reinforce that Abrami's rights, when he voluntarily presented himself to Humber through the doorway, were not clearly established. Indeed, the substantial uncertainty surrounding doorway seizures has formed the basis for qualified immunity in the past. . .I conclude that, on the facts most favorable to Abrami, Humber mistook the extent to which Abrami had relinquished his expectations of privacy in the home (and effectively consented to entry) merely by voluntarily coming to the door and placing himself in public view. . .But Humber's mistake was reasonable, given the considerable uncertainty surrounding the rights of suspects engaged in doorway interactions with law enforcement—with respect to their Fourth Amendment protection against both an arrest or investigatory seizure and any accompanying entry into the home. Moreover, Humber accompanied his reasonable mistake about the extent to which Abrami had forfeited his expectations of privacy with the proportionally modest entry of requiring that the door to the apartment remain open while he conducted an investigatory doorway seizure. Humber is thus entitled to qualified immunity. On this basis, summary judgment must enter on the aspects of Count I alleging unlawful entry, as well as those alleging that Abrami's arrest was unlawful as a result of any such entry.")

Walker v. Jackson, 952 F.Supp.2d 343, (D. Mass. 2013) ("The Walkers seek to hold the defendants liable for failing to intervene to prevent Officer Jackson's allegedly unreasonable search. But the court has not found any cases holding officers liable in analogous circumstances. Indeed, the cases within the First Circuit deal almost exclusively with the failure to intervene in the use of excessive force. . . Nevertheless, this court cannot definitively conclude that a claim alleging a failure to intervene in an unreasonable search fails to state a constitutional violation. Other circuits addressing failure to intervene claims have described liability in more general terms. According to the Second Circuit, 'An officer who fails to intercede is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used; (2) that a citizen has been unjustifiably arrested; or (3) that *any constitutional violation* has been committed by a law enforcement official.'. . But even when courts define liability more broadly, the facts of the cases tend to involve acts of excessive force or unlawful arrest. . . It is therefore unclear whether liability may be imposed for failing to intervene in an unreasonable search. It is plain, however, that the contours of the constitutional right were not sufficiently clear to give the defendants notice that their conduct in this case was unconstitutional. The court has not found any support for the proposition that allowing a fellow officer to enter a residence and participating in the subsequent search constitutes a claim for failure

to intervene. Accordingly, the court agrees that the defendants have qualified immunity as to Count II.")

Holder v. Town of Newton, No. 09-cv-341-JD, 2010 WL 5185137, at *6, *7 (D.N.H. Dec. 15, 2010) ("Courts that have considered the issue have determined in similar circumstances that a right of individuals to possess and bear firearms for private civilian purposes, as opposed to military purposes, was not clearly established before 2008, when the Supreme Court decided *District of Columbia v. Heller,* 128 S.Ct. 2783, 2799 (2008)). *See, e.g., Emerson v. City of New York,* 2010 WL 2910661, at *7 (S.D.N.Y. July 19, 2010); *Cardenas v. City of Chicago*, 2010 WL 2609866, at *7, n. 8 (N.D. Ill. June 25, 2010) (citing cases). . . . Therefore, to the extent Holder could show that Streeter and Jewett violated his Second Amendment rights, which has not been established in this case, they are protected by qualified immunity.")

Vendouri v. Gaylord, No. 10-cv-277-SM, 2010 WL 4261233, at *5 (D.N.H. Oct. 26, 2010) ("In this case, the right at issue is not the general parental right to direct the upbringing and education of her child. Defined at the appropriate level of specificity, the right at issue here is the claimed right of a noncustodial parent to be notified by her child's school whenever the child is dismissed from school to the parent who has been awarded legal and physical custody by a court of competent jurisdiction (or that parent's appropriate representative). None of the relevant Supreme Court opinions, nor controlling decision by the United States Court of Appeals for the First Circuit, establishes such a right. *James,* the opinion on which Vendouri relies, was decided after the conduct Vendouri complains of and identifies a significantly narrower parental right than the one Vendouri claims the school defendants violated in this case. . . Moreover, *James* holds that at the time of the conduct underlying that case, the right of a noncustodial parent to be notified of an actual legal transfer of custody was not clearly established. If the narrow right at issue in *James* was not clearly established when the school defendants engaged in the conduct Vendouri challenges, then the broader right on which Vendouri bases her claim was not clearly established either.")

Oxley v. Penobscot County, No. 09-cv-21-B-W, 2010 WL 582222, at *12 (D. Me. Feb. 12, 2010) ("My reading of the cases is to the effect that arrestees subject to a temporary seizure at a jail who will not be joining the prison population are entitled to the same Fourth Amendment protection against unreasonable searches and seizures as any other arrestee, and that officers cannot manipulate the standard simply by processing or booking an arrestee at a facility that houses others for penological purposes. I arrive at this conclusion by reading existing caselaw, beginning with *Bell v. Wolfish.*. . . I am persuaded that a reasonable officer in Ms. Kelleher's position could reasonably have believed that a strip search in a private setting by officers of the same sex as Ms. Oxley would not violate the constitution because contraband was discovered on the person of Ms. Oxley's traveling companion at the jail and because Ms. Oxley was being processed in the county jail pending release on bail. . . . A reasonable officer in her position could have believed that the jail environment and presence of contraband on Ms. Hughes was minimally sufficient to justify the search in question.").

Toro v. Murphy, No. 07-11721-PBS, 2009 WL 5064575, at *6, *7 (D. Mass. Dec. 17, 2009) ("The crucial question in this case is whether the unlawfulness of Murphy's conduct would have been apparent to a reasonable officer in the same position. This demands an analysis of the laws concerning materiality that existed at the time of Murphy's alleged withholding. At that time, evidence was material if it [sic] 'the omitted evidence create[d] a reasonable doubt that did not otherwise exist.' *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). . . . At the time of the Plaintiff's criminal trial, the *Agurs* standard required timely disclosure of exculpatory evidence if, 'on consideration of the entire record, the evidence is capable of creating a reasonable doubt that would not otherwise exist.'. . In addition, this duty was extended to the police officers who investigated the case. *Commonwealth v. Redding*, 382 Mass. 154, 157, 414 N.E.2d 347, 348 (1980) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of nondisclosure.") (internal citations omitted). . . . The *Agurs* standard was sufficiently specific to 'clearly establish' the right to exculpatory evidence regarding alternative suspects. The big question is whether a reasonable officer in Murphy's position in 1981 would have believed that the evidence of an alternative suspect should have been turned over. Murphy himself has admitted, through deposition testimony, that if he had the report, it should have been turned over as both exculpatory and material. . . . In these circumstances, Murphy is not protected by qualified immunity.")**.**

Bowler v. Town of Hudson, 514 F.Supp.2d 168, 183 (D. Mass. 2007) ("Plaintiffs argue that the First Amendment right of the high school students to engage in non-disruptive speech was clearly established, and that the individual defendants should have known that censorship of HSCCA posters was unconstitutional under *Tinker* and *Fraser*. The First Amendment jurisprudence governing a school's regulation of student access to violent speech on the internet with the benign intent to protect students from images which may be upsetting and psychologically damaging is not settled, as is indicated by the fractured decisions in *Pico* regarding the role of the subjective intent for the censorship and the uncertain status of the 'right to be left alone' under *Harper*. Given the Court's own difficulty in determining whether a First Amendment violation occurred in this case, the Court cannot find that the First Amendment rights in this case were 'clearly established' in order to defeat the individual defendants' claim of qualified immunity .The Court also finds no evidence that a similarly situated official would have acted differently. The plaintiffs do not dispute that the videos linked by the HCSSA website were upsetting, . . .and plaintiffs do not otherwise challenge the blocking of access to the URL on HHS computers by Technology Director Ms. Schuck. It is understandable that, after limiting access to the URL on HHS computers, a reasonable school administrator would proceed to remove the URL from the Club's posters. Qualified immunity contemplates such errors and mistakes. . . Finally, and curiously, plaintiffs have not argued against qualified immunity for the individual school administrators on the ground that they were impermissibly motivated to punish the Club's speech because of its content. . . . As a result, the Court similarly considers abandoned any claim that the individual defendants are not entitled to qualified immunity because of their impermissible motivation. The Court thus ALLOWS summary judgment as to the qualified immunity of the individual defendants.").

Mongeau v. City of Marlborough, 462 F.Supp.2d 144, 153 (D. Mass. 2006) ("In the immediate case, Mongeau may have a viable claim that his constitutional rights were violated. As discussed, the First Circuit has left the door slightly ajar in substantive due process claims in land-use actions involving allegations of corruption or bribery. Given that the First Circuit has explicitly refused to decide whether such an allegation *can* make out a section 1983 claim, such a right is not 'clearly established.' Consequently, as counterintuitive as it may seem, Reid is entitled to qualified immunity *even if* he required mitigation payments in order to grant a permit. This is the logical conclusion that must follow from *Harlow* and the First Circuit opinions discussing section 1983 in the context of land-use disputes. This qualified immunity follows in the wake of the First Circuit's express reluctance to recognize *any* type of section 1983 claim in this particular context.").

Charles v. City of Boston, 365 F.Supp.2d 82, 89 (D. Mass. 2005) ("Bogdan's related qualified immunity argument must also fail because it turns on the absence of a clearly established duty for him to disclose directly to a defendant, which is not the constitutional breach that Charles is alleging. Bogdan's duty to disclose *Brady* information to the prosecutor was clearly established at the time of his investigation into the 1980 rapes (not to mention his duty–unquestionably well-established–to testify truthfully on the stand). Thus, if the qualified immunity question is 'whether a reasonable official could have believed his actions were lawful in light of clearly established law and the information the official possessed at the time of the allegedly unlawful conduct,' . . . the answer is an unequivocal 'no.' Bogdan, an experienced crime lab technician, must have known of his legal obligation to disclose exculpatory evidence to the prosecutors, their obligation to pass it along to the defense, and his obligation not to cover up a *Brady* violation by perjuring himself. That there is no statutory or common law rule explicitly proscribing such conduct–no case that says 'a crime lab technician whose tests go a long way to exculpating the defendant must disclose that to the prosecutor and cannot lie about them on the stand'–does not mean that Bogdan's behavior is immunized. Some acts are unlawful on their face.").

King's Grant Inn v. Town of Gilford, No. Civ.03-249-SM, 2005 WL 361547, at *4, *5 (D.N.H. Feb. 16, 2005) (not reported)("The general principle stated in *Shuttlesworth*, however, is too abstract for useful application in considering qualified immunity. *See Riverdale Mills*, 392 F.3d at 66 ("The district court below erred by posing the second prong as whether 'the law regarding the necessity for a search warrant is clear."). Rather, the proper question here *is* whether a local government official, in April, May, and June of 2003, should have understood, based on established law, that it was unlawful to deny a request for an exotic dancing permit based upon the applicant's having a 'significant history' of violating alcoholic beverage control laws. . . . When the constitutional right at issue here is properly cast, it becomes apparent that the right was not clearly established. The selectmen made their permit decisions pursuant to an ordinance that had not, to that point, been challenged on constitutional grounds. And, the ordinance was adopted pursuant to the implicit mandate of a state statute, requiring that holders of liquor licenses may 'provide entertainment and dancing ... provided they have received written authorization by the

town or city.'. . At the time the individual defendants denied plaintiff's permit applications, no decisional law was in place describing the permissible bases on which written authorization for entertainment and dancing in establishments licensed to serve liquor might, constitutionally, be either granted or withheld. Moreover, neither the Court of Appeals for the First Circuit nor the United States Supreme Court has resolved a case sufficiently similar to this one to provide clear notice that defendants' denial of plaintiff's permit applications amounted to a denial of First Amendment rights. The general principle established in *Shuttlesworth* was applied, by the Eleventh Circuit, in a somewhat similar factual setting, as described earlier. But, it is not at all clear that the opinion in *Fly Fish*, constitutes 'a consensus of persuasive authority elsewhere[.]'. . . It cannot be said, then, that the constitutional right at issue here, properly framed, was clearly established in federal decisional law. Finally, the third permit denial (on June 2, 2003) took place after the New Hampshire Superior Court had held that the Inn was not likely to succeed on the merits of its First Amendment claim. At the very least, then, on that occasion, defendants' reliance on the decision of the New Hampshire Superior Court, particularly given the absence of specific federal precedent, was not unreasonable, and did not result in forfeiture of their qualified immunity. Because the contours of the legal right defendants violated were not clearly established at the time they acted, the individual defendants are entitled to qualified immunity from personal liability, and they are entitled to partial summary judgment on that point.").

McIntyre v. United States, No. CIV.A.01-CV-10408-RC, 2004 WL 2230406, at *17, **23-25 (D. Mass. Sept. 30, 2004) ("[W]hen plaintiffs allege that, in disclosing the informant status of McIntyre to Bulger and Flemmi, Connolly acted affirmatively to put the life of McIntyre in jeopardy, they have sufficiently alleged a violation by Connolly of McIntyre's substantive due process right to be protected from the danger of the government's own creation. But the plaintiffs argue in vain when they assert that the 'state-created danger' theory, or the 'constitutional duty not to affirmatively abuse governmental power so as to create danger to individuals and render them more vulnerable to harm,'. . . was clearly established at the time Bulger and Flemmi are alleged to have murdered McIntyre. *Soto v. Flores* forecloses this argument . . . The defense of qualified immunity applies unless the law is clearly established either by materially similar precedent or by general legal principles that apply with obvious clarity to the facts of the case. . . Under the facts as alleged by the plaintiffs, it cannot be doubted that Connolly violated the substantive due process rights of McIntyre. In fact, because Connolly allegedly participated in and/or aided and abetted the murder of McIntyre, the right in question might be characterized as the right not to be murdered by the government. As so characterized, the right is clearly established by the words of the Fifth Amendment itself. . . But, even if the right is characterized as a right not to be murdered by a private actor where a government actor aided, abetted, collaborated or conspired with the private actor to accomplish the murder, the right was clearly established before McIntyre was murdered. The fact that there is no case proclaiming the existence of the right under factual circumstances like those presented by the case before me does not preclude a determination that the right was clearly established. The Supreme Court has rejected the notion that the determination of whether a constitutional right is clearly established requires that a court find that the facts before it are fundamentally similar to a previous case declaring the right. . . . Based on

these principles, I hold that in 1984, the substantive due process right to not be murdered by a private actor where a government actor aided, abetted, collaborated or conspired with the private actor to accomplish the murder was clearly established. Although in 1984 the courts had not addressed factual circumstances 'fundamentally similar' to those alleged by the plaintiffs in this case, 'in the light of pre-existing law, the unlawfulness' of Connolly's conduct was 'apparent.' . . The text of the Fifth Amendment provided the general prohibition against the government's depriving citizens of life. It was also clearly established in 1984 that constitutional violations can be effectuated by private actors acting in concert with government actors. . . . Although none of the parties have addressed the issue, I also hold that, based on the plaintiff's allegations, it was reasonable for Connolly to have been aware that his conduct violated McIntyre's clearly established right to be free from government-involved murder. There are no allegations supporting a conclusion that Connolly made a reasonable mistake as to what the law required, . . . that he was reasonably ignorant of crucial facts, . . .or that any other circumstance existed that would have made it unreasonable for Connolly to appreciate that his conduct was unconstitutional.")

Hudson v. Maloney, 326 F.Supp.2d 206, 210-12 (D. Mass. 2004) ("That the plaintiffs clearly identified viable and pertinent constitutional rights in their Complaint under the First and Fourteenth Amendments is not seriously contested by defendants. . . . Consequently, it is to the second step of the *Saucier* test that the court turns: would a reasonable prison administrator when confronted, in September of 2002, at the latest, with plaintiffs' demands for Halal meals prepared by Muslim inmates, have determined that a clearly established right was being invoked. Here, it is important not to confuse the general with the particular and to frame the issue precisely. In September of 2002, a reasonable prison official would have known that a prisoner's right to the free exercise of his religion, so long as it did not compromise institutional security, was clearly established, and further that this right encompassed a diet consistent with the prisoner's sincere religious beliefs. . . Rather, the precise question that would have been asked is whether the law had clearly established a Muslim inmate's right to a particular dietary ingredient (Halal meal), prepared in a particular way (by other Muslim inmates), or whether it was sufficient for prison authorities to provide an alternative diet (vegetarian or pork-free) that was 'consistent' with the teachings of the inmate's faith, if not every aspect of his belief. In consulting the decisions of courts that had considered the issue before September of 2002, [footnote omitted] a reasonable prison official would have learned that the vast majority of these courts had determined that a prison permissibly discharged its constitutional duty to respect the dietary beliefs of Muslim inmates by offering an alternative, pork-free diet, and more broadly, that the law permitted prison authorities to limit the dietary options available to prisoners in the interests of reducing the costs and burdens entailed in accommodating the smorgasbord of food-related religious beliefs likely to be encountered in a prison population. . . . In light of this legal precedent, no reasonable prison official would have concluded that Muslim inmates had an established right to Halal meals prepared by other Muslim inmates or that prison administrators did not have broad discretion in the matter of prison dietary alternatives.").

Quiles v. Kilson, 337 F.Supp.2d 224, 231(D. Mass. 2004) ("In the instant case, the defendants are entitled to qualified immunity with respect to the strip searches conducted. It is possible that the plaintiffs' allegations about the City's practice of strip searching, if true, would establish a constitutional violation. The law at the time of this alleged violation, however, was not clear because the First Circuit had not yet decided *Swain*. The law does not require state actors to 'carry a crystal ball' as to what the future trajectory of the law will be. . . The defendants cannot be expected to have known that the searches, made pursuant to a valid warrant and a City policy with respect to strip searching, violated the law. The individual defendants are, therefore, entitled to qualified immunity with respect to the inside plaintiffs.[footnote omitted] With respect to the outside plaintiffs, the question of qualified immunity is more problematic. The searches themselves were questionable because if the defendants were not in the Apartment, they were almost certainly illegal. The 'all persons' warrant applied only to the persons in the Apartment. There is nothing in the affidavit or elsewhere to suggest that children were involved in selling drugs at 7 Congress Street. If they were not in the Apartment, there was no probable cause to search the outside plaintiffs. Unlike the law with respect to strip searching, which was unclear at the time of the incident, the law relating to probable cause was clear. An objectively reasonable officer should have known that it violated the Fourth Amendment rights of the outside plaintiffs to search them if they were not originally inside the Apartment. The individual defendants are not, therefore, entitled to a qualified immunity defense with respect to the outside plaintiffs.").

Suboh v. Borgioli, 298 F.Supp.2d 192, 205, 206 (D. Mass. 2004) ("In its opinion on this case, the First Circuit ruled that it was clearly established as of 1998 that 'a state official could not effectively resolve a disputed custody issue between a parent and another without following any due process procedures at all[.]' . . . It then indicated that the relevant question, in determining whether Borgioli was entitled to qualified immunity, was whether 'a reasonable officer could have concluded on the facts before him that the Kandys had undisputed custody of the child, despite Suboh's claims, and so no process of any sort was due before the child could be released to the Kandys.'. . By framing the issue in such a way, the First Circuit necessarily reduced the scope of facts determinative to the qualified immunity analysis. Were there, for example, a genuine dispute as to whether Suboh told Borgioli that she was Sofia's biological mother or that she wanted custody of her daughter, the jury would indeed be needed to resolve these crucial questions. To the extent that the determinative facts were unclear or disputed prior to the trial, however, that dispute was resolved by Borgioli's own trial testimony. As noted above, on the stand Borgioli testified that Suboh told him that she was Sofia's biological mother, that she had not signed any papers giving custody of Sofia to her parents, and that she wanted to regain custody of her daughter. Regardless of the apparent credibility or lack thereof of Suboh's statements, [footnote omitted] the Court fails to see how any reasonable officer could not have, at a minimum, concluded that there were indeed competing claims to Sofia's custody such that he simply could not decide the dispute himself. Borgioli argues that 'there was certainly a hotly contested factual dispute as to what [he] knew at various points in his investigation,'. . . but it is undisputed that the crucial piece of information–that Suboh was claiming to be Sofia's biological mother and was asserting a right to custody of her daughter–was known to Borgioli when he decided to place Sofia in the custody of

the Kandys. Accordingly, at this point, there are simply no remaining factual disputes that a jury needs to resolve for the Court to be able to rule on qualified immunity, given Borgioli's own testimony. In such a circumstance, it is appropriate for the Court to rule on qualified immunity straightaway, . . and that is what the Court has done here. Given the Court's determinations that (1) the undisputed facts of this case establish that Suboh's procedural due process rights were violated by her failure to receive any hearing attendant to the loss of custody of her daughter; and (2) the undisputed facts demonstrate that Borgioli is not entitled to qualified immunity, the scope of the new trial is necessarily limited. All that remains for the new trial is the important question of what– if any–damages were proximately caused by Borgioli's violation of Suboh's procedural due process rights.").

Pliakos v. City of Manchester, No. 01-461-M., 2003 WL 21687543, at *13, *14 (D.N.H. July 15, 2003) (unpublished) ("A difficult question is presented in this case regarding the level of specificity with which it is appropriate to define the constitutional right plaintiff claims was violated. All can agree that the right not to be subjected to 'unreasonable' or 'excessive' force during the course of an arrest was, when Pliakos was taken into custody, clearly established. . . . If the constitutional right plaintiff claims was infringed must necessarily be defined more precisely, it is far less clear that such a right was 'clearly established' at the time of Pliakos's arrest. . . . Except for Pliakos's predisposition to positional asphyxia (due to, among other things, obesity, acute cocaine intoxication, cardiac hypertrophy, and his violent struggle), he likely would have suffered no lasting adverse effects from his brief detention on his stomach. Reduced to its essence, then, the question presented is whether Pliakos had a clearly established right not to be restrained in the manner (and for the duration) that he was, in light of the risk factors he presented with regard to positional asphyxia (some of which were obvious and others of which were unknown to the officers). . . . The case precedent discussed above does not establish a constitutional right not to be handcuffed in a prone position if one presents some of the risk factors for positional asphyxia. In fact, many of the courts that have confronted this relatively rare situation have specifically concluded, under circumstances very much like those presented in this case, that there is no such constitutional right at all, much less a 'clearly established' right. *See, e.g., Phillips, supra; Cottrell, supra.* Necessarily, then, an objectively reasonable police officer, presented with the violent circumstances that confronted the defendants on October 13, 1999, would not have realized that restraining Pliakos in the manner (and for the period of time) that defendants did would amount to a violation of his clearly established Fourth Amendment right to be free from unreasonable seizure or the use of excessive force.").

Demers v. Leominster School Department, 263 F. Supp.2d 195, 208 (D. Mass. 2003) ("Because I determined that Michael's constitutional rights were not infringed by the actions of the School Officials, no reasonable government official in the Defendants' shoes would have believed that he or she was violating Michael's rights by suspending him because of the drawing and note. Michael had a record of emotional disturbances and school behavioral problems, some which involved violence or aggression toward others. It was not clearly established at the time that Michael was suspended that disciplining a student, who made a violent and threatening

drawing, violated that student's constitutional rights. Finally, there is limited case law on the issue of school violence in this Circuit, which lends further credence to conclude that this area of the law is unsettled. . . Therefore, the individual Defendants are entitled to qualified immunity.").

Aceto v. Kachajian, 240 F. Supp.2d 121, 126, 127 (D. Mass. 2003) ("In sum, the Court holds that on May 23, 2000, it was clearly established under published caselaw that when a non-threatening, non-flight-risk, cooperating arrestee for a minor crime tells the police she suffers from an injury that would be exacerbated by handcuffing her arms behind her back, the arrestee has a right to be handcuffed with her arms in front of her even if the injury is not visible. If the Court assumes Aceto's account of the facts to be true, any reasonable officers confronting Aceto's situation would have known that handcuffing her arms behind her back was unlawful excessive force.").

Soto v. Bzdel, 214 F. Supp.2d 69, 75-77 (D. Mass. 2002) ("In the court's opinion, a plaintiff may state a constitutional claim if, while a police officer is making an arrest pursuant to a warrant, the officer fails to release the plaintiff after the officer receives information upon which to reasonably conclude that the warrant had been recalled. Thus, viewing the facts here in a light most favorable to Plaintiff–particularly the fact that Plaintiff made Defendants aware of the Notice of Recall, but that Defendants chose not to look at that notice–the court finds, for present purposes, that Plaintiff has sufficiently alleged that he was unreasonably 'seized' in violation of the Fourth Amendment. . . . With regard to the second and, in effect, the third questions, Plaintiff asserts that the law was 'clearly established' at the time of the incident that Fourth Amendment seizures must be conducted in a reasonable manner. That may be true as a general proposition. . . However, as the First Circuit has explained, 'the inquiry whether the right at issue [is] clearly established properly focuses not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged.' *Singer v. State of Me.,* 49 F.3d 837, 845 (1st Cir.1995) (citations and internal quotation marks omitted). . .[T]he court must answer the second question in the qualified immunity analysis in the negative. Plaintiff has 'not brought to [the court's] attention any cases of controlling authority in [this] jurisdiction at the time of the incident which clearly established the rule on which [he] seek[s] to rely,' nor has he 'identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' . . It need hardly be said, therefore, with regard to the third question that no objectively reasonable officer in October of 1999 would have believed that disregarding Plaintiff's Notice of Recall and arresting him based on information from the WMS [Warrant Management System], as did Defendants, was [un]lawful in light of clearly established law. . . . [E]ven though Defendants may well have been cavalier in dealing with Plaintiff, and thus might lose were the court to consider the merits, they cannot reasonably be charged with knowing that they were violating a clearly established right. This ought not hold true in the future. Presently, however, Defendants fall under the umbrella of qualified immunity and the court will grant them summary judgment on Counts I and IV." [footnotes omitted]).

Moreta-Ramirez v. Lemert, 156 F. Supp.2d 138, 142 (D.P.R. 2001) (Clearly, the duty to disclose established by *Brady,* is imposed on the prosecution. *Brady* does not express a view as to the duty of police officers to disclose exculpatory evidence. . . In fact, the existence of a constitutionally-derived liability on the part of police officers for failure to disclose and the contours of such liability are not clearly established.").

Reid v. Simmons, 163 F. Supp.2d 81, 96, 97 (D.N.H. 2001) ("In summary, because it was not clearly established in 1987 that a police officer's failure to disclose potentially, though not obviously, exculpatory impeachment material (particularly that which was generated in unrelated investigations) would constitute a discrete and actionable violation of the defendant's constitutional right to due process (independent of the *Brady* violation which is, of course, caused by the *prosecutor's* failure to turn over such information), Simmons is entitled to qualified immunity. He is also entitled to the protections afforded by qualified immunity because an objectively reasonable police officer in his situation in 1987, looking forward before Reid's criminal trial, would not have appreciate[d] the potentially material *and* exculpatory nature of the investigative reports in question. So, even if Simmons did fail to disclose the reports, he cannot be charged with having understood that such a failure would violate federal law by depriving Reid of his right to due process and a fair trial.").

Greenleaf v. Cote, No. CIV. 98-250-B, 2000 WL 863217, at *3 & n.3 (D. Me. March 3, 2000) ("greeing with courts in *Konop* and *Sostarecz* that students had clearly established right to be free from unreasonable search of belongings by school officials; disagreeing with *Jenkins v. Talladega City Bd. of Ed.*, 115 F.3d 821 (11th Cir. 1997)).

Grendell v. Gillway, 974 F. Supp. 46, 52 (D. Me. 1997) ("[A]lthough the Court is mindful that the First Circuit has never held verbal threats or harassment to constitute conscience-shocking behavior, the Court is equally mindful that abhorrent conduct is still abhorrent even though it has not been subject to judicial determination. For these reasons, the Court finds that, lack of direct precedent notwithstanding, Gillway's alleged conduct is shocking to the conscience and violative of Grendell's substantive due process rights. Since the Court finds that Grendell has alleged that Gillway violated a constitutional right, it is now appropriate to turn to the issue of qualified immunity and, consequently, the question of whether this right was clearly established at the time Gillway acted. . . .The Court is persuaded that Grendell's right to be free from behavior that is shocking to the conscience was clearly established at the time of Gillway's alleged conduct and therefore holds that Gillway is not entitled to qualified immunity. . . . Simply because there is no clearly defined case law condemning certain conduct does not mean police officers should be free to engage in such conduct, no matter how offensive or destructive to a fair and just society that conduct may be, and then hide behind the shield of qualified immunity. The Court is convinced, therefore, that even in the absence of precedent, conduct that shocks the conscience is so patently egregious that the constitutional right it violates is necessarily clearly established and that a reasonable officer should know that his conduct violates that right.").

Ferreira v. Dubois, 963 F. Supp. 1244, 1258 (D. Mass. 1996) ("[I]t was not clearly established that procedural due process afforded an inmate/defendant the right to have interpreter services for a non-English speaking inmate/witness at a prison disciplinary hearing. Nor was it clearly established that an inmate/defendant had a right to require the hearing officer to query the inmate/ witness as to his ability to speak and/or comprehend English. ").

SECOND CIRCUIT

Shannon v. Venettozzi, No. 17-2092, 2018 WL 4224321, at *2 (2d Cir. Sept. 6, 2018) (not reported) ("Shannon first argues that Officer McTurner's alleged conduct in 2011 was objectively unreasonable and therefore violated his Eighth Amendment rights. We agree that it was objectively unreasonable for a correctional officer to behave as alleged in light of our current standards of decency. As we recognized in *Crawford,* in 2015, the Eighth Amendment is violated by even a single instance of '[a] corrections officer's intentional contact with an inmate's genitalia or other intimate area' when such contact 'serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or humiliate the inmate.'. . But Shannon's legal claim arises from events predating *Crawford* by four years. Although the conduct alleged in the amended complaint is reprehensible both then and now, when it occurred in 2011, our precedent did not establish that such conduct was clearly unconstitutional. Rather, in *Boddie*, we had held that a 'small number of incidents in which [the plaintiff] allegedly was verbally harassed, touched, and pressed against without his consent' was *not* sufficient to state a claim. . . And, prior to our decision in *Crawford,* district courts had routinely interpreted *Boddie* to mandate the dismissal of similar claims at the pleading stage. . . In line with this conclusion, we recently affirmed the district court's grant of qualified immunity in *Crawford* itself, explaining that '[a]t a minimum, any constitutional distinction between [Crawford's] case and *Boddie* was not clearly established" in 2011, when the conduct in *Crawford,* too, allegedly occurred. *See Crawford v. Cuomo*, 721 F. App'x 57, 59 (2d Cir. 2018) (summary order). The same is true here. We therefore affirm the District Court's grant of Officer McTurner's motion to dismiss on qualified immunity grounds.")

Colvin v. Keen, 900 F.3d 63, 75-76 (2d Cir. 2018) ("The Defendants were entitled to summary judgment unless there was clearly established law to the effect that Colvin's speech was on a matter of public concern. There is no clearly established law to that effect. The speech of a public employee is addressed to a matter of public concern where it can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'. . To qualify, the speech must have 'a broader public purpose' and not be merely 'calculated to redress personal grievances.'. . In determining whether speech addresses a matter of public concern, we examine the 'content, form, and context of a given statement.'. .The precedents do not show a 'clearly established' law favoring Colvin on this question. This court has found, on the one hand, that speech debating issues of discrimination, speech seeking relief from 'pervasive or systemic misconduct' by public officials, and speech that is "part of an overall effort to correct allegedly unlawful practices or bring them to public attention' all go to matters of public concern. . . By contrast, we have found speech that 'concerns essentially personal grievances' does not qualify as speech on a matter of

public concern[.] . . We have also reasoned that speech is not on a matter of public concern where it has 'no practical significance to the general public[.]'. . It is true that, under certain circumstances, we have found speech to be on a matter of public concern where it sought to 'vindicate ... constitutional rights ... in the face of alleged police misconduct.'. . In *Golodner*, we reasoned that 'it is axiomatic that misconduct within a police department implicates a matter of public concern.'. . In that case, however, the speech at issue related to alleged policies and patterns of police misconduct that 'raise[d] serious constitutional concerns.'. . Colvin's speech, by contrast, was not addressed to misconduct at all. Colvin merely identified herself as an attorney, told her co-worker and the police officers that she wanted to get her co-worker an attorney and union representative, and advised her friend not to say anything until such representatives arrived. Colvin said nothing to indicate that Ms. Buch's arrest was constitutionally improper. . . Since her speech was not addressed to police misconduct at all, much less to the sort of pattern of misconduct alleged in *Golodner*, *Golodner* does not clearly establish that Colvin's speech was on a matter of public concern.")

Berg v. Kelly, 897 F.3d 99, 112-13 (2d Cir. 2018) ("Police officers charged with protecting the President . . . might have reasonably believed that they could temporarily deny freedom of movement to persons on the scene, perhaps even until the President had departed. In short, while the present record does not permit us to conclude, as a matter of law, that the Officers' actions went no further than the special need to protect the President warranted, no then clearly established law would have alerted reasonable officers that their actions did not fall within the special needs exception. Nor is a different conclusion warranted because the police did not deny all pedestrians and traffic movement to the same degree as the protesters. Reasonable officers might have been particularly alert to risks posed by the Occupy Wall Street protesters, whose professed intent was to '#OccupyObama.'. . That a reasonable officer might objectively think that OWS protesters would not leave the area upon release but, rather, would attempt to approach or gain access to the hotel and the President found some support in other OWS protesters' actions only weeks earlier in shutting down the Brooklyn Bridge. . . In sum, in the absence of clearly established law prohibiting the challenged detentions in the circumstances presented, the Officers are entitled to qualified immunity. . . The OWS protesters also assert that they were unlawfully detained for the duration of the President's visit in retaliation for exercising their First Amendment rights. Because the Officers have qualified immunity from suit based on their temporary detention of the protesters, these claims also fail. In *Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), we concluded that 'if [an] officer either had probable cause or was qualifiedly immune from subsequent suit (due to an objectively reasonable belief that he had probable cause), then we will not examine the officer's underlying motive in arresting and charging the plaintiff.' The same reasoning applies to qualified immunity based on an objectively reasonable belief of special needs. We have determined above that officers in the position of protecting the President, as here, would have an objectively reasonable belief under the circumstances that the special needs presented in this case justified their limited detention of the protesters. Our rationale in *Singer* thus accords the Officers qualified immunity from the protesters' retaliation claims.")

Simon v. City of New York, 893 F.3d 83, 88, 97 (2d Cir. 2018) ("We conclude that, with the facts taken in the light most favorable to Simon, the defendants violated the Fourth Amendment. A warrant must be executed in conformity with its terms. . . Here, the warrant required the defendants to produce Simon to court on August 11, 2008, at 10:00 a.m., but they instead detained her for 18 hours over August 11 and 12, occasionally interrogated her about a crime, and never presented her to a judge. We further conclude that the unlawfulness of the defendants' conduct was clearly established when they acted. This is an uncommon '"obvious case"' in which 'the unlawfulness of the [defendants'] conduct is sufficiently clear even though existing precedent does not address similar circumstances.'. . No officer who is executing a warrant that requires that a prospective material witness be brought before a judge at a fixed date and time to determine whether the witness should be detained can reasonably believe that she is free instead to detain and interrogate the witness for hours on end outside of court supervision. . . . *Miller*, *O'Rourke*, and *Yanez–Marquez*, when considered in light of this Court's decisions explaining that an officer executing a warrant must generally comply with its terms, . . . might be thought to 'clearly foreshadow' our ruling today, which would likewise be sufficient to conclude that the defendants are not entitled to qualified immunity. . . But we need not decide whether these out-of-circuit authorities clearly foreshadow today's decision. This is one of the uncommon ' "obvious case[s]"' in which 'the unlawfulness of the [defendants'] conduct is sufficiently clear even though existing precedent does not address similar circumstances.'. . .We conclude, with the First Circuit, that this Fourth Amendment violation is so obvious that it violated clearly established law despite the lack of binding authority directly on point.")

Edrei v. McGuire, 892 F.3d 525, 539-44 (2d Cir. 2018) ("[F]or purposes of 'clearly established law,' we apply the Fourteenth Amendment analysis from *Glick*, not the Supreme Court's 2015 decision in *Kingsley*. We begin with the delicate task of defining the right at issue. . . . Here, defendants' frame the question as 'whether the officers violated the Fourteenth Amendment by using the LRAD 100X to aid in moving protesters to the sidewalks after the protest became obstructive and potentially violent.' . . This framing puts not one but two thumbs on the scale in favor of defendants. First, it focuses on the officers' professed objective—moving protesters onto the sidewalk—while ignoring the degree of force that the officers allegedly used. Second, it recasts the protest as 'violent,' a characterization that, based on plaintiffs' allegations and the scene captured in the videos, is at best arguable. . .Perhaps this is an inference that a factfinder might ultimately make, but at this stage we must draw all inferences in favor of the plaintiffs, not the defendants. . . . [A]ccepting the facts alleged by the plaintiffs, the question here is whether, in 2014, non-violent protesters and onlookers, who officers had not ordered to disperse, had a right not to be subjected to pain and serious injury that was inflicted to move them onto the sidewalks. Preliminarily, we address whether this conduct alleges a Fourteenth Amendment violation under the legal standard applicable in 2014. Although our earlier discussion drew on *Kingsley*, the result is the same under *Glick*'s parallel factors. To repeat, this Court's longstanding test for excessive force claims teaches that force must be necessary and proportionate to the circumstances. . . . Would reasonable officers have known that subjecting non-violent protesters to pain and serious injury simply to move them onto the sidewalks violated the Fourteenth Amendment? Defendants

insist that the circumstances before them were too dissimilar from then-existing precedents to provide this notice. They raise two principal arguments. Neither withstands scrutiny. First, the defendants deny that it was clearly established in December 2014 that using force in a crowd control context violates due process. In their view, because this Court has not applied 'substantive due process principles to crowd control,' the officers lacked notice that the right against excessive force applies to non-violent protesters. . . But that is like saying police officers who run over people crossing the street illegally can claim immunity simply because we have never addressed a Fourteenth Amendment claim involving jaywalkers. This would convert the fair notice requirement into a presumption against the existence of basic constitutional rights. Qualified immunity doctrine is not so stingy. . . Training our focus on controlling authority, we see that this Court has repeatedly emphasized that officers engaging with protesters must comply with the same principles of proportionality attendant to any other use of force. . . . Both *Parmley* and *Amnesty America* gave the defendants fair warning that the prohibition on excessive force applies to protesters. This is true even though both those cases arose under the Fourth Amendment. . . . Shifting attention from the protesters to the technology at issue, defendants' second argument is that, at the time of the events, the Fourteenth Amendment did not apply to LRADs. . . . [N]ovel technology, without more, does not entitle an officer to qualified immunity. . . . Given our call for common sense in the face of new technology, defendants cannot credibly complain they lacked notice that the proscription on excessive force applied to acoustic devices. . . . Even though sound waves are a novel method for deploying force, the effect of an LRAD's area denial function is familiar: pain and incapacitation. . . . Using common sense, any reasonable officer with knowledge of the LRAD's operations would understand that the area denial function represents a 'significant degree of force.'. . To recap, assuming the truthfulness of the allegations in the complaint, and drawing all reasonable inferences in plaintiffs' favor, the defendants knew or should have known that the area denial function could cause serious injury. When engaging with non-violent protesters who had not been ordered to disperse, no reasonable officer would have believed that the use of such dangerous force was a permissible means of moving protesters to the sidewalks. Whatever legitimate interest the officers had in clearing the street, the use of sound capable of causing pain and hearing loss in the manner alleged in the complaint was not rationally related to this end. We therefore conclude that the district court properly denied the defendants' motion to dismiss based on qualified immunity. . . . Our decision regarding the defendants' use of the LRAD is a narrow one. We do not hold that the Fourteenth Amendment bars law enforcement from using LRADs. To the contrary, we are confident that, in appropriate circumstances, following careful study and proper training, LRADs can be a valuable tool for law enforcement. Their usefulness as a long-range communications device is plain. We also think that, under certain conditions, an LRAD that is properly calibrated might be a lawful means of ordering (or perhaps even compelling) protesters to disperse. We merely hold (1) that, on the allegations before us, which we must accept as true, the plaintiffs have stated a Fourteenth Amendment excessive force claim and (2) that purposefully using the LRAD in a manner capable of causing serious injury to move non-violent protesters to the sidewalks violated law that was clearly established as of 2014. We are also mindful that the complaint before us is just one side of the story, told from the perspective of the plaintiffs. But courts and juries must assess excessive force claims from 'the perspective of a reasonable officer

on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.'. . It follows that, once the allegations are tested by evidence, particularly evidence about what the officers saw and knew, the defendants may yet be entitled to qualified immunity. We can envision various factual showings that would change the calculus. One key variable is the state of unrest at the protest. The evidence may show that the defendants observed a more violent scene than is portrayed in the complaint and incorporated videos. Another key consideration is how the LRAD was used, most notably the volume of the device and its proximity to protesters and passersby. And, third, as *Kingsley* acknowledges, much hinges on what the defendants knew. Perhaps the defendants had not seen the report on the Model 3300 and lacked knowledge of the LRAD's harmful effects. The complaint alleges that the NYPD 'has not properly trained its officers' on LRAD use and acknowledges that Department's use of force protocols 'do not account for LRAD use.'. . So perhaps the defendants had received training but reasonably believed that they were not using the device in an unsafe or gratuitous manner. Any one of these non-exhaustive factors could warrant a reappraisal of qualified immunity.")

Monaco v. Sullivan, 737 F. App'x 6, __ (2d Cir. 2018) ("The district court held that Monaco failed to make an adequate showing to survive summary judgment on either the objective or the subjective prongs. When assessing the subjective prong, the district court applied *Caiozzo*, where we held that a plaintiff must show 'that the government-employed defendant disregarded a risk of harm to the plaintiff *of which the defendant was aware*.'. . Monaco failed to meet this standard, the court concluded, because the record contained no evidence suggesting that Packard *knew* that his failure to prescribe Lithium posed a threat to Monaco. On appeal, Monaco does not dispute that he would not meet the *Caiozzo* test. He instead points out that this Court overruled *Caiozzo*. In *Darnell*, decided a year after the district court's decision in this case, we held that a plaintiff can meet the subjective prong of the deliberate indifference test as long as the defendant 'should have known' that his action 'posed an excessive risk to [the plaintiff's] health or safety.'. . Monaco therefore argues on appeal that we should vacate the district court's grant of summary judgment because it applied the now-defunct *Caiozzo* standard, and a jury could reasonably conclude that Packard acted recklessly under *Darnell*. We disagree. Assuming *arguendo* that Monaco is correct that Packard's failure to prescribe Lithium was reckless, Packard would still be entitled to qualified immunity. *Darnell* was decided in 2017 and thus could not have clearly established that reckless medical treatment amounts to deliberate indifference at the time Packard treated Monaco. Indeed, before *Caiozzo*, we had never decided this issue at all. . . Because Packard did not violate clearly established law when he treated Monaco in 1998, the district court did not err in granting summary judgment on this claim.")

Montero v. City of Yonkers, New York, 890 F.3d 386, 394, 398-403 (2d Cir. 2018) ("We conclude that the district court correctly held that the existence of a civilian analogue is not dispositive of whether a public employee spoke as a private citizen, but it is merely a factor the court could consider as part of the inquiry into whether the public employee's speech was made pursuant to his ordinary employment-related responsibilities. We nevertheless find that the district court erred in ruling that Montero's speech was not protected because it was tangentially related to his job

responsibilities. That fact is not dispositive as a matter of law. It is clear from the pleadings that Montero's union remarks did not fall within his responsibilities as a police officer, and he therefore made these remarks as a private citizen. Because at least some of Montero's remarks addressed a matter of public concern, moreover, we vacate and remand the district court's judgment dismissing Montero's First Amendment retaliation claim as to defendant Olson. We affirm the district court's dismissal of the claims against defendants Moran and Mueller for a different reason: their alleged acts were protected by the doctrine of qualified immunity. . . . We conclude that Montero sufficiently pled that his union remarks cannot be considered 'part-and-parcel of his concerns about his ability to properly execute his duties.'. . The 'critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.'. . Montero made his remarks as union vice president, a role in which he was not required to serve. . . .Nevertheless, Montero would have us go further and decide categorically, as some circuits have, that when a person speaks in his or her capacity as a union member, he or she speaks as a private citizen. . . .While we therefore decline to decide categorically that when a person speaks in his capacity as a union member, he speaks as a private citizen, we conclude that, under the facts of this case as set out in the amended complaint, when Montero spoke in his capacity as a union member, he spoke as a private citizen. This was because, taking the amended complaint's allegations as true, Montero spoke in his role as a union officer, and his union speech was not composed of statements made as a 'means to fulfill' or 'undertaken in the course of performing' his responsibilities as a police officer. . . Consequently, he engaged in citizen speech for purposes of the First Amendment. . . .At this stage in the proceedings, we cannot say that Montero's union remarks about how reductions in police manpower might reduce public safety and his call for a vote of no-confidence in Commissioner Hartnett were solely 'calculated to redress [his] personal grievances' against Olson and his allies. . . Nor, despite the City defendants' contentions otherwise, do we find it critical to this inquiry that Montero made his remarks at a non-public meeting. . . We therefore conclude that Montero has sufficiently pled that his criticism of cuts in police manpower at the June 2010 union meeting and his call for a no-confidence vote in Police Commissioner Hartnett at the February 2011 union meeting qualified as statements on matters of public concern. . . .Defendants Moran and Mueller argue that even if Montero's speech was constitutionally protected and they took adverse employment actions against him for this speech, they are, even on the present state of the proceedings, entitled to qualified immunity. We agree. . . . It is true that at the time Moran and Mueller allegedly retaliated against Montero, we had stated in *Weintraub* that the 'lack of a citizen analogue [was] "not dispositive" in [that] case.'. . As detailed above, the role of a citizen analogue in determining whether one speaks as a citizen remained murky, however, and we had expressed no view as to its role in protecting union speech outside the context of a union grievance. . . Thus, we had not made clear that, under the circumstances as alleged in the amended complaint, Montero spoke in his capacity as a private citizen. On appeal, Montero contends, once again, that *Clue* 'clearly establishe[s]' that a person's union activity criticizing management is categorically protected by the First Amendment. . . But, as noted above, *Clue* was decided before *Garcetti*, and focused solely on whether the union plaintiffs had spoken on a matter of public concern. . . After *Garcetti*, it is clear that courts must determine both whether the plaintiff spoke on a matter of public concern

and whether he or she spoke as a private citizen. Moreover, in *Weintraub*, we plainly rejected the notion that one is necessarily speaking as a private citizen when acting in his or her union capacity. Because the specific question of whether the plaintiff's alleged union remarks were protected by the First Amendment was not beyond debate at the time of Moran and Mueller's alleged retaliation against Montero, nor does *Clue* hold otherwise, we conclude as a matter of law that under the claims as pled by Montero, these defendants are protected from liability by qualified immunity.")

Hancock v. County of Rensselaer, 882 F.3d 58, 61, 69 (2d Cir. 2018) ("[W]e find that even individuals with non-stigmatizing medical conditions have a right to privacy in their medical records, even if their interest in privacy might be less. We REMAND this case back to the district court for further proceedings consistent with this analysis, including a consideration of whether qualified immunity might apply. . . .Because the district court found that Appellants did not have claims under the Fourteenth Amendment, it did not have to pass on whether the individual Appellees were entitled to qualified immunity from those claims. In remanding the case, we instruct the court to determine whether Mahar, Hetman, and/or Young are entitled to it. . . We note that on a summary judgment motion, facts are to be interpreted most favorably to non-movants, i.e. Appellants in this case. We have just discussed how their version of the facts plausibly alleges a violation of a constitutional right. That leaves only the question of whether that right was clearly established at the time of the alleged violation, keeping in mind that qualified immunity law does not require a case on point concerning the exact permutation of facts that state actors confront in order to establish a clear standard for their behavior.")

Crawford v. Cuomo, 721 F. App'x 57, ___ (2d Cir. 2018 ("Plaintiffs first argue that the violative nature of Prindle's conduct was clearly established by *Boddie v. Schnieder*, where we stated that 'sexual abuse of a prisoner by a corrections officer may in some circumstances violate the prisoner's right to be free from cruel and unusual punishment.'. . This argument is not persuasive. Although *Boddie* held that inmate sexual abuse could, in principle, violate the Eighth Amendment, it concluded that a 'small number of incidents in which [the plaintiff] allegedly was verbally harassed, touched, and pressed against without his consent' were insufficient to state a claim. . . Contrary to plaintiffs' argument, the allegations we considered in *Boddie* are quite similar to the allegations here. A reasonable officer could therefore have believed that the sexual abuse here alleged, even if it might violate state criminal law or subject him to tort liability, did not violate the Eighth Amendment. At a minimum, any constitutional distinction between this case and *Boddie* was not clearly established in March 2011. . . .Plaintiffs next argue that, in 2011, out-of-circuit authorities 'clearly foreshadow[ed]' our holding in *Crawford I* that Prindle's actions violated the Constitution. . . We disagree. Although some other courts had described an inmate's right to be free of sexual abuse in admirably clear, broad terms, . . . '[t]he dispositive question is whether the violative nature of the *particular* conduct is clearly established,'. . . and out-of-circuit authority was, at the time, sharply divided on whether abuse comparable to Prindle's was cruel and unusual.")

Almighty Supreme Born Allah v. Milling, 876 F.3d 48, 56-59 (2d Cir. 2017) ("[W]e agree with the district court that Allah's substantive due process rights were violated when he was assigned to Administrative Segregation in October 2010 while a pretrial detainee. Although prison officials are to be afforded deference in matters of institutional security, such deference does not relieve officials from the requirements of due process or permit them to institute restrictive measures on pretrial detainees that are not reasonably related to legitimate governmental purposes. . . Here, in assigning Allah to Administrative Segregation in October 2010, prison officials made no individualized assessment whatsoever of the risk that Allah posed to institutional security. Instead, they placed Allah in Administrative Segregation solely on the basis of his prior assignment to (and failure to complete) the Administrative Segregation program during a prior term of incarceration, consistent with their practice of doing so for any such inmate, unless he or she had nearly completed all three phases of the program or more than five years had elapsed since the inmate's prior term of incarceration. . . That practice may serve as a useful rule of thumb for determining when an inmate who has previously been identified as a security risk is sufficiently rehabilitated, such that prison officials may want to consider whether he or she should re-enter the general prison population. We do not quarrel with the proposition that such rules of thumb may often be appropriate in guiding the many day-to-day decisions that prison officials must make to safeguard institutional security. But when such rules of thumb are applied inflexibly to justify severe restrictions on pretrial detainees at the expense of any meaningful consideration of whether those restrictions are justified by a legitimate governmental purpose, due process concerns come into play. Here, prison officials adhered reflexively to a practice that did not allow for individualized consideration of Allah's circumstances and that required him to be placed in Administrative Segregation regardless of his actual threat, if any, to institutional security. On that basis, Allah was isolated in his cell for up to 23 hours a day; required for months to wear restraints whenever out of his cell, including when showering; allowed very limited opportunities to see his family; and subjected to the numerous other restrictions described above. . . .We agree that *Wolfish* and its progeny put prison officials on notice that pretrial detainees have a substantive due process right not to be subjected to restrictions amounting to punishment. But just as '[t]he general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established,'. . . the general principle articulated in *Wolfish* does not clearly establish that a substantive due process violation would result from Allah's placement in Administrative Segregation based solely on his prior assignment to (and failure to complete) that program. Nor does Allah identify any other case law that would have placed Defendants on notice that their conduct violated substantive due process.")

Almighty Supreme Born Allah v. Milling, 876 F.3d 48, 60, 62-63 (2d Cir. 2017) (Pooler, J., concurring in part, dissenting in part, and dissenting from the judgment) ("I concur with the majority's holding that Allah's constitutional rights were violated when prison officials failed to consider whether he posed a risk to the institution before placing him in extended solitary confinement. I would additionally hold, however, that the restraints imposed in this case were unconstitutional as a response to the minimal infraction Allah committed. And I would not afford

the defendants qualified immunity for having imposed the restraints. . . . In light of the similarity of Allah's conditions to the Supreme Court's example in *Wolfish*, and in light of the lack of legitimate government interest in instituting those conditions, I would not afford the defendants qualified immunity. Accordingly, I dissent from the portion of the majority's opinion granting immunity to the officials and from its disposition reversing the judgment below.")

Brown v. City of New York, 862 F.3d 182, 190-92 (2d Cir. 2017) ("On the uncontested facts and the two facts that it presumed in Brown's favor, the District Court held that the officers were shielded from liability by their qualified immunity. We agree. As instructed by the Supreme Court, we are 'not to define clearly established law at a high level of generality,'. . . and we consider, as we must, the particular circumstances in which the force was used in effecting Brown's arrest. The force applied, which was the repeated use of pepper spray, the kicking of Brown's legs out from under her to bring her to the ground, and Plevritis's using his hand to push Brown's face onto the pavement, occurred after Brown refused to comply with the instructions to place her hands behind her back for handcuffing. During her noncompliance with the instructions, she was warned prior to each application of the pepper spray. The issue presented, therefore, is whether, under clearly established law, every reasonable officer would have concluded that these actions violated Brown's Fourth Amendment rights in the particular circumstance presented by the uncontested facts and the facts presumed in Brown's favor. Here, those circumstances involved a person's repeatedly refusing to follow the instructions of police officers who were attempting to apply handcuffs to accomplish an arrest. No precedential decision of the Supreme Court or this Court 'clearly establishes' that the actions of Naimoli or Plevritis, viewed in the circumstances in which they were taken, were in violation of the Fourth Amendment. The excessive force cases on which Brown relies do not suffice for this purpose. . . .There is some tension in this Court's case law concerning whether out-of-circuit precedent can ever clearly establish law in this Circuit. *Compare Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006), *with Garcia v. Does*, 779 F.3d 84, 95 n.12 (2d Cir. 2015). Even assuming that such precedent may suffice in certain circumstances, however, we conclude that no such circumstances exist in this case. This is not a case, for example, 'where the law was established in three other circuits and the decisions of our own court foreshadowed' the establishment of the rule of law on which Brown seeks to rely. . . Similarly, we must reject Brown's argument that summary judgment on qualified immunity grounds was improper because the officers allegedly violated the New York City Police Department Patrol Guide directive not to use pepper spray from a distance of less than three feet. Our presuming in Brown's favor the disputed fact as to the distance the officers maintained, as the District Court did, does not change our conclusion. Brown is unable to demonstrate that *any* administering of pepper spray at a distance of as short as one foot upon an uncooperative arrestee violated 'clearly established' Fourth Amendment law against excessive force. Brown argues that the two officers 'were not entitled to qualified immunity since they violated clearly established law by using substantial and unnecessary force to arrest Ms. Brown when she posed no threat to the officers or others, and there were less aggressive techniques to arrest her for a noncriminal and slight offense.'. . . Her argument is grounded in the *Graham* factors, but this Court already has concluded that these factors 'would seem to point toward a determination of excessive force,'. . . in concluding that a jury

possibly could find the force used against Brown to have exceeded that permitted under the Fourth Amendment. Her positing that she posed no threat and that less forceful methods existed to accomplish her arrest is not directed to the inquiry we must make as to qualified immunity. Again, that inquiry is whether every reasonable police officer would view the force used by Naimoli and Plevritis, in the circumstances in which that force was applied, as excessive according to clearly established law.")

Johnson v. Perry, 859 F.3d 156, 175-77 (2d Cir. 2017) ("Johnson has not called to our attention any case in which a parent has been held to have a First Amendment right to unlimited access to school property. Given the responsibility of school officials to prevent 'the kind of boisterous and threatening conduct' that would interrupt the 'peace and quiet' and 'disturb[ ] the tranquility' required for the academic aspects of a school's functions, . . . we cannot conclude that a parent has a general and unlimited First Amendment right of access to school property. To the extent that Perry banned Johnson from Capital Prep property for purposes other than attendance at sporting events, we conclude that Perry should have been granted summary judgment on the basis of qualified immunity for that aspect of Johnson's First Amendment claim. . . . As indicated in Part II.C. above, unless there is a clear and present danger of disruptions such as disorder, riot, obstruction of the event, or immediate threat to public safety, the school may regulate access to its gymnasium when it is being used as a limited public forum only if its restrictions are reasonable and viewpoint-neutral. The version of the events proffered by Johnson, with the record taken in the light most favorable to him, would permit a rational juror to find that Perry's ban of Johnson from Capital Prep basketball games was neither viewpoint-neutral nor reasonable. The jury could permissibly find that Perry had repeatedly bullied JD, that Perry had falsely denied bullying her and maligned her, and that Johnson had vehemently complained of the bullying and the falsehoods. The jury could further infer that Johnson presented no threat of disruption or of harm to anyone--nor even any specter of intimidation, his daughter having already withdrawn from the varsity team before imposition of the ban--and that Perry's motive in banning Johnson from the Capital Prep limited public forum was to punish him for having expressed his views that Perry had engaged in bullying and falsification. . . . We also conclude, in light of the authorities discussed in Part II.C. above, that the right not to be excluded, based on viewpoint differences or because of possible annoyance, from sports events to which the public was invited was clearly established. Perry's motion for summary judgment was properly denied as to this aspect of Johnson's First Amendment claim. . . Finally, we can see no basis for Perry's claim of qualified immunity with respect to his ban against Johnson's attendance at school sports events held beyond school property. First, the distinction between school regulations applicable on school property and those targeting events beyond school property is one that other Circuits, in assessing whether school authorities' restrictions violated First Amendment rights, had found important, and indeed dispositive. . . .Second, the state championship basketball game from which Perry had Johnson removed was held not only off Capital Prep property but in a stadium at the Mohegan Sun casino, a venue that was privately owned. Persons attending sports events there are invitees of the owner. 'First Amendment protections ... are especially strong where an individual engages in speech activity from his or her

own private property,' *Papineau*, 465 F.3d at 56, or on private property on which the individual is an invitee.")

Estate of Devine v. Fusaro, 676 F. App'x 61, (2d Cir. 2017) ("Even when we view the record in the light most favorable to the Estate, we conclude, as the district court did, that Defendants are entitled to qualified immunity because the asserted right, *i.e.*, Devine's right to be free from less-than-lethal force in the circumstances, was not clearly established in the described circumstances. As the district court observed, three undisputed facts support that conclusion: (1) the police used force designed to be less-than-lethal, rather than deadly; (2) they used such force against a man reasonably believed to be suicidal and armed with a loaded gun while occupying public property; and (3) they used such force only after several hours of a standoff and negotiations that had not convinced Devine to surrender his gun. . . .We accept as true the Estate's assertion that an interval of several minutes passed between the two rounds of rubber baton projectiles fired by Defendants, during which Devine stated, '[W]hat are you doing? ... You guys are going to make me do this[.]'. . But the Estate points to no law clearly establishing that, following such a statement, the firing of a second round of rubber batons in a less-than-lethal manner violated Devine's clearly established constitutional right to be free from excessive force. We acknowledge the tragic circumstances of this case; nevertheless, because the law afforded the defendant officers no 'fair and clear warning' that their conduct might violate Devine's constitutional rights, we affirm the qualified-immunity-based judgment.")

Garnett v. Undercover Officer C0039, 838 F.3d 265, 268, 274-80 & n.6 (2d Cir. 2016) ("In *Ricciuti*, we held that, even if there is probable cause to arrest a defendant, an officer who subsequently fabricates that defendant's confession 'and forwards that information to prosecutors ... violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983.'. . This case calls for us to consider whether *Ricciuti* requires the same result when the fabricated information at issue is the officer's own account of his or her observations of alleged criminal activity which he or she conveys to prosecutors. We hold that it does. . . .The instant case presents this court with an important legal question: whether *Ricciuti*'s holding—that a Section 1983 plaintiff may sue for denial of the right to a fair trial based on a police officer's fabrication of information—applies when the information fabricated is the officer's own account of his or her observations of alleged criminal activity, which he or she then conveys to a prosecutor. We answer that question in the affirmative, while emphasizing the essential limiting principles encompassed by the *Ricciuti* standard. . . . *Ricciuti*'s reasoning applies as much to a situation where, as here, the falsified information was the officer's account, conveyed to prosecutors, of what he heard the defendant say or do during the alleged offense, as it did in *Ricciuti*, where the officer was describing what he heard the defendant say during an interview after his arrest. UC 39 makes two arguments against relying on *Ricciuti*. First, UC 39 argues that *Ricciuti* does not control this case because *Ricciuti* addressed only whether qualified immunity was available to police officers who willfully fabricated evidence, rather than the merits of Ricciuti's denial of the right to a fair trial claim. . . Second, UC 39 argues that falsification of evidence has always been addressed under the

auspices of false arrest and malicious prosecution claims under the Fourth Amendment. UC 39 maintains that application of a denial of the right to a fair trial claim to falsified evidence would upset the balance between liability and probable cause developed in Fourth Amendment jurisprudence. On the first point, UC 39 is incorrect that *Ricciuti*'s holding is limited to the question of immunity. In *Ricciuti*, the panel held that fabrication of evidence violated a 'clearly established constitutional right[ ]' and thus the officers were not entitled to qualified immunity. . . Thus, in order to find that the officers were not entitled to qualified immunity, the panel necessarily *also* held that the officers' conduct in fabricating Ricciuti's supposed 'confession' violated a clearly established constitutional right, the right to a fair trial. . . .Whether this right is rooted in the Sixth Amendment or Fifth and Fourteenth Amendments, or both, is an issue we need not decide because the constitutional harm resulting from the falsified information at issue is in any event redressable in an action for damages under 42 U.S.C. § 1983. . . .In short, a Section 1983 claim for the denial of a right to a fair trial based on an officer's provision of false information to prosecutors can stand even if the officer had probable cause to arrest the Section 1983 plaintiff. . . .First, claims alleging the denial of a right to a fair trial based on fabricated information are redressable under the Constitution, regardless of which constitutional provision provides the basis for the claim—'[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands.'. . .Second, probable cause, which is a Fourth Amendment concept, should not be used to immunize a police officer who violates an arrestee's non-Fourth Amendment constitutional rights. . . .Third and lastly, any limitation of false information allegations to false arrest and malicious prosecution claims would ignore the collateral consequences that are associated with fabricated information even if the officer had probable cause for the initial arrest. . . .Although we hold that *any* information fabricated by an officer can serve as the basis of a claim for a denial of the right to a fair trial, we acknowledge concerns raised by the City of New York ("City") about attaching liability for false information to an officer's account of his or her own observations of an alleged criminal activity giving rise to an arrest. For example, the City posits that an affirmance of *Ricciuti* would lead to the retrial of every unsuccessful state prosecution as a federal Section 1983 action and would turn an individual's resentment at being prosecuted into allegations of fabrication against police officers. The City cautions that such retrials would impose burdens on society by chilling the work of honest officers and by diverting energy away from general policing and towards defensive litigation. This court does not take those concerns lightly. Nonetheless, the City's proposed distinction between fabricated testimony about what an officer claims to have seen during a 'buy and bust' and fabricated testimony about a purported confession is incoherent. The court's holding in *Ricciuti* covers 'false information,'. . . not merely false information about confessions. The information fabricated by Lieutenant Wheeler in *Ricciuti*, exactly like the fabricated information at issue here, is nothing more or less than a false account of something the officer claimed to have seen or heard the defendant say, which he forwarded to prosecutors and to which he would be expected to testify at trial. That the officer here fabricated testimony about what he heard in a bodega, rather than what he heard in a police station during an interview, cannot conceivably make a difference. Having considered the City's policy arguments, we find that the standard outlined in *Ricciuti* places appropriate limitations on the availability of a claim for denial of the right to a fair trial based on fabrication of information by a police officer

which serve to address the City's fears. As the jury was properly instructed here, the standard in *Ricciuti* restricts fair trial claims based on fabrication of information to those cases in which an (1) investigating official (2) fabricates information (3) that is likely to influence a jury's verdict, (4) forwards that information to prosecutors, and (5) the plaintiff suffers a deprivation of life, liberty, or property as a result. . . In order to succeed on a claim for a denial of the right to a fair trial against a police officer based on an allegation that the officer falsified information, an arrestee must prove by a preponderance of the evidence that the officer created false information, the officer forwarded the false information to prosecutors, and the false information was likely to influence a jury's decision. . . These requirements all provide necessary limits on the reach of a denial of a fair trial claim based on false information. In particular, the requirements that the information be both false and likely to influence a jury's decision constrain the types of information that can serve as the basis for a denial of the right to a fair trial claim. *Ricciuti* has been the law for nearly twenty years, without the dire results that the City predicts from the perfectly routine application of its principles to the facts here. Experience thus suggests that the limiting principles of *Ricciuti* have proven effective to date in restricting claims for a denial of the right to a fair trial against police officers on the basis of false information. The court thus embraces the limiting principles inherent in the *Ricciuti* standard while affirming that *Ricciuti*'s holding applies to falsified information contained in an officer's account of his or her observations of alleged criminal activity which he or she conveys to prosecutors.")

Vill. of Freeport v. Barrella, 814 F.3d 594, 609 & n.57 (2d Cir. 2016) ("[W]e reject Hardwick's qualified-immunity argument, which contends—rather incredibly—that it was 'objectively reasonable' for him to believe in 2010 that federal law did not forbid discrimination based on Hispanic ethnicity. . . . This case presents many knotty legal and factual issues. For purposes of qualified immunity, however, the question is simple. The jury found that Hardwick appointed Bermudez rather than Barrella because the former was 'a White person of Hispanic origin' and the latter was 'a White person of Italian origin.'. .Would a reasonable official in Hardwick's position have known that such intentional discrimination against non-Hispanic whites violated Barrella's rights under federal antidiscrimination law?[57] [fn 57 Importantly, Hardwick does not argue that the law was not clearly established with respect to when intentional racial discrimination might be permissible. For instance, he does not claim that he gave preference to a Hispanic as part of an arguably lawful affirmative-action program, or that he was attempting to appeal to Hispanic voters. . . Accordingly, we consider qualified immunity with respect to 'unjustified' racial discrimination only.] The answer is plainly yes. As Hardwick acknowledges, a right is clearly established if 'the Supreme Court or the Second Circuit has recognized the right.'. .Under that standard, it has been clear since the Reagan Administration that § 1981 bars employers from discriminating based on Hispanic ethnicity or lack thereof. . . Indeed, defendants manage to obscure the clarity of established law only by failing to cite *Albert v. Carovano* in any of the four briefs they collectively submitted, despite the District Court's citation of that case in its opinions below. . . The most charitable reading of Hardwick's assertion of qualified immunity is that the law was unsettled with respect to Title VII. But Title VII is irrelevant to Hardwick's personal liability, which stems solely from § 1981. . . And in any event, it has long been obvious under Title VII that employers may not

discriminate based on Hispanic ethnicity, even if it has not hitherto been clearly established that such discrimination would constitute discrimination *on the basis of race. . .* In short, we conclude that the District Court correctly denied defendants' pre-and post-verdict motions for judgment as a matter of law pursuant to Rule 50.")

Mangino v. Inc. Vill. of Patchogue, 808 F.3d 951, 953, 956-59 & n.10 (2d Cir. 2015) ("The principal question presented is whether, in August 2005, there was a clearly established right to be free from abuse of process under New York law even where probable cause existed. We conclude that there was not. . . . 'The existence of probable cause will defeat ... a First Amendment claim that is premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive, in an attempt to silence [him].' *Fabrikant v. French,* 691 F.3d 193, 215 (2d Cir.2012); *see also Hartman v. Moore* . . . . Here, as the District Court correctly found, . . . probable cause existed with respect to each of the criminal summonses issued to Mangino. . . . We turn next to Mangino's argument that the District Court erred in dismissing his abuse-of-process claim, which dismissal we also review de novo. . . The basis for this dismissal was the District Court's determination that Nudo was entitled to qualified immunity because, under New York law, 'although there was a clearly established right to be free from malicious abuse of process at the time of the alleged conduct'—that is, in August 2005—'it was not clearly established that such a claim [could] exist even when probable cause existed for the issuance of the [summonses].'. . . We agree. There has been considerable confusion within our Circuit regarding whether probable cause is a complete defense to a claim of abuse of process under New York law. . . . We need not, and do not, resolve this confusion here, as its very existence establishes that Nudo is entitled to qualified immunity. . . .This appeal 'presents the legal possibility that law, which may have once been clear [for purposes of qualified immunity], can become unclear later.'. . Which is to say, it may be the case that, under this Circuit's interpretation of New York law, the existence of a right to be free from abuse of process even where probable cause existed was incontrovertible in 1963, when *Weiss* was decided, but had been called into question by 1988, when *PSI Metals* was decided, or 2005, when the alleged conduct occurred. No matter-'[t]he nature of the law is not always to move from unsettled to settled. Although one of our decisions may not be expressly overruled, later cases ... may bring its reasoning or holding into such doubt that the elements set out in the case are no longer clearly established....'").

Morse v. Fusto, 804 F.3d 538, 547, 550 (2d Cir. 2015) ("Notwithstanding the legally permissible one-sided nature of grand jury proceedings, everyone possesses the additional and distinct 'right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.'. . This right was violated, Morse contends, when the defendants knowingly created false or misleading billing summaries that were determined to be material to the grand jury's decision to indict. We conclude that the omissions in this case were properly considered under the rubric of *Zahrey,* under which government officials may be held liable for fabricating evidence through false statements or omissions that are both material and made knowingly. . . . Having concluded that the defendants' falsifications constituted a violation of Morse's constitutional rights, we must next determine whether the falsifications violated clearly

established law that sufficiently warned the defendants that their conduct was unconstitutional. We conclude that they did. . . . We conclude that the right in question was clearly established such that the defendants are not entitled to qualified immunity. Although there is no prior decision of ours precisely equating the fraudulent omission of factual information from a document with the affirmative perpetration of a falsehood, *Ricciuti* and its progeny, including *Zahrey*, clearly establish that 'qualified immunity is unavailable on a claim for denial of the right to a fair trial where that claim is premised on proof that a defendant knowingly fabricated evidence and where a reasonable jury could so find.'. . As discussed in detail above, because there is no plausible legal distinction between misstatements and omissions that we can perceive in this context, we conclude that it was not 'objectively legally reasonable' for the defendants in this case to believe that it was permissible for them to knowingly make material omissions in the creation of the billing summaries, thereby knowingly altering evidence during a criminal investigation.")

Edwards v. Arnone, 613 F.3d 44, 46 (2d Cir. 2015) ("The district court in this case described the right at issue as one 'to recreate free from restraints' and held that, as a matter of law, such a right was not clearly established. . . We disagree, however, and conclude that the district court erred in finding that no clearly established right was implicated because the court defined the scope of the relevant right too narrowly. . . .Taken together, our earlier decisions have clearly established a right for inmates to have some meaningful opportunity for exercise, unless the prison has a legitimate safety justification and has adequately considered feasible alternatives. As such, the district court erred by defining the scope of the right at issue too narrowly and by concluding that no right implicated in this case is clearly established. . . . The defendants nevertheless press that, even if the district court did not consider the adequacy of the safety justification, we should affirm because, at the time of the defendants' actions, 'there was no decisional law requiring that inmates in [Phase I of Administrative Segregation] exercise without handcuffs and leg restraints.'. . But 'the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established.'. . Under existing clearly established case law, a reasonable juror may conclude that reasonable officers would agree that fully restraining inmates during out-of-cell exercise without an adequate safety justification is unconstitutional. Accordingly, the district court erred in granting qualified immunity to the defendants without first considering whether disputed issues of fact precluded summary judgment with respect to the adequacy of the defendants' proffered safety justification for the exercise-restraint policy imposed on Edwards. We therefore vacate the judgment and remand for the district court to consider in the first instance the adequacy of the safety justification for the imposition of this policy on Edwards.")

Gardner v. Murphy, 613 F. App'x 40, 42, 43 (2d Cir. 2015) ("Here, the defendants argue that all reasonable jurors would agree that the prison officials acted reasonably in permitting Gardner to exercise only while handcuffed behind his back. We disagree. Of particular relevance on this interlocutory appeal are the district court's conclusions that questions of fact remained as to whether the plaintiff had some meaningful opportunity to engage in exercise and whether the defendants had an adequate safety justification for their imposing restraints on Gardner's exercise. Because we lack jurisdiction to resolve the adequacy of the plaintiff's opportunity for exercise or

the defendants' safety justification, . . .the question we must confront on this appeal narrows considerably: We must decide solely whether reasonable jurors could disagree about whether it would have been objectively reasonable for the defendants to believe that they would not violate Gardner's clearly established constitutional rights by requiring him to be handcuffed behind his back during exercise, absent an adequate safety justification for the restraints. The defendants argue that reasonable officials could debate the legality of the conduct now at issue because neither the Supreme Court nor this Court 'has held that requiring an inmate to recreate in restraints *for security reasons* is unconstitutional.'. . We are unpersuaded for several reasons. First, the defendants' argument assumes that there is in fact a valid safety rationale, which we must assume is not true for purposes of this appeal. Second, the defendants' position defines the scope of the right too narrowly. We have recognized that a restriction on the meaningful opportunity to exercise must be based on a valid security exception. . . Here, it is undisputed that while in Phase I of the Administrative Segregation Program, Gardner was permitted to attend outdoor recreation only while handcuffed behind his back. Such a restriction may be found to infringe an inmate's right to a meaningful opportunity to exercise, and, if so, must be justified by a valid security concern. Accordingly, if it finds unpersuasive a proffered safety justification, a reasonable jury could readily conclude that a corrections official acted unreasonably by permitting an inmate to exercise only in restraints. . . . [A]s we have noted previously, 'the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established.'. . Accordingly, we hold that under existing clearly established case law, a reasonable jury may conclude that reasonable officers would agree that handcuffing inmates behind their backs during their out-of-cell exercise without an adequate safety justification is unconstitutional. We therefore cannot conclude on this interlocutory appeal that the district court erred in denying summary judgment to the defendants.")

Golodner v. Berliner, 770 F.3d 196, 205-07 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established, mainly because courts must calibrate, on a case-by-case basis, how generally or specifically to define the right at issue. . . In a sense, we must apply the Goldilocks principle. If the right is defined too narrowly based on the exact factual scenario presented, government actors will invariably receive qualified immunity. If, on the other hand, the right is defined too broadly, the entire second prong of qualified immunity analysis will be subsumed by the first and immunity will be available rarely, if ever. . . Since neither result maintains the delicate balance 'between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties' that lies at the heart of qualified immunity, *Davis v. Scherer*, 468 U.S. 183, 195 (1984), we must chart a middle course. Our definition must be 'particularized' in the sense that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.'. . Once we identify the right at issue we look to whether the Supreme Court or this Court had articulated that right with adequate specificity at the time of the retaliatory actions. . . Here, the

determinative question is whether Berliner and Myers could reasonably have believed-based on the law as it existed in the second half of 2009—that the First Amendment did not prevent them from discontinuing the City's existing relationship with an independent contractor on account of a lawsuit the contractor filed against the City alleging an unconstitutional dual-arrest policy and police misconduct. . . As an initial matter, 'the First Amendment right of public employees to be free from retaliation for speech on matters of public concern' is beyond debate. . . Next, as discussed at length above, the speech at issue has nothing to do with personal employee grievances related to Golodner's conditions of employment and extends well into the realm of public concern. This conclusion is firmly supported by the relevant jurisprudence in place in 2009. . . Next, although the right at issue is most often raised in the context of a government official firing an employee in retaliation for his or her speech, any attempt to distinguish the case on appeal from those cases based on Golodner's status as a contractor is vitiated by the Supreme Court's 1996 decision in *Board of County Commissioners v. Umbehr,* 518 U.S. 668 (1996). . . Finally, it was clearly established that a complaint may constitute a form of speech for First Amendment purposes. . . Based on the relevant case law at the time of the individual defendants' alleged retaliatory actions, we have no trouble concluding that the constitutional right implicated here was clearly established.")

Harris v. O'Hare, 770 F.3d 224, 241 (2d Cir. 2014) ("Because the police officers lacked a warrant or probable cause plus exigent circumstances to invade Plaintiffs' curtilage, and because Defendants cannot offer any other basis on which the officers' intrusion would be lawful, we conclude that Defendants violated Plaintiffs' Fourth Amendment rights. We also hold that Defendants are not entitled to qualified immunity for this violation because, under the undisputed facts, it would not have been objectively reasonable for them to have believed that their conduct was lawful.")

Raspardo v. Carlone, 770 F.3d 97, 114-15 (2d Cir. 2014) ("Although we have long recognized that Title VII-based hostile work environment claims by government employees are actionable under § 1983, . . . we have not specified in our prior decisions the role of individual responsibility required for a defendant in a § 1983 case involving claims of sex-based harassment by multiple defendants, nor have we charted supervisory liability in this context. This case demonstrates how hostile work environment claims that may readily be brought against employers under Title VII do not always fit easily within the context of individual liability under § 1983. The Title VII framework often requires courts to consider the workplace conduct of multiple employees and supervisors in determining whether the plaintiff has experienced a hostile work environment. . . . Section 1983, however, applies by its terms only to individual 'persons' responsible for violating plaintiffs' rights. . . In order to overcome a government official's claim to qualified immunity and 'establish individual liability under § 1983, a plaintiff must show ... that the defendant caused the plaintiff to be deprived of a federal right.'. . If a defendant has not *personally* violated a plaintiff's constitutional rights, the plaintiff cannot succeed on a § 1983 action against the defendant. Our few prior decisions addressing multi-defendant § 1983 hostile work environment cases have denied qualified immunity to defendants whose conduct, considered alone, was

sufficiently severe or pervasive to alter the conditions of the plaintiff's employment. . . .Thus, our prior cases have established only that when a plaintiff alleges that multiple individual defendants have engaged in uncoordinated and unplanned acts of harassment, each defendant is only liable under § 1983 when his own actions are independently sufficient to create a hostile work environment. We therefore cannot say that it is clearly established law that an individual defendant has violated a plaintiff's equal protection rights if he has not personally behaved in such a way as to create an atmosphere of severe or pervasive harassment. Accordingly, absent such behavior, an individual defendant is entitled to qualified immunity.")

Terebesi v. Torreso, 764 F.3d 217, 232, 233 (2d Cir. 2014) ("At least two circuits and one decision from the District of Connecticut have suggested that the decision to employ a tactical team may violate the Fourth Amendment's prohibition on excessive force. [citing cases] The district court referred to these decisions in denying summary judgment on this issue. . . In November 2012—after the district court's decision in this case, but before the appeal was briefed—a panel of this Court determined that 'there was no "clearly established" right in this Circuit to be free from the deployment of a police SWAT team.' *Fortunati v. Vermont,* 503 F. App'x 78, 81 (2d Cir.2012) (non-precedential summary order). . . . We agree that there is no clearly established right in this Circuit to be free from the deployment of a tactical team in general. . . . It is difficult to ask that a police officer identify clearly established law that three judges of this Court could not find. We therefore reverse the decision of the district court insofar as it denied qualified immunity to Chief Solomon for his decision to call out a tactical team in connection with the search of Terebesi's home.")

Gonzalez v. City of Schenectady, 728 F.3d 149, 160-62 & n.6 (2d Cir. 2013) ("The officers do not dispute that the search violated Gonzalez's right to be free from unreasonable searches; their position is that the right violated was not clearly established. We need not determine whether the facts alleged make out a violation of a constitutional right prior to determining whether that right was clearly established. . . This is especially true here, where the issue was not fully briefed by the government. . . Defendants–Appellees are not liable under § 1983 unless the right at issue was clearly established, meaning that '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . At the time of the search, we had never held that the Fourth Amendment is violated by a suspicionless search (strip search or visual body cavity search) of a person arrested for felony drug possession. Although we have repeatedly held that the police may not conduct a suspicionless strip or body cavity search of a person arrested for a misdemeanor, reasonable officers could disagree as to whether that rule applied to those arrested for felony drug crimes, given the propensity of drug dealers to conceal contraband in their body cavities. . . Judge McMahon (who seems to have had a full share of these cases) has repeatedly emphasized that we have never applied the rule from *Weber* and *Shain* to searches of suspects arrested for felony drug crimes. . . The New York Court of Appeals' decision in *People v. Hall*, 10 N.Y.3d 303 (2008), does not support the view that the search of Gonzalez violated a clearly established federal constitutional rule. *Hall* was decided after the search at issue in this case. It is not a ruling of the Supreme Court or this Court. . . .While we can expect police

officers to be familiar with black-letter law applicable to commonly encountered situations, they cannot be subjected to personal liability under § 1983 based on anything less. There are so many permutations of fact that bear upon the constitutional issues of a search: the arrest can be for a misdemeanor or a felony, for a drug offense or not; the search can be a strip search, a visual body cavity search, or a manual one; the person arrested can be headed to the general prison population or a single cell; the place of the search can be private or less than private; the impetus for the search can be a tip, or the policeman's observations or experience or hunch, or the neighborhood, or a description, or some or all of the above; and other considerations as well. The policeman is not expected to know all of our precedents or those of the Supreme Court, or to distinguish holding from dicta, or to put together precedents for line-drawing, or to discern trends or follow doctrinal trajectories. Otherwise, qualified immunity would be available only to a cop who is a professor of criminal procedure in her spare time. The police cannot be expected to know such things at risk of *personal liability* for the policeman's savings, home equity, and college funds. And such personal liability is the only kind of liability imposed by § 1983 (absent a *Monell* claim). That tells us something about the threshold of liability in these cases. . . . The premise—that a suit against an individual government employee is in substance a suit against his employer—is wrong. Doubtless in some political subdivisions of this Circuit the government supplies defense counsel and pays the judgment if an officer is personally liable under § 1983. But this Circuit includes scores of counties and hundreds of towns and municipalities; and there are thousands of political subdivisions in the nation. Not all of them will indemnify their employees for § 1983 judgments; many cannot even afford to furnish a defense; some can barely keep the school open. . . .We conclude that a reasonable officer—even one familiar with the cases described above—would not have understood that conducting an otherwise suspicionless visual body cavity search of a person arrested for a felony drug offense was unlawful; the defendants in this case are therefore entitled to qualified immunity.")

Gonzalez v. City of Schenectady, 728 F.3d 149, 164-71 (2d Cir. 2013) (Pooler, J., dissenting) ("Here, the relevant question is whether the heightened standard for an anal body cavity search of a felony arrestee was clearly foreshadowed by this Circuit or the Supreme Court, at the time of Gonzalez's search in 2006. . . .Regardless of whether the Supreme Court or this Circuit directly held this rule, it was undoubtedly foreshadowed previous to Gonzalez's arrest, thus, I must disagree with the majority's conclusion in Part III. . . .Despite Supreme Court precedent and over two decades of this Circuit's case law rejecting cavity searches, the district court stated and Appellees still contend that the rule was not clearly established until *Hall*, 10 N.Y.3d at 310–11. . . Regardless of *Hall*, the rule established therein was already clearly suggested by the Supreme Court and presaged by this Circuit. As the majority states, 'we have repeatedly held that police may not conduct a suspicionless strip or body cavity search.' Even if no federal case prior to *Hall* stated the rule as explicitly applying to felony arrestees, the waterfall of decisions from *Schmerber* to *Weber* to *Shain* to *Murcia* made *Hall's* and *Sarnicola's* ultimate results a fait accompli—as reflections of this Circuit's developing case law. In addition, even Appellees are in accord with the district court and the New York Court of Appeals, recognizing that the rule on searches was 'evolving' in this direction. . . We have held that such foreshadowing requires the rule to be deemed

clearly established. . . Accordingly, where the Supreme Court and this Court clearly foreshadowed a ruling on the issue, and other courts have also acknowledged this outcome, we should conclude that the rule was clearly established. . . .Moreover, even accepting that the strip search of the defendant was in accordance with police procedure, that, too, does not excuse police who should have known that to perform a strip search of the defendant absent reasonable suspicion was unjustified. . . .Accordingly, where the unlawfulness was 'apparent,'. . . and the searching officers suspicion was based on 'vague' information, an objectively reasonable person in the officer's position should have known that this conduct was unreasonable and qualified immunity should therefore not apply.")

Spavone v. New York State Dept. of Correctional Services, 719 F.3d 127, 138 (2d Cir. 2013) ("Simply put, the record reveals no basis on which to conclude that Fischer and Joy could not reasonably have believed, as Joy has affirmed, that the mental health needs of DOCS inmates were being met 'in the correctional facility setting through the comprehensive services provided by OMH.' This conclusion means that a reasonable public official in the position of Fischer or Joy could reasonably have believed there was a rational basis for distinguishing between leaves of absence for the treatment of mental illness as opposed to other sorts of illness. And this conclusion, in turn, entitles Fischer and Joy to qualified immunity.")

Vincent v. Yelich, 718 F.3d 157, 166-70 (2d Cir. 2013) ("[W]e conclude that *Earley I* itself, in June 2006, clearly established that the administrative imposition of PRS terms not imposed by the court is unconstitutional. We conclude further, that as to Annucci—the only defendant discussed in plaintiffs' briefs on appeal—the dismissals as a matter of law on the basis of qualified immunity on the present record were inappropriate. . . . *Earley I* dealt with the AEDPA principle that a federal court may not grant habeas unless the state court's adjudication of the claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' 28 U.S.C. § 2254(d)(1). It was in that context that *Earley I* ruled that the federal-law principle that punishment for a crime could not properly be imposed administratively but could only be imposed by the court had been clearly established by the United States Supreme Court in *Wampler* . . . That AEDPA question is not the same as whether a federal right is clearly established for purposes of denying an official qualified immunity: The conclusion that a 'legal proposition was "clearly established" for purposes of its application by professional state court judges does not require a conclusion that it was "clearly established" in the qualified immunity context, which governs the conduct of government officials who are likely neither lawyers nor legal scholars.'. . We thus ruled in *Scott* that *Earley I's* holding did not mean that the *Wampler* principle that there was a right not to be subjected to administratively imposed PRS was clearly established for purposes of qualified immunity. . . .*Earley I* itself, however, in dealing with the precise conduct at issue in the present cases—the administrative imposition of PRS on a prisoner who has not had that condition imposed on him by the sentencing court—applied *Wampler* and plainly held such an imposition of PRS to be unconstitutional. . . . We conclude that *Earley I* itself clearly established that where the court has not included PRS in a defendant's sentence, DOCS may not add that term without violating federal law. . . . State court decisions that

rejected *Earley I's* holding could not disestablish the federal right to due process for the purposes of qualified immunity analysis. . . Because *Earley I's* explicit ruling that 'New York's Department of Correctional Services has no ... power to alter a sentence' clearly established the contour of the right plaintiffs seek to vindicate, our inquiry ends there.") [*See also* ***Hassell v. Fischer***, 879 F.3d 41 (2d Cir. 2018)]

Bailey v. Pataki, 708 F.3d 391, 404-07 (2d Cir. 2013) ("We have already determined that there is sufficient evidence in the record to support, as a matter of law, the plaintiffs' procedural due process claims. We therefore turn to the question of whether the right at issue was clearly established. In answering that question, we look to whether (1) the right was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) a reasonable defendant would have understood from the existing law that his conduct was unlawful. . . We have further held that where the law was established in three other circuits and the decisions of our own Court foreshadowed the right, the law was sufficiently 'well established' that its violation stripped the defendant of his immunity. . . .We ultimately agree with the district court that 'the basic proposition that due process requires a predeprivation hearing unless there is an immediate danger to society' was well established prior to 2005. . . Despite the litany of cases cited by the defendants to suggest that due process tolerates civil commitment of inmates without either notice or a hearing, each of those cases involved critical factors not present here. In none of the cases was a civil commitment effected without notice or a predeprivation hearing where the inmate was safely confined, and, indeed, where the standard the inmate met was not one of immediate and acute dangerousness but rather potential recidivism five, ten, or fifteen years after his release. . . The defendants offer no Supreme Court or Second Circuit precedent for the proposition that due process is satisfied if an individual in the plaintiffs' position has the opportunity to request a hearing *after* he has been labeled an SVP and civilly committed. Except for emergent or otherwise unusual circumstances, such as where an emergency makes it necessary for the State to act immediately to avoid imminent harm to the person being restrained or to the public, or where predeprivation process is highly impracticable, the Supreme Court has long held that 'the Constitution requires some kind of a hearing *before* the State deprives a person of liberty.'")

Looney v. Black, 702 F.3d 701, 710 (2d Cir. 2012) ("We do not doubt that Looney's interest in his continued full-time employment was important, or that he has felt the negative effects of being deprived of his pension and health care benefits. Unfortunately, however, Looney's interest in these items does not suffice to guarantee them constitutional protection as property rights to which he has any procedural entitlement. . . We therefore conclude that Looney has not adequately alleged a constitutionally protected property interest in his full-time employment. Accordingly, the District Court erred in determining that Black was not entitled to qualified immunity as to Looney's procedural due process claim.")

Looney v. Black, 702 F.3d 701, 713 (2d Cir. 2012) ("It is true that Looney alleges that his supervisor, in admonishing him for this alleged speech, requested that he refrain from discussing

matters '*outside* [Looney's] job duties.'. . It is also alleged that his speech regarded an '*outside* agency enforcing a cease and desist order against Town residents.'. . But '[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.' *Garcetti,* 547 U.S. at 424–25. Similarly, whether 'speech was unprotected does not rest on the fact that [the] speech was made in the workplace as opposed to elsewhere.'. .The face of Looney's complaint alleges nothing more than a vague set of circumstances regarding speech which necessarily 'owed its existence' to Looney's role as Building Official. . . Because the speech at issue is alleged to have been made in the course of Looney's official duties, he has not adequately alleged that such speech is entitled to First Amendment protection.")

Looney v. Black, 702 F.3d 701, 713 (2d Cir. 2012) (Droney, J., dissenting) ("I respectfully dissent from the majority's resolution of both the due process and First Amendment claims. I cannot conclude that the allegations in Looney's complaint call for qualified immunity and warrant dismissal at this juncture. As to Looney's procedural due process claim, the allegations of the representations and conduct by defendant First Selectman Black and the other Town officials, and the importance of the salary and benefits to Looney, are sufficient to show that he had a property right to full-time employment protected by procedural due process during his four-year statutory term as a Building Official. As to Looney's First Amendment retaliation claim, the allegations in the complaint sufficiently demonstrate that Looney's speech was made as a private citizen and on a matter of public concern. Although discovery may uncover facts to the contrary, it would be premature to conclude otherwise on a motion to dismiss. Accordingly, I would affirm the district court's denial of qualified immunity.")

Fabrikant v. French, 691 F.3d 193, 213, 214 (2d Cir. 2012) ("The due process right asserted by Fabrikant—her right not to have her dogs sterilized by the SPCA, at least without some form of process, prior to being sent to foster homes while she was awaiting trial in state court on animal abuse charges—is not a right that was 'clearly established' at the time of defendants' challenged actions in 2002. Nor has the right achieved that status today. It was not then, and is not now, 'sufficiently clear that every reasonable official would have understood' that spaying or neutering Fabrikant's dogs following their seizure from her home violates a clearly established due process right. . . Fabrikant cites no binding precedent that comes close to establishing that the asserted due process right was clearly established in 2002. . . In fact, she appears to concede that no such binding authority exists; instead, she argues that we should extend existing precedent to prohibit defendants' behavior and to find that the due process right that she has asserted on this appeal was clearly established in 2002. That argument, however, is foreclosed by *Reichle* and other recent Supreme Court jurisprudence, which recognizes that although '[w]e do not require a case directly on point, ... existing precedent must have placed the statutory or constitutional question beyond debate.' *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2083 (2011). Here, as in *Reichle* and *al-Kidd*, the question 'falls far short of that threshold.'").

McGarry v. Pallito, 687 F.3d 505, 511-14 (2d Cir. 2012) ("Because the Thirteenth Amendment 'denounces a status or condition, irrespective of the manner or authority by which it is created,' *Clyatt v. United States*, 197 U.S. 207, 216 (1905), institutions housing pretrial detainees are not exempt from the Amendment's scope. . . . McGarry's allegations state a claim under the Thirteenth Amendment. He alleges that his work in the prison laundry was compelled and maintained by the use and threatened use of physical and legal coercion. He supports his allegations with well-pleaded facts that the defendants threatened to send him to 'the hole' if he refused to work and that he would thereby be subjected to 23 hour-per-day administrative confinement and shackles. These allegations plausibly allege 'threat of physical restraint or physical injury' within the meaning of *Kozminski*. . . Likewise, McGarry also plausibly alleges facts supporting his assertion that defendants coerced him through legal process by threatening him with DRs, which are alleged to be taken into consideration when making recommendations for a release date and, therefore, lengthen any period of incarceration. . . .[I]t is clearly established that a state may not 'rehabilitate' pretrial detainees. The Supreme Court has unambiguously and repeatedly held that a state's authority over pretrial detainees is limited by the Constitution in ways that the treatment of convicted persons is not. . . .This Court also has held that, while the State has legitimate interests in the health, safety, and sanitation of the correctional facility and its inhabitants, where pretrial detainees are concerned, those interests do not include rehabilitation. . . In light of this authority, it was clearly established that prison officials may not rehabilitate pretrial detainees, and it was not 'objectively reasonable' for defendants to conclude otherwise. . . . We are prepared to continue to assume that correctional institutions may require inmates to perform personally related housekeeping chores such as, for example, cleaning the areas in or around their cells, without violating the Thirteenth Amendment. However, on a motion to dismiss, 'it is the defendant's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness.'. . As such, we look to the complaint to determine if, at the pleading stage, defendants are entitled to qualified immunity. It is clearly established that requiring hard labor of pretrial detainees—persons not 'duly convicted'—violates the Thirteenth Amendment. *See* U.S. Const. amend. XIII, § 1. Reviewing the allegations of the complaint in the light most favorable to McGarry, we conclude that a pretrial detainee's compelled work in a laundry for up to 14 hours a day for three days a week doing other inmates' laundry cannot reasonably be construed as personally related housekeeping chores and that officers of reasonable competence could not disagree on these points. . . Accordingly, we conclude that, at this stage of the proceeding, defendants have not demonstrated that they are entitled to qualified immunity.")

Southerland v. City of New York, 680 F.3d 127, 160 (2d Cir. 2012), reh'g en banc denied, 681 F.3d 122 (2d Cir. 2012) ("The fact that *Tenenbaum* changed the legal 'rubric' applicable to the Southerland Children's constitutional claim—from substantive due process to illegal seizure—however, is not alone determinative of whether the constitutional rights implicated in the Children's seizure were clearly established prior to the time of the seizure. It would be inappropriate, we think, to afford Woo qualified immunity on the Southerland Children's claim solely because, two years after the events in question, we shifted the constitutional *label* for

evaluating that claim from the Fourteenth to the Fourth Amendment. . . What matters is whether an objectively reasonable caseworker in Woo's position would have known that removing a child from his or her home without parental consent, circumstances warranting the removal, or court order would violate a constitutional right—not whether the caseworker would have known which constitutional provisions would be violated if the caseworker proceeded to act in a particular way. . . . Although the standard for determining whether the circumstances justify seizure of a child without judicial authorization or parental consent under the Fourth Amendment was not established by 1997 and, as we have pointed out, remains unsettled to this day, the Children's right not to be taken from the care of their parent without court order, parental consent, or emergency circumstances was firmly established, albeit under a procedural due process framework. . . Regardless of whether probable cause or exigent circumstances must be established to justify a warrantless seizure for Fourth Amendment purposes, the existence of emergency circumstances sufficient to justify removal of the Southerland Children in a manner comporting with their due process rights would also certainly suffice to justify their removal in a manner comporting with their Fourth Amendment rights barring unreasonable seizure. To that extent, at the time of the events in this case, the Southerland Children's Fourth Amendment rights against unreasonable seizure were clearly established. In light of this determination, the next question the Court must address is whether 'it was objectively reasonable for [Woo] to believe [that his] acts did not violate th[e Childrens' clearly established] right [ ],' *Holcomb*, 337 F.3d at 220, not to be taken from the care of their parent without court order, parental consent, or emergency circumstances. Once again, for the purposes of the qualified immunity analysis, the legal origin of the right is not determinative. If Woo has established that he was objectively reasonable in believing that he did not violate the Children's right to be free from unwarranted seizure without exigent circumstances, court order, or parental consent, then he is protected against their Fourth Amendment seizure claim, no matter the standard used to determine liability on this claim on the merits. For the same reasons as in our procedural due process analysis—that we cannot conclude as a matter of law on the current record that it would have been objectively reasonable for Woo to believe that his actions did not violate the Children's constitutional right not to be removed from their home barring exigent circumstances—we cannot conclude as a matter of law that Woo must prevail on the 'objectively reasonable' inquiry as to the violation of the children's Fourth Amendment illegal seizure claims. . . Thus, qualified immunity is unavailable to Woo at this stage on the current record.")

Nagle v. Marron, 663 F.3d 100, 115, 116 (2d Cir. 2011) ("In the present case, Appellees do not argue that Nagle did not have a clearly established right not to suffer adverse employment actions in retaliation for her protected speech. Rather, they argue that it is not clearly established that speech protected at one time 'remains protected when discovered years later' in a 'geographically remote community.' Appellees cite no cases suggesting that First Amendment protection wanes over time. More importantly, they point to no basis on which a reasonable official might conclude that it would so wane, thereby permitting the official to retaliate for the speech. As we have previously observed, there are material questions of fact in this case as to whether the complained-of tenure decision was made in retaliation for Nagle's speech. But assuming, as we must, that this

causation question is decided against Appellees at trial, no reasonable official could think that such speech-retaliatory conduct was constitutionally permissible based simply on the passage of time. Insofar as Appellees mean to rest on the cases cited by the district court in its discussion of this issue, we note that none of those cases held, or even supported the conclusion, that First Amendment protection deteriorates over time and space. On the contrary, every case the district court cited held or assumed that earlier expressive acts could give rise to a claim of retaliation. . . . It is true that no case in our Circuit has specifically held that First Amendment protection does not grow weaker over time and space. But as the Supreme Court has explained, 'the very action in question' need not have been the subject of a holding in order for a right to be clearly established. . . . Fried and Castar knew or should have known that retaliation for protected speech would violate an employee's First Amendment rights, and they had no reason to think that speech protected in Virginia in 2004 would *not* be protected in New York in 2007. We therefore hold that, based on the record on appeal, neither Fried nor Castar are subject to qualified immunity from Nagle's suit." footnotes omitted)

Jackler v. Byrne, 658 F.3d 225, 241-43 (2d Cir. 2011) (on prong one of qualified immunity, holding officer's claim that he was retaliated against for his refusal to obey supervisors' instructions to retract truthful report relating to another officer's use of excessive force and file a false report was not controlled by *Garcetti* and was within the scope of First Amendment protection; on prong two, leaving qualified immunity question for resolution by district court after issues of fact resolved by jury, but noting that "[a]ny uncertainty [in circuit's prior clearly established law] introduced by *Garcetti* and *Weintraub,* which were not decided until after defendants' retaliation against [plaintiff] . . . would not entitle defendants to qualified immunity because the availability of that defense depends on whether the unlawfulness of their conduct was apparent in light of ' "pre-existing law."')

Scott v. Fischer, 616 F.3d 100, 107 (2d Cir. 2010) ("In the presence of a statute that requires all sentences for certain crimes to be accompanied by mandatory PRS [Post Release Supervision], and New York cases that routinely upheld the administrative imposition of that PRS, we conclude that it was not clearly established for qualified immunity purposes prior to *Earley* that the administrative imposition of PRS violates the Due Process Clause.")

Manganiello v. City of New York, 612 F.3d 149, 165 (2d Cir. 2010) ("In the present case, given the jury's findings that Agostini misrepresented the evidence to the prosecutors, or failed to pass on material information, or made statements that were false, and engaged in such misconduct knowingly, and given the ample evidentiary support for those findings, the district court correctly concluded that no reasonable officer could have believed Agostini's actions to be lawful. Agostini's motion for judgment as a matter of law based on qualified immunity was properly denied.")

Okin v. Village of Cornwall-On-Hudson Police Dept., 577 F.3d 415, 434, 435, 437 (2d Cir. 2009) ("The issue in this case is whether defendants were on notice that their affirmative interactions

with an individual accused of domestic violence, their failure to arrest the accused individual, and their disregard of established procedures for responding to domestic violence incidents, which were reasonably likely to encourage the accused individual to believe that he would not be arrested, punished, or otherwise interfered with while engaging in domestic violence, would contribute to the vulnerability of the complainant by emboldening her abuser, thereby giving rise to a substantive due process violation. . . . We . . . find that the state-created danger theory, at the time of defendants' actions here, clearly established that police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages *intentional* violence against the victim, and as that is the substantive due process violation alleged here, qualified immunity does not apply. Together, *Dwares* and *Hemphill* stand for the proposition that police officers may not engage in conduct that encourages or condones a private actor's infliction of intentional violence . . . . In sum, the rule drawn from *Dwares,* although its application was not clearly established under the circumstances in *Pena,* applied with 'obvious clarity' to Okin's case. . . We conclude that the state of the law in 2001 to 2003 gave defendants fair warning that police conduct that encourages a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior will not be confronted by arrest, punishment, or police interference, gives rise to a substantive due process violation, and that defendants, if found liable, would not be entitled to qualified immunity.")

Hartline v. Gallo, 546 F.3d 95, 102 & n.5, 103 (2d Cir. 2008) ("Ultimately, if the facts of this case amount to reasonable suspicion, then strip searches will become commonplace. Given the uniquely intrusive nature of strip searches, as well as the multitude of less invasive investigative techniques available to officers confronted by misdemeanor offenders, that result would be unacceptable in any society that takes privacy and bodily integrity seriously. . . . We note that this case presents a markedly different set of circumstances than those addressed by the standard of the 'special needs' of penal or other institutions to conduct strip searches by reason of the presence of a larger, or dangerous, or vulnerable population, where introduction of secreted contraband from the outside raises a substantial risk of harm. *See N.G. v. Connecticut*, 382 F.3d 225, 234-37 (2d Cir.2004); *Covino v. Patrissi*, 967 F.2d 73, 76-80 (2d Cir.1992). No such special needs exist where, as here, an arrestee is taken to an empty cell for purposes of an evidentiary search, subsequent booking, and release. . . . Defendants do not dispute that for more than twenty years this Court has held that a misdemeanor arrestee may not be strip searched in the absence of individualized reasonable suspicion that she is secreting contraband. . . . It is true that this Court has never decided a case with facts just like those now before us. However, we have also never decided a case suggesting that a strip search on these facts would be constitutionally permissible. Thus, we are comfortable concluding that in the absence of indicia that this Court has found to support individualized reasonable suspicion in the past, a reasonable jury might determine that Defendants were acting in a fashion that clearly violated Hartline's Fourth Amendment rights. . . Defendants are therefore not entitled to summary judgment on the issue of qualified immunity.").

Higazy v. Templeton, 505 F.3d 161, 174 (2d Cir. 2007) ("The objective prong of the qualified immunity test asks whether an officer in Templeton's shoes would have known that he was

violating the right in question. We believe that a reasonable jury could conclude that he would. For the purposes of our inquiry here, we conclude that when the facts are cast in the light most favorable to Higazy, an officer in Templeton's shoes would have understood that the confession he allegedly coerced from Higazy would have been used in a criminal case against Higazy and that his actions therefore violated Higazy's constitutional right to be free from compelled self-incrimination.")

Russo v. City of Bridgeport, 479 F.3d 196, 208, 209, 211, 212 (2d Cir. 2007) ("Today, we hold that the right mentioned in *Baker* and enunciated in the above cited cases protected Russo from a sustained detention stemming directly from the law enforcement officials' refusal to investigate available exculpatory evidence. The Bridgeport police officers retained sole custody of the videotape evidence–and stored it in an improper manner–for a full 68 days after Russo alerted them that examining the pictures of the perpetrator for tattoos could exonerate Russo. They did this after intentionally misstating that the robber had tattoos. Moreover, their failure to perform the simple task of checking the tape resulted in all of Russo's 217-day incarceration. We must clarify the source of this right, however. Although Justice Blackmun in *Baker*–and several circuits including our own in *Satchell*–have suggested that the right was rooted in substantive due process, we now conclude, in light of more recent guidance from the Supreme Court, that the right should instead be analyzed under the Fourth Amendment. . . . . We therefore treat Russo's claim as being based on the Fourth Amendment's protection against unreasonable seizures. And, doing so, we conclude, in light of (1) the length of time of Russo's wrongful incarceration, (2) the ease with which the evidence exculpating Russo–which was in the officers' possession– could have been checked, and (3) the alleged intentionality of DePietro's and Borona's behavior, that Russo has sufficiently alleged that he was unreasonably seized. In other words, the evidence Russo has proffered suffices to prevent summary judgment on Russo's claim of a Fourth Amendment violation by DePietro and Borona. . . . Based on our determination that a reasonable factfinder could conclude that DePietro and Borona's conduct violated Russo's Fourth Amendment rights, we move to the second step of the *Saucier* inquiry and assess whether these officers are entitled to qualified immunity as a matter of law. . . . First, Russo had a clearly-established constitutional right to be free from prolonged detention caused by law enforcement officials' mishandling or suppression of exculpatory evidence in a manner which 'shocks the conscience.' . . Today we have clarified that Russo's claim should be 'treated under the Fourth Amendment,' . . . rather than under substantive due process. But this clarification is of no consequence to the question of whether the right was clearly established, because the proper inquiry is whether the right itself–rather than its source–is clearly established.").

Jones v. Parmley, 465 F.3d 46, 57-61(2d Cir. 2006) ("Defendants concede that plaintiffs had a constitutional right to protest but instead argue that the contours of the right were not sufficiently clear because of the absence of decisional law supporting the existence of a right to continue with a demonstration after some of the participants create a public safety hazard.' While we recognize that to be clearly established, the right 'must have been recognized in a particularized rather than a general sense,'. . . we disagree for the reasons that follow with defendants' contention that the

right at issue in this case was too general to be clearly established. Defendants misapprehend the nature of the inquiry here. They essentially argue that we should find qualified immunity unless a Supreme Court or Second Circuit case expressly denies it, but that standard was rejected by the Supreme Court in favor of one in which courts must examine whether in 'the light of pre-existing law the unlawfulness [is] apparent.'. .As we established in the previous section, the Supreme Court has long applied the 'clear and present danger' test to protest cases to determine when police interference is constitutional. . . . In the protest context, the Supreme Court has already well articulated the contours of the right and made clear that the police may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety. . . . Taken as a whole, the facts as alleged by plaintiffs reveal an orderly, peaceful crowd, the overwhelming majority of whose members had not entered the I-81 roadway. Given the above, it is clear to this Court that a reasonable factfinder could determine under plaintiffs' version of events that the demonstration did not constitute a 'clear and present danger' and thus that the NYSP's actions violated a clearly established constitutional right to protest. . . . Here, defendants concede that they issued no dispersal order and instead stood in a 'skirmish line,' waited thirty-five seconds, and then charged into the crowd, arresting protesters indiscriminately. . . In the end, the district court properly concluded that the facts as alleged by plaintiffs demonstrate that defendants violated plaintiffs' clearly established First Amendment rights 'of which a reasonable person would have known.'")

Pena v. DePrisco, 432 F.3d 98, 115 (2d Cir. 2005) ("Although it is a close question, we think that the substantive due process violation that the plaintiffs allege here was not clearly established for purposes of qualified immunity. *Dwares* did not address, let alone decide, whether repeated inaction on the part of government officials over a long period of time without an explicit statement of approval, might effectively constitute such an implicit 'prior assurance' that it rises to the level of an affirmative act. *Dwares* also did not indicate whether government officials may implicitly send a message of official sanction by engaging in related misconduct themselves or by participating in or tolerating such a practice. And *Dwares* did not expressly address the question of the scienter required for section 1983 liability. The rule of law that we draw from *Dwares* today was not 'clearly established' at the time of the conduct in question here. . .We therefore conclude that the pre-accident individual defendants are entitled to qualified immunity as to the substantive due process claims. Insofar as the complaints alleged such substantive due process violations against them, they should have been dismissed.").

Huminski v. Corsones, 396 F.3d 53, 88, 89, 92, 93 (2d Cir. 2005) (as amended on rehearing) ("We have pointed out at some length why it is clear to us that Huminski had a personal right of access to the Rutland courts. We have also noted, however, that we can find no Supreme Court or previous Second Circuit authority that actually decides this issue and thereby establishes that the First Amendment right of access to judicial proceedings or courthouses is violated when one identified person, rather than the public or press at large, is excluded from judicial proceedings. . . .The defendants therefore are not liable for damages to Huminski for their violation of his First Amendment right of access and, to that extent, the district court erred in denying their motion for

summary judgment. . . .The Notices Against Trespass in effect prohibit indefinitely any and all expressive activity in which Huminski might want to engage in and around Rutland state courthouses. These notices are thus pervasive enough to be viewed as creating a 'First-Amendment-Free Zone' for Huminski alone in and around the Rutland courts. The defendants' singling out of Huminski for exclusion, thereby permitting all others to engage in similar activity in and around the courts, suggest to us that the trespass notices are not reasonable. . . . Our review thus suggests to us that the defendants violated Huminski's First Amendment right of free expression by issuing the trespass notices. The defendants are not entitled to qualified immunity with regard to this claim because this right was clearly established at the time that the defendants issued the trespass notices.").

Palmer v. Richards, 364 F.3d 60, 67, 68 (2d Cir. 2004) ("Whether Palmer's liberty interest was clearly established depends, in turn, on whether the duration and conditions of Palmer's confinement in SHU not only infringed a liberty interest, but also were of such a degree that an officer in Richards's position should have known, in light of *Sandin* and the law of this Circuit, that Palmer's liberty interests were at stake. . . . . The same factual question that prevents us from determining whether Palmer's liberty interest was infringed by his SHU confinement also prevents us from deciding whether Richards is entitled to qualified immunity. Given the state of the record, it is impossible to conclude that Palmer endured merely the normal SHU conditions that we have surveyed in our previous cases; instead, it is possible that Palmer endured unusually harsh SHU conditions that constituted an 'atypical and significant deprivation' under *Sandin*, in which case Palmer's right to due process protections was clearly established. Richards made no effort before the district court to demonstrate what Palmer's conditions were, content to rest on the argument that 'since plaintiff served only 77 days in SHU, no liberty interest is implicated.' We had repeatedly held, prior to Palmer's disciplinary hearing in August 2000, that SHU confinements shorter than 101 days would deprive a prisoner of a liberty interest–and thus trigger due process rights–if the conditions of confinement were severe enough. . . Our decisions, therefore, 'clearly foreshadow' a finding that Palmer's liberty interests could have been infringed, entitling him to hearing procedures that conform to due process, . . . although we cannot conclude as much without knowing more about the conditions of his confinement. Richards, therefore, did not carry his burden on summary judgment to show, on the undisputed facts, that no clearly established right of Palmer's was infringed.").

Cobb v. Pozzi, 363 F.3d 89, 111 (2d Cir. 2004) (as amended) ("The defendants argue that the equal protection principles articulated in *Olech* were not clearly established law at the time of the alleged unconstitutional conduct at issue in this appeal and that they should therefore be shielded from that claim on the grounds of qualified immunity. They also contend that they are entitled to qualified immunity because they treated the defendants in a manner that was objectively reasonable. We reject each of these arguments. First, the law pertaining to 'class of one' equal protection claims was clearly established in 1999 (i.e. when the events at issue here took place). . . . As the Supreme Court underscored in *Olech*, the Court has long 'recognized successful equal protection claims brought by a Aclass of one," where the plaintiff alleges that she has been

intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' . . . The defendants nonetheless contend that the specific contours of a 'class of one' equal protection claim were modified when the Supreme Court decided *Olech* in 2000 such that the standards for this type of claim could not have been 'clearly established' in 1999. However, in *African Trade & Info. Ctr*., where the plaintiffs brought a 'class of one' equal protection claim premised on conduct that had taken place in 1998, we explained that '[i]f plaintiffs had alleged that [the defendant's conduct] ... was wholly arbitrary, or irrational, they would have alleged a violation of a clearly established constitutional right.' . . Because that is the type of 'class of one' equal protection claim with which the district court charged the jury at the close of the trial, there can be little doubt in the wake of our decision in *African Trade & Info. Ctr.* that the relevant standards for the particular *Olech*-based equal protection claim advanced at trial were clearly established even with respect to conduct that pre-dated *Olech*.")

Blouin v. Spitzer, 356 F.3d 348, 361 (2d Cir. 2004) ("Blouin has not demonstrated that clearly established federal law barred the defendants from effectuating the state's interest in prolonging the life of one of its citizens, whatever its quality.")**.**

Ford v. McGinnis, 352 F.3d 582, 597, 598 (2d Cir. 2003) ("We agree with the district court's discussion of qualified immunity insofar as it found that the constitutional right at issue is clearly established. . . Defendants argue that the specific right at issue has not been clearly established, as this Court has never held that 'prison officials were obligated to provide an inmate with an Eid-ul-Fitr meal.' We, however, have clearly established that a prisoner has a right to a diet consistent with his or her religious scruples . . . . Defendants are correct that we have never had occasion to recognize a prisoner's right to the Eid ul Fitr feast in particular, but courts need not have ruled in favor of a prisoner under precisely the same factual circumstance in order for the right to be clearly established. . . We find that prior cases make it sufficiently clear that absent a legitimate penological justification, which for present purposes we must assume defendants were without, prison officials' conduct in denying Ford a feast imbued with religious import was unlawful. [footnote omitted] We part company with the district court, however, over the reasonableness of defendants' belief that they did not violate Ford's constitutional rights. The district court held that it was 'objectively reasonable for defendants to rely on' the advice of the DOCS religious authorities to conclude that the postponed Eid ul Fitr feast did not retain religious significance. . . Whether the prison officials, with or without the counsel of the religious authorities, thought that the Eid ul Fitr feast was not religious is beside the point. [footnote omitted] Despite the fact that all the religious authorities testified to their belief that the postponed Eid ul Fitr was without religious significance, the proper inquiry was always whether Ford's belief was sincerely held and 'in his own scheme of things, religious.' . . We do not suggest that religious authorities can never be employed in assisting prison officials in making that determination, but the religious authorities' opinions that a particular practice is not religiously mandated under Muslim law, without more, cannot render defendants' conduct reasonable.")**.**

Patel v. Searles, 305 F.3d 130, 139, 140 (2d Cir. 2002) ("Having found that the right to intimate association extended to Patel's family relationships, we must still determine, in this specific factual context, whether defendants' actions violated a clearly established 'constitutional right[ ] *of which a reasonable person would have known.*' . . . . In this regard, defendants point out that even in the more common fact pattern of a child abuse investigation, our precedents have not delineated the exact boundaries of associational rights, making it difficult for social workers to know when their actions are unconstitutional. . . Similarly, since neither the Supreme Court nor this Court has ever ruled upon a fact pattern similar to the one now before us, the officers maintain that they, like the social workers in *Wilkinson,* had no reasonable basis to conclude that their alleged actions violated the Constitution. Defendants' contentions are not without merit. Yet, at the pleading stage of this litigation, we are unable to conclude that it is 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley,* 355 U.S. at 45-46. Plaintiff has alleged sufficiently serious misconduct that were we to reverse the district court, it would be equivalent to holding that the right to intimate association does not impose any clearly established limits on the tactics that a police officer may use in the course of an investigation. . . . As a consequence, we do not think it would be objectively reasonable for the police to engage in an extended public and private defamatory misinformation campaign to destroy a family, hoping that those tactics *might* produce incriminating leads in a murder investigation.").

Poe v. Leonard, 282 F.3d 123, 126 (2d Cir. 2002) ("We hold that in order for a supervisor to be held liable under section 1983, both the law allegedly violated by the subordinate and the supervisory liability doctrine under which the plaintiff seeks to hold the supervisor liable must be clearly established. By 1993, it was clearly established that a police officer violates a person's Fourteenth Amendment right to bodily privacy when that officer views, photographs or otherwise records another's unclothed or partially unclothed body, without that person's consent. By 1993, it was also clearly established that a supervisor could be liable if he had actual or constructive notice that it was highly likely his subordinate, while on duty, might violate another's right to privacy in his or her unclothed body, but the supervisor deliberately or recklessly disregarded that risk by failing to take reasonable action to prevent such a violation, and that failure caused the constitutional injury to the plaintiff.").

Shain v. Ellison, 273 F.3d 56, 66 (2d Cir. 2001) ("[I]t was clearly established in 1995 that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons.")

Kerman v. City of New York (Kerman II), 261 F.3d 229, 237 (2d Cir. 2001) ("We find that at the time of the officers' conduct in this case no clearly established law prohibited a warrantless entry into an apartment on the ground of exigent circumstances based solely on an anonymous 911 call. Therefore, we affirm the district court's grant of summary judgment to all nine defendant police officers with regard to defendants' entry into Kerman's apartment.").

Johnson v. Newburgh Enlarged School District, 239 F.3d 246, 253 (2d Cir. 2001) ("Bucci's reliance on the absence of Supreme Court or Second Circuit precedent expressly holding students have a substantive due process right, as he puts it, 'not to be struck by a teacher' construes the right too narrowly. In *Rodriguez*, decided one year before Bucci's alleged attack on T.J., we held that individuals possess a Fourteenth Amendment substantive due process right 'in the non-seizure, non-prisoner context' to be free from excessive force employed by government actors acting under the color of government authority. . . . To the extent that no case applying this right in the educational setting has previously arisen in our circuit, we view this unremarkable absence as a strong indication that the right to be free from excessive force is so well-recognized and widely observed by educators in public schools as to have eluded the necessity of judicial pronouncement. . . . [W]e believe that for claims based on intentionally tortious harmful conduct employed in the absence of any legitimate government interest, the requisite degree of particularity is lessened. Such conduct in the 'non-seizure, non-prisoner context' by any government actor under any circumstances is unjustifiable and, therefore, no additional situation-specific 'contouring' of the right to be free of excessive force is required. Accordingly, we hold that the right to be free of excessive force as announced by this court in *Rodriquez* was sufficiently concrete to put Bucci on notice that he could not use intentionally harmful force in the absence of a legitimate and discernible government aim.")**.**

Ford v. Moore, 237 F.3d 156, 163 n.4 (2d Cir. 2001) ("The application of qualified immunity law to supervisory liability claims presents important and unresolved questions. What law must be 'clearly established' to defeat a qualified immunity defense: the law violated by the subordinates, or the supervisory liability doctrine under which the plaintiff hopes to hold the defendant liable, or both? And what must be 'objectively unreasonable': the subordinates' acts, or the supervisor's failure to act, or both? These questions have gone largely unexplored. The First Circuit, in a thoughtful opinion, recently appeared to conclude that a court should examine whether the constitutional right allegedly violated by the subordinates and the plaintiff's supervisory liability theory are clearly established, and if they are, then move on to evaluate the supervisor's objective liability in failing to act. *See Camilo-Robles v. Hoyos*, 151 F.3d 1, 8 (1st Cir.1998). This Circuit has not explicitly discussed the issue, but has at least once used a rule different from the First Circuit's, looking to the clarity of the law allegedly violated by the subordinates, and then moving on to the objective reasonableness of the defendant's actions. [citing cases] Because we hold that Lt. Moore is entitled to qualified immunity under even the narrow rendering of the doctrine favorable to the Plaintiff (one in which only the law violated by the subordinates must be clearly established, and only the supervisor's acts must be objectively unreasonable), we leave this matter to be resolved another day.").

Zahrey v. Coffey, 221 F.3d 342, 344, 349, 356, 357 (2d Cir. 2000) ("We hold that there is a constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty. We also believe that this right was clearly established in 1996, when Coffey's alleged misconduct occurred. . . .It is arguable that

in this case the right should be identified as the right not to be deprived of liberty as a result of any governmental misconduct occurring in the investigative phase of a criminal matter. A right defined that broadly, however, would cover too much ground because some investigative actions, though fairly labeled as "misconduct," might not merit condemnation as a denial of due process. On the other hand, the right need not be identified at such a level of particularity as to focus only on fabrication of evidence by a prosecutor acting in an investigating capacity. . . . We think the right at issue in this case is appropriately identified as the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity. . . . Although no prior decision has found a violation by an investigating prosecutor of the right not to be deprived of liberty on the basis of fabricated evidence, the cases in which such claims have been made reveal some support for Zahrey's position. . . . *Anderson* instructs . . . that for a right to be clearly established for purposes of a qualified immunity defense, the precise conduct at issue need not previously have been ruled unlawful. . . We think the right at issue in this case should not be defined at such a level of particularity as to be limited to a right not to be deprived of liberty as a result of an investigating prosecutor's fabrication of evidence. The right is appropriately identified as the right not to be deprived of liberty as a result of any government officer's fabrication of evidence. That right was clearly established in 1996, when Coffey's alleged acts occurred . . . .").

Lauro v. Charles, 219 F.3d 202, 216 (2d Cir. 2000) ("There are . . . differences between *Ayeni* and this case that, we believe, render the likeness between the two less than obvious. Thus, the police action in *Ayeni* was a search, while in this case it was a seizure. More importantly, the search in *Ayeni* invaded a private home, an area that has traditionally been given the highest degree of protection by the Fourth Amendment . . . , while the seizure in this case infringed Lauro's personal privacy in the course of detention by the police, a situation in which the privacy protections of the Fourth Amendment must often yield to law enforcement needs. . . . For purposes of determining whether the rule we announce today was clearly established by *Ayeni*, these are significant distinctions. . .In light of *Wilson*'s admonition that the particular right must be defined with specificity, we are not prepared to say that a reasonable police officer should clearly have been able to discern that the search in *Ayeni* and the seizure in this case infringe what are merely different aspects of the same previously defined constitutional right.").

Tenebaum v. Williams, 193 F.3d 581, 596, 597 (2d Cir. 1999) ("[N]ot until today have we specifically held that where there is reasonable time consistent with the safety of the child to obtain a judicial order, the 'emergency' removal of a child is unwarranted. We cannot say that this principle was clearly enough articulated in or implied by our case law as of 1990 to require the defendants to answer in damages for their failure to abide by it at that time. . . . Because we now hold that it is unconstitutional for state officials to effect a child's removal on an 'emergency' basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety, caseworkers can no longer claim, as did the defendants here, that they are immune from liability for such actions because the law is not 'clearly established.' But there remains substantial protection for caseworkers under the second prong of the qualified immunity test, so long as it is

'objectively reasonable [for them] to believe that [their] acts [do] not violate these clearly established rights.'. . . We are confident that the doctrine of qualified immunity applied in light of these principles will continue to provide ample protection for caseworkers, enabling them to fulfill their crucial duties safely and effectively.").

Powell v. Schriver, 175 F.3d 107, 115 (2d Cir. 1999) ("In our view, it was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's HIV-positive status and–perhaps more so–her transsexualism could place that inmate in harm's way. Accordingly, we hold that 'under preexisting law,' a reasonable prison official in December of 1991 would have known that such disclosure, under certain circumstances and absent legitimate penological purposes, could constitute deliberate indifference to a substantial risk that such inmate would suffer serious harm at the hands of other inmates.").

Lewis v. Cowen, 165 F.3d 154, 166, 167 (2d Cir. 1999) ("In determining that Hickey had violated a clearly established right of which a reasonable person should have known, both the district judge and the magistrate judge identified the right at issue as the 'freedom of speech.' . . . The district and magistrate judges defined the right in question far too broadly. The relevant inquiry is not whether the defendants should have known that there was a federal right, in the abstract, to "freedom of speech," but whether the defendants should have known that the specific actions complained of violated the plaintiff's freedom of speech. Such an inquiry requires that a court define the constitutional right with some specificity. . . .The present case illustrates the problem of defining the right too broadly. Under the district court's formulation, no defendant in any First Amendment action could ever successfully assert the qualified immunity defense. We think the proper qualified immunity question in this case is whether the defendants should have known that terminating a policymaking public employee for refusing to promote agency policy as directed by his employer would violate the First Amendment. As this opinion indicates, the magistrate judge should have answered this question in the negative. A highranking policy-making employee does not have, and never has had, a First Amendment right to refuse his employer's directive to promote agency policy.").

Bruneau v. South Kortright Central School District, 163 F.3d 749, 755, 756 (2d Cir. 1998) ("The law does not clearly impose a duty on school officials under Title IX or the Fourteenth Amendment to stop peer sexual harassment. Indeed, there are no court of appeals cases before 1998 holding school officials potentially liable for peer sexual harassment in the school environment. Even now, there is disagreement among the circuits as to whether a school district and school officials may be held liable for sexual harassment where the officials are not directly involved in the harassment. . . . We hold that it was not clearly established law in the fall of 1993 that a § 1983 claim could be stated against individual officials for failure to prevent peer sexual harassment among students.").

Smith v. Garretto, 147 F.3d 91, 95 (2d Cir. 1998) ("Though we must be careful not to define the right in terms of the precise circumstances of a case, an approach so narrow that the defined right

would rarely if ever be said to have been previously established, see *LaBounty v. Coughlin*, 137 F.3d 68, 73 (2d Cir.1998), we think the right at issue here must be defined as a right to be free of a retaliatory entrapment, rather than the more general right to be free of any retaliatory action. . . . No case has previously been decided in which an entrapment was ruled to be a retaliatory violation of First Amendment rights. It is therefore not clear whether the First Amendment claimant must show that the criminal case against him was frivolous, or merely lacking in probable cause, or whether he can prevail, as Bodak appears to contend, simply by alleging that although he committed a crime without any apparent inducement, he acted with a benign motive and the prosecutor's motive was retaliatory. However the law might develop with respect to the retaliatory initiation of a plan to see if a target is willing, for whatever reason, to accept the invitation to commit a crime, it was not clearly established at the time of Bodak's acceptance of the offered bribe that Garretto's alleged action violated any constitutionally protected right. For that reason, Bodak's allegations encounter an insuperable defense of qualified immunity.").

LaBounty v. Coughlin, 137 F.3d 68, 73, 74 (2d Cir. 1998) ("The chronic difficulty with this [qualified immunity] analysis for courts is in accurately defining the right at issue. An overly narrow definition of the right can effectively insulate the government's actions by making it easy to assert that the narrowly defined right was not clearly established. On the other hand, as the Supreme Court noted in *Anderson*, if the right is defined too broadly, '[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.' *Anderson*, 483 U.S. at 639. With these warnings in mind, we find that the district court erred in describing the right at issue as 'the right to be free from crumbling asbestos.'. . . Instead, we find that the right to be free from deliberate indifference to serious medical needs, established in *Estelle v. Gamble* . . . best encompasses the alleged conduct. . . . Given the known dangers of friable asbestos in 1991-92 [footnote omitted], we hold that a reasonable person would have understood that exposing an inmate to friable asbestos could violate the Eighth Amendment.").

Danahy v. Buscaglia, 134 F.3d 1185, 1193 (2d Cir. 1998) ("The foregoing observations are expressed not to support a finding that plaintiffs were Policymaker/Confidential employees as a matter of law, but rather to show that officers of reasonable competence, based on the information before the defendants concerning the positions of plaintiffs, measured against the decided federal cases (i.e., those in existence at the time the defendants acted) applying the *Elrod/Branti* exception, could reasonably have perceived that they were, and therefore that defendants are entitled to qualified immunity. . . . For purposes of qualified immunity, enough facts were known to defendants so that an officer of reasonable competence could believe that all of the plaintiffs held confidential positions in a highly specialized prosecutor's office.").

McEvoy v. Spencer, 124 F.3d 92, 97-98 (2d Cir. 1997) ("The claim as to the first demotion . . . requires consideration of the distinction between the *Pickering* and the *Elrod* lines of decisions and poses the specific issue of whether an employer motivated to act against an employee for exercising both his speech and associational rights is insulated from liability by *Elrod*. The claim

as to the second demotion . . . appears to present only issues implicating the *Pickering* line of cases, but since the complaint alleges circumstances warranting a conclusion that McEvoy was a policymaker even after his first demotion, the second demotion poses the specific issue of the significance that should be attached to an employee's policymaker role in applying *Pickering*. As our discussion . . . reveals, both issues were unsettled at the time of the demotions. As a result, the contours of the rights alleged to have been violated by [defendants] were not 'sufficiently clear that a reasonable official would understand that what he was doing violates [those] right[s],'. . .and these defendants are therefore entitled to qualified immunity. Moreover, our resolution of the first issue entitles [defendants] not only to qualified immunity but also to have the claim against them regarding the first demotion dismissed entirely.").

McEvoy v. Spencer, 124 F.3d 92, 104-05 (2d Cir. 1997) ("[A]s we have previously discussed, the law was unsettled regarding whether an employee's policymaking status automatically immunized an employer's adverse action even in a pure *Pickering* case. Although we decide in this opinion that no dispositive policymaker exception exists in the *Pickering* balancing test, [defendants] did not violate a clearly established right of McEvoy's when, reasonably believing that he was a policymaker, they demoted him from Deputy Chief to Captain because of speech activities. They are therefore entitled to qualified immunity on this claim.").

Brown v. City of Oneonta, 106 F.3d 1125, 1131 (2d Cir. 1997) ("Because we agree with appellants' contention that it was unclear whether FERPA's [Family Educational Rights and Privacy Act] emergency exception allowed release of the list, we find that they are entitled to qualified immunity on that ground. . . . The statute, as it read in 1992, made no specific direction whether an educational institution might release information from students' education records to police to aid them in their search for a violent criminal who might be on campus.").

Williams v. Greifinger, 97 F.3d 699, 706 (2d Cir. 1996) (concluding that at time of plaintiff's confinement in medical keeplock, right to exercise was clearly established).

Schecter v. Comptroller of City of New York, 79 F.3d 265, 271 (2d Cir. 1996) ("Although the district court correctly reasoned that a constitutional right to access to the courts has long been established, this general right does not meet the specificity requirements of *Anderson*. All of the cases cited . . . for the existence of a constitutional right of access to the courts involve impediments to such access by incarcerated prisoners. . . . These cases do not establish with 'reasonable specificity,' that the provision of misleading legal advice to an unincarcerated adversary constitutes a constitutional violation." [cites omitted]).

Genas v. State of New York Dep't of Correctional Servs., 75 F.3d 825, 830-31 (2d Cir. 1996) ("[T]he district court analyzed plaintiff's religious discrimination claim, and concluded that 'the contours of the right to be free from religious discrimination and an employer's duty to make reasonable accommodation for religious observance are clearly defined.' We hold that the district court erred by defining the right at too abstract a level of generality. . . Though the duty to

reasonably accommodate the religious preferences of employees has been clearly established, it has not been established that an employer acting under the terms of a collective bargaining agreement must do more to accommodate religious preferences than is required by the agreement.").

Rodriguez v. Phillips, 66 F.3d 470, 476-77 (2d Cir. 1995) ("[W]e must determine whether in January 1991 the right to be free from the use of excessive force was so clearly defined in this non-seizure, non-prisoner context that defendant Epstein knew his actions were unlawful. Earlier in our jurisprudential history, the contours of this right were clearly defined. All excessive force claims were analyzed under a single substantive due process standard . . . . Our silence and that of the Supreme Court on the continued viability of Fourteenth Amendment excessive force actions after *Graham*, together with the recited decisions of our sister circuits, demonstrate that any federal right of a non-arrestee/non-prisoner to be free from excessive force was not clearly established at the time of Epstein's alleged actions. While we now read the 1989 *Graham* decision not to preclude a claim such as Ms. Rodriguez', we agree with the Eleventh Circuit's comment that *Graham* 'forecloses any contention that the law was clearly established in 1990 and 1991 that use of excessive force violated the Due Process Clause.' [*Swint*] Since, in January 1991, Sara Rodriguez did not have a clearly established substantive due process right to be free from use of excessive force, Officer Epstein is entitled to qualified immunity on this cause of action and the denial of summary judgment in his favor was error.").

Brown v. D'Amico, 35 F.3d 97, 99-100 (2d Cir. 1994) ("In essence, [Plaintiff] is asserting the right to be free from an arrest under circumstances where (a) probable cause is furnished, (b) probable cause would arguably have been negated if information in the applicant's possession had been disclosed to the issuing magistrate, and (c) the undisclosed information had previously been disclosed to an investigatory grand jury that had made a finding of probable cause. We hold that [Defendant] is entitled to qualified immunity because this right was not clearly established in December 1986 when he applied for an arrest warrant . . . . Plaintiff might object that we have defined the right asserted at an undue level of particularity. We do not believe that we have. We do not grant immunity because no previous case has presented the exact set of facts now before us. [citing *Anderson*] Rather, we uphold the claim of immunity because no case has considered the responsibilities of a state law enforcement officer in the special state procedural context presented here. A police officer violates no settled interpretation of the Fourth Amendment when the officer omits from a warrant application information that has previously been included in the aggregate of evidence that led a neutral investigatory grand jury to make a finding of probable cause. We observe that a more abstract level of generality might be appropriate in other cases involving charges of false arrest and malicious prosecution.").

Soares v. State of Connecticut, 8 F.3d 917, 922 (2d Cir. 1993) ("Given the absence of any preexisting caselaw recognizing plaintiff's alleged right not to be handcuffed and in light of the presently existing conflict of views, it is plain that [defendants] did not violate plaintiff's 'clearly established' rights. . . . ").

Mozzochi v. Borden, 959 F.2d 1174, 1178-79 (2d Cir. 1992) ("The district court framed the qualified immunity question ...as whether 'a citizen possessed a clearly established constitutional right not to have his speech regulated because the state actor disagreed with its content'....Framed at the proper level of generality and incorporating the facts ... the qualified immunity question is whether, at the time the alleged acts took place, it was clearly established that an individual's constitutional rights were violated when a criminal prosecution, supported by probable cause, was initiated in an attempt to deter or silence the exercise by the criminal defendant of his right to free speech, but without the effect of actually deterring or silencing the individual.").

Gibbs v. City of Bridgeport, No. 3:16-CV-635 (JAM), 2018 WL 4119588, at *8-11 (D. Conn. Aug. 29, 2018) ("The qualified immunity doctrine is doubtlessly most easily applied when one side or the other can cite a prior case with virtually identical facts. But that's a lot to ask in terms of coincidence. And it's a shaky proposition as well to presume that police officers devote themselves like fastidious law students to monitoring appellate court opinions for the latest nuances in fact-laden developments of Fourth Amendment law. That is why for qualified immunity purposes there need not necessarily be a case right on point, because 'officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances, and there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.'. . As discussed above, since the Supreme Court's decision in *Tennessee v. Garner*, it has been clear that a police officer may not use deadly force against a fleeing suspect unless the officer 'has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'. . Moreover, in the qualified immunity context, if the substantive Fourth Amendment standard requires a determination of probable cause, a police officer is entitled to qualified immunity so long as there is even *arguable* probable cause. . . Although the *Garner* rule is itself a constitutional sub-rule of the more general rule that a police officer may not use objectively unreasonable force, the Supreme Court has cautioned that—absent a so-called 'obvious case'—the *Garner* rule may be too general a guide for whether an officer's use of force violated clearly established law. . . Fair enough. I will consider in light of the facts of *Garner* and other cases whether an objectively reasonable police officer would have known as of April 2013 that the Constitution does not permit him to kill a fleeing suspect after the officer sees the suspect lose or abandon his weapon. . . . At the least, the facts and holding of *Garner* 'clearly foreshadow' the application of the Fourth Amendment to this case. . . . This is the . . . kind of obvious case (if I credit plaintiff's version of the facts). Even though Stukes had previously been armed, Detective Borona knew him no longer to be armed when he advanced up the sidewalk and then shot him for the second time. On plaintiff's version of the facts, no reasonable officer would have believed the use of deadly force to be necessary. . . . I am not persuaded to the contrary by any of the cases that Detective Borona cites. For one thing, most of the cases he cites issued after the shooting occurred in this case in April 2013. The doctrine of qualified immunity requires a court to evaluate what law was clearly established at the time of the incident in question, not several years later. Detective Borona cites *Scott v. Harris, supra*, and *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), both cases

involving police use of force against suspects who led them on Hollywoodstyle high speed car chases that posed a continuing danger to bystanders. Here, by contrast, there was no car chase or anything about Stukes' unarmed flight on foot that posed a continuing danger to the public. Equally distinguishable is the Supreme Court's very recent decision in *Kisela*, 138 S. Ct. at 1152–1154, in which the Supreme Court concluded that an officer who shot and killed a woman with a large knife was entitled to qualified immunity. The Supreme Court's decision turned on evidence that the woman refused to drop the knife despite repeated commands to do so, such that the officer who shot her reasonably believed she would use the knife on another person standing six feet away. . . The evident difference between this case and *Kisela* is that the suspect in *Kisela* continued to be armed when the police decided to shoot her. . . .

In short, when viewing the facts in the light most favorable to plaintiff, I conclude that they do not allow for the grant of qualified immunity at this time. If Detective Borona knew that Stukes was unarmed and did not have other arguable probable cause to believe that Stukes posed an imminent danger to others, then the use of deadly force on Stukes violated clearly established law, and no objectively reasonable police officer would have resorted to the use of deadly force to kill Stukes as he was running away.")

Price v. City of New York, No. 15 CIV. 5871 (KPF), 2018 WL 3117507, at *17–18 (S.D.N.Y. June 25, 2018) ("The Supreme Court has never overruled *Hope*, but its retreat from that decision is palpable. . . Two years after *Hope* was decided, the Supreme Court characterized that case as standing for the narrow proposition that the absence of federal appellate authority supporting a claim is not fatal in cases where the constitutional violation is 'obvious.'. . And despite the wave of Supreme Court cases addressing (and granting) qualified immunity in recent years, no Supreme Court majority has cited *Hope* in the qualified immunity context for approximately four years, *see Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014), and none has cited its 'novel circumstances' holding in almost nine years, *see Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377-78 (2009). In this action, Plaintiff argues that Brooks and Obe are not entitled to qualified immunity because, generally speaking, government officials should know that viewpoint discrimination is unlawful in any forum. . . But the Supreme Court has repeatedly instructed lower courts 'not to define clearly established law at a high level of generality.'. . The Second Circuit has followed suit. . . Here, neither the parties nor the Court has 'identified any binding authority in existence at the relevant time that ... "directly address[ed]" the reasonableness of the challenged conduct,'. . particularly in the context of First Amendment claims concerning the government's use of social media. Nor have decisions from other circuits 'clearly foreshadow[ed] a particular ruling on the issue.'. . After careful consideration, the Court concludes that it must grant qualified immunity to Brooks and Obe on the individual-capacity claims against them.")

Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *2, *6-8, *11-13 (E.D.N.Y. June 26, 2018) (as amended) ("Qualified immunity is denied. Its grant, in the instant case, would be inconsistent with the purpose of 42 U.S.C. § 1983. . . .The courts, police, and public, will benefit from a clarifying jury decision in this often replicated situation. . . . Qualified immunity has recently come under attack as over-protective of police and at odds with the original purpose of

section 1983: 'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'. . The Court's expansion of immunity, specifically in excessive force cases, is particularly troubling. . . .The legal precedent and policy justifications of qualified immunity, it has been charged, fail to validate its expansive scope. The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights. . . .The failure to address whether or not an act was constitutional prevents the creation of 'clearly established' law needed to guide law enforcement and courts on narrow issues not yet decided by the Supreme Court. . . . Although the Court is no longer constrained by a common law good faith defense, it continues to rely on the common law as precedent for granting immunity. . . . The Supreme Court's recent emphasis on shielding public officials and federal and local law enforcement means many individuals who suffer a constitutional deprivation will have no redress; state governments are protected by sovereign immunity and municipalities are not liable under *Monell* unless individual liability can be first proven. . . . Courts should, when reasonable, follow *Saucier's* guidance to first analyze whether a constitutional violation occurred, instead of skipping to whether the right at issue was 'clearly established.'. . . Turning to the application of qualified immunity, courts should, it has been suggested, return to the standard expressed in *Hope v. Pelzer*, 536 U.S. 730 (2002), and define 'clearly established law' at a 'high level of generality.' The key inquiry being whether officers are on 'notice their conduct is lawful.'. . This allows courts to recognize 'obvious' constitutional violations, even if not yet specifically outlawed in a prior Supreme Court ruling. Such a standard is vital in a rapidly changing society, where any willing judge or jurist may distinguish precedent as not 'clearly established' because of slightly differing facts. . . . If courts, as instructed in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), decline to address constitutional issues by looking first to qualified immunity, and are instructed to rely on 'existing precedent ... [established] beyond debate,' government officials and officers may continue to operate in clear violation of constitutional standards without advise of what is constitutional and without fear of redress, because the law will continue to protect 'all but the plainly incompetent.'. . .The court declines to apply qualified immunity. Case precedent and policy rationale fail to justify an expansive regime of immunity that would prevent plaintiff from proving a serious constitutional violation.")

Case v. Anderson, No. 16 CIV. 983 (NSR), 2017 WL 3701863, at *18 n. 18 (S.D.N.Y. Aug. 25, 2017) ("[C]ourts considering [the] right *post-Barkes* continue to conclude the right is clearly established. *See Estate of Clark v. Walker*, No. 16-3560, 2017 WL 3165632, at *6 (7th Cir. July 26, 2017) (in the Seventh Circuit, the right to treatment of a serious medical need, including risk of suicide, is clearly established); *Campos v. Cty. of Kern*, No. 14 Civ. 1099 (DAD) (JLT), 2017 WL 915294, at *10 (E.D. Cal. Mar. 7, 2017) ("the law regarding the Fourteenth Amendment right to adequate medical care," including right "to be protected from the known risks of suicide in jail," was "clearly established" in the Ninth Circuit by "the time of decedent's suicide, August 2013").")

McEvoy v. Matthews, No. 3:16-CV-922 (JAM), 2017 WL 3597473, at *4-5 (D. Conn. Aug. 21, 2017) ("It does not look like the Second Circuit has addressed the application of the community-

caretaking or emergency-aid exceptions on facts similar to this case. The First Circuit, however, has applied qualified immunity on highly similar facts, concluding that the community-caretaking exception arguably allowed the police to enter a person's home on the report of a neighbor who called the police to say that the door to the home was standing wide open. *See MacDonald v. Town of Eastham*, 745 F.3d 8 (1st Cir. 2014). The First Circuit surveyed conflicting precedent about the application of the community-caretaking exception in this context, and concluded that '[t]he short of it is that neither the general dimensions of the community caretaking exception nor the case law addressing the application of that exception provides the sort of red flag that would have semaphored to reasonable police officers that their entry into the plaintiff's home was illegal.'. . That is equally true here. Plaintiff argues that the community caretaking exception applies only to the police's search and seizure of automobiles and does not apply to searches by the police inside the home. Maybe plaintiff is right, but the federal courts of appeals are deeply divided on the question. *See Sutterfield*, 751 F.3d at 556 (collecting cases). And the Second Circuit has yet to take sides. . . Accordingly, the law was not clearly established as of the time of the officers' actions in this case that the community caretaking function could not apply to an entry into plaintiff's home. Just 'the fact that the courts are divided ... demonstrates that the law on the point is not well established.' *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017). So even if plaintiff is right on the merits about the limits of the community caretaking exception, this would not overcome the officers' qualified immunity in the absence of clearly established law in plaintiff's favor. . . . In the event of appellate review of this ruling, it will of course be for the Second Circuit to decide if it wishes in its discretion to offer guidance for the police and citizens alike in this important area of the law.")

Gerskovich v. Iocco, No. 15 CIV. 7280 (RMB), 2017 WL 3236445, at *8–9 (S.D.N.Y. July 17, 2017) ("Assuming it were appropriate for the Court to decide the qualified immunity issue at this point (which it is not), the Court would likely conclude, first, that 'under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas' and, second, that Captain Iocco and Chief Anger did **not** have immunity to arrest Plaintiff for exercising that right because the right was 'clearly established.' *Fields*, 2017 WL 2884391, at *5. The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have found that the First Amendment protects the right to record police activity. [collecting cases] In analyzing the issue of qualified immunity, the Court would point out that not all of the Circuits have found that the constitutional right to photograph police activity was 'clearly established' at the time of their decisions. *Compare Glik*, 655 F.3d at 85 ("[T]he right violated by [police officers] was clearly established in this circuit at the time of [the plaintiff's] arrest [on October 1, 2007]."), *with Fields*, 2017 WL 2884391, at *6 ("[O]ur case law does not clearly establish a right to videotape police officers performing their duties [in 2012 and 2013]."), and *Turner*, 848 F.3d at 687 ("Although the right was not clearly established at the time [i.e. September 2015]," "the right is clearly established henceforth."). . . Qualified immunity, as noted, depends upon 'whether the right plaintiff asserts is so clearly established [or foreshadowed] that defendants should have known it.'. . And, while the Second Circuit Court of Appeals has not spoken definitively on this subject, the '[d]ecisions of other

circuits also may indicate whether the law was clearly established' by 'clearly foreshadow[ing] a particular ruling on the issue.'. . If this Court were resolving the issue of qualified immunity, the Court would likely conclude that decisions from other Circuits clearly foreshadowed a finding here that 'the First Amendment right to film was ... clearly established at the time of the arrest.'. . Plaintiff's alleged conduct in this case was very similar to that of the plaintiffs in Glik, Smith, and Fordyce, and those decisions, in this Court's view, clearly foreshadow a ruling here that citizens have a right to film police activity and that police officers are not entitled to qualified immunity if they retaliate against a citizen who exercises that right. . . Tellingly, perhaps, the NYPD has trained its officers since the 1970s to understand that citizens may record (photograph) police activity.")

Soto v. City of N.Y., No. 13 CV 8474-LTS-JLC, 2017 WL 892338, at *5 (S.D.N.Y. Mar. 6, 2017) ("The scope of the First Amendment right to record police activity is the subject of considerable debate. *See Rivera v. Foley*, 2015 WL 1296258, at *9 (D. Conn. Mar. 23, 2015) (surveying cases and the active split among the Courts of Appeals over this question). To find that officers are entitled to qualified immunity, however, the Court need not resolve that debate: its existence is enough to demonstrate that there was not clearly established law establishing a right to photograph police activity at the time of Plaintiff's arrest. . . The lack of clearly established law entitles Defendants to summary judgment on Plaintiff's retaliation claim on the basis of qualified immunity.")

Charles v. City of New York, No. 12CV6180SLTSMG, 2017 WL 530460, at *21-25 (E.D.N.Y. Feb. 8, 2017) ("Even though neither the Supreme Court nor the Second Circuit has explicitly held that there is a right to videotape or film police activity, the Court may nonetheless find that the right is clearly established 'if decisions from this or other circuits "clearly foreshadow a particular ruling on the issue."'. . Several other circuit courts have either held or implied that a right to film police activity exists, at least under some circumstances. [discussing cases from 1st, 7th, 9th, and 11th Circuits] At least two other circuit court cases have held that the right to record police activity in public places is not clearly established. [discussing cases from 3d and 4th Circuits] At least three district courts in this Circuit have held that the right to record police activity is not clearly established. [discussing *Mesa, Rivera, Basinski*] At least one district court in this Circuit, however, has found that the First Amendment right to record police officers performing their duties in a public space is clearly established. [discussing *Higginbotham*] In light of the foregoing cases, the Court concludes that issues of material fact prevent the Court from determining whether Plaintiff had a right to record the police stop under the circumstances of this case. First, the Court agrees with *Higginbotham* that an argument could be made that a right to videotape police activity in public places was clearly established as of June 5, 2012. As *Higginbotham* correctly notes, *Szymecki* and *Kelly* do not hold that such a right does not exist, but only that the right was not clearly established in the Fourth Circuit as of sometime prior to 2009 and in the Third Circuit as of late May 2007. In contrast, *Fordyce*, *Smith, Glik*, and *Alvarez* all either imply or hold that such a right exists, and *Glik* and *Alvarez* were both decided less than a year before the incident at issue. Accordingly, even though neither the Supreme Court nor the Second Circuit had explicitly held that there is a right to videotape or film police activity, one could argue that the 'decisions from ...

other circuits "clearly foreshadow [ed]"' a ruling that such a right existed under certain circumstances. . .None of those decisions, however, suggest that the right to film police activity is without limitation. To the contrary, three of the four circuit opinions discussed above and cited in *Higginbotham* expressly note that the right to film police activity is not absolute, but subject to reasonable time, place and manner limitations. . . . In this case, there is a substantial factual issue regarding whether Plaintiff's filming was interfering with police activity. . . . Since there is a genuine issue of material fact as to whether Plaintiff was interfering in police activity, the Court cannot determine at this juncture whether Plaintiff had a clearly established right to film. However, even if this Court were to find that Plaintiff's videotaping interfered with police activity, that finding would not result in dismissal of Plaintiff's First Amendment retaliation claim on qualified immunity grounds. Plaintiff's First Amendment claim is not based solely on the theory that Defendants retaliated against Plaintiff for exercising her right to videotape police activity. Plaintiff also claims that the arrest was retaliation for Plaintiff's 'request to file a complaint against Office Benites' and 'her speech about the stop-and-frisk she witnessed and the NYPD's stop-and-frisk practices generally.'")

Adkins v. City of New York, 143 F.Supp.3d 134, 140-41 (S.D.N.Y. 2015) ("[T]he Court concludes that transgender people are a quasi-suspect class. Accordingly, the Court must apply intermediate scrutiny to defendants' treatment of plaintiff. To state a claim on this basis, plaintiff's complaint must adequately allege that his removal from the general cell and handcuffing were not 'substantially related to an important government interest.'. . On its face, the complaint does so. . . . Although plaintiff's complaint therefore states a claim that his Fourteenth Amendment rights were violated, the claim must still be dismissed if defendants can successfully plead the affirmative defense of qualified immunity. . . . Plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment were not clearly established at the time of his arrest on October 1, 2011. *Windsor v. United States*, 699 F.3d 169 (2d Cir.2012), was not decided until October 18, 2012, and the Second Circuit had not previously ruled on what protections are accorded lesbian, gay, bisexual, or transgender people under the Fifth or Fourteenth Amendments. Accordingly, defendants could not be expected to know that their actions would be subject to any standard more stringent than rational basis review. . . . While the Court does not reach the question of whether defendants' actions would survive rational basis review on the merits, it does hold that it would have been objectively reasonable for defendants to conclude as much and that qualified immunity therefore attaches. . . . Particularly because many transgender detainees have alleged that they have been held with individuals who posed a risk to their safety, . . . it was reasonable for defendants to conclude that it would not be arbitrary or irrational to hold plaintiff separately. . . Accordingly, the individual defendants are entitled to immunity, and all claims against them must be dismissed.")

Gonzalez v. City of New York, No. 14 CIV. 7721 LGS, 2015 WL 6873451, at *7 (S.D.N.Y. Nov. 9, 2015) ("In July 2012, when Plaintiff was arrested, neither the Supreme Court nor the Second Circuit had directly addressed the constitutionality of recording officers engaged in official conduct. . . As of July 2012, the First, Seventh, Ninth and Eleventh Circuits had concluded that the right exists, but the Third and Fourth Circuits had determined that the right was not clearly

established. . . In particular, the Third Circuit stated that the First Amendment right to record matters of public concern is far from absolute and does not clearly establish the right to videotape police officers during a traffic stop. *Kelly v. Borough of Carlisle,* 622 F.3d 248, 262–63 (3d Cir.2010). . . .For these reasons, in July 2012, there was no clearly established right in this Circuit to videotape police officers. *See Ortiz v. City of New York,* No. 11 Civ. 7919, 2013 WL 5339156, at *4 (S.D.N.Y. Sept. 24, 2013) (finding defendants were entitled to qualified immunity because there was no clearly established right to record police officers performing their official duties); *Mesa,* 2013 WL 31002 at *24–25 (same). *But see Higginbotham v. City of New York,* —— F.Supp.3d ——, 2015 WL 2212242, at *9 (S.D.N.Y. May 12, 2015) (concluding that "the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact 'clearly established' "). Accordingly, Officer Medina is entitled to qualified immunity on the First Amendment claim against him.")

Higginbotham v. City of New York, 105 F.Supp.3d 369, 378-81 (S.D.N.Y. 2015) ("*Pluma* [*see infra* in outline] may be distinguishable on the basis that the plaintiff in that case, although he called himself a 'citizen journalist,' did not allege that he ever intended to disseminate his videos: the complaint merely alleged that he went to Zuccotti Park 'with hopeful reflection upon the efforts of Occupy Wall Street.'. . To the extent *Pluma* is not distinguishable, however, the Court declines to follow it. While videotaping an event is not itself expressive activity, it is an essential step towards an expressive activity, at least when performed by a professional journalist who intends, at the time of recording, to disseminate the product of his work. . . .The defendants also raise the issue whether, more narrowly, a right to record police activity exists, a question that neither the Supreme Court nor the Second Circuit has decided. All of the circuit courts that have, however, have concluded that the First Amendment protects the right to record police officers performing their duties in a public space, subject to reasonable time, place and manner restrictions. [collecting cases] The Court agrees with those cases. If one accepts that photographing and filming receive First Amendment protection as a general matter (at least when they are 'expressive'), it is difficult to see why that protection should disappear simply because their subject is public police activity. . . . On the other side of the ledger lies the government interest in preventing interference with legitimate police activity. But that interest does not override all others. . . . In any event, the right recognized here and by other courts does not apply when the recording would impede police officers in the performance of their duties. The defendants further assert that they are entitled to qualified immunity because the right to record the police is 'insufficiently defined.'. . .The Court concludes, however, that the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact 'clearly established' at the time of the events alleged in the complaint. When neither the Supreme Court nor the Second Circuit has decided an issue, a court 'may nonetheless treat the law as clearly established if decisions from ... other circuits "clearly foreshadow a particular ruling on the issue."' *Terebesi v. Torreso,* 764 F.3d 217, 231 (2d Cir.2014) (quoting *Scott v. Fischer,* 616 F.3d 100, 105 (2d Cir.2010)); *see also Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2084 (2011) (requiring, in the absence of controlling authority, 'a robust "consensus of cases of persuasive authority"' (quoting *Wilson v. Layne,* 526 U.S. 603, 617 (1999))). By November 2011, the First, Ninth and Eleventh Circuits

had all concluded that the right exists. So had a number of district courts. [collecting cases] The Court is unaware of any decision holding that the recording of police activity by a journalist otherwise unconnected to the events recorded is categorically not protected (rather than holding merely that the right to record was not 'clearly established'). At the time of Higginbotham's arrest, there was thus a 'robust consensus of persuasive authority' in favor of the right that 'clearly foreshadowed' an analogous ruling by the Second Circuit or the Supreme Court. . .In so concluding, the Court parts ways with *Mesa v. City of New York,* No. 09 Civ. 10464(JPO), 2013 WL 31002 (S.D.N.Y. Jan. 3, 2013). That case cited *Kelly v. Borough of Carlisle,* 622 F.3d 248 (3d Cir.2010), and *Szymecki v. Houck,* 353 F. App'x 852 (4th Cir.2009), as evidence of a circuit split on the existence of the right to record, and accordingly concluded that the right was not 'clearly established' for qualified immunity purposes. . . In this Court's reading, however, *Kelly* and *Szymecki* did not decide whether the right existed: they merely held that, even if it did exist, it was not clearly established for the purposes of qualified immunity in those cases' factual contexts. . . They are thus not relevant to the question whether there is a consensus on the existence of a journalist's right to record events in which he is otherwise a nonparticipant. In both cases, the plaintiff was affiliated with and in close proximity to the person being stopped or arrested by the police: in *Kelly,* the plaintiff was the passenger of the person stopped, and in *Szymecki,* the plaintiff was the wife of the arrestee. . . By contrast, Higginbotham had no relation to the arrestees he was filming, and was at a remove from the arrest. In addition, both cases involved particularly dangerous situations: in *Kelly,* a traffic stop, which the *Kelly* court itself recognized as an 'inherently dangerous situation,'. . . and in *Szymecki,* an armed arrestee who defied a police order. Finally, in *Kelly,* the plaintiff was videotaping the police surreptitiously, whereas Higginbotham's filming was overt. Certainly, the right to record police activity in a public space is not without limits, and some uncertainty may exist on its outer bounds. For instance, it may not apply in particularly dangerous situations, if the recording interferes with the police activity, if it is surreptitious, if it is done by the subject of the police activity, or if the police activity is part of an undercover investigation. As alleged, however, Higginbotham's conduct falls comfortably within the zone protected by the First Amendment. The complaint alleges that he was a professional journalist present to record a public demonstration for broadcast and not a participant in the events leading up to the arrest he was filming. There is nothing in the complaint suggesting that his filming interfered with the arrest. Accordingly, and in light of the case law consensus described above, a reasonable police officer would have been on notice that retaliating against a non-participant, professional journalist for filming an arrest under the circumstances alleged would violate the First Amendment.")

Schoolcraft v. City of New York, 103 F.Supp.3d 465, 511, 514 (S.D.N.Y. 2015), reconsidered in part in ***Schoolcraft v. City of New York,*** 133 F.Supp.3d 563 (S.D.N.Y. 2015) ("The QAD and IAB speech, in light of *Matthews,* is not part-and-parcel of Schoolcraft's role and is therefore protected. Schoolcraft complained of 'corruption involving the integrity control program' in the 81st Precinct, mainly attributable to DI Mauriello, resulting 'in violation of people's civil rights.'. . This is virtually identical to Matthews's speech about his own precinct, when Matthews stated that his own supervisors' policies were resulting in 'unjustified stops, arrests, and summonses because

police officers felt forced to abandon their discretion in order to meet their numbers and [were] having an adverse effect on the precinct's relationship with the community.'. . Moreover, Schoolcraft reported this activity outside the chain of command, and separate from his appeal process. These circumstances distinguish Schoolcraft's speech from that in *Weintraub* and warrant the conclusion that his IAB and QAD reports constituted protectable speech outside of official duties under *Matthews IV*. . . .As discussed above, and particularly in light of this Court's contrary *September 2012 Opinion,* Schoolcraft's protected First Amendment right to report to IAB and QAD was not clearly established at the time it was made. Consequently, the First Amendment Claim cannot be pleaded against any officers in their individual capacities.")

Greenaway v. Cty. of Nassau, 97 F. Supp. 3d 225, 240-41 (E.D.N.Y. 2015) ("Here, the Nassau Police Officers' conduct constituted false imprisonment and excessive force, and thus violated a federal right, if Greenaway posed no immediate threat to himself, the officers, or any bystander. As discussed in Sections II and IV above, there are significant factual disputes about whether Greenaway was a threat to anyone. In *Garcia,* 43 F.Supp.3d at 289–95, the Southern District of New York found no qualified immunity on the first prong of the inquiry where the defendant officer tased someone engaged in non-criminal conduct and where a reasonable fact-finder could have found that the tased person was not a danger to others or actively resisting arrest. If the fact-finder had so found, then the tasing would be a violation of the Fourth Amendment. . . Similarly, the Court here finds that, since a reasonable factfinder could decide that the Nassau police officers' conduct amounted to a violation of the Fourth Amendment, there is no qualified immunity on the first prong. With respect to the second prong, the Court finds that tasing a non-violent mentally ill person engaged in non-criminal conduct violated a federal right that was clearly established on April 25, 2010. . . Since a reasonable fact-finder could find that Greenaway was not actively resisting arrest, the record here precludes qualified immunity for the Nassau police officers.")

Rivera v. Foley, No. 3:14-CV-00196 VLB, 2015 WL 1296258, at *9-10 (D. Conn. Mar. 23, 2015) ("'We look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation to determine whether the conduct violated a clearly established right.'. . At the time of the acts alleged in the Complaint, the right to photograph and record police officers who are engaged in an ongoing investigation was not clearly established as a matter of constitutional law in this Circuit. . . Other circuits are split on this issue. The First Circuit, Seventh Circuit, Eleventh Circuit, and Ninth Circuit all recognize that the First Amendment protects the photography and recording of police officers engaged in their official duties. . .The Third Circuit and the Fourth Circuit take the contrary approach. . . However, '[w]hen neither the Supreme Court nor this [C]ourt has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit.'. . Moreover, the Court notes that in cases where the right to record police activity *has* been recognized by our sister circuits, it appears that the protected conduct has typically involved using a handheld device to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue. . . By contrast, here Plaintiff directed a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it,

effectively trespassing onto an active crime scene. . . Even if recording police activity were a clearly established right in the Second Circuit, Plaintiff's conduct is beyond the scope of that right as it has been articulated by other circuits. In sum, the Individual Defendants are entitled to qualified immunity with respect to Plaintiff's First Amendment claim concerning the right to photograph police activity.")

[*See also* ***Pluma v. City of New York***, No. 13 CIV. 2017 LAP, 2015 WL 1623828, at *6-8 & n.4 (S.D.N.Y. Mar. 31, 2015) ("Although some Courts of Appeals have held that the First Amendment protects the right to film the police, neither the Supreme Court nor the Second Circuit has addressed 'the right to photograph and record the police.' *Mesa v. City of New York*, 09 Civ. 10464, 2013 WL 31002, at *25 (S.D.N.Y. Jan. 3, 2013). . . It consequently remains unclear whether Plaintiff's filming was protected by the First Amendment. . . . [T]he present motion does not raise a qualified immunity defense, and as such the lack of clearly established law on this point does not conclude the Court's analysis. . . . Even granting that Plaintiff engaged in protected activity, however, the Complaint does not allege a causal connection between that activity and the deployment of pepper spray. On its face, the Complaint fails to allege any motivation related to specific protected speech behind the officers' decision to push the barricade and deploy pepper spray. Rather, Plaintiff's briefing relied on the Complaint's subsequent allegations that the NYPD has a practice of applying excessive force against Occupy Wall Street demonstrators as implicitly supplying the alleged motivation. Assuming these allegations raise an inference that the officers were retaliating against Occupy Wall Street speech, Plaintiff still does not allege that he engaged in that particular expressive conduct. The Complaint makes clear that the commotion began near Plaintiff when he was doing nothing other than 'peacefully remain[ing] in the park,' at which point he began to film the police, who shortly thereafter pepper sprayed him and others near him. . . Yet the only allegations about the officers' motivation for pushing the barricade and deploying pepper spray relates to Occupy Wall Street protest activity, *not* attempts to film the police. . . Although the Complaint alleges that '[t]he police deployed the pepper spray in such a way as to strike those present holding cameras, including the Plaintiff,' that statement does not suggest that the officers' were substantially motivated by a desire to retaliate against Plaintiff's journalistic activities. . . Rather, the only specific allegation of motive is 'the intention of creating the maximum possible confusion and suffering among the protesters,' which again focuses only on protest activity in which Plaintiff has not alleged he participated. . . Given that Plaintiff was admittedly 'a bystander and citizen journalist witnessing the event,' rather than a protester participating in Occupy Wall Street expressive conduct, the Complaint on its face fails to allege that the police were motivated by Plaintiff's own protected activity when they caused his injury. . . Accordingly, the Complaint fails to raise a plausible claim for First Amendment retaliation, and that cause of action is dismissed. To the extent Plaintiff moves to amend this claim, his proposed amended complaint does nothing to compensate for the defects in this cause of action; indeed, it does not appear to revise any allegations relating to the officers' motivation or Plaintiff's expressive activity. As such, any amendment of this claim would be futile, and Plaintiff is denied leave to amend his First Amendment retaliation cause of action.")]

Poventud v. City of New York, No. 07 CIV. 3998 DAB, 2015 WL 1062186, at *9-10 (S.D.N.Y. Mar. 9, 2015) ("Defendants attempt to avoid a finding that the law was clearly established by defining Plaintiff's constitutional right to having Defendant Umlauft 'prepare a DD5 or otherwise document the photo identification procedure involving Francisco Poventud,' (Defs.' Mot. Summ. J. 19). Their limited definition of the right is too narrow, and totally unsupported by any case law. Plaintiff's right to *Brady* evidence is not tied to *how* an officer documents eyewitness evidence; it is based on the officer's obligation to present that evidence and the Government's disclosure of it to the defense where necessary. That Defendant Umlauft had to disclose exculpatory and impeachment evidence to the prosecutor, and that disclosure by the prosecutor to the defense was required in time for it to be effectively used at trial was clearly established. . . . In addition to Second Circuit case law, the NYPD and district attorney's policies and practices demonstrate that *Brady* obligations related to photo identification procedures and disclosure of exculpatory evidence were clearly established and that reasonable police officers would have known about them.")

Turczyn ex rel. McGregor v. City of Utica, No. 6:13-CV-1357 GLS/ATB, 2014 WL 6685476, at *4-5 (N.D.N.Y. Nov. 26, 2014) ("Unlike *Town of Castle Rock v. Gonzales* . . . or *Neal v. Lee County* . . . cases in which police had limited interaction with either the victim or killer prior to the victim's demise, and upon which defendants rely for dismissal of the claim against Shanley, . . . the allegations here go substantially farther. Turczyn alleges several occasions . . . when Shanley knew of Anderson's threatening acts and did nothing, which arguably communicated to him prior assurances that there would be no penalty to pay for his conduct. . . . *Okin* has specifically recognized the liability that may arise under these circumstances. . . .The amended complaint also pleads facts that demonstrate, at this juncture, egregious behavior that shocks the contemporary conscience. As in *Okin*, the allegations here tend to show that Shanley, who was tasked with accomplishing certain goals related to curbing domestic violence, was deliberately indifferent as to whether or not Anderson would make good on his multiple threats against Turczyn's life over a twelve-month-period. . . These allegations sufficiently support that Shanley's affirmative conduct was the product of deliberate indifference that shocks the conscience, and would provide a reasonable jury with a valid basis to so find. . . Finally, Shanley is not entitled to qualified immunity at this juncture. Her argument on this issue is two-fold. First, Shanley asserts that no constitutional violation occurred, and, second, she claims that, even if a constitutional violation occurred, the right was not clearly established. . . The first prong of the argument is easily swept aside by reference to the preceding paragraphs that explain that the amended complaint alleges a cognizable substantive due process violation. As for whether or not the right was clearly established, which is a prerequisite to qualified immunity, . . this question has been resolved by the Second Circuit. On the issue, the court has explained that it is 'clearly established,' under the state-created danger theory, 'that police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct, whether explicit or implicit, that encourages *intentional* violence against the victim, and as that is the substantive due process violation alleged here, qualified immunity does not apply.' *Okin*, 577 F.3d at 434. Accordingly, Shanley is not entitled to qualified immunity at this time.")

Garcia v. Dutchess Cnty., 43 F.Supp.3d 281, 296-98 (S.D.N.Y. 2014) ("*Tracy* involved pepper spray; it did not involve a taser. But just as in *Tracy,* a jury here could reasonably determine on this record that Healy no longer posed a threat to the arresting officers at the time he was repeatedly tased. And as in *Tracy,* the use of force here was 'significant,' 'somewhere in the middle of the nonlethal-force spectrum' and 'on par with pepper spray.'. . It was therefore clearly established law in the Second Circuit as of April 2000 that it was a Fourth Amendment violation to use 'significant' force against arrestees who no longer actively resisted arrest or posed a threat to officer safety, regardless of whether that significant force emanated from a pepper spray canister or the trigger of a taser. . . Decisions involving tasers from at least four other federal courts of appeals make pellucid that the contours of the constitutional right at issue here were indeed clearly established by March 2010. [collecting cases] The fact that many of these decisions involve the use of tasers in dart rather than stun mode is not a dispositive difference, given that both methods of deploying a taser constitute 'significant' force in Fourth Amendment jurisprudence. . . The courts of appeals are in broad agreement that for qualified immunity purposes, 'it does not matter [if] no case [in a particular] court directly addresses the use of a particular weapon; ... an officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.'. . [collecting cases] Defendant Sistarenik seeks refuge in the Second Circuit's Summary Order in *Crowell v. Kirkpatrick,* 400 Fed.Appx. 592 (2d Cir.2010), which affirmed a district court's grant of qualified immunity to officers who used a taser in stun mode against individuals who 'actively resisted' arrest for trespass by 'chain[ing] themselves' to a barrel drum and repeatedly refusing to unchain themselves despite warnings that they would be tased if they did not leave the property. *Crowell* provides no safe harbor for Sistarenik. First and foremost, as a Summary Order, *Crowell* simply has 'no[ ] ... precedential effect.'. . Second, because *Crowell*'s publication post-dated the March 2010 incident at issue here, Sistarenik could not have relied on that decision as a guide to conduct himself. Third, *Crowell* 'd[id] not suggest that the use of a taser to effect an arrest is always, or even often, objectively reasonable.'. . Instead, *Crowell* determined that the totality of the circumstances presented in *that* case did not amount to a clearly established constitutional violation. Fourth, factual distinctions between *Crowell* and this case abound. Unlike the *Crowell* plaintiffs, who continued to resist arrest before being tased, Healy was largely subdued on the floor (or so a jury could reasonably find). And unlike the officers in *Crowell* who had 'attempted several alternate means' of forcing the plaintiffs to unchain themselves before deploying the taser 'as a last resort,' Sistarenik used the taser even though the officers had already successfully restrained Healy, again, viewing the evidence in the light most favorable to plaintiff. . . For these reasons, the Court concludes that with regard to the particular circumstances of this case, *Crowell* has neither persuasive nor precedential value. Construed in the light most favorable to plaintiff, the record in this case precludes a grant of qualified immunity in Sistarenik's favor.")

Marchand v. Simonson, 16 F.Supp.3d 97, 117-18 (D. Conn. 2014) ("The Supreme Court has recently stated that 'federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit. . . of that suspect.'. . In *Stanton,* the Supreme Court held that because

the law in this area is unsettled, reasonable officers could disagree as to whether they could enter a home while in continuous pursuit of a misdemeanor suspect, and therefore an officer was entitled to qualified immunity from a Fourth Amendment illegal entry claim arising out of such an incident. . . Here, as set out above, although the undisputed facts did not provide actual probable cause for Simonson to arrest plaintiff, they did provide 'arguable probable cause.'. .As in *Stanton,* the crimes for which Simonson possessed arguable probable cause, and the crime for which Marchand was arrested, were misdemeanors. As the Court has found that reasonable officers could disagree as to whether Simonson was legally permitted to enter the home or curtilage. . .without a warrant to arrest Marchand for a misdemeanor, Simonson is entitled to qualified immunity and the Court will therefore grant defendants' Motion on plaintiff's Fourth Amendment illegal entry claim.")

Dinler v. City of New York, No. 04 Civ. 7921(RJS)(JCF), 2012 WL 4513352, *11 (S.D.N.Y. Sept. 30, 2012) ("As stated above with respect to the Fulton Street arrests, the law of individualized probable cause was clearly established well before August 31, 2004. Accordingly, the arresting officers would be entitled to qualified immunity only if they reasonably could have believed that each of the individuals arrested on East 16th Street was involved in unlawful conduct. As noted above, this inquiry turns on the officers' efforts to release innocent bystanders and to make sure that they arrested only those who participated in the unlawful march. Because there are questions of fact concerning whether the police made sufficient efforts to clear innocent bystanders from East 16th Street before arresting those who remained, the Court must deny Defendants' motion for summary judgment on the basis of qualified immunity. . . .Based on the undisputed facts, and particularly the video of the Fulton Street march and arrests, the Court finds that there was not even arguable probable cause to make those arrests. At most, reasonable officers could disagree as to whether *some* of the marchers were obstructing traffic; however, no reasonably competent officer could have believed that *all* of the marchers on Fulton Street had violated the law and were properly subject to arrest. As noted above, it was clearly established by 2004 that an officer must have individualized probable cause to arrest an individual and that mere proximity to illegal conduct does not establish probable cause with respect to an individual.")

Warney v. City of Rochester, 536 F.Supp. 285, 295, 296 (W.D.N.Y. 2008) ("Having determined that Warney did have a right to disclosure of the exculpatory material, the analysis turns upon whether that right is one that was 'clearly established' in 2005 or early 2006. In this respect, I believe that *Gauger* and *Harper,* which found that the prosecutors were ultimately entitled to qualified immunity based solely on the lack of voluminous case law to 'clearly establish' the convicted plaintiff's due process rights to disclosure, missed the mark by neglecting to examine whether the due process right to prompt post-conviction disclosure of exculpatory evidence is one of which a reasonable prosecutor would have known. . . Based upon the facts alleged in the complaint, I find that plaintiff's allegations suggest that this is one of the 'rare cases, where the constitutional violation is patently obvious' and where 'widespread compliance with [the] clearly apparent law may have prevented the issue from previously being litigated' to an appreciable extent. . . Implicit in the prosecutor's duty to accomplish the 'dual aim of our criminal justice system[:] 'that guilt shall not escape or innocence suffer,' *U.S. v. Nobles,* 422 U.S. 225, 230 (1975),

quoting *Berger*, 295 U.S. at 88, is an ongoing obligation to disclose to the imprisoned, within a reasonable time, evidence which falls into the prosecutor's hands which compellingly and forcefully exonerates the prisoner. In short, whether or not he was conversant with the holdings in *Harper* and *Gauger*, no reasonable prosecutor in 2005 or early 2006 could have believed that it was constitutionally permissible to withhold or conceal evidence from a convicted citizen, which had substantial power to exonerate him. . . . . Again, the prosecutors here do not dispute that at some point after their receipt of the exculpatory evidence, they were constitutionally required to disclose it to Warney. The crux of the parties' debate is simply whether, under the facts pleaded in the complaint, the 'clearly established' duty was one that arose at the time the prosecutors learned of the exculpatory evidence, or at some later time. . . . Thus, the question becomes whether the prosecutors' disclosure of the exculpatory evidence after the period alleged in the complaint, 72 days at the minimum and potentially several months, comprised reasonably timely disclosure as a matter of law, such that the prosecutors are entitled to qualified immunity . Upon examination of the circumstances as alleged in the complaint, I find that it was not.")

Saleh v. City of New York, 2007 WL 4437167, at *9 (S.D.N.Y. Dec. 17, 2007) ("Defendants urge that a reasonable NYPD officer would have no reason to believe that alerting ICE to the presence of illegal aliens constitutes a constitutional violation. By so framing the issue, however, defendants miss the point. This case is not about whether NYPD officers can alert ICE when they encounter illegal aliens, but whether they can retaliate against individuals who file police-misconduct grievances by making referrals to ICE. With respect to such retaliation, the law is clear: '[t]he rights to complain to public officials and to seek administrative and judicial relief are protected by the First Amendment.' . . When officials take adverse action against those who exercise this right, they can be held liable for a constitutional violation. . . A defendant's ability to justify the purported adverse action on non-retaliatory grounds is irrelevant because ' A[a]n act in retaliation for the exercise of a constitutional right is actionable under section 1983 even if the act, when taken for different reasons, would have been proper."'. . Accordingly, it may be sound practice for NYPD officers to alert ICE when they encounter unlawful aliens under normal circumstances, but when they do so for retaliatory purposes, they run afoul of the Constitution. . . In light of this firmly established law, it would have been clear to a reasonable officer that reporting Saleh to ICE in retaliation for filing a CCRB complaint violated the First Amendment to the Constitution. Accordingly, the individual defendants are not entitled to qualified immunity.")

Garcia v. Brown, 442 F.Supp.2d 132, 144, 145 (S.D.N.Y. 2006) ("After *Dwares*, the law in this Circuit clearly provides that police officers who give express permission to a private citizen to injure another are violating the injured person's Due Process rights. But not until *Pena*-which came down a year after the events that are the subject of this lawsuit–was it clearly settled that giving implicit permission for a private civil rights violation qualified as unconstitutional. Indeed, the Second Circuit dismissed the case against the defendants in *Pena* on qualified immunity grounds. The question, then, is whether the facts of this case are closer to those of *Dwares* than of *Pena*. If the former, the right was clearly established at the time of the alleged wrongdoing; if the latter, it was not. I conclude that the facts of this case are far closer to those of *Dwares* than of

Pena. . . . Because the facts of this case are far closer to those of *Dwares* than of *Pena*, I conclude that Officer Brown does not qualify for qualified immunity under the second prong of *Harlow*."), *aff'd*, 2008 WL 681340 (2d Cir. Mar. 11, 2008).

Shapiro v. City of Glen Cove, No. CV 03-0280(WDW), 2005 WL 1076292, at *26 (E.D.N.Y. May 5, 2005) (not reported) ("The 'appropriate inquiry is, therefore, how closely analogous' the defendants' allowing media to enter and remain in the building is to actions by police that had been held unconstitutional at the time the events took place, that is, in January 2000. . . Here, the unconstitutionality of the defendants' alleged acts was not apparent, because the relevant cases– *Wilson* and *Ayeni*–did not set forth with the requisite specificity the right to be free from media presence during a search of a building at which the claimant had only a diminished expectation of privacy and where the claimant was not present during the media intrusion. Both *Wilson* and *Ayeni* emphasized the violation of the plaintiffs in their homes, and, while *Lauro* held that the holdings of the earlier cases were not limited to the home, *Lauro* was decided after January 18, 2000 and cannot be considered in the inquiry into whether the law that they enunciate was 'well-established.' Thus, reasonable police officers could have construed *Wilson* and *Ayeni* as being applicable only to media presence in a home. Moreover, *Wilson, Hanlon* and *Ayeni* involved situations in which the government actors had expressly invited or arranged for the media to be present, which is not the case here. Further, in those cases the plaintiffs were themselves present at the site and personally subjected to the media intrusion, with the plaintiffs in *Wilson* and *Ayeni* . . . appearing in the photographs or video footage that the media took. The relevant cases are, in short, insufficiently analogous to the facts of this case to allow the court to find that 'a reasonable police officer should clearly have been able to discern' that allowing the media to enter 19 Eastway Drive and record the events 'infringed merely different aspects of the same previously defined constitutional right' enunciated in the earlier cases. . . Finally, even if the right that Shapiro alleges was violated was well-established in January 2000, we cannot say that the defendants were unreasonable for failing to reach that conclusion at the time, and they are entitled to qualified immunity on the media ride-along claim.").

Young v. Goord, No. 01 CV 0626(JG), 2005 WL 562756, at *8 (E.D.N.Y. Mar. 10, 2005)(not reported) ("Assuming arguendo a clearly established right not only to have prison officials react promptly to new legislation in new cases, but also to apply that legislation to pending proceedings that are based on pre-legislation events, the question then would be how fast must the reaction be? As Young's counsel put it at oral argument: 'The question is how quickly after the statute did they have to react to it.'. . Given the undisputed facts alleged by Young–the statute became effective on September 22, 2000; 25 days later, Annucci instructed all superintendents about the law and directed them to comply; and by the following day all of the sanctions against Young were lifted– there are no set of facts on which Young could be entitled to relief. DOCS's response to RLUIPA was admirably swift. No one could reasonably suggest that the defendants' belief that they acted quickly enough to satisfy the Constitution was either incorrect or objectively unreasonable.").

Garcia v. Scoppetta, 289 F.Supp.2d 343, 353 (E.D.N.Y. 2003) ("The individual defendants in this case are entitled to qualified immunity. Even accepting the allegations of plaintiff's complaint as true, she fails to state a claim of violation of clearly established law. The law of the Court of Appeals for the Second Circuit does not conclusively support the existence of the right in question. Its decision in *Nicholson v. Scoppetta* certifying key issues to the New York Court of Appeals indicates that critical areas of the law in this field are not yet established. Although the *Nicholson* opinion focuses on the uncertainty surrounding the law on removals, it is also relevant to prosecutions for neglect. One of the questions the Court certified to the New York Court of Appeals concerns the definition of a 'neglected child' under the New York Family Court Act and whether it includes instances in which the sole allegation of neglect is allowing the child to witness domestic violence. Such a determination is relevant to whether defendants may prosecute mothers for neglect on this basis alone. In the absence of clearly established law on what constitutes a neglected child, defendants can not reasonably have been expected to know whether or not the initiation of neglect proceedings against plaintiff violated her rights. They are entitled to qualified immunity.")**.**

Brooks v. Berg, 270 F. Supp.2d 302, 311, 312 (N.D.N.Y. 2003) ("[T]he Second Circuit has held that defendants who act pursuant to a facially invalid policy are not entitled to qualified immunity. . . . As noted above, Section 1.31 of the DOCS Health Services Policy Manual provides for the continued treatment of inmates who were diagnosed with GID prior to incarceration. The policy's silence regarding the treatment of transsexual inmates who were not diagnosed with GID prior to incarceration is apparently read by prison officials to indicate that DOCS will not provide any treatment to these inmates. While Defendants rely heavily on this policy as justification for their actions, they do not explain the puzzling distinction that the policy makes between those inmates who were diagnosed before incarceration and those who were diagnosed after being incarcerated. Surely inmates with diabetes, schizophrenia, or any other serious medical need are not denied treatment simply because their conditions were not diagnosed prior to incarceration. . . . This blanket denial of medical treatment is contrary to a decided body of case law. Prisons must provide inmates with serious medical needs some treatment based on sound medical judgment. There is no exception to this rule for serious medical needs that are first diagnosed in prison. Prison officials are thus obliged to determine whether Plaintiff has a serious medical need and, if so, to provide him with at least some treatment. Prison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration. In light of the numerous cases which hold that prison officials may not deny transsexual inmates all medical attention, especially when this denial is not based on sound medical judgment, the Court finds that Defendants have failed to establish as a matter of law that their actions were objectively reasonable."), *vacated in part by* ***Brooks v. Berg***, 289 F.Supp.2d 286 (N.D.N.Y. 2003).

Small v. City of New York, 274 F. Supp.2d 271, 281 (E.D.N.Y. 2003) ("The City and the individual officer defendants argue that qualified immunity protects them from plaintiffs' substantive due process claim of the right to be free of state created danger because the contours

of the state created danger doctrine are not clearly established in this Circuit. That argument is without merit. The Court of Appeals for the Second Circuit decided *Dwares* in 1993. Thus, for at least a decade, officials in this Circuit have been on notice that police action which emboldens private citizens to injure others may give rise to a substantive due process violation.").

THIRD CIRCUIT

Walker v. Coffey, 905 F.3d 138, 144, 148-50 (3d Cir. 2018) ("[F]or purposes of qualified immunity, we must consider, at a minimum, whether it is clearly established that the Fourth Amendment affords an employee, such as Walker, the right to have the contents of her work emails remain free from a law enforcement search, absent a warrant or valid exception to the warrant requirement. Because we conclude that such a right is not clearly established—especially where, as here, the employer ultimately produces the emails to law enforcement—we hold that Appellees are entitled to qualified immunity. . . . [W]e would be hard put to find that Walker enjoyed a clearly established right to privacy in the content of her work emails. But because this case involves Walker's *work* emails, which were produced to law enforcement by her employer, Penn State, our inquiry does not end there. As explained below, those facts remove any doubt that Walker has failed to allege a violation of a clearly established constitutional right. . . . We emphasize that nothing in this opinion should be taken as condoning the actions of Appellees in this case. On the contrary we are dismayed by their reliance on an invalid subpoena to procure the documents that they sought. And we add a note of caution that, under slightly difference circumstances, similar actions might well lead us to a conclusion opposite from the one we reach today. But improper conduct alone does not result in a forfeiture of qualified immunity. . . Rather, the relevant question is whether, under the particular circumstances of this case, Appellees' conduct violated Walker's clearly established constitutional rights. Because we conclude that it did not, Appellees are entitled to qualified immunity.")

Munchinski v. Solomon, No. 17-2633, 2018 WL 4090881, at *6-7 (3d Cir. Aug. 28, 2018) (not reported) ("Our decision in *Perdomo*. . . clearly established that a defendant had a right to exculpatory evidence in the hands of the police, not just evidence physically possessed by the prosecutors. But at the time, the prosecution team's disclosure requirements did not extend to evidence that the defendant, with due diligence, should have discovered on his own. Specifically, '[e]vidence [was] not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.'. . In sum, Warman violated clearly established law if he suppressed or withheld favorable and material evidence in possession of police or prosecutors, but only if Munchinski, in the exercise of diligence, could not have discovered that evidence himself.")

Kane v. Barger, 902 F.3d 185, 188-95 (3d Cir. 2018) ("Altogether, the record—again, viewed in the light most favorable to Kane—supports the inference that Barger acted for his own personal gratification, rather than investigative ends, in both touching Kane and photographing her intimate bodily areas with his personal cell phone in violation of department policy. That is conscience-

shocking behavior. Thus, Barger violated Kane's right to bodily integrity. . . . Here, the right at issue is an individual's right not to be sexually fondled and illicitly photographed by a police officer investigating his or her case, for the officer's own gratification. Thus, based on the above, '[t]he ultimate question is whether the state of the law when the offense occurred' gave Barger 'fair warning' that his conduct violated this right. . . We conclude that it did. Intuitively, it seems absurd to analyze whether the right to be free from an officer's sexual assault was clearly established by case law at the time of Barger's conduct. This is because, given the egregiousness of Barger's violation of Kane's personal security and bodily integrity, the right here is so 'obvious' that it could be deemed clearly established even without materially similar cases. . . Indeed, while Barger has not been convicted of a crime, his actions—viewed in the light most favorable to Kane—resemble the crime of indecent assault in Pennsylvania, where Barger's conduct occurred. . . .Further, at the time of Barger's conduct, both our case law and that of other circuits placed Barger on notice that he acted unconstitutionally.")

Santini v. Fuentes, No. 17-2890, 2018 WL 3408265, at *3 (3d Cir. July 12, 2018) (not reported) ("Here, viewing the facts in the light most favorable to Santini, the District Court considered: whether Plaintiff had a right to be free from the use of force, including the use of pepper spray and strikes from nightsticks, as a non-suspect witness who walked away from an investigatory discussion, and who admitted he (1) unintentionally did not comply with an officer's request to keep his hands visible, and (2) resisted arrest. . . We agree with the District Court that this formulation of the question adequately contextualizes the alleged conduct as *Saucier* instructs, with consideration of specifics rather than 'broad general proposition[s].'. . This question captures the particular conduct alleged and allows us meaningfully to consider whether the right at issue was clearly established at the time of the alleged violation. We conclude that the right, if it exists, was not clearly established. First, there are no cases directly on point that suggest that this conduct is unlawful. Santini cites several excessive force cases, but none establish a rule for these facts or state a constitutional right that is obviously applicable to this case. Second, the amount of force used was not so significant that the objectively reasonable officer would know it to be unlawful. This is evidenced by the facts that all force stopped as soon as Santini was in handcuffs and that he suffered no significant or lasting injuries. Finally, the objectively reasonable officer would not know the use of force on these facts to be unlawful. Even in the light most favorable to Santini, the facts suggest some level of resistance to Fuhrmann at all stages of the physical interaction and continued resistance, even as officers instructed him to stop resisting. Also relevant is the repeated non-compliance with the instruction to keep hands visible. Even if the right to be free from police use of force in those circumstances exists, the objectionably reasonable officer might not know that. Because qualified immunity protects officers from reasonable error, we conclude that the grant of summary judgment is appropriate.")

Olson v. Ako, 724 F. App'x 160, 165 (3d Cir. 2018) ("Here, the District Court correctly noted that 'a finding of qualified immunity should be made at the earliest possible point,' but then allowed Plaintiffs' claim to proceed without so finding. . . . A defense motion for a more definite statement is appropriate to 'facilitate an early resolution of the qualified immunity issue.'. . Here, Defendants

moved alternatively to dismiss or for a more definite statement. When the Court granted their 12(e) motion, they provided Plaintiffs with relevant documents from the underlying criminal matter. Plaintiffs then filed an amended complaint, attaching exhibits including: the arrest warrants for the Plaintiffs, the interviews of M.R. and J.C., the search warrant and Detective Ako's supporting affidavit, the interview with R.W., the investigation report following the execution of the search warrant, and evidence vouchers signed by Defendant Sullivan. The District Court therefore had a record sufficient to rule on qualified immunity. Considering whether the Defendants are immune, the pertinent question 'is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession.'. . The unlawfulness of the conduct must have been placed 'beyond debate' in light of 'controlling authority' or 'a "robust consensus of ... persuasive authority."'. . Here, neither of Plaintiff's generalized Fourth Amendment claims convincingly places Defendants' conduct in the orbit of unlawful, let alone unlawful 'beyond debate.' Indeed, the Supreme Court has emphasized that '[t]he general proposition ... that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.'. . .Plaintiffs' allegations 'are the kinds of broad propositions of law that cannot guide a court in determining whether a constitutional right is clearly established.'. . And even if we were to consider their allegations at the broad level of generality requested, Plaintiffs have failed to identify, for either claim, a case where an officer in similar circumstances was held to have violated the Fourth Amendment.")

Kedra v. Schroeter, 876 F.3d 424, 435-38, 440-42, 450-52 (3d Cir. 2017) ("Granted, the contours of a given right are necessarily co-extensive with the scope of conduct that violates that right, so that where it would not be clear to 'a reasonable official ... that what he is doing violates [a] right,'. . . the second prong of qualified immunity would not be satisfied regardless of whether the lack of clarity arose from an uncertain theory of liability or from the application of a clearly established theory of liability to a set of facts so novel as to deprive an actor of fair notice of the violative nature of his actions. But where a defendant contends that neither the theory of liability nor the right at issue is clearly established, the reviewing court may need to analyze both to determine conclusively whether the defendant is entitled to qualified immunity. . . .Here, the District Court addressed the 'clearly established' inquiry only in the first sense, determining that the theory of liability was not clearly established. Because we conclude this was error, we also address the inquiry in the second sense, assessing whether, under the facts of this case, the specific right at issue was clearly established. . . . Here the District Court examined one of the elusive aspects of deliberate indifference with which we and other Courts of Appeals have wrestled over time: whether deliberate indifference in the substantive due process context—as opposed to the Eighth Amendment context—may be satisfied using an objective test or only a subjective 'actual knowledge' test. . . In the Eighth Amendment context, the Supreme Court has rejected an objective standard for 'deliberate indifference,' i.e., a standard where liability may be premised on an official's objective 'failure to alleviate a significant risk that he should have perceived but did not,'. . . and the Court has instead explicitly required a showing of 'subjective culpability,'. . . i.e., a showing that 'the official kn[ew] of and disregard[ed] an excessive risk[.]'. . But uncertainty

about whether this 'subjective culpability' requirement carried over to pretrial detainees and other plaintiffs asserting substantive due process claims produced a split among the Courts of Appeals. . . That split led us in *Sanford* to note, in the substantive due process context, 'the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known,'. . . and to acknowledge shortly thereafter that we 'ha[d] not yet definitively answered the question of whether the appropriate standard in a non-Eighth Amendment substantive due process case is subjective or objective,' *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 430–31 (3d Cir. 2006). More recently, both the Supreme Court and this Court have spoken to the issue. In *Kingsley v. Hendrickson*, . . . distinguishing between the different language of the Eighth Amendment and the Due Process Clause and the different nature of those claims, the Supreme Court held that a pretrial detainee claiming a substantive due process violation based on excessive force 'must show ... only that the officers' use of that force was *objectively* unreasonable' and not 'that the officers were *subjectively* aware that their use of force was unreasonable.'. . . Consistent with this approach, we too recently embraced an objective standard in the context of a substantive due process claim—in particular, for a claim of state-created danger. In *L.R. v. School District of Philadelphia*, we denied qualified immunity to a teacher who released a kindergartener to a stranger who then abused the child. . . After reiterating our observation in *Sanford* that 'deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known,'. . we held this standard was met by the allegations in that complaint. . . . Seeking to benefit from the trajectory of this case law, . . . Appellant would have us rely on *L.R.* to conclude an objective standard of deliberate indifference was clearly established at the time Schroeter shot Kedra and to reverse the District Court on that basis. We reject that invitation, however, because we assess qualified immunity based on the law that was 'clearly established at the time an action occurred,'. . . while *L.R.* was not decided until nearly two years after the action at issue in this case. That is, regardless of what may be deemed 'clearly established' in the wake of *Kingsley* and *L.R.*, we must look to the state of the law at the time of shooting. And at that point, as the District Court correctly recognized, it was not yet clearly established whether deliberate indifference in the substantive due process context was governed by an objective or subjective standard. . . The question to which we therefore turn is whether Appellant pleaded deliberate indifference under the subjective test, which was then-clearly established, or under an objective test, which then was not. . . . Contrary to the way that Schroeter and the District Court characterize it, the complaint here clearly and unmistakably alleges facts that support an inference of actual, subjective knowledge of a substantial risk of lethal harm, and neither the Supreme Court nor we have wavered from the well-established principle that a plaintiff may plead and prove deliberate indifference in the substantive due process context using this subjective test. . . . The risk of lethal harm when a firearms instructor skips over each of several safety checks designed to ascertain if the gun is unloaded, points the gun at a trainee's chest, and pulls the trigger is glaringly obvious, and this obviousness supports the inference that the instructor had actual knowledge of the risk of serious harm. . . . '[D]raw[ing] all inferences from the facts alleged in the light most favorable to [Appellant],'. . . the allegations in Appellant's complaint are more than sufficient to state a claim for a state-created danger based on actual knowledge of a substantial risk of serious harm—the subjective theory of deliberate indifference that was then-

clearly established. . . .Having concluded that the facts, as alleged, plead the elements of a substantive due process violation under a clearly established theory of liability, we must still contend with Schroeter's argument that there was no precedent sufficiently '*factually similar to the plaintiff's allegations*[ ] to put [him] on notice that his ... conduct [was] constitutionally prohibited.'. . .Here, in view of the allegations of the complaint, we define what is at issue as an individual's right not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols. . . We then must determine whether the contours of that right are sufficiently clear that 'a reasonable officer would understand that what he is doing violates that right.'. . We typically look to Supreme Court precedent or a consensus in the Courts of Appeals to give an officer fair warning that his conduct would be unconstitutional. . . . We are persuaded that Schroeter had such fair warning at the time of the shooting. This was not merely an accidental discharge of a firearm that happened to be 'point[ed] ... at another officer' at the time. . . Instead, at a training Kedra was required to attend, he was subjected to his training instructor contravening each and every firearm safety protocol by skipping over both required safety checks, treating the firearm as if it were unloaded, pointing the firearm directly at Kedra, and pulling the trigger. Our case law made it clear at that time that state actors may be liable for affirmatively exposing a plaintiff to a deadly risk of harm through 'highly dangerous ... conduct,'. . . or through 'us[ing] their authority as police officers to create a dangerous situation or to make [the victim] more vulnerable to danger had they not intervened,'. . . and that officials are expected to use the benefit of their expertise and professional training when confronted with situations in which they are responsible for preventing harm to other individuals[.]. . Under that case law, no reasonable officer who was aware of the lethal risk involved in demonstrating the use of deadly force on another person and who proceeded to conduct the demonstration in a manner directly contrary to known safety protocols could think his conduct was lawful. . . .In addition to our own case law and that of the Supreme Court, 'we routinely consider decisions by other Courts of Appeals as part of our "clearly established" analysis when we have not yet addressed the specific right asserted by the plaintiff.'. . A closely analogous case from the First Circuit confirms that a reasonable officer would anticipate liability for this conduct. [discussing *Marrero-Rodriguez v. San Juan*, 677 F.3d 497 (1st Cir. 2012)] . . . In sum, the right alleged to have been violated was clearly established, and Appellant's complaint sufficiently pleads a violation of that right. Accordingly, Schroeter was not entitled to qualified immunity.")

Kedra v. Schroeter, 876 F.3d 424, 452-53, 457-58 (3d Cir. Nov. 28, 2017) (Fisher, J., concurring) ("I file this concurrence to explain my belief that the District Court's judgment should be reversed on narrower grounds than those on which the majority relies. . . . The District Court granted Schroeter qualified immunity under the second prong, concluding that it was not clearly established that he could violate a constitutional right without actual knowledge that his actions posed a substantial risk of harm. The majority reverses, concluding that (1) Kedra has pleaded that Schroeter acted with actual knowledge that his actions posed a substantial risk of harm, and (2) the right at issue here was clearly established. . . . I would limit this decision to the narrowest possible grounds, and would reverse solely because of the allegation that Schroeter pleaded guilty to recklessly endangering another person in Pennsylvania court. I do not believe that the other

allegations on which the majority relies are sufficient—separately or together—to state a claim. . . . In short, after scrutinizing the entire complaint, I conclude that aside from Schroeter's guilty plea to reckless endangerment, the remaining allegations in Kedra's complaint make out only a strong case of negligence. I do not believe they would be sufficient, by themselves, to state a claim that Schroeter acted with the deliberate indifference required to shock the conscience. . . .To summarize, Kedra adequately pleaded deliberate indifference, and therefore she alleged all four required elements of a state created danger claim. . . Having adequately pleaded her constitutional claim, Kedra has met the first requirement of the qualified immunity analysis: conduct by an officer that violates a federal right. . . I arrive, then, at the second element that must be shown in order to defeat Schroeter's claim of qualified immunity: that 'the right in question was clearly established at the time of the violation.'. . I agree with the majority's conclusion that the right at issue in this case was clearly established—but again, based on different reasoning. . . .The majority defines the right at issue here as 'an individual's right not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols.'. . I would define the right more narrowly, and in accordance with my analysis of the first qualified immunity prong in Section I.A., as: a police officer's right not to be subjected to a firearms training in which the instructor acts with deliberate indifference, that is, consciously disregards a known risk of death or great bodily harm. Schroeter's admitted deliberate indifference is crucial, in my opinion, to the conclusion at the first step of the analysis that a right was violated. . . Therefore, in order to narrowly define the right in light of the particular conduct at issue, . . . I would include deliberate indifference in the definition. . . Given the unique facts of this case—namely, Schroeter's guilty plea—I believe it is appropriate to tether the right in question to the standard of care he admitted he breached. The majority's approach, by contrast, suffers from its focus on the violation of 'all applicable safety protocols,' which will inevitably lead to disputes over how many safety protocols need to be violated for qualified immunity to be forfeited. And those disputes, I predict, will devolve into a negligence-type analysis, which precedent clearly forbids. The majority's definition of the right could prove fertile ground for future plaintiffs seeking to lower the bar yet further in § 1983 cases. Turning to whether the right as I define it was clearly established, I conclude that in light of existing case law, a reasonable person could not have believed that it was consistent with Kedra's substantive due process rights to subject him to a firearms training at which the instructor was deliberately indifferent to his safety. Therefore, the right was clearly established. Unlike the majority, I do not read existing cases as being 'fundamentally' or 'materially' similar to this one. . . The lack of on-point precedent gives me pause, because a case's 'present [ation] [of] a unique set of facts and circumstances' can be 'an important indication' that the conduct at issue 'did not violate a clearly established right.'. . Nonetheless, I feel constrained to conclude that Supreme Court and Circuit precedents have 'clearly established' the 'violative nature,'. . . of conducting a firearms training with deliberate indifference to a known risk. To begin with, the deliberate indifference standard was clearly enunciated in the state created danger context more than a decade ago and was clear at the time of Kedra's death in 2014. . . While our state created danger cases are not factually similar to this one—they do not involve police officers conducting firearms training—I cannot see how any

reasonable official could believe that acting with deliberate indifference in the police firearms training context would be consistent with trainees' constitutional rights.")

In Re: J & S Properties, LLC, 872 F.3d 138, 143-45 (3d Cir. 2017) ("We . . . hold that bankruptcy trustees are government officials, entitled under *Harlow* to qualified immunity from § 1983 claims by third parties when they act in their official capacity in a manner that is not contrary to clearly established law. . . .In this case, Swope was not plainly incompetent and did not violate clearly established law. We agree with the Bankruptcy Court that there is a 'dearth of case law on the topic' of whether a bankruptcy trustee may take control of a building which she is obliged to preserve and which is at imminent risk of destruction or damage, especially in the face of the lack of cooperation by a third-party tenant. . . Rather than point to any case balancing a bankruptcy trustee's duties to preserve the estate under her care in the face of 'exigent circumstances' and her duties to a third-party tenant, . . .Phoenician cites black-letter Pennsylvania law indicating that self-help eviction is generally impermissible. . . .The Supreme Court has cautioned that the question of 'objective legal reasonableness' with respect to clearly established precedent should not be applied at too high a level of generality. . . Phoenician makes that mistake by noting that its rights to due process of law and to be free of illegal seizure are 'quite clearly established.'. . But the existence of those clearly established rights sheds no light on whether Swope's actions would violate them in the circumstances presented here. . . The cases Phoenician cites do not approach the level of specificity required for clearly established law. . . .None of the cases upon which Phoenician relies involved a trustee attempting to preserve assets of an estate under her care in the face of past and future damage to those assets. And considering Phoenician's lack of cooperation by giving Swope a key that only opened the outer door, its refusal 'to keep the property adequately heated,' and its failure to meet at the property and maintain insurance, . . . there is no law that clearly establishes the unlawfulness of Swope's actions. . . . It strains credulity to suggest, as Phoenician does, that 'every reasonable official would have understood that what' Swope did constituted an impermissible eviction that violated due process.")

Borrell v. Bloomsburg Univ., 870 F.3d 154, 162-63 (3d Cir. 2017) ("The record indicates that it is hardly 'beyond debate' that Ficca violated Borrell's due process rights. Although many cases have concluded that graduate students at public universities have property interests in continuing their education, . . . those cases do not speak to the right of a clinical student at a private hospital to a hearing or comparable process before termination—even if the natural consequence of that termination is an inability to complete an educational program. The District Court pointed to no cases even suggesting such a right and we are aware of no such case. And the district court cases cited cannot clearly establish law for qualified immunity purposes in any event. . . . In responding to Ficca's qualified immunity argument, Borrell seems to miss the relevant question—would a reasonable official have known that her actions violated a clearly established right? Even if, as Borrell claims, Ficca should have known that Richer's actions were disciplinary and not academic, and Borrell was thus entitled to more process from someone, this does not answer the question of whether Ficca was that person. Given all the factors discussed herein, and given her reasonable understanding that she could not have provided process for the clinical dismissal even if she

thought it was necessary in the abstract, the District Court should have granted qualified immunity to Ficca.")

Fields v. City of Philadelphia, 862 F.3d 353, 355-62 (3d Cir. 2017) ("Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public. [collecting cases] Today we join this growing consensus. Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public. . . .Defendants ask us to avoid ruling on the First Amendment issue. Instead, they want us to hold that, regardless of the right's existence, the officers are entitled to qualified immunity and the City cannot be vicariously liable for the officers' acts. We reject this invitation to take the easy way out. Because this First Amendment issue is of great importance and the recording of police activity is a widespread, common practice, we deal with it before addressing, if needed, defenses to liability. . . . We have not ruled on the First Amendment right, instead merely holding that at the time of our rulings the claimed right was not clearly established. *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010); *True Blue Auctions v. Foster*, 528 F. App'x 190 (3d Cir. 2013). In the years since, First Amendment issues from the recording of police activity recur, and they deal directly with constitutional doctrine. With technological progress and the ubiquity of smartphone ownership—especially in the years since our *Kelly* decision—we are now in an age where the public can record our public officials' conduct and easily distribute that recording widely. This increase in the observation, recording, and sharing of police activity has contributed greatly to our national discussion of proper policing. Consequently, police departments nationwide, often with input from the U.S. Department of Justice, are developing polices addressing precisely these issues, and our opinion can assist in their efforts to comply with the Constitution. Moreover, in the case before us the constitutional question is not 'so factbound that [our] decision [will] provide[ ] little guidance for future cases.'. . All we need to decide is whether the First Amendment protects the act of recording police officers carrying out official duties in public places. We also have excellent briefing on appeal, including counsel for the parties and eight *amici*, including the U.S. Department of Justice, the Cato Institute, well-known First Amendment law professors, and some of the largest news organizations in the country. We therefore address the First Amendment question before moving to the defenses. . . . The First Amendment protects the public's right of access to information about their officials' public activities. . . .[R]ecording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public. . . .We do not say that all recording is protected or desirable. The right to record police is not absolute. '[I]t is subject to reasonable time, place, and manner restrictions.'. . But in public places these restrictions are restrained. We need not, however, address at length the limits of this constitutional right. Defendants offer nothing to justify their actions. Fields took a photograph across the street from where the police were breaking up a party. Geraci moved to a vantage point where she could record a protestor's arrest, but did so without getting in the officers' way. If a person's recording interferes with police activity, that activity might not be protected. For instance, recording a police conversation with a confidential informant may interfere with an investigation and put a life at stake. But here there are no countervailing concerns. In sum, under

the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas. . . . To determine whether the right is clearly established, we look at the state of the law when the retaliation occurred, here in 2012 (Geraci) and 2013 (Fields). . . To conduct the clearly established inquiry, we 'frame the right "in light of the specific context of the case, not as a broad general proposition,"'. . . as it needs to be 'specific enough to put "every reasonable official" on notice of it.'. . At issue here is Plaintiffs' ability to record the police carrying out official duties in public. We have never held that such a right exists, only that it might. . . In 2010 we held that there was no clearly established right for the public to do so, at least in the context of a police traffic stop. . . Only a few years later in 2013, in a non-precedential opinion, we held that '[e]ven if the distinction between traffic stops and public sidewalk confrontations is [ ] meaningful ... [,] our case law does not clearly establish a right to videotape police officers performing their duties [in 2009].'. . . So to resolve whether the right has become clearly established after these decisions, we must decide whether a 'robust consensus' has emerged that puts the existence of this First Amendment right 'beyond debate.'. . .Plaintiffs contend the absence of Circuit precedent does not end the inquiry, as after the events in *Kelly* and *True Blue* the Philadelphia Police Department adopted official policies recognizing the First Amendment right of citizens to record police in public. As plausible as that may be on the surface, it does not win the argument. With one breath Plaintiffs assert that these policies clearly established their legal right, but for purposes of municipal liability (an issue we remand) they vigorously argue that the policies were utterly ineffective in conveying to the officers that this right clearly existed. And Plaintiffs have compiled evidence indicating this was so. . . .As to decisions of other appellate courts relevant to the qualified immunity analysis, Defendants and the District Court argue that those decisions are distinguishable because they involved expressive intent or an intent to distribute. . . .Indeed, the Fifth Circuit just this year recognized that these other appellate decisions did not clearly establish the constitutional right to record. . . Where District Courts in our Circuit have held in favor of the First Amendment right, Defendants also distinguish those cases for requiring expressive act or intent, not just recording alone, once again echoing the reasoning of the District Court here. . . .Whether Defendants and the District Court correctly distinguished these cases, we cannot say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected. Accordingly, the officers are entitled to qualified immunity.")

Fields v. City of Philadelphia, 862 F.3d 353, 362-65 (3d Cir. 2017) (Nygaard, J., concurring in the part, dissenting in part) ("I agree with the majority that the cause must be remanded. Because I conclude that the First Amendment right at issue is and was clearly established, I dissent. . . .First, as the majority notes, every Circuit Court of Appeals that has considered the issue ruled that there is a First Amendment right to record police activity in public. Four of these decisions were published before the conduct at issue here, and two of them occurred after our decision in *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010), in which we posited that the right was not clearly established at that time. *See Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332

(11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). . . I am convinced that such a 'robust consensus,' alone, sufficiently grounds a ruling that the right is clearly established. . . However, our record goes far beyond that. The Police Department's official policies explicitly recognized this First Amendment right well before the incidents under review here took place. . . .Although the Directives declared a First Amendment right well ahead of this Court, the Philadelphia Police Department Commissioner had a desire to 'get out ahead' of what he presciently viewed as an inevitable ruling. With all of this, it is indisputable that all officers in the Philadelphia Police Department were put on actual notice that they were required to uphold the First Amendment right to make recordings of police activity. From a practical perspective, the police officers had no ground to claim ambiguity about the boundaries of the citizens' constitutional right here. Mindful of the established trend among the Circuit Courts of Appeals, this combined with this clear Guidance from the Commissioner sufficiently grounds a conclusion that the right to record official, public police activity was clearly established and 'beyond debate.'. . However, this, too, ignores another piece of the context of this case that should be considered as part of the 'reasonable official' inquiry. The majority cites to the 2011 article of Seth F. Kreimer. . . in which he notes that, given the ubiquity of personal electronic devices with cameras, '[w]e live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private. Capture of images has become an adjunct to memory and an accepted medium of connection and correspondence.' Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (2011). If we are to assess the issue from a reasonable officer perspective, we cannot artificially remove him or her from this widespread societal phenomenon. (Indeed, it is not unreasonable to speculate that most—if not all—of the police officers themselves possessed such a personal electronic device at the time that the incidents underlying these cases took place.) A reasonable police officer would have understood, first-hand, the significance of this proliferation of personal electronic devices that have integrated image capture into our daily lives, making it a routine aspect of the way in which people record and communicate events. Apart from any court ruling or official directive, the officers' own lived experience with personal electronic devices (both from the perspective of being the one who is recording and one who is being recorded) makes it unreasonable to assume that the police officers were oblivious to the First Amendment implications of any attempt by them to curtail such recordings. As I noted above, I concur with the majority's analysis and conclusions regarding the existence of a First Amendment right to record, and agree that the case against the City of Philadelphia should be remanded for further proceedings. However, in light of the social, cultural, and legal context in which this case arose, I am convinced that—in this unique circumstance—no reasonable officer could have denied at the time of the incidents underlying these cases that efforts to prevent people from recording their activities infringed rights guaranteed by the First Amendment. For these reasons, I dissent from the majority's conclusion that the police officers are immune from suit.")

De Ritis v. McGarrigle, 861 F.3d 444, 458 n.12 (3d Cir. 2017) ("As we conclude that there was no constitutional right violated by Roger under then-existing case law, *a fortiori*, such right was not ' "clearly established" at the time of the challenged conduct,'. . . and thus Roger was entitled

to qualified immunity on that independent ground. The District Judge here diligently identified the relevant case law and properly recognized as a general matter that a public employee has a clearly established right to 'alleg[e] misconduct or wrongdoing by public officials.'. . . That description of the right, however, is so general as to encompass not only cases where speech alleging misconduct or wrongdoing is protected, . . . but also those where it is not[.] Under our case law, the 'clearly established' inquiry requires reference not to such 'broad general proposition[s],' but to precedent that is 'factually similar to the plaintiff's allegations,' based on 'the specific context of the case.'")

Bag of Holdings, LLC v. City of Philadelphia, 682 F. App'x 94, ___ (3d Cir. 2017) ("BOH does not cite, and the Court has not found, any precedent clearly establishing that operation of a governmental land sale process which results in more favorable treatment for friends and political contributors amounts to an equal protection violation. To now say that *Olech* established that principle of law would be too near to concluding that any disparate treatment by a government actor without a rational basis—regardless of the factual circumstance—so clearly establishes a violation of the Equal Protection Clause of the Fourteenth Amendment that the question is beyond debate. Such a broad pronouncement would fail to define the right at issue with sufficient specificity, and it would run contrary to a long-recognized purpose of qualified immunity: to shield public officials from potentially disabling threats of constitutional liability except in those situations where they have fair warning that their conduct violates federal law. . .Accordingly, we agree with the District Court's conclusion that Councilman Johnson is entitled to qualified immunity.")

Holt v. Commonwealth of Pennsylvania, No. 15-3302, 2017 WL 1048055, at *6 (3d Cir. Mar. 20, 2017) (not published) ("We start with the First Amendment retaliation claim, for which a plaintiff must prove: (1) constitutionally protected conduct; (2) an adverse action sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) a causal link between the constitutionally protected conduct and the retaliatory action. . . Our Circuit has not considered whether the initiation of an internal investigation can constitute an 'adverse action' for purposes of a First Amendment retaliation claim, and our sister circuits are split on the issue. *Compare Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000) ("Investigating alleged violations of departmental policies ... [is] not [an] adverse employment action[.]"), *with Dahlia v. Rodriguez*, 735 F.3d 1060, 1078–79 (9th Cir. 2013) (holding that placement on administrative leave pending discipline can constitute an adverse action for a First Amendment retaliation cases). This disagreement among our sister courts indicates that Winterbottom is entitled to qualified immunity. After all, '[i]f judges thus disagree on a constitutional question, it is unfair to subject [a public official] to money damages for picking the losing side of the controversy.' *Wilson v. Layne*, 526 U.S. 603, 618 (1999). We next consider Holt's racial discrimination claim, where we apply the *McDonnell Douglas* burden-shifting framework. *See Stewart v. Rutgers, The State Univ.*, 120 F.3d 426, 431–32 (3d Cir. 1997). At the first step of the *McDonnell Douglas* framework, Holt must establish a prima facie case of discrimination, which includes proving by a preponderance of the evidence that he suffered an 'adverse employment action.'. . In the Title VII context, we recently

held that suspension with pay pending an internal investigation does not constitute an adverse employment action. . .And because of the overlap between Title VII claims and constitutional discrimination claims, we have applied Title VII caselaw to equal protection claims. . . Given our holding in *Jones* and the close relationship between Title VII and equal protection claims, it would have been reasonable for Winterbottom to conclude that the initiation of an IAD investigation would not create liability under the Equal Protection Clause. She is thus entitled to qualified immunity.")

Pearson v. Prison Health Service, 850 F.3d 526, 542 n.6 (3d Cir. 2017) ("Nurse Rhodes argued that he was entitled to qualified immunity because it was not clearly established at the time of these events that an official would be liable for a delay in care without expert medical evidence that the inmate suffered harm as a result. This fundamentally misunderstands the qualified immunity inquiry. Qualified immunity requires us to ask whether a reasonable official would have understood, at the time of the challenged conduct, that what he or she was doing violated an established right. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).That analysis cannot turn on facts that could not be known to an official at the time, like whether the plaintiff would ultimately be able to produce expert testimony that the delay resulted in harm. It was sufficiently clear at the time of these events that exposing an inmate to the kind of severe and protracted pain and mental anxiety alleged in this case could expose an official to Eighth Amendment liability.")

Rossiter v. City of Philadelphia, 674 F.App'x 192, ___ (3d Cir. 2016) ("Rossiter alleged that Ramsey and the Department retaliated against him because he exercised his First Amendment right to be a member of the FOP, his union. The District Court found a clearly established right of a public-sector employee to be a member of an association. . . However, what it did not do was focus specifically on the kind of associational activity present in this case. . .That a public employee has a right to associate with a union is unchallenged. What is contested here is whether there is an established right of that employee in a pending disciplinary proceeding to associate passively with a union whose representatives oppose internal policies. . . .In *Sanguigni*, we emphasized *Labov* 'd[id] not make clear' whether *Connick*'s public concern requirement for public employee speech applies in associational cases. . .We recognized that, in the years since we decided *Labov*, our Court had not settled the question of whether a public employee must demonstrate that the union representative's advocacy raises a matter of public concern in bringing a claim for expressive association. . . We reserved judgment on whether the public concern requirement applies to association claims when those claims do not allege retaliation for the member's speech. . .Our sister Circuits are split on whether an employee must demonstrate that the protected activity relates to a matter of public concern to trigger First Amendment associational rights and consequent protections against retaliation. [collecting cases] . . . .We accordingly find no consensus of authority that leveraging a claim against a specific union member facing good faith disciplinary action in an effort to settle internal police affairs implicates a clearly established constitutional right. What the Deputy Commissioner attempted to resolve by tethering Rossiter's case to resolution of union opposition to the Disciplinary Code may not be Hoyle, but it was not established as unconstitutional when it occurred. Therefore, Ramsey and the Department are

entitled to qualified immunity, and we reverse the decision of the District Court and remand this case for it to enter judgment in their favor.")

L.R. v. School District of Philadelphia, 836 F.3d 235, 248-50 (3d Cir. 2016) ("Defendants argue that the District Court defined Jane's right at the highest level of generality: '[Jane's] Fourteenth Amendment right to bodily integrity ... under the state-created danger theory.'. . We agree that this definition is too broad. Individuals indeed have a broad substantive due process right to be free from 'unjustified intrusions on personal security.'. . In light of the specific allegations in the complaint, however, the right at issue here is an individual's right to not be removed from a safe environment and placed into one in which it is clear that harm is likely to occur, particularly when the individual may, due to youth or other factors, be especially vulnerable to the risk of harm. Framed in this way, and surveying both our case law and that of our sister circuits, we conclude that this right was clearly established at the time of Littlejohn's actions. Although there is no case that directly mirrors the facts here, as in *Estate of Lagano*, there are sufficiently analogous cases that should have placed a reasonable official in Littlejohn's position on notice that his actions were unlawful. . . .[W]e conclude that the state of the law in 2013 was sufficiently clear to put Littlejohn on notice that permitting a kindergarten student to leave his classroom with an unidentified adult could lead to a deprivation of that student's substantive due process rights. . . .State-created danger cases often involve unsettling facts and this case is no different. Even so, our resolution of the legal issues is straightforward. Exposing a young child to an obvious danger is the quintessential example of when qualified immunity should not shield a public official from suit. Accordingly, the order of the District Court is affirmed.")

Mammaro v. New Jersey Div. of Child Prot. & Permanency, 814 F.3d 164, 169-70 (3d Cir. 2016) ("In bringing a substantive due process claim, one alleges that the government has abused its power in an arbitrary manner that 'shocks the conscience.'. . In this case Mammaro alleged the arbitrary interference with her right to parent her child. . . She contends that the right at issue is her right to be free from the temporary removal of her child unless there is 'some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.'. . This definition is too broad for purposes of qualified immunity, however. We must frame clearly established law 'in light of the specific context of the case, not as a broad general proposition.'. . . We thus consider the substantive due process right of Mammaro as a parent in light of the specific allegations in her amended complaint. She contends that the caseworkers removed her child after she violated the restrictions on her contact with D.M. by removing the child from supervised housing. At the time of the removal, Mammaro alleges that there was insufficient evidence of past abuse or risk of future abuse by her to justify D.M.'s removal. Even if so, for Mammaro's case to have legs she must show that the law was so well established at that time a reasonable caseworker would have understood that temporarily removing a child in those circumstances would violate substantive due process. . . We conclude that there was no consensus of authority that temporarily removing a child after the parent takes the child from approved housing violates substantive due process. . . . The Court has never found a substantive due process violation when state agencies temporarily remove a child, whatever the circumstances of the

removal. Accordingly, no Supreme Court precedent clearly establishes that D.M.'s temporary removal from her mother's custody violated substantive due process. Likewise, assuming a consensus of persuasive authority could clearly establish a right, there is no consensus that removing D.M. was an unconstitutional interference with the parent-child relationship.")

Estep v. Mackey, 639 F. App'x 870, 872-74 & n.4 (3d Cir. 2016) ("Here, the District Court's order turned on its view that there were disputed issues of material fact, but it reached this conclusion without identifying with the requisite level of specificity the right that was allegedly violated and whether that right was clearly established at the time of the conduct at issue. This omission constitutes a legal error that requires us to vacate the order denying summary judgment. . . In this case, the District Court defined the right at issue as the Fourth Amendment right to be free from the excessive use of force. This formulation lacks the required level of specificity and does not address the question that needs to be answered in this context because it does not describe the specific situation that the officers confronted. . . As a result, we will remand to the District Court to allow it to more specifically identify the right at issue. After the District Court formulates the right, its second task will be to determine if that right was clearly established at the time the taser was used against Baum. While there need not be a case on point, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . Put differently, while a court need not find that 'the very action in question has previously been held unlawful,'. . to be clearly established, it must 'conclude that the firmly settled state of the law, established by a forceful body of persuasive precedent, would place a reasonable official on notice that his actions obviously violated a clearly established constitutional right.' . . If the District Court determines that such a right was clearly established, it would then determine whether the facts it already correctly found to be in dispute are material to assessing whether that right was violated. . . . Our Court has not yet spoken in a precedential opinion about taser use and we decline to do so here, as the District Court has not specifically identified the right allegedly violated and whether it was clearly established at the time Baum was tased. As stated in the text, the identification of the right depends upon the factual circumstances of the case.")

Michtavi v. Scism, 808 F.3d 203, 207 (3d Cir. 2015) ("*Barkes* makes clear that there must be precedent indicating that the specific right at issue is clearly established. There is no Supreme Court or appellate precedent holding that prison officials must treat retrograde ejaculation, infertility, or erectile dysfunction; in fact, the weight of authority is to the contrary. The Magistrate Judge relied on *Skinner*, but *Skinner* establishes only that states may not sterilize prisoners; it does not hold that prisoners are entitled to treatment for infertility or sexual problems. The Court of Appeals for the Sixth Circuit has held that a prisoner is not entitled to treatment for erectile dysfunction. . . . Because there is no authority establishing—let alone 'clearly' establishing—a right for prisoners to receive treatment for a right for prisoners to receive treatment for conditions resulting in impotence and/or infertility, such as retrograde ejaculation or erectile dysfunction, Appellants are entitled to qualified immunity.")

Young v. Martin, 801 F.3d 172, 180 & n.8, 182 (3d Cir. 2015) ("[I]n *Hope,* the Supreme Court applied its excessive force jurisprudence for the first time to a prisoner's allegation that his placement in mechanical restraints was unconstitutional. We conclude, under *Hope,* that Young's claims should be analyzed under the excessive force test and that such analysis demonstrates that the District Court's grant of summary judgment was in error. . . .We conclude from our independent review of the videotape and record evidence that the District Court failed to draw all reasonable inferences in Young's favor and that, when those inferences are properly drawn, there are genuine disputes of material fact as to whether the Defendants' use of the restraint chair in this case violated the Eighth Amendment. . . .In sum, applying the use of excessive force test, analyzing the record under the criteria identified in *Hope,* and drawing all inferences in favor of Young as the nonmoving party, we cannot say that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'. . .The Defendants also ask us—in a single sentence—to affirm on the ground of qualified immunity. The District Court did not reach the issue and the availability of the defense was not briefed on appeal. In *Hope,* the Supreme Court held that the officers were not entitled to qualified immunity because their actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . We will leave this issue for the District Court to address in the first instance on remand, considering (1) whether 'the state of the law' in 2009, including *Hope,* gave the Defendants 'fair warning that their alleged treatment of [Young] was unconstitutional,'. . . and (2) whether Young's confinement in the restraint chair violated prison regulations of which the Defendants were aware[.]. . . While we conclude that the particular claims here concerning the use of mechanical restraints are properly analyzed under the excessive force test, we note that the record in this case, reflecting Young's detention in solitary confinement for over six years, and the DOJ investigative report, detailing prolonged solitary confinement at SCI–Greene and five other Pennsylvania prisons, raises serious concerns under the Eighth Amendment's conditions of confinement test. As Justice Kennedy recently observed, '[y]ears on end of near-total isolation exact a terrible price.' *Davis v. Ayala,* —– U.S. ——, ——, 135 S.Ct. 2187, 2210, 192 L.Ed.2d 323 (2015) (Kennedy, J., concurring)[.]")

Potts v. Holt, 617 F. App'x 148, 151-53 (3d Cir. 2015) ("The District Court determined that defendants had not adduced evidence sufficient to show that their suspension of the certified meals program was reasonable under *Turner* or that it satisfied the RFRA standard. We agree with these determinations because, inter alia, defendants did not establish the nature or even the existence of any nexus between the salmonella outbreak/lockdown and their suspension of certified religious meals. . .The District Court concluded, however, that Potts's rights were not clearly established at the time of defendants' alleged conduct. . . . The District Court defined the right at issue in this case as the right to 'religious meals during a prison-wide lockdown that resulted after an outbreak of food poisoning (or disease generally) in the inmate population.'. . The District Court further concluded that such a right was not clearly established because there is no case law addressing an inmate's right to religious meals in a similar factual scenario. There does indeed appear to be a dearth of such case law. . . . 'Even though there may be no previous precedent directly on point,' however, 'an action can still violate a clearly established right where a general constitutional rule already identified in the decisional law applies with obvious clarity.'. .Such is the case here. At the

time of defendants' alleged conduct, it was clearly established in this Circuit that prisoners' general right to freely exercise their religion gives them the more specific right to be served religiously acceptable meals while in prison. . . It also had long been established that prison officials may constitutionally infringe that specific First Amendment right when prison administration so requires, but only when the infringement is reasonable under the *Turner* factors. . . And RFRA clearly establishes that defendants may not substantially burden an inmate's exercise of religion without satisfying the standard set forth in 42 U.S.C. § 2000bb–1(b). Thus, at the time of defendants' alleged conduct, it was clearly established both that Potts had a right to religiously acceptable meals and that defendants could not infringe on that right without sufficient justification under *Turner* and RFRA. . . In light of our precedent addressing prisoners' religious diets, no reasonable prison official could have believed that he or she could simply withhold Potts's religious meals for two weeks in the absence of some justification. And in light of *Turner* and RFRA, no reasonable prison official could have believed that the salmonella outbreak and lockdown provided such justification in the absence of some nexus between the outbreak/lockdown and defendants' ability to provide religious meals, which the current record does not reveal. . . .In sum, the District Court erred in concluding on this record that defendants are entitled to qualified immunity on Potts's First Amendment and RFRA claims. We express no opinion on the merits of those claims or on whether, at some later stage, defendants might show that they are entitled to qualified immunity.")

Vargas v. City of Philadelphia, 783 F.3d 962, 972 n.13 (3d Cir. 2015) ("The officers' conduct here would also be shielded by qualified immunity. . . The case law does not indicate any analogous factual circumstances that would have put the officers on notice that they cannot briefly detain individuals in response to an emergency call and to await trained medical transport without violating the Fourth Amendment. We had not, before today, expressly held that the community caretaking doctrine could justify the seizure of a person outside of a home, which suggests that, to the extent there was doubt, the law in this area was not 'clearly established.'")

Estate of Lagano v. Bergen Cnty. Prosecutor's Office, 769 F.3d 850, 859 (3d Cir. 2014) ("The District Court focused on the second prong of the qualified immunity analysis, holding that the constitutional right claimed to have been violated was not clearly established at the time of Lagano's murder. In reaching this conclusion, the District Court reasoned that because '[t]here are no published cases that extend the state created danger right to confidential informants in the Third Circuit[,] ... it would be unfair to hold that a constitutional right was "clearly established."'. . The District Court defined the right asserted by the Estate as 'a confidential informant's constitutional right to nondisclosure.'. . We cannot endorse the District Court's unduly narrow construction of the right at issue, or its statement that the right was not clearly established. It has been clearly established in this Circuit for nearly two decades that a state-created danger violates due process. . . That we have not applied the state-created danger theory in the context of a confidential informant is not dispositive on the qualified immunity defense. . . . Thus, the Estate can overcome Mordaga's qualified immunity defense without proving that we have previously issued a binding decision recognizing a state-created danger in the context of the disclosure of a confidential

informant's status, and the District Court erred in requiring it to do so. The focus of the qualified immunity inquiry is on the allegations made by the Estate. Specifically, the question is whether the facts averred by the Estate fall within the elements of the state-created danger theory, and whether 'it would be clear to a reasonable officer' that the alleged disclosure was unlawful under the circumstances. . . We express no opinion as to whether the amended complaint satisfies these inquiries, but, because the District Court failed to apply the proper standard, we must vacate the District Court's decision in favor of Mordaga on the qualified immunity defense.")

Montanez v. Sec'y Pennsylvania Dep't of Corr., 773 F.3d 472, 487 (3d Cir. 2014) ("At the time that the deductions from Hale's account first occurred in February 2004, it was not clearly established in this Court that the failure to provide prison inmates with a pre-deprivation opportunity to object to automatic deductions from their prison accounts violated the Due Process Clause. In 2005, the Pennsylvania Supreme Court decided *Buck v. Beard,* which could be read to suggest that a sentencing hearing was the only pre-deprivation hearing constitutionally required. . . Further, earlier decisions of our Court had held that, in some circumstances, postdeprivation remedies were sufficient constitutional process for deductions. . . For these reasons, there was a sufficient lack of clarity in Third Circuit and Pennsylvania case law regarding automatic deductions that the Corrections Officials should be entitled to qualified immunity in this case.")

Shively v. Green Local Sch. Dist. Bd. of Educ., 579 F. App'x 348, 356, 358 (6th Cir. 2014) ("Here, Defendants' alleged decision not to enforce rules against bullying or punishments for bullying gave students license to act with impunity. We decline to establish a standard in which '[d]ereliction of duty becomes a school's best defense,' particularly in cases such as this where it 'enabl[es] a pattern of physical abuse to persist,' *Morrow v. Balaski,* 719 F.3d 160, 196 (3d Cir.2013) (Fuentes, J. dissenting), and would reasonably be expected to embolden them to continue to escalate their abuse. In any event, even assuming there was a state-created danger, reasonable officials would not have believed that their conduct was unlawful based on clearly established law. Defendants correctly argue that federal cases addressing the state-created danger doctrine have not previously found school officials liable for student-on-student harassment. Although these cases are distinguishable, the fact remains that at the time Defendants violated T.S.'s substantive due process right, it was not clearly established that school officials violate due process by failing to address student-on-student harassment. Accordingly, we reverse the district court's denial of qualified immunity for violations of T.S.'s substantive due process right. . . . The equal protection right to be free from student-on-student discrimination is well-established. *See Williams,* 455 F. App'x at 619; *Murrell,* 186 F.3d at 1250–52; *Flores,* 324 F.3d at 1135. It is difficult to imagine how any school administrator could think he would not be liable for allowing unregulated religious and gender-based persecution that spanned a four-year period. In light of the case law, the Shivelys have pled facts that show Defendants were objectively unreasonable in failing to address their complaints of student-on-student harassment and are not entitled to qualified immunity on the Shivelys' equal protection claim.")

Shively v. Green Local Sch. Dist. Bd. of Educ., 579 F. App'x 348, 360-63 (6th Cir. 2014) (Griffin, J., concurring in part and dissenting in part) ("Although I agree with the majority in most respects, I respectfully disagree with my colleagues regarding two issues. First, the majority finds no error with the district court's blanket denial of immunity to all six individual defendants. I disagree. . . . The district court failed to separately analyze the constitutionality of each defendant's actions. Its failure to do so was error. . . In the same vein, neither did the Shivelys 'plead that each' individual defendant, 'through [the individual defendant's] own ... actions' violated the constitution. . . The Shivelys did make specific allegations as to defendants Booth, Nutter, and Lucas (a school principal and two superintendents, respectively). The Shivelys' complaint alleges that these defendants had knowledge of T .S.'s harassment and that they made decisions about the district's response to that harassment. However, the complaint is deficient regarding defendants Wells, Miller, and Brown. The complaint does not allege any instances where Wells, Miller, or Brown were informed about T.S.'s harassment or that they made any decisions about how to respond to that harassment. The majority concludes that it is proper to allow claims against Wells, Miller, and Brown to proceed, despite the complaint's failure to make allegations regarding these defendants. I respectfully disagree. The majority reaches this conclusion on the theory that, because Wells, Miller, and Brown were administrators of the schools T.S. attended, it is reasonable to infer that they must have known about the harassment and made decisions in response to it. This, however, is precisely the type of inference that the law prohibits. . . For these reasons, I would hold that we should address the claims against Lucas, Booth, and Nutter, as they were properly pleaded. However, the claims as to Wells, Miller, and Brown should be dismissed because the Shivelys have not shown that they are entitled to relief against these defendants. Second, although I agree with the majority that the district court properly concluded that Lucas, Booth, and Nutter are entitled to qualified immunity on the Shivelys' substantive due process claim, I write separately to emphasize that the majority does not hold that the Shivelys have established a substantive due process violation. Rather, it holds that, *assuming* the Shivelys did establish such a violation, the right at issue here was not clearly established. Therefore, the majority's rather extensive discussion regarding whether the Shivelys have established a due process violation is unnecessary. Moreover, in my judgment, the Shivelys could not establish a due process violation in any event. As the majority notes, generally 'a State's failure to protect an individual against private violence ... does not constitute a violation of the due process clause.'. . A failure of the state to protect a citizen is only cognizable if the plaintiff can establish that the 'state-created danger exception' is met. . . . The thrust of the Shivelys' allegations are that Booth, Nutter, and Lucas knew about the violence and harassment to which T.S. was subjected and failed to act. Repeatedly, the Shivelys assert that defendants are not entitled to qualified immunity because 'defendants did nothing to stop' the violence and 'fail[ed] to address' the violence. However, this court has specifically held that a 'failure to act is not an affirmative act under the state-created danger theory.'. . . Accordingly, I would also reverse the district court's judgment on the basis that plaintiffs failed to establish a violation of T.S.'s due process rights.")

Halsey v. Pfeiffer, 750 F.3d 273, 289, 292-96 & n.19 (3d Cir. 2014) ("When falsified evidence is used as a basis to initiate the prosecution of a defendant, or is used to convict him, the defendant

has been injured regardless of whether the totality of the evidence, excluding the fabricated evidence, would have given the state actor a probable cause defense in a malicious prosecution action that a defendant later brought against him. We thus pass to the question of whether a state actor can be liable on a stand-alone claim for fabrication of evidence or whether a defendant's fabrication claim must be included as an aspect of a malicious prosecution claim. . . . To the best of our knowledge, every court of appeals that has considered the question of whether a state actor has violated the defendant's right to due process of law by fabricating evidence to charge or convict the defendant has answered the question in the affirmative. *See Whitlock v. Brueggemann,* 682 F.3d 567, 585 (7th Cir.2012) (collecting court of appeals cases. . . We join these courts in expressly adopting this principle. . . . Accordingly, we hold that if a defendant has been convicted at a trial at which the prosecution has used fabricated evidence, the defendant has a stand-alone claim under section 1983 based on the Fourteenth Amendment if there is a reasonable likelihood that, without the use of that evidence, the defendant would not have been convicted. . . [W]e [do not] decide whether a defendant acquitted at a trial where fabricated evidence has been used against him has an actionable section 1983 claim. We note, however, that if fabricated evidence is used as a basis for a criminal charge that would not have been filed without its use the defendant certainly has suffered an injury. . . . Analogous precedent should have informed appellees or any reasonable state actor that, by fabricating evidence for use in a criminal prosecution, a state actor would violate a defendant's constitutional rights regardless of whether or not the state actor violated other constitutional rights of the defendant. . . .The obviousness of this violation would be difficult to escape even without the closely analogous Supreme Court precedent discussed above. By the time appellees allegedly fabricated Halsey's confession, more than two decades had passed since the Supreme Court had held that the due process clause required that the prosecution reveal exculpatory evidence to a criminal defendant. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963). Reasonable officers should have known that if they could not withhold exculpatory evidence from a defendant, they certainly could not fabricate inculpatory evidence against a suspect or defendant. For these reasons, we will reverse the District Court's entry of summary judgment dismissing Halsey's fabricated-evidence claim.")

Hinterberger v. Iroquois School Dist., 548 F. App'x 50, 2013 WL 6284433, *4 & n.2 (3d Cir. 2013) (not published) ("We note that cases decided in this circuit after Hinterberger's accident have not been models of clarity as to whether a state-created danger claim can be successfully maintained in the context of school sports. [collecting and comparing cases] The differing outcomes in these cases further undermines Hinterberger's contention that Loftus should reasonably have understood her actions in March 2004 to violate a constitutional right. . . . We thus conclude that Hinterberger's alleged right was not clearly established at the time of her accident. It was not 'beyond debate' as of March 2004 that Loftus's decision to introduce a new cheerleading stunt following a delay of several months, through the instruction of an experienced cheerleader, with the use of multiple spotters, but without any matting, violated Hinterberger's substantive due process rights. . . . As Hinterberger's alleged right was not clearly established at the time of her injury, Loftus is entitled to qualified immunity from suit.")

Sharp v. Johnson, 669 F.3d 144, 159, 160 (3d Cir. 2012) ("At issue here is whether Sharp had a clearly established right under the First Amendment to separate religious services in accordance with the Habashi sect of Sunni Islam when Sunni Islamic services were already available. The Supreme Court has stated that '[a] special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.'. . We echoed this when we said, 'The requirement that a state interpose no unreasonable barriers to the free exercise of an inmate's religion cannot be equated with the suggestion that the state has an affirmative duty to provide, furnish, or supply every inmate with a clergyman or religious services of his choice.' *Gittlemacker v. Prasse,* 428 F.2d 1, 4 (3d Cir.1970). . . . Given this precedent, a reasonable official would not have understood the denial of Sharp's request, whether made by Sharp on behalf of either himself or a small number of inmates, to violate a constitutional right.")

Beckinger v. Township of Elizabeth, No. 10-2002, 2011 WL 2559446, at *4, *5 (3d Cir. June 29, 2011) (not published) ("As the District Court reasoned, after *Garcetti* and prior to our decision in *Reilly* on July 1, 2008, the status of First Amendment protection for government employee attendance at hearings as part of employment duties was uncertain. To the extent that *Reilly* clarified the issue, it did so in the context of testimony presented under compulsion of a subpoena in a criminal trial. *Reilly*, therefore, does not stand for the proposition that a law enforcement officer has a First Amendment right to attend voluntarily a parking ticket adjudication hearing in derogation of direct orders to the contrary. Thus, it cannot be said that the right asserted in this case was clearly established when Memorandum No. 07-17 was issued. Moreover, *Reilly* is also distinguishable on the ground that it involved discipline for the content of the employee's testimony. In this case, by way of contrast, the employer made a decision not to pursue parking violation charges against any alleged violators as part of an effort to correct what it felt was an overzealous enforcement of a township parking ordinance. . . . The instant case, rather than focusing on an employer's retaliation based on the substance of testimony, is far more akin to an employer's attempt to restrain the actions of employees which were considered to 'detract from the agency's effective operation.' In this case, a decision was made to not devote public resources to pursuing parking citations issued under unique circumstances. Our holding in *Reilly* certainly did not address this particular context. Nor have the Appellants cited any authority that would preclude a municipality from instructing its law enforcement officers from appearing at hearings to enforce parking violations. Under this set of facts, it simply cannot be said that the Appellants' 'right' to appear at hearings was 'clearly established.' In summary, we find that a government employee's right to attend a court proceeding to enforce parking violations was not clearly established at the time Memorandum No. 07-17 was issued. . . Thus, we will affirm the District Court's finding of qualified immunity for Appellants McNeilly and Black and its concomitant grant of summary judgment on this basis.")

Burns v. PA Dept. of Corrections, 642 F.3d 163, 179 (3d Cir. 2011) ("[W]e do not think it is unreasonable for prison officials at the time of Burns' hearing to have known that: (1) Burns had a property interest in his prison account, (2) he was entitled to due process before his account could

be debited, (3) a later *Holloway* hearing would determine the amount of money to be deducted, but the actual disciplinary hearing was the only forum for determining if any money should be deducted at all, and (4) due process is violated when a determination to deprive an inmate of a protected interest is based solely on the uncorroborated statements of confidential informants. However, two matters give us pause in concluding that Burns is entitled to relief here. First, although it was not unreasonable for a government official to have realized that due process must be provided in adjudicating whether a prison account can be debited, *Burns* is the first case that clearly established that the *assessment* itself implicates a prisoner's protected property interests, even if the account is not actually debited. The devaluation in the property interest in the inmate's funds that results from such an assessment was not clearly established before *Burns I,* and we do not believe that a reasonable official could have foreseen the analogy to a judgment creditor that formed the basis of our holding in *Burns I.* Second, we think it understandable that the existence of a later *Holloway* hearing could have caused a reasonable prison official to believe that, because the Pennsylvania state courts have found that a *Holloway* hearing was *necessary* to satisfy due process, that hearing was also *sufficient* to satisfy due process. Although some officials may have been able to deduce that a *Holloway* hearing was insufficient to satisfy due process, we do not believe that a reasonable official in Canino's position would have had a 'fair warning' that an assessment of the account prior to the *Holloway* hearing was subject to due process protections. Prior to *Burns I,* inmates were only entitled to procedural due process before their accounts were debited. Neither this court, nor any Pennsylvania appellate courts had held that an inmate was also entitled to procedural due process before the account was assessed, even if the fund was not debited before we decided *Burns I.* Thus we cannot conclude that the circumstances here were sufficient to give prison officials 'fair warning' that their conduct was unconstitutional. . . Accordingly, we hold that they are entitled to qualified immunity.")

McSpadden v. Wolfe, No. 08-2209, 2009 WL 1059552, at *5 (3rd Cir. Apr. 21, 2009) ("In the case at hand, Appellees were forced to apply confused caselaw to a confusing factual situation– when presented with a sentence that, in their opinion, violated *Bowser*, they twice wrote for clarification to the sentencing judge, who, in emphasizing that the April 10, 1997, sentence was 'with all appropriate credit for time served,' led them to believe that the credit specified in the amended order had already been applied. In light of the complexity of Pennsylvania sentencing case law, and the fact that Appellees were confronted with Judge New's ambiguous letter, computation of Appellant's sentence constituted a discretionary function for which qualified immunity may be available.").

Yarris v. County of Delaware, 465 F.3d 129, 142, 143 (3d Cir. 2006)("At the outset, we note that *Youngblood* addresses law enforcement officials' constitutional duty to preserve evidence *prior* to conviction, whereas Yarris's claim is based on the CID Detectives' post-conviction conduct. . . . The CID Detectives contend that their alleged mishandling of DNA samples does not amount to a constitutional violation because they could not have acted in bad faith insofar as DNA testing was still in its infancy at the time of the alleged violation. We disagree. . . . [A]ccepting Yarris's allegations as true and drawing all reasonable inferences in his favor, we conclude that even though

DNA testing may have been less common at the time of the alleged mishandling of evidence, the CID Detectives were given fair warning that their conduct was unconstitutional. . . Accordingly, the CID Detectives are not entitled to qualified immunity from this claim at this stage of the proceedings.").

Jones v. Brown, 461 F.3d 353, 364, 365 (3d Cir. 2006) ("*Bieregu* established as a general matter that prisoners have a First Amendment protected interest in being present when their legal mail is opened. . . But as the Supreme Court emphasized in *Saucier*, 'that is not enough.'. . . For two reasons, we believe it cannot be said with confidence that reasonable prison administrators in the defendants' position would have realized that they were violating the teachings of *Bieregu*. First, as we have explained, prison administrators in defendants' position would not have been violating inmates' rights if they reasonably believed they were acting in the interest of inmate and staff health and safety. As we have further explained, the *Turner* test is highly fact sensitive and, at the time the challenged regulation was adopted, there was no guidance in our case law regarding the application of *Bieregu* and *Turner* in the context of the special circumstances encountered in the Fall of 2001. Without being able to determine whether the October 2001 series of anthrax letters had ended or was on-going, a reasonable administrator might well have understood the legal mail policy to be consistent with those cases. Second, even at a later point in time when it became apparent that there was no significant, on-going risk from anthrax attack, we believe a reasonable prison administrator evaluating whether the legal mail policy should be continued might well have concluded that *Bieregu* was no longer sound law. As previously noted, at that point we had declared without reservation in *Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir.1997), that the Supreme Court had 'effectively overruled *Bieregu*.' While we here hold that this was not true with respect to the First Amendment aspects of *Bieregu*, in the absence of authority suggesting otherwise, we cannot find a prison administrator to have been unreasonable in taking our statement in *Oliver* at face value. Accordingly, we will affirm the ruling of both the *Allah* Court and the *Jones* Court that the defendants are entitled to qualified immunity with respect to plaintiffs' damage claims.").

McKee v. Hart, 436 F.3d 165, 171-73 (3d Cir. 2006) ("Before Sattele allegedly engaged in the conduct at issue in this case, we held . . . that a public employee states a First Amendment claim by alleging that his or her employer engaged in a 'campaign of retaliatory harassment' in response to the employee's speech on a matter of public concern, even if the employee could not prove a causal connection between the retaliation and an adverse employment action. . . Jones contends that *Suppan* and *Baldassare*, taken together, were sufficient precedent to put Sattele on notice that his conduct–making harassing comments to Jones arising out of Jones's voicing of concerns about corruption in the pharmaceutical industry–was constitutionally prohibited. In *Suppan*, however, we gave little guidance as to what the threshold of actionability is in retaliatory harassment cases. Instead, we merely held that such a claim existed. . . . Moreover, the alleged conduct in *Suppan* spanned more than a year and involved the supposed lowering of ratings on employees' promotion evaluations and the admonishment of employees because of their union activities and support for a particular mayoral candidate. . . Based only on our acknowledgment of a retaliatory harassment

cause of action in *Suppan* and the facts of that case, a reasonable official in Sattele's position would not have been aware that making a few comments over the course of a few months (the gist of which was asking an employee to focus on his job) might have run afoul of the First Amendment. *Baldassare* also does not further Jones's argument that his First Amendment right to be free from retaliatory harassment was clearly established at the time of Sattele's alleged conduct. That case involved a straightforward retaliation claim brought under the First Amendment in which the plaintiff alleged a direct causal connection between his speech on a matter of public concern and his demotion, . . . not that he was subject to a campaign of retaliatory harassment such as the one involved in *Suppan* and alleged by Jones in this case. Thus, *Baldassare* would not have helped Sattele understand that his conduct might be constitutionally prohibited. . . . *Brennan* provided some additional guidance about what types of conduct would support such a claim, holding that some of the plaintiff's allegations (that he had been taken off the payroll for some time and given various suspensions as a result of his speech) would support a retaliation claim, whereas other of his allegations (including his claim that his supervisor stopped using his title to address him) would not because of their triviality. . . However, *Brennan* was not decided until 2003, after Sattele's alleged conduct, which occurred in the fall of 2002, had already taken place. Thus, to the extent that *Brenna*n added some specificity to the contours of the retaliatory harassment cause of action, an employee's First Amendment right to be free from such harassment was still not clearly established at the time of Sattele's conduct. . . . Accordingly, because of the dearth of precedent of sufficient specificity (and factual similarity to this case) regarding a public employee's First Amendment right to be free from retaliatory harassment by his or her employer at the time of Sattele's conduct, we cannot say that the constitutional right Jones alleged Sattele violated was clearly established. Sattele is therefore entitled to qualified immunity under the second, as well as the first, prong of our *Saucier* analysis.").

Estate of Smith v. Marasco, 430 F.3d 140, 154, 155 (3d Cir. 2005) (***Smith II***)("The question we must address, of course, is not simply whether the behavior of the troopers 'shocks the conscience' under the applicable standard, but whether a reasonable officer would have realized as much. In this regard, 'the salient question' we must ask is whether the law, as it existed in 1999, gave the troopers 'fair warning' that their actions were unconstitutional. . . It is not necessary for the plaintiffs to identify a case presenting analogous factual circumstances, but they must show that the contours of the right at issue were ' Asufficiently clear that a reasonable official would understand that what he is doing violates that right." ' . . While the jurisprudence does not yield a clear definition of 'conscience-shocking' (applicable to situations such as this), we agree with the District Court that the Smiths have not shown that a reasonable officer in the position of these troopers would have understood his conduct to be 'conscience-shocking.' . . We therefore conclude that the troopers are entitled to qualified immunity with respect to the state-created danger claim. . . . [W]e think a reasonable officer could recognize a difference between abandoning a private citizen with whom he had come in contact and failing to prolong a two-hour search for a private citizen whom he has been unable to locate . . . . At this stage, such a difference is sufficient for the officers to be entitled to qualified immunity.").

Rivas v. City of Passaic, 365 F.3d 181, 200, 201 (3d Cir. 2004) ("We discern from these cases that, as of November 1998, our case law had established the general proposition that state actors may not abandon a private citizen in a dangerous situation, provided that the state actors are aware of the risk of serious harm and are partly responsible for creating the opportunity for that harm to happen. As the Supreme Court explained in *Hope v. Pelzer* . . . in some cases 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though Athe very action in question has [not] previously been held unlawful."' In sum, we find that the preexisting law of 'state-created danger' jurisprudence was clearly established. As such, it was sufficient to put Garcia and Rodriguez on notice that their conduct, if deemed unlawful, would not shield them with immunity.").

Doe v. Groody, 361 F.3d 232, 243 (3d Cir. 2004) ("We agree that in determining whether a right is 'clearly established,' we should analyze the right with specificity. . .Where a challenged police action presents a legal question that is 'unusual and largely heretofore undiscussed' . . . or where there is 'at least some significant authority' that lends support of the police action, . . . we have upheld qualified immunity even while deciding that the action in question violates the Constitution. On the other hand, the plaintiff need not show that there is a prior decision that is factually identical to the case at hand in order to establish that a right was clearly established. . . . The principal narrow question in this case is whether in 1999, when these searches occurred, it was clearly established that police could not broaden the scope of a warrant with an unincorporated affidavit. We think that a review of the cases indicates that it was.").

Kopec v. Tate, 361 F.3d 772, 778 (3d Cir. 2004) ("Therefore, we hold that the right of an arrestee to be free from the use of excessive force in the course of his handcuffing clearly was established when Officer Tate acted in this case, and that a reasonable officer would have known that employing excessive force in the course of handcuffing would violate the Fourth Amendment. Accordingly, the district court committed error in granting summary judgment in favor of Officer Tate on the basis of his qualified immunity defense. In reaching our result we point out that other courts of appeals have made determinations consistent with ours. [citing cases] ").

Kopec v. Tate, 361 F.3d 772, 779, 785, 786 (3d Cir. 2004) (Smith, J., dissenting) ("The Supreme Court has repeatedly instructed that the determination of qualified immunity requires particularizing the constitutional right 'in light of the specific context of the case.' . . This is where I believe the majority's analysis falls short, because it only relies on the broad proposition that the Fourth Amendment secures the right to be free from the use of excessive force during an arrest, and concludes that Officer Tate violated this clearly established right. This analysis is flawed, in my view, because it fails to determine what the contours of the right were, and neglects to recognize that the law did not provide Officer Tate with fair warning that he was required to respond more promptly than he did to Kopec's complaint that the handcuffs were too tight. . . . In February 2000, only a handful of cases of § 1983 claims involving tight handcuffing were extant. [citing cases] . . . . Prior to the incident at issue in this case, the caselaw did not provide any guidance with respect to how quickly an officer must respond to a complaint that handcuffs have

been applied too tightly. Nor was there any guidance in the cases as to how an officer should prioritize his response when there are other tasks in which he is legitimately engaged or may be required to undertake at the time. In light of this caselaw, I conclude that Tate could have reasonably believed that his response to Kopec's complaints was lawful. To put it another way, I believe the law did not put Officer Tate on notice that he had to respond immediately to Kopec's complaint that the handcuffs were too tight. Nor was there any caselaw providing Officer Tate with fair notice that he must stop engaging in the legitimate police task at hand, i.e., interviewing Smith, in order to assess whether the handcuffs were too tight. Because the caselaw did not provide Tate with notice that his response was unlawful, he should be entitled to qualified immunity.").

S.G., as Guardian ad Litem of A.G. v.Sayreville Bd. of Ed., 333 F.3d 417, 423 (3d Cir. 2003) ("[W]e hold that the school's prohibition of speech threatening violence and the use of firearms was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate A.G.'s First Amendment rights. In any event, defendants are entitled to qualified immunity because there was no clearly established law to the contrary.")

Atkinson v. Taylor, 316 F.3d 257, 264 (3d Cir. 2003) ("In the present case, without weighing the underlying evidence with respect to Atkinson's claim, we conclude that appellants are not entitled to qualified immunity on the ETS claim of future harm. As the *Warren* Court recognized, the *Helling* decision established the constitutional right required by the first prong of the *Saucier* test. . . Atkinson invokes the constitutional right claimed by the *Helling* prisoner: alleging that he was unwillingly exposed to levels of ETS that pose an unreasonable risk of future harm. Similarly, Atkinson has satisfied the second prong of the *Saucier* test. The right recognized by the *Helling* decision is 'clearly established' so that a reasonable prison official would know when he is violating that right.").

McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001) ("[W]e agree with Defendant that the District Court erred in summarily dispensing with the qualified immunity issue in favor of Plaintiffs. As discussed above, the analytical framework that a court must use in addressing a 'qualified immunity' argument is well-settled in this Circuit. The court cannot–as the District Court essentially did here–stop with a conclusory statement that Stiles' alleged use of 'influence with plaintiffs' employer' violated the first amendment. Rather, the District Court must go one step further and determine whether the facts alleged by plaintiffs violated a 'clearly established right.' This necessarily entails an analysis of case law existing at the time of the defendant's alleged improper conduct. Without such an analysis there is no way to determine if the defendant should have known that what he or she was doing was constitutionally prohibited . . . . In other words, there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited.").

Brown v. Muhlenberg Township, 269 F.3d 205, 211 & n.4 (3d Cir. 2001) ("If the facts asserted by the Browns are found to be true, we conclude that a reasonable officer in Officer Eberly's position could not have applied these well established principles to the situation before him and

have concluded that he could lawfully destroy a pet who posed no imminent danger and whose owners were known, available, and desirous of assuming custody. . . In other words, it would have been apparent to a reasonable officer that shooting Immi would be unlawful. . . . If the unlawfulness of the defendant's conduct would have been apparent to a reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising.").

Brown v. Muhlenberg Township, 269 F.3d 205, 219-22 (3d Cir. 2001) (Garth, J., dissenting and concurring) ("The issue that has divided this panel and which should concern every judge, every police officer and every official who claims qualified immunity by virtue of his or her office is: how do we determine the second prong of the qualified immunity doctrine–i.e., when is the constitutional right which is claimed to have been violated clearly established so as to visit liability on the official? Distressingly, the majority opinion fails to announce a standard by which the bench and the bar can test whether a particular legal principle–that is the particular constitutional right–is 'clearly established' for purposes of qualified immunity. I strongly urge that in deciding this second prong, at the least a balancing process should be undertaken whereby the factors to be balanced are: (1) Was the particular right which was alleged to have been violated specifically defined, or did it have to be constructed or gleaned from analogous general precepts? [citing *Wilson v.Layne*] (2) Has that particular right ever been discussed or announced by either the Supreme Court or by this Circuit? (3) If neither the Supreme Court nor this Circuit has pronounced such a right, have there been persuasive appellate decisions of other circuit courts– and by that I mean more than just one or two–so that the particular right could be said to be known generally? (4) Were the circumstances under which such a right was announced of the nature that an official who claimed qualified immunity would have, acting objectively under pre-existing law, reasonably understood that his act or conduct was unlawful? . . . . Can it really be held that the Fourth Amendment 'seizure of property' right was readily and generally known to apply to the shooting of a Rottweiler which was loose on the street? Can we really say that this particular Fourth Amendment principle was defined with particular specificity and was therefore clearly established for purposes of qualified immunity? I am aware of no authority which defines the principle with sufficient particularity so as to make it applicable to the situation here. . . . The relevant focus has to be on the final part of the qualified immunity inquiry–whether the right allegedly violated was clearly established so that a reasonable official in Eberly's position would understand that what he was doing violated that right. . . . If there has never been a constitutional right articulated that would prevent a police officer from shooting a barking, unleashed, uncontrolled dog such as the Rottweiler which was killed–as there has not been in this jurisdiction or any others–how can the absence of such a right as postulated by the majority constitute a clearly established right so as to hold Eberly liable?").

Doe v. Delie, 257 F.3d 309, 322 (3d Cir.2001) ("We conclude that the contours of defendants' legal obligations under the Constitution were not sufficiently clear in 1995 that a reasonable prison official would understand that the non-consensual disclosure of a prisoner's HIV status violates the Constitution.").

Doe v. County of Centre, 242 F.3d 437, 454 (3d Cir. 2001) ("The Supreme Court has directed that the right in question should be defined in a particularized and relevant manner, rather than abstractly. . . .Therefore, we define the right in question as the right of HIV-positive individuals and related persons to be free from generalized discrimination when public agencies place HIV-negative individuals into their HIV-positive private homes. To defeat qualified immunity, this right must have been sufficiently clear such that a reasonable official would have known that enacting and applying the County's policy would have violated the right. . . To the contrary, however, the placement of HIV-negative children into HIV-positive private homes presents a novel legal issue.").

Sterling v. Borough of Minersville, 232 F.3d 190, 197, 198 (3d Cir. 2000) (". . . Wilinsky testified that he did not include suspicion of homosexual activity in his police report because of the confidential nature of the information. Obviously, then, Wilinsky was aware that one's sexual orientation is intrinsically personal and no compelling reason to disclose such information was warranted. Because the confidential and private nature of the information was obvious, and because the right to privacy is well-settled, the concomitant constitutional violation was apparent notwithstanding the fact that the very action in question had not previously been held to be unlawful.").

Gruenke v. Seip, 225 F.3d 290, 300 (3d Cir. 2000) ("Merely because the Supreme Court has not yet ruled on whether a school official's administration of a pregnancy test to a student violates her Fourth Amendment rights does not mean the right is not clearly established. Moreover, a review of current Fourth Amendment law in the public school context reveals not only that the right is clearly established, but also that Seip's conduct as alleged was objectively unreasonable.").

Bartholomew v. Commonwealth of Pennsylvania, 221 F.3d 425, 429, 430 (3d Cir. 2000) ("[W]hile it was 'clearly established' that warrants must be particular, the narrower and more appropriate question, i.e. whether it was clearly established that one has a constitutional right to be free from a search pursuant to a warrant based upon a sealed list of items to be seized, has not heretofore been answered, at least in those terms. . . It simply cannot be said, therefore, that 'the contours of the right'–the precise right at issue here–were 'sufficiently clear' such that 'a reasonable official would understand that what he[or she] is doing violates that right.' . . . We now make clear what was heretofore not 'sufficiently clear' and hold that, generally speaking, where the list of items to be seized does not appear on the face of the warrant, sealing that list, even though it is 'incorporated' in the warrant, would violate the Fourth Amendment.").

Assaf v. Fields, 178 F.3d 170, 177 (3d Cir. 1999) ("Given the nature of the inquiry in the *Branti-Elrod* cases, we reject appellees' argument that qualified immunity is 'well suited to cases where there is no Abright line" rule.'. . Were we to adopt this position, we would effectively eviscerate the constitutional imperative behind *Branti-Elrod* jurisprudence. Under the qualified immunity regime contemplated by appellees, liability in such areas could never attach because the lack of 'bright line' rules inherent in the doctrine would continually provide cover for violations of

constitutional rights. In an earlier case in which we rejected the defendants' qualified immunity claim, we explained that if we were to require ' Aprecise factual correspondence" between the case at issue and a previous case ... we would not be Afaithful to the purposes of immunity by permitting ... officials one liability-free violation of a constitutional or statutory requirement."' . . . . Contrary to the District Court's assertion, our cases have given guidance to government officials within our circuit. An employee may be terminated for political reasons only if 'a difference in party affiliation [is] highly likely to cause an official to be ineffective in carrying out the duties and responsibilities of the office,' . . . and that only if an employee's duties make it possible to cause 'serious political embarrassment,'. . . will the position meet the narrow *Branti-Elrod* exception.").

Thomas v. City of Philadelphia, No. 17-4196, 2018 WL 684836, at *8-10 (E.D. Pa. Feb. 5, 2018) ("The fundamental distinction between the Fourth and Fourteenth Amendments is temporal: The Fourth Amendment's 'protection against unlawful seizures extends only until trial.'. . Once trial starts, however, the Fourteenth Amendment kicks in: 'The guarantee of due process of law...protects defendants during an entire criminal proceeding *through and after trial*.'. . This temporal distinction suggests that a procedural due process right against malicious prosecution may exist. However, this was, and indeed remains, an unsettled question, meaning that Mr. Thomas fails to overcome the defense of qualified immunity, discussed next. . . .The procedural due process right against malicious prosecution is not clearly established. The Supreme Court has not yet articulated such a right. And the Third Circuit Court of Appeals stopped short of deciding the right's 'viability' in 2014, let alone in the early 1990s when Mr. Thomas interacted with the defendants. . . In response, Mr. Thomas shifts his focus from the *right* to the officers' *conduct*. As he puts it, the 'exact constitutional provision' that has been violated is 'irrelevant,' so long as some constitutional provision is clearly violated. The officers' conduct as alleged in this case was clearly unconstitutional: it violated Mr. Thomas's clearly established *Fourth* Amendment right against malicious prosecution. But the conduct was not clearly unconstitutional under the *Fourteenth* Amendment. Thus, the question becomes: what is a Court to do when certain conduct is clearly unconstitutional, but due to a different constitutional source? Is there still qualified immunity as to the unsettled constitutional source — in this case, the Fourteenth Amendment? The parties each endeavor to marshal case law to support their positions. On the one hand, courts have addressed qualified immunity as providing 'fair and clear warning' to officers 'that their *conduct* is unlawful.' *Halsey*, 750 F.3d at 295 (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc)) (emphasis added); *see also United States v. Lanier*, 520 U.S. 259, 270 (1997) (explaining that "the qualified immunity test is simply the adaptation of the fair warning standard" from the criminal context). As Mr. Thomas put the issue: 'The dispositive question here is whether Defendants Devlin and Worrell were on notice that their conduct violated Mr. Thomas' constitutional rights. The answer is yes.' On the other hand, '[t]he contours of the *right*,' as opposed to the *conduct*, 'must be sufficiently clear that a reasonable official would understand that what he is doing violates *that right*.' *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). The Court holds that this latter 'right-centric' position is the correct one. It would be strange to say that right *X* is clearly established just because right *Y* is clearly established and happens to prohibit the same conduct. Indeed, precisely *because* right *Y* is clearly established (in

this case, precisely *because* a Fourth Amendment right against malicious prosecution is clearly established), Mr. Thomas has a clear avenue to recovery for being the target of a malicious prosecution. Therefore, the Court holds that the individual defendants have qualified immunity from a claim for malicious prosecution in violation of the procedural due process clause.")

Castellani v. City of Atl. City, No. CV 13-5848 (JBS/AMD), 2017 WL 3112820, at *14-15 (D.N.J. July 21, 2017) ("Thus, the question presented here is whether a reasonable officer in Defendant Wheaten's position would have understood that it violated the Fourth Amendment to use mechanical force against an individual who was pinned to the ground face down by five officers and was told '[w]e're ok right now.' Applying the evidence most favorably to Plaintiff, a reasonable officer, even arriving late to the scene and assuming the other officers followed proper procedures, could not have believed that immediately unleashing his K9, without warning or without assessing the situation, to attack a person who, under Plaintiff's testimony, was not resisting arrest and restrained by five officers, was lawful. It would have been clear to a reasonable K9 officer approaching the scene that the unleashing of the K9 to attack the downed civilian was excessive and unconstitutional. Additionally, clearly establishing the existence of the right does 'not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'. . The Supreme Court gave no indication that its decision in *Pauly* was intended to repudiate the proposition that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Furthermore, Justice Ginsberg's concurrence in *Pauly* confirms that the per curium opinion 'does not foreclose the denial of summary judgment' on qualified immunity where fact disputes exist on material issues. . . Accordingly, and in light of the previously identified disputed issues of material fact, Defendant Wheaten is not entitled to qualified immunity. . . While Plaintiff does not submit any factually-identical cases regarding the deployment of a police dog while five officers have already subdued a plaintiff, it was certainly clearly established in June 2013 that even if someone posed a threat at the time force was initiated on them, an officer cannot continue to apply serious force when the threat has subsided. . . .Regardless of what Defendant Wheaten knew as he arrived to the scene and when he initially deployed the dog, it was clearly established at the time that he could not continue holding the dog on Plaintiff for two additional minutes.")

Igwe v. Skaggs, No. CV 16-1403, 2017 WL 395745, at *4-7 (W.D. Pa. Jan. 30, 2017) ("Citing this mid-level culpability standard, Mr. Igwe alleges Officer Skaggs was not involved in a high-speed chase the day of the accident and, having voluntarily undertaken the pursuit, had a reasonable three minute opportunity to deliberate. . .Mr. Igwe alleges Officer Skaggs, against Monroeville's policy, voluntarily joined the pursuit of the suspect despite Officer Supancic's dispatch as 'secondary unit;' failed to advise dispatch he intended to provide assistance until he approached the intersection where the accident occurred; failed to obtain approval from a pursuant supervisor before joining the pursuit in violation of Monroeville's policy; failed to comply with Monroeville's 'Pursuit' and 'Emergency Response' policies as well as Pennsylvania law on pursuits and emergency vehicles; drove his police car at a high rate of speed in the area of a retail shopping

area; entered an intersection against a red traffic signal; and outran the Opticom safety system, all of which evidences Skaggs 'consciously disregarded a substantial risk that great harm would result from his conduct.'. . Taking Mr. Igwe's allegations as true and applying the mid-level culpability standard, the allegations give rise to a plausible claim under a state-created danger theory. The thrust of Mr. Igwe's allegations focuses on Officer Skaggs' decision to *voluntarily* assume a role as a responding officer in violation of Monroeville policy, knew he could terminate his response at any time, and drove his police car in reckless disregard for the safety of the general public. While Mr. Igwe provides us with no authority, nor could we find any, where this alleged conduct shocks the conscience and thus requires we dismiss Officer Skaggs under qualified immunity, we cannot find Mr. Igwe's allegations could never state a substantive due process claim at this preliminary stage. At this stage, we address only whether Mr. Igwe pleaded Officer Skaggs consciously disregarded a great risk of harm by voluntarily joining a police pursuit including over-running several red lights. Until we review the discovery, we defer to Mr. Igwe's allegation of either no need to pursue or a limited emergency. Under this rubric, Officer Skaggs' speeding through traffic lights in a voluntary pursuit of a suspect leaving his vehicle may shock the conscience. . . . Having found Mr. Igwe pleads a plausible substantive due process claim, we now must determine whether this substantive due process right was 'clearly established' when Officer Skaggs decided to join a police pursuit on December 8, 2014. . . .Earlier this month in *White*, the Supreme Court again reminded district courts we must identify a case where an officer acting under similar circumstances violated the Constitution to defeat qualified immunity. . . While our Court of Appeals defined the high standards in a hyperpressurized police pursuit, we are aware of no controlling precedent applying when an officer decides to join in a police pursuit and whether he has time to deliberate. . . A clearly established right is not defined by the state actors' internal guidelines and policies. . . . As conceded by the absence of authority in the parties' briefs, we are unaware of any existing precedent giving fair warning to Officer Skaggs deciding to join an ongoing high speed police pursuit as to his substantive due process liability. We have no guidelines in clearly established law. As in *Taylor*, we have a general standard with no clearly established law. We have general guidance from the Supreme Court in *Lewis* and our Court of Appeals in *Sanford* regarding the officer's potential mid-level culpability depending on the immediacy of the need for police action and generally directing a test focusing on whether he 'consciously disregarded a great risk of harm' in circumstances where there is less than a 'split-second' decision but more than an 'unhurried judgment.' But this general test does not define the procedures or conduct permissible when deciding to join a police pursuit. Officer Skaggs has no clearly established caselaw advising when he can decide to join a high speed police pursuit during the course of his police duties. As in the Fourth Amendment context in *White,* this case of an allegedly voluntary joinder into an ongoing police pursuit presents a unique set of facts and circumstances. . . Also, unlike the Court of Appeals for the Tenth Circuit's decisions in *Browder v. Casaus*, . . . the parties do not dispute Officer Skaggs acted within the scope of his police duties and did not speed for personal purposes. Counsel has not shown, and we are not aware, of any clearly established federal constitutional right contravened by Officer Skaggs' deciding to join a police pursuit and, through violating state driving laws, causing fatal harm to Ms. Robinson. Absent a

clearly established federal constitutional right, Mr. Igwe may seek damages under state law claims but Officer Skaggs is immune from civil rights liability.")

Kenneth v. Palmerton Area Sch. Dist. et al., No. 3:14-CV-00068, 2016 WL 3090404, at *7-8 (M.D. Pa. June 2, 2016) ("The viability of a state-created danger claim is well-settled. . . However, no published opinion of the Third Circuit has found that a state-created danger arises when coaches fail to take certain precautions in athletic practice or in any analogous situation. . . . Here, Plaintiffs allege that the relevant constitutional right is 'the student's right to freedom from school officials' deliberate indifference to, or affirmative acts that increase the danger of, serious injury from unjustified invasions of bodily integrity perpetrated by third parties in the school setting.'. . In support of this constitutional right, Plaintiffs rely on an opinion from the Eastern District of Pennsylvania, *Sciotto v. Marple Newtown Sch. Dist.*, 81 F. Supp. 2d 559, 568 (E.D. Pa. 1999). However, as explained by the Third Circuit in *Hinterberger*, which was decided in 2013, over a decade after *Sciotto* was decided, this right was not clearly established. . . In fact, the Third Circuit cited *Sciottio* in their opinion, yet still found that the right was not clearly established. . . Because Sheldon's alleged right was not clearly established at the time of his injury, Coach Walkowiak is entitled to qualified immunity. Judgment will be entered in favor of Coach Walkowiak on this claim.")

Rodriguez v. Panarello, 119 F. Supp. 3d 331, 342-43 (E.D. Pa. 2015) ("The most compelling aspect of this case is the height at which Plaintiff was standing when the Taser was discharged. The record does not reveal the precise height of the roof of the vehicle on which Mr. Rodriguez was standing at the time, but for purposes of analogy it is enough to note that the prevailing standard for fall protection in general industry workplaces is four feet. . . Despite that, the circuit court decision most analogous to this case is of no help to the plaintiff. In *Harper v. Davis*, an alcohol-fueled disturbance at a barbecue prompted an inebriated suspect to fire a rifle inside a home. . . He then hid in the woods with the weapon, perching on a tree branch eight feet above the ground. . . When found by officers, he was told both to descend the tree and show his hands. . . The suspect protested he could not do both, but identified for the officers the location of the gun down by his feet. . . Upon seeing the gun, even though the plaintiff was not holding it and had volunteered its location, an officer Tasered him, and the resulting fall caused paraplegia. . . The Court concluded that the officer's perception of risk was reasonable and warranted the precautionary use of force. . . In this case, the officers did not see a gun, but responded to radio calls that included a report of shots fired, and a man with a gun. Unlike the suspect in *Harper*, Plaintiff here resisted the officers' instructions, and most importantly he refused to show his hands. The law is clear that an officer need not be accurate in his perception of a risk in order to justify deadly force, but only that his perception of the threat and the corresponding need to use force is objectively reasonable under the conditions he faced. Moreover, to defeat a qualified immunity defense, the right allegedly violated must have been clearly established at the time of the violation. . . . As of 2012, several courts had found the use of a Taser to bring a resisting subject under control was reasonable. . . .The parameters of the constitutional use of a Taser in circumstances like those Officer Panarello confronted would not have been sufficiently clear that a reasonable

officer would have known his conduct was unlawful. . . Officer Panarello is thus protected by qualified immunity for his conduct using a Taser on Plaintiff.")

Kingsmill v. Szewczak, 117 F. Supp. 3d 657 (E.D. Pa. 2015) ("Although the parties did not identify, and we were unable to locate, a case with a cognate claim and a constellation of factual averments, this is the type of case where the alleged conduct is outrageous enough, and the broad contours of the constitutional right sufficiently well-known, that Officer Szewczak was on notice that his conduct violated Kingsmill's constitutional rights. Officer Szewczak lured Kingsmill away from a physical altercation, engaged him in conversation, and then watched as Brown hit Kingsmill in the face with a steel pipe. Officer Szewczak reacted by telling Brown to flee the scene, declining to make a police report, and refusing to render assistance to the injured Kingsmill. . .Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . . Although this particular scenario does not appear to have been considered by our Court of Appeals, the conduct alleged is not the type qualified immunity protects. *Any* reasonable officer at the time of this incident—February 9, 2014—would have known that he had a duty not to place an individual at greater risk of injury from a physical assault by hailing him away from the altercation and then declining to intervene. A reasonable officer would have known that he had a duty not to command such an individual to comply with a directive, so that compliance would increase the risk of harm to him. This is not a case where the 'most that can be said of the state functionaries in this case is that they stood by and did nothing when ... circumstances dictated a more active role for them.'. . . Officer Szewczak exercised his authority to command Kingsmill to disengage from a physical altercation, and, as a result of Kingsmill's compliance, Brown was able to attack him from behind. Officer Szewczak's failure to warn Kingsmill that Brown was approaching from behind might appear more akin to the inaction that prior courts have found insufficient to ground liability under a state-created danger theory. But Officer Szewczak did not just fail to warn: his initial hail and interference with the assault in this circumstance placed Kingsmill at risk of additional serious injury. After placing Kingsmill in greater danger than he had been before, the officer did not bother to warn him of Brown's oncoming assault. Nor is this a case where the exercise of a state actor's discretion did not increase the danger. . . To be sure, Officer Szewczak was not obligated to protect either Kingsmill or Brown, and his knowledge of their altercation was not sufficient to create an affirmative duty to act. But once Officer Szewczak chose to call Kingsmill to his patrol car, and chose to continue their conversation despite Brown's approach, pipe in hand, he put Kingsmill in greater danger of the assault from Brown. . . . Officer Szewczak may not have placed Kingsmill in the physical confrontation with Brown, but observing Kingsmill in such a snake pit, he made it worse by hailing him and commanding him to disengage, leaving him vulnerable to Brown's attack from behind. Such conduct is sufficiently outrageous that a reasonable officer would have known that doing so could violate Kingsmill's constitutional rights. We find that Kingsmill's right to be free from state-created danger in this particular factual circumstance was clearly established when this incident took place in February of 2014, when this incident took place. Officer Szewczak is therefore not entitled to qualified immunity.")

Biddle v. Parker, No. CV 13-343-RGA, 2015 WL 5190694, at *3 (D. Del. Sept. 4, 2015) ("Similar to the claim at issue in *Taylor*, Counts III and IV assert Plaintiff's right to the proper implementation of training, supervision, and policies for handling individuals who suffer from seizures. As of May 16, 2012-the date of the challenged conduct-there was no Supreme Court decision establishing such a right. Further, there was not a 'robust consensus of cases of persuasive authority' suggesting that such a right existed. Plaintiff fails to cite a single case suggesting the existence of an inmate's right to the implementation of adequate training and policies for handling inmates with seizures. . . As the Supreme Court held in *Taylor*, even if HRYCI's training and policies regarding seizures were as deficient as Counts III and IV allege, there was no precedent in May 2012 that would have made clear to Supervisor Defendants 'that they were overseeing a system that violated the Constitution.' *Taylor*, 135 S. Ct. at 2045. Thus, Counts III and IV do not allege a 'statutory or constitutional right that was clearly established at the time of the challenged conduct.' Therefore, Supervisor Defendants are entitled to qualified immunity with respect to Counts III and IV").

Gaymon v. Borough of Collingdale, No. CIV.A. 14-5454, 2015 WL 4389585, at *9-10 (E.D. Pa. July 17, 2015) ("Here, Mrs. Gaymon openly videotaped the officers, and the recording took place within the curtilage of her property and inside her home. No officer could credibly claim any expectation of privacy on Plaintiffs' property or inside their house. If anyone had an expectation of privacy under these circumstances, it was clearly the Gaymons. Unlike *Kelly II,* there are no allegations that Defendant White stopped and in good faith sought advice provided from a prosecuting authority. Moreover, in *Kelly* there was at least some basis on which a uniformed officer might be confused, because the recording there was 'surreptitious,' as opposed to Mrs. Gaymon's open and obvious recording. Without a doubt, Mrs. Gaymon wanted the officer to know he was being recorded. This was not an 'inherently dangerous situation,' such as a traffic stop. . . Rather, the officers responded during daylight to a non-violent complaint about a vehicle's tire touching the curb in a residential neighborhood. . . . *Killingsworth* involved events in 2011. Even if I assume that there was still no clearly established First Amendment right to record officers by 2014, the lack of such a right would not transform a citizen's act of recording on her own property to something criminal in nature justifying arrest. It is certainly clear that the absence of a First Amendment right to record from the confines of one's own home would not amount to exigent or other circumstances that would justify entering the Plaintiffs' home without a valid warrant or consent. . . The *Killingsworth* plaintiffs were all citizens who came upon police activity on public streets and undertook the role of observers and recorders of events. The issues presented by cases of that nature, where the person inserts himself into a situation as the police are discharging their duties, bear little relevance to this case, where Mrs. Gaymon was either on or inside her private property at all times, the police had entered onto that property without permission, and in addition to herself, both her daughter and husband were directly affected by the actions of the police. Finally, Plaintiffs' retaliatory arrest claim focuses on the Plaintiffs' First Amendment right to 'verbally express their disagreement with and challenge the authority' of the Defendant officers. . . 'The Supreme Court has explicitly held that an individual has a viable claim against the government when he is able to prove that the government took action against him in retaliation for

his exercise of First Amendment rights.'. . It is indisputable that 'the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.'. . In fact, the Supreme Court has gone so far as to say that '[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.'. . . Here, a jury could reasonably conclude that the Defendant officers arrested Mrs. Gaymon and Ms. Purnell for voicing disagreement about the officers' actions in violation of the First Amendment. Accordingly, a jury could find liability on every constitutional claim alleged without ever needing to confront the issue of whether recording an officer under these circumstances is protected by the First Amendment. . . It is the combination of factors that make this case compelling to the Court on the facts alleged: the frivolous nature of the neighbor's initial complaint; the absence of lurking risks inherent in other police activities, such as traffic stops; the alleged aggressiveness of the responding officers; the purported threat to deploy Tasers against a family on the premises of their own home; the overall disproportionate response of law enforcement; the protective instincts of a wife and mother seeking only to record what was occurring; the makeweight nature of the criminal charges brought; and finally, the contorted nature of the qualified immunity defense raised. Defendants have the right to contest, and may well disprove, these allegations at trial. But the contention that no reasonable officer would have understood that such conduct would palpably violate our Constitution is utterly lacking in merit. Therefore, qualified immunity is not a viable defense at this preliminary stage. Defendants' Motion has been denied.")

Montgomery v. Killingsworth, No. 13CV256, 2015 WL 289934, at *11-12 (E.D. Pa. Jan. 22, 2015) ("[T]he clearly established right cannot be the broad First Amendment right to be free from retaliation for engaging in protected speech, although the specific right in this case differs from the one the Court defined in *Reichle.* Unlike Reichle, Fleck asserts the constitutional right to be free from an arrest that is *not* supported by probable cause and was initiated in retaliation for peacefully criticizing a government official. This right was clearly established at the time of Fleck's arrest. . . . Under Fleck's version of that day's events, Nicholson and Doe thus violated clearly established law. *Losch* was decided many years before the incident here, and it involved a constitutional right that almost mirrors the right asserted by Fleck in this case: the right to be free from an arrest that lacked probable cause and was initiated in retaliation for the peaceful observation and criticism of a police officer. To be sure, the cases are not factually identical, but the rights invoked in both cases are close enough to establish that 'existing precedent [has] placed the ... constitutional question beyond debate.'. . .[T]he right that Fleck asserts was clearly established because any reasonable officer would have known that arresting her in this manner and for this reason violated her constitutional rights.")

Montgomery v. Killingsworth, No. 13CV256, 2015 WL 289934, at *13-15 & n.7 (E.D. Pa. Jan. 22, 2015) ("Although Montgomery and Loeb urge the court to follow the two-step *Saucier* procedure and first 'reaffirm the existence of a First Amendment right to observe and record public police activities in public,' it declines to do so and addresses only the second *Saucier* step. That is because, unlike Fleck's case, these cases are ones 'in which it is plain that a constitutional right is

not clearly established but far from obvious whether in fact there is such a right.'. . .Under their version of the facts, which the court must adopt here, Montgomery and Loeb were arrested without probable cause while they were peacefully recording police officers performing their duties in public. . . The dispositive inquiry here is thus whether they had a clearly established constitutional right to peacefully record police officers performing their duties in public. . . . Existing precedent is not limited to Third Circuit case law; case law from other circuits is relevant in analyzing whether a reasonable officer would have known that his conduct violated the Constitution. . . Importantly, this inquiry focuses only on the state of the law at the time of the arrests: January 23, 2011, for Montgomery, and July 14, 2011, for Loeb. . . Relying on case law from the First, Ninth, and Eleventh circuits, Montgomery and Loeb contend that this right was clearly established at the time of their arrests. . . . Killingsworth and Gaspar, on the other hand, draw mostly on a Third Circuit case in arguing that the right to peacefully film police conduct was not clearly established at the time of the arrests. . . . Given this pre-existing and recent Third Circuit case law, Montgomery and Loeb did not have a clearly established right to record police officers while they were performing their duties in public. The case law at the time of their 2011 arrests did not establish a clear constitutional rule such that reasonable police officers would know that they were violating the constitutional rights of Montgomery and Loeb. . . . Killingsworth and Gaspar are thus entitled to qualified immunity on the First Amendment retaliation claims asserted against them by Montgomery and Loeb, respectively. . . . Whether the Third Circuit will eventually decide to follow what appears to be a growing trend in other circuits to recognize a First Amendment right to observe and record police activity is, of course, not for this court to decide, even if there are good policy reasons [to] adopt that change.")

Hartman v. Gloucester Tp., No. 12–2085, 2014 WL 2773581, *10-*12 (D.N.J. June 19, 2014) ("Defendants argue that the right to be free from entry of a home under the community caretaking function was not clearly established in April, 2010. *Ray v. Twp. Of Warren* was decided on November 23, 2010 (after Hartman's arrest) and held that:

> The community caretaking doctrine cannot be used to justify warrantless searches of a home. Whether that exception can ever apply outside the context of an automobile search, we need not now decide. It is enough to say that, in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement.

Ray, 626 F.3d at 177. Until *Ray*, the question of whether the community caretaking doctrine could justify a warrantless entry into a home was unanswered in our Circuit; on that basis the Ray police officer defendants were entitled to qualified immunity because it would not have been apparent to an objectively reasonable officer that entry into Ray's home on June 17, 2005 was a violation of the law. While *Ray* resolved the question of whether the community caretaking exception applied to searches of the home, it is not dispositive here. Although Belcher and the other officers may have had a mistaken belief as to whether or not they could enter the home under the community

caretaking exception, application of the exception still requires an evaluation of the totality of the circumstances. And an assertion of a constitutional right to privacy cannot be evidence of wrongdoing or used as justification for warrantless entry. . .Thus, even if the police officers believed they could enter the home under the exception, because Hartman's right was not clearly established, there are questions of facts related to whether the circumstances justified warrantless entry into Hartman's residence pursuant to the community caretaking exception. . . As a result, the Court cannot evaluate whether the police officer's actions were objectively reasonable under the present record, and Defendants' Motion for Summary Judgment is denied on this basis.")

Adams v. Springmeyer, 17 F.Supp.3d 478, 508-09 (W.D. Pa. 2014) ("Nine months *after* the raid at issue in this case, the Court of Appeals continued to question whether *Payton* had established a threshold lower than 'probable cause' to justify an entry into the residence of an individual named in an arrest warrant. . . If the applicable standard was unclear to members of the Court of Appeals *after* the raid, there is no way that it could have been clear to the Defendants at the time of the raid. In *Deary,* the Court of Appeals concluded that defendants sued under § 1983 could not establish their entitlement to qualified immunity as long as genuine issues of material fact existed as to whether their actions had been supported by probable cause. . . To the extent that *Deary* held that a defendant could never establish his or her entitlement to qualified immunity as a matter of law in the face of such a factual dispute, it is no longer good law. In *Karnes v. Skrutski,* 62 F.3d 485, 491, n. 3 (3d Cir.1995), the Court of Appeals recognized that *Deary* had been 'supplanted by the Supreme Court's subsequent determination of the question' in *Anderson v. Creighton,* 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). In *Anderson,* the Supreme Court clarified that a law enforcement officer may be entitled to qualified immunity if he or she 'reasonably but mistakenly conclude[s] that probable cause is present' and proceeds to conduct a search proscribed by the Fourth Amendment. . . .Although the meaning of the phrase 'reason to believe' appearing in *Payton* has been the subject of disagreement among courts, the Defendants cannot establish their entitlement to qualified immunity simply by demonstrating that 'courts ha[ve] not agreed on one verbal formulation of the controlling standard.'. . The relevant question is whether the 'state of the law' on March 3, 2011, gave the Defendants 'fair warning that their conduct violated the Constitution.'. . Regardless of how the applicable standard has been articulated, courts have generally agreed that an entry is permissible under *Payton* only where multiple facts support a belief that the individual named in an arrest warrant is both residing and present within a particular home at the time of entry. . . Extensive surveillance of the Orchard Avenue residence conducted in February 2011 failed to yield a single observation of Hunter. . . . On the basis of the existing record, the Court is not convinced that objectively reasonable officials in the situation faced by the Defendants would have concluded that they had 'reason to believe' that Hunter was still residing and present within the home on the morning of March 3, 2011. . . The Defendants' decision to move forward with the raid appears to have been heavily influenced by Whaley's alleged observation of Black at the Orchard Avenue residence on February 10, 2011. . . In his email of February 25, 2011, Christman expressed a belief that Hunter and Black were living together. . . At the time of Black's earlier arrest, however, it became known that he was a resident of Delaware. . . .This inconsistency in the Defendants' asserted beliefs about the location of Black's residence

undermines their contention that they reasonably believed him to be *living* in the Plaintiffs' home. Reasonable officials in the position of the Defendants would have known that they needed a *search* warrant to 'legally search for the subject of an arrest warrant in the home of a third party.'. . The entering officers sued in *Ray* were entitled to qualified immunity because, at the time of their actions, it had not been clear whether the 'community caretaking doctrine' could justify a warrantless search of a home in the absence of consent or exigent circumstances. . . *Ray* was decided more than three months before the raid conducted at the Orchard Avenue residence. The evidentiary record, when viewed in the light most favorable to the Plaintiffs, could support a finding that Springmeyer entered the Orchard Avenue residence *after* learning that Hunter and Black were not present. . . . At the time of Springmeyer's entry, it was clearly established law that, in the absence of a warrant, a law enforcement officer could enter a home without the consent of the owners only in the face of exigent circumstances. . . Because the Defendants' entitlement to qualified immunity will turn on the existence of facts that have not yet been reduced to findings, the Defendants' motion for summary judgment will be denied with respect to the Fourth Amendment claims remaining in the case. The Defendants remain free to raise the defense of qualified immunity at trial.")

Caldwell v. Nodiff, No. 13–162, 2014 WL 641356, *9, *10 (E.D. Pa. Feb. 18, 2014) ("Notwithstanding the sometimes broad statements about the scope of the failure-to-intervene doctrine, however, the Court has not found a case applying the failure-to-intervene doctrine to a case analogous to this one where the alleged constitutional violation is an unreasonable search and seizure of a person's bodily fluids for the purposes of testing for substance abuse. Under these circumstances, the Court concludes that it would not be clear to a reasonable officer that his failure to intervene in what plaintiff avers was an unreasonable drug test was unlawful. *Walker v. Jackson,* No. 12–cv–10267, 2013 WL 3379685, at *5 (D.Mass. July 8, 2013) ("The court has not found any support for the proposition that allowing a fellow officer to enter a residence and participating in the subsequent search constitutes a claim for failure to intervene."). Thus, the Court concludes that Sgt. Henry and Jane and/or John Does are entitled to qualified immunity with respect to plaintiff's Section 1983 claim insofar as it asserts liability against officers who failed to intervene with respect to the four drug tests.")

Fleck v. Trustees of University of Pennsylvania, 995 F.Supp.2d 390, 408 (E.D. Pa. 2014) ("The plaintiffs were on a public street, not in a car, and initially recorded only their own activity. But when they ignored repeated police requests to move from the mosque doorway and lower their voices, the landscape changed. Marcavage refused to shift the camera away from the Penn officer's face, a refusal she took as a threat. That disregard led to their arrest and the video camera's seizure. Under such circumstances we hold that there was then no clearly-established First Amendment right in our Circuit to film police activity where, as here, the plaintiffs actively impeded efforts to restore public order.")

McAndrew v. Bucks Cnty. Bd. of Comm'rs, 982 F. Supp. 2d 491, 499-503 (E.D. Pa. 2013) ("The Third Circuit has categorically found that testimony, even voluntary testimony, at a grand jury hearing is protected speech. **. . .**Therefore, plaintiff's grand jury testimony as alleged in paragraph

39 of his complaint is protected speech. The court further concludes that plaintiff's reporting of corruption and wrongdoing also implicate the First Amendment because, based on the limited information before the court, it appears that these statements were made in plaintiff's capacity as a citizen, not as a government employee. Plaintiff was a deputy at the Bucks County Sheriffs Office, and the complaint alleges that he complained to his superiors about rigged auto-repair bids, false gun-training certifications, the office's use-of-force policy, corruption, and retaliation for his whistleblowing activities. While the parties have provided only limited information from which the court may infer the boundaries of plaintiff's job responsibilities, the reporting of corruption and wrongdoing does not appear to fall within the ambit of the responsibilities of a deputy sheriff. Furthermore, it is not dispositive that plaintiff learned about the alleged wrongdoing by nature of his position with the Sheriff's Department; indeed 'courts have found that public officials are uniquely qualified to comment on issues of public concern, precisely because of the access to information their positions afford them.'. . After carefully examining the allegations of the complaint and considering the inferences that flow therefrom, the court has determined that plaintiff has stated a plausible First Amendment claim for which relief can be granted, one which discovery may further substantiate. . . Furthermore, the court believes that the Supreme Court's decision in *Garcetti v. Ceballos* as well as a long line of Third Circuit cases addressing the free speech rights of government employees have settled the issue of when a government employee's speech is entitled to First Amendment Protection. . . While these cases may be somewhat distinguishable from the present matter, the Third Circuit has acknowledged that there need not be 'previous precedent directly on point' for a constitutional right to be clearly established for qualified immunity purposes. . . Given the substantial precedent addressing the First Amendment rights of public employees, the court believes plaintiff's rights were clearly established at the time he was discharged from employment. As such, defendants' qualified immunity defense is without merit.")

Ingram v. Township of Deptford, 858 F.Supp.2d 386, 399, 400 (D.N.J. 2012) ("A right is clearly established when 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . It is clearly established that the '[u]se of excessive force by a state official effectuating a search or seizure violates the Fourth Amendment.'. . Moreover, while the law surrounding excessive force is fact-dependent, this does not mean the law is not clearly established. *Tofano v. Reidel,* 61 F.Supp.2d 289, 299 (D.N.J.1999). At the time of this incident, it was clearly established law in the Third Circuit that the objective reasonableness standard articulated in *Graham v. Connor, infra,* and reiterated in *Couden v. Duffy, infra,* applied to alleged excessive force violations of the Fourth Amendment. . .While there was no case law in this circuit addressing the reasonableness of force used when removing a litigant from a courtroom pursuant to a judge's directive, it would have been clear to a reasonable officer in Sergeant Taylor's position that forcibly lifting a non–resisting senior citizen and carrying her out of the courtroom was excessive. Therefore, from the facts alleged in the Plaintiff's complaint, Sergeant Taylor is not entitled to qualified immunity on the allegation that he used constitutionally excessive force in executing the judge's directive. Accordingly, the Defendants' motion to dismiss the claims against Sergeant Taylor will be denied.")

Velius v. Township of Hamilton, No. 09-53 (JEI/JS), 2010 WL 4975979, at *5 (D.N.J. Dec. 7, 2010) ("[T]e Court concludes that in 2007, the law with respect to claims of excessive force by handcuffing, was clear: officers may violate a person's Fourth Amendment right to be free from excessive force even in the absence of physical injury. Defendants are therefore not entitled to qualified immunity.")

Hain v. DeLeo, No. 1:08-CV-2136, 2010 WL 4514315, at *5 (M.D. Pa. Nov. 2, 2010) ("Even now many questions remain as to the scope of the Second Amendment. As the Third Circuit has recently cautioned, 'Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately when addressing regulations unmentioned by *Heller.' United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010). Plaintiffs' argument must therefore be rejected; there is no question that the clearly established legal rules confronting DeLeo would not have put him on notice that his conduct violated the Second Amendment. As a local official, it would not have been clear to him at the time that his actions implicated Plaintiff's Second Amendment right, which was only just recently incorporated by the Supreme Court. Indeed, it was not and is still not clear that the Second Amendment right set out in *Heller* is implicated by the revocation of a license to carry concealed weapons in public. Even interpreting the complaint to allege that the revocation of Plaintiff's permit in retaliation for Plaintiff's exercise of her Second Amendment rights is a distinct Second Amendment violation, qualified immunity applies to Plaintiff's claims against Sheriff DeLeo. Accordingly, the Court finds that DeLeo is entitled to qualified immunity; the Defendants' motion to dismiss will be granted on this claim.")

Burke v. Twp. of Cheltenham, No. 10-1508, 2010 WL 3928524, at *15 (E.D. Pa. Oct. 5, 2010) ("Even though the strip search in question here occurred in April of 2008–well before our Circuit decided *Florence*–we cannot find that the right of an arrestee–even one charged with a minor offense–not to be strip searched *while in a correctional facility* was 'clearly established' twenty-eight months ago. Baskins is therefore entitled to qualified immunity with respect to Burke's unlawful search and seizure claims arising out of the strip search of Burke at the Cheltenham Township Police station. Regarding strip searches incident to arrest, however, Judge DuBois has recently noted that '[n]o Supreme Court case discusses the constitutionality of strip searches incident to arrest, which appear to fall between the "full searches" considered by *Robinson* and the "intrusions beyond the body's surface" considered by *Schmerber*.'. . But the factors elucidated in *Wolfish* that must be considered before ruling on whether a strip search in prison is reasonable–'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted,'. . all militate against the legality of the street strip search described in Burke's complaint. . . . [A] public strip search that fails the four-factor test of *Wolfish* would necessarily be unreasonable given that *Wolfish* explicitly dealt with strip searches *in prisons.*Applying *Wolfish* to Burke's version of the facts, then, we conclude on this limited record that the arresting officers violated the Fourth Amendment when they searched Burke on Fenton Road. While this satisfies only the first prong of *Saucier*, what little precedent there is

dealing with public strip searches suggests that such searches violate clearly established rights under *Saucier*'s second prong.")

Henry v. City of Philadelphia, No. 09-1584, 2010 WL 3927638, at *15, *16 (E.D. Pa. Sept. 30, 2010) ("Since *Grazier*, which was issued on May 9, 2003, and the Third Circuit's decision in *Neuberger*, which was issued on January 5, 2005 but was non-precedential, our Court of Appeals has not answered the question left open by *Abraham v. Raso* in 1999. As a result, we cannot say that, as of August 5, 2007, the notion that an officer violates an individual's constitutional rights if he engages in conduct that unreasonably or unnecessarily increased the likelihood that significant force would be applied against the individual was a constitutional right that was 'clearly established' by virtue of controlling case law in the Third Circuit. . . Nor do we find that a consensus of cases of persuasive authority had embraced this notion as of the relevant date as to have had the effect of 'clearly establishing' it for purposes of the qualified immunity analysis. . . .Having surveyed the case law, we are not persuaded that Henry had a clearly established right as of August 5, 2007 to be free of instructions by officers to drop his knives and come outside, where the officers sought to disarm and subdue him at a time when he was subject to arrest for his earlier assaults on officers and notwithstanding the fact that department policy instructed them to leave such tactics to colleagues in a specialized unit. . . .Because Plaintiffs have not established that any conduct of Officer Orth or Sergeants Schiavone or Bradshaw in directing Henry to emerge from the house violated a clearly established constitutional right, these officers are entitled to summary judgment on the basis of qualified immunity . . . .")

Beckinger v. Township of Elizabeth, No. 08-432, 2010 WL 1024644, at *17 (W.D. Pa. Mar. 17, 2010) ("As evident from *Green*, with respect to whether an employee has a clearly established First Amendment right to attend or testify at judicial proceedings, this court concludes that *Garcetti* called into question whether the testimony of a government employee at a judicial hearing in the course of the employee's duties may constitute speech as a citizen entitled to First Amendment protection. This ambiguity after *Garcetti* lasted until *Reilly* was decided. While *Reilly* recognized that the right was clearly established prior to *Garcetti*, it noted that no precedential opinion was rendered after *Garcetti* until the court of appeals in *Reilly* addressed the issue. The relevant conduct in *Reilly* occurred prior to *Garcetti* at a time when the right was clearly established. *Reilly* did not address the situation where the conduct occurred in the period between *Garcetti* and *Reilly* when there was uncertainty about how broadly *Garcetti* would be applied. . . . The court finds that during the small window of time between May 30, 2006 when *Garcetti* was decided and July 1, 2008 when *Reilly* was decided, it would not have been clear to a reasonable officer that imposing discipline on a police officer for testifying on matters related to the officer's official duties was unlawful.")

Crawford v. Commonwealth of Pennsylvania, No. Civ.A. 1CV03-693, 2005 WL 2465863, at *10 (M.D. Pa. Oct. 6, 2005) ("The individual Defendants argue that because it was not clear at the time of Plaintiff's prosecutions that police were obligated under *Brady* to disclose favorable evidence to the accused, they are entitled to qualified immunity. If this was the extent of the

violation claimed by Plaintiff, Defendants argument might have some appeal. [citing *Gibson*]However, the right to be free from falsifying documents, fabricating evidence, giving misleading or perjured testimony, and malicious prosecution was clearly established. It strains credibility to think that police officers could participate in the conduct alleged here and not understand that their actions violate the accused's rights. . . It is up to Plaintiff to prove by a preponderance of the evidence at trial that the individuals did in fact conspire to alter the evidence in order to convict him and are responsible for his imprisonment. At summary judgment, taking the facts in the light most favorable to Plaintiff, the individual Defendants have failed to meet their burden in demonstrating immunity for the violations claimed.").

Maslow v. Evans, No. 01-CV-3636, 00-CV-5660, 00-CV-5805, 01-CV-1538, 01-CV-2166, 2003 WL 22594577, at *27, *28 (E.D. Pa. Nov. 7, 2003) ("It is beyond question that when Plaintiffs' claim arose it was a clearly established principle of law that a state actor violates another's constitutional rights when he sexually assaults that person in the course of an arrest, or transports a person to her house and then forcibly performs oral sex, or otherwise uses his authority as a state official to force himself sexually upon an unwilling victim. Even if no case had ever proclaimed it so, it would be manifestly clear to any reasonable officer that such conduct is unlawful. . . . Having addressed the law applicable to the subordinate, the Court must next determine whether the supervisory liability doctrine, as it applies to this context, was clearly established. . . As set forth above, Plaintiffs have adduced sufficient facts to make out a constitutional violation, thus satisfying the first step in the *Saucier* analysis. . . The Court concludes that it was clearly established by early 1999 that a supervisor who was deliberately indifferent in the face of an unreasonable risk of harm could be held liable under § 1983 if his inaction bore an affirmative causal link to the harm suffered by the plaintiff. . . . Given the nature, quality and quantity of scandalous and troubling information known to these Defendants, the Court cannot conclude that their legal obligations could have been unclear. Each of these Defendants was aware that Evans had used his authority as a state trooper improperly and that the objects of his egregious misconduct were, on far too many occasions, women or young girls in the community. Defendants contend that it is only with the benefit of hindsight that the extent of Evans' depravity and risk to the community could be known and that these officials acted reasonably at the time. However, the Court is satisfied that the information known to these Defendants in early 1999 would compel a reasonable officer to intervene and take appropriate steps to prevent Evans from abusing his position of power for his own perverted sexual gratification. In these circumstances, no reasonable officer could believe that the Constitution demanded less. Accordingly, these Defendants are not entitled to qualified immunity.").

FOURTH CIRCUIT

Abbott v. Pastides, 900 F.3d 160, 174-75 (4th Cir. 2018) ("For the reasons laid out above, we agree with the district court that the plaintiffs have failed as a matter of law to establish that the University defendants violated their First Amendment rights in connection with the inquiry into the Free Speech Event. . . We note, however, that even if this were not the case, the defendants

would be entitled to summary judgment on qualified immunity grounds. . . [E]ven assuming, *arguendo*, that it were possible to find that the University's response to student complaints arising out of the Free Speech Event transgressed some First Amendment limit, the plaintiffs are unable to identify any precedent – and we have found none – that would put that result 'beyond debate.' As we and other courts have recognized, First Amendment parameters may be especially difficult to discern in the school context. . . And as we have noted, the plaintiffs' claim for damages relief in connection with a speech event that the University approved and for which they were never sanctioned presents some especially novel questions. At a minimum, the University defendants were not on clear notice that their response to student complaints regarding the Free Speech Event violated the First Amendment, and for that reason alone they are entitled to qualified immunity.")

Cannon v. Vill. of Bald Head Island, N. Carolina, 891 F.3d 489, 499-501 (4th Cir. 2018) ("Acknowledging that the fact-specific nature of the *Pickering* inquiry often leads courts to conclude that a defendant is entitled to qualified immunity from a First Amendment retaliation claim, the district court nonetheless held that this Court's opinions in *Cromer* and *Ridpath* clearly established that the balance of interests weighed in the Officers' favor. [Court distinguishes both cases] . . . . [N]either *Cromer* nor *Ridpath* rendered it 'beyond debate,'. . . that the balance of interests weighs in the Officers' favor here. We therefore reverse the district court's determination that Peck and Mitchell were not shielded by qualified immunity from the Officers' First Amendment retaliation claims.")

Cannon v. Vill. of Bald Head Island, N. Carolina, 891 F.3d 489, 502, 506 (4th Cir. 2018) (4th Cir. 2018) ("In the context of a claim that a governmental defendant violated a former employee's Fourteenth Amendment rights by publicly disclosing the reasons for the employee's discharge, as here, this Court has held that this opportunity to be heard 'must be granted at a meaningful time.'. . This is because, as we further held, '[a]n opportunity to clear your name *after* it has been ruined by dissemination of false, stigmatizing charges is not "meaningful."'. . .With this legal framework in mind, we now must determine (1) whether, under clearly established law, the Officers were deprived of a protected liberty interest and (2) if so, whether, under clearly established law, the Officers were deprived of that interest without due process of law. . . . '[H]arassment,' 'sexual harassment,' and 'detrimental personal conduct' amount to 'significant character defects,'such as 'immorality,'. . . and therefore stigmatize the Officers' reputation in a constitutionally cognizable manner. Additionally, the Officers' evidence shows that after the Department released the relevant documents, each Officer either had difficulty securing a job or accepted a job with less significant responsibilities and lower pay, thereby creating a reasonable inference that the claims in the termination letters did, in fact, place a stigma on the Officers' reputations with prospective employers. . . . This Court decided *Sciolino*, *Ledford*, *Ridpath*, and the other cases cited above years before the Department discharged the Officers and disclosed the grounds for their termination. Accordingly, under our qualified immunity analysis, it was clearly established at the time of the disclosures that the disclosed allegations would place a constitutionally cognizable stigma on the Officers' reputations. . . .In sum, under our qualified immunity analysis, at the time

of the disclosures this Court's precedent clearly established that the allegedly stigmatizing statements were made public by Peck. . . . In sum, we conclude that under clearly established precedent, Peck made public false and stigmatizing charges regarding the grounds for the Officers' termination. This satisfies *Sciolino*'s four prongs, thus demonstrating deprivation of the Officers' constitutionally cognizable liberty interests under clearly established law. . . . Having concluded that this Court's decisions clearly established that Peck deprived the Officers of a liberty interest, we now must determine whether, under clearly established law, the Officers were deprived of that interest 'without due process of law.'. . As explained above, when a governmental employer places an employee's reputation 'at stake' by publicly disclosing defamatory charges, the employee is entitled to a hearing 'to "clear [his] name" against [the] unfounded charges.'. . Here, the Officers *never* received a name-clearing hearing. Accordingly, Peck has denied the Officers due process of law. Peck nonetheless asserts that the failure to afford the Officers a name-clearing hearing does not amount to a violation of clearly established law for two reasons: (1) he 'w[as] not required to provide [the Officers] with an adversarial pre-termination hearing,'. . . and (2) '[the Officers] had alternative processes to contest the contents of the termination letter[s][.]'. . We disagree. . . . In *Sciolino*, this Court clearly established that '[a]n opportunity to clear your name *after* it has been ruined by dissemination of false, stigmatizing charges *is not* "*meaningful*."'. . Accordingly, regardless whether the Fourteenth Amendment obliged Defendants to afford the Officers an adversarial, *pre-termination* name-clearing hearing, *Sciolino* established that the Fourteenth Amendment required Defendants to afford the Officers a constitutionally adequate name-clearing hearing before *publicly disclosing* false information regarding the basis for the Officers' termination that, in fact, restricted their ability to obtain new employment.")

Adams v. Ferguson, 884 F.3d 219, 226-30 (4th Cir. 2018) ("The Supreme Court previously required courts to address the first prong before the second. . . In 2009, however, the Court held that judges 'should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . Thus, we now can 'skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.'. .We do so here. . . . *Farmer*, *Iko*, and *Slakan*. . . do not establish that failure to transfer an inmate from a prison to a state mental health facility creates 'an excessive risk to inmate health or safety,'. . . or, as Adams claims, a 'know[n] ... substantial risk' that an inmate will 'suffer[ ] serious harm[.[' . . . This is true even with respect to an inmate subject to a Competency Order or equivalent court order directing treatment of the inmate's mental health needs. Adams has not identified any case law that holds that mentally ill prisoners housed in state prisons, including those subject to Competency Orders or the like, must be transferred to state mental health hospitals to escape an excessive risk to their health. Nor have we found any. Virginia law requires prisons to provide mental health services to inmates. . . The Competency Order scheme presumes that inmates with serious mental health conditions are *more likely* to have their competency restored if they receive treatment at a state mental health hospital. . . But that does not mean that inmates with such conditions who remain in Virginia's prison system are *per se* subject to an 'excessive risk to inmate health or safety.'. .We are not blind to the fact that many prison systems offer inadequate

mental health care. But we are unaware of any clearly established law (or indeed, any law at all) holding that prisons are, as a general rule, unfit to house mentally ill inmates. Instead, inmates regularly challenge, and judges regularly address, the provision of prison mental health services on a system-by-system, facility-by-facility, and prisoner-by-prisoner basis. . . Of course, in this case, the complaint alleges that prison officials affirmatively denied Mitchell his constitutional right to personal health and safety. It maintains that prison guards denied Mitchell food, turned off the water to his cell, and allowed him to live in a less-than-human state. Prison medical staff assertedly provided Mitchell little-to-no medication or treatment for severe mental and physical ailments. The complaint further alleges that guards forced Mitchell 'to the ground, dragged, sprayed with mace, stood upon, punched and kicked' him, and that after he died, 'a correctional officer employee ... attempted to clean Mitchell's cell' to hide the evidence of this systemic mistreatment. Adams has brought suit against some forty-nine other defendants in an effort to hold them liable for this conduct. But these are not the claims alleged against Ferguson. In assessing whether she is entitled to qualified immunity, we must differentiate the claims made against other defendants from those asserted against her. The Tenth Circuit recently undertook a similar analysis in *Blackmon v. Sutton*, 734 F.3d 1237 (10th Cir. 2013), which concerned the treatment of a juvenile in a detention facility. The court, in an opinion by then-Judge Gorsuch, denied qualified immunity for defendants who allegedly 'shackled' the plaintiff to a restraining chair and allowed 'a fully grown man ... to sit on the [plaintiff's] chest' 'simply ... to punish him.'. . It also denied qualified immunity for prison officials who 'were well aware of' the plaintiff's 'grave mental health problems' but 'delayed or denied' the plaintiff's access to necessary medical care. . . But the *Blackmon* court rejected the claim that the director of the facility violated the plaintiff's constitutional rights by 'failing to transfer him to' a less restrictive facility pending trial. . . The court reasoned that the plaintiff had not shown 'that his placement in the juvenile detention facility *automatically and alone* amounted to an "objectively excessive risk" to his health and safety.'. . Said differently, it was not clear that, absent the use of excessive force or denial of access to medical care, placing the plaintiff in the detention center and denying him a transfer *per se* violated the Constitution. The court therefore granted the director qualified immunity. . .The same is true here. Adams has alleged conduct by many other defendants that, if true, clearly violates the Constitution. But her claim against Ferguson turns on 'five words: "waiting lists and empty beds."'. . Our qualified immunity analysis must therefore focus on this conduct, and this claim, alone: that—in her own words—it is clearly established that 'plausible allegations of "waiting lists and empty beds" state claims for relief' under § 1983. . . We cannot hold that they do. Time and again, the Supreme Court has reiterated that for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question *beyond debate*.'. . No clearly established law dictates that housing mentally ill inmates in prisons, rather than transferring them to state mental health facilities, 'automatically and alone amount[s] to an "objectively excessive risk" to [inmate] health and safety.'. .In light of repeated instruction from the Supreme Court, we must conclude that Ferguson is entitled to qualified immunity from suit on Adams's § 1983 claims.")

Thompson v. Commonwealth of Virginia, 878 F.3d 89, 101-10 (4th Cir. 2017) ("The excessive

force analysis thus focuses on the maliciousness of the force used, not the severity of the injury that results from that force. . . Here, the momentum from the van was sufficient to cause a gash on Mr. Thompson's forehead, bleeding from his hands and arms and bruising, not to mention significant emotional distress. The force alleged is therefore beyond *de minimis* for Eighth Amendment purposes. . . .Because Mr. Thompson has alleged facts from which a reasonable factfinder could conclude that Officer Cooper maliciously subjected him to a rough ride, he has sufficiently alleged an Eighth Amendment excessive force claim sufficient to survive summary judgment as to Cooper. . .We further hold that Mr. Thompson's right was clearly established by April 8, 2010, the date of the incident. Defined at the appropriate level of specificity, prisoners have a right not to be assaulted by their captors. Under the Eighth Amendment, prisoners have the right to be free from malicious or penologically unjustified infliction of pain and suffering. . . . After examining both controlling and persuasive authority, we conclude that Officer Cooper had fair warning that gratuitously giving an inmate a 'rough ride' for no reason other than to retaliate against him for filing lawsuits and grievances is unconstitutional. A reasonable officer would have known from Supreme Court precedent that the Eighth Amendment prohibits such malicious acts of violence or intentional endangerment. In *McMillian*, one of the seminal cases defining the scope of the right not to be subjected to excessive force, the Supreme Court reversed the dismissal of an Eighth Amendment claim based on a correctional officer's gratuitous punch of an inmate during transport. . . In *Wilkins*, a prison official, angered by the prisoner's request for a grievance form, slammed the prisoner against the ground and physically beat him in response. . . The Supreme Court reversed the district court's dismissal of the case for failure to state a claim and held that the prisoner would prevail if he proved that the official had in fact acted maliciously. . . As in *Wilkins*, if we credit Mr. Thompson's account, the only reason Cooper used force against him was in retaliation for filing grievances. Accordingly, *Wilkins* and *McMillian* are sufficiently similar to Cooper's alleged conduct that a reasonable officer would have known that a retaliatory "rough ride" is unconstitutional. To be sure, *McMillian* and *Wilkins* involved direct punches and kicks, rather than a 'rough ride,' but it makes no difference to the constitutional analysis whether Mr. Thompson was slammed against the side of the van by the officer's hands or by the momentum maliciously created by the officer's driving. . . The intentionally erratic driving was simply a different means of effectuating the same constitutional violation. To draw a line between these acts would encourage bad actors to invent creative and novel means of using unjustified force on prisoners. Although *McMillian* and *Wilkins* did not reach the qualified immunity question, their holdings provide officers with fair notice that malicious, unprovoked, unjustified force inflicted on inmates who are compliant and restrained, and violates the Eighth Amendment. In other words, the Eighth Amendment principle prohibiting such gratuitous violence applies with 'obvious clarity' to a malicious 'rough ride,' just as it does to a malicious direct blow. . . Indeed, two Eighth Circuit cases have held that malicious 'rough rides' violate the Eighth Amendment. . . .Given the factual parallels, the Eighth Circuit cases are powerful indicators that the officers here had fair notice. . . .As is apparent from the case law of eleven federal courts of appeals, the Eighth Amendment protection against the malicious and sadistic infliction of pain and suffering applies in a diverse range of factual scenarios. That unifying thread provides fair notice to prison officials that they cannot, no matter their creativity, maliciously harm a prisoner on a whim or for reasons

unrelated to the government's interest in maintaining order. That principle applies with particular clarity to cases such as this one, where the victim is restrained, compliant, and incapable of resisting or protecting himself, and otherwise presents no physical threat in any way. The government argues, unpersuasively, that the law is not clearly established because courts have not found a constitutional violation in some failure-to-fasten-seatbelt cases, notwithstanding the Eighth Circuit precedent. However, with one exception, every other seatbelt case cited by the district court and the government involved mere negligence, rather than malice or even recklessness. . . . The government also argues, unpersuasively, that an official's wrongful intent is never relevant to the qualified immunity analysis, even in the context of an Eighth Amendment deliberate indifference or excessive force claim. . . The government cites *Crawford-El v. Britton* for the sweeping proposition that, under *Harlow v. Fitzgerald* . . . '[e]vidence concerning the defendant's subjective intent is simply irrelevant.'. . *Crawford-El*'s holding is much more limited and is not itself a decision on qualified immunity. . . Read in context, the Court was merely referring to and reiterating *Harlow*'s holding that ' "bare allegations of malice" cannot overcome the qualified immunity defense.'. . *Crawford-El* and *Harlow* do not forbid us from considering evidence of intent in Mr. Thompson's excessive force claim. *Harlow* did not involve an Eighth Amendment excessive force claim or a deliberate indifference claim. . . As *Crawford-El* itself recognized, the significance of evidence of intent differs when it 'is an essential component of the plaintiff's affirmative case.'. . For claims where intent is an element, an official's state of mind is a reference point by which she can reasonably assess conformity to the law because the case law is intent-specific. Considering evidence of intent in this manner is not foreclosed by *Crawford-El*, as the Supreme Court itself has applied the clearly established prong in reference to retaliatory intent. *See Ortiz v. Jordan*, 562 U.S. 180, 189–91, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011) (holding that law was clearly established that prison guard cannot retaliate against inmate by putting her in solitary confinement) (citing *Crawford-El*, 523 U.S. at 592, 118 S.Ct. 1584). Thus, in light of the Supreme Court precedent in *McMillian* and *Wilkins*, case law on 'rough rides' from our sister circuit, and the overwhelming consensus on the prisoner's right to be free from assault, *i.e.*, malicious infliction of pain and suffering, we conclude that Officer Cooper had fair warning that his actions were unconstitutional and that Mr. Thompson's right was therefore clearly established. Accordingly, we reverse the district court's determination that Officer Cooper is entitled to qualified immunity on the Eighth Amendment excessive force claim. . . .Unlike Cooper, who drove the van, Diming did not use unlawful force against Mr. Thompson—rather, he failed to do anything to stop it. Accordingly, the claim against Diming is functionally the same as claims in failure-to-protect or conditions-of-confinement cases, which are evaluated under the deliberate indifference standard. . . .In sum, viewing the evidence in the light most favorable to Mr. Thompson, he has alleged sufficient facts to satisfy both prongs of the deliberate indifference test. He adequately asserts that he was exposed to the substantial risk of harm of being physically tossed about in an erratic vehicle and that Diming was aware of that risk and disregarded it by failing to take any preventative measures. . .The only remaining question is whether Mr. Thompson's right to reasonable protection from a known threat was clearly established as of April 8, 2010, the date of the incident. . . .We conclude that Mr. Thompson's right was clearly established. *Odom* held that, by June 2000, it was clearly established in the Fourth Circuit that 'a correctional officer who

stands by as a passive observer and takes no action whatsoever to intervene during an assault violates the rights of the victim inmate.' . . Reasonable officials would understand *Odom* to mean that inmates have an Eighth Amendment right to be protected from malicious attacks, not just by other inmates, but also from the very officials tasked with ensuring their security. . . . Because controlling authority clearly establishes an inmate's right to reasonable protection from malicious assault, we look no further and conclude that Mr. Thompson's right was clearly established in this case. Accordingly, we reverse the district court's grant of qualified immunity to Officer Diming.")

Humbert v. Mayor & City Council of Baltimore City, 866 F.3d 546, 560-62 (4th Cir. 2017) ("All of [the] facts taken together are not 'sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown,' that Humbert engaged in criminal activity. . . Much like with the corrected warrant application, we simply cannot see how, under the circumstances of this case, the Officers could have reasonably concluded that they had probable cause to arrest Humbert. At most, the circumstances would have given the Officers only reasonable suspicion to investigate Humbert further. We therefore conclude that Humbert's arrest was not supported by probable cause. Similarly, the legal process instituted against Humbert and his resulting pretrial detention were unsupported by probable cause. The evidence shows that the court commissioner made his probable cause determination by relying on a materially false and misleading warrant application. And during Humbert's fifteen-month detention, the Officers never obtained any evidence of his criminality before or after his arraignment. To the contrary, the victim continuously informed them that she could not identify Humbert. What is more, the Officers received reports excluding Humbert as a source of the DNA found on the victim and her clothing—the first report on June 2, 2008, and the last report on December 15, 2008. Yet, they did not give the reports to Assistant State's Attorney Tan until May 11, 2009, despite receiving a memorandum from Tan a year earlier on May 12, 2008, expressly demanding that any and all information received by the BPD in connection with the case be *immediately* delivered to his office. Drawing all inferences in Humbert's favor, the Officers failed to promptly give the reports to Tan because the victim only agreed to testify against Humbert based on their assurances that DNA evidence supported Humbert's guilt. Further, they never notified Tan of the victim's inability to identify Humbert. It was only after Tan received the reports that he learned from the victim herself that she could not identify Humbert and she refused to testify. Because the Officers withheld such substantial information from Tan, he maintained the criminal proceedings against Humbert without any proper basis. To be sure, once Tan finally possessed this information, he entered a *nolle prosequi*. Viewing these facts in the light most favorable to Humbert, his criminal proceedings and pretrial detention also violated his Fourth Amendment rights. Put differently, the Officers caused legal process to be instituted and maintained against him without probable cause to believe that he committed a crime. *See Manuel v. City of Joliet*, ——U.S. ——, 137 S. Ct. 911, 918 (2017) (holding that pretrial detention resulting from legal process unsupported by probable cause violates the Fourth Amendment). We therefore conclude that the evidence reasonably supports the jury's verdict in favor of Humbert's § 1983 malicious prosecution claim. . . . Because we have determined that the Officers lacked probable cause to seize Humbert, we must next examine whether instituting criminal process against him violated a clearly established rule. The

Officers argue that a reasonable person in the Officers' positions would not have known that his or her actions violated a clearly established right. Certainly, the Fourth Amendment right to be seized only on probable cause was clearly established at the time of the events at issue here. . . The law made clear that arresting and initiating legal process against a person without probable cause amounts to a seizure in violation of the Fourth Amendment. . . Additionally, it was clearly established 'that the Constitution did not permit a police officer deliberately, or with reckless disregard for the truth, to make material misrepresentations or omissions to seek a warrant that would otherwise be without probable cause.'. . The objective standard for qualified immunity accommodates the allegation of falsity or material omissions 'because a reasonable officer cannot believe a warrant is supported by probable cause if the magistrate is misled by [stated or omitted facts] that the officer knows or should know are false [or would negate probable cause].'")

Bounds v. Parsons, 700 F. App'x 217, ___ (4th Cir. 2017) ("[I]n 2013, when Bounds was arrested, relevant precedent did not clearly prohibit an officer from using force, including a taser, in order to effectuate an arrest of a suspect who physically resists. It was not until 2016, in *Armstrong*, that we made clear that a taser 'may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk,' and not 'in the face of stationary and non-violent resistance to being handcuffed.'. . Nor does *Meyers v. Baltimore Cty., Md.*, 713 F.3d 723 (4th Cir. 2013), decided before Bounds's arrest, clearly establish any limit on the use of force to restrain a suspect who is resisting: At the time excessive force was applied in *Meyers*, the suspect 'was *not* actively resisting arrest,' . . . whereas Bounds resisted arrest throughout, starting with his efforts to turn and face Parsons while being handcuffed and continuing through the officers' multiple efforts to secure Bounds in the police car. . . . At the time of Bounds's arrest, neither *Meyers* nor any other precedent would have made clear to 'every reasonable official,'. . . that they were precluded from using force to effectuate the arrest of a physically resistant and noncompliant suspect. The officers are therefore entitled to qualified immunity.")

Safar v. Tingle, 859 F.3d 241, 246-48 (4th Cir. 2017) ("Here the complaint presupposes an altogether novel duty: *after* a magistrate issued the arrest warrants based on probable cause, Rodriguez had the duty to take steps to withdraw the warrants upon learning that the charges were meritless. By no means do we diminish the dreadful ordeal that Rodriguez might have averted by seeking to retract the warrants. But that is a different matter from holding that Rodriguez had an affirmative duty in law to do so. We need not decide whether such a duty exists: the critical point is that the proposed duty was certainly not clearly established. Tellingly, plaintiffs fail to note what exactly the duty was or where in the law the obligation was to be found. They do not sketch out the procedures officer Rodriguez was supposed to follow, identify the point in the criminal process when such steps should have been taken, or explain why it was her responsibility to have the warrants revoked. Moreover, a Virginia police officer does not 'ha[ve] the authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant.'. . Only an attorney for the Commonwealth may move the court for dismissal. . . And while Rodriguez might have raised the issue with a supervisor or relayed her concerns to a prosecutor, we are unaware of a nebulous duty requiring police officers to follow some undefined procedure whenever they come across further information

that casts doubt on an active arrest warrant. After all, 'in a situation in which a warrant has issued upon probable cause, a police officer is not called upon either to exercise discretion or to weigh the proof.' *Brady v. Dill*, 187 F.3d 104, 112 (1st Cir. 1999); *see also id.* at 111 ("[I]t is the magistrate and not the policeman who should decide whether probable cause has dissipated to such an extent following arrest that the suspect should be released.").This is no abstract point. Although plaintiffs assure us that this is an exceptional circumstance where probable cause had completely dissipated, we must be careful not to make bad law out of an ostensibly 'easy' case. . . To say that an affirmative duty attached here fails to emphasize the limits of such an obligation and how it might function in practice. Probable cause is fluid; after an arrest warrant is sworn out there often comes to light additional evidence that may be more or less exculpatory. Sometimes a victim may recant, as Costco did here. Or perhaps a complaining witness offers new or conflicting testimony. In either case, an officer is forced to make a discretionary call about whether the subsequent information undermines a magistrate's finding of probable cause and, if so, how best to proceed. Given the vagaries of these evidentiary judgments, courts should not lightly enter the business of micromanaging police investigations and impose a categorical duty on officers governing the termination of allegedly stale arrest warrants. Indeed, if every failure of a police officer to act in some unspecified way on the basis of new information gave rise to liability, we would invite a legion of cases urging us to second-guess an officer's decision about whether to second-guess a magistrate's finding of probable cause. In any event, to the extent that plaintiffs struggle to define a Fourth Amendment right, they face an even bigger obstacle demonstrating that such a duty was clearly established. Plaintiffs frame the constitutional right at the highest level of generality, asserting that centuries of 'Anglo-American law' forbid a state official from 'knowingly caus[ing] or permit[ting] the arrest of an innocent citizen.'. . That is certainly true, as far as it goes. But what plaintiffs fail to do is 'identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.' *White*, 137 S. Ct. at 552. The absence of controlling cases suggests that Rodriguez did not have a clearly established affirmative duty to take steps to revoke the arrests warrants. In fact, all the indications from our case law point to the opposite conclusion. . . .We do not require that a prior case be identical to the case at bar to advance a civil suit. . . But despite their assertions to the contrary, plaintiffs cannot marshal a 'settled Fourth Amendment principle' that would have put Rodriguez on notice that she was violating the Constitution. . . Given the absence of an established duty to act, we award qualified immunity to Rodriguez on the § 1983 claims.")

Safar v. Tingle, 859 F.3d 241, 252-55 (4th Cir. 2017) (Floyd, J., concurring) ("The seizures that occurred when Plaintiffs Jan Eshow and Fadwa Safar were arrested strike me as manifestly unreasonable. The affiant for their warrants, Officer Rodriguez, was aware that probable cause for their arrests had *entirely* dissipated. . .Yet, she did nothing to initiate any recall of the arrest warrants or to inform the Commonwealth's Attorney's Office that the information on which she relied to obtain the warrants was entirely undermined. I believe that the Fourth Amendment mandates that when probable cause for an outstanding arrest warrant wholly disappears and the affiant is aware, the affiant has a duty to take steps to rescind the warrant. My belief that a seizure pursuant to a warrant for which probable cause has entirely dissipated is unreasonable under the

Fourth Amendment is not novel. Multiple justices of the Supreme Court have recognized this point, albeit in opinions that have no binding force of law, as have several of our sister circuits. . . .The duty I envision would be limited to those extreme cases where probable cause has *completely* dissipated, a question we ask police officers to evaluate every day in the context of warrantless arrests. . . Thus, it would not be a departure to require an officer, having sworn under oath to facts in support of a warrant application, to have a responsibility to inform the court when the facts have so drastically changed as to eliminate all probable cause prior to the execution of the warrant the officer sought. . . Although I believe that the Fourth Amendment mandates such a duty, I recognize that announcing such a duty in this case would stand in tension with our decisions in *Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996) and *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178 (4th Cir. 1996), as the majority notes. . . I fear that the holdings in these cases are overbroad, and ultimately stray too far from their facts in appearing to establish a bright line rule that all potential liability for an officer cuts off at the moment of a warrant being issued, absent a materially false statement or material omission in the warrant application. . .If we adhere to the idea of reasonableness in understanding the Fourth Amendment, as we must, then the holdings of *Taylor* and *Brooks* appear to be in tension with that idea. Thus, I write separately to note this problem in the hopes that a future en banc court may have the chance to consider the impact of *Taylor* and *Brooks* and considerably narrow the scope of their holdings.")

Martin v. Duffy, 858 F.3d 239, 251 (4th Cir. 2017) ("In *Booker*, this Court held that an inmate's 'right to file a prison grievance free from retaliation was clearly established under the First Amendment' at least as far back in time as 2010—the year in which the defendant's conduct in *Booker* took place. . . Because Martin's First Amendment right to be free from retaliation by prison officials for filing a grievance was clearly established in 2010, . . . Duffy—whose alleged conduct took place in 2014—is not entitled to qualified immunity. Accordingly, we conclude that the district court erred in dismissing Martin's First Amendment retaliation claim.")

Liverman v. City of Petersburg, 844 F.3d 400, 407-12 (4th Cir. 2016) ("The threshold question in this case is whether the Department's policy regulates officers' rights to speak on matters of public concern. There can be no doubt that it does: the restraint is a virtual blanket prohibition on all speech critical of the government employer. The explicit terms of the Negative Comments Provision prevent plaintiffs and any other officer from making unfavorable comments on the operations and policies of the Department, arguably the 'paradigmatic' matter of public concern. . . .If the Department wishes to pursue a narrower social media policy, then it can craft a regulation that does not have the chilling effects on speech that the Supreme Court deplored. We cannot, however, allow the current policy to survive as a management and disciplinary mechanism. . . .In light of the First Amendment protection accorded to the officers' posts, we conclude that the discipline they received pursuant to the social networking policy was unconstitutional. . . . Having found that Dixon violated the officers' First Amendment rights, we must consider whether such rights were 'clearly established' at the time of the events at issue. . . . [T]his case does not involve gray areas: the right against such a sweeping prior restraint on speech was clearly established and then some. Indeed, it is axiomatic that the government may not ban speech on the ground that it

expresses an objecting viewpoint. . . Accordingly, there can be no doubt that prohibiting any '[n]egative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers' — even comments of great public concern — violates the First Amendment. . . .Dixon also asserts that the disciplinary actions taken pursuant to the policy were reasonable in light of the vague boundaries distinguishing public and private speech. Given the patent unconstitutionality of the social networking policy, however, efforts to enforce the policy are similarly suspect. After all, the core of the policy was a prohibition on legitimate speech and, as detailed above, we have little difficulty locating the officers' speech within this protected sphere. Plaintiffs raised serious concerns regarding the Department's training programs and the promotion of inexperienced supervisors, both of which are matters of public concern. As this court has held time and again, it was clearly established law that such speech is protected by the First Amendment. . .We appreciate the need for order and discipline in the ranks. . . At the same time, we cannot countenance an arm of government with such enormous powers being removed to this extent from public scrutiny. This is not an all- or-nothing matter; there is a balance to be struck. But the Department's social networking policy, and the disciplinary actions taken to enforce it, lean too far to one side. We therefore hold that Chief Dixon is not entitled to qualified immunity.")

Jackson v. Holley, 666 F. App'x 242, ___ & n.* (4th Cir. 2016) ("In this case, Jackson alleges only that Holley: (1) sent him one 'sexually explicit and lurid' letter; (2) 'posed up seductively before [Jackson] and whispered sexually explicit words to [him;]' and (3) 'plant[ed] her groin area in [Jackson's] face while [he] was seated for [his] haircut in the barber's chair.' We conclude that the conduct about which Jackson complains does not amount to an Eighth Amendment violation. . . . Given the lack of circuit authority regarding whether sexual harassment by prison officials amounts to a constitutional violation, we also find that it was not unreasonable for Holley to have 'failed to appreciate that h[er] conduct would violate [Jackson's] rights.' Meyers v. Baltimore Cnty., 713 F.3d 723, 731 (4th Cir. 2013) (internal quotation marks omitted). Thus, even if the conduct about which Jackson complains is sufficient to state an Eighth Amendment violation, Holley is entitled to qualified immunity under the second prong of the qualified immunity inquiry.")

Scinto v. Stansberry, 841 F.3d 219, 235-36 (4th Cir. 2016) ("Plaintiff has alleged facts sufficient for a reasonable jury to conclude that his constitutional rights were violated when Dr. Phillip denied Plaintiff his prescribed insulin and when Dr. Phillip and Administrator McClintock failed to aid Plaintiff during a medical emergency. . . Although a jury may ultimately decide that Defendants' version of events is more credible, we are barred from making such a determination when deciding whether to grant summary judgment based on qualified immunity. . . To determine whether the right was clearly established, we first must define the right at issue. . . Dr. Phillip maintains that we should frame our analysis of qualified immunity as to Plaintiff's insulin claim as whether it is 'clearly established that a prison medical provider runs afoul of the Eighth Amendment when he does not give one single dose of insulin to a federal inmate, after the inmate becomes angry and hostile ..., and the doctor implements a plan to monitor the inmate thereafter.'. . Similarly, Dr. Phillip and Administrator McClintock assert that we should consider their qualified

immunity as to Plaintiff's medical emergency claim based on whether a reasonable official would have known it violated a clearly established constitutional right to follow protocol by placing an inmate in administrative detention after he receives an incident report. But '[f]or a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."'. . There is no requirement that the 'very action in question [must have] previously been held unlawful' for a reasonable official to have notice that his conduct violated that right. . . Accordingly, we reject Dr. Phillip's and Administrator McClintock's invitations to define the rights at issue in accordance with the 'very action[s] in question.'. .Rather, we define the right in question as the right of prisoners to receive adequate medical care and to be free from officials' deliberate indifference to their known medical needs. This definition is consistent with previous deliberate indifference cases from this Circuit. For example, in *Iko v. Shreve*--a case in which a prisoner alleged government officials failed to conduct a medical evaluation after pepper-spraying him to compel compliance during a cell removal--this Court defined the right at issue as 'the right to adequate medical care.'. . This definition also accords with Supreme Court jurisprudence, which has long dictated that the Eighth Amendment confers a duty upon prison officials to ensure that prisoners 'receive adequate ... medical care.'. .A prisoner's right to adequate medical care and freedom from deliberate indifference to medical needs has been clearly established by the Supreme Court and this Circuit since at least 1976 and, thus, was clearly established at the time of the events in question. . . Because we conclude that there is sufficient evidence that Plaintiff's Eighth Amendment right to adequate medical care and freedom from officials' deliberate indifference to his medical needs was violated and that the right was clearly established, Dr. Phillip and Administrator McClintock are not entitled to qualified immunity.")

Lane v. Anderson, 660 F. App'x 185, ___ (4th Cir. 2016) ("With respect to the first *McVey* prong, we cannot agree with Sheriff Anderson that Appellant stated his concerns merely as a self-serving complaint. Rather, Appellant, as a private citizen, spoke on a matter of public concern when he questioned a police shooting, which resulted in a fatality, and the subsequent investigation. When Appellant communicated with the media, he was acting outside the scope of his duties as a deputy sheriff. Although Appellant's 'expressions related to [his] job,' the First Amendment affords him protection when he conveys these views as a private citizen. . . . The content of Appellant's speech here was undeniably a matter of public concern. He questioned a shooting in which a suspect was killed (and Appellant himself injured). He questioned an allegedly botched investigation, which he suspected was cloaked in a police cover-up. And he ultimately questioned whether friendly fire occurred, as opposed to the Suspect having allegedly shot him, which resulted in the Suspect's death. . . .Having concluded that Appellant's speech should be accorded First Amendment protection, we now turn to the second prong of the qualified immunity analysis: whether every reasonable official would have known that terminating Appellant for speaking out would be in violation of his First Amendment rights. . . Appellees maintain that Maryland state law, specifically the Law Enforcement Officers' Bill of Rights, expressly provides that the law enforcement agency's chief -- here, Sheriff Anderson -- is permitted to punish Appellant for 'divulg[ing] information' that is contrary to the department's policy. . . If Sheriff Anderson

complied with this express statutory right, Appellees' argument goes, 'he had no reason to doubt the constitutionality of the policies.'. . But, the position urged by Appellees, and adopted by the district court, that the Sheriff was acting within his legal authority because he was acting pursuant to Maryland law, ignores clearly established precedent. . .Sheriff Anderson's adherence to state law is not helpful here. An independent basis for sanctions does not provide a shield from liability when the speech is constitutionally protected. . . .[W]hen Sheriff Anderson terminated Appellant in 2012, the law was not in any 'gray area[ ].' . . Rather, the law was clearly established. After our decisions in *Andrew* and *Durham*, no reasonable official could have believed that a law enforcement officer's statements to media outlets regarding misconduct and corruption surrounding a police-involved shooting lacked First Amendment protection. Therefore, we hold that Sheriff Anderson is not entitled to qualified immunity, and Appellant can continue to press the damages claim brought against Sheriff Anderson in his individual capacity."

Brickey v. Hall, 828 F.3d 298, 303-08 (4th Cir. 2016) ("On appeal, Hall does not challenge the district court's holding that Brickey has properly alleged a constitutional violation—the first qualified-immunity prong. Instead, Hall contends that the right Brickey asserts was not clearly established in 2012 when Brickey was terminated. Our review, therefore, is confined to the question of what law was clearly established—we do not reach the merits of Brickey's constitutional claim. . . .Because we hold that the law was not clearly established as to the second question—the balancing of the employee's and employer's interests—Hall is entitled to qualified immunity. Consequently, we need not reach the question of whether it was clearly established that Brickey spoke as a citizen on a matter of public concern. . . .It was clearly established in 2012 that police officials are entitled to impose more restrictions on speech than other public employers because a police force is ' "paramilitary"—discipline is demanded, and freedom must be correspondingly denied.'. . Because of this heightened need for discipline, police officials have 'greater latitude ... in dealing with dissension in their ranks.'. . . In sum, the parties have not directed us to any case that would have clearly warned Hall that terminating Brickey for his comments about the D.A.R.E. funds would violate his First Amendment rights. On the contrary, our case law had stressed the broad discretion granted police officials to limit speech when discipline is at stake. As a result, we cannot say that it was beyond debate that Brickey's interests outweighed Hall's. . . .We hold that it was not clearly established on the date of Brickey's termination that his speech interests as a citizen outweighed Hall's interests as an employer. Hall is therefore entitled to qualified immunity.")

Lawson v. Union Cty. Clerk of Court, 828 F.3d 239, 250 (4th Cir. 2016) ("In an effort to demonstrate that the law in this area is muddled, Gault cites a 1996 decision in which we held, in an unpublished opinion, that qualified immunity shielded a clerk of court who fired his chief deputy for disloyalty. . . This does not advance Gault's argument, however, because the fact that the law was unsettled in 1996 tells us nothing about the state of the law nearly sixteen years later. As we have explained, the state of the law in 2012 would have put Gault on notice that political affiliation was not an appropriate requirement for administrative employees. Thus, we conclude

that Gault has not established the defense of qualified immunity, and we cannot affirm the district court's judgment on that basis.")

Cox v. Quinn, 828 F.3d 227, 239 (4th Cir. 2016) ("On the record as we may view it here, we find that the district court correctly concluded that the correctional officers were not entitled to qualified immunity. It has long been established that jail officials have a duty to protect inmates from a substantial and known risk of harm, including harm inflicted by other prisoners. . . Moreover, by 2011, we had made it clear that 'a prison official acts with deliberate indifference when he ignores repeated requests from a vulnerable inmate to be separated from a fellow inmate who has issued violent threats which the aggressor will likely carry out in the absence of official intervention.'. . Here, Cox repeatedly informed the appellants that he was being threatened and robbed and that he feared for his safety, and his concerns were corroborated by other inmates. But the only action the correctional officers took in response to this information — despite the instructions of their sergeant — was to do the one thing Cox specifically warned them would increase the risk to his safety. And when confronted with Cox's concerns again, Miles just threw up his hands and walked away. Under the law of this Circuit, an objectively reasonable correctional officer — certified or uncertified — would have known that these actions were unreasonable, ran afoul of clearly established law, and violated rights "manifestly included within more general applications of the core constitutional principle" articulated in *Farmer*. . . Accordingly, the correctional officers are not entitled to qualified immunity.")

King v. Rubenstein, 825 F.3d 206, 222 n.3 (4th Cir. 2016) ("The defendants argued that they are entitled to qualified immunity, as any constitutional violations were not clearly established. The district court did not consider this argument, presumably because it concluded that King failed to allege a violation. As we may affirm a dismissal on any grounds supported by the record, . . . we briefly consider the argument here. Even where a plaintiff suffers a constitutional violation, an officer is only liable if 'the right was clearly established at the time the violation occurred such that a reasonable person would have known that his conduct was unconstitutional.'. . . We decline to affirm the dismissal on qualified-immunity grounds at this stage: we cannot conclude that a right to be free from an egregiously sexually invasive, unjustified, compelled surgery was not clearly established under the Fourth, Eighth, and Fourteenth Amendments.")

Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 170 (4th Cir. 2016) ("Accepting the allegations of the complaint as true, Goines, though having speech and other physical difficulties, exhibited no signs of mental illness and made no threats to harm himself or others, but instead sought the help of the police to avoid a confrontation and potential fight with a neighbor who had spliced into Goines' cable line. Under these facts, the Officers lacked probable cause for an emergency mental-health detention, and Goines' complaint therefore alleges a constitutional violation. . . And again accepting Goines' allegations as true, the constitutional violation alleged is one for which the Officers would not be entitled to qualified immunity. . . . [T]he facts as alleged by Goines—the involuntary detention of a man with physical disabilities who exhibited no signs of mental illness and made no threats of harm—are sufficiently beyond the realm of probable cause that no

reasonable police officer would find them adequate. . . . Because Goines' complaint plausibly alleges facts that no reasonable officer would have found sufficient to justify an emergency mental-health detention, the complaint states a constitutional violation by the Officers for which they would not be entitled to qualified immunity.")

Yates v. Terry, 817 F.3d 877, 886-88 (4th Cir. 2016) ("Our analysis of the *Graham* factors when measured against the level of force used by Terry against Yates leads us to conclude that such force was not objectively reasonable in light of the totality of the circumstances in this case. Terry was ordered out of his car and subsequently tased three times over not having his driver's license. We have explained that '[d]eploying a taser is a serious use of force,' that is designed to 'inflict[ ] a painful and frightening blow.'. . For these reasons, it 'may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser.'. . As we held in *Estate of Armstrong,* '[t]he subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance-even when that resistance includes physically preventing an officer's manipulations of his body.'. . The objective facts, when viewed in the light most favorable to Yates, as we must do at this point in the proceedings, show that he was neither a dangerous felon, a flight risk, nor an immediate threat to Terry or anyone else. Yates has thus established that Terry's use of his taser constituted excessive force in violation of Yates' Fourth Amendment rights. . . . Having concluded that Yates' constitutional rights were violated, we must determine whether those rights were clearly established at the time of Terry's conduct. . . .In this case, it was clearly established in 2008 that a police officer was not entitled to use unnecessary, gratuitous, or disproportionate force by repeatedly tasing a nonviolent misdemeanant who presented no threat to the safety of the officer or the public and who was compliant and not actively resisting arrest or fleeing. . . Although our decisions in *Meyers, Bailey,* and *Jones* dealt with individuals who were secured when they were subjected to excessive force, our precedent nonetheless provided Terry with fair notice that the force he used against Yates under the facts of this case was unconstitutionally excessive. . . .Even though Yates was not handcuffed, our precedent makes clear that a nonviolent misdemeanant who is compliant, is not actively resisting arrest, and poses no threat to the safety of the officer or others should not be subjected to 'unnecessary, gratuitous, and disproportionate force.'. . . Viewing the facts in the light most favorable to Yates, no reasonable officer would have believed that Terry's use of the taser was justifiable at all and certainly not on three occasions. We reject Terry's argument that the unlawfulness of his conduct was not clearly established because he was faced with a dual-sided threat. Drawing reasonable inferences in Yates' favor, there was no threat to safety, dual-sided or otherwise. Rather, there was a commotion attributable to Terry's excessive and unjustifiable use of force, which unnecessarily escalated tension during what can at best be described as a routine traffic stop. . . . For the foregoing reasons, we conclude that based on the totality of the circumstances and viewing the evidence in the light most favorable to the non-moving party, Terry is not entitled to qualified immunity as a matter of law. We therefore affirm the district court's denial of Terry's motion for summary judgment based on qualified immunity.")

Smith v. Murphy, 634 F. App'x 914, 917 (4th Cir. 2015) ("Defendants contend, the fact that Smith suffered only de minimis injuries absolves them from liability under the clearly established law at the time of the incident. Prior to *Wilkins v. Gaddy*, 559 U.S. 34 (2010), this court 'consistently held that a plaintiff could not prevail on an excessive force claim [under the Eighth Amendment] absent the most extraordinary circumstances, if he had not suffered more than a *de minimis* injury.'. . . For Fourth Amendment excessive force claims, however, the severity of injury resulting from the force used has always been but one 'consideration in determining whether force was excessive.'. . . The cases cited by Defendants do not suggest otherwise. All but one of the cases involves either prisoners or pretrial detainees, therefore implicating either the Eighth or Fourteenth Amendment, rather than the Fourth Amendment. And *Carter v. Morris*, 164 F.3d 215, 219 n.3 (4th Cir.1999), the free citizen case, does not demonstrate that the de minimis injury rule applies to Fourth Amendment claims; rather, it merely suggests, in passing, that the plaintiff's claim failed because she offered 'minimal evidence' to support it. . . Finding no support for Defendants' contention that suffering only de minimis injuries bars one from asserting a Fourth Amendment excessive force claim, we conclude that the district court appropriately denied Defendants' motion for summary judgment as to this claim.")

Hunter v. Town of Mocksville, N.C., 789 F.3d 389, 399-402 (4th Cir. 2015) ("Nothing before us suggests that Plaintiffs' 'daily professional activities,'. . . included calling the Governor's Office for any purpose, much less to express concerns about the Mocksville PD. Nothing suggests that Plaintiffs' request that the Governor's Office look into suspected corruption and misconduct at the Mocksville PD was 'ordinarily within the scope of [Plaintiffs'] duties.'. . . Indeed, a 'practical' inquiry into Plaintiffs' day-to-day duties, . . . manifestly does not lead to the conclusion that those included reaching out to the Governor's Office about anything at all. Instead, the evidence viewed in the light most favorable to Plaintiffs illustrates that Plaintiffs acted as private citizens. . . . Defendants counter that Plaintiffs acted pursuant to their official duties because all sworn police officers have a duty to enforce criminal laws, and Plaintiffs, police officers, suspected criminal conduct. While some of the suspected corruption and misconduct at issue here, such as misusing public funds for personal gain, might qualify as criminal, other misconduct, such as racial discrimination within the Mocksville PD, might not. Moreover, and more importantly, a general duty to enforce criminal laws in the community does not morph calling the Governor's Office because the chief of police himself is engaging in misconduct into part of an officer's daily duties. . . . . In sum, privately reaching out to the Governor's Office about suspected corruption and misconduct at the Mocksville PD, at the hands of the chief of police, cannot fairly or accurately be portrayed as simply part of Plaintiffs' 'daily professional activities.'. . . In reaching out to the Governor's Office, Plaintiffs were not 'just doing [their] job'. . . Rather, Plaintiffs spoke as citizens, on a matter of undisputedly public concern. . . and no countervailing government interest has even been suggested. Accordingly, the district court rightly rejected Defendants' motion for summary judgment on this basis. . . .With their final argument on appeal, Defendants contend that even if Plaintiffs' First Amendment rights were violated, those rights were not clearly established at the time, i.e., in December 2011. Accordingly, Cook and Bralley argue that they are entitled to qualified immunity protecting them from suit. . . . *Andrew* and *Durham* clearly established that,

long before the December 2011 speech and retaliation at issue here, 'speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected.'. . . Defendants attempt to make much of the fact that, in both *Andrew* and *Durham,* the plaintiffs had reached out to the news media (though in Durham, the plaintiff also reached out to others, including the Governor's Office). That may be. But nothing in this Court's reasoning or broadly-worded holdings in either *Andrew* or *Durham* suggests that that fact was somehow dispositive. Nothing in either *Andrew* or *Durham* stands for the proposition that only speech to a media organization can qualify for First Amendment protection. And we agree with Justice Stevens that it would be 'perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly,'. . . which is precisely what we would be doing, were we to adopt Defendants' position that exposing serious government misconduct to the news media is protected, but exposing that same misconduct to the Governor's Office, as in this case, by definition is not. In sum, 'it was clearly established in the law of this Circuit' in December 2011 that speech about 'serious misconduct in a law enforcement agency[ ] is protected.'. . The district court therefore did not err in denying qualified immunity to Cook and Bralley on this basis.")

Hunter v. Town of Mocksville, N.C., 789 F.3d 389, 403-07 (4th Cir. 2015) (Niemeyer, J., dissenting) ("I would grant qualified immunity to Police Chief Robert Cook and Town Manager Christine Bralley because it was not clearly established at the time that Chief Cook fired the plaintiff-officers that the officers had complained to the North Carolina Governor's Office *as citizens,* rather than *as employees.* If the officers had complained as employees, 'the Constitution does not insulate their communications from employer discipline.'. . . [T]he majority fails to identify any controlling precedent that would have informed Chief Cook and Town Manager Bralley that they were acting unlawfully in firing the officers for going over their heads to the Governor's Office to complain about departmental misconduct. The question of whether police officers speak *as employees* or *as citizens* when complaining to the Governor's Office about departmental corruption and misconduct was undecided in this circuit—and has remained so before today—and the proper application of relevant principles is murky at best. Therefore, the relevant case law was not clearly established at the time of the defendants' conduct. In such circumstances, Chief Cook and Town Manager Bralley are entitled to qualified immunity, which shields government officials from suits for damages when acting in their personal capacity unless (1) they violate a statutory or constitutional right (2) that was 'clearly established at the time of the challenged conduct.'. . .I agree with the defendants that, as of December 2011, the law was not clearly established—nor, indeed, has it been at any time before now—that a police officer complaining to the Governor's Office of departmental corruption involving his police chief speaks *as a citizen.* Given the lack of relevant authority, it was entirely reasonable for Chief Cook and Town Manager Bralley to have concluded that the officers were complaining as employees in the course of their official duties when making their complaints. In deciding otherwise, the majority relies on two decisions—*Andrew v. Clark,* 561 F.3d 261 (4th Cir.2009), and *Durham v. Jones,* 737 F.3d 291 (4th Cir.2013). But those cases only go so far as to conclude unremarkably that exposing corruption within a police department is *a matter of public concern*—a proposition with which Chief Cook and Town Manager Bralley agree. Neither case addresses the *independent inquiry* of

whether the officers were speaking as citizens when reporting departmental corruption for investigation. . . . Not only did *Andrew* and *Durham* not address whether police officers speak as citizens when reporting corruption to a state agency, but the facts of those cases also render them decidedly distinguishable from the case before us. Whereas the terminated officers in those cases had leaked information *to members of the media,* either exclusively (Andrew) or in tandem with a distribution to a broad spectrum of public officials (Durham), the terminated officers in this case reported the corruption exclusively to a single governmental agency that could have been thought to have supervisory or investigatory responsibility over the Police Chief and the Town Manager. In light of this factual distinction, it can hardly be said that existing precedent 'placed the ... constitutional question *beyond debate*[.]'. . . To the extent that our prior case law suggested that a law-enforcement officer speaks as a citizen when reporting corruption and misconduct *to the media for publication,* it would not necessarily have been apparent to a reasonable official that such an officer speaks as a citizen when making such a report *to a governmental agency for investigation.* . . 'Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'. . Here, not only was there no authority in this circuit holding that the defendants' conduct was unlawful, but also there was no precedent regarding when a police officer speaks as a citizen rather than as an employee. Thus, Chief Cook and Town Manager Bralley were left to speculate about and guess whether terminating the employment of Officers Hunter, Donathan, and Medlin would violate their First Amendment rights. Because those public officials are not liable for incorrect guesses, I would grant them qualified immunity and reverse the district court's ruling denying that immunity.")

Ussery v. Mansfield, 786 F.3d 332, 335-36, 338 (4th Cir. 2015) ("As the parties agree, the law clearly established at the time of the extraction governs the entitlement to qualified immunity here. Further, they agree that *Norman v. Taylor,* 25 F.3d 1259 (4th Cir.1994) (en banc), provides the legal framework for determination of that question. In *Norman,* this court held that 'absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is de minimis.'. . The Supreme Court expressly abrogated *Norman* in *Wilkins v. Gaddy,* 559 U.S. 34, 38–39 (2010). . . . We have subsequently concluded, however, that where the alleged use of force occurred prior to *Wilkins,* a defendant's entitlement to qualified immunity turns on whether that force 'was objectively reasonable in view of the clearly established law at the time of the alleged event'—i.e., the law as set forth in *Norman. See Hill v. Crum,* 727 F.3d 312, 321, 322 (4th Cir.2013). To prevail, then, an inmate like Ussery, seeking relief for excessive force deployed before the issuance of *Wilkins* in 2010, must establish either that he sustained more than de minimis injuries or that the defendants' use of force was 'of a sort repugnant to the conscience of mankind and thus expressly outside the de minimis force exception.'. . With this standard in mind, we turn to the case at hand. . . . [O]n numerous occasions, applying the *Norman* standard, we have concluded that injuries comparable to—and arguably less severe than—those Ussery maintains he suffered were not de minimis.")

Smith v. Ray, 781 F.3d 95, 104 (4th Cir. 2015) ("In arguing that the unconstitutionality of his conduct was not clearly established on the day in question, Ray attempts to draw fine distinctions

between the facts of the present case and those of *Rowland*. However, our determination that the officer was not entitled to qualified immunity in *Rowland* was not based on any case that was factually on all fours. Rather, it was based on the simple fact that the officer took a situation where there obviously was no need for the use of any significant force and yet took an unreasonably aggressive tack that quickly escalated it to a violent exchange when the suspect instinctively attempted to defend himself.")

Covey v. Assessor of Ohio Cnty., 777 F.3d 186, 196 (4th Cir. 2015) ("At this stage, we cannot conclude that the defendants are entitled to qualified immunity. As to the police officers, the Supreme Court has held that no reasonable officer can 'claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.'. . As we have recognized for over a decade, 'the curtilage is entitled to the same level of Fourth Amendment protection extended to the home.'. . As alleged in the complaint, the officers violated clearly established law by proceeding directly to where they suspected marijuana would be found and without any reason to believe that they would find Mr. Covey there. Thus, they are not entitled to qualified immunity at this stage. The tax assessor's claim to qualified immunity is a closer call. On one hand, 'an official who performs an act clearly established to be beyond the scope of his discretionary authority is not entitled to claim qualified immunity under § 1983,' and the Supreme Court has 'made clear that determination of the scope of an official's authority depends upon an analysis of the statutes or regulations controlling the official's duties.'. . . Arguably, by entering into the curtilage and house despite the presence of 'No Trespassing' signs and a regulation's explicit directive to leave, the tax assessor exceeded his discretionary authority and therefore should not be entitled to qualified immunity. On the other hand, the Supreme Court has repeatedly instructed that we should not 'define clearly established law at a high level of generality.'. . . The parties have failed to offer any caselaw involving facts substantially similar to this case. Thus, it may be unwarranted to deny qualified immunity on the basis that 'a reasonable [civil servant] would have known' that merely entering into the curtilage, in contravention to a regulatory directive, violated a clearly established right under the Constitution. . . As already stated, however, the exact manner in which Crews searched the property is unknown and should be developed through discovery. Therefore, at this stage, Crews is not entitled to qualified immunity.")

M.C. ex rel. Crawford v. Amrhein, 598 F. App'x 143, 147-50 (4th Cir. 2015) ("The 'salient question' before us is 'whether the state of the law in [2006] gave [the defendants] fair warning that their alleged treatment of [M.C.] was unconstitutional.'. . Because we find that the alleged rights at issue in this case were not clearly established at the time of M.C.'s 2006 sex assignment surgery, we need not reach the question of whether M.C. alleged sufficient facts to show that the surgery violated his constitutional rights. . . We first consider M.C.'s contention, accepted by the district court, that the defendants had fair warning that the sex assignment surgery violated his constitutional right to reproduction. In support of this proposition, M.C. draws our attention to three cases: *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); and *Avery v. County of Burke,* 660

F.2d 111 (4th Cir.1981). Although we acknowledge the broad statements in these cases about reproductive rights, we cannot say that a reasonable official would understand them as clearly establishing an infant's constitutional right to delay sex assignment surgery. . . .Relying on the principles gleaned from these cases, the district court concluded that the defendants violated M.C.'s clearly established 'right to procreation.'. . We think, however, that this frames the right too broadly for purposes of assessing the defendants' entitlement to qualified immunity. . . .In our view, the alleged right at issue is that of an infant to delay medically unnecessary sex assignment surgery. By 'medically unnecessary,' we mean that no imminent threat to M.C.'s health or life required state officials to consent to the surgery, or doctors to perform it. Viewed in that light, we do not think that *Casey, Skinner,* or *Avery* put reasonable officials on notice that they were violating M.C.'s constitutional rights. As we have repeatedly emphasized, '[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'. . We hold that the defendants did not transgress such a bright line in this case. . . . Our core inquiry is whether a reasonable official in 2006 would have fair warning from then-existing precedent that performing sex assignment surgery on sixteen-month-old M.C. violated a clearly established constitutional right. In concluding that these officials did not have fair warning, we do not mean to diminish the severe harm that M.C. claims to have suffered. While M.C. may well have a remedy under state law, . . . we hold that qualified immunity bars his federal constitutional claims because the defendants did not violate M.C.'s clearly established rights.")

Owens v. Baltimore City State's Attorneys Office, 767 F.3d 379, 396-401(4th Cir. 2014) ("A qualified immunity defense can be presented in a Rule 12(b)(6) motion, but, as the Second Circuit has noted, when asserted at this early stage in the proceedings, 'the defense faces a formidable hurdle' and 'is usually not successful.'. . This is so because dismissal under Rule 12(b)(6) is appropriate only if a plaintiff fails to state a claim that is *plausible* on its face. . . A claim has 'facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'. . To satisfy the standard, a plaintiff must do more than allege facts that show the 'sheer possibility' of wrongdoing. . . The plaintiff's complaint will not be dismissed as long as he provides sufficient detail about his claim to show that he has a more-than-conceivable chance of success on the merits. . . . We have little difficulty concluding that Owens's allegations state a plausible § 1983 claim. First, the information Officers Pelligrini, Dunnigan, and Landsman assertedly withheld from ASA Brave was favorable to Owens. Had the Officers properly disclosed Thompson's statements, his inconsistencies would have lent support to the contention advanced by Owens's defense that Thompson, not Owens, had raped and murdered Ms. Williar. At a minimum, the inconsistencies would have aided Owens in his attempt to discredit Thompson's testimony and sow reasonable doubt in the minds of the jurors. . . Second, Owens has offered specific allegations as to the Officers' bad faith. He asserts that these experienced police officers willfully, consciously, and in bad faith 'chose not to disclose' the multiple revisions to Thompson's statement that they elicited from him during their hours-long interrogation. Further, he alleges that the Officers told ASA Brave about the final version of the story almost as soon as the witness had said it. The temporal proximity between Thompson's succession of narratives and the Officers' report to the prosecutor lends support to the contention

that Thompson's inconsistent narratives were fresh in the Officers' minds, and thus, the Officers' omissions were not accidental, but intentional and malicious. Finally, Owens's allegations satisfy *Brady's* materiality requirement. Owens asserts that Thompson was the State's 'star witness,' and that in post-trial proceedings, ASA Brave admitted that without Thompson, 'the case could not have gone forward.' Certainly, it is plausible that impeachment of such a key witness could have altered the outcome at trial. We emphasize that *Brady* does not require that disclosure *probably* would have modified a trial's result. . . On the contrary, it is enough that the suppression of evidence cast serious doubt on the proceedings' integrity. . . If Owens can prove his allegations, they would certainly satisfy this requirement. . . . [T]o be clearly established, a right need not be one with respect to which all judges on all courts agree. Rather, '[i]f the unlawfulness is apparent, the fact that some court may have reached an incorrect result will not shield a defendant's violation of a clearly established right.'. . Thus, although judicial disagreement about the existence of a right is certainly a factor we consider in determining whether a right has been clearly established, . . . disagreement alone does not defeat a plaintiff's claim in every instance. The Supreme Court has never sanctioned such a rule, *see, e.g., Hope,* 536 U.S. at 745–46 (holding a right was clearly established and rejecting a qualified-immunity defense notwithstanding the contrary views of three dissenting justices and the court of appeals), and neither have we, *see, e.g., Henry v. Purnell,* 652 F.3d 524, 536–37 (4th Cir.2011) (en banc) (rejecting a qualified-immunity defense over a three-judge dissent). With these principles in mind, we consider whether the constitutional rights Owens asserts were clearly established as of February and March 1988, the time of the alleged violations. . . . The partial dissent offers a different view. It maintains that the law was not clearly established in 1988 because the cases decided before that date—*Barbee, Sutton,* and *Boone*—imposed no independent obligation on police officers to disclose exculpatory evidence. The dissent insists that *Barbee, Sutton,* and *Boone* stand only for the proposition that 'a police officer's knowledge of exculpatory evidence will be imputed to the prosecutor for *Brady* purposes.' This holding, the dissent contends, fails to notify police officers of their susceptibility to suit, and thus, the Officers in the case at hand enjoy qualified immunity. We cannot agree. Qualified immunity exists to ensure that 'public officials performing discretionary functions [are] free to act without fear of retributive suits ... except when they should have understood that particular conduct was unlawful.' *Limone v. Condon,* 372 F.3d 39, 44 (1st Cir.2004). Ever since it first articulated the contours of modern qualified-immunity doctrine, the Supreme Court has emphasized that qualified immunity assesses the apparent unlawfulness of *conduct. . . . Barbee, Sutton,* and *Boone* each held that certain conduct by police officers—the suppression of material exculpatory evidence—results in the violation of criminal defendants' rights. Whether or not an officer's knowledge is "imputed" to the prosecutor does not affect the lawfulness of the officer's own conduct. *See Limone,* 372 F.3d at 47 (rejecting police officers' argument that law was not clearly established because cases announcing plaintiff's constitutional right referenced "the State's" obligations, not those of police officers). *Barbee, Sutton,* and *Boone* taught police officers how to conform their conduct to the law. These cases each held that if a police officer suppresses material exculpatory evidence, courts will invalidate a defendant's criminal sentence as unconstitutional. A police officer acting after the issuance of these decisions, like each of the Officers here, could not have thought that the suppression of material exculpatory evidence would pass constitutional muster. . . *Goodwin* recognized this

reality, and held in light of *Barbee, Sutton,* and *Boone* that a police officer's obligation to disclose material exculpatory evidence was clearly established by 1983, five years *prior* to the *Brady* violations alleged in this case. Yet the dissent suggests that our reliance on *Goodwin* retroactively subjects the Officers to liability. Not so. For although *Goodwin* issued after the Officers in this case acted, *Goodwin* announced no new rule of constitutional law. Rather, it merely held, in light of the constitutional rule already established by *Barbee, Sutton,* and *Boone,* that a police officer's duty to disclose material exculpatory evidence was *clearly* established in 1983. If a right was clearly established in 1983 (as *Goodwin* held), it must have been clearly established in 1988 (when the Officers acted). To hold to the contrary would directly conflict with *Goodwin. . .* Indeed, if the dissent is correct and *Barbee, Sutton,* and *Boone* announced no rule of constitutional law applicable to police officers, then *Goodwin* was wrongly decided. For according to the dissent's view, *Goodwin* acted in the absence of any prior circuit precedent to hold that a constitutional right was clearly established and so a police officer did not enjoy qualified immunity. We cannot endorse such an extraordinary view of our precedent. In sum, our precedent unmistakably provides that, by 1988, a police officer violates clearly established constitutional law when he suppresses material exculpatory evidence in bad faith. Accordingly, we hold that the Officers were clearly on notice of the impermissibility of their conduct in 1988, the time of the alleged violations.")

Smith v. Gilchrist, 749 F.3d 302, 312, 313 (4th Cir. 2014) ("Gilchrist argues to us. . . as he did to the district court, that even assuming that Smith's interests actually (and completely) outweighed the government's, he is nonetheless entitled to qualified immunity because *it would not have been clear to a reasonable official in Gilchrist's position* that Smith's interests outweighed the government's. . . In this regard, Gilchrist emphasizes that balancing the government's interests against the employee's is a subtle process. He also maintains that because of the significant role that the defensive-driving course played in reducing the DA's office caseload and freeing resources for other matters, a reasonable DA in his position could have believed that any public criticism of that course undermined the operation and mission of the DA's office. Gilchrist contends that, under this theory, a reasonable DA might have believed he was justified in firing Smith for publicly making the statements in question. This argument need not detain us long. For purposes of determining whether Smith's right to speak without recrimination was clearly established, we conclude that the right at issue, described at the appropriate level of specificity, is as follows: it is the right of an ADA running for public office not to be fired for speaking publicly in his capacity as a candidate on matters of public concern when the speech is critical of a program that substantially reduces the DA's office's caseload but there is no reason to believe the speech will negatively impact the DA's office's efficiency. Any reasonable official in Gilchrist's position would have been aware of that right on the day of Smith's termination. . . The notion that programs that reduce a government agency's workload are somehow off limits from criticism by government employees even when there is no reason to expect that the criticism will actually hamper the government office's efficiency finds no basis whatsoever in the law. At the time of Smith's firing, it was well established that a government employee's speech made as a private citizen on a matter of public concern is balanced against the adverse effect that the government reasonably anticipates the speech will have on its ability to operate efficiently. *See Maciariello,*

973 F.2d at 300. In this case, there was no evidence forecasted in the summary judgment record that Smith's speech was expected to have any particular effect, as Gilchrist's concession in the district court reflected. Thus, although Gilchrist is certainly correct that the process of balancing the employer's interests against the employee's is a subtle one, the general complexity of the balancing test is of no consequence in this case since there is nothing on the employer's side of the ledger to weigh. . . . In sum, a reasonable DA in Gilchrist's position would have known that he could not fire an ADA running for public office for speaking publicly in his capacity as a candidate on matters of public concern when the speech is critical of a program that substantially reduces the DA's office's caseload but there is no reason to believe the speech will negatively impact the DA's office's efficiency. We therefore hold that the district court erred in granting summary judgment to Gilchrist on the First Amendment claim on the basis of qualified immunity.")

Wall v. Wade, 741 F.3d 492, 502, 503 (4th Cir. 2014) ("As noted, we have previously held that under 'the Free Exercise Clause ... a prisoner has a *clearly established* ... right to a diet consistent with his ... religious scruples, including proper food during Ramadan.'. . Further, '[a] prison official violates this clearly established right if he intentionally and without sufficient justification denies an inmate his religiously mandated diet.'. . We take these statements to mean quite exactly what they say: that Wall's right to participate in Ramadan was clearly established, and when the defendants abridged this right without first satisfying *Turner's* reasonableness test, they subjected themselves to the potential for liability. As expressed above, the defendants' application of their policy to Wall was unnecessarily strict. They overlooked (at best) significant evidence that Wall was, in fact, a practicing Muslim who was entitled to participate in Ramadan. We cannot conclude that a reasonable official in the defendants' position, giving proper consideration to our statement in *Lovelace* that the right is clearly established, and to *Turner's* objective reasonableness test, would have felt it permissible to apply the policy in so strict a fashion. The defendants attempt to avoid this rather straightforward result by arguing that there is a lack of case law elucidating exactly how prisons may utilize sincerity tests in determining eligibility for religious accommodations. While it may be true that we have never specifically evaluated a sincerity test, . . . this argument overlooks the broader right at issue: that inmates are entitled to religious dietary accommodations absent a legitimate reason to the contrary. As we have previously stated, clearly established 'includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked.'. . In light of our unequivocal statement in *Lovelace* that inmates are entitled to religious dietary accommodations, we need not to have previously passed judgment on the appropriateness of particular sincerity tests in order to demand that prison officials act reasonably in administering that right. An expectation of reasonableness in this context is not a high bar, and does not punish officials for 'bad guesses in gray areas.'. . To the contrary, it offers only a minimal level of protection to inmates seeking to exercise their constitutionally protected rights.")

Williams v. Calton, 551 F. App'x 50, 51 (4th Cir. 2013) (per curiam) ("Viewed in the evidence most favorable to Williams, the evidence showed that when Williams, who was being escorted in restraints, resisted entering a cell, Calton slammed his head into the cell door and then shoved him

to the floor. Williams sustained a "minor" and "superficial" 1.5 inch scalp laceration requiring six staples. . . . In *Norman v. Taylor,* 25 F.3d 1259 (4th Cir.1994) (en banc), this court held that, 'absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is de minimis.'. . Three days after Williams filed his initial complaint, however, the Supreme Court handed down *Wilkins v. Gaddy,* 559 U.S. 34 (2010), abrogating *Norman* and stating that there was no injury threshold for excessive force claims. However, because '*Norman* and its progeny were controlling in the Fourth Circuit' when the incident in this case occurred, Williams' excessive force claim and Calton's qualified immunity defense must be analyzed under the standards established by those cases. *Hill,* 727 F.3d at 322. We conclude that, under the legal standards in place when the incident occurred, a reasonable officer in Calton's position would not have understood his actions to have violated Williams' constitutional rights. . . Consequently, Calton is entitled to qualified immunity.")

Occupy Columbia v. Haley, 738 F.3d 107, 121, 122, 124, 125 (4th Cir. 2013) ("Stated at the appropriate level of particularity, the right allegedly violated by Appellants is the right to be present and protest on State House grounds after 6:00 p.m. Therefore, the qualified immunity analysis must begin with this alleged constitutional violation in mind, and we must simply determine 'whether [Occupy Columbia's] allegations, if true, establish a constitutional violation.'. . . Occupy Columbia's Third Amended Complaint sufficiently alleges that its members were engaged in protected speech at the time they were arrested. Specifically, the complaint alleges Occupy Colombia's members were assembled on State House grounds (a public forum) and were 'protesting and petitioning our government.'. . Occupy Columbia's allegations thus satisfy the standards to qualify as protected speech. . . .Therefore, in the absence of a valid time, place, and manner restriction, Occupy Columbia had a First Amendment right to assemble on State House grounds after 6:00 p.m., and its Third Amended Complaint sufficiently alleges that this right was violated. . . .Having concluded that Occupy Columbia's complaint sufficiently alleges that arresting its members for their presence and protests on State House grounds after 6:00 p.m. constituted a violation of their First Amendment rights, we must turn to the second prong of the qualified immunity analysis. . . . At this stage, we must assess whether the First Amendment right allegedly violated by Appellants was a 'clearly established' right 'of which a reasonable person would have known.'. . It is not disputed that South Carolina and its state officials could have restricted the time when the State House grounds are open to the public with a valid time, place, and manner restriction. However, as explained above, at the time of Occupy Columbia's arrest, no such restrictions existed. In light of the case law from this circuit and from the Supreme Court, it was clearly established on November 16, 2011, that arresting Occupy Columbia for protesting on State House grounds after 6:00 p.m. was a First Amendment violation. Accordingly, at this stage, Appellants are not entitled to qualified immunity for damages arising out of Occupy Columbia's arrest on November 16, 2011. . . .In sum, we hold that the Occupy Columbia protesters have stated a viable claim that Appellants violated their First Amendment rights to assemble and protest peacefully on the grounds of the South Carolina State House in the absence of a valid time, place, or manner regulation. Condition 8 did not constitute a valid regulation because on its face it imposed no limit on when the State House grounds were open to the public and, even if it had

restricted the time during which protesters could assemble, it did not contain any standards to guide the official's decision regarding when to grant special permission to continue such activities beyond closing time. Furthermore, at this point in the proceedings, we cannot say as a matter of law that the state statutes upon which Appellants rely are valid applicable time, place, and manner restrictions. For purposes of this motion, we must accept as true Occupy Columbia's assertion that its members gathered in a peaceful and lawful manner and conclude that the protesters were not violating any law. Based on the complaint, there were no existing time, place, and manner restrictions on the protesters' First Amendment activities on the State House grounds. Therefore, Appellants violated these rights by removing the protesters from the grounds. We also hold that the right of the protesters to assemble and speak out against the government on the State House grounds in the absence of valid time, place, and manner restrictions has been clearly established since *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).")

Durham v. Jones, 737 F.3d 291, 303, 304 (4th Cir. 2013) ("We have been clear that where public employees are speaking out on government misconduct, their speech warrants protection. . . .The incidents at issue here rise far above an ordinary workplace dispute. Durham accused several high-ranking law enforcement officials, in positions of authority within the SCSO, of falsifying law enforcement reports and with authorizing aggressive threats against a member of their own agency if he persisted in his opposition to such a practice. As we have indicated above, Durham's honest belief, even if it was a mistaken belief, that his use of force was both justified to assist in the apprehension of the suspect, but (at the same time) did not arise out of any contemporaneous criminal act by the suspect, might call for retraining or some other response from his supervisors. That is their call. But the use of coercion and threats against him as shown in this record and accepted as accurate by the jury goes far beyond such permissible bounds. Durham was being coerced to lie under oath insofar as they demanded that he revise his reports in a way contrary to his honestly-held beliefs; he testified that, as when any law enforcement officer signs a police report, 'you're swearing under oath and swearing to God that that's the truth, that's the facts of the case.'. . . This is especially important to the function of law enforcement, as such reports 'become a piece of evidence that could later on be used in court to prosecute somebody, to possible even send them to jail, so it has to be truthful and accurate of the facts.'. .In short, it was clearly established in the law of this Circuit in September 2009 that an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, . . . is protected. The mere fact that Jones may have had an independent basis to impose some lesser disciplinary sanction on Durham short of outright termination, such as a short suspension from duty, does not muddle the clarity of that legal principle.")

Bland v. Roberts, 730 F.3d 368, 391-94 (4th Cir. 2013) ("We conclude that the Sheriff is entitled to qualified immunity concerning Carter's, McCoy's, and Dixon's claims because in December 2009 a reasonable sheriff could have believed he had the right to choose not to reappoint his sworn deputies for political reasons, including speech indicating the deputies' support for the Sheriff's political opponent. Simply put, *Jenkins* sent very mixed signals. Although we conclude today for the reasons discussed earlier that *Jenkins* is best read as analyzing the duties of the particular

deputies before the court, much of the opinion's language seemed to indicate that a North Carolina sheriff could terminate his deputies for political reasons regardless of the duties of their particular positions. Truthfully, the *Jenkins* majority opinion reads almost like two separate opinions that are in tension with one another. All of the majority's analysis up to the opinion's final page concerns deputies generally or North Carolina deputies, and references particular duties of deputies without indicating that the plaintiffs had those duties. . . . This analysis leads up to the broad conclusion that 'North Carolina deputy sheriffs may be lawfully terminated for political reasons under the *Elrod–Branti* exception to prohibited political terminations.'. . .As if this language were not already strong support for a broader reading of *Jenkins,* as we have pointed out, the dissent in *Jenkins* read it that way as well, accusing the majority of 'hold[ing] that *all* deputy sheriffs in North Carolina—regardless of their actual duties—are policymaking officials.'. . .Additionally, *Knight v. Vernon,* while important to our decision regarding the *merits* of Carter's, McCoy's, and Dixon's constitutional claims, did not *clearly establish* that the broader reading of *Jenkins* was incorrect. . . . A sheriff reasonably reading *Jenkins* as painting all deputies with a broad brush could well have viewed *Knight* as doing the same, or, at the very least, not weighing in on the issue. . .The broader reading of *Jenkins* is also in line with a statement from another of our opinions, which was issued after *Knight.* In *Pike v. Osborne,* 301 F.3d 182 (4th Cir.2002), we held that, on a claim that a sheriff terminated a dispatcher for political affiliation reasons, the sheriff was entitled to qualified immunity because in December 1999 it was not clearly established that a sheriff in Virginia could not lawfully terminate, for political affiliation reasons, a dispatcher who was privy to confidential information. . . . For the reasons we explained in reviewing the merits of the *Elrod–Branti* issue, we believe that this language, while consistent with the *Jenkins* dissent's characterization of *Jenkins's* reasoning, is an overstatement in light of the *Jenkins* majority's specific rejection of the dissent's characterization of its analysis. Nevertheless, considering the conflicting signals that *Jenkins* and *Pike* sent, we conclude that a reasonable sheriff in December 2009 could have believed that he was authorized to terminate any of his deputies for political reasons. . .If we were deciding what the law was in December 2009 regarding the legality of a sheriff firing a deputy for political reasons, we would agree with our colleague in dissent that the law was that a sheriff could not fire for political reasons a deputy sheriff with the limited duties of a jailer. Where we believe we differ in our assessment of this case is in whether that law was clearly established and would have been so recognized not by a judge trained in the law, but by a reasonable sheriff. For the reasons stated previously, we believe we have sent mixed signals as to when a sheriff could fire a deputy for political reasons and we have been unclear as to when he could and when he could not. Some parts of our en banc decision in *Jenkins* indicate he could do so and other parts would prohibit it. The dissent in *Jenkins* expressed its own confusion as to what the holding of *Jenkins* was and language in our cases since, as well as those from other courts, have interpreted the holding in *Jenkins* broadly and consistent with the Sheriff's. In short, we understand why a sheriff would not find the law in this situation clear, particularly given that he is a lay person. We do not expect sheriffs to be judges and to have the training to sort through every intricacy of case law that is hardly a model of clarity. . .Rather, in considering whether constitutional rights were clearly established for qualified-immunity purposes, we view the issue from 'the layman's perspective,'. . . recognizing that '[p]articularly with regard to legal conclusions, lay officers obviously cannot be expected to

perform at the level achievable by those trained in the law. . . . We note that in cases in which the *Elrod–Branti* exception applies, and an employer therefore does not violate his employee's association rights by terminating him for political disloyalty, the employer also does not violate his employee's free speech rights by terminating him for *speech* displaying that political disloyalty. . . Thus, a reasonable sheriff in December 2009 who believed that the *Elrod–Branti* exception applied to his deputies could have also reasonably believed that he could choose not to reappoint them for their *speech* indicating their political disloyalty to him. And Carter's and McCoy's Facebook activity and Dixon's bumper sticker and polling-place comment certainly fall into that category. For this reason, we conclude that the Sheriff was entitled to qualified immunity concerning the claims of Carter, McCoy, and Dixon.")

Bland v. Roberts, 730 F.3d 368, 395, 401, 402 (4th Cir. 2013) (Hollander, District Judge, concurring in part and dissenting in part) ("I concur in Chief Judge Traxler's excellent opinion, with one exception. The majority concludes that, at the relevant time, 'a reasonable sheriff could have believed he had the right to choose not to reappoint his sworn deputies for political reasons,'. . . and, on this basis, it determines that Sheriff Roberts is protected by qualified immunity with respect to his discharge of Carter, Dixon, and McCoy. In my view, when these deputies were discharged in December 2009, the law was clearly established that a sheriff's deputy with the job duties of a jailer could not be fired on the basis of political affiliation. Therefore, I respectfully disagree with the majority's ruling as to qualified immunity. . . .The salient facts of this case are so close to the facts in *Knight* that any reasonable sheriff would have predicted that both cases would yield the same result. To the extent that there is any distinction between *Knight* and this case, it concerns only the title of the positions held by the employees. Yet, it was clearly established that the title itself is of no legal significance. Therefore, Sheriff Roberts should have known that he could not discharge his jailers on the basis of their political affiliation. The majority is correct in stating that, in considering whether the law was clearly established for purposes of qualified immunity, we look to the perspective of a layperson, not a lawyer. . . .In 1997, this court delivered an unequivocally clear message to lay sheriffs. Directly addressing sheriffs, the *Jenkins* Court announced: 'We ... caution sheriffs that courts examine the job duties of the position, and not merely the title, of those dismissed.'. . Any person capable of serving as a sheriff surely would have understood that directive, which was subsequently reiterated in *Knight,* and would have grasped what all the members of this panel agree was 'the law ... in December 2009 regarding the legality of a sheriff firing a deputy for political reasons.'. .In sum, Sheriff Roberts' dismissal of Carter, McCoy, and Dixon on the basis of their political allegiance, if ultimately proven, cannot be excused on the basis of qualified immunity. Therefore, I respectfully dissent from the portion of the majority opinion that upholds the finding of qualified immunity for Sheriff Roberts with respect to the First Amendment claims lodged by Carter, McCoy, and Dixon.")

Hill v. Crum, 727 F.3d 312, 320-24 (4th Cir. 2013) ("The threshold requirement that a plaintiff suffer more than a *de minimis* injury to state an excessive force claim was thus settled law in this circuit until 2010, when the Supreme Court in *Wilkins* abrogated *Norman, Riley,* and *Taylor*. . . The *Wilkins* Court clarified that the nature of the force, rather than the extent of the injury, is the

relevant inquiry. . .Thus, it is clear that the *de minimis* injury threshold that this Court (and the district courts within this circuit) had relied upon in considering excessive force claims is no longer the appropriate test. The question, however, is whether Crum's alleged conduct which took place prior to the Supreme Court's *Wilkins* decision, is covered by qualified immunity. . . . Crum does not dispute the first prong, that there is a constitutional right to be free of excessive force. His argument is that he is entitled to qualified immunity because Hill's claimed constitutional violation was not clearly established at the time of the assault. Under the clearly established law of the Fourth Circuit on November 1, 2007, we must agree with Crum. . . .At the time of the alleged assault on Hill, *Norman* and its progeny were controlling in the Fourth Circuit and had been since 1994. Although *Wilkins* abrogated *Norman* in 2010, *Wilkins* can only be applied prospectively in the context of a qualified immunity analysis. . . In other words, the 2010 holding in *Wilkins* cannot be imputed retroactively to an officer in this circuit whose allegedly tortious conduct predated the *Wilkins* decision. The applicable law for qualified immunity purposes would be that in existence in 2007, the time of the alleged assault. In 2007 under *Norman*, a reasonable correctional officer would have objectively believed that the law in this circuit was what the Fourth Circuit said it was; that is, a plaintiff could not prevail on an excessive force claim 'absent the most extraordinary circumstances,' if he had suffered only *de minimis* injury. . . Although *Wilkins* established that the Fourth Circuit had been applying the incorrect standard, the inquiry—for qualified immunity purposes—is not whether the officer correctly interpreted the law as it would be changed in later years, but rather, whether the conduct at issue was reasonable based on the officer's imputed knowledge of the law at the time. Crum's reliance on *Norman* satisfies this standard. . . . In no sense do we suggest that Crum's alleged conduct was appropriate for a correctional officer, but it fails to cross the very high threshold for extraordinary circumstances that permit an excessive force claim to advance in the absence of more than *de minimis* injury for purposes of a pre- *Wilkins* qualified immunity analysis.")

Hill v. Crum, 727 F.3d 312, 325-29 (4th Cir. 2013) (Thacker, J., dissenting) ("With all due respect to the majority, I must dissent. Under prevailing Supreme Court precedent available at the time of the assault in this case, it was clearly established that an officer could not maliciously or sadistically impose harm on a custodial, handcuffed, and completely non-resistant inmate without violating the inmate's Eighth Amendment right to be free from cruel and unusual punishment—and any *reasonable* officer would have known as much. . . . Appellant Crum claims that he was entitled to assault Mr. Hill unabated for over two minutes so long as any resulting injury was *de minimis*. . . Not so. Under controlling Supreme Court precedent at the time—- not to mention applying pure common sense—no reasonable officer could have believed such abuse was lawful. . .On November 1, 2007, the controlling Supreme Court authority for excessive force cases in the Eighth Amendment context was *Hudson v. McMillian*, 503 U.S. 1 (1992). One need only read the first paragraph of *Hudson* to realize the right at issue was clearly established:

> This case requires us to decide whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury. We answer that question in the affirmative.

. . .
The Supreme Court went on to emphasize as follows:

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. *This is true whether or not significant injury is evident.* Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.

. . .
At the time of the incident in this case, *Hudson* had been controlling Supreme Court precedent for 15 years. In fact, this was the controlling law even before *Hudson.* The *Hudson* Court merely extended its prior holding in *Whitley v. Albers*, 475 U.S. 312 (1986) (regarding the legal standard for an Eighth Amendment excessive force claim arising out of a prison riot), to standard claims by inmates against prison officials for the use of excessive force. . . Under *Whitley* and *Hudson,* '"the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment."'. . The Court explained that 'the core judicial inquiry' in *excessive force* cases is not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'. . Thus, although this circuit misinterpreted *Hudson* in *Norman v. Taylor,* 25 F .3d 1259 (4th Cir.1994), the fact remains that *Hudson* and *Whitley* set forth the long standing and clearly established controlling precedent at the time of this incident. . . The law was, and is, clear; the proper focus is on the *force* used, not on the resulting injury. . . . Even if we assume Hill's injuries were minor—which he does not concede—analysis of the other factors make clear Crum's alleged use of force could be deemed excessive. . . . A lone cooperative inmate, handcuffed and hunched over a desk could not pose a reasonable threat to a prison officer sufficient to justify the use of force. Moreover, Appellant Crum did not temper the severity of the force employed, but, rather, allegedly continued beating Hill for a total of two minutes. These factors indicate that Crum exercised force, not in a good-faith effort to restore order, but, rather, maliciously and sadistically simply to cause harm. . . .Ultimately, whatever erroneous interpretive gloss *Norman* placed on *Hudson, see Wilkins v. Gaddy,* 559 U.S. 34 (2010) (abrogating *Norman*), on November 1, 2007, it would have been readily apparent to a reasonable officer that where a disturbance had already been abated, he could not assault a restrained, compliant, and cooperative inmate for 'a good solid two minutes,'. . . punching and elbowing him repeatedly in the abdomen and head, without applying excessive force in violation of the inmate's Eighth Amendment right to be free from cruel and unusual punishment. Accordingly, I would hold Appellant Crum is not entitled to qualified immunity, and affirm the decision of the district court.")

Tobey v. Jones, 706 F.3d 379, 391 & n.6 (4th Cir. 2013) ("Taken together, it is crystal clear that the First Amendment protects peaceful nondisruptive speech in an airport, and that such speech cannot be suppressed solely because the government disagrees with it. Thus, Mr. Tobey's right to display a peaceful non-disruptive message in protest of a government policy without recourse was clearly established at the time of his arrest. . . .[E]ven though the dissent purports to understand

factually analogous precedent is not a prerequisite for finding that a right is clearly established, the entire dissent seemingly hinges on this very premise. Moreover, the unequivocal constitutional precedent provided Appellants with more than adequate notice that they cannot retaliate against Mr. Tobey for exercising his First Amendment rights. This is not an abstract principle but an irrefutable precept. . . . Appellants argue that because there is no case on-point detailing what is a reasonable restriction on speech in an airport screening area, Mr. Tobey's constitutional rights cannot be said to have been clearly established. . . . .While reasonableness in and of itself may be an ineffective guide as to whether a right is 'clearly established,' in this case there are clear constitutional parameters. It may be unclear as to what reasonableness entails in the abstract, but at a minimum, given well-established precedent, we know that it is *unreasonable* to effect an arrest without probable cause for displaying a silent, nondisruptive message of protest—which is what allegedly occurred here. Appellants even conceded at oral argument that it would have clearly been unlawful for them to seize Mr. Tobey if the text of the Fourth Amendment was printed on his t-shirt. We see no reason why the same clear principle should not apply here, as Mr. Tobey's allegations amount to the factual equivalent. Appellants cite *Reichle v. Howards,* 132 S.Ct. 2088 (2012) as supporting their argument that Mr. Tobey's constitutional rights were not clearly established, but in doing so, miss the mark completely. In *Reichle,* an appeal from *summary judgment,* the Supreme Court found that it was not clearly established that a plaintiff could make out a cognizable First Amendment claim for an arrest that was supported by probable cause. . . . *Reichle* does not apply here because Mr. Tobey specifically alleges that his arrest was *not* supported by probable cause, and 'probable cause or its absence will be at least an evidentiary issue in practically all [ ] cases.' *Hartman v. Moore,* 547 U.S. 250, 265 (2006). At this stage in the litigation, of course, we must credit Mr. Tobey's allegation that Appellants arrested or caused him to be arrested without probable cause. He has, therefore, satisfied the requirement in *Hartman* and *Reichle* to plead an absence of probable cause.")

Tobey v. Jones, 706 F.3d 379, 392 (4th Cir. 2013) ("Given that peaceful, silent, nondisruptive protest is protected in a nonpublic forum, like an airport; that it is unequivocally clear that the government cannot effectuate an arrest for the display of a message of peaceful protest; and that Mr. Tobey's arrest in this instance was allegedly not supported by probable cause—we find that Mr. Tobey's rights at the time of his arrest were clearly established by decades-old precedent. . . . Here, Mr. Tobey engaged in a silent, peaceful protest using the text of our Constitution—he was well within the ambit of First Amendment protections. And while it is tempting to hold that First Amendment rights should acquiesce to national security in this instance, our Forefather Benjamin Franklin warned against such a temptation by opining that those 'who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.' We take heed of his warning and are therefore unwilling to relinquish our First Amendment protections—even in an airport.")

Tobey v. Jones, 706 F.3d 379, 394-97 (4th Cir. 2013) (Wilkinson, J., dissenting) **("**I cannot join the majority's decision permitting a damages action to proceed against Transportation Security Administration ("TSA") agents who were faithfully performing one of the most essential functions in our post–9/11 age: protecting air passengers from the threat of air terrorism. We now view these

events in the comfort of hindsight. But while some may consider plaintiff Aaron Tobey's conduct to be cute or even funny in retrospect, it was no laughing matter at the time. . . . One would think the Supreme Court's admonitions on the need for some modicum of specificity in notice to defendants might actually mean something. . . And yet, by allowing Tobey's suit to proceed by enunciating legal principles at the highest and most nebulous level of generality, the majority deprives the doctrine of its value. . . . I regret that a doctrine so essential to the performance of public functions has been reduced to hollow and formulaic recitations that signal only its demise. . . . General propositions stripped of all sense of context may seem useful to my fine appellate colleagues, . . . but they are of no use at all to people who must confront specific and difficult real-life situations. Neither Tobey nor the majority points to a single court decision addressing a situation even remotely similar in time, place, or manner to the one that occurred here, let alone a decision that would have made the unlawfulness of defendants' actions 'apparent.' They cite no decision involving the period before scores of passengers board airplanes, no decision involving the security-screening area of an airport, and no decision involving distracting conduct that poses a potential security threat. . . . The complete dearth of pertinent precedent should be dispositive of the question whether it was clearly established that defendants' conduct was unreasonable: it was not.")

Tobey v. Jones, 706 F.3d 379, 400, 401 (4th Cir. 2013) (Wilkinson, J., dissenting) ("Tobey's complaint. . . alleged a violation of the Fourth Amendment as well as the First, and for many of the reasons noted above, the district court rightly dismissed Tobey's Fourth Amendment claim, describing defendants' decision to summon local law enforcement as 'eminently reasonable.'. . This conclusion should have led it to dispose of Tobey's First Amendment claim as well. For just last Term, the Supreme Court held that, notwithstanding the First Amendment's general prohibition against retaliatory arrests, 'the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause' is not clearly established for purposes of qualified immunity, reasoning that any inference of impermissible causation is severely undermined by the existence of probable cause. . . .The same conclusion applies here: the causation element of Tobey's First Amendment claim is undermined, if not vitiated, by the fact that defendants' actions were reasonable under the Fourth Amendment. In light of *Reichle*, then, it was not clearly established that these same actions violated the First Amendment. The majority responds by pointing to Tobey's allegation that defendants' actions were not supported by 'probable cause.'. . The problem with this argument is that neither Tobey nor the majority cites a single case holding that probable cause is the relevant standard governing the decision by an official who does not have arresting authority, such as a TSA agent, to refer someone to another official who does. And any confusion regarding the appropriate Fourth Amendment standard only bolsters the conclusion that defendants' alleged constitutional violation was not clearly established. For the majority to hold otherwise, it must ignore conflicting precedents and expect lay TSA agents to have imposed on the spot a degree of coherence on First and Fourth Amendment jurisprudence that has eluded serious students of constitutional law. Qualified immunity exists to forestall precisely this result.")

Cilman v. Reeves, Nos. 09-1887, 09-1920, 2011 WL 5252646, at *3 (4th Cir. Nov. 4, 2011) (unpublished) ("No controlling Supreme Court or Fourth Circuit precedent speaks to a person's right to be free from a warrantless entry into his home in circumstances like those in the case at hand. Numerous out-of-circuit cases do address this issue, but courts have divided on this question. Some hold that commission of a misdemeanor drunk driving offense subject to a possible jail term does not justify a warrantless home arrest. [collecting cases] Others, however, hold to the contrary. [collecting cases] In light of the divergence in these holdings, we can only conclude that Officer Reeves was entitled to qualified immunity. . . Accordingly, the district court erred in granting summary judgment to Cilman on liability as to the § 1983 and Va.Code Ann. § 19.2-59 claims.")

H.H. ex rel. H.F. v. Moffett, No. 08-1009, 2009 WL 1931203, at *7 (4th Cir. July 7, 2009) ("We have little difficulty finding that a reasonable teacher would know that maliciously restraining [disabled] child in her [wheel]chair for hours at a time interferes with that child's constitutional liberty interests.")**.**

Fields v. Prater, 566 F.3d 381, 389, 390(4th Cir. 2009) ("It is true that defendants knew or should have known that consideration of political affiliation when hiring a local director was forbidden by the State Board's regulations. However, 'an official's clear violation of a state administrative regulation does not allow a § 1983 plaintiff to overcome the official's qualified immunity .'. . The law requires something more, namely that it be clear to a reasonable official at the time of the decision that selecting a local director on the basis of political affiliation contravened the First Amendment. We conclude that at the time of the hiring decision the law had not achieved that level of constitutional clarity that would allow us to hold defendants liable. . . . Because application of the principles of *Branti* and *Jenkins* to new situations invariably requires particularized inquiries into specific positions in the context of specific systems, it is not always easy to say that there is a clearly drawn line between those positions for which consideration of political affiliation is allowed and those for which it is not. . . . Undisputed evidence in the record, including an affidavit from a state official familiar with the system and the job application itself, show that political affiliation was not 'an appropriate requirement for the effective performance of the public office involved.'. . But to say that the rule in the Commonwealth is now clear going forward is a different matter from the retrospective imposition of monetary consequence. Both *Nader* and this case concerned management positions in local services agencies. In both cases, resolving the constitutional issue required a fact-intensive inquiry into the particular responsibilities of the positions and their role in their respective state systems. There was thus no 'bright line[ ]' rule in this context. . . .We find no fault with the able district judge, who concluded that the constitutional rights at issue were clearly established; this was a close question. But because we cannot unequivocally say that defendants knew or should have known they were violating Fields's constitutional rights when they refused to hire her, they are entitled to qualified immunity.")

Iko v. Shreve, 535 F.3d 225, 240 (4th Cir. 2008) ("We held over a decade ago that '[i]t is generally recognized that it is a violation of the Eighth Amendment for prison officials to use mace, tear gas *or other chemical agents in quantities greater than necessary* or for the sole purpose of infliction

of pain.' . . Notwithstanding this clear pronouncement, Lt. Shreve attempts to distinguish *Williams* on the grounds that it involved the use of mace, not pepper spray. Williams's use of 'or other chemical agents,'. . . plainly reaches the use of pepper spray, and evinces the principle that ' A'[c]learly established" ... includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked.' . . . Because Lt. Shreve had ' Afair warning" that [his] conduct was unconstitutional,' . . . we hold that Iko's right to be free from excessive use of pepper spray was clearly established, preventing an award of qualified immunity to Lt. Shreve on the facts before us.")**.**

Campbell v. Galloway, 483 F.3d 258, 271 (4th Cir. 2007) ("There is no doubt that the broad legal principle governing this case– that public employees may not be fired on a basis that infringes on their First Amendment rights–was clearly established at the time of Campbell's termination. At this stage of our analysis, however, our focus must be narrower, as the determination of whether a given right was clearly established requires us to define that right 'at a high level of particularity.' . . When the right is defined at the proper level of particularity and the analysis is directed to what is disputed in this case, the question becomes whether a reasonable officer would have known that Campbell's rambling thirteen-page memo to Chief Galloway, which focused overwhelmingly on personal grievances and vague gripes about fellow officers not being very nice to her, touched on a matter of public concern, thus entitling Campbell to the protection of the First Amendment. We answer that question in the negative. . . . As discussed above, this circuit has provided limited guidance on when complaints about sexual harassment will amount to matters of public concern. . . . Our fact-specific resolution of individual cases has done little to sharpen the line between cases where the complaints about discrimination are matters of public concern and those where such complaints are not matters of public concern. In our view, the speech at issue in this case falls within the gray area between speech that clearly is a matter of public concern and speech that clearly is not a matter of public concern. . . . Under these circumstances, we cannot conclude that the defendants unreasonably viewed Campbell's letter as involving personal grievances only, particularly given the state of the law in other circuits.").

Miller v. Prince George's County, 475 F.3d 621, 632, 633 (4th Cir. 2007) (". . . . Det. Dougans. . . seems to claim entitlement to qualified immunity on the theory that the magistrate found that his affidavit provided probable cause to issue the warrant. . . . In sum, well before the events at issue in this case, it was clearly established that a police officer could not lawfully make intentionally or recklessly false material statements or omissions in order to obtain a warrant. Accordingly, Det. Dougans is not entitled to qualified immunity, as a matter of law, on the present record.")

Lovelace v. Lee, 472 F.3d 174, 196-99 (4th Cir. 2006) ("Here, the district court erroneously granted Lester qualified immunity on the premise that there was uncertainty about RLUIPA's constitutionality at the time of the alleged violation. We apply a two-step analysis in assessing whether qualified immunity is available. . .We first consider whether the facts alleged, taken in the light most favorable to Lovelace, show that Lester violated Lovelace's statutory rights under

RLUIPA. Lovelace satisfies this part of the test, as our earlier discussion establishes. Second, we consider whether these statutory rights were clearly established at the time of the claimed violation. . . .Chronology and the origins of RLUIPA inform our analysis of whether the rights in question were clearly established at the time Lovelace was removed from the Ramadan pass list. RLUIPA was enacted in September 2000; the alleged violation occurred more than two years later, November and December 2002. . . . Section 3 of RLUIPA. . .encountered some hurdles before the Supreme Court declared it constitutional under the Establishment Clause in *Cutter v. Wilkinson*, 544 U.S. at 719-26. Prior to that decision, the Fourth, Seventh, and Ninth Circuits had upheld the provision under the Establishment Clause while the Sixth Circuit had invalidated it. . . . The question still remains whether a reasonable prison guard should have known that the conduct attributed to Lester violated Lovelace's free exercise rights under RLUIPA. . . . Because the facts support an inference that Lester acted intentionally in depriving Lovelace of his free exercise rights, Lester is not entitled to summary judgment on qualified immunity grounds. Although the outer boundaries of RLUIPA may have been uncharted at the time, its core protections were not. As explained earlier, RLUIPA incorporates and exceeds the Constitution's basic protections of religious exercise. . . Under both the Free Exercise Clause and RLUIPA in its most elemental form, a prisoner has a 'clearly established ... right to a diet consistent with his ... religious scruples,' including proper food during Ramadan. . . A prison official violates this clearly established right if he intentionally and without sufficient justification denies an inmate his religiously mandated diet. . . Thus, under both the First Amendment and any straightforward interpretation of RLUIPA, the unlawfulness of intentional and unjustified deprivations of Ramadan meals was apparent at the time of the incident. Lester's state of mind is therefore critical to determining whether a reasonable person in his position would have understood that his conduct violated clearly established rights. If Lovelace succeeds in showing that Lester intentionally blocked his observance of Ramadan in violation of RLUIPA's basic protections, then Lester would not be entitled to qualified immunity. Because there is on this record a genuine issue of material fact as to whether Lester intentionally and purposefully infringed Lovelace's free exercise rights–rights clearly established at the time under RLUIPA and the First Amendment–Lester is not entitled to qualified immunity at this stage on the RLUIPA claim.")

Blankenship v. Manchin, 471 F.3d 523, 533 (4th Cir. 2006) ("In sum, the general proposition that a government official may not retaliate against a citizen for the exercise of a constitutional right is clearly established law, per *Trulock*. The specific right at issue here, the right to be free of threats of imminent, adverse regulatory action due to the exercise of the right to free speech, was clearly established by this Court in *Suarez*.").

Ridpath v. Bd. of Governors of Marshall University, 447 F.3d 292, 314, 315, 321 (4th Cir. 2006)("We have provided, in several decisions, concrete examples of the types of public statements implying the existence of serious character defects such as dishonesty and immorality. . . Of course, none of these decisions involved the use of the 'corrective action' label in the course of an NCAA investigation. However, there is no logical distinction between, for instance, linking an employee's discharge to an investigation of financial irregularities . . . and tying Ridpath's

reassignment from the Department of Athletics to the University's serious NCAA rules violations (as the 'corrective action' label served to do). In each of these scenarios, the charge at issue can be understood to insinuate dishonesty and other serious character defects. Thus, our precedent gave the Administrators fair warning that the 'corrective action' label was just the type of charge that implicates a protected liberty interest. . . Similarly, we have specified that a public employer's stigmatizing remarks may infringe on an employee's liberty interest if such remarks are 'made in the course of a discharge or significant demotion.'. . . The Administrators therefore were provided with fair and clear warning that, by banishing Ridpath from the Department of Athletics, they were unlawfully subjecting him to a 'significant demotion' within the meaning of *Stone* and authorities relied on therein. . . Finally, because it is undisputed that Ridpath was not provided any procedural safeguards with respect to the labeling of his reassignment as a 'corrective action,' it cannot be questioned that the Administrators contravened Roth's requirement for 'notice and an opportunity to be heard.'. . Accordingly, accepting the allegations of the Amended Complaint as true, the Administrators contravened a clearly established Fourteenth Amendment procedural due process right of which a reasonable person would have known. They therefore are not entitled to qualified immunity at this stage of these proceedings on Ridpath's due process claim. . . . While further factual development in this case may present a murky picture of why Ridpath was relieved of his teaching position, the content and context of his statements, and any negative impact his remarks had on the efficiency of his workplace, the scene painted by the Amended Complaint is crystal clear. Read in the proper light, it alleges that the Administrators retaliated against Ridpath for making protected statements that they did not like. Such activity does not merely implicate the gray edges of the right Ridpath asserts; it goes to its very core. And taking the allegations of the Amended Complaint as true, a clearer violation of constitutionally protected free speech would be difficult to fathom. Therefore, Ridpath's retaliation claim alleges a violation of clearly established law of which a reasonable person would have known.")**.**

Short v. Smoot, 436 F.3d 422, 427-30 (4th Cir. 2006) (" The right in question here, defined at the appropriate level of specificity, is the right of a detainee, whose jailers know that he is suicidal, to have his jailers take precautions against his suicide beyond merely placing him in a cell under video surveillance. We hold that *Brown v. Harris*, 240 F.3d 383 (4th Cir.2001), demonstrates that no such right derives from the Eighth Amendment. . . . Importantly, a prison official 'who actually [knows] of a substantial risk to inmate health or safety may be found free from liability if [he] responded reasonably to the risk, even if the harm ultimately was not averted.'. . . Brown demonstrates that the first-shift officers' response to Short's risk of suicide was objectively reasonable and therefore sufficient to prevent liability under the Eighth Amendment. . . . Here, the first-shift officers' response to the risk that Short would kill himself was the same as Ogden's response in *Brown*: they placed the detainee in a cell under video surveillance. Thus, under *Brown*, this response was sufficient under the Cruel and Unusual Punishments Clause regardless of whether additional precautions might also have been advisable. . . . The critical point is that despite the actual failure of the officers' measures to prevent the detainees' suicides, and despite possible inattentiveness of the officers whose duty it was at the time of the suicides to watch the monitors, in both *Brown* and the present case the officers placed their detainees in video-monitored cells,

knowing that someone would be responsible for watching the monitors. . . . Appellants do not dispute that it was clearly established on the day of Short's death that the conscious failure by a jailer to make any attempt to stop an ongoing suicide attempt by one of his detainees would constitute deliberate indifference.").

Meeker v. Edmundson, 415 F.3d 317, 323 (4th Cir. 2005) ("Having concluded that Meeker has alleged the violation of a constitutional right, we turn to the second step of the *Saucier* qualified immunity analysis to determine whether Coach Edmundson is nonetheless entitled to immunity from suit. . . . [H]ere we ask whether in November 2000 a reasonable educator could have believed that repeatedly instituting the unprovoked and painful beatings of one of his students was lawful, in light of clearly established law. By November 2000, the law provided clear guidance: No school official could, consistent with constitutional principles, cause a student to be subjected to such beatings.").

Washington v. Wilmore, 407 F.3d 274, 283, 284 (4th Cir. 2005) ("We therefore conclude that the facts stated by Washington allege the violation of his constitutional right not to be deprived of liberty as a result of the fabrication of evidence by an investigating officer. Moreover, this right was clearly established in 1983, when the events relevant to this litigation took place. . . Accordingly, we affirm the denial of qualified immunity.").

Kirby v. City of Elizabeth City, 388 F.3d 440, 448, 450, 451 (4th Cir. 2004) ("It would violate the principles articulated in *McDonald* and *Thorne* to extend constitutional protection of public employees' petitions for redress beyond the protections afforded to public employee speech. In fact, it would allow the anomalous result that a private employment dispute could 'be constitutionalized merely by filing a legal action.' . . We therefore join the majority of circuits to have addressed the question in holding that a public employee's petition, like his speech, is constitutionally protected only when it addresses a matter of public concern. . . . Although we hold that Kirby's petitions implicated a matter of public concern, we affirm the judgment in favor of Appellees on other grounds. . . . Here, the petition rights that Kirby alleges that Chief Hampton and Lieutenant Koch violated were anything but clear. As is apparent from our analysis of the petition claim, the legal viability of the claim presents a close and novel issue, and even assuming that Kirby's allegations are true, Hampton and Koch cannot be held liable for what would amount to 'bad guesses in [a] gray area [ ].'").

Mom's Inc. v. Willman, 109 F. App'x 629, 2004 WL 2179166, at *5, *6 (4th Cir. Sept. 29, 2004) ("The remaining question is whether Colaprete's Fourth Amendment right against having his property converted following a search was clearly established when the alleged conversion occurred. The Seventh Circuit has held that the existence of this right is '[s]o obvious ... that we do not think the absence of case law can establish a defense of immunity.' . . We respectfully disagree. This court has never applied the Fourth Amendment in this manner, and Supreme Court precedent tilts slightly against the existence of any constitutional right against theft during the course of a search. . . . If either Appellant stole Colaprete's watch, he or she should have recognized

that this was a tort, a crime, and even a sin, but he had no clear notice that this action violated the United States Constitution. Accordingly, the district court erred in denying summary judgment on grounds of qualified immunity.").

Love-Lane v. Martin, 355 F.3d 766, 784 (4th Cir. 2004) ("Thus, by 1997 it was clearly established that Love-Lane's speech about race discrimination at Lewisville involved a matter of public concern. We have said on many occasions, however, that 'only infrequently will it be Aclearly established" that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a Aparticularized balancing" [under *Pickering*] that is subtle, difficult to apply, and not yet well-defined.' . . But we have never said 'that a public employee's right to speak on matters of public concern could never be clearly established.' . . In light of this earlier discussion, we are persuaded that the interests to be balanced under Pickering weigh so heavily in Love-Lane's favor that her right to speak about race discrimination in a public school was clearly established well before 1997 and 1998. . . . Because case law had confirmed Love-Lane's right to speak and because the *Pickering* balancing test tips decidedly in her favor, we hold that any reasonable school superintendent in Martin's position in 1997 and 1998 would have realized that he would violate the Constitution if he, in fact, took adverse employment action against Love-Lane for speaking out about race discrimination at Lewisville Elementary School.")

Love-Lane v. Martin, 355 F.3d 766, 801 (4th Cir. 2004) (Wilkinson, J., dissenting) ("In the final analysis, even if we disagree with Martin's personnel actions, his educational philosophy, his view of school discipline, or his feelings about the need for cooperative relations at the head of a school within his district, that is a far cry from saying that he violated clearly established federal law. In holding that he did, my fine colleagues have made a serious mistake. . . . To eviscerate the doctrine of qualified immunity, as the majority has done here, is to subject public schools uniquely to the omnipresent spectre of litigation, to the detriment of the children and communities they were intended to serve.").

Odom v. South Carolina Dep't of Corrections, 349 F.3d 765, 773, 774 (4th Cir. 2003) ("In June 2000, it was clearly established in this circuit that correctional officers who are present when a violent altercation involving an armed inmate erupts and fail to intervene immediately do not violate the Eighth Amendment if the officers are unarmed, unaware of a risk of harm prior to the altercation, and take reasonable steps to intervene safely. . . . By the same token, we had also determined, well before the time of this attack, that a correctional officer who stands by as a passive observer and *takes no action whatsoever* to intervene during an assault violates the rights of the victim inmate. . . . Other circuit courts of appeal, at the time of the attack, had concluded that a prison official acts with deliberate indifference when he ignores repeated requests from a vulnerable inmate to be separated from a fellow inmate who has issued violent threats which the aggressor will likely carry out in the absence of official intervention. . . We conclude that, at the time of the attack on Odom, the state of pre-existing law was such that reasonable prison guards

in the defendants' position would have understood that doing nothing in response to Odom's requests in light of the circumstances of this case violated Odom's rights.").

Bailey v. Kennedy, 349 F.3d 731, 741 (4th Cir.2003) ("Defining the right at issue with the requisite level of particularity, the appropriate question is whether, at the time of Kennedy and Whitley's actions on May 27, 1998, it was clearly established that a police officer may not detain someone for an emergency mental evaluation based only on a 911 report that the person was suicidal, where the officers were able to observe the person alleged to be suicidal and observed nothing indicating that the person might have been a danger to himself. We conclude that it was clearly established that probable cause was lacking in such a situation."), *pet. for reh'g and reh'g en banc denied,* 360 F.3d 470 (4th Cir. 2004).

Martin v. St. Mary's Dep't of Social **Services,** 346 F.3d 502, 506(4th Cir. 2003) ("Because of the complicated balance between parents' rights to raise their children and a State's interest in protecting its minor citizens, the right to familial integrity is 'amorphous' in many cases. . . The contours of the right to familial integrity may not be 'sufficiently clear' in certain situations, to be deemed 'clearly established' as required. . . A public official must decipher what conduct violates protected rights, but an official will not be held liable for 'bad guesses in gray areas.'").

Wilson v. Kittoe, 337 F.3d 392, 403 (4th Cir. 2003) ("In deciding whether the right alleged to have been violated was clearly established, the right must be defined 'at a high level of particularity.'. . Defining the right at issue with the requisite level of particularity, we agree with the district court that the appropriate question is whether, at the time of Kittoe's actions on April 14, 1999, it was clearly established that a police officer may not arrest a third party for criticizing the officer's conduct and refusing to leave the scene of an arrest. We conclude that that right was clearly established at the time of Wilson's arrest: a reasonable Virginia police officer in Kittoe's position would have understood that, as 'obstruction' has long been circumscribed in Virginia law, the four Conversations and the three Refusals to Obey could not generate probable cause for arrest under the Obstruction Statute.").

Altman v. City of High Point, 330 F.3d 194, 210, 211 (4th Cir. 2003) ("The dissent's effort to adduce relevant legal authority is ineffective. At the time Officers Moxley and Perdue acted, neither the Supreme Court nor the Fourth Circuit had held that dogs were 'effects' within the meaning of the Fourth Amendment. Nor had either court issued any opinion as to the Fourth Amendment reasonableness standards governing seizure of dogs. . . . Perhaps sensing this weakness, the dissent seeks to marshal a consensus of cases from other circuits, but no such consensus existed at the time of the actions at issue here. . . . There is one remaining avenue open to the dissent. Qualified immunity is also inappropriate when the action at issue was so obviously unconstitutional that, even though no precedent was factually similar, any reasonable officer would have known from the general contours of the law that his action was in violation thereof. . . . This is a difficult standard to satisfy . . . and it has been rendered even more so in this circuit by the *Robles* decision. For, if binding a man to a pole in the middle of a deserted parking lot at three in

the morning and abandoning him all for no legitimate law enforcement purpose was not clearly unconstitutional, then few things will be. Indeed, it follows *a fortiori* from the fact that it was far from obvious, even to a court of law, that dogs are 'effects' protected by the Fourth Amendment, that the officer on the beat could not reasonably be expected to know that his seizure of a dog might violate the Fourth Amendment.").

Mills v. Steger, 64 F. App'x 864, 2003 WL 21089092, at *8, *9 (4th Cir. May 14, 2003) (unpublished) ("Although plaintiffs have prevailed in some First Amendment retaliation cases, . . . most do not, simply because the individualized assessment required by the *Pickering* balancing test means we can rarely say that the law was clearly established and that reasonable officials would have been aware of the law. . . Here, as with most cases, we cannot say that the defendants should have known that transferring or terminating Mills because of his speech would be a violation of his First Amendment rights. Given the fine line drawing required to determine whether someone in Mills's position is entitled to First Amendment protection under the *Pickering* test, we cannot say that the law with respect to Mills's First Amendment rights was clearly established. We also cannot say that a reasonable official should have known what the outcome of our First Amendment analysis would be. We therefore conclude that the defendants are entitled to qualified immunity on Mills's First Amendment claim.").

Jones v. Buchanan, 325 F.3d 520, 532 (4th Cir. 2003) ("Both before and after November 1999, courts have consistently applied the *Graham* holding and have consistently held that officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity. So it is here. Jones has proffered evidence that Deputy Keller severely injured him by knocking him to the floor and jumping on him, even though Jones, although drunk and using foul language, was unarmed, handcuffed, and alone in a secured room in the sheriff's headquarters, having come there voluntarily and not under arrest or suspected of any crime. In reported cases prior to November 1999 and involving conduct that took place well before then, we and other courts have repeatedly denied qualified immunity to law enforcement officers in similar circumstances.").

Batten v. Gomez, 324 F.3d 288, 296 (4th Cir. 2003) ("The gist of Batten's argument is that it was clearly established that due process required notice and an opportunity to be heard before a state official could interfere with a mother's liberty interest in her child. The statement of the right at this level of generality, however, is of little help in determining the reasonableness of Shuster and Gomez's conduct. . . As the court in *Morrell* explained, '[t]he appropriate question is whether it would be clear to reasonable officials in the defendants' position that enforcing the [out-of-state] order without prior notice or an opportunity to be heard in [the home state] was unconstitutional.' . . In this case, aside from *Morrell*, we have been unable to find any authoritative cases considering analogous circumstances that hold that pre- deprivation notice and an opportunity to be heard is required as a matter of constitutional due process before a state may enforce another state's order directing that a child be brought before the out-of-state court. Because *Morrell* was

decided after Shuster and Gomez's actions in this case, Shuster and Gomez, like the defendants in *Morrell*, are immune from suit under the law of qualified immunity.")

Mansoor v. Trank, 319 F.3d 133, 139, 140 (4th Cir. 2003) ("Appellants' principal . . . argument is that in cases involving qualified immunity and the *Pickering* balancing test, the outcome of the balancing test can 'only infrequently' be said to be 'clearly established.' [citing *DiMeglio*] Although this is so, 'we did not say [in *DiMeglio*] that a public employee's right to speak on matters of public concern could *never* be clearly established.' . . In this case, as discussed earlier, Appellants have conceded that they had *no* interest in restricting the clearly protected speech covered by the Plan (*i.e.*, Mansoor's right to speak about matters of public concern as a private citizen). Given this concession, we have no difficulty concluding that the district court did not err in denying them qualified immunity.").

Robles v. Prince George's County, Maryland, 308 F.3d 437, 439, 440 (4th Cir. 2002) (*denying rehearing en banc*) ("In reasoning as it did, the panel followed the two-step analysis in [*Siegert* and *Wilson*]. Under step one of that analysis, if a constitutional violation is found then it will nearly always be a 'bad act.' In fact the constitutional violation in *Wilson* could be argued to be a far more invasive act than the incident the panel confronted here. If every bad act under step one of the *Wilson* analysis sufficed by itself to answer the step two qualified immunity inquiry, there would simply be no qualified immunity defense. The district court felt strongly that the officers had not been placed on notice that their behavior, however dumb, violated a clearly established constitutional right. My dissenting brother quotes at length from the majority's analysis under the first step of *Wilson.* The panel naturally relied on general language in *Bell v. Wolfish* to find a constitutional violation on these specific facts. The dissent indicates that the language of the step one analysis detailing the unconstitutionality of the officers' actions also suffices to satisfy the second prong of *Wilson.* However, the pitfalls of this approach should be apparent. If a court's general explanation of why an act is unconstitutional also suffices to supplant the need for specific notice, then there will be no independent force to the qualified immunity inquiry at all. The two steps of an analysis which the Supreme Court clearly intended to be sequential and distinct will simply collapse. The concept of notice is rooted in case law. The panel emphatically did not require the plaintiff to come forward with a case on all fours with the present one in order to abrogate the qualified immunity defense. . . It pressed for even one case that would put the officers on fair notice of a constitutional infraction, but all the cases plaintiff advanced involved much more egregious or far different circumstances than those present here. The plaintiff was unable to provide a single decision to illustrate even the general point that a fleeting or misguided prank rose to the level of a constitutional violation. *Wilson* requires that a plaintiff point to at least some pertinent authority. . . Plaintiff provided none at all. . . . While *Hope* certainly did not require prior cases to have fundamentally similar facts, neither did it take leave of the need to inquire into the case law to give at least a semblance of specificity to what would otherwise be general and abstract constitutional principles. These basic, simple principles worked well here. The officers did not go unpunished. In finding a constitutional violation, the panel allowed the plaintiff to proceed before a jury on his state due process claim for which Maryland provides no qualified

immunity defense. . . . It makes good sense to allow state law to hold officers to strict account while the parameters of federal violations are fairly defined. Moreover, the proper precedent has been established for the future. Police officers have been put on the clearest notice in this circuit that even brief episodes of foolishness implicate due process guarantees.")

Robles v. Prince George's County, Maryland, 308 F.3d 437, 441, 445 (4th Cir. 2002) (Luttig, J., dissenting from denial of rehearing en banc) ("Irrespective of any larger doctrinal implications, it is significant when a court of appeals holds, as did this panel, that law enforcement officers today could not reasonably have known that handcuffing a pretrial detainee to a pole in a deserted shopping center, and abandoning him there in the middle of the night, admittedly for no law enforcement purpose whatsoever, would violate his rights under the Constitution. I think it clear that the constitutional impermissibility, not to mention the inherent danger of such, is sufficiently self-evident to require the denial of qualified immunity to the defendant officers. . . . It should be apparent that I do not believe that a decided case is necessary in order for officers to be on fair notice that conduct like that by the officers here is violative of the Constitution. . . . And I would like to have thought that at this point in our history no court would hold, as did this panel, that law enforcement officers need an opinion from this court in order for them to be on notice that handcuffing a pretrial detainee to a metal pole in a deserted shopping center at 3:00 a.m. in the morning, and abandoning him there, *for no law enforcement purpose at all,* is unconstitutional. The sheer danger, not even to mention the constitutional irresponsibility, of such conduct is manifest as a simple matter of common sense, and is made all the more evident by events such as the recent spree of unpredictable sniper killings in the Washington, D.C., metropolitan area, which have even reached to *the identical shopping center in which appellant was handcuffed.* Such a holding as that of the panel analytically completes the transformation of qualified immunity into absolute immunity and goes a long way toward the dilution of section 1983 itself.").

McVey v. Virginia Highlands Airport Commission, No. 01-2466**,** 2002 WL 1869992, at * (4th Cir. Aug. 15, 2002) (unpublished) ("Because we conclude that McVey has failed to demonstrate at least two of the necessary elements for establishing a First Amendment claim, we need not reach the second inquiry under qualified immunity–whether her constitutional right was 'clearly established.' But we note in passing that in *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir.1996), we explained that 'only infrequently will it be Aclearly established" that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a Aparticularized balancing" that is subtle, difficult to apply and not yet well- defined.'").

Pike v. Osborne, 301 F.3d 182, 186 (4th Cir. 2002) (Hamilton, J., concurring in the judgment) ("*Jenkins* is confusing, at best, on the point of whether sheriffs in Virginia can lawfully terminate for political affiliation reasons dispatchers with privity to confidential information. Accordingly, because the law was not clearly established in December 1999 that a sheriff could not lawfully terminate for political affiliation reasons a dispatcher with privity to confidential information, Sheriff Osborne was entitled to qualified immunity").

Trulock v. Freeh, 275 F.3d 391, 403, 404 (4th Cir. 2001) ("Trulock had a reasonable expectation of privacy in the password-protected computer files and Conrad's authority to consent to the search did not extend to them. Trulock, therefore, has alleged a violation of his Fourth Amendment rights. Nevertheless, the Defendants are entitled to immunity because a reasonable officer in their position would not have known that the search would violate clearly established law. [footnote omitted] At the time of the search, at least one published case, although from a district court outside this circuit, held that a third party may consent to the search of a shared computer when the third party has complete access to the computer. . . . Conversely, we are aware of no reported cases answering whether an individual has a reasonable expectation of privacy in password-protected files stored in a shared computer. Trulock, though conceding the absence of computer specific caselaw, urges us to recognize a clearly established right based upon *Block* and other similar cases. We decline to do this. Although cases involving computers are not *sui generis,* the law of computers is fast evolving, and we are reluctant to recognize a retroactive right based on cases involving footlockers and other dissimilar objects. Thus, a reasonable officer in the Defendants' position would not have known that Conrad's consent did not authorize them to search Trulock's files; the Defendants are, therefore, entitled to qualified immunity.").

Trulock v. Freeh, 275 F.3d 406, 407, 409 (4th Cir. 2001) (Michael, J., concurring in part and dissenting in part) ("The majority holds that Conrad lacked the authority to consent to a search of Trulock's password-protected computer files. . .I agree. I also agree with the majority's conclusion. . .that Trulock's computer files are analogous to the locked footlocker in *United States v. Block,* 590 F.2d 535, 540-42 (4th Cir.1978) (holding that a mother's consent to the search of her son's room did not extend to his locked footlocker). I respectfully disagree, however, with the majority's view that the defendants are entitled to qualified immunity because there was no clearly established law saying that one co-user's consent to search a computer does not extend to the password-protected files of another co-user when the consenting co-user does not know the other's passwords. I would reject the defendants' qualified immunity defense because the unlawfulness of searching Trulock's password-protected files was readily apparent in light of the principles established in *Matlock* and reiterated in *Block.* . . . The central question here is whether in the light of pre-existing law it would have been apparent to a reasonable FBI agent that Conrad's general consent to search the computer she shared with Trulock did not authorize the search of Trulock's password-protected files stored in that computer. In answering this question, we look to Supreme Court cases, ' Acases of controlling authority in [this] jurisdiction," [and] the Aconsensus of cases of persuasive authority" from other jurisdictions' as sources of clearly established law. *Amaechi v. West,* 237 F.3d 356, 363 (4th Cir.2001) (quoting *Wilson,* 526 U.S. at 617). No court has decided a case involving third-party consent to the search of password-protected computer files. Nevertheless, we have clearly established law that is applicable: it comes from *Matlock* and *Block.* . . . Whatever the *physical* differences between locked footlockers and password-protected computer files, the question here must be whether a reasonable officer would believe that there is a *legal* difference for Fourth Amendment purposes. In other words, is there any reason why a reasonable FBI agent fully apprised of the principles in *Block* would believe that he could lawfully search Trulock's password-protected files on the basis of Conrad's general consent to search the

computer? If there is no such reason, the unlawfulness of the agents' conduct in this case is 'apparent,' *Wilson*, 526 U.S. at 615, and qualified immunity does not apply. Any reasonable officer should have recognized that the privacy expectations attaching to a password-protected computer file are essentially the same as those attaching to a locked footlocker. A computer file is a repository for information and images in electronic form, just as a footlocker is a repository for more tangible items such as papers and other personal effects. Once password protection attaches to a computer file, that protection is the electronic equivalent of the lock on a footlocker containing items that are intended to remain private. The password is an electronic key. While the medium for ensuring privacy is different, the result–a clear signal that privacy is expected against all those who lack the key (or the password)–is the same. There is simply no reason why a reasonable officer who understood that a locked footlocker signals a discrete expectation of privacy would believe that a password-protected computer file does not. The physical differences between the two repositories have no legal significance.").

Knussman v. Maryland, 272 F.3d 625, 638 & n.9 (4th Cir. 2001) (*Knussman IV*) ("Here, the concurring opinion departs and would, like the district court, define the right in fairly broad terms: whether 'a person's right not to have a gender neutral statute applied in a discriminatory manner' was clearly established in 1994. Such a broad definition is not faithful to the particularity principle which 'mandates that courts refer to concrete applications of abstract concepts to determine whether the right is clearly established.'[citing *Amaechi v. West*] In our view, defining the right so broadly is not too far removed from framing the issue as whether it was clearly established that a person had the right not to be discriminated against based on gender. Such a definition is too general to provide state officials with adequate guidance on the constitutional limits to their conduct. . . . We view the relevant constitutional question as follows: was the law clearly established in December 1994 that the equal protection clause prohibited a state agency from permitting only mothers, never fathers, to take child-nurturing leave benefits available to the primary care giver for a newborn? We think the decisions outlined above demonstrate that it was.").

Amaechi v. West, 237 F.3d 356, 362, 363 (4th Cir. 2001) ("West conceded at oral argument that a strip search or a body cavity search conducted in public violates an arrestee's Fourth Amendment right to a reasonable search, but he argues that relevant precedent does not define his conduct as unlawful because no case holds that the 'swiping' and 'slight' penetration of an arrestee's genitalia pursuant to a search incident to an arrest violates the Fourth Amendment. Contrary to West's argument, the exact conduct at issue need not have been held unlawful for the law governing an officer's actions to be clearly established. . . . Such precise precedent is not what the particularity principle mandates. Rather, the particularity principle mandates that courts refer to concrete applications of abstract concepts to determine whether the right is clearly established. . . . Accordingly, we must determine whether the contours of the right to be free from an unreasonable search have been identified in such a way as to afford West adequate notice that his search of Amaechi transgressed the Fourth Amendment. In doing so, we look to 'cases of controlling

authority in [this] jurisdiction,' as well as the 'consensus of cases of persuasive authority' from other jurisdictions. [citing *Wilson*]").

Doe v. Broderick, 225 F.3d 440, 455 (4th Cir. 2000) ("In August 1998, clearly established Fourth Amendment principles prohibited officers from searching private areas within commercial or business premises, or even private areas within public places, without probable cause. We believe it would have been apparent to a reasonable officer that these limitations encompassed a locked, patient-records room within a methadone clinic that contained confidential patient files, and that, if nothing else, Detective Broderick knew (or should have known) that his actions violated the Fourth Amendment rights of every person who had an expectation of privacy in the records room or the records contained there.").

Norwood v. Bain, 166 F.3d 243, 252, 253 (4th Cir. 1999) (en banc) (per curiam) (Wilkins, J., writing separately, and joined in this part of his opinion by Wilkinson, C.J., and JJ. Widener, Luttig, Niemeyer, Williams, Traxler) ("The constitutional right that Plaintiffs claim was violated, defined at the appropriate level of specificity, is their Fourth Amendment right to avoid individualized searches of their motorcycle saddlebags and unworn clothing performed prior to entering the rally for the purpose of detecting weapons when reliable information indicated that a real and imminent danger existed that armed members of warring motorcycle gangs planned to attend the rally and when Plaintiffs were informed that they would not be searched unless they chose to enter the fairgrounds on their motorcycles. The qualified immunity question presented, then, is whether in September 1994 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it. . . . But, it is undisputed that when this incident took place there was no clear law from the Supreme Court, this court, or the South Carolina Supreme Court holding that a search fails to pass constitutional muster under the Fourth Amendment as a special needs search when officers conduct a search at a checkpoint without individualized suspicion or a warrant–and a grave matter of public interest is at stake, an effective means of preventing that harm is available, and the searching technique employed is relatively unintrusive.").

Gould v. Davis, 165 F.3d 265, 270-71 (4th Cir. 1998) ("The parties agree, then, that the following was clearly established law in October 1992: the officers were required by the Fourth Amendment to knock and announce their presence, and wait a reasonable time for a response, prior to entering Gould's home; and, this requirement could only be excused if exigent circumstances justified immediate entry. With this background in mind, we turn now to the officers' basic argument in this court–that the exigent circumstances doctrine was not sufficiently defined in 1992 so that a reasonable officer would know he was violating clearly established law in seeking and executing a no-knock warrant under the circumstances of this case. . . . We believe it would have been 'sufficiently clear' and 'apparent' to a reasonable officer in October 1992 that failure to knock and announce prior to entering Gould's home could only be justified by a fear for officer safety or a fear that the evidence sought in the warrant could be easily destroyed.").

Gould v. Davis, 165 F.3d 265, 274 (4th Cir. 1998) (Williams, J., dissenting) ("Although the majority contends that the unlawfulness of the officers' actions was apparent in 1992, it was only last year, 1997, that the Supreme Court stated that the officer safety exception would not justify a 'no-knock' search 'at a time when the only individuals present in a residence ha[d] no connection with the [criminal] activity.' *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 1421, 137 L.Ed.2d 615 (1997). Thus, although it is now clearly established that the officers' conduct–as portrayed by the majority– violated the 'knock and announce' requirement, it was not clearly established that their conduct violated the 'knock and announce' requirement in October 1992.").

Vathekan v. Prince George's County, 154 F.3d 173, 175 (4th Cir. 1998) ("We hold that it was clearly established in 1995 that it is objectively unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone. We conclude that there is a factual dispute about whether Simms failed to give a warning before sending his dog into the house where Vathekan lived. This unresolved factual issue makes it impossible to grant summary judgment to Simms on qualified immunity grounds.").

Osborne v. Rose, Nos. 97-1259, 97-1264, 1998 WL 17044, *4 (4th Cir. Jan. 20, 1998) (unpublished) ("The Osbornes accept that *Albright* foreclosed malicious prosecution claims based on the Fourteenth Amendment but contend that *Albright* recognized such claims brought under the Fourth Amendment. It is true that *Albright* left open this question, and, prior to November 1994, some courts read *Albright* in conjunction with earlier Supreme Court cases to permit malicious prosecution claims under the Fourth Amendment. . . We do not believe, however, that the mere possibility that such claims might survive after *Albright* demonstrates that a constitutional right had reached the status of being clearly established.").

S.P. v. City of Takoma Park, 134 F.3d 260, 265-67 (4th Cir. 1998) ("Peller asserts that the clearly established right that the officers violated was her Fourth Amendment right to be free from seizure for the purpose of medical treatment absent probable cause to believe that she suffered from a mental disorder, posed a danger of serious harm to herself, and that there was no less restrictive alternative available consistent with her welfare. Because we conclude that the contours of such a right were not clearly established so as to make the unlawfulness of these officers' actions apparent, we affirm the district court's order granting the officers qualified immunity and dismissing her claim. . . . Reasonable officers, relying upon our decision in *Gooden* and the other circuit court decisions addressing similar situations, would have concluded that involuntarily detaining Peller was not only reasonable, but prudent.").

White v. Chambliss, 112 F.3d 731, 736, 737 (4th Cir. 1997) ("If section 1983 liability attaches too readily to removal and placement decisions, the course of public agencies would invariably become one of inaction, thus leaving children in abusive environments. The facts presented by White reveal that the DSS defendants violated no 'clearly established' law in removing White's children from her custody. Therefore, qualified immunity must lie.").

Winfield v. Bass, 106 F.3d 525, 531 (4th Cir. 1997) (en banc) ("The district court ruled that the right to personal security protected by the Eighth Amendment was well established at the time the events underlying this appeal transpired. But, it is axiomatic that defining the applicable right at that degree of abstraction is inappropriate. . . . Thus, we must inquire whether the established contours of the Eighth Amendment were sufficiently clear at the time of the attack to make it plain to reasonable officers that their actions under these particular circumstances violated Winfield's rights. In the context of this case, we ultimately are called upon to decide whether it was clearly established in February 1993 that an unarmed prison official would be deliberately indifferent to an inmate's need for safety if, during an attack by a prisoner armed with a dangerous weapon upon another prisoner, the official instantly mobilized to take control of the situation but failed to intervene immediately. We conclude that it was not.").

Conner v. McGraw, 104 F.3d 358 (Table), 1996 WL 741132, **5-7 (4th Cir. Dec. 30, 1996) ("While no one disagrees with a general statement of the principles of the *Elrod/Branti* line of cases, the jurisprudence of what offices are legally subject to political patronage terminations has been a burning and unresolved issue that has not been resolved even yet in this circuit, or indeed elsewhere. Less than a year before McGraw terminated Conner, we conducted a survey in the Fourth Circuit as well as in other jurisdictions to determine which positions could require political patronage. *See Stott v. Haworth*, 916 F.2d 134, 143-144 (4th Cir.1990) . . . . We hold that just as in the area of the *Elrod/Branti* line of cases, the *Pickering/Connick* line of cases was, and today is, not much clearer when applied to particularities. . . . The area of discharge for the exercise of First Amendment rights . . . is one of the most complex that we have to apply. When the courts have applied it inconsistently to justify dismissals of some employees and not others, it is simply expecting far too much of an objectively reasonable elected chief clerk to conclude that he is not entitled to fire his chief deputy clerk when he takes office in order to have his own administration carry out the policies of his campaign.").

Hogan v. Carter, 85 F.3d 1113, 1116 (4th Cir. 1996) (en banc) ("[A]lthough [*Washington v.*] *Harper* [, 494 U.S. 210 (1990)] had clearly established by the time that Dr. Carter ordered administration of the single emergency dose of Thorazine to Hogan that an inmate possesses a liberty interest in avoiding the administration of psychotropic drugs by prison officials, *Harper* had not established, let alone clearly established, the particular process that must precede the one-time administration of an antipsychotic drug in an emergency circumstance such as that confronted by Dr. Carter. Contrary to Hogan's contention, and to the holdings of the district court and panel, *Harper* does not, therefore, constitute clearly established law of which Dr. Carter could have been in violation.")

Price v. Sasser, 65 F.3d 342, 347 (4th Cir. 1995) ("While *Farmer* established that a risk of danger particular to the individual was not required, . . . that was not clearly the law, at least in this circuit, at the time of the attack on Price. . . . Because Tadlock could not reasonably have known that his behavior violated Price's clearly established rights at the time he was assaulted, Tadlock is entitled to qualified immunity . . . .").

Pinder v. Johnson, 54 F.3d 1169, 1176 (4th Cir. 1995) (*en banc*) ("Given the principles laid down by *DeShaney*, it can hardly be said that Johnson was faced with a clearly established duty to protect Pinder or her children in March of 1989. Indeed, it can be argued that *DeShaney* established exactly the opposite, i.e., that no such affirmative duty existed because neither Pinder nor her children were confined by the state.").

Hodge v. Jones, 31 F.3d 157, 167-68 (4th Cir. 1994) ("[W]e feel compelled to address a matter raised in the district court's opinion with which we find a fundamental error, namely the court's generalized formulation of a constitutional right which prevents reasonable government officials from knowing just what conduct is actually prohibited by the broad concept of family inviolability. [cite omitted] We commend the district court's thoughtful consideration of the familial privacy right, but note that it is this very need for such complex legal analysis that renders a denial of qualified immunity inappropriate in this case. Absent our conclusion that Defendants violated no constitutional rights, this would be a proper case for the application of qualified immunity because '[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'... To expect Defendants to resolve what reasonable jurists have long debated–namely the precise strictures of the penumbral right of familial privacy . . .is to impose burdens and expectations well beyond their reasonable capacities ... On the facts of this case and in light of preexisting law, we cannot say that the purported unlawfulness of retaining records of unsubstantiated child abuse charges should have been apparent to Defendants.").

Pritchett v. Alford, 973 F.2d 307, 314 (4th Cir.1992) ("[T]he fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes. [cite omitted] 'Clearly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle involved.").

Newhard v. Borders, 649 F.Supp.2d 440, 448, 449 (W.D. Va. 2009) ("First, the Unnamed Officer who allegedly searched through Newhard's phone after the arrest is entitled to qualified immunity because Newhard's constitutional right to be free from such a search under the Fourth Amendment was not 'clearly established' at the time of the alleged misconduct. As an initial matter, it is well established that, subsequent to an arrest, an officer may conduct a warrantless search of an arrestee's person and the area 'within his immediate control' 'in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape,' or to prevent the concealment and destruction of evidence, without running afoul of the Fourth Amendment. *Chimel v. California,* 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Furthermore, a post-arrest, pre-incarceration inventory search is another 'well-defined exception to the warrant requirement.' *Illinois v. Lafayette,* 462 U.S. 640, 644, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). In the Internet age, the extent to which the Fourth Amendment provides protection for the contents of electronic communications (such as images stored on a cell phone) in a search incident to arrest or inventory

search is an open question. . . The Fourth Circuit has held that 'officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest' in order to preserve evidence, *see United States v. Murphy,* 552 F.3d 405, 411 (4th Cir.2009), and other courts have reached similar conclusions. *See, e.g., United States v. Finley,* 477 F.3d 250, 259-60 (5th Cir.2007); *United States v. Santillan,* 571 F.Supp.2d 1093, 1102 (D.Ariz.2008); *United States v. Deans,* 549 F.Supp.2d 1085, 1093-94 (D.Minn.2008). Under different circumstances, however, other courts have invalidated warrantless searches of cell phones incident to arrest. *See, e.g., United States v. McGhee,* 2009 WL 2424104, 2009 U.S. Dist. LEXIS 62427 (D.Neb. July 21, 2009); *United States v. Quintana,* 594 F.Supp.2d 1291, 1301 (M.D.Fla.2009). But given the Fourth Circuit's approval of the retrieval of text messages and other information from a cell phone seized incident to an arrest in *Murphy* and the lack of a clear rule from the Supreme Court or other lower courts regarding with the permissible scope of a search of a cell phone incident to arrest, I cannot conclude that the search conducted by the Unnamed Officer in this case violated any 'clearly established' Fourth Amendment right of Newhard's, or that the purported illegality of the search 'would have been evident to a reasonable officer based on existing caselaw.'..Under the circumstances alleged in the Amended Complaint, a reasonable officer could have believed that the Unnamed Officer's search of the cell phone after Newhard's arrest 'comported with the Fourth Amendment' as either a valid search incident to arrest or inventory search.")**.**

Brown v. Mitchell, 327 F.Supp.2d 615, 649-51 (E.D. Va. 2004) ("Mitchell contends that, because Brown is unable to cite to a case presenting the specific fact pattern in this case, qualified immunity attaches. Thus, according to Mitchell, because there is no precedent finding a sheriff, who runs a jail facility owned by a separate political entity and who has tried to get this separate political entity to improve the facility, liable for an inmate's death caused by a disease, of a type that the facility has never before experienced, she is entitled to qualified immunity. Mitchell's argument proves too much. Indeed, to ascertain whether a right is 'clearly established' as posited by Mitchell would mean that, until a particular fact pattern (or an almost identical fact pattern) had been judicially determined to infringe a constitutional right and, thereafter, repeated itself, officials would remain immune from Section 1983 liability. [footnote omitted] Contrary, however, to Mitchell's argument, the nonexistence of controlling authority holding that the defendant's identical (or virtually identical) conduct is unlawful does not guarantee qualified immunity. . . 'Clearly established' does not mean that the very actions in question have previously been held unlawful; rather, it merely means that, in light of preexisting law, the unlawfulness of the official's conduct was reasonably and objectively apparent. . . Qualified immunity is not intended to relieve government officials from the responsibility of applying settled legal principles to new, but reasonably analogous, situations; there need not exist a case on 'all fours' with the fact pattern presented by the case under review before Section 1983 liability can attach. . .[footnote omitted] Mitchell's argument, unfortunately, has come into vogue in this district. Counsel all too often look to, and cite (often out of context), snippets of qualified immunity decisions and not the doctrine of qualified immunity reflected in Fourth Circuit jurisprudence as a whole. That is precisely what Mitchell has done here. As the Court of Appeals recently explained in *Parrish*, however, the Fourth Circuit rule does not instruct district courts to define the implicated right in terms of decided cases

on all fours with the one at issue. And, none of the decisions cited by Mitchell follow the approach that Mitchell urges here. . . . It is undisputed that here, Mitchell knew that the overcrowded conditions at the Jail presented an unacceptably high risk of the spread of contagious disease. A reasonable official, armed with this knowledge, would have realized that housing inmates under such conditions was violative of their rights. And, as explained above, the absence of decisional law containing Mitchell's precisely posited facts (e.g., a jail facility owned by a separate political entity, a inmate who dies from a disease that the facility has never before experienced, a jailor who has asked the jail owners to fix the facility's problems) does not entitle her to qualified immunity. Rather, because the applicability of the complained of right on the facts presented here is manifestly apparent from the core constitutional principle, the absence of a case presenting a virtually identical fact pattern to this one is not dispositive. Simply stated, in light of the clearly established legal authority respecting inmates' rights to be housed in prison conditions that meet their basic human needs, a reasonable official in Mitchell's position would have realized that it was a violation of the Constitution to continue to house inmates in a jail that was so grossly overcrowded that it presented an unacceptably high risk of spreading contagious diseases.").

FIFTH CIRCUIT

Shumpert v. City of Tupelo, 905 F.3d 310, 321-23 (5th Cir. 2018) ("Plaintiffs have the burden of demonstrating that Officer Cook violated a 'clearly established law at the time the challenged conduct occurred.' Plaintiffs do not provide any legal authority to demonstrate that Officer Cook violated clearly established law by releasing the K9. Instead, they contend generally that Shumpert had a constitutional right to be free from excessive force. This court has previously rejected such general contentions. Even if Plaintiffs had included case law to support their argument, they would still be unable to demonstrate that Officer Cook's conduct violated clearly established law. At the time of the challenged conduct, neither the United States Supreme Court nor this court had addressed what constitutes reasonable use of K9 force during an arrest. After that date, this court decided *Cooper v. Brown*, which addressed the issue. . . .[U]nder *Cooper*, the law is now clearly established that when '[n]o reasonable officer could conclude that [a suspect] pose[s] an immediate threat to [law enforcement officers] or others,' it is unreasonable to use K9 force to subdue a suspect who is complying with officer instructions. Even if *Cooper* were applicable, Officer Cook's conduct would not violate clearly established law. We emphasized in *Cooper* that '[o]ur caselaw makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced." Because the officer in *Cooper* continued to use force and even increased its use while the threat to officers decreased, he violated clearly established law. By contrast, Officer Cook did not use or increase the use of force after Shumpert was subdued; instead, Shumpert ignored Officer Cook's instructions and retreated further under the home, preventing Officer Cook from determining whether he was armed. While caselaw establishes that it is unreasonable to use force after a suspect is subdued or demonstrates compliance, this court has repeatedly held that the 'measured and ascending' use of force is not excessive when a suspect is resisting arrest—provided the officer ceases the use of force once the suspect is subdued. Because it is undisputed that Shumpert was violently resisting arrest and that Officer Cook did not know whether he was armed,

Plaintiffs have not met their burden of demonstrating that—under the discrete facts of this case—Officer Cook's use of K9 force was objectively unreasonable in light of clearly established law. The district court properly determined that Officer Cook was entitled to qualified immunity on this claim." [footnotes omitted])

Mote v. Walthall, 902 F.3d 500, 505 n.12 (5th Cir. 2018) ("We recently remarked in another First Amendment case, *Davidson v. City of Stafford*, 848 F.3d 384 (5th Cir.2017):

On the second prong of the qualified immunity defense, recent Supreme Court decisions addressing claims for excessive force have 'reiterate[d] the longstanding principle that "clearly established law" should not be defined "at a high level of generality."'. . Our cases outside the excessive force area involving warrantless arrests and limits on speech have not specifically mentioned this aspect of Supreme Court cases. *See, e.g.*, *Deville v. Marcantel*, 567 F.3d 156, 166 (5th Cir.2009); *Evett v. DETNTFF*, 330 F.3d 681, 687 (5th Cir.2003).

848 F.3d at 394. But we recited the 'high level of generality' standard in another First Amendment case soon thereafter. *See Turner v. Lieutenant Driver*, 848 F.3d 678, 686 (5th Cir.2017). Because we believe, as shown below, that the First Amendment law here meets this higher standard, we need not analyze whether the 'high level of generality' language perforce applies to cases outside of the excessive force line of cases.")

Zadeh v. Robinson, 902 F.3d 483, 498-500 & n. 11 (5th Cir. 2018) (Willett, J., concurring dubitante) ("The court is right about Dr. Zadeh's rights: They were violated. But owing to a legal *deus ex machina*—the 'clearly established law' prong of qualified-immunity analysis—the violation eludes vindication. I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work. And the entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. But immunity ought not be immune from thoughtful reappraisal. To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to 'every' reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. Today's case applies prevailing immunity precedent (as best we can divine it): Dr. Zadeh loses because no prior decision held such a search unconstitutional. But courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist. How indistinguishable must existing precedent be? On the one hand, the Supreme Court reassures plaintiffs that its caselaw 'does not require a case directly on point for a right to be clearly established.' On the other hand, the Court admonishes that 'clearly established law must be "particularized" to the facts of the case.' But like facts in like cases is unlikely. And this leaves the 'clearly established' standard neither clear nor established among our Nation's lower courts. Two other factors perpetuate perplexity over 'clearly established law.' First, many courts grant immunity without first determining whether the challenged behavior violates the Constitution. They avoid scrutinizing the alleged offense by skipping to the simpler second prong:

no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding. But the inexorable result is 'constitutional stagnation'—fewer courts establishing law at all, much less *clearly* doing so. Second, constitutional litigation increasingly involves cutting-edge technologies. If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity—matter-of-fact guidance about what the Constitution requires—remains exasperatingly elusive. Result: blurred constitutional contours as technological innovation outpaces legal adaptation. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose. Count me with Chief Justice Marshall: 'The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.' The current 'yes harm, no foul' imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed. It is indeed curious how qualified immunity excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations. . . Qualified immunity aims to balance competing policy goals. And I concede it enjoys special favor at the Supreme Court, which seems untroubled by any one-sidedness. Even so, I add my voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence and its 'real world implementation.'. . . The most recent issue of the *Notre Dame Law Review* gathers several scholarly essays that carefully examine qualified immunity and discuss potential refinements in light of mounting legal and empirical criticism. Symposium, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793 (2018); *see also, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (claiming the doctrine "lacks legal justification, and the Court's justifications are unpersuasive"); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 70 (2017) (concluding that "the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility"); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 869 (2010) ("Today, the law of qualified immunity is out of balance .... The Supreme Court needs to intervene, not only to reconcile the divergent approaches of the Circuits but also, and more fundamentally, to rethink qualified immunity and get constitutional tort law back on track.")." [footnotes omitted])

Collie v. Barron, No. 17-10935, 2018 WL 4182173, at *3 (5th Cir. Aug. 30, 2018) (per curiam) (not reported) ("An officer's use of deadly force is justified when the officer reasonably perceives an immediate threat of serious bodily harm or death to themselves or to others. . . Neither post-incident proof that Collie carried no weapon, nor the fact that Collie never directly pointed at Flores changes this analysis. Nor do the stop-action shots made by Collie's expert from the dash cam video change this analysis, because they give a false perspective on events that transpired in a few seconds. The district court properly focused on whether Officer Barron's actions were

justified in the heat of the moment. . . The district court's determination that Officer Barron acted reasonably in light of the facts before him is well supported. . . .Collie fails to address the Supreme Court's explicit directive in *Pauly* that although claims of excessive force do not require a case that is directly on point, the standard hugs the line closely by requiring a case 'under similar circumstances.'. . Instead, Collie relies on *Graham v. Connor* for the general rule that an officer's actions must be objectively reasonable. He then contends that because he did not fit more complete descriptions of the suspects, did not point in the direction of Deputy Flores, and did not have a weapon in his hand, Officer Barron's claim to believe his partner's life was in danger should be given no more weight than Collie's own testimony. We note that the summary judgment evidence does not show that the officers had received the height/weight/age descriptions of the suspects at the time they encountered Collie. Collie's position also excludes the relevant facts that he was a shirtless black male on foot in the near vicinity of the robbery who encountered the officers in a dimly lit area and did not stop in response to their commands. Accordingly, Collie's argument failed to discharge his legal burden to 'find a case in his favor that does not define the law at a "high level of generality."'")

Winfrey v. Rogers, 901 F.3d 483, 494-98 (5th Cir. 2018) ("Here, the clearly established constitutional right asserted by Junior is to be free from police arrest without a good faith showing of probable cause. Since *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), it has been clearly established that a defendant's Fourth Amendment rights are violated if (1) the affiant, in support of the warrant, includes 'a false statement knowingly and intentionally, or with reckless disregard for the truth' and (2) 'the allegedly false statement is necessary to the finding of probable cause.'. . In *Franks*, the Supreme Court observed that the warrant requirement is meant 'to allow the magistrate to make an independent evaluation of the matter.'. . It requires affiants to 'set forth particular facts and circumstances underlying the existence of probable cause,' including those that concern the reliability of the information and the credibility of the source to avoid 'deliberately or reckless false statement[s].'. .Still, 'negligence alone will not defeat qualified immunity.'. . '[A] proven misstatement can vitiate an affidavit only if it is established that the misstatement was the product "of deliberate falsehood or of reckless disregard for the truth."'. . Recklessness requires proof that the defendant ' "in fact entertained serious doubts as to the truth" of the statement.'. .Here, we conclude that Junior alleges a clearly established constitutional violation. . . . In short, the evidence presented is sufficient to support a finding that [Johnson's] conduct was unreasonable in the light of the well-established principle requiring probable cause for the issuance of an arrest warrant. . . . The primary question on remand appears to be whether Johnson acted recklessly, knowingly, or intentionally by presenting the judge with an arrest-warrant affidavit that contained numerous omissions and misstatements. This case should go to trial without delay in a manner not inconsistent with this opinion.")

Perniciaro v. Lea, 901 F.3d 241, 256-57 (5th Cir. 2018) ("Even if we agreed that the professional-judgment standard applies to persons detained pre-trial for competency restoration, Perniciaro still would have failed to establish that defendants' conduct violated clearly established law. . . Perniciaro has not cited a single case—either in his briefing before the district court or before us—

clearly establishing that the particular conduct at issue here violates the professional-judgment standard. Thus, he has failed to address the dispositive question: '[W]hether the violative nature of *particular* conduct is clearly established.'. .Perniciaro relies on the general statement that, under *Youngberg*, his due-process rights to care and safety were violated because defendants' actions '[were] such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.' But general propositions of law defined at 'high level[s] of generality' are insufficient to define clearly established law for purposes of defeating qualified immunity. . . Even assuming that the *Youngberg* standard applies, Perniciaro has failed to establish that defendants' conduct was objectively unreasonable in light of clearly established law. . . . But assuming—as did the district court—that the deliberate-indifference standard applies, defendants would still be entitled to qualified immunity. The evidence, taken in the light most favorable to Perniciaro, fails to establish a dispute of material fact as to whether defendants' conduct was objectively unreasonable in light of clearly established law.

Romero v. City of Grapevine, Texas, 888 F.3d 170, 178 n.3 (5th Cir. 2018) ("Even if Clark had used excessive force in violation of Villalpando's Fourth Amendment right, Clark would still be entitled to qualified immunity because the right, defined at a fact specific level, was not clearly established at the time of the violation. . . The Supreme Court has explained that courts must not 'define clearly established law at a high level of generality.'. . Instead, the question is 'whether it was clearly established that the Fourth Amendment prohibited the officer's conduct *in the "situation [he or she] confronted*.'". . Romero does not cite to any controlling authority nor does she point to a 'robust consensus of persuasive authority' that suggests Clark's actions were obviously unconstitutional. . . While authority need not be exactly analogous to aid the court in determining whether a right was clearly established, 'this area is one in which the result depends very much on the facts of each case,' and the authority must 'squarely govern[ ]' the circumstances. . . There simply is no such authority.")

Hale v. City of Biloxi, 731 F. App'x 259, ___ (5th Cir. 2018) ("Hale must point to case law clearly establishing that Lea and Garner acted unreasonably based on facts similar to the particular circumstances they faced—the use of deadly force and a taser where a person suspected of a nonviolent crime ignores repeated warnings to keep his hands visible and step outside of a confined area when he knows the people warning him are armed police officers, even if they have not told him he is under arrest. . . Hale does not cite any such case on point. Hale does try to distinguish our prior cases where officers were entitled to qualified immunity because they reasonably believed the suspect was reaching for a weapon. As discussed, Hale argues that, in those cases, the suspect was wanted for a violent crime, resisting or fleeing arrest, or clearly brandishing a weapon. We have already explained that *Manis* shows Hale cannot prevail on this front. Moreover, the fact that in previous cases we found qualified immunity where such factors were present, but where we did not state that those factors were required for qualified immunity, would hardly provide 'fair warning' to Garner and Lea.")

Sam v. Richard, 887 F.3d 710, 714 & n.3 (5th Cir. 2018) ("On the facts as recounted by Sam, Richard's use of force was objectively unreasonable at the summary judgment stage. Although Sam initially ran, he states in deposition that he was lying face down on the ground with his hands on his head when Richard kneed him in the hip and pushed him against a patrol car. Such a use of force on a compliant suspect is excessive and unreasonable. . . Furthermore, it was clearly established at the time of this incident that pushing, kneeing, and slapping a suspect who is neither fleeing nor resisting is excessive. . . Richard's contention that the force alleged by Sam would have produced more serious injuries is a question of credibility which is not appropriate for resolution at this stage. Accordingly, we hold that Sam's evidence of excessive force is sufficient to survive a motion for summary judgment. . . .We note that the Supreme Court recently reversed denial of qualified immunity in an excessive force case. *See Kisela v. Hughes*, —— U.S. ——, 138 S.Ct. 1148, —— L.Ed.2d —— (2018) (per curiam). But, as that decision instructs, '[u]se of excessive force is an area of the law "in which the result depends very much on the facts of each case."' The facts at issue in *Kisela* bear little resemblance to those before us here.")

Lincoln v. Scott, 887 F.3d 190, 197-98 (5th Cir. 2018) ("[A]lthough the officers violated Erin's Fourth Amendment rights by detaining her for four hours without probable cause, the court must determine whether that right was 'clearly established.'. . . In a recent, related appeal, this court held that it was not clearly established that an officer could not detain the sole compliant witness to a police shooting. *Turner*, 874 F.3d at 849. . . The court disagreed with Erin's reliance on *Dunaway v. New York* . . . and *Davis v. Mississippi*. . . as evidence that the Fourth Amendment right violated was clearly established. *Turner*, 874 F.3d at 849. It held that those cases did not 'clearly establish[ ] that a law enforcement officer could not detain a witness to a police shooting for ... two hours while a SWAT team sorted out the scene, [particularly] when the witness was standing beside a person when the police shot him.'. . . Moreover, *Walker* similarly determined that the officers did not violate clearly established law when officers forcefully detained witnesses in their own home. . . The intricate facts here—reasonableness of detaining a sole, compliant witness to a police shooting—have never been directly addressed or clearly established by this Circuit or the Supreme Court. *See Turner*, 874 F.3d at 849. The Supreme Court has 'repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the *particular circumstances* that he or she faced."'. . Our inability to point to a string of cases establishing 'settled law' that these facts amount to a Fourth Amendment violation demonstrates that the violated right was not so clearly established that these officers can be liable. . . In sum, this court, as well as other circuits, have determined that officers acting under similar circumstances—detaining a sole witness for questioning and investigative preservation—do not violate any clearly established right. It follows that these officers—Meeks, Scott, and Barnes—similarly were not bound by any such clearly established law. The district court correctly granted these officers qualified immunity.")

Melton v. Phillips, 875 F.3d 256, 262-66 (5th Cir. 2017) (en banc) ("The panel opinion treated *Jennings* and *Hampton* as in conflict with *Hart*. . . However, we, like the parties in this

case, interpret our precedents to be in one accord. Thus, an officer who has provided information for the purpose of its being included in a warrant application under *Hart* has assisted in preparing the warrant application for purposes of *Jennings* and *Hampton* and may be liable, but an officer who has not provided information for the purpose of its being included in a warrant application may be liable only if he signed or presented the application. . . . Here, the fact issue that the district court identified was whether Deputy Phillips used the P.I.D. in an improper way while preparing the incident report. The district court determined that this fact issue was material to recklessness and that Deputy Phillips's immunity depended on whether he was reckless because, as the district court understood it, *Franks* applies to 'any government official who makes a reckless misstatement.' However, even assuming *arguendo* that Deputy Phillips was reckless in completing the incident report, . . . he is still entitled to summary judgment unless there is a question of fact as to whether he assisted in the preparation of the complaint on the basis of which the *capias* warrant issued. . . Melton seeks to create a fact issue as to whether Deputy Phillips helped prepare the complaint by providing information for use in it, asserting that '[a]ny investigator would know' an incident report will be used to obtain a warrant. However, there is no record evidence of a policy or practice at the Hunt County Sheriff's Office that would have allowed Deputy Phillips to anticipate that the incident report would be used to obtain a warrant. . . .Even assuming *arguendo* that Melton could demonstrate that a fact issue exists on his claim that Deputy Phillips recklessly filled out the incident report, Melton bears the burden of demonstrating that Deputy Phillips violated his clearly established rights. . . . Rather than attempting to demonstrate that his rights were clearly established by cases addressing analogous or near-analogous facts, Melton has repeatedly emphasized that the facts of his case are unique. . . Moreover, Melton conceded at oral argument that he could not identify a single case applying *Franks* to a situation in which there was no error in the complaint and no false statement that made its way into the warrant. . . Indeed, *Franks* expressly requires a falsehood to be included in the warrant application for there to be a Fourth Amendment violation. . . Particularly in light of *Franks*'s detailed discussion of why its rule must be narrowly construed, we cannot say *Franks* clearly established the unconstitutionality of Deputy Phillips's conduct. . . Moreover, even if Melton had attempted to satisfy his burden rather than conceding that his case is unique and that no case applies *Franks* in similar circumstances, Melton could not have shown that Deputy Phillips violated his clearly established rights without assisting in preparing, presenting, or signing the complaint. *Hart* and *Hampton* had been decided at the time Deputy Phillips prepared the incident report. As discussed above, *Hampton* held that an officer is entitled to qualified immunity if he does not prepare, present, or sign a warrant application. . . *Hart* held that an officer is not entitled to qualified immunity if he 'deliberately or recklessly provides false, material information *for use in an affidavit in support of [a warrant]*.". . Because Melton cannot show that Deputy Phillips prepared, presented, signed, or provided information for use in the complaint, he cannot show that Deputy Phillips violated clearly established law.")

Melton v. Phillips, 875 F.3d 256, 268 (5th Cir. 2017) (en banc) (Costa, J., concurring in the judgment) ("The en banc court's attempt to reconcile rather than correct our caselaw, with *Hart* apparently now being a subpart of the *Hampton* standard, will continue to result in

confusion. That confusion is especially problematic for a claim in which individuals can assert a qualified immunity defense as a lack of clarity in the law provides a defense. In a future *Franks* case, an officer who provided false information 'for use in' an affidavit will no doubt argue he was not 'fully responsible' for the warrant application and thus is immune under the *Hampton* and *Jennings* decisions that we reaffirm today. Such a conflict in the caselaw will support an easy defense of qualified immunity as this case demonstrates. Although the 'violation of clearly established law' standard is increasingly being questioned, *see Ziglar v. Abbasi*, —— U.S. ——, 137 S.Ct. 1843, 1870–72, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring) (citing Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. (forthcoming 2018)), it is hard to imagine that any immunity threshold should hold law enforcement to a higher standard than judges when it comes to interpreting the law. If judges thought (and apparently still think) that the *Michalik* standard should extend to *Franks* cases, then an officer like Phillips who has neither the legal training of judges nor the time we can devote to parsing caselaw should not face civil liability for that error. So I join the majority opinion in concluding that Phillips is immune from this suit. . .But I would use the en banc process to recognize the dubious provenance of the 'sign or prepare' requirement in our *Franks* case. *Hart* alone should provide the appropriate standard for *Franks* claims. Its 'for use in' requirement is more straightforward, consistent with the law in other circuits, and fully captures *Franks*'s concern that an officer's misrepresentations to a court should not be a basis for interfering with citizens' privacy and liberty interests. Our failure to straighten out the strands of Fourth Amendment law that got tangled in *Hampton* means that the next time one of these cases comes along, perhaps with a stronger case for liability than this one, the important Fourth Amendment concerns that *Franks* protects might not be vindicated.")

Melton v. Phillips, 875 F.3d 256, 271-75 (5th Cir. 2017) (en banc) (Dennis, J., joined by Graves, J., dissenting) ("The majority opinion's holding that an officer who makes a deliberate or reckless misrepresentation can only be held liable if he 'assisted in the preparation of, or otherwise presented or signed a warrant application' is unsound and, unsurprisingly, is not the law in any other circuit. . .Our sister circuits' caselaw reflects a common-sense understanding: when an officer, acting with reckless disregard for the truth, includes false, material information in an official report for further official use, leading to an unlawful search or arrest of an innocent person, there is no justification to insulate him from liability. . . . .In addition to establishing an imprudent and unfounded rule of law, the court makes serious procedural missteps. On appeal from the denial of a motion for summary judgment based on qualified immunity, this court 'lack[s] jurisdiction to review the genuineness of a fact issue.'. . We have jurisdiction to review only the materiality of the factual issues. . . In this case, the district court found that the plaintiff 'has introduced evidence suggesting that Phillips's identification of [the plaintiff] in his incident report was reckless.' The majority opinion acknowledges that recklessness is a question of fact, but in the same breath, it concludes that the facts identified by the district court are not 'material' to recklessness. . . In actuality, the majority opinion simply overrules the district court's determination that there is a genuine dispute as to whether Phillips 'in fact entertained serious doubts as to the truth of the information included in the warrant application,'. . . and by so doing exceeds this court's jurisdiction. . .The majority proceeds to absolve Phillips on the additional basis that, even if he did

violate the plaintiff's constitutional rights, those rights were not 'clearly established.' Phillips never made such an argument—not before the district court, not in his brief on appeal, and not in his supplemental en banc brief. The majority opinion states that Phillips's assertion of qualified immunity below 'placed the burden on Melton to demonstrate that neither prong of the defense applies.'. . But it is the appellant's burden to show that the district court erred. . . .Pro se litigants could only dream of receiving the judicial help that the en banc court is giving an officer represented by a highly competent attorney. . . This court's zeal to protect officers from the prospect of chilling liability cannot justify abandoning our rules and reversing the district court's judgment on the basis of arguments that the appellant has not made. . .Because I believe that the majority opinion errs in reversing the district court's denial of qualified immunity, I respectfully dissent.")

Lincoln v. Turner, 874 F.3d 833, 848-51 (5th Cir. 2017) ("As we have already concluded that Erin sufficiently alleged violations of her right to be free from unreasonable seizure and excessive force, the remaining question for qualified immunity purposes is whether those rights were clearly established. . . .The district court held that plaintiffs did not cite clearly established law establishing that an officer cannot 'detain a witness for a period of approximately two hours while an investigation was underway,' although the parties have also consistently addressed Erin's detention as a potential suspect. . . The reality may be somewhere in between. Turner seized Erin in the aftermath of a police shooting resulting from a SWAT team deployment. Even on Erin's account, the scene was tense, and the officers were acting with incomplete information. In these circumstances, Turner may have been entitled to detain Erin for some amount of time to determine her role in the situation. As we explained, Turner exceeded this authority when he handcuffed Erin and detained her in the back of a police car for two hours. In doing so, Turner violated Erin's constitutional rights. Yet we are not persuaded that '*every* reasonable official would have understood that what he is doing violates that right.' At this stage, Erin has the burden to demonstrate that the law was clearly established in this area on the date of the incident. . . .*Davis* and *Dunaway* put officers on notice that probable cause may be required even where an interaction is not labeled an arrest, and *Lidster* warns officers that the Fourth Amendment applies even in a brief, information-gathering stop. However, none of those cases clearly established that a law enforcement officer could not detain a witness to a police shooting for these two hours while a SWAT team sorted out the scene, at the least when the witness was standing beside a person when the police shot him. Thus, we find that Erin has not shown that the contours of the right were so clearly established that 'a reasonable official would understand that what he is doing violates that right.'. . Finally, we note that there may well be an emerging trend toward holding it unreasonable to detain a police shooting witness for an extended period of time, absent either reasonable suspicion or probable cause to believe that a crime has been committed. . . While we may look to other circuits to find clearly established law, we must consider 'the overall weight' of such authority. . . A 'trend' alone is just that. As of December 2013, only two circuits had weighed in on the 'contours of the right.' These cases alone do not provide sufficient authority to find that the law was clearly established. This conclusion is bolstered by the fact that the Tenth Circuit itself found no 'clearly established weight of authority from other courts,'. . . and the Ninth Circuit relied

on intra-circuit precedent to find clearly established law. . . .Although Erin identifies the second step in the qualified immunity analysis, it is not clear that her contention was that the right to be free from excessive force was clearly established in this case. Instead, she suggests that her allegations lead to the conclusion that physically removing Erin in the manner that Turner did was unreasonable, and that her injuries sustain her claim. However, these are arguments that feed into the first step of the qualified immunity analysis—whether there was a constitutional violation. Accordingly, Erin waived argument as to the clearly established law prong and thus cannot overcome qualified immunity. . . Regardless, we cannot on this record conclude that Erin could overcome qualified immunity on her excessive force claim given the lack of guiding precedent that shows the force used in this particular situation was 'clearly unreasonable.'")

***Jauch v. Choctaw County*,** 874 F.3d 425, 436-37 (5th Cir. 2017), *reh'g en banc denied,* 2018 WL 1542262 (5th Cir. Mar. 29, 2018) ("We have spilled much ink to thoroughly establish our constitutional footing, an effort we found necessary in light of *Jones*' limited analysis. That explication does not diminish the *Jones* holding, however—prolonged detention without the benefit of a court appearance violates the detainee's Fourteenth Amendment right to due process. . . The right at issue here was clearly established and its contours 'sufficiently clear' that any reasonable official would understand that the Constitution forbids confining criminal defendants for a prolonged period (months in this case) prior to bringing them before a judge. . . And so we held in *Jones* itself, ruling the individual defendants, a sheriff and his deputy, not entitled to qualified immunity. . . Sheriff Halford's claim to qualified immunity is less compelling than was the claim of those Mississippi law enforcement officers. Tellingly, Sheriff Halford's arguments relating to qualified immunity do not even mention *Jones*. In fact, at one point in this litigation, he conceded that that 'the Choctaw County Sheriff's Office, Choctaw County District Attorney or Circuit Court Judge *clearly* should have provided Plaintiff Jauch with an appearance before the Circuit Court of Choctaw County' within the 30 days provided for by state law. (Emphasis added.) While he attempted to spread the blame to other officials, his actions and decisions are the cause of Jauch's constitutional injury. Either Sheriff Halford is plainly incompetent, or he knowingly violated the law. Sheriff Halford's lone argument regarding qualified immunity is that '[f]unctions of state officials do not impute legal duties actionable by federal tort to a county official simply because the applicable state official is otherwise immune.' Translated from legalese, the assertion is that Jauch sued him only because the truly responsible parties, judges of the circuit court, are immune from suit. This is simply wrong. Sheriff Halford is responsible for those incarcerated in his jail, Miss. Code Ann. § 19-25-69, and the capias did not require him to impose the unconstitutional detention policy.)

See also ***Jauch v. Choctaw County***, No. 16-60690, 2018 WL 1542262, at *1, *4-6 (5th Cir. Mar. 29, 2018) (Southwick, J., joined by Jones, Smith, Owen, Willett, and Ho, JJ., dissenting from denial of rehearing en banc) ("I respectfully dissent from our failure to rehear this case en banc. The panel opinion — for the first time in this or any circuit — declared that a sheriff violated the Constitution when an indicted, pretrial detainee was held until the next regular term of the local criminal court before being afforded an opportunity to have bail set. A capias warrant instructed

the sheriff to hold her until the term of court, which was when a judge with authority over that prisoner would be in the county. The sheriff did so, following a practice authorized by the state's Supreme Court. There is no law to the contrary that is established with the clarity the United States Supreme Court requires under recent caselaw that was not considered because it postdates the panel opinion. At its most basic, my concern is that in assessing the liability of the County and the sheriff, the panel opinion used precedents that are inapplicable to the process afforded in this case, a process drawn from statutes, court rules, and perhaps even policies of the local judges. I cannot discern how these defendants had any effect on when this plaintiff was considered for release. Thus, as to these parties, I believe the panel was wrong. More relevant to whether to take a case en banc, what rights prisoners have to be released on bail or otherwise before trial is a profoundly significant question due to its implications for individual liberty. The full court should rework the answer. . . .In summary, under state law the sheriff had no clear obligation to take Jauch before a judicial officer for an initial appearance or for a preliminary hearing because she had been indicted. There was no obligation on the sheriff to have Jauch arraigned because that is a duty that falls elsewhere. The explicit obligation under the court-issued capias was to hold Jauch until the next circuit court term, which is just what the sheriff did. Those legal points are clear, to my eyes at least. The controlling question, then, is whether there was other law that with better clarity established that every reasonable sheriff would have known Jauch had a federal right that overrode these state procedures. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The only precedent the *Jauch* panel considered to be directly on point involved jail procedures in Jackson, Mississippi. *Jauch v. Choctaw Cnty.*, 874 F.3d 425, 429 (5th Cir. 2017) (citing *Jones v. City of Jackson*, 203 F.3d 875 (5th Cir. 2000)). That is a decision that set no specific time limit for presenting a detainee to a magistrate, did not discuss the practice of waiting until the next term of court, and did not address a sheriff's responsibility in such matters. Absolutely critical, Jones had not been jailed after indictment. Thus, in light of what I have already discussed about indicted detainees, *Jones* seems all but irrelevant. Silence in these varied respects is itself enough to say *Jones* did not clearly establish the relevant law for the Choctaw County sheriff. . . . [T]he governing law was not clearly established to justify denying qualified immunity to the sheriff. Under *Wesby*, *Jones* is not a closely analogous case. Whether Jauch was detained unconstitutionally while awaiting the return of a circuit court judge is not clearly established by *Jones*, which did not set a specific time limitation and did not involve a circuit-riding judge. *Eldridge* and *Medina* offer general pronouncements about due process without remotely similar facts. Finally, this is not a case about indefinite detention. It is about unfairly delayed consideration for bail, but not a delay yet clearly announced as unconstitutional. . . .My able colleagues on the *Jauch* panel held that based on *Jones* and these more general authorities, it was 'clearly established' that Mississippi's 'policy whereby certain arrestees were indefinitely detained without access to courts' violates an individual's constitutional due process rights. *Jauch*, 874 F.3d at 436. No such clarity was established by *Jones* — it did not even deal with the relevant post-indictment procedures. The panel also concluded it was 'clearly established' that 'the Constitution forbids confining criminal defendants for a prolonged period' before bringing them before a judge. . . True, but what was not clear at all to someone responsible for detention is how prolonged detention must be to constitute a violation of rights. The caselaw would not have informed very

many officials that the state's post-indictment rules violated the federal Constitution. Thus, qualified immunity applies.")

Trammell v. Fruge, 868 F.3d 332, 343 (5th Cir. 2017) ("[T]his Court's opinion in *Goodson* outlines a scenario very similar to this case. Both *Goodson* and this case involve a plaintiff who was tackled by officers after very minimal physical resistance—pulling away from an officer after the officer grabbed the plaintiff's arm. The primary distinction between *Goodson* and this case appears to be the fact that in *Goodson*, the defendant officers lacked any reasonable suspicion to detain or frisk the plaintiff in the first place. *Goodson*, 202 F.3d at 740. Here, on the other hand, it is virtually undisputed that the officers had probable cause to arrest Trammel for public intoxication. But we find this distinction is merely a matter of degree. In *Graham*, the Supreme Court directed lower courts to consider 'the severity of the crime at issue' in determining whether police officers used excessive force. . . We interpret *Goodson*'s focus on reasonable suspicion as a consideration of this factor. So, while in *Goodson*, the officers lacked reasonable suspicion that the plaintiff had committed any crime, here the officers believed the plaintiff was guilty of the minor offense of public intoxication. Although the severity factor may have weighed slightly more in favor of finding a use of force reasonable in this case than it did in *Goodson*, we nevertheless conclude that *Goodson* gave officers 'fair warning' that their conduct was unconstitutional. . . Accordingly, the law at the time of Trammel's arrest clearly established that it was objectively unreasonable for several officers to tackle an individual who was not fleeing, not violent, not aggressive, and only resisted by pulling his arm away from an officer's grasp.")

Trammell v. Fruge, 868 F.3d 332, 346-47 (5th Cir. 2017) (Southwick, J., dissenting in part) ("The majority concludes there are several genuine factual disputes, but it does not always view the facts from the perspective of a reasonable officer on the scene. For example, it concludes there is 'a question of fact as to whether Trammell posed any danger to himself,' and there is 'a factual dispute as to whether Trammell was actively resisting arrest....' When we review a grant of summary judgment in this context, we 'first construe[] disputed historical facts in favor of the non-movant,' but we 'then ask how a reasonable officer would have perceived those historical facts.'. . So the question is not, for example, whether 'a reasonable jury might find that [Trammell] was not *actually* resisting arrest,' but whether the force used was reasonable 'under the facts as a reasonable officer *would perceive them*[.]'. . . [T]he law was not clearly established so that 'every "reasonable official would have understood"' that the force used here was unlawful. . . The majority relies heavily on one case to conclude that the law was clearly established. *See Goodson v. City of Corpus Christi*, 202 F.3d 730 (5th Cir. 2000). That case focused on whether the officers violated the defendant's right to be free from seizure without reasonable suspicion. . . After reversing summary judgment on that claim, the court also held the defendant raised a fact issue regarding whether the officers, 'who lacked reasonable suspicion to detain and frisk [the defendant] and from whom [the defendant] was not fleeing,' used reasonable force. . . *Goodson*'s import in the excessive-force context is limited because it focused on the officers' lack of reasonable suspicion. For that reason, we said in *Poole* that *Goodson* 'lack[ed] analytical force in assessing the reasonableness of [the officer's] actions' regarding the amount of force used. . .

Griggs supports that the law was not clearly established in our case. . . In *Griggs*, after the officer told the defendant to stop performing a one-legged stand sobriety test and to put his hands behind his back, the defendant 'lurched to one side and said "no, no."'. . The officer 'immediately placed [the defendant] in a choke hold, swept his legs out from under him, and body-slammed him onto the nearby grass.'. . Once on the ground, the officer punched the defendant several times with a closed fist to the back of the head as he struggled to gain control of the defendant's hands. . . We concluded that our precedent did not clearly establish that the officer's takedown maneuver or use of 'non-deadly punches' to gain control of the defendant was constitutionally unreasonable. . . We distinguished *Goodson* because that case 'turned not on whether the force was excessive, but on whether the force was justified *at all* because fact issues remained as to whether the officer had reasonable suspicion to initiate the stop.'. . Here, as in *Griggs*, our precedents do not make clear to every reasonable officer that the force used was unlawful.")

McClin v. Ard, 866 F.3d 682, 696 (5th Cir. 2017) ("Here, we cannot say that *every* reasonable officer would understand that McLin was seized for purposes of the Fourth Amendment. To date, neither the Supreme Court nor the Fifth Circuit has decided that an officer's acceptance of a voluntary surrender to an arrest warrant constitutes a Fourth Amendment seizure. And there is no a 'robust consensus of persuasive authority': only one circuit—the Eleventh—has found a seizure in these circumstances in a published opinion, and a majority of circuit courts have not yet weighed in. Although we now hold that McLin was seized, reasonable officers might not have understood that accepting McLin's surrender to the arrest warrants, without imposing further pre-trial restrictions, constituted a seizure. We therefore hold that McLin fails to plead a violation of a 'clearly established' constitutional right, and we affirm the district court's grant of qualified immunity to the Defendants and dismissal of McLin's Fourth Amendment claim on that basis.")

Cobarobio v. Midland County, Tex., No. 15-50096, 2017 WL 3495588, at *1 (5th Cir. Aug. 15, 2017) (not reported) ("As determined by the district court, Cobarobio fails to establish that there was a clearly established First Amendment right for him to record police activity during an on-going emergency situation like the one involved in the instant case. In *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017), this court held that 'First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions.' However, we did so only after noting that 'there was no clearly established First Amendment right to record the police at the time of Turner's [2015 arrest].'. . Because Cobarobio's arrest occurred in 2012, he cannot satisfy his burden of establishing that the defendants are not entitled to qualified immunity. . . Moreover, because there was probable cause to arrest Cobarobio for interference with public duties, Cobarobio cannot establish a Fourth Amendment violation.")

Rivera v. Bonner, 691 F. App'x 234, ___ (5th Cir. 2017) ("[A] few months before Rivera was sexually assaulted, another senior jailer sexually abused a female detainee at the Hale County Jail. This event should have alerted Appellees that a substantial risk of serious harm existed in their facility and that they needed to do more to protect detainees from sexual exploitation. Yet the

record suggests that Appellees did not make any modifications to their training, policies, or supervision. Instead, Appellees merely reminded jailers that they should not sexually exploit detainees and posted a sign indicating that 'sex with inmates' was prohibited. A jury could conclude that these reminders did not constitute an adequate response to the serious incident of sexual abuse that had recently transpired in the jail. . . Nonetheless, we must determine whether the constitutional right at issue was clearly established at the time of Appellees' alleged misconduct. In doing so, we look to 'cases of controlling authority in [this] jurisdiction at the time of the incident which clearly established the rule' or 'a consensus of cases of persuasive authority such that a reasonable [official] could not have believed that his actions were lawful.'. .It has long been clearly established that detainees like Rivera have the right to be protected from sexual abuse, both at the hands of correctional officers and fellow inmates, and that jail officials violate inmates' constitutional rights 'by showing "deliberate indifference" to a substantial risk' of sexual abuse 'when the official[s] "know[ ] of and disregard[ ] an excessive risk' of that harm occurring. . . By now, the substantial risk of sexual assault in jails and prisons is well-documented and obvious. . . Jail administrators are not permitted to 'bury their heads in the sand' and ignore these obvious risks to the inmate populations they have an affirmative duty to protect. . . Accordingly, this Court has previously held that jail officials who provide '*no* training' on sexual abuse and leave their employees 'virtually unsupervised' are deliberately indifferent to the substantial risk that jailers might abuse detainees. . . Still, in the case at bar, Rivera concedes that officers at the jail received at least some state-sanctioned training aimed at sexual assault prevention. She also agrees that Appellees took some limited responsive action following the prior incident of sexual abuse. In other words, we are not faced with a case in which jail officials took *no* preventive measures to address the risk of sexual assault. And unfortunately, when Rivera was sexually assaulted, our case law did not provide much clarity on the scope of jail officials' obligations with respect to protecting detainees from sexual abuse. Indeed, Rivera has not identified any controlling Fifth Circuit authority establishing the constitutional inadequacy of Appellees' response to the risk of sexual assault in their jail. . . . Furthermore, at the time of the sexual assault in this case, there was not a consensus of persuasive authority such that reasonable officials in Appellees' position would have known their actions were unlawful. . . . As a result, we conclude that it was not clearly established at the time of the alleged misconduct that Appellees needed to make significant changes to their training, supervision, and policies in response to the July 2014 incident of sexual abuse. We hold that the district court did not err in concluding that the defendants were entitled to qualified immunity with respect to Rivera's inadequate training and supervision claims.")

Brinsdon v. McAllen ISD, 863 F.3d 338, 350-53 (5th Cir. 2017) ("[I]t is clearly established that a school may compel some speech. Otherwise, a student who refuses to respond in class or do homework would not suffer any consequences. Students, moreover, generally do not have a right to reject curricular choices as these decisions are left to the sound discretion of instructors. . . .As true of us all, teachers and administrators can exercise their discretion poorly. This case involved a student's disagreement with a teacher's curricular choices and First Amendment issues arising from how the disagreement was addressed. We conclude that Santos as teacher, and Cavazos as principal, were not ignoring clearly established law when compelling a non-operative recitation of

the Mexican pledge. Qualified immunity on compelled speech was properly granted. . . .Making unauthorized and secret video recordings of secondary-school classes does not represent a recognized First Amendment right, nor does the public dissemination of the video. To use *Tinker's* formulation, it was an 'invasion of the rights of others[.]'. . No clearly established law would have counseled these defendants not to respond to such behavior. To summarize, the evidence is that disruptions in mid-October were triggered primarily by dissemination of the secret video that showed students, with their faces blurred, performing the Mexican pledge. School officials did not violate clearly established law when the school reacted to the secretly taken video, and the evidence is that is what the officials did. We agree with the district court that Brinsdon's First Amendment rights were not violated by school officials reacting to the disruptions that had occurred and might continue. Qualified immunity was properly granted to Santos and Cavazos on the claim they violated Brinsdon's First Amendment rights by removing her from class.")

Brewer v. Hayne, 860 F.3d 819, 824-26 (5th Cir. 2017) ("Plaintiffs argue that the clearly established right at issue here is the due process right to be free from fabricated evidence. We have previously held that 'deliberate or knowing creation of misleading and scientifically inaccurate [evidence] amounts to a violation of a defendant's due process rights,' and that reasonable officers know of this right. . . .As a baseline, we agree with the district court that merely presenting forensic odontology evidence in the early 1990s was not unreasonable or violative of due process. While that sort of evidence has been called into question, . . . at the time of Plaintiffs' trials, forensic odontology was widely accepted. Plaintiffs are thus tasked with demonstrating not that the evidence Defendants presented is no longer considered trustworthy, but rather that Defendants intentionally created false evidence or intentionally produced evidence that they knew to be scientifically inaccurate by the standards of the day. . . . Plaintiffs have made a compelling showing that Defendants were negligent in their forensic analysis, but negligence alone will not defeat qualified immunity. . . Viewed in the most favorable light, Plaintiffs' evidence is not suggestive of an intent to fabricate. . . . Absent some additional evidence, the autopsy form and the result of the biopsy in the Brooks case are not sufficient to raise a reasonable inference that Dr. Hayne either deliberately failed to perform biopsies or withheld exculpatory evidence. At most, Plaintiffs have presented evidence that Dr. Hayne was negligent in failing to perform the biopsies or in failing to examine biopsied tissues. Ultimately, we think that true of all the evidence in the record: viewed in its entirety and in the light most favorable to Plaintiffs, the record tends to show that Defendants were negligent—perhaps grossly so—but no more. Plaintiffs have failed to raise a genuine issue of fact as to whether Defendants violated their right to due process by intentionally creating false or misleading scientific evidence. Defendants were entitled to summary judgment under the defense of qualified immunity. We affirm.")

Lincoln v. Barnes, 855 F.3d 297, 301-04 (5th Cir. 2017) ("The question . . . is whether Erin's detention at the police station for the purposes of questioning her as a witness to her father's shooting and obtaining her statement satisfied the Fourth Amendment's 'reasonableness' requirement. The relevant facts are as follows: Erin witnessed the events leading up to her father's death; after her father was lethally shot by members of the SWAT team, the police had an interest

in detaining Erin to solicit information from her, including a statement; toward that end, Erin was handcuffed and placed in the backseat of a patrol car; after a period of approximately two hours, she was transported to the police station; and at the station, Barnes and Meeks questioned her for approximately five hours and forced her to write out a statement. . . . Accordingly, police violate the Fourth Amendment when, absent probable cause or the individual's consent, they seize and transport a person to the police station and subject her to prolonged interrogation. . . .*Walker* is persuasive authority that the prolonged detention of witnesses to a police shooting for the sole purpose of obtaining information from them, including statements, is unreasonable absent any exigencies justifying the detention for investigative purposes. . . But the clearly established law governing this case derives from *Davis* and *Dunaway*, not *Walker*. . . .While 'the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime,'. . . '[a]bsent special circumstances, the person approached may not be detained ... but may refuse to cooperate and go on his way[.]'. . . Any further detention of such individual constitutes a seizure under the Fourth Amendment, which must satisfy the Fourth Amendment's 'reasonableness' requirement. . . As a general matter, the detention of a witness that is indistinguishable from custodial interrogation requires no less probable cause than a traditional arrest. *Dunaway*, 442 U.S. at 216; *Davis*, 394 U.S. at 726–28.")

Alexander v. City of Round Rock, 854 F.3d 298, 305, 308 (5th Cir. 2017) ("We do not suggest that officers in this circuit have faced this precise factual situation before. But that is not a condition precedent to denying qualified immunity—'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . Based on these facts alone, we cannot conclude as a matter of law that Garza had reasonable suspicion to detain Alexander pursuant to the Fourth Amendment. Moreover, taking the facts as alleged, the lack of reasonable suspicion was clearly established—the factors we laid out as relevant in *Hill*, *Martinez*, *Rideau*, and *Micheletti*, as well as the Supreme Court's decision in *Wardlow*, do not support reasonable suspicion here. We therefore reverse the district court's dismissal of Alexander's unlawful detention claim. . . . Alexander also argues that the officers retaliated against him for exercising his First Amendment right to be silent and not answer their questions. This argument was not addressed straight-on by the district court. We hold that Alexander's claim on this point cannot overcome the officers' qualified immunity, because 'it was not clearly established that an individual has a First Amendment right to refuse to answer an officer's questions during a *Terry* stop.' *Koch v. City of Del City*, 660 F.3d 1228, 1244 (10th Cir. 2011). . . Surprisingly few courts have ruled on this precise issue; the parties point to no cases from this circuit directly on point. The sparse case law that does exist, however, indicates no consensus that a defendant has a First Amendment right not to answer an officer's questions during a stop like the one at issue here.")

Hanks v. Rogers, 853 F.3d 738, 747-49 (5th Cir. 2017) ("'[C]learly established law must be "particularized" to the facts of the case,'. . . and 'should not be defined "at a high level of generality,"'. . . . " In other words, outside of 'an obvious case,' the law is only 'clearly established' if a prior case exists 'where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'. . In 'an obvious case,' *Graham* and *Garner* may supply the

'clearly established law.'. .In this case, we conclude that on the night Officer Rogers stopped Hanks, clearly established law demonstrated that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation. . . . Though we conclude *Deville* clearly proscribed Officer Rogers's actions, we also view this as an 'obvious' instance of excessive force in light of the factors set forth in *Graham*. *Graham* directs us to consider the 'facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'. . As noted above, all of these factors strongly favor Hanks. No reasonable officer who is aiming a taser at the back of an individual such as Hanks—i.e., an individual who (1) was stopped for a minor traffic violation; (2) exited his car and has his hands displayed behind his back, thus presenting no immediate threat or flight risk; and (3) has displayed, at most, passive resistance, including asking whether he was under arrest—would escalate the situation via a physical takedown only seconds after ordering that individual to kneel. . . We hold that on Feb. 26, 2013, clearly established law demonstrated, and *Graham* makes obvious, that it was clearly unreasonable and excessive for Officer Rogers to abruptly escalate the encounter via a physical takedown where (1) Officer Rogers stopped Hanks for a minor traffic offense; (2) immediately before the takedown, Officer Rogers had his taser aimed at Hanks's back while Hanks stood against his vehicle, facing away from Officer Rogers, with his empty hands displayed behind his back, presenting no immediate threat or flight risk; and (3) Hanks offered, at most, passive resistance, including asking whether he was under arrest.")

Turner v. Lieutenant Driver, 848 F.3d 678, 685-90 (5th Cir. 2017) ("The district court's analysis rested on the second, 'clearly established,' prong, so we begin there. . . .At the time in question, neither the Supreme Court nor this court had determined whether First Amendment protection extends to the recording or filming of police. . . Although Turner insists, as some district courts in this circuit have concluded, that First Amendment protection extends to the video recording of police activity in light of general First Amendment principles, . . . the Supreme Court has 'repeatedly' instructed courts 'not to define clearly established law at a high level of generality': 'The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.' . . Thus, Turner's reliance on decisions that 'clarified that [First Amendment] protections ... extend[ ] to gathering information' does not demonstrate whether the specific act at issue here—video recording the police or a police station—was clearly established. . . The district court stated that circuit courts 'are split as to whether or not there is a clearly established First Amendment right to record the public activities of police.' The circuit courts are not split, however, on whether the right exists. The First and Eleventh Circuits have held that the First Amendment protects the rights of individuals to videotape police officers performing their duties. . . In *American Civil Liberties Union v. Alvarez*, the Seventh Circuit explained that the First Amendment protects the audio recording of the police and concluded that an Illinois wiretapping statute, which criminalized the audio recording of police officers, merited heightened First Amendment scrutiny

because of its burdens on First Amendment rights. . . No circuit has held that the First Amendment protection does *not* extend to the video recording of police activity, although several circuit courts have explained that the law in their respective circuits is not clearly established while refraining from determining whether there is a First Amendment right to record the police. . . We cannot say, however, that 'existing precedent ... placed the ... constitutional question *beyond debate*' when Turner recorded the police station. . . Neither does it seem that the law 'so clearly and unambiguously prohibited [the officers'] conduct that "*every* reasonable official would understand that what he is doing violates [the law]."'. . In light of the absence of controlling authority and the dearth of even persuasive authority, there was no clearly established First Amendment right to record the police at the time of Turner's activities. All three officers are entitled to qualified immunity on Turner's First Amendment claim. . . . Although the right was not clearly established at the time of Turner's activities, whether such a right exists and is protected by the First Amendment presents a separate and distinct question. . . Because the issue continues to arise in the qualified immunity context, . . .we now proceed to determine it for the future. We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions. . . .We agree with every circuit that has ruled on this question: Each has concluded that the First Amendment protects the right to record the police. . . .This right, however, 'is not without limitations.'. . Like all speech, . . filming the police 'may be subject to reasonable time, place, and manner restrictions.'. . In this case, however, we need not decide which specific time, place, and manner restrictions would be reasonable. . . Nonetheless, we note that when police departments or officers adopt time, place, and manner restrictions, those restrictions must be 'narrowly tailored to serve a significant governmental interest.'. . That said, to be constitutionally permissible, a time, place, and manner restriction 'need not be the least restrictive or least intrusive means of serving the government's interests.'")

Turner v. Lieutenant Driver, 848 F.3d 678, 696-97 (5th Cir. 2017) (Clement, J., dissenting as to Parts III.A.2 & III.B.1.b) ("I respectfully dissent from the majority's dicta purporting to clearly establish a First Amendment right to film the police and from the majority's reversal of the district court's grant of qualified immunity to Officers Grinalds and Dyess regarding Turner's unlawful arrest claim. . . .The majority does not determine that the officers here violated Turner's First Amendment rights—perhaps because it would be reasonable for security reasons to restrict individuals from filming police officers entering and leaving a police station. Because the majority does not hold that the officers actually violated the First Amendment, 'an officer acting under similar circumstances' in the future will not have violated any clearly established law.")

Davidson v. City of Stafford, Texas, 848 F.3d 384, 392-94 (5th Cir. 2017) ("We agree with the district court that there was no actual probable cause for Davidson's arrest. At the time Officers Flagg and Jones arrested Davidson, the only crime charged to Davidson was failure to identify under § 38.02. This is further confirmed in Davidson's police report, which charged Davidson with failure to identify under § 38.02(a). But § 38.02(a) applies only when an officer 'has lawfully arrested the person and requested the information.' Tex. Penal Code § 38.02(a). At the time they

performed the arrest for the alleged § 38.02 violation, Davidson was not under arrest for any other violation, thus, the 'failure to identify' statute clearly was not triggered. We therefore conclude that the district court correctly determined that the officers had no actual or 'arguable' probable cause for arresting Davidson under § 38.02. We consider whether they had probable cause under any other statute below. Turning to objective or 'arguable' probable cause, and taking the facts in the light most favorable to Davidson, it is clear that the officers were objectively unreasonable in believing that there was probable cause for Davidson's arrest under the only other section posited here, § 42.03. Based on the information available to Officers Flagg and Jones, Davidson had not 'render[ed] impassable or ... render[ed] passage unreasonably inconvenient or hazardous' for Clinic patients. Tex. Penal Code § 42.03. . . .In addition to cases establishing the lack of probable cause, there was fulsome case law clearly establishing that an arrest without probable cause violates both First and Fourth Amendment rights at the time of Davidson's arrest in 2013. Specifically, Officers Flagg's and Jones's conduct violated Davidson's clearly established rights as demonstrated in federal case law. . . .These federal and state decisions make clear that Davidson's arrest without probable cause was a violation of his First and Fourth Amendment rights. . . . On the second prong of the qualified immunity defense, recent Supreme Court decisions addressing claims for excessive force have 'reiterate[d] the longstanding principle that "clearly established law" should not be defined "at a high level of generality."'. . Our cases outside the excessive force area involving warrantless arrests and limits on speech have not specifically mentioned this aspect of Supreme Court cases. . . Assuming arguendo that the specific *White/Mullenix* admonition applies to all qualified immunity cases regardless of the constitutional violation charged, the officers here still come up short. The cases cited above clearly demonstrate what does and does not violate § 42.03 and also clearly establish the unconstitutionality of warrantless arrests without probable cause. Even if he had not been exercising core First Amendment rights, Davidson was not (even arguably) in violation of § 42.03 when he stood outside of the Clinic. Additionally, his right to protest prohibited the officers' application of § 42.03 in the manner employed here. Resolving all factual disputes in favor of Davidson, the objective unreasonableness displayed by Officers Flagg and Jones in the face of law clearly establishing Davidson's rights leads us to the conclusion that qualified immunity cannot shield their actions against Davidson. We conclude that in Davidson's case, 'every reasonable official would have understood that what he is doing violates' Davidson's rights.")

Cooper v. Brown, 844 F.3d 517, 524-25 (5th Cir. 2016) ("The undisputed facts establish that Brown's use of force was objectively unreasonable. . . To be clear, we do not say that *any* application of force to a compliant arrestee is *per se* unreasonable, and we do not opine on the line of reasonableness. Instead, we state only the obvious: Under the facts in this record, permitting a dog to continue biting a compliant and non-threatening arrestee is objectively unreasonable. . . .Cooper's right was clearly established. Our caselaw makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced. [discussing cases] In the same way, Cooper was not attempting to resist arrest or flee, and Brown had no reason to think that he posed an immediate threat. Moreover, the fact that *Bush* and *Newman* are not dog-bite cases does not shield Brown. 'Lawfulness of force ... does not depend on the precise instrument used to apply it.

Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.'. . Thus, Brown had 'fair warning' that subjecting a compliant and non-threatening arrestee to a lengthy dog attack was objectively unreasonable.")
Anderson v. Valdez, 845 F.3d 580, 599-602 (5th Cir. 2016) ("Valdez urges that, even if Anderson stated a retaliation claim, he (Valdez) is entitled to qualified immunity because neither *Garcetti* nor other relevant contemporary cases clearly established that speech made pursuant to a *professional* (here, ethical) duty is not speech made pursuant to an *official* duty. Anderson counters that *Garcetti* did nothing more than create a limited presumption that speech made by a public employee pursuant to an official duty is unprotected; it did not disrupt the presumption that speech made by a public employee is presumptively protected, including speech made pursuant to an ethical duty. . . . By at least 2014, it was clearly established that an employee's speech made 'externally' concerning 'an event that was not within [his or her] job requirements' was entitled to First Amendment protection. . . Taking Anderson's allegations as true, as we must at this stage of the litigation, Anderson alleges exactly what *Cutler* requires. *First*, Anderson alleges that he reported his concerns about Justice Valdez externally, *viz.*, to the State Commission on Judicial Conduct. . . *Second*, Anderson alleges that his complaint to the judicial conduct commission was outside of his job duties. Accepting Anderson's allegations as true, *Cutler* decides this appeal. That is not to say that, by 2014, our law applying *Garcetti* spoke loudly regarding every factual circumstance. Indeed, just after Anderson spoke, the Supreme Court clarified *Garcetti* in *Lane*. . . . *Lane* plainly demonstrates that, following *Garcetti*, some First Amendment retaliation cases would still result in findings of qualified immunity. That is, *Garcetti* did not plainly establish all First Amendment retaliation law. Nonetheless, *Cutler* makes it apparent that *Garcetti*, and this court's jurisprudence interpreting it, clearly established some law. The question is how much. Based on the allegations at issue here, *Howell v. Town of Ball* answers that question. . . There, the plaintiff alleged that he had been fired from his job as a town police officer for cooperating with an FBI investigation into public corruption. . . The plaintiff 'emphasize[d] that, under the Supreme Court's recent decision in *Lane*, the relevant question [was] whether the speech at issue [was] ordinarily within the scope of an employee's duties.'. . And, what job duties were 'ordinary' was critical to the court's holding. The plaintiff 'offered evidence that his involvement in the FBI investigation was outside the ordinary scope [of] his professional duties.'. .The defendants pointed to the 'general' duty of all police officers to 'detect and prevent crime.'. .We found that the defendants' evidence was inadequate because broad general duties 'fail to describe with sufficient detail the day-to-day duties of a public employee's job.'. . . Nonetheless, we determined that the individual defendants were entitled to qualified immunity. . .In doing so, we noted that 'the Supreme Court did not emphasize that only speech made in furtherance of an employee's "ordinary" job duties is not protected until nearly three years after [plaintiff] was discharged.'. . . Reading *Howell* in the framework of *Cutler* properly synthesizes *Lane*'s effect on *Garcetti*. Namely, *Garcetti* and our court's pre-*Lane* jurisprudence established that when employees speak outside of their chain of command and outside of their job duties they are entitled to First Amendment protection. . . *Lane* and *Howell*, however, indicate that some cases are too difficult to be determined pursuant to that rule. Even though in some cases employees might have a general employment duty to speak, that duty is not part of their 'ordinary' official duties, so their speech

pursuant to that general duty is protected by the First Amendment. Equally clear, however, is that neither *Lane* nor *Howell* meaningfully altered the analysis required by *Garcetti* and *Cutler* when an employee's allegations do not concern the distinction between 'ordinary' and 'non-ordinary' job duties. . . Here, there is not—and at the motion to dismiss stage there can never be—a meaningful factual dispute that implicates *Lane*'s ordinariness rule. . . Anderson alleges that his speech to the State Commission on Judicial Conduct was made outside of his chain of command and outside of his job duties. Perhaps at the summary judgment or trial phase facts will come to light that implicate *Lane*. Until then, however, the ordinariness rule simply does not implicate the right at issue here. Accordingly, under *Cutler*, Anderson has pleaded the violation of a clearly established right. Qualified immunity thus does not apply—at least, not yet.")

Anderson v. Valdez, 845 F.3d 580, 603-07 (5th Cir. 2016) (Jones, J., dissenting) ("I agree with the majority that even after *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006), Anderson has plausibly alleged a violation of his First Amendment rights. Unfortunately, that is the end of our agreement, because I disagree with the majority's reasoning to this conclusion and would grant qualified immunity. . . . [T]he issue is more complex than the majority's analysis acknowledges because, under the Texas Constitution, the Commission includes members of the public, . . . but its proposed sanctions against a judge are ultimately reviewable by the Texas Supreme Court. . . The Texas judiciary may thus be considered its own self-regulator. In this situation, Chief Justice Valdez's argument is far from frivolous that Anderson's complaint went up the 'chain of command' within the judiciary. Consequently, the ultimate constitutional status of Anderson's speech, and thus his right to a First Amendment shield against employment consequences, are debatable. Debatable constitutional violations demand qualified immunity for public officials, even when this court is bound to conclude that a violation in fact occurred. . .For these reasons, even if Anderson's allegations are proven to be true, I conclude that Chief Justice Valdez visited unconstitutional retaliation upon Anderson but the law was not 'clearly established' such that any 'reasonable [judicial] official would understand' that Anderson's speech was constitutionally protected because it occurred outside the law clerk's 'chain of command.'") .

Cowart v. Erwin, 837 F.3d 444, 454-55 (5th Cir. 2016) ("We have little difficulty concluding that in 2009, the time of the incident, it was well-established, in sufficiently similar situations, that officers may not 'use gratuitous force against a prisoner who has already been subdued ... [or] incapacitated.' . .Reasonable officers had fair notice that such conduct under the circumstances violated Cowart's right to be free from excessive force.")

Gonzalez v. Huerta, 826 F.3d 854, 857-59 (5th Cir. 2016) ("[E]ven if we assume that Huerta violated Gonzalez's constitutional rights by detaining him without reasonable suspicion, we cannot say that this detention was objectively unreasonable in light of clearly established law. . . Gonzalez argues that the law is clearly established that a police officer's demand for identification constitutes a seizure under the Fourth Amendment and must be based on reasonable suspicion. But this general claim—that a seizure under the Fourth Amendment must be based on reasonable suspicion—is precisely the type of 'general proposition' that the Supreme Court has rejected. *See Ashcroft v. al-*

Kidd, 131 S. Ct. 2074, 2084 (2011). Instead, the Court has repeatedly emphasized the need to look at the specific facts of a case when determining qualified immunity. . . .With the more specific inquiry the Court requires, the question becomes whether there is either 'directly controlling authority ... establishing the illegality of such conduct' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that *his actions* were lawful[.]' . . . Here, it appears that Huerta's decision to detain Gonzalez was based, at least in part, on his belief that Gonzalez was required to identify himself pursuant to § 37.105 of the Texas Education Code. [section 37.105 of the Texas Education Code. Section 37.105 provides: The board of trustees of a school district or its authorized representative may refuse to allow a person without legitimate business to enter on property under the board's control and may eject any undesirable person from the property on the person's refusal to leave peaceably on request. Identification may be required of any person on the property.] And while prior Supreme Court cases have held that police may not detain an individual solely for refusing to provide identification, *see Brown* [*v. Texas*], 443 U.S. at 52, and *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 188 (2004), neither of those cases dealt with incidents occurring on school property. This is no small distinction, as the Supreme Court has routinely reconsidered the scope of individual constitutional rights in a school setting. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Thus, we find that *Brown*—which Gonzalez relies on—and *Hiibel* do not meet the 'sufficiently high level of specificity' necessary 'to put a reasonable official on notice' that detaining an individual for a failure to provide identification on school property 'is definitively unlawful.'. . Accordingly, we do not find that Huerta's actions were 'objectively unreasonable in light of a clearly established rule of law.'. . Huerta is therefore entitled to qualified immunity.")

Gonzalez v. Huerta, 826 F.3d 854, 859-61 (5th Cir. 2016) (Graves, J., dissenting) ("The majority essentially acknowledges that Huerta did not have a reasonable basis to detain Gonzalez, but then determines that the law is not clearly established. I disagree. As an initial matter, I would explicitly conclude that, under the totality of the circumstances, Huerta lacked reasonable suspicion to detain Gonzalez and, thus, violated his constitutional rights. Huerta received only a bare report that originated from an unknown third party of a suspicious' vehicle in the school parking lot and information of a recent history of automobile burglaries at the same location. Huerta did not receive any information connecting either Gonzalez or the 'suspicious' vehicle to that information. As the majority states, the scenario encountered by Huerta was akin to that in *Brown v. Texas*, 443 U.S. 47, 52 (1979), and did not justify reasonable suspicion for a stop. As the majority further concludes, based on the totality of the facts and circumstances in this case, any suspicions held by Huerta should have been alleviated when he approached the vehicle. However, after a fairly thorough analysis outlining how Huerta violated Gonzalez's constitutional rights without reasonable suspicion, the majority then determines that the very law it relies upon is not clearly established. . . I cannot agree. Further, I disagree with any attempt to make the qualified immunity analysis so fact-specific that it would never be clearly established. Thus, I would conclude that Huerta's detention of Gonzalez was objectively unreasonable in light of clearly established law. In so concluding, I disagree with the majority's characterization of Gonzalez's claim as a 'general

proposition' rejected by the Supreme Court. Although the law is clearly established that a seizure under the Fourth Amendment must be based on reasonable suspicion, Gonzalez does not merely make a general claim. Instead, he asserts that a police officer's demand for identification constitutes such a seizure and must be based on reasonable suspicion based on the clearly established law of *Brown*. . . Further, even Huerta acknowledges that the applicable law here is well-settled. . . . The Supreme Court has definitively held that a police officer may not detain an individual he deems suspicious solely for refusing to provide identification, even under a state statute and in a neighborhood frequented by drug users, without reasonable suspicion. *See Brown*, 443 U.S. at 51-52; Tex. Penal Code Ann., Tit. 8, § 38.02. *See also Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cty.*, 542 U.S. 177, 188 (2004). . . Despite the fact that the Supreme Court specifically said in *al-Kidd* that '[w]e do not require a case directly on point,' the majority concludes that school property is somehow different and there must be a case directly on point. . . The majority cites, as does Huerta, section 37.105 of the Texas Education Code. Section 37.105 says:

The board of trustees of a school district or its authorized representative may refuse to allow a person without legitimate business to enter on property under the board's control and may eject any undesirable person from the property on the person's refusal to leave peaceably on request. Identification may be required of any person on the property. . . . However, section 37.105 says nothing about any authority to detain an individual who does not immediately provide identification upon demand, but rather says only that a person may be ejected. Moreover, it is not clear that Huerta is either a member of the board of trustees of the school district or an authorized representative. Nonetheless, assuming that section 37.105 allowed Huerta to require that Gonzalez provide identification, it would have been unreasonable for Huerta to believe that he could then detain Gonzalez under that same section for failing to immediately do so. Huerta apparently agrees because he argues that he did not detain Gonzalez solely for failing to provide identification, but did so because he had a reasonable basis to suspect a connection between Gonzalez and recent car burglaries under what he refers to as the 'settled law' of *Terry* and *Michelletti*. Further, the district court decided the case on reasonable suspicion of criminal activity. But, as the majority's analysis reveals, the record does not support the existence of reasonable suspicion. Both Huerta and the district court attempted to distinguish *Brown* on the basis that Huerta had more specific information than the officer in *Brown*, not because *Brown* did not occur in a school parking lot. However, the record does not establish that Huerta had more information than the officer in *Brown* and the case law does not support the majority's conclusion that the law is not clearly established. For these reasons, I would reverse the grant of summary judgment on the illegal detention claim. Accordingly, I respectfully dissent.")

Hinojosa v. Livingston, 807 F.3d 657, 669-70 (5th Cir. 2015) ("Defendants argue . . . that the complaint cannot surmount the qualified immunity hurdle because there is no clearly established right to an air-conditioned cell or to around-the-clock medical care. Defendants' argument again misreads the complaint and confuses right with remedy. While the complaint does allege that TDCJ cells are not air-conditioned and that TDCJ fails to employ medical staff during nighttime hours, it does not claim that the Eighth Amendment requires such accommodations. Rather, the

right that it asserts is the right to be free from exposure to extremely dangerous temperatures without adequate remedial measures. The complaint's description of the lack of remedial measures does not purport to be an exhaustive list of the Eighth Amendment's basic requirements. It is simply a description of several ways in which Defendants could have addressed the risk, but instead chose not to do so. The right that it asserts, however, is the well-established Eighth Amendment right not to be subjected to extremely dangerous temperatures without adequate ameliorative measures. Defendants also contend that the Supreme Court's recent decision in *Taylor v. Barkes*, —— U.S. ——, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015), bolsters their qualified immunity argument. It does not. . . .In sum, the Court found, even if the alleged shortcomings existed, 'no precedent on the books ... would have made clear to petitioners that they were overseeing a system that violated the Constitution.'. . Here, by contrast, assuming Hinojosa's allegations to be true, our precedent put Defendants on notice that they were 'overseeing a system that violated the Constitution.'. . Our circuit has made very clear that inmates have a right, under the Eighth Amendment, not to be subjected to extreme temperatures without adequate remedial measures, and Defendants have not alerted us to any contrary authority.")

Hinojosa v. Livingston, 807 F.3d 657, 675-80, 683 (5th Cir. 2015) (Jones, J., dissenting) ("No one doubts the tragedy of a prisoner's life lost to heat stroke during a hot Texas summer. The question here, however, is not whether better prison policies or procedures might theoretically have prevented Hinojosa's death in the Garza West transfer unit of the Texas Department of Criminal Justice ("TDCJ"). As in all cases of qualified immunity, the question is whether the three top officials of the TDCJ ("Executive Defendants"), whose 111 institutions supervise over 150,000 prisoners at a time, must endure litigation and potential personal liability in damages for this prisoner's death because of some arguably defective 'condition of confinement.'. . . By the lights of *Taylor, Mullenix*, and many other Supreme Court decisions, the majority opinion is indefensible for two primary reasons. First, it defines the allegedly 'clearly established right' of Hinojosa in an overbroad and ambiguous way, the antithesis of what qualified immunity stands for. Qualified immunity is due these officials as a matter of law. Second, it affords credence to pleadings that are insufficient under *Iqbal* . . . to raise a question about these officials' liability under any circumstances. The pleadings thus failed to state a claim under Rule 12(b)(6). . . .Here, as in *Taylor*, the Executive Defendants were neither plainly incompetent nor knowing lawbreakers. The alleged actions of the Executive Defendants were not objectively unreasonable in light of the clearly established law at the time of the violation, and they are entitled to immunity from suit. . . .The right to be free from extreme temperatures without adequate remedial measures is too generalized to be of any use to the Executive Defendants in deciding what actions they should or should not take regarding system-wide policies. The qualified immunity doctrine is 'highly context-sensitive.'. . And the Supreme Court has repeatedly and frequently instructed—recently with some exasperation—that courts should not 'define clearly established law at a high level of generality.'. . Instead, the right must be defined so that it is 'beyond debate' that 'every reasonable official would have understood that what he is doing violates that right.'. . The Supreme Court's guidance underlines the real world implications of the qualified immunity analysis. General principles are of limited use to prison officials who must often make difficult policy choices in highly fact-

dependent situations. Because reasonable mistakes are inevitable in these settings, the 'clearly established' requirement protects mistaken judgments. . . .The parallels between *Taylor* and this case are obvious. Like the Third Circuit majority, the majority here affirm an Eighth Amendment right of medically vulnerable inmates not to be subjected to extreme temperatures without adequate remedial measures. Like the Third Circuit majority, the panel majority here approve a claim that these defendants were deliberately indifferent to the inmate's serious medical needs because their policies failed to provide certain 'adequate remedial measures' or 'measures like those' mentioned in prior circuit case law. Moreover, as in *Taylor,* it is alleged that the Executive Defendants knew their system was inadequate because thirteen other inmates died from heatstroke in five years before Hinojosa's death. The *Taylor* plaintiffs also explicitly alleged that the Delaware prison officials 'were aware that the suicide rate in the Delaware prisons was above the national average.'. . . The majority's analytical mistake in this decision is the same mistake made by the Third Circuit. . . . No prior Fifth Circuit case comes close to giving these Executive Defendants fair notice that they needed additional system-wide housing, medical, or intake policies to avoid running afoul of the Constitution and exposing themselves to personal liability. This court should grant the Executive Defendants' motion to dismiss.")

Cole v. Carson, 802 F.3d 752, 765 (5th Cir. 2015), *cert. granted sub nom Hunter v. Cole, judgment vacated and case remanded for further consideration in light of Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam), 137 S. Ct. 497 (2016), *opinion reinstated on remand,* ***Cole v. Carson***, 905 F.3d 334 (5th Cir. 2018) ("The Coles allege that Officer Carson committed a *Brady* violation in two ways: by lying to conceal his own knowledge that Ryan Cole never assaulted an officer, and by conspiring with other officers to conceal physical evidence also tending to exculpate Ryan. But prior to 2010, we had held that *Brady* is not implicated when there is no trial. . . Ryan Cole was not tried for aggravated assault, nor did he plead guilty; the charge was dismissed. There is no suggestion that the aggravated assault charge was used as leverage to secure a plea on the unlawful carrying charge. It follows that Officer Carson was not on notice that withholding evidence in these circumstances could violate *Brady,* and he is entitled to qualified immunity for the alleged *Brady* violations.")

Cole v. Carson, 802 F.3d 752, 768-74 (5th Cir. 2015), *cert. granted sub nom Hunter v. Cole, judgment vacated and case remanded for further consideration in light of Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam), 137 S. Ct. 497 (U.S. Nov. 28, 2016), *opinion reinstated on remand,* ***Cole v. Carson***, 905 F.3d 334 (5th Cir. 2018) ("In sum, we have held that a victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted. We have never decided whether false charges must survive to the trial stage in order to implicate due process rights. . . . Two circuits have found that there is no due process claim in the absence of a conviction—a requirement we have not insisted upon. . . .The Second, Eighth, Ninth, and Tenth Circuits have . . . all found denials of due process when charges rest on fabricated evidence. The Seventh Circuit's decisions appear to point the other way. The court has held that 'a police officer does not violate an acquitted defendant's due process rights when he fabricates evidence.' Acquittal forecloses the claim. In the Seventh Circuit's view, the only liberty interest damaged in

such cases 'stems from [plaintiff's] initial arrest' and should be addressed under the Fourth Amendment; being forced to defend oneself at trial is no deprivation of liberty. The Seventh Circuit's no-due process violation decisions have occurred in cases that either did not address the availability of a Fourth Amendment claim or found that the claim had been purposefully abandoned, and it has suggested a willingness to consider deprivations short of conviction and imprisonment if properly raised. . . .The remaining circuits do not appear to have answered the question before us. [discussing circuit cases] All the circuits that have squarely considered the question have either found that a due process violation may lie where state officers fabricate evidence to support false charges against a plaintiff, or have found no due process violation in the absence of a conviction, an approach we have expressly rejected. We agree with those that have found a due process right not to have police deliberately fabricate evidence and use it to frame and bring false charges against a person. . . .Deliberate framing of a person by the state offends the most strongly held values of our nation. We echo again the apt words of the First Circuit that, 'if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals.' As the Third Circuit has stated, 'no sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence.' Here, the framing was allegedly done in order to conceal and justify excessive force against one of the people our laws and systems are supposed to protect. The rule of law, which we have cherished since our founding, cannot abide such conduct. We agree with the Second Circuit that official framing of a person in these circumstances undermines the right to a fair trial. Being framed and falsely charged brings inevitable damage to the person's reputation, especially where, as here, the crime is a felony involving the threat of violence. Alongside the reputational damage, it requires the person framed to mount a defense, and places him in the power of a court of law, where he may be required to appear. Though these wrongs may be addressed through a Fourth Amendment challenge in many cases, they do not disappear where there is no violation of that amendment. Instead, where there is no more specific constitutional protection available, the Fourteenth Amendment may offer protection. It does so here, where the conduct is undoubtedly shocking to the conscience and no conceivable state interest justifies the deprivations imposed. The Fourteenth Amendment forbids what allegedly happened to Ryan Cole. Where police intentionally fabricate evidence and successfully get someone falsely charged with a felony as cover for their colleagues' actions, and the Fourth Amendment is unavailing, there may be a due process violation. Having found that the Coles have alleged a due process violation, we must also decide whether the violation was clearly established in October 2010. . . . By 2010, no 'reasonable law enforcement officer would have thought it permissible to frame somebody for a crime he or she did not commit.' Though the First Circuit was addressing official framing that led to conviction, and the state of the law in 1967, the principle applies with obvious clarity here. 'To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false [evidence] at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice.' '[T]he wrongfulness of charging someone on the basis of deliberately fabricated evidence is sufficiently obvious,' that in light of our due process violation holdings in *Castellano* and *Boyd* and the decisions of our sister circuits, a reasonable officer in Officer Carson's shoes would have known

his conduct violated the Constitution. '[N]o reasonably competent police officer could believe otherwise.'" [footnotes omitted])

Chavis v. Borden, 621 F. App'x 283, 286-87 (5th Cir. 2015) ("Unlike our sister Circuits, we have repeatedly declined to decide whether such a cause of action [state-created-danger claim] is viable in the Fifth Circuit. . . Nevertheless, we have identified elements that a plaintiff would need to allege if we ever recognized the state-created danger doctrine. First, the plaintiff would have to allege that the defendant used his or her authority to create a dangerous environment. . .Second, the plaintiff would have to allege that the defendant ' "acted with deliberate indifference to the plight of the plaintiff.''. . To establish deliberate indifference, the plaintiff must allege that (1) the environment created by the state actor was dangerous; (2) the state actor knew the environment was dangerous; and (3) the state actor used his or her authority ' "to create an opportunity that would not otherwise have existed for the third party's crime to occur.'". .A number of our opinions also state that the plaintiff would also have to allege he or she was a 'known victim' of the state-created danger, rather than merely one of many foreseeable victims of the danger in question. . . Chavis asks us to recognize the state-created danger theory without including the 'known victim' requirement as an element of the plaintiff's *prima facie* case. . . We have no occasion to consider whether a plaintiff must be a 'known victim' to prevail on a state-created danger claim, or, if so, whether Jones would qualify as a 'known victim' under these facts. Nor must we consider whether a state-created danger cause of action exists in this Circuit at all, or whether Chavis's complaint properly alleges a constitutional violation. Assuming—without deciding—that Borden violated Jones's substantive due process rights, we conclude that Borden did not violate a constitutional right that was 'clearly established' at the time of Jones's tragic death. . . . As reckless and unprofessional as Borden's alleged conduct was, none of our Circuit's prior decisions gave Borden reasonable warning that leaving a drunk driver behind the wheel of his vehicle could violate another motorist's substantive due process rights. . .To the contrary, this Court previously held, in a case with relatively similar facts, that a police officer did not 'offend due process by permitting an intoxicated driver to remain on the highway' because his 'decision, while imprudent and ultimately tragic, was not sufficiently willful and targeted toward specific harm to remove the case into the domain of constitutional law.'. . Chavis argues that it is not dispositive that our Circuit has never recognized the state-created danger theory because there is a 'robust consensus of persuasive authority' from other Circuits that could support liability under these facts. It is true that this Court 'may consider the law of other circuits when determining whether a constitutional right is clearly established.'. . However, [t]he reluctance of this court ... to embrace some version of the state-created danger theory despite numerous opportunities to do so suggests that, regardless of the status of this doctrine in other circuits, a reasonable officer in this circuit would, even today, be unclear as to whether there is a right to be free from 'state-created danger.'. .Thus, Chavis's claim does not satisfy the 'clearly established law' element, so Borden is entitled to qualified immunity.")

Culbertson v. Lykos, 790 F.3d 608, 627 (5th Cir. 2015) ("Palmer argues she is entitled to qualified immunity because, in light of *Beattie,* the law was not clearly established that a mere

recommendation of termination to a higher authority who makes the final decision causes an adverse employment action. We have already noted ambiguity as to the liability of a person for recommending an adverse employment decision. 'The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . It was unsettled at the time of Palmer's actions, and remains so now, whether someone who is not a final decision-maker and makes a recommendation that leads to the plaintiff being harmed can be liable for retaliation under Section 1983. . . In fact, some clear statements in the caselaw have held there can be no liability. . . We conclude the claims against Palmer should be dismissed based on qualified immunity.")

Singleton v. Darby, 609 F. App'x 190, 196 (5th Cir. 2015) ("[T]he Supreme Court recently repeated its warning against defining the law in question 'at a high level of generality.'. . In doing so, the Supreme Court rejected the lower court's reliance on a generalized assessment of the *Graham* factors for overcoming qualified immunity in an excessive force case—the same analysis the dissent employs to try and defeat qualified immunity here. . . Instead, to overcome qualified immunity, the plaintiff must identify case law clearly establishing that the 'official acted reasonably in the particular circumstances that he or she faced.'. . Notably, the dissent is unable to point to case law with facts anywhere close to the particular circumstances involved here—the use of pepper spray to clear a road filled with protestors who vastly outnumbered law enforcement—that would have placed Darby on notice that his conduct was unlawful. Thus, viewing the facts through the deferential lens of qualified immunity and from the perspective of a reasonable officer on the scene, we conclude that Darby's use of force was not objectively unreasonable under the circumstances. At a minimum, case law did not make it clear to every reasonable officer that use of pepper spray in this situation was unreasonable. . . The district court therefore properly granted summary judgment in Darby's favor.")

Singleton v. Darby, 609 F. App'x 190, 196-97, 206-07 (5th Cir. 2015) (Dennis, J. concurring in part and dissenting in part) (not reported) ("Regarding the Fourth Amendment claim, the majority incorrectly read the Supreme Court's decision in *Scott v. Harris,* 550 U.S. 372 (2007) to hold that in analyzing a motion for summary judgment in an excessive force case in which the record contains a videotape of crucial events in question, a court is not required to determine the relevant facts by adopting the plaintiff's version of events and reading the record in the light most favorable to the plaintiff, but rather should decide whether the officer violated the Fourth Amendment solely in light of the facts depicted by the videotape. *Scott v. Harris* did not so hold. Rather, the Court so proceeded in that case *only* because the record contained a telling videotape that 'blatantly' and 'utterly' contradicted and discredited the plaintiff's version of the facts, so that no reasonable jury could have believed him. . . In a case, such as the present one, in which the record with a videotape does not contradict, but instead corroborates, plaintiff Singleton's version of the facts, the court is required to apply standard summary-judgment principles, including accepting the plaintiff's version of the facts as the basis for its decision and viewing the record and reasonable inferences in the light most favorable to her. The majority's failure to do so skewed its entire decisional

process, leading it to erroneously affirm the district court's summary judgment. . . .At the time of the pepper-spraying incident, '[Singleton] had a clearly established right to be free from excessive force ... and it was clearly established that the amount of force that [Darby] could use depended on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee.'. . Viewing the evidence in the light most favorable to Singleton, she and the other protesters posed no threat, were not resisting arrest, and were committing, at the very most, a non-violent, minor offense when Darby almost immediately and, without any warning that he would do so, resorted to the significant force of pepper spray. 'While the Fourth Amendment's reasonableness test is "not capable of precise definition or mechanical application," the test is clear enough that [Darby] should have known that he could not [use pepper spray against Singleton and the other protesters under the particular circumstances.]' *Bush v. Strain,* 513 F.3d 492, 502 (5th Cir.2008) (quoting *Graham,* 490 U.S. at 396). Accordingly, I would conclude that Darby is not entitled to qualified immunity on Singleton's Fourth Amendment claim. In reaching the opposite conclusion, the majority erroneously contends that the Supreme Court's recent decision in *Plumhoff v. Rickard,* 134 S.Ct. 2012 (2014), requires us to find a case with nearly identical facts to the particular circumstances here in order to conclude that Darby's conduct violated 'clearly established' Fourth Amendment law. In so doing, the majority grossly misreads that decision and altogether ignores the long-established principle that the lodestar in qualified-immunity cases is whether officers had 'fair warning' that their conduct would violate a constitutional right. . . In *Plumhoff,* the Court held that police officers who shot the driver of a fleeing vehicle in order to end a dangerous car chase were entitled to qualified immunity. . . In conducting the 'clearly established law' prong of its qualified immunity analysis, the Court emphasized its precedents observing that *deadly force* cases 'depend[ ] very much on the facts of each case,' meaning that a pure application of the *Graham* and *Garner* factors may not be appropriate in such a case. . . Accordingly, in light of the unique fact that the officers utilized deadly force in response to a high-speed car chase, the Court held that *Graham* and *Garner* alone did not put the officers on notice that their conduct violated 'clearly established' Fourth Amendment law. . . Contrary to the majority's position, *Plumhoff* does not eviscerate the long-established principle that a police officer is not entitled to qualified immunity where, as here, he has 'fair warning' based on existing precedents that his conduct would violate the constitutional rights of the plaintiff. . . Rather, as even a cursory review of *Plumhoff* reveals, the Court's 'clearly established law' analysis pivoted entirely upon the unique fact that the case involved 'deadly force' in response to a dangerous 'vehicular flight,'. . . which is clearly not the case confronting us here. Indeed, unlike the instant case where there was no threat to Darby or the public whatsoever, the officers in *Plumhoff* 'shot at Rickard to put an end to what had already been a lengthy, high-speed pursuit that indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby.'. . Moreover, in addition to ignoring these meaningful factual distinctions between *Plumhoff* and the instant case, the majority also errs in concluding that *Plumhoff* militates against applying a 'generalized assessment of the *Graham* factors' in order to conclude that Darby violated 'clearly established' Fourth Amendment law. Such logic further reflects the majority's careless reading of *Plumhoff. Plumhoff* explicitly and repeatedly endorsed the Court's earlier decision in *Brousseau,* wherein the Court made clear that, *even in* the fact-

dependent context of deadly force cases, '*Graham* and *Garner* alone [can] offer a basis for decision' that officers violated 'clearly established' Fourth Amendment law in 'an obvious case.'. . As explained above, this is an obvious case: in response to the alleged commission of a non-violent and indisputably minor offense, Darby unleased pepper spray into the face and eyes of an elderly woman without providing her any warning or opportunity to comply with his command and without attempting to first utilize any less severe alternative whatsoever. . . Given these egregious facts, a reasonable officer in Darby's position would have 'fair warning' that his conduct violated the Fourth Amendment's prohibition on excessive force pursuant to both Supreme Court and this Circuit's precedents.")

Trent v. Wade, 776 F.3d 368, 382-84 (5th Cir. 2015), reh'g en banc denied, 801 F.3d 849 (5th Cir. 2015) ("We conclude that hot pursuit—unless accompanied by one of the specific justifications enumerated in *Richards*—does not justify a no-knock entry. Wade points to no authority to the contrary. The fact that the pursued in a hot pursuit is aware of the officer's presence says nothing, without more, about the awareness of the other occupants of the home, all of whom are protected by the knock-and-announce rule. Therefore, the mere fact that the district court upheld the constitutionality of Wade's search of the Trents' home as one carried out in hot pursuit does not justify Wade's failure to knock and announce. . . . As explained above, *Wilson* and *Richards* placed the knock-and-announce rule and the justifications for dispensing with it beyond debate. With respect to the justifications, any reasonable officer would know that he was violating the rule if he did not have reasonable suspicion that knocking and announcing would be dangerous or futile or that it would inhibit effective investigation of the crime. . . The rule and the justifications are therefore clearly established. . .Any reasonable officer would understand that, because the knock-and-announce rule serves to alert the occupants of a home of an impending lawful intrusion, the futility justification requires reasonable suspicion that the occupants of the home to be searched are already aware of the officer's presence. The Fifth Circuit's decision in *Seelig* and the Supreme Court's decisions in *Wilson* and *Richards* gave Wade the 'fair warning' that the law requires. . . Although the law in our circuit is not flush with cases explaining specific circumstances in which officers were or were not entitled to rely on the futility justification, the knock-and-announce rule and its accompanying reasonable suspicion requirement are clear. In light of the materiality of the genuine issues of fact regarding whether Wade violated clearly established Fourth Amendment rights when he entered the Trents' home without knocking or announcing his presence, the district court was correct to deny qualified immunity on this ground. The remaining fact issues must be resolved at trial."), *pet. for reh'g en banc denied*, 2015 WL 5432089 (5th Cir. Sept. 14, 2015)

Wilkerson v. Goodwin, 774 F.3d 845, 858 (5th Cir. 2014) ("The Wade Defendants contend that, despite subsequent developments in the law, they were objectively reasonable in relying on the assumption in *Wilkerson I* that a liberty interest could not arise from an initial classification, regardless of the duration or indefiniteness of Woodfox's solitary confinement. . . However, the law did not freeze with the decision in *Wilkerson I* in 2003. As we have said, prior to the 2010 transfer of Woodfox, both our court and the Supreme Court had recognized that even if an initial security classification does not generally implicate a liberty interest, such an interest may arise

where an initial classification is also attended by 'extraordinary circumstances,' that is, an 'atypical and significant hardship.'. . .Woodfox was subjected to the sort of 23–hour–a–day in-cell confinement, limited physical exercise, limited human contact, and effectively indefinite placement that gave rise to a liberty interest in *Wilkinson.* Any differences between the Supermax conditions in *Wilkinson* and the CCR conditions at Wade are insufficient to render reasonable the conclusion that there is no liberty interest here. . . .In the circumstances of this case, no reasonable prison official could conclude that continuing four decades in indefinite solitary confinement would not implicate a liberty interest protected by due process.")

Gibson v. Kilpatrick, 773 F.3d 661, 667-73 (5th Cir. 2014) ("*Lane* seems to us to be an application of prior Supreme Court precedent. It was, after all, undisputed in *Lane* that 'Lane's ordinary job responsibilities did not include testifying in court proceedings.'. . *Garcetti* had indicated that the mere fact that speech concerns information learned while performing official job duties does not preclude First Amendment protection. . . More fundamentally, the Court's reasoning in *Pickering* indicated that the high value of public employees' contributions to civic discourse often derives from the knowledge they gain from their public employment, . . . a premise that was reiterated in *Garcetti* . . . . Given that precedent, *Lane* does not appear to have altered the standard for whether public employees speak pursuant to their official duties, but appears rather to be an application of *Garcetti'*s rule. Yet three aspects of the *Lane* opinion merit discussion, as they appear to offer the prospect of new law. The first is *Lane'*s injection of the word 'ordinary' into the 'pursuant to official duties' test. . . . The second is *Lane*'s discussion of the importance of public-employee speech in ferreting out public corruption. The third is *Lane*'s discussion of the affirmative legal obligation to testify truthfully in reasoning that the speech at issue was speech as a citizen. . . . Whatever may come of *Lane*'s use of the 'ordinary' modifier, at this point it likely has not altered the rule in *Garcetti,* at least not in any way that can be said to be clearly established. It was undisputed in *Lane* that the employee had not spoken pursuant to his official duties. . . . As such, there was no occasion for the Court to refine the standard for determining when an employee speaks pursuant to his official duties. Therefore, whatever change in the jurisprudence 'ordinary' may augur, we are unable to discern any change in *Garcetti*'s rule from *Lane* applicable to this case, for any change resulting from *Lane* cannot be said to have been ' "clearly established" *at the time of the challenged conduct.*' *Al–Kidd,* 131 S.Ct. at 2080 (emphasis added). Second, we turn to *Lane'*s discussion of the context of public corruption and its impact on whether the speech in that case was protected by the First Amendment. *Lane'*s discussion of whether the plaintiff spoke as a citizen or as an employee concludes by addressing the necessity of public-employee whistleblowing in stemming public corruption. . . . We doubt that this discussion means that speech is 'as a citizen' whenever public corruption is involved, as that could conflict with the opinion in *Garcetti.* . . . In *Lane,* it was undisputed that the employee was not speaking as part of his ordinary job duties. . . The testimony of public-employees is frequently necessary to prosecute public corruption. But it cannot be said to be strictly necessary that they be speaking *pursuant to their official duties* when they testify in order to prosecute public corruption. As such, it cannot be said that *Lane'*s discussion of public corruption alters *Garcetti* in a way that is clearly established for purposes of this case. Lastly, we must confront *Lane'*s discussion of the legal obligation to testify

truthfully and its relation to classifying speech as citizen-speech. . . . *Lane*. . . relied upon an independent legal obligation to tell the truth. . . Citing this discussion in *Lane*, Gibson points to 18 U.S.C. § 4 and *Roberts v. United States*, 445 U.S. 552, 557–58 (1980), as establishing a similar duty of citizens to affirmatively report crime. But any such independent legal obligation is only relevant if Gibson was speaking pursuant to his official duties; otherwise, his speech would be outside of *Garcetti's* ambit regardless. And, fatally, if Gibson was speaking pursuant to his official duties and was under an independent legal obligation as a citizen to report crime, it would raise the question that *Lane* expressly declined to answer, that is, whether there are obligations as a citizen that preempt obligations as an employee for First Amendment purposes. . . As such, we could not say that such a right was 'clearly established' at the time Gibson was allegedly retaliated against. Therefore, we turn to the central issue—whether Gibson was acting pursuant to his official duties in reporting Kilpatrick's use of the gas card to outside agencies. In making that inquiry, one of the factors that we have considered is whether the employee's complaint was made within the chain of command or to an outside actor, such as a different government agency or the media. . . . [W]hen an employee's official duties include communicating with outside agencies or the press, it would be in dissonance with *Garcetti* to conclude that, when he does so, he enjoys First Amendment protection. . . Further, where, as here, the employee is reporting the misconduct of his supervisor, an outside agency may be the most appropriate entity to which to report the misconduct. . . In turning to the instant case, we cannot say that Kilpatrick's reprimanding Gibson for reporting the illegal use of the gas card to outside agencies violated Gibson's clearly established constitutional rights. Gibson was the Chief of Police for the city, indicating that communicating with outside law enforcement agencies was part of his job responsibilities. The presumption is buttressed by Gibson's admission that he reported his concerns about the gas card to law enforcement officers at the outside agencies whom he had met through his official duties. It is also supported by his statement in a letter to the Mayor and Board of Aldermen that he worked with the FBI and DEA as part of his role as Chief of Police. Further, Gibson's statutory duties provide additional support to the notion that he was acting pursuant to his official duties. . . . While we cannot, and do not, rely on official job descriptions, even statutory ones, in applying *Garcetti's* rule, they can be instructive. . . . Moreover, the facts of this case make plain that Gibson was acting pursuant to his official duties when he made the reports to the OSA. For Gibson did not merely make a report to the OSA on his personal time after work. He met with the investigator in his office, he coordinated his department's resources with the OSA, and he instructed his employees to aid extensively in the investigation. All of this is compelling circumstantial evidence that Gibson reported the misuse of the gas card not as a citizen, but in his official capacity as Chief of Police. . . . The fact that what was being reported in this case was public corruption does not change the result—*Garcetti*'s rule is a broad one, and it must be applied even where it may lead to a potentially distasteful result in an individual case. As such, any reprimand based on Gibson's reports to the OSA cannot be said to violate his clearly established constitutional rights. Similarly, reprimanding Gibson for his report to the Attorney General would not have violated his clearly established First Amendment rights. Gibson communicated his concerns about the gas card at the 'Chief of Police Conference' to the Mississippi Attorney General in person. He spoke with the Attorney General and others who were with him for about twenty minutes. Given that Gibson was

attending a chief of police conference when he met with the Attorney General and expressed his concerns, it would not have been objectively unreasonable for Kilpatrick to believe Gibson made the report while performing his official duties. To the extent that additional facts could show that Gibson was not acting pursuant to his official duties when he made his report to the Attorney General, Gibson has failed to meet his burden of producing evidence sufficient to show that Kilpatrick violated his clearly established constitutional rights. . . The reports to the FBI and DEA present a closer case. Gibson made a call to an FBI agent that he had met through his law enforcement work. He then met with two FBI agents, including the agent he already knew, at schools in Drew rather than at his office. He testified that he believed his report to the FBI was confidential. He also made his initial complaint to the DEA via telephone, then met with DEA agents, and agents from other federal law enforcement agencies, at the DEA office in Oxford, Mississippi, again not at his office in Drew. Gibson testified that he believed his report to the DEA was also confidential. Gibson did, however, testify that he had previously met the agents he contacted at the FBI and the DEA through his official duties. Further, he stated in a letter to the Mayor and Board of Aldermen that he generally worked with outside agencies, including the DEA and FBI, 'to help with crimes within the city of Drew.' Additional facts could elucidate Gibson's role when he made his complaints in this case. Whether he spoke with the agents during working hours, whether he was in uniform, and whether he offered the assistance of local law enforcement would all be instructive as to whether he acted pursuant to his official duties. But those facts are not present in the record, and, there being no genuine dispute as to the facts, we take record as it is. Given the lack of evidence clarifying Gibson's role when he made his reports to the FBI and the DEA, we hold that Gibson has not met his burden of producing evidence sufficient to show that Kilpatrick violated his clearly established constitutional rights, and, as such, summary judgment should have been granted for Kilpatrick. . . We do not hold that, as the Chief of Police, *any* report of criminal activity Gibson made to outside agencies was part of his official duties. We hold only that Gibson has adduced insufficient evidence here to meet his burden of producing evidence showing that his reports here were made as a citizen rather than in his official capacity. He has therefore failed to come forward with evidence showing that his clearly established constitutional rights were violated. As such, Gibson's communications to the outside agencies in this case are distinguishable from previous cases in which we have held that communications outside the chain of command are speech as a citizen. Therefore, we cannot say that reprimanding Gibson for reporting violations of the law to outside law enforcement agencies violated his clearly established constitutional rights.")

Stephen F. Austin State Univ., 767 F.3d 462, 472, 473 (5th Cir. 2014) ("*Garcetti* alone may not 'clearly establish' Cutler's First Amendment right. *Garcetti* did not 'articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.'. . After all, *Garcetti* 'did not explicate what it means to speak pursuant to one's official duties, although we do know that a formal job description is not dispositive ... [,] nor is speaking on the subject matter of one's employment.'. .Several pre–2010 decisions have, however, given the Defendants the 'fair warning' they need. [discussing cases] These cases should have provided Defendants with a clear warning that terminating Cutler on the basis of his speech to Rep.

Gohmert's office—based on the undisputed facts and taking all reasonable inferences in Cutler's favor—would violate Cutler's First Amendment right. Assuming that Cutler's account of his conversations with Rep. Gohmert's office is credible, as we must do, Cutler's speech was made externally to a staff member of an 'elected representative[ ] of the people' allegedly about participating in an event that was not within his job requirements. . .. Cutler spoke about concerns entirely unrelated to his job and from a perspective that did not depend on his job as a university employee, but rather emanated from his views as a citizen. . . Therefore, reasonable officials in the Defendants' position should have known on the basis of *Charles* and *Davis* that Cutler's speech was protected as the speech of a citizen and that their decision to terminate Cutler on the basis of that citizen speech would violate Cutler's First Amendment right.")

U.S. ex rel. Parikh v. Brown, 13-41088, 2014 WL 3906268, *3, *4 (5th Cir. Aug. 11, 2014) ("Properly focused on the claim for payment here, the relevant pleading that we have taken as true is that Appellants *knew* their compliance certification was false. The key question, then, is whether the contours of the FCA were sufficiently clear at the time such that every reasonable official would have understood that—as Relators pleaded in their complaint—presenting claims for payment, while knowingly falsely certifying compliance with the AKS and Stark Law, violated the FCA. . . Based on circuit precedent, we answer in the affirmative. . . . In light of our decision in *Thompson,* every reasonable official would understand that the FCA is violated when (1) 'the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation,' and (2) the official 'falsely certifies compliance with that statute or regulation.'. . This clearly established statutory right is precisely what Relators alleged Appellants to have violated. Accordingly, we hold that as a matter of law Brown and Campbell are not entitled to qualified immunity.")

Morgan v. Swanson, 755 F.3d 757, 761, 762 (5th Cir. 2014) (per curiam) ("Morgan argues that his right to distribute religious material is clearly established because 'regardless of forum, viewpoint discrimination regarding private speech is unconstitutional.' This assertion is generally true. Yet such a broad generalization is exactly the kind of proposition that will not suffice for the purposes of qualified immunity analysis, as it simply does not provide the official with any sense of what is permissible under a certain set of facts. . . . When asked at oral argument to name a case that clearly establishes Morgan's right to distribute the religious gifts, Morgan pointed to *Chiu v. Plano Indep. Sch. Dist.,* 260 F.3d 330 (5th Cir.2001). Yet the case is inapposite. *Chiu* dealt with after-school meetings whose express purpose was to allow adults to discuss mathematics instruction. . . This Court held that-regardless of whether the meetings were properly classified as public forum or limited public forum-school officials could not prohibit the plaintiffs from distributing material related to certain curriculum options. . . It is difficult to imagine how *Chiu* establishes a specific rule applicable to this case. The present case does not involve an individual trying to contribute relevant materials to a public forum dedicated to adult dialogue. Instead, a parent asked whether he could distribute religious material during a classroom activity. So while Chiu may indeed be relevant in discerning the nature and extent of Morgan's rights in the classroom, the case does not itself establish those rights, and its radically different factual context

renders *Chiu* incapable of providing any meaningful guidance to an educator trying to handle First Amendment concerns arising out of a third-grade party. . . .After carefully considering Morgan's arguments, we find that he has not identified any case clearly establishing the constitutional right asserted here. Nor are we aware of such a case. Where there is no authority recognizing an asserted right, and where the area of law is as 'abstruse' and 'complicated' as First Amendment jurisprudence, that right cannot be clearly established for the purposes of qualified immunity analysis. . . Accordingly, Morgan's allegations are not sufficient to overcome Swanson's qualified immunity defense. His claim is therefore properly dismissed.")

Castro v. Cabrera, 742 F.3d 595, 599-602 (5th Cir. 2014) ("Before addressing qualified immunity, we decide the threshold question whether the Fourth Amendment applies to these detainees. As a general matter, it applies to aliens within U.S. territory. . .In *Verdugo–Urquidez,* however, the Court held, 494 U.S. at 261, that it does not apply to the search and seizure of nonresident aliens on foreign soil. . . Moreover, excludable aliens that have been denied entry into the United States, even when technically within U.S. territory, may be 'treated, for constitutional purposes, as if stopped at the border.'. .That is the doctrine of 'entry fiction,' which is applied to excludable aliens regarding the constitutionality of indefinite detention and, more specifically, the applicability of substantive and procedural due process rights under the Fifth Amendment. . . There are limitations to our application of entry fiction. In *Lynch,* we specifically confined it to the contexts of immigration and deportation and held that it 'does not limit the right of aliens detained within the United States territory to humane treatment.'. .For purposes of this exception, we have interpreted 'humane treatment' as being denied only in those cases involving 'gross physical abuse.' . .Therefore, if these detainees are excludable aliens stopped before entry into the United States and their claims arise in the context of immigration, the entry fiction applies and there is no violation of the Fourth Amendment. If, however, they were subject to wanton or malicious infliction of pain or gross physical abuse, the doctrine does not apply, and we consider whether Cabrera was entitled to qualified immunity. . .The detainees, however, were detained as excluded aliens for varying amounts of time—all ten hours or less—as their admissibility was being determined, a situation well within the immigration context. Additionally, neither of the claims involve physical abuse, let alone 'gross physical abuse' as in *Lynch* or *Martinez–Aguero.* Therefore, these claims fall squarely within the confines of entry fiction, and the Fourth Amendment is not applicable; the detention did not violate constitutional rights. . .and the district court properly dismissed these claims under Rule 12(b)(6). . . . Lastly, we decide whether the entry fiction applies to the detainees' Fourth Amendment claim of excessive force through the use of harsh interrogation techniques. Although we held in *Lynch* and *Martinez–Aguero* that the entry fiction did not apply to the excessive-force claims under, respectively, the Fifth and Fourth Amendments, we did so because the fiction does not apply to 'gross physical abuse at the hands of state or federal officials.'. . The present detainees do not allege *any* physical contact but make bare assertions of 'threats, insults, and false statements.' These accusations, without any allegation of conduct that could be considered 'gross physical abuse' or the wanton or malicious infliction of pain, do not meet our standard for avoiding application of the entry fiction. . Therefore, the fiction applies to the Fourth Amendment claim, which was properly dismissed. . . .Even if they individuals

are in fact U.S. citizens, dismissal is proper because Cabrera enjoys qualified immunity, . . . as the district court convincingly discussed in its order of dismissal. The detainees point to no authority clearly establishing that Cabrera's actions in detaining, even for as long as ten hours, individuals who presented facially valid documentation, plus the use of unspecified threats and insults during interrogation, violated the Constitution. . . Instead, the caselaw of the Supreme Court . . . and of this circuit, . . .as well as federal regulations, . . . are to the contrary. Therefore, the claims of any of the detainees who might be U.S. citizens were properly dismissed.")

Marquez v. Garnett, 567 F. App'x 214, 217, 218 (5th Cir. 2014) ("Stripped of multiple conclusory statements in the amended complaint, the allegation here is that the student was sliding Garnett's compact disc across a table during class time and Garnett reacted. As in *Fee* and *Moore,* the setting is pedagogical, and C.M.'s action was unwarranted. The inference must be that Garnett acted to discipline C.M., even if she may have overreacted. . . Because Marquez's pleadings demonstrate corporal punishment rather than a mere attack, the only remaining question is the sufficiency of state remedies. The parties do not dispute that, as we found in *Fee* and *Moore,* Texas provides criminal and civil remedies to parents like Marquez. . . In this case, Garnett was charged in state court with assault causing bodily injury, was placed on administrative leave, and was required to surrender her teaching certificate in response to her conduct. Marquez has not shown that C.M.'s substantive due process rights were violated . . .Fifth Circuit law squarely forecloses Marquez's claim against Garnett. Accordingly, she was entitled to qualified immunity.")

Estate of C.A. v. Castro, 547 F. App'x 621, 2013 WL 6155819, *4 (5th Cir. Nov. 25, 2013) ("In addition to the Agwuokes' failure to make out a cognizable constitutional violation, Castro and Coronado are entitled to qualified immunity because the right at issue was not clearly established. The Agwuokes claim that the individual defendants did more than fail to protect C.A. from the inherent dangers of swimming pool: they planned and approved a school project that placed students in a dangerous environment, and did so in a manner that disregarded reasonable and legally required safety measures. . . . Applying this case's facts to the standard set forth in *al-Kidd* and *Kinney,* the Agwuokes would need to demonstrate that reasonable teachers and school officials were on notice that designing and executing a high school science experiment involving a pool violated the constitutional right to life of any student that may drown. The Agwuokes do not identify 'controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.'. . Instead, they note merely that C.A. had a 'right to life' under the Fourteenth Amendment, which the individual defendants allegedly violated through their deliberately indifferent conduct. This falls short of the requirement to show 'defendants' actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of.'. . We hold that, even assuming a constitutional violation, the individual defendants were not on notice that their conduct violated a clearly established constitutional right because no case has found a violation under similar facts.")

McCreary v. Richardson, 738 F.3d 651, 658, 659 (5th Cir. 2013) ("Strip searches have been upheld as constitutional even when conducted in non-private areas in the presence of non-essential

personnel, *see Elliott*, 38 F.3d at 190–92, or on male prisoners in the presence of female officers, *see Letcher*, 968 F.2d at 510; *Tasby v. Lynaugh*, 123 F. App'x 614, 615 (5th Cir.2005). Given the present case law in this circuit, we are not prepared to say that a reasonable officer would believe that a public strip search conducted by a male officer on a male offender in the presence of females after an equally public disruption was contrary to clearly established law. Precedent does not clearly establish that a reasonable officer could not perform the strip search in the most efficient manner possible without abandoning his post—the location where the incident occurred. . . Richardson accordingly deserves qualified immunity relating to Fourth Amendment claims concerning the public nature of the strip search.")

Wyatt v. Fletcher, 718 F.3d 496, 503-06, 508-10 (5th Cir. 2013) ("Under the Fifth Circuit standard, the doctrine of qualified immunity protects government officials from civil damages liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question *beyond debate*. . . When deciding whether the right allegedly violated was 'clearly established,' the court asks whether the law so clearly and unambiguously prohibited the conduct that *every* reasonable official would understand that what he is doing violates the law. . . Answering in the affirmative requires the court to be able to point to 'controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity.'. . This requirement establishes a high bar. When there is no controlling authority specifically prohibiting a defendant's conduct, the law is not clearly established for the purposes of defeating qualified immunity. . . .The Fifth Circuit has never held that a person has a constitutionally-protected privacy interest in her sexual orientation, and it certainly has never suggested that such a privacy interest precludes school authorities from discussing with parents matters that relate to the interests of their children. . . Therefore, when the magistrate judge in this case held that there is a constitutional right that bars the unauthorized disclosure by school coaches of a student's sexual orientation to the student's mother, he proclaimed a new rule of law. . . .In summary, then, when we consider *ACLU of Miss.* and *Fadjo,* neither is established—much less *clearly* established—authority for the claims presented here. It is of major significance that neither occurred in the context of public schools' relations with their students and the students' parents. We therefore hold there is no controlling Fifth Circuit authority—certainly not with 'sufficient particularity'—showing a clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students' interests, even when private matters of sex are involved. . . . In our case today, the trial court cited other cases from outside the circuit on its way to denying summary judgment to the coaches. Perhaps the most salient distinguishing factor in all these cases is that none occurred in a school context; together, they establish only the simple and unsurprising proposition that individuals generally can have a privacy interest in some personal 'sexual matters,' a broad, general proposition with which we do not take issue. . . None of these cases approximate the factual context we have before us, and none of them provide any guidance regarding the crucial question: whether a student has a privacy right under the Fourteenth Amendment that forbids school officials from discussing student sexual information during meetings with parents. . . In sum, then, we hold that Wyatt has

not alleged a clearly established constitutional right—drawn either from the Supreme Court's jurisprudence, from our own precedent or from that of other circuits—that the coaches violated . . . .To summarize our opinion today: we hold that the magistrate judge erred in denying Newell and Fletcher summary judgment on the claims of qualified immunity. It was error because there is no Supreme Court or Fifth Circuit case that clearly establishes or even suggests that a high school student has a Fourth Amendment right that bars the student from being questioned by coaches in a locker room or a Fourteenth Amendment right to privacy that bars a teacher or coach from discussing the student's private matters with the student's parents. Fletcher and Newell were entitled to qualified immunity for this suit with respect to the federal claims, because, based on undisputed facts, there was no violation of a clearly established federal right.")

Wyatt v. Fletcher, 718 F.3d 496, 513, 514 (5th Cir. 2013) (Graves, J., dissenting) ("At least five other circuits have recognized a right of privacy regarding personal sexual matters. [collecting cases] Based on the applicable case law set out above, there clearly exists a right to privacy regarding one's sexual orientation. The findings of the United States Supreme Court and six Circuit Courts of Appeal (including the 5th) that information of a sexual nature is intrinsically private is more than a 'simple and unsurprising proposition.' Additionally, the school context does not defeat the very existence of a right, but rather comes into play with regard to a balancing test and whether the government's interest outweighs a student's privacy right.")

Waganfeald v. Gusman, 674 F.3d 475, 486 (5th Cir. 2012) ("There is no doubt that Appellees suffered terribly while held in custody after Hurricane Katrina struck New Orleans. It is equally clear, however, that (1) Gusman's failure to release Appellees falls within the emergency exception to the rule that a probable cause determination must be made within 48 hours, and (2) Hunter's failure to allow Appellees to use cell phones was not objectively unreasonable in light of any clearly established law. We therefore reverse and vacate the judgment of the district court, and remand with instructions to enter judgment in favor of Gusman and Hunter on all claims asserted by Appellees.")

Bishop v. Arcuri, 674 F.3d 456, 466, 467 (5th Cir. 2012) ("In sum, neither Arcuri's concerns for evidence preservation nor for officer safety amounted to reasonable suspicion based on particular facts, so exigent circumstances did not justify his team's no-knock entry of Appellants' home. The entry therefore violated Appellants' Fourth Amendment rights. . . . Having concluded that the no-knock entry led by Arcuri violated Appellants' Fourth Amendment right to be free from unreasonable searches, we now turn to the second prong of qualified-immunity analysis: whether Arcuri's conduct was objectively unreasonable under established law. . . .At the time of the search, the Supreme Court's unanimous decision in *Richards* rejecting a blanket exception to the knock-and-announce requirement for narcotics searches had been on the books for twelve years. As discussed above, Arcuri's proffered justifications for his team's no-knock entry—evidence preservation and officer safety—were based primarily on generalities rather than particularized suspicion, and his position is therefore virtually indistinguishable from the type of blanket rule repudiated in *Richards.* Moreover, multiple decisions of this circuit, and of the Texas state courts

[footnote omitted] have reinforced the applicability of the knock-and-announce requirement to searches indistinguishable from the one conducted on Appellants' home. Arcuri's no-knock entry of Appellants' home, based only on generalized concerns about evidence preservation and officer safety, violated clearly established law and was therefore unreasonable. . .Because the rights violated by Arcuri's team were well-established at the time of the raid, Arcuri's actions were unreasonable, and he is not entitled to qualified immunity.")

Cantrell v. City of Murphy, 666 F.3d 911, 921 (5th Cir. 2012) ("Taking the allegations in the Cantrells' complaint as true, we conclude that they have failed to satisfy their burden of demonstrating the inapplicability of the Officers' qualified immunity defense. In their brief, they fail to cite any cases involving sufficiently similar situations that would have provided reasonable officers with notice that they had an affirmative constitutional duty to provide medical care and protection to a young child [who was strangled when he became entangled in a soccer net] when they temporarily physically separate the child from his mother. While the Cantrells analogize to cases involving foster care in arguing that Matthew's putative right was clearly established, this line of cases is materially distinguishable, and therefore could not have provided reasonable officials in the Officers' position with notice that they had an affirmative constitutional duty to provide medical care and protection to Matthew. Stated differently, Matthew's asserted right was not clearly established on October 2, 2007.")

Juarez v. Aguilar, 666 F.3d 325, 336 (5th Cir. 2011) ("Appellants have not shown their entitlement to qualified immunity at this stage of the proceedings. Appellee's retaliation claim is straightforward. He alleges that because he informed the FBI of illegal activities, the Appellants entered into an agreement not to extend Appellee's contract. Assuming Appellee's allegations are true, . . . such conduct would fall well within the clearly established elements of retaliation in violation of Appellee's First Amendment rights. With respect to the issues we can consider on this appeal, the only distinction between this case and the previous cases we have decided is the fact that Appellants did not formally vote when making the alleged adverse employment decision. That this court has not previously considered an identical fact pattern does not mean that a litigant's rights were not clearly established. . . As long as the officials received fair notice that their conduct violated the litigant's rights, the right was clearly established. . . In this case, it would have been unreasonable for the Appellants to believe that the absence of a formal vote would absolve them of liability. As we explained above, the conclusion that informal actions can result in liability follows clearly from the precedent of this court and the Supreme Court. This was sufficient to provide Appellants with fair notice that even an informal decision to retaliate against Appellee would violate Appellee's First Amendment rights. Accordingly, the district court did not err when it denied summary judgment on Appellants' qualified immunity defense.")

Morgan v. Swanson, 659 F.3d 359, 371, 372 (5th Cir. 2011) (en banc) (opinion of Benevides, J.) ("Before discussing the substantive law in this case, we turn to first principles to guide our determination of what it means for the law to be 'clearly established.'. . .Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split

on the issue, the law cannot be said to be clearly established. This is true even when the circuit split developed *after* the events in question. . . . The Supreme Court's admonition in *Al-Kidd* that we should not 'define clearly established law at a high level of generality' sits in tension with its earlier statement in *Hope v. Pelzer* that 'general statements of the law are not *inherently* incapable of giving fair and clear warning,' at least in a certain category of 'obvious' cases. In *Hope*, the Court noted that the general Eighth Amendment prohibition against the unnecessary and wanton infliction of pain '*arguably*' gave the defendants 'fair warning' that it was unconstitutional to strip a prisoner shirtless and chain him to a hitching post (a painful stress position) for seven hours in the Alabama sun. But the Court's suggestion that generalizations can sometimes clearly establish the law was dicta; the Court did not rest its qualified-immunity decision on such a broad statement. It relied instead on binding circuit precedent prohibiting extremely similar conduct, including 'handcuffing inmates to the fence and to cells for long periods of time.'. . .The *Al-Kidd* Court, in admonishing lower courts 'not to define clearly established law at a high level of generality,' did not discuss or even cite *Hope,* nor other earlier opinions reflecting a similar concern that a damages remedy be available for 'obvious' or flagrant constitutional violations. This silence is puzzling given that *Al-Kidd* reversed a Ninth Circuit decision denying immunity in reliance on *Hope.* Adding to the perplexity is that, in its next major 'clearly established' opinion after *Hope,* the Supreme Court granted qualified immunity because there were no cases that 'squarely govern[ed].' That said, this case does not call on us to decide whether the Court's statements in *Hope* survive *Al-Kidd:* the constitutional issue in this case is far from 'beyond debate,' as evidenced by a large body of oft-conflicting case law and the variety of opinion among members of this Court. We leave for another day the question of whether and when a constitutional violation may be so 'obvious' that its illegality is clear from only a generalized statement of law." [footnotes omitted])

Morgan v. Swanson, 659 F.3d 359, 391-94 (5th Cir. 2011) (en banc) (opinion of Dennis, J., specially concurring in parts and not joining in other parts) ("I . . . do not join fully in Part IV.A of Judge Benavides' opinion because I disagree with one of its premises in discussing clearly established law. Specifically, I disagree with the blanket statement that 'generalizations and abstract propositions are not capable of establishing the law.'. . . [T]he *Hope* Court reversed the court of appeals not only because it reached the wrong result on qualified immunity based on prior circuit precedent, but also because it had wrongly applied the 'materially similar' standard in reaching that result. Indeed, the Court first held that the fair warning standard from *Lanier* should be used to evaluate whether the defendants were entitled to qualified immunity, and then applied that standard to conclude that they were. . . .Therefore, the Court's pronouncements on the fair and clear warning standard were an essential part of its holding in *Hope.* Moreover, in the years since *Hope,* the Supreme Court has reaffirmed this principle. . . . The Supreme Court's recent decisions in *Camreta v. Greene,* 131 S.Ct. 2020 (2011), and *Ashcroft v. al-Kidd,* 131 S.Ct. 2074 (2011), do not overrule *Hope, Lanier,* or any case in that line. In fact, the majority in neither *al-Kidd* nor *Camreta* mentions them, and Justice Kennedy's concurrence in *al-Kidd* cites *Lanier* affirmatively as supporting the 'fair and clear warning' rule. . . . In sum, pursuant to the line of cases described above, I believe that certain official conduct may so obviously fall within the prohibition of a general or abstract rule of the Constitution that any reasonable official would have 'fair warning'

that his actions are unconstitutional, even absent a prior court decision to that effect. However, I agree with Judge Benavides that this case does not present a situation where the defendants had fair warning that their actions were unconstitutional, for substantially the reasons given by Judge Benavides in his opinion.")

Swindle v. Livingston Parish School Bd., 655 F.3d 386, 401 (5th Cir. 2011), *reh'g en banc denied*, 662 F.3d 328 (5th Cir. 2011) ("[I]t has been clear since *Goss* that when state law directs local authorities to provide public education, a student's 'total exclusion from the educational process' must be accompanied by the procedural protections required by the Due Process Clause. . . In *Nevares* and *Harris*, this court made clear that no deprivation of the liberty and property interests associated with public education occurs when a student is removed from her regular school environment and transferred to an alternative education program. . . In a disciplinary alternative education model like those in *Nevares* in *Harris*–and like the Louisiana statutory scheme at issue here. . . a student's expulsion from her regular school does not deny her access to the educational process, because she continues to receive a public education in the form of alternative programming. . . Under these decisions, a constitutionally relevant deprivation occurs when an official denies a student access to alternative education to which she has an entitlement based on state law . . . . We conclude that these 'precedents ... placed ... beyond debate,' [citing *Ashcroft v. Al-Kidd*] the question of whether procedural due process safeguards had to be complied with in connection with Pope's refusal to permit Morgan access to alternative education.")

Good v. Curtis, 601 F.3d 393, 400-02 (5th Cir. 2010) ("In the instant case, Curtis is alleged to have intentionally secured a false identification that produced a wrongful conviction in retaliation for a suspect's failure to cooperate in an unrelated matter–a *Malley* 'knowing violation of the law.'. . . In keeping with *Geter I* and *II*, we conclude that knowing efforts to secure a false identification by fabricating evidence or otherwise unlawfully influencing witnesses constitutes a violation of the due process rights secured by the Fourteenth Amendment. A plaintiff need not undertake the impossible task of satisfying the *Brathwaite* test where an officer's intentional conduct was designed to artificially produce precisely the sort of witness certainty that otherwise justifies the admission of suggestive lineups and the criminal defendant has been exonerated in the meantime. Moreover, we find that any reasonable official would know that framing an individual for a crime they did not commit by securing such an identification represents a constitutional violation. Accordingly, the appeal must be dismissed on his Fourteenth Amendment claim. With respect to the Fourth Amendment, Curtis's efforts to secure Good's arrest notwithstanding the fact that Curtis affirmatively knew he manufactured probable cause constituted a clearly established violation of Good's Fourth Amendment rights at the time of the arrest such that the appeal on this claim must also be dismissed.").

Wernecke v. Garcia, 591 F.3d 386, 399, 400 (5th Cir. 2009) ("In the light most favorable to the Werneckes, a reasonable person would not believe that an immediate danger would be posed by JW and JW remaining in the home. Therefore, the Werneckes have asserted a Fourth Amendment violation by Garcia. Although the Werneckes have asserted a constitutional violation, the question

whether the applicable law was clearly established remains. The Werneckes argue that the general contours of the Fourth Amendment sufficed to give 'fair warning' to reasonable officials of the alleged unlawfulness of the seizure of the boys. Although '[i]t could plausibly be asserted that any violation of the Fourth Amendment is Aclearly established,"' we recall that 'the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.'. . Therefore, we must consider the state of the clearly established law in 2005 and whether it gave TDFPS employees 'fair warning that their alleged treatment of [the plaintiffs was] unconstitutional.'. . As of June 1, 2005, Fifth Circuit precedent clearly established that the Fourth Amendment governs social workers' investigations of allegations of child abuse. . .We indicated in *Roe v. Texas Department of Protective & Regulatory Services* that '[s]ocial workers retain the power to seize a child if Aexigent circumstances" exist; if they Ahave reason to believe that life or limb is in immediate jeopardy," they need not obtain a court order.'. . . The quoted language from *Roe*, combined with the reference to 'evidence of danger' in *Wooley*, clearly established that, at the very least, some evidence of imminent danger to a child was required to justify a warrantless seizure. . . Officials do not receive the protection of qualified immunity when 'in the light of pre-existing law the unlawfulness [of the challenged act is] apparent,' and in the light of *Roe* and *Wooley*, Garcia's actions (as alleged by the Werneckes) were clearly unlawful. . . . On the facts as stated by the Werneckes, Fifth Circuit law clearly established in June 2005 that the warrantless seizure of the Wernecke boys–in the absence of any imminent danger–was a constitutional violation.")**.**

DePree v. Saunders, 588 F.3d 282, 288 (5th Cir. 2009) ("Because this court has not formally applied *Burlington* to First Amendment retaliation claims, the interrelation among *Harrington, Dorsett*, and *Burlington* yields no 'clearly established law' that Saunders would have known she was violating by revoking DePree's teaching duties and access to the business school. At most, these cases create a fact issue [as] to whether DePree suffered a material adverse employment action. Similarly, no clearly established law dictated that Saunders could not impose discipline, notwithstanding a few references to DePree's 'speech,' in light of the uniform reports about his intimidating and disruptive behavior. In sum, this court cannot conclude that Saunders's action was objectively unreasonable, 'assessed in light of the legal rules that were clearly established at the time it was taken.'").

Brown v. Miller, 519 F.3d 231, 327, 238 (5th Cir. 2008) ("We . . . hold that the deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounts to a violation of a defendant's due process rights, and that a reasonable laboratory technician in 1984 would have understood that those actions violated those rights. The district court did not err in denying qualified immunity on this theory. . . . Brown also alleges that Miller concealed, suppressed, or destroyed lab results that were conclusively exculpatory with respect to Brown. The Supreme Court held in *Brady v. Maryland* that a criminal prosecutor's failure to disclose exculpatory evidence to a criminal defendant violates a defendant's right to a fair trial. . . A police officer's deliberate concealment of exculpatory evidence violates this same right, and can give rise to liability under § 1983. . . By 1967, a public official's concealment of exculpatory evidence was

a constitutional violation in this circuit. . . Therefore, the law was sufficiently clear in 1984 that a state crime lab technician would have known that suppression of exculpatory blood test results would violate a defendant's rights. Miller does not argue otherwise. We therefore hold that the district court did not err in denying the qualified immunity defense on this theory.")

Bolton v. City of Dallas, 472 F.3d 261, 266 (5th Cir. 2006) ("Although we now conclude that ' 5 of the Dallas City Charter creates a vested property right in employment at a former rank for executive-level officials, this decision is not apparent from *Muncy*. There we were considering a due process claim in the context of demotion, but we stated that executive rank officials are 'employees at will, and the city was free to discharge them without cause.'. . If we are to respect the principle underlying qualified immunity to the effect that officials must be able reasonably to 'anticipate when their conduct may give rise to damages,' we cannot hold an official liable for taking action that was arguably supported by decisions of this court. . . Bolton's claim against Benavides in his personal capacity must be dismissed based on qualified immunity, because reasonable public officials could have differed on whether discharging Bolton would violate his constitutional rights.")**.**

Williams v. Ballard, 466 F.3d 330, 333 (5th Cir. 2006) ("The fundamental question is whether the state of the law gave defendants fair warning that their conduct was unconstitutional. . . Because at the time there was no binding precedent clearly establishing the right, we must determine if other decisions at the time showed 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'. . As the district court noted, in 1998 only the Ninth Circuit had recognized a non-sex offender's right against mandatory sex-offender registration and treatment as a condition of parole, . . . and it unsurprisingly held the law not clearly established . . . .Moreover, another Ninth Circuit panel that same year declined to recognize a non-sex offender's right against registration under a community notification statute as a condition of parole. . . We cannot conclude from this that Williams's right was clearly established.").

Porter v. Ascension Parish School Board, 393 F.3d 608, 620 (5th Cir. 2004) ("Because Adam's drawing was composed off-campus, displayed only to members of his own household, stored off-campus, and not purposefully taken by him to EAHS or publicized in a way certain to result in its appearance at EAHS, we have found that the drawing is protected by the First Amendment. Furthermore, we have found that it is neither speech directed at the campus nor a purposefully communicated true threat. However, a reasonable school official facing this question for the first time would find no 'pre-existing' body of law from which he could draw clear guidance and certain conclusions. Rather, a reasonable school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate student speech reaches beyond the confines of the campus. Given the unsettled nature of First Amendment law as applied to off-campus student speech inadvertently brought on campus by others, the contours of Adam's right to First Amendment protection in the present case cannot be deemed 'clearly established' such that it would be clear to a reasonable EAHS official that sanctioning Adam based on the

content of his drawing was unlawful under the circumstances. Thus, Braud is entitled to qualified immunity. Even if Adam's rights were clearly established at the time of his expulsion, Braud's determination that the drawing was not entitled to First Amendment protection was objectively reasonable. The Supreme Court has observed that, even when a particular legal doctrine is clearly established, '[i]t is sometimes difficult for an [official] to determine how the relevant legal doctrine ... will apply to the factual situation the [official] confronts.' . . The record indicates that, at the time he recommended Adam for expulsion, Braud was aware that Adam was responsible for the drawing, that the drawing was two or three years old, and that the drawing had been brought to Galvez Middle School by Adam's younger brother. These facts raise the subtle but important legal questions of whether the drawing constitutes on-campus speech, or an intentionally communicated threat. Although we have answered both of these queries in the negative, we cannot say that all reasonable school officials facing these circumstances would reach the same conclusion.").

Collins v. Ainsworth, 382 F.3d 529, 544, 545 5th Cir. 2004) ("For essentially the same reasons we find no error in the district court's denial of qualified immunity against Ainsworth on the Fourth Amendment issue, this Court agrees with Plaintiffs. Plaintiffs presented evidence that after failing to dissuade the Concert sponsors from proceeding with their plans for the 2 Live Crew event, Ainsworth chose to erect an indirect (but fully effective) bar in the guise of a facially valid pair of driver's license checkpoints on either side of OPG Road, flanking the only entrance to Collins Field. By setting up these checkpoints to stop the Concert from taking place, Ainsworth abused his discretionary power to deny in advance the use of Collins Field for First Amendment-protected musical expression and association. No procedural safeguards were put in place to prevent censorship of legitimate speech and music. Therefore, we find Ainsworth's use of the driver's license checkpoints amounted to an impermissible prior restraint on the Concert. Most Plaintiffs thus have clearly alleged a constitutional violation by Ainsworth. As to most Plaintiffs, we find under these circumstances that no sheriff could reasonably believe his actions aimed at stopping the Concert were legal and would entitle him to qualified immunity.").

Hart v. Texas Dep't of Criminal Justice, No. 03-40274, 2004 WL 1682757, at *4, *5 (5th Cir. July 26, 2004) (not for publication) ("In fact, the *Hope* Court's discussion of 'clearly established' constitutional rights casts serious doubt on the continued viability of the rigid standard laid down in *Pierce v. Smith* and *Thompson v. Upshur County*. In *Hope*, the Supreme Court expressly disapproved of Eleventh Circuit precedent requiring that 'the facts of previous cases be 'materially similar' ' to the situation before the reviewing court, explaining that '[t]his rigid gloss on the qualified immunity standard ... is not consistent with our cases.' This is significant because *Pierce*, the foundation of our own rigid standard on the 'clearly established law' question, itself borrowed that standard from *Lassiter v. Alabama A & M University, Board of Trustees*–a case specifically noted by the *Hope* Court as being inconsistent with Supreme Court precedent. Thus, *Hope* pushes us toward a more general description of the constitutional right at issue both by describing a level of specificity lower than that we have used in the past, and by undermining the case law that originally established the more rigid standard and thereby eroding the foundations of our precedent

on this point. It is in this context that we must consider whether the right at issue in the instant case was 'clearly established.' As we must take the facts in the light most favorable to the non-movant, the real question is whether a public official in charge of inmate medical care may ignore system-wide problems–especially when they are repeatedly brought to her attention by another similarly credentialed public official–that threaten the health and safety of inmates, thereby (as Hall has alleged) knowingly, i.e. consciously, pursuing a path of complete inactivity–affirmatively deciding to do nothing– in the face of these problems. We must ask rhetorically whether the more general formulations of the Eighth Amendment right to adequate medical care give 'fair and clear warning' that such inaction is impermissible, despite the 'novel factual circumstances' of the instant case. We think that they do. Were we to define the right at issue as narrowly as Dr. Adams urges, we would, in effect, be freezing the law as it exists today. No plaintiff could ever successfully allege a violation of a constitutional right, as long as the violation was perpetrated in even a slightly new and unusual way. This appears to be exactly the situation about which the *Hope* Court was concerned." [footnotes omitted]).

Kinney v. Weaver, 367 F.3d 337, 371, 372 (5th Cir. 2004) (en banc) ("While some of the relevant First Amendment retaliation precedents in place in the fall of 1998 involved schools . . . and others of them . . . have involved police departments, we concede that our past cases do not include one that has specifically addressed retaliation against instructors at a police academy. We do not see the absence of such a case as an embarrassment to our conclusion that the Police Officials are not entitled to qualified immunity. If we accepted the defendants' view of what it means for the law to be clearly established, qualified immunity would be available in almost every case, even those cases in which 'in the light of pre-existing law the unlawfulness [was] apparent,' *Anderson*, 483 U.S. at 640. As the Supreme Court has recently admonished, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' *Hope*, 536 U.S. at 741. Although we are sensitive to the fact that reasonable officials might not always be able to predict the outcome of a balancing test such as that used in *Pickering* cases, . . . we believe that in this case the illegality of the Police Officials' conduct is sufficiently clear that they can fairly be said to have been on notice of the impropriety of their actions. Indeed, given the factual disputes identified by the district court and taking the plaintiffs' side of those disputes, this case does not require any real balancing at all, for the Police Officials do not have any relevant, legitimate interests to put on their side of the *Pickering* scales. Our cases show that it is entirely appropriate to deny qualified immunity when the balance of cognizable interests weighs so starkly in the plaintiff's favor.").

Kinney v. Weaver, 367 F.3d 337, 398 (5th Cir. 2004) (en banc) (Jolly, J., dissenting) ("I respectfully dissent and agree with Judges Jones and Barksdale that the defendant law enforcement officers are entitled to qualified immunity and should be released from personal liability. It seems disingenuous to hold that the law is clearly established when it takes 20,467 words to explain, and when six United States Court of Appeals judges sharply disagree about it. To my way of reasoning, the majority has turned the words, and the doctrine, of 'clearly established' on its head when it denies immunity in this novel case.").

Williams v. Kaufman County, 352 F.3d 994, 1007, 1011, 1012 (5th Cir. 2003) ("In sum, *Ybarra*, *Stewart* and *Watt* dispel any doubt that the law was clearly established by the night of the raid in April, 1995, that strip searching individuals, about whom the police had no individualized probable cause of weapon or drug possession, was unlawful. . . .Although we hold today that the prolonged detention of plaintiffs was unlawful, we nonetheless agree with the district court that qualified immunity shields Harris from liability. Even though *Summers* does not sanction Harris's conduct, neither did it establish a clear rule warning defendants that such conduct was illegal. . . . In the instant case, there is no doubt that the illegal strip search of plaintiffs corrupted the legality of their detention by extending it unnecessarily. Still, the objective unreasonableness of Harris's conduct in ordering a strip search of plaintiffs does not automatically make his conduct in unduly detaining plaintiffs for the duration of the search objectively unreasonable in and of itself. Whereas *Ybarra* established the clear rule that any full search of plaintiffs required individualized probable cause, *Summers* allows a seizure without probable cause when the proper balance is struck between law enforcement and personal security interests. Thus, *Summers* left the state of the law more ambiguous as to what constituted an unlawful detention in a premises search like the one here. In other words, under the law as it existed in April, 1995, Harris had fair warning that his generalized law enforcement safety interests did not justify strip searching plaintiffs; the law was less clear about whether these same interests were sufficient to permit detention of plaintiffs until the completion of the otherwise unlawful search. We agree with the district court's grant of qualified immunity on plaintiffs' unlawful detention claims.")

Barrow v. Greenville ISD, 332 F.3d 844, 848 (5th Cir. 2003) ("*Brantley* and *Fyfe* . . . confirm that the constitutional right of public-school employees to select a private-school education for their children was clearly established when Smith refused to consider Barrow for the position of assistant principal. Smith argues that *Brantley* and *Fyfe* does not give fair warning to all reasonable officials in his place that refusing to consider Barrow for the assistant principal position would be unconstitutional. Initially, we note that the question whether there was a clearly-established right does not turn on the existence of a court decision determining that conduct identical to that which is at issue here is unlawful.")

Austin v. Johnson, 328 F.3d 204, 210 (5th Cir. 2003) ("Defendants do not dispute the accuracy of Gipson's log, nor its literal interpretation. Before 3:00 p.m., defendants' conduct was perhaps only negligent, but their failure to call an ambulance for almost two hours while John E lay unconscious and vomiting rises to the level of deliberate indifference. Since *Estelle v. Gamble* . . . state officers have been on notice that deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment. Defendants' contention that no case has specifically proscribed the withholding of medical treatment for boot camp attendees reads the right too narrowly; officers need only have 'fair warning' that their conduct is unlawful. . . Given the serious medical consequences of dehydration, a reasonable person would not have waited nearly two hours to call an ambulance once John E became unconscious.")

Estep v . Dallas County, Texas, 310 F.3d 353, 360, 361 (5th Cir. 2002) ("Although we have stated that the constitutional right at stake is Estep's right to be free from a vehicle search unless an officer has a reasonable belief that he is in danger, we must further evaluate whether the contours of that right were 'clearly established' in a more particularized way. . . As applied to this case, we must consider whether it is clearly established law that a reasonable officer could not conclude that he was in danger when faced with a citizen who exited the car prior to the approach of the officer, continuously asked why he had been stopped, showed the officer a key chain with mace, possessed camoflauge [sic] gear, and possessed an NRA sticker? There is no Fifth Circuit case which directly addresses whether a reasonable officer could conclude, based on these specific facts, that a citizen posed a danger and could gain immediate control of a weapon. [footnote omitted] However, there does not have to be a case directly on point for the law to be 'clearly established.' . . Our cases make clear that a *Long* 'frisk' of a vehicle is only constitutional if there are specific, articulable facts from which a reasonable police officer could believe he was in danger. In our view, the constitutional violation in this case is clear-cut and obvious. No reasonable police officer could have really believed that a search was constitutional under the circumstances presented.").

McClendon v. City of Columbia (McClendon II), 305 F.3d 314, 331-33 (5th Cir. 2002) (en banc)("[I]n the instant case we must assess whether those cases from our sister circuits recognizing the existence of a substantive due process right to be free from state-created danger established the contours of that right with sufficient clarity to provide a reasonable officer in Detective Carney's position with fair warning that providing Loftin with a gun would violate McClendon's rights. . . . [W]hile a number of our sister circuits had accepted some version of the state-created danger theory as of July of 1993, given the inconsistencies and uncertainties within this alleged consensus of authorities, an officer acting within the jurisdiction of this court could not possibly have assessed whether his or her conduct violated this right in the absence of explicit guidance from this court or the Supreme Court. . . . [E]ven if a 'consensus' of circuits had adopted some version of the state-created danger theory in July of 1993, this consensus did not at that time establish the contours of an individual's right to be free from state-created danger with sufficient clarity to provide Detective Carney with fair warning that his conduct violated that right.").

McClendon v. City of Columbia (McClendon II), 305 F.3d 314, 341 (5th Cir. 2002) (en banc) (Robert M. Parker, J., joined by Judges Wiener and Harold R. DeMoss, Jr., dissenting) ([T]he majority contends that the numerous cases which had adopted the state-created danger theory by 1993 do not constitute a 'consensus of cases of persuasive authority' on this point of law because slight variations existed among the circuits concerning the level of culpability required to hold the state actor constitutionally liable. This conclusion strikes me as plainly inconsistent with the more liberal approach to the 'clearly established law' inquiry as set forth in *Wilson*. . . .By July of 1993, a consensus of cases of persuasive authority existed to put reasonable police officers on notice that they may violate the Constitution if (1) they create or increase a danger to a known victim; and (2) act with deliberate indifference towards the known victim during the creation of such danger.").

Roe v. Texas Dep't of Protective and Regulatory Services, 299 F.3d 395, 408-11 (5th Cir. 2002) ("In *Hope*, the Court recently elaborated on what is required for a particular right to be 'clearly established' in the context of qualified immunity. . . . On July 10, 1999, Supreme Court and Fifth Circuit precedent plainly established the following: (1) A strip or body cavity search raises serious Fourth Amendment concerns, *Watt*, 849 F.2d at 199; and (2) The Fourth Amendment governs the lawfulness of a social worker's entry into a dwelling to resolve a child custody dispute. Mary and Jackie need not prove that 'the very action in question has previously been held unlawful.' . . We had not, however, ever addressed whether the traditional test or the 'special needs' doctrine applies to a social worker's visual searches of naked juveniles. . . . The Supreme Court's previously vague test for finding a 'special need' caused the federal circuits to diverge over this precise substantive question and to disagree again as to whether the rights were 'clearly established' for purposes of qualified immunity. It is difficult to argue that a matter of law is clearly established for state actors in this circuit where this court has not opined on the issue in question and the other circuits are in disagreement as to whether the challenged acts constitute a constitutional violation. We need not even reach the question whether, or to what extent, the law of other circuits may be relevant to our qualified immunity jurisprudence, in the absence of plain guidance from our own circuit's caselaw, because here the other circuits were inconsistent in their treatment of the rights here alleged. . . . In July 1999, there was insufficient legal guidance, even under the standard enunciated in *Hope*, to inform a CPS worker that what Strickland did in reaction to the reports received about Jackie's conduct ultimately would be considered a constitutional violation." [footnotes omitted]) .

Thompson v. Upshur County, 245 F.3d 447, 460, 463 (5th Cir. 2001) ("As to the scope of clearly established law, the question is whether an unmarried adult, under no guardianship or finding of incompetency, who is a pretrial detainee at the jail of a small rural county, holding him on transfer from and as accommodation to a larger neighboring county where he is charged and was arrested for DWI, and who while at the smaller county jail becomes delusional and hallucinatory from DTs, has a clearly established constitutional right to have his jailers at the smaller county either force him to submit to medical care for his DTs against his clearly communicated refusal to do so, or make reasonable efforts to locate a substitute decision maker, in lieu of promptly returning him to the custody of the larger county's jail from which he was transferred and which has detoxification facilities the smaller county's jail lacks. . . . In these circumstances, and given the lack of precedent on the matter, we conclude that not all reasonable sheriffs situated similarly to either sheriff Cross or sheriff Tefteller would realize that the *United States Constitution required* them to have their jail personnel medically trained respecting the likely medical seriousness of an inmate suffering from DTs and the need to have such an inmate promptly receive medical care or respecting the inability of such an inmate to legally or competently refuse medical treatment despite being able to adequately communicate such refusal. The failure of the sheriffs to furnish such training cannot reasonably be analogized to welfare officials selling foster children into slavery . . . , at least not so long as the doctrine of qualified immunity is to retain any significance beyond the strictly aberrational or symbolic. "). (emphasis original)

Brown v. Nationsbank Corp., 188 F.3d 579, 592 (5th Cir. 1999) ("Applying the *Lewis* analysis to the FBI's alleged activity in this case, we conclude that the FBI made decisions which harmed the Plaintiffs after ample opportunity for cool reflection. In fact, they invested almost two years and thousands of man hours in developing the sting operation. Thus, the due process clause protects the Plaintiffs from any harm that arose from the officers' deliberate indifference. The facts, as pleaded, establish at least that level of federal agent culpability as Operation Lightning Strike evolved into a disastrous boondoggle. We therefore hold that Hodgson's allegations that federal agents inflicted damages on him, an innocent non-target, during this particular undercover operation and refused him compensation states a claim under *Bivens*. However, because we address today for the first time the parameters of due process protections afforded innocent third parties injured by law enforcement sting operations run amok, and because the Supreme Court's language that drives our analysis appeared in a case decided in 1998, we cannot say that the due process rights claimed by Hodgson were clearly established during 1992- 94. . . . We therefore affirm the district court's dismissal of Hodgson's *Bivens* claims on the alternative basis of qualified immunity.").

Harris v. Victoria Independent School District, 168 F.3d 216, 224 (5th Cir. 1999) ("The Defendants are not insulated from their unconstitutional conduct merely because a balancing test is involved in our analysis. While employee speech cases are a likely vehicle for varied fact scenarios, the law is clearly established that a 'mix of public and private speech' may be constitutionally protected.").

Petta v. Rivera, 143 F.3d 895, 899, 908, 911-14 (5th Cir. 1998), *denying pet. for reh'g and superseding opinion at* 133 F.3d 330 (5th Cir. 1998), ("[O]ur review of the record shows that Rivera is entitled to the defense of qualified immunity based on the undisputed fact that the Petta children alleged purely psychological harm as a result of Rivera's actions. At the time of these events, it was not 'clearly established' in our law that such non-physical harm gave rise to a constitutional tort. . . . Between July 5, 1989 and February 25, 1992 . . . *Johnson v. Morel* was 'clearly established law' regarding an excessive force claim brought under the Fourth Amendment. As we have noted above, this is the relevant 'legal window' within which we must look to determine whether Officer Rivera's actions on January 15, 1990 were 'objectively reasonable.' . . . Our inquiry here is very narrow. We are not asking whether the Petta children's psychological injuries were redressable under the Fourteenth Amendment in January, 1990. We are merely asking whether a § 1983 plaintiff at that time had a clearly established right under the Fourteenth Amendment to be free from purely emotional harm resulting from an officer's use of excessive force. We have already demonstrated . . . that such a right was not clearly established in January, 1990, under the Fourth Amendment. What we hold here is simply that the same right was equally 'unclear' (for qualified immunity purposes) under the Fourteenth Amendment. We do so for essentially two reasons: (1) our cases following *Graham v. Connor* do not clearly distinguish between Fourth and Fourteenth Amendment analyses in this context; we are thus persuaded that *Johnson v. Morel* and *Dunn v. Denk*. . . , although admittedly addressing the Fourth Amendment right, also affected the Fourteenth Amendment right to be free from excessive force; and, (2)

under the particular facts here, we see no principled reason for drawing an analytical distinction between the Petta children's due process claim and an arrestee's Fourth Amendment claim, given the substantially similar concerns implicated by the two claims (e.g., the right to be free from excessive force in an arrest situation and the need for a police officer to use reasonable force in effecting arrests). . . . [O]ur precedents, such as *Johnson v. Morel* . . . and *Dunn v. Denk*. . . interjected as much uncertainty into our Fourteenth Amendment jurisprudence as into our Fourth Amendment jurisprudence, regarding whether a purely non-physical injury rose to the level of a constitutional violation. . . . We must therefore hold that in January, 1990, the Petta children had no 'clearly established' constitutional right under the due process clause to be free from a police officer's use of excessive force where the only injuries allegedly suffered were psychological.").

Petta v. Rivera, 133 F.3d 330, 346, 347 (5th Cir.1998) (Dennis, J., dissenting) ("The contours of the right of helpless and innocent bystander children of tender years, such as the Petta children, to be free from potentially lethal assault, such as being fired upon with a .357 magnum, was sufficiently clear on January 15, 1990 that a reasonable official in Rivera's alleged position would have understood that what he was doing violated the Petta children's constitutional rights. Even in the absence of any analogous judicial precedent, a reasonable officer would or should have known that such egregious conduct was unlawfully excessive and unconstitutional. . . . I am persuaded that on January 15, 1990 a reasonable law enforcement officer knew or should have known that to attack a family suburban automobile occupied by an unarmed mother and her three and seven year old children by firing on the vehicle with a .357 magnum, bludgeoning its window, pointing the .357 magnum in the direction of the mother and three year old child while threatening to kill the mother, and other acts of excessive force and violence, in connection with minor traffic violations, was constitutionally impermissible. Rivera's misbehavior was simply too egregious to justify concluding that because of language in cases involving an entirely different context, i.e., the arrest, detention and seizure of adult suspects, offenders or prisoners, a reasonable officer in Rivera's situation would not know or should not know that his actions in assaulting helpless and innocent bystander children with deadly force for no justifiable reason violated the Petta children's Fourteenth Amendment substantive due process constitutional rights and subjected him to liability under § 1983 for their severe psychological damage."), *pet. for reh'g denied and opinion superseded by* 143 F.3d 895 (5th Cir. 1998). (In the superceding opinion, Judge Dennis adopts his original dissenting opinion. *See* 143 F.3d at 914)

Gutierrez v. City of San Antonio, 139 F.3d 441, 445-51 (5th Cir. 1998) ("[W]e have jurisdiction to consider the officers' contention that issues of law separable from the merits exist–namely, whether hog-tying violates clearly established law and whether their conduct was objectively reasonable. . . [Defendants] initially argue that the right to be free of hog-tying was not clearly established in November 1994 because neither the Supreme Court nor the Fifth Circuit (or any other circuit) had specifically held that hog-tying constituted excessive force. Such a dogmatic argument is unjustified. . . . [W]e will examine whether a reasonable police officer in November 1994 would have known whether hog-tying falls within the bounds of the Fourth Amendment's prohibition of the use of excessive force 'in the light of pre-existing law.'. . . Although guns

represent the paradigmatic example of 'deadly force,' *Garner* failed to address whether other police tools and instruments can also be characterized as 'deadly force.' Lower courts since have struggled with whether to characterize various police tools and instruments as 'deadly force.' . . . These courts have generally described 'deadly force' as force 'carry[ing] with it a substantial risk of causing death or serious bodily harm.' . . . Although we have not had occasion to adopt this description, both the Texas statute and SAPD procedures in effect in November 1994 employed it. . . The Texas statute and SAPD procedures in effect in November 1994 also conformed to *Garner*'s holding that an officer can use 'deadly force' only against a suspect who poses a threat of death or serious physical harm to the officer or to others. . . Accordingly, we find both the definition of 'deadly force' and *Garner*'s holding to have been clearly established prior to November 1994. . . . The question thus becomes whether hog-tying in these circumstances creates a substantial risk of death or serious bodily injury, and hence, becomes deadly force. . . . Gutierrez thus presents sufficient evidence that hog-tying may create a substantial risk of death or serious bodily injury in these circumstances and thereby become deadly force. . . . Assuming this evidence to be true, hog-tying in these circumstances would have violated law clearly established prior to November 1994. . . . In arguing that their conduct was objectively reasonable, [Defendants] first present the affidavit of Commander Albert Rodriguez, who states that the official policies of the SAPD, the Texas Department of Public Safety, and the International Association of Chiefs of Police Use of Force Model Policy in November 1994 did not prohibit the use of hog-ties. He further avers that SCDS was not known to reasonably well-trained police officers in Texas at that time, and that hog-tying was reasonable under these circumstances. To counterbalance this affidavit, Gutierrez presents that of Lou Reiter, former Deputy Chief of the Los Angeles Police Department, who analyzes the facts of this case and states that [Defendants'] use of force and actions were unreasonable. Claiming that a 'battle of the experts' thus exists, [Defendants] assert that they are entitled to qualified immunity because 'if officers of reasonable competence could disagree on this issue, immunity should be recognized.' [citing *Malley v. Briggs*] We do not believe that the Supreme Court intended by this statement to mean that summary judgment must be granted in favor of the police whenever they can find an expert to testify that their actions were reasonable; in such a scenario, the police would virtually always win summary judgment. Moreover, an expert's opinion does not establish reasonableness as a matter of law, especially when directly contradicted by another expert's well-supported opinion. . . . [B]ased on the combination of the multiple factual issues in dispute and the evidence weighing against the officers, we cannot determine whether [Defendants'] conduct was objectively reasonable as a matter of law. . . .Accordingly, we dismiss the officers' appeal from the district court's denial of summary judgment on Gutierrez's Fourth Amendment claim for lack of jurisdiction.").

Sorenson v. Ferrie, 134 F.3d 325, 328, 330 n.12 (5th Cir. 1998) ("Sorenson cannot satisfy *Siegert*'s first prong–the need to allege the violation of a clearly established constitutional right–merely by asserting that the right not to be arrested without probable cause is clearly established. Instead, she must show that the legality of her conduct was clearly established. That is to say, she must demonstrate that, at the time of her arrest, it was clearly established in Texas that one may lawfully possess a handgun in one's trunk. . . . We hold only that, for purposes of qualified

immunity in this civil case, the law was not clearly established on this question as of the date of this incident. We do not mean to express a view as to whether ' 46.02 does or does not prohibit the possession of a weapon in one's trunk. That is for the state courts to decide.").

Dunn v. Denk, 79 F.3d 401, 402 (5th Cir. 1996) (en banc) ("This is a case controlled by the law applicable from 1989 to 1992, a window created by our decision in *Johnson v. Morel*, 876 F.2d 477 (5th Cir.1989) (en banc), and *Hudson v. McMillian*, 503 U.S. 1 (1992), the decision of the Supreme Court effectively overruling it. . . . Given the explicit language of *Johnson*, and its footnote 1 in particular, we conclude that the law at the time of this arrest was uncertain regarding whether 'a significant injury will be caused by unnecessary force without significant physical injury.' On the present facts, Denk was entitled to qualified immunity from the claims asserted in this case.").

Dunn v. Denk, 79 F.3d 401, 407 (5th Cir. 1996) (en banc) (Reavley, Circuit Judge, joined by Politz, Chief Judge, Wiener, Benavides, Stewart, Parker and Dennis, Circuit Judges, dissenting) ("Once an officer uses objectively unreasonable force to effect an arrest, he loses his qualified immunity, whether the other elements of an excessive force claim are clearly established or not.").

Kiser v. Garrett, 67 F.3d 1166, 1173 (5th Cir. 1995) ("[I]t is apparent that, although a substantive due process right to family integrity has been recognized, the contours of that right are not well-defined, and continue to be nebulous, especially in the context of a state's taking temporary custody of a child during an investigation of possible parental abuse. Even assuming that such a right exists under the circumstances involved here, it certainly was not clearly established when the appellees engaged in the conduct at issue.").

Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994) ("[W]e hold that the right of access, as clearly established in 1985-1988, encompassed a right to file an action, but not the right to proceed free of discovery abuses after filing. . . . [E]ven assuming that the contours of the right of access have been expanded since 1988 to include the Fosters' definition, those contours were not clearly established at the time the claimed violations occurred.").

Doe v. Taylor Independent School Dist., 15 F.3d 443, 455 (5th Cir. 1994) (en banc) ("The 'contours' of a student's substantive due process right to be free from sexual abuse and violations of her bodily integrity were clearly established in 1987".).

Doe v. Taylor Independent School Dist., 15 F.3d 443, 465 (5th Cir. 1994) (en banc) (Higginbotham, J., and Politz, J., specially concurring) ("Justice Scalia pointed out in *Anderson v. Creighton*, [cite omitted] the hazards of framing the legal question at too great a level of generality. The error can be made in the opposite direction–a search so narrowed that legal nuance rises to uncertainty and ultimately confounds common sense. Qualified immunity reflects the judgment that an official ought not to be mulcted for choices made that only later prove to have been 'illegal.' I don't think we today put any school principal in peril or unfairly second guess this one. This

was not an episodic act of an interloper to the school scheme nor the private act of a student. Rather, it was the persistent pattern of indefensible conduct of a school official, the principal's subordinate.").

Doe v. Taylor Independent School Dist., 15 F.3d 443, 467 (5th Cir. 1994) (en banc) (Garwood, J., joined by Jones, J., Smith, J., Garza, J., and DeMoss, J., dissenting in part) (finding it not clearly established that the Constitution protects a fifteen-year-old schoolgirl from being sexually fondled and having "consensual" sexual relations with a public schoolteacher.).

Colle v. Brazos County, 981 F.2d 237, 246 (5th Cir. 1993) ("We are persuaded that Sheriff Miller knew of or should have known that if he staffed the jail with persons having no authority to transfer a seriously ill detainee to a hospital, and if he pursued a policy of failing to monitor the critical medical condition of a detainee, these actions would be constitutionally impermissible. If the allegations in Plaintiffs' complaint are true, and they must be accepted as true, Miller should have known that such a policy would result in the deprivation of a detainee's right to reasonable medical care. At this stage of the proceeding, Miller is not entitled to a 12(b)(6) dismissal.").

White v. Taylor, 959 F.2d 539, 546 (5th Cir. 1992) ("...while we think the law was clearly established...that a warrantless misdemeanor arrestee had a right to a prompt determination of probable cause, we hold the contours of that right were not sufficiently clear so that a reasonable law enforcement officer would have known that such a person, arrested late at night in a city without a night magistrate, could not be held overnight before [being taken] before a magistrate.").

Dyer v. Fyall, No. 3:15-CV-2638-B, 2018 WL 2739025, at *9 (N.D. Tex. June 6, 2018) ("The confusion surrounding medical-inattention claims in the Fifth Circuit dooms the Dyers' medical-inattention claim. The officers in this case have qualified immunity, which means the Dyers can hold them liable for violations of only clearly established rights. A right is clearly established only if 'the contours of the right [are] sufficiently clear that a reasonable officer would understand what he is doing violates that right.'. . So, given that some Fifth Circuit cases require plaintiffs to show intent to cause harm in medical-inattention cases and other do not, there is no clearly established right in the Fifth Circuit to be free from medical inattention by officers who do not actually intend to cause harm. Here, the Dyers neither argue nor present evidence that any of the officers in this case actually intended to harm Graham by withholding medical care. Thus, because qualified immunity bars the Dyers' medical-inattention claim, the Court **GRANTS** the officers' motion for summary judgment on that claim.")

Luna v. Valdez, No. 3:15-CV-3520-D, 2018 WL 684897, at *14-15 (N.D. Tex. Feb. 2, 2018) ("The court concludes that, with respect to Luna's § 1983 claims against Sheriff Valdez based on the County's alleged policy of refusing to release on bail inmates with an immigration hold, or on the County's alleged policy of holding inmates with an immigration hold for 48 hours after they were otherwise eligible for release, Luna has failed to present evidence that would enable a reasonable jury to find that Sheriff Valdez's conduct was objectively unreasonable in light of

Luna's clearly established constitutional rights. . . .Luna has failed to meet his summary judgment burden with respect to the second prong of Sheriff Valdez's qualified immunity defense. In his response brief, Luna contends that 'there can be no dispute that the extant jurisprudence at the time in question required the Defendants to have probable cause to believe Mr. Luna had committed another crime, which the Defendants did not have. The ICE detainer did not give the Defendants that required probable cause.'. . But the only authority Luna cites is *Mercado II*, which post-dates Luna's period of confinement by more than a year and a half. . . Luna does not point to any controlling authority (or to a 'robust consensus of persuasive authority') that would establish the following critical element: that *at the time Luna was detained pursuant to the Immigration Detainer*, all reasonable officials in Sheriff Valdez's position would have known that honoring federal immigration detainers by denying pretrial release to detainees with immigration holds, or by holding inmates subject to ICE detainers for up to 48 hours after they were otherwise eligible for release, resulted in a clear violation of Luna's constitutional rights under the circumstances. For example, in holding in *Mercado II* that 8 C.F.R. § 287.7(d) does not mandate that local law enforcement detain persons who are subject to detainers, it was necessary for this court to piece together out-of-circuit authority, relying on *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), and the decisions of several district courts that agreed with *Galarza*. The court specifically noted that "the Fifth Circuit has not yet addressed the issue." *Mercado II*, 229 F.Supp.3d at 514. And the court held that, '[a]bsent Fifth Circuit authority to the contrary, [it would] follow *Galarza* and the district courts that rel[ied] on its reasoning or otherwise reach[ed] the same result.'. . The law does not require that, to be entitled to qualified immunity, reasonable officials accurately predict how the court might decide a new legal issue. . . Accordingly, under the second step of the qualified immunity analysis, the court holds that Sheriff Valdez is entitled to qualified immunity with respect to Luna's § 1983 claims asserted against her.").

Basler v. Barron, No. CV H-15-2254, 2017 WL 784895, at *3 (S.D. Tex. Mar. 1, 2017) ("In denying Deputy Barron's motion on the grounds of qualified immunity, this court analyzed the second prong and concluded that filming the police is a clearly established First Amendment right. . . However, later, in *Turner*, the Fifth Circuit noted divergent district court opinions in analyzing the second prong of the qualified immunity defense in determining whether filming the police is a 'clearly established right.'. . The Fifth Circuit's holding in *Turner* is directly applicable to Deputy Barron's assertion of a qualified immunity defense against Basler's First Amendment claim. . . In light of *Turner*, the court reconsiders the second prong of the qualified immunity analysis. . .Like the police officers in the *Turner* case, Deputy Barron asserted the defense of qualified immunity in his motion to dismiss. . . Basler responded that the right to film the police is a 'clearly established' First Amendment right. . . Basler was arrested in 2014, prior to Turner's 2015 arrest and prior to the Fifth Circuit's 2017 decision in *Turner*. Applying the Fifth Circuit's reasoning in *Turner*, the court concludes that First Amendment right to film the police was not clearly established 'at the time' of Basler's arrest.")

Estate of Gray v. Dalton, No. 1:15CV061-SA-DAS, 2017 WL 564035, at *1–2 (N.D. Miss. Feb. 10, 2017) ("The Court entered a Memorandum Opinion and Order on January 6, 2017 granting in

part and denying in part the Defendants' Motion for Summary Judgment. Those Defendants have asked for a reconsideration of three points: (1) the Court's denial of qualified immunity for the individual officer, (2) the Court's lack of finding as to the County's liability under the Fourth Amendment, and (3) the Court's denial of summary judgment as to Plaintiffs' state law wrongful death and gross negligence claims. After reviewing the motion, responses, rules and authorities, the Court hereby GRANTS IN PART the request for reconsideration and alters its judgment as follows: As noted in the Memorandum Opinion, Wilburn Gray claimed that Defendants illegally detained him in violation of the Fourth Amendment at the Alcorn County Jail from December 23 until December 26 without a judicial hearing on probable cause being held.The Court held that based on the United States Supreme Court's general presumption that "[j]udicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*", *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), together with the state statute citing 48 hours as the threshold for probable cause hearings, and no explanation from the Defendants as to why there would be that delay, that the 'clearly established' prong of the qualified immunity analysis was satisfied. The Court then found that genuine issues of material fact as to whether Dalton's actions were objectively reasonable existed based on the absence of a factual record. Defendants now seek reconsideration based on a recent United States Supreme Court proclamation regarding the blanket of qualified immunity. [Court notes *White v. Pauly*] Instead of focusing on the more general constitutional issue regarding time, the Court should have, and now does, examine the facts and circumstances of this particular case to determine whether Wilburn Gray's constitutional rights were affected. Here, Wilburn Gray was physically arrested by Deputy Scott Dalton who immediately handed Gray over to Deputy David Harrison for transport to the Alcorn County Jail. Dalton was soon thereafter placed on administrative leave due to his role in the shooting incident. Dalton was not released from administrative leave until January or February of the next year. The record is undisputed in these regards. Plaintiff failed to put forth any case law showing facts approximating those present here. The United States Supreme Court recently admonished a lower court for 'fail[ing] to identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.' *White*, 137 S. Ct. at 552. The Supreme Court quoted the Circuit Court's pronouncement that the case 'presents a unique set of facts and circumstances' as indicative that the officer's conduct did not violate a clearly established right. . . . Under the qualified immunity standards as articulated, to demonstrate that Defendants unreasonably detained Gray, Plaintiff must present controlling authority that '*squarely governs* the case here,'. . . and that would have put 'beyond debate,'. . . the question of whether Wilburn Gray's Fourth Amendment rights were violated. Plaintiff did not carry this burden. There is no controlling case law involving sufficiently similar circumstances that would apprise every objectively reasonable officer that he had further duties and obligations to ensure a probable cause hearing to a suspect once custody of that suspect is relinquished to another officer and even after he was placed on administrative leave. This case presents a 'unique set of facts and circumstances' which require the Court's reconsideration. Accordingly, Deputy Scott Dalton is entitled to the protections of qualified immunity.")

Sanders v. Vincent, No. 3:15-CV-2782-D, 2016 WL 5122115, at *11-12 (N.D. Tex. Sept. 21, 2016) ("Sanders alleges that Lt. Vincent, Officer Bagley, and Officer Jones deprived him of his 'constitutional rights under the First Amendment to videotape the activities of the Addison Police Department by harassing, detaining, seizing and arresting' him. . . Assuming *arguendo* that defendants' actions violated Sanders' First Amendment rights, defendants are nonetheless entitled to qualified immunity to the extent Sanders bases his § 1983 claim on these allegations because it was not clearly established at the time of the incident that the First Amendment protects an individual's right to videotape police activities. . . .Sanders has failed to point to any controlling authority that would establish that he had a constitutionally-protected First Amendment right to videotape police activity. Nor is there a 'robust consensus of persuasive authority,'. . . that such activity is protected. . . . [U]nder the second step of the qualified immunity analysis, the court holds that Lt. Vincent, Officer Jones, and Officer Bagley are entitled to qualified immunity to the extent Sanders bases his § 1983 claim on defendants' alleged deprivation of his First Amendment rights.")

Bishop v. City of Denton, No. 4:14-CV-608, 2015 WL 8273986, at *4 (E.D. Tex. Dec. 8, 2015) ("As discussed above, the Court concludes that Bishop has presented sufficient evidence to establish that a question of fact exists as to whether Porter violated Bishop's right to be free from the use of excessive force. However, Porter argues that his conduct was not a violation of clearly established law. To support this contention, Porter cites Justice Alito's dissent in *Kingsley v. Hendrickson,* which states that it has not been determined whether a pretrial detainee may bring a Fourth Amendment excessive force claim against a detention facility employee. . . However, the Fifth Circuit has allowed pretrial detainees to assert Fourth Amendment excessive force claims against detention facility employees. . . . If bystander liability for excessive force based on the Fourth Amendment was clearly established law as of January 2010, direct liability for excessive force was also clearly established. Therefore, within the Fifth Circuit, there was clearly established law at the time the event at issue occurred that detention facility employees could be held liable under the Fourth Amendment for using excessive force against pretrial detainees.")

Cauley v. Walker, No. CV 1:10CV326, 2015 WL 5521972, at *6 & n.4 (E.D. Tex. Sept. 16, 2015) ("Plaintiff has presented competent summary judgment showing that the amount of force used against him was objectively unreasonable and that he suffered more than a *de minimis* injury. Moreover, plaintiff's right to be free from having excessive force used against him was clearly established at the time of the incident in question. . . .The right of a pretrial detainee to be free from the use of excessive force was clearly established at the time of the incident in question. However, as indicated above, at that time courts considering an excessive use of force claim against a pretrial detainee asked whether force was used maliciously and sadistically, for the very purpose of causing harm, or in a good faith effort to maintain and restore discipline, rather than whether the force used was objectively unreasonable. As stated above, plaintiff's testimony at his deposition indicates that he was not presenting any threat while in the defendant's office and, accordingly, there was no need for any force to be used to maintain or restore discipline. Plaintiff

has therefore demonstrated excessive force was used against him even under the test previously applied.")

Modica v. Humphrey, 2007 WL 2777779, at *5 (W.D.Tex. Sept. 21, 2007) ("At the time of Modica's termination, the law regarding public employees' First Amendment rights was well-established, by *Pickering*, *Givhan*, and many other Supreme Court and appellate court decisions. All that *Garcetti* did was to reduce the class of plaintiffs who can prevail on such claims by making it clear that only public employees who are speaking outside of their official duties may bring retaliation claims. It otherwise did not change the general rule, set out in *Pickering* and countless other cases, that it is unlawful to terminate an employee for exercising their First Amendment rights. In other words, given the facts of this case, Humphrey cannot plausibly contend that she relied on law existing at the time she took actions against Modica, and then that law was changed by *Garcetti* to her detriment. Indeed, it is quite the opposite; Humphrey filed the instant motion because she contends that *Garcetti* changed the law in a manner favorable to her (i.e., to eliminate the Plaintiff's claim). Because *Garcetti* narrowed the class of people who may sue under the First Amendment, but that narrowing did not eliminate Modica's claim, nothing about the change affected by *Garcetti* is relevant to the question of whether Modica's right infringed upon by her harassment and firing was 'clearly established' at the time it took place.")**.**

Caudillo v. Lubbock ISD, No. Civ.A. 5:03-CV-165-C, 2003 WL 22670934, at *6, *7 (N.D. Tex. Nov. 10, 2003) ("The Court finds the appropriate level of generality in this case relates to the issue of whether a school and its officials may deny a gay-straight student group access to the campus. In a more highly specific query relevant to this case, the issue presented here is whether a school superintendent may deny access to the school's bulletin boards, PA system, and group meeting areas if a prospective student group 1) lists as one of its goals that it will discuss subject matter relating to sexual activity and birth control other than abstinence–a subject matter the school's administration and board of trustees have declared inappropriate for the forum; and 2) seeks to advertise itself by posting fliers with the group's website address which has direct links to sites that contain explicit sexual material and discussions. . . . Under the circumstances of this case, this Court cannot say that the unlawfulness of Defendant Clemmons' particular actions should have been apparent to him in light of clearly established law at the time of the actions. The relatively few cases addressing the issue on a level of generality relevant to this case occurred not only outside of this circuit, but also in federal district courts. None of the cases consisted of opinions handed down by a circuit court. Such a fact seems relevant since the Fifth Circuit has stated that 'even if a Aconsensus" of *circuits* had adopted' the relevant rule, such an adoption still may not have provided a defendant with fair warning. *McClendon,* 305 F.3d at 332-33 (emphasis added to show that the consensus of cases should be from a higher level than obscure district court orders). Clemmons may have had fair warning that generalized limits on a student's free speech might violate the First Amendment; the law was less clear whether, in the context of secondary school students, limits on the speech of a group of minors whose goals included discussing safe sex and providing a website with direct links to materials that clearly discussed explicit sexual acts, might violate the First Amendment.").

SIXTH CIRCUIT

Morgan v. Fairfield County, Ohio, 903 F.3d 553, 560-65 (6th Cir. 2018) ("Government officials sued in their individual capacities for constitutional violations are free from liability for civil damages unless (1) they violate a constitutional right that (2) was clearly established at the time that it was violated. . . Courts can address these two elements in any order. . . And although this decision turns on the second element—whether the law was clearly established—we have the ability, if not the responsibility, to clarify the state of the law in this circuit so that government agents can understand the limits of their power and that citizens will be protected when those limits are transgressed. For that reason, we address both parts of the qualified-immunity analysis. . . . Because the area surrounding Morgan's and Graf's house was curtilage, and curtilage is treated as part of the home for Fourth Amendment purposes, the officers' entry onto the curtilage could be justified only by a warrant or one of the recognized exceptions to the warrant requirement. It is undisputed that the SCRAP unit had no warrant. As for exceptions to the warrant requirement, the county argues that the entry was justified for three reasons. None, however, is convincing. . . .The SCRAP unit was concerned about general drug activity at Morgan's and Graf's house. But the Fourth Amendment prohibited them from entering the property: they had no warrant, no exigent circumstances, and no other exception to the warrant requirement. A "knock and talk" by police was permitted 'precisely because that is "no more than any private citizen might do."'. . Thus, the officers' right to enter the property like any other visitor comes with the same limits of that 'traditional invitation': 'typically ... approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.'. . Certainly, '[a] visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.'. . Neither can the police. By doing so here, the SCRAP unit violated Morgan's and Graf's Fourth Amendment rights. . . . In determining the contours of the right, there is a tension between defining the right at too high a level of generality, on one hand, and too granular a level, on the other. There does not need to be 'a case directly on point, but existing precedent must have placed the ... constitutional question beyond debate.'. . . In all, the most important question in the inquiry is whether a reasonable government officer would have 'fair warning' that the challenged conduct was illegal. . . For centuries, the common law has protected the curtilage of the house. . . And the Supreme Court long has held that the curtilage is 'considered part of the home itself for Fourth Amendment purposes.'. . That means that the police can enter the curtilage on the same terms that they can enter the rest of the home—no more, no less. . . Under those long-settled principles, warrantless searches 'are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'. . A reasonable officer thus would understand that without a warrant or an exception to the warrant requirement, entering the curtilage violates a clearly established right. Despite these long-settled standards, one case from this circuit, although incorrectly decided, requires that we grant qualified immunity. That case, *Turk v. Comerford*, decided within a month of the "knock and talk" in this case, found that the law was not clearly settled against a factual background that was, in every material way, the same as here. . . Central

to *Turk*'s analysis was our published decision in *Hardesty*, in which we held that '[if] knocking at the front door is unsuccessful in spite of indications that someone is in or around the house, an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage.'. . *Hardesty*'s extension of the knock-and-talk doctrine was, by its terms, limited to particular circumstances. . . And if our case law ended there, qualified immunity here would be improper. But in *Turk*, this court read *Hardesty* more broadly and reasoned that because some limited intrusions of the curtilage were allowed, it was not clearly established that surrounding a house for a "knock and talk" was in the category of unacceptable intrusions. . . Although *Hardesty* and *Turk* are outliers, Morgan and Graf cannot overcome their burden of showing that the law was clearly established at the time of the search in this case. In those two cases, this court should have reaffirmed long-settled Fourth Amendment principles. . . But it did not. And although unpublished cases do not upset the state of the law, in rare instances they can show that members of this court, during the same time period, facing the *exact* same question, did not think the law to be clearly established. And '[i]f judges ... disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'. . For that reason we affirm the district court's grant of qualified immunity to the officers in their individual capacities. Nevertheless, in light of recent Supreme Court decisions, neither *Hardesty* nor *Turk* remains good law. . . *Jardines* and, more recently, *Collins* made clear that, outside of the same implied invitation extended to all guests, if the government wants to enter one's curtilage it needs to secure a warrant or to satisfy one of the exceptions to the warrant requirement. . . Our acknowledgment that those cases are no longer good law does not affect the qualified-immunity analysis here, which looks to the law at the time of the challenged action. . . But it does put officers on notice that principles of *Jardines* and *Collins*—and not *Hardesty* or *Turk*—should guide their actions going forward.")

Morgan v. Fairfield County, Ohio, 903 F.3d 553, 567 (6th Cir. 2018) (Stranch, J., concurring) ("I join the majority opinion in full. I write separately only to emphasize the unique circumstances that merit applying qualified immunity in this case. As the Supreme Court recently reaffirmed, it 'has long been clear that curtilage is afforded constitutional protection,' and 'officers regularly assess whether an area is curtilage before executing a search.'. . Despite this fundamental principle, our jurisprudence has evidenced some confusion related to the police action that we refer to as ' "knock and talk" investigations.'. . A materially indistinguishable case, *Turk v. Comerford*, 488 F. App'x 933 (6th Cir. 2012), demonstrates that, at the time of the search at issue, even federal appellate judges were struggling with assessments of curtilage in the limited context of knock-and-talk investigations. It is rare to have a contemporaneous circuit case revealing judicial confusion on the precise question confronted by police officers. The existence of one here supports finding the law sufficiently unsettled that the officers should receive qualified immunity. This case, moreover, presents different circumstances from even *Wilson v. Layne*, . . . referenced by the majority. There, the Supreme Court acknowledged that the 'state of the law' at the time of the constitutional violation was 'undeveloped' and that a circuit split had arisen between the alleged violation and that Court's ultimate decision. . . The Supreme Court therefore declined to punish the officers' lack of prescience. . . But the case before us is quite unlike the open question

in *Wilson*, which had percolated up through the circuits on its way to final resolution by the Supreme Court. As explained in the majority opinion, *Turk* and *Hardesty* instead stand alone on a doctrinal spur. For purposes of this case, however, *Turk* is sufficient to show that the law surrounding knock and talk investigations was muddy at the relevant time. Though this is the unusual case in which an outlier may insulate officers from liability, today's decision forecloses that possibility for future cases.")

Morgan v. Fairfield County, Ohio, 903 F.3d 553, 574 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) ("Turning to the officers, I agree with the majority that the constitutional violation was not clearly established. But, if I was writing on a clean slate, I would remand. And the question I would direct the district court to answer is whether the officers engaged in a purposeful, investigative act to find the marijuana plants. . . .As the county's policy did not direct a search in Morgan and Graf's case (and the original meaning approach to the Fourth Amendment would require a remand to determine whether the officers in fact 'searched'), the court need not go further.")

Bunkley v. City of Detroit, Michigan, 902 F.3d 552, 566 (6th Cir. 2018) ("The duty of law enforcement officers to intervene to prevent an arrest not supported by probable cause was stated in precedent 'clear enough that every reasonable official would interpret it to establish' this rule. . . . And the arresting officers here—Dennis, Tanguay, and Washington (and Lucas)—knew that they had not investigated the Knox shooting at all, knew that Knox and Bunkley did not reasonably match the descriptions that Ainsworth had given them, knew that they did not question Bunkley (or Knox) before arresting him, and knew that Bunkley did not have a probation violation (their asserted reason for arresting him). They identified Bunkley, left the room to call Lucas, and returned to arrest Bunkley. Any of these officers had time to stop, intervene, and prevent this arrest-without-probable-cause. Based on Sixth Circuit law, the court properly denied qualified immunity.")

Stillwagon v. City of Delaware, Ohio, No. 17-3873, 2018 WL 4055972, at *13 (6th Cir. Aug. 24, 2018) (not reported) ("Despite having different purposes, tight handcuffing and the tight hand taping both constrain the movement of a person's wrists. From an excessive-force analysis, both can cut off circulation and cause the restricted person's hands to go numb as a result of restricted blood flow. This court's tight-handcuffing precedent puts officers on notice that they cannot cut off the circulation to a suspect's wrists—regardless of how they do it. This means that the right was clearly established at the time Flynn allegedly taped Stillwagon's hands too tightly.We affirm the district court's finding that Officers Ailes and Flynn are not entitled to immunity from claims of excessive force.")

Brent v. Wayne Cty. Dep't of Human Servs., 901 F.3d 656, 685 (6th Cir. 2018) ("[I]f Wenk violated plaintiffs' clearly established constitutional rights when executing the removal order, she would not be entitled to qualified immunity from plaintiffs' claims. Plaintiffs first argue that Wenk violated clearly established law by executing a removal order that she knew to contain falsehoods,

in contravention of the well-established Fourth Amendment principle that an officer 'cannot rely on a judicial determination of probable cause' to justify executing a warrant 'if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant.'. . Though we entirely agree—and now directly hold—that a social worker, like a police officer, cannot execute a removal order that would not have been issued but for known falsities that the social worker provided to the court to secure the order, this principle was not clearly established at the time Wenk executed the order in this case. Indeed, we held as recently as 2015 that 'general assertions that "the Fourth Amendment was violated as to [a child] when he was seized pursuant to [an] order" that he claims "was based on false statements and otherwise lacked probable cause" invoke no clearly established right.'. . As *Barber* concerned conduct that occurred after the allegedly unlawful actions in this case, . . . we must grant Wenk qualified immunity here.")

Hansen v. Aper, No. 17-2220, 2018 WL 3997321, at *5 (6th Cir. Aug. 21, 2018) (not published) ("Aper's reliance on *Fettes*, *O'Malley*, and *Lee* is misplaced because these cases are all distinguishable from *Morrison*. First, *O'Malley* is easily distinguishable because there, '[the plaintiff] did not have an obvious physical injury.'. . .Therefore, the plaintiff did not meet one of the essential elements of the *Morrison* test. Hansen, though, has presented medical records diagnosing him with a crush injury caused by handcuffing. *Fettes* and *Lee*, in addition to being unpublished and therefore non-precedential, are also distinguishable from both *Morrison* and this case. The plaintiff in *Fettes* was handcuffed for around ten minutes. . .and in *Lee*, the handcuffing lasted only between five to ten minutes[.] . . In contrast, the plaintiff in *Morrison* was handcuffed for forty to fifty minutes, . . and Hansen was handcuffed for thirty to forty minutes. Another pertinent distinction between *Fettes* and both *Morrison* and the instant case has to do with the officers' reactions to being told the cuffs were too tight. . . In both *Morrison* and the instant case, then, the defendant did not merely ignore the plaintiff's complaints but actively rebuffed them. Granting Aper qualified immunity here would thus directly conflict with *Morrison*, which controls in this circuit absent an intervening change in the law. . . Aper was on notice that handcuffing violates the Fourth Amendment if the arrestee is handcuffed, complains about the tightness, law enforcement ignores the complaint, and the arrestee suffers injury. Therefore, the district court correctly denied Aper qualified immunity.")

Przybysz v. City of Toledo, No. 18-3139, 2018 WL 3993546, at *4-5 (6th Cir. Aug. 20, 2018) (not reported) (Gilman, J., concurring in part and concurring in the judgment) ("I fully concur in my colleague's disposition of Marcia Przybysz's *Monell* and state-law claims, as well as their decision to vacate the district court's sanction order. Where we part company is over their disposition of Marcia's § 1983 claim against Sgt. Karrie Williams, although in the end I agree (for different reasons) that we should affirm the judgment of the district court. The lead opinion holds that no clearly established law governs Marcia's claim against Sgt. Williams. . . I respectfully disagree. Although the facts of this case differ from those of *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), that case sets out a clear standard for constitutional torts premised on the state-created-danger theory. I believe that my colleagues' qualified-immunity analysis is overly rigid

because it relies too heavily on factual differences between Marcia's claim and state-created-danger cases in which plaintiffs have prevailed. Nevertheless, I share my colleague's ultimate conclusion because the record contains insufficient evidence to show that Sgt. Williams acted with deliberate indifference to Thomas's safety. . . .True enough, the only similarly situated plaintiffs who have prevailed under the state-created-danger theory in our circuit are those in cases where the state official directly disclosed confidential information. . . In contrast, Sgt. Williams did not directly disclose Thomas's identity to his supplier, Scott Warnka, or to Warnka's associates. This fact alone appears to be enough, in my colleagues' view, to shield Sgt. Williams from liability. . .I disagree. The Supreme Court has warned the lower courts against placing too 'rigid [a] gloss on the qualified immunity standard' by 'requir[ing] that the facts of previous cases be "materially similar"' to those at hand. . . The unlawfulness of an official act 'must be apparent' to give rise to individual liability, but the doctrine of qualified immunity does not require that 'the very action in question ha[ve] previously been held unlawful.'. . Moreover, 'general statements of the law are not inherently incapable of giving fair and clear warning, and ... a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. .If a state actor is on notice that directly disclosing a confidential informant's name to violent third parties can give rise to liability, then I see no reason why that same actor lacks sufficient notice that affirmative acts that indirectly but unmistakably identify a confidential informant can do the same. *Kallstrom* and its progeny set forth 'a general constitutional rule' that 'appl[ies] with obvious clarity to the specific conduct in question' here. . . Accordingly, I would find that clearly established law is at issue in this case. But that is not the end of the qualified-immunity analysis. We must also consider whether the facts of the case, '[t]aken in the light most favorable to the party asserting the injury, ... show [that] the officer's conduct violated a constitutional right.'. . In my view, this prong of *Saucier*'s two-part framework, not the clearly-established-law prong, is the insurmountable barrier to Marcia's claim against Sgt. Williams.")

Scott v. Becher, 736 F. App'x 130, ___ (6th Cir. 2018) ("[T]he inquiry into whether a right is clearly established asks whether a reasonable government officer would have 'fair warning' that the challenged conduct was illegal. . . The standard is 'fair warning' because the purpose of qualified immunity is not to protect malicious behavior that violates constitutional rights in a manner the precise likes of which have not yet been the basis of a lawsuit in this circuit. Instead, qualified immunity has a two-fold purpose: to ensure that government agents are not deterred from vigorous pursuit of their duties due to fear that an honest misstep will expose them to money damages and, at the same time, to provide citizens a remedy for constitutional injuries. . . After all, qualified immunity 'acts to safeguard government, and thereby to protect the public at large, not to benefit its agents.'. . To conclude otherwise in the Eighth Amendment context would 'encourage bad actors to invent creative and novel means of using unjustified force on prisoners.'. .Taking the allegations in Scott's complaint as true, we conclude that Becher was not entitled to qualified immunity at this stage of Scott's Eighth Amendment claim of deliberate indifference through reckless driving. According to the complaint and the attachments, Scott was one of a number of prisoners being transferred from Saginaw Correctional Facility to Bellamy Creek Correctional Facility. Becher was driving above the speed limit, swerving, and generally driving

recklessly. When Scott and other inmates 'beg[ged] him to slow down, before [they] all die[d],' Becher refused, laughed, and instead accelerated. At some point, the speeding bus hit a bump, sending the front tires of the bus airborne. The inmates went airborne, too. One would assume that all the prisoners were handcuffed at the time, but apparently none were seat-belted. As a result, Scott was catapulted out of his seat, and was then slammed down onto his head, neck, and back. When the bus tires landed, the front tire of the bus went off the road, and in an apparent overcorrection, Becher swerved the bus into the lane of oncoming traffic before regaining control. Scott has alleged actions by Becher that no reasonable corrections official could believe were legal. Caselaw supports that conclusion. Scott points to factually similar cases out of the Eighth and the Fifth Circuits that analyzed under the Eighth Amendment allegations of reckless driving while transporting an inmate without a seatbelt. [discussing cases] Although a number of circuits have not addressed the specific reckless use of a vehicle to harm an inmate, 'there is a clear consensus among the circuits' that 'the Eighth Amendment protect[s] against the malicious and sadistic infliction of pain and suffering ... in a diverse range of factual scenarios.'. . And to use a vehicle maliciously to harm an inmate falls squarely into that category—especially when there is no risk posed by the inmate and no legitimate penal interest. . . A 'rough ride' is 'a peculiarly cruel means of punishment, as [it] is designed to place the victim in fear for his life. Not only is the prisoner not able to protect himself, but motor vehicles, unlike a controlled spray or direct applications of force, are not designed for use as a means of securing compliance or otherwise subduing a prisoner.'. . .[F]ailure-to-seatbelt cases 'involved mere negligence,' but 'all cases that have squarely dealt with intentional misconduct'—which Scott has alleged here—'have found an Eighth Amendment violation.'. .In light of the obviousness of the constitutional violation, Becher could not reasonably have believed that driving recklessly while Scott and the other prisoners were not wearing seatbelts was lawful. Accordingly, the district court erred in granting Becher qualified immunity on Scott's Eighth Amendment claim of deliberate-indifference by reckless driving.")

Cummin v. North, 731 F. App'x 465, ___ (6th Cir. 2018) ("We determined that we did not need to resolve the issue in *Johnson*, and to date have not decided whether to adopt the 'continuing seizure' doctrine. . . Thus, even if the conditions of Cummin's release could constitute a seizure under this doctrine, Defendants 'would still be entitled to qualified immunity because the particularized right alleged—the right to be free from a "continuing seizure" by virtue of a pending criminal charge—is not clearly established.' *Rapp v. Putman*, 644 Fed.Appx. 621, 628 (6th Cir. 2016). Cummin cites several cases in support of his assertion that the right was clearly established. But the cases he cites are distinguishable. . . .Further, Cummin has cited no Sixth Circuit case finding the requirement that he attend five court appearances sufficient to constitute a seizure. In contrast, we have previously held, albeit in unpublished opinions, that requiring attendance at court proceedings does not constitute constitutional deprivation of liberty. [citing cases] In the absence of additional, onerous conditions, we cannot say the requirement to appear in court constitutes a clearly established seizure. This is consistent with many of our sister circuits. . . Because Cummin was not arrested, incarcerated, required to post bail or pay any bond, and was never subject to any

travel restrictions, we cannot conclude that a reasonable government official would understand that the conditions of Cummin's release constituted a seizure under the Fourth Amendment.")

Hopper v. Plummer, 887 F.3d 744, 754-56 (6th Cir. 2018) ("Defendants also argue that no clearly established law barred unreasonable force against civil contemnor detainees in 2012. Plaintiff relies primarily on this court's opinion in *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004), as notice to defendants that their 'conduct was unlawful in the situation [they] confronted.'. . In *Champion*, we considered an excessive-force claim brought by the family of a severely autistic man who died after several arresting officers restrained him, prone on the ground and handcuffed behind his back, for seventeen minutes. . . Several witnesses described how the officers were 'laying on top of' the man while 'he was prone on the ground with his face towards the carpet.'. . We affirmed the denial of qualified immunity to the officers and explained that '[c]reating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force.'. . Although the man was also pepper sprayed, the application of asphyxiating force 'by itself violated a clearly established right.'. .Thus 'the prohibition against placing weight on [Richardson's] body after he was handcuffed was clearly established in the Sixth Circuit as of' May 2012. . . Although not every defendant may have placed his weight on Richardson's torso, we have cautioned against taking 'too cramped a view' of our precedent, and have explained that *Champion* 'proscribes the use of "substantial or significant pressure" that creates asphyxiating conditions in order to restrain a subject who does not pose a material danger to the officers or others.'. . Even though '*Champion* arose in the context of an arrest, the conduct at issue, the risk of death to the detainee, and the minimal threat posed by a bound and incapacitated detainee to officer safety is the same in a' jail. . . In response to *Champion*'s admonition, defendants maintain that the presence of medical personnel distinguishes this case because defendants claim they restrained Richardson only to facilitate his medical treatment. No medical personnel were present while force was used on Champion, but defendants do not explain how this distinction is material to our clearly-established analysis here. There is no dispute that Richardson was suffering a medical emergency, or that while he may have kicked and thrashed, defendants did not consider him a threat to anyone after he was handcuffed. Champion, who had created a disturbance in a store and 'kick[ed] violently' while on the ground, arguably posed a threat. . . In any event, neither the mere presence of a third party at the scene nor defendants' professed reason for using force would excuse defendants' use of an otherwise unreasonable amount of force or alter relevant, clearly established constitutional guarantees. . . We are cognizant that plaintiff must identify a case with a fact pattern similar enough to have given 'fair and clear warning to officers' about what the law requires. . . But such a case need not 'be on all fours in order to form the basis for the clearly established right.'. .Defendants also argue that they cannot be held liable for their actions because it was not clear in 2012 whether civil contemnor detainees fell within the Eighth or the Fourteenth Amendment. Although some district courts in this circuit may have applied the Eighth Amendment to civil contemnor detainee excessive-force claims, the Supreme Court long ago 't[ook] the position that the Eighth Amendment is inapplicable to [a civil contempt] sentence.'. . Moreover, it is well-established that 'the qualified immunity doctrine is an objective one[.]'. . We

decline to accept the defense of qualified immunity based on defendants' 'dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose.' *See Kingsley v. Hendrickson*, 801 F.3d 828, 832–33 (7th Cir. 2015) (per curiam). Nor can defendants escape liability merely because the incident in question occurred before the Supreme Court made it clear that the standard of liability applicable to Fourteenth Amendment excessive-force claims is purely an objective one. . . As defendants acknowledge, we have rejected this argument before because 'a defendant is not entitled to qualified immunity simply because the courts have not agreed upon the precise formulation of the [applicable] standard.'. . Rather, the relevant question under the clearly established prong is whether defendants had notice 'that [their] conduct was unlawful in the situation [they] confronted.'. .We agree with the district court that *Champion*, among other precedent, gave such notice to defendants here. Accordingly, we affirm the district court's conclusion that it '[w]as unconstitutional' on May 19, 2012, to create asphyxiating conditions by 'forcibly restraining an individual in a prone position for a prolonged period of time' when that individual posed no material threat.")

Maben v. Thelen, 887 F.3d 252, 270 (6th Cir. 2018) ("Thelen . . . argues that there was no violation of a clearly established right because our cases dealing with the false issuance of misconduct charges deal with the issuance of major misconduct charges and not minor misconduct charges. We think Thelen's preoccupation with MDOC's label of major and minor misconduct is misplaced. Instead of focusing on that classification, Thelen should focus on the action of retaliating by issuing a misconduct ticket and the penalties that come with being found guilty of misconduct. We have made clear that a prison officer may not undertake adverse actions in retaliation for a prisoner's exercise of his First Amendment rights. . . We have also made clear that actions comparable in seriousness to the ones at issue in this case implicate a prisoner's First Amendment rights. . . .[W]e think that a reasonable prison officer would have been aware that issuing a misconduct ticket, even a minor misconduct ticket, in retaliation for the inmate's exercise of his First Amendment rights could give rise to constitutional liability.")

Enoch v. Hogan, 728 F. App'x 448, ___ (6th Cir. 2018) ("The Complaint alleges that the Deputies stopped and searched Enoch and Corbin because of their race and despite the fact that their behavior was entirely lawful. It has been the law of this circuit for decades that 'the reasonable suspicion requirement for an investigative detention cannot be satisfied when the sole factor grounding the suspicion is race.' *United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997). Enoch and Corbin therefore plausibly allege that they were victims of an unconstitutional search and seizure. Because individualized suspicion is less demanding than probable cause, . . . the same race-related facts necessarily do not satisfy the higher probable cause standard. . . .As of June 2014, the published precedent of this court made clear that an officer may not stop, much less arrest and prosecute, an individual on the basis of her race. . . . Enoch and Corbin have plausibly alleged violations of their clearly established Fourth Amendment rights. The Deputies are not entitled to qualified immunity as a matter of law on these counts of the Complaint. . . .The Deputies could

not constitutionally prevent Enoch and Corbin from or punish them for gathering news about matters of public importance when their actions violated neither rules nor laws. Enoch and Corbin have therefore plausibly alleged a violation of their First Amendment rights. Those rights were clearly established. Decades ago, the Supreme Court established with clarity that the First Amendment protects the rights of both the media and the general public to attend and share information about the conduct of trials, 'where their presence historically has been thought to enhance the integrity and quality of what takes place.'. . The Court linked the right of access to another fundamental First Amendment right, explaining that '[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.'. . The same logic necessitates finding a constitutional violation in this case, where Enoch and Corbin's access to a press conference held immediately after a hearing was foreclosed on the basis of their race. The Supreme Court has likewise been clear for more than fifty years that state officials may not enforce rules or regulations that implicate First Amendment rights in a racially discriminatory manner. . . . [O]n the facts alleged, state officials purported to enforce state law in a racially discriminatory manner, stopping and arresting black citizens for engaging in behavior that was both protected by the First Amendment and permitted for their white counterparts. Based on the Complaint, the Deputy Sheriffs violated Enoch and Corbin's clearly established First Amendment rights. The Deputies are therefore not entitled to qualified immunity as a matter of law on this count of the Complaint.")

Richmond v. Huq, 885 F.3d 928, 948 (6th Cir. 2018) ("[I]t was clearly established at the time of Richmond's incarceration in Wayne County Jail that neglecting to provide a prisoner with needed medication, intentionally scrubbing her wound to cause unnecessary pain, and failing implement the prescribed plan of treatment could constitute a constitutional violation.")

Greer v. City of Highland Park, Michigan, 884 F.3d 310, 317-18 (6th Cir. 2018) ("In this case, the Greers claim that the officers did not knock or announce their presence before entering the residence, and—taking the Greers' factual allegations as true—exigent circumstances did not excuse the officers' disregard of the knock-and-announce rule. Although the search warrant listed controlled substances as items to be seized, which could potentially be destroyed, the presence of drugs alone did not vitiate the knock-and-announce requirement. . . Moreover, the Greers state that they were in bed when the officers arrived and that they presented no threat of violence. The warrant gives no indication that a person was in peril at the Greers' home. Finally, facts set forth in the complaint clearly allege that no person within the home knew of the searching officers' authority or purpose. These facts indicate a lack of exigent circumstances. Furthermore, '[n]ighttime searches have long been recognized as more intrusive than searches conducted during the day.'. . Consequently, the officers' failure to knock and announce their presence at the Greers' home at 4:00 a.m. absent exigent circumstances was clearly unconstitutional. As to the officers' refusal to show the Greers the search warrant, it is clearly established that the purpose of a search warrant—informing citizens that the searching agents are authorized—cannot be accomplished if executing officers withhold presentation of the warrant despite an occupant's requests to view it. . . The Greers claim that they repeatedly asked to see the warrant, and the officers refused.

Furthermore, they state that the officers failed to leave a copy of the warrant at the Greers' home after the search concluded. These alleged facts further support the Greers' claim that the officers violated their clearly established Fourth Amendment rights by conducting the search of their home in an unreasonable manner. Thus, taking the facts alleged in the second amended complaint as true, the district court properly found that the Greers stated a claim for relief that is plausible on its face. . . Even if the underlying search warrant was based on probable cause, the Greers have posed factual allegations that the officers violated their clearly established Fourth Amendment right to be free from unreasonably conducted searches. Consequently, the district court did not err in denying the officers' Rule 12(c) motion based on qualified immunity.")

Doe v. Miami University, 882 F.3d 579, 604 (6th Cir. 2018) ("John has. . . sufficiently alleged a claim under § 1983 that Vaughn violated his equal-protection and procedural-due process rights. . . . All of these rights were clearly established in the fall of 2014. John's 'right to freedom from invidious [gender] discrimination under the Equal Protection Clause was certainly clearly established at all times pertinent to this action ....' *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011). John's procedural-due-process right to an impartial adjudicator and access to the evidence used against him was also clearly established. First, viewing the allegations in the light most favorable to John, we conclude that a reasonable person in Vaughn's position should have known that she was partial and that she could not, therefore, sit on John's Administrative Hearing Panel. 'The impropriety of [Vaughn's] alleged conduct in failing to disqualify [her]self should have been apparent based on *Goss* [, 419 U.S. at 579–84], *Newsome*[*v. Batavia Local Sch. Dist.*, 842 F.2d 920, 927 (6th Cir. 1988)], and other precedent directly on point.' *Heyne*, 655 F.3d at 568. Second, John's right to view all of the evidence against him is clearly established. . . Thus, we reverse the district court's holding that Vaughn is entitled to qualified immunity from John's equal-protection and procedural-due-process claims.")

Flanigan v. Panin, 724 F. App'x 375, ___ (6th Cir. 2018) ("[T]o withstand Panin's qualified immunity argument, Flanigan must also show that his right to be free from fifteen to twenty hits to the head was clearly established at the time of the claimed violation. 'In order for a right to be clearly established for the purposes of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."'. . . Sixth Circuit case law supports Flanigan's 'right not to be struck ... gratuitously,' *Shreve*, 453 F.3d at 688, and Flanigan's version of events permits the court to draw the inference that he did not fight back against Panin's attempts to handcuff him. In such a scenario, Panin's blows to Flanigan's head were gratuitous. . . Thus, viewing the facts in the light most favorable to Flanigan, a reasonable jury could conclude that Panin used excessive force. . . Accordingly, at this point in the proceedings, Panin 'is not entitled to qualified immunity as a matter of law.'")

Flanigan v. Panin, 724 F. App'x 375, ___ (6th Cir. 2018) (Kethledge, J., dissenting) ("Qualified immunity protects all police officers except 'the plainly incompetent or those who knowingly violate the law.'. . Neither label fits Deputy Scott Panin. Hence I would reverse the district court's partial denial of immunity. The only question on appeal is whether Panin violated Joseph

Flanigan's clearly established rights when he (allegedly) hit Flanigan in the head toward the end of their encounter. Our caselaw says that a police officer may use force to subdue a suspect who actively resists arrest—*e.g.*, one who struggles with, threatens, or disobeys an officer. *See Rudlaff v. Gillispie*, 791 F.3d 638, 641-42 (6th Cir. 2015). By contrast, an officer may not use force against a suspect who is compliant or has stopped resisting. . . Although in this appeal we must accept Flanigan's story as true, we must also view it through the eyes of a reasonable officer on the scene. . . In Flanigan's telling, he ran away from Panin into someone's backyard, repeatedly ignoring Panin's orders to stop. After Panin had chased, tased, and maced Flanigan, Panin told him, 'Don't get up. Don't resist.' Yet Flanigan tried to get up. Only then did Panin hit Flanigan in the head. And only after that did Flanigan give up, follow Panin's commands, and submit to handcuffing. A reasonable officer in this hectic situation could have viewed Flanigan as actively resisting arrest until he was restrained. Since Panin used only the force necessary to subdue Flanigan—and used no further force thereafter—he is entitled to qualified immunity. . . In holding otherwise, the majority stresses that Panin used too much force to subdue Flanigan. Our cases are to the contrary. For example, we have granted qualified immunity to officers who struck a naked (and obviously unarmed) suspect with batons, maced him, and tased him 38 times, because they needed to use that much force to gain his compliance. *See Williams v. Sandel*, 433 F. App'x 353, 362-63 (6th Cir. 2011). So it is here. Tasing and macing Flanigan had proven ineffective, so Panin was justified in hitting him, and each blow was necessary to overcome Flanigan's resistance. *See Jackson v. Washtenaw County*, 678 F. App'x 302, 309 (6th Cir. 2017). The majority speculates that Panin could have arrested Flanigan with less force, but in Flanigan's own account, he did not give up until Panin had hit him 15 to 20 times. The majority also draws support from three cases in which we denied qualified immunity, but in those cases officers used force far beyond what was necessary to make prone suspects produce their hands for cuffing, or hit suspects who had already surrendered. *See Griffith v. Coburn*, 473 F.3d 650, 658 (6th Cir. 2007); *Shreve v. Jessamine Cty. Fiscal Court*, 453 F.3d 681, 686-88 (6th Cir. 2006); *Baker v. City of Hamilton*, 471 F.3d 601, 607-09 (6th Cir. 2006). Neither was true here. As shown above, Flanigan remained defiant throughout, refused to stay on the ground, and resisted being handcuffed. Moreover, Panin used only the force necessary to overcome Flanigan's resistance. Hence Panin did not violate Flanigan's clearly established rights. I respectfully dissent.")

Seales v. City of Detroit, 724 F. App'x 356, ___ (6th Cir. 2018) ("In light of these cases, we find Seales had a clearly established constitutional right to be free from continued detention after officers should have known that he was not the person named in the warrant. Accordingly, we find the district court correctly determined that Zberkot was not entitled to qualified immunity. It is for the trier of fact to decide whether Zberkot violated Seales' constitutional rights.")

Richmond v. Huq, 879 F.3d 178, 196-97 (6th Cir. 2017) ("'The proposition that deliberate indifference to a prisoner's medical needs can amount to a constitutional violation has been well-settled since *Estelle* in 1976.'. . This certainly includes the 'unnecessary and wanton infliction of pain.'. . It is also well-established that right of a prisoner to be free from deliberate indifference extends to psychological needs. . . Further, as noted above, this Circuit's precedent is clear that

neglecting a prisoner's medical need and interrupting a prescribed plan of treatment can constitute a constitutional violation. . . Thus, it was clearly established at the time of Richmond's incarceration in Wayne County Jail that neglecting to provide a prisoner with needed medication, intentionally scrubbing her wound to cause unnecessary pain, and failing [to] implement the prescribed plan of treatment could constitute a constitutional violation.")

Nailon v. University of Cincinnati, 715 F. App'x 509, ___ (6th Cir. 2017) ("[V]iewing all these facts in the light most favorable to Nailon, she has demonstrated a causal connection between her termination and her niece's protected speech and established a First Amendment retaliation claim. She has thus satisfied the first prong of the qualified immunity analysis by showing a constitutional violation. . . . The Defendants argue that there is no clearly established law putting a university official on notice that terminating an individual in retaliation for speech made by her niece would be a constitutional violation. In their principal brief, they allege it is '[n]ot clear at all that a claim of retaliation for the speech of a family member fits under the First Amendment.' The district court determined that such a right was clearly established based on cases within this circuit that examined claims of First Amendment retaliation where the underlying speech was made by a relative, rather than the plaintiff herself. . . The Defendants revise this argument in their Reply. There they posit that even though there is precedent establishing that a First Amendment retaliation claim may be based on speech made by a relative, these cases involve a 'closer' relationship between the speaker and the plaintiff than aunt and niece. They cite *Teare v. Independence Local School District Board of Education*, No. 1:10-cv-01711, 2011 WL 4633105, at *5 (N.D. Ohio Aug. 18, 2011), in which the district court determined that the plaintiff, a thirteen-year-old girl, had not shown a clearly established right of familial association with her uncle. Again, Nailon does not assert a claim for violation of her associational rights—she alleges that the Defendants retaliated against her based on her niece's speech. Accordingly, *Teare* does not control our analysis. The Supreme Court has found that in the Title VII context, a third-party reprisal can form the basis of a retaliation claim. . . Moreover, the Court has explicitly 'decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful.'. . It recognized that there may be 'difficult line-drawing problems concerning the types of relationships entitled to protection,' and that 'the significance of any given act of retaliation will often depend on the particular circumstances.'. . .An examination of the facts in this case confirms that Nailon and Davis's relationship may form the basis for Nailon's retaliation claim. As in *Ward* and *Henley*, the close familial relationship between Nailon and Davis was known to the Defendants. . . . Given these facts showing the close relationship between Nailon and Davis, as well as the cases establishing that private citizens have a protected First Amendment right to criticize public officials, . . . it should have been clear to a reasonable University official that retaliating against Nailon for Davis's speech would be unlawful. The Defendants are therefore not entitled to qualified immunity.")

Bays v. Montmorency Cty., 874 F.3d 264, 268-70 (6th Cir. 2017) ("Prison officials violate the Eighth Amendment when they act with 'deliberate indifference' to the 'serious medical needs' of inmates committed to their charge. . . The Due Process Clause of the Fourteenth Amendment

provides the same guarantee to pretrial detainees. . . Two inquiries loom over every deliberate indifference case: Was the ailment a serious one? And was the official 'subjective[ly] reckless[ ],' such that she was actually 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and ... also [drew] the inference'? . . . . Sigler adds that nothing in the record shows that she subjectively knew, then disregarded, that Shane was at risk of suicide. But the relevant question is not whether Sigler recognized that Shane might kill himself. It is whether Sigler recognized that Shane was suffering from a serious mental illness creating a host of risks and requiring immediate treatment during the fourteen days that Sigler treated him. . . Sigler argues that while she may have committed malpractice, her conduct was not deliberately indifferent to Shane's plight. If a prison medical official provides treatment, it is true, constitutional liability attaches only if the treatment is 'so cursory as to amount to a conscious disregard for [the inmate's] needs.'. . Taking the Bays' allegations as true, Sigler's care fell below this admittedly low bar. She scheduled an appointment weeks in the future despite symptoms that she, Nurse Pilarski, and the Bays' expert now all agree required immediate or near-immediate care. Yes, she eventually did try to schedule an earlier appointment. But the sum total of her efforts were two phone calls and a message, all while she had the option of getting immediate emergency room treatment or at least putting him on a watch list, and yet she chose to do neither. Sigler looks to *Taylor v. Burkes*, which held that inmates have no clearly established right to the proper implementation of suicide prevention procedures. . . But the Bays do not argue that Sigler violated Shane's right to procedures that might have prevented his suicide. They argue that Sigler violated Shane's right to have a serious psychological illness treated seriously. And that right is clearly established.")

Moody v. Michigan Gaming Control Bd., 871 F.3d 420, 430 (6th Cir. 2017) ("Under the conditions articulated with respect to the particular right at issue, a public employee 'may rightfully refuse to answer *unless and until* he is protected at least against the use of his compelled answers.'. . The Supreme Court has made clear that if a state wishes to punish an employee for invoking that right, 'States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity.'. . We therefore reverse the district court's grant of qualified immunity on the Fifth Amendment claim, and hold that the right articulated in *Moody I* was clearly established at the time of the violation.")

Moody v. Michigan Gaming Control Bd., 871 F.3d 420, 433, 436-37 (6th Cir. 2017) (Batchelder, J., concurring in part and dissenting in part) ("At 'a high level of generality,'. . . a public employee or, in this case, a licensee may refuse to answer questions that may tend to incriminate himself unless and until he has immunity from prosecution on the basis of his answers to the State's questions. *Moody I* was correct to explain that ' "a governmental body may not require an employee to waive his privilege against self-incrimination as a condition to keeping his job ... even [when] no criminal proceedings were ever instituted against" an employee who was later successful in constitutional claims.'. . I part ways with the majority, however, because it does not—and cannot—point to 'clearly established law [that is] "particularized" to the facts of [this] case.'. . The majority finds clearly established *Moody I*'s holding that MGCB violated the drivers' rights

when it 'did not offer [them] immunity before the hearing.'. . Based on my understanding of the Supreme Court's precedent, I cannot agree. . . .I cannot agree that *Turley*, *Gardner*, and like cases provide the proper lens through which we should assess this case for purposes of qualified immunity. These cases address different situations from the one here. The question, then, is whether MGCB needed to 'offer' immunity in the form of notifying the drivers that their testimony could not be used against them. This is where *Garrity*, which is the progenitor of the other cases I have discussed so far, fits into the picture. . . .Interpreting *Garrity* to mean that coerced testimony cannot be used in a subsequent criminal proceeding, however, leaves an important question unanswered: is that effect of the Fifth Amendment privilege against self-incrimination a self-executing one, or must the public employer or agency affirmatively make its employee, contractor, or licensee aware of the immunity that *Garrity* affords? In *Moody I*, we concluded that MGCB had an affirmative obligation to notify the drivers that they were afforded immunity in exchange for being threatened with the loss of their licenses. In effect, we created a prophylactic rule, but this rule had not been in place before. The district court was therefore correct when it explained that '[w]hat was not clearly established in this Circuit [before *Moody I*] was whether the State was required to *offer* immunity in the first place.'. .This is the proper lens through which to analyze this case, so I cannot find that the right had been clearly established before *Moody I*. The Supreme Court has not directly addressed how this right plays out in non-prosecutorial administrative proceedings, as I discussed above. Nor has our circuit addressed this previously. And looking to the other circuits demonstrates precisely why I cannot find that the right announced in *Moody I* was clearly established, for it is the subject of a circuit split among the various United States Courts of Appeals. . . . This split of authority, although not acknowledged by the majority, supports my conclusion that the law was not clearly established prior to *Moody I*. To saddle MGCB with the unjustified holding that this issue was clearly established before *Moody I* runs counter to the qualified immunity doctrine. I therefore respectfully dissent.")

Brenay v. Schartow, 709 F. App'x 331, ___ (6th Cir. 2017) ("If an officer initiates an arrest in a public place, but the suspect flees into a private one, the officer may give chase without stopping for a warrant. . . In other words, a suspect may not defeat an arrest by simply running inside. . . Whether the hot pursuit doctrine applies to this case depends on whether Brenay, Jr. was standing in a public place when Officer Sierras told him that he was under arrest. We know that Brenay, Jr. was standing in the foyer, six inches from the open doorway, for most of his interaction with the officers. The Supreme Court has said that a person who stands in his front doorway stands in a public place because he is 'as exposed to public view, speech, hearing, and touch as if [he] had been standing completely outside [his] house.'. . But this circuit has not addressed whether a person who opens his door *voluntarily* to talk to police loses his reasonable expectation of privacy within the meaning of *Santana*. Our sister circuits are split on the issue. . . And how the analysis might change when the person is standing six inches back from the doorway is even less settled. If this appeal came down to these questions, it would be easy. Government officials are entitled to qualified immunity unless 'existing precedent ... placed the statutory or constitutional question beyond debate.'. . With so many answers outstanding, how *Santana* would apply to this case is hardly 'beyond debate.' That the officers violated the Brenays' constitutional rights when they

entered the Brenays' home would not be clearly established. Unfortunately for Officer Sierras, the hot pursuit doctrine may not apply because Brenay, Jr. may have ended his interaction with the police *before* Officer Sierras told him he was under arrest. . . . Unless and until Officer Sierras initiated an arrest, the Brenays were free to shut the door and walk away.")

Kulpa for Kulpa v. Cantea, 708 F. App'x 846, ___ (6th Cir. 2017) ("Cantea argues that even if his conduct was objectively unreasonable, the law's contours were not clearly established at the time of the alleged violation with respect to the restraint of pretrial detainees. The gist of his argument is that because the events in this case took place before the Supreme Court adopted the objective reasonableness standard in *Kingsley*, no clearly established law barred unreasonable force against pretrial detainees. At the time of Kulpa's death in October 2011, we evaluated a pretrial detainee's excessive-force claim by asking 'whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'. . . Our pre-*Kingsley* caselaw put Cantea on notice 'that his conduct was unlawful in the situation he confronted.'. . *Champion*, decided seven years before Kulpa's death, clearly articulated that driving heavy pressure into a prone, handcuffed, incapacitated detainee's back was constitutionally impermissible because it posed a serious risk of asphyxiation to the arrestee and was unnecessary to protect the officers. . . . Although *Champion* arose in the context of an arrest, the conduct at issue, the risk of death to the detainee, and the minimal threat posed by a bound and incapacitated detainee to officer safety is the same in a pretrial detention center. Furthermore, it was clearly established in 2011 that 'pretrial detainees had a clearly established right not to be gratuitously assaulted while fully restrained and subdued.'. . Cantea argues that—notwithstanding *Champion*'s clear admonition about this precise conduct—the law permitted him to plant significant weight into a prone, handcuffed detainee's back so long as he lacked malicious intent. For the reasons explained above, however, sufficient evidence exists that Cantea acted with malicious intent, given the extent of Kulpa's injury, the minimal threat Kulpa posed to officer safety, and Cantea's application of unnecessary force. In addition, as the Seventh Circuit recently explained, to buy Cantea's argument 'we would have to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose.' *Kingsley v. Hendrickson*, 801 F.3d 828, 833 (7th Cir. 2015). As we have noted, however, the law clearly established that the 'amount of force that was used' must be roughly proportionate to the 'need for the application of force.'").

Mills v. Barnard, 869 F.3d 473, 486-87 (6th Cir. 2017) ("In holding that Mills sufficiently pleaded his claims of fabrication of evidence, suppression of evidence, and malicious prosecution, we determine that at this time qualified immunity is not warranted. Again, in the factually similar *Gregory* case, we stated that it was clearly established by at least 1992 that knowing fabrication of evidence violates constitutional rights. . . *Brady* violations are, of course, clearly established violations of constitutional rights. And, as we stated recently, it is also clear that 'individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has "made, influenced, or participated in the decision to prosecute the plaintiff" by, for

example, "knowingly or recklessly" making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.")

Sumpter v. Wayne County, 868 F.3d 473, 478, 485-88 (6th Cir. 2017) ("The issue we face is whether periodically conducting group strip searches when the number of jail inmates waiting to be processed makes individual searches imprudent constitutes a violation of clearly established Fourth Amendment law. Under the facts of this case, we answer that question 'no' and therefore hold that the jail official who conducted the group searches, defendant Terri Graham, is entitled to qualified immunity. . . . To summarize, on one hand, the group strip searches plaintiff endured in the Registry were especially intrusive; on the other hand, defendants have asserted a legitimate penological justification for periodically conducting the searches. Typically, we would proceed to balance the nature of the intrusion against the penological justification to determine whether the searches were unreasonable under the Fourth Amendment. However, we need not go that far in order to determine that Graham is entitled to qualified immunity. Qualified immunity protects a constitutional tortfeasor from personal liability unless the contours of the constitutional right she violated 'were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'. . The dispositive inquiry, 'undertaken in light of the specific context of the case, [and] not as a broad general proposition,' is 'whether the violative nature of *particular* conduct is clearly established.'. . Nowhere is that specificity as important as in the Fourth Amendment context, where, under the governing ad-hoc interest-balancing test, '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts.'. . Because 'case-by-case, incremental decisionmaking of balancing tests ... infrequently will provide the "fair notice" that qualified-immunity precedent requires,'. . . '[c]ourts generally accord public officials wide latitude (for qualified-immunity purposes) when the constitutionality of their acts comes down to the subtleties of interest balancing[.]'. . . Thus, it is imperative that plaintiff rely on a decision that 'squarely governs' the outcome of the case. . . That she cannot do. . . .Both *Stoudemire* and *Williams* are distinguishable in one important respect: in both cases, there was *no* penological justification for the particular searches at issue. This critical difference makes *Stoudemire* and *Williams* poor templates for declaring the particularized right at issue in this case—freedom from a group strip search *supported* by a legitimate penological justification—clearly established. . . .Regardless of how the balancing actually plays out, one thing is clear: *Stoudemire* and *Williams* could not have predicted the result since neither case involved penological justifications to weigh against the nature of the intrusion. To put it in more descriptive terms: it is easy enough to predict how scales with one hundred apples on one end will balance out, but it is far more difficult to predict how many oranges must be added to the other side to bring it to equipoise. Tasked with making that second prediction, Graham would have found no clues in 'apples-only' cases like *Stoudemire* and *Williams*. The dissent starts with the wrong question. It asks whether our case law clearly establishes Officer Graham's justification for the group searches as a legitimate one. . . But that's not how qualified immunity works. To overcome an officer's request for immunity, the plaintiff must show that the 'right' she seeks to vindicate is clearly established, not that the officer's justification is *not* clearly established. . . The issue is the right to be free from a group strip search where the officer has an

administrative need to process a large quantity of inmates at one time. The cases fail to address this situation, and so the right is not (and was not) clearly established. In focusing on only one half of the right at issue, the dissent inverts the burden, leaving the officer, rather than the plaintiff, in need of clearly established law to succeed. The dissent also focuses much of its energy on a question we do not address: whether the searches violate the Fourth Amendment. Its key points—that the jail later changed (or clarified) its policy, that Officer Graham had other alternatives available to her, and that she could have anticipated the situation and planned accordingly—all fail to address whether the *law* at the time clearly established the searches as Fourth Amendment violations. The absence of a decision that 'squarely governs' this situation is particularly detrimental to plaintiff's claim because, when the constitutional test is one of interest-balancing, the point at which the constitutional shades into the unconstitutional will necessarily be gray. . . Qualified immunity exists to give public officials breathing room to make close calls when the issue is not black-and-white. . . And this breathing room is especially appropriate when the legal standard is flexible and heavily dependent on on-the-ground judgment calls, as it is in this context. . . . Strip searches, even when conducted in the most private circumstances, are intrusive. But in the absence of bright lines and per se prohibitions, whether and when to subject inmates to increasingly intrusive searches depends on the facts confronting the corrections official in each particular case. For these reasons, we need not conduct the Fourth Amendment analysis to its completion in order to conclude that Graham is entitled to qualified immunity. Neither *Stoudemire*, nor *Williams*, nor any other case, would have put Graham on notice that conducting group strip searches when the volume of inmates made individual searches imprudent was unreasonable. Thus, regardless of whether Graham, in fact, violated the Fourth Amendment, no reasonable officer would have known that at the time. We therefore hold, as the district court did, that defendant Graham is entitled to qualified immunity.")

Sumpter v. Wayne County, 868 F.3d 473, 498-500 (6th Cir. 2017) (Clay, J., dissenting) ("The issue as the majority frames it is whether our cases clearly establish that a group strip search conducted to expedite access to medical treatment violates the Fourth Amendment. However, that is definitively not the issue in this case. Rather, the true issue is whether the justification provided by Graham sufficiently demonstrates a special, exigent, or emergency circumstance which necessitated that such an invasive and humiliating jail intake process be conducted in the presence of others who had no reason to view such things. . . . Because the three Registry group strip searches violated Plaintiff's clearly established Fourth Amendment rights, I would hold that Graham is not entitled to qualified immunity.")

Miller v. Maddox, No. 17-5021, 2017 WL 3298570, at *7 (6th Cir. Aug. 3, 2017) ("Maddox spends a considerable portion of his brief illustrating why it is not clear that he should be liable for malicious prosecution, thus reasoning that he is entitled to qualified immunity. Yet, his claim that the contours of our jurisprudence concerning malicious prosecution are not entirely clear misses the point. Our inquiry is whether Maddox's alleged actions—arresting and detaining Miller based on false pretenses and then seeking an arrest warrant based on these false statements—violated Miller's clearly established constitutional rights. We conclude that they did.")

Darrah v. Krisher, 865 F.3d 361, 374 (6th Cir. 2017) ("The first inquiry of the qualified-immunity analysis asks 'whether plaintiff has alleged facts which, when assumed to be true, show that the defendants' conduct violated a constitutional right.'. . This inquiry 'collapses into the analysis of whether [Darrah] has produced sufficient evidence to show that [Defendants] were deliberately indifferent to [Darrah's] medical needs under the subjective component' of the deliberate-indifference standard. . . We have already concluded that a jury could so find. Thus, we turn to the question of whether the right was clearly established. For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . Further, we are not required to 'find a case in which "the very action in question has previously been held unlawful,"'but, 'in the light of pre-existing law, the unlawfulness must be apparent.' . . Initially, '[t]he proposition that deliberate indifference to a prisoner's medical needs can amount to a constitutional violation has been well-settled since *Estelle* in 1976.'. . Furthermore, we have already noted that this Circuit's precedent is clear that neglecting a prisoner's medical need and interrupting a prescribed plan of treatment, even for a relatively short period, can constitute a constitutional violation. . . Thus, it was 'clearly established' in 2011, at the time of Darrah's transfer to MCI, that neglecting to provide a prisoner with needed medication, choosing to prescribe an arguably less efficacious treatment method, and continuing on a treatment path that was clearly ineffective could constitute a constitutional violation.")

Guy v. Nashville, No. 16-6100, 2017 WL 1476896, at *3–4 (6th Cir. Apr. 25, 2017) (not reported) ("Taking a different tack on appeal, Romines argues that this right was not clearly established at the time of the alleged violation. Although this argument was not made in the district court, we exercise our discretion to consider the issue because it is a legal question within our jurisdiction and resolution of the defendant's asserted qualified-immunity defense would further the progress of the litigation. . . The essence of this argument is that the use of force in this case occurred prior to the Supreme Court's adoption of the objective reasonableness standard in *Kingsley*. It is true that there was disagreement among the circuits prior to *Kingsley* about whether a claim of excessive force 'brought by a pretrial detainee must satisfy the subjective standard or only the objective standard.'. . But, a defendant is not entitled to qualified immunity 'simply because the courts have not 'agreed upon the precise formulation of the [applicable] standard.' *Harris v. City of Circleville*, 583 F.3d 356, 367 (6th Cir. 2009) (alteration in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 202-03 (2001)). Rather, the question under the second prong of the qualified-immunity analysis 'is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . Although there need not be a case directly on point, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . The right must not be defined at a 'high level of generality,' and the 'dispositive question is "whether the violative nature of *particular* conduct is clearly established."'. . . At the time of the use-of-force incident in September 2013, this court applied analogous standards to excessive-force claims brought under the Eighth and Fourteenth Amendments. . . That is, under either amendment the question was whether the use of force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for the purpose of causing harm. . . The force need not

have been absolutely necessary, but we asked in *Griffin* 'whether the use of force could plausibly have been thought necessary.'. . In *Griffin*, this court held that the prison officials' use of a leg-sweep maneuver to gain control over a pretrial detainee who created a disturbance, resisted being moved, and struggled as two officers tried to guide her away from a nurse's station did not violate this standard. . . In *Williams*, prison officials used a chemical agent and assault team on an inmate who was ordered to 'pack up' his cell and responded by asking, 'What for, sir?' *Williams v. Curtin*, 631 F.3d 380, 384 (6th Cir. 2011). We concluded in *Williams* that the facts, if true, could permit a finding that the use of force was unnecessary, was not applied in a good-faith effort to maintain or restore discipline, and was possibly motivated by malicious purpose. . . Viewing the evidence in the light most favorable to plaintiff, we conclude that a reasonable officer would have been on notice in September 2013 that use of a chemical agent on a non-threatening pretrial detainee who did not comply with the officer's verbal orders and then passively resisted an open-handed escort by hesitating and stopping to turn to ask again about seeing a nurse would amount to constitutionally excessive force. The denial of qualified immunity with respect to this claim was not error.")

Evans v. Plummer, 687 F. App'x 434, ___ (6th Cir. 2017) ("In sum, Evans 'fail[s] to identify a case where an officer acting under similar circumstances as [Feehan] was held to have violated the Fourth Amendment.'. . Thus, 'in the light of pre-existing law,' it was not apparent that pointing a taser at Evans violated the Fourth Amendment. . . We therefore reverse the denial of qualified immunity to Feehan.")

Littlejohn v. Myers, 684 F. App'x 563, ___ (6th Cir. 2017) ("Myers' conclusion that Littlejohn constituted a threat rests entirely on a misplaced belief that Littlejohn was armed, and that he previously attempted a robbery. But at the moment that he was shot, it is hard to see what threat of serious harm Littlejohn posed to anyone in the alley. Upon resisting arrest by merely bucking his hips and evading Myers' grasp, Littlejohn never explicitly threatened Myers, never reached for a weapon, and never attempted to strike the officer. Instead, he immediately began to run. During his flight, Littlejohn did not reach to his side or make any comparable gesture that may have given a reasonable officer the impression that Littlejohn posed a serious threat. And the facts indicate that no one beside Myers was in the alley—removing any threat to an innocent bystander. Consequently, we conclude that a reasonable officer would not have exercised deadly force under the circumstances because Littlejohn did not constitute a threat to either the officer or to any bystanders. . . .Our conclusion is further buttressed by the fact Myers never warned Littlejohn that he might shoot, as required by *Garner* when feasible under the circumstances. . . Consequently, we agree that under Littlejohn's version of the facts, Myers violated Littlejohn's Fourth Amendment rights. . . .The district court held that an officer who employs deadly force against a fleeing suspect without reason to believe that the suspect poses a significant threat of serious physical harm to himself or others constitutes an excessive force violation. In so doing, the district court relied upon this Circuit's 2007 decision, *Bouggess v. Mattingly*, to say such a right was clearly established. The aforementioned case clearly establishes a constitutional violation when an officer shoots a fleeing suspect in the back without a basis for believing that the suspect poses an

imminent threat, regardless of the previous felony the suspect committed. . . As we have previously explained, Littlejohn did not pose a threat to the officer or to any innocent bystanders. Accordingly, a reasonable officer in Myers' position would know that the use of deadly force was not authorized.")

Middaugh v. City of Three Rivers, 684 F. App'x 522, 529-30 (6th Cir. 2017), *on remand from Piper v. Middaugh*, 136 S. Ct. 2408 (2016) (per curiam) (vacating and remanding for further consideration in light of *Mullenix*) ("In light of this record, we affirm as a matter of law the district court's conclusion that the Officers acted unreasonably in violation of the Middaughs' Fourth Amendment rights. *See Cochran*, 656 F.3d at 308 (noting that "police officers [who] take an active role in a seizure or eviction" generally "are not entitled to qualified immunity ... when there is neither a specific court order permitting the officers' conduct nor any exigent circumstance in which the government's interest would outweigh the individual's interest in his property"). . . . In sum, *Mullenix* instructs that the qualified immunity inquiry must be formulated not based on general principles, but rather on officers' specific conduct, especially in the Fourth Amendment context. Whether the Middaughs' rights were clearly established depends on the 'objective legal reasonableness' of the Officers' specific conduct. . . This fact-specific analysis asks whether reasonable officials in the Officers' positions could have believed that their conduct was lawful at the time. . .We look to the totality of the circumstances here in light of then-existing precedent. For example, although we find the Officers' conduct here more similar to the physical interventions in *Cochran* and *Hensley* than the distant observation in *Coleman*, the conduct in both *Cochran* and *Hensley* includes some substantive distinctions from the Officers' conduct here. In those two cases, the officers engaged in direct confrontations with the plaintiffs. The officials in *Cochran* threatened to arrest the plaintiff, and in *Hensley* an official brandished his handgun, broke a car window, and pulled the plaintiff out of her car. Although the Officers here came onto the Middaughs' property, parked a patrol car between the Buick and the Middaughs' home, and stayed until Chrystal left with the Buick, the Officers neither threatened arrest nor used force. They had no direct interaction with the Plaintiffs. In light of the analysis in *Mullenix*, we find it not beyond debate that reasonable officers in their position could have believed their conduct was lawful under then-existing precedent. It is important to note that *Mullenix* does 'not require a case directly on point,' 136 S. Ct. at 308, and 'the very action in question' need not have 'previously been held unlawful,' *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). For example, 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. . *Mullenix* does not undermine our circuit's longstanding holding that 'an action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs.'. . However, there is sufficient daylight between the Officers' conduct here and the conduct in *Cochran* and *Hensley* that those precedents may not 'apply with obvious clarity to [this] specific conduct.'. . Therefore, Officers Piper and Gipson are entitled to qualified immunity.")

King v. Harwood, 852 F.3d 568, 581-83 (6th Cir. 2017), *cert. denied*, 138 S. Ct. ___ (2018) ("[E]ven if King did impliedly concede probable cause by signing the *Alford* plea, that does not

retroactively prove that there had been probable cause to support King's prosecution all along. . . .Nothing in *Broaddus* helps Defendants to use King's *vacated Alford* plea to prove, at summary judgment, that no reasonable trier of fact could find a lack of probable cause to support King's prosecution. Further, once the strength of the *Alford* plea is removed from the district court's probable-cause analysis, a genuine issue of material fact remains as to whether the 'facts and circumstances' known to Harwood would be 'sufficient to lead an ordinarily prudent person to believe' that King was guilty of murdering Breeden. . . . [I]n light of the fact that all reasonable inferences must be given to King at the summary-judgment stage, the district court erred in holding that King would be unable to prove the requisite lack of probable cause to win her malicious-prosecution claim. . . .[I]ndividuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has 'made, influenced, or participated in the decision to prosecute the plaintiff' by, for example, 'knowingly or recklessly' making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants. . . .Though our ultimate ruling is based on the written record, Defendants' arguments at oral argument reflect just how much of the dispute before us consists of contested facts. Summary judgment is therefore inappropriate for disposing of King's malicious-prosecution claim against Harwood. We therefore hold that the district court erred in granting summary judgment for Harwood on the issue of Harwood's qualified immunity from suit.")

Arrington-Bey v. City of Bedford Heights, 858 F.3d 988, 992-94 (6th Cir. 2017), *cert. denied*, 138 S. Ct. ___ (2018) ("The second prong resolves this case. Because no case clearly established the unlawfulness of the decisions made during Omar's arrest and detention, the officers involved are entitled to qualified immunity. Yes, 'a pretrial detainee's right to medical treatment for a serious medical need has been established since at least 1987.'. . . And yes, that right encompasses physiological and psychiatric ailments. . . But these principles do not suffice on their own. . . The Supreme Court recently reminded us that a plaintiff must identify a case with a similar fact pattern that would have given 'fair and clear warning to officers' about what the law requires. [*White v. Pauly*] The district court, we note, did not have the benefit of *Pauly*. But we do, and accordingly we must follow its lead. Immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. .Arrington-Bey has not pointed to, and we have not found, any case like this one—a case showing to 'all but the plainly incompetent' that the officers at the scene immediately needed to seek medical treatment or that the jailers had to do the same once he arrived at the prison. . . .Arrington-Bey's case citations are at least one step removed from this fact pattern. We begin with, and could end with, the reality that she points to no Supreme Court or Sixth Circuit case that requires officers to take a delusional arrestee like Omar to a hospital rather than a jail. Each of Arrington-Bey's cases fails to address this point, and not one involves remotely comparable facts. . . .In short, no clearly established law, here or anywhere else from what we've seen, required the arresting officers to drive Omar to a hospital rather than the jail under these circumstances. . . .Even if the jail officers knew that Omar was bipolar and delusional, no clearly established law required them to do more than what they did: They kept him in seclusion for everyone's safety, waited until he was calm to feed him and book him, asked him about any psychiatric diagnoses during the medical screening, and after eight hours of detention uncuffed

him and released him from his cell to make a call to be released on bail. Because a reasonable officer in the situations confronted by officers Honsaker, Ellis, Chow, Hill, Lee, Mudra, Sindone, and Leonardi could have believed their treatment of Omar was lawful, they each are entitled to qualified immunity.")

Scott v. Kent County, 679 F. App'x 435, 441 (6th Cir. 2017) ("While Scott was being removed from a cell for disruptive conduct, he stepped towards Lyons in close quarters, unhandcuffed and with clenched fists. We have not found other Supreme Court or Circuit precedent that would have put Lyons on notice that his takedown was an excessive use of force in this situation. Because Scott has not met his burden on this inquiry, we affirm the district court's grant of summary judgment to Lyons on the basis of qualified immunity.")

Scott v. Kent County, 679 F. App'x 435, 441-42 (6th Cir. 2017) (Moore, J., dissenting) ("I disagree with the majority that Lyons is entitled to qualified immunity. There is ample evidence that 'the right which was violated was clearly established' in our circuit. . . We have held that an officer's conduct is not objectively reasonable where he performs a 'takedown' of an individual already in custody, who, despite being argumentative and possibly intoxicated, was not actually aggressive against any officers. . . .Although the video confirms that Scott was unruly and yelling in the holding cell, there is no indication that he was being physically aggressive toward any officers.")

Hermansen v. Thompson, No. 16-6197, 2017 WL 438225, at *3–4 (6th Cir. Feb. 1, 2017) (not published) ("As recently as last month, the Supreme Court unanimously and insistently reaffirmed its repeated admonition that, for purposes of qualified immunity, 'clearly established law' is not to be defined 'at a high level of generality,' but must be defined in a 'particularized' sense. . . The Court reiterated that although 'general statements of the law are not inherently incapable of giving fair and clear warning' to government officials, their conduct is protected by qualified immunity unless its unlawfulness was 'apparent' or 'obvious' in light of pre-existing law. . .Applying this teaching, we find the instant record devoid of support, in fact or law, for the notion that it should have been obvious to defendants that their provision of kosher food products to Hermansen, prepared in a separate kitchen facility, was nonetheless violative of his First Amendment free exercise rights because the same utensils used to prepare or serve otherwise approved meat products had also been used to prepare or serve otherwise approved dairy products, at some point, without having first been kashered and certified by a rabbi. Hermansen contends these defendants are without excuse because they were on notice of the *Froman* case, where Kosher Meal Program Guidelines were implemented by agreement at KSR as early as 2010. Yet, even if one or more of the individual defendants was actually aware of the guidelines implemented by agreement at KSR, the fact remains that no court had, in authoritative precedent, interpreted the First Amendment as requiring strict compliance with the guidelines, whether at KSR or elsewhere. Even though the *Froman* agreement was enforced by district court order, it never ripened into a precedential ruling on the merits of the free exercise claim. The *Froman* agreement simply did not become precedent defining the 'clearly established law.' Accordingly, there was no error in the district court's ruling

that defendants are protected from damages liability by qualified immunity and are therefore entitled to summary judgment on Hermansen's First Amendment claim under 42 U.S.C. § 1983.")

Courtright v. City of Battle Creek, 839 F.3d 513, 520 (6th Cir. 2016) ("Having failed to establish that Courtright's factual allegations did not plausibly allege the violation of a constitutional right, the defendants argue, in the alternative, that it was not clearly established that handcuffing *without* physically injuring the suspect constitutes excessive force. The premise of this argument is flawed. As discussed, Courtright *did* suffer physical injury: he suffered pain as a result of the manner in which he was handcuffed. Moreover, the relevant clearly established right in our circuit is 'freedom from excessively forceful or unduly tight handcuffing.'. . 'Requiring any more particularity than this would contravene the Supreme Court's explicit rulings that neither a "materially similar," "fundamentally similar," or "case directly on point"—let alone a factually identical case—is required, and that the specific acts or conduct at issue need not previously have been found unconstitutional for a right to be clearly established law.'. . Therefore, we affirm the district court's order denying the motion to dismiss the excessive-force claim based on qualified immunity.")

Stamm v. Miller, 657 F. App'x 492 (6th Cir. 2016) ("We have held that '[i]t has been settled law for a generation that, under the Fourth Amendment, '"w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."'. . Though *Walker* was decided after the events giving rise to this case, its principle was not new, as we explicitly noted. In that case, which involved a collision similar to the one here, we noted that '[i]t is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force.'. . Thus, it is clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others. The evidence, construed in the light most favorable to Mrs. Stamm, indicates a violation of a clearly established constitutional right. Under Mrs. Stamm's version of the facts, Miller intended to block Stamm's passage with his police cruiser, causing the deadly collision. As the district court observed, the risk to others at the time of Miller's use of force was minimal, as there were no other vehicles in sight, and Stamm's motorcycle posed little threat to Miller, who was inside a much-larger vehicle. Because the facts as interpreted in the light most favorable to Mrs. Stamm indicate a violation of a clearly established constitutional right, and material facts are in dispute, the district court properly denied summary judgment to Miller").

Gohl v. Livonia Public Schools School Dist., 836 F.3d 672, 680-81 (6th Cir. 2016) ("The head-grabbing incident here mirrors the head-grabbing incident in *Domingo* and involves far less illegitimate force than the act of binding a student to a gurney and gagging him. What was true in *Domingo* is true here. While Turbiak's 'educational and disciplinary methods ... may have been inappropriate' and 'insensitive,' they are not 'unconstitutional.'. . . The Fourteenth Amendment's right to be free from excessive force may include, we have said, protection from *physical* force that causes only psychological injury. . . But we have never said that purely psychological bullying can suffice to shock the conscience. And we certainly have not said so with clarity that 'place[s]

the ... constitutional question beyond debate.'. . That necessarily means that the right Gohl asserts is not clearly established, making Turbiak eligible for qualified immunity.")

Gohl v. Livonia Public Schools School Dist., 836 F.3d 672, 698 (6th Cir. 2016) (Clay, J., dissenting) ("By fundamentally misapplying well-settled summary judgment standards, ignoring some of the most important facts, and disregarding evidence favorable to Gohl, the majority reveals how result-oriented it is in attempting to reach its own conclusions. The majority's approach to this case sidesteps the Supreme Court's clear direction that when reviewing a summary judgment decision, an appellate court must examine the evidence in the light most favorable to the nonmoving party and draw all inferences in that party's favor. This basic and fundamental principle of civil procedure seems lost on the majority in this case. All that matters here is that Gohl has presented enough evidence to create a genuine issue of material fact on each of her claims, and as a result, her case should go to a jury. For these reasons, this case should be reversed and remanded. I respectfully dissent.")

Gavitt v. Born, 835 F.3d 623, 648 (6th Cir. 2016) ("In *Osborne*, 557 U.S. at 68, the Supreme Court noted that 'nothing in our precedents' suggests that the prosecutor's obligation to disclose *Brady* material to the defendant before trial continues after the defendant is convicted and the case is closed. Gavitt has failed to cite any contrary authority. To the extent due process *could* be deemed to include such an obligation, it is not yet a matter of clearly established law and defendants are entitled to qualified immunity.")

D.E. v. Doe, 834 F.3d 723, 729, 733 (6th Cir. 2016) (Keith, J., concurring in the judgment) ("I cannot join the majority's interpretation of the Fourth Amendment. In holding that Customs and Border Protection ("CBP") officers may, without reasonable suspicion, search individuals who are not in the process of crossing an international border, the majority stretches the 'border search' exception to its breaking point. . . .While I am inclined to conclude that the right was clearly established, three other judges (the two on this panel, and the district court judge) have concluded—for whatever reason—that our unpublished decision in *Humphries* can be read as sanctioning the conduct in this case. While I disagree for the reasons explained above, *Humphries*' supposed muddling of the waters in this area compels me to conclude that it less likely that a reasonable official would have known that his conduct violated a clearly established right. *See Sheets v. Moore*, 97 F.3d 164, 168 (6th Cir. 1996) ("If federal district judges could reasonably disagree over the constitutionality of the regulation, then it can fairly be said that a reasonable official would not have known that his conduct violated a clearly established right."). Therefore, I concur in the judgment of the majority to dismiss D.E.'s civil rights complaint.")

Schattilly, ex rel A.F. v. Daugharty, 656 F. App'x 123, ___ (6th Cir. 2016)("With respect to her first claim, Schattilly has not identified any cases that support her contention that, in May 2011, it was clearly established that interviewing a juvenile about suspected parental abuse or neglect without parental consent violates a parent's First Amendment or Fourteenth Amendment rights. This is not surprising. First, these rights are typically grounded in the Fourteenth Amendment, not

the First Amendment. . . And second, we recently held that as of January 2011, this right—as it pertains to the Fourteenth Amendment—was *not* clearly established. *See Barber v. Miller*, 809 F.3d 840, 842 (6th Cir. 2015). . . . Additionally, in an unpublished case, we held that, as of January 2010, it was not clearly established that interviewing a child in an abuse-and-neglect investigation without the parent's consent violated the parent's Fourteenth Amendment rights. *Brent v. Wenk*, 555 F. App'x 519, 530 (6th Cir. 2014). Schattilly does not provide any bases on which to distinguish *Barber* or *Brent*, nor does she point to any developments in the law from January 2011 to May 2011 that would warrant a different conclusion. . . Accordingly, we hold that officials do not violate clearly established First Amendment or Fourteenth Amendment rights by interviewing a child about suspected abuse or neglect by the parent without the parent's consent.")

Williams v. Morgan, 652 F. App'x 365, 374-75 (6th Cir. 2016) ("Officer Morgan also argues that the prohibition against this force was not clearly established. That is, under the facts established for purposes of this appeal, Officer Morgan is contending that he had no forewarning that it would be improper for him to accost a 13-year old girl, without provocation or resistance, use his size advantage to place her physically against a wall; verbally menace or threaten her while he twisted her arm behind her back and lifted her off the floor until he broke that arm; and then maintain pressure on that broken arm, despite her pleas for relief, as he forced her down the hall to the principal's office with further verbal threats. We disagree. This was clearly established. *See Norton v. Stille*, 526 F. App'x 509, 513-14 (6th Cir. 2013) (holding that the prohibition against gratuitous force was clearly established as of October 2010). But, even lacking a specific case on point, we conclude that this conduct, as alleged, was so gratuitous that Officer Morgan was nonetheless 'on notice that [this] conduct violate[d] established law even in novel factual circumstances.' *See Hope*, 536 U.S. at 741. Officer Morgan is not entitled to qualified immunity on this basis.")

Smith v. City of Wyoming, 821 F.3d 697, 711 (6th Cir. 2016) ("On the facts developed thus far, taken in a light favorable to Smith, the officers violated her Fourth Amendment rights when they made a warrantless entry into her home on March 9, 2012. The Supreme Court has consistently validated the right to retreat into one's home and avoid contact with the police. . . Any reasonable officer would have understood that to enter a private home after being expressly told the occupant could not speak with him, in the course of a routine child welfare check, flies in the face of this clearly established law. Qualified immunity does not protect the officers from liability for the constitutional violation under these circumstances. We therefore vacate the entry of judgment for the officers on this claim.")

Rapp v. Putman, 644 F. App'x 621, 627-28 (6th Cir. 2016) ("To state a valid Fourth Amendment malicious-prosecution claim, a plaintiff must establish four elements: (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor. . . . The sole basis for plaintiff's retaliation claim against Poston is his refusal to intervene and stop the

prosecution. Even reading plaintiff's complaint generously, it alleges a merely 'passive[ ] or neutral [ ]' role in the prosecution, insufficient to state a claim for malicious prosecution. . . Finally, by far the most evident deficiency in plaintiff's complaint is his failure to allege the third element, a 'deprivation of liberty.'. . Nowhere in his complaint does plaintiff allege that he was 'seized' or otherwise detained following the issuance of the citation. . . .The closest he comes is alleging that he 'was subject to the authority of the 54–B District Court or appellate Courts as a direct and proximate result of the conduct of Defendants.' This allegation echoes Justice Ginsburg's 'continuing seizure' doctrine from her concurrence in *Albright v. Oliver,* 510 U.S. 266 (1994), in which she argued that 'a defendant [released pretrial] is ... indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges.'. . However, neither the Supreme Court nor this court has adopted the 'continuing seizure' doctrine. . . Thus, even if we assume that being 'subject to the authority of the [court]' constitutes a Fourth Amendment seizure, defendants would still be entitled to qualified immunity because the particularized right alleged—the right to be free from a 'continuing seizure' by virtue of a pending criminal charge—is not clearly established. . . .Having failed to adequately allege several elements of his malicious-prosecution claim, plaintiff has failed to show that defendants violated his constitutional rights. As a result, the district court was correct to dismiss the malicious-prosecution claim, not because it was untimely, but because defendants are entitled to qualified immunity.")

Brown v. Chapman, 814 F.3d 447, 460-62 (6th Cir. 2016) ("The heart of the parties' dispute is over the third factor—whether Brown was actively resisting arrest or attempting to evade arrest by flight. . . .The parties' dispute is resolved by the constraints placed on this court at this point in the litigation. We are obligated to take the plaintiff's facts as true and make all reasonable inferences from those facts in her favor. Accordingly, for the purposes of summary judgment, we assume that the facts show that Brown broke away from the officers in order to avoid further injury, that he was standing still at the time Chapman tasered him, and that therefore Brown was not actively resisting or evading arrest. Thus, a jury could find that Chapman's actions were not objectively reasonable in light of the facts and circumstances confronting him. . . . Mindful of the need to define the right narrowly, . . . we frame this question as whether Brown's right not to be tasered, after having broken away from police officers but while not threatening others or actively resisting arrest, was clearly established as of December 31, 2010. . . .In conducting this analysis, two lines of cases emerge. The first line of cases has held that there is no clearly established right not to be tasered when a suspect is actively resisting arrest. . . .The second line of cases has held that an individual's right to be free from a taser is clearly established when the individual is not actively resisting arrest or is already detained. . . .The right articulated above fits squarely within this second line of cases: as of December 31, 2010, it was clearly established that tasering a non-threatening suspect who was not actively resisting arrest constituted excessive force. Accordingly, Chapman is not entitled to summary judgment regarding the claimed Fourth Amendment violation based on his use of a taser.")

Gardner v. Evans, 811 F.3d 843, 846-48 (6th Cir. 2016) ("First, we address whether a constitutional violation occurred. The Tenants argue that the Inspectors violated their due process

rights by failing to provide constitutionally sufficient notice of their ability to appeal the red-tag evictions. . . In response, the Inspectors assert that the telephone number and the offer to answer questions was sufficient to satisfy the constitutional notice requirement. . . They also assert that, because the Lansing Housing and Premises Code was extant and available to the public, the Tenants had constructive notice of the appeals process. . . The district court agreed with the Tenants, holding that our precedent in *Flatford* clearly established that direct and clear notice of an appeals process is necessary to satisfy the constitutional notice requirement. . . .For purposes of deciding this case, we need not determine whether the red-tags provided by the Inspectors meet the constitutional notice standard that we have just outlined. Even if we assume, without deciding, that the Tenants are correct and that the red-tags were constitutionally infirm, the Tenants cannot satisfy the second prong of the qualified immunity analysis, namely, whether this constitutional notice requirement was clearly established. . . .*Flatford* stands for the principle that the tenant is entitled to the same notice that is afforded to the landlord. But it does not clearly establish the particularity or specificity required for such notice. A diversity of precedent highlights this general lack of clarity regarding the notice requirement for a post-deprivation appeals process. . . . *Flatford* did not clearly establish that a notice of eviction must include an explicit reference to the availability of any post-deprivation appeals process and the manner in such an appeal may be pursued. The case law is not so clear on this point as to render the Inspectors' actions unreasonable.")

Snow v. Nelson, 634 F. App'x 151, ___ (6th Cir. 2015) ("Here, the State did not secure a criminal conviction by improperly withholding exculpatory evidence. On the contrary, the record is clear that the State was complying with discovery requests. Moreover, there is no question that before a plea was discussed or trial dates set, Snow's attorney learned of the allegedly exculpatory information. Perhaps Snow would have been released earlier had the alleged misidentification come to light sooner, but he can have no complaints about the ultimate *outcome* of his case. The fifty-two days Snow spent in jail awaiting a plea or a trial is simply not the type of deprivation *Brady* claims are intended to remedy. Even were we to recognize a *Brady* claim in this context, defendants would be entitled to qualified immunity. As we held in *Robertson v. Lucas,* our precedent does not support any clearly established right of criminal defendants to receive exculpatory *Brady* material before plea bargaining. . . There, the court found that while every reasonable officer 'would know that they were under an obligation to present *Brady* material to the prosecutors in time for its effective use at trial,' the officers were under 'no clearly established obligation to disclose exculpatory *Brady* material to the prosecutors in time to be put to effective use in plea bargaining.'. . Here, Snow's attorney was aware of the alleged misidentification prior to any plea bargaining. Thus, defendants are well within the ambit of qualified immunity.")

Devlin v. Kalm, 630 F. App'x 534, 538-39 (6th Cir. 2015) ("Devlin also must show that his First Amendment rights in this setting were clearly established when the agency fired him on July 24, 2008. This is rarely an easy question given the fact-specific nature of *Pickering*-balancing inquiries, but Devlin satisfies the test in this instance. It was well established that Devlin's speech on the regulation of tribes addressed a matter of public concern. . . And it was well established that

he spoke outside the duties of his employment. . . As to the third question, our *Pickering* caselaw points in the same direction. It was well established by mid–2008 that Devlin's speech 'substantially involved matters of public concern' and thus the officers had to 'make a particularly strong showing that the employee's speech interfered with workplace functioning before taking action.'. . And a reasonable officer could not find that Devlin's speech was sufficiently disruptive of the internal workplace—which *Pickering* balancing is primarily focused on—to lose protection. . . . In scenarios such as this one—where the violation of a constitutional right is 'so obvious that a materially similar case would be unnecessary'—a case directly on point (which is lacking here) is not required. *Paterek v. Vill. of Armada,* 801 F.3d 630, 651–52 (6th Cir.2015). Devlin's First Amendment rights were clearly established.")

Stinebaugh v. City of Wapakoneta, 630 F. App'x 522, 531 (6th Cir. 2015) ("Rains and Krites argue that they are entitled to qualified immunity because reasonable officials could have believed that Stinebaugh's speech was not protected. We disagree. The district court properly found that reasonable officials in Rains's and Krites's positions could not have believed their conduct was lawful given the state of the law as it existed at the time of the events giving rise to this action. . . . Likewise, it is clearly established in this circuit that an off-duty public employee who speaks to city council members about city expenditures may be a private citizen for First Amendment purposes, even if those comments involve expenditures by his own agency or department. . .Thus, the district court properly denied qualified immunity.")

Bible Believers v. Wayne Cnty., Mich., 805 F.3d 228, 252, 257-60 (6th Cir. 2015) (en banc) ("The Supreme Court, in *Cantwell, Terminiello, Edwards, Cox,* and *Gregory,* has repeatedly affirmed the principle that 'constitutional rights may not be denied simply because of hostility to their assertion or exercise.'. . . If the speaker's message does not fall into one of the recognized categories of unprotected speech, . . . the message does not lose its protection under the First Amendment due to the lawless reaction of those who hear it. Simply stated, the First Amendment does not permit a heckler's veto. In this Circuit, a modicum of confusion is understandable with respect to the prohibition against the heckler's veto due to *Glasson*'s discussion of a good-faith affirmative defense. However, this defense is inconsistent with subsequent Supreme Court precedent, with the strict scrutiny that must be applied to content-based discrimination, and with the superseding affirmative defense to a § 1983 suit—qualified immunity. . . Therefore, to the extent that *Glasson'*s good-faith defense may be interpreted as altering the substantive duties of a police officer not to effectuate a heckler's veto, it is overruled. . . . Whether Deputy Chiefs Richardson and Jaafar can be held liable for civil damages is a separate question from whether their actions violated the Constitution. . . Although *Glasson* spoke about a good-faith defense, qualified immunity—announced seven years after *Glasson* in *Harlow v. Fitzgerald*—is the presently available affirmative defense for government officials subject to liability under § 1983. . . . Deputy Chief Defendants Richardson and Jaafar contend that, 'no "clearly established" law existed on the subject of correct law enforcement response to a situation where speakers may or may not be engaged in protected speech, the audience in proximity to the speech reacts violently, and the deputies do not have sufficient manpower to restrain the audience, to protect the speakers,

and to ensure their own safety.'. . The Deputy Chiefs' position is untenable and unsupported by the record. As is evident from the Supreme Court opinions detailed above, and as explicitly stated in *Glasson*, '[a] police officer has the duty not to ratify and effectuate a heckler's veto.... Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights.'. . Defendants were specifically put on notice of this requirement, insofar as the Bible Believers quoted this precise language in a letter that was sent to Wayne County. To the extent that *Glasson*'s discussion of a good-faith defense confused the issue of whether a heckler's veto constitutes a constitutional violation, the facts and analysis in *Glasson* nonetheless alerted Defendants that removing a peaceful speaker, when the police have made no serious attempt to quell the lawless agitators, could subject them to liability. . . .Defendants emphasize the fact that *Glasson* involved an officer tearing up a sign in response to agitated hecklers, as opposed to officers removing a speaker in an attempt to quell an angry crowd that was actually engaged in violent retaliation. These distinctions are immaterial. The violence here was not substantial, much less overwhelming, and speech, whether it be oration or words written on a poster, is speech nonetheless. Moreover, this case was also about removing from view signs that were considered offensive by a group of hecklers—as Israel informed the Deputy Chiefs, his group was no longer preaching during the latter portion of the onslaught against them. Finally, it should be noted that *Glasson* involved a more compelling state interest—protection of the President—yet the officers' actions were still deemed to be unreasonable. . . .Had the Bible Believers refused to leave, and consequently been arrested, charged, and convicted of disorderly conduct, the convictions could certainly be held invalid pursuant to *Gregory*. . . The Bible Believers' decision to comply with the police officers' demands, under threat of arrest for disorderly conduct—as opposed to the speaker's decision in *Gregory* to disregard the officer's command—cannot stand for the proposition that there was no clearly established law as to whether the police may threaten to arrest a peaceful speaker in order to calm a hostile crowd of hecklers. . . *Gregory*, like this case, involved protestors who used offensive language and, in response, were assaulted with debris by a violent crowd of hecklers. On facts such as these, state-sanctioned penalties for alleged breaches of the peace cannot withstand constitutional scrutiny.")

Welch v. Spaulding, 627 F. App'x 479, 484 (6th Cir. 2015) ("The legal question of immunity will ultimately depend on which version of the facts the jury finds most credible. *Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir.1989). Thus, we find as a matter of law that it is clearly established that the prison must provide adequate nutrition to prisoners, despite religious restrictions. Welch has demonstrated that his allegations—if accepted by a jury—give rise to a constitutional violation. He has therefore made *Plumhoff's* required showing to defeat defendants' claim of qualified immunity at this stage, and established a genuine issue of material fact regarding whether the particular restricted diet in his case was so lacking as to violate this established right. Accordingly, we AFFIRM the district court's order denying qualified immunity.")

Welch v. Spaulding, 627 F. App'x 479, 484-88 (6th Cir. 2015) (McKeague, J., dissenting) ("This qualified-immunity case presents two purely legal questions of constitutional interpretation. After taking the facts in the light most favorable to the plaintiff—*i.e.*, that the prisoner (Welch) received

only 1,300 calories a day for the month of his religious fast—we must decide (1) whether administering such a diet violated the Constitution; and (2) if so, whether that violation was clearly established at the time of the fast. . . . The majority answered 'yes' to both questions, affirming the district court's denial qualified immunity. I would answer 'no' to both, because Welch has not met his burden of producing evidence that shows a constitutional violation, much less a clearly established one. The majority, however, affirms the district judge's improper denial of qualified immunity—improper both because (A) Welch did not meet his burden of producing evidence that the officials violated the Constitution; and because (B) even if they did violate the Constitution, the right at issue was not clearly established. Accordingly, I respectfully dissent. . . . It all, then, boils down to this: The majority holds that the First Amendment requires a specific number of calories during a religious fast. That's the only possible way to understand its judgment. It doesn't matter that the lower number of calories didn't cause *any* substantial burden-none. All that matters is that the number of calories the plaintiff received was less than the other inmates or others in the plaintiff's age group. Lacking even an alleged substantial burden, Welch cannot make out a First Amendment violation. . . .As misguided as the majority's novel constitutional holding is, the error in its determination of the clearly established law is worse. Even assuming the defendants violated Welch's First Amendment right to a nutritionally adequate diet during a prison fast, how can we *possibly* hold that such a violation was clearly established? There is simply *no way* that '*every* reasonable official would have understood' that administering a 1,300–calorie–per–day diet for thirty days during an inmate's religious fast—with no evident or even alleged adverse effects to the inmate—violates the First Amendment. . . These officials should not be subject to personal liability because, if nothing else, Welch has not met his burden of showing that they violated a 'clearly established' constitutional right. . . . I've already gone through all the cases the majority cites, and none of them establishes anything more than the generalized right to a 'nutritionally adequate diet' during a religious fast. That was enough for the district court, and it's apparently enough for the majority, too. But it shouldn't be. The Supreme Court has 'repeatedly told courts ... not to define clearly established law at a high level of generality.'. . Courts must instead define the law in a *particularized* sense, by looking for a body of law that 'squarely governs' the conduct at issue. . . The majority's cited cases no more 'squarely govern' this case than *Graham v. Connor,* 490 U.S. 386 (1989), 'squarely governs' all excessive-force cases. . . Indeed, until now, *not one* Sixth Circuit case has even allowed this kind of alleged violation to proceed to a jury. How, then, can the right be clearly established? The majority's telling silence on this issue—and its telling failure to even *try* to support its prong-two conclusion with caselaw—suffices to demonstrate its error. If anything is clearly established here, it's that this was *not* a clearly established constitutional violation. . . .To affirm on the ground that the defendants violated a clearly established First Amendment right is wrong both because of the startling lack of facts to prove such a violation and because of the even-more-startling lack of caselaw to clearly establish that right.")

Paterek v. Vill. of Armada, Mich., 801 F.3d 630, 650-51 (6th Cir. 2015) ("Defendants contend that Delecke is entitled to qualified immunity with respect to each of the constitutional claims, but they fail to offer any analysis on this point, other than to say that Delecke's actions did not offend

the Constitution. This failure to address the clearly established prong of our inquiry is unsurprising given the complete absence of case law with remotely comparable fact patterns—a point, which at first glance, seems to weigh in favor of Delecke's claim for qualified immunity. . . However, 'a case directly on point' is not required to establish that the law is clearly established, *Ashcroft v. al-Kidd,* 563 U.S. 731, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011), because '[s]ome violations of constitutional rights are so obvious that a materially similar case' would be unnecessary, *Hearring v. Sliwowski,* 712 F.3d 275, 280 (6th Cir.2013). At bottom, the dispositive inquiry is whether, at the time of injury, the law was 'sufficiently clear [such] that a reasonable official would understand that what he [was] doing violate[d]' the plaintiff's constitutional rights. . . The allegations in this case, if proven, would constitute an obvious violation of Plaintiffs' constitutional rights of which any reasonable official should have been aware. Viewed in the light most favorable to Plaintiffs, the facts suggest that Delecke used his government post to harass and retaliate against Plaintiffs by causing tickets to be issued and by denying Plaintiffs the rights bestowed to them under their SALUs. It is fundamental that the right to be free of such retaliation, arbitrary and capricious state action, and disparate treatment with no rational basis is clearly established.")

Baynes v. Cleland, 799 F.3d 600, 611-16 & n.3 (6th Cir. 2015) ("In *Hope,* the Supreme Court established that, for purposes of qualified immunity, the precise factual scenario need not have been found unconstitutional for it to be sufficiently clear to a reasonable official that his actions violate a constitutional right—that is, for the right to be 'clearly established.'. . In fact, the Supreme Court determined that government officials can still be on notice that their conduct violates established law even in novel factual circumstances. . . .To be sure, the Supreme Court also has also explained that generalizations and abstract propositions are insufficient to establish the law clearly. . . .Reading these cases together, the Supreme Court has made clear that the *sine qua non* of the 'clearly established' inquiry is 'fair warning.'. . While it is apparent that courts should not define clearly established law at a high level of generality, it is equally apparent that this does not mean that 'a case directly on point' is required. . . In fact, under *Hope,* a requirement that a prior case be 'fundamentally' or 'materially' similar to the present case would be too rigid an application of the clearly established inquiry. . . Rather, 'existing precedent must have placed the statutory or constitutional question beyond debate,' *al-Kidd,* 131 S.Ct. at 2083, although the specific conduct need not have been found unconstitutional. . . Our task, then, is to determine whether the contours of the right at issue have been made sufficiently clear to give a reasonable official fair warning that the conduct at issue was unconstitutional. This test has been applied, both explicitly and implicitly, in our own jurisprudence. . . In applying this test, both pre- and post-*Hope,* we have found that freedom from excessively forceful or unduly tight handcuffing is a clearly established right for purposes of qualified immunity. . . .The extent of case law in this Circuit suffices to put a reasonable officer on notice that excessively forceful or unduly tight handcuffing is a constitutional violation under the Fourth Amendment. The cases in this Circuit place it beyond peradventure that such a right exists; thus, the law is sufficiently clear for the purpose of the clearly established prong of the qualified immunity analysis. These cases define the right that is clearly established not at a high level of generality or on the basis of a broad historical proposition, . . . but rather, in a particularized context: excessively forceful or unduly tight handcuffing, a type of

excessive force, is a type of Fourth Amendment violation, which, in turn, is a constitutional violation. This level of particularity in defining the constitutional right easily meets the standards set out by the Supreme Court, which requires that the contours of a right to be sufficiently clear under preexisting law. . . Although the court first found the constitutional right at issue clearly established in this Circuit, in its subsequent pursuit of what it called a 'more particularized inquiry,' it then determined that the law had not been clearly established, essentially because no prior case presented the exact factual circumstances present in this case. The factual nuances the district court noted to distinguish Baynes' case from this Court's extensive precedent on unduly tight handcuffing amount to precisely the kind of rigidity the Supreme Court foreclosed in *Hope. Hope* was unequivocal in mandating that precise factual similarity is not required . . . . In this case, under the guise of determining whether the law regarding excessively forceful handcuffing is clearly established, the district court essentially made a determination of whether it believed that Deputy Cleland's behavior was reasonable—in other words, whether the deputy should be *liable* for a claim of unduly tight or excessive handcuffing. But such a determination infringes on the province of the jury and is therefore improper. The trial court had already determined—appropriately so—that Baynes had adduced sufficient evidence to state a claim for excessively forceful handcuffing sufficient to survive a motion for summary judgment. Indeed, Baynes had established already that genuine issues of material fact exist as to whether the deputies acted objectively reasonably. Then, a few pages later, the district court decided that, based on its view of the facts, there was an 'absence of ... egregious, abusive, or malicious conduct' that 'support[ed] the reasonableness of the deputy's conduct.' Such a determination is inappropriate under a 'clearly established' analysis. Once a plaintiff demonstrates a genuine issue of material fact as to whether there has been a constitutional violation, by making out a claim of excessively forceful handcuffing sufficient to survive summary judgment, weighing the evidence and determining whether an officer should be liable are tasks exclusively for the jury. In this case, however, the district court turned the factual determinations best left to the jury into factors militating in favor of qualified immunity. That is not the role of the district court in analyzing the second prong of a qualified immunity analysis; rather, it is to determine whether the law was clearly established at the time of the allegedly unconstitutional conduct. As discussed, *supra*, while a right may not be 'clearly established' at a 'high level of generality' or by broad historical assertions, neither must the specific conduct at issue have been found unconstitutional for a reasonable officer to be on notice that the conduct is unconstitutional. Rather, the *contours* of the right must be sufficiently clear such that a reasonable officer has fair warning. . . Such is the case in the Sixth Circuit with respect to the law surrounding excessively forceful or unduly tight handcuffing under the Fourth Amendment. Because, in the Sixth Circuit, the right to be free from excessively forceful or unduly tight handcuffing under the Fourth Amendment is clearly established law, no more specificity in defining this right is required. We recognize, however, that the district court's error was based in part on reliance on our unpublished decisions in *Fettes v. Hendershot,* 375 F. App'x 528 (6th Cir.2010) and *Lee v. City of Norwalk, Ohio,* 529 F. App'x 778 (6th Cir.2013). We also note that the case of *O'Malley v. City of Flint,* 652 F.3d 662 (6th Cir.2011), would seem to disagree with our conclusion here.").

Coley v. Lucas Cnty., Ohio, 799 F.3d 530, 540-41 (6th Cir. 2015) ("The key inquiry is whether a defendant claiming qualified immunity 'was on notice that his alleged actions were unconstitutional.'. . The inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . We look first to Supreme Court decisions, then Sixth Circuit case law in order to determine if the right claimed was clearly established when the events occurred. . . The plaintiff 'has the burden of showing that a right is clearly established,' while the defendant 'carries the burden of showing that the challenged act was objectively reasonable in light of the law existing at the time.'. . At the time of the incident, pretrial detainees had a clearly established right not to be gratuitously assaulted while fully restrained and subdued. . . Under the Fourteenth, Fourth, or Eighth Amendments, assaults on subdued, restrained and nonresisting detainees, arrestees, or convicted prisoners are impermissible. . . The facts alleged show that Schmeltz assaulted the fully restrained Benton so that he fell and hit his head on the cement floor. Schmeltz then attempted to cover up the assault by filing false reports and lying to federal investigators after Benton's death. These actions reasonably lead us to conclude that Schmeltz violated clearly established law and was 'on notice that his alleged actions were unconstitutional.'. . Schmeltz's argument that his actions did not violate clearly established law fails. . . . Having determined that Gray violated Benton's constitutional rights, we turn again to whether the right in question—to be free from deadly physical force such as a chokehold while fully restrained—was clearly established, providing Gray notice that 'what he [was] doing violate[d] that right.'. . Our cases make it abundantly clear that it is constitutionally impermissible to abuse a shackled prisoner to the point of death and then leave him to die in his cell. . . Chokeholds are objectively unreasonable where an individual is already restrained or there is no danger to others. . . Gray's actions as described in the complaint violated clearly established law: Gray put Benton in a chokehold and continued to choke him even after Gray heard him gurgling and another officer told Gray to stop, and Gray left Benton in his cell without medical care. Gray's efforts to hide evidence of his actions, by filing false reports and lying to federal investigators, reasonably lead to the conclusion that he knew he had violated the law. In short, like Schmeltz, Gray behaved like someone who 'was on notice that his alleged actions were unconstitutional.'. . Gray's argument that his actions did not violate clearly established law thus also fails.")

Gradisher v. City of Akron, 794 F.3d 574, 584-86 (6th Cir. 2015) ("Gradisher argues that his 'right to be free from a warrantless forced entry absent exigent circumstances was clearly established on September 2, 2011, and, therefore, these defendants are not entitled to qualified immunity.' But Gradisher frames the issue at too high a level of generality. . .The appropriate question to ask is whether, on September 2, 2011, it was clearly established that no exigent circumstance exists when officers enter a residence in response to multiple erratic 911 calls from there and when they believe that someone inside may have threatened the use of a gun. . . .Viewing the facts in the light most favorable to Gradisher, we are unpersuaded that the defendants violated any of his clearly established rights by entering his house. As our precedent establishes, such an entry may be justified if there is evidence that an individual in a residence has a gun and officials receive a 911 call from within that residence that was hung up. . . . The parties dispute whether or not Gradisher was resisting or refusing to be handcuffed. . . . Thus, whether Gradisher resisted or not and whether

he was given an opportunity to comply with commands before, and while, being tased are material facts in dispute. 'Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.'. . Accordingly, we reverse the district court's grant of summary judgment to Officer Craft on Gradisher's excessive-force cause of action.")

Booker v. Lapaglia, 617 F. App'x 520, 525-26 (6th Cir. 2015) ("A remand here will result in the district court developing the factual record. Despite the dissent's contentions, Shelton's specific role in the search and his relationship to LaPaglia and the other officers involved in the hospital search cannot be determined on the present record. Despite the lack of record, the dissent improperly reads like an order granting summary judgment against Shelton in Booker's favor by focusing on various facts irrelevant to Shelton's liability, like events leading up to the hospital search not alleged to be constitutional violations. While the dissent suggests there is nothing to be gained from a remand, such factual development of the record may very well entitle Shelton to qualified immunity. At the very least, he will have been heard on that issue. But as it stands now, we cannot distinguish between Shelton's involvement and that of the other officers as is required by our precedent. . . We therefore vacate and remand for the district court to address Shelton's role in the search and to properly evaluate his qualified immunity defense.")

Booker v. Lapaglia, 617 F. App'x 520, 527, 532-35 (6th Cir. 2015) (Karen Nelson More, J., dissenting) ("This appeal is ripe for adjudication because there is nothing more for the district court to do; the record will not change, and neither will the law as of February 12, 2010. . . . When the record is viewed in the light most favorable to Booker, this search violated the Fourth Amendment. A reasonable jury could find that Shelton caused, watched, and was complicit in the unconstitutional searches, and therefore violated the Fourth Amendment. . . .Even if we were not bound by *Booker I*, however, I would have no trouble finding that the law was clearly established in February 2010 that an officer cannot use private parties to conduct illegal searches. . . . I also believe that it was clearly established that this search was far more invasive than other searches the Supreme Court and other circuits have found unconstitutional. The Supreme Court has declared that forcible surgery and induced vomiting are unreasonable investigative searches. . . I do not have to strain to conclude that penological goals do not justify anesthetizing, paralyzing, intubating, and anally probing someone if induced vomiting is 'too close to the rack and screw to permit constitutional differentiation.'. . Both *Rochin* and *Winston* significantly predate this search. . . . Finally, our holding that, on February 12, 2010, the right to be free from forced anesthetization, paralyzation, intubation, and warrantless rectal examinations to prevent a suspect from overdosing on drugs lodged in his rectum was clearly established is consistent with the Ninth Circuit. In *George v. Edholm*, the Ninth Circuit concluded that a warrantless digital rectal examination and forced sedation and intubation violated the Fourth Amendment. . . Not only was it a constitutional violation, but the right to be free of that procedure had been clearly established long before March 13, 2004. I see no reason to create a circuit split, and therefore would hold that no reasonable officer would believe that this search was reasonable under the circumstances apparent in this record.")

Rudlaff v. Gillispie, 791 F.3d 638, 641-44 (6th Cir. 2015) ("Our cases firmly establish that it is *not* excessive force for the police to tase someone (even multiple times) when the person is actively resisting arrest. . . Active resistance includes 'physically struggling with, threatening, or disobeying officers.'. . And it includes refusing to move your hands for the police to handcuff you, at least if that inaction is coupled with other acts of defiance. . .But active resistance does not include being 'compliant or hav[ing] stopped resisting,'. . . or having 'done nothing to resist arrest,' or having 'already [been] detained[.]'. . .A simple dichotomy thus emerges: When a suspect actively resists arrest, the police can use a taser (or a knee strike) to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot. . . .A reasonable police officer observing this scene in the heat of the moment did not need to give Carpenter any more time to comply before tasing him. Because Carpenter 'actively resist[ed] arrest and refus[ed] to be handcuffed,'. . . a reasonable jury applying the law of our circuit could conclude only that the officers were constitutionally able to use the force they did to subdue him. . . .Now assume we got it completely wrong. On the constitutional point (prong one), assume Carpenter gets it right: The officers violated the Fourth Amendment because Carpenter did not resist *enough* to justify the knee strike or the one-time use of a taser. We would still have to reverse. . . .The district court wrote that 'this case do[es] not fall neatly into the[ ] categories' of clearly established taser law. . . That's a concession that it could find no clearly established constitutional violation, and the court should have stopped there—and held for the defendants. In fact, we have done the same in an excessive-force case that 'does not fit cleanly within' our taser case law . . . because qualified immunity operates in the 'hazy border between excessive and acceptable force.'")

Rudlaff v. Gillispie, 791 F.3d 638, 644, 647-48 (6th Cir. 2015) (Bernice Bouie Donald, J., concurring only in the judgment) ("In my view, the facts in this case—properly construed in Lawrence Carpenter's favor—did not justify the level of force employed by the officers. However, in light of the Supreme Court's recent heightening of the second prong of the qualified-immunity standard, I agree with the majority that the officers in this case are entitled to qualified immunity. Because I would hold that the officers' nearly immediate resort to the use of a taser constituted excessive force, I concur only in the judgment. . . . In its recent pronouncements on qualified immunity, the Supreme Court arguably has heightened the standard to clarify that a right is clearly established if it is 'sufficiently clear "that *every* reasonable official would [have understood] that what he is doing violates that right."'. . . Prior case law merely required a right to be 'sufficiently clear that *a* reasonable official would understand that what he is doing violates that right'—not *every* reasonable official. . . Nor was any identical case required to be on point . . . . Now, however, the law at the time of the officers' conduct must have placed the constitutional question 'beyond debate.'. . Here, as demonstrated by my disagreement with the majority regarding the constitutionality of the officers' use of a taser in this scenario, the constitutional question is not—as it must be—'beyond debate.'. . I would hold that the officers' practically immediate resort to the use of a taser in this 26–second encounter violated Carpenter's Fourth Amendment right to be free from the use of excessive force. But because the question is debatable, it cannot be said that

the officers' mistaken belief in the justification of their actions signals that they are 'plainly incompetent' or 'knowing[ ] violat[ors of] the law.'. .Accordingly, I concur only in the judgment.")

Webb v. United States, 789 F.3d 647, 659-60, 662, 670 (6th Cir. 2015) ("To succeed on a malicious-prosecution claim under *Bivens* or § 1983, a plaintiff must prove the following: (1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceedings, the plaintiff suffered a deprivation of liberty apart from the initial arrest; and (4) the criminal proceeding was resolved in the plaintiff's favor. . . As there is no dispute that Webb and Price were deprived of their liberty as a result of criminal proceedings that were resolved in their favor, we focus on the first and second elements. Within the meaning of the first element, 'the term "participated" should be construed within the context of tort causation principles. Its meaning is akin to "aided." To be liable for "participating" in the decision to prosecute, the officer must participate in a way that aids in the decision, as opposed to passively or neutrally participating.'. . Webb and Price were arrested and charged following grand-jury indictments. As a general rule, 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause.' . . An exception to this general rule applies when defendants knowingly or recklessly present false testimony to the grand jury to obtain the indictment. . . .A law-enforcement defendant is deliberately indifferent—and therefore not entitled to qualified immunity—if he mistakenly identifies an individual as a suspect when the individual does not match the suspect's description. . . . Because there is a dispute of material fact as to whether Webb and Conrad looked alike, we cannot determine that it was objectively reasonable for Lucas to believe that the person who sold him drugs on October 14, 2005, was Webb unless he undertook appropriate efforts to confirm Webb's identity in light of potential differences. Nothing in the record indicates that Lucas undertook such efforts. Accordingly, a jury could reasonably conclude that Lucas's grand-jury testimony contained knowing or reckless falsehoods as to the identity of the person who sold him drugs, and therefore the grand-jury indictment against Webb cannot be the basis for probable cause at summary judgment. . . . The district court held that all individual Defendants were entitled to qualified immunity with respect to Price's fabrication-of-evidence claims because there was independent evidence to support probable cause. . . But there are genuine issues of material fact as to the existence of probable cause against Price. More importantly, even if independent evidence establishes probable cause against a suspect, it would still be unlawful for law-enforcement officers to fabricate evidence in order to strengthen the case against that suspect. . . Accordingly, it was improper for the district court to grant summary judgment to Lucas, Metcalf, and Faith for fabricating evidence against Price on the basis that there was probable cause to charge Price.")

Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1131-34 (6th Cir. 2015) ("In today's case, Officer Bright relies on two 'specific and articulable facts': Northrup's open possession of a firearm and the 911 call about what Northrup was doing. The Fourth Amendment no doubt permitted Bright to approach Northrup and to ask him questions. But that is not what he did. He relied on these facts to stop Northrup, disarm him, and handcuff him. Ohio law permits the open

carry of firearms, Ohio Rev.Code § 9.68(C)(1), and thus permitted Northrup to do exactly what he was doing. While the dispatcher and motorcyclist may not have known the details of Ohio's open-carry firearm law, the police officer had no basis for such uncertainty. If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes. *Heien v. North Carolina*, 135 S.Ct. 530, 540 (2014). Clearly established law required Bright to point to evidence that Northrup may have been 'armed *and dangerous.*' *Sibron v. New York*, 392 U.S. 40, 64 (1968) (emphasis added). Yet all he ever saw was that Northrup was armed—and legally so. . . . This requirement and the impropriety of Officer Bright's demands are particularly acute in a State like Ohio. Not only has the State made open carry of a firearm legal, but it also does not require gun owners to produce or even carry their licenses for inquiring officers. . . .If Bright had no reason to stop and frisk Northrup, he violated clearly established law in handcuffing—fully seizing—Northrup in his squad car for thirty minutes. . . . Unlike Officer Bright, Sergeant Ray is entitled to qualified immunity. . . . Sergeant Ray did not arrive until after Northrup was handcuffed in the back of Officer Bright's police car. Ray was then told Bright's account of events, including of Northrup's 'furtive movement' toward his gun and his failure to produce identification when initially requested. . . With this information in hand, Ray contacted the Toledo Police Department detective's bureau to help determine the proper charge. A detective advised Ray to cite Northrup for failure to disclose personal information, Ohio Rev.Code § 2921.29, which Ray and Bright then did. Northrup has a claim against Sergeant Ray only if we infer that Officer Bright, in his initial conversation apprising Ray of recent events, confessed to an illegal seizure. There is no basis in the record for such an inference. . . . Accordingly, Ray should receive qualified immunity.")

Wenk v. O'Reilly, 783 F.3d 585, 598-600 (6th Cir. 2015) ("Schott does not contest that the Wenks' right to be free from retaliation for exercising their First Amendment right to criticize school officials is clearly established. Rather, Schott argues that 'a reasonable governmental official in [Schott's] position would not recognize that, by following a mandatory obligation to report abuse, she is violating federal law.'. . Schott does not cite any federal case law to support her argument, and instead cites only Ohio's mandatory reporting statutory scheme. . . Schott points to the fact that Ohio imposes no good faith requirement on mandatory reporters and provides that they are absolutely immune from civil and criminal liability for those reports. Ohio Rev.Code § 2151.421(G)(1)(a). As an initial matter, we note that Schott does not take the facts in the light most favorable to the Wenks in framing the clearly-established-law inquiry, as she must do on appeal. . . The premise of Schott's argument is that Schott in fact believed herself to be following her mandatory duty to report child abuse under Ohio law when she reported the Wenks to FCCS. However, this argument ignores the factual disputes that the district court found as to whether Schott would have reported the Wenks absent their protected conduct. Reading those disputes in the light most favorable to the Wenks suggests that Schott did not think that the report she made to FCCS was required under Ohio's mandatory reporting law. . . . A reasonable official in Schott's position would have understood that what she did violated the Wenks' right to be free from retaliation for exercising their First Amendment rights. Our decision in *Jenkins*, decided in 2008, made clear that school officials can be liable if they make reports of child abuse to retaliate against

parents for exercising their First Amendment rights. . . Although the report in *Jenkins* was false, the heart of a First Amendment retaliation claim, which we have reaffirmed numerous times before 2011, is that '[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 *even if the act, when taken for a different reason, would have been proper*.' *Bloch*, 156 F.3d at 681–82 (emphasis added). Under this rule, it is clear that the distinction between a completely false report and a partially false report does not matter. At oral argument, Schott appeared to frame the inquiry slightly differently, asking whether a reasonable school official would think that the immunity conferred under Ohio law for reports of child abuse made in bad faith would prevent liability for violating the Wenks' clearly established right not to be retaliated against for exercising their First Amendment rights. The Supreme Court has long held 'that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, ... which of course already provides certain immunities for state officials.' *Felder v. Casey*, 487 U.S. 131, 139 (1988). . . .In sum, we hold that the Wenks' right to be free from retaliation for exercising their First Amendment rights was clearly established at the time of this case, and that a reasonable official in Schott's position would have understood that filing a child abuse report in bad faith violated the Wenks' rights.")

Flying Dog Brewery, LLLP v. Michigan Liquor Control Comm'n, 597 F. App'x 342, 352, 355 (6th Cir. 2015) ("We begin with the district court's analysis on the second part of the qualified immunity inquiry: whether the constitutional right the Administrative Commissioners are alleged to have violated was clearly established at the time the Commissioners acted. . . .By the time the Administrative Commissioners banned Flying Dog's beer label in 2009, the clear line of Supreme Court commercial speech precedents, coupled with our own decision in *Sambo's* and the persuasive opinion of the Second Circuit in *Bad Frog Brewery*, should have placed any reasonable state liquor commissioner on notice that banning a beer label based on its content would violate the First Amendment unless the *Central Hudson* test was satisfied. Consequently, we disagree with the district court's determination that applicable First Amendment law was not clearly established in 2009 and set aside the grant of qualified immunity to the Commissioners.")

Moore v. Money, 590 F. App'x 562, 565-66 (6th Cir. 2014) ("After the district court issued its opinion, the Supreme Court in *Lane v. Franks*, —— U.S. ——, 134 S.Ct. 2369, 2374–75, 189 L.Ed.2d 312 (2014), a case arising from the Eleventh Circuit, held that the First Amendment protects a public employee who provides truthful testimony under oath outside of his ordinary job duties. Nonetheless, the Court upheld qualified immunity for the defendant because at the time of Lane's 2008 and 2009 trial testimony, neither Eleventh Circuit nor Supreme Court precedent provided clear notice that a public employee's testimony, given under oath and outside the scope of his ordinary job duties, is entitled to First Amendment protection. . . In so holding, the Supreme Court determined that 'the relevant question for qualified immunity purposes' is whether the defendant could 'reasonably have believed, at the time he fired [the plaintiff], that a government employer could fire an employee on account of testimony the employee gave....'. . . To answer that question, the Supreme Court looked to Eleventh Circuit decisions addressing whether

testimony, either in-court testimony or deposition testimony, is protected employee speech. . . Here, as the district conceded, at the time of Moore's testimony and the alleged retaliatory conduct, neither this Court nor the Supreme Court had addressed whether in-court testimony is protected public employee speech. . . Moreover, as highlighted by the Court in *Lane*, there was a circuit split among the other circuit courts that had decided this issue. . . Thus, at the time of Moore's testimony, there was no 'controlling authority' or a 'consensus of cases of persuasive authority' that could have put Defendants on notice that Moore's testimony was protected by the First Amendment.")

Roberson v. Torres, 770 F.3d 398, 407 (6th Cir. 2014) ("As a theoretical matter, spraying a chemical agent upon a sleeping prisoner might not violate clearly established law where the corrections officer, under the circumstances, reasonably believed that the prisoner was in fact awake but disobeying the order. But that is not Torres's claim here, nor does Roberson concede such a reasonable belief on Torres's part. We are required to 'take, as given, the facts that the district court assumed when it denied summary judgment.'. . On those facts, we agree that using a chemical agent in an initial attempt to wake a sleeping prisoner, without apparent necessity and in the absence of mitigating circumstances, violates clearly established law.")

Baker v. Union Twp., 587 F. App'x 229, 235-36 (6th Cir. 2014) ("The right at issue can be expressed as Baker's right not to be shot with a taser without warning, while offering no resistance to arrest, and while standing on an observably elevated surface. This articulation comports with *al-Kidd's* mandate that rights not be defined at 'a high level of generality' at the second step of qualified immunity analysis. . . Examining the incident under the facts conceded, it is fairly certain that a reasonable officer would have been 'on notice that [this] conduct violates established law' at the time Ventre tased Baker. . .Baker was suspected of, at most, a minor, non-violent misdemeanor at the time he was tased. The police were called to the scene of a disturbance at the VFW. It is unclear what, exactly, the police suspected him of at the time they gave chase. The police did not even positively identify Baker as the suspect of the reported incident, they merely chased someone they saw running away. This is a far cry from the scenarios implicitly contemplated by *Graham* in which a heightened level of caution may be warranted in the apprehension of someone suspected of a violent felony. Under the facts conceded, Baker did not resist arrest before Ventre deployed his taser the second time. . . In the past, this court has held that an officer violates a suspect's clearly-established Fourth Amendment rights when 'he pepper sprays a suspect who has not been told she is under arrest and is not resisting arrest.'. . Other courts have held similarly. . . . Here, Baker was not resisting arrest. . . A reasonable officer would have known that it was unlawful to deploy a taser against an un-resisting suspect standing stock-still in a well-lit hallway. Moreover, Ventre should not have tased Baker without a warning. The tasing of a suspect without warning is, at the very least, an additional factor useful in determining whether an officer violated a suspect's Fourth Amendment right to be free of excessive force. . .Here, Ventre's tasing of Baker before giving Baker an opportunity to comply with instructions was a violation of clearly established law.")

Bolick v. City of E. Grand Rapids, 580 F. App'x 314, 318-23 (6th Cir. 2014) ("The officers contend that a reasonable officer would have interpreted Matthew's actions as active resistance. . .We have jurisdiction when a defendant appeals the 'denial of a claim of qualified immunity,' . . . but the scope of our jurisdiction is narrow. We may only review the denial of qualified immunity based purely on issues of law, . . . meaning the officers must accept 'the plaintiff's facts, taken at their best[.]'. . . In other words, we do not have jurisdiction insofar as the officers solely contest 'whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'. . . The officers in this case appeal the denial of qualified immunity as to two discrete police actions against Matthew on the night of his death: Parker's alleged use of a taser while Matthew lay handcuffed on his stomach, and Davis's alleged pressure against Matthew's back under the same circumstances. . . .Yes, Matthew assaulted Parker and attempted to evade arrest. But, taking the facts in his favor, Matthew could barely move, had stopped resisting, was under control, and thus posed little risk to himself or anyone else by the time he was in handcuffs—at which point Parker tased him and Davis (who knew Matthew suffered from a diminished mental state) put the weight of his body into Matthew's upper back. For these reasons, a reasonable jury could conclude that the officers' post-handcuff actions were not calibrated to the threat Matthew posed, and thus were objectively unreasonable uses of force. . . .We thus ask: whether it was clearly established in November 2009 that it was excessive for an officer to apply the weight of his body to the back of a handcuffed suspect who did not resist, all while the suspect lay on his stomach with another officer controlling his legs; and whether it was excessive for an officer to tase the arrestee in drive-stun mode under the same circumstances. The answer to both questions is yes. . . . *Champion* also applies to Parker's use of the taser in drive-stun mode. To be sure, *Champion* addressed the use of pepper spray (not a taser) on a hobbled and handcuffed suspect. But the *Champion* court did note that, as of 2004, we had 'consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right.'. . . Here, if it was 'clearly established that the Officers' use of pepper spray against [an arrestee] after he was handcuffed and hobbled was excessive,'. . it was clearly established that Parker's tasing of Matthew under substantially similar conditions was also excessive. . . . The officers counter that not every reasonable officer in their position would have understood that Matthew did not struggle or resist. . . Again, this argument asks us to view the facts in a light most favorable to the officers, which we cannot do. A view of the record in Matthew's favor (which shows that he was barely able to move and did not resist) controls our analysis, not one that considers whether every reasonable officer would have acted differently under a situation drawn more in their favor. . . .In this case, even though the district court declined to grant summary judgment to the officers based on qualified immunity, it improperly dismissed qualified immunity as a defense. Reinforcing our conclusion is the fact that the officers complied with the only requirement necessary for them to invoke the defense at trial: raising qualified immunity as an affirmative defense from the outset. . . We thus reverse the district court's decision to dismiss qualified immunity as a defense to the police actions that remain at issue.")

Cordell v. McKinney, 759 F.3d 573, 587, 588 (6th Cir. 2014) ("To sum up, at this stage in the litigation, we must accept Cordell's version of events without weighing the evidence or assessing

the credibility of prospective witnesses. The district court failed to do so and, thus, committed error. If we do accept Cordell's testimony and allegations as true—that Deputy McKinney rammed Cordell headfirst into the wall while he was handcuffed and controlled—a reasonable jury could conclude that Cordell suffered severe pain that objectively violated our contemporary norms of human dignity. Thus, Cordell has demonstrated that summary judgment on the objective component of his Eighth Amendment claim was inappropriate. . . .While there may be much sense in stating that it is inappropriate to grant qualified immunity whenever a jury could find that a jail official acted with malicious and sadistic intent, it seems that *Plumhoff* requires us to frame Cordell's Eighth Amendment right at a lower level of generality. In the past, we have held that 'if there is a genuine issue of fact as to whether an officer's use of force was objectively reasonable, then there naturally is a genuine issue of fact with respect to whether a reasonable jail official would have known such conduct was wrongful.' *Kostrzewa v. City of Troy,* 247 F.3d 633, 642 (6th Cir.2001). Under this standard, as discussed above, we conclude that any reasonable official would know that ramming a handcuffed and controlled prisoner headfirst into a concrete wall is an unreasonable method of regaining control of a prisoner in a hallway occupied only by other jail officials. . . Therefore, Cordell's rights were clearly established as of July 20, 2009, and granting qualified immunity at this time is inappropriate.")

Daily Services, LLC v. Valentino, 756 F.3d 893, 901-04 (6th Cir. 2014) ("The applicability of *Parratt* . . . is irrelevant to the clearly established prong of the qualified immunity analysis. As a colleague on our sister circuit noted, 'Granting immunity based on the lack of clarity as to whether the *State* bears responsibility would turn the qualified immunity doctrine on its head. The official would in effect be seeking immunity based on a "reasonable" belief that his conduct was so wrong—i.e., it was "random and unauthorized"—that it could not provide the basis for a procedural due process claim.' *San Gerónimo Caribe Project, Inc. v. Acevedo–Vilá,* 687 F.3d 465, 500 (1st Cir.2012) (en banc) (Lipez, J., concurring). Qualified immunity exists to shield actions reasonable in light of current law without protecting abuses of office. . . It would undermine that doctrine's purpose to find a due process violation but provide no remedy because the defendant could have thought that *Parratt* would let him (and the state) off the hook for his violation of clearly established due process law. *San Gerónimo,* 687 F.3d at 500 (Lipez, J., concurring). Indeed, the Supreme Court has never looked to the *Parratt* doctrine when assessing whether a defendant deserves qualified immunity because the claimed procedural due process right was not clearly established. Nor has our court ever held that uncertainty about whether *Parratt* applies gives rise to qualified immunity. . . Some of our sister circuits and other courts also have suggested that uncertainty about the *Parratt* doctrine does not affect the 'clearly established' inquiry. [collecting cases] A handful of other cases have discussed the *Parratt* doctrine while assessing whether the claimed procedural due process right was clearly established, but none have examined whether the *Parratt* doctrine is properly part of the clearly established law inquiry in the first place. [collecting cases] These cases therefore fail to provide meaningful guidance on the question before us. Thus, while courts may consider the *Parratt* doctrine to determine whether the plaintiff has alleged a procedural due process violation, courts should not consider the *Parratt* doctrine to determine whether the due process right at issue was clearly established. The doctrine simply has no place in

assessing whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . Here, the district court erred when it granted qualified immunity based on its understanding that the law 'is unsettled as to whether the failure of a public official to follow established procedure constitutes "random and unauthorized" conduct, thereby triggering *Parratt.*' Simply put, the court focused on the clarity of the wrong law. The inquiry is not whether a reasonable official would understand that his wrongful denial of predeprivation process might not ultimately amount to a due process violation by the state under the *Parratt* doctrine. Rather, in the context of this procedural due process claim, the 'clearly established law' inquiry should ask whether a reasonable official would understand that the plaintiff was entitled to notice and an opportunity to be heard before the official filed a judgment or lien against the plaintiff. . . At the time of the defendants' actions, it was clearly established that 'even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.'. . As the Supreme Court stated many years ago, 'the root requirement' of due process protection is 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'. . Ohio law recognizes these requirements by requiring the Bureau and its employees to provide notice and an opportunity to be heard before filing a judgment or lien for unpaid premiums. . .It is well-established and unassailable that 'a reasonably competent public official should know the law governing his conduct.'. . Thus, if Daily Services has alleged facts that make out a violation of its constitutional right to predeprivation process, discussed *infra,* the only basis for qualified immunity would be the defendants' reasonable uncertainty about whether the circumstances presented 'extraordinary situations where some valid governmental interest' justified postponing notice or the opportunity to be heard until after the deprivation. . . The facts of this case present no such uncertainty. Reasonable officials in the defendants' positions would know that predeprivation process—notice and an opportunity to be heard—was required before filing the judgments and liens against Daily Services.")

Burgess v. Fischer, 735 F.3d 462, 473, 474 (6th Cir. 2013) ("In the instant case, the district court applied the 'shocks the conscience' standard of the Fourteenth Amendment to find that there was no evidence that the deputies acted maliciously and sadistically. . . The district court found that the claim did not fall under the Fourth Amendment because the right to be free from excessive force as a pretrial detainee in the booking process was not clearly established until our decision in *Aldini v. Johnson,* 609 F.3d 858 (6th Cir.2010), well after Burgess' arrest. . . .However, a review of our case law, including *Aldini,* compels the opposite conclusion, and we find that the district court erred in not applying the Fourth Amendment's reasonableness standard to the facts of this case. . . .To be sure, *Aldini* did set forth a new principle. The *Aldini* court clearly established in 2010 that the dividing line between the Fourth and Fourteenth Amendment zones of protection was the probable cause hearing for warrantless arrests. . . However, the district court missed a critical point of the decision—it was already clearly established that the Fourth Amendment's reasonableness standard applied at least through the booking process. . . Indeed, the court held that the Fourth Amendment's reasonableness standard applied to a set of facts arising in May 2006, over two-and-a-half years before Burgess' car was stopped on January 23, 2009. . . Because it was

a reversal, the *Aldini* decision necessarily held that the Fourth Amendment right was clearly established in 2006. Therefore, the right was no less established in January 2009 when Burgess was allegedly assaulted. Consequently, the district court erred in applying the Fourteenth Amendment's 'shocks the conscience' standard rather than the Fourth Amendment's reasonableness standard.")

Hidden Village, LLC v. City of Lakewood, Ohio, 734 F.3d 519, 529 (6th Cir. 2013) ("To defeat the qualified immunity defense, . . . Hidden Village must also show that precedents on the books when the defendants acted (in 2006 and 2007) clearly established that their conduct violated § 3617 even though it violated nothing else in the Fair Housing Act. That in turn requires pointing to either 'controlling authority' or 'a robust consensus of cases of persuasive authority.'. . Hidden Village does not have controlling authority on its side. Until today, the Sixth Circuit has never held that a defendant can violate § 3617 without violating §§ 3603–3606. To the contrary, we had left the question open. . . Nor was there a 'consensus' of cases of 'persuasive authority.' Just the opposite. By 2007, the Fifth Circuit had held that a violation of §§ 3603–3606 is indispensable to a § 3617 claim. . .The Seventh Circuit had twice reserved the question. . . Another Seventh Circuit opinion implied that the defendants' interpretation was right. . . Hidden Village, meanwhile, does not identify a single federal appellate court decision that had clearly come out on its side of this debate. The best we have found is dictum to that effect from the Ninth Circuit, *see Smith v. Stechel,* 510 F.2d 1162, 1164 (9th Cir.1975), and a handful of decisions from district courts. This state of affairs circa 2007 does not amount to the 'robust consensus' that the qualified immunity test demands. Hidden Village invokes *Bloch v. Frischholz,* which interpreted § 3617 as we do today. 587 F.3d 771, 781 (7th Cir.2009) (en banc). But that decision came out in 2009; it did not clearly establish anything in 2006 or 2007. More telling is *Bloch's* observation about the state of the law on whether liability under § 3617 depends on a violation of §§ 3603–3606: 'Courts are split on the issue.' *Id.* at 781. In the final analysis, Hidden Village may carry on with its Fair Housing Act lawsuit against the city. But the individual defendants are entitled to qualified immunity.")

Jasinski v. Tyler, 729 F.3d 531, 540, 544 (6th Cir. 2013)("Under the circumstances presented here, the contours of the substantive due process right to be free from government action increasing the risk of harm was not sufficiently clear under our case law that a reasonable official would understand that the state's actions in pursuing Oliver for use of the cattle prod and then failing to immediately remove Nicholas would violate Nicholas's substantive due process rights. Accordingly, Defendants are therefore entitled to qualified immunity [on substantive due process claim]. . . . Given the previous decisions of our court, we cannot say that a reasonable CPS official would understand that the failure to file a petition under § 722.638 would constitute a denial of procedural due process. No decision has yet found a procedural due process right in a similar context. In the future, CPS officials are on notice that if a petition is mandated based on a substantive predicate, the failure to file a petition when the predicate is met may constitute a denial of procedural due process under statutes similar to the instant one.")

Kovacic v. Cuyahoga County Dept. of Children and Family Services, 724 F.3d 687, 695-700 (6th Cir. 2013) ("The social workers argue that the district court erred in denying their motion for summary judgment based on qualified immunity, contending that exigent circumstances existed and that the relevant Fourth and Fourteenth Amendment rights were not clearly established as of March 26, 2002. . . . While there certainly remain unresolved issues relating to the Fourth Amendment, as noted by the dissent, . . . the issue at hand—whether a government official can seize children from their homes without a warrant or exigent circumstances—is simply not one of them. . . .In sum, there is an absence of pre–2002 case law specifically mentioning social workers, which under our binding precedent is insufficient to upset the presumption that all government searches and seizures are subject to the strictures of the Fourth Amendment. . .We thus agree with the district court that at the time of the social workers' actions, it was clearly established that Fourth Amendment warrant requirements, including the exigent-circumstances exception, apply to the removal of children from their homes by social workers. . . .Concerning the Fourteenth Amendment due-process right, we established in *Doe* that in the context of child removal, due process requires, among other things, that 'parents be given notice prior to the removal of the child ... stating the reasons for the removal ... [and that] [t]he parents be given a full opportunity at the hearing to present witnesses and evidence on their behalf.'. . . The district court did not err in concluding that the due-process right at issue was clearly established in 2002.")

Kovacic v. Cuyahoga County Dept. of Children and Family Services, 724 F.3d 687, 703, 708-10 (6th Cir. 2013) (Sutton, J., dissenting) ("The defense prompts a present-tense and a past-tense inquiry: Does the seizure violate the requirements of the Fourth and Fourteenth Amendments? If so, were those requirements clearly established at the time of the seizure—here in 2002? I would skip the first question, . . . and answer no to the second. . . . All appellate law considered, the social workers acted reasonably from the vantage point of 2002. Even had they consulted a lawyer at every turn, consider the many questions implicated by this case. Do the normal Fourth Amendment standards apply? Is there a special needs exception for child endangerment cases? Does it make a difference whether the state officials are engaged in investigating criminal conduct or protecting children? Does past abuse suffice? Must the evidence of danger be within the past 24 hours? Or will evidence over the last month suffice? The majority may have some confidence in answering some of these questions today. But in the face of our previous silence, the Supreme Court's continued silence and the conflicting signals sent by other circuits, I doubt even the most sophisticated social worker, accompanied by the most sophisticated attorney,could have distilled one framework for answering all of these questions in 2002. That is the purpose of qualified immunity, and that is why it applies here. . . . When a social worker has concerns that immediate removal is required and when a state court judge later vindicates those concerns after a hearing, it is a strange notion of qualified immunity that would permit the social workers to be found liable under § 1983. We should pause before making social workers retroactively liable for a three-day temporary seizure when the state court judge is insulated from liability for the ten months of custody that followed. No such oddity occurs if we respect the state court's contemporaneous finding that probable cause of an exigency existed, which confirms that the social workers at most made a mistake. In the end, these social workers faced two state laws allowing them to act, set

against a murky backdrop of federal court precedent. And they had evidence of abuse, enough in fact to convince a magistrate that they acted correctly and that Nancy's children ought not stay in Nancy's care. Qualified immunity applies.")

Villegas v. Metropolitan Government of Nashville, 709 F.3d 563, 569-71, 574, 575, 578-80 (6th Cir. 2013) ("Plaintiff predicates her first deliberate indifference claim on her being shackled during labor and postpartum recovery. In bringing such a claim, Plaintiff finds herself in the recent 'burgeoning movement to end the practice of shackling pregnant women prisoners, particularly during labor and delivery.'. . Though the push to end the practice is fairly new, sadly, it is a practice that has been around for at least a century. . . In spite of this history, the law on the shackling of pregnant women is underdeveloped, and this Court has not previously decided a deliberate indifference claim based on the practice. Therefore, we must at the outset determine a framework under which to analyze such a claim. **. . .**In dealing with deliberate indifference claims in the past, this Court has enumerated some specific types of claims for factual scenarios that frequently arise. These types include, but are not limited to, conditions-of-confinement, excessive-force, and medical-needs. . . The district court as well as the parties in their briefing discuss this as a medical-needs claim, . . . but as we explain below, the nature of Plaintiff's claim does not quite square with our medical-needs jurisprudence nor our other refinements of the general deliberate indifference principles. . . . A shackling claim does not necessarily involve the denial of or interference with medical treatment; rather, it may be premised on the notion that the shackles increase Plaintiff's risk of medical complications. We should hasten to add that there may be circumstances where shackling could interfere with medical treatment—where, for example, the shackles are not removed so that the medical treatment may proceed unimpeded; however, such were not the circumstances in this case. This problem led one court to analyze the shackling claim it faced as a conditions-of-confinement claim. . . .While a shackling claim does in some respects resemble some of our conditions-of-confinement cases, *see, e.g., Barker*, 649 F.3d at 434 (analyzing the use of handcuffs on a mentally ill prisoner under a conditions-of-confinement, as well as excessive-force, rubric), the nature of the medical proof offered by Plaintiff is different than we have previously addressed in the conditions-of-confinement context. Similarly, we believe that the excessive-force type of claim is also not well adapted for analysis of Plaintiff's claim. . . . In sum, it seems to us that none of the refinements we have made to the general deliberate indifference principles in order to more easily analyze common factual scenarios are particularly well-suited to the theory and proof offered by Plaintiff. The Eighth Circuit in *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir.2009) (en banc), seems to have similarly recognized the crossover nature of a pregnant shackling claim. . . . [R]ather than attempt to pigeonhole Plaintiff's shackling claim into a more specific subcategory of deliberate indifference claims, we think it best to analyze her claim under the general deliberate indifference principles. . . . Consistent with the general principles discussed above, we analyze Plaintiff's claim in two steps, addressing first the objective component and then the subjective one. . . . On the objective component, we ask whether shackling pregnant detainees in the manner and under the circumstances in which Plaintiff was shackled creates a substantial risk of serious harm that society chooses not to tolerate. . . On the subjective component, the inquiry is whether the officers were aware and understood (or should have been

aware and understood) that they were exposing Plaintiff to a substantial risk of serious harm. . . .Two things are clear from Plaintiff's evidence on the objective component. First, the shackling of pregnant detainees while in labor offends contemporary standards of human decency such that the practice violates the Eighth Amendment's prohibition against the 'unnecessary and wanton infliction of pain'—i.e., it poses a substantial risk of serious harm. . .The universal consensus from the courts to have addressed this issue as well as the chorus of prominent organizations condemning the practice demonstrates that, without any extenuating circumstances, shackling women during labor runs afoul of the protections of the Eighth Amendment. Second, it is equally clear, however, from both courts and commentators that the right to be free from shackling during labor is not unqualified. . . .To be sure, this evidence shows that the jail's classification procedures were followed in this case. However, because of Plaintiff's obvious, physical condition as a pregnant woman in labor, a reasonable factfinder could nonetheless conclude that Plaintiff was not a flight risk despite the jail's conformity with its classification procedures. This potential dispute renders summary judgment inappropriate. . . .In light of the material factual disputes surrounding whether Plaintiff was shown to be a flight risk, whether Defendant's officers had any knowledge about a no restraint order, and the conflicting expert testimony about the ill effects of Plaintiff's shackling, we conclude that the district court improperly granted summary judgment to Plaintiff on her shackling claim. On remand, a jury will need to determine whether Plaintiff was a flight risk in her condition and whether Defendant had knowledge of the substantial risk, recognized the serious harm that such a risk could cause, and, nonetheless, disregarded it, . . . recognizing that such knowledge may be established through the obviousness of the risk. . . . Absent proof that the breast pump was prescribed, as is necessary under a diagnosed medical-needs theory, Plaintiff must show that it was so obvious that even a layperson would recognize the need to provide Plaintiff with a breast pump. . . Unlike her shackling claim, where Plaintiff pointed to specific statements by outside organizations and testimony from Defendant's officer, Plaintiff on this claim has only pointed to the opinion testimony of Torrente and DeBona, who both opined that a breast pump was necessary to allow Plaintiff to express her milk and relieve her breast pain. Such testimony regarding the harmful consequences of being denied the breast pump does not specifically speak to the obviousness of the risk to Plaintiff. Therefore, Plaintiff has failed to produce sufficient evidence to make out the objective component of her breast pump claim, and therefore, the district court improperly granted summary judgment to Plaintiff on this claim as well.")

Villegas v. Metropolitan Government of Nashville, 709 F.3d 563, 581, 582, 584 (6th Cir. 2013) (Helene N. White, J., dissenting) ("I respectfully dissent. The district court determined on the parties' cross-motions for partial summary judgment that shackling Villegas during labor and postpartum recovery absent any indication that she was a flight risk or posed a risk of harm to herself or others, and denying her the breast pump hospital staff provided her on discharge, constituted deliberate indifference to a serious medical need. The *material* facts-the facts that might affect the determination of Defendant's liability-were not in dispute. . . .Villegas was not being held for a crime of violence and had not been convicted of any crime. She was not individually assessed for flight risk or risk of harm to herself or others, and she had not engaged

in any conduct evidencing such. . . . The subjective component of a deliberate indifference claim goes to whether Defendant's officers were deliberately indifferent to substantial risks of serious harm posed by shackling. Defendant's experts did not address several of the serious medical risks to which Villegas's experts attested and did not rebut that shackling Villegas while en route to the hospital, during labor and postpartum, increased the medical risks of serious harm to Villegas and her unborn child. . . I agree with the district court that no genuine or material factual dispute remained regarding whether Defendant's officers knew of and disregarded the substantial risks of harm posed by shackling Villegas during labor and postpartum and denying her the breast pump hospital staff gave her on discharge.")

McAdam v. Warmuskerken, Nos. 12–2330, 12–2331, 2013 WL 1092729, *2 (6th Cir. Mar. 15, 2013) (unpublished) ("*First,* may an officer tase an individual who is subdued on the ground and is not resisting arrest, even if the officer does so only once? No. *See Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 509–10 (6th Cir.2012); *Austin v. Redford Twp. Police Dep't,* 690 F.3d 490, 497–98 (6th Cir.2012). A single tasing violates a plaintiff's clearly established rights if he is neutralized and is not resisting an officer's efforts to restrain him. The district court thus properly denied the officers' qualified-immunity defense. *Second,* may an officer tase an individual, who is handcuffed to a hospital bed and is verbally resisting medical treatment, but does not pose a safety risk to hospital staff or police officers? No. *See Austin,* 690 F.3d at 497–98. Again, the right of an individual to be free from an officer's force if he is cooperative and non-aggressive is clearly established. *See Hagans,* 695 F.3d at 509–10. Taking McAdam's factual description of the hospital tasing as true, the officers are not entitled to qualified immunity. Because McAdam has put forward plausible factual bases for his legal claims, he is entitled to a trial.")

Quigley v. Tuong Vinh Thai, 707 F.3d 675, 685 (6th Cir. 2013) ("Because a reasonable factfinder could conclude that Thai consciously exposed Quigley to a substantial risk of death through his medical treatment without so much as a warning, the estate has shown that Thai violated a clearly established right.That there is no federal case directly on point does not undermine this conclusion. The principle at issue—namely, that a doctor cannot 'consciously expos[e a] patient to an excessive risk of serious harm' while providing medical treatment—is enshrined in our caselaw. . . The estate has established that Thai violated a constitutional right and that the right was clearly established. Thai is therefore not entitled to qualified immunity.")

Stoudemire v. Michigan Dept. of Corrections, 705 F.3d 560, 571, 575 (6th Cir. 2013) ("According to Stoudemire, the relevant constitutional question is not whether clearly established law proscribes same-sex strip searches in prisons, but whether clearly established law proscribes a strip search that served no legitimate penological purpose and was intended only to harass. [Defendant] focuses on whether the law regarding same-sex strip searches is 'clearly established' for qualified immunity purposes. However, the applicable inquiry is whether the strip search was reasonable under the circumstances and whether Stoudemire's constitutional rights in this regard were clearly established at the time of the search. We address both issues. [Defendant's] position is that inmates

have no right to be free from *same-sex* strip searches. But that is not the right that Stoudemire is seeking to vindicate. Rather, Stoudemire has 'identified a well established right, the right not to be subjected to a humiliating strip search in full view of several (or perhaps many) others *unless the procedure is reasonably related to a legitimate penological interest.*'. . Based on the state of the law in existence at the time of the strip search, it was clearly established that suspicionless strip searches were permissible as a matter of constitutional law, but only so long as they were reasonable under the circumstances and performed pursuant to a legitimate penological justification.")

Sutton v. Metropolitan Government of Nashville and Davidson County, 700 F.3d 865, 877 (6th Cir. 2012) ("The district court summarily concluded that the law clearly established that an arrest without probable cause and a *Terry* stop without reasonable suspicion violate the Fourth Amendment. But the court's bare-bones analysis is far too general, failing to recognize that the right violated must be clear in a particularized context so that a reasonable official would be on notice that his actions were unconstitutional. . . Still, taking the facts alleged in the complaint as true, Sutton's constitutional rights were clearly established in this context and the court properly concluded that the qualified-immunity defense fails at this juncture.")

Andrews v. Hickman County, Tenn., 700 F.3d 845, 858-64 (6th Cir. 2012) ("The State Defendants argue that while the Andrews have asserted facts that taken as true, 'may establish a formulation of a general Fourth Amendment claim,' they have failed to assert sufficient facts to establish that 'a clear violation of the Fourth Amendment as it applies to social workers has occurred....' Although the State Defendants do not cite any authority for their contention, their argument seems to imply that social workers engaging in their statutorily mandated investigative functions are not governed by the same requirements of the Fourth Amendment that apply to law enforcement officers or other state actors.[footnote omitted] If their implication is that social workers are not state actors for the purposes of the Fourth Amendment, the Supreme Court has established that the Fourth Amendment's restrictions on unreasonable searches and seizures extend well beyond the police . . . . In other circuits, defendant caseworkers and social workers have unsuccessfully attempted to argue that the Fourth Amendment should not apply to their actions when entering homes to investigate allegations of child abuse. . . .Although this court has not yet had occasion to definitively address this issue, other courts have found that the Fourth Amendment governs entries and searches of homes made by social workers. [collecting cases] Given the presumption that state actors are governed by the Fourth Amendment and the sanctity of the home under the Fourth Amendment, we agree that a social worker, like other state officers, is governed by the Fourth Amendment's warrant requirement. This would simply mean that social workers would have to obtain consent, have sufficient grounds to believe that exigent circumstances exist, or qualify under another recognized exception to the warrant requirement before engaging in warrantless entries and searches of homes. . . . Given that the Fourth Amendment's strictures apply to social worker actions, the Andrews have asserted a violation of their constitutional right to be free from unreasonable searches unless an exception to the warrant requirement is established. Construing the facts in the light most favorable to the Andrews, the State Defendants have not demonstrated

that an exception to the warrant requirement applies. . . .The State Defendants argue that it was not clearly established at the time of their actions that social workers may not enter a home without a warrant or an applicable exception to the warrant requirement. . . .The Supreme Court has not expressly held that the Fourth Amendment prohibition on warrantless searches of homes does or does not apply to social workers carrying out investigations regarding the welfare of children. . . . [W]e must examine whether our own decisions have addressed the issue in order to ascertain whether the law was clearly established at the time the State Defendants entered the Andrews' home. . .While *Jordan* is not binding precedent, it is the only case from our court that bears on the issue of whether the reasonable social worker, facing the situation in the instant case, would have known that her conduct violated clearly established law. Yet, *Jordan* fails to give clear guidance to the social worker faced with the decision to enter the Andrews home. First, the *Jordan* footnote referencing the views of other circuits does not endorse them, explicitly or otherwise. The footnote does not hint at whether the court believes a social worker exception to the application of the Fourth Amendment should apply. The footnote is merely an observation about the existence of an issue not explored in *Jordan.* Moreover, the court in *Jordan* concluded, using fairly broad language, that social workers should not 'have to second guess' the decisions of officers. . . . Although the court mentions that the officer told the social worker the children in the house were in immediate physical danger—a circumstance not present here—the opinion makes no effort to delineate the situations in which reliance on officers' decisions would be appropriate and those in which it would not. Consequently, a social worker could not determine, based on *Jordan,* whether she might reasonably rely on the officers' decision under the circumstances presented here. In fact, to the extent *Jordan* suggests an answer to the question of whether the social worker could rely on an officer's decision, it suggests that she could do so. . . . Quite simply, the reasonable social worker faced with the circumstances of this case could not ascertain from clearly established law the legality of her conduct. [footnote omitted] . . . . [G]iven the lack of clarity of *Jordan,* it was not objectively unreasonable for the State Defendants to enter the home. . . .As we have explained, the actions of social workers in entering a home are governed by the Fourth Amendment, and we have concluded that no social worker exception applies in such situations. Nonetheless, there is still a question, going forward, about whether social workers can rely upon the actions of police officers in deciding whether they can enter a home, although, to be sure, there is a question of fact in this case about whether reliance on the officers occurred. While we recognize that social workers have a duty to cooperate with police officers and, perhaps, a natural inclination to defer to their decisions, exempting social workers from the Fourth Amendment whenever they rely upon a police officer's actions is tantamount to recognition of a 'social worker exception' to the Fourth Amendment's requirements. We join other circuits in recognizing that Fourth Amendment standards are the same, whether the state actor is a law enforcement officer or a social worker. [collecting cases] Nonetheless, if social workers cannot be treated better than police officers under the Fourth Amendment, they should not be treated worse, either. Social workers are frequently asked to make decisions based on information provided to them, directly or indirectly, by the police. When social workers rely in good faith on information from police officers which suggests they can enter a home under an exception to the warrant requirement, or can reasonably infer that an exception applies from their actions, they are entitled to rely on that information. . . The social

workers' position is the same as that of a police officer who reasonably relies on another police officer.")

Patrizi v. Huff, 690 F.3d 459, 465-67 (6th Cir. 2012) ("Construing the facts in Patrizi's favor, we conclude it is clear that Patrizi's actions did not constitute an affirmative act under the obstruction ordinance. Patrizi asked the officer questions in a calm and measured manner; she did not continuously interrupt so that the officer could not speak to the subjects of his investigations. She did not ignore instructions from him to cease her questioning—in fact, she was never even given such instructions—and she did not in any way exhibit aggressive, boisterous, or unduly disruptive conduct. . . In short, it is evident that Patrizi's actions were of the same nature as those held not to constitute an affirmative act by the Ohio Court of Appeals in *Kristoff.* Therefore, under clearly established law the officers lacked probable cause to arrest her. . . . [D]espite any arguable ambiguity in the Ohio state courts' jurisprudence, the U.S. Supreme Court has clearly established that nonaggressive questioning of police officers is constitutionally protected conduct. . . Patrizi's actions fall precisely within that protected ambit because, when the facts are viewed in her favor, her conduct did not cross the line into fighting words or disorderly conduct prohibiting the officers from conducting their investigation.")

McGlone v. Bell , 681 F.3d 718, 735 (6th Cir. 2012) ("State university officials in their individual capacities were not entitled to qualified immunity in § 1983 action by Christian evangelist challenging university's policy requiring nonaffiliated individuals to obtain permission before speaking on certain parts of its campus; evangelist had clearly established right to engage in his desired expression on campus free from requirements imposed by university.)

Clemente v. Vaslo, 679 F.3d 482, 492, 493 (6th Cir. 2012) ("What is clearly established is only that public employers may not coerce their employees to abdicate their constitutional rights on pain of dismissal, and that is not what happened here. . . . Defendants' actual conduct highlights the blurriness of the Fourth Amendment's contours in the context of an employer-employee relationship. Bartok and White acted on a gradient, applying more pressure at each step to obtain consent (simply asking, then citing to a city ordinance, then giving a direct order as supervisor), but never forced Plaintiffs to choose between letting them in or losing their jobs. Though we do not decide the issue, we note that a supervisor's direct order may be coercive in some situations, as it may be reasonable for an employee to believe that disobeying it will result in termination. The question, however, is not whether such conduct could possibly constitute a Fourth Amendment violation but whether, according to settled Supreme Court and Sixth Circuit precedent at the time, such conduct was so clearly violative of the Fourth Amendment that it is beyond debate. . .Short of threatening termination, what public employers could do to obtain an employee's consent to conduct an inspection was not clearly established. Duchane and Bartok are thus entitled to qualified immunity.")

Whitney v. City of Milan, 677 F.3d 292, 299 (6th Cir. 2012) (public employee's "right to speak publicly and participate in a lawsuit addressing workplace discrimination and public corruption in the City's government was clearly established.")

O'Neill v. Louisville/Jefferson County Metro Government, 662 F.3d 723, 731, 732, 735 (6th Cir. 2011) ("In concluding that the LMAS officers could constitutionally reenter the O'Neills' home without a warrant, the district court relied on the consent-once-removed doctrine. This doctrine allows government agents to enter a suspect's premises *to arrest* the suspect without a warrant if [undercover agents]: 1) entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers. . .The O'Neills argue that this doctrine does not apply in the present case, where the undercover officers left the premises and then attempted to make a second entry. This court has previously held that, under the consent-once-removed doctrine, an undercover agent or informant in a suspect's home may signal to agents outside to come in and effectuate an arrest. . . But this court has not extended the doctrine to cover reentry after the undercover agent or informant has left the premises, or where there is no intent to effectuate an arrest, and we decline to do so here. . . .Applying the consent-once-removed doctrine to the LMAS officers' second entry, where no arrest was intended, would go well beyond the confines of this limited doctrine, which has yet to be adopted by the Supreme Court. *See Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) (declining to rule on whether the consent-once-removed doctrine is constitutional by instead resolving the issue of qualified immunity on the basis that no clearly established law was violated). We therefore conclude that the O'Neills have sufficiently pleaded a Fourth Amendment violation based on the second warrantless entry. . . . Given that we are reversing the court's rulings on the Class A kennel issue, the consent-once-removed doctrine, and procedural due process issue, the court's analysis of the O'Neills' Fourth Amendment and procedural due process claims will necessarily change, as will its determination of what law was or was not clearly established. We accordingly remand the qualified-immunity issue to the district court for further proceedings in light of our opinion.")

Wheeler v. City of Lansing, 660 F.3d 931, 941-43 (6th Cir. 2011) ("Although we refused to address whether Wheeler's first Fourth Amendment claim actually presented a constitutional violation, we must address the constitutionality of her second claim in order to determine whether Wirth is entitled to qualified immunity. . . . The warrant to search Wheeler's apartment listed broad categories of stolen property, providing no basis to distinguish the stolen items from Wheeler's own personal property. Moreover, it appears that officers had additional information about the stolen items to be seized that they could have included in the warrant. . . . Wirth is not entitled to qualified immunity from this aspect of Wheeler's claim, as it would be apparent to a reasonable officer that listing general categories of items to be seized even though further details are available violates the Fourth Amendment's specificity requirement. . . .Because a reasonable officer would have known that the warrant was deficient, Wirth is not entitled to qualified immunity on this portion of Wheeler's Fourth Amendment claim.")

Barker v. Goodrich, 649 F.3d 428, 435-37 (6th Cir. 2011) ("Defendants had fair warning in 2007 that their conduct was unconstitutional. Case law from the Supreme Court, this Court, and other circuits established at that time that each condition seen here-restraining an inmate in an uncomfortable position, denying access to water, and denying access to the toilet–could rise to an Eighth Amendment violation if allowed to persist for an extended period. These cases, taken together with the notice given by normal prison practice and the obvious cruelty inherent in the conduct, clearly established that Defendants' alleged conduct–subjecting Barker to all of these conditions at once for a period in excess of twelve hours-violated Barker's Eighth Amendment rights. . . . Although *Ort* and *Gates* come from the Eleventh and Fifth Circuits, respectively, and so are not binding on this Court, neither are they 'single idiosyncratic opinions' from other circuits. . . Moreover, these cases were thoroughly analyzed and served as the basis for the Supreme Court's decision in *Hope*–a decision that is certainly binding on this Court. . . They are thus sufficient to give the Defendants fair warning. A defendant's deviation from normal practice and prison policies can also provide notice that his actions are improper. . . In this case, the evidence establishes that normal procedure would have been to change Barker's clothing and remove his handcuffs before placing him in the observation cell, thus allowing him full use of his hands to rest comfortably and access the water fountain and toilet. Defendants argue that they deviated from this practice because Barker was resisting the removal of his handcuffs. However, for the purposes of qualified immunity, this Court must take the plaintiff's evidence as true. . . Thus, the fact that Defendants deviated from normal procedure, even though Barker was cooperating and removal of the handcuffs would have been simple, provides further evidence that Defendants knew their conduct was unconstitutional. Furthermore, *Hope* makes clear that the obvious cruelty inherent in a punishment can serve as notice that it is unconstitutional. . . . Taking Barker's evidence as true, he was handcuffed in an uncomfortable position for over twelve hours for no legitimate purpose, and denied even the basic dignity of relieving himself. The obvious cruelty in Defendants' actions warned them that they were violating the prohibition against cruel and unusual punishment. Accordingly, the constitutional right was clearly established and we **REVERSE** the district court's grant of qualified immunity to all Defendants.")

Gaspers v. Ohio Dept. Of Youth Service, 648 F.3d 400, 417(6th Cir. 2011) ("Here, as in *Adkins* and *Sowards*, plaintiffs' right of intimate association was clearly established by the Supreme Court as early as 1984 and by this court as early as 1993–long before William was terminated and Aldine was demoted and transferred. As a result, it was objectively reasonable to require the individual defendants to be aware of and to observe this constitutional right.")

Roth v. Guzman, 650 F.3d 603, 612, 617 (6th Cir. 2011) ("Even if we accept that the DPPA may be read to impose liability on a state official in his individual capacity when personal information disclosed for a purportedly permissible purpose was actually obtained for an impermissible purpose, we cannot agree that this right was clearly established at the time of the disclosures. . . . The district court acknowledged that there was (and is) no binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits deciding the issues raised in this case such as would render the asserted right 'clearly established.'. . . To the extent that the plaintiffs

could prove a violation of the DPPA based on the allegation that Shadowsoft misrepresented itself as having a proper purpose under § 2721(b)(3) or that the disclosures were made in bulk under § 2721(b)(3), we find the contours of such rights were not sufficiently clear that a reasonable official would have understood at the time that the disclosures would violate such rights.")

Roth v. Guzman, 650 F.3d 603, 617-21 (6th Cir. 2011) (Clay, J., dissenting) ("While I do not take issue with the majority's conclusion that nothing in the Drivers Privacy Protection Act . . . prohibits the bulk disclosure of personal information contained in drivers' records, I respectfully dissent from the majority's determination that the disclosure of such records to Shadowsoft by officials at the Ohio Department of Public Safety and the Ohio Bureau of Motor Vehicles . . . without reasonably inquiring into whether Shadowsoft was a legitimate business using the records for a permissible purpose, was not a violation of a clearly established statutory requirement. While, as the majority notes, we have no binding case authority to guide us in addressing the claims raised in this case, we do have the statutory language of the DPPA. Under the factual scenario and procedural posture of the case now before us, I agree with the district court that the language of the DPPA is, in itself, sufficient to defeat qualified immunity for Defendants . . . .Even if it were true, as the majority contends, that BMV Officials' obligation of reasonable inquiry into a requester's permissible use begins and ends with a check in a box on a standardized form, it cannot be the case that a state official fulfills his legal obligations, under 18 U.S.C. § 2721(b)(3), when he releases drivers' personal information with absolutely nothing to indicate that he is releasing the information to a 'legitimate business.' Under the facts as pleaded in this case, any reasonable official would have been on notice that to disclose the information requested by Shadowsoft in response to Shadowsoft's facially deficient request would violate the DPPA. Finally, it must be emphasized that the exceptions outlined in 18 U.S.C. §§ 2721(b)(1)-(14) are permissive, not mandatary. Holding that a state official must perform a reasonable minimal inquiry before releasing sensitive personal information to anyone with a fax machine, a pencil and two dollars does not impose an unreasonable burden. BMV Officials may decide that they do not want to face the threat of DPPA liability for disclosing drivers' information without first inquiring into whom and for what purpose they are being asked to disclose. The solution is simple: when in doubt as to whether the purpose of the request comports with the requirements of the Act, BMV Officials may choose not to release drivers' information for non-mandatory uses. After all, the purpose of the DPPA is to encourage state officials to do what they should strive to do anyway, which is to protect the personal information of state residents.")

Pritchard v. Hamilton Township Bd. of Trustees, 424 F. App'x 492, 2011 WL 2039066, at *13 (6th Cir. May 25, 2011) ("At first blush it might seem unduly harsh to have an expectation that law enforcement officers should know the intricacies of criminal statutes, but this position finds support in other areas of the qualified immunity doctrine that regularly impute knowledge of statutes and caselaw to officers. Indeed, it is a touchstone of qualified immunity doctrine that 'a reasonably competent public official should know the law governing his conduct.'. . For instance, we impute knowledge of state-law definitions and state-court interpretations of a statute to police officers when we decide whether an officer could reasonably conclude that probable cause exists

under a given set of circumstances. . . .In light of these principles, and the abundantly plain language of the statute at issue here, we hold that the Defendant officers did not have probable cause to arrest Christman for underage drinking because the facts and circumstances known to the officers established a statutorily affirmative justification of the suspected criminal act.")

Kennedy v. City of Villa Hills, Ky., 635 F.3d 210, 214-19 (6th Cir. 2011) ("For purposes of this appeal, Schutzman concedes that a genuine issue of material fact exists about the amount of noise that Kennedy made, and therefore whether Schutzman violated Kennedy's constitutional right to be free from wrongful arrest. At stake is the second question: whether Kennedy's constitutional right to be free from wrongful arrest in these circumstances was clearly established such that Schutzman should have known of it. We conclude that Kennedy's right was clearly established. . . . In the context of qualified immunity, preexisting, clearly established law refers to 'binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point.'. . . Given the context of the arrest as Kennedy has portrayed it, a reasonable officer could not conclude that Kennedy's outburst provided probable cause for his arrest. . . . Regardless of why Schutzman made the arrest, the relevant inquiry is whether an officer with no ill will toward Kennedy could have believed that he had probable cause to arrest Kennedy. We answer no, rendering qualified immunity inappropriate on the claim of wrongful arrest. . . . In contrast to its role in the Fourth Amendment context, motive *is* relevant to Kennedy's claim that Schutzman arrested Kennedy in retaliation for Kennedy's exercise of his First Amendment rights. . . . At the summary-judgment stage, this evidence suffices to show that the content of Kennedy's speech may have been a motivating factor for Schutzman to arrest Kennedy. Finally, Kennedy's right to be free from retaliatory arrest after insulting an officer was clearly established.")

U.S. v. Buford, 632 F.3d 264, 276 n.10 (6th Cir. 2011) ("*Gant* itself underscored the reasonableness of an officer's reliance on settled law, even if that law is later overturned. The Court noted that qualified immunity will shield officers from liability in civil suits challenging unconstitutional vehicle searches conducted before *Gant* because such officers acted in 'reasonable reliance' on the then-prevailing and 'widely accepted' understanding of *Belton*. . . That observation directly supports the conclusion that the good-faith exception to the exclusionary rule applies in criminal prosecutions because the qualified immunity test turns on the same standard of reasonableness as the good-faith exception.")

Ellison v. Balinski, 625 F.3d 953, 959 (6th Cir., 2010) ("While police generally are entitled to rely on a judicially secured warrant for immunity from liability for unconstitutional searches, qualified immunity is not appropriate 'where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'. . Here, a jury could reasonably determine that this affidavit–mentioning no specific crimes thought probably committed, making no link between Plaintiff's residence and any crime, yet seeking broad authority for a search of Plaintiff's entire residence for any document 'pertaining to' Plaintiff–was so lacking in indicia of probable cause to render Defendant's belief in its existence objectively

unreasonable. Accordingly, the district court was correct to deny Defendant's motion for judgment as a matter of law.")

Elkins v. Summit County, Ohio, 615 F.3d 671, 676, 677 (6th Cir. 2010) ("Having assumed that the officers received the Mann memorandum and did not divulge it, we must next determine whether that failure violated Elkins' constitutional right to due process. . . .[I]n *Moldowan*, we held that 'the due process guarantees recognized in *Brady* also impose an analogous or derivative obligation on the police [to disclose to the prosecutor evidence whose materially exculpatory value should have been 'apparent' to him at the time of his investigation].'. . Thus, Elkins had a constitutional right to have favorable evidence disclosed to the prosecution and court. . . In *Moldowan*, we found that 'at least three circuits recognized prior to August 1990 ... this right was clearly established,'. . and that the right may have been clearly established as early as 1964. . . Thus, Elkins' right to have the Mann memorandum disclosed was clearly established on January 5, 1999.")

Knisley v. Pike County Joint Vocational School Dist., 604 F.3d 977, 982, 983 (6th Cir. 2010) ("The United States Supreme Court has asked us to reconsider this case in light of *Redding*, in which the Court invalidated a strip search of a female student when looking for ibuprofen tablets. *Redding*, 129 S.Ct. at 2642-43. The Court, however, found that the officials at issue were nevertheless protected by qualified immunity because (1) there was no clearly established law finding unconstitutional the strip searching of students under materially similar circumstances from the Supreme Court and (2) the appellate courts who had ruled in factually similar circumstances were not in concert. *Id.* at 2643-44. Essentially, the *Redding* defendants were entitled to qualified immunity because neither the Supreme Court nor the Ninth Circuit had clearly established case law on point . . . and there was no national consensus on this issue among the Circuits at the time of the *Redding* search. . . However, this Circuit's law on student strip searches was clearly established as early as 2005, when we published our opinion in *Beard*. We read *Redding* to affirm our constitutional holding in *Beard*. Thus, because *Beard* remains good constitutional law and because that law was clearly established at the time of the strip search in this case, *Redding* does not require a result contrary to that reached in *Knisley I*. . . Our Circuit's clearly established case law on this issue put the school and its employees on notice that this search was unconstitutional, so defendants are not entitled to qualified immunity protection.").

Harris v. City of Circleville, 583 F.3d 356, 367 (6th Cir. 2009) ("Defendants contend that the law was not clearly established because the law was unclear about what standard applies to Harris's excessive force claims (i.e., the Fourth or Fourteenth Amendment). We reject that argument because even if there were some lingering ambiguity as to whether the Fourth or the Fourteenth Amendment applies in this precise context, the 'legal norms' underlying Harris's claims nevertheless were clearly established. A defendant is not entitled to summary judgment on the basis of qualified immunity simply because the courts have not 'agreed upon the precise formulation of the [applicable] standard.'. . Under this circuit's existing case law, there undoubtedly is a clearly established legal norm precluding the use of violent physical force against

a criminal suspect who already has been subdued and does not present a danger to himself or others. . . . Thus, even if it were unclear whether the Fourth or Fourteenth Amendment governs Harris's excessive force claims, the legal norms underlying those claims were nevertheless clearly established.").

Moldowan v. City of Warren, 578 F.3d 351, 378, 381-84, 386-89 (6th Cir. 2009) ("Because prosecutors rely so heavily on the police and other law enforcement authorities, the obligations imposed under *Brady* would be largely ineffective if those other members of the prosecution team had no responsibility to inform the prosecutor about evidence that undermined the state's preferred theory of the crime. As a practical matter then, *Brady's* ultimate concern for ensuring that criminal defendants receive a 'fundamentally fair' trial . . . demands that A*Brady's* protections also extend to actions of other law enforcement officers such as investigating officers," *White v. McKinley*, 519 F.3d 806, 814 (8th Cir.2008). Although this Court has not yet directly addressed the issue, a number of our decisions support this conclusion. . . . If the police can be expected to recognize what evidence must be preserved, certainly it is not too burdensome to demand that they simply turn that same information over to the prosecutor's office. . . . For most of the same reasons we have laid out here, virtually every other circuit has concluded either that the police share in the state's obligations under *Brady*, or that the Constitution imposes on the police obligations analogous to those recognized in *Brady*. . . . Although our recognition of this type of a claim is more recent and less specific, the overwhelming number of decisions from other circuits recognizing this type of claim satisfies us that any reasonable police officer would know that suppressing exculpatory evidence was a violation of the accused's constitutional rights. . . . Notwithstanding the concurrence's argument to the contrary, the cases in this area clearly establish that police actions taken in bad faith are not the only species of police conduct that can deprive criminal defendants of the due process guaranteed by the Constitution. We acknowledge that a number of courts, including the Supreme Court, have held that a showing of bad faith is required to prevail on a claim that the police deprived a defendant of due process by concealing or withholding evidence that is only 'potentially useful.' But, where the police are aware that the evidence in their possession is exculpatory, the Supreme Court's decisions in this area indicate that the police have an *absolute* duty to preserve and disclose that information. The critical issue in determining whether bad faith is required thus is not whether the evidence is withheld by the prosecutor or the police, but rather whether the exculpatory value of the evidence is 'apparent' or not. . . . In other words, the critical issue in determining whether government conduct deprived a criminal defendant of a fair trial is the nature of the evidence that was withheld; it emphatically is not the mental state of the government official who suppressed the evidence. . . . Simply put, where the evidence withheld or destroyed by the police falls into that more serious category, the defendant is not required to make any further showing regarding the mental state of the police. . . . The only difference in the requisite inquiry is that, where the police are concerned, the 'exculpatory value' of the evidence must be 'apparent.' . . . Where the exculpatory value of a piece of evidence is 'apparent,' the police have an *unwavering* constitutional duty to preserve and ultimately disclose that evidence. . . . The reason no *further* showing of animus or bad faith is required is that, where the police have in their possession evidence that they know or should know 'might be expected to

play a significant role in the suspect's defense,'. . . the destruction or concealment of that evidence can *never* be done 'in good faith and in accord with their normal practice,' *Killian v. United States*, 368 U.S. 231, 242 (1961). Consequently, requiring a criminal defendant or § 1983 plaintiff to show a 'conscious' or 'calculated' effort to suppress such evidence would be superfluous.")

Back v. Hall, 537 F.3d 552, 557 (6th Cir. 2008) ("[Defendants] argue that any constitutional protection Back enjoyed could not have been clearly established because, as in *Cope*, 'there was no published decision ... holding that political compatibility is not ... an appropriate requirement for [her former] position.' . . In one sense, they are right. Neither we nor the Supreme Court has ever held that the Internal Policy Analyst III job in the Kentucky Office of Homeland Security is a nonpolitical job. But in a more fundamental way, they are wrong. The absence of such a precise holding does not prevent the relevant law from being clearly established, even in the particularized sense that our case law requires.")**.**

Parsons v. City of Pontiac, 533 F.3d 492, 504 (6th Cir. 2008) ("Detectives Martin and McKinney . . . are entitled to qualified immunity unless their actions 'were objectively unreasonable in light of the clearly established right.'. . But viewing the evidence in the light most favorable to Parsons, a jury could find that their actions were not objectively reasonable. The problem is not that they ignored exculpatory evidence in arresting a suspect as in *Gardenhire*, . . . but that a genuine issue of material fact exists as to whether they possessed sufficient *inculpatory* evidence to reasonably believe that Parsons shot Frantz. We therefore conclude that the decision of the district court with regard to qualified immunity for Martin and McKinney must be reversed.").

Jacob v. Township of West Bloomfield, 531 F.3d 385, 391, 392 (6th Cir. 2008) ("Because the warrantless searches at issue in this case began in 1999, there is no question that the Fourth Amendment's protection of the intimate area surrounding Plaintiff's home was clearly established at the time of Defendant's entry upon the property. Indeed, the Supreme Court's longstanding precedents show that it was clearly established at the time of Defendant's intrusion onto Plaintiff's land that such a criminal investigation is constrained by the Fourth Amendment's warrant requirement.").

El Bey v. Roop, 530 F.3d 407, 421 (6th Cir. 2008) ("Reasonable officers presented with the circumstances as alleged by El Bey should have known that a warrantless search of El Bey's home, and an arrest based on an outstanding warrant that was discovered only as a result of the warrantless search, would be unconstitutional.").

Lanman v. Hinson, 529 F.3d 673, 689 (6th Cir. 2008) ("The facts viewed in the light most favorable to plaintiff demonstrate that defendants knew because of their NAPPI training that restraining a patient face-down on the floor and putting pressure on a patient's back posed a substantial risk of asphyxiation. Despite knowledge of this risk, defendants chose to restrain Lanman using these dangerous restraint techniques. Their actions were objectively unreasonable

given the fact that plaintiff's eyewitness testified that defendants continued to restrain Lanman in this dangerous position five minutes after he wasn't resisting at all and looked like he was passed out. It would have been clear to defendants that it was not necessary to continue restraining a patient who looked like he was passed out with techniques that pose a substantial risk of asphyxiation. A reasonable official in defendants' positions would understand that his actions violated Lanman's constitutional right to freedom from undue bodily restraint.").

Jones v. City of Cincinnati, 521 F.3d 555, 559, 560 (6th Cir. 2008) ("The complaint alleges that the six officers who subdued Jones (1) savagely beat him with batons, striking him at least 33 times without giving him a chance to comply with their orders; (2) sprayed chemical irritant in his face after they had placed him in handcuffs; and (3) used their combined weight to hold him prone on the ground after he had stopped struggling. Such use of force is not objectively reasonable, and hence a violation of Jones's Fourth Amendment rights. . . . The right of an unresisting suspect to be free from baton strikes, 'significant pressure on [his] back,' and a dose of chemical irritants was clearly established over three years before Jones died. . . Therefore, the officers who subdued Jones are not entitled to qualified immunity on the excessive force claim. . . . The defendants argue that this case should be analyzed under the heightened malice standard because there was little time between taking Jones into custody and the time he stopped breathing. We disagree. The complaint alleges that the officers left Jones on the ground for a prolonged time and that they 'stood there and discussed the absence of fire personnel' after they noticed Jones was not breathing. These facts are similar to those in *Owensby*, in which this Court ruled that the deliberate indifference standard was appropriate because the six minutes between taking the suspect into custody and the time medical care was provided gave the officers 'time to fully consider the potential consequences of their conduct.' . .The complaint alleges that each of the officers present–the six who subdued Jones and the three sergeants who arrived afterwards–knew that the handcuffed Jones was not breathing. Therefore each knew of a substantial risk of serious harm to Jones's safety while he was in their custody and disregarded that risk by failing to provide aid. The right of a suspect in custody to receive adequate medical care, even if the suspect had been fleeing and resisting before the officers placed him in custody, was clearly established almost three years before Jones's death. . . Therefore, the officers who subdued Jones and the sergeants who arrived soon after are not entitled to qualified immunity on the failure to provide medical care claim.").

King v. Ambs, 519 F.3d 607, 615 (6th Cir. 2008) ("The undisputed facts of this case are that King repeatedly interfered with an ongoing criminal investigation, that after King had done so twice, Officer Ambs warned King that 'if he said one more word' he would be arrested for so doing, and that King continued to interfere with the officer's attempt to interview Klein. Based on these facts, and regardless of whether King actually 'spoke over' Officer Ambs, it is clear that King was arrested for the act of disrupting the officer's investigation, and not for the content of his speech. . . . [A]s with our analysis of King's Fourth Amendment claim above, while King's arrest did not violate any constitutional right, and the first step of the qualified immunity analysis is not met, even if the holding in *Hill* could be extended to apply to King's arrest under the particular facts of this case, Officer Ambs would still be entitled to qualified immunity as to the alleged First

Amendment violation. For a violation to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . Because a reasonable officer would not have known that enforcement of the Columbia Township obstruction ordinance in the context of this case violated the First Amendment, the right was not clearly established and Officer Ambs would be entitled to qualified immunity at the second step of the *Saucier* analysis.")

King v. Ambs, 519 F.3d 607, 615, 625 (6th Cir. 2008) (O'Malley, District Judge, dissenting) ("The majority, much like the district court before it, appears loathe to allow a civil rights action to proceed where that action would give voice to the complaints of an obnoxious, disrespectful and likely intoxicated young man, whose own classless conduct led to his arrest. I certainly sympathize with that apparent concern. Established First Amendment jurisprudence counsels against indulging such concerns, however, especially in the context presented here. . . . Put simply, the majority concludes that the First Amendment right was not clearly established because no protected First Amendment conduct occurred. Putting aside its circularity, the ultimate conclusion that the right at issue here was not clearly established can not be squared with the state of the law when the arrest occurred.At least twenty years ago, the Supreme Court made clear that, within reason, individuals may not be subject to arrest merely because they interrupt or challenge police conduct. . . . The majority's decision today provides a broad shield to police officers who seek to enforce obstruction statutes against those engaged in speech-related challenges to police activity. It simply cannot be squared, however, with well-established, and, indeed, important First Amendment jurisprudence.").

Dorsey v. Barber, 517 F.3d 389, 394, 400 (6th Cir. 2008) ("[A]lthough the district court couched its ruling in terms of factual disputes, the pure legal issue legitimately before us on appeal concerns whether Begin's display of his firearm in conjunction with ordering plaintiffs to lie face-down on the ground for a period of time undisputedly no greater than two minutes–until additional law enforcement support arrived and control of the scene was assumed by a superior officer–constituted an unreasonable seizure or an excessive use of force in violation of plaintiffs' clearly established rights, of which a reasonable officer would have known. . . . [W]e have no trouble concluding that Begin made a mistake. Considering that the suspects were wanted in connection with an auto theft investigation, . . . and that plaintiffs did not manifestly pose an immediate threat to anyone's safety or a risk of flight, Begin should have been able to 'stop and hold' them without brandishing his firearm and ordering them to lie face-down on the pavement. Begin's response to the apparent demands of the situation seems to have been exaggerated and the resultant seizure, though supported by reasonable suspicion, was, due to the unnecessarily intrusive means employed by Begin, at least arguably unreasonable. . . . Yet, it does not follow that Begin's mistake necessarily disqualifies him from qualified immunity. Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . There is no support for the notion that Begin knowingly and deliberately violated plaintiffs' right to be free from unreasonable seizure. Nor can his mistake be fairly characterized as so egregious as to suggest outright incompetence. At worst, Begin made an error of judgment, erring on the side of public safety. Not

knowing the seriousness of the criminal activity for which the suspects were wanted, but knowing that the persons before him, who matched the BOLO description, had first disregarded and then resisted his orders to stop, Begin chose to stabilize the situation by acting with a preemptive show of authority. This approach turned out to be unnecessary, but cannot be said to have been plainly incompetent or objectively unreasonable.").

Brannum v. Overton County School Board, 516 F.3d 489, 494, 495, 498, 499(6th Cir. 2008) ("Before explaining our Fourth Amendment analysis, we think it might be useful to explain why we do not assess the students' privacy claims under the Due Process Clause of the Fourteenth Amendment. This court has held that the constitutional right to privacy, which includes the right to shield one's body from exposure to viewing by the opposite sex, derives from the Fourth Amendment, rather than the Due Process Clause. . . We are aware that some circuits have found that the same privacy right is located in the Due Process Clause. . .. However, since the Fourth Amendment approach is the precedent in this circuit, and the Supreme Court seems to prefer it, . . . we will follow our precedent. . . . Neither the Supreme Court nor this court has ever addressed the applicability of video surveillance to the Fourth Amendment's proscription against unreasonable searches. However, the Supreme Court has applied the amendment's guarantees to practices that were not in existence at the time the amendment was enacted and has instructed that in such cases, the ultimate measure of the constitutionality of such searches is one of 'reasonableness.'. . . We are satisfied that both the students' expectation of privacy and the character of the intrusion are greater in this case than those at issue in *Vernonia* and *T.L.O.* We conclude that the locker room videotaping was a search, unreasonable in its scope, and violated the students' Fourth Amendment privacy rights. . . . In analyzing whether a constitutional right is clearly established, we look '*principally* to the decisions of the United States Supreme Court and this circuit to determine whether the law was clearly established at the time of the action.'. . The Supreme Court has left it to the lower federal courts to decide, case by case, what 'clearly established' means when applied to factual situations not previously confronted by the Supreme Court. The Court provided some guidance in *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004), when it announced that the specific constitutional right at issue must be clearly established when considered at an appropriate level of specificity and cannot be asserted at a high level of generality. . . . Some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion. Surreptitiously videotaping the plaintiffs in various states of undress is plainly among them. . . Stated differently, and more specifically, a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room. These notions of personal privacy are 'clearly established' in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches. But even if that were not self-evident, the cases we have discussed, *supra*, would lead a reasonable school administrator to conclude that

the students' constitutionally protected privacy right not to be surreptitiously videotaped while changing their clothes is judicially clearly established.").

Figel v. Overton, 263 F. App'x 456, 2008 WL 341458, *3 (6th Cir. Feb. 6, 2008) ("At the time of the alleged conduct, one circuit had already concluded that the RULPA [sic] was constitutional, *see Mayweathers v. Newland*, 314 F.3d 1062 (9th Cir.2002), and five circuits, including the Ninth, had concluded that the identical operative language in RFRA did not violate the Establishment Clause. . . Thus, at the time of Defendants' alleged unconstitutional acts, the RULPA [sic] was presumptively constitutional, and no federal appellate authority was to the contrary. Thus, at the time of the conduct in question, the constitutionality of the RULPA [sic] was clearly established and Defendants are not entitled to qualified immunity on Figel's RULPA [sic] claim. . . . Defendants' reliance on *Key* is misplaced. In *Key*, this Court addressed the applicability of the Americans with Disabilities Act and the Rehabilitation Act to prisoners, noting that prison officials were entitled to qualified immunity during the time that there was uncertainty on this issue. . . Unlike those statutes, it is clear from the face of the state that the RULPA [sic] applies to prisoners. Further, as noted above, until November 7, 2003, when *Cutter* was decided by this Circuit, the RULPA [sic] was valid law requiring compliance by prison officials.").

Logsdon v. Hains, 492 F.3d 334, 346 (6th Cir. 2007) ("The contours of the First Amendment public forum doctrine are sufficiently clear. Here, Defendants ostensibly arrested Plaintiff for violating Ohio's criminal trespass law. However, if instead, as Plaintiff appears to allege, Defendants arrested him because of the content of his speech, then Defendants acted in violation of the First Amendment in ways that should have been clear to a reasonable officer. Viewing the allegations in the light most favorable to Plaintiff, the district court erred in dismissing Plaintiff's First Amendment claims. We reverse because Plaintiff stated a claim, but express no opinion as to whether Plaintiff will ultimately succeed on his claim following discovery.").

Peete v. Metropolitan Government of Nashville and Davidson County, 486 F.3d 217, 219, 221, 223 (6th Cir. 2007) ("We find no case authority holding that paramedics answering a 911 emergency request for help engage in a Fourth Amendment 'seizure' of the person when restraining the person while trying to render aid. Hence there is no 'clearly established law' creating federal liability for a constitutional tort under these circumstances. The district court, therefore, erred in failing to grant qualified immunity to the paramedics. . . . [W]here the purpose is to render solicited aid in an emergency rather than to enforce the law, punish, deter, or incarcerate, there is no federal case authority creating a constitutional liability for the negligence, deliberate indifference, and incompetence alleged in the instant case. The Eighth Amendment 'Cruel and Unusual Punishment' Clause raising a 'deliberate indifference' standard does not apply here because Becerra was not incarcerated and the purpose of the alleged wrong was not punishment. . . . Assuming arguendo that the restraint techniques used by the EMT's were excessive or medically unreasonable, the plaintiff may be entitled to recovery under the state law of negligence, but improper medical treatment by a government employee, standing alone, does not violate the Fourth or Fourteenth Amendment. . . . The custody exception imposes on state

officials a 'constitutional duty to provide adequate medical care to incarcerated prisoners ... and those under similar restraint of personal liberty.'. . The court in *Jackson* held that a constitutional duty was not triggered where paramedics placed an individual wounded by a gunshot into their ambulance and began transporting him to the hospital. The District Court had held that moving an unconscious patient into the ambulance constituted custody, but we held that 'the concept of custody does not extend this far.'. . The facts in the present case similarly fail to allege that Becerra was taken into custody. He was restrained while he was unconscious, and the defendants' actions were undertaken in an effort to render medical treatment. This is easily distinguished from the archetypical custody exception case where jail or prison officials fail to provide medical treatment to an incarcerated individual.").

Koulta v. Merciez, 477 F.3d 442, 448 (6th Cir. 2007) ("Even if we assumed for the sake of argument that the officers' actions violated Koulta's substantive due process rights, his estate cannot show that these rights were 'clearly established' at the time of the accident. Not just in 2002, but since then as well, our cases have failed to recognize a 'state-created danger' claim unless the State indeed created the danger-either by increasing the risk of harm to third parties by its affirmative conduct or by doing something that endangers a discrete member or group of the public. . . The estate has not identified a case from our circuit or any other that clearly establishes the contours of a substantive-due-process right of action on facts like these.").

Center for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807, 830, 831 (6th Cir. 2007) ("Here, the 'contours' of Plaintiffs' Fourth Amendment rights were 'sufficiently clear that a reasonable official would understand' that detaining Plaintiffs over two hours after they dispelled any reasonable suspicions ripened the investigatory stop into an arrest absent probable cause. . . Although Defendants confronted novel factual circumstances, the unlawfulness of their conduct should have been apparent in light of well-settled precedent of the Supreme Court and of this Circuit.")

See also ***Center for Bio-Ethical Reform Inc. v. City of Springboro***, 2007 WL 4322234, at *2, *3 (S.D. Ohio Dec. 7, 2007) ("The Court agrees with Defendants Morris and Shaw that there is a reasonable probability that four Justices of the Supreme Court would grant *certiorari* in this case and a majority of at least five would vote to overturn the decision of the Sixth Circuit. The Supreme Court in recent years has been particularly solicitous of the doctrine of qualified immunity; it has taken many cases raising that issue and not infrequently reversed courts of appeals on the issue. *See, e.g.,* from the 2006 Term, *Morse v. Frederick*, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007)(the "bong hits for Jesus" case); *Scott v. Harris* , 127 S.Ct. 1769 (2007). These were two out of only sixty-eight cases, the smallest Supreme Court docket since the mid-19th century. However, Defendants Morris and Shaw cannot demonstrate that they will suffer any substantial harm from denial of the stay. They argue, correctly, that the doctrine of qualified immunity protects public officials not only from liability, but also from suit and the inconveniences attendant on defending litigation. . . Because qualified immunity is an immunity from suit as well as from damages, a public official who pleads a qualified immunity defense is entitled to have that defense decided

before the case proceeds even to discovery. . . Had Defendants Morris and Shaw sought such relief, they would have been entitled to have their qualified immunity defense decided before any discovery took place and could have taken an interlocutory appeal from an adverse decision. However, they did not exercise that right in this case, but permitted the case to proceed to discovery without objection. They are not now faced with any additional discovery burden: discovery was completed in this case before the pre-appeal summary judgment motions were filed. After remand, the Court conducted a scheduling conference and no party suggested the need for any additional discovery in the case (See Scheduling Order, Doc. No. 102). Thus the only immediate burden Defendants Morris and Shaw face is the burden of briefing the currently pending Motion for Summary Judgment. That burden will fall entirely on the shoulders of their counsel and the performance of their important duties as special agents of the F.B.I. will in no way be impacted. A different situation might be presented if the case were set for immediate trial, but in fact the trial date is not until August, 2008. As Plaintiffs note, the Supreme Court is very likely to decide any petition for *certiorari* by that time. Of course, if the Court grants *certiorari*, this Court will then stay its proceedings. Thus Defendants Morris and Shaw will not suffer the harms which the doctrine of qualified immunity shields them from by denial of the stay. Moreover, the stay will work harm to others. The asserted interference with Plaintiffs' constitutional rights occurred in June, 2002; even without a stay, it will be more than six years before they receive a trial. The other Defendants in the case also deserve finality and have not sought a stay . . . Even without a stay, the Court was unable in September, 2007, to confirm a trial date in less than eleven months because of counsels' trial calendars. Unless the Supreme Court decides to grant *certiorari*, this Court is loathe to lose the currently set trial date.").

Haynes v. City of Circleville, Ohio, 474 F.3d 357, 364, 365 (6th Cir. 2007) ("In lodging his protests to Chief Gray against the training cutbacks, Haynes was acting as a public employee carrying out his professional responsibilities . . . Haynes's speech is therefore unprotected as a matter of law because all of the speech at issue in this case, like the speech at issue in *Garcetti*, was made pursuant to his official duties. . . . . As a police officer, Haynes had developed the standard operating procedure for the canine unit and worked with his dog as part of his day-to-day professional activities. His memo to Chief Gray, made pursuant to these professional duties, is not protected under the First Amendment. . . . . At the time that Haynes sent his memo in February of 2003, he was simply speculating that someday there could be a negative incident that might result from the reduction in canine training. Haynes's memo focused on his discontent with the new program, which he later admitted in his deposition was in compliance with Ohio law. The memo thus reflects nothing more than 'the quintessential employee beef: management has acted incompetently.'. . Haynes's invocation in his memo of legal terms such as 'deliberate indifference' and 'failure to train' do not, without more, render Haynes's speech a matter of public concern. . . In short, the district court erred in concluding that Haynes's memo constituted protected speech even under the law of this circuit prior to *Garcetti*. Haynes thus has no First Amendment cause of action even if Chief Gray did fire him as a direct result of either the memo or the ill-fated 'Christmas gift.'. . . Because Haynes's speech took place pursuant to his official duties as a police officer, he cannot establish that a constitutional violation took place. . . . Haynes is *a fortiori* unable

to satisfy the second prong of the qualified-immunity analysis–that the constitutional right was clearly established.")**.**

Carver v. City of Cincinnati, 474 F.3d 283, 287 (6th Cir. 2007) ("There are no cases that present facts similar to Carver's situation that would make it 'clear to [an objectively] reasonable officer that his conduct was unlawful in the situation he confronted.'. . . The district court, citing to *Beck v. Haik*, 377 F.3d 624, 643 (6th Cir., 2004), found it clearly established that the officers violated Carver's constitutional rights. *Beck*, however, stands for the proposition that the state may not cut off access to private rescue without providing an adequate state alternative of aid. In this case, unlike *Beck*, there were no allegations of any attempted private rescue. There are no other cases from this circuit or the Supreme Court with analogous facts to the one before us. Therefore, the law was not clearly established at the time of the alleged constitutional violation.")**.**

Perez v. Oakland County, 466 F.3d 416, 427-29 (6th Cir. 2006) ("Here, we have already determined that there is a genuine issue of fact as to whether Rice violated Perez's Eighth Amendment constitutional right. Thus, though it is a close case, we cannot hold that Rice is entitled to qualified immunity (on summary judgment) based on the first step of the qualified immunity analysis. We thus move to the second step of the qualified immunity test; we determine whether the right violated was 'clearly established' at the time of the violation. . . . In the context of a prisoner's Eighth Amendment medical-care claim, such precedent had to alert Rice that her conduct was deliberately indifferent to a strong likelihood that Perez would try to kill himself. . . . In *Comstock v. McCrary*, 273 F.3d 693 (2001), this court held that once a prisoner has been deemed suicidal, it is clearly established that the prisoner is entitled to continuing medical treatment. Here, Perez was not deemed to be suicidal at the time he was moved to the single cell. Additionally, Perez was not generally deprived of medical treatment involving his mental health needs. Thus, Perez Sr. would have to prove that his son's right to have his serious medical needs treated without deliberate indifference encompassed a right to a correct assessment of his suicide risk or an effective suicide-monitoring arrangement. . . . Perez identifies no pre-November 2002 published decision of the U.S. Supreme Court or this court requiring such a determination, nor have we found any. If no binding precedent is available that directly holds that conduct materially or fundamentally similar to Rice's was unlawful in October-November 2002 under the circumstances, as is the case here, the court may still find that Rice violated a clearly established right through one other avenue: showing 'a generally applicable principle from either binding or persuasive authorities whose Aspecific application to the relevant controversy" is Aso clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional."'. . However, Perez Sr. failed to show such a principle. On the contrary, by October 2002 this circuit's published case law had established that inmates have no general right to be correctly screened for suicidal tendencies. . . The circuit's published case law also held that 'the generalized right of a prisoner to be free from deliberate indifference [to a known serious medical need] cannot support a finding that there was a clearly established right to be protected from committing suicide.'").

Baranski v. Fifteen Unknown Agaents of the Bureau of Alcolhol, Tobacco and Firearms, 452 F.3d 433, 447-50 (6th Cir. 2006) (en banc) ("Doubtless, the agents would have been wiser to bring a written summary of the items to be seized (presumably signed by the magistrate) or to list the items to be seized in the warrant itself. There seems to be little doubt (and none has been offered by the United States) that agents who choose to rely on an incorporated affidavit typically have good reason and ample means to avoid complaints like this one. But the question is whether the Fourth Amendment demands these things, even when the purposes of doing them have been satisfied and even when the failure to do them has not prejudiced the property owners. On this record and under these circumstances, we hold that no constitutional violation occurred. . . But even if that were not the case, even if the search violated the Fourth Amendment, it did not violate 'clearly established' law. . . . Even aside from this mirror-image precedent from another circuit, the prevailing law in this circuit would have led reasonable agents to believe that their conduct was legal at the time they conducted the search. [discussing cases] . . . *Groh* does not alter this conclusion. The Court could criticize that search as warrantless because the warrant contained a 'glaring deficiency' upon issuance recognizable by 'any reasonable police officer[.]'. . . Absent any evidence on the face of the warrant that it incorporated the attached affidavit, the Court concluded, the warrant was 'manifestly invalid,' 'warrantless' and thus 'constitutionally fatal.' . . . Today's facts offer a poor analogy. At the time of issuance, this warrant specifically incorporated the affidavit ('See Attached Affidavit'), which in turn particularly described the items to be seized. Far from invalidating incorporated affidavits, *Groh* recognized that they may satisfy the particularity requirement, and in this case no one disputes that the warrant upon issuance appropriately incorporated the affidavit and that the magistrate reviewed, approved and signed the warrant and affidavit. At the time of issuance, in marked contrast to *Groh*, no amount of study by the agents or the magistrate would have revealed a constitutional infirmity in the warrant. Nor did *Groh* say that it was clearly established that a warrant valid upon issuance becomes invalid upon execution if the incorporated affidavit does not accompany the search. The words of the Constitution, to which the Court referred in concluding that the *Groh* warrant was facially invalid, establish particularity requirements that apply by their terms upon the 'issu[ance]' of a warrant, not upon the execution of it. Whether a particularized warrant at the time of issuance may become an unparticularized warrant when a cross-referenced affidavit does not accompany the search remains a matter of continued debate among the circuits and remains an issue that neither the text of the Fourth Amendment nor *Groh* resolves. We thus conclude that even if this search had violated the Fourth Amendment right, it did not violate 'clearly established' constitutional law, and accordingly the agents should receive qualified immunity.").

Silberstein v. City of Dayton, 440 F.3d 306, 316, 317 (6th Cir. 2006) ("The Board Members do not dispute that a City of Dayton employee in the classified service had a clearly established right to a pre-termination hearing at the time of Silberstein's termination; rather, they argue that Silberstein's status as a classified employee is disputable such that a reasonable person would not know that he or she was violating Silberstein's rights. . . . No reasonable official reading the plain language of the Charter would reach the conclusion that Silberstein was an unclassified employee. Although some cases reveal disagreement or ambiguity regarding an employee's status as

classified or unclassified, these cases address whether an employee's position falls within the particular statutory language defining the categories of unclassified service. . . . Silberstein's position was clearly established as classified not only by the plain language of the Charter but also by general understanding and practice.").

Caudill v. Hollan, 431 F.3d 900, 913, 914 (6th Cir. 2005) ("We believe that *Hall*, *Heggen*, and *McCloud* make the law in this circuit with respect to patronage dismissals of these types of county employees clearly established with the requisite specificity to satisfy the Supreme Court's requirement that the law 'clearly establish[ ] in [a] more particularized sense' that the act was unconstitutional. . . The duties of the deputy sheriffs described in *Hall* are little different from the duties of the deputy clerks here. Deputy sheriffs duties were described in *Heggen* as 'including road patrol, serving arrest warrants and civil papers, taking complaints and 'working' auto accidents, ... transport [ing] prisoners[,] and providing courtroom security.' . . *Heggen* described all of these duties as 'nonpolicymaking duties .'. . Deputy clerks, whose work is essentially clerical work, also perform nonpolicymaking duties. Although deputy sheriffs and deputy clerks engage in different tasks, their respective levels of responsibility and the nature of their jobs are not so different as to cause this court to find that the law with respect to deputy sheriffs is clearly established, but that the law with respect to deputy clerks is not clearly established. In addition, Hager's duties are also best described as nonpolicymaking duties. It is difficult to understand how a reasonable official could believe that it would be constitutionally permissible to terminate a clerical employee like a deputy clerk through political patronage, when this court has held that it is not constitutionally permissible to terminate a deputy sheriff or a teacher and administrator of a gifted and talented program through political patronage. Furthermore, were this court to hold that *Hall*, *Heggen*, and *Hager* did not make the law clearly established for deputy county clerks, we would be ignoring the Supreme Court's rule that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . Were this court to require position-specific findings before it found that the law was clearly established, we would be, in effect, requiring a previous finding on the constitutionality of patronage dismissals for every government position before holding that the law was clearly established for that position. Such a finding could lead to the result that similarly situated county officials could engage in political patronage dismissals at least once with impunity, unless and until a court ruled on the constitutionality of political patronage for that particular position. Such a result is not warranted by logic or precedent. . . . In sum, by virtue of *McCloud*, *Heggen*, and *Hager*, Defendant had sufficient notice that patronage dismissals in Kentucky were constitutionally suspect. These cases alone are enough to find that the rule prohibiting patronage dismissals of deputy county clerks was clearly established. The memo from the Boyd County Attorney warning new county executives against patronage dismissals further solidifies our holding that a reasonable official would be on notice that patronage dismissals would violate the constitutional rights of county employees in most circumstances.").

Evans-Marshall v. Bd. of Education of the Tipp City Exempted Village School District, 428 F.3d 223, 232, 233 (6th Cir., 2005)("Evans-Marshall has made allegations sufficient to satisfy the first

prong of qualified immunity, that 'the officer[s'] conduct violated a constitutional right[.]'. . Since the Complaint adequately alleges a claim of First Amendment retaliation, there are sufficient allegations to support a claim that the individual defendants violated Evans-Marshall's constitutional rights by terminating her. . . Evans-Marshall's claim also satisfies the second prong of qualified immunity, that 'the right was clearly established.'. . Under a liberal reading of the Complaint, Evans-Marshall was terminated due to a public outcry engendered by the assignment of protected material that had been approved by the Board. Such a claim dovetails with previous, meritorious claims in this circuit. . . The dissent calls our attention to the comments by several of our sister circuits to the effect that constitutional rights discovered only pursuant to a balancing of interests have special implications for qualified immunity. . . . Yet *Cockrel* is clearly analogous to the facts at bar. In *Cockrel*, a teacher was fired because of a public outcry over material she presented in class that had been approved by the school. . . We held that her presentation of material in class constituted speech that dealt with a matter of public interest.. . We assumed that the concerns of the school did not outweigh Cockrel's interest in speaking because the school had approved the very material that gave rise to the disruption. . . Even were this circuit to adopt the reasoning of some of our sister circuits, surely the fact that Evans-Marshall assigned books, whereas Cockrel brought in a guest lecturer about industrial hemp, does not obscure the constitutional right at issue.")

Evans-Marshall v. Bd. of Education of the Tipp City Exempted Village School District, 428 F.3d 223, 234-38 (6th Cir., 2005)(Sutton, J., concurring) ("Individual defendants likewise will only rarely be able to establish that the right was not 'clearly established' at this stage of the dispute. The case-by-case, incremental decisionmaking of balancing tests, it is true, infrequently will provide the 'fair notice' that qualified-immunity precedent requires, as each case may contain unique employee interests in speaking and unique employer concerns in restricting the speech. . . But just as these considerations frequently will make it difficult for a plaintiff to surmount a qualified-immunity defense after discovery, so they make it difficult for a defendant to claim qualified immunity on the pleadings before discovery and before the parties (much less the courts) know what is being balanced against what. . . Absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is 'obvious' or 'squarely govern[ed]' by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not. Third, while I am prepared to accept these conclusions in this case, I respectfully believe that our circuit should re-think the way it has applied *Connick* and *Pickering* to in-class curricular speech. The Supreme Court has never held that the First Amendment applies to a teacher's classroom speech, and there is good reason to think that it would not do so. In *Connick*, the Court said that 'when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.'. . *Connick*, then, draws two dichotomies: (1) between speech by public employees acting as 'employees' and speech by public employees acting as private 'citizens'; and (2) between speech 'on matters of public concern' and speech 'upon matters of personal interest.' When public school

teachers speak as 'employees,' even when they speak on 'matters of public concern,' the First Amendment thus does not protect their speech under Connick, a conclusion that respects the reality that it is the employer (not the employee) who bears ultimate responsibility for what goes on in the classroom, the reality that virtually all speech by public school teachers in the classroom involves speech in the teacher's capacity as an employee and the reality that many public school teachers (consider English, History and Government teachers) speak about 'matters of public concern' virtually every day of the school year. Only when teachers speak as private citizens on matters of public concern does the First Amendment and the *Pickering* balancing test apply. . . Submitting issues of this sort to the federal courts is not a sensible way to make decisions about the books that children read in public school or about the way books are taught in school, and it is not something that the Constitution mandates. Because it is the method that our circuit's case law appears to have adopted, however, I respectfully concur in today's opinion.")

Evans-Marshall v. Bd. of Education of the Tipp City Exempted Village School District, 428 F.3d 223, 238 (6th Cir., 2005) (Zatkoff, District Judge, concurring, in part, and dissenting, in part) ("I concur in Judge Cole's majority opinion, which faithfully applies this circuit's precedent in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir.2001) to the present facts. In addition, I concur in Judge Sutton's concurring opinion, which calls for a re-examination of this circuit's First Amendment jurisprudence regarding in-class curricular speech. I disagree with the majority insofar as it would deny qualified immunity to the individual defendants. Because I find that the alleged Constitutional violation was not 'clearly established,' I would grant qualified immunity to the individual defendants.").

Cagle v. Headley, No. 04-6162, 2005 WL 2108367, at *6 (6th Cir. Sept. 1, 2005) (not published) ("No case 'squarely governs' the outcome here. Although the generalized right to be free of a patronage demotion was clearly established at the time of Headley's actions, the qualified-immunity inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . As our discussion of the Williamson County lieutenants' duties fairly indicates, the position at best falls on the 'hazy border' between *Hall* and *Heggen*. . . Although Cagle need not identify 'a separate patronage dismissal decision by the Supreme Court or the Sixth Circuit involving a particular position before qualified immunity can be denied,' . . . he has failed here to identify a case from the Supreme Court or the Sixth Circuit that treats as nonpolicymaking a position that is similar for constitutional purposes to a lieutenant's position with these particular responsibilities. Indeed, there is considerable disagreement among the federal courts of appeals as to whether a deputy sheriff–a position that in most sheriffs' departments involves fewer responsibilities than a Williamson County lieutenant–falls on the policymaking side of the First Amendment divide.[comparing cases] This division of opinion, as the Supreme Court has explained in a related context, by itself indicates that the 'cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case.' [citing *Brosseau*] Neither can we say that Cagle's right to be free of a patronage dismissal was so 'obvious' as to be clearly established by a 'general test[ ] ... even without a body of relevant

case law.' . . He thus also cannot prevail under this option for showing the existence of a clearly established right.").

Schultz v. Sillman, No. 04-1507, 2005 WL 2175942, at *8 (6th Cir. Aug. 10, 2005) (not published) ("Once we have established that Plaintiff's version of the facts demonstrates a violation of his constitutional right, the court next decides whether at the time of the suicide, in December 2001, a reasonable officer would have known that his conduct was unlawful. . . While this analysis is particularized and fact-specific, the plaintiff does not have to show that the court has had a 'fundamentally similar' or 'materially similar' case in order for a clearly established right to apply here. . .The jurisprudence of the Sixth Circuit has established a clear right of a prisoner not to have his psychological medical needs, in the form of suicidal tendencies, treated with deliberate indifference. . . Based on this case law, a reasonable officer would know that recklessly disregarding a known risk of an inmate's suicide would violate the inmate's Eighth Amendment right. Importantly, Sillman does not contest that there is clearly established law that would hold a corrections officer liable for deliberate indifference to the risk of suicide if an inmate demonstrates a strong likelihood that he would commit suicide. Therefore, if a jury determines that Schultz demonstrated a strong likelihood of suicide, and that Sillman was aware of this likelihood but chose to disregard it, Sillman's actions would constitute a violation of Schultz's clearly established Eighth Amendment right to receive medical treatment for his suicidal tendencies.").

Knott v. Sullivan, 418 F.3d 561, 571 (6th Cir. 2005) ("In light of the extensiveness of the search warrant defects at issue in this case, we conclude that the constitutional infirmity of the search warrant executed by the Defendants was clearly established at the time they searched Knott's 1988 Plymouth Horizon. . . . The Fourth Amendment obviously forbids relying on a warrant to search one vehicle when all of the vehicle-specific descriptors refer to another vehicle, and thus we conclude that the constitutional invalidity of the search warrant at issue in this case was clearly established at the time Knott's vehicle was searched.").

Fisher v. Harden, 398 F.3d 837, 846-49 (6th Cir. 2005) ("The specific question at issue is whether it was clearly established at the time of Fisher's arrest that a law enforcement officer may not affect a mental health seizure without probable cause. As we have already noted, in 1997 this court specifically held that '[t]he Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others.' . . . The seizure in this case was not specifically for purposes of a professional psychiatric evaluation. This difference, however, is of no effect. Viewing the evidence in the light most favorable to Fisher, we must reject the sentiments of the dissent that the deputies were 'merely securing the scene.'. . . This record evidence reveals that the officers seized and detained Fisher, not merely to secure the scene, but for purposes of a mental health evaluation. Under our Fourth Amendment jurisprudence, that action requires probable cause. We have not found any case in which this court has stated that officers may restrain an individual's liberty on the sole basis that they have a reasonable suspicion that the individual suffers from a mental illness. In addition, the other circuits that have examined this issue have similarly held that probable cause is

the correct standard. . . . Fisher has alleged facts sufficient to establish a violation of his constitutional rights. It is clearly established that an officer may not affect a mental health seizure without probable cause. Viewing the facts in the light most favorable to Fisher, we conclude that the Alexanders engaged in conduct that violated a clearly established constitutional right. Accordingly, we find that qualified immunity does not shield them from civil liability." [footnotes omitted]).

Barrett v. Steubenville City Schools, 388 F.3d 967, 973, 974 (6th Cir. 2004) ("In this case, Barrett made a decision to send his son to private school. Barrett's choice in directing his son's education is activity shielded by his constitutionally protected right of liberty. The Defendants do not dispute that. Because it has been clearly established that one's involvement in constitutionally protected activity cannot be the sole basis for denying public employment, any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law. Nevertheless, Defendants argue that '[t]here is no clearly established line of cases out of the Supreme Court or this Circuit which establish that dictating where public school employees send their children to school violates the employees' parental rights.' Defendants would have us find that the district court erred by relying on other circuits in its analysis. . .The cases referenced by the district court point unmistakably to the unconstitutionality of the conduct complained of and are clearly foreshadowed by applicable direct authority in the Supreme Court. . . While it was therefore permissible for the district court to rely on these cases in finding that the law was clearly established, it was unnecessary. We do not adopt the district court's analysis, . . .for we need not rely on law outside of our jurisdiction to find that a clearly established right exists. The Supreme Court has instructed that qualified immunity does not require 'the very action in question [to] ha[ve] previously been held unlawful,' but rather 'in the light of pre-existing law the unlawfulness must be apparent.'. . .Defendants cannot escape liability by arguing that no precedent exists that specifically enunciates a law that a public school official cannot deny someone employment solely because that person chooses to his child to a private school. . .As aforementioned, Barrett has a constitutionally protected fundamental right to educate his child at the school of his choice. There is also a clearly established law that forbids employers from denying one employment based only on 'person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty.' In accordance with these fundamental principles of law, Lucci cannot obtain qualified immunity by claiming that no clearly established right existed.").

Barrett v. Steubenville City Schools, 388 F.3d 967, 975, 976 (6th Cir. 2004)(Rogers, J., dissenting) ("The majority concludes that 'any reasonable official would know that denying employment based on a parent's constitutional right to direct his child's education is a violation of the law.' And yet, such a right has not been articulated in the Supreme Court or this circuit. Rather, the majority constructs this right from the parts of two others: the fundamental right of a parent to raise his or her children and direct their education, which is clearly established, and a right the majority describes as a right not to be denied government employment because of a decision to exercise a fundamentally protected right. This second 'right' is not a right in all contexts, and has certainly

not been clearly established in the context presented by this case. . . . On the facts of this case, it is not clear that 'every like-situated, reasonable government agent' would have clearly understood that the right to direct the education of one's children should be combined with a balancing test used to determine what rights a public employer can require a public employee to give up, with the result that a public school can not require a public school teacher to send his or her child to that public school.").

Champion v. Outlook Nashville, Inc., 380 F.3d 893, 902-05 (6th Cir. 2004) ("Our caselaw and the evidence presented at trial about the training that the Officers received demonstrate that the force exerted against Champion violated his clearly established Fourth Amendment rights. . . . The particular type of physical force exerted against Champion was unreasonable, and the Officers should have been aware that they were violating Champion's rights. First, it is clearly established that the Officers' use of pepper spray against Champion after he was handcuffed and hobbled was excessive. . . . In addition to prior precedent, the Officers' training demonstrates that they were aware of Champion's clearly established right to be free from this type of excessive force. The Officers were taught that pepper spraying a suspect after the individual was incapacitated constitutes excessive force. Sergeant Robert Allen, who testified about the training the Nashville Police Officers received, agreed that if Champion were handcuffed and hobbled, spraying him with pepper spray would be excessive. Second, it also clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force. This appeal gives us no cause to consider whether leaving a bound suspect on his or her stomach without more constitutes excessive force that violates a suspect's clearly established Fourth Amendment rights. This is neither a 'positional asphyxia' case nor a case in which the officers lightly touched or placed incidental pressure on Champion's back while he was face down. The asphyxia was caused by the combination of the Officers placing their weight upon Champion's body by lying across his back and simultaneously pepper spraying him. Creating asphyxiating conditions by putting substantial or significant pressure, such as body weight, on the back of an incapacitated and bound suspect constitutes objectively unreasonable excessive force. . . . Additionally, the Officers' training outlined the boundaries of excessive force and made clear that lying on a suspect can cause asphyxiation. All three Officers admitted that they were aware of the potential danger of putting pressure on an individual's back or diaphragm. . . Additionally, Sergeant Allen testified that he taught his officers that lying across an individual's back when that person is on his or her stomach increases the possibility of asphyxia. Just as the Supreme Court determined that the Alabama Department of Corrections Regulations and the communications between the U.S. Department of Justice and the State of Alabama put the state on notice about what constituted cruel and unusual punishment, so too here the training these Officers received alerted them to the potential danger of this particular type of excessive force. . . It cannot be forgotten that the police were confronting an individual whom they knew to be mentally ill or retarded, even though the Officers may not have known the full extent of Champion's autism and his unresponsiveness. The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted. . . . Consequently, the right to be free from the two types of excessive force exerted against

Champion was clearly established by the law of this circuit and by the training of the Officers. Either action by itself violated a clearly established right, and the combination of the actions bolsters the conclusion that no reasonable officer could believe that excessive force was not being used. We recognize that the Officers perhaps did not intend to harm Champion; indeed, they may have believed they were helping him. Such a consideration is immaterial, however, because the qualified immunity doctrine is an objective one; motive is irrelevant. The evidence presented in the light most favorable to Champion, and in the light accepted by the jury, demonstrates that the Officers unreasonably applied excessive force to Champion after he had been incapacitated in violation of Champion's clearly established rights. No reasonable officer would have continued to spray a chemical agent in the face of a handcuffed and hobbled mentally retarded arrestee, who was moving his or her head from side to side in an attempt to breathe, after the arrestee vomited several times. No reasonable officer would continue to put pressure on that arrestee's back after the arrestee was subdued by handcuffs, an ankle restraint, and a police officer holding the arrestee's legs.").

Dean v. Byerley, 354 F.3d 540, 558 (6th Cir. 2004) ("Dean had a constitutionally protected right to engage in peaceful targeted residential picketing, in the absence of an applicable time, place, or manner regulation, and retaliation against Dean for exercising that right would violate Dean's First Amendment rights. Therefore, Dean has satisfied the first hurdle necessary to survive summary judgment based upon qualified immunity by pointing to evidence showing that Byerley violated Dean's First Amendment rights. The Sixth Circuit precedent holding that a § 1983 claim can be predicated upon retaliation for exercising First Amendment rights and the Supreme Court precedent holding that peaceful picketing is constitutionally protected predate the March 27, 2001 confrontation, and thus the right to engage in peaceful targeted residential picketing, free from such retaliation, was clearly established at the time of the confrontation. . . Therefore, Dean has satisfied the second hurdle necessary to survive summary judgment based upon qualified immunity by showing that the constitutional right was clearly established. Finally, through his complaint and Doolittle's deposition, Dean has presented evidence that Byerley's alleged conduct was objectively unreasonable in light of Dean's clearly established First Amendment rights. Therefore, Dean has satisfied the third hurdle necessary to survive summary judgment based upon qualified immunity by pointing to evidence showing that what Byerley did was objectively unreasonable in light of clearly established constitutional rights.")**.**

Akers v. McGuinnes, 352 F.3d 1030, 1042, 1043 (6th Cir. 2003) ("Having found no constitutional violation, we must answer the qualified immunity question in the affirmative. While this disposes of this question, we note that for a plaintiff to defeat a defense of qualified immunity, he must not only prove the violation of a right, but of a *clearly established* right. . . Indeed, the right must be 'so clearly established when the acts were committed that *any* officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.' . . However, in the present case the district judge found no violation of a constitutional right at all. Thus, for the plaintiffs to prevail here on the question of qualified immunity, the situation would have to be such that *any MDOC official*

when promulgating the Rule would be aware of the fact that it violated the Constitution, but a United States district judge, given the benefit of decades of legal training and practice, years of hearings and adversarial briefings by able counsel, was unable to find such a violation. While such a situation is not logically impossible, and doubtless has occurred from time to time, it certainly must be a very rare one, implicitly casting some doubt on the minimum competency of such a trial judge. Therefore, in cases such as this, unless counsel are prepared to contend that such an extreme and unusual situation occurred, they will not be able to succeed in reversing a grant of qualified immunity.").

Akers v. McGuinnes, 352 F.3d 1030, 1055 n.3 (6th Cir. 2003) (Clay, J., concurring in part and dissenting in part) ("I do take issue with the majority's statement that Defendants are entitled to qualified immunity because "a United States District Court Judge, given the benefit of decades of legal training and practice, years of hearings and adversarial briefings by able counsel, was unable to find ... a violation." With all due respect, my brethren in the district courts have been known to commit legal error, including plain error through the failure to cite and apply clearly established legal precedent. If a district judge's opinion of the state of the law were somehow dispositive of the qualified immunity issue, the Courts of Appeals rarely would have occasion to reverse a district judge's ruling on qualified immunity. Thus, whether a district judge failed to find a constitutional violation should not control this Court's analysis of the issue.").

Toms v. Taft, 338 F.3d 519, 526, 527 (6th Cir. 2003) ("Because the case law fails to show that an inmate's right to marry was so clearly established that an official reasonably would believe that declining to assist an inmate in obtaining a marriage license is unconstitutional, the [Plaintiffs] have failed to meet their burden. We affirm the finding of qualified immunity. [footnote omitted] However, in order to provide more guidance to officials in the future, we note that *Turner's* test extends to situations in which an inmate's right to marry will be completely frustrated without prison officials' affirmative assistance. Although it was not previously clearly established, we now hold that the distinction between actively prohibiting an inmate's exercise of his right to marry and failing to assist is untenable in a case in which the inmate's right will be completely frustrated without officials' involvement. Therefore, where an inmate will be unable to marry without prison officials' affirmative assistance, *Turner's* strictures apply. The inmate's right to marry may be curtailed only where the officials' refusal to assist the inmate is reasonably related to legitimate penological interests.").

Gean v. Hattaway, 330 F.3d 758, 775-77(6th Cir. 2003) ("The law in the Sixth Circuit is not settled regarding whether Rehabilitation Act claims are properly brought pursuant to § 1983. [citing cases] Moreover, federal courts outside of this circuit are not in agreement as to whether Congress intended the remedies available under the Rehabilitation Act to preclude a suit brought under § 1983 to enforce rights created by the Rehabilitation Act. [citing cases] Because, as we explain below, a § 1983 claim to enforce the plaintiffs' rights under the Rehabilitation Act is barred by qualified immunity in this case and therefore has no chance of success even if it is not precluded by the remedial scheme of the Act, we need not pick a side in that debate. . . . The plaintiffs . . .

fail to allege that the defendants' use of plaintiffs' Social Security benefits to pay for part of their current maintenance 'excluded [them] from the participation in, ... denied [them] the benefits of, or ... subjected [them] to discrimination under any program or activity' on the basis of their disability. 29 U.S.C. § 794(a). Rather, as with their claim under the Medicaid Act, their Rehabilitation Act claim alleges discrimination only in highly general terms. In order to overcome the defense of qualified immunity, the plaintiffs must show that the right allegedly violated was 'clearly established in a more particularized ... sense,' *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), which they have wholly failed to do. Therefore, the plaintiffs may proceed directly under the Rehabilitation Act against the defendants in their official capacities, but plaintiffs' § 1983 claim against the defendants in their individual capacities, were that claim allowed to proceed, would be barred by qualified immunity. . . . Only with respect to the plaintiffs' claim brought under the Rehabilitation Act against the defendants in their official capacities–for which sovereign immunity has been waived–may this suit go forward.")

Thacker v. City of Columbus, 328 F.3d 244, 259, 260 (6th Cir. 2003) ("Although no case has explicitly sanctioned an entry into a private home under circumstances identical to those presented here, such precedent is not required for qualified immunity purposes. . . . It was not apparent that entering plaintiffs' apartment to secure the safety of the paramedics was unlawful. In fact, reasonable officials at the scene would likely disagree over whether the entry into plaintiffs' home violated plaintiffs' rights. . . .Thus, we cannot find that it was clearly established that entering a home without a warrant to secure the safety of paramedics under the circumstances presented in this case would violate the Fourth Amendment.")

Feathers v. Aey, 319 F.3d 843, 850, 851 (6th Cir. 2003) ("[T]he rights at issue here were clearly established when the incident occurred. Under *Hope v. Pelzer,* a right can be clearly established even if there is no case involving 'fundamentally similar' or 'materially similar' facts. . . We see no exception in this analysis for the admittedly 'somewhat abstract' problem of determining when the reasonable suspicion requirement is met, *Arvizu,* 534 U.S. at 274, because *Hope* specifically states that a right is clearly established when '[t]he reasoning, though not the holding,' of a prior court of appeals decision puts law enforcement officials on notice, or when the 'premise' of one case 'has clear applicability' to a subsequent set of facts. . . Here, this standard is met. *Terry,* which requires reasonable suspicion for investigative detentions, had been clearly established since 1968. The Supreme Court had emphasized the importance of establishing the reliability of anonymous tips in 1990 in *White* and had re-affirmed that principle in *J.L.,* decided just a few months before this incident. And the principle that an officer may rely on a dispatch for reasonable suspicion only to the extent that the dispatch is itself based on sufficient information had been established since *Hensley* in 1985. These premises clearly apply to the case at hand, and a reasonable officer would have been aware of the relevant rights. Nonetheless Feathers cannot overcome the officers' qualified immunity. Aey's and Donohue's behavior was not objectively unreasonable, even in light of the clearly established rights, as *Williams v. Mehra,* 186 F.3d at 691, requires before a plaintiff can overcome qualified immunity. Based on the information that Aey and Donohue had themselves, the *Terry* stop was reasonable. The dispatcher informed the officers

of a suspicious person who was possibly intoxicated and supposed to be carrying a weapon. Although this information was from an anonymous tipster, whose information was not sufficient to create reasonable suspicion under *J.L.*, the officers knew only what had been reported from the dispatch, and efficient law enforcement requires–at least for the purposes of determining the civil liability of individual officers– that police be permitted to rely on information provided by the dispatcher. If the dispatcher's information were accurate and reliable, as the police presumed, the totality of circumstances would justify the *Terry* stop. . . . So although the stop violated the Fourth Amendment because the authorities' collective information did not amount to reasonable suspicion, Feathers cannot prevail in a § 1983 suit because the individual defendants had a sufficient factual basis for thinking that they were acting consistently with *Terry.* Although there might be a legitimate question about whether the City should be held liable for a policy that does not inform dispatched officers of the reliability of their tip, the dismissal of the claims against the City is not before us.").

Burchett v. Kiefer, 310 F.3d 937, 945, 946 (6th Cir.2002) ("Burchett claims that his detention in the police car with the windows rolled up in ninety degree heat for three hours constituted excessive force. We agree that unnecessary detention in extreme temperatures, like those that could be reached in an unventilated car in ninety-degree heat, violates the Fourth Amendment's prohibitions on unreasonable searches and seizures. The Supreme Court has noted that under certain circumstances 'unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks' can violate the Eighth Amendment's prohibition on 'unnecessary and wanton infliction of pain.' . . Such actions a fortiori violate the Fourth Amendment, which requires a showing of objective unreasonableness rather than any particular subjective motivation. . . Further, the government's interest in effecting the seizure in this case did not justify the imposition of extreme heat on the individual. The officers had many equally effective alternative ways of detaining Burchett that would not have subjected him to excessive heat, but their denial of his request that they roll down the windows to allow him air indicates a wanton indifference to this important safety factor. They could have left the windows slightly open, for example, or utilized the car's cooling or ventilation devices. If the detainee did spit upon officers or passers-by or otherwise disrupted the officers' search, and the officers could not otherwise effectively separate the detainee from passers-by, a reasonable officer might conclude that closing the windows was necessary. Resolving factual disputes in Burchett's favor, however, those circumstances were not present here. Thus we conclude that those responsible for detaining Burchett for three hours in ninety-degree heat with no ventilation violated his Fourth Amendment right against unreasonable seizures. We also conclude that, under the Supreme Court's recent guidance in *Hope v. Pelzer*, this right was clearly established for qualified immunity purposes. In *Hope*, the Court made clear that a right can be clearly established even if there is no case involving 'fundamentally similar' or 'materially similar' facts. . . Rather, a right is clearly established when '[t]he reasoning, though not the holding,' of a prior court of appeals decision puts law enforcement officials on notice, or when the 'premise' of one case 'has clear applicability' to a subsequent set of facts. . . Here, this standard is met. We have long recognized, for instance, that the Fourth Amendment permits detention using only 'the least intrusive means reasonably available.' . .

Similarly, we have recognized that 'claims of excessive force do not necessarily require allegations of assault,' but rather can consist of the physical structure and conditions of the place of detention. . . These premises have clear applicability to this case, and the reasoning of those cases should have alerted reasonable officers to the constitutional violations inherent in subjecting a detainee to excessive heat.").

Farm Labor Organizing Committee v. Ohio State Highway Patrol, 308 F.3d 523, 539, 541, 542 (6th Cir. 2002) ("[E]ven if Trooper Kiefer is correct that the record reveals that he possessed *some* race-neutral basis for initiating the investigation of the plaintiffs, this fact alone would not entitle him to summary judgment on qualified immunity as long as the plaintiffs can demonstrate that he was partly motivated by a discriminatory purpose. Of course, Trooper Kiefer can still argue, based upon *Mt. Healthy* and *Arlington Heights*, that his race-neutral reasons would have caused him to investigate the plaintiffs regardless of any discriminatory motive that may have existed. The question of whether Trooper Kiefer's allegedly discriminatory motive played a determinative role in the decision to investigate the plaintiffs, however, is a factual dispute best suited for resolution at trial. . . . We disagree with the defendant's characterization of the state of the law in 1995. While *Travis* may have been the first case to reach the merits of such an equal protection claim, we expressly acknowledged in a 1992 en banc case, *United States v. Taylor*, that an equal protection claim could be based upon evidence that law enforcement officers targeted minorities for consensual interviews on the basis of race. . . . We conclude, therefore, that a reasonable officer at the time of the events in question would have known that the Constitution forbade embarking on an investigation of someone for a particular offense on the basis of that person's race.").

Bell v. Johnson, 308 F.3d 594, 612, 613 (6th Cir. 2002) ("In sum, we conclude that the plaintiffs' allegations, if proven, would establish a violation of the law that was clearly established in 1994. Our review of the relevant case law reveals that it was not until *McLaurin* was issued in 1997 that a reasonable official might expect to escape liability for retaliatory acts falling short of conscience-shocking abuses of power. Prior to that opinion, the published authority in our circuit made it clear that the "shocks the conscience" test did not apply to retaliation claims expressly brought under the First Amendment. We therefore determine that defendants are not entitled to qualified immunity.").

Waller v. Trippett, No. 01-2716, 2002 WL 31296347, at *4, *6, *7 (6th Cir. Oct. 10, 2002) (unpublished) ("In this Circuit, we have recognized the possibility of using the 'state-created danger' theory to hold a state or state actor liable under the Fourteenth Amendment for private acts of violence. *See, e.g., Jones v. City of Carlisle*, 3 F.3d 945, 949-50 (6th Cir.1993); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1965 (6th Cir.1994); *Sargi*, 70 F.3d 907 at 912-13; *Stemler*, 126 F.3d at 868. However, it was not until *Kallstrom* that we actually held a state actor liable for private acts of violence under the 'state-created' danger theory. . . . We conclude that the district court described the right that the Defendant allegedly violated too broadly. . . . Contrary to the district court's conclusion, we do not believe that the relevant 'legal rule,' here, the 'state-created danger,' was articulated in a particularized sense at the time of the Defendant's challenged conduct in May

1998. To be sure, in 1989 in *DeShaney*, the Supreme Court suggested, but did not hold, that state actors may be liable if they help create the danger that causes an individual's injury by a private party or if they render an individual more vulnerable to injury by a private party. The *DeShaney* Court did not specify how a state might create the danger causing an individual's injury, what actions of a state would render an individual more vulnerable to danger, or by how much the state must increase an individual's risk of injury from a third party before that individual's substantive due process rights are violated. . . . . While each of these cases generally suggests that a state actor might be liable if he or she renders a victim more vulnerable to danger, not one of them convinces us that, in the period after *DeShaney* and before Ms. Taylor's death, the Defendant should have known that, by acting as he did, he would violate Ms. Taylor's substantive due process rights. Absent law that would have put the Defendant on notice that his particular conduct offended the Constitution, we find that he is entitled to qualified immunity.").

Thomas v. Cohen, 304 F.3d 563, 580, 581 (6th Cir. 2002) (" We do not believe that Defendants are entitled to qualified immunity with respect to Plaintiffs' procedural due process claim. The Supreme Court had decided *Fuentes* and *Good Real Prop*. long before Plaintiff's eviction. As we stated in *Flatford*, "it was sufficiently clear at the time of the eviction that [Plaintiffs] were entitled to pre-eviction judicial oversight in the absence of emergency circumstances." . . . Furthermore, Kentucky laws forbidding self-help evictions without judicial process and providing for preeviction notice and forcible detainer actions were well-established. As trained police officers, Defendants should have known that self-help evictions are prohibited in the state of Kentucky, and that the eviction they facilitated was therefore 'patently unlawful.'").

Sheets v. Mullins, 287 F.3d 581, 589, 590 (6th Cir. 2002) ("In denying relief to Mullins, the district court wrote: 'Based upon the state of the law in February 1997, this Court concludes that a reasonable official in the position of Sergeant Mullins should have known that a party's right to substantive due process is violated by a public actor whose conduct significantly increases the risk of injury from a third party.' We think the district judge described the right that Mullins allegedly violated too broadly. As the Supreme Court explained in *Anderson v. Creighton*, . . . the 'clearly established' standard becomes meaningless if the relevant 'legal rule' is defined in abstract or general terms. Instead, the relevant 'legal rule' must be articulated in a particularized sense, such that the contours of the rule are sufficiently clear to put a reasonable official on notice that what he is doing is probably unlawful. . . . The district court determined that it was clearly established in February, 1997, that an officer would violate the substantive due process clause by significantly increasing an individual's risk of injury from a third party. To be sure, in 1989 in *DeShaney*, the Supreme Court suggested, but did not hold, that state actors may be liable if they help create the danger that causes an individual's injury by a private party or if they render an individual more vulnerable to injury by a private party. The *DeShaney* Court did not specify how a state might create the danger causing an individual's injury, what actions of a state would render an individual more vulnerable to danger, or by how much the state must increase an individual's risk of injury from a third party before that individual's substantive due process rights are violated. . . . In *Kallstrom*, decided in February of 1998, a year after Mullins responded to the call about Sheets,

we noted that no court within the Sixth Circuit had yet held the state or a state actor liable for private acts of violence under the state-created-danger theory. Indeed, before Kallstrom was decided and before Mullins acted in February of 1997, there was only one reported decision from a court within this circuit that had even allowed a private-act-of-violence case to survive a motion for summary judgment. *Smith v. City of Elyria*, 857 F.Supp. at 1203. . . . Absent law that would have put Mullins on notice that his particular conduct offended the Constitution, we find that he is entitled to qualified immunity.").

Comstock v. McCrary, 273 F.3d 693, 711 (6th Cir. 2001) ("The right at issue in this case is not, as defendants argue, the right to be diagnosed accurately for one's propensity to commit suicide; Montgomery had already been correctly identified as suicidal by McCrary and the prison staff. As we have discussed above, the right that plaintiff claims on Montgomery's behalf is the more basic right to continuing medical treatment once a prisoner has been determined to be suicidal. This circuit has consistently recognized a prisoner's established right to medical attention once the prisoner's suicidal tendencies are known. . . . Based on case law from the Supreme Court and our circuit, we conclude that a reasonable prison psychologist in 1995 'would have clearly understood that [he] was under an affirmative duty' to offer reasonable medical care to a prisoner whom he knew to be suicidal, in the circumstances confronted by McCrary. . . Because, viewed in the light most favorable to plaintiff, McCrary's conduct violated Montgomery's constitutionally protected right to medical care for his serious medical needs under the Eighth Amendment, and the constitutional right was clearly established such that a reasonable official, at the time McCrary acted, would have understood that his behavior violated that right, we AFFIRM the district court's denial of summary judgment with respect to McCrary.").

Rippy v. Hattaway, 270 F.3d 416, 425 n.4 (6th Cir. 2001) ("The right to representation by counsel in a proceeding affecting custody of one's child was a clearly established requirement of procedural due process in 1995. . .The right to be informed of the right to representation by a social worker, who performs a role like that of a prosecutor in that proceeding,was not clearly established at that time, however. The distinction is that Aaron and Janet Rippy do not allege that Appellant Bryant deprived them of their right to counsel, but that she failed to inform them of that right. A reasonable official in Appellant Bryant's position in May 1995 would not have clearly understood that she bore an affirmative duty to inform Aaron and Janet Rippy of their right to representation by counsel at the May 25, 1995 hearing.").

LeMarbe v. Wisneski, 266 F.3d 429, 440 (6th Cir. 2001) ("It is clearly established that, if a doctor knows of a substantial risk of serious harm to a patient and is aware that he must either seek immediate assistance from another doctor to prevent further serious harm or must inform the patient to seek immediate assistance elsewhere, and then fails to do in a timely manner what his training indicates is necessary to prevent such harm, that doctor has treated the patient with deliberate indifference.")

Rodgers v. Hawley, No. 99-2219, 99-2311, 2001 WL 798618, at *5 & n.5 (6th Cir. June 22, 2001) (unpublished) ("In this case, the alleged retaliatory conduct occurred in 1995 and 1996. At that time, the law of this Circuit required that actionable retaliation shock the conscience or involve an egregious abuse of government power. . . In his dissent, Judge Clay suggests that the shocks-the- conscience test did not govern Kedzierzawski and Kirkwood's conduct in 1995 and 1996. He says the new standard for retaliation claims adopted in *Thaddeus-X* 'did not effect a profound change in the law ...,' but merely recognized the standard for retaliation claims 'long ago established' by the United States Supreme Court's decision in *Graham v. Connor,* 490 U.S. 395 (1989). We disagree. . . Unlike the Fourth Amendment involved in *Graham,* the First Amendment does not express any substantive standard governing intrusions on the rights guaranteed thereunder. Including no explicit standard, the First Amendment could not have alerted Kedzierzawski and Kirkwood that they were violating Irvin's First Amendment rights.").

McCurdy v. Montgomery County, 240 F.3d 512, 525, 526 (6th Cir. 2001) (Engel, J., dissenting) ("The majority holds that the district court erred in its conclusion that when Officer Cole acted, it was not clearly established that the First Amendment prohibited an officer from effectuating an otherwise valid arrest if that officer was motivated in part by a desire to retaliate against the arrestee's assertion of First Amendment rights. The majority reasons that because it was well-established then that McCurdy had a constitutional right to challenge verbally Officer Cole's surveillance, the district court erred in granting Officer Cole qualified immunity on the retaliation claim. . . . Whether a plaintiff may recover for a deprivation of First Amendment rights caused by an allegedly retaliatory arrest which the officer had probable cause to effect was not a matter of clearly established law in 1996. Indeed, it is still an issue that is subject to debate in the federal courts. The majority cites no Supreme Court or published Sixth Circuit cases discussing retaliation claims in the context of an arrest, and I am aware of none.").

Sowards v. Loudon County, 203 F.3d 426, 439, 440 (6th Cir. 2000) ("Neither the Supreme Court nor the Sixth Circuit has evaluated whether a jailer at the LCSD, or a jailer possessing the same duties as those mandated by Tennessee law, falls under the *Elrod/Branti* exception . . . .[H]owever, the position of a jailer is analogous to the position of a prison guard, and the Supreme Court concluded that political considerations are inappropriate for the employment decisions concerning a prison guard in 1990. . . It was objectively unreasonable for Guider to believe that political considerations were appropriate for the position of a jailer in 1995 in light of the Supreme Court's 1990 *Rutan* decision. Because the law was so clearly established that he could not reasonably take political considerations into account when terminating Sowards, Guider is not entitled to qualified immunity in his individual capacity for Sowards's political association claim.").

Gable v. Lewis, 201 F.3d 769, 771, 772 (6th Cir. 2000) ("We believe that the law is clearly established that the 'public concern test' does not apply to the petitioning activity in the instant case. . . . [T]here is no basis in our First Amendment jurisprudence for applying *Connick's* public concern test to petitioning activity by a private business woman who is simply supplying services to a governmental agency as an independent contractor. . . .[W]e conclude that the law interpreting

the petition clause protects the plaintiff in filing a complaint with the Ohio Highway Patrol claiming sex discrimination, and this law was clearly established prior to the retaliatory conduct found by the jury in the present case. We also conclude that the law was clearly established that the 'public concern' test does not apply to plaintiff's petitioning activity. Hence the doctrine of official immunity is inapplicable . . . .").

Gable v. Lewis, 201 F.3d 769, 773 (6th Cir. 2000) (Nelson, J., dissenting) ("[I]f reasonable members of this court could disagree in March of 1997 over the applicability of the public-concern test in the Petition Clause context, how can we say that the law was so clearly established seven months earlier that there was no room at that time for disagreement among reasonable Highway Patrol officials?").

Blake v. Wright, 179 F.3d 1003, 1008, 1010, 1011, 1013 (6th Cir. 1999) ("Although we acknowledge that the Fourth Amendment warns of inherent dangers with wiretapping, we agree with Wright that the case law, when examined with the relevant Ohio statute, was sufficiently uncertain regarding the unlawfulness of implementing the DigiVoice system in a police department's official phones in Ohio. . . . In sum, we hold that Wright is entitled to qualified immunity under § 1983 because the law regarding the administrative monitoring of police phone lines was sufficiently unclear at the time of the alleged violations that a "reasonable" officer in Wright's position would not have known he was violating clearly established law. . . . Ultimately, we believe that the Court intended to apply qualified immunity to statutory violations and we thus hold that a defendant may claim qualified immunity in response to a Title III claim. We fail to see the logic of providing a defense of qualified immunity to protect public officials from personal liability when they violate constitutional rights that are not clearly established and deny them qualified immunity when they violate statutory rights that similarly are not clearly established.").

Key v. Grayson, 179 F.3d 996, 997, 1002 (6th Cir. 1999) ("[W]e conclude that the defendants are entitled to qualified immunity because, prior to 1996, it was not clearly established that the ADA and the Rehabilitation Act applied to prisoners. . . .[T]he language of the ADA and the Rehabilitation Act indicates the statutes' applicability to prisons but, prior to 1996, there is no published court decision so holding from the Supreme Court, this court or a court within this circuit. At least one circuit has held that, prior to 1994, the statutes did not apply to state prisons. [citing *Torcasio*] Finally, in a similar–albeit distinguishable–situation, the Eighth Circuit determined that qualified immunity was available to defendants because it was not clearly established that the ADA and the Rehabilitation Act applied to the transportation of arrestees.").

Bloch v. Ribar, 156 F.3d 673, 686, 687 (6th Cir. 1998) ("Despite what appears to be a possible violation of the Blochs' privacy interests in this case, their claim against Ribar on this ground must fail because, as the district court held, a reasonable public official would not be on notice that the release of such intimate details of a rape constituted an actionable violation of a rape victim's privacy interests. A reasonably prudent sheriff should have refrained from unnecessarily releasing the highly confidential and embarrassing personal information, but in light of the dearth

of case law on this issue and the complexities stemming from the nature of crimes of sexual violence, it would be unfair to conclude that a reasonable official would have been aware that releasing these details violated a clearly established constitutional right to privacy. . . . In light of our ruling in the present case, however, public officials in this circuit will now be on notice that such a privacy right exists. Therefore, any future violation will not allow an official such as Ribar to claim the lack of reasonable notice that is necessary to sustain a defense of qualified immunity.").

Daughenbaugh v. City of Tiffin, 150 F.3d 594, 603 (6th Cir. 1998) ("[T]he illegal search occurred before this court's decision in *United States v. Jenkins*, 124 F.3d 768 (6th Cir.1997) (holding that one's backyard is definitely part of the curtilage). In light of *Jenkins* and the instant case, however, the police will be precluded in the future from relying on qualified immunity as a defense to warrantless searches of garages and backyards in situations similar to those herein.").

Gravely v. Madden, 142 F.3d 345, 348, 349 (6th Cir. 1998) ("While it was clear in 1987 that *Tennessee v. Garner* governed the use of excessive force by law enforcement officers on free citizens, it was not clearly established that *Garner* applied in excessive force cases involving escaped convicts. The use of excessive force to recapture an escaped convict creates a different problem than the use of force to apprehend a nonviolent fleeing felony suspect. The Fourth Amendment is not triggered anew by attempts at recapture because the convict has already been 'seized,' tried, convicted, and incarcerated. . . . Although *Whitley* involved the use of deadly force during the suppression of a prison riot, the factors relied on by the Court in that context are also relevant in evaluating the use of force in the apprehension of an escaped felon. Applying these factors in the present case, and viewing the evidence in the light most favorable to the plaintiff, we conclude that a reasonable officer in Madden's position may well have deemed it permissible to use deadly force under the circumstances.").

Gravely v. Madden, 142 F.3d 345, 350, 352-53 (6th Cir. 1998) (Kennedy, J., concurring in the result) ("The cases upon which the majority relies all involve actions taken against convicted persons in the prison context. Because I believe that a convicted person whom prison officials are not hotly pursuing is more analogous to a fleeing felon than to a confined prisoner, I would apply the Fourth Amendment to the claims of escapees. I then would find that the prison officials' actions violated the decedent's rights under this Amendment. However, I too believe summary judgment is appropriate because the Fourth Amendment's applicability to an official's use of deadly force during an attempt to apprehend an escaped, convicted felon was not clearly established in 1987, when the relevant actions took place. . . . I would hold that the Eighth Amendment applies so long as the officials are in 'hot pursuit,' or 'immediate and continuous pursuit,' of the escapee. . . The Eighth Amendment should apply so long as the officials are in 'hot pursuit' because we cannot expect prison guards to know, or take the time to learn, for what crime the escapee was imprisoned. In addition, applying the lesser constitutional standard throughout the 'hot pursuit' of an escapee would be a deterrent to other prisoners contemplating an escape attempt. This deterrent interest is served when other prisoners are prevented from witnessing successful escapes. Once a convicted

person is no longer being hotly pursued, his eventual recapture is less likely to affect other inmates' decision to attempt escape. At that point, the policy reasons militate in favor of Fourth Amendment protection.").

Cope v. Heltsley, 128 F.3d 452, 460 (6th Cir. 1997) ("Would it have been possible, at the end of 1993, for a reasonable person, newly-elected a Kentucky county clerk, to believe that the law entitled her to take political compatibility into account in deciding whom to retain as her deputy clerks? The answer, we think, is 'yes.' . . . [T]here was no published decision of the United States Court of Appeals for the Sixth Circuit–and certainly no decision of the United States Supreme Court–holding that political compatibility is not, in the words of *Rutan*, 'an appropriate requirement for the position involved.'. . . '[I]n the circumstances' of the present case, pre-existing law did not 'truly compel' the conclusion that in selecting her staff–the public face of the county clerk's office–the clerk could not take political compatibility into account.").

Hall v. Tollett, 128 F.3d 418, 429-30 (6th Cir. 1997) ("[A]n absence of cases directly on point does not indicate that the constitutionality of a patronage based discharge has yet to be established. In *McCloud*, we developed a categorical approach to help establish and define which public offices fall within the *Branti* exception. This approach, however, will not remove all uncertainty. . . . Although *Elrod* seemingly established that low-level sheriff's department employees fall outside this exception, we held in *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir.1992), that it was not clearly established that deputy sheriffs were protected from patronage based dismissals. Unfortunately, we granted a sheriff qualified immunity, without first determining whether there had actually been a constitutional violation. 957 F.2d at 1349. Therefore, *Cagle* effectively established only that in 1992 the state of the law regarding patronage dismissals of sheriffs' deputies was not clearly established. In the time between *Cagle* and September 1, 1994, no further cases added clarity to the status of deputy sheriffs. The split among circuits regarding this issue also indicates the unsettled nature of the law regarding the status of deputy sheriffs. . . For these reasons, we agree with the District Court that defendant is entitled to qualified immunity in this case.").

Stemler v. City of Florence, 126 F.3d 856, 866-67, 870 (6th Cir. 1997) ("[T]he district court reviewed the relevant case law dealing with claims that state actors violated substantive due process by allowing individuals to become subject to an indirect harm, and found much of that law to be confused and in conflict. It then appeared to reason that, since the doctrine of substantive due process was unclear in its entirety, no such claim could ever survive a motion to dismiss on the ground of qualified immunity . . . . This was error. While. . . there is a good deal of uncertainty with regard to the precise contours of substantive due process, it does not follow that state actors are insulated from liability on all such claims, no matter what the underlying facts may be. The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of the violation. Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known in February

1994 that their actions violated that right. . . . The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society.").

Sandul v. Larion, 119 F.3d 1250, 1255, 1256 (6th Cir. 1997) ("In 1990 when Sandul was arrested for his use of the "f-word," it was clearly established that speech is entitled to First Amendment protection with the exception of fighting words. . . . While the Livonia ordinances are presumptively valid as they have not been challenged, Sandul's § 1983 claims are unaffected by his failure to challenge the constitutionality of the ordinances.").

Saylor v. Bd. of Educ. of Harlan County, 118 F.3d 507, 516 (6th Cir. 1997) ("We are aware of no pre-existing law 'dictat[ing]' the conclusion that a disciplinary paddling administered by a school teacher in violation of school regulations would ipso facto violate federal constitutional law." *citing Lassiter*).

Martin v. Heideman, 106 F.3d 1308, 1312-13 (6th Cir. 1997) ("The district court found that at the time of the plaintiff's arrest, the law was not clearly established that the overly tight application of handcuffs was a violation of an arrestee's constitutional right not to have excessive force applied during an arrest, citing conflicting cases from around the country. . . . This circuit, however, has chosen to view an 'excessively forceful handcuffing' claim under the general excessive force rubric. . . . Because clearly established law in 1991 . . . prohibited an officer's use of excessive force, and because a genuine issue of material fact exists as to whether Officer Paul used excessive force under the circumstances, the district court erred by granting Paul qualified immunity on the handcuffing issue.").

Doe v. Claiborne County, 103 F.3d 495, 507 (6th Cir. 1996) ("We . . . hold that Doe had a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity, that such right is fundamental, and that Davis's sexual abuse of Doe violated that right.").

McBride v. Village of Michiana, 100 F.3d 457, 461 (6th Cir. 1996) ("The possible scenarios involving retaliatory treatment of persons engaged in protected speech are too numerous to begin to list. . .[I]t is not essential that a Supreme Court or Sixth Circuit case discuss each of those imaginable possibilities before finding that the right to be free from retaliation for exercise of First Amendment freedoms is clearly established. At the time of the alleged retaliatory actions, Supreme Court and Sixth Circuit precedent had clearly established that retaliation aimed at chilling fundamental rights was improper. Although no Supreme Court or Sixth Circuit decisions had...applied time-honored First Amendment principles to a situation specifically involving governmental retaliation against a news reporter, relevant pre-existing case law made the illegality of such retaliation apparent.").

McCloud v. Testa, 97 F.3d 1536, 1547, 1557 (6th Cir. 1996) ("We conclude that it is improper to grant qualified immunity to every defendant who has taken an adverse employment action against a plaintiff occupying or previously occupying a public office that the Supreme Court or the Sixth Circuit has not yet explicitly held falls into or outside of the *Branti* exception. In doing so, we give more precise content to the *Branti* exception, so that we can better delineate those public positions that as a general matter should receive First Amendment protection, and those that should not. . . . We reject the notion that there must be a separate patronage dismissal decision by the Supreme Court or the Sixth Circuit involving a particular position before qualified immunity can be denied in such a case. The lack of specific precedent holding that a particular position is outside the *Branti* exception is a necessary condition to arguing that the First Amendment right to be free from patronage dismissal is unclear as to a particular position, but the lack of such precedent is not a sufficient condition for concluding that the law is unclear on the subject and so qualified immunity must be granted to a defendant. . . . It simply cannot be true that there must be a specific patronage dismissal case in the Supreme Court or Sixth Circuit before qualified immunity can be denied to any otherwise eligible defendant in such a case. If this were true, qualified immunity would be converted into a nearly absolute barrier to recovering damages against an individual governmental actor in patronage cases because the reported case law classifies new positions very slowly. . . . we believe that certain categories of positions falling into the *Branti* exception can be specified with reasonable certainty. We set these categories out below so that the district courts may apply them in future patronage cases, especially those involving issues of qualified immunity . . . .").

Durham v. Nu'Man, 97 F.3d 862, 867 (6th Cir. 1996) ("Although there has not yet been a case in this Circuit specifically holding that a hospital security officer can be held liable under § 1983 for failing to protect a patient or inmate from being beaten by another hospital security officer, it is not necessary that there be a specific holding in order to find that a constitutional rule in the § 1983 area has been 'clearly established.'").

Sheets v. Moore, 97 F.3d 164, 168 (6th Cir. 1996) ("If federal district judges could reasonably disagree over the constitutionality of the regulation [prohibiting prisoners from receiving free advertising and other bulk mail], then it can fairly be said that a reasonable official would not have known that his conduct violated a clearly established right.").

Hughes v. City of North Olmstead, 93 F.3d 238, 243 (6th Cir. 1996) ("In this case, it is clear that there was a generally established right to privacy and free association at the time of the police investigation. However, at that time, those rights were not so clearly established by the Supreme Court or this Circuit that police department officials would have realized their actions were violating the law. Thus, in the absence of more fact-specific authority defining how an investigation into private sexual matters invades the realm of privacy and free association, the department investigation could not have infringed upon clearly established constitutional rights.").

Smith v. Williams, 78 F.3d 585 (Table), No. 94-6306, 1996 WL 99329, *5 (6th Cir. March 6, 1996) ("[T]he right to be free from malicious prosecution is a clearly established right, although prior to January of 1994, this circuit analyzed the right as accruing under the Fourteenth rather than the Fourth Amendment.").

Adams v. Yontz, 73 F.3d 361 (Table), 1996 WL 5563, *2 (6th Cir. Jan. 5, 1996) ("[T]he relevant inquiry for the purposes of our qualified immunity analysis is whether the law clearly established supervisory liability on principals for the unconstitutional actions of their subordinates at the time that the alleged incidents occurred. We believe that it did.").

Foy v. City of Berea, 58 F.3d 227, 229 (6th Cir. 1995) ("On May 3, 1990, neither the Supreme Court nor this court had held that police officers commit a substantive due process violation if, after receiving complaints from the owner of property that intoxicated persons are causing a disturbance on that property, the officers command these individuals to leave the property and the intruders are injured later by their own actions or those of other private parties. In fact, we find no controlling authority holding that such action by police under generally similar circumstances would constitute a due process violation.").

Thomas v. Whalen, 51 F.3d 1285, 1292 (6th Cir. 1995) ("[Plaintiff] did not have a clearly established right to invoke the name of the Cincinnati Police Division or display the police department's insignia in order to enhance his own credibility in advocating [the NRA position against gun control].").

Cameron v. Seitz, 38 F.3d 264, 275-76 (6th Cir. 1994) ("We hold that, at the time of the relevant actions underlying the complaint in this case, the constitutional protection of the right of marital association did not clearly extend to a dating relationship or to engagement, and qualified immunity attaches to Seitz's interference with Cindy's and Larry's relationship by his employment actions. Whether an engagement to marry is a right protected by the Constitution against any adverse action is a question we need not decide today. The fact that the contours of such protection simply have not been clearly extended to engagements compels the conclusion that qualified immunity is mandated here.").

Buckner v. Kilgore, 36 F.3d 536, 540 (6th Cir. 1994) ("[A]n officer violates a clearly established right under *Brower* if he pulls his squad car onto a highway with knowledge or reason to know that an approaching motorcyclist will not have time or the ability to stop or otherwise safely avoid collision with the car.").

Williams v. Commonwealth of Kentucky, 24 F.3d 1526, 1537 (6th Cir. 1994) ("Defendants argue that because particularized balancing is necessary under *Pickering* and its progeny, they are entitled to qualified immunity because the contours of a public employee's free speech rights are unclear . . . . We agree that in many public employee free speech cases it would be unclear to a reasonable official what the outcome of the balancing inquiry should be. However, the instant

case presents a situation where the employee has spoken out on matters of great public concern, and these statements apparently had only minimal effect on the efficiency of the office. . . [T]his is not a case where the imprecision of the standard makes a difference.).

Centanni v. Eight Unknown Officers, 15 F.3d 587, 592 (6th Cir. 1994) ("[W]e conclude that it has been clearly established that–regardless of any exigent circumstances–the seizure and removal to the station house of an individual who is not suspected of any criminal activity constitutes a de facto arrest requiring probable cause."), *cert. denied*, 114 S. Ct. 2740 (1994).

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993) ("[A]t the time of [plaintiff's] arrest in 1988, there was no clearly established right to personal security forbidding the police from abandoning passengers. . . . [T]he 'contours of the right,' if there is such a right, were not sufficiently clear so that a reasonable officer would have known that leaving the children in the parking lot violated that right.").

Weeks v. Chaboudy, 984 F.2d 185, 188 (6th Cir. 1993) (plaintiff could rely on Eighth Circuit precedent directly on point)**.**

Heflin v. Stewart County, 958 F.2d 709, 717 (6th Cir. 1992) ("There can be no doubt that in 1987 existing law clearly established the right of pretrial jail inmates to receive care for their serious medical needs. At least as early as 1985 we recognized this right as the basis for section 1983 claims involving jail suicides by hanging....The unlawfulness of doing nothing to attempt to save [the inmate's] life would have been apparent to a reasonable official in [defendants'] position in light of pre-existing law."), *rehearing granted in part on reconsideration*, 968 F.2d 1 (6th Cir. 1992).

Rich v. City of Mayfield Heights, 955 F.2d 1092, 1096-97 (6th Cir. 1992) ("[G]eneralized right of a prisoner to be free from deliberate indifference cannot support a finding that there was a clearly established right to be protected from committing suicide....The 'right' at issue in the instant appeal is the right of a pretrial detainee to be cut down by police officers when discovered hanging in a jail cell.").

Daugherty v. Campbell, 935 F.2d 780 (6th Cir. 1991) (where very action in question, visual body cavity search of prison visitor without reasonable suspicion, had been held unlawful by every circuit considering the issue since 1982, and where cases from other circuits were similar enough to merit reasonable reliance upon them, the contours of the right were clearly established).

Davis-Bey v. City of Warren, No. 16-CV-11707, 2018 WL 895394, at *6 (E.D. Mich. Jan. 16, 2018), *report and recommendation adopted sub nom. Davis-Bey v. City of Warren*, No. 16-CV-11707, 2018 WL 878879 (E.D. Mich. Feb. 14, 2018) ("The parties cite conflicting cases from within this circuit regarding whether the First Amendment clearly establishes a right to film police officers carrying out their duties. . . The existence of conflicting caselaw suggests that an absolute

right to record is not clearly established. Furthermore, the court in the *Crawford* case cited by Plaintiff subsequently reversed its position and held that 'The Supreme Court and Sixth Circuit have not ruled specifically on the right of the public openly to film police officers and their actions in a public setting.' *Crawford v. Geiger (Crawford II),* 131 F. Supp. 3d 703, 714 (N.D. Ohio 2015). Finally, the *Glik* case, cited by Plaintiff, holds that any recording of police officers must be done from 'a comfortable remove' and without interfering with the performance of the officers' duties. . .As several officers testified, Plaintiff was arrested for remaining 'too close' to the scene and interfering with the investigation, despite several officers directing Plaintiff to 'leave,' 'back up,' and/or 'walk away.' Officers testified that this was a safety concern. Accordingly, the Court should find that there is no clearly established right to videotape police officers under the circumstances of this case.")

S.R. v. Kenton County Sheriff's Office, No. 215CV143WOBJGW, 2017 WL 4545231, at *9–11 (E.D. Ky. Oct. 11, 2017) ("[U]nder the totality of the circumstances, the Court concludes as a matter of law that Sumner's manner of handcuffing S.R. and L.G. was an unconstitutional seizure and excessive force. . . . On the facts of this case, qualified immunity is a close call. Neither party points to a Supreme Court or Sixth Circuit decision directly on point that would have alerted a reasonable officer in 2014 to the unlawfulness of his actions under these circumstances. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), which involved searches of children in a school setting, the Court recognized that public school students' rights under the Fourth Amendment are not as broad as those of the public and adopted a 'reasonableness' test based on all the circumstances. . . .At a general level, one might argue that *T.L.O.* put police officers on notice that they would be subject to a reasonableness standard in determining whether their search or seizure of a school child passes constitutional muster. However, the Sixth Circuit has rejected such an application of *T.L.O.* in the qualified immunity context, reasoning that *T.L.O.* merely established basic principles of law without guidance as to their application in specific situations. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005). In *Beard*, high school students who were strip searched sued school officials and a police officer alleging Fourth Amendment violations. The Sixth Circuit held that the searches did violate the students' constitutional rights, but that the defendants were entitled to qualified immunity because, notwithstanding the general principles set forth in *T.L.O.*, the lack of factual context similar to the case before the Court meant that *T.L.O.* could not have 'truly compelled' defendants to realize that they were acting illegally in conducting the strip searches. . . Similarly here, the broad principles set forth in *T.L.O.* would not have alerted Sumner to the unlawfulness of his actions under the specific facts of this case. . . . .The parties cite no Sixth Circuit authority that would have alerted Sumner to the illegality of his actions. However, at least two other Circuits had denied qualified immunity to police officers who handcuffed young school children. *See C.B. v. City of Sonora*, 769 F.3d 1005, 1039-40 (9th Cir. 2014) (officer who handcuffed calm, compliant but nonresponsive 11-year-old child not entitled to qualified immunity); *Gray v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006) (handcuffing of nine-year-old student who had threatened to hit coach was unlawful seizure; incident was over, student posed no threat, and handcuffing by sheriff's deputy was attempt to punish student and change her behavior in the future). Under the Sixth Circuit's teaching in *Beard*, however, these out-of-circuit cases are

insufficient to satisfy the 'clearly established' requirement. . . . Here, the two out-of-circuit cases cited above both rely on *T.L.O.*, which *Beard* held is insufficiently generalized to constitute 'applicable direct authority.' Therefore, plaintiffs have not shown that it was 'clearly established' in 2014 that Sumner's handcuffing of S.R. and L.G. was unconstitutional, and Sumner is thus entitled to qualified immunity." [Note that the court did find the County liable as a matter of law for the unlawful handcuffing. *See* Blum, "Overview Outline"])

O'Brien v. City of Mason, No. 1:16-CV-391, 2017 WL 2805165, at *4 (W.D. Mich. June 29, 2017) ("Marcia's First Amendment claim fails because she has not cited a case clearly establishing a First Amendment right to observe the police. A number of circuits have addressed the existence of a First Amendment right to observe and record the police activity, and some have found that right to be clearly-established. *See, e.g.*, *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). But the Sixth Circuit has yet to join those courts, and the only district courts in the Sixth Circuit to address that issue have found otherwise. *See Williams v. City of Paris*, No. 5: 15-108-DCR, 2016 WL 2354230, at *4 (E.D. Ky. May 4, 2016); *Crawford v. Geiger*, 131 F. Supp. 3d 703, 715 (N.D. Ohio 2015), *aff'd in part, rev'd in part and remanded,* 656 F. App'x 190 (6th Cir. 2016)[.]")

Guertin v. State of Michigan, No. 16-CV-12412, 2017 WL 2418007, at *23 (E.D. Mich. June 5, 2017) ("Taking plaintiffs' allegations as true and in the light most favorable to them, as the Court must, the violation of plaintiffs' clearly established rights is adequately pleaded against defendants City of Flint [and individual defendants]. Plaintiffs plead (with particularity as to which defendant did what) that these defendants were the decision makers responsible for knowingly causing plaintiffs to ingest water tainted with dangerous levels of lead, which has no therapeutic benefits, and hiding the danger from them. The emergency managers and individual state employees switched the source of Flint's water from the Detroit River to the Flint River, then knowingly took deliberate action that violated federal and state, civil and possibly even criminal law, which caused the lead levels in Flint's water to rise to dangerous levels. . . They knew that their actions were exposing the residents of Flint, including plaintiffs, to dangerous levels of lead. Lead poisoning caused plaintiffs to suffer from severe medical problems with their hair, skin, digestive system, and organs, as well as brain and other developmental injuries including cognitive deficits, among other issues. . . And when the evidence confirmed that, in fact, the lead levels in the water and in residents' blood were rising, these defendants worked to discredit the evidence and knowingly and proactively made false statements to the public to persuade residents that the water was safe to consume. They did so, even though their own testing revealed the opposite. Many residents, plaintiffs included, continued to consume the water in reliance on defendants' false assurances. It cannot be that such actions are not 'so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience.'. . Nor can it be said that reasonable officials would not have had fair notice that such actions would violate the Constitution, *i.e.*, that defendants were violating plaintiffs' clearly established right to bodily integrity and to be free from arbitrary, conscience shocking executive action. As recently reiterated by the Sixth Circuit, immunity does not extend

to 'the plainly incompetent or those who knowingly violate the law.'. . And particularly with respect to the individual governmental defendants who are facing felony and misdemeanor criminal charges pursuant to the Michigan Attorney General's Flint Water Investigation, qualified immunity cannot and should not protect them from civil liability for the constitutional violations that are pleaded against them.")

Cummerlander v. Patriot Preparatory Acad. Inc., No. 2:13-CV-0329, 2015 WL 519308, at *14-15 (S.D. Ohio Feb. 9, 2015) ("At the time of the search at issue, the prior law of the Supreme Court and this Circuit involving searches of students for suspected drug use and possession all clearly establish that Smith's determination that JT should be subjected to a drug test was unconstitutional. A reasonable principal should have known that students have a Fourth Amendment right against unreasonable searches and seizures, and that the standard for a reasonable search of students is reasonable suspicion. . . The Supreme Court standard for free and voluntary consent to a search under the Fourth Amendment is also well-established. Further, the Supreme Court cases *T.L.O.* and *Safford,* as well as the Sixth Circuit case *Williams,* and the District Court case *Fewless,* puts Smith on notice as to the indicia of drug use and possession that should be considered in an investigation for and determination of reasonable suspicion of drug use. While it is unfortunate that Smith may have acted in conformity with a school policy to which he was bound, as will be discussed in the following section, such a school policy is unconstitutional and provides no protection to Smith in the individualized qualified immunity analysis. Thus, this Court concludes that it was objectively legally unreasonable for Smith to believe that JT and his mother gave voluntary and free consent to a urinalysis, and unreasonable for him to believe that his investigation into JT's alleged drug use met the well-established standard of reasonable suspicion under the circumstances. As the Sixth Circuit has explained, '[l]ike police officers, school officials need discretionary authority to function with great efficiency and speed in certain situations, so long as these decisions are consistent with certain constitutional safeguards.'. . While questioning 'an official's every decision with the benefit of hindsight would undermine the authority necessary to ensure the safety and order of our schools,' coercing a student under threat of expulsion to take a drug test without establishing reasonable suspicion under the circumstances is akin to a student shedding his or her constitutional rights at the school gate. . . Accordingly, the Court does not find that qualified immunity precludes personal liability for Smith.")

Hoskins v. Cumberland Cnty. Bd. of Educ., No. 2:13-CV-15, 2014 WL 7238621, at *12-13 (M.D. Tenn. Dec. 17, 2014) ("Although neither the Court nor the parties has identified a Sixth Circuit case directly on point, at least two courts of appeal have held that law enforcement officers were not entitled to qualified immunity for handcuffing children. [discussing *C.B. v. City of Sonora* (9th Cir.) and *Gray ex rel Alexander v. Bostic* (11th Cir.)] The record in this case does not demonstrate whether the principal and the officer actually continued to be afraid for their safety at the time the handcuffs were placed on [8 year-old] T.H., how much time elapsed between T.H.'s threats and rearing back of his fist and the officer's putting him in handcuffs, what T.H.'s demeanor was at the time the handcuffs were put on, or what his demeanor was for any of the forty-five minutes that he sat with handcuffs on in the principal's office. . .Based on the record before the Court,

Plaintiffs have not demonstrated that Officer Tollett is not entitled to qualified immunity. Accordingly, Officer Tollett's motion for summary judgment on Plaintiff's claim of unlawful seizure will be granted on the basis of qualified immunity.")

Combs v. City of Birmingham, No. 12–14528, 2013 WL 4670699, *1, *8, *9, *11, *12 (E.D. Mich. Aug. 30, 2013) ("Michigan is not among the 25 states with a law requiring its citizens to provide identifying information to police officers during a lawful *Terry* stop. . . .This case is not about the legality of Mr. Combs carrying his rifle openly, or any right he may have to do so. In this 42 U.S.C. § 1983 case, Mr. Combs claims that his unquestionable Fourth Amendment right to be free from seizure without probable cause was violated through false arrest and false imprisonment. But, even in the absence of a mandatory state identification law in Michigan, the Court finds that under the totality of the circumstances, including Mr. Combs' youthful appearance, the police officers' request for proof that Mr. Combs was 18 constituted a lawful command; and, Mr. Combs' refusal to provide such proof gave the police officers probable cause to arrest him for resisting their lawful command under Birmingham, Mich., Code of Ordinances part II, ch. 74, art. II, § 74–27 and Mich. Comp. Laws § 750.479. The principles of *Terry v. Ohio* require a suspect to supply proof of his age when the suspected criminal activity is a minor carrying a loaded weapon in public. And, the failure to supply such proof can lead to charges, including resisting a lawful command, breach of the peace, and brandishing. However, even if the Court had found an absence of probable cause to arrest Mr. Combs, these police officers would be entitled to the protection of qualified immunity because Mr. Combs' right is not clearly established in the contours of this particular situation: the police officers could have mistakenly concluded that it was reasonable to require Mr. Combs to prove his age so that they could assure themselves that a minor was not openly carrying a loaded assault rifle on a public street. . . . Accordingly, even in the absence of a stop and identify law in Michigan, the police officers' request that Mr. Combs provide identification that would prove his age was a lawful command, based on this Court's finding that: (1) *Hiibel* stands for the proposition that identifying information can be required of suspects during a *Terry* stop; and (2) a police officer can require proof to dispel reasonable suspicions of underage violations of the law during a *Terry* stop. The police officers' requests were reasonably related to the circumstances justifying Mr. Combs' legal *Terry* stop; they investigated a suspected violation of the underage weapon statute, based on a reasonable suspicion that Mr. Combs was not 18. . . . Although *Hiibel* has been the law of the land since 2004, one could argue it only applies in states with stop and identify laws. This case involves a request for identification to verify age in a state without a stop and identify law, but with a law requiring compliance with police officers' commands. The Supreme Court has only addressed the legality of an arrest for failure to provide a name during a *Terry* stop. Consequently, probable cause may not be sufficiently clear in the contours of this particular situation, such that police officers would understand that their request for Mr. Combs to prove his age may violate the law. In other words, while police officers always need probable cause to arrest, it may be arguable that Mr. Combs' failure to supply proof of his age amounted to probable cause to arrest him. Because reasonable police officers could disagree, Defendants are entitled to qualified immunity on Mr. Combs' false

arrest and false imprisonment claims, even if the Court found an absence of probable cause to arrest him.")

Ayers v. City of Cleveland, No. 1:12–CV–753, 2013 WL 775359, *7, *8, *10-*12 (N.D. Ohio Feb. 25, 2013), *appeal not considered by* ***Ayers v. City of Cleveland***, 773 F.3d 161 (6th Cir. 2014) ("[T]his Court has previously held that *Brady*'s application against police officers who fail to disclose material and potentially exculpatory evidence is clearly established law. . . Defendants do not contend otherwise. Therefore, Defendants Cipo and Kovach do not enjoy qualified immunity as to Plaintiff Ayers's due process *Brady* claim, and the claim survives summary judgment. . . . A § 1983 claim for malicious prosecution is cognizable, although 'the contours of such a claim remain uncertain.'. . To succeed on such a claim, Ayers must prove the following: first, that a criminal prosecution was initiated against him and that the defendants made, influenced, or participated in the decision to prosecute; second, that there was a lack of probable cause for the criminal prosecution; third, that as a consequence of the proceeding, Ayers suffered a deprivation of liberty; and fourth, that the criminal proceeding was resolved in Ayers's favor. . . Neither a lack of malice, nor the intervention of a prosecutor, works to absolve an individual officer of liability. . . . The Court therefore finds that, viewing the evidence in a light most favorable to Ayers, there is sufficient evidence that Defendants Cipo, Kovach, and Donaldson violated Ayers's constitutional right to be free of malicious prosecution under the Fourth Amendment. Further, the Court finds that through deposition testimony and affidavits, Ayers has created a genuine issue of material fact. Finally, the Court finds that the acts in question—stating falsehoods in warrant affidavits and mischaracterizing key evidence—is well-understood by reasonable officers to be violative of a suspect's rights. . . .Certainly, the right to *Brady* material, to a constitutionally sufficient indictment, or to counsel during important criminal proceedings is clearly established. But with the failure to intervene claim, the Court must ask whether there was a clearly established constitutional right that a law enforcement officer was required to intervene to prevent another law enforcement officer from violating these rights. For there to be a failure to intervene, there must be a corresponding duty. There is ample Sixth Circuit caselaw regarding police officers' duty to intervene in excessive force cases. . . But the Court finds no such caselaw (nor does Ayers provide any) regarding a duty to intervene in the situations described in Ayers's complaint. . . '[G]iven the absence of any case law that has imposed a duty of protection under even roughly analogous circumstances,'. . . it could not be 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . Therefore, the Court concludes that the failure to intervene claim is independent of the other claims and that there is insufficient authority to show that Detectives Cipo and Kovach violated clearly established law.")

Colebrook v. Kentucky Dept. of Motor Vehicle Enforcement, No. 08-110-JGW, 2010 WL 4979072, at *5 (E.D. Ky. Dec. 2, 2010) ("Officer Scott is entitled to qualified immunity because, at the time of the incident in question, *Gant* had not yet been decided. Rather, at the time of the incident *Belton* controlled and a reasonable officer would have believed that the search of the vehicle was permissible. As the Court in *Gant* itself anticipated, '[b]ecause a broad reading of

Belton has been widely accepted, the doctrine of qualified immunity will shield officers from liability for search conducted in reasonable reliance on that understanding.'")

Ambris v. City of Cleveland, No. 1:12CV774, 2012 WL 5874367, *8-*10 (N.D. Ohio Nov. 19, 2012) ("Here, if we decided to follow *Scarbrough* and determine that the plaintiff has plead a prima facie constitutional violation, our inquiry would turn to whether the existence of *Scarbrough* is enough to determine that Plaintiff's right to be free from discrimination based on her sexual orientation was 'clearly established.' While the Sixth Circuit's most recent decision is *Scarbrough* and there have been cases, both in other circuits and the United States Supreme Court, that have showed a trend to giving homosexuals such protection, the heavily conflicting case law in the Sixth Circuit would tend to show that there is no 'clearly established right.' The Courts have been all over the place with regard to treating such claims for disparate treatment based on sexual orientation, so it would be difficult to say that Defendant Bahhur knew, or should have known, that he was violating a clearly established right. Plaintiff points to the United States Supreme Court's decision in *Romer v. Evans,* 517 U.S. 620 (1996) for the proposition that Defendants should have been on notice that their actions violated Plaintiff's 'clearly established rights.'. . . *Romer* is distinguishable from the facts in the present case. *Romer* was decided outside of an employment context. There is no mention of Title VII throughout the entire opinion, which this Court is required to implement in an employment discrimination analysis. . .Were the facts to show that this discrimination happened outside of an employment context, the holding and analysis of *Romer* would serve to put Defendants on notice that their actions were violating a 'clearly established right,' as is required to negate qualified immunity. However, there is no binding case law that would 'clearly establish' Plaintiff's rights under this fact pattern, and as such, Defendants are entitled to qualified immunity.")

Cline v. City of Mansfield, No. 1:07-CV-1070, 2010 WL 3860735, at *27 (N.D. Ohio Sept. 30, 2010) ("In this case, that prior Sixth Circuit caselaw does not name *which* specific law enforcement official must review the affidavit underlying a search warrant does not immunize the very person responsible for planning and executing a search. It was clearly established that *some* member of Mack's team needed to perform that review and it is reasonable to conclude that Mack was charged with either doing it himself or assuring it was done. . . There need not be a Sixth Circuit or Supreme Court case specifically stating that a supervisor has the responsibility to supervise to make it so. . . To the contrary, it was clearly established as of September 12, 2006 that *some* officer needed to at least look at the affidavit attached to this search warrant . . . and it was objectively unreasonable in view of that clearly established law for Team Leader Mack to fail to ensure that someone did so. . . Again, the Court's determination rests squarely on the fact that even a simple glance would have revealed the defect in this document.")

Wilson v. Columbus Bd. of Educ., 589 F.Supp.2d 952, 964, 965 (S.D. Ohio 2008) ("There is no Sixth Circuit case law involving materially similar facts to this case. However, although Sisco confronted a novel factual circumstance, well-settled precedent of the Sixth Circuit recognizes that in a non-custodial setting, a governmental actor can be held responsible for an injury committed

by a private person if that governmental actor increases the risk of harm to the plaintiff and acts with deliberate indifference. . . Therefore, it would have been clear to a reasonable person in Sisco's position that her issuance of the suspension, which placed Jane Doe in a dangerous environment, could subject Sisco to constitutional liability.").

Hendrickson v. Caruso, No. 1:07-cv-304, 2008 WL 623788, at *10 (W.D. Mich. Mar. 4, 2008) ("The Sixth Circuit has never held that a prisoner has a statutory cause of action for monetary damages under RLUIPA. RLUIPA creates a private cause of action for a prison inmate if section 3 is violated, and further provides that the complaining party, if successful, may 'obtain appropriate relief against a government.' 42 U.S.C. § 2000cc-2(a). The Eleventh Circuit recently observed, 'To put it mildly, there is a division of authority on th[e] question [of whether RLUIPA authorizes an award of monetary damages].' *Smith v. Allen*, 502 F.3d at 1270 (collecting cases). Assuming arguendo that RLUIPA authorizes a cause of action for damages, qualified immunity is undoubtedly an appropriate defense. . . Plaintiff has not addressed much less demonstrated how defendants' actions violated any 'clearly established' rights under RLUIPA. Plaintiff has not identified any authority that clearly established his right to official MDOC recognition of Satanism as a religion, and every court that has considered Anton LaVey's books on Satanism has determined that they are fundamentally incompatible with prison safety, security, and prisoner rehabilitation. Accordingly, I find that defendants are entitled to summary judgment on plaintiff's claims for monetary damages on the alternative basis of qualified immunity.")

Yamaha Motor Manufacturing Corp. of America v. Commonwealth of Kentucky, 403 F.Supp.2d 601, 607 (W.D. Ky. 2005) ("The court must first determine whether the plaintiff has alleged the deprivation of a constitutional or statutory right at all and then, and only then, determine whether the right was clearly established at the time of the alleged violation. . . .Here, the plaintiffs have alleged violations of statutory rights under the ADA and the Rehabilitation Act, so the court will turn to the second prong. . . . Here, the plaintiffs argue that the 'clearly established right' is 'meaningful access' to the Commonwealth's golf courses. As of the date in question, the requirement that certain types of golf cars must be provided to constitute 'meaningful access' to state golf courses was not clearly established. . . Consequently, the plaintiffs cannot maintain their claims for monetary damages against the Commonwealth Defendants in their individual capacities. There is thus no need for the court to consider the third element of the qualified immunity test.").

Hainey v. Parrott, No. 1:02-CV-733, 2005 WL 2397704, at *8 (S.D. Ohio Sept. 28, 2005) ("There is no dispute in this case that the coroner's office retained and then disposed of Plaintiffs' decedents' brains without any notice to Plaintiffs. As explained above in Part III.A, Plaintiffs have established uncontested facts which demonstrate that Defendants violated their constitutional right to receive notice prior to the disposal of their decedent's body parts. The Court also finds that this right was clearly established at the time the coroner's office committed the acts in question here. As the Court stated above, supra, at 10-15, in 1991, *Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by

the due process clause of the Fourteenth Amendment. Finally, a reasonable coroner in this judicial circuit would have known that disposing of body parts without notice to the decedent's next of kin would have violated that right. That seems especially true where, as Plaintiffs observe, this same coroner's office was involved in the case that established the right at stake here.").

May v. City of Springfield, No. 3:03 CV 293, 2005 WL 2338785, at *6 (S.D. Ohio Sept. 23, 2005) ("Immediately before Emmel took Plaintiff to the pavement, she had resumed her vandalism of Hatter's truck by kicking it. Thus, Emmel had a reason for his actions, to wit: preventing Plaintiff from continuing to damage Hatter's truck. Moreover, Plaintiff's ability to resume her destructive acts towards Hatter's truck, even though she was handcuffed at the time, demonstrates beyond cavil that she had not been completely restrained. Plaintiff has not cited a case which would demonstrate that it was clearly established in December, 2001, that an officer violates the Fourth Amendment by using force to bring a suspect to the ground, in order to prevent her from resuming her vandalism of the private property of another. Nevertheless, Plaintiff argues that the evidence raises a genuine issue of material fact concerning the question whether the Fourth Amendment right she relies upon herein was clearly established, because, after a post-incident investigation, Springfield found that Emmel had violated the use of force policy for its Police Department. It bears emphasis, however, that the right must be clearly established at the time the alleged constitutional violation occurred. . . Simply stated, after the fact conclusions by Springfield concerning Emmel's compliance with its use of force policy do not demonstrate that a constitutional right had been clearly established before the incident giving rise to the investigation. Accordingly, the Court concludes that the evidence fails to raise a genuine issue of material fact as to whether the particulars of Plaintiff's Fourth Amendment right to be free from an unreasonable seizure through the use of excessive force had been clearly established before December 15, 2001.").

Cahill v. Walker, No. 3:03-CV-00257, 2005 WL 1566494, at *4 (E.D. Tenn. July 5, 2005) ("Certainly, a reasonable police officer would understand that sexually harassing and assaulting an individual violates a constitutionally-protected right; however, this court does not now address Officer Walker's conduct. Here, the conduct at issue is Chief Montgomery's inaction, failing to discipline Officer Walker for his alleged prior sexual misconduct. The appropriate question is whether a reasonable supervisor would have understood that, by failing to discipline Officer Walker, he was allowing the misconduct to continue and thus proximately causing Plaintiff's constitutional right to be violated. . . In *Lynn v. City of Detroit*, the court found that this question 'turns on whether the defendant[ ] knowingly acquiesced in [the] subordinates' unconstitutional conduct, to the plaintiffs' injury.' . . In this case, the question of whether Chief Montgomery 'knowingly acquiesced' in Officer Walker's alleged misconduct is dependent on the question of whether he knew of that misconduct. When genuine issues of material fact remain as to an element of qualified immunity, summary judgment on qualified immunity is not appropriate. . . Here, the factual issue of whether Chief Montgomery knew of Officer Walker's prior misconduct is intertwined with the second prong of the qualified immunity inquiry. Chief Montgomery is therefore not entitled to summary judgment on the issue of qualified immunity.")

Shahit v. Tosqui, No. 04-71538, 2005 WL 1345413, at *9 (E.D. Mich. June 1, 2005) (not reported) ("The Court finds it impossible to conclude that Defendants, police officers who are required to make split-second decisions on the street, violated a 'clearly established' right to be stopped only upon probable cause that a civil traffic violation occurred when only a few months later, in *Weaver*, a trio of federal appellate judges clearly believed that probable cause was not required. Accordingly, given that the Supreme Court and the Sixth Circuit had not directly addressed the issue of whether probable cause is always required to stop a vehicle for a civil traffic offense, and Sixth Circuit in *Weaver* upheld a traffic stop based upon reasonable suspicion shortly after the events of this case occurred, the Court finds that the right to be stopped only upon probable cause that a civil traffic offense occurred was not clearly established when Defendants stopped Plaintiffs' vehicle.").

Rose v. Saginaw County, 353 F.Supp.2d 900**,** 924 (E.D. Mich. 2005) ("In this case, the right to be free from unreasonable seizures is clearly established. But the qualified immunity defense requires the Court to look beyond the right in the abstract. . . .The Court finds that the contours of the right to reasonable seizures pertaining to pretrial detainees was not sufficiently clear to impose liability on individual actors following the County's policy in effect during the period at issue in this case. Issues relating to strip and body cavity searches, viewing of naked inmates by guards of the other gender, and removal of clothing from unruly detainees have troubled courts over the past several years and have not yielded a uniform set of decisions on the subject. . . . At the time of the detentions in this case, there was no clear precedent that would have provided guidance to the individual defendants, who were attempting to walk the line between protecting detainees from harming themselves and violating their rights to personal privacy. That they transgressed that 'hazy border' here will not forfeit their qualified immunity from suit.").

Magrum v. Meinke, 332 F.Supp.2d 1071, 1082 (N.D. Ohio 2004) ("Defendant directs the Court to *Ferguson v. Leiter*, 220 F.Supp .2d 875 (N.D.Ohio 2002), *Hale v. Vance*, 267 F.Supp.2d 725 (S.D.Ohio 2003), and *Joy*. . . for the proposition that a reasonable officer in Meinke's position would have concluded that the amount of force employed was lawful. In *Hale*, the court determined that the use of a choke hold, or escort position, in the context of a *Terry* stop might give rise to an excessive force claim. The officer, however, was still entitled to qualified immunity because the court could not 'say that it was clearly established as of February 20, 2001, that a police officer may not detain an individual exiting a house reportedly providing sanctuary for at least one suspect in an investigation of gunshots by placing her arm behind her back and holding her in a choke hold.' . . Likewise, in *Ferguson*, though the use of a neck hold under the circumstances presented therein might have constituted excessive force, the officer was still entitled to qualified immunity. . . . In reaching its conclusion, this Court observed that the '[p]laintiffs have not presented relevant, controlling authority from this jurisdiction, or a consensus from other jurisdictions, regarding the constitutionality of neckholds.' . . Subsequently, however, the *Fultz* court, relying on *Hope*, declined to follow *Ferguson*, even though 'there was no direct precedent from the Sixth Circuit or Supreme Court directly dealing with the constitutionality of

neck restraints.'. . Instead the *Fultz* court focused on general excessiveness of the conduct in light of the circumstances presented, and noted that '[a]t the time of the incident in question, the law was clearly established that a police officer should use no more force than necessary to effect an arrest.'. . Upon further consideration, and in light of *Hope*, the Court agrees with *Fultz's* analytical framework. If, as Defendant contends, he employed a takedown maneuver together with a head or neck repositioning technique, then Meinke did not act contrary to any clearly established standards. However, under Plaintiff's version of events, in which Meinke flipped Magrum to the ground and choked him two times, the second time while Magrum was not resisting, Defendant acted in violation of clearly established law.")

Watkins v. The Millennium School, 290 F.Supp.2d 890, 902, 903 (S.D. Ohio 2003) ("Applying the *Williams* test, the Court has already determined that a constitutional violation may have occurred. The next issue then is whether the right was 'clearly established' such that a reasonable official would have known about it. In this case, a reasonable teacher should have known that students have Fourth Amendment rights against unreasonable searches and seizures. The Supreme Court decided *T.L.O.* in 1985, clarifying that the Fourth Amendment applies to searches conducted by school officials. . . . The third prong–whether the official's actions were objectively unreasonable in light of clearly established rights–is the most contentious because there are no comparable cases such that it could be said that Defendant Apley should have understood that what she was doing violated Plaintiff Watkins' privacy rights. Even *Thomas,* to the extent that it is analogous, was decided after the events in question took place. However, the *Williams* test is in accord with *Anderson v. Creighton,* where the Supreme Court considered *not* whether the defendant should have known, but whether the official's actions were 'objectively unreasonable' in light of the clearly established right. This Court finds that Plaintiffs have presented a genuine issue of material fact regarding whether Defendant Apley is entitled to qualified immunity. As explained by the Court in *Anderson v. Creighton*, the official is not protected by qualified immunity just because this *very* action previously has not been held unlawful. . . A reasonable jury could find Defendant Apley acted objectively unreasonable in requesting Plaintiff Watkins to accompany her alone, and into a supply closet, to conduct a second search, despite having no apparent basis to search further. A reasonable jury also could conclude that Defendant Millennium's School Policy 425 put Apley on notice that her actions in contravention of that policy would be objectively unreasonable.").

Fultz v. Whittaker, 261 F. Supp.2d 767, 776 & n.6 (W.D. Ky. 2003) ("[T]he fact that there was no direct precedent from the Sixth Circuit or Supreme Court directly dealing with the constitutionality of neck restraints does not necessarily mean that the right to be free from certain types of restraints under these circumstances was not clearly established for purposes of qualified immunity. . . . The Court is aware that this is contrary to the holding of *Ferguson v. Leiter,* 220 F.Supp.2d 875, 881 (N.D.Ohio 2002), upon which Defendants heavily rely. In *Ferguson,* the Court concluded that the right to be free from an unconstitutional excessive neck restraint was not clearly established. *Id.* The *Ferguson* court, however, did not reference the *Hope* opinion. The Court believes that *Ferguson* defines the issue too narrowly, and that based on *Hope* a court must look

generally at the excessiveness of the conduct in light of the circumstances instead of focusing on whether the precise conduct at issue has previously been held unconstitutional. . . . The appropriate inquiry in this case is whether a reasonable officer could have objectively believed that using a neck restraint in which pressure or force is applied is an acceptable method by which to maintain control over a handcuffed individual not actively resisting arrest or physically threatening the Officers or others under these particular circumstances.").

Smartt v. Grundy County, Tennessee, No. 4:01-CV-32, 2002 WL 32058965, at *4 (E.D. Tenn. Mar. 26, 2002) ("Shooting a fleeing car thief when the officer was not in physical danger, if proven, would violate clearly established law of which a reasonable person should have known.").

Fewless v. Bd. of Education of Wayland Union Schools, 208 F. Supp.2d 806, 822, 823 & n.17 (W.D. Mich. 2002) ("The Court could not find any cases involving school officials attempting to obtain legally valid consent from youths with disabilities like ADHD. [Relying on *Hope v. Pelzer,*] [t]his Court finds that *Schneckloth* gave 'fair warning' that Joseph's personal characteristics, as they affected the totality of the circumstances, rendered him unable to voluntarily consent to be searched. . . . As to the reasonableness of the strip search, a Sixth Circuit case on point, *Williams v. Ellington,* held the school officials protected by qualified immunity only after an investigation much more extensive and reliable than the one that was conducted here. . . . Thus, the decision to strip search Joseph Fewless was not objectively legally reasonable. Moreover, the decision was highly questionable in light of common sense and general experience. Qualified immunity does not bar the personal liability of Defendants Cutler and Medendorp.").

SEVENTH CIRCUIT

Lovett v. Herbert, No. 17-1668, 2018 WL 5316552, at *3-5 (7th Cir. Oct. 29, 2018) ("Although questions of (1) Fourth Amendment liability and (2) qualified immunity both involve an analysis of the 'reasonableness' of a defendant's conduct, the objects of those analyses are different. As we have explained in prior cases, ' "the substantive constitutional standard protects [a defendant officer's] reasonable factual mistakes [whereas] qualified immunity protects [the officer] from liability where [he] reasonably misjudge[d] the legal standard.". . . This distinction allows us to work around the factual disputes identified by the district court by assuming that the Officers knew Martin was severely intoxicated and that cells without upper bunks were available. Making these assumptions, we can properly exercise jurisdiction to determine whether providing a severely intoxicated person access to an upper bunk, in a cell where the lower bunk was occupied, violates clearly established law for qualified immunity purposes. . . .Here, the right at issue is a pre-arraignment detainee's Fourth Amendment right to 'objectively reasonable' treatment. We have explained that this right is assessed with reference to the defendant officer's notice of the detainee's medical need, the seriousness of the medical need, the scope of the alleged required treatment, and police interests. The Estate argues that the Officers obviously violated this right by giving a severely intoxicated person access to an upper bunk. The Officers argue that only analogous

precedent could have put them on notice that their conduct was unreasonable, but that no such precedent exists. Examination of the specific context of the Officers' conduct in this case shows that it was not 'egregiously' or 'obviously' unreasonable. Martin's severe intoxication did not necessarily indicate imminent or ongoing danger, such that giving access to an upper bunk was patently unreasonable. Although severe intoxication impairs a person's physical and mental abilities, the level of impairment varies by individual, and it is undisputed that Martin was communicating with the Officers and moving around under his own capacity prior to being left in the cell. Further, impairment from intoxication eventually decreases with time. We and the Supreme Court have required a much higher level of obvious risk to deny qualified immunity based on the Fourth Amendment's general requirement of reasonable conduct with respect to detainees. . . . [Court distinguishes cases relied on by the Estate and concludes that] even drawing all factual inferences in its favor, the Estate has failed to show that the Officers' conduct violated clearly established law. For that reason, the Officers are entitled to qualified immunity.")

Muhammad v. Pearson, 900 F.3d 898, 901, 904-07 (7th Cir. 2018) ("Law enforcement officers who discover that a search warrant does not clearly specify the premises to be searched must ordinarily stop and clear up the ambiguity before they conduct or continue the search. . . If they do not, they may lose the legal protection the warrant provides for an invasion of privacy and accompanying restraints on liberty. As we explain below, however, we conclude that summary judgment for the officer was appropriate here. Defendant Pearson testified that he did not know there were two apartments, including an apartment 1B, and he has offered undisputed, reliable, and contemporaneous documents confirming his after-the-fact testimony that the address searched was in fact the correct target of the search authorized by the ambiguous warrant. Summary judgment on the unlawful entry claims was correct. Also, Officer Pearson had arguable probable cause to arrest plaintiff Muhammad for suspected drug trafficking, though Pearson quickly confirmed that Muhammad was not the right suspect and released him within fifteen minutes. Summary judgment based on qualified immunity was also correct on that unlawful arrest claim . . . . We approach this illegal entry claim through the lens of qualified immunity and ask whether Officer Pearson's actions violated clearly established law. More precisely, since the district court granted summary judgment for Pearson, the question is whether the undisputed facts show that Pearson did not violate clearly established law. . . .With th[e] qualified immunity standard in mind, we take a closer look at Fourth Amendment law where search warrants have errors or key ambiguities. We have held that officers executing a search warrant can rely on what they know and see independent of the documents to make sure they search the correct premises, at least where the circumstances show there is no reasonable chance that the officers will search the wrong location, meaning a location other than the one the issuing magistrate authorized. . . . Search first, check later, is not a sound policing strategy. *Jones* teaches that officers need to read the warrant before executing it, and they should call a judge if there is a discrepancy between the affidavit and the warrant. . .This case, however, is different from *Jones* in a critical way. Unlike the officer in *Jones*, who knew there were two apartments, knew that the warrant was ambiguous, and essentially took his best guess about which one to search, Officer Pearson testified that when he

applied for the warrant he did not know there was an apartment 1B in the building. He also testified that the omission of 'A' from the warrant was a clerical omission. Pearson used his knowledge of the case, including information from his source, to search the correct apartment, the one for which he had probable cause. So Officer Pearson relies on the line of cases cited above that allow executing officers to rely on what they know to make sure they search the correct locations, despite errors or ambiguities in search warrants. The critical question for this case is whether it was proper to resolve Pearson's defense in his favor *on summary judgment*. In civil litigation about searches that turned out to involve mistakes or ambiguities in warrants, there can be plenty of room for material factual disputes about what the executing officers actually knew and did. Parties and courts can reasonably question the credibility of officers' after-the-fact attempts to explain away their mistakes. Such cases may well present factual issues that require a full trial to resolve. In this case, however, summary judgment was justified. Officer Pearson has offered undisputed evidence, in the form of reliable, contemporaneous documents, confirming that the correct target apartment—the one he intended to search and had probable cause to search—was apartment 1A. The LEADS report (dated the day before the warrant) and the deconfliction submission (dated the same day the warrant was executed) both listed apartment '1A' as the target of the search. Those documents remove reasonable grounds for disputing Pearson's claim that he used his knowledge to ensure that he searched the intended location. This contemporaneous evidence distinguishes this case from others where we held that officers could not have concluded that a plaintiff's apartment was the appropriate target of the search warrant. . . .Given the case law that allows an executing officer to use his or her own knowledge to resolve ambiguities, at least where there is no chance that the wrong location might be searched by mistake . . . and the contemporaneous documentation that corroborates Pearson's testimony, we affirm the district court's grant of summary judgment. Plaintiffs have not identified a precedent that should have alerted Officer Pearson that he could not proceed to search the apartment that he knew, beyond reasonable dispute, was the intended target.")

Thompson v. Cope, 900 F.3d 414, 420-24 (7th Cir. 2018) ("The plaintiff estate has not cited any cases holding that a paramedic could violate a patient's Fourth Amendment rights by rendering medical treatment. We have found just two opinions allowing such cases to go forward. . . Given the undisputed facts here, we doubt that the reasoning of those cases applies. In any event, the second prong of the qualified immunity analysis is dispositive here, so we decline to decide the first. . . .We have appellate jurisdiction to review the legal issue at the second step of qualified immunity analysis: whether the constitutional right that Heishman's estate asserts was clearly established at the time Cope administered the sedative. . . . [H]ow should courts analyze whether a right is clearly established? The Supreme Court has 'repeatedly told courts ... not to define clearly established law at a high level of generality.'. . Defining the right too broadly 'may defeat the purpose of qualified immunity.'. . On the other hand, defining the right too narrowly is equally problematic. That error 'may defeat the purpose of § 1983.'. . The Second Circuit has said that the 'Goldilocks principle' illustrates the 'middle course' between the two extremes—not too broad, not too narrow, but just right. [citing *Golodner*, 770 F.3d at 206] Can we be more specific? Precedent tied to particularized facts can indicate that law is clearly established, but the Supreme

Court does 'not require a case directly on point.'. . 'Of course, there can be the rare "obvious case," where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.'. . As we view this case, the question for qualified immunity is whether it was clearly established in 2014 that a paramedic 'seizes' an arrestee and is subject to Fourth Amendment limits on excessive force by sedating the arrestee—who appears to the paramedic to be suffering from a medical emergency—before taking the arrestee by ambulance to the hospital. It was not. The district court defined the asserted right too broadly. It said that 'officers cannot use excessive force in effectuating an arrest.'. . That 'lofty definition of the right' is just 'one floor down from the words of the Fourth Amendment itself ("the right to be free of 'unreasonable ... seizures'") and two floors down from the highest level of generality possible ("the right to be free from a constitutional violation").'. . The district court's formulation suggests that it tried to treat this case as an obvious one, evident from broad principles in excessive force cases. But we do not think a paramedic (or his lawyer) reasonably familiar with circuit and Supreme Court precedent would have understood that the Fourth Amendment prohibition of unreasonable searches and seizures applies to treatment in the field during a medical emergency. Fourth Amendment restrictions are almost wholly alien to that situation, where paramedics are subject to a distinct set of professional standards and goals aimed at responding to medical emergencies. . . The district court's formulation 'defines the qualified immunity inquiry at a high level of generality ... and then fails to consider that question in "the specific context of the case."'. . Neither the plaintiff estate nor the district court cited any case where a court found that conduct like Cope's—administering a therapeutic drug in response to a medical emergency—violated the Fourth Amendment. The cases cited by plaintiff and the district court involved excessive force cases brought against police officers. . . .Qualified immunity exists to avoid or at least to reduce the risk of the kind of catch-22 that would result from accepting the estate's position: treat the arrestee or don't treat him, but face a lawsuit either way. Suppose we put aside for a moment the human and professional ethics and responsibilities of paramedics and police officers when confronting a person in dire straits. Let's focus only on legally enforceable duties. If the officers and paramedic had not responded to Heishman's excited delirium, they could easily have found themselves defending against a deliberate indifference claim for ignoring his obvious and serious medical needs. . . .That dilemma helps to explain why the right the plaintiff estate asserts here was not clearly established under the circumstances. To treat the right as clearly established, the district court boiled away key circumstances of the situation here—especially the fact that Cope was a paramedic confronting a patient suffering from a life-threatening emergency. Those facts take this case out of the realm of clearly established Fourth Amendment law. It was not clearly established that a paramedic effects a 'seizure' within the meaning of the Fourth Amendment and subjects himself to an excessive force claim by sedating an arrestee who is suffering from a medical emergency to take the arrestee to the hospital. Defendant Cope was entitled to summary judgment on the Fourth Amendment claim.")

Mitchell v. Kallas, 895 F.3d 492, 499-501 (7th Cir. 2018) ("Dr. Kallas urges that he is entitled to qualified immunity because no binding decision guarantees inmates the right to a speedier gender dysphoria evaluation or short-term hormone therapy prior to release. That formulation,

however, frames the right too narrowly. Dr. Kallas has conceded (consistently with other cases) that Mitchell's gender dysphoria was a serious medical need. . . The first question is thus whether a prison doctor would have known that it was unconstitutional *never* to provide a person with the appropriate treatment for her particular case (and for many others)—hormone therapy. . . Prison officials have been on notice for years that leaving serious medical conditions, including gender dysphoria, untreated can amount to unconstitutional deliberate indifference. . . .Because circuit precedent clearly established that a total absence of treatment for the serious medical needs created by gender dysphoria is unconstitutional, Dr. Kallas may not claim qualified immunity for the denial of Mitchell's request for care. . . .To the extent that Mitchell may be complaining about the length of time it took for the assessment to be completed, as opposed to the lack of treatment, our answer is different. It is true that delays in care for 'non-life-threatening but painful conditions may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain.'. . Yet prisons have limited resources, and that fact makes some delay inevitable. For a delay in treatment to qualify as deliberate indifference, we must weigh 'the seriousness of the condition and the ease of providing treatment.'. . As we have said, the serious nature of gender dysphoria is not disputed here. But the ease of evaluating the appropriateness of hormone therapy remains to be considered. There is little evidence about the typical length of these evaluations, either in prisons or in the community. The few courts that have considered this question (some after the events in question) have determined that even longer delays in evaluating an inmate's candidacy for hormone treatment did not amount to deliberate indifference. . . Because Dr. Kallas was not on notice that a 13–month evaluation would violate Mitchell's Eighth Amendment right, he is entitled to qualified immunity on any possible claim of unreasonable delay. That is not to say that this delay cannot be criticized. Far from it. The lack of any sense of urgency, or even of the need for prompt follow-through, is quite disturbing. But on these facts, no clearly established law would have signaled to Dr. Kallas that this delay amounted to deliberate indifference.")

Comsys, Inc. v. Pacetti, 893 F.3d 468, 474 (7th Cir. 2018) ("As an IT specialist, Comsys surely knew that it could acquire its own domain name and set up an email server on its own equipment, for the greatest possible security. Instead it chose to use the City's servers, without any contractual guarantee of privacy. This puts it in a middle ground: it did not consent to the search (expressly or by implication), but neither did it arrange privacy by contract. Clearly established law does not tell us what expectation of privacy a contractor has in such a situation, which means that the appellants are entitled to qualified immunity. ualified immunity protects public employees who do not violate clearly established law. Unless we accept highly general statements—such as 'do not invade reasonable expectations of privacy without probable cause'—as clearly establishing the law when the existence of a reasonable privacy interest is itself debatable, these appellants prevail. We have been told by the highest authority not to take general principles as clearly establishing how novel situations must be resolved. It follows that Mayor Bosman, Administrator Pacetti, and Manager St. Peter cannot be ordered to pay damages under 42 U.S.C. § 1983.")

Comsys, Inc. v. Pacetti, 893 F.3d 468, 474-76 (7th Cir. 2018) (Gilbert, District Judge, concurring in part and dissenting in part) ("I join with my colleagues on the Fourth Amendment question. The majority's holding on the First Amendment issue, however, is problematic. . . .The majority then holds that Pacetti gets qualified immunity for his actions because he did not violate any clearly established rights of the appellees. What the majority is effectively saying is that you do not have a clearly established right to report a crime against you or your privately-held business to the police. That cannot be correct. The First Amendment expressly protects 'the right of the people ... to petition the government for a redress of grievances.' U.S. Const. amend. I. This clause has been incorporated against the states through the Fourteenth Amendment's due process clause. . . .It should be clear that the First Amendment protects your ability to report to the police that you are the victim of a crime. And although the Supreme Court 'does not require a case directly on point for a right to be clearly established,' *Kisela v. Hughes*, —— U.S. ——, 138 S.Ct. 1148, 1152, 200 L.Ed.2d 449 (2018), there are numerous published opinions at both the district and circuit court levels coming to the same conclusion. . . .There is one final matter: the majority is correct that the Supreme Court continues to move the ball on when law is 'clearly established' for a qualified immunity analysis, but the majority takes this principle too far. My colleagues rely chiefly on *Trigillo v. Snyder*, 547 F.3d 826 (7th Cir. 2008) to indicate that the right to report a crime against you or your personally-held business is not clearly established at the moment. But *Trigillo* dealt with a public service administrator trying to ensure that the Illinois Department of Corrections was proceeding appropriately, and when the employee became more concerned with what was going on at the Department, she filed a report with the Illinois Attorney General. . . . The employee wrote the report on a department letterhead and signed it as the 'Chief of Procurement.'. . So it should not be a surprise that the speech in *Trigillo* fell within the scope of *Garcetti v. Ceballos*. . . considering the speaker was undoubtedly speaking as an employee rather than as a citizen in her private capacity. That is far different from our case, where McAuliffe learned that someone was stealing trade secrets from her privately-held business and reported as much to the authorities. And the fact that McAuliffe's privately-held business had a contract with the city cannot mean that suddenly McAuliffe loses her right to report those computer crimes simply because 'performance of the contract' may be at play. Because it is clearly established that McAuliffe had a First Amendment right to report a crime against herself and her privately-held business to law enforcement, and Pacetti retaliated against her for doing so, Pacetti should not be entitled to qualified immunity on that claim. I respectfully dissent as to the majority's holding on the First Amendment question.")

Broadfield v. McGrath, 737 F. App'x 773, ___ (7th Cir. 2018) ("[A] defendant who is denied qualified immunity at summary judgment may not immediately appeal whether the evidence was sufficient to show a genuine issue of fact for trial. . . And accepting the defendants' argument would require disrupting the district court's conclusion that Broadfield's level of cooperation was sufficiently disputed. Because the court's ruling on this step of the qualified immunity inquiry turns on factual questions, we lack jurisdiction to review this issue. We do have jurisdiction to decide the second step of the qualified-immunity inquiry: whether Broadfield's right to be free from the type of excessive force described by the district court was

clearly established. The Supreme Court has stressed that this right must be defined with adequate specificity. *Kisela v. Hughes*, 138 S. Ct. 1148, 1151 (2018). The question, then, is not whether the law forbids the use of excessive force, but whether the law clearly established as excessive force the pressing of a non-resisting detainee's neck against the concrete in a manner that prevented him from breathing, carrying him hog-tied to his cell, and severely twisting his wrist in the process. . . In making this determination, we do not require a case be directly on point, but existing precedent must be sufficiently analogous to place the officers on notice that their conduct was unlawful. . . The Supreme Court has held that a pretrial detainee can succeed on an excessive force claim by showing only that the force used against him was objectively unreasonable. . . And our precedent makes clear that the actions of McGrath and Durham were objectively unreasonable if Broadfield was not resisting. . . Thus, we will not disturb the district court's denial of McGrath and Durham's qualified-immunity defense.")

Hurt v. Wise, 880 F.3d 831, 844-47 (7th Cir. 2018) ("Introducing an involuntary confession in a criminal prosecution violates the protection against compelled self-incrimination. . . Vantlin raises two preliminary legal arguments, which if accepted would entitle all three defendants to qualified immunity. First, he argues that Deadra's confession was never introduced against her in a criminal trial, and so she was never compelled to testify against herself. We have already rejected such a cramped understanding of what it means to 'use' a confession against someone in a criminal case. . . It is enough that the statement was used against Deadra in a probable cause affidavit and in a pre-trial hearing. . . .False confessions are a real problem, as both the majority and dissenting opinions in *Dassey* recognized. . . Even though William and Deadra 'confessed,' if a trier of fact could conclude that the officers knew that the confessions were false, then the officers are not entitled to qualified immunity for their actions. . . .We acknowledge, as we did in *Dassey*, that '[t]he Supreme Court's many cases applying the voluntariness test have not distilled the doctrine into a comprehensive set of hard rules.'. . Nonetheless, when the facts must be taken in the light most favorable to the plaintiffs, and when an interrogation is infected with numerous problems, a full trial may be necessary before a final characterization of the process is possible. This is not the place for an in-depth look at psychological coercion and false confessions, because we are not charged with making the final decision on the admissibility of William's and Deadra's statements. We must decide only whether, taking the facts and inferences favorably to the plaintiffs, any reasonable officer would have known that he was applying impermissible pressure. The district court concluded that the answer to this more limited question is yes, and we agree with it.")

Kemp v. Liebel, 877 F.3d 346, 351-52 (7th Cir. 2017) ("Before we can determine if the law was clearly established, 'the right allegedly violated must be defined at the appropriate level of specificity.'. .The Supreme Court has expressly rejected over-general formulations of clearly established law in the Fourth Amendment context. . . . In recent years, the Court has repeatedly stressed that *Graham* and *Garner* 'lay out excessive-force principles at only a general level.'. . . Thus, the Court held that '*Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case."'. . Here, plaintiffs ask us to define the relevant clearly established law

as 'the right of prisoners not to have their religious practices interfered with and prevented absent a legitimate penological basis.' This formulation is too broad. In fact, it simply restates the standard for analyzing prisoners' constitutional claims created by the Court in *Turner v. Safley*[.] . . . Just as *Garner* and *Graham* create a generalized excessive force standard, *Turner* creates a generalized framework to analyze prisoners' constitutional claims. Both describe a multi-factor reasonableness test used to determine whether a defendant's actions violated the Constitution. Thus, like the *Garner* and *Graham* standard, the *Turner* test cannot create clearly established law outside an obvious case. . . Instead, as the district court stated, the proper inquiry is whether there existed a 'clearly established constitutional right on the part of prisoners to congregate services and study absent appropriate leadership and supervision at the time of an interfacility transfer.' . .Under this framework, it is clear that Liebel is protected by qualified immunity. Plaintiffs cite no case where we held that the Free Exercise Clause provides prisoners the right to group worship when outside volunteers were unavailable to lead or train inmates. Likewise, they cite no case where we held that a prison official violates the Free Exercise Clause by transferring inmates to a facility that does not provide congregate worship and study, or by failing to delay a transfer until the new facility provides congregate worship and study.")

Smith v. Anderson, 874 F.3d 966, 968 (7th Cir. 2017) ("Qualified immunity bars Smith's claim. No court has held that the Fourth Amendment compels the release of sex offenders who lack lawful and approved living arrangements. *Brown v. Randle*, 847 F.3d 861, 864 (7th Cir. 2017). Thus, when sex offenders lack these arrangements, their continued detention does not violate clearly established rights. In such circumstances, the officers responsible for their detention are entitled to qualified immunity. . . That is the situation here. Indeed, Illinois law requires the Department to ensure that inmates have proper and approved residences before releasing them on parole. . . It also authorizes the Department to hold inmates until it has approved their living arrangements. . . As of his release date, Department had not approved Smith's host site. Thus, Smith's continued detention did not violate a clearly established right.")

Estate of Perry v. Wenzel, 872 F.3d 439, 460 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1440 (2018) ("The defendants urge us to narrowly define Perry's right. But, in doing so, they are essentially urging us to conclude that because there is no case with the exact same fact pattern, qualified immunity applies. That is not what the qualified immunity analysis requires us to do. Rather, we find that in September 2010, it was clearly established that the Fourth Amendment governed claims by detainees who had yet to receive a judicial probable cause determination. . . In 2007, in *Williams*, we identified the four factors later articulated in *Ortiz*, and upon which we have relied to evaluate the merits of Perry's claims. And, if by 2010, it was clearly established that an officer or prison nurse's actions were judged by the objectively reasonable standard of the Fourth Amendment, the failure to take *any* action in light of a serious medical need would violate that standard. Because Perry has met his burden at summary judgment of establishing that there was a violation of his constitutional rights and that that right was clearly established in 2010, his claims must be submitted to a jury for consideration.")

Orlowski v. Milwaukee Cty., 872 F.3d 417, 422-23 (7th Cir. 2017) ("Defendants' construction of the 'clearly established' law at issue here is narrow to the point of meaninglessness. Defendants assert that there is no clearly established right for 'a convicted prisoner to be awoken and told that he is snoring or breathing irregularly' or 'to receive immediate medical attention simply because he is snoring or breathing inconsistently in his sleep.' This inaccurately construes the Estate's claim. We cannot assume the Defendants' version of the facts that Orlowski was only snoring. The Estate provides evidence that Alexander knew, and told Manns, that Orlowski was breathing irregularly, appeared to have a severe sleeping disorder, and could not be woken up. Any reasonable officer would know that these observations indicated a serious medical condition and the law required them to seek medical attention. But, Alexander and Manns instead ignored Orlowski's condition. Because the facts proffered by the Estate could demonstrate a violation of Orlowski's clearly established Eighth Amendment rights, factual disputes prevent a finding that Defendants are entitled to qualified immunity.")

Houlihan v. City of Chicago, 871 F.3d 540, 546-49 (7th Cir. 2017) ("Given the 'considerable uncertainty [that] exists in the area of patronage law,' it is often difficult to prove that a government official violated a clearly established right by considering politics when making an employment decision. . . The reason for this uncertainty is that determining whether it is permissible to consider politics is a highly fact-specific inquiry—one that requires considering 'a wide range of government positions, which in turn involve an endless variety of job responsibilities and varying degrees of discretion and autonomy.'. . Between the low-level government worker (who typically receives protection from patronage hiring and firing) and the confidential employee (who receives no such protection), there are numerous government positions for which the pro-priety of patronage-based employment decisions 'has depended largely on the courts' juggling of competing constitutional and political values.'. . For that reason, 'it is difficult to imagine how any plaintiff ... could have a clearly established right to be free from patronage dismissal unless a nearly identical case had already been decided.'. . .Although the *Shakman* decrees reflect one of the First Amendment's proscriptions—that is, the general prohibition of patronage-based employment decisions—the decrees are not an edict encapsulating the contours of the constitutional rule; the decrees instead are the result of settlement between the parties to litigation. . . .The evidence shows that a reasonable person not only could debate whether the security-specialist position is a confidential one, but in fact could conclude so. And because the position is arguably confidential, a patronage-based employment decision regarding the position—although illegal under *Shakman*—does not necessarily entail a First Amendment violation. Accordingly, at the time of the plaintiffs' reassignment, Hillard and Thompson did not have notice that it is an obvious constitutional violation to consider politics when appointing security specialists. Hillard and Thompson are thus entitled to qualified immunity.")

Archer v. Chisholm, 870 F.3d 603, 620 (7th Cir. 2017) ("In sum, *Garcetti* might support either side: Archer, because the defendants were not her employer; the defendants, because Archer's activities were part of her job as a public employee. This uncertainty means that Archer has not shown that her asserted right was 'clearly established'—a stringent standard that demands that

'every reasonable official would have understood that what he is doing violates that right.'. . . [T]he existence of probable cause and the judicial supervision of the John Doe investigation further counsel in favor of finding that qualified immunity applies. No case we have seen has considered how to treat public employee speech that draws the attention of a John Doe judge or a grand jury for purposes of the First Amendment. . . And we know from *Hartman* that probable cause (or the lack thereof) is relevant to a claim of retaliatory prosecution. . . There is no clearly established rule of law under which an official pursuing a lawful investigation, based on probable cause, has been found liable under the First Amendment to a target.")

Green v. Newport, 868 F.3d 629, 634-35 (7th Cir. 2017) ("Green counters that, while *Gentry* and *Packer* may not have expressly proscribed Officer Newport's conduct, these cases provided him 'fair warning' that his conduct was unlawful. . . It is not clear on what legal basis Green asserts this argument, but as we have already concluded, *Gentry* and *Packer* are too factually dissimilar to control this case. The inquiry into whether a right is clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . Green ignores the context of the situation which Officer Newport confronted: the auto store's recent robbery; the 'casing' behavior reportedly carried out by the driver of the Marquis; and the proximity to the store's closing hour. These facts make this case wholly distinguishable from *Gentry* and *Packer*, in which officers lacked any information to warrant suspicion of criminal conduct, and consequently these cases cannot provide Officer Newport 'fair warning' that his conduct was unlawful. Accordingly, the district court erred in its determination that Officer Newport's *Terry* stop violated clearly established law, and we find that Officer Newport is entitled to qualified immunity.")

Estate of Clark v. Walker, 865 F.3d 544, 552-53 (7th Cir. 2017) ("Walker argues that the Supreme Court's decision in *Taylor v. Barkes* shows that Clark's rights were not clearly established. . . . *Taylor* is readily distinguishable from this case. First, Clark's estate is not suing supervisory officials who did not know about Clark's risk. The estate contends that Walker and Kuehn *actually knew* Clark's risk and disregarded it. Second, in *Taylor* the Supreme Court reversed the Third Circuit in part because the right at issue was not clearly established in the Third Circuit. Here, the right at issue has long been clearly established in this circuit, as explained above. Finally, Walker argues that the clearly established prohibition on deliberate indifference to prisoners' and jail inmates' risk of suicide is too general to be enforceable for purposes of qualified immunity. Walker urges us to consider Clark's rights at a very high level of specificity: whether a jail inmate had a right 'to be placed immediately on a special watch in a suicide cell despite no outward signs of suicidal ideation during an initial intake assessment, when the intake officer knew that trained medical personnel would conduct a follow-up assessment and ultimately determine the inmate's proper observation and housing status.' This very specific right, Walker argues, 'has never been clearly established by the Supreme Court.' Courts may not define clearly established law at too high a level of generality, . . . but there is no such problem here. The Supreme Court has long held that prisoners have an Eighth Amendment right to treatment for their 'serious medical needs.'. . For purposes of qualified immunity, that legal duty need not be litigated and then

established disease by disease or injury by injury. Risk of suicide is a serious medical need, of course. . . .Walker should have taken action based on this knowledge, yet he chose to do nothing. Our precedent establishes that 'particular conduct' such as this violates clearly established law. . . To the extent Walker argues that our prior cases are factually distinguishable from this case, our limited jurisdiction precludes considering that argument.")

Lewis v. McClean, 864 F.3d 556, 565-66 (7th Cir, 2017) ("[W]e reject the defendants' claim that they are entitled to qualified immunity from Lewis's suit. Qualified immunity protects government employees from liability for civil damages for actions taken within the scope of their employment unless their conduct violates 'clearly established ... constitutional rights of which a reasonable person would have known.'. . Viewing the facts in the light most favorable to Lewis, we ask whether the defendants violated a clearly established constitutional right. . . In establishing whether a constitutional right has been clearly established, it is unnecessary for the particular violation in question to have been previously held unlawful. . . Instead, we ask whether the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . It has long been clear that deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. As for whether Cichanowicz and McLean's delay in assisting Lewis ran afoul of that clearly established right, as the discussion above makes clear, when viewed in the light most favorable to Lewis, his factual allegations could demonstrate a constitutional violation. Thus, the defendants are not entitled to immunity from suit.")

Karow v. Fuchs, 695 F. App'x 966, ___ (7th Cir. 2017) ("Public officials are entitled to qualified immunity unless their acts violate clearly established law. See, e.g., *White v. Pauly*, 137 S. Ct. 548 (2017). Neither the Supreme Court nor any court of appeals has held that prisoners are entitled to place advertisements in an effort to attract support for a proposal to change a prison system's policies. To the contrary, many decisions have held that a prisoner's efforts to speak directly to the public at large or to the press are subject to restrictions by wardens and other officials. . . Karow had every right to contact lawyers who might have been willing to help him and to initiate litigation seeking an injunction requiring the prison system to recognize Asatru. By choosing a different route—one that could have entailed gang code, even if it did not in fact—Karow invited a reaction by the prison system. The district court was right to conclude that the defendants are entitled to qualified immunity from damages.")

Karow v. Fuchs, 695 F. App'x 966, ___ (7th Cir. 2017) (Rovner, J., dissenting) ("Thaddeus Karow placed an ad in a religious newsletter, seeking 'ideas' for how to have his religion recognized as 'legitimate' in the Wisconsin prison system. Officers viewed the ad as a prohibited call for collective action, placed Karow in segregation, and issued him a conduct report. Even though a hearing committee exonerated Karow of violating prison rules, the officers continued to threaten Karow with punishment if he ran the ad again. The majority, in concluding that the officers are entitled to qualified immunity on Karow's claim that the officers violated the First Amendment, misframes the issue by asking whether prisoners have a clear right to advertise. But it is Karow's message, not its medium, that matters. I view Karow's speech as a request for legal assistance that,

because no reasonable officer would believe it threatened legitimate prison interests, was clearly protected speech. I would therefore deny the officers qualified immunity on Karow's First Amendment claim.")

Isby v. Brown, 856 F.3d 508, 529-30 (7th Cir. 2017) ("It is well established that whenever process is constitutionally due, no matter the context, it must be granted in a meaningful manner. . . That said, we must also be cautious about defining the due process violation at issue here 'at the appropriate level of specificity.'. . There is no Seventh Circuit or Supreme Court case establishing exactly that periodic reviews of administrative segregation like those at issue here violate due process. 'However, a case holding that the exact action in question is unlawful is not necessary.'. . After all, prison officials have been on notice since *Hewitt* that periodic reviews of administrative segregation are constitutionally required, and it is self-evident that they cannot be a sham. Although some appellate courts that have considered this issue have concluded that qualified immunity applied, *see, e.g., Toevs*, 685 F.3d at 916 ("we cannot conclude that the state of the law from 2005 to 2009 gave defendants fair warning that the [Quality of Life Level Program] review process [for prisoners in administrative segregation] was not meaningful, or that the lack of reviews at QLLP Levels 4 through 6 was a due-process violation"), in the case at hand, the various factual disputes discussed above preclude summary judgment on the basis of qualified immunity. . . .As Isby may be able to convince the trier of fact that defendants-appellees have been deliberately giving him meaningless 'reviews,' without any intention of ever releasing him from the SCU, qualified immunity may not apply.")

Gill v. City of Milwaukee, 850 F.3d 335, 341 (7th Cir. 2017) ("The right 'to be free from coercive interrogation' is highly generalized. Therefore, it cannot be the basis for defeating a qualified immunity defense, unless there is closely analogous precedent that is 'particularized' to the facts of the instant case. . . . Gill has not cited, and we have not identified, any precedent from the Supreme Court or this Circuit that puts the unconstitutionality of the officers' conduct here 'beyond debate.'. . When no such precedent exists, we look outside our Circuit 'to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'. . Gill relies exclusively on two cases from the Eighth Circuit that he argues clearly establish the contours of the right violated here. *See Livers v. Schenk*, 700 F.3d 340 (8th Cir. 2012)*; Wilson v. Lawrence Cty.*, 260 F.3d 948 (8th Cir. 2001). In both cases, the court denied officers summary judgment after determining that there were questions of fact as to whether the interrogation methods in question violated the Fifth and Fourteenth Amendment rights of a mentally disabled suspect. . . In our view, however, these two cases from another circuit are insufficient to establish a 'clear trend' indicating that recognition of this right as clearly established in this Circuit is 'merely a question of time.'. . . This is particularly true in light of our recent holding in *Cairel*, where we rejected a closely similar substantive due process claim based on the interrogation of a suspect with a cognitive disability. . . There, the officers interrogated the suspect without a lawyer present, despite the fact that they were 'aware of [the suspect's] disability and knew that he might not have been fully able to understand what was going on.'. .In sum, Gill has failed to demonstrate that his right to be free

from the interrogation tactics used here is clearly established. There is no precedent that places the constitutionality of the detectives' actions 'beyond debate.'. . For that reason, Defendants are entitled to qualified immunity on Gill's Fifth and Fourteenth Amendment claims.")

Brown v. Randle, 847 F.3d 861, 863-64 (7th Cir. 2017) ("No matter how the Due Process calculus may come out, Brown insists, he had a right under the Fourth Amendment to release as soon as his prison sentence ended. Yet as of 2009, when he was kept in prison, no court had held that the Fourth Amendment entitles a sex offender to release even though it appears likely that, as soon as he steps outside the prison's front door, he will be in violation of the terms of release. Indeed, no federal court has so held to this day. Under the circumstances, therefore, the defendants are entitled to qualified immunity from damages. And so we concluded with respect to Wisconsin's system of keeping sex offenders in prison until they have a lawful post-prison residence. See *Werner v. Wall*, 836 F.3d 751 (7th Cir. 2016). In a supplemental brief filed after argument, Brown asks us to put *Werner* to one side because Illinois and Wisconsin do not use identical systems, and he emphasized the Fourth Amendment while Werner relied principally on the Eighth Amendment. These distinctions are true but beside the point. The core conclusion of *Werner* is that the federal judiciary has not clearly established that sex offenders who lack a lawful place to live must nonetheless be released from prison. That conclusion does not depend on the particulars of the state systems or the constitutional provision a given plaintiff emphasizes. Brown does not identify any decision of a federal court establishing that sex offenders without approved living arrangements must be released. Instead he states the constitutional rule at a high level of generality (the Fourth Amendment forbids unreasonable seizures) and contends that this suffices. No, it doesn't. As the Justices reiterated earlier this month:

'clearly established law' should not be defined 'at a high level of generality.'. . As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. . . Otherwise, '[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'. . [citing *White v. Pauly*] Federal courts have not particularized the sort of right Brown asserts, so the defendants are entitled to immunity from liability in damages.")

Catledge v. City of Chicago, 666 F. App'x 558, ___ (7th Cir. 2016) ("That probable cause was so lacking in this case—at least if the evidence is viewed in the light most favorable to Catledge—also forecloses the defendants' reliance on their defense of qualified immunity. On this question we disagree with the district court. A police officer loses the shield of qualified immunity if the facts, viewed in the light most favorable to the plaintiff, demonstrate that the officer's conduct constituted a violation of a clearly established constitutional right. . . The constitutional right to be free from unreasonable searches, including being free from searches of one's vehicle if the police lack probable cause to conclude that it contains evidence of a crime, has been long established. And on this record a jury readily could conclude that Martin and Kappel, who have yet to offer their version of events, knew that they did not have probable cause to believe that Catledge had engaged in stalking or disorderly conduct. Instead a jury could find that the officers searched Catledge's car knowing full well that he had done nothing more than pretend to be engaged in

lawful use of a video camera on a public street. The officers argue that they have qualified immunity because there wasn't yet a clear interpretation of the Illinois disorderly conduct statute. Again, they base this argument on *Reher*'s statement that it was unclear what type of 'other suspicious circumstances' would push 'mere videotaping' over the line into disorderly conduct. . . . But as we just explained, the officers have not identified *any* suspicious circumstances, so it is irrelevant that ambiguity may exist regarding the kinds of suspicious circumstances that might suggest disorderly conduct. And as we have noted repeatedly, after the *Terry* investigatory stop, the officers knew that Catledge was not engaged in videotaping at all.")

Williams v. Hansen, 837 F.3d 809, 810-11 (7th Cir. 2016) ("Williams asserted in his deposition and affidavit that he had ordered the death certificate for use in state post-conviction proceedings rather than to save as a trophy of his crime, and the defendants have presented no contrary evidence to support their assumption that Williams wanted a trophy. And the prison could have avoided this controversy in the first place by holding on to the death certificate except for the short time needed to include it (or indeed just a xerox copy of it) in Williams's court filing. The remaining defendants argue however that even if Williams has stated a claim for relief, they are insulated from liability because the right that he asserts was not clearly established when they violated it. *Ashcroft v. Al–Kidd*, 563 U.S. 731, 735 (2011). Wrong. The right of a prison inmate to read the mail he receives, provided that his reading it would not infringe the prison's legitimate interests, is, as noted above, clearly established.")

Rebirth Christian Academy Daycare, Inc. v. Brizzi, 835 F.3d 742, 746-49 (7th Cir. 2016) ("We. . .begin with the question whether the law clearly established that Rebirth had a property interest in its registration as a child care ministry. We conclude that the answer is yes. This question is not a close one, as the law on this issue has been clearly established for decades. . . . Thus, any reasonable government official would have understood that Rebirth had a property interest in its registration as a child care ministry. . . .Numerous Supreme Court decisions reinforce our conclusion that, because Rebirth was entitled to retain its registration unless it violated state law, Rebirth's ability to operate a registered child care ministry was a clearly protected property right at the time that the defendants revoked its registration. . . .These decisions thus demonstrate that the question whether Rebirth had a protected property interest in its registration was beyond debate. . . . It has long been clearly established that the 'root requirement' of due process is that a person 'be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'. . .Rebirth was clearly entitled to a pre-deprivation opportunity to challenge the proposed loss of its registration. We agree with the district judge's assessment—unchallenged by the appellees—'that the interest at stake here, to wit, [Rebirth's] interest in the continued operation of its child care business, is an important one.'. . Moreover, the appellees have not identified any governmental interest that might have arguably justified their failure to provide Rebirth with an opportunity to be heard *before* depriving it of this significant property interest. The fact that the Bureau did not revoke the registration until two weeks after it gave Rebirth notice of the revocation further undermines any potential argument that

the Bureau was responding to some perceived emergency necessitating that it quickly rescind Rebirth's registration without first giving it a chance to challenge the Bureau's allegations. We therefore conclude that, by revoking Rebirth's registration without first providing the organization with an opportunity to be heard, the appellees violated clearly established law and are not entitled to qualified immunity. The appellees argue that the proper inquiry is not whether Rebirth had a clearly established right to be heard before its registration was revoked but whether it had a clearly established right to an administrative appeal of the type available to license holders. We reject this argument. Contrary to the appellees' assertions, this is not a case about 'what amount of process is due.' Rather, this is a case in which due process clearly required *some* pre-deprivation opportunity to be heard and the appellees provided *no* opportunity for a hearing, though nothing prevented them from doing so. . . .[A]lthough the appellees are correct that no statutory provision requires an administrative appeal before the revocation of a registration, this does not mean that Brizzi and Gargano are excused from providing Rebirth with due process. True, the statutory scheme did not require that registered child care ministries receive an administrative appeal of the type afforded to license-holders, but neither did it prohibit the appellees from providing registered child care ministries with *some* type of pre-deprivation hearing. The issue then is whether Rebirth adequately alleged that the appellees personally decided to withhold from Rebirth the pre-deprivation hearing that they could have provided. We conclude that Rebirth's complaint plausibly alleges that Brizzi and Gargano were personally involved in depriving Rebirth of an opportunity for a pre-deprivation hearing, and thus the complaint satisfies the requirements of notice pleading. . . . In sum, we do not decide the type of pre-deprivation hearing that Rebirth was entitled to or that Rebirth shall now recover damages. We conclude only that Rebirth's complaint alleges that the appellees personally violated clearly established law by depriving Rebirth of a property interest (its registration) without first providing Rebirth with *any* opportunity to be heard. Rebirth will, of course, need more than allegations to prevail on these claims; it will need evidence proving that these defendants were personally involved in the constitutional violation. Given the procedural posture of this case, the district court should, if necessary, provide Rebirth with an opportunity for additional discovery so that it may obtain such evidence.")

Kristofek v. Village of Orland Hills, 832 F.3d 785, 798-99 (7th Cir. 2016) ("We have 'long recognized that an employer may not retaliate against an employee for expressing his views about matters of public concern.'. . . However, we typically conduct qualified-immunity inquiries by focusing on the 'specific context in the case,' rather than on a 'broad general proposition.'. . Nevertheless, 'general statements of the law are not inherently incapable of giving fair and clear warning, and in [certain] instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.'. . As discussed above, Kristofek has adequately demonstrated that Scully terminated him in retaliation for speaking out about potential political corruption involving senior officials within the police department. In addition, it was clearly established at the time of Scully's actions that the First Amendment prohibited retaliating against a public employee because he had spoken with colleagues and with the FBI about public corruption. [citing cases] . . . .So Scully is not entitled to qualified immunity on Kristofek's First Amendment retaliation claim.")

Figgs v. Dawson, 829 F.3d 895, 905-06 (7th Cir. 2016) ("Fishel contends that 'no clearly established constitutional rule established that [she] violated the Eighth Amendment by failing to recalculate Figgs's sentence in response to his concerns or by referring it to' the chief record office. This argument is flawed because it does not address the broader deficiencies with Fishel's chosen course of action, which we have discussed above. The appropriate inquiry here is whether it was clearly established that Fishel's failure to investigate the substance of Figgs's complaints violated his constitutional rights by requiring him to serve more time than his sentence required. . . At the time Figgs presented his complaints, it was clearly established by decisions in closely analogous cases that the failure to investigate a claim that an inmate is being held longer than the lawful term of his sentence violates the Eighth Amendment if it is the result of indifference. . . While, to be clearly established, 'a right must be specific to the relevant factual context of a cited case and not generalized with respect to the Amendment that is the basis of the claim,' the 'very action in question' need not have previously been held unlawful for a public official to have reasonable notice of the illegality of some action. . . Viewing the record in the light most favorable to Figgs, the evidence supports his claim that Fishel's conduct violated his established constitutional right to be free from cruel and unusual punishment. Thus, Fishel is not entitled to qualified immunity.")

Becker v. Elfreich, 821 F.3d 920, 926-30 (7th Cir. 2016) ("[W]e are not holding the 'bite and hold' technique is *per se* deadly force. . . Rather, whether a 'bite and hold' technique constitutes deadly force 'depends on how [the dog] is trained to behave when confronting a suspect.'. . . [B]ased on the record, we cannot say whether the use of the 'bite and hold' constituted deadly force. But the force was clearly force at the higher end of the spectrum, and the government's intrusion on Becker's rights was thus significant. . . . Reading the facts in the light most favorable to Becker, after his mother told him police were there to arrest him, Becker got dressed and started down the stairs within two minutes with his hands above his head. And just two seconds after he released Axel, Officer Elfreich encountered Becker toward the bottom of the stairs with his hands above his head. At this point, Officer Elfreich should have recognized that Becker was not hiding in the house but was in the process of surrendering. Further, when Officer Elfreich saw Becker on the stairs Becker had his hands in full view over his head and kept his hands there even while being bitten by Axel. Becker did not exhibit any sort of aggressive behavior toward Officer Elfreich or anyone else. . . Nor was Becker actively resisting arrest or attempting to evade arrest by flight. Accordingly, while the initial release of Axel to find Becker may have been justified because the officers believed Becker was concealing himself in the house, once it became clear that Becker was not concealing himself, but was actually near the bottom of the staircase about 30 seconds after Officer Elfreich purportedly told him to come down, the force used by Officer Elfreich was no longer reasonable. . . .Under the facts as a whole, it was unreasonable for Officer Elfreich to pull Becker down three steps and place a knee in his back while allowing Axel to violently bite his leg. . . . Case law makes clear that officers cannot use significant force on a nonresisting or passively resisting suspect. Further, as we have often said, 'a case directly on point is not required for a right to be clearly established and "officials can still be on notice that their conduct violates established law even in novel factual circumstances."' Thus, the relevant case law did not need to

involve a police dog in order to clearly establish the principle that you cannot allow a dog to violently attack such a suspect. . . .When Evansville police attempted to arrest Jamie Becker, Officer Elfreich released his police dog under the belief that Becker was hiding in the house. However, two seconds later, Officer Elfreich discovered Becker had been descending the stairs to surrender with his hands above his head. Nonetheless, Officer Elfreich continued to allow the police dog to bite Becker, while pulling him down three steps and placing his knee on his back and handcuffing him. And Becker suffered serious bodily injury as a result of the dog bite. While it is unclear from the record whether Axel presented a substantial risk of serious risk bodily harm (and thus deadly force), the force was clearly at the more severe end of the force spectrum. A jury could reasonably find such force was excessive. Further, because it was clearly established at the time of Becker's arrest that no more than minimal force was permissible to arrest a non-resisting, or passively resisting, suspect, Officer Elfreich was not entitled to qualified immunity on this record.")

Alicea v. Thomas, 815 F.3d 283, 290-92 (7th Cir. 2016) ("Applying the *Graham* factors to Alicea's account, we do not find that Alicea, standing in broad daylight with his hands up at gunpoint and enclosed by a five-foot pool, posed a sufficient threat to Thomas to justify ordering Leo to attack and hold him. The district court erred in holding it was reasonable to command a dog to attack a suspect who had ceased flight, was effectively trapped, and who immediately complied with police orders. . . . We see even less of a basis to grant summary judgment to Officer Alvarez, taking all facts in a light most favorable to Alicea. At the point at which Alvarez first saw Alicea, Alicea's arm was in the jaws of a seventy-two pound dog. Two other officers were already at the scene. A reasonable officer would not think that punching, kicking, and stomping on Alicea was required to control the situation. It is true that Alicea was screaming, but there is no dispute that he was crying for help. . . . Officer Alvarez came upon Alicea when he was already seriously injured. Alicea was agitated, to be sure, but the source of his agitation was clear: he had just been attacked by a dog, and needed medical attention. Alicea testified at his deposition that he was already face-down, on the ground, when Alvarez began to punch, kick and stomp on him. At this point, however loudly Alicea was screaming, under his version of events, he simply did not present a threat that justified kicking, stomping, and punching him. . . . In sum, Alicea's factual account creates a material dispute as to whether Officer Alvarez used excessive force. Lack of medical documentation of his injuries, while potentially relevant to Alicea's credibility, is immaterial to the threshold question of whether Officer Alvarez's use of force was reasonable when the facts are viewed and reasonable inferences are drawn in Alicea's favor. . . . As explained above, we conclude that the evidence, taken in a light most favorable to Alicea, would permit a reasonable jury to find excessive force in violation of the Fourth Amendment. So we turn to the question of whether Thomas's and Alvarez's actions violated clearly established law. . . .At the time of Alicea's arrest, it was clearly established that an officer may not use excessive force against an individual during an arrest. . .It was also clearly established that using a significant level of force on a non-resisting or a passively resisting individual constitutes excessive force. . . Commanding a dog to attack a suspect who is already complying with orders clearly violates the principles set forth in *Holmes* and *Rambo.* Punching, stomping and kicking a suspect who is on the ground and

seriously injured similarly violates clearly established law. There is a material dispute as to whether Alicea was resisting arrest, both at the moment that Thomas commanded Leo to attack him, and at the moment that Alvarez arrived at the scene of the arrest and removed Alicea from the pool. There is also a material dispute as to the level of force that Alvarez used, described in detail above. . . . It was improper to grant qualified immunity to Thomas and Alvarez prior to a jury determining whether Alicea was, as he contends, fully complying with orders before the defendants used force to arrest him.")

Gustafson v. Adkins, 803 F.3d 883, 892 (7th Cir. 2015)("[T]he Supreme Court and this Circuit had clearly established the right of employees to be free from unreasonable employer searches by the time Adkins installed the hidden surveillance equipment in 2007. Adkins also claims that Gustafson failed to satisfy her burden of setting forth 'existing precedent [that] placed the statutory or constitutional question beyond debate.'. . However, a broad constitutional test, such as the *O'Connor* plurality's reasonableness test, is sufficient to clearly establish the law 'in an obvious case ... even without a body of relevant case law.'. . Because this is an obvious case that presents a flagrant Fourth Amendment violation, identification of a body of relevant case law is unnecessary. In sum, we find that *O'Connor* clearly established the contours of the Fourth Amendment violation Gustafson alleges. Therefore, the district court properly denied Adkins's motion for summary judgment on the basis of qualified immunity.")

Kingsley v. Hendrickson, 801 F.3d 828, 831-33 (7th Cir. 2015) (on remand) ("The defendants next suggest that they should be able to avoid retrial because they are entitled to qualified immunity. Their argument is a nuanced one. In their view, the decision of the Supreme Court, resolving a circuit split in its decision in this case, altered the substantive law of liability. Because there was a division among the circuits on the state of the law at the time that they acted, they contend that they cannot be held liable for their actions. Although the matter of qualified immunity was brought to the attention of the Court, its instructions to us make no mention of our returning to this issue. In any event, we do not believe that this defense is a viable one here. . . .[I]n this case, the scope of the right in issue must be drawn more narrowly than the right of a pretrial detainee to be free from excessive force during his detention; instead, we must examine whether the law clearly established that the use of a Taser on a non-resisting detainee, lying prone and handcuffed behind his back, was constitutionally excessive. Here, the facts surrounding the underlying incident are in sharp dispute. When those facts are construed in the light most favorable to Mr. Kingsley, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), a reasonable officer was certainly on notice at the time of the occurrence that Mr. Kingsley's conduct did not justify the sort of force described in his account. According to Mr. Kingsley, he was not resisting the officers in a manner that justified slamming his head into the wall, using a Taser while he was manacled, and leaving him alone after use of that instrument. Our precedent makes clear that when the officers applied the Taser to Mr. Kingsley in May 2010, use of the Taser violated Mr. Kingsley's right to be free from excessive force if he was not resisting. . . If we were to accept the defendants' argument here, we would untether the qualified immunity defense from its moorings of protecting those acting in reliance on a standard that is later determined to be infirm. Here, *before and after* the

Supreme Court's decision in this case, the standards for the amount of force that can be permissibly employed remain the same. To accept the defense of qualified immunity here, we would have to accept the dubious proposition that, at the time the officers acted, they were on notice only that they could not have a reckless or malicious intent and that, as long as they acted without such an intent, they could apply any degree of force they chose. As we have noted, however, the law clearly established that the amount of force had to be reasonable in light of the legitimate objectives of the institution. Accordingly, the judgment of the district court is reversed, and the case is remanded for further proceedings in accordance with this opinion.")

Gevas v. McLaughlin, 798 F.3d 475, 485 (7th Cir. 2015) ("On the record before us, construed in the light most favorable to the plaintiff, the defendants were aware that Gevas was in danger of being harmed by Adkins, who was threatening to stab him, and yet did nothing to address that danger *other* than having previously made him aware that he had the option to refuse housing, be ticketed in response, and have himself transferred into disciplinary segregation. Expecting a prisoner to defy an order in pursuit of his own safety runs counter to the essential nature of incarceration as well as to cases emphasizing the need for order and discipline in the prison environment. . . . A prison official could not logically believe, in view of the duty imposed on him by the Eighth Amendment, *Farmer*, and other deliberate indifference cases, that requiring a prisoner to violate a prison directive (including his cell assignment) is a reasonable response to a substantial risk of the prisoner's cellmate attacking him. And the defendants may not now find refuge in the doctrine of qualified immunity simply because no case had previously rejected the specific defense that they have creatively fashioned, when the logic (or illogic) of that defense is so at odds with the respective duties that existing case law imposed on prisoner and prison official.").

Davis v. Wessel, 792 F.3d 793, 803-05 (7th Cir. 2015) ("Wessel and Lay contend that they are entitled to judgment as a matter of law on the basis of qualified immunity. . . Wessel and Lay contend that the intent requirement for a substantive due process claim was unsettled at the time of the restroom incident. They argue that a reasonable official could have believed at the time that the Eighth Amendment's 'malicious and sadistic' excessive-force standard applied to a due process claim such as that asserted by Davis. . . They assert that '[t]here was insufficient evidence for a reasonable jury to infer that Wessel and Lay acted with the requisite subjective intent.'. . In making this determination, we must view the evidence in the light most favorable to Davis. . . Viewing the evidence in that light, a reasonable jury could have found that Wessel and Lay knew that Davis could not effectively use the restroom while wearing the hand restraints; they refused to remove the hand restraints despite knowing that Davis was old, frail, and not a security risk while in the windowless restroom; and they laughed at Davis as he urinated on himself and then refused to allow him to clean himself. . . Taken together, these findings allowed the jury to conclude that Wessel and Lay refused to remove Davis's hand restraints for the purpose of humiliating and causing psychological pain to Davis, and not for any legitimate security reason. At the time of the incident at issue, it was clearly established that the Due Process Clause of the Fourteenth Amendment prohibited the unreasonable use of bodily restraints in a manner that serves

to punish a civilly committed individual. . . . The evidence viewed in the light most favorable to Davis demonstrates that Wessel and Lay violated the clearly established law governing substantive due process claims for excessive use of restraints. Even under the Eighth Amendment standard advocated by Wessel and Lay, the evidence viewed in the light most favorable to Davis demonstrates that Wessel and Lay violated clearly established law by refusing to remove Davis's hand restraints for the purpose of humiliating and ridiculing Davis.")

Armstrong v. Daily, 786 F.3d 529, 532-33, 556-57 (7th Cir. 2015) ("[A]t the time of the original investigation, it was clearly established under *Killian v. United States*, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961), and then *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that bad-faith destruction or loss of exculpatory evidence would violate a suspect's due process rights. *Brady* made clear that the police and prosecution could not *suppress* exculpatory evidence. A reasonable police officer or prosecutor would not have concluded that he could instead *destroy* evidence to avoid disclosing it to the defense. . . . [W]hile there is some disagreement among courts about the conditions for obtaining a civil remedy for destruction of exculpatory evidence, those disagreements do not support a qualified immunity defense. It was clearly established in 2006 that the defendants' alleged *conduct* of destroying the evidence would violate defendant's due process rights. That is sufficient to defeat the qualified immunity defense. . . .Defendants argue that reasonable officials would not be aware that they violated a constitutional right in these circumstances—destroying evidence that would or could exculpate a criminal defendant detained in preparation for retrial. This argument is built on a basic misunderstanding about qualified immunity. The issue is not whether issues concerning the availability of a *remedy* are settled. The qualified immunity defense focuses instead on whether the official defendant's *conduct* violated a clearly established constitutional right. . . . This point is consistent with the way the Supreme Court has repeatedly described the defense of qualified immunity, in terms of whether the defendant official's 'actions' or 'conduct' violated clearly established law, not in terms of whether a defendant should have realized he would be held civilly liable for his actions or conduct. . . . Debate about the need for a trial or conviction goes to the question of injury, which is essential to proving liability but not relevant to qualified immunity. Focusing on the defendants' *conduct*—destroying a semen stain that had previously tested negative for Armstrong's DNA—it is clear that they had fair warning that this exculpatory evidence had to be preserved. Their alleged actions were objectively unreasonable in defying that command. The fact that their actions were so egregious as to cause dismissal of the charges before a retrial does not protect them from liability for injuries they caused. The district court correctly denied their motion to dismiss on the ground of qualified immunity.")

Doe v. Vill. of Arlington Heights, 782 F.3d 911, 916 (7th Cir. 2015) ("Even though dismissal under Rule 12(b)(6) on qualified immunity grounds may be inappropriate in many cases, . . . in some cases it is proper; indeed, we have reversed the denial of qualified immunity at the pleading stage where appropriate, *see, e.g., Chasensky v. Walker*, 740 F.3d 1088, 1095–97 (7th Cir.2014) (holding that the plaintiff failed to establish a clearly established right and the district court erred in denying the defendants' motion to dismiss on qualified immunity grounds); *Steidl v. Fermon*,

494 F.3d 623, 633 (7th Cir.2007) (reversing denial of motion to dismiss plaintiff's access-to-the-courts claim because officials were entitled to qualified immunity). The district court correctly determined that it was not clearly established that calling off another police officer or falsely reporting to dispatch that the scene was clear violates a constitutional right of a victim of private violence. Doe has not shown that it was clearly established that any other conduct or inaction of Del Boccio violated a constitutional right. Even assuming that the complaint alleges that Del Boccio violated Doe's constitutional right, the law was not clearly established such that he should have known he was violating her rights. Therefore, Del Boccio is entitled to qualified immunity and Count IV against him was properly dismissed.")

Beaman v. Freesmeyer, 776 F.3d 500, 509-10 (7th Cir. 2015) ("Beaman argues that *Brady* 'has been on the books since 1963 and easily qualifies as clearly established law.'. . The withholding of materially exculpatory evidence violates the Due Process Clause. . . He contends that the novelty of the factual circumstance cannot excuse the *Brady* violation where it is well-established that investigators who withhold exculpatory evidence violate the defendant's constitutional due process right. While it is true that the idea that police officers must turn over materially exculpatory evidence has been on the books since 1963, it certainly has not been on the books since 1963 that polygraph reports are materially exculpatory evidence. That is because in most states, polygraph reports are inadmissible at trial. . .And a few months after Beaman's trial concluded, the Supreme Court decided *Wood v. Bartholomew,* 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995). In *Wood,* the Court held that because polygraph results were not admissible at trial, the state's failure to disclose the fact that a witness failed a polygraph test did not deprive a defendant of 'material' evidence under *Brady,* absent a reasonable likelihood that disclosure of the polygraph test could have had a direct effect on the outcome of the trial. . . .Even if the relevant inquiry was what the Illinois Supreme Court decided, that court's determination in 2008 that the polygraph test could have affected the trial does not answer the question of whether, in 1995, it was clearly established that the officers needed to turn over inadmissible polygraph reports. . . Beaman points to no cases pre–1995 where the Illinois Supreme Court, or any Illinois court for that matter, found that inadmissible polygraph tests, or any other type of inadmissible evidence, could constitute *Brady* material. Without such a case, it cannot be said that it was clearly established in 1995 that inadmissible polygraph reports were *Brady* material in Illinois. . . Beaman also argues that it was clearly established in 1995 that evidence inculpating another suspect was *Brady* material. While that is true as a general matter, Beaman forms the question too broadly. In its broadest form, the relevant inquiry is whether *inadmissible* information inculpating another suspect could be *Brady* material. Again, Beaman points to no pre–1995 case from Illinois or the Supreme Court, and we are unable to find one, establishing that inadmissible evidence inculpating another suspect (to frame it broadly) or polygraph tests (to frame it narrowly) is *Brady* material. During the relevant time period, it was not clearly established that the results of a polygraph test, inadmissible at trial, constituted *Brady* material. Arguably, it was not until *Wood*—decided three months after Beaman's trial concluded—that it became clearly established that inadmissible polygraph tests stood any chance of *ever* being *Brady* material. The question of whether and when inadmissible evidence can be *Brady* material remains an open question in many jurisdictions today. . . Therefore

we find that the defendants are entitled to qualified immunity for their failure to turn over the Murray polygraph report to the prosecution and Beaman's defense counsel.")

O'Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014) ("Plaintiffs' claim to constitutional protection for raising funds to engage in issue advocacy coordinated with a politician's campaign committee has not been established 'beyond debate.' To the contrary, there is a lively debate among judges and academic analysts. The Supreme Court regularly decides campaign-finance issues by closely divided votes. No opinion issued by the Supreme Court, or by any court of appeals, establishes ("clearly" or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups—let alone that the First Amendment forbids even an *inquiry* into that topic. The district court broke new ground. Its views may be vindicated, but until that day public officials enjoy the benefit of qualified immunity from liability in damages. This makes it unnecessary for us to consider whether any defendant also enjoys the benefit of absolute prosecutorial immunity, which depends on the capacities in which they may have acted at different times.")

Seiser v. City of Chicago, 762 F.3d 647, 658 (7th Cir. 2014) ("At the point that the breathalyzer test was administered to Seiser, a reasonable police official would have believed in light of *Carey* and like cases that so long as there was probable cause to justify a breathalyzer examination, there was no need to consider seeking a warrant first. By the time Seiser was being processed at the Ninth District, nearly two and one-half hours had transpired since he was seen drinking from the liquor bottle, and an attempt to obtain a warrant, through whatever means, would have portended at least some further delay. *Carey* suggested that dispensing with a warrant application was a sound course. And as the *McNeely* decision recognizes, there was a prior division of authority among courts on this very point. . . Conflicting precedents present the very sort of uncertainty as to what the law requires that entitles a public official to qualified immunity.")

Volkman v. Ryker, 736 F.3d 1084, 1090, 1091 (7th Cir. 2013) ("The qualified immunity analysis . . . traditionally involves a two-part inquiry. The first question is whether the defendants' conduct violated a constitutional right. . .The second question is whether that particular constitutional right was 'clearly established' at the time of the alleged violation. . .We may consider the two questions in either order. . . In this case, we begin by asking whether the right alleged to be violated is 'clearly established.'. . .The cases Volkman has put forward demonstrate little more than that the First Amendment right against retaliation, writ large, is clearly established. But this is not so easy a case that citing to a general proposition of law is enough to show that any reasonable official would have known that to restrict or punish Volkman's speech was unconstitutional. . . There are fact-intensive considerations at play, including whether Volkman spoke as a private citizen or in his capacity as a public employee, whether he spoke on a matter of public concern, and whether IDOC had an adequate justification for treating Volkman differently from any other member of the general public. . . The defendants highlighted the weakness of Volkman's effort to show that his rights were clearly established in their response brief, but he did nothing to buttress his position in his reply. As a result, we need not say at exactly what level of specificity Volkman was required

to show that his rights were clearly established on these facts; it is enough to note that what he *has* done is plainly not enough.")

Hardaway v. Meyerhoff, 734 F.3d 740, 745 (7th Cir. 2013) ("As Hardaway admits in his appeal, 'there is ambiguity among various Seventh Circuit cases regarding the proper baseline against which to measure conditions of disciplinary confinement.' Although the district court would benefit from a bright-line rule on the types of conditions and duration of segregation give rise to a prisoner's liberty interest, no such guidance has yet to be specifically addressed by this Court. Hence, even if Hardaway's segregation amounted to the violation of a liberty interest, the Defendants should not be held responsible for incorrectly guessing otherwise due to the ambiguity of the parameters of the law. In sum, the right to avoid disciplinary segregation in a cell with a solid metal door and a confrontational cell mate for 182 days with weekly access to the shower and recreational yard was not a clearly established right in September 2009 when the conduct occurred. Therefore, the Defendants are entitled to qualified immunity.")

Hobgood v. Illinois Gaming Bd., 731 F.3d 635, 648 (7th Cir. 2013) ("First, as we have described, the facts make out a violation of Hobgood's right to be free from retaliation for exercising his First Amendment rights. Second, it was clearly established at the time of the Gaming Board's actions that the First Amendment prohibited investigating and then suspending and terminating a public employee because he had helped another employee pursue a lawsuit aimed at uncovering and proving public corruption.")

Currie v. Chhabra, 728 F.3d 626, 628-32 (7th Cir. 2013) ("Currie filed her initial complaint on October 14, 2009, naming as defendants various jail officials, Williamson County, Chhabra and Reynolds, and Health Professionals, Ltd. The initial iterations of her complaint alleged that the defendants acted with 'deliberate indifference' to Okoro's medical needs, suggesting a claim that the defendants violated Okoro's due process rights under the Fourteenth Amendment. . . At the close of discovery, however, in response to the defendants' motion for summary judgment, Currie argued for the first time that the Fourth Amendment's 'objectively unreasonable' standard should govern. . . . Upon receipt of Currie's revised complaint alleging 'objectively unreasonable' conduct, Chhabra, Reynolds, and Health Professionals filed a motion to dismiss, asserting qualified immunity 'because the Fourth Amendment has not been applied to licensed medical professional[s] subcontracted to care for state detainees.' The court denied this motion. Only Chhabra and Reynolds are before us on appeal. . . . The defendants' real argument is that the Fourth Amendment *never* governs constitutional claims alleging inadequate provision of medical care to an arrestee by a nurse or doctor, regardless of the defendant's employment arrangement. Although the Supreme Court has provided relatively little guidance regarding the constitutional rights of arrestees and pretrial detainees, . . . this court's cases foreclose the defendants' argument. [discussing cases] The defendants attempt to distinguish *Ortiz, Williams,* and *Sides* as cases involving the objectively unreasonable denial of medical care by *jailers,* not the objectively unreasonable provision of medical care by *doctors and nurses.* A jailer might violate an arrestee's Fourth Amendment rights by unreasonably denying the arrestee access to insulin, the defendants

urge, but a health care professional who unreasonably withholds insulin does not. This argument lacks support in law or logic. . . . True, the named defendants in our earlier Fourth Amendment medical-care cases were 'lockup keepers' (*Ortiz* and *William*) and police detectives (*Lopez*), but from the perspective of the arrestee, it matters not a whit whether it is the jailer or the doctor whose conduct deprives him of life-saving medical care. This is why our Fourth Amendment cases speak broadly of claims involving the '*provision* of medical care,'. . . not simply the '*denial* of medical care by a jailer' (as the defendants would have it). . . . The defendants next argue that even if their conduct violated Okoro's Fourth Amendment rights, qualified immunity is proper because no previous decision 'applied the Fourth Amendment to analyze the reasonableness of health care provided by contracted medical professionals to arrestees being held by the police in jail.' If there is any lack of clarity in our previous cases, however, it is only with respect to the threshold issue whether the defense of qualified immunity is *ever* available to private medical care providers like the defendants. . . .The Supreme Court recently considered the question whether 'an individual hired by the government to do its work is prohibited from seeking [absolute or qualified] immunity, solely because he works for the government on something other than a permanent or full-time basis.'. . It held that 'immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.'. . On the other hand, the *Filarsky* Court reaffirmed the holding of *Richardson* categorically rejecting immunity for the private prison employees there; in so doing, the Court emphasized that the incentives of the private market suffice to protect employees when 'a private firm, systematically organized to assume a major lengthy administrative task ... for profit and potentially in competition with other firms,' assumes responsibility for managing an institution. . . In a detailed opinion tracking the Court's analysis in *Filarsky,* the Sixth Circuit recently held that a doctor providing psychiatric services to inmates at a state prison is not entitled to assert qualified immunity. *McCullum v. Tepe,* 693 F.3d 696 (6th Cir.2012) (discussing the historical roots of immunity for similarly situated parties and the history and purpose of § 1983); see also *Hasher v. Hayman,* 2013 WL 1288205 (D.N.J. Mar. 27, 2013) (private medical employees failed to establish that they are entitled to assert a qualified immunity defense, 'even after *Filarsky*'). We find the Sixth Circuit's reasoning persuasive, though we need not definitively decide the issue today; even if our defendants were entitled to seek qualified immunity as a general matter, we would conclude that the defense is not applicable here. The contours of Okoro's Fourth Amendment rights were 'sufficiently clear that a reasonable official would understand that what he is doing violates that right' throughout the period of Okoro's detention. . . . As we already have explained, nothing in our opinions hints at some special Fourth Amendment exemption for health care professionals . . . . It was 'quite clear' in 2004, we said, 'that the Fourth Amendment protects a person's rights until she has had a probable cause hearing.'. . It was no less clear in December 2008, when Okoro collapsed in his cell, that the same Fourth Amendment standard applies to the wrongdoing alleged here.")

Chrzanowski v. Bianchi, 725 F.3d 734, 742, 743 (7th Cir. 2013) ("Given our rationale in the *Fairley* line of cases, we have little trouble concluding that reasonable officials in the defendants' shoes would understand that retaliating against Chrzanowski for giving truthful grand jury and

trial testimony would violate the First Amendment. . . . Defendants point out that *Morales* involved testimony in the civil context, whereas this case involves testimony in criminal proceedings, but this is a distinction without a difference: providing eyewitness testimony regarding potential wrongdoing, civil or criminal, was never 'part of what [Chrzanowski] was employed to do.' Chrzanowski's rights were clearly established at all relevant times.")

Humphries v. Milwaukee County, 702 F.3d 1003, 1004, 1007 (7th Cir. 2012) ("Although Humphries maintains that the denial of her application violated her right to due process, we agree with Muniz and his supervisor that qualified immunity protects them from any liability for this decision. They had no involvement whatsoever in the investigation or determination of the 1988 finding of substantiated abuse, and no case law clearly establishes that they violated Humphries's constitutional rights when they relied on that finding to deny her child care provider renewal application. Therefore, we affirm the district court's grant of summary judgment to Muniz and his supervisor on the basis of qualified immunity. . . . None of the case law to which Humphries points holds that persons without a role in the abuse determination may not later rely on such a determination without first independently ensuring the determination was made in accordance with due process.")

Betker v. Gomez, 692 F.3d 854, 864 (7th Cir. 2012) ("The question is whether, at the time of the violation in this case, a 'reasonably well-trained police officer would have known that the arrest was illegal.'. . In 1985, we held in *Olson* that immunity does not extend '[w]here the judicial finding of probable cause is based solely on information the officer knew to be false or would have known was false had he not recklessly disregarded the truth.'. . In 1992, in *Juriss v. McGowan,* we stripped an officer of qualified immunity where only his false and misleading statements provided probable cause to arrest a woman for aiding a fugitive. . . We reiterated this point in *Knox,* 342 F.3d at 658 ('We have held in previous cases that a warrant request violates the Fourth Amendment if the requesting officer knowingly, intentionally, or with reckless disregard for the truth, makes false statements in requesting the warrant and the false statements were necessary to the determination that a warrant should issue.'). And this principle has been firmly established in the criminal context since the Supreme Court decided *Franks v. Delaware,* 438 U.S. 154 (1978). . . . In the civil context, the plaintiff need only 'point to a closely analogous case decided prior to the challenged conduct in order to defeat qualified immunity.'. . We think there are plenty. So Officer Gomez is not entitled to qualified immunity as a matter of law.")

Levin v. Madigan, 692 F.3d 607, 622 (7th Cir. 2012), *cert. dismissed as improvidently granted by* ***Madigan v. Levin***, 134 S. Ct. 2 (2013) ("Because the ADEA does not preclude Levin's § 1983 equal protection claim, we now turn to the issue of qualified immunity. . . . At the time of the alleged wrongdoing, it was clearly established that age discrimination in employment violates the Equal Protection Clause. . . Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not 'rationally related to a legitimate state interest.'. . Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is irrelevant, and as Judge Chang noted, it is 'odd to apply qualified immunity in the

context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively *broader* than the equal protection clause.'. . Because Levin's constitutional right was clearly established, the Individual Defendants are not entitled to qualified immunity.")

Estate of Miller, ex rel. Bertram v. Tobiasz, 680 F.3d 984, 991 (7th Cir. 2012) ("Having established that plaintiff has alleged facts that, if proven, show the defendants violated a constitutional right, we must evaluate whether they would be entitled to qualified immunity under the second prong of the qualified immunity analysis; that the constitutional right must be clearly established. The defendants urge this Court to apply a very high threshold for this prong. They argue for an examination of this prong in such a specific manner that virtually nothing besides intentionally harmful actions could be 'clearly established.' Under defendants' analysis, for a right to be clearly established there must be precedent holding that a prisoner has a constitutional right specific to the conduct alleged. However, the cases in this circuit have understood the term 'right' in a broader sense. For example, in *Cavalieri v. Shepard*, we stated that the right that Cavalieri was asserting is 'the right to be free from deliberate indifference to suicide.' 321 F.3d 616, 623 (7th Cir.2003) (citing *Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir.1992). Here, plaintiff asserts the same right. We therefore conclude that that right was clearly established in 2009 as it was in 1998.")

Grayson v. Schuler, 666 F.3d 450, 451, 455 (7th Cir. 2012) ("Inmates' complaints that prison authorities have infringed their religious rights commonly include a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, which confers greater religious rights on prisoners than the free exercise clause has been interpreted to do. . . The plaintiff doesn't mention the Act, but he is proceeding pro se and in such cases we interpret the free exercise claim to include the statutory claim. . . But the Act can no longer do him any good. Although his complaint is none too clear, he appears to be seeking damages against the defendant in both the latter's official capacity and his personal capacity, and the former claim is barred by the state's sovereign immunity, *Sossamon v. Texas*, 131 S.Ct. 1651, 1658–61 (2011); *Vinning–El v. Evans*, 657 F.3d 591, 592 (7th Cir.2011), and the latter claim cannot be based on the Act because the Act does not create a cause of action against state employees in their personal capacity. . . It does authorize injunctive relief, which the plaintiff initially sought along with damages, but he's since been released from prison, so his injunctive claim is moot and he is left with his personal-capacity damages claim under section 1983. . . . Since, however, '[qualified] immunity protects public employees who make reasonable errors in applying even clearly established law,' *Vinning–El v. Evans*, *supra*, 657 F.3d at 594, the defendant is entitled to immunity if he committed a reasonable error in failing to apply clearly established law—that is, if he reasonably thought the plaintiff insincere in his religious belief, or a security threat. But there is no suggestion that the defendant ordered the plaintiff's dreadlocks shorn because of a reasonable belief in either of these possibilities. He seems just to have been applying the Rastafarian exception, which could not reasonably be thought constitutional. So neither on substantive nor immunity grounds can the grant

of summary judgment be upheld. The judgment is reversed and the case remanded for further proceedings consistent with this opinion.")

Surita v. Hyde, 665 F.3d 860, 873, 874 (7th Cir. 2011) ("Here, Hyde's purpose in silencing Surita is apparent from his words at the city council meeting: he demanded that Surita apologize to Figueroa before he would be allowed to speak. A reasonable person in January 2004 would have known that silencing Surita for that purpose was constitutionally impermissible. Thus, the denial of qualified immunity on this theory is affirmed. . . . Recently, in *Greene v. Doruff*, 660 F.3d 975 (7th Cir.2011), we addressed the tension in our cases between motivating-factor causation and but-for causation, clarifying that First Amendment cases are governed not by *Gross* but by *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Greene*, 660 F.3d at 977. We noted that *Spiegla* and *Fairley* are correct to an extent because the burden of proof relating to causation is divided between the parties in First Amendment cases. . . To meet the prima facie burden regarding causation in a First Amendment case, a plaintiff needs to show only that the defendant's conduct was a motivating factor, i.e., a 'sufficient factor,' meaning when something present makes something else bound to happen. . . The defendant can then rebut that showing, but only by establishing that his or her conduct was not a but-for or 'necessary condition' of the harm, i.e., that the harm would have occurred anyway. . . .Thus, Judge Shadur was not wrong in referencing a burden-shifting test that included a plaintiff's burden to show a motivating factor. Moreover, at the summary judgment stage the burden-shifting test is used to determine whether a plaintiff makes it to trial. Even as we stated in *Fairley*, if evidence exists upon which a reasonable jury could find but-for causation, no more is necessary to overcome a defendant's summary judgment motion. Here, viewing the facts in Surita's favor, his speech at the Belvidere Mall was protected. Hyde argues that he was not motivated to suppress Surita's point of view but only the threatening manner in which Surita's view was delivered. However, Hyde's comments during the city council meeting indicate that Surita was silenced to induce him to apologize for the Belvidere Mall speech; by Hyde's own words, excluding Surita from speaking was a reaction to what Surita said at the Belvidere Mall. Thus, Hyde's comments at the meeting provide evidence that the Belvidere Mall speech was the cause (whether motivating or but-for) that prevented Surita from expressing his views at the city council meeting. Even before January 2004 an official's act taken in retaliation for the exercise of free speech under the First Amendment was recognized to violate the Constitution. *Vukadinovich* and *Abrams*, decided in 2002, made clear that Hyde could not retaliate against someone for protected First Amendment speech, whether acting pursuant to a but-for motive or a substantially motivating one. Hence, a reasonable official in January 2004 would have known he could not retaliate.")

Hernandez ex rel. Hernandez v. Foster, 657 F.3d 463, 486, 487 (7th Cir. 2011) ("At the time of Jaymz's removal, our case law did not put a reasonable DCFS investigator, supervisor, or manager on notice that removing Jaymz without a pre-deprivation hearing violated the plaintiffs' clearly established procedural due process rights. *Jensen* had indicated that the removal was lawful as long as there was probable cause to believe that Jaymz would be subject to the danger of abuse if not removed, and a post-deprivation hearing was held within two business days. We have

concluded that a reasonable DCFS worker could have believed there was probable cause to remove Jaymz. . . . . [T]he defendants are entitled to qualified immunity on the due process claim arising from Jaymz's initial removal. But the process due with respect to the allegedly coerced safety plan is another matter. Due process 'requires that government officials not misrepresent the facts in order to obtain the removal of a child from his parents.'. . This conclusion applies equally in the context of obtaining parental consent to a restrictive safety plan. Under *Dupuy,* the state may not threaten to infringe parental custody rights when the state has no legal right to carry through on the threat. . . If Foster misrepresented the facts and Crystelle's and Joshua's legal rights in order to obtain their consent to the safety plan, their agreement to the safety plan was not voluntary and they were illegally coerced into signing the plan. Hence, they would have been denied due process. . . The plaintiffs have created a triable issue as to whether a reasonable parent in their situation would have felt free to refuse to sign the safety plan. Therefore, they have enough evidence to raise a genuine issue as to whether they were coerced into agreeing to the safety plan.")

Ortiz v. City of Chicago, 656 F.3d 523, 538, 539 (7th Cir. 2011) ("In light of our decision to reverse the grant of summary judgment in favor of the seven defendants mentioned above, we must address the defendants' qualified immunity defense. They argue that the uncertainty over whether the 'deliberate indifference' or 'objectively unreasonable' standard governs the medical care claim entitles them to qualified immunity. They argue that until 2007, when we decided *Williams v. Rodriguez,* 509 F.3d 392 (7th Cir. 2007), and *Sides v. City of Champaign,* 496 F.3d 820 (7th Cir. 2007), no decision had applied the Fourth Amendment to analyze the reasonableness of the provision of medical care to arrestees. While that may be true, we have long held that the Fourth Amendment protects a person's rights until she has had a probable cause hearing. . . The multifactor test announced in *Sides* and clarified in *Williams* was unannounced at the time of Molina's death, yet it was quite clear that the Fourth Amendment applied to her stage of the criminal process. But even if we were to assume that the standard we have applied in this case was not clearly established at the time Molina died, the outcome of this case would be unaffected. To survive summary judgment, Ortiz would then be required to satisfy the more stringent deliberate indifference standard. This, however, is not a case that turns on the difference between the two standards. Ortiz's argument, if credited by a jury, satisfies the deliberate indifference standard because she argues that defendants were subjectively aware that Molina had a serious medical condition that needed care and they failed to respond adequately. . . The defendants do not argue that Molina did not suffer from an objectively serious medical condition. The question is only whether the officers' failure to act was not only negligent, but deliberately indifferent. Yet it is well settled that providing no medical care in the face of a serious health risk constitutes deliberate indifference. . . This is not a case where prison officials provided substandard medical care and we must decide whether they crossed the line from medical malpractice (negligence) to deliberate indifference (recklessness). Ortiz's claim is that each of the defendants knew that Molina suffered from a serious medical condition, yet they failed to take any step in response. At this stage, she has done enough to defeat summary judgment even if the higher standard applied. We therefore conclude that the defendants are not entitled to qualified immunity on this claim.")

Ammons v. Washington Dept. of Social and Health Services, 648 F.3d 1020, 1026-34 (9th Cir. 2011) ("Courts are given the discretion to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . Here, it is difficult to assess whether the facts alleged by Ammons establish the alleged constitutional violation without setting forth the governing law. Therefore, we first examine the clearly established law with respect to the alleged Fourteenth Amendment violation, and then determine whether the facts before us support such a violation. . . .[A]t the time the events alleged in this case took place, it was clearly established that LaFond and Webster, as state officials, had a duty to exercise professional judgment to provide safe conditions for Ammons and the other patients at CSTC. . . .In light of the clearly established law that hospital officials must provide safe conditions for involuntarily committed patients, we now examine the circumstances under which state hospital officials may be held responsible for failing to do so. . . . *Youngberg* and *Neely* serve as pre-existing, clearly established law as to what conduct supports infringement of the Fourteenth Amendment rights of involuntarily committed hospital patients. At the time of the alleged events, then, it was clear that the actions of LaFond and Webster violated the Constitution if they ran afoul of the objective *Youngberg* professional judgment standard as applied in *Neely*. . . . Under *Neely*, a jury could find that a reasonable administrator, exercising professional judgment with respect to providing safe conditions, would have taken Resident A's allegation into account when assigning and supervising staff members in cottages where female patients resided. While LaFond had no cause to discipline Grant, because he had been exonerated of the molestation charge, she certainly had reason, in light of her duties with respect to the safety of her patients, to manage and monitor his duties more carefully. Instead, LaFond allowed Grant to gain unfettered and unmonitored access to the female residents, and to spend time with them on a one-on-one basis. . . . We hold that, under the facts alleged and produced, LaFond's apparent inaction and poor supervision with respect to the safety of Ammons and the other female patients support a finding that she failed to exercise professional judgment, and thereby violated the Fourteenth Amendment."[footnotes omitted])

Florek v. Village of Mundelein, Ill., 649 F.3d 594, 601(7th Cir. 2011) ("Florek points to no case where a court has held that police acted unreasonably when they summoned emergency medical personnel instead of supplying non-prescription medication to an arrestee, nor has she pointed to other authority that might help her in making the argument. We located no helpful authority on her behalf, and a straightforward application of our precedent militates against her position. Thus, summary judgment on the merits was appropriate as to Hansen, and that means that judgment for the Village was proper as well.")

Vodak v. City of Chicago, 639 F.3d 738, 746, 747 (7th Cir. 2011) ("The underlying problem is the basic idiocy of a permit system that does not allow a permit for a march to be granted if the date of the march can't be fixed in advance, but does allow the police to waive the permit requirement just by not prohibiting the demonstration. . . The defendants' lawyer at oral argument was unable to come up with a reason for such a rule. As a result not of the rule itself but of the failure to plug the hole in it, the police did not know what the route of the march would be and, reacting ad hoc

and perhaps in some panic, resorted to mass arrests without justification. Or so at least a trier of fact could find on the record compiled to date. The district judge ruled that it was not clearly established law on March 20, 2003, that police cannot upon revocation of a permit arrest any demonstrator who does not immediately cease demonstrating and leave the scene. If this is right, then the judge's ruling that the police are protected by the doctrine of qualified immunity from liability in damages to any demonstrator or suspected demonstrator who was arrested is also right. But the premise is wrong. The Supreme Court had held decades earlier that police must give notice of revocation of permission to demonstrate before they can begin arresting demonstrators. . .No precedent should be necessary, moreover, to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission. . . . So this is one of those cases in which a defense of immunity would fail even in the absence of a precedent that had established the illegality of the defendants' conduct. . .The absence of a reported case with similar facts may demonstrate nothing more than widespread compliance with well-recognized constitutional principles.")

Roe v. Elyea, 631 F.3d 843, 859, 861 (7th Cir. 2011) ("Dr. Elyea inaugurated a protocol for hepatitis C treatment that categorically required that *all* candidates for antiviral therapy–despite their particular genotype–have at least two years left on their sentence. This categorical rule, the plaintiffs submit, deprived them of necessary treatment that would have been effective. This rule was grounded, they further contend, in consideration of administrative convenience rather than medical effectiveness. . . . The evidence permitted, although it did not compel, the jury to conclude that Dr. Elyea's policy prevented treating physicians from exercising any professional judgment as to whether to commence interferon treatment for inmates who could complete the prescribed course of treatment during the remaining period of their incarceration. Mr. Roe's records reflect that on several occasions his physicians identified him as not a candidate for treatment *because of the policy*. . . Under these circumstances, we believe that the district court properly denied, each time it was presented, Dr. Elyea's invocation of qualified immunity.")

Purvis v. Oest, 614 F.3d 713, 721 (7th Cir. 2010) ("There is no case law of the U.S. Courts of Appeals or Supreme Court of which we are aware that demonstrates that Purvis's constitutional rights would have been violated by reporting her to a body that would perform an independent investigation before effecting a deprivation. . . . It was clearly established that due process was denied by the introduction of a fundamental conflict of interest into the investigative process. But it was not clearly established that such a procedural defect violated the Constitution if whatever conclusion eventuated was subject to confirmation and validation by a subsequent independent investigation.")

T.E. v. Grindle, 599 F.3d 583, 590 (7th Cir. 2010) ("Grindle argues that because none of our decisions have explicitly adopted *Stoneking*, it cannot be considered clearly established for the purpose of qualified immunity. Grindle's argument misses the mark. . . . While district court decisions alone do not clearly establish a right for the purpose of qualified immunity, the number

and unanimity of these decisions, combined with our circuit-level precedent, show that a reasonable school principal would have concluded that she could be held liable for turning a blind eye to and affirmatively covering up evidence of child sexual abuse by one of her teachers.").

Catlin v. City of Wheaton, 574 F.3d 361, 369 (7th Cir. 2009) ("If there is a legitimate question as to the existence of the right at issue, then qualified immunity attaches. . . In the present case, even if the defendants had consulted a casebook prior to formulating their plan, they still would not have had fair notice that they had a constitutional obligation to announce their identity prior to completing [an] arrest [in a public place].")

Narducci v. Moore, 572 F.3d 313, 322, 323 (7th Cir. 2009) ("Although there was Ano square holding addressing whether recording an employee's phone calls violates his Fourth Amendment rights," court holds Ait was sufficiently clear that government employees enjoyed a reasonable expectation of privacy in the workplace to preclude qualified immunity.").

Matrisciano v. Randle, 569 F.3d 723, 730, 731, 735, 736 (7th Cir. 2009) ("Although we ultimately decide this case on account of the failure to meet the 'clearly established' requirement, some examination of the alleged constitutional right that was violated is helpful in understanding whether such a right was clearly established at the relevant time. Matrisciano argues that the defendants retaliated against him, in a manner contrary to the protections guaranteed by the First Amendment, by reassigning him after he testified before the Prisoner Review Board in support of Aleman's release. . . . Matrisciano voluntarily testified before the Board on a day that he took off from work. His job description does not hint at voluntary testimony before the Board. In short, we find no evidence that Matrisciano spoke to the Board pursuant to his official duties, and the defendants do not argue otherwise. . . .In these particular circumstances, the law at the time was not such that reasonable officials would know that transferring Matrisciano after his testimony before the Board was unlawful. . . . This is also not an obvious case. Aleman was an infamous prisoner known to have bribed a government official, and an Assistant Deputy Director in the Department of Corrections voluntarily made his first Prisoner Review Board comments on behalf of that inmate, without any special knowledge of the inmate's daily behavior in custody. None of the cases to which Matrisciano points put the defendants on notice that reassigning him as a result of this testimony violated the Constitution.").

Carvajal v. Dominguez, 542 F.3d 561, 569, 570 (7th Cir. 2008) ("The district court reached the second step of qualified immunity analysis in concluding that the obligation to disclose impeaching or exculpatory information would have been clear to a reasonable law enforcement officer. Given our conclusion that no *Brady* violation occurred here, we do not need to evaluate that aspect of the ruling. Nonetheless, a more careful examination of this question should have produced a different result. The question at this step, if reached, would not be whether a law enforcement officer would clearly know that he had to disclose impeaching or exculpatory information. That assumed the result. Rather, the question should have been whether it was clear that a law enforcement officer would have been expected to disclose whether he had seen a photo of a suspect before he went to

a potentially dangerous undercover meeting with that individual. As noted, good police practices and common sense would suggest that an officer ought to prepare in that way. We are aware of no case which clearly indicates, or even hints, for that matter, that a law enforcement officer would be expected to disclose that he had undertaken such preparation. It is about the equivalent of strapping on a concealed weapon or reviewing a suspect's prior criminal history before attending such an undercover encounter. Unless clear guidance is given that such a practice must be disclosed as potentially impeaching or exculpatory, the broad protection of qualified immunity should protect a law enforcement officer from liability for failure to mention viewing a suspect's photo before meeting with him.").

Lee v. Young, 533 F.3d 505, 512 (7th Cir. 2008) ("While we agree with the district court's overall disposition of the case, we pause to note that we explicitly do not affirm its rulings regarding qualified immunity . . . . The district court concluded, in error, that no factually similar cases were on point, and so the contours of the right at issue were not clearly defined. In *Alvarado v. Litscher*, 267 F.3d 648, 653 (7th Cir.1999), we explicitly held that '[g]iven the decision in *Helling*, the right of a prisoner to not be subjected to a serious risk of his future health resulting from ETS was clearly established in 1998-99.' Since this right was clearly established in 1998-1999, it was also clearly established during the relevant period of time here, 2001-2002. Nevertheless, the district court did not have to rule on the issue of qualified immunity, and neither do we, since the first prong of the test (i.e., defendants violated plaintiff's constitutional rights) has not been met, as detailed above.")**.**

Michael C. v. Gresbach, 526 F.3d 1008, 1017, 1018 (7th Cir. 2008) ("Considering the facts above in the light most favorable to the Plaintiffs, we find that a reasonable child welfare worker would have known that conducting a search of a child's body under his clothes, on private property, without consent or the presence of any other exception to the warrant requirement of the Fourth Amendment, is in direct violation of the child's constitutional right to be free from unreasonable searches. Gresbach argues that *Heck* is distinguishable from this case, because *Heck* did not address the issue of scope of consent in the context of child abuse investigations. However, a general constitutional rule already identified may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful. . . . At the time Gresbach conducted the searches at Good Hope in 2004, there was a clearly established doctrine as to what actions a Bureau caseworker must take when conducting a child abuse investigation at a private school. Today we reiterate *Heck's* definitive holding, along the lines of the Fourth Amendment principles outlined above, that it is a violation of a child's constitutional rights to conduct a search of a child at a private school without a warrant or probable cause, consent, or exigent circumstances.").

Koger v. Bryan, 523 F.3d 789, 802, 803 (7th Cir. 2008) ("RLUIPA was enacted on September 22, 2000. . . Koger filed his requests for a non-meat diet in May 2001, December 2001, and April 2002. His internal grievance was filed in January 2002. Because of the dearth of cases dealing with RLUIPA during this period, Koger must show that RLUIPA itself, or principles established in

other contexts and applicable to RLUIPA, established the contours of his rights so that a reasonable official could have easily discerned them. There are numerous reasons leading us to conclude that the rights protected by RLUIPA, and violated by the prison officials as set forth above, were clearly established during the period the prison officials denied Koger's dietary requests. First, RLUIPA did not announce a right having broad application across many segments of society. Rather, it prohibited substantially burdening religious exercise in only two contexts: by land use regulation, 42 U.S.C. § 2000cc, or while a person is imprisoned. 42 U.S.C. § 2000cc-1. Moreover, RLUIPA did not announce a new standard, but shored up protections Congress had been attempting to provide since 1993 by means of the RFRA, and which had seen frequent litigation in the prison context. . . Aside from the fact that RLUIPA employs a standard already contained in the RFRA, it is noteworthy that the components of its analysis have been used in constitutional litigation for some time. For example, the difficult burden laid on a defendant who must show that its conduct was the 'least restrictive means of achieving some compelling state interest' has been established for decades. . . Similarly, the prohibition against substantially burdening sincerely held religious beliefs is well-established in Free Exercise Clause cases. . . RLUIPA has a broader scope of protection than 'central religious beliefs or practices,' but Congress cleared up any resulting ambiguity by expressly setting forth what is included within that broader protective scope–'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'. . While the case will undoubtedly arise where a plaintiff asserts a right only questionably covered by RLUIPA, Koger asserted the right to religious accommodation for a religious practice demonstrably associated with, though not compelled by, his religion. The prison officials violated this clearly established right because they required exactly what RLUIPA provides they cannot–a religious practice compelled by OTO. Likewise, in requiring clergy verification, the prison officials employed a clergy-as-arbiter-of-orthodoxy standard that had long been rejected. . . Finally, we note that the only other circuit court to have considered this issue held that '[a]lthough the outer boundaries of RLUIPA may have been uncharted at the time [of the defendant's conduct], its core protections were not.' [citing *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006)]Accordingly, Koger's right not to be subjected to a religiously required test or a clergy verification requirement was clearly established when the prison officials employed both. Those rights being clearly established at the relevant time, we conclude that the prison officials are not entitled to qualified immunity.").

Steidl v. Fermon, 494 F.3d 623, 632, 633 (7th Cir. 2007) ("We have found no case that is directly analogous to the alleged misconduct of the police here. (This is essentially good news: we sincerely hope that this type of behavior is rare.) We therefore must decide whether the alleged actions were 'so egregious' that no reasonable person could have believed that they were permissible. This is the approach that the Supreme Court took in its decisions in *United States v. Lanier*, 520 U.S. 259, 265 (1997), and *Hope v. Pelzer*, 536 U.S. 730, 740 (2002), both of which focused on whether a reasonable person would know that the challenged behavior violated a constitutional right and held that there need not be case law on point so long as the official had 'fair warning' that her conduct was impermissible. . . In urging this court not to dispense with the need to find a closely analogous case, the ISP Officials rely on *Denius v. Dunlap*, 209 F.3d 944, 951 (7th Cir.2000), which held

that '[i]n some rare cases, where the constitutional violation is patently obvious, the plaintiff may not be required to present the court with any analogous cases.' *Id.* at 951. But *Denius's* use of the word 'rare' did not mean that the second route should normally be closed. To the contrary, *Denius* noted that 'widespread compliance with a clearly apparent law may have prevented the issue from previously being litigated.'. . We are persuaded that the ISP Officials, and indeed all of the police officers involved in this case, had ample notice that the knowing suppression of exculpatory material that was in the files at the time of the trial violated the defendant's constitutional rights. If, as we held in *Newsome*, the duty to disclose was clearly established as of 1979 and 1980, then it remained clearly established at Steidl's initial trial in 1987 and throughout his post-trial proceedings. Supervisors in the Illinois State Police cannot have thought that they were permitted deliberately to obstruct the access to this evidence of the post-conviction court and the Governor's Office, which has its own role to play in the state's criminal justice system. By the time these officials acted, *Kyles v. Whitley* was also on the books, eliminating any doubt about the joint responsibility of the police and prosecutors to assure the fair administration of the criminal justice system. Much of our discussion of the scope of the right Steidl is asserting applies with equal force to the question whether that right was clearly established, as we have taken care to rely on cases and doctrines that were in place before these officials acted. We therefore conclude that the district court correctly denied the ISP Officials' motion for dismissal based on qualified immunity.").

Boyd v. Owen, 481 F.3d 520, 523, 524 (7th Cir. 2007) ("The district court appears to have conflated the two prongs of the qualified immunity test. The court held that Boyd possessed a protected liberty interest in his employment as a police officer. The court then recognized that our decision in *Dupuy* could not clearly establish any due process violation because it was issued after the events at issue in the case. The court nevertheless held that Foott and Owen violated Boyd's clearly established constitutional right to due process because 'DCFS' own rules and regulations imposed a duty to identify other possible explanations for the abuse,' and Owen and Foott failed to do so. . . The district court properly held that our *Dupuy* decision could not demonstrate a clearly established right because it did not exist when these events occurred, but its alternative reasoning is erroneous. The Supreme Court has made clear the requirement of due process is not defined by state rules and regulations, but is an independent determination. . . Accordingly, the district court erred in determining that the failure to comply with DCFS regulations demonstrated a violation of a clearly established constitutional right.").

Borello v. Allison, 446 F.3d 742, 749, 750 (7th Cir. 2006) ("Because Defendant has not shown that his constitutional rights were violated, we need not move to the second step of the qualified immunity analysis: whether those rights were clearly established at the time of the attack. We note, however, that the district court improperly simplified this second step, finding that '[i]t is untenable to say that prison officials don't know what actions in this area are illegal.' This analysis relieved Plaintiff of his burden of proof. . . . The inquiry into whether a right is clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . It is insufficient for a plaintiff simply to point to a recognized constitutional right and claim that the right has been violated. A plaintiff is required to show that a violation of that right has been found

in factually similar cases, or that the violation was so clear that an official would realize he or she was violating an inmate's constitutional rights even in the absence of an on-point case. . . Although it is well established that a plaintiff can bring an Eighth Amendment claim based on a prison official's deliberate indifference to a substantial risk of serious harm, there is still a question whether the facts of this case are sufficient to establish deliberate indifference. The purpose of the second step of the qualified immunity analysis is to ensure that prison officials will not be held personally liable for their official conduct when they were not aware that their conduct violated any of an inmate's constitutional rights. Plaintiff has not attempted to compare this case to any factually similar ones, or argue that the violation was so obvious that Defendants should have been on notice that their actions constituted deliberate indifference.").

Miller v. Jones, 444 F.3d 929, 939 (7th Cir. 2006) ("To leap from the simple observation that the boundaries of what constitutes public concern require some searching, to the argument that after *San Diego* 'no reasonable law enforcement official' may be expected to determine what is appropriate behavior in this realm, is a step too far. Nothing in *San Diego* reformed the core of our jurisprudence on the matter. Nor did *San Diego* strike down *Delgado*, where we held that employee speech on a matter of public concern was protected under the First Amendment, and therefore protected against retaliatory transfers, when it grew out of some discretionary act. . . For examples of similar factual scenarios, Chief Jones may have turned to our holding in *Campbell v. Touse*, where we held that a police officer's speech criticizing the management of a community-oriented policing program was a matter of public concern. . . Additionally, Jones may have turned to *Knapp v. Whitaker*, wherein we held a public school teacher had spoken on a matter of public concern when protesting an inequitable reimbursement scheme for expenses incurred in coaching students. . . The core of the public concern in *Knapp* was the misuse of funds intended for the school's athletic program; a secondary mission of the school system, to be sure. . . Finally, should former Chief of Police Jones have needed personal notice that the retaliatory transfer of public employees for speech protected by the First Amendment is subject to suit under § 1983, he need only look to our holding in *Octavio Delgado* v. *Police Chief Arthur Jones* and *Deputy Chief Monica Ray*, 282 F.3d 511, Mar. 8, 2002, decided against the appellant himself in the same month during which the merger was first proposed.")**.**

Wernsing v. Thompson, 423 F.3d 732, 747, 748 (7th Cir. 2005) ("We are satisfied that Thompson is entitled to qualified immunity, though not for the precise reasons he advances. Simply put, Thompson must prevail in the present suit since it was not clearly established, at the time the pre-clearance directive was first issued (December 5, 2000), that such a directive constituted an unlawful prior restraint on speech. Of course the case law on prior restraints is replete with decisions invalidating zoning ordinances, licensing schemes, permit regulations and other official acts that limit expressive activity. Additionally, our recent decision in *Crue v. Aiken*, where we held a similar pre-clearance directive to constitute an unlawful prior restraint on speech, casts serious doubt upon the legality of Thompson's directive. . . However, while the constitutional limits of restraints applicable to the general public are well-settled, and while the Supreme Court has struck down formal statutory bans of certain speech activity by government employees, . . .

the prerogatives of a government supervisor in managing the communications of his own staff are far less clear. We emphasize that our analysis of qualified immunity here is focused specifically and exclusively on this kind of relatively informal supervisory directive aimed at close subordinates. . . In December 2000 case law touching on this kind of internal pre-clearance directive was decidedly scant and, to the extent that it existed at all, actually suggested that such directives are permissible.").

Nanda v. Moss, 412 F.3d 836, 844, 845 (7th Cir. 2005) ("We find that a reasonable dean or university administrator was on notice as of 1998 that it would be a violation of federal law to ratify a recommendation to terminate a female professor without investigation into several allegations of gender and ethnic discrimination surrounding the recommendation, and then to falsely report that the recommendation was made with the approval of faculty and an advisory committee.").

Kiddy-Brown v. Blagojevich, 408 F.3d 346, 356 (7th Cir. 2005) ("The State defendants contend that it was not clearly established at the time Ms. Kiddy-Brown's employment was terminated that dismissing the warden at a state prison would violate the Constitution. They submit that 'there are no closely analogous cases ... involving the position at issue–Warden of a state correctional institution.' . . However, the law of qualified immunity does not require a plaintiff to produce a case that is 'directly on point' in order to show that a right is clearly established. . . . As we noted earlier, because this case is before us on a motion for judgment on the pleadings, we are obliged–as was the district court–to view the facts alleged in Ms. Kiddy-Brown's complaint in the light most favorable to her. . . According to Ms. Kiddy-Brown, she had no 'discretionary policymaking powers' and 'no meaningful input into government decision making on issues where there was room for principled disagreement on goals.'. . Accepting these allegations as true, Ms. Kiddy-Brown was among the employees who have a right not to be subjected to patronage dismissal. We think the law was sufficiently clear at the time Ms. Kiddy-Brown was dismissed that a reasonable official would have understood that political affiliation was not an appropriate requirement for a position such as the one described in Ms. Kiddy-Brown's complaint.").

Lunini v. Grayeb, 395 F.3d 761, 769 (7th Cir. 2005) ("We acknowledge that 'liability is not predicated upon the existence of a prior case that is directly on point,' . . . yet nonetheless '[t]he contours of the right [at issue] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' . . However suggestive our dicta in *Hilton*, we are instructed to conduct the 'clearly established' inquiry from the defendant-official's perspective, and in this light, a claim in a factually dissimilar case which ultimately fails to survive a qualified immunity defense cannot be said to sufficiently define 'the contours of the [purported] right' to any significant degree. Indeed the precise contours of class of one equal protection rights continue to elude some of this circuit's most capable judges. . . . Certainly Lunini is unhappy with defendant police officers' response to the incident at the High Street residence. However, on this record it appears highly doubtful that any alleged police misjudgments (if misjudgments there were) took on constitutional proportions. While we take pains to affirm the baseline principle that police

support and protection must be afforded to all citizens on a non-discriminatory basis, we decline to take the unprecedented step of implying a general constitutional police duty to arrest certain individuals during a response to an isolated domestic incident. Such a ruling would threaten to turn every police house call into a potential federal constitutional lawsuit.").

Board v. Farnham, 394 F.3d 469, 484 (7th Cir. 2005) ("Because dental care is a basic human need and the constitutional test requires us to look at 'the evolving standards of decency that mark the progress of a maturing society,'. . .Farnham was or should have been 'on notice' and had 'fair warning' that it would be unconstitutional for him to deny oral hygiene products to pretrial detainees under his watch for long periods of time. [citing *Hope*] We hold that the district court did not err in denying qualified immunity to Farnham based on the alleged denial of toothpaste to Duke and Jerry Board for three-and-a-half weeks and approximately 113 days respectively.").

Baird v. Bd. of Educ. for Warren Community Unit School Dist. No. 205, 389 F.3d 685, 696, 697 (7th Cir. 2004) ("The Board contends that its individual members are absolutely immune from liability since various discrete actions in firing Baird–namely the determination of rules and procedures, participation in the pre-termination hearing and individual decisions to terminate Baird–were legislative acts. The issues raised by this appeal are, however, a totality involving the termination of an employee, which is an administrative act. The evidence does not establish that the Board members are entitled to legislative immunity. Nor do Board members appear to be entitled to qualified immunity, which protects public officials who exercise discretionary or policymaking functions from liability in damages. . . We have already found that the Board violated Baird's due process rights by according him a hearing whose procedures were severely deficient. Thus, we proceed directly to the question whether Baird's rights were clearly established. We conclude that they are. . . . Determining the reasonableness of a 'mistake' does not necessitate comparison to a precedent that squares in every detail with the present case. . .As earlier discussed, numerous cases from *Perry v. Sindermann* to *Loudermill* to *Lujan*–a case the defendants rely on to justify their conduct–have defined the contours of what process is due to a public employee who is to be terminated. Given the quality and volume of this precedent, we cannot determine on this record that the Board's conduct was a reasonable mistake, thereby establishing the defense of qualified immunity.").

Manning v. Miller, 355 F.3d 1028, 1034 (7th Cir. 2004) ("Buchan and Miller also argue that *Brady* should not be extended to cover the actions of police or investigators, but rather, only prosecutors. This assertion, while eloquently argued, is flatly contradicted by existing case law. In *Kyles v. Whitley*, the Supreme Court found that the *Brady* duty of turning over exculpatory evidence includes not only the prosecutor, but the investigating officers as well. 514 U.S. 419, 438 (1995). . . . Manning is able to meet the second prong of the qualified immunity test: his constitutional due process right was 'clearly established' at the time he asserts it was violated. Buchan and Miller assert that this behavior was not clearly prohibited at the time of its occurrence because no decision had dealt with a *Brady* claim that matched the facts in Manning's *Brady* claim. Following this logic, all *Brady* violations would receive qualified immunity because the facts of

every case are unique. Instead, we hold that it is enough that, prior to the actions that gave rise to this case, it was well established that investigators who withhold exculpatory evidence from defendants violate the defendant's constitutional due process right. *See, e.g ., United States ex rel. Smith v. Fairman,* 769 F.2d 386, 391 (7th Cir.1985). It is immaterial whether Manning complains that Agents Buchan and Miller withheld exculpatory information regarding fabricated testimony or fingerprint analysis.")

Dunn v. City of Elgin, 347 F.3d 641, 650, 651 (7th Cir. 2003) ("Although it was objectively unreasonable for the police officers to believe they had authority to seize a child pursuant to an out-of-state order, we cannot say that the unconstitutionality of this action was clearly established when Katia was seized. It may have been clearly established that such conduct violated Illinois law and the standard operating procedures for the City of Elgin Police Department, but Plaintiffs must also show that the conduct was so severe that 'a reasonable person would have known of the unconstitutionality of the conduct at issue.' . . This requires either that the plaintiff point to closely analogous cases, . . . or prove that the right is 'so clear... that no one thought it worthwhile to litigate the issue.'. . In both cases the plaintiff must do more than merely prove that a general right, such as the right to be free from unreasonable seizures, was clearly established. . . Plaintiffs have not met this burden. Plaintiffs have pointed to no cases where the enforcement of an out-of-state custody order in violation of a state statute was found to be a constitutional violation. . . . Considering the circuit split that existed regarding whether an officer may act reasonably when acting beyond his or her jurisdiction, . . . we also cannot say that the absence of cases on point is due to the obviousness of the constitutional violation.").

McCann v. Mangialardi, 337 F.3d 782, 787, 788 (7th Cir. 2003) ("In *Brady v. Maryland* . . . the Supreme Court held that during trial the government is constitutionally obligated to disclose evidence favorable to the defense when the evidence is material to either the guilt or punishment of the defendant. . . The Court has yet to address, however, whether the Due Process Clause requires such disclosures outside the context of a trial. . . . [W]e have a question not directly addressed by [*United States v. Ruiz,* 536 U.S. 622 (2002)]: whether a criminal defendant's guilty plea can ever be 'voluntary' when the government possesses evidence that would exonerate the defendant of any criminal wrongdoing but fails to disclose such evidence during plea negotiations or before the entry of the plea. . . . *Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea. We need not resolve this question, however, because even if such disclosures of factual innocence are constitutionally required, McCann has not presented any evidence that Mangialardi knew about the drugs being planted in McCann's car prior to the entry of his guilty plea.").

Molina ex rel Molina v. Cooper , 325 F.3d 963, 972 (7th Cir. 2003) ("As for the Molinas' alternative argument that the police failed to wait a reasonable amount of time after announcing

their presence to forcibly enter the house, we are similarly unconvinced. Police officers' compliance with the 'knock and announce' requirement is determined on a case- by-case basis. . . . Although the duration is disputed, the officers claim that five seconds passed after their third and final knock, and that a total of twelve to fifteen seconds passed between their first knock and forcible entry. . . Under the circumstances, we find that this was a reasonable interval. Even if it was not, the officers would be entitled to qualified immunity. The plaintiffs have not cited any cases which clearly establish that an interval of this length was unconstitutional at the time that they conducted the search.")**.**

Cavalieri v. Shepard, 321 F.3d 616, 623, 624 (7th Cir. 2003) ("Of course, the law did not require Shepard to sit by the telephone all day, communicating with the CCCF about transferred prisoners. The question is what he was supposed to do in the face of the knowledge of a life-threatening situation that he actually had. He made several telephone calls to the CCCF, but he passed by the opportunity to mention that he had been informed that Steven was a suicide risk, and that the jail itself had recognized this only a month earlier. If Shepard had known that a detainee had an illness that required life-saving medication, he would also have had a duty to inform the CCCF, or any other entity that next held custody over the detainee. . . . We conclude that the law as it existed at the time of Steven's suicide attempt provided Shepard with fair notice that his conduct was unconstitutional. The rule that officials, including police officers, will be 'liable under section 1983 for a pre- trial detainee's suicide if they were deliberately indifferent to a substantial suicide risk,' . . . was clearly established prior to 1998. The fact that several state agencies were working together on his case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change this analysis.")

Sonnleitner v. York, 304 F.3d 704, 716 (7th Cir. 2002) ("Under the first prong of this inquiry, we agree with Sonnleitner that the Institute may have violated his procedural due process rights by failing to accord him a predisciplinary hearing on the unenumerated (i.e., the more serious) charges contained in the Bellaire report. However, under the second prong of the qualified immunity analysis, Sonnleitner has failed to establish that this right was clearly established at the time of the alleged violation. Although Sonnleitner need not offer up a federal decision which precisely mirrors the facts of this case, at a minimum he must point to a closely analogous case decided prior to the challenged conduct. . . Sonnleitner contends that the Supreme Court's decision in *Loudermill* clearly established his right to more exhaustive pre-disciplinary proceedings. However, as discussed earlier, *Loudermill* involved the termination of two public employees without any pre-termination proceedings, and is therefore factually distinguishable from this case.").

Driebel v. City of Milwaukee, 298 F.3d 622, 637, 652 (7th Cir. 2002) ("[I]in light of the *Saucier* decision, we must determine whether, and at what point, actions initiated by the Department against its on-duty police officers during a criminal investigation should be classified as unreasonable seizures in violation of the officers' Fourth Amendment rights. . . . [W]e have been unable to discover any case law that would justify a reasonable belief that an officer suspected of

criminal misconduct may be seized during a criminal investigation and detained for questioning based on the reasonable suspicion standard.").

Morrell v. Mock, 270 F.3d 1090, 1100 (7th Cir. 2001) ("Morrell contends that it was clearly established that due process requires notice and an opportunity to be heard before state actors may interfere with a mother's liberty interest in her child. The statement of the right at this level of generality, however, is of little help in determining the reasonableness of the defendants' conduct. . . The appropriate question is whether it would be clear to reasonable officials in the defendants' position that enforcing the New Mexico court's order without prior notice or an opportunity to be heard in Illinois was unconstitutional. . . . Morrell has not identified, and we have been unable to find, any authoritative cases considering analogous circumstances that hold that pre-deprivation notice and an opportunity to be heard is required as a matter of constitutional due process before a state may enforce another state's custody order.").

Siebert v. Severino, 256 F.3d 648, 654, 655 (7th Cir. 2001) ("A violation may be clearly established if the violation is so obvious that a reasonable state actor would know that what they are doing violates the Constitution, or if a closely analogous case establishes that the conduct is unconstitutional. . . This case seems to fit within the 'obvious' scenario–a reasonable state actor would know that he cannot enter a fenced-in, closed structure located within 60 feet of a person's house without a warrant or some exception to the warrant requirement. But even if not reasonably obvious to Severino, a closely analogous case indicates that his conduct was unconstitutional: his search took place in 1996, and less than three years earlier the Fourth Circuit held that citizens enjoy an expectation of privacy in their barn.[citing Fourth Circuit case] Therefore, Severino is not protected by qualified immunity.").

Campbell v. Peters, 256 F.3d 695, 700, 701 (7th Cir. 2001) ("Campbell contends that he has shown that it was clearly established that incarcerating a prisoner beyond the termination of his sentence without penological justification violates the Eighth Amendment as cruel and unusual punishment. At a general level, this proposition may be true. . . . But we do not deal with generalities. Instead, we must determine whether it was clearly established that the defendants, in revoking the good conduct credits and computing a new release date after the recommitment, were violating Campbell's constitutional rights by requiring him to serve more time than state law and his sentence required. As Campbell points out, it is not necessary for him to point to a case saying that the revocation, under the identical circumstances, was unlawful. Instead, as the Supreme Court put it in *Katz*, the law is 'clearly established' if 'various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand....'. . . At the time of the revocation of Campbell's credits, it was not apparent that this kind of state law mistake rose to the level of an Eighth Amendment violation.").

Pearson v. Ramos, 237 F.3d 881, 884 (7th Cir. 2001) ("Since no one could believe that a single 90-day denial of yard privileges would be a cruel and unusual punishment for a serious violation

of prison disciplinary rules, the dispositive issue in this case is whether the stacking of such sanctions to the point of depriving a prisoner of an entire year of yard access is cruel and unusual punishment; and as there was no case law when the defendant acted indicating that it is and no tenable argument then or now that stacking so clearly violated the Eighth Amendment that an official in the defendant's position would have had to know that it did, even without any guidance from case law, it is obvious that the immunity defense should have been sustained.")

Brokaw v. Mercer County, 235 F.3d 1000, 1022, 1023 (7th Cir. 2000) ("The defendants argue that it was not clearly established in June 1983 that their actions violated C.A.'s constitutional rights, noting that C.A. failed to cite to closely analogous cases clearly establishing his constitutional rights. However, a plaintiff need not always identify a closely analogous case; rather, he can establish a clearly established constitutional right by showing that the violation was so obvious that a reasonable person would have known of the unconstitutionality of the conduct at issue.Thus, binding precedent is not necessary to clearly establish a right. . . . As alleged, this case fits that principle to a T. The defendants' alleged conduct in this case is so severe that a reasonable person would have understood that he was violating C.A.'s constitutional rights. Specifically, a reasonable person would have known that it was unconstitutional to use the government's power to cause, or conspire to cause, the unjustified removal of a six-year-old child from his parents in order to destroy the family, based simply on the family's religious beliefs. . . . In closing our discussion of qualified immunity, we note that several circuit courts have concluded that because the balance between a child's liberty interest in familial relations and a state's interest in protecting the child is nebulous at best, social workers and other state actors who cause a child's removal are entitled to qualified immunity because the alleged constitutional violation will rarely–if ever–be clearly established.[citing cases]. While we agree that that is generally the case, . . .as noted above, some governmental actions are so clearly beyond the pale that a reasonable person should have known of their unconstitutionality even without a closely analogous case.").

Elwell v. Dobucki, 224 F.3d 638, 641 (7th Cir. 2000) ("A snapshot of the law in 1992 . . . shows that there was no clearly established prohibition against taking race into account in a hiring decision within a prison or police department context.").

Perry v. Sheahan, 222 F.3d 309, 317 (7th Cir. 2000) ("In summary, it was clearly established law at the time of the seizure that even seizures pursuant to an eviction are not immune to the strictures of the Fourth Amendment. Here, the defendants seized the weapons even though they knew that the eviction had been stayed by order of the court and thus that the seizure was not pursuant to any court order. It was also clearly established that warrantless seizures of personal effects from a home are presumably unreasonable. No exception to that rule or other circumstances apparent in this motion to dismiss would render objectively reasonable their belief that this seizure was constitutional. Therefore, there is no basis for qualified immunity, and the decision of the district court in *Perry I* must be reversed on this issue.").

Coady v. Steil, 187 F.3d 727, 734 (7th Cir. 1999) ("[W]e reject the defendant's argument that because this court has not previously had a case with identical facts to this one, the violation of the plaintiff's right to be free from harassment in his exercise of protected political speech could not have been clearly established. . . . Indeed, because *Connick-Pickering* balancing always involves factspecific balancing, if plaintiffs had to point to a case on all fours with their own, defendants would nearly always be entitled to qualified immunity. However, we have rejected that argument. . . . We believe it was clear on March 18, 1995, that in this circuit, a government official could not harass a subordinate employee because of that individual's activities in support of political candidates, when the subordinate employee's actions were protected by the First Amendment and not in contravention of any state law, municipal ordinance or departmental policy.").

Markham v. White, 172 F.3d 486, 492 (7th Cir. 1999) ("[I]t was well established by 1993 that the U.S. Constitution does not tolerate sex discrimination in an educational setting. Contrary to the defendants' argument, the fact that neither this court nor any other has ever dealt with a situation involving a short training seminar conducted for narcotics officers is of no moment. Under the doctrine of qualified immunity, 'liability is not predicated upon the existence of a prior case that is directly on point.'. . In light of the law at the time, a reasonable government official in the defendants' shoes would have understood that the prohibition against sexual harassment extended to their training seminars.").

Kerr v. Puckett, 138 F.3d 321, 323-24 (7th Cir. 1998) ("We must determine whether the generalities of the Constitution have been made concrete, so that officeholders can understand the limits on their conduct. No court has ever held that 'brainwashing' of prisoners as part of substance-abuse-control programs violates the eighth amendment.... Prison officials needn't predict the outcome of cases yet to be brought. And the lack of precedent is not because these programs are so plainly unconstitutional that no one has ever needed to litigate the point before.").

Khuans v. School District 110, 123 F.3d 1010, 1018-19 (7th Cir. 1997) ("Khuans alleges termination of an independent contractor relationship. And back in mid-1994, whether the analysis regarding First Amendment rights of public employees to free speech extended to independent contractors was an unsettled matter. Not until June 28, 1996, did the Supreme Court address whether and to what extent the First Amendment restricts the freedom of federal, state, or local governments to terminate a relationship with an independent contractor because of the contractor's speech.... [A]t the time Khuans lost her job, whether independent contractors could be terminated for their exercise of free speech in the workplace was unaddressed, undecided and unsettled in this circuit.").

Flenner v. Sheahan, 107 F.3d 459, 465 (7th Cir. 1997) ("We do not take exception with the district court's observation that considerable uncertainty exists in the area of patronage law. This is an observation that. . . we have made often ourselves. . . . The district court's error lies in its conclusion that the uncertainty in applying the *Branti* standard precludes liability for the dismissal of those employees who do in fact occupy an extremely 'low rung on the bureaucratic ladder.'

[cite omitted] . . . In making the determination whether the law was sufficiently clear in 1993 that correctional officers were not subject to patronage dismissal, the district court should look to analogous case law. . . . To prevail, appellants need not point to a case holding unconstitutional the dismissal of Cook County correctional officers for patronage reasons. . . . Appellants must, however, establish that, given the inherent powers of their positions and in the light of pre-existing law, the unlawfulness of Sheriff Sheahan's actions was apparent.").

Vickery v. Jones, 100 F.3d 1334, 1340 (7th Cir. 1996) ("We simply do not agree with the plaintiff's assertion that the constitutional status of patronage hiring of temporary positions was clearly established at the time of the activities challenged in this case. For the reasons stated above, the plaintiff has not provided a 'closely analogous' case that covers both the *Rutan* holding and its application to temporary employment positions like the temporary highway maintainer positions, nor has he shown that using information regarding an applicant's political affiliation was so obviously unconstitutional that the State Defendants should have known that they were violating the law. Therefore, the district court correctly concluded that the State Defendants were entitled to qualified immunity.").

Hernandez v. O'Malley, 98 F.3d 293, 297 (7th Cir. 1996) ("A regimen of case-by-case balancing makes it hard to dismiss complaints and simultaneously makes it hard to show that the right in question was 'clearly established.' . . . . Drawing a stable line in *Elrod* cases has been difficult; even slight differences in the nature and context of the job can lead to opposite outcomes . . . . Contextual balancing tests should be worked out prospectively, rather than at the expense of public officials who guess wrong about future legal developments.").

Erwin v. Daley, 92 F.3d 521, 528 (7th Cir. 1996) ("Whatever else one might say about the state of the law in 1990 on affirmative action programs, the standard of review to which they are subject, and the nature of the justifications that will support them, it is clear that as of the time the City officials implemented their promotion program it was not 'clearly established' . . . that the use of standardization techniques and out of rank order promotions in police departments was illegal. . . it may not be illegal at all.").

Anderson v. Romero, 72 F.3d 518, 525-27 (7th Cir. 1995) ("Neither in 1992 nor today was (is) the law clearly established that a prison cannot without violating the constitutional rights of its HIV-positive inmates reveal their condition to other inmates and to guards in order to enable those other inmates and those guards to protect themselves from infection. . . . [D]istrict court decisions cannot clearly establish a constitutional right. . . . They are evidence of the state of the law. Taken together with other evidence, they might show that the law had been clearly established. . . .And, although we cannot find any cases on the point, we are confident that an unpublished decision cannot elevate the decision that it affirms to the status of circuit precedent. . . . If the only reason that the defendants denied haircuts and yard privileges to Anderson was that he was HIV- positive, and there is no conceivable justification for these as AIDS-fighting measures, then the absence of a case involving this specific form of arbitrary treatment would not confer immunity on the

defendants. A constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent.").

Camp v. Gregory, 67 F.3d 1286, 1298 (7th Cir. 1995) ("Certainly it was clear by 1991 that a child had a right not to be placed with an abusive caretaker. *K.H.*, a 1990 decision, settled that issue in this circuit. However, Camp has cited no decision to us recognizing a constitutional right to adequate supervision and guidance. There are hints in the cases that caseworkers must not place children with caretakers who will abuse or neglect them. *E.g., K.H.* . . . Neglect certainly could be construed to include not only the failure to provide a child with the necessities, but the degree of supervision, instruction, and involvement necessary to steer the child clear of dangerous activities. Yet, no case cited to us does so. Thus, at best a public official would have had to predict that cases such as *K.H.* would be construed expansively in order to anticipate our holding today. Certainly an official could be charged with knowledge that it was impermissible to misrepresent facts to a court. . . but he could not have predicted civil liability under the due process clause for the placement decision itself.").

Burns v. Reed, 44 F.3d 524, 528 (7th Cir. 1995) ("Plaintiff. . . would need to cite more specific precedent than the basic line of coercion cases to persuade this Court that the United States Constitution clearly proscribed hypnosis of a suspect at the time of her interrogation.").

Dahm v. Flynn, 60 F.3d 253, 258 (7th Cir. 1994) ("Because it was not clearly established at the relevant time that qualitative reductions in job responsibilities, without discharge, transfer, demotion, or salary loss, could constitute an adverse employment action, [Defendant] is immune from civil damages . . .").

Eberhardt v. O'Malley, 17 F.3d 1023, 1028 (7th Cir. 1994) ("If the complaint is taken at face value, ... the defendants punished the plaintiff for writing a novel, without having any legitimate reason for such punishment. This is such an elementary violation of the First Amendment that the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles.").

Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994) ("*Garner* is not the most apt analogy to this case because the facts of *Garner* are not sufficiently particularized to put potential defendants on notice that striking a fleeing vehicle with their police cruisers constitutes an unreasonable seizure.").

Henderson v. DeRobertis, 940 F.2d 1055, 1058-59 (7th Cir. 1991) ("...until a particular constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been clearly established"; court should look to whatever decisional law is available to decide whether right clearly established), *cert. denied*, 112 S. Ct. 1578 (1992).

K.H. ex rel Murphy v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990) ("There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune...because no previous case had found liability in those circumstances.")

Rivera v. Guevara, 319 F.Supp.3d 1004, 1053-54 (N.D. Ill. 2018) ("The facts of *Jones* are very similar to those here, and the *Jones* decision more than suffices to show that by 1988 it was clearly established that due process would not tolerate a police officer fabricating evidence. . . .As for the *Brady* claims, the Seventh Circuit held in *Newsome v. McCabe* that it was 'clearly established in 1979 and 1980 that police could not withhold from prosecutors exculpatory information about fingerprints and the conduct of a lineup.'. . *Jones* again furnishes the salient example. . . The officer defendants again cite *Gauger v. Hendle*, 349 F.3d 354, 360 (7th Cir. 2003), for the proposition that it was not established, much less clearly, that they had to turn over anything if the person who ultimately stood trial was present at the lineup. . . But *Newsome* involved a lineup in which the wrongfully convicted person stood (so he knew about it), and the officers nevertheless had no qualified immunity for *Brady* claims that they did not tell the prosecutors or the defense that they encouraged witnesses to pick the § 1983 plaintiff from the lineup. . . *Newsome*, therefore, clearly established that the *Brady* disclosure requirement expounded in *Jones* has full force when the person who later stands trial is in the lineup (which is usually the case since introducing evidence identifying someone else as the perpetrator of a crime is a poor strategy for winning a conviction). . . Given the genuine fact issues, the court cannot say that Rivera is complaining of the nondisclosure of 'little...tidbit[s]' of evidence whose value to the defense would not have been apparent to the officer defendants. . . As discussed extensively earlier, the jury could find that whole swaths of evidence that would have corroborated the existence of the first lineup were suppressed and that cumulatively the withheld evidence was an impeachment goldmine. Based on the foregoing analysis, the court concludes that a jury viewing the summary judgment record most favorably to Rivera could find that his clearly established rights were violated.")

Chatman v. City of Chicago, No. 14 C 2945, 2018 WL 1519160, at *15 (N.D. Ill. Mar. 28, 2018) ("Mokstad and Cartrette assert that they are shielded, in their individual capacities, from Chatman's due process claim by qualified immunity. As noted, in the context of a *Brady* claim, the qualified immunity issue is not whether the officer knew he had to disclose exculpatory information; rather, the question is whether it was clearly established that the information the plaintiff claims the police failed to disclose was exculpatory or impeaching. . . For the reasons discussed above, Chatman has satisfied his burden of showing, at least at this stage of the litigation, that Mokstad and Cartrette should not be afforded qualified immunity. As explained above, it was clearly established that the sleeping deputy evidence was exculpatory or impeaching, and a reasonable jury could view the record and conclude that the evidence was otherwise unavailable. In addition, whether Mokstad and Cartrette knowingly suppressed the evidence depends on disputed issues of fact.")

Myvett v. Chicago Police Detective Edward Heerdt, 232 F.Supp.3d 1005, 1024 (N.D. Ill. 2017) ("*Whitlock* and its progeny stand for the proposition that if a police officer fabricates information that is used 'in some way' to deprive a plaintiff of his liberty, then that officer has violated the very laws he has sworn to protect. . . The Seventh Circuit made no suggestion in *Whitlock*, or any other case, that fabrication claims should somehow turn on the admissibility of the concocted information. Instead, what *Whitlock* illustrates is that so long as the fabricated statements are used to deprive a plaintiff of his liberty in some way, then the defendant officers have violated his clearly established constitutional rights. Here, as discussed *supra*, that is exactly what happened (or so the jury could reasonably conclude).

Smith v. Burge, 222 F.Supp.3d 669, 680-83 (N.D. Ill. 2016) ("Reviewing Plaintiff's well-pleaded allegations and all reasonable inferences in his favor—as the Court is required to do at this procedural posture—Plaintiff bases his *Brady* violation on more than just Defendant Officers' failure to disclose their unlawful interrogation tactics in relation to his coerced confession. Specifically, Plaintiff alleges that Defendant Officers suppressed the implements of their torture, including the plastic bag, the rubber nightstick, and Plaintiff's bloody clothes. . . More importantly, Plaintiff alleges that Defendants suppressed and destroyed evidence of systemic torture and abuse in Area 2, obstructed investigations into the CPD's systemic torture, and discredited findings of systemic torture. . . With the Seventh Circuit's *Gauger* and/or *Sornberger* decisions in mind, courts in this district have concluded that similar allegations state a *Brady* claim based on events that transpired outside of the interrogation room. [collecting cases] The decision in *Saunders-El* does not change this reasoning as it relates to Plaintiff's allegations of Defendants suppressing the implements of their torture, destroying evidence of systemic torture and abuse in Area 2, obstructing investigations into the CPD's systemic torture, and discrediting findings of systemic torture. In sum, at this stage of the proceedings, Plaintiff's allegations are distinguishable from the facts in *Saunders-El* because Plaintiff is not merely basing his *Brady* claim on Defendants 'keeping quiet about their wrongdoing.'. . .[T]he individual Defendants argue that qualified immunity protects them from liability as to Plaintiff's *Brady* claim. . . . Defendants argue that their 'failure to disclose the alleged torture evidence did not in 1984 and does not today violate any clearly established constitutional right.'. . In making this argument, Defendants characterize Plaintiff's *Brady* claim as follows: 'Plaintiff has essentially alleged that *Brady* requires police officers to disclose their misconduct, including criminal misconduct, to criminal defendants.'. .First, Defendants mischaracterize Plaintiff's *Brady* claim, which includes allegations that Defendants suppressed and destroyed evidence of systemic torture and abuse in Area 2, obstructed investigations into the CPD's systemic torture, and discredited findings of systemic torture. Second, Defendants fail to explain how it was not clearly established in 1983-84 that destroying and suppressing exculpatory evidence was unconstitutional. In fact, since *Brady* and *Killian v. United States*, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 (1961), 'bad-faith destruction or loss of exculpatory evidence violate[s] a suspect's due process rights.' *Armstrong v. Daily*, 786 F.3d 529, 532 (7th Cir. 2015); *see also Tillman*, 813 F. Supp. 2d at 966 n.12. Moreover, viewing Plaintiff's allegations and all reasonable inferences in his favor, his allegations show that Defendants' conduct was 'so egregious that no reasonable person could have believed that it would not violate

established rights.'. .The Court therefore denies Defendants' motion to dismiss Plaintiff's *Brady* claim.")

Alton v. City of Naperville, No. 16 CV 6640, 2016 WL 6877678, at *2 (N.D. Ill. Nov. 22, 2016) ("Naperville argues that this Court should find that qualified immunity shields the officers from liability. Qualified immunity shields officers from civil liability stemming from discretionary functions so long as their conduct did not violate a clearly established statutory or constitutional right that a reasonable person would have known. . . Naperville asserts that: The correct inquiry is whether it was clearly established that police engagement of a canine constitutes excessive force when the engagement of the canine arises when a suspect in a serious crime has recklessly utilized every available means to evade capture, including fleeing in a vehicle until the vehicle becomes inoperable, followed by fleeing on foot across a major interstate highway, and secreting himself underneath garbage within a small, confined and enclosed dumpster space, all during the dark of night, and before police were able to determine whether the suspect was armed. . . . If constitutional rights needed to be so narrowly defined to be 'clearly established,' then police officers would enjoy qualified immunity in nearly every instance. . . .This Court must take the allegations in the Complaint as true for purposes of ruling on the motion to dismiss, including that Alton was not resisting and was complying with Officer Lippencott's order to get out of the dumpster. Further, there are no allegations in the Complaint suggesting Officer Lippencott had reason to suspect that Alton was armed. Under Alton's version of the facts, he was at most passively resisting. Accordingly, at this stage, the Court finds the allegations in the Complaint do not establish the affirmative defense of qualified immunity.")

Chatman v. City of Chicago, No. 14 C 2945, 2016 WL 4734361, at *2-4 (N.D. Ill. Sept. 12, 2016) ("The OPS Defendants argue, that even if they had a duty to disclose exculpatory material, such an extension of *Brady* was not clearly established at the time of Chatman's criminal proceedings. . . . Initially, only the members of the prosecution bore the obligation to disclose material, exculpatory evidence to defense counsel. . . Subsequently, *Brady* was extended so that the prosecutor's duty to disclose reached evidence in the hands of police officers, even if the information was not known to the prosecutor. . . Although the rule was articulated in terms of a duty by the prosecutor to learn of information held by the police, it has also been understood to establish an independent duty on the part of police officers to disclose such information. *See Steidl v. Fermon*, 494 F.3d 623, 630–33 (7th Cir. 2007) (holding that the duty of police officers to disclose exculpatory information—which is enforceable under § 1983—has been clearly established since *Kyles*). That said, neither the Seventh Circuit nor the Supreme Court has addressed whether governmental agencies that are in charge of investigating the police officers themselves—as opposed to the criminal defendant—are also subject to the duty to disclose under *Brady*. . . . 'Exactly who constitutes a member of the prosecution team is determined using a "case-by-case analysis of the extent of interaction and cooperation between" a potential member of the team and the prosecutor.'. . . In this case, the second amended complaint is bereft of any allegations that the OPS Defendants actively investigated the case against Chatman, acted under the Assistant State's Attorney's supervision, or were involved in crafting trial strategy. In short, there is no

indication in the second amended complaint that the OPS Defendants were part of the prosecution team against Chatman. The inquiry that was sparked by the anonymous memo focused on uncovering misconduct by Officer Kato rather than investigating the allegations of rape against Chatman. . . .Because the OPS Defendants were not part of the prosecution team behind Chatman's arrest and conviction (at least, as they are portrayed in the second amended complaint), there was no clearly established law in this circuit tasking them with a duty to disclose the anonymous memo to the defense. . . Chatman relies heavily on the fact that OPS was formally part of the Chicago Police Department. As a result, argues Chatman, the OPS Defendants' duty to disclose under *Brady* is coextensive with that of the police—which has been clearly established since *Kyles*. . . But Chatman's reliance upon the organizational relationship between the OPS and the Chicago Police Department ignores the functional inquiry utilized in cases like *Morris* that asks whether the individual in question participated in the investigation and prosecution of the underlying crime. . . In fact, OPS has since been replaced by the Independent Police Review Authority, which is an entity separate from the Chicago Police Department. . . To rely entirely on CPD's internal organizational structure to determine the bounds of *Brady*, as Chatman urges here, would invite the type of formalistic departmental compartmentalization denounced in *Morris*. . . With no Supreme Court or Seventh Circuit cases on point, Chatman turns to out-of-circuit cases to argue that the OPS Defendants clearly had a duty to disclose. The cases he relies on, however, all turn on the prosecutor's duty to search for information held by other government agencies as opposed to the agencies' independent duty to disclose. . . . For these reasons, the Court holds that the duty at issue in this case (assuming that one exists) was not clearly established at the relevant time period. The Court takes no position as to the appropriateness of imposing a duty to disclose on the OPS Defendants under these circumstances, particularly given that they plainly were aware of the ongoing criminal proceedings against Chatman. What is clear, however, is that such a duty was not clearly established at the time the proceedings were taking place.")

Sanders v. City of Chicago Heights, No. 13 C 0221, 2016 WL 2866097, at *10 (N.D. Ill. May 17, 2016) ("Because the Court has determined that Sanders has set forth sufficient evidence raising a genuine issue of material fact for trial that Defendant Officers violated his due process rights by employing unnecessarily suggestive identification procedures, the Court addresses whether this due process right was clearly established at the time of the alleged violations in December 1993 and January 1994. . . In support of their argument, Defendant Officers maintain that because there is no set of universally adopted police identification procedures, they are shielded by qualified immunity. In other words, Defendant Officers argue that at the time of the identification procedures at issue, there were no established guidelines for them to follow. Defendant Officers, however, admit that it is 'well established that an officer should not do anything overtly or intentionally to cause the witness to identify a suspect in a photo array or line-up.'. . Defendants' argument about established police procedures misses the mark because whether there were generally accepted police practices for conducting identification procedures does not speak to whether it was clearly established in December 1993 and January 1994 that police officers violated a criminal defendant's due process rights by conducting impermissibly suggestive identification procedures. Indeed, it has been clearly established since at least 1977 that a criminal defendant has

a due process right not to be subjected to unduly suggestive identifications that taint his criminal trial. . . As such, Defendant Officers' qualified immunity argument fails.")

Spaulding v. City of Chicago, No. 12 C 8777, 2016 WL 2733232, at *10-13 (N.D. Ill. May 11, 2016) ("The parties agree that Plaintiffs' work for IAD is not protected by the First Amendment. . . They disagree, however, over whether Plaintiffs' reports to the FBI about Watts's illegal activity, and their pre-IAD work for the FBI, are constitutionally protected. . . .Under these precedents [discussed in case], all of which were issued before the retaliatory conduct alleged in this case, Plaintiffs' speech to the FBI—from their initial report to Smith in late 2007 until the August 17, 2008 meeting where the CPD formally assigned them to Operation Brass Tax—is protected by the First Amendment. Prompted by Watson's dismissal of Echeverria's debriefing of the suspect who reported Watts's activity, Plaintiffs reported Watts's misconduct to an outside law enforcement agency, on their own initiative, while off-duty and on their own time. These were not 'the tasks [Plaintiffs were] paid to perform,'. . . and police corruption is, as Defendants concede, . . . a matter of public concern. It follows that Plaintiffs' speech to the FBI before August 17, 2008—when, with their assignment to Detached Services, their reports to the FBI became part of their official CPD duties—is constitutionally protected. . . .As discussed above, the record would allow a reasonable jury to find a First Amendment violation, so Plaintiffs have met their 'burden of establishing that [their] rights were violated' under the first prong of the qualified immunity inquiry. . . For the second element, Plaintiffs submit that ever since the Supreme Court issued *Garcetti* in 2006, it 'has been clearly established law … that the First Amendment protects a public employee who complains about public corruption in a forum outside of his or her official job duties.'. . As noted above, the Seventh Circuit has applied the *Garcetti* standard in a variety of contexts. [collecting cases] All of these cases were issued before August 17, 2010, the first alleged act of retaliation in this case. And because the Seventh Circuit—in *Chaklos, Chrzanowski*, and *Houskins*—has consistently interpreted *Garcetti* to hold that the speech of an employee who reports misconduct *outside* official or established channels is constitutionally protected, reasonable police officers in the defendant officers' position would have known that Plaintiffs' speech to FBI was protected and that any retaliation against them for that speech would violate the First Amendment.")

Herrera v. Pohl, No. 15 C 2983, 2015 WL 7731867, at *7 (N.D. Ill. Dec. 1, 2015)("It was ultimately discovered that Herrera could be charged with an unrelated crime, but that is of no effect when the question is whether he was unlawfully held for the month preceding the issuance of a warrant in that other case. The wheels that ultimately resulted in the indictment's dismissal were set in motion too late because Houpt and Knudsen failed in their duty to consider evidence at their ready disposal that at a glance would have resolved whether they had the wrong man. . . .Houpt and Knudsen raise the defense of qualified immunity, a defense that should be decided at as early a stage as is consistent with the liberal notice pleading requirements of Rule 8 . . . .Houpt and Knudsen cannot . . . take refuge by simply pointing to the absence of clearly analogous caselaw. Law enforcement personnel do not get a free pass for shocking and egregious abuses of power simply because those abuses mark an innovation in the catalogue of shocking and egregious abuses

of power. And their conduct as alleged by Herrera (and as necessarily credited at this threshold stage) does fit under the well-established rubric of *Hankins*, *BeVier* and *Armstrong*, which possess the appropriate specificity to have put a reasonable officer on notice that he had a duty to act.")

Vaughn v. City of Chicago, 14 C 47, 2014 WL 3865838, *3, *4 (N.D. Ill. Aug. 5, 2014) ("At the motion to dismiss stage, Defendants are not entitled to the inference that their actions left Vaughn no worse off than when he returned to the scene with a stick in hand. . . It is plausible that Vaughn was safer with a stick in his hand than he was after Defendants ordered him to drop it. In simple terms, Defendants made Vaughn an easier target for would-be assailants in the rival group than he otherwise would have been. This marginal increase in risk is sufficient to state a plausible state-created danger claim. . . . [A]n individual has clearly established rights not be stranded (*Paine*) or trapped (*Monfils*) in dangerous situations that state actors either created or made more perilous. . . Plaintiff's claim falls within this clearly established line of cases. Defendants stranded Vaughn in a dangerous situation by ordering him to drop the object he intended to use for self-protection and simply watching while he was bludgeoned to death. The same police actions placed Vaughn in a trap of sorts by making him an easy target for the man who killed him. In short, Defendants are not entitled to dismissal on qualified immunity grounds because Plaintiff's claim is based on clearly established due process rights.")

T.V. ex rel. B.V. v. Smith-Green Community School Corp., 2011 WL 3501698, at *17 (N.D. Ind. 2011) ("Principal Couch has qualified immunity from damages because, on the current state of the developing law in this context, particularly involving student speech originating off-campus and by use of the internet, Couch's actions could reasonably have been thought to be consistent with the rights they are alleged to have violated.")

Husband v. Turner , No. 07-CV-391-bbc, 2008 WL 2002737, at *4, *5 (W.D. Wis. May 6, 2008) ("Defendants contend that plaintiff's right to a *Miranda* warning under the circumstances of the in-school interrogation was not so clear that reasonable officers would have known that failure to give a *Miranda* warning would violate plaintiff's Fifth Amendment rights. Defendants are correct. No precedent addresses the custodial nature of school interrogations by police officers. Moreover, although no case on point is necessary where the constitutional violation is obvious, . . . this is not such an obvious case. In the circumstances of plaintiff's interrogation, it was not so evident that a *Miranda* warning was required that defendants should have reasonably known that a lack of such a warning would violate plaintiff's constitutional rights. Accordingly, when defendants interrogated plaintiff on April 12, 2002, his right to a *Miranda* warning was not clearly established. Defendants are entitled to qualified immunity for their failure to give such a warning. Moreover, although defendants do not raise this argument, it was not even clear in 2002 that a failure to give a *Miranda* warning was a violation of a constitutional right and not simply a ground for excluding evidence obtained from a suspect before the warning was given. At the time, no opinion from the Supreme Court or the Court of Appeals for the Seventh Circuit held that a failure to give a *Miranda* warning violated a person's constitutional rights. . . Indeed, courts in other circuits had explained that a failure to give a Miranda warning was not a constitutional violation.[citing cases] Some

courts have suggested that the Supreme Court repudiated this rationale in 2000 in *Dickerson v. United States*, 530 U.S. 428 (2000), in which the Court stated that *Miranda* announced a 'constitutional rule.' . . However, *Dickerson* did not hold that a violation of *Miranda* is a violation of the Fifth Amendment. . . The Court declined the invitation to 'go farther than Miranda' and refused to say that '*Miranda* warnings are required by the Constitution.'. . . In the absence of clear Supreme Court authority, a failure to give a *Miranda* warning was not clearly established as a constitutional violation until *Sornberge*r, 434 F.3d 1006, was decided in 2006. *Sornberger* held that if a suspect's statement were used against him in a 'criminal case,' a *Miranda* violation was actionable under § 1983 (and therefore a constitutional violation). . . Because it was not clearly established until 2006 that a failure to give a *Miranda* warning was a constitutional violation, defendants are entitled to qualified immunity for their failure to give plaintiff a *Miranda* warning on April 12, 2002.").

West v. Frank, No. 04-C-173-C, 2005 WL 701703, at **5-7 (W.D. Wis. Mar. 25, 2005)(not reported) ("Defendants do not try to defend the constitutionality of the decisions to deny plaintiff the downloaded internet materials sent to him under the old version of DOC 309 IMP 1. They do not argue that any penological interest was furthered by denying plaintiff the materials sent to him by his family and they do not try to show any reasonable relation between their actions and any penological interest. Instead, they argue that plaintiff's right to receive internet materials was not clearly established at the time the original version of DOC 309 IMP I was in effect. Because the policy burdens plaintiff's First Amendment right to receive mail and because there is no record evidence of any legitimate penological interest served by the restriction, I must conclude that the policy violated plaintiff's First Amendment rights. . . Plaintiff frames the right at issue in this case as an inmate's 'right to information,' which was recognized in *Turner*. Although that case did not establish or recognize this right explicitly, it did acknowledge implicitly that prison inmates have protected interests in sending and receiving mail. . . It is reasonable to infer that these interests grow out of an underlying interest inmates have in receiving and sending information. Thus, plaintiff's contention is not an incorrect statement of the law. For the purpose of the 'clearly established' inquiry, however, the right identified by plaintiff is too broad because it fails to incorporate the specific factual context of this case. . . The fact that an inmate's right to information was clearly established at the time defendants' denied plaintiff's mail would not put defendants on notice that the reason why plaintiff's mail was denied in this case was constitutionally suspect. The proper formulation of the right at issue in this case is an inmate's right to receive and possess materials downloaded from the internet. To date, neither the United States Supreme Court nor the Court of Appeals for the Seventh Circuit has held that a prison policy prohibiting inmates from receiving internet materials violates the First Amendment. . . The lack of controlling authority in plaintiff's favor does not foreclose the possibility of finding a right clearly established if there is 'such a clear trend in the case law that we can say with fair assurance that the recognition of the right by controlling precedent was merely a matter of time.' . . . . From August 2003 to February 2004, the time during which defendants denied delivery of plaintiff's mail, *Clement* [v. *California Dept. of Corrections*, 364 F.3d 1148 (9th Cir.2004)] was the only case fairly on point. One case does not constitute a clear trend in the law. Given the sometimes extensive curtailment of

constitutional rights in the prison setting, the limitation imposed by the earlier version of DOC 309 IMP 1 was not so obviously unconstitutional that reasonable persons in defendants' shoes would have known they were violating plaintiff's First Amendment rights by refusing delivery of his mail.").

EIGHTH CIRCUIT

Karels v. Storz, No. 17-2527, 2018 WL 4957704, at *5 (8th Cir. Oct. 15, 2018) ("*Blazek* and Wertish do not establish that the slightest resistance justifies any subsequent use of force by an officer, as Storz seems to argue. They instead establish that an officer may use 'somewhat more force' on a 'passively resistant' suspect. The evidence here would support a finding that Karels was not 'passively resistant.' A jury could find that she did not have time to comply with Storz's command to put her hands behind her back before he used significant force against her. A jury could also consider Norlin's use-of-force review form, on which he did not check the box marked 'passive resistance' in describing Karels's actions. Whether a reasonable officer would have interpreted Karels as being resistant—either passively or actively—is a disputed question of fact that a jury must decide. As set forth above, a jury could find that Karels did not resist at all and that a reasonable officer would have known that she was not resisting. . .Viewing the facts in the appropriate light, several cases establish that every reasonable officer would have understood that he could not forcefully take down Karels—a nonviolent, nonthreatening misdemeanant who was not actively resisting arrest or attempting to flee—in the allegedly violent and uncontrolled manner that Storz did . . .To the extent Storz argues that these cases present different facts and circumstances, 'there is no requirement that [the plaintiff] must find a case where "the very action in question has previously been held unlawful,". . . so long as "existing precedent [has] placed the statutory or constitutional question beyond debate[.]"'")

Kelsay v. Ernst, 905 F.3d 1081, 1085 (8th Cir. 2018) ("It was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer. We held in *Ehlers v. City of Rapid City*, 846 F.3d 1002 (8th Cir. 2017), that an officer did not violate the Fourth Amendment by executing a takedown of a nonviolent misdemeanant when the officer twice ordered the suspect to place his hands behind his back, but the suspect continued walking away. . . The court concluded that a reasonable officer would interpret the subject's behavior as 'noncompliant,' and reasoned that he 'at least appeared to be resisting' when he continued to walk away, so the officer was 'entitled to use the force necessary to effect the arrest.'. . Under Kelsay's version of the facts, Ernst told Kelsay only once to 'get back here' before she continued to walk away, but even if there might be a constitutionally significant distinction between one command and two, no such rule was clearly established when Ernst made his arrest. None of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here. The constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity. . . . A reasonable officer thus could interpret *Ehlers* to

mean that it is reasonable to execute a takedown when a nonviolent misdemeanant ignores two commands. If that was the law in 2017, then it was not obvious or beyond debate in 2014 that an officer was forbidden to execute a takedown when a nonviolent misdemeanant ignored one command. For these reasons, the order of the district court denying qualified immunity is reversed.")

Kelsay v. Ernst, 905 F.3d 1081, 1085-86 (8th Cir. 2018) (Beam, J., concurring) ("I concur in the court's reversal of this matter. But, I do so somewhat advisedly because of the extant but confusing precedent available to the district court at that time. And, speaking parenthetically, the slamming of this lady to the ground by the deputy with force sufficient to fracture her shoulder was uncalled for given the nature of the encounter underway.")

Kelsay v. Ernst, 905 F.3d 1081, 1086-87 (8th Cir. 2018) (Smith, C.J., dissenting) ("I respectfully dissent. The court rightfully concludes that in May 2014, case law did not clearly establish 'that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to "get back here" and continued to walk away from the officer.'. . But, 'in an obvious case,' the clearly-established prong can be met 'even without a body of relevant case law.'. . Prior case law is unnecessary where 'a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct in question.'. . This is such a case. . . . Given the facts, a reasonable officer on the scene would have known that a full-body takedown of a small and nonviolent misdemeanant was excessive under the circumstances. Deputy Ernst was entitled to use the force necessary to effect an arrest. However, a jury might decide that Deputy Ernst used substantially more force than necessary.")

Wilson v. Lamp, 901 F.3d 981, 990-91 (8th Cir. 2018) ("The officers' drawing and pointing of weapons as they approached the truck, which they reasonably believed was being driven by David, was not excessive. But Levi and M.W. say that the officers kept their weapons drawn and pointed at them throughout the incident even after they realized the driver was Levi, not David, the passenger was M.W., a child, and the officers had patted Levi down. . . On the facts here, the continuous drawing and pointing of weapons constitutes excessive-force. . . .Finally, the officers argue that the law is not clearly established, claiming that this court has not recognized excessive force under similar facts. To the contrary, an officer's 'use of force against a suspect who was not threatening and not resisting' is unreasonable. [collecting cases] The district court correctly concluded that the officers were not entitled to qualified immunity on the excessive force claim.")

Ross v. City of Jackson, Missouri, 897 F.3d 916, 922-23 (8th Cir. 2018) ("Viewing the evidence in the light most favorable to Ross, the officers saw the comment, discovered where Ross worked, and then went to his job site with the sole intent of placing him under arrest. Ross tried to explain what was meant by his comment and provide the officers with more context about the post, but the officers did not give him that opportunity until after he was booked at the police station. . . And, after interviewing Ross, officers indicated that they did not think the charges would stick, i.e., they did not believe he had truly made a 'terrorist threat.' Ross was nonetheless charged and held in

custody for several days until he was able to post bail. In sum, it is beyond debate that—had the officers engaged in minimal further investigation—the only reasonable conclusion was that Ross had not violated § 574.115.1(3). . . We reverse the district court's grant of summary judgment to the officers based on qualified immunity and remand the case for further proceedings consistent with this opinion.")

Neal v. Ficcadenti, 895 F.3d 576, 582 (8th Cir. 2018) ("Neal has provided adequate evidence that he neither posed a threat to anyone's safety nor resisted arrest at the time that Officer Ficcadenti executed the arm-bar takedown. We are satisfied that these facts, construed in a light most favorable to Neal, establish a violation of a constitutional right to be free from unreasonable and excessive force. . . We turn now to the question of whether or not the constitutional right that Officer Ficcadenti allegedly violated was clearly established as of June 6, 2012. We have said many times that '[t]he right to be free from excessive force in the context of an arrest is clearly established under the Fourth Amendment's prohibition against unreasonable searches and seizures.'. . The 'salient question' is whether the state of the law at the time the force was exerted gave Officer Ficcadenti 'fair warning' that his alleged treatment of Neal was unconstitutional. . . In June 2012, the state of the law would have given a reasonable officer fair warning that using physical force against a suspect who was not resisting or threatening anyone was unlawful. . . .After construing the facts in a light most favorable to Neal, i.e. that he was fully compliant at the time that Officer Ficcadenti applied the arm-bar takedown maneuver on him, that conduct violated a clearly established constitutional right on June 6, 2012. The district court correctly concluded that this is one of those relatively rare cases in which a question of fact is presented for the ultimate finder of fact and qualified immunity does not apply.")

Dean v. Searcey, 893 F.3d 504, 518-19 (8th Cir. 2018) ("In both *White* and *Winslow*, we examined the deputies' actions and found that a jury could believe that they 'conducted a conscience-shocking reckless investigation ... that was used to box' Appellees in. . . And we held—relying on Supreme Court precedent and this Court's holding in *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001)—that the prohibitions against their actions were clearly established in 1989. The deputies argue that it was improper to rely on 'general statements of the law' in reaching the latter conclusion. But, *Pauly* explicitly reaffirmed that 'general statements of the law are not inherently incapable of giving fair and clear warning' so long as 'the unlawfulness ... [is] apparent.'. . There is no doubt that the conduct we described above and in prior opinions is (and was) unlawful. . . Indeed, 'if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from ... framing individuals for crimes they did not commit.'. . The jury was warranted in concluding that this is exactly what happened through the reckless investigation here. The prohibition on using official power to frame individuals is deeply embedded in the historical roots of due process. . . . The Supreme Court—long before 1989—recognized this as well. . .To put it simply, this is not a case like many Fourth Amendment cases, where the 'specificity of the rule is especially important' because 'officers will often find it difficult to know how' the Constitution applies in 'the precise situation encountered.'. . Instead, this is an ' "obvious case,"' where the 'unlawfulness of the [deputies'] conduct is sufficiently

clear.'. . The evidence supports the conclusion that the deputies 'knowingly violate[d],'. . . the due process rights of the Appellees by applying 'systematic pressure' to implicate the Appellees and by 'purposefully ignor[ing]' exonerating evidence. . . The illegality of this was well-established long before 1989. Thus, our prior determination holds: qualified immunity does not shield the deputies.")

Cravener v. Shuster, 885 F.3d 1135, 1140-41 (8th Cir. 2018) ("Cravener argues his case is unique because he was not engaged in criminal activity, and thus the force greatly exceeded the need. True, Cravener's lack of criminal activity is an important consideration in the qualified immunity analysis. However, officers may seize a person 'in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity.'. . Here, the deputies were called to the house to ensure Cravener's safety. This court has found no excessive force where the subject was not currently engaged in criminal activity or resisting arrest. . .Cravener also argues the deputies faced no imminent harm because Cravener was unarmed and was passively, not actively, resisting. Even if Cravener were passively resisting, this argument fails. Unarmed, passively resisting subjects can pose a threat necessitating the use of taser force. . . .Deputy Calvin also is entitled to qualified immunity based on the second inquiry because 'even if the reasonableness of [his] actions was questionable,' Cravener cannot 'show that a reasonable officer would have been on notice that the officers' conduct violated a clearly established right.'. . Because of the significant similarities between this case and *De Boise*—with no intervening Eighth Circuit case between 2008 and 2013—*De Boise* controls here. '[N]o reasonable officer, observing [Cravener's] behavior, would have understood the actions taken to be so disproportionate and unnecessary as to amount to a violation of [Cravener's] rights.'. .The district court erred in denying qualified immunity.")

Estate of Walker v. Wallace, 881 F.3d 1056, 1060-62 (8th Cir. 2018) ("The district court denied Wallace qualified immunity because, if the jury believed the plaintiffs' version of the facts, then the evidence 'could show that the consent was not voluntary.' True, but that is not the correct inquiry. The correct inquiry is whether, even if we construe the facts in a light most favorable to the plaintiffs, a reasonable official in Wallace's position would have known that he was violating the constitution when he searched the plaintiffs' house after receiving signed consent to do so in the particular circumstances. We believe that Wallace, at worst, made a bad guess in a gray area of the law—but the law gave him the breathing room to make such a guess. First, determining whether consent is voluntary requires a highly particular look at all the relevant circumstances. . . .Since questions of consent necessarily turn on the particular facts of a case, it may be hard to show that prior decisions should have put Wallace on notice that his search under the circumstances was unconstitutional or that every reasonable official in his position would have understood that he was violating a constitutional right. . . We do not mean that officials are always entitled to qualified immunity when dealing with questions of consent; it is easy to imagine facts that would alert a reasonable person that consent was not voluntarily given. We mean only to emphasize that officials should be given some leeway when acting in legally murky environments. We believe that both the plaintiffs and the district court defined the right in question here too generally. The plaintiffs

focus on the presumptive unreasonableness of searching a house (whether for evidence of a crime or for building code violations) without a warrant. The district court began its analysis with the observation that a government official's warrantless entry into a house does not violate the Fourth Amendment when one voluntarily consents to the entry, only to note then that consent may not have been voluntarily given here. But 'clearly established law should not be defined at a high level of generality' and must be particularized to the facts of the case so that the unlawfulness of an official's actions are apparent. . . Context is critical in determining qualified immunity in Fourth Amendment cases. . . The first principles that the district court and the plaintiffs emphasized can only go so far. Nowhere do they identify any case applying these first principles in a context sufficiently similar to the situation in which Wallace found himself when he searched the plaintiffs' house. Though the plaintiffs need not provide a case directly on point, some existing precedent must place the question beyond debate, or the conduct must be so obviously unconstitutional that no precedent is needed. . . The plaintiffs have failed to carry their burden on this point. . . . A single case, which is not even a binding precedent in the district in which it was decided, seems hardly enough to count as one that establishes a clear legal principle. One swallow does not a summer make. For these reasons, the plaintiffs have not carried their burden to show that the unconstitutional nature of Wallace's conduct was clearly established. We therefore reverse and remand for further proceedings.")

Morgan v. Robinson, 881 F.3d 646, 656-57 (8th Cir. 2018) ("Since we have determined that Morgan's speech was protected, his termination was an adverse employment action sufficient to violate his First Amendment rights. . . We therefore turn to the second inquiry, under which '[t]he relevant question ... is this: Could [Robinson] reasonably have believed, at the time he fired [Morgan], that a government employer could fire an employee on account of' the employee exercising his First Amendment right to free speech during a run for political office, where that speech had no disruptive impact on office functioning? . . .The answer to this question is an unequivocal "no.". . .[P]ublic officials have been on notice since the Court decided *Pickering* in 1968 that they may not sanction an employee for uttering protected speech when that speech neither impacts the employee's official duties nor detracts from office efficiency. This is all the more true given the context in which Morgan spoke here: a political campaign, where 'the First Amendment has its fullest and most urgent application.'. . To the extent that there remains any ambiguity, we hold that a public employee cannot be terminated for making protected statements during a campaign for public office where that speech has no demonstrated impact on the efficiency of office operations.")

Lyons v. Vaught, 875 F.3d 1168, 1173-76 & n.4 (8th Cir. 2017) ("Throughout this litigation, Lyons has conceded and the district court has acknowledged, correctly in our view, that his speech during the student appeal process was unprotected employee grievance. . . However, in denying defendants qualified immunity, the district court concluded that the meeting with Chancellor Morton was not 'part of [Lyons's] job duties,' that 'academic improprieties involving interscholastic athletes is an issue of public concern,' that Eighth Circuit cases prior to *Garcetti* 'clearly established that a public employee had a First Amendment right to speak on

maters of a public concern so long as that speech was not part of the employee's job duties,' and that *Garcetti* did not change that law. We disagree. . . .Determining whether an employee's speech was pursuant to his official duties is a practical inquiry. . . . Here the central focus is whether it was clearly established that Lyons's speech at the meeting with Chancellor Morton was as a citizen, not a part-time lecturer. . . .Under *Garcetti*, 'a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command.'. . Did Lyons transform what began as unprotected speech pursuant to his duties as a lecturer into protected speech by virtue of speaking more broadly about the issue to both the UMKC Chancellor and 'community leaders'? Perhaps. But Vaught and Bassa could reasonably conclude that Lyons spoke solely as an aggrieved lecturer in asking Chancellor Morton to investigate grading policies for student athletes. In these circumstances, Lyons has failed to show, using the particularized inquiry required, that his right to make *this* speech *in these circumstances* was clearly established. . . . *Garcetti* left open the question whether its holding would apply to 'speech related to scholarship or teaching.'. . In our view, this case does not involve speech related to scholarship or teaching. . . But in any event, the law is no more clearly established even if *Garcetti* is persuasive but not controlling precedent.")

Hansen v. Black, 872 F.3d 554, 559-60 (8th Cir. 2017) ("Even assuming a constitutional violation, Trooper Black is entitled to qualified immunity because his conduct did not violate a clearly established Fourth Amendment right. To avoid qualified immunity, Hansen must show that existing precedent placed Trooper Black's conduct 'beyond debate.'. . Hansen has not cited, and we have not found, any case concluding that an officer violated the Fourth Amendment when he shot and killed an unrestrained, unsupervised dog creating a serious risk to public safety and avoiding numerous attempts to control him without force.")

Hoyland v. McMenomy, 869 F.3d 644, 653-55 & n.4 (8th Cir. 2017) ("We hold that, under Minnesota law, it was not objectively reasonable for these officers to believe they had probable cause to arrest Hoyland for obstruction. This case is far removed from the examples of 'obstruction' described above. Here, Hoyland stood in his own lighted doorway, on his own property, some 30-40 feet from the officers and his wife. The officers almost immediately saw that he held a camera and not any kind of weapon in his hands. No more than twenty seconds elapsed from Hoyland's first words spoken from his doorway to McMenomy's shout of 'you are under arrest.'. . . However reasonable the command for Hoyland to go back inside may have been, his refusal to do so did not constitute obstruction. As Minnesota law makes abundantly clear, obstruction must be either physical obstruction or verbal conduct, such as fighting words, that has the effect of physically obstructing officers in the performance of their duties. Nowhere in Minnesota law does mere physical presence at a distance constitute obstruction. So arresting Hoyland for obstruction due to his continued presence in his doorway was unreasonable under state law. Even when we consider his verbal conduct, no reasonable officer could construe his shouting as 'physically obstructing or interfering' in the officers' performance of their duties. . . . The officers are therefore denied qualified immunity for Hoyland's Fourth Amendment claim. . . . As to whether it was objectively reasonable for the officers to believe that probable cause existed

to seize Hoyland as he stood in his doorway, the dissent contends that the fact that the state prosecutor resisted dismissal of the charge of obstructing legal process against Hoyland 'is as significant as the decision of the state judge to dismiss the charge.' No authority is provided for this proposition and, indeed, it is the lack of neutrality and detachment that disqualifies prosecutors, who have a 'responsibility to law enforcement,' from a role in the ultimate probable cause determination.")

Hoyland v. McMenomy, 869 F.3d 644, 658-61 (8th Cir. 2017) (Colloton, J., dissenting) ("Notably absent from the majority opinion is any mention of the Supreme Court's several recent decisions reversing denials of qualified immunity by the courts of appeals. The Court explained that these opinions were necessary 'both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial.'. . .The officers are entitled to qualified immunity on both claims if they had 'arguable probable cause' to make an arrest. The Fourth Amendment requires probable cause to arrest, but if police make an objectively reasonable mistake about the existence of probable cause, then they have 'arguable probable cause' and are immune from suit. . .A First Amendment retaliation claim fails if the police had arguable probable cause to arrest. . . .Viewing the situation more broadly, Hoyland's repeated argumentative refusals to comply with police commands at an active arrest scene also gave police at least arguable probable cause to believe that he violated § 609.50. Although the Minnesota Supreme Court wrote in response to a vagueness challenge that the statute is directed at 'physically obstructing or interfering' with an officer, . . . the few decisions applying the statute show that it encompasses violations that do not involve physical contact between an offender and a police officer. . . .We must address qualified immunity 'in light of the specific context of the case,'. . . yet there is no Minnesota court decision applying the statute to alleged obstruction by a third party at an active arrest scene. What constitutes obstruction of an officer may well be different at an active arrest scene than in the reception area at police headquarters. Hoyland refused seven times to comply with commands of police officers. It was reasonable to believe that his conduct substantially hindered the officers who were attempting to control the scene, by creating a new security concern and by preventing the officers from focusing their attention on the two suspects who were apprehended at Hoyland's residence after fleeing. Hoyland's persistence in refusing to comply supported an objectively reasonable belief in probable cause that he intentionally resisted or interfered. It was not beyond debate that the statute encompassed the interruptions and refusals directed at the desk officer in *Occhino*, and the loud and repetitive interruptions of the officers issuing citations in *Hanson*, but did not proscribe Hoyland's interruptions and distraction of police officers at an active arrest scene.")

Div. of Employment Sec. v. Bd. of Police Commissioners, 864 F.3d 974, 979 (8th Cir. 2017) ("Although Supreme Court precedent 'do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'. . 'Our prior cases have clearly established that use of [a] taser on a nonfleeing, nonviolent suspected misdemeanant [is] unreasonable.'. . Where a suspect is neither fleeing nor resisting arrest and does not pose a threat to the safety of the officers, it is 'unreasonable for [an

officer] to use more than de minimis force against' the suspect. . . In light of Gurley's compliance with the officers' demands, it was therefore beyond debate at the time of the events in question that the officers could not reasonably use more than de minimis force against Gurley.")

Gerlich v. Leath, 861 F.3d 697, 708-09 (8th Cir. 2017) ("We conclude that it was clearly established at the time that ISU's [Iowa State University's] trademark licensing program was a limited public forum. Defendants argue that they did not violate clearly established law because at the time of this dispute the contours of the government speech doctrine were not clearly established. It was clearly established, however, that the government speech doctrine does not insulate a state actor from First Amendment scrutiny when the state has created a limited public forum for speech. . . . Like the university in Rosenberger, ISU was not engaging in government speech in this case because it had created a limited public forum to facilitate speech by private persons. . . Moreover, ISU's trademark licensing program was capable of accommodating a large number of student groups without defeating its essential function. . . Because ISU's trademark licensing program facilitated the speech of private persons and was capable of accommodating a large number of speakers, ISU's administration of that program was not government speech under clearly established law. The next question is whether at that time it was clearly established that a university may not discriminate on the basis of viewpoint in a limited public forum. It has long been recognized that if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum. . . . Given this history, plaintiffs' right not to be subjected to viewpoint discrimination while speaking in a university's limited public forum was thus clearly established at the times in question. Because defendants violated plaintiffs' clearly established First Amendment rights, the district court did not err by denying qualified immunity to defendants and granting plaintiffs summary judgment on their First Amendment claims.")

Gerlich v. Leath, 861 F.3d 697, 717 (8th Cir. 2017) (Loken, J., dissenting) ("Repeatedly, the Supreme Court has cautioned that 'clearly established law should not be defined at a high level of generality.' *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quotations omitted). Rather, 'clearly established law must be particularized to the facts of the case.'. . In a public school or university setting, 'educators are rarely denied immunity from liability arising out of First-Amendment disputes. The rare exceptions involve scenarios in which a factually analogous precedent clearly established the disputed conduct as unconstitutional.'. . The court cites no case in which school officials administering a trademark licensing program violated, or were even accused of violating, the First Amendment by denying proposed uses of the school's registered trademark. This case presents two uncertain First Amendment issues that warrant qualified immunity: (1) whether a trademark licensing program that allows student groups to associate their messages with the university's symbol or logo is a form of government speech or a limited public forum; and (2) if the program is a limited public forum, whether administrators' decisions to restrict the licensing of designs associating the university with unsafe or illegal activities such as drug use constitute unlawful viewpoint discrimination or permissible content regulation.")

Perry v. Woodruff County Sheriff Dep't, 858 F.3d 1141, 1146 (8th Cir. 2017) ("Wolfe raises a two-fold challenge to our conclusion about the clearly established nature of the Fourth Amendment violation. She first claims that under *White v. Pauly*, 137 S. Ct. 548 (2017), it was not clearly established that she was prohibited from relying on Clark's judgments about the need to use force against Perry. Next, she asserts that Perry's claim founders on *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir. 2011), because Perry only alleged *de minimis* injuries and under *Pennycook*, such injuries could not serve as the basis for excessive-force claims until 2011. Both her arguments are unavailing. In *White*, the Supreme Court held that '[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action ... from assuming that proper procedures ... have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers.'. . *White* is inapplicable to our case because it addresses a wholly different set of facts. As noted above, Wolfe was on the scene at the time of the incident and testified that she viewed the entire interaction between Perry and Clark. As a result, *Smith* governs this case, and Perry's Fourth Amendment right to be free from excessive force was clearly established. Wolfe responds that even if she used excessive force against Perry, he suffered only *de minimis* injuries as a result of her conduct. In *Pennycook*, decided in 2011, we held for the first time 'that a citizen may prove an unreasonable seizure based on an excessive use of force without necessarily showing more than *de minimis* injury.'. . While it is true that a *de minimis* injury could not serve as the basis for an excessive-force claim in August 2009, the record indicates that Perry suffered more than *de minimis* injuries such that *Pennycook* does not apply.")

Williams v. Tucker, 857 F.3d 765, 770-71 (8th Cir. 2017) ("Tucker argues that even if he violated Jenkins' First Amendment right to support an electoral candidate, the contours of that right were not clearly established at the time of any such violation. Tucker frames the right at issue as the right to remain a full time court employee, but the issue is properly characterized as whether Tucker impermissibly retaliated against Jenkins by causing her to become a part time employee. It is clearly established 'that a government employer cannot take adverse employment actions against its employees for exercising their First Amendment rights' by participating in electoral activities. . . This right was clearly established at the time of the alleged violation.")

De La Rosa v. White, 852 F.3d 740, 745-47 (8th Cir. 2017) ("[I]n this case, the Fourth Amendment issue is whether an officer had reasonable suspicion justifying a warrantless investigative detention, rather than probable cause to arrest or search. Thus, Trooper White is entitled to qualified immunity if a reasonable officer could have believed that he had a reasonable suspicion; in other words, if he had arguable reasonable suspicion. . . In this case, we find no controlling Eighth Circuit authority placing the question beyond debate, nor a 'robust consensus of cases of persuasive authority.' More recent Eighth Circuit decisions have distinguished *Jones* and *Beck*, the cases on which the district court primarily relied, in finding no Fourth Amendment violations, let alone violations of clearly established Fourth Amendment law. . . Rather than 'a robust consensus of cases of persuasive authority' favoring the district court's resolution of this difficult issue, our prior cases have found reasonable suspicion upholding the extension of traffic stops by

officers relying on similar facts[.] [discussing cases] To be sure, on the merits, the existence of reasonable suspicion was a close question, because the facts on which Trooper White relied, taken together, did not raise as strong a suspicion of interstate drug trafficking as in prior cases such as *Riley* and *Lebrun*. But White relied on facts presenting substantial similarities with prior cases in which reasonable suspicion of drug trafficking was found and extension of a traffic stop was upheld. In recent years, the Supreme Court has repeatedly reversed decisions denying qualified immunity where lower courts 'misunderstood the "clearly established" analysis.' *White v. Pauly*, 137 S. Ct. 548, 552 (2017). To avoid qualified immunity, De La Rosa must show a 'a robust consensus of cases of persuasive authority.' Here, there is no consensus to be found in the prior decisions that have resolved a fact-intensive Fourth Amendment issue under a governing standard that requires judges to 'allow[ ] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.' . . Trooper White is therefore entitled to qualified immunity from De La Rosa's damage claims.")

Ehlers v. City of Rapid City, 846 F.3d 1002, 1012 (8th Cir. 2017) ("The law did not clearly establish in December 2010 that the use of an arm bar in this context constitutes excessive force. Indeed, the only instance in which we have considered the merits of the use of an arm bar occurred after 2010 and concerned an arm bar as a takedown maneuver, not as a method of handcuffing a suspect. *See Hicks v. Norwood*, 640 F.3d 839, 842 (8th Cir. 2011). More broadly, we have held that officers may use force to handcuff a suspect who is resisting, even if that force causes pain. *See, e.g., Blazek v. City of Iowa City*, 761 F.3d 920, 924 (8th Cir. 2014) (analyzing the state of the law in 2009). The only cases Ehlers provides to support a finding of clearly established law concern the use of force against an individual who is not resisting. . . As discussed above, the officers reasonably interpreted Ehlers's behavior as resistance. The officers also reasonably considered Ehlers's free hand a potential threat. . . As a result, Ehlers's cases are inapposite. A reasonable officer would not have understood the action in question to constitute excessive force. . . Thus, the law was not clearly established, and Rybak is entitled to qualified immunity.")

Jenkins v. Univ. of Minnesota, 838 F.3d 938, 947 (8th Cir. 2016) ("Swem does not dispute that the right to be free of sexual harassment in the workplace is clearly established, but asks us to take a very narrow view of the contours of that right here. He insists that a reasonable public official would not have known that his comments, 'void of any physical conduct,' could amount to sexual harassment. We find this argument unavailing. Our case law clearly establishes that physical contact is not required to make out a hostile-work-environment claim. . . We find that the right Swem violated was clearly established. Swem then argues that a reasonable official in his position would not have known the conduct was unlawful because he did not receive any sexual harassment training from UM and lacked specific knowledge of UM's sexual harassment policy. 'A reasonably competent public official should know the law governing his conduct.'. . A person such as Swem, who has had prior experience working with and supervising students, should be aware that sexual harassment violates a student's clearly established rights, even in the absence of specific training. . . Because we find that Jenkins has satisfied both prongs of the qualified

immunity analysis, we agree with the district court that Swem was not entitled to qualified immunity or summary judgment on that basis.")

Gilmore v. City of Minneapolis, 837 F.3d 827, 834 (8th Cir. 2016) ("Because the law regarding warrantless misdemeanor arrests for offenses committed outside the presence of the arresting officer is not clearly established under the Fourth Amendment, the arresting officers are entitled to qualified immunity on Gilmore's constitutional claim.")

Stewart v. Wagner, 836 F.3d 978, 982-86 (8th Cir. 2016) ("[W]e note that, while a prosecutor's duty to disclose is absolute, to recover damages from other law enforcement officials for a *Brady* violation, a § 1983 plaintiff must prove the requisite *mens rea*. In denying investigators Wagner and Choate summary judgment on this claim, the district court adopted the amorphous 'bad faith' *mens rea* standard set forth in *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008), rather than the more precise standard adopted in our earlier, and therefore controlling, opinion in *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004) – '*Brady* ensures that the defendant will obtain relief from a conviction tainted by the State's nondisclosure of materially favorable evidence, regardless of fault, but the recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor *intended to deprive the defendant of a fair trial*.' (Emphasis added.) The district court must apply this controlling standard when the issue again arises on remand, whether before, during, or after trial. . . .[A] § 1983 plaintiff's claim that he was arrested or prosecuted without probable cause, even if labeled a claim of malicious prosecution, 'must be judged' under the Fourth Amendment, not substantive due process. . . We recognized in *Moran* that additional considerations in a particular case may trigger substantive due process protection, like the impact of 'falsely-created evidence and other defamatory actions' on a public employee plaintiff's career, and the equal protection interest in not being investigated or punished on account of race, that were present in that case. . . But here, Stewart was not a public employee, race was not an issue, and the alleged fabricated evidence was only used in a probable cause statement. Thus, the general rule in *Oliver* applies, and the district court committed an error of law in not judging the actions of Selby and Wagner under the Fourth Amendment. . . .We note that the preliminary hearing at which Kimberling testified was nearly two months after charges were filed based on Wagner's probable cause statement. Stewart did not gain pretrial release or dismissal of the charges at that hearing, which strongly suggests that the presence of arguable probable cause was overwhelming. On this record, we conclude it was error to deny Prosecutor Selby qualified immunity on this claim because Stewart failed to present sufficient evidence that Wagner and Selby violated 'clearly established [Fourth Amendment] rights of which a reasonable person would have known.'. . .If this were an appeal from the denial of a motion to suppress or exclude the testimony of Parker and Pollard, or from the denial of a properly preserved federal habeas claim, we might well agree there is sufficient evidence of a Sixth Amendment violation under *Kuhlmann* to warrant a full trial of this claim. But this is the appeal from the denial of qualified immunity from a § 1983 claim. Neither the district court nor Stewart cited, and we have not found, a reported federal decision discussing the elements of a § 1983 Sixth Amendment claim based on use of a jailhouse informant's testimony at trial, and the proper application of qualified immunity principles to such a claim. The absence of such

precedent is not dispositive but is clearly relevant. . . . The judgment of Wagner and Selby on this issue may have been wrong, but *Kuhlmann* and the earlier cases it applied create a very indistinct line between aggressive use of jailhouse informants that does and does not violate the Sixth Amendment rights of a defendant who has just been charged and invokes his right to counsel. And there were no § 1983 precedents giving these defendants 'fair and clear warning of what the Constitution requires,' . . . and therefore no 'existing precedent [that] placed the statutory or constitutional question beyond debate[.]'. . In such circumstances, suppression, not § 1983 damage liability, is the appropriate remedy.")

Carter v. Huterson, 831 F.3d 1104, 1107-09 (8th Cir. 2016) ("In appealing the dismissal of his Fourth Amendment claim, Carter first contends that because he was a civilly committed individual rather than a pre-trial detainee or a prisoner, the defendants could not collect a blood sample to produce his DNA profile without first demonstrating individualized suspicion of criminal wrongdoing and acquiring a search warrant. However, we do not reach the question of whether the alleged warrantless collection of Carter's blood sample violated the Fourth Amendment because the defendants are entitled to qualified immunity with respect to this claim. Here, the defendants are entitled to qualified immunity with respect to their alleged taking of Carter's blood sample because Carter has failed to demonstrate that, at the time of the events in question, civilly committed sexually violent predators maintained a clearly established right to be free from the warrantless drawing of a blood sample to produce a DNA profile. . . . First, we previously have held that civilly committed individuals 'retain the Fourth Amendment right to be free from unreasonable searches that is analogous to the right retained by pretrial detainees.' *Beaulieu v. Ludeman*, 690 F.3d 1017, 1028 (8th Cir. 2012). Shortly after our decision in *Beaulieu*, the Supreme Court held in *Maryland v. King* that the Fourth Amendment does not require authorities to obtain a warrant before conducting a mouth swab to obtain the DNA profile of a pretrial detainee. 569 U.S. ——, 133 S. Ct. 1958 (2013). Relying on these two cases, therefore, the defendants reasonably could have concluded that the Fourth Amendment does not prohibit the warrantless collection of a civilly committed person's DNA profile. Indeed, the defendants have shown that several of the same government interests identified in *King* reasonably could justify the DNA identification of a civilly committed sexually violent predator, including determining 'the [individual]'s future dangerousness' and the extent he might be 'inclined to flee' from confinement. . . Second, courts generally have recognized the collection of a blood sample as a minimally intrusive mechanism for obtaining information from individuals in state custody. . . .Given the state of the law at the time of the alleged events and his status as a civilly committed sexually violent predator, Carter did not have a 'clearly established' right to be free from the warrantless collection of his blood sample for the purpose of obtaining his DNA profile. . . As a result, the district court did not err when it found that the defendants are entitled to qualified immunity with respect to this claim.")

Ingrassia v. Schafer, 825 F.3d 891, 899 (8th Cir. 2016) ("Defendants contend that, even if questions of material fact remain whether Ingrassia was denied adequate nutrition, the right to adequate nutrition was not clearly established, warranting qualified immunity. Defendants argue

that appellate courts have not clearly defined adequate nutrition in the civil commitment context. At the time of the alleged violations, however, it was clearly established that a prisoner may properly allege a constitutional violation by demonstrating significant weight loss or other adverse physical effects from lack of nutrition. . . While there are contested issues of fact about Ingrassia's weight loss and caloric intake, his evidence established a significant weight loss tied to nutrition. Because the law was settled, the district court properly denied summary judgment to Englehart, Blake and Weinkein.")

Dadd v. Anoka Cty., 827 F.3d 749, 757 (8th Cir. 2016) ("Dadd arrived at the jail with instructions from his doctor in the form of a Vicodin prescription, and the deputies and the jail nurse ignored his complaints of pain and requests for treatment. When Dadd was prescribed additional medication by a jail doctor, he did not receive it. Moreover, the defendants had fair warning about the unconstitutionality of a failure to provide pain medication for serious dental conditions in particular. . . . Dadd's right to adequate treatment was clearly established, and the district court properly denied the defendants qualified immunity.")

Barton v. Taber, 820 F.3d 958, 968-70 (8th Cir. 2016) (Colloton, J. dissenting) ("It was clearly established in September 2011, at least under the law of the Eighth Circuit, that a law enforcement officer must not act with deliberate indifference to the serious medical needs of an arrestee. . . But this is a broad general proposition. The issue here is whether the facts alleged, in the specific context of this case, show that only a plainly incompetent state trooper, or a trooper who knowingly violates the law, would have turned Barton over to the custody of the detention center without seeking medical attention. In other words, it must be clearly established that the complaint's allegations are sufficient to show that Barton suffered from an objectively serious medical need, and that Owens exhibited deliberate indifference (i.e., criminal recklessness) to that need by failing to seek medical attention. The complaint and relevant precedents do not support a denial of qualified immunity. . . .Owens knew that Barton was a drunk driver, and a reasonable state trooper with no medical training could have believed that his slurred speech, difficulty walking, inability to answer questions, and even temporary non-responsiveness were the results of intoxication that did not require immediate medical attention. On the facts alleged, it would not have been obvious to a layperson that Barton's symptoms exceeded those of acute intoxication. There is no allegation that Owens had any knowledge that Barton suffered from the heart condition that eventually caused his death. And there is no assertion that Owens knew how to distinguish symptoms of intoxication from those of an impending coronary. The district court thought *Thompson v. King*, 730 F.3d 742, 748 (8th Cir.2013), clearly established that Owens's conduct violated Barton's constitutional rights, but this conclusion was error. Assuming that controlling circuit precedent is a dispositive source of clearly established law, *cf. Carroll v. Carman*, ––– U.S. ––––, ––––, 135 S.Ct. 348, 350, 190 L.Ed.2d 311 (2014) (per curiam), *Thompson* was decided in 2013, two years after Barton's death in 2011, so it could not provide clearly established law for this incident. . . The court relies instead on *McRaven v. Sanders*, 577 F.3d 974 (8th Cir.2009), but the decision there on dissimilar facts did not put Owens on notice of a clearly established constitutional right in this case. The officers in *McRaven* knew that an arrestee had consumed a 'cocktail of potent

drugs' under circumstances that "strongly suggested" they were not taken in prescribed dosages, yet they failed to seek medical attention when the arrestee exhibited extreme symptoms of drug intoxication. Unlike Owens, who was unaware of Barton's heart condition, the officers in *McRaven* had specific reason to believe that the offender suffered from a serious medical need—a drug overdose—that distinguished him from an arrestee who had consumed excessive amounts of alcohol. . . . More instructive is a decision that unfortunately was not cited by either party. In *Martinez v. Beggs,* 563 F.3d 1082 (10th Cir.2009), officers arrested a man named Ginn for public intoxication. The arresting officer reported that Ginn 'was unable to stand.' A witness testified that officers 'picked up' Ginn and 'dragged' him to a patrol car. The officer transporting Ginn to the detention center thought Ginn had 'passed out, like most of your drunks do' during a ride to the facility. At the detention center, Ginn could not walk in a straight line, and officers helped to support his weight. Ginn was placed in a cell. Three hours later, he died from a heart attack due to coronary artery disease. Ginn's estate sued the arresting officers, alleging that they knew that Ginn had consumed a large quantity of alcohol, could not walk without help, may have been unconscious for a short time, and was talking as if he were hallucinating. The plaintiff also sued two custodial officers, asserting that they knew Ginn was drunk, was too incoherent to be booked into jail, and had difficulty walking. The court affirmed a grant of summary judgment for the officers because there was insufficient evidence to show deliberate indifference to the detainee's serious medical needs:

[T]he sufficiently serious objective harm that Ginn faced was heart attack and death, and not acute intoxication.... The officers subjectively knew that Ginn was intoxicated, but there is no evidence to show that anyone would have known that Ginn would face an imminent heart attack or death, much less that the individual county defendants subjectively knew that Ginn was at risk of heart attack or death.

Id. at 1090.

So too here. Owens knew that Barton was a drunk driver, and Barton exhibited symptoms that a reasonable trooper could associate with acute intoxication. Owens had no reason to know that Barton suffered from an undiagnosed heart condition that would cause his death. Barton may have had an objectively serious medical need for treatment of his heart, but it was not a need to which Owens was deliberately indifferent under clearly established law on the facts alleged. I would therefore reverse the district court's order denying the motion to dismiss.")

Mountain Pure, LLC v. Roberts, 814 F.3d 928, 935 (8th Cir. 2016) ("The employees finally assert that Roberts and Spradlin acted unreasonably in detaining them incommunicado by denying them access to telephones. Again they rely on *Ganwich,* in which the Ninth Circuit also concluded that qualified immunity did not apply because the officers there had denied employees telephone access during their detentions. . . The *Ganwich* court reasoned that based on the Supreme Court's decisions in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) and *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), a reasonable official would have known that incommunicado detention 'was significantly more intrusive than was necessary for them to complete the search' of the employees' offices. . . We disagree. To conclude that official conduct violates clearly established rights, we must find some 'factual correspondence with precedent,'

which requires a 'fact-intensive inquiry [that] must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . Neither *Royer* nor *Terry* involved factually similar circumstances to those in question here, and those cases do not support the conclusion that the agents violated the employees' clearly established rights. . . We thus conclude that the district court did not err in concluding that qualified immunity barred their unlawful detention claims.")

Bailey v. Feltmann, 810 F.3d 589, 593 (8th Cir. 2016) ("Bailey first argues that we should analyze his § 1983 claim against Feltmann for denial of medical care under the objective reasonableness standard of the Fourth Amendment. The Fourth Amendment governs an arrestee's claim alleging excessive use of force, *Graham v. Connor,* 490 U.S. 386, 395 (1989), but this court has not resolved whether an arrestee's claim alleging denial of medical care is analyzed under the Due Process Clause or the Fourth Amendment. One recent decision, *Carpenter v. Gage,* 686 F .3d 644, 650 (8th Cir.2012), applied due process analysis to the claim of an arrestee, but the plaintiff there did not invoke the Fourth Amendment, and the issue was not joined. Earlier cases seem to imply—also without discussion of the Fourth Amendment—that the Due Process Clause may govern, *e.g., Spencer v. Knapheide Truck Equip. Co.,* 183 F.3d 902, 905 & n. 3 (8th Cir.1999), and there is a conflict in authority elsewhere about how to evaluate this type of claim. *Compare Ortiz v. City of Chicago,* 656 F.3d 523, 530 (7th Cir.2011) (applying Fourth Amendment), *with Barrie v. Grand Cty.,* 119 F.3d 862, 865–69 (10th Cir.1997) (applying Due Process Clause). For present purposes, it is enough to acknowledge that a right under the Fourth Amendment against unreasonable delay in medical care for an arrestee was not clearly established in March 2012. Neither the Supreme Court nor this circuit had announced such a right, and there is no uniform body of authority that might allow us to conclude that the right was clearly established. Nor was it clearly established that a standard of objective reasonableness applies under the Due Process Clause. *Cf. Kingsley v. Hendrickson,* 135 S.Ct. 2466, 2473 (2015). Feltmann is therefore entitled to qualified immunity on Bailey's claim that Feltmann acted unreasonably, and the district court properly dismissed that portion of the complaint. We think it prudent to avoid addressing the proper constitutional standard unnecessarily. *See Camreta v. Greene,* 131 S.Ct. 2020, 2031 (2011). Bailey argues in the alternative that Feltmann's decision to proceed to the jail rather than to a hospital exhibited deliberate indifference to his need for medical attention in violation of his clearly established constitutional rights under the Due Process Clause. Regardless of whether an 'unreasonable' decision to forego treatment would violate the Constitution, this court deemed it clearly established by 2008 that a pretrial detainee (or an arrestee, *see Spencer,* 183 F.3d at 905 n. 3) has a right to be free from deliberately indifferent denials of emergency medical care. *See Thompson v. King,* 730 F.3d 742, 750 (8th Cir.2013). Bailey's claim fails, however, because he has not produced sufficient evidence to support a finding that Feltmann violated that right.")

Wright v. United States, 813 F.3d 689, 696-99 (8th Cir. 2015) ("Recently, in *Hollingsworth v. City of St. Ann,* we determined that it was not clearly established in July 2009 that the use of a Taser resulting in only *de minimis* injury violated the Fourth Amendment. . . Despite a Taser's 'unique capability to cause high levels of pain without long-term injury, "we have not categorized the Taser as an implement of force whose use establishes, as a matter of law, more than *de minimis* injury."'.

. In April 2009, when the events at issue in this case transpired, the state of the law was no different. . . . Therefore, the Marshals are entitled to qualified immunity on Wright's excessive force claim. The district court, despite the Marshals' failure to argue the clearly established issue, cited to our decision in *Shekleton v. Eichenberger* in support of the court's conclusion that the tasering of Wright was excessive force in violation of clearly established law at the time. . . .The facts in *Shekleton* are distinguishable from those in this case in that a Grand Jury had indicted Vinol Wilson for several felonies. . . He was considered armed and dangerous. In contrast, the suspect in *Shekleton* was arrested for public intoxication, a misdemeanor. . .. Thus, our holding in *Shekleton* does not change our finding that the state of the law in April 2009 was such that a reasonable officer would not have had fair warning that using a single Tazer shock against a suspected felon would have violated clearly established Constitutional rights. Accordingly, we hold that the Marshals are entitled to qualified immunity on Wright's excessive force claim because it was not clearly established in April 2009 that the use of a Tazer against a suspected armed and dangerous felon violated the Fourth Amendment. . . . Wright was held for up to twenty minutes after the Marshals realized that he was not Vinol Wilson. Under the totality of circumstances, we conclude the delay in releasing Wright was reasonable. . . . The Fourth Amendment does not demand perfection from law enforcement officers; it only requires that their conduct be reasonable under the totality of the circumstances. The twenty-minute detention was not an unreasonable seizure under the Fourth Amendment, and therefore the Marshals are entitled to summary judgment on Wright's claim for unreasonable seizure.")

Hollingsworth v. City of St. Ann, 800 F.3d 985, 990-91 (8th Cir. 2015) ("The issue in this case is whether McCallum, having justification to use *some* force to cause Hollingsworth to change into an orange jumpsuit, violated her clearly established rights by deploying the Taser rather than employing other means such as physical restraint and forcible removal of clothing. . . As we have explained in other decisions, it was an open question at the time of this incident in July 2009 whether a plaintiff must demonstrate greater than *de minimis* injury to establish an excessive force claim under the Fourth Amendment. . . The district court, citing a concession by Hollingsworth, concluded that her injuries were *de minimis,* and she does not dispute that point on appeal. Therefore, Hollingsworth can prevail only if it was clearly established in July 2009 that use of a Taser that caused *de minimis* injury violated the Fourth Amendment. Hollingsworth's claim founders on our decision in *LaCross v. City of Duluth,* 713 F.3d 1155 (8th Cir.2013). *LaCross* held that it was not clearly established in 2006 that an officer's use of a Taser that resulted in no lasting physical injuries or injuries requiring medical care nonetheless could be unreasonable because Tasers caused 'excruciating pain without lasting physical effects.'. . This court held that despite the Taser's unique capability to cause high levels of pain without long-term injury, 'we have not categorized the Taser as an implement of force whose use establishes, as a matter of law, more than *de minimis* injury.'. . We thus concluded it was not clearly established that an officer's use of a Taser, resulting in only *de minimis* injury, was an unconstitutional use of force. . . The law was not materially different in July 2009, so McCallum is entitled to qualified immunity.")

Hollingsworth v. City of St. Ann, 800 F.3d 985, 992-96 (8th Cir. 2015) (Kelly, J., concurring) ("I concur in the decision to affirm the judgment of the district court. I write separately for three reasons. First, to state clearly that, in my belief, Officer McCallum acted unreasonably in tasing Hollingsworth. Second, to highlight my concern that Hollingsworth did not, in fact, concede to the district court that she sustained merely *de minimis* injuries. And third, to explain that while I believe that at the time this event occurred in July 2009, it was clearly established that it was unlawful to use a Taser on an unarmed, secured, and nonthreatening misdemeanant, I recognize that I am constrained by this court's decision in *LaCross,* and thus I concur. . . .The majority allows that 'the actions of one or more officers might have been unreasonable' and does not elaborate further—instead reaching its decision on the second prong of the qualified immunity test. In my view Officer McCallum's actions were unreasonable. . . .As the court notes, the district court summarily concluded that Hollingsworth's injuries were *de minimis* by citing to a 'concession' made by Hollingsworth on this point. . . .Acknowledging that Eighth Circuit precedent may construe her injuries as *de minimis* does not constitute a concession that Hollingsworth agreed her injuries were *de minimis,* particularly when she goes on to argue for a change in the law. . . .It appears from her briefing, however, that Hollingsworth has abandoned any argument that her injuries were above and beyond the injuries alleged in *LaCross,* and thus I agree with the court that she is limited by our ruling in that case. . . .Finally, I write to express my belief that at the time of Hollingworth's tasing in July 2009, it was clearly established that it was unlawful to use a Taser on an unarmed, secured, and nonthreatening misdemeanant. Were I not constrained by precedent, I would decline to extend qualified immunity to Officer McCallum . . . . Each of these cases stands for the proposition that a reasonable officer would have known that the use of a Taser in circumstances similar to the one at present was clearly established as unlawful: *Brown* concerned events that took place in 2005, and *Shekleton* and *DeBoise* concerned separate events that took place in 2008. . . .These holdings, then, must be reconciled with *Chambers,* which holds that prior to 2012, arrestees did not have a clearly established right to be free from unreasonable force that resulted in merely *de minimis* injuries. Rather than ignoring these cases, I read *Brown* and *Shekleton* as support for the view that a Taser, when effectively used, typically results in more than *de minimis* injuries. . ..While I find this court's decision in *LaCross* to be at odds with much of our precedent outlined here, I recognize that its factual similarity to the case at hand, combined with the plaintiff's failure to plead specialized injury, forecloses the conclusion that Hollingsworth suffered greater than *de minimis* injuries. Thus, I concur in the decision of the court.")

Robinson v. Payton, 791 F.3d 824, 829-30 (8th Cir. 2015) ("We find that a reasonable official, standing in Trooper Condley's shoes, would not understand that what he is doing—restraining a hysterical individual on the scene and deciding not to leave the hysterical individual and intervene—violates clearly established law. Trooper Condley neither was plainly incompetent nor did he knowingly violate the law. His decision to stay with Eva and not to intervene did not transgress a bright line. If he left Eva, she could have and likely would have joined the altercation, possibly harming herself or others. . . . Because we do not find it would be clear to a reasonable officer, standing in the shoes of Trooper Condley, that his conduct was unlawful in the present

case, Trooper Condley is entitled to qualified immunity. The district court's denial of qualified immunity is reversed.")

Robinson v. Payton, 791 F.3d 824, 831 (8th Cir. 2015) (Murphy, J., dissenting) ("Trooper Condley was present when Stevens first threatened to tase Matthew, then aimed the taser, and pulled its trigger. Condley did not say or do anything to deescalate the situation. He simply stood by and watched the deputies repeatedly tase the young man. . . Nor did he intervene after Matthew's mother was returned to the patrol car. There is no question that the law is 'clearly established that an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment.'. . Also well established is that 'one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge.'. . Important issues of disputed fact remain on this record as to whether Corporal Condley failed a clearly established duty by not intervening while officers Stevens and Payton fired multiple taser shocks into Matthew's body. The experienced trial judge's denial of qualified immunity should be affirmed.")

Story v. Foote, 782 F.3d 968, 970-73 (8th Cir. 2015) ("The Supreme Court never has resolved whether convicted inmates retain a Fourth Amendment right against unreasonable searches while in custody. The Court in *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), assumed the point for the sake of analysis. . . In *Hudson v. Palmer* . . . the Court held that the Fourth Amendment did not apply to a search of a prison cell, reasoning that '[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.'. . The Seventh Circuit, in the wake of *Hudson,* ruled that inmates retain no right under the Fourth Amendment against visual inspections by prison guards. *Johnson v. Phelan,* 69 F.3d 144, 146–47 (7th Cir.1995). This court, however, has said that 'prison inmates are entitled to Fourth Amendment protection against unreasonable searches of their bodies,' *Levine v. Roebuck,* 550 F.3d 684, 687 (8th Cir.2008), and allowed a Fourth Amendment claim challenging strip searches to proceed in *Seltzer–Bey v. Delo,* 66 F.3d 961, 963 (8th Cir.1995). The Arkansas Supreme Court, as best we can tell, has never addressed the question. The Supreme Court recently has reserved judgment twice on the question whether decisions of a federal court of appeals are a source of clearly established law for purposes of qualified immunity analysis. *See Carroll v. Carman,* —— U.S. ——, 135 S.Ct. 348, 350, 190 L.Ed.2d 311 (2014) (per curiam); *Reichle v. Howards,* —— U.S. ——, 132 S.Ct. 2088, 2094, 182 L.Ed.2d 985 (2012). Following the approach of the Court in those cases, we assume for the sake of analysis that our decisions clearly establish that a convicted inmate has rights under the Fourth Amendment against unreasonable searches of his body. . . .Here, Story alleges that officers conducted a visual body-cavity inspection when Story returned to the Williams facility from outside the institution. Given what the Supreme Court and this court have said about the strong institutional interests in maintaining security, and about the reasonableness of visual body-cavity inspections when detainees enter a facility, Story's allegation of a body-cavity search by itself does not state a claim for the violation of a clearly established right. Story

argues, however, that the manner in which this particular search was conducted violated the Fourth Amendment. He highlights an allegation that a female correctional officer was working in the master control room at the time of the search, and that she viewed the search on a video screen. He cites this court's statement—in a case about a strip search of an arrestee in a motel room—that 'strip searches should be conducted by officials of the same sex as the individual to be searched.' *Richmond v. City of Brooklyn Center,* 490 F.3d 1002, 1008 (8th Cir.2007). The search in this case, consistent with *Richmond's* general admonition, was conducted by male correctional officers. Story does not allege that the male officers knew that female officers would observe the video feed from the master control unit. In any event, the male officers did not violate Story's clearly established rights by conducting the inspection in a location where a female officer also may have viewed the search from the master control room through a video feed from a security camera. This court in *Timm v. Gunter,* 917 F.2d 1093 (8th Cir.1990), held that prison administrators did not violate the Fourth Amendment rights of inmates by allowing intermittent visual surveillance of male inmates by female guards while the inmates used showers and bathrooms or slept without clothing in their cells. Our opinion cited the 'rational connection between sex-neutral visual surveillance of inmates and the goal of prison security,' and observed that staffing adjustments (akin to removing female officers from the master control room during searches in this case) would interfere with equal employment opportunities for women and require significant expenditures by the prison. . . We also have held that the use of cameras to monitor activities from a control booth is reasonable, even when body-cavity searches are involved. . . In light of these precedents, it was not beyond debate that a reasonable correctional officer was forbidden to proceed with a visual body-cavity search in an area monitored by security cameras while a female officer was assigned to the master control unit. . . .We cannot say, however, that Foote's single alleged use of the term 'monkey,' even with its potential racial overtones, is sufficient to allege the violation of a *clearly established* right under the Fourth Amendment. Story cites no supporting case with analogous facts, and recent decisions rejecting Fourth Amendment claims based on verbal abuse alone militate against a conclusion that the alleged.")

Story v. Foote, 782 F.3d 968, 974-76 (8th Cir. 2015) (Bye, J., concurring in part and dissenting in part) ("The majority *sua sponte* raises qualified immunity, 'an affirmative defense that must be pleaded by a defendant official.'. . In the instant matter, the district court did not discuss qualified immunity and the correctional officers do not raise qualified immunity on appeal. The majority does not cite, and I have been unable to find, any cases where the Eighth Circuit *sua sponte* raised the affirmative defense of qualified immunity after the district court dismissed without mention of qualified immunity and the defendants failed to brief a qualified immunity defense on appeal. . . .It appears the majority's *sua sponte* qualified immunity ruling in this case is unique. Unlike before the district court, where the correctional officers had not been served or had an opportunity to respond, on appeal the correctional officers had the opportunity to brief any affirmative defenses they wished to raise. The correctional officers chose not to raise a qualified immunity defense. . . .Even if a qualified immunity defense were properly before this court, I would not find defendants entitled to qualified immunity at this time. . . .A correctional officer's power to strip search an inmate may be broad, but it is not unfettered. . . Second, a reasonable correctional officer would

have known an overly-intrusive and unnecessary strip search was unconstitutional at the time Story was strip searched. It was clearly established law that unreasonable strip searches violate the Fourth Amendment. . . Perhaps after the completion of discovery and briefing by the parties, it will be appropriate to find the correctional officers entitled to qualified immunity against Story's claims; however, the time for such a finding is not now.")

Rodgers v. Knight, 781 F.3d 932, 939-42 (8th Cir. 2015) ("It was not clearly established that the officers, having developed probable cause for a concealed firearms offense, were required to investigate Greg's claim about a Florida permit; our precedent suggests the opposite. . . Although Greg reportedly informed different police officers about the Florida permit during a previous encounter in January 2011, there was no evidence that the arresting officers in August 2011 knew that information. Nor was it clearly established that probable cause was defeated by the 'dwelling unit' exception for carrying concealed weapons in Missouri. No court had construed the meaning of 'dwelling unit or ... premises over which the actor has possession, authority or control,'. . . and there was Missouri authority suggesting that 'a tenant does not have control of the common areas and thus does not possess them.'. . Officers reasonably could have believed that Greg was forbidden to carry a concealed weapon without a permit in common outdoor areas of the apartment complex. Therefore, officers are entitled to qualified immunity for recommending the firearms charge to county prosecutors. . . . As of 2011, an officer was entitled to qualified immunity against this type of retaliation claim if an arrest or prosecution was supported by probable cause. . . The qualified immunity extends further to an action based on at least 'arguable' probable cause. . . For reasons discussed in connection with Greg's Fourth Amendment claims, a reasonable officer in 2011 could have believed that there was probable cause to charge Greg with unlawful use of a firearm based on carrying a concealed weapon or unlawful possession of a firearm as a fugitive from justice. Therefore, the district court was correct to dismiss the First Amendment claims against the officers.")

Parker v. Chard, 777 F.3d 977, 981-82 (8th Cir. 2015) ("Based on *White* and *J.L.*, it was not clearly established that Chard and Illetschko—having corroborated the running asserted in the eyewitness tip, and knowing shoplifting recently occurred—could not reasonably suspect Parker of shoplifting. '[W]hether or not the constitutional rule applied by the court below was correct, it was not beyond debate.'. . The officers are entitled to qualified immunity.")

Reeves v. King, 774 F.3d 430, 433 (8th Cir. 2014) ("We conclude a reasonable correctional officer in Lieutenant King's position would have known, based on *Irving* and *Norman*, labeling Reeves a snitch for reporting on a prison nurse who was bringing contraband into the prison would violate his constitutional right to protection from harm. Accordingly, the district court properly denied qualified immunity to Lieutenant King.")

Williams v. City of Alexander, Ark., 772 F.3d 1307, 1313 (8th Cir. 2014) ("Because a reasonable official would understand that including false information in and omitting relevant information from an affidavit in an effort to punish someone for supporting one's political opponent would

constitute a violation of clearly established constitutional rights, Walters is not entitled to qualified immunity.")

Bates v. Hadden, 576 F. App'x 636, 639 (8th Cir. 2014) ("In a pair of 2001 decisions, we observed that malicious prosecution is not a constitutional injury. . . *Kurtz* and *Technical Ordnance* raise a high hurdle for Bates's § 1983 malicious prosecution claim. . . . Our precedents dictate that Officer Hadden is entitled to qualified immunity as to Bates's malicious prosecution claim. No 'reasonable officials acting in [Officer Hadden's] position would ... have understood they were violating"' Bates's constitutional right against malicious prosecution because no such constitutional right had been clearly established.")

Meehan v. Thompson, 763 F.3d 936, 941, 946, 947 (8th Cir. 2014) ("We conclude that, at the time of Meehan's arrest, the law was not clearly established that a police officer could not constitutionally arrest an individual whom he reasonably believed to be moderately intoxicated and who would otherwise be left alone on a public roadway at night. Thompson asserts that his arrest of Meehan was a valid exercise of his role as a 'community caretaker.'. . We have recognized that it may be reasonable under the Fourth Amendment for a police officer, acting in his capacity as community caretaker, to seize an apparently intoxicated individual 'to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity.'. . Such an arrest is reasonable 'if the "governmental interest in the police officer's exercise of [his] community caretaking function," ... outweighs "the individual's interest in being free from arbitrary government interference."'. . As we made clear in *Winters,* the primary governmental interest underlying the arrest of an intoxicated individual who is not suspected of criminal activity is a concern for safety. . . Meehan asserts that this interest does not justify her arrest because, under clearly established law, her apparent intoxication was too mild to support a reasonable inference that she was a danger to herself or others. We disagree. As we explain below, Thompson reasonably believed that Meehan was at least moderately intoxicated, and the law at the time of Meehan's arrest was not so clear that a reasonable officer would have known that he lacked probable cause to arrest a moderately intoxicated individual in lieu of leaving her alone on a public roadway at night. . . . Meehan also argued to the district court, and the district court concluded, that Thompson used excessive force in frisking Meehan. Meehan does not dispute that Thompson's frisk caused only *de minimis* injury. This fact is fatal to Meehan's excessive force claim because, at the time of her arrest, it was not clearly established that conduct by a police officer that caused only *de minimis* injury could constitute excessive force. We recognized for the first time in *Chambers v. Pennycook,* 641 F.3d 898 (8th Cir.2011), that police conduct that causes only *de minimis* injury could constitute excessive force. We noted, however, that it had previously 'remain [ed] an open question in this circuit whether an excessive force claim requires some minimum level of injury.'. . *Chambers* was handed down on June 6, 2011, more than a month after Meehan was arrested. Meehan thus cannot avail herself of the legal principle articulated in *Chambers.* Meehan argues, however, that the law was clearly established even before *Chambers* that *de minimis* injury could give rise to an excessive force claim. Meehan notes that *Chambers* was the result of an en banc rehearing granted in part because of the petitioner's assertion that the

original panel's holding—that *de minimis* injury could not support an excessive force claim—conflicted with a 2010 Supreme Court case, *Wilkins v. Gaddy,* 559 U.S. 34 (2010). *Wilkins,* however, dealt with a prisoner's right to be free from excessive force under the Eighth Amendment and did not clearly establish that *de minimis* injury could support an excessive force claim under the Fourth Amendment. *Chambers*'s holding was not based on *Wilkins* but on an exhaustive study of case law, a study that no reasonable police officer should have been expected to conduct. . . Meehan does not point to any other specific case enunciating the principle that *de minimis* injury can give rise to an excessive force claim, nor can we find one. . . Because the law was not clear before *Chambers* that police conduct could constitute excessive force even if it caused only *de minimis* injury, Meehan's excessive force claim must fail.")

Jacobson v. McCormick, 763 F.3d 914, 917, 918 (8th Cir. 2014) ("In September 2009, a reasonable officer had a solid basis to believe that strip searching an arrestee was constitutional if there was reasonable suspicion that the detainee possessed contraband. . . The county's policy provided for strip searches based on reasonable suspicion. Jacobson was arrested for driving while impaired. He admitted that he recently smoked a bowl of marijuana, so there was also probable cause to believe that he recently had committed a controlled substance offense. Officers found no drugs in a traditional pat-down search of Jacobson's person while he was clothed. The question confronting the officers under county policy, therefore, was whether they had reasonable suspicion that Jacobson may have concealed contraband in a private area that could be viewed only through a strip search. Two circuits had held by 2009 that an arrest based on evidence that a person was under the influence of drugs did not provide reasonable suspicion for a strip search. . . . In 2009, this court had never addressed the constitutionality of a strip search premised on an arrestee's recent use of drugs, and a close reading of our precedent left open the possibility that drug-related offenses or conduct might give rise to reasonable suspicion.")

Blazek v. City of Iowa City, 761 F.3d 920, 924-26 (8th Cir. 2014) ("In our view, the narrower scope of qualified immunity urged by the partial dissenting opinion would impose an unreasonable burden on the police officers and cannot be squared with the more robust version of the doctrine espoused recently by the Supreme Court. Blazek must show that 'every reasonable official would have understood that what he is doing violates' a constitutional right, . . . and that the constitutional question was 'beyond debate.'. . We must not 'define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.' *Plumhoff v. Rickard,* 134 S.Ct. 2012, 2023 (2014) . . . It is clear in light of *Wertish* that if the officers had lifted the belligerent Blazek off his feet, thrown him to the ground, and jumped on his back to handcuff him, without causing the alleged injury to his ankle or shoulder, then the officers would have acted reasonably or at least be entitled to qualified immunity. But the partial dissent would hold that if Blazek instead had one foot planted on the floor, and the torque of the throw to the ground caused his ankle to twist and fracture, then the officers are subject to suit and liability for damages. Similarly, an awkward landing that caused a separated shoulder would trigger liability, but a smoother alighting that resulted in ordinary bruising would not. And if the throw had caused merely a sprained ankle with no fracture, then

who knows? Immunity from suit and liability for damages would depend on whether a reviewing judge later decides that use of the forceful throw allowed in *Wertish* caused an unacceptable degree of injury. Qualified immunity is designed to free police officers from the risk of suit and liability based on such fine distinctions. One can debate the Fourth Amendment ruling in *Wertish,*. . . but taking the decision as a given, it is unrealistic to expect a police officer, in the heat of the moment, to discern whether a particular ankle injury would result from a takedown or to plan a careful landing for the detainee's shoulder. The same goes for the force applied to Blazek's arms during the handcuffing. A reasonable officer reading the annals of the federal courts in 2009 would know that the technique like that applied here—where an officer 'grabbed plaintiff's arm, twisted it around plaintiff's back, jerking it up high to the shoulder'—was 'a relatively common and ordinarily accepted non-excessive way to detain an arrestee.'. . . Yet the partial dissent would hold that if the detainee complains of no pain during the incident, but discovers later that otherwise permissible 'twisting' of his arm upward and behind his back caused a tear in his rotator cuff, then the officers have violated a clearly established right and are subject to suit and liability for damages. It was not 'beyond debate' in 2009 that the constitutionality of the officers' actions here depended on whether their use of a 'common and ordinarily accepted' handcuffing method caused injury to the detainee's shoulder area. The officers' jerking of Blazek from the floor to his bed, however, presents a discrete use of force for consideration under the Fourth Amendment. At that point in the encounter, Blazek was handcuffed and under control. In his telling, Blazek was not resisting and posed no threat to the officers. He was not suspected of any serious offense; he was detained only because he was present at Feldhacker's residence and would not stay seated and identify himself when questioned. Nonetheless, the officers allegedly 'jerked' him up by the arms with sufficient force to cause serious injury to his shoulder area. It was clearly established in 2009 that when a person is subdued and restrained with handcuffs, a 'gratuitous and completely unnecessary act of violence' is unreasonable and violates the Fourth Amendment. . . Pepper spray administered in the face of a subdued arrestee . . . and handcuffs applied so tightly—despite repeated complaints of pain—that they broke the wrist of a compliant arrestee, . . . were known to violate the Fourth Amendment. There is no prior case involving Blazek's precise factual scenario, but he need not show that the 'very action in question has previously been held unlawful' to overcome qualified immunity, as long as the unlawfulness was apparent in light of preexisting law. . . Reasonable officers surely could bring Blazek up from the floor in some manner after he was handcuffed, and officers are not required to treat detainees as gently as possible. . . But Blazek's allegation is that the officers did more than lift him up roughly. If Blazek can prove at trial that he was subdued and compliant, but that the officers grabbed him by the arms and gratuitously 'jerked' him from the floor onto the bed, using enough violent force to cause significant injury, then we agree with the district court that a reasonable jury could find a violation of the Fourth Amendment. And the law was sufficiently developed to show that such a violation—allegedly involving unnecessary violence against a handcuffed and compliant detainee—would contravene clearly established law as of 2009.")

Blazek v. City of Iowa City, 761 F.3d 920, 926-31 (8th Cir. 2014) (Gruender, J., concurring in part and dissenting in part) ("I concur in the court's opinion insofar as it affirms the denial of

qualified immunity to Officers Santiago and Roth for their act of jerking Blazek from the floor and dismisses the appeal of Blazek's state-law claims. However, I respectfully dissent from the court's decision to grant qualified immunity to the officers for their use of force to handcuff Blazek, which a reasonable jury could conclude caused a separated shoulder, a torn rotator cuff, and a fractured ankle. . . .Considering the totality of the circumstances—including Officer Santiago's lack of suspicion that Blazek had committed a crime, the fact that Blazek was wearing a bath towel, the degree of Blazek's passive resistance, and the extent of his injuries—a reasonable jury could conclude that the officers' applications of force during the entire sequence of events—grabbing, twisting, throwing, jumping on, holding, and jerking—violated the Fourth Amendment. . . . This brings me to the legal issue on which the court and I disagree: whether the constitutional right implicated by Blazek's handcuffing was clearly established at the time of the incident. This determination requires discerning whether '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . A plaintiff need not show that 'the very action in question has previously been held unlawful,'. . . but he must establish that the unlawfulness was apparent in light of preexisting law. . . . This circuit applies a 'flexible standard' in conducting this inquiry, 'requiring some, but not precise factual correspondence with precedent, and demanding that officials apply general, well-developed legal principles.'. . Judged by this standard, Officers Santiago and Roth violated a clearly established constitutional right. *Kukla,* a then-existing precedent in this circuit, and the analogous decisions of our sister circuits demonstrate as much. By distinguishing *Kukla* on its facts, . . . the court mandates too much factual correspondence between past cases and the present scenario. *Kukla* is far more analogous to this case than the court allows. . . .That the constitutional right at issue was clearly established is further supported by the then-existing views of our sister circuits. The First, Second, and Sixth Circuits have reached similar conclusions to that in *Kukla,* and the First Circuit even cited *Kukla* in doing so. . . . Notwithstanding *Kukla* and other analogous decisions, the court artificially separates an unbroken sequence of events that involved multiple applications of force—grabbing, twisting, throwing, jumping on, holding, and jerking—to grant qualified immunity for all but one of these uses of force. The court takes this step even though we cannot determine which use (or uses) of force caused Blazek to suffer a separated shoulder, a torn rotator cuff, and a fractured ankle. The court justifies its unusual bifurcation of this incident by concluding that of the applications of force at issue here, a reasonable officer would have understood that only one of them—the jerking—violates the Constitution. Because precedent clearly establishes that a reasonable officer would not draw this distinction, I respectfully dissent.")

Hemminghaus v. Missouri, 756 F.3d 1100, 1114 & n.12 (8th Cir. 2014) ("'At least five circuits have concluded that, because *Pickering's* constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered "clearly established" for purposes of ... qualified immunity.' *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir.1992). . . . This is not to say *Pickering* balancing *never* allows for clearly established law in the qualified immunity analysis.")

Nord v. Walsh County, 757 F.3d 734, 739, 743 (8th Cir. 2014) ("We begin with the first step of the qualified immunity inquiry. In this limited context, Wild concedes that Nord was terminated

in violation of his First Amendment rights under the first prong of the investigation. Assuming, without holding, that this is true, we conclude that step one of the qualified immunity analysis has been sufficiently established for purposes of further inquiry. Despite this concession, Wild contends that given the circumstances of this dispute, qualified immunity nonetheless protects him because his act of terminating Nord did not violate a 'clearly established statutory or constitutional right[ ] of which a reasonable person would have known.'. . .Based upon the foregoing analysis, we conclude that use of the *Pickering/Connick* balancing test is clearly called for in this dispute. And, based upon the use of such test, we conclude (1) that at least some of Nord's campaign speech does not merit First Amendment protection; (2) that even if Nord's speech was fully protected by the Constitution, Wild could have reasonably believed that the speech would be at least potentially damaging to and disruptive of the discipline and harmony of and among co-workers in the sheriff's office and detrimental to the close working relationships and personal loyalties necessary for an effective and trusted local policing operation . . . and, the above-mentioned adverse employer-employee circumstance did not need to become manifest in order to be acted upon promptly by Wild. . . (3) that applying the second step of the qualified immunity inquiry, and considering North Dakota law and well-established state and federal jurisprudence, and especially the advice given by the Walsh County attorney and its human resources consultant, Sheriff Wild could have logically and rationally believed that his decision to terminate Nord was well within the breathing room accorded him as a public official in making a reasonable, even if mistaken, judgment under the circumstances. . . and thus (4) that Wild, as a matter of law, is entitled to qualified immunity to shield him from any liability claimed to have arisen through violation of the First Amendment as asserted by Nord.")

Nord v. Walsh County, 757 F.3d 734, 747-50 (8th Cir. 2014) (Shepherd, J., dissenting) ("Because the *Pickering/Connick* test informs the first step of the qualified immunity analysis and the majority has already acknowledged that the first step has been met, in my opinion, the majority erred in stating that 'we must determine whether or not Nord's particular speech was protected by the First Amendment,' *ante* at 5, and, thus, was mistaken in its conclusion that, under the *Pickering/Connick* balancing test, Nord's rights were not clearly established. Consistent with a proper qualified immunity framework, I would hold that Nord's First Amendment rights were clearly established and the qualified immunity defense fails. . . .Even if we were to consider Nord's positional status and apply the *Elrod/Branti* test instead, I find unpersuasive the majority's reliance on a Fourth Circuit case in determining that Nord holds a position of confidence. This court has acknowledged that although 'other circuits have determined that deputy sheriffs held policymaking positions and could be transferred for political reasons, ... these cases are not controlling here because they turned on state law provisions in different jurisdictions.'. . We have to look to the applicable state laws and the actual duties assigned to deputy sheriffs in Walsh County, North Dakota to determine whether political affiliation is essential to Nord's effective performance of his position as deputy sheriff. . .Here, Nord's duties included the routine tasks of general police work, prevention and detection of crime, protection of life and property, and the performance of duties as assigned. Nothing in the Walsh County Deputy Sheriff's job description empowers the deputy with any discretionary function nor can it be said, based on this job description, that the

deputy sheriff ‘ “performs virtually all the duties attendant to the actual duties of the sheriff himself.”’. . Viewing the deputy sheriff and sheriff’s relationship in the abstract is insufficient to establish the type of relationship necessary under *Elrod/Branti*. . . .Nord was fired in violation of his First Amendment rights which were clearly established under the law. He did not hold a confidential or policymaking position, nor is political affiliation essential to the performance of his duties. Accordingly, the Appellants have failed to satisfy the elements of the qualified immunity defense.”)

Edwards v. Byrd, 750 F.3d 728, 731 (8th Cir. 2014) (“The facts that the district court found to be supported by the record for the purpose of summary judgment would support a claim of excessive force in violation of the Eighth Amendment. . . . The district court found for the purpose of summary judgment that, immediately before the guards entered Pod B, the plaintiffs were lying submissively, face-down, in the pod. The guards could see this through the window in the pod door. . . The plaintiffs did not resist or otherwise act aggressively. Nevertheless, the guards employed a flash-bang grenade in close quarters, kicked the compliant detainees, and shot them with bean-bag guns. These facts, if proved, could show that the guards did not apply this force in order to restore order or discipline but rather for the sole—and impermissible—purpose of inflicting unjustified harm on the detainees. At the time of the incident, it was clearly established that such conduct would violate the Eighth Amendment's proscription of cruel and unusual punishment.”)

Ellis v. Houston, 742 F.3d 307, 325, 326 (8th Cir. 2014) (“Long before the actions of supervisors in this case, the Supreme Court had recognized employee rights to be free from racial harassment and retaliation in *Jones*, 541 U.S. at 383, and *CBOCS*, 553 U.S. at 451. In light of this preexisting law it was readily apparent that a ‘continuous racially invidious climate’ in a penitentiary, *Snell*, 782 F.2d at 1099, and undertaking ‘systematic[ ]’ retaliation following complaints, *Kim*, 123 F.3d at 1052, would violate clearly established rights. . . .The black officers presented evidence here that the Nebraska penitentiary’s own administrative regulation 112.07 recognized that inflammatory racial comments and jokes violate employee rights. Any reasonable supervisor would have recognized that racial slurs and remarks like those used here would illegally affect the working environment. . . As in the prison in *Snell*, there is also evidence that conduct by the supervisors at the Nebraska penitentiary caused black guards to question whether white officers would come to their aid if they were in danger. . . The evidence in this case is nearly identical to that shown to violate the law in *Allen*, including black officers being monitored more closely than white employees and told not to congregate in the yard, receiving baseless citations, and being denied career advancement opportunities. . . .We conclude that existing precedent put the supervisors on notice that such actions would violate constitutional rights. A reasonable prison supervisor would have understood that permitting and participating in racially derisive remarks and assigning inferior work assignments would violate the black officers’ rights under §§ 1981 and 1983. Based on the record evidence, Sergeant Miles has not shown that he is entitled to qualified immunity on the black officers’ harassment claims, nor have Lieutenants Stoner and Haney shown they are entitled to qualified immunity on the retaliation claims of Officer Ellis.”)

Spencer v. Jackson County Mo., 738 F.3d 907, 913 (8th Cir. 2013) ("The right of an inmate to file a lawsuit is well established, . . . as is an inmate's First Amendment right to access the prison grievance process . . . . Since Spencer has raised genuine issues of material fact as to whether defendants violated his First Amendment rights, the district court's grant of qualified immunity to the defendants was premature and must be reversed.")

Burton v. Arkansas Secretary of State, 737 F.3d 1219, 1236, 1237 (8th Cir. 2013) ("We have not yet addressed whether a plaintiff may bring a retaliation claim for complaining of discrimination 'under the guise of equal protection' pursuant to § 1983. . . . We conclude that the district court 'erred in denying [Chief Hedden] qualified immunity on [Burton's] equal protection claim for retaliation [under § 1983].'. . 'The right to be free from retaliation is clearly established as a *first amendment* right and as a statutory right under Title VII; but no clearly established right exists under the *equal protection* clause to be free from retaliation.'. . We have only recognized that '§ 1983 provides a vehicle for redressing claims of retaliation *on the basis of the First Amendment.*'. . 'Because no established right exists under the equal protection clause to be free from retaliation, we reverse the district court's denial of qualified immunity on [Burton's] equal-protection retaliation claim.'")

Scott v. Baldwin, 720 F.3d 1034, 1037 (8th Cir. 2013) ("The plaintiffs cite no authority that clearly required Baldwin to recalculate their release dates within a certain time. Under the circumstances, the law did not fairly warn him that the amount of time spent recalculating thousands of release dates, including the plaintiffs', recklessly disregarded their constitutional right to release. . . Because Baldwin's conduct was not clearly 'unlawful in the situation he confronted,' he is entitled to qualified immunity.")

Roberts v. City of Omaha, 723 F.3d 966, 972-74 (8th Cir. 2013) ("The qualified immunity defense is available for ADA and Rehabilitation Act claims. *See Gorman v. Bartch*, 152 F.3d 907, 914 (8th Cir.1998); *Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir.1994). Therefore, the officers were entitled to summary judgment unless Roberts produced evidence showing the officers violated a clearly established right under these statutes. . . . Taking all disputed facts in Roberts's favor, nothing in the law clearly established the ADA and Rehabilitation Act applied to the undisputed circumstances of this case. No reasonable officer could have known the ADA and Rehabilitation Act imposed a duty on the officers to accommodate Roberts's disability while the officers were attempting to secure Roberts and take him into custody for his own safety and the safety of the officers and Roberts's family. . .The officers are entitled to qualified immunity on Roberts's ADA and Rehabilitation Act claims. . . . [On Fourth Amendment claim] The district court found a genuine dispute of material fact regarding whether Roberts posed an objectively reasonable threat of violence during the entire encounter. Some evidence intimates Officer Martinec fired his weapon at Roberts several times, paused, and fired several more times, possibly shooting Roberts in the back. We are bound by the district court's evidence-supported factual findings for purposes of Officer Martinec's appeal.")

S.L. ex rel. Lenderman v. St. Louis Metropolitan Police Dept. Bd. of Police Com'rs, 725 F.3d 843, 853, 854 (8th Cir. 2013) ("We conclude that conspiring to prevent a plaintiff from bringing a viable § 1983 action by covering up a false arrest . . . may amount to a violation of a clearly established right. . . .A reasonable officer would be aware that it is impermissible to assist in falsifying an arrest report or hinder an investigation into the underlying misconduct. Nor is this a circumstance in which officers unwittingly accepted a falsified arrest report or disclosed details of an investigation. Rather, Isshawn–O'Quinn instructed Lorthridge to fabricate portions of the report, resulting in her inserting a false witness, false place of arrest, and false incident summary. He then approved the modified report without question or comment. Drawing 'reasonable inferences in [S.L.'s] favor,'. . . the record similarly supports that Harris disclosed confidential information to Arnold in order to assist her in concealing facts sought by investigators. We conclude that the material facts identified by the district court and the record viewed in the light most favorable to S.L. would support a conclusion that Harris and Isshawn–O'Quinn conspired with Arnold and Lorthridge to prevent S.L. from filing a § 1983 action following her false arrest, which amounted to participation in a § 1983 conspiracy. The record at this stage is sufficient for a reasonable jury to find that Harris and Isshawn–O'Quinn violated S.L.'s clearly established constitutional rights, and the district court accordingly did not err in denying qualified immunity to them.")

Hess v. Ables, 714 F.3d 1048, 1052, 1053 (8th Cir. 2013) ("There are two primary obstacles to *Lesher's* capacity to serve as clearly established law for the purposes of this qualified immunity analysis. First, *Lesher's* holding establishes that a municipal employer cannot attempt to compel one of its employees to relinquish his Fourth Amendment rights. But as Hess concedes, it was a state trooper, not her employer the City, who requested the ostensibly unreasonable search. Second, there was no coercion under threat of termination; neither Lawson nor Ables ever threatened Hess in an attempt to convince her to voluntarily undergo an unconstitutional search. Although Lawson directed Hess to leave work and go to Trooper Chastain's office, Hess does not allege that Lawson told her to go to the police station and submit to a drug test or that Lawson warned her she would be fired if she refused such a test. Instead, it was only *after* Hess had refused the test that Lawson conferred with Ables and terminated Hess's employment. Hess argues that these differences are too minute to matter, but 'the right allegedly violated must be defined at the appropriate level of specificity.'. . While 'officials can still be on notice that their conduct violates established law even in novel factual circumstances,' prior cases must give officers 'fair warning that their alleged [conduct] was unconstitutional.'. . *Lesher* simply does not provide fair warning. In light of existing law on February 23, 2010, it would not have been clear to a reasonable official in the position of Lawson or Ables that it was unconstitutional to fire someone after she refused a state trooper's request to take a drug test for law enforcement purposes. Accordingly, we agree with the district court's conclusion. Even assuming the termination violated Hess's Fourth Amendment rights, it was not clearly established at the time of the incident that such an action was unconstitutional, and therefore the defendants were entitled to qualified immunity.")

Atkinson v. City of Mountain View, Mo., 709 F.3d 1201, 1212-14 (8th Cir. 2013) ("Viewing the record in the light most favorable to Atkinson, we decide the unlawfulness of Sanders' charging Atkinson 'would be clear to a reasonable officer' in Sanders' situation. . . . On August 31, 2007, Sanders had 'fair warning' that charging at a non-resisting individual without first identifying himself as a police officer was unconstitutional in the context of an arrest. . . .We doubt a reasonable officer in Sanders' position would have needed to 'consult[ ] a casebook,'. . . to recognize the unreasonableness of using enough force to cause three broken ribs, a punctured lung, and repeated pneumothorax against a man who was objectively using peaceful means to prevent a fight. . . Even if the conduct which cast Sanders in the role of 'irate' stranger was itself reasonable, a reasonable officer finding himself in that role would have sought to pacify—not escalate—the tense situation. A reasonable officer would recognize that his own conduct—shoving a father who was trying to extract his son from a fight and announcing 'I'm the motherf[——] er who says who does what around here'—directly contributed to the tense situation. But had Sanders perused the United States Reports on August 31, 2007, he would have discovered the Supreme Court's 1989 decision in *Graham,* showing his extreme use of force against Atkinson was unconstitutional. . . .The 'linchpin' of our decision is not that Sanders should have known the Fourth Amendment required him 'to identify himself as an officer before using force to carry out an arrest in public.'. . We deny Sanders qualified immunity because as in *Gainor, Lambert, Kukla,* and *Samuelson,* there is a genuine dispute of material fact whether *any* of the three *Graham* factors reasonably justified slamming Atkinson into the side of a truck with enough force to break three ribs and puncture a lung. Our emphasis on Sanders' failure to identify himself flows directly from *Graham's* third factor: it is convincing *evidence* that Atkinson was neither 'actively resisting arrest [n]or attempting to evade arrest by flight.'. . Had Sanders clearly identified himself and Atkinson still intervened or refused to return the cell phone, Sanders might reasonably expect Atkinson would 'actively resist[ ] arrest,'. . . But if Atkinson's account is accepted, then Sanders could not reasonably expect active resistance to an unidentified officer. It is not for us, at the summary judgment stage, to construe the evidence in Sanders' favor.")

Atkinson v. City of Mountain View, Mo., 709 F.3d 1201, 1219, 1220 (8th Cir. 2013) (Colloton, J., concurring in part and dissenting in part) ("The doctrine of qualified immunity requires an exercise of judicial restraint that sometimes can be discomfiting. Even when a court believes that a defendant violated the constitutional rights of a plaintiff, the court is required to dismiss the plaintiff's claim if the unconstitutionality of the defendant's conduct was not clearly established. Perhaps this is an appropriate case in which to announce a rule that a police officer must identify himself before using more than *de minimis* force to complete an arrest, if it is reasonable to believe that self-identification would obviate the need to use force. . . . But the rule announced by the court today was not clearly established in 2007, and the putative unlawfulness of Sanders's action was not apparent under pre-existing law. . . I would affirm the judgment.")

Stickley v. Byrd, 703 F.3d 421, 423, 424 (8th Cir. 2013) ("Stickley broadly asserts that the denial of adequate toilet paper violated his constitutional rights. We must, however, review the totality of the circumstances at issue. . . Although Stickley exhausted his supply before receiving an

additional roll the following week, he was not always without toilet paper. When he did run out of toilet paper, he was able to clean himself by taking a shower. The Seventh Circuit has concluded that a prisoner's deprivation of toilet paper for five days, though 'merit[ing] some management criticism,' did not rise to the level of a constitutional violation. . . This holding is consistent with our precedent. . . We conclude that, given the amount of toilet paper afforded him, the limited time in which he went without toilet paper, and his ability to attend to his hygiene needs at those times, Stickley's constitutional rights were not violated by the denial of additional toilet paper. . . Whether the denial of a request for additional toilet paper or similar hygiene items might in some circumstances constitute a constitutional violation is a question we need not resolve today. We hold only that, in the circumstances presented in this case, the Defendants' refusal to grant Stickley's request for additional toilet paper did not violate any clearly established right. Accordingly, the Defendants are entitled to qualified immunity.")

Sutton v. Bailey, 702 F.3d 444, 449 (8th Cir. 2012) ("[T]he issue here is qualified immunity from Sutton's claims of inadequate pre-termination process. Appellants were aware of the University's grievance procedures, but they were not responsible for their adequacy. Appellants provided Sutton the essential elements of the pre-termination hearing *Loudermill* and our cases applying *Loudermill* required. It was reasonable for them to assume that Sutton, if he wished to contest the termination, would file a grievance and that the grievance procedures would comport with the minimum post-termination procedures that the Due Process Clause mandates. . . . Whether the University's post-termination process was so inadequate that due process required more than an informal pre-termination hearing is an uncertain issue that turns on 'a balancing of the competing interests at stake' in a particular case. . . Because the constitutional adequacy of post-termination procedures therefore cannot be assessed in a vacuum, the *possible* inadequacy of the post-termination procedures Sutton failed to invoke cannot, as a matter of law, be a proper basis for denying qualified immunity from individual-capacity damage claims based entirely on the alleged inadequacy of the pre-termination process the decision-makers provided.")

Winslow v. Smith, 696 F.3d 716, 738, 739 (8th Cir. 2012) ("Defendants do not dispute that the right to be free from the use of false evidence to secure a conviction was clearly established in 1989, nor could they. . . Instead, the parties dispute whether reasonable officers in 1989 should have known that recklessly investigating a crime violated clearly established law. We have previously addressed this issue in *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir.2001). In *Wilson,* the plaintiff brought a section 1983 civil rights action against law enforcement officials for their conduct in a murder investigation which led to his wrongful conviction. We affirmed the district court's denial of qualified immunity to the defendants, recognizing that 'the liberty interest involved ... is the interest in obtaining fair criminal proceedings.' *Wilson,* 260 F.3d at 956 n. 8. In *Wilson,* we noted such a right had previously been recognized in *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), where suppression of exculpatory evidence violated due process, and *Napue v. Illinois,* 360 U.S. at 269, 79 S.Ct. 1173, where use of false evidence at trial violated due process. *Wilson,* 260 F.3d at 956 n. 8. As a result, '[l]aw enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and

prosecutions fairly.' *Id.* at 957. Here, the district court held that the right to be free from a reckless investigation was not clearly established in 1989. In reaching this result, the district court interpreted *Wilson* as not deciding whether a right to be free from reckless investigatory police work was clearly established in 1986 because the appellants '[did] not challenge the district court conclusion that the right was clearly established at the time of the alleged violation.' The district court is correct that in *Wilson* the appellants conceded that 'intentional acts of failing to investigate other leads would violate due process.' *Wilson*, 260 F.3d at 955. However, the appellants still argued that 'allegations or evidence of recklessness [were] insufficient to state a claim.' *Id.* We rejected their argument and held that the plaintiff's claim based on a reckless investigation in 1986 was actionable. *Id.* at 957. Pursuant to *Wilson*, then, a due process right against a reckless investigation was clearly established in 1986. As a result, Plaintiffs' right to be free from a reckless investigation was clearly established three years later in 1989.")

Williams v. Herron, 687 F.3d 971, 978 (8th Cir. 2012) ("Herron attempts to distinguish his case on appeal by arguing that we must limit our clearly established right analysis to cases involving section 1983 and qualified immunity; he further asserts that the type of claim brought by Williams has never given rise to section 1983 liability. We have previously held that section 1983 sexual-harassment claims are treated the same as sexual-harassment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. See Moore v. Forrest City Sch. Dist.*, 524 F.3d 879, 883 (8th Cir.2008); *Weger v. City of Ladue*, 500 F.3d 710, 717 n. 4 (8th Cir.2007); *Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir.2003); *see also Wright*, 417 F.3d at 884–85 (listing cases). It should be no surprise that we apply the same treatment here, making Title VII sexual-harassment cases relevant to our determination. As explained above, a qualified-immunity analysis does not augment a plaintiff's burden to show her hostile-work-environment claim. Thus, because our claim analysis is the same regardless of whether qualified immunity is implicated, we may rely on cases not involving qualified immunity when determining whether a violation is clearly established.")

Burke v. Sullivan, 677 F.3d 367, 372 (8th Cir. 2012) ("Because the instant matter concerns a claim of qualified immunity, not a motion to suppress evidence, we need not reach the issue of whether the officers violated the dictates of the Fourth Amendment. . . .Based on the several facts known to the officers, it was reasonable for them to conclude their warrantless entry into Burke's home was lawful under either the emergency aid exception or the community caretaker exception. Jay had become highly intoxicated. Jay refused to leave the neighbor's party. Jay would not cooperate with Burke when she tried to take him home and was verbally abusive to Burke. Jay forcefully pushed Burke against a wall. Jay was involved in a physical altercation with one of the party guests, seriously biting him. Jay kicked and broke a table. Jay was known to use illegal drugs and may have been under the influence of illegal drugs. Jay went into Burke's house across the street immediately before the officers' arrival. There was no response when the officers attempted to contact Burke by knocking on her door, shouting, shining a flashlight inside, and telephoning the residence. Burke, who had been thrown against a wall by Jay, was now in the home alone with a violent suspect. When viewed collectively, these facts could lead a reasonable police officer to conclude there was either a threat of violence or an emergency requiring attention. . . . Contrary to

Burke's assertion, *Smith v. Kansas City, Mo. Police Department*, 586 F.3d 576 (8th Cir.2009) does not dictate a different result. In *Smith*, we determined a police officer was not entitled to qualified immunity when the officer entered the home of an unarmed domestic violence suspect without a warrant. . . In reaching our decision, we gave significant weight to the fact the officer had no information any victim or potential victim was inside the home. . . In Burke's case, the officers had specific information a potential victim, Burke, was inside the home with Jay, the violent suspect, whose erratic behavior generated the domestic disturbance call. Jay had already been involved in violent encounters with Burke and LaRose. Given these facts, it was reasonable for the officers to conclude their warrantless entry into Burke's home was lawful. . . In addition, our court did not decide *Smith* until November 2009, over four months after the officers entered Burke's home. As such, *Smith* was not part of the established law when the officers entered Burke's home.")

Wagner v. Jones, 664 F.3d 259, 273-75 (8th Cir. 2011) ("The Supreme Court decided *Rutan* in 1990. Dean Jones does not contend that either the full-time or adjunct LAWR positions were policymaking or confidential positions and acknowledges that Wagner had a First Amendment right not to have her hiring decision based on her political beliefs and associations. Thus, Wagner has met her burden to prove that, at the time the hiring decisions were made, the law was clearly established that an employee seeking employment with the state cannot be denied a job based on her political associations or beliefs unless the position is a policymaking or confidential position. Because Wagner has shown that the First Amendment generally prohibits a state from basing its hiring decision on political beliefs or associations, the question now is 'whether a reasonable [dean] could have believed [not hiring Wagner] to be lawful, in light of clearly established law and the information [that the dean] possessed.'. . Dean Jones had several indications that Wagner's political beliefs and associations may have played a role in the faculty's hiring decisions. Only one law school faculty member out of 50 is a registered Republican. As dean, Dean Jones generally should have been aware of her faculty's point of view and its political tendencies. Associate Dean Andersen contacted Dean Jones before Wagner interviewed for the full-time position and relayed Wagner's concerns about whether her politics would make it difficult for her to be hired. Dean Jones apparently did nothing to ensure that the faculty did not impermissibly consider Wagner's politics in making its recommendation as to whom she should hire even though Dean Jones was present for the faculty discussion on January 25, 2007. After the faculty voted not to recommend Wagner for the full-time position, Associate Dean Carlson sent an e-mail to Dean Jones questioning whether Wagner's politics played a role in the faculty's vote and if Wagner's politics would play a role in voting on whether she could teach the summer LAWR program or serve as an adjunct. Dean Jones apparently completed no further investigation other than speaking to Associate Dean Carlson. More importantly, Dean Jones took no steps to ensure that the faculty did not take Wagner's political associations and beliefs into consideration when the faculty voted on whether to recommend her for an adjunct LAWR position. Dean Jones supported Wagner's serving as an adjunct instructor because she asked Janis to follow up with Wagner to determine whether she was interested in the adjunct position. But Dean Jones refused to hire Wagner and instead relied on the faculty's recommendations. Dean Jones did not provide Wagner with any

explanation as to why she chose not to hire her for any of the adjunct positions. Dean Jones argues that the University has a standard policy for hiring law school faculty. The Committee receives the applications, screens the candidates, conducts the initial interviews, and then chooses candidates for a full-day interview. The faculty attends the job talk portion of the candidate's full-day interview and votes on whether to recommend hiring candidates to the dean. Dean Jones argues that as the dean, she has to hire the person whom the faculty recommends and that this has been the practice for the last 50 years. The district court found 'that Jones acted in strict conformity with longstanding hiring policy' and 'deans routinely and consistently exercised no independent personal judgment in making hiring decisions but acted entirely on the advice and recommendations of a Faculty Appointments Committee.' Wagner, however, presented evidence that at least one other dean in the past 50 years chose not to hire the person whom the faculty recommended. In her deposition, Dean Jones also conceded that she was free to refuse to hire the person recommended by the faculty and would do so in unusual circumstances . . . . Whether Dean Jones had the ability to hire Wagner absent the faculty's vote is a genuine issue of material fact that the jury, not the court, should decide. Furthermore, Dean Jones was notified that the 'process' may not have been working properly and the faculty may have violated the First Amendment, but she still made her hiring decision based solely on the faculty's suggestions. By her own admission, Dean Jones had the ability to hire someone whom the faculty had not recommended but chose not to do so. Dean Jones's conduct confirmed the faculty's recommendations, which a jury ultimately could conclude violated the First Amendment. Consequently, Dean Jones has not shown that a reasonable university dean in her position would have believed that failing to hire Wagner was lawful in light of clearly established law.")

Mathers v. Wright, 636 F.3d 396, 402 (8th Cir. 2011) ("[W]e conclude that it was clearly established that a school official may not treat a student differently from her similarly situated peers when such conduct exceeds the scope of professionally acceptable choices and stems from an improper personal motivation. This holding is consistent with decisions from other courts that have denied qualified immunity to a school official accused of discriminating against a student in the absence of a rational basis to do so. . . Our holding is narrow. Looking no further than the face of the complaint and accepting as true all allegations therein, we conclude that the allegations regarding Wright's treatment of J.S.J. state an equal protection violation, and we are satisfied that a reasonable teacher in Wright's position would recognize as much. Accordingly, Wright is not entitled to qualified immunity at this stage of the proceeding.")

Doe v. Flaherty, 623 F.3d 577, 585 (8th Cir. 2010) ("It was clearly established at the time of the incident in this case that a supervisory school official with actual notice of ongoing sexual abuse against a student was required to take action to investigate and stop the abuse. The plaintiffs do not appear to argue that the notice standard under § 1983 is less stringent than actual knowledge, but to the extent that the issue is raised, no less stringent notice standard was clearly established for purposes of qualified immunity in this circuit as of October 2006.")

Langford v. Norris, 614 F.3d 445, 461, 462 (8th Cir. 2010) ("In this case, it is plain that if Byus knew all the relevant facts about Langford's and Hardin's medical needs, the unlawfulness of failing to ensure that they received adequate treatment would have been apparent. The more difficult question centers on how much Byus actually knew about Langford's and Hardin's medical needs and the allegedly inadequate treatment they received. As we have said, we may take as given the facts that the district court assumed. . . But the only relevant fact identified in the magistrate judge's proposed findings and recommendations is that Byus sent letters to Langford and Hardin in which he acknowledged receiving letters from them. . . .The district court likely inferred that the letters from Langford and Hardin contained at least some description of their medical needs–Langford's stomach and back pain and Hardin's Charcot foot–and the perceived inadequacy of the treatment they had received to that point. . . . Considering these facts together, and drawing all reasonable inferences from them in favor of the plaintiffs, we are convinced that the constitutional right at issue was clearly established as of the time of the relevant conduct, such that a reasonable supervisory official would have known that his actions were unlawful. That is to say, a reasonable official standing in Byus's shoes would have understood that ignoring Langford's and Hardin's complaints about receiving deficient medical care contravened clearly established principles of Eighth Amendment jurisprudence.")

Morris v. Zefferi, 601 F.3d 805, 812 (8th Cir. 2010) ("We believe our decision in this case is controlled by the reasoning of *Nelson.*The district court did not err in finding the unconstitutionality of Zefferi's alleged conduct should have been obvious to Zefferi based both on common sense and prior general case law. . . Transporting a pretrial detainee in a small, unsanitary dog cage for ninety minutes, with no compelling urgency and other alternatives available, under the above precedent, sufficiently shows the possible infringement of a clearly established constitutional right to be free from improper punishment.")

Williams v. Jackson, 600 F.3d 1007, 1014 (8th Cir. 2010) ("Here, for purposes of our review, the allegations in the case involve the malicious and retaliatory exposure of inmates to an apparently intended harm without a penological purpose. . . . We do not believe that qualified immunity in this context hinges on the question of whether prior cases referenced the particular, technological manner in which force was applied. Similarly, we do not believe qualified immunity applies simply because the precise degree of harm likely to result was uncertain. As already discussed, the material inquiry is not the degree of harm, but rather, the degree of force applied and the reason for applying that force. . . .[R]easonable officers are on sufficient notice that they may not purposefully expose prisoners to potentially harmful radiation in the complete absence of a penological purpose. Importantly, the record here taken in a light most favorable to Williams shows just such a complete absence of a penological purpose in removing the shield and in failing to deactivate the light immediately upon removal of the shield. Given the reasonable inference that the officers acted maliciously in an effort to cause harm, and the allegations that an injury did result, the correction-officer defendants are not entitled to qualified immunityat this time. Similarly, in this case, the same rationale supports the denial of qualified immunity as to the related claim of deliberate indifference.")**.**

Heartland Academy Community Church v. Waddle, 595 F.3d 798, 807-09 (8th Cir. 2010) ("In response to Heartland's jurisdictional challenge, the Officials try to couch their fact-intensive 'I didn't do it!' defenses in the language of a purely legal argument. The Officials characterize the issue before us as whether the evidence Heartland adduced is sufficient to survive scrutiny under Fed.R.Civ.P. 56. The Officials stress they do not dispute Heartland's evidence, but only challenge its sufficiency to establish violations of clearly established constitutional rights. We decline to elevate the form of the Officials' argument over its substance. . . .The evidence Heartland presented to the district court–if believed–is so outrageous we are presented with a case in which the civil rights defendants acted in a 'plainly incompetent' manner or in 'a knowing violation of a clearly established precedent.'. . We express no view as to the ultimate truth. But under the version of the facts we must accept as true for purposes of this interlocutory appeal, the Officials knowingly worked with one another to effect the mass removal of HCA students without court orders, with court orders based upon lies, or court orders devoid of probable cause. The Officials deprived Heartland of notice and an opportunity to be heard, and then tried to cover up the Officials' wrongdoing– with false, misleading, and incomplete statements. All of Heartland's relevant constitutional rights were clearly established on October 30, 2001. The state of the law on October 30, 2001, gave the Officials fair warning that effecting or at least conspiring to effect the mass removal of HCA students with bogus ex parte orders potentially would violate Heartland's Fourteenth Amendment rights to family integrity, Fourth and Fourteenth Amendment rights to be free from unreasonable seizures, First and Fourteenth Amendment rights to free association, and Fourteenth Amendment rights to procedural due process. The Supreme Court has long recognized the constitutional rights the Officials allegedly infringed.").

Rush v. Perryman, 579 F.3d 908, 914 (8th Cir. 2009) ("Rush's right to a post-termination name-clearing hearing was clearly established. The district court did not err in denying the Board members' summary judgment motion on qualified immunity grounds.").

Bonner v. Outlaw, 552 F.3d 673, 679, 680 (8th Cir. 2009) ("Outlaw's conduct violated Bonner's clearly established rights because the law gave Outlaw 'fair warning' his conduct was unconstitutional. Over thirty years ago, the Supreme Court in *Procunier* declared that inmates have a due process right to notice whenever correspondence addressed to them is rejected. . . Outlaw argues he did not have fair notice *Procunier* applies to packages because *Procunier* only discussed letters, and he reasonably relied on 28 C.F.R. ' 540.13 to support his interpretation of *Procunier.* We believe, however, such an interpretation of *Procunier* strains credulity. The reasoning of *Procunier* clearly applies to all forms of correspondence, even if the decision only discussed letters. There is no valid reason for distinguishing between letters and packages: the inmate's liberty interest is the same and there is no additional administrative burden involved.").

Cross v. Mokwa, 547 F.3d 890, 896, 897 (8th Cir. 2008) ("These six plaintiffs allege that the police officers' actions at 3309 Illinois violated their First Amendment right to protest because the Building Code Violation Enforcement Plan was devised and executed as a prior restraint on

protester activities. The district court denied the police officers qualified immunity on these claims, concluding that reasonable police officers should have known that 'selective and disproportionate use of police power to prevent the occurrence of a protest' would violate clearly established First Amendment rights, and that plaintiffs presented sufficient evidence that 'a person of ordinary firmness would be deterred by this State action.' We disagree. . . . Neither the court nor plaintiffs on appeal cite any authority for the proposition that a policeman's decision to enforce a traffic law or a provision of the housing code, for example, is unconstitutional if it can be shown that he has enforced that law in a 'selective' manner, not to retaliate for the violator's prior First Amendment protected activity, but to 'chill' future First Amendment activity that the violator *may* be contemplating. We have found no federal appellate case granting or upholding First Amendment relief on this ground. . . . At a minimum, it was not clearly established in 2003 that a police officer could be liable on a 'prior restraint' theory for making arrests that were supported by probable cause and then conducting a reasonable search and seizure of a condemned building. For these reasons, the district court's denial of qualified immunity from these First Amendment claims is reversed.").

Stufflebeam v. Harris, 521 F.3d 884, 887-89 (8th Cir. 2008) ("[T]he primary question, one not addressed by the district court or carefully analyzed by the parties on appeal, is whether Arkansas law permits a police officer to arrest a person for refusing to identify himself when he is not suspected of other criminal activity and his identification is not needed to protect officer safety or to resolve whatever reasonable suspicions prompted the officer to initiate an on-going traffic stop or *Terry* . . .stop. . . We conclude it does not. . . . Here, Harris acted contrary to the plain meaning of Rule 2.2(b) and the law of Arkansas as clearly established in *Meadows* by prolonging the detention and then arresting Stufflebeam, a passenger not suspected of criminal activity, because he adamantly refused to comply with an unlawful demand that he identify himself. . . . On this record, Officer Harris is not entitled to dismissal of Stufflebeam's claim, either on the merits or based on qualified immunity.").

Irving v. Dormire, 519 F.3d 441, 450 (8th Cir. 2008) ("An officer who acts so far beyond the bounds of his official duties that 'the rationale underlying qualified immunity is inapplicable' can have fair warning even if there is no factually similar case. . . It was clearly established by *Burton* that a guard is not permitted to threaten an inmate with death by means readily at hand. It should have likewise been clear that a guard may not threaten an inmate with death by means of arming, bribing, and inciting other inmates to accomplish that which the guard may not do directly. No reasonable prison guard would have believed that no constitutional right would be violated by such conduct, and thus the district court correctly denied qualified immunity to Brigance.")**.**

Brown v. Fortner, 518 F.3d 552, 561 (8th Cir. 2008) ("We conclude that Fortner had 'fair warning' that driving recklessly while transporting a shackled inmate who had been denied the use of a seatbelt and ignoring requests to slow down violated the constitutional prohibition against cruel and unusual punishment. There is no question that it was clearly established that subjecting inmates to unreasonable and substantial risk of harm constituted a constitutional violation. . . While there

are not any published cases from our circuit directly addressing deliberate indifference in the context of prisoner transportation, *Morgan* is on point. . . . The facts in *Morgan* that were sufficient to support a conclusion that an officer transporting an individual was deliberately indifferent are sufficiently similar to the conduct alleged of Fortner to make it clear to a reasonable officer that the conduct was unconstitutional. Moreover, even discounting *Morgan*'s significance because it was unpublished, '"officials can still be on notice that their conduct violates established law even in novel factual circumstances."' . . Other cases addressing deliberate indifference to the safety of prisoners provided notice that the conduct engaged in by Fortner was unconstitutional, making the right clearly established.")**.**

Duckworth v. St. Louis Metropolitan Police Dept., 2007 WL 2050857, at *5 (8th Cir. July 19, 2007) ("In the specific context of this case, the superiors were confronted with the situation where no female officers were working the night watch in District One. Captain Filla thought that Special Order 90-S-7 granted her authority to reassign Plaintiffs, as long as she had a 'sufficient justification.' . . . . Reasonable police administrators could believe that assigning female officers to the night watch was lawful.").

Lindsey v. City of Orrick, Missouri, 491 F.3d 892, 902 (8th Cir. 2007) ("Although neither the Supreme Court nor this court has considered a completely analogous case–one involving an employee's dismissal after speech alleging violations of open meetings law that is not our inquiry. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court changed the clearly established law inquiry from a hunt for prior cases with precisely the same facts to asking whether the official had fair notice her conduct was unconstitutional.").

Richmond v. City of Brooklyn Center, 490 F.3d 1002, 1007, 1009 (8th Cir. 2007) ("The defendants do not dispute on appeal the jury's finding that Officer Bruce conducted the strip search in an unreasonable manner in violation of Richmond's Fourth Amendment rights. Therefore, we proceed directly to the second prong of the qualified immunity analysis, which asks whether the asserted constitutional right was clearly established. . . . In this case, the officers had reasonable suspicion that Richmond was concealing evidence on his person and were in a position to conduct a private, hygienic and non-abusive strip search on the spot, rather than risk Richmond disposing of the evidence during the course of his transportation to the police station. . . . No clearly established legal standards would have put a reasonable officer on notice that, in these particular circumstances, it was objectively unreasonable to lower the handcuffed arrestee's pants and boxer shorts to accomplish the strip search, rather than to risk loss of evidence by waiting until the arrestee was in an environment where handcuffs were not required.").

Clemmons v. Armontrout, 477 F.3d 962, 966 (8th Cir. 2007) ("We hold that, under the first prong of *Saucier*, Investigator Brooks did not violate Clemmons's constitutional rights, as Clemmons adduced no evidence that Brooks acted intentionally, recklessly, or in bad faith when he failed to disclose the IOC to the prosecutor and failed to investigate Clark's statement that Bagby murdered Johnson. While Clemmons argues that he demonstrated recklessness by providing evidence that

Investigator Brooks received the IOC, failed to interview Clark, failed to interview other eyewitnesses, and failed to include the IOC to the prosecutor, he has offered no explanation for why these actions constitute recklessness as opposed to mere negligence. . . . As a matter of law, we conclude that the undisputed facts establish that Investigator Brooks's actions were not intentional or reckless. Mere negligence on Brooks's part by failing to disclose the IOC or investigating another lead is insufficient to deny him qualified immunity.")**.**

Kahle v. Leonard, 477 F.3d 544, 554 (8th Cir. 2007) ("Without question, then, Kahle's constitutional right to be protected from being sexually assaulted by a guard was clearly established on December 14, 2002, as was the fact that a supervisor who was deliberately indifferent to a substantial risk of such an assault could be held liable under § 1983. . . . Because a reasonable juror who accepted Kahle's version of the events could conclude that Malone violated Kahle's clearly-established constitutional rights by demonstrating deliberate indifference to a substantial risk that she would be seriously harmed by Leonard, the district court's denial of Malone's summary-judgment motion is AFFIRMED.")**.**

Ambrose v. Young, 474 F.3d 1070, 1078 (8th Cir. 2007) ("Major Young was in charge of all inmate crews involved in the Sinai clean-up. As previously discussed, Major Young knew the dangling, live power line created a substantial risk of harm. Despite this known risk, Major Young told the inmates to stomp out a non-threatening fire within arms reach of an obviously unstable and live power line. . . .. It is well-established in this circuit that 'knowingly compelling an inmate to perform labor that is ... dangerous to his or her life or health' is a violation of the Eighth Amendment. . . Viewing the facts in the light most favorable to Ambrose, we therefore conclude Major Young's conduct was not 'objectively legally reasonable,'. . . and the district court properly denied Major Young qualified immunity.")

Szabla v. City of Brooklyn Park, Minnesota, 429 F.3d 1168, 1174 (8th Cir. 2005) ("In this case, as in *Kuha*, the officer accompanied the dog, rather than allowing the dog to run loose. Keeping the dog on the lead gave the officer more control over the dog, but it also exposed the officer to greater risk. In both cases, the officer was running with the dog, at night, searching for a person who had fled and whose whereabouts were unknown. Szabla argues that this case is distinguishable from *Kuha* because Baker used a dog to track a person who may have fled because he was injured or ill, not because he wanted to evade the police. This distinction is indeed relevant to the Fourth Amendment reasonableness of Baker's use of the track command, but it does not demonstrate that any reasonable officer would have known on August 17, 2000, that a prior warning was constitutionally required in these circumstances. Baker is therefore entitled to summary judgment on the ground of qualified immunity.").

Wright v. Rolette County, 417 F.3d 879, 887-89 (8th Cir. 2005) (Bye, J., concurring) ("I concur with the majority as to the facts as alleged by Ms. Wright, if proven true, could support a claim for sexual harassment, but not a claim for constructive discharge. I write separately in regards to section III.D.2 of the opinion, which discusses the clearly established prong of the qualified

immunity inquiry. The majority declares '[t]he right to be free of gender discrimination is clearly established.' This hasty resolution of the clearly established prong ignores the Supreme Court's pronouncements in *Anderson v. Creighton*. . .and *Saucier v. Katz*. . . . Although we do not require a precise factual analog to precedent, in light of pre-existing law the unlawfulness of specific conduct must be apparent to a reasonably competent official. . . The importance of this particularized inquiry cannot be discounted because it is the teeth of the qualified immunity defense. Without these teeth, the defense lacks the bite essential in promoting the compelling public policy objectives underlying it. . . . Our case law clearly establishes sexual innuendo or discriminatory conduct is pervasive or abusive when it is both frequent and severe. . . . That is not to say our case law is a model of clarity in the absence of frequent and severe discriminatory conduct. In fact, the line between merely offensive conduct and actionable sexual harassment is blurred where the harassment, though severe, occurs relatively infrequently, or where the complained of conduct, though frequent, is relatively innocuous. But the conduct at issue here is neither infrequent nor innocuous. Thus, if Ms. Wright's allegations turn out to be true, Sheriff Sims's conduct falls within the realm of frequent and severe sexual innuendo and outside the protection of the qualified immunity defense." [footnotes omitted]).

Davis v. Hall, 375 F.3d 703, 719 (8th Cir. 2004) ("Based on *Slone* and the law of other circuits . . . we have no difficulty concluding that Davis alleged the deprivation of a clearly established right and that a reasonable government actor would know that failing to respond to Davis's requests to be released in keeping with the court order that he possessed was unlawful.").

Burton v. Richmond, 370 F.3d 723, 730 (8th Cir. 2004) ("Assuming arguendo that plaintiffs have shown a constitutional violation, defendants are still entitled to qualified immunity if the alleged right at issue was not clearly established at the time of the complained-of conduct in 1985. . . We believe the constitutional right of children under DFS supervision, yet not within DFS custody, to be free from abuse in a court-ordered placement was not clearly established in 1985. Courts have split on whether children in the mid-1980s had a clearly established right to reasonable safety while placed in foster care after having been taken into state custody. [citing cases] Given the wide divergence of views on whether the right to protection from abuse was clearly established for children in state custody placed in foster care, we refuse to find that a right to protection while under state supervision, yet not in state custody, was clearly established in 1985. The District Court erred when it ruled that in 1985 plaintiffs had a clearly established constitutional right to be protected from abuse at the hands of a private individual while under state supervision yet not in state custody.").

Villasana v. Wilhoit, 368 F.3d 976, 978 (8th Cir. 2004) ("After substantial discovery, the district court granted defendants' motion for summary judgment, concluding they are entitled to qualified immunity from these claims. The court reasoned that no case has extended liability under *Brady* to crime laboratory technicians and therefore Villasana failed to show 'that defendants had a clearly established obligation under *Brady* to disclose exculpatory or potentially exculpatory

evidence to the prosecution or to the plaintiff.' Reviewing de novo the question whether the asserted federal right was clearly established, we agree.").

Kuha v. City of Minnetonka, 365 F.3d 590, 601, 602 (8th Cir. 2004) (amending and superceding original panel opinion on reh'g)("Kuha has alleged facts sufficient to survive summary judgment on his Fourth Amendment claim, which is based on the officers' failure to give a verbal warning prior to using a police dog to seize him. The second step of the qualified immunity inquiry will still shield the officers from suit, however, if their conduct was objectively legally reasonable in light of the information they possessed at the time of the alleged violation. . . . Kuha's right to a verbal warning in this case was not clearly established at the time of the seizure. Officers Anderson and Warosh were not on notice that it arguably was constitutionally impermissible to use a police dog against Kuha without a verbal warning under the circumstances of this case. . . . There are no cases from this circuit that mandate such a warning and a review of other circuits offers little guidance on the issue. In most of the published K-9 bite cases, the fighting issue is whether the initial decision to release the dog was objectively reasonable under the circumstances. . . . In those few cases turning on a failure to warn, significant factual differences weigh against charging Officers Anderson and Warosh with notice sufficient to warrant denial of qualified immunity. . . . An officer could conclude, as Officer Anderson testified in this case, that in situations where the location of the suspect is less evident, a warning would place the officers at undue risk from a hiding suspect. We cannot say that 'no reasonably competent officer' would have concluded otherwise. . . . Accordingly, Officers Anderson and Warosh are entitled to qualified immunity for their actions in this case.").

Lawyer v. City of Council Bluffs, 361 F.3d 1099, 1108 (8th Cir. 2004) ("Even if an Iowa court were to conclude later that conduct such as Timothy's does not violate the statute, the officers are entitled to qualified immunity. Police officers are not expected to parse code language as though they were participating in a law school seminar, and a reasonable officer certainly could believe that Timothy's earnest efforts to induce Michael's defiance of a lawful command 'obstructed' the officer's duties. Given the lack of detailed judicial guidance on the interplay among the statutory terms 'obstruct,' 'resist,' and 'verbal harassment,' we conclude that the arrest of Timothy did not violate clearly established law.").

Moran v. Clarke, 359 F.3d 1058, 1061 (8th Cir. 2004) ("Appellants, especially as law enforcement officials, knew or should reasonably have known that the specific conduct outlined by Moran was unlawful. No reasonable official would believe it was permissible to hatch a plan to scapegoat an innocent officer for acts of police brutality against a developmentally disabled citizen. On April 14, 1997, and every day thereafter, such actions were clearly beyond the scope of Appellants' discretionary authority. . . . Appellants arguments based on *Albright* are unavailing. They argue that because the Supreme Court held in *Albright* that a substantive due process claim would not lie in a malicious prosecution claim, . . . they could not have been on notice that their conduct violated the Constitution. We disagree. As we explained in *Moran I,* Appellants' purported actions went well beyond the realm of malicious prosecution. . . 'Instead of simply allowing a weakly

supported prosecution to proceed,' Moran asserts that Appellants engaged in a 'purposeful police conspiracy to manufacture ... false evidence.'").

Hawkins v. Holloway, 316 F.3d 777, 788 (8th Cir. 2003) ("Although the sheriff faults the district court for failing to cite to any case that is factually similar, it was not necessary for the court to do so because Sheriff Holloway's alleged conduct was so far beyond the bounds of the performance of his official duties that the rationale underlying qualified immunity is inapplicable. . . . . No reasonable official in the sheriff's shoes could have thought it within his duties to threaten his employees with deadly force.").

Hill v. McKinley, 311 F.3d 899, 904, 905 (8th Cir. 2002) ("Although we conclude that the facts establish a constitutional violation, we believe the defendants were entitled to qualified immunity on the ground that their actions did not violate clearly established law. . . .[T]the relevant authority indicates that prisoners are entitled to very narrow zones of privacy, and circumstances may warrant the most invasive of intrusions into bodily privacy. In light of this authority, we cannot say as a matter of law that it was clearly established in 1996 that a highly intoxicated, loud and violent prisoner could not constitutionally be restrained naked outside the view of all but a small number of guards. Thus, the district court should have ruled that the defendants were entitled to qualified immunity on Hill's Fourth Amendment claim.").

Treats v. Morgan, 308 F.3d 868, 875 (8th Cir. 2002) ("At the time Treats was sprayed, the law was clearly established that correctional officers do not have a blank check to use force whenever a prisoner is being difficult. . . Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established. *Hope*, __ U.S. at __, 122 S.Ct. at 2517. The ADC regulations authorize use of pepper spray only when an inmate is threatening physical harm, refuses to produce an item, or refuses to relocate, . . and the regulations prohibit its use without warning, . . or as punishment. . . The ADC promulgated these rules to regulate the conduct of correctional officers, and Treats has presented evidence that appellants violated each of them.").

Meloy v. Bachmeier, 302 F.3d 845, 849 (8th Cir. 2002) ("We conclude Bachmeier's adherence to Dr. O'Neill's order that the prison need not provide Meloy a CPAP was objectively reasonable in light of the legal rules in place at the time of her adherence. Bachmeier had some medical training as a nurse, but she was functioning in an administrative role. Bachmeier was not responsible for examining Meloy or treating him herself. Although Meloy personally told Bachmeier about his condition and his need for a CPAP, Bachmeier relied on the opinion of prison doctors, who had more medical training, about the necessary treatment for Meloy's OSA. Bachmeier followed Dr. O'Neill's order that a CPAP was unnecessary, and followed the cardiologist's order that the prison should provide one. . . . . As for Bachmeier's liability in her role as a supervisor, we cannot say the law was clearly established that Bachmeier's failure to override Dr. O'Neill's treatment order constituted deliberate indifference to any Eighth Amendment violation by him. The law does not clearly require an administrator with less medical

training to second-guess or disregard a treating physician's treatment decision. Because the law was not clearly established that Bachmeier was deliberately indifferent to Meloy's serious medical needs, Bachmeier is entitled to qualified immunity.").

Omni Behavioral Health v. Miller, 285 F.3d 646, 653, 654 (8th Cir. 2002) ("While there appears to be no reported case dealing with the precise situation before us, to find a right clearly established, 'it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful.' . . . However, there must be the 'requisite degree of factual correspondence' between the case at issue and previous cases. . . . The only cases that appear to be factually similar to this case involve lawsuits by parents claiming that their liberty interest in the care and custody of their children was violated by child abuse investigations. [citing cases] In each of these cases, the court held the state actor that was investigating child abuse was entitled to qualified immunity. . . . The need to continually subject the assertion of this abstract substantive due process right to a balancing test which weighs the interest of the parent against the interests of the child and the state makes the qualified immunity defense difficult to overcome. Moreover, the requirement that the right be clearly established at the time of the alleged violation is particularly formidable. . . Applying the above analysis here, it is clear that the right to occupational liberty, to the extent that it exists at all in this context, does not include a right to be free from child abuse investigations.").

Foulk v. Charrier, 262 F.3d 687, 702 (8th Cir. 2001) ("By June of 1994, the law was well established that a malicious and sadistic use of force by a prison official against a prisoner, done with the intent to injure and causing actual injury, is enough to establish a violation of the Eighth Amendment's cruel and unusual punishment clause.").

Gorman v. Bartch, 152 F.3d 907, 915-16 (8th Cir. 1998) ("At the time of Gorman's arrest in May of 1992, Title II of the ADA had only been in effect for some four months. Despite the clear language of the statute, there was uncertainty about the extent of its coverage. There were no cases addressing its possible application to government agencies like police departments or to the transportation of arrestees. Although there were some cases applying the Rehabilitation Act to prisons, there were none dealing with facts similar to those alleged by Gorman. . . In the intervening years until the Supreme Court decided *Yeskey*, courts divided on the applicability of the ADA and Rehabilitation Act to state prisons. . . . Under the circumstances, it cannot be said that reasonable police officials in May of 1992 would have known that the actions alleged against the individual defendants in respect to the transportation of a disabled arrestee were subject to, and in violation of, Title II of the ADA or ' 504 of the Rehabilitation Act.").

Greer v. Shoop, 141 F.3d 824, 828 (8th Cir. 1998) ("We are of the view that the state-created danger theory was an emerging rule of law in this circuit in 1991. Therefore, we assume without deciding, based on the facts accepted for purposes of summary judgment, that Greer has sufficiently alleged a violation of Mora Greer's constitutional rights pursuant to the state-created danger theory. However, we are not convinced that the law was so clearly established in 1991

that a reasonable official under these factual circumstances would have known that his or her actions were violative of Mora Greer's constitutional rights. Although a precise factual correspondence with precedents has never been required for a constitutional right to be clearly established, *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir.1988), when the distinguishing facts are such that they change the nature of the claim presented, they are relevant to that determination. In this case, the privacy issues that surround a person's medical condition, specifically when that person is HIV-positive or has AIDS, complicate the application of the state-created danger theory. See Iowa Code Ann. ' 141.23 (West, WESTLAW through 1991) (prohibiting non-consensual disclosure of a person's HIV-positive status). Because of those privacy concerns, we cannot say that in 1991, a reasonable official would have known that failing to inform Mora Greer of Stevens' HIV-positive status violated her due process rights. It is just as likely that a reasonable official would have thought that disclosing Stevens' HIV-positive status violated Stevens' right of privacy. Therefore, we hold that the contours of the state-created danger theory, as applied to the unique facts of this case, were not defined clearly enough in 1991 to remove the defendants' qualified immunity protection.").

Burnham v. Ianni, 119 F.3d 668, 675, 677 (8th Cir. 1997) (en banc) ("Because this case involves Ianni's suppression of plaintiffs' protected speech, plaintiffs have (at least for purposes of summary adjudication) sufficiently established a violation of a constitutional right . . . . Here, of course, we have long established, binding precedent totally supportive of plaintiffs' claims. The Supreme Court and this court have both clearly and directly spoken on the subject on numerous occasions and in years long prior to the 1992 censorship by Ianni. Accordingly, Chancellor Ianni's "not clearly established" claim must be rejected.").

Veneklase v. City of Fargo, 78 F.3d 1264, 1269 (8th Cir. 1996) (*Veneklase I)* ("[U]pon a careful reading of *Frisby*[*v. Schultz*, 487 U.S. 474 (1988)], we do not find that its holding defined the outer parameters of 'focused' residential picketing. We hold that plaintiffs did not have a clearly established right on October 10, 1991, to picket in a route encompassing the Bovard residence and the two to three homes on either side of it. We further hold that the arrest of plaintiffs by the defendant officers was objectively reasonable in light of the legal rules in existence at the time the action occurred.").

Bills v. Dahm, 32 F.3d 333, 335 (8th Cir. 1994) ("To determine whether [plaintiff's] constitutional right to equal protection was violated ... we cannot begin with the generalized inquiry into whether the right to equal protection is clearly established. Instead, we must ask 'a more particularized' question ... namely, whether under the circumstances of this case he had a clearly established right. In other words, we must determine whether he had a clearly established right to be offered the same opportunities [privilege of overnight child visitation] afforded prisoners confined within the Nebraska Center for Women.").

Sellers v. Baer, 28 F.3d 895, 900 (8th Cir. 1994) ("As was the case in *Anderson*, the plaintiffs here have stated the constitutional right allegedly violated at too high a level of generality. It is

particularly important for a complaint alleging a violation of substantive due process to state with particularity the precise nature of the alleged violation. [cite omitted] The issue in this case for purposes of qualified immunity is whether reasonable officers in the position of [defendant officers] would have understood they were violating [decedent's] constitutional rights when they removed him from the fairgrounds, where he had been making a great nuisance of himself, and set him free in a parking lot, near a police station and behind a federal building, away from his companions, without funds, and in an intoxicated state, rather than retain custody and charge him with disorderly conduct.").

Grantham v. Trickey, 21 F.3d 289, 293 (8th Cir. 1994) ("Our cases recently have reached different conclusions on the question of when an individual's right to free speech in public employment is 'clearly established' for the purposes of qualified immunity. We have held that 'when *Pickering*'s fact-intensive balancing test is at issue, the asserted First Amendment right "can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard." '" cites omitted).

Bartlett v. Fisher, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test.").

Parada v. Anoka County, No. CV 18-795 (JRT/TNL), 2018 WL 3621210, at *5-6, *8 (D. Minn. July 30, 2018) ("Neither the Supreme Court nor the Eighth Circuit has expressly decided whether the Fourth Amendment 'permits a warrantless arrest for a misdemeanor when the alleged offense did not occur in the presence of the arresting officer.'. . Although the Eighth Circuit has not decided the issue, it has held that, '[b]ecause the law regarding warrantless misdemeanor arrests for offenses committed outside the presence of the arresting officer is not clearly established under the Fourth Amendment,' arresting officers are entitled to qualified immunity. . . Because the law was not clear at the time of the arrest, the Court concludes that Oman is entitled to qualified immunity for any argument based on his lack of presence during Parada's commission of the crime. . . . The Court must decide whether it was clearly established at the time of the arrest that unreasonably prolonging a traffic stop and subsequently arresting someone under these circumstances violates the Fourth Amendment. *Caballes* and *Rodriguez* clearly establish that a seizure cannot extend beyond the time necessary to issue a traffic ticket. . . And while Parada cannot use Rule 6.01 to establish a Fourth Amendment violation, the Rule is evidence that Oman should know that a full custodial arrest is not necessary – and indeed not even allowed in Minnesota – to issue a citation for driving without a license. The Court concludes that Oman has not shown that he is entitled to qualified immunity with respect to Parada's Fourth Amendment claim stemming from the initial arrest. The Court notes that this is the only Fourth Amendment theory that Parada can assert against Oman in his individual capacity. . . . Having established that Parada states a sufficient claim that her Fourth Amendment rights were violated, the Court must decide whether it was clearly established at the time of the arrest that law enforcement cannot detain an alien on suspicion of removability without probable cause to believe that a crime has

been committed. It is clearly established that a warrantless arrest must be supported by probable cause of criminal activity, that unlawful presence is not a crime, and that an immigrant's possible removability is insufficient to give rise to probable cause. . . It is also clearly established that an ICE Detainer alone cannot support local law enforcement's continued detention of an alien. . . Oman cannot establish at this stage that he is entitled to qualified immunity.")

Ferguson v. Short, No. 2:14-CV-04062-NKL, 2017 WL 194282, at *4 (W.D. Mo. Jan. 17, 2017) ("Clearly, Defendants were on notice that it would be a constitutional violation to knowingly use fabricated evidence or unreliable evidence to convict a criminal defendant. But Defendants contend that they also had to know that falsifying evidence through one defendant to use against another defendant was unconstitutional. Qualified immunity, however, is intended to protect officers who do not know that they are doing something wrong. It is not intended to protect them if they knowingly do something wrong. Furthermore, to prove his fabrication claim, Ferguson must show that Defendants could foresee that their actions would injure Ferguson. It would be illogical to place that burden on Ferguson and then excuse the Defendants' actions because they didn't know the Court would find them responsible for their unconstitutional conduct under recognized common law standards.")

Ellington v. Piercy, No. 2:14-CV-04316-NKL, 2016 WL 2745868, at *6-7 (W.D. Mo. May 11, 2016) ("Having considered the precedent behind Plaintiffs' Fourth Amendment allegations, the Court finds it 'beyond debate' that the erratic operation of a police vehicle—whether a car or a boat—can constitute an objectively unreasonable seizure. Eighth Circuit precedent has established that the manner in which an offer operates his vehicle may cause a Fourth Amendment violation. . . While the Eighth Circuit has not discussed Fourth Amendment seizures in the context of a water transport, Plaintiffs allege that Piercy drove at speeds exceeding 40 miles per hour across a crowded lake in a non-emergency situation. Such driving would bring Piercy's actions in line with those found unreasonable in *Chambers*: in both cases, a restrained suspect was subject to erratic driving, causing him physical injury. . . . The novel factual elements of Brandon's case—that he was being transported in a patrol boat across water and died by drowning—do not affect these underlying legal principles. The United States Supreme Court has 'expressly rejected a requirement that previous cases be "fundamentally similar."'. . Instead, because the central question of this inquiry is 'whether the state of the law at the time gave the officials fair warning their conduct was unlawful,' the 'contours of a right' may be sufficiently clear even if the factual situations are different. . . Although Piercy argues there is no clearly-established constitutional right where someone is 'improperly and incorrectly secured during transport over water after his arrest,'. . . Piercy does not show how the legal principles differ when a suspect is transported in a boat, as compared to cases where the suspect is transported in a car. The Court cannot say as a matter of law that 'a reasonable officer could have believed that his conduct was justified.'. .Consequently, Piercy had fair warning that his conduct was unlawful and cannot shield himself from Plaintiffs' Section 1983 claim alleging Fourth Amendment violations.")

Thomas v. Barze, 57 F. Supp. 3d 1040, 1068, 1071-75 (D. Minn. 2014) ("The Court concludes that here, where the idea and execution of the interview was entirely directed by the law enforcement officer rather than the school official, traditional Fourth Amendment principles, rather than the relaxed standards of *TLO*, apply. The Court will proceed to analyze the evidence in support of Thomas' unreasonable seizure and false arrest claims under traditional Fourth Amendment standards. However, to the extent that, for qualified immunity purposes, it was not clearly established in January 2012 that *TLO* would not apply in such circumstances in the Eighth Circuit, the Court also concludes that, even under *TLO*'s relaxed standard, summary judgment for Barze and Mills would not be appropriate. . . .Having determined that a reasonable jury could conclude that Barze and Mills violated Thomas' rights under the Fourth Amendment, the Court must also consider whether those rights were clearly established in order to assess Barze's and Mills' claims that they are entitled to qualified immunity. . . .The officers should have known that a private meeting in an inner office which involved a pat-down at some point was excessively intrusive if the purpose of the meeting was to mentor Thomas or merely encourage him to not incite any potential fights. Even Matlock acknowledges that the 'mentoring' meeting turned wrong quickly, and a reasonable jury could conclude that the escalation was due to the officers', rather than Thomas', conduct. If that were the case, a reasonable officer should have known that such a seizure, which involved Thomas being placed into a choke hold, would not have been appropriate in scope given the initial fight-prevention rationale for the meeting. The Court therefore concludes that summary judgment for Barze and Mills on Thomas' claims for excessive force and false arrest is not appropriate and that the officers are not entitled to qualified immunity. . . .With regard to whether it was clearly established that not intervening would violate Thomas' constitutional rights, the Court concludes that any determination on whether intervention was warranted or necessary is contingent upon the jury's determination as to what was happening between Thomas and Barze, which is not yet determined. Given that Defendants have not moved for summary judgment on the excessive force claim against Barze, the Court takes the facts surrounding the physical altercation in a light most favorable to Thomas and concludes that a reasonable officer should have known to intervene and stop another officer from putting a student in a neck restraint or choke hold where such restraint was unprovoked. The Court therefore concludes that summary judgment on Thomas' excessive force claim against Mills is not warranted at this time and that Mills is not entitled to qualified immunity on this claim.")

Robinson v. City of Minneapolis, 957 F.Supp.2d 1094, 1099 & n.3 (D. Minn. 2013) ("If Defendants caused Robinson only *de minimis* injuries, they are entitled to qualified immunity regardless of whether their use of force was justified *ab initio*.. . . Robinson argues that endorsing such a result will give police officers 'free license to rough up *any* suspect, regardless of the need to use force. That is hardly "reasonable" and thus contrary to the Fourth Amendment's prohibition against "unreasonable" seizures.'. . But 'roughing up' a suspect suggests causing far more than *de minimis* injury. And in any event, Robinson's concern is illusory. *Chambers* made clear, for conduct occurring after that case was decided, that the focus is on the *force used* and not its end result. . . Hence, officers cannot 'rough up' suspects with impunity going forward. A *de minimis*

injury defense will shield officers from liability only for arrests occurring before June 6, 2011, the date *Chambers* was decided.")

R.S. ex rel. S.S. v. Minnewaska Area School Dist. No. 2149, 894 F.Supp.2d 1128, 1139, 1140 (D. Minn. 2012) ("The movement of student speech to the internet poses some new challenges, but that transition has not abrogated the clearly established general principles which have governed schools for decades. . . . The law on out-of-school statements by students can thus be summarized as follows: Such statements are protected under the First Amendment and not punishable by school authorities unless they are true threats or are reasonably calculated to reach the school environment *and* are so egregious as to pose a serious safety risk or other substantial disruption in that environment. R.S.'s Facebook wall postings were not true threats or threats of any kind. While her statements may have been reasonably calculated to reach a school audience, that possible fact is not sufficient to justify her punishment. The school defendants must also show that the statements posed a substantial disruptive effect. . . . [T]he general rule that schools may not regulate merely inappropriate out-of-school speech (as opposed to truly threatening or substantially disruptive speech) has been well-established for decades.")

Shepard v. Wapello County, 303 F.Supp.2d 1004, 1016 (S.D. Iowa 2003) ("At the time Sheriff Kirkendall discharged Shepard the applicable law was very well developed and gave one in Kirkendall's position 'fair warning' that discharging Shepard because he reported Craven's alleged misconduct and complained to a County Supervisor that the Sheriff's budget was inadequate would violate Shepard's rights under the First Amendment.").

NINTH CIRCUIT

Scott v. County of San Bernardino, 903 F.3d 943, 950-51 (9th Cir. 2018) ("We do not diminish the seriousness of potential violence between students, or the need for conflict resolution in the educational setting. But '[s]ociety expects that children will make mistakes in school—and yes, even occasionally fight.' *E.W. by and through T.W. v. Dolgos*, 884 F.3d 172, 183 (4th Cir. 2018). Deputy Ortiz faced a room of seven seated, mostly quiet middle school girls, and only generalized allegations of fighting and conflict amongst them. Even accounting for what Deputy Ortiz perceived to be non-responsiveness to his questioning, the full-scale arrests of all seven students, without further inquiry, was both excessively intrusive in light of the girls' young ages and not reasonably related to the school's expressed need. Ironically, the primary instigator of the conflicts, L.V., was the only one released to a parent at the school campus. The foundation of *T.L.O.*'s special needs standard is reasonableness. . . An arrest meant only to 'teach a lesson' and arbitrarily punish perceived disrespect is clearly unreasonable under *T.L.O.* Under the circumstances of this case, we hold that the arrests of the students were unreasonable and in violation of the Fourth Amendment. . . . At the time of the students' arrest, it was clearly established that a police seizure at the behest of school officials must, at a minimum, be 'reasonably related to its purpose, and must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."'. . . Defendants do not—and indeed, cannot—meaningfully contest Deputy Ortiz's motivation for

the arrests, which he stated multiple times. No reasonable officer could have reasonably believed that the law authorizes the arrest of a group of middle schoolers in order to prove a point. . . . [N]othing in *C.B.* suggests that an officer may arrest an entire group of students to teach them a lesson or to 'prove a point.' While the officers in *C.B.* took the troubled student into custody in order to safely transport him into the care of a relative, here, in contrast, Deputy Ortiz admitted that he 'did not care' who was at fault in the alleged fighting and arrested all of the students in order to teach them a lesson. Under any standard, the arrests here were unreasonable, and the district court properly denied Deputies Ortiz and Thomas qualified immunity.")

Mellen v. Winn, 900 F.3d 1085, 1103-04 (9th Cir. 2018) ("We next must decide whether it was clearly established, in 1997, that police officers had a duty to disclose material impeachment evidence to prosecutors. This is not an open question in our Circuit. In *Carrillo v. County of Los Angeles*, we concluded that '[t]he law in 1984 clearly established that police officers were bound to disclose material, exculpatory evidence.'. . *Carrillo* cited approvingly *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (per curiam), an even earlier case that concluded that police investigators violate *Brady* when they fail to disclose material impeachment evidence to prosecutors. . . . *Carrillo* also relied on *Kyles*, the case where the Supreme Court expressly extended *Brady* obligations to police officers. . . .Detective Winn offers no meaningful way to distinguish *Carrillo*, *Butler*, and *Kyles*, and we agree that these cases are controlling. We therefore reverse the district court's grant of summary judgment for Detective Winn on Mellen's § 1983 claim premised on a violation of her due process rights, and we remand for further proceedings.")

Rodriguez v. Swartz, 899 F.3d 719, 728-34 (9th Cir. 2018), *petition for cert. filed*, No. 18-309 (U.S. Sept. 7, 2018) ("Swartz filed this interlocutory appeal to challenge the district court's denial of qualified immunity. The United States filed an amicus brief that presented an argument that had not been made in district court: that Rodriguez lacks a *Bivens* cause of action for a Fourth Amendment violation. Though Swartz had not raised that argument in his opening brief on appeal, he adopted it in his reply brief. We affirm the district court's decision to let Rodriguez's Fourth Amendment claim proceed. . . . Based on the facts alleged in the complaint, Swartz violated the Fourth Amendment. It is inconceivable that any reasonable officer could have thought that he or she could kill J.A. for no reason. Thus, Swartz lacks qualified immunity. . . .[U]nlike the American agents in *Verdugo-Urquidez*, who acted on Mexican soil, Swartz acted on American soil. Just as Mexican law controls what people do there, American law controls what people do here. *Verdugo-Urquidez* simply did not address the conduct of American agents on American soil. Also, the agents in *Verdugo-Urquidez* knew that they were searching a Mexican citizen's property in Mexico, but Swartz could not have known whether J.A. was an American citizen or not. The practical concerns in *Verdugo-Urquidez* about regulating conduct on Mexican soil also do not apply here. There are many reasons not to extend the Fourth Amendment willy-nilly to actions abroad, as *Verdugo-Urquidez* explains. But those reasons do not apply to Swartz. He acted on American soil subject to American law. We recognize that on similar facts, the Fifth Circuit reached a contrary conclusion. But its reasoning was about the Fourth Amendment generally, including warrantless searches of those crossing the border and electronic surveillance of the

border itself. The concerns in *Verdugo-Urquidez* were also specific to warrants and overseas operations. But this case is not about searches and seizures broadly speaking. Neither is it about warrants or overseas operations. It is about the unreasonable use of deadly force by a federal agent on American soil. Under those limited circumstances, there are no practical obstacles to extending the Fourth Amendment. Applying the Constitution in this case would simply say that American officers must not shoot innocent, non-threatening people for no reason. Enforcing that rule would not unduly restrict what the United States could do either here or abroad. So under the particular circumstances of this case, J.A. had a Fourth Amendment right to be free from the objectively unreasonable use of deadly force by an American agent acting on American soil, even though Swartz's bullets hit him in Mexico. *Verdugo-Urquidez* does not require a different conclusion. . . .Swartz argues that when he shot J.A., it was not clearly established that he could not shoot someone on the other side of the border. We cannot agree. 'The qualified immunity analysis ... is limited to the facts that were knowable to the defendant officers at the time they engaged in the conduct in question. Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.'. . . When he shot J.A., Swartz could not have known whether the boy was an American citizen. Thus, Swartz is not entitled to qualified immunity on the bizarre ground that J.A. was not an American. For all Swartz knew, J.A. was an American citizen with family and activities on both sides of the border. Therefore, the question is not whether it was clearly established that aliens abroad have Fourth Amendment rights. Rather, it is whether it was clearly established that it was unconstitutional for an officer on American soil to use deadly force without justification against a person of unknown nationality on the other side of the border. Had there been a serious question about whether the Constitution banned federal officers from gratuitous cross-border killings, *Tennessee v. Garner* and *Harris v. Roderick* would have answered it. 'It does not take a court ruling for an official to know that no concept of reasonableness could justify the unprovoked shooting of another person.' Any reasonable officer would have known, even without a judicial decision to tell him so, that it was unlawful to kill someone—anyone—for no reason. . . .Rodriguez's complaint makes a persuasive case for murder charges. Indeed, the United States has indicted and tried Swartz for murder. We are unable to imagine a serious argument that a federal agent might not have known that it was unlawful to shoot people in Mexico for no reason. To be sure, *Brosseau v. Haugen* holds that the Fourth Amendment prohibition on excessive force is 'cast at a high level of generality.' That general prohibition clearly establishes a constitutional violation only 'in an obvious case.' But this is an obvious case. Unlike officers in other situations, Swartz did not have to determine how much force to use; he was not permitted to use any force whatsoever against someone who was innocently walking down a street in Mexico." [footnotes omitted])

Pike v. Hester, 891 F.3d 1131, 1141-42 (9th Cir. 2018) ("Hester first contends that no single case has held that 'a consensual K-9 sniff-sweep of a public employee's shared office' is unlawful. However, the justice court concluded the search was not consensual. The relevant question is whether a no-consent dog search of a public employee's office was clearly unlawful in 2011, when the search occurred. Supreme Court and Ninth Circuit precedent easily resolve that question in the affirmative. . . .The fact that Hester's search involved a dog does not affect that conclusion. In

2011, it was clearly established that dog sniff searches are exempt from Fourth Amendment protection only when the dog and accompanying officer are lawfully present. . . .Accordingly, it was clearly established in 2011 that a dog search of a public employee's private office violates the Fourth Amendment, absent consent. . . Hester's conduct violated Pike's clearly established right; therefore, he is not entitled to qualified immunity.")

Easley v. City of Riverside, 890 F.3d 851, 865-67 (9th Cir. 2018) (Pratt, J. (S.D. Iowa), dissenting) ("The second inquiry asks whether the constitutional 'right at issue was clearly established at the time of the incident.'. . The first step in determining whether Macias's alleged conduct violated a clearly established right is to determine whether case law existed at the time of the incident in which 'an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'. . Even if this is not the 'obvious' case, I conclude other clearly established case law in this circuit would have given officers fair notice that the conduct alleged here was unconstitutional at the time of the incident. . . In non-obvious cases, courts must explicitly identify particular court rulings demonstrating the unlawfulness of the alleged conduct. . . This specific-case requirement ensures that officers are not exposed to liability without a 'fair and clear warning of what the Constitution requires.'. .This Court has held that its 1991 decision, *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321, 324 (9th Cir. 1991), fairly informs officers of the constitutionality of the use of deadly force in circumstances sufficiently analogous to the present case. . . . In the present case, as in *Curnow*, the record for summary-judgment purposes reveals that Easley was not holding a gun at the time of the shooting, nor was he raising his arm toward or turning to face Macias. Further, in *Curnow*, the suspect had a firearm within immediate reach, while in this case, Plaintiff had thrown his firearm away from his person and continued to run in the opposite direction of the gun. Therefore, *Curnow*, a twenty-year-old decision at the time of the shooting in this case, gave Macias a fair and clear warning that his use of deadly force—at least on the facts as construed for summary judgment—was not constitutional. . . .There is some tension in the case law concerning how distinguishable a case may be on its facts before it cannot be construed as clearly established law for qualified-immunity purposes. On the one hand, the Supreme Court has repeatedly admonished this Court 'not to define clearly established law at a high level of generality.'. . To constitute clearly established law, the 'existing precedent must have placed the ... constitutional question beyond debate' and must ' "squarely govern[ ]' the specific facts at issue.'. . At the same time, the Supreme Court has consistently maintained that its 'caselaw does not require a case directly on point for a right to be clearly established,'. . . and that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). This of course must be true because every individual case will present at least nominal factual distinctions. If precisely identical facts were required, qualified immunity would in fact be *absolute* immunity for government officials. With these principles in mind, I conclude that clearly established law for qualified-immunity purposes will necessarily contain both operative circumstances—i.e., the circumstances from which the constitutional violation flowed—and ancillary circumstances—i.e., the surrounding factual details of the case that bear no constitutional significance. The operative circumstances described in *Curnow* include: (1) the suspect was not holding a gun when shot even

though a gun was within his reach, (2) the suspect did not point a gun at the officers, and (3) the suspect did not turn to face the officers. These same circumstances are the foundational points of fact in the present case for summary-judgment purposes. . . .In broader terms, Macias contends the only court ruling that would satisfy the established-law inquiry would be a case holding that it is 'unconstitutional for an officer to shoot at an armed suspect who grabbed and raised an object immediately before being shot, simply because the suspect let go of the object seconds before being hit.' This curious characterization of the present circumstances is strained and self-contradictory; it claims Easley was simultaneously armed and unarmed. But more to the point, the law does not require this level of precise factual identity for the unconstitutionality of certain conduct to be 'clearly established.' In this case, there exists a construction of the disputed facts that is controlled by the clearly established expectations for government officials both as generally set forth in *Garner* and *Graham* and as specifically set forth in *Curnow*. . . .The third inquiry asks whether 'a reasonable officer would have understood her conduct to be unlawful' in the circumstances alleged. . . Again, this is a separate question from whether Macias's conduct was reasonable. Macias enjoys an extra layer of deference on this third inquiry insofar as he may have reasonably *believed* his conduct was permissible even if it was not. In recognition of this extra deference, 'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'. .However, the proper answer to this inquiry, like that of the first inquiry, is presently lost within the contested facts. If the objective circumstances would have unequivocally informed a reasonable officer that Easley was disarmed and if four full seconds to deliberate passed between that officer's perception thereof and his decision to shoot Easley, I conclude there is no room for a reasonable officer with an understanding of *Garner*, *Graham*, and *Curnow* to assert that the use of deadly force was reasonable. Therefore, there remain genuine issues of material fact bearing upon resolution of this inquiry. Based on the summary-judgment record taken in the light most favorable to Easley, Macias's entitlement to qualified immunity is not presently established as a matter of law.")

Daniels Sharpsmart, Inc. v. Smith, 889 F.3d 608, 617-18 (9th Cir. 2018) ("The district court was satisfied that, as it said, '[t]he extraterritorialty doctrine has been clearly established for decades.' No doubt that is so, but that is far from deciding that it was clearly established that application of the MWMA [Medical Waste Management Act] violated the doctrine. . . Certainly, the Department officials could not look at a decision dealing with the MWMA itself, and that statute at least injected some ambiguity into the equation when it declared that '[m]edical waste transported out of [California] shall be consigned to a permitted medical waste treatment facility in the receiving state.' Cal. Health & Safety Code § 118000(c). Of course, that does not say who must issue the permit to the facility, and a reasonable official, who is not knowledgeable about the arcane considerations lurking within dormant Commerce Clause doctrine, could reasonably, if erroneously, believe that the Department could control what was done with California waste in another state. . . As we see it, this area is complex and murky enough that it was improper to decide that Pilorin, Dabney, and Hilton could be mulcted with damages for their error. The district court erred in holding that they could be.")

Reese v. County of Sacramento, 888 F.3d 1030, 1037-40 (9th Cir. 2018) ("Here, the jury found Deputy Rose violated Reese's right to be free from excessive force under the Fourth Amendment. . . . Rose's entitlement to qualified immunity therefore turns on whether Reese's right was clearly established at the time of the incident in 2011. Joining other circuit courts from around the country, this Court recently determined that the 'clearly established' prong of the qualified immunity analysis is a matter of law to be decided by a judge. *Morales v. Fry*, 873 F.3d 817, 824–25 (9th Cir. 2017). . . . We recognized, however, that '[a] bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.'. . In arguing that his right to be free of excessive force under these circumstances was clearly established, Reese relies on the jury's answer to Question 14, their finding that it did not appear that Reese posed an immediate threat of death or serious physical injury to Rose at the time Rose fired his shot. Reese contends that by making this finding, the jury determined Rose violated Reese's clearly established right not to be subjected to deadly force when he posed no immediate threat to Rose or others. As *Morales* confirmed, however, the question of whether the right was clearly established is solely for the judge to decide, not the jury. . . Thus, although the jury's finding that Reese posed no immediate threat of death or serious physical injury to Rose addresses the first prong of the qualified immunity analysis, it does not answer the purely legal question of whether the right was clearly established in this context. Therefore, the district court was within its authority to determine, as a matter of law, whether Deputy Rose was entitled to qualified immunity, even where a jury determined that he violated Reese's Fourth Amendment right to be free from excessive force. . . .We agree with the district court that Reese has not identified any sufficiently analogous cases showing that under similar circumstances, a clearly established Fourth Amendment right against the use of deadly force existed at the time of the shooting. The jury determined that when Reese answered the door to his apartment, he had a knife in his hand in an elevated position. Upon seeing Reese in the doorway with the knife, which was very close to where Rose was standing, Brown immediately fired a shot from his rifle at Reese, but missed. After Brown fired the shot, he saw Reese back into the apartment and drop the knife. Rose, who saw Reese when he first opened the door, lost sight of Reese when he backed up into his apartment and after Brown fired at him. Rose then advanced toward the doorway and was surprised to see Reese standing in the apartment. Rose stated that he could not see Reese's hands but upon seeing him, shot Reese in the chest from three to five feet away. Notably, while the jury found that Reese did not brandish the knife at Rose, they also found that at the time Rose fired his shot, he did not see Reese's hands. Although Reese goes to great lengths to remind this Court that we do not demand a case with 'materially similar' factual circumstances or even facts closely analogous to his case, *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), none of Reese's cited cases demonstrate that the contours of his Fourth Amendment right were sufficiently clear such that 'any reasonable official in [his] shoes would have understood that he was violating it.'. . Critically, Reese points to no case that considered the relevant question whether Deputy Rose, having come within striking distance of a suspect who had held a knife a fraction of a second before, was objectively unreasonable in using deadly force before determining whether the suspect still possessed the knife. . . .Reese's reliance on our decision in *Hughes v. Kisela*, 862 F.3d 775

(9th Cir. 2016), only confirms that the law was not clearly established here. In *Hughes*, we reasoned that an officer's shooting of a plaintiff who was approaching a third party while holding a kitchen knife at her side violated the plaintiff's clearly established rights, where the facts viewed in the plaintiff's favor showed that she was not 'angry or menacing,' officers knew only that she has been using the knife to carve a tree, and the plaintiff did not understand orders to drop the weapon. . . After Reese's appeal was argued, the Supreme Court summarily reversed our decision in *Hughes*, concluding that it was 'far from an obvious case,' and that none of our precedents squarely governed the facts involved. *Kisela v. Hughes*, —– U.S. ——–, 138 S.Ct. 1148, 1153, —– L.Ed.2d —— (2018). Given that Rose had greater reason to perceive a threat here, and no luxury of time or distance to discern whether Reese still posed such a threat, the Supreme Court's decision in *Kisela v. Hughes* further illustrates that Rose is entitled to qualified immunity. None of Reese's cases 'squarely govern' the situation that Rose confronted such that they would have given Rose clear warning that his use of deadly force was objectively unreasonable. . . Absent a showing by Reese that the right was clearly established at the time, Rose is entitled to qualified immunity on the Fourth Amendment excessive force claim. We therefore affirm the district court's ruling that Deputy Rose is entitled to qualified immunity on that claim.")

Thompson v. Rahr, 885 F.3d 582, 584, 586-90 (9th Cir. 2018) ("This appeal presents a question at the intersection of the Fourth Amendment and qualified immunity law. In the course of a felony arrest, may a police officer point a loaded gun at an unarmed suspect's head, where that suspect had already been searched, was calm and compliant, was watched over by a second armed deputy, and was seated on the bumper of a police cruiser 10–15 feet away from a gun found in the suspect's car? Because the facts are at this stage disputed, we take the facts in the light most favorable to the suspect. We hold that pointing a loaded gun at the suspect's head in these circumstances constitutes excessive force under the Fourth Amendment, but that the officers here are entitled to qualified immunity because the law was not clearly established at the time of the traffic stop. . . . [W]e conclude that Copeland's use of force in arresting Thompson was not objectively reasonable. Accepting Thompson at his word, as we are required to do at the summary judgment stage, Copeland pointed the gun at Thompson's head and threatened to kill him if he did not surrender. This type and amount of force can hardly be characterized as 'minor,' as the government contends. We have previously held, in the context of a residential confrontation, that 'pointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force.'. . With respect to the government's interests, Thompson was suspected of driving with a suspended license and violating the Uniform Firearms Act—potential crimes of low and moderate severity, respectively. The safety threat either to the officers or the public was relatively low. The government's claim that Thompson 'could have charged past Deputy Copeland and grabbed the revolver [in the back of the car] in a matter of seconds' is weak. Thompson would have had to travel 10–15 feet to his car to grab the gun or make any use of it. Thompson had no weapon and had already been searched. He was sitting on the bumper of a squad car, watched over by an armed deputy. He was not 'actively resisting arrest or attempting to evade arrest by flight.'. . He was 'compliant with the directions of law enforcement at all times.'. . Nor did the officers have 'reason to believe that he would resist or flee.'. . Reviewing the totality of the circumstances, the force

used against Thompson was excessive when balanced against the government's need for such force. In the end, 'pointing guns at persons who are compliant and present no danger is a constitutional violation.'. . A jury could find that 'brandishing a cocked gun in front of [Thompson's] face' and threatening to kill him was unreasonable under these particular circumstances. . . We do not discount the concern for officer safety when facing a potentially volatile situation. But where the officers have an unarmed felony suspect under control, where they easily could have handcuffed the suspect while he was sitting on the squad car, and where the suspect is not in close proximity to an accessible weapon, a gun to the head constitutes excessive force. . . .Although the use of excessive force violated Thompson's constitutional rights, Copeland is entitled to qualified immunity because Thompson's right not to have a gun pointed at him under the circumstances here was not clearly established at the time the events took place. In arriving at this conclusion, we take careful note of recent Supreme Court precedent illuminating the reach and parameters of qualified immunity in the excessive force context. . . . Just last year, in a case addressing excessive force, the Supreme Court underscored that qualified immunity, when properly applied, protects 'all but the plainly incompetent or those who knowingly violate the law.'. . .Looking to the particular setup here, we cannot say that every reasonable officer in Copeland's position would have known that he was violating the constitution by pointing a gun at Thompson. Thompson's nighttime, felony arrest arising from an automobile stop, in which a gun was found, coupled with a fluid, dangerous situation, distinguishes this case from our earlier precedent. More specifically, Copeland was conducting a felony arrest at night of a suspect who was not handcuffed, stood six feet tall and weighed two hundred and sixty-five pounds, was taller and heavier than Copeland, and had a prior felony conviction for unlawfully possessing a firearm. Although Thompson was cooperative, the situation was still critical in terms of potential danger to the officers, especially given that a loaded gun was only 10–15 feet away. Copeland did not violate a 'clearly established' right as that concept has been elucidated by the Supreme Court in the excessive force context. . . In arguing that Copeland violated his clearly established rights, Thompson points to our earlier decisions in *Robinson v. Solano Cty.*, 278 F.3d 1007 (9th Cir. 2002) (en banc), and *Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009). But neither of those cases involved a felony traffic stop with a firearm in proximity, nor did they feature facts sufficiently similar to the pattern we address here to put the constitutional question *beyond debate* as required to defeat qualified immunity. . . . After careful scrutiny of the record, we are not persuaded that Copeland was 'plainly incompetent' or that he 'knowingly violate[d] the law' when he acted as he did. . . .While Thompson fails to carry his burden that, in view of the safety concerns faced in this traffic stop, every reasonable police officer would have known that Copeland's conduct was unconstitutional under these circumstances, we acknowledge that the facts of this case are at the outer limit of qualified immunity's protection in the excessive force context. There can be little question that holding the gun in the low-ready alternative would have been a superior option for Copeland to use in the circumstances here, rather than pointing it at Thompson's head. In the face of the then-current law, there was not a clearly established constitutional violation. Going forward, however, the law is clearly established in this scenario.")

Thompson v. Rahr, 885 F.3d 582, 590-97 (9th Cir. 2018) (Christen, J., dissenting) ("The majority decides Deputy Copeland is entitled to qualified immunity on Lawrence Thompson's excessive force claim because Thompson's right not to have a gun pointed at his head was not clearly established in 2011, when the events of this case took place. This decision squarely conflicts with the clear directive our court issued in *Robinson v. Solano County*, a case involving facts that, if distinguishable at all, posed a greater threat to officer safety. We specifically took *Robinson* en banc 'to clarify the law of the circuit on the scope of qualified immunity for excessive force claims,' 278 F.3d 1007, 1009 (9th Cir. 2002) (en banc), and *Robinson*'s holding was plain: an officer who points his gun at the head of an arrestee who is cooperative and unthreatening, outnumbered by police, and apparently unarmed, violates the Fourth Amendment. . . If the contours of this right were not clearly established before we decided *Robinson*, they most certainly were thereafter. . . Today's decision regrettably muddies *Robinson*'s clear dictates, but it cannot overturn sixteen years of precedent. Because our three-judge panel is bound to abide by *Robinson*, I respectfully dissent. . . . *Robinson* was decided in 2002. It cannot be questioned that the rule from *Robinson* was clearly established when Thompson was arrested in 2011. Today, the court agrees that Deputy Copeland used unconstitutionally excessive force. It also agrees that, going forward, qualified immunity should not be available to officers who point guns at suspects under similar circumstances. Yet the court grants Deputy Copeland qualified immunity. It does so by concluding that, until now, the law had not made it clear to an officer in Deputy Copeland's position that pointing a gun at the suspect's head would constitute excessive force. The court offers two reasons for reaching this conclusion. Neither withstands scrutiny. First, the court likens Thompson's case to a traffic stop. That comparison would be apt if Thompson had been sitting in a car, because then a reasonable deputy might have feared that Thompson could reach a hidden weapon. But Thompson was outside of his car and well away from it, he had already been frisked, and he was under the guard of a second officer. The possibility of a secreted weapon did not justify pointing a gun at Thompson's head. The only other justification the court offers for granting qualified immunity is its suggestion that Robinson's case did not put Deputy Copeland on notice that threatening Thompson with lethal force would be excessive because, unlike Thompson, Robinson was 'approach[ing] from the area immediately surrounding ... his home' when officers pointed their guns at him. . . . Inevitably, there are minor factual differences between Robinson's case and Thompson's, but the Supreme Court has repeatedly instructed that a plaintiff need not identify 'a case directly on point' for a right to be clearly established. . . . The question is whether existing precedent 'placed the statutory or constitutional question beyond debate,'. . such that a reasonable officer in the defendant's position would have known his behavior was unlawful[.] . .Here, factual differences between Thompson's case and Robinson's only underscore the strength of Thompson's excessive force claim: Deputy Copeland himself patted down Thompson before he directed Thompson to sit on the bumper of the patrol car. Thompson's affect was calm, he was under the supervision of another officer, he was seated at least 10 to 15 feet away from the vehicle he had been driving—and at least that far from the gun on its rear floorboard. Like Robinson, Thompson was outnumbered by officers. He was apologetic and uncombative. There were 'no dangerous or exigent circumstances apparent at the time of the detention,'. . . nor any allegation that Thompson was behaving erratically. *Robinson* provided fair notice that

pointing a gun at a suspect's head under these circumstances—where a fully compliant suspect is unarmed, outnumbered, and unthreatening—violates the Fourth Amendment. The court's effort to distinguish *Robinson* by suggesting that Robinson was anywhere near the curtilage of his home erodes our en banc effort to provide a clear standard for police officers. . . . Here, the court acknowledges that Thompson was 'under control' and 'not in close proximity to an accessible weapon.' . . . This court has seen an alarming number of officer shooting cases in recent years, many involving circumstances similar to those present here but with fatal results. Police departments are to be commended for acknowledging the problem and making efforts to address it, . . . as are Blue Ribbon commissions convened to determine how and why situations like this one too often escalate to involve the use or threatened use of deadly force, and to identify training tactics that reduce risks. . . Hopefully, this important work will continue. There will always be tension between protecting individual rights and allowing officers the flexibility they need to protect the public and themselves, but the court's job is to balance officers' use of force against intrusions on individuals' Fourth Amendment rights. . . The facts of this case cannot be meaningfully distinguished from those in *Robinson*, and we have already made the judgment that on these facts the balance tips in the suspect's favor. . . .*Robinson* recognized the critical distinction between pointing a gun at someone's head and holding it in the low-ready position. Deputy Copeland was justified in displaying some degree of force, but accepting the allegations in the complaint as true, he unquestionably used excessive force when he aimed his gun at Thompson's head and threatened that if Thompson moved, he'd be dead. Because that rule was clearly established long before Thompson was arrested, I respectfully dissent.")

Bonivert v. City of Clarkston, 883 F.3d 865, 872-74, 879 (9th Cir. 2018) ("[T]he reasonableness standard governing violations of a Fourth Amendment right is distinct from the reasonableness standard governing whether the right was 'clearly established.'. . The former protects an officer who reasonably, but mistakenly, perceives facts that would have made his actions lawful had they been true. . . The latter, by contrast, goes further by acknowledging 'that reasonable mistakes can be made as to the legal constraints on particular police conduct.'. . Thus, even an officer who correctly perceives the facts establishing that his conduct was 'unreasonable' under the Fourth Amendment is entitled to immunity if he was mistaken 'as to what the law require[d]' under the circumstances, so long as the mistake was 'reasonable.'. . . Among constitutional rules, few are as well established, frequently applied, and familiar to police officers as the warrant requirement and its exceptions. Because there is no dispute that the officers failed to obtain a warrant before entering Bonivert's home, the entry was presumptively unreasonable. The officers argue that their entry was nevertheless justified by the three exceptions to the warrant requirement: consent, emergency aid, and exigent circumstances. Alternatively, the officers claim they are entitled to qualified immunity because it was not clearly established law that these exceptions did not justify a warrantless entry under the circumstances. . . .This is not a case involving 'such an undeveloped state of the law' that qualified immunity is necessary to protect the officers from the special unfairness that results when they are 'expected to predict the future course of constitutional law.'. . Rather, it is one demanding 'knowledge of ... basic, unquestioned constitutional rights.'. . To the extent the officers were mistaken 'as to what the law require[d]' to justify a warrantless

entry that evening, we conclude their mistake was not 'reasonable.'. . Taken in the light most favorable to Bonivert, the facts demonstrate that the officers violated Bonivert's constitutional right because no exception to the Fourth Amendment's warrant requirement justified the officers' entry into Bonivert's home. Additionally, the unlawfulness of the officers' entry under each exception was clearly established because it 'was apparent in light of pre-existing law. . . We explain our holding with respect to each exception below. . . .We recognize that police officers responding to reports of domestic violence are 'not conducting a trial, but' rather are 'required to make ... on-the-spot decision[s].'. . In this case, however, the facts of the situation did not entitle officers to 'disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'. . The officers are not entitled to qualified immunity on Bonivert's warrantless entry claim because it was clearly established law, as of 2012, that neither consent, the emergency aid exception, nor the exigency exception justified the officers' warrantless entry.")

Kramer v. Cullinan, 878 F.3d 1156, 1164 (9th Cir. 2018) ("By the time of Kramer's termination, it was clearly established law that an employer charging an employee with fraud, dishonesty, or immorality is required under the Fourteenth Amendment to afford that employee a name-clearing hearing. . . However, that generalized statement of the law was not sufficient to put Dr. Cullinan on notice that her particular actions violated Kramer's constitutional rights. . . Accordingly, Kramer's reliance on *Tibbets* and *Cox* as 'clearly establishing' precedent is not persuasive. Those cases did not definitively place the question of whether the conditional language in the Miller Nash letter was stigmatizing 'beyond debate.'. . Indeed, as discussed, the language in the Letter is not similar to phrasing that we have found to be stigmatizing. The district court failed to identify, the parties have not cited, and we have not found a case where conditional language was determined to be stigmatizing. Neither has a case been referenced that found stigmatization in the absence of a charge of fraud, dishonesty, or immoral conduct. In this circumstance, Kramer has failed to place the stigmatizing nature of the Letter 'beyond debate.'. . Reliance on the broad principles espoused in *Tibbets* and similar cases clearly establishing the stigmatizing nature of charges of fraud, dishonesty, or immorality does not place the question in this case 'beyond debate' because the Letter did not charge Kramer with fraud, dishonesty or immorality. At worst, the Letter could plausibly be read to imply a breach of fiduciary duty. But no precedent has been brought to our attention clearly establishing a charge of breach of fiduciary duty as stigmatizing. The Supreme Court has cautioned us against defining clearly established law 'at a high level of generality.'. . In *White*, the Supreme Court overruled a decision of the Tenth Circuit denying qualified immunity where 'it failed to identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment.'. . The Supreme Court reiterated that 'the clearly established law must be particularized to the facts of the case.'. . There is simply no clearly established law 'particularized to the [unique] facts of [this] case.'. . This is not a case where the stigmatizing nature of the charge is obvious as in *Guzman* . . . or *Tibbetts*. . .or *Campanelli*. . . or *Vanelli*. . . . Dr. Cullinan's conduct did not constitute such a run-of-the-mill Fourteenth Amendment violation. Instead, this case lacks an explicit charge of fraud, dishonesty, or

immorality, militating against a conclusion that Dr. Cullinan's actions violated a 'clearly established' right.")

Frudden v. Pilling, 877 F.3d 821, 832 (9th Cir. 2017) ("While *Barnette* and the present case both involve public schools, 'Tomorrow's Leaders' is not analogous to the Pledge of Allegiance. The former is an anodyne phrase printed on a shirt or sweatshirt, while the latter is a compelled oral recitation pledging fidelity to national unity (in its current form, to national unity 'under God'). Further, while *Wooley* and the present case both involve printed words, the cases are not analogous. The motto 'Tomorrow's Leaders' has little if any substantive content and was displayed on a uniform only in a school setting. In contrast, 'Live Free or Die' has obvious political content and is publicly displayed everywhere a vehicle is driven. Thus, it can hardly be maintained that these two cases clearly establish that the motto 'Tomorrow's Leaders' violates the First Amendment. Stated otherwise, existing precedent had not 'placed the ... constitutional question beyond debate.'")

Dunlap v. Anchorage Police Dep't., 712 F. App'x 646, ___ (9th Cir. 2017) ("The legal framework governing the probable cause determination was contradictory and confusing, and the singular case on which Dunlap relies, *De Nardo v. State*, 819 P.2d 903 (Alaska Ct. App. 1991), does not resolve that confusion. For a right to be 'clearly established,' 'a case directly on point' is not required, 'but existing precedent must have placed the statutory or constitutional question beyond debate.'. . *De Nardo* did not place beyond debate the question of whether 'on the person' applies to concealed weapons located within easy reach, as *De Nardo* explicitly declined to define the 'outer boundaries' of 'on the person' and did not address the concealed weapons laws in a factual context similar to that of the instant appeal. . . Moreover, no case law or statutory definitions clarify how the combination of Alaska Statute 11.61.220 and Anchorage Municipal Ordinance 8.25.020 operate under the circumstances at issue here. . . Accordingly, Dunlap fails to carry his burden of demonstrating that the right allegedly violated was clearly established. . . The district court correctly held that Henry is entitled to qualified immunity.")

Entler v. Gregoire, 872 F.3d 1031, 1042-45 & n. 27 (9th Cir. 2017) ("It was . . . beyond cavil that Entler's grievances were the first requisite steps in the pursuit of civil litigation. . . The threat of civil litigation if a prisoner's complaints are not redressed is implicit in every grievance; explicitly articulating that threat as a precursor to initiating civil litigation does not suddenly make that threat more intimidating or coercive. Thus, in the analogous Title VII retaliation context, we noted—twenty years before Entler was punished—that '[w]e see no legal distinction to be made between the filing of a charge which is clearly protected, and threatening to file a charge.'. .We find the *Gifford* footnote persuasive since we see no material distinction between retaliation in the Title VII context and prisoner retaliation. . . The sanctity of a constitutional right is at least of equal moment as a statutory right. And even though, in the face of Ninth Circuit precedent, we need not resort to out-of-circuit caselaw, we note with approval two out-of-circuit district court cases involving prisoner litigation. . . .In essence, it is illogical to conclude that prison officials may punish a prisoner for *threatening* to sue when it would be unconstitutional to punish a prisoner

for *actually* suing. Thus, once again, as we held in *Hargis*, ten years before Entler was sanctioned, a threat to sue—even if verbal—may not *ipso facto* rise to the level of coercion to support prison retaliation. . . Taking the complaint as true in the face of a 12(c) motion to dismiss on the pleadings, . . . we cannot conclude that a reasonable official would not have understood that disciplining Entler for threatening to file a civil suit was constitutionally impermissible. Therefore, on the papers before us, Appellees are not entitled to qualified immunity for Entler's threats to initiate civil litigation. . . .Included in the mix of infractions that caused Hearing Officer Jackson to sentence Entler to fifteen days of lost 'big yard' and gym time was Entler's threat to 'file criminal charges/arrest by sheriff.' We hold, as a matter of first impression in our circuit, that both the filing of a criminal complaint by a prisoner, as well as the threat to do so, are protected by the First Amendment, provided they are not baseless. . . Although we have not had occasion to opine on the foundational constitutional principle, we join our two sister circuits that have held that the filing of criminal complaints falls within the embrace of the First Amendment. [citing cases from 10th and 5th Circuits] It logically follows, therefore, just as with threats to file civil litigation, that the right to petition for the redress of grievances applies with equal force to threats to file criminal complaints. Therefore, the threat by a prisoner to file a criminal complaint, as well as the filing of the complaint, are both constitutionally protected conduct. . . . Although we hold that Entler's threat to file his criminal complaint was a constitutionally protected right, we are not convinced that at the time of the threat 'any reasonable official in [Appellees'] shoes would have understood that [they were] violating it, meaning that existing precedent ... placed the ... constitutional question beyond debate.'. . While it is true that where, as here, there is no binding Ninth Circuit precedent, we may 'look to whatever decisional law is available, including relevant decisions of other circuits, state courts, and district courts,'. . . , neither *Meyer*, *Hylton*, nor the three out-of-circuit prisoner cases hold that the *threat* to file a criminal complaint is constitutionally protected conduct. . . Unlike the threat to sue, therefore, there is neither Ninth Circuit precedent nor out-of-circuit authority addressing that issue, let alone a 'robust consensus of cases of persuasive authority.'. . .Since the record does not support Entler's claim that he was retaliated against for filing a criminal complaint, we need not address whether qualified immunity would there attach.")

Sharp v. Cty. of Orange, 871 F.3d 901, 910-13, 915-20 (9th Cir. 2017) ("Although unconstitutional, the arrest was not clearly proscribed by established federal law. The Supreme Court has repeatedly instructed that we examine 'whether the violative nature of *particular* conduct is clearly established' by controlling precedent, not whether the conduct violates a general principle of law. . . Therefore, while *Hill v. California*, 401 U.S. 797, 802 (1971), and *Rivera v. County of Los Angeles*, 745 F.3d 384, 389 (9th Cir. 2014), establish a general rule that an unreasonable mistake of identity renders an arrest unconstitutional, we cannot simply apply that general rule to the facts of this case. Except in the rare case of an 'obvious' instance of constitutional misconduct (which is not presented here), Plaintiffs must '*identify a case* where an officer acting under similar circumstances as [defendants] was held to have violated the Fourth Amendment.'. . In other words, Plaintiffs must point to prior case law that articulates a constitutional rule specific enough to alert *these* deputies *in this case* that *their particular conduct* was unlawful. To achieve that kind of notice, the prior precedent must be 'controlling'—

from the Ninth Circuit or Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction. . . . It is true that in a sufficiently 'obvious' case of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents. . . . But this obviousness principle, an exception to the specific-case requirement, is especially problematic in the Fourth-Amendment context. When a violation is obvious enough to override the necessity of a specific factual analogue, we mean to say that it is almost *always* wrong for an officer in those circumstances to act as he did. But that kind of categorical statement is particularly hard to make when officers encounter suspects every day in never-before-seen ways. There are countless confrontations involving officers that yield endless permutations of outcomes and responses. So the obviousness principle has real limits when it comes to the Fourth Amendment. . . With these observations in mind, we find this is not 'one of those rare cases' in which a violation was so 'obvious' that qualified immunity does not apply 'even without a case directly on point.'. . . The deputies subsequently detained Sharp III's in the patrol car *after* they discovered that he was not the warrant subject. . . .We hold that the categorical detention rule announced in *Summers* does not apply to arrest warrants, and because there were no particular circumstances justifying Sharp III's detention after learning he was not the arrest-warrant subject, we conclude that detention was unconstitutional as well. However, once again, it did not violate clearly established law because of the legal ambiguity existing at the time of the arrest as to whether the categorical *Summers* exception applied to arrest warrants. Thus, qualified immunity should have been granted. . . . We hold that the *Summers* exception, which hinged critically on the distinct nature of a search warrant, does not extend to arrest warrants. . . .Although there was no constitutional authority to detain Sharp III in the patrol car after discovering he was not the subject of the warrant, that particular detention was not clearly proscribed by established law. Except when there is an 'obvious' instance of constitutional misconduct, Plaintiffs must '*identify a case* where an officer acting under *similar circumstances* as [defendants] was held to have violated the Fourth Amendment.'. . Simply put, there is no such controlling case here that would alert these officers to the proper scope of *Summers*. . . .Plaintiffs have also failed to identify a case that pronounces a constitutional rule at a level of specificity sufficient to alert these deputies here that their conduct was unconstitutional in the specific circumstances they confronted. Nor is this a sufficiently 'obvious' case justifying departure from our requirement that there be some factually analogous judicial precedent. Thus, qualified immunity should have been granted. . . .Turning to the degree of force used, Plaintiffs point only to cases that establish the general framework for evaluating how much force is constitutionally excessive. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 395 (1989). But that is not enough to defeat a qualified-immunity defense. We are aware of no controlling constitutional principle or judicial precedent that is specific enough to alert Deputy Anderson that the degree of force he used in these circumstances was unreasonable. Thus, qualified immunity was warranted. . . .Sharp III asserts a First Amendment claim based on the deputies' alleged retaliation against him for being argumentative. . . .While in the patrol car, Sharp III was visibly angry at the deputies, swore at them, and threatened to sue them. In response, Deputy Anderson told him, 'If you weren't being so argumentative, I'd probably just put you on the curb.'. . We conclude that Sharp III suffered unconstitutional retaliation that was clearly proscribed by established law. . . .This violation was clearly established by *Ford v. City of Yakima*,

706 F.3d 1188 (9th Cir. 2013). In that case, a police officer pulled over a driver who was blasting loud music, and because the driver would not stop 'running [his] mouth' and exhibited an uncooperative 'attitude,' the officer arrested him and booked him in jail—rather than merely issuing a citation. . .The officer repeated that he was arresting the man because the man would not 'shut up' and had 'diarrhea of the mouth.'. . On these facts, we found an unconstitutional retaliation. These facts are sufficiently analogous to the case before us to conclude that Deputy Anderson was on notice that his particular conduct was unconstitutional. Thus, qualified immunity was properly denied.")

Sharp v. Cty. of Orange, 871 F.3d 901, 923-27 (9th Cir. 2017) (N.R. Smith, J., dissenting in part) ("Viewing the evidence in the light most favorable to Sharp III, it is obvious that the deputies arrested Sharp III without probable cause. The facts in this case do not come close to meeting the probable cause standard. In an effort to avoid that uncomfortable truth, the Majority ignores the statements made by Deputies Anderson and Flores and analyzes this case as one of mistaken identity. . . But that theory crumbles when we view the facts in the light most favorable to Sharp III. Since the deputies had fair warning that their conduct violated Sharp III's Fourth Amendment rights when they arrested him without probable cause, they are not entitled to qualified immunity. The District Court was right; this claim should go to trial. . . . Based on Deputy Anderson's statement, the Majority concedes that the deputies failed to release Sharp III in retaliation for exercising his *First Amendment* rights. In contrast, when analyzing whether the continued detention violated Sharp III's Fourth Amendment rights, the Majority inexplicably ignores Deputy Anderson's statement. Instead, the Majority improperly concludes that the deputies may have reasonably but mistakenly believed that the exception in *Summers* applied to arrest warrants. However, the Majority's conclusion is possible only if we view the evidence in the light most favorable *to the deputies*. Thus, viewing the facts in the light most favorable to Sharp III, the deputies continued Sharp III's arrest because he exercised his First Amendment rights. . . . Holding a suspect in custody for exercising his First Amendment rights is an obvious violation of the Fourth Amendment. . . .[In *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372 (9th Cir. 1990)], the court held that detaining an individual without probable cause for exercising First Amendment rights was an obvious violation of the Fourth Amendment. . . The import of *Duran* is clear: the deputies committed a clearly established violation of the Fourth Amendment when they kept Sharp III in custody for exercising his First Amendment rights. . . As a result, the second prong of the qualified immunity analysis does not provide immunity to the deputies. . . . In this case, the Majority agrees Sharp III was arrested, so the exception in *Summers* could never apply. While a mere detention can turn into a de facto arrest, . . . the Majority does not go there. Further, I am aware of no case in which an arrest turned into a mere detention. . . Consequently, Sharp III continued to be under arrest during his subsequent seizure in the patrol vehicle. Thus, *Summers*, even if it applied to arrest warrants, could never justify Sharp III's continued seizure. Since the language in *Summers* is categorical and clear, any reasonable officer would know this. . . .Viewing the evidence in the light most favorable to Sharp III, the deputies used considerable force against Sharp III. The deputies arrested Sharp III at gun point and used enough force to tear his rotator cuff. On the other hand, he had committed no crime. Deputy Flores conceded that the deputies

arrested Sharp III because 'we were trying to just detain everybody[.]' Sharp III posed no immediate threat to the safety of the officers or others. Sharp III walked calmly toward the deputies and was fully compliant. He never resisted or attempted to evade arrest by flight. No reasonable officer would believe using force, let alone significant force, was lawful under these circumstances. None of the *Graham* factors were present. Since Deputy Anderson had fair warning that his use of force violated Sharp III's Fourth Amendment rights, he is not entitled to qualified immunity. The District Court was right; this claim should go to trial. . . . Contrary to precedent regarding qualified immunity, the Majority fails to view the facts in the light most favorable to Sharp III when analyzing these Fourth Amendment claims. Consequently, the Majority improperly grants the deputies qualified immunity for their initial arrest of Sharp III, their use of excessive force against Sharp III, their subsequent search of Sharp III, and their continued arrest of Sharp III. Instead, viewing the facts in the light most favorable to Sharp III, the deputies are not entitled to qualified immunity for any of these constitutional violations. Thus, Sharp III's Fourth Amendment claims stemming from these violations should go to trial right along with Sharp III's claim of First Amendment retaliation. I dissent.")

Shafer v. Cty. of Santa Barbara, 868 F.3d 1110, 1113, 1117-18 (9th Cir. 2017) ("The jury found that Deputy Padilla violated Shafer's Fourth Amendment constitutional right to be free from excessive force. The evidence adduced at trial was sufficient to sustain the jury's verdict. However, Deputy Padilla is entitled to qualified immunity, because, at the time this incident occurred, the law was not clearly established that an officer cannot progressively increase his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver when a misdemeanant refuses to comply with the officer's orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him in a challenging environment. . . . Defined at an appropriate level of specificity, the question at hand is whether an officer violates clearly established law when he progressively increases his use of force from verbal commands, to an arm grab, and then a leg sweep maneuver, when a misdemeanant refuses to comply with the officer's orders and resists, obstructs, or delays the officer in his lawful performance of duties such that the officer has probable cause to arrest him in a challenging environment. The answer is no. We are mindful of the Supreme Court's pronouncement in *White v. Pauly* that, to satisfy this step in the qualified immunity analysis, we generally must 'identify a case where an officer acting under similar circumstances as [Deputy Padilla] was held to have violated the Fourth Amendment.'. . We are aware of no such case. Shafer cites four cases with comparable degrees of force used by officers, but none of which involved a challenging environment or an act of physical resistance or obstruction by the arrestee. . . .Although we do not require a case to be 'on all fours,'. . . '[w]e cannot conclude ... in light of these existing precedents, that "*every* reasonable official would have understood ... *beyond debate*,"'. . . that Deputy Padilla's conduct in these circumstances constituted excessive force based on the cases cited by Shafer. In these cases, where there is a 'hazy border between excessive and acceptable force,'. . . such that the officer 'reasonably misapprehends the law governing the circumstances [ ]he confronted,' qualified immunity protects officers. . .Shafer's primary argument on appeal is that Deputy Padilla violated clearly established law, because he had no basis for using *any* force

whatsoever. We disagree. The jury found that Deputy Padilla had probable cause to arrest Shafer for violations of California Penal Code section 148 for resisting, delaying, or obstructing an officer. This entitled Deputy Padilla to use *some* degree of force. . . Finally, Shafer argues that it is Deputy Padilla's burden to demonstrate that he did not violate Shafer's clearly established constitutional right. Again, we disagree. It is the plaintiff who 'bears the burden of showing that the rights allegedly violated were "clearly established."'. . Because Shafer fails to identify sufficiently specific constitutional precedents to alert Deputy Padilla that his particular conduct was unlawful, Deputy Padilla is entitled to qualified immunity.")

S.B. v. County of San Diego, 864 F.3d 1010, 1014-16 (9th Cir. 2017) ("Here, a reasonable jury could conclude that: (1) the three officers, responding to a call about a mentally ill and intoxicated individual 'acting aggressively,' entered Brown's house and saw that he had knives in his pockets; (2) after Brown complied with the officers' orders to kneel, Brown grabbed a knife with a six-to-eight-inch blade from his back pocket; (3) Moses shot Brown as soon as his hand touched the knife; (4) Brown was on his knees when he was shot; (5) when he grabbed the knife, Brown was approximately six to eight feet away from Vories; (6) Moses could not see the other officers at the time Brown grabbed the knife; (7) after Brown went for the knife, the officers did not order him to drop the knife or warn that he was about to be shot; and (8) Vories had a non-lethal option – a Taser gun. Viewing the facts in this light, Moses's use of deadly force was not objectively reasonable, and therefore violated Brown's Fourth Amendment right against excessive force. Our holding mirrors those in similar cases. . . .But that is not all. Under the second prong of the qualified immunity test, we decide if the alleged violation of Brown's Fourth Amendment right against excessive force 'was clearly established at the time of the officer's alleged misconduct.'. . . In analyzing this question, we acknowledge the Supreme Court's recent frustration with failures to heed its holdings. The Supreme Court has 'repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality.'. . Our court lacks a monopoly over such immunity missteps. When recently reversing the Tenth Circuit, the Supreme Court wrote: 'In the last five years, [the Supreme Court] has issued a number of opinions reversing federal courts in qualified immunity cases.' *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citing *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases)). 'The Court has found this necessary both because qualified immunity is important to "society as a whole," and because as "an immunity from suit," qualified immunity "is effectively lost if a case is erroneously permitted to go to trial."'. . . We hear the Supreme Court loud and clear. Before a court can impose liability on Moses, we must identify precedent as of August 24, 2013 – the night of the shooting – that put Moses on clear notice that using deadly force in these particular circumstances would be excessive. General excessive force principles, as set forth in *Graham* and *Garner*, are 'not inherently incapable of giving fair and clear warning to officers,' but they 'do not by themselves create clearly established law outside an obvious case.'. . Instead, we must 'identify a case where an officer acting under similar circumstances as [Moses] was held to have violated the Fourth Amendment.'. . We cannot locate any such precedent. Our most similar case which pre-dates Moses's use of deadly force is *Glenn*, where officers fatally shot a suicidal and intoxicated individual in his driveway who did not comply with orders to put down a pocketknife. . . But in *Glenn*, the individual 'did not brandish

[the pocketknife] at anyone, but rather held [it] to his own neck.'. . Brown's grabbing the knife from his pocket despite orders to place his hands on his head was more threatening. . . As such, the facts of *Glenn* are not sufficiently analogous to give Moses fair notice that it was objectively unreasonable to use lethal force against Brown. . . Plaintiffs argue that two district court decisions (within the Ninth Circuit but outside of California) provided clear warning to Moses. However, 'district court decisions – unlike those from the courts of appeals – do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.'. . Moreover, even if district court decisions could clearly establish the law for purposes of qualified immunity, the cases on which plaintiffs rely are insufficient. . . . We disagree with the district court that it was clearly established on August 24, 2013, that using deadly force in this situation, even viewed in the light most favorable to plaintiffs, would constitute excessive force under the Fourth Amendment. . . The district court did not have the benefit of *White*, and the cases that plaintiffs cite do not satisfy *White*'s exacting standard. Nor does this case involve an 'obvious' or 'run-of-the-mill' violation of the Fourth Amendment under *Graham* and *Garner*. . . Moses is therefore immune from liability under section 1983 for his use of deadly force, so we reverse the denial of summary judgment on the Fourth Amendment claim.")

Estate of Peterson v. Krueger, No. 14-35682, 2017 WL 1174402, at *1 (9th Cir. Mar. 30, 2017) (not reported) ("The United States Supreme Court recently reiterated 'the longstanding principle that "clearly established law" should not be defined "at a high level of generality."'. . '[T]he clearly established law must be "particularized" to the facts of the case.'. . The district court erred in failing to identify a case where an officer acting under similar circumstances as Krueger was held to have violated the Fourteenth Amendment. Instead, the district court relied on *Munger v. City of Glasgow Police Department*, 227 F.3d 1082 (9th Cir. 2000), *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006), and *Patel v. Kent School District*, 648 F.3d 965 (9th Cir. 2011), which lay out the state-created danger exception in markedly different circumstances and are applicable to this case only at a high level of generality. Accordingly, we conclude that summary judgment based on qualified immunity was warranted because the law was not clearly established at the time of the alleged conduct.")

Hardwick v. County of Orange, 844 F.3d 1112, 1117-20 (9th Cir. 2017) ("[T]he 'salient question' we must answer is 'whether the state of the law [as of February, 2000, when the conduct at issue allegedly occurred] gave [these social workers] fair warning' that their alleged use of perjured testimony and fabricated evidence in court in order to sever Preslie's familial bond with her mother was unconstitutional. . . .No official with an IQ greater than room temperature in Alaska could claim that he or she did not know that the conduct at the center of this case violated both state and federal law. The social workers in this case are alleged to have knowingly and maliciously violated the law in their attempt to sever Preslie's protected relationship with her mother. Perjury is a crime under both federal and California state law, as is the knowing submission of false evidence to a court. 18 U.S.C. § 1621; Cal. Penal Code § 118. Both crimes make no distinction between criminal and civil proceedings. This malicious criminal behavior is hardly conduct for which qualified immunity is either justified or appropriate. The doctrine exists to protect mistaken but reasonable

decisions, not purposeful criminal conduct. As the Supreme Court repeated in *Sheehan*, officials who knowingly violate the law are not entitled to immunity. . . . Just as the Court in *Hope* used an ADOC regulation and a DOJ report to support its conclusion that the officials were on fair notice of the wrongfulness of their conduct, here, a pertinent state statute warns defendants in unmistakable language of the personal consequences of lies, perjury, and deception: the loss of immunity for such conduct. Furthermore, the statute focuses on behavior designed wrongfully to affect dependency proceedings in court, the citadel of Due Process. We believe this is the kind of case the Supreme Court had in mind in *Hope* when it talked about conduct so clearly and obviously wrong that the conduct itself unmistakably 'should have provided [defendants] with some notice' that their alleged conduct violated their targets' constitutional rights.")

Kirkpatrick v. County of Washoe, 843 F.3d 784, 792-93 (9th Cir. 2016) (en banc) ("In July 2008 it was well-settled that a child could not be removed without prior judicial authorization absent evidence that the child was in imminent danger of serious bodily injury. . . But the Supreme Court has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'. . . In 2008, it was not beyond debate that the confluence of factors set forth above would not support a finding of exigency. No Supreme Court precedent defines when a warrant is required to seize a child under exigent circumstances. And although the Supreme Court has assumed that circuit precedent can be a dispositive source of clearly established law, *see id.*; *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014); *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012), none of the cases from this court explain when removing an infant from a parent's custody at a hospital to prevent neglect, without a warrant, crosses the line of reasonableness and violates the Fourth Amendment. . . . In fact, very few cases from any circuit have addressed what constitutes exigent circumstances in a case that remotely resembles this one. . . No matter how carefully a reasonable social worker had read our case law, she could not have known that seizing B.W. would violate federal constitutional law. Without that fair notice, the social workers in this case are entitled to qualified immunity.")

Kirkpatrick v. County of Washoe, 843 F.3d 784, 798-800 (9th Cir. 2016) (en banc) (Friedland, J., joined by Thomas, C.J., concurring in part and dissenting in part) ("I join the majority's opinion as to municipal liability but dissent from its affirmance of summary judgment on the claim against the individual defendants. An official is liable, and not entitled to qualified immunity, if her 'conduct violated a clearly established constitutional right.'. . The constitutional rule that B.W. could not be seized without a warrant absent imminent danger was clearly established, and it was equally clear that there was no imminent danger to B.W. On the Fourth Amendment claim against the social workers, I would therefore hold that summary judgment to Defendants should be reversed and Plaintiff's cross-motion for summary judgment should be granted. . . The majority correctly recognizes that the rule of law at issue here was clearly established at the time: '[A] child could not be removed without prior judicial authorization absent evidence that the child was in imminent danger of serious bodily injury.'. . . Although it is true that no binding authority has addressed this exact factual scenario, such specificity is not required for a constitutional obligation to be 'clearly established.'. . It was clearly established that a child could not be seized without a

warrant absent imminent danger, and the inescapable conclusion to be drawn from this record is that no objective social worker could have believed—and indeed, these social workers did *not* believe—that B.W. was in imminent danger. It follows, therefore, that the social workers violated B.W.'s clearly established constitutional rights.")

Kirkpatrick v. County of Washoe, 843 F.3d 784, 800 (9th Cir. 2016) (en banc) (Kozinski, J., joined by O'Scannlain, Rawlinson, and Bea, JJ., and Watford, J., joining with respect to Part 2, dissenting in part) ("For the reasons explained in my panel dissent, I agree that the social workers here are entitled to qualified immunity and join that part of the opinion. But I cannot agree that the social workers committed a constitutional violation, nor that the County can be liable for a policy of unconstitutional conduct under *Monell*. I therefore dissent from those portions of the opinion.")

Shepard v. Quillen, 840 F.3d 686, 693-94 (9th Cir. 2016) ("A prisoner's general right against retaliatory punishment was clearly established well before Wise transferred Shepard to administrative segregation in 2008. . . Nor was there any question that Shepard was engaged in protected conduct and that he was subject to the type of adverse action that would chill speech. . . But to overcome qualified immunity, Shepard must show that, as to the precise conduct at issue, 'existing precedent ... placed the ... constitutional question beyond debate.'. . Because the analysis of a retaliation claim is largely subjective, it's difficult to determine at the summary judgment stage whether a reasonable officer in Wise's position would have known he was violating the law. As we have explained, a jury could determine that Wise was motivated by retaliatory animus. But a jury could also conclude that Wise was relying on what he reasonably thought was a prison policy. In the latter circumstance he wouldn't have violated any right, let alone a clearly established one. But in the former, Wise would have been 'knowingly violat[ing] the law.'. . Nor, assuming Shepard's version of events is true, can Wise claim that he could have *reasonably* believed his conduct was lawful because he was advancing a legitimate penological goal by complying with section 3335. . . As we have explained, there's virtually no evidence that Shepard needed to be transferred out of the general population for his own safety or to preserve the integrity of an investigation. . .Wise argues that because section 3335 mandates placing a prisoner in administrative segregation following a complaint, he could not have been on notice that his conduct was unlawful; the dissent echoes Wise's reading of the regulation, dissent at 25. But the regulation does no such thing, . . . let alone authorize prison officials to retaliate against prisoners for complaining about officers. No reasonable prison official could read the regulation in that way, and Wise has offered no evidence that any other official did so[.]. . . Considering the substantial chilling effect that such a reading would have on the long established right of prisoners to seek redress of grievances, . . . this interpretation doesn't even 'pass[ ] the laugh test'; its illegality would be 'so obvious that any prison official involved in enforcing it should have known he was breaking the law.'. . In 2003, five years before the events at issue, we followed 'other circuits [in] holding that prison officials may not defeat a retaliation claim ... simply by articulating a general justification for a neutral process, when there is a genuine issue of material fact as to whether the action was taken in retaliation for the exercise of a constitutional right.'. . Those circuits have stated their rule even more bluntly, holding that the 'policy [against retaliation] applies even where

the action taken ... would otherwise be permissible.'. . Accordingly, the contours of Shepard's right against retaliation were 'sufficiently clear that a reasonable official' in Wise's position would have understood 'that what he [was] doing violate[d] that right.'. . Wise may have done just what *Bruce* prohibits. Resolution of the disputed factual issues is thus 'critical to a proper determination of [Wise's] entitlement to qualified immunity.'. .Shepard has established a genuine issue of material fact as to whether Wise retaliated against him. He has also shown that Wise isn't entitled to qualified immunity at this stage. Accordingly, we reverse the district court's grant of summary judgment in Wise's favor.")

Shepard v. Quillen, 840 F.3d 686, 696-98 (9th Cir. 2016) (Tallman, J., dissenting) ("In short, Lieutenant Wise received a complaint that one of his correctional officers had engaged in abusive misconduct. Knowing this, Lieutenant Wise made a judgment call: Shepard's continued presence in his housing unit 'present[ed] an immediate threat to [Shepard's] safety' and 'jeopardize[d] the integrity of an investigation' into Officer Quillen's alleged misconduct. . . Lieutenant Wise properly followed prison policy and transferred Shepard into administrative segregation in furtherance of those legitimate penological goals. A reasonable correctional supervisor would have done the same. . . .Even assuming Shepard has alleged facts that show a constitutional violation, Lieutenant Wise is still entitled to qualified immunity if the right at issue was not 'clearly established' at the time of the challenged conduct. . . A clearly established right is one that is 'sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.'. . Shepard can't meet that high burden here. The question we must answer is: would a reasonable prison official in Lieutenant Wise's position have known that placing Shepard in administrative segregation after a complaint of serious staff assault, as directed by a clearly legitimate prison regulation, was a violation of Shepard's constitutional rights? I am at a loss as to how the answer to this question can be anything but a resounding 'no.'The relevant prison regulation, § 3335, required Lieutenant Wise to transfer Shepard into administrative segregation following his complaint of serious staff misconduct if Lieutenant Wise determined that Shepard's personal safety was at risk or that Shepard's continued presence in the housing unit threatened the integrity of the resulting internal investigation. The record amply demonstrates why it was reasonable for Lieutenant Wise to transfer Shepard into administrative segregation for these legitimate reasons. Under these circumstances, a reasonable officer in Lieutenant Wise's position could not have known that complying with a mandatory prison regulation would be a violation of Shepard's constitutional rights. In concluding otherwise and second-guessing his decision, the majority subjects Lieutenant Wise to unnecessary 'harassment, distraction, and liability.'. . The Supreme Court has told us that qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . Lieutenant Wise's decision to transfer Shepard into administrative segregation falls squarely within the range of conduct that is protected by qualified immunity. The district court properly granted him the law's protection. My colleagues err in refusing to apply it.")

A.K.H. v. City of Tustin, 837 F.3d 1005, 1013-14 (9th Cir. 2016) ("It has long been clear that '[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' *Garner*,

471 U.S. at 11. Viewing the evidence in the light most favorable to the plaintiffs, that is precisely what Officer Villarreal did here. We affirm the district court's denial of qualified immunity and remand for further proceedings consistent with this opinion.")

Pauluk v. Savage, 836 F.3d 1117, 1118-19, 1123-26 (9th Cir. 2016) ("This case lies at the intersection of two lines of authority—on the one hand, the state-created danger doctrine under which constitutional due process claims may be brought; on the other, the Supreme Court's decision in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), declining to find a general due process right to a safe workplace. We hold that *Collins* does not bar Plaintiffs' due process claim. Plaintiffs have stated a claim under the state-created danger doctrine, notwithstanding the fact that the danger at issue is a physical condition in the workplace. However, we reverse the district court's denial of summary judgment as to Wojcik and Savage, on the ground that the due process right asserted by Plaintiffs was not clearly established at the time of the violation. . . . The threshold question before us is whether Plaintiffs' claim under the state-created danger doctrine is foreclosed by *Collins*. We conclude that it is not. . . .Other courts agree that *Collins* does not foreclose application of the state-created danger exception in workplace safety cases. . . . To prevail on a state-created danger due process claim, a plaintiff must show more than merely a failure to create or maintain a safe work environment. First, a plaintiff must show that the state engaged in 'affirmative conduct' that placed him or her in danger. . . .Second, the state actor must have acted with 'deliberate indifference' to a 'known or obvious danger.'. . .Plaintiffs' evidence, if true, satisfies both elements of a state-created danger claim. First, Pauluk's 2003 transfer back to Shadow Lane was 'affirmative' conduct. Pauluk clearly did not want to return to Shadow Lane and was transferred 'involuntarily.' There is sufficient evidence in the record that either or both Wojcik and Savage were sufficiently involved in the decision to transfer that a reasonable jury could conclude they should bear some responsibility for that transfer. . . .Second, construing the facts in the light most favorable to Plaintiffs, Wojcik and Savage acted with deliberate indifference in exposing Pauluk to a known and obvious danger. Plaintiffs presented evidence that Wojcik and Savage were both aware of the CCHD's long and tortured history of pervasive mold problems in multiple buildings, including the Shadow Lane facility. . . .The core question in this appeal is whether *Collins* bars the application of the state-created danger doctrine in cases where the danger is a physical condition in the workplace. Because *Wood* did not involve a dangerous workplace, it does not speak to this question. *Grubbs I* presents a closer analogy to this case. However, as recounted above, the danger in *Grubbs I* was a human actor who posed a known threat. In contrast, Pauluk was not harmed by a human agent, but rather by a physical condition in the building where he worked. This case is factually very similar to *Collins*, where, as here, the danger was a physical danger in the workplace. For the reasons given above, we conclude that Plaintiffs have stated a claim despite the fact that Pauluk's injury was caused by physical conditions in the workplace. But, because the Supreme Court in *Collins* declined to find a due process violation in a case with very similar facts, we cannot say that Wojcik and Savage were 'on notice' that their conduct was unlawful under clearly established law.")

Pauluk v. Savage, 836 F.3d 1117, 1126 (9th Cir. 2016) (Murgia, J., concurring in part and dissenting in part) ("I fully agree with the opinion's analysis as to the scope of this court's jurisdiction to review the district court's denial of summary judgment on qualified immunity grounds, and with its conclusion that the district court erred in denying qualified immunity to Wojcik and Savage. However, even accepting as true the plaintiffs' version of events, *see Behrens v. Pelletier*, 516 U.S. 299, 313 (1996), I respectfully disagree that the plaintiffs have presented a cognizable claim that Wojcik and Savage affirmatively acted with deliberate indifference to Pauluk's substantive due process rights under the state-created danger doctrine.")

Pauluk v. Savage, 836 F.3d 1117, 1132-34 (9th Cir. 2016) (Noonan, J., dissenting) ("Today, the majority holds that the state-created danger doctrine—a theory of constitutional harm whose contours have been 'clearly established' by at least nine published opinions of this court over the course of two decades—is no longer sufficiently 'clear' in light of a single case which addresses an unrelated legal theory. I respectfully dissent. . . .No basis exists to distinguish this case from *Wood*, *Kennedy*, or any other published opinion of this court upholding the applicability of the state-created danger doctrine. I would affirm the district court's denial of summary judgment. I therefore concur with the majority's conclusion that, viewing the facts in the light most favorable to plaintiffs, they have shown a violation of the Fourteenth Amendment under the state created danger doctrine. . . .Pauluk's case therefore presents the precise facts that the *Collins* Court deemed were inapplicable to its analysis and holding. Accordingly, *Collins* does not counsel against affirming the district court here. Indeed, the majority appears to concede that *Collins* is distinguishable, but concludes that even assuming Pauluk has stated a constitutional violation, the factual circumstances of this case are simply too similar to the facts of *Collins* for the defendants to have been ' "on notice" that their conduct was unlawful under clearly established law.'. . The law governing the state-created danger doctrine is 'clearly established' by the controlling precedent discussed above such that 'any reasonable official in [defendants'] shoes would have understood that [they were] violating it.' *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765 (2015) (citations omitted). Indeed, in light of these cases, the constitutional question has been 'placed...beyond debate.'. . A case which presents some factual similarities but lacks any legal nexus to the state-created danger doctrine cannot revive that debate, nor can it serve to convolute what this court has defined with pellucid clarity. *Collins* does not control here. Accordingly, I dissent.")

Managed Protective Services, Inc. v. City of Mesa, 654 F. App'x 276, __ (9th Cir. 2016) ("[T]he district court erred in examining solely 'hot pavement' cases to determine whether the law was clearly established. That courts have resolved prior 'hot pavement' cases differently is not dispositive; law can be 'clearly established' even if 'there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.'. .Among other relevant principles, it was clearly established that the Fourth Amendment prohibits the continued use of force against an arrestee who is restrained and no longer resisting, *see, e.g.*, *LaLonde v. County of Riverside*, 204 F.3d 947, 960–61 (9th Cir. 2000), and that ignoring an arrestee's complaints of pain violates the Fourth Amendment, *see, e.g.*, *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993)")

Managed Protective Services, Inc. v. City of Mesa, 654 F. App'x 276, ___ (9th Cir. 2016) (Bea, J., concurring in part, dissenting in part) ("I respectfully dissent from the majority's decision to reverse the district court's grant of qualified immunity as to the excessive force claim. The district court did not err when it canvassed other hot surface cases to determine whether the officers' conduct here amounted to a clearly established violation of Simpson's constitutional right to be free from unreasonable seizure. In assessing qualified immunity, '[i]t is important to emphasize that this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."'. . Broad general propositions *can* establish a 'clear' violation 'in an obvious case.'. . However, as the district court noted, this is not such a case. Federal courts have reached different results in cases involving detainees and hot surfaces. . . This body of case law 'undoubtedly show[s] that this area is one in which the result depends very much on the facts of each case.'. . 'None of them squarely governs the case here; they do suggest that [the officers'] actions fell in the "hazy border between excessive and acceptable force."'. . Accordingly, I would affirm the district court's holding that hobbling Simpson on hot pavement to overcome his physical resistance to entering the squad car did not amount to a clearly established violation of his constitutional rights.")

Sialoi v. City of San Diego, 823 F.3d 1223, 1233-36 (9th Cir. 2016) ("In sum, once the officers determined that the item in G.S.'s hand was a toy, no officer of 'reasonable caution' would have had any reason to believe that G.S., T.O.S., and B.F. were the suspects the apartment manager described, or were otherwise engaged in unlawful activity. Accordingly, taking the facts in the light most favorable to the plaintiffs, the officers violated the constitutional rights of G.S., T.O.S., and B.F. when they arrested them. . . .It is true, as the defendants argue, that the officers found themselves in a potentially dangerous situation: they were in a high-crime area responding to a report of suspects with weapons. While these background circumstances are no doubt relevant to the question whether the officers' conduct was reasonable, they do not render it even 'reasonably arguable' that probable cause existed for the arrests of the young boys. Where no facts specific to the arrestees establish probable cause, officers may not rely on general background facts to immunize themselves from suit. . . . To repeat, the officers encountered not two black individuals but instead three Samoans wearing clothing that did not resemble the apartment manager's description. Before handcuffing the three boys and placing them in a police car, the officers knew that the item in G.S.'s hand was a mere toy, knew that none of the boys possessed a gun, and were aware of no other even remotely suspicious activity in which any of the boys had engaged or were engaging. For these reasons, no reasonable officer would have concluded that probable caused existed to arrest the teenagers, and we affirm the district court's denial of qualified immunity for their arrest. . . . We hold that, taking the facts in the light most favorable to the remaining plaintiffs, no reasonable officer would have thought it lawful to detain and search them. The defendants do not dispute that it has long been clearly established that it is unlawful to conduct an investigatory stop and search unsupported by reasonable suspicion. . . Once the officers discovered that the item in G.S.'s hand was a mere toy, the only fact that in any way suggested that the Sialoi family was involved in criminal activity was the sole circumstance of their presence outside an apartment

building near which two armed suspects had earlier been spotted. Were this sufficient to establish reasonable suspicion, the police would be authorized to indiscriminately detain individuals in areas of expected criminal activity without any 'basis for suspecting that the *particular* person detained is engaged in criminal activity.'. . Accordingly, no reasonable officer would think that the location of the encounter alone could serve as the basis for reasonable suspicion. Furthermore, because the officers do not 'allege[ ] any specific facts' suggesting that any of the remaining plaintiffs possessed a weapon, 'we conclude that it would have been clear to a reasonable officer that [the] pat-down[s] ... [were] unlawful in this situation.'. . Accordingly, we affirm the district court's denial of qualified immunity for the officers' seizure and search of the remaining plaintiffs.")

Hamby v. Hammond, 821 F.3d 1085, 1091-95 & n.3 (9th Cir. 2016) ("In a nutshell, according to the Supreme Court, state officials are entitled to qualified immunity so long as 'none of our precedents "squarely governs" the facts here,' meaning that 'we cannot say that only someone "plainly incompetent' or who "knowingly violate[s] the law" would have ... acted as [the officials] did.'. .Before applying the above principles to Hamby's case, we must emphasize that the fact-specific, highly contextualized nature of the inquiry does not depend on which particular constitutional right a given plaintiff claims the officials have violated. In particular, Hamby—drawing on some recent statements from our court—suggests that the qualified-immunity inquiry in Eighth Amendment cases differs from the inquiry in other types of cases, such as those involving excessive force, where analogies to prior cases supposedly play a stronger role. That proposition is demonstrably untrue. Not only has the Supreme Court never suggested any such distinction, but several cases affirmatively repudiate it. Indeed, *Taylor v. Barkes* was an Eighth Amendment case—just like the present one—in which an inmate's estate alleged that prison officials were deliberately indifferent to the inmate's serious medical needs. . . . Likewise, *Wood v. Moss* and *Reichle v. Howards* were First Amendment cases rather than Fourth Amendment ones. . . And yet the Supreme Court's analysis proceeded along the same lines. These cases make clear that the particular right at issue in no way changes the fact-specific, highly contextualized nature of the 'clearly established' analysis. . .Given the foregoing doctrine, the question in this case must be: viewing the evidence in the light most favorable to Hamby, was it 'beyond debate,' at the time the prison officials acted, that their conduct violated the Constitution? If the answer is no—if the officials' actions did not *clearly* violate Hamby's rights under the Eighth Amendment—then the officials are entitled to qualified immunity, and summary judgment must be entered in their favor. . . . For purposes of determining qualified immunity, therefore, we must ask the narrower question: viewing the evidence most favorably to Hamby, and given existing case law at that time, was it 'beyond debate' that the prison officials pursued a medically unreasonable course of treatment by declining to refer Hamby for a surgical evaluation? . . . Here, the answer is no, even if we assume that each of the officials Hamby sued was aware of his chronic pain. . . That is, in light of existing precedent and the specific facts of Hamby's case, it is at least debatable that the officials complied with the Eighth Amendment, because—to the extent they played any role in the decision to deny Hamby surgery for his umbilical hernia—the record makes clear that they did so based on legitimate medical opinions that have often been held reasonable under the Eighth Amendment. . . . At worst, the evidence in the record shows a difference of medical opinion amounting to possible

negligence on the part of Drs. Hammond and Smith. . . . Hamby's argument misunderstands the sort of clarity a plaintiff must demonstrate in order to overcome a defense of qualified immunity. For starters, defining the relevant right as simply the right to be free from deliberate indifference 'is far too general a proposition to control this case.'. . To proceed in that manner is to neglect the dispositive question: whether these officials, on these facts, should have known that what they did violated the Eighth Amendment. In short, Hamby would have us repeat the same error the Supreme Court has time and again felt compelled to correct. Of course, it is true (as far as it goes) that a plaintiff need not find a case with identical facts in order to survive a defense of qualified immunity; obviously, one can imagine a situation where the officials' conduct is so egregious that no one would defend it, even if there were no prior holding directly on point. . . But it should be equally obvious that the farther afield existing precedent lies from the case under review, the more likely it will be that the officials' acts will fall within that vast zone of conduct that is perhaps regrettable but is at least arguably constitutional. So long as even that much can be said for the officials, they are entitled to qualified immunity. Such is the case here. Even when the facts are viewed most favorably to Hamby, they demonstrate that the prison officials acted on a bona fide medical opinion, and opted for a course of treatment held to be constitutional on numerous prior occasions. . . That is enough to shield them from damages liability.")

Hamby v. Hammond, 821 F.3d 1085, 1096-97 (9th Cir. 2016) (Gould, J., concurring in part and dissenting in part) ("I concur only in the result reached by the majority in Part IV. I respectfully dissent from the rest of the majority's opinion. We have long recognized: 'It is settled law that deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment.'. .I do not say that Hamby showed deliberate indifference as a matter of law and could receive summary relief himself. But his evidence was sufficient to raise a genuine issue of material fact on whether 'the course of treatment the doctors chose was medically unacceptable under the circumstances,' and whether they 'chose this course in conscious disregard of an excessive risk' to Hamby's health. . . This case should have gone to a jury as the trier of fact, with the guidance of correct jury instructions on deliberate indifference. It should not have been resolved by summary judgment of the district court. . . Nor should that summary judgment be affirmed by us. And so I dissent in the hope that a future court may correct the majority's error.")

Injeyan v. City of Laguna Beach, 645 F.3d 577, 580 (9th Cir. 2016) (Pregerson, J., dissenting) ("I dissent. Injeyan's claim of excessive force is not a carbon copy of *Meredith, Hansen, Franklin,* or *Tekle.* But these cases, when taken together, provide clear notice that the officer's conduct would run afoul of the law. . . Here, the officer was faced with seventy-two-year-old Marilyn Injeyan—a slight woman whom the officer had met the day before, who was not a suspect in the crime, and who readily submitted to the officer's authority to detain her. Yet, in the face of ready submission, the officer handcuffed Injeyan and wrenched her arms to such a degree that he tore her rotator cuffs. Any reasonable officer would have understood that such force in these circumstances was excessive. I understand that the Supreme Court has cautioned that we not define clearly established law at a high level of generality. But I am troubled that in a number of cases this caution has become an insurmountable barrier to many righteous claims.")

Garcia v. Cty. of Riverside, 817 F.3d 635, 642-44 (9th Cir. 2016) ("[A]n obvious physical discrepancy between a warrant subject and a booked individual, such as a nine-inch difference in height, accompanied by a detainee's complaints of misidentification, should prompt officers to engage in readily available and resource-efficient identity checks, such as a fingerprint comparison, to ensure that they are not detaining the wrong person. Here Plaintiff's claim of mistaken identity was not uncorroborated, because of the height and weight differences, and he also alleges that officers already had all the information they needed to differentiate him from the warrant subject. . . . Because we hold that Garcia has sufficiently pleaded a Fourteenth Amendment violation, whether Baca is entitled to qualified immunity depends on whether the right that Garcia asserts was 'clearly established' at the time of the alleged misconduct. . . Defendants contend that until *Rivera,* our cases have applied *Baker* unevenly and inconsistently. However, the holdings of *Lee, Fairley, Rivera,* and *Gant* are explained by differences in the facts, not by inconsistent statements of law. *Rivera,* decided after the district court's second order, summarizes existing law: officers violate the Fourteenth Amendment if they wrongly detain a person where 'the circumstances indicated to [them] that further investigation was warranted.'. . .In sum, at the time of Plaintiff's November 2012 incarceration, the standards for determining whether alleged police conduct violates the Fourteenth Amendment were clearly established. Baca is not entitled to qualified immunity.")

O'Brien v. Welty, 818 F.3d 920, 936 (9th Cir. 2016) ("In this case, the district court held that qualified immunity shielded defendants from suit because the FAC 'fail[ed] to set forth facts to show that any constitutionally protected right was infringed by any Defendant at any time.' As explained above, we disagree with the district court and hold that the FAC pleads a plausible First Amendment retaliation claim. The constitutional right to be free from retaliation was 'clearly established at the time of defendants' actions.'. . Retaliation for engaging in protected speech has long been prohibited by the First Amendment. . . We have previously made it clear that there is a right to be free from retaliation even if a non-retaliatory justification exists for the defendants' action. . . A reasonable official in defendants' shoes would thus have known that taking disciplinary action against O'Brien in retaliation for the expression of his views violated his First Amendment rights. Our denial of qualified immunity at this stage of the proceedings does not mean that this case must go to trial. Once an evidentiary record has been developed through discovery, defendants will be free to move for summary judgment based on qualified immunity.")

Reza v. Pearce, 806 F.3d 497, 506 (9th Cir. 2015) (order denying reh'g and reh'g en banc and amending opinion) ("On February 22, 2011, the date of the S.B. 1070 hearing, clearly established law held that an individual could protest in a limited public forum, but that the government could restrict the individual's speech to safeguard the purpose of the forum, as long as the restrictions were reasonable and viewpoint neutral. . . Our circuit's case law also unambiguously held that a government official could remove an individual from a limited public forum if the individual had actually disrupted proceedings. . . . *Norse* reaffirmed the fundamental principle that the government can remove an individual from a limited public forum only if the individual actually

disrupts the proceedings. No cases, in the Ninth Circuit or otherwise, even remotely suggest that *Norse's* principle can be inverted to indefinitely ban an individual from a government building based on a single disruption of a hearing. . . . Thus, nothing in our caselaw suggests that Pearce could have reasonably believed that he could violate *Norse* and instead bar Reza from the building at a time when it is undisputed that he was not being disruptive. . . . We thus conclude that, when genuine disputes of fact are resolved in Reza's favor, Senator Pearce violated Reza's clearly established First Amendment rights and that the district court erred by granting summary judgment to Senator Pearce.")

Reza v. Pearce, 806 F.3d 497, 509-11 (9th Cir. 2015) (order denying reh'g and reh'g en banc and amending opinion) (Wallace, J., concurring in part and dissenting in part) (" I dissent from Part I of the majority opinion, which incorrectly holds that Senator Pearce 'violated Reza's clearly established First Amendment rights.' The Supreme Court has repeatedly cautioned courts-and our circuit in particular—'not [to] define clearly established law at a high level of generality.'. . Rather than correct the course, as directed by the Supreme Court, in this case, the majority continues in the wrong direction and I therefore dissent. . . .[W]e need not even reach the question of whether Senator Pearce actually violated First Amendment law in this case by relying, as he could, on reports given to him by officers assigned to keep order, because there is no doubt that the senator did not violate 'clearly established' law at the time of the challenged conduct. At that time, not a single Supreme Court decision clearly established the right Reza now asserts. Implicitly acknowledging this fact, the majority focuses solely on Ninth Circuit law. After reviewing our law at the time, the majority concludes that '[n]o cases, in the Ninth Circuit or otherwise, even remotely suggest that *Norse's* principle can be inverted to indefinitely ban an individual from a government building based on a single disruption of a hearing.'. . But this answers the wrong question and is ultimately a red herring. The fact that no cases affirmatively *permitted* an official to ban an individual from a government building based on a single disruption (the majority's conclusion) is irrelevant for purposes of qualified immunity. Instead, the relevant question is whether any case expressly *prohibited* an official from banning an individual from a government building for a single disruption. None of our cases at the time of the hearing in question answered that question. . . . Maybe Senator Pearce made a mistake in banning Reza from the senate building. Perhaps the First Amendment should prohibit such a ban. But neither view should make any difference in this case because at the time of the challenged conduct Senator Pearce did not violate any 'clearly established' right. On this basis, I would hold that Senator Pearce is entitled to qualified immunity and would affirm the district court's summary judgment in his favor. The majority's holding to the contrary continues our unfortunate ignoring of the Supreme Court's repeated caution to 'avoid defining clearly established law at a high level of generality.' . . I therefore dissent from the holding reversing the district court's summary judgment in favor of Senator Pearce but concur in the remainder of the majority opinion.")

Jones v. Cnty. of Los Angeles, 802 F.3d 990, 1004-08 (9th Cir. 2015) ("Were we faced with a social worker who detained a child without exigent circumstances, this case would fall neatly within our existing case law. . . .What makes this case more difficult is that Dr. Wang was a

physician investigating child abuse, not a social worker, and the seizure occurred in a hospital. Therefore, the question presented by this case is whether these two facts—that Dr. Wang was a physician investigating abuse, not a social worker, and that G.J. was detained in a hospital following his parents' consent to hospitalization—sufficiently differentiate this case from our precedent in child abuse investigations such that our precedent does not clearly apply. We conclude that our case law provided fair warning to Dr. Wang that detaining G.J. would violate the Constitution. . . .Our recent decision in *Kirkpatrick* supports our conclusion that Dr. Wang's efforts to keep G.J. in the hospital—as described by the Joneses—violated clearly established law. . . .[O]ur case law prohibits an official from detaining a child before the official develops a reasonable belief that a risk of serious harm is imminent. It follows from this clearly established principle that an official may not detain a child merely in the hope that further investigation will turn up facts suggesting that exigent circumstances exist. We next turn to whether this case is distinguishable from the general rule because Dr. Wang is a physician investigating child abuse rather than a social worker. Dr. Wang insists that because she is a physician investigating the cause of serious injuries sustained by an infant, the constitutional standard that we have applied to social workers is not clearly established with respect to her. Again, we disagree. 'It is well-settled that the immunity to which a public official is entitled depends not on the official's title or agency, but on the nature of the function that the person was performing when taking the actions that provoked the lawsuit.'. . The appropriate frame for our analysis therefore focuses on what Dr. Wang did, not her title or person. . . . This case presents complex legal and factual issues. However, once the legal landscape is properly understood, the simplicity of the Joneses' claim underscores why the district court did not err when it denied Dr. Wang summary judgment. . . . It is clearly established law that a state actor may not remove a child from their parents' custody absent a court order or exigent circumstances. According to the Joneses, that is exactly what Dr. Wang did: she orchestrated G.J.'s hospitalization without sufficient evidence that G.J. was in imminent danger, implicitly coerced the Joneses to consent to that hospitalization, and ensured they could not remain alone with their child while Dr. Wang made the final decision whether to request a hospital hold. If the Joneses' version of events were believed, a rational juror could conclude that Dr. Wang knew she was violating the law. Dr. Wang knew she did not have sufficient evidence to detain G.J., yet a rational juror could find that she seized him anyway to further her investigation. The clear guidance our precedent provides to state officials investigating child abuse would put any reasonable state official in Dr. Wang's position on notice that such conduct violated G.J.'s and the Joneses' rights. Accordingly, because both prongs of the qualified immunity test were satisfied, the Joneses are entitled to attempt to prove their version of the facts to a jury and summary judgment was not appropriate.")

Jones v. Cnty. of Los Angeles, 802 F.3d 990, 1009, 1011-12 (9th Cir. 2015) (McNamee, District Judge, dissenting) ("I find that Dr. Wang is entitled to qualified immunity because she did not violate either the Fourth Amendment or clearly established law. . . .In sum, 'there is a world of difference[]'. . . between a social worker removing young children without physical manifestations of abuse from their homes and Dr. Wang recommending hospital care to a nonverbal infant with textbook head and rib injuries suggesting serious child abuse. Given the unique situation presented

in this case, a finding that 'every reasonable official [in Dr. Wang's situation] would have understood that what he is doing violated' a constitutional right is simply unsupported. . . .The lack of affirmative facts implicating Dr. Wang, the distinct circumstances of this case, and the cornucopia of child abuse investigation standards lead me to find that Dr. Wang is entitled to qualified immunity. . . . I share Judge Kozinski's concern that 'future babies will pay with their lives' due to the current trajectory of our qualified immunity case law. . . I also fear that today's decision will encourage state officials, particularly investigating doctors, to forgo medically reasonable tests and procedures before making life-altering accusations. I therefore respectfully dissent from the majority's opinion.")

Carrillo v. Cnty. of Los Angeles, 798 F.3d 1210, 1218-28 & n.15 (9th Cir. 2015) ("The defendants do not dispute that the evidence allegedly withheld falls within *Brady's* scope, and we therefore do not address the first prong of the qualified immunity analysis. . . Instead, we consider only the second prong: whether the officers would have understood they were violating the Supreme Court's 1963 decision in *Brady* by failing to disclose this evidence. We first address whether it was clearly established in 1984 that police officers as well as prosecutors were bound by *Brady* at all . . . and next whether the evidence allegedly withheld in these cases was clearly established to be *Brady* evidence. . . .The officers argue the law did not clearly establish that they were bound by *Brady* at all in 1984 and 1991. This contention lacks merit because it was clearly established well before the events in these cases that police officers were bound to disclose material and exculpatory evidence. . . .Just one year after *Brady*, the Fourth Circuit held police officers as well as prosecutors were bound to disclose material, exculpatory evidence . . . . [citing *Barbee v. Warden,* 331 F.2d 842, 846 (4th Cir.1964)]Requiring police officers as well as prosecutors to disclose material and exculpatory evidence follows logically from *Brady's* rationale. . . .This circuit adopted *Barbee*'s logic well before the investigations here. In *United States v. Butler*, 567 F.2d 885, 891 (9th Cir.1978), we rejected the government's argument that no *Brady* violation occurred because investigative agents, and not the prosecutor, were responsible for the nondisclosure of promises made to certain prosecution witnesses. . . . *Butler* undisputably put police officers on notice that their failure to disclose *Brady* information would constitute a violation the defendant's constitutional rights. . . . Because 'clearly established law' includes 'controlling authority in [the defendants'] jurisdiction,' *Butler* clearly established in 1978 that police officers have a duty to disclose *Brady* material. . . The officers' attempts to circumvent *Butler* are unpersuasive. . . . [T]he officers argue the law did not clearly establish they were bound by *Brady* until the Supreme Court itself 'extended' *Brady* to police officers in *Kyles v. Whitley,* 514 U.S. 419, 438 (1995). . . . But *Kyles* did not announce a new principle of law. In fact, *Kyles* itself *rejected* the state's argument that 'it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor,' explaining that '[t]o accommodate the State in this matter would ... amount to a *serious change of course* from the *Brady* line of cases.'. . .Furthermore, the vast majority of circuits to have considered the question have adopted the view that police officers were bound by *Brady* well before the Court decided *Kyles.* . . The Third Circuit alone has disagreed, concluding such an obligation was not clearly established until 'the Supreme Court ... settle[d] this matter' in *Kyles,* notwithstanding precedent in that circuit that a police officer's

failure to disclose *Brady* evidence could be imputed to the prosecutor. . . . The First Circuit has also held police officers were not bound to affirmatively disclose *Brady* evidence until *Kyles. See Drumgold v. Callahan,* 707 F.3d 28, 43 (1st Cir.2013). But it distinguished the affirmative duty to disclose evidence from the duty not to deliberately suppress exculpatory evidence. Where the defendant police officer was alleged to have deliberately suppressed evidence, in violation of either *Brady* or *Mooney v. Holohan,* 294 U.S. 103 (1934), the court concluded such conduct was clearly established as unlawful in 1989. . . . The defendants argue that the Third Circuit's decision created a circuit split on the issue and that, 'if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'. . . Although disagreement among circuit courts may imply a legal principle is not 'beyond debate,' and thus not clearly established, qualified immunity is not the 'guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear.' *Safford Unified Sch. Dist. No. 1 v. Redding,* 557 U.S. 364, 378 (2009). More importantly, however, '[i]f the right is clearly established by decisional authority of the Supreme Court or of this Circuit, our inquiry should come to an end.'. . Only in the absence of binding precedent do we consider other sources of decisional law such as out-of-circuit cases. *See Boyd v. Benton Cnty.,* 374 F.3d 773, 781 (9th Cir.2004). Because *Butler* unambiguously held due process is violated where a police officer fails to disclose material, exculpatory evidence, our inquiry is over. We hold that, at the time of the relevant events in these cases, circuit precedent clearly established that police officers were bound by *Brady'*s disclosure requirements. . . .Even though it was clearly established at the time of the investigations that police officers were bound to disclose *Brady* evidence, we must next consider whether every reasonable police officer would have understood the specific evidence allegedly withheld was clearly subject to *Brady's* disclosure requirements. . . . Here, the right being violated is, by its terms, significantly more specific than the 'extremely abstract' right of freedom from unreasonable searches and seizures. . . *Brady* defines the type of material the government is obligated to disclose concretely and specifically as 'favorable to the accused, either because it is exculpatory, or because it is impeaching.'. . Unlike the broad touchstone of 'unreasonableness,' the contours of a defendant's right to *Brady* material are focused and clear. . . .As in *Tennison,* law predating the investigations in both of these cases clearly established that the type of evidence allegedly withheld—including impeachment and alternative suspect evidence—fell within *Brady*'s scope. The officers' assertions of qualified immunity, therefore, fail. . . .The law clearly established, well before the events in these cases, that police officers were bound by *Brady* and that the evidence allegedly withheld in these cases fell within *Brady*'s scope. We therefore affirm the denial of qualified immunity in both cases and remand to the district court for further proceedings.")

Jones v. Williams, 791 F.3d 1023, 1034 (9th Cir. 2015) ("Here, there is at least an issue of material fact as to what a reasonable officer at the Penitentiary should have known on July 8, 2007. Several months before McBride ordered Jones to cook pork loins, the Penitentiary implemented a new policy providing that an inmate could opt out of handling pork on religious grounds. And Jones alleges that he told the officers in charge that he had the right to not handle pork. That some officers claim they were not personally aware of the policy change or Belleque's memo to Jones is not

sufficient to show that Jones's right to avoid handling pork was not clearly established. In sum, viewing the record in the light most favorable to Jones, Appellees' conduct violated Jones's clearly established right to avoid handling pork on the basis of his religious beliefs. On this record, Appellees are not entitled to qualified immunity.")

Walker v. Beard, 789 F.3d 1125, 1131 n.3, 1139 (9th Cir. 2015) ("Walker asserts claims for both damages and injunctive relief, but we consider only the mootness of the injunctive claims because Defendants are immune from liability for damages. Defendants are immune from Walker's official capacity damages claims under the Eleventh Amendment. *See Will v. Mich. Dep't of State Police,* 491 U.S. 58, 64–65 (1989); *Holley v. Cal. Dep't of Corr.,* 599 F.3d 1108, 1111–12 (9th Cir.2010). Walker's personal capacity claims fail because Defendants plainly did not violate clearly established rights of which a reasonable person would (or should) have known, thus entitling Defendants to qualified immunity. *See Pearson v. Callahan,* 555 U.S. 223, 232–33 (2009). . . .Walker successfully alleged a burden on his religious exercise under RLUIPA and the First Amendment, but the State has a compelling interest in avoiding unconstitutional racial discrimination, and subjecting Walker to integrated celling is the only possible means of furthering that interest. Accordingly, we conclude that Walker has failed to state claims under RLUIPA and the First Amendment; we further conclude that the district court did not abuse its discretion in denying leave to amend.")

Mikich v. City & Cnty. of San Francisco, 612 F. App'x 443, 445 (9th Cir. 2015) ("At the time of this event, it was clearly established law that, in order for a warrantless removal based on exigent circumstances to be lawful, a social worker 'must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' *Rogers v. Cnty. of San Joaquin,* 487 F.3d 1288, 1294 (9th Cir.2007). No reasonable social worker could have concluded that AM was in imminent danger of serious bodily injury while she was in the hospital; the danger already identified as potentially warranting seizure would only materialize at the time of AM's discharge. Accordingly, because the danger would not have arisen in the time it would have taken Defendants to obtain a warrant, no reasonable social worker in Defendants' position would have believed it was lawful to remove AM without obtaining a warrant.")

Tatum v. Moody, 768 F.3d 806, 821 n.10 (9th Cir. 2014) ("Moody and Pulido do not independently appeal the denial of qualified immunity on the ground that even if the jury was properly instructed, 'the right at issue was [not] "clearly established" at the time of [their] alleged misconduct.'. . They have thus forfeited any such objection for failure to assert it 'specifically and distinctly' in their opening brief. . .Nor could Moody and Pulido have asserted that the right they violated was not clearly established. They *concede* 'that withholding exculpatory evidence may cause constitutional injury not only at the criminal trial, but during the pretrial stages of the criminal proceedings as well,' but they argue that this rule applies only if their conduct violates the standards set by the Fourth Amendment. Immunity, however, turns 'on an officer's duties, not on other aspects of the constitutional violation.' *Stoot v. City of Everett,* 582 F.3d 910, 927 (9th Cir.2009). Uncertainty regarding the procedural niceties of privately enforcing the relevant constitutional prohibition—

including knowledge of the particular constitutional provision implicated by the violation—does not immunize state officials from liability. . . Where, as here, officers recognize that their conduct '*could* ripen into' an actionable violation on the basis of subsequent contingencies beyond their control, they are not immune from suit. *Stoot*, 582 F.3d at 927. Commonsense confirms Moody and Pulido's concession that the withholding of exculpatory evidence can cause constitutional injury; that concession recognizes 'the almost tautological conclusion that an individual in custody has a constitutional right to be released from confinement after it was or should have been known that the detainee was entitled to release.'")

George v. Edholm, 752 F.3d 1206, 1220, 1221 (9th Cir. 2014) ("George has provided evidence that would support a jury conclusion that Freeman and Johnson gave false information to Dr. Edholm, and that this false information induced Edholm to perform unconstitutionally intrusive procedures that he would not otherwise have performed. '[E]very reasonable official would have understood' that conduct to violate the Fourth Amendment. . . We reach this decision based on Supreme Court precedent, 'cases of controlling authority in [the officers'] jurisdiction,' and 'a consensus of cases of persuasive authority.'. . First, it was clearly established that a private citizen's search may be attributed to the police when the 'the private party act[s] as an instrument or agent of the Government' in conducting the search. . . That principle had been repeatedly and clearly applied to doctors' searches of suspects' bodies. . . No reasonable officer could have believed that he could avoid responsibility for an unconstitutional search by using deception to induce a private party to perform the search. The Supreme Court has deemed that principle so obvious as to be 'axiomatic.'. . Second, it was clearly established that a search of a patient's body must be reasonable. . . As we explained above, forced sedation, anoscopy, intubation, insertion of a nasogastric tube, and bowel evacuation are more intrusive than the stomach-pumping rejected in *Rochin*, and at least as intrusive as other searches characterized as highly invasive by courts across the country. . . Case law clearly established that the possibility that a baggie of drugs could rupture, standing alone, cannot justify a warrantless search as intrusive as that conducted here. . . Indeed, the California Supreme Court so held nearly thirty years before the search in this case.")

Grenning v. Miller-Stout, 739 F.3d 1235, 1241, 1242 (9th Cir. 2014) ("We conclude, based on the foregoing, that there are material issues of fact remaining as to the brightness of the continuous lighting in Grenning's SMU cell, as to the effect on Grenning of the continuous lighting, and as to whether the defendant officials were deliberately indifferent. . . .The district court did not consider the question of qualified immunity because it granted summary judgment to Defendants on the merits. We leave the issue of qualified immunity for the district court to determine in the first instance on remand. . . If the district court finds for Grenning on the merits of his Eighth Amendment claim, and if it finds that Defendants are entitled to qualified immunity, Grenning may still be entitled to injunctive relief. . . It is obvious from the record before us that prisoners at Airway Heights may be placed in the SMU for many reasons, and, so far as the record shows, Grenning is likely to remain a prisoner at Airway Heights for a sustained period. It thus appears that there is sufficient likelihood of Grenning being again confined in the SMU to preserve his claim for injunctive relief.")

Grenning v. Miller-Stout, 739 F.3d 1235, 1242, 1243 (9th Cir. 2014) (Rawlinson, J., dissenting) ("I respectfully dissent from the majority's failure to rule on the issue of qualified immunity in this case. We may affirm the district court's decision 'on any ground supported by the record.'. . And the record in this case supports affirming the grant of summary judgment in favor of the prison officials on the basis of qualified immunity. . . I agree that constant illumination of an inmate's sleeping quarters may constitute a serious deprivation of the right to shelter guaranteed by the Eighth Amendment in some circumstances. . . However, before denying qualified immunity to prison officials, we must determine whether the party asserting the injury has sufficiently alleged a constitutional violation, *and* whether the right violated was clearly established. . . We recently held that constant illumination of an inmate's cell is unconstitutional only if no penological justification is provided for such illumination. . . .By contrast, in this case, prison officials offered the following legitimate penological purposes for constant illumination:

• Offenders in the Segregation Management Unit (SMU) pose a greater security risk within the institution.
• Because of the greater security risk, inmates housed in the SITU are subjected to security checks every thirty minutes.
• Constant illumination allows staff to conduct security checks without disrupting offenders by turning on the lights every thirty minutes or by shining a flashlight into the inmate's cell.
• Constant illumination prevents inmates from observing the use of lights by correctional staff to assess their proximity.

As federal judges, we are in no position to second-guess the legitimacy of these proffered justifications. . . In my view, the presence of legitimate justifications for the constant illumination in the SMU sufficiently distinguishes this case from *Keenan* such that it would not be clear to a reasonable prison official that reliance on the proffered justifications for the use of constant illumination in the SMU would violate the Eighth Amendment. I would affirm the district court's grant of summary judgment in favor of the prison officials on the alternative basis that they were entitled to qualified immunity.")

Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1092-96 (9th Cir. 2013) ("Having concluded that Sgt. Shelton may indeed have used excessive force in violation of the Fourth Amendment, we now consider whether the right to be free from such force was clearly established at the time of the incident. . . .The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to 2008. [Discussing *Deorle, Nelson,* and *Headwaters*] Though these cases do not concern tasers, they need not. As we explained in *Deorle*, '[i]t does not matter that no case of this court directly addresses the use of [a particular weapon]; we have held that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury."'. . Indeed, even absent taser-specific case law, three of our sister circuits have held that the law was clearly established, prior to 2008, that the use of a taser can in some instances constitute excessive force. . . .Still,

relying on our grants of qualified immunity in *Bryan* and *Mattos*, Defendants argue that the law was insufficiently clear before 2010—when we first identified tasers in dart mode as an intermediate level of force, . . . to put Sgt. Shelton on notice that his use of a taser against Blondin was excessive. But this case is factually distinguishable from *Bryan* and *Mattos* in one critical respect: Blondin engaged in no behavior that could have been perceived by Sgt. Shelton as threatening or resisting. As a result, the use of non-trivial force of any kind was unreasonable. . . .Here, evaluating the situation from Sgt. Shelton's perspective, Blondin—who, unlike Bryan, Brooks, and Mattos, had no connection to the underlying crime—committed no act of resistance. He took no affirmative step to violate an officer order (Bryan), did not physically resist officers (Brooks), and neither made physical contact with an officer nor tried to interfere with efforts to arrest a suspect (Mattos). His momentary failure to move farther than thirty-seven feet away from officers arresting his neighbor, . . . after merely inquiring into what those officers were doing, can hardly be considered resistance. This is especially so given evidence that Blondin was visibly frozen with fear. . . .Having determined that the right to be free from the application of non-trivial force for engaging in passive resistance was clearly established prior to 2008, we proceed to the second part of our constitutional inquiry, . . . considering a question that was not before us in *Bryan* or *Mattos* : whether it was clear in 2008 that using a taser in dart mode was *non-trivial.* . . . By 2008, the Tenth Circuit and a number of district courts had found taser use unconstitutionally excessive in some circumstances. Because '[a]bsent binding precedent, we look to all available decisional law, including the law of other circuits and district courts, to determine whether [a] right was clearly established,'. . . those decisions are relevant here. . . . We do not look to these cases to establish Blondin's right to be free from non-trivial force in response to his total lack of resistance—as discussed above, that right was established within our own circuit as early as 2001, such that, by 2008, it was 'beyond debate' that using non-trivial force in response to such passive bystander behavior would be unconstitutionally excessive. . . Instead, they support our determination that, though the specific level of force involved in using a taser was not clear until 2010, it was well known as of 2008 that a taser in dart mode constitutes more than trivial force. Sgt. Shelton is therefore not entitled to qualified immunity.")

Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1101-05 (9th Cir. 2013) (Nguyen, J., dissenting) ("The majority goes badly astray because it loses sight of the specific context of this case and employs hindsight rather than viewing the scene through the eyes of a reasonable officer. Blondin interjected himself into a rapidly-evolving, highly volatile scene: officers struggling to restrain a combative, armed man in the process of trying to take his own life. At the time Blondin was tased, two loaded firearms were unsecured. Yet, at every turn, the majority attempts to minimize the precariousness of the situation, thinly splicing the facts to assess Blondin's conduct—and the reasonableness of the officers' response—in a vacuum. It is one thing to resolve disputed facts and inferences in Blondin's favor. But the majority goes well beyond this by choosing to ignore *undisputed* facts which do not favor Blondin's case. By discounting the danger and abstracting the qualified immunity inquiry, the majority's approach fails to accord appropriate deference to an officer's reasonable judgment exercised under exigent circumstances. Because the majority fails to follow the Supreme Court's dictate to assess the use of force 'from the perspective of a

reasonable officer on the scene, rather than with the 20/20 vision of hindsight [,]' *Graham v. Connor,* 490 U.S. 386, 396 (1989), I respectfully dissent. . . .Even if we assume that Sgt. Shelton's use of force was excessive, why wasn't his mistake reasonable? What precedent existed in May 2008 such that every reasonable officer would have understood that it was unlawful to tase Blondin for two seconds under these circumstances? Which case placed this constitutional question 'beyond debate' in 2008? . . . I don't know. Nor is it evident from the majority's opinion, which, rather than squarely addressing these questions, re-frames the inquiry instead. The issue here, the majority says, is whether 'the right to be free from non-trivial force for engaging in mere passive resistance was clearly established prior to 2008.'. . This formulation is wrong in two respects. First, it contravenes the Supreme Court's instruction that the qualified immunity inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . Indeed, the Court has expressly taken us to task for failing in this regard. . . I recognize that the inquiry need not be so narrowly defined as to allow the officers to 'define away all potential claims.' . . However, by analyzing whether Blondin's right was clearly established without reference to the specific factual context, the majority not only brushes off the Supreme Court's instructions, it departs from the same cases upon which it goes on to rely. . . .Lastly, even if the majority is correct that we may look to cases which do not involve tasers, . . . framing our inquiry in terms of 'non-trivial force' still paints with too broad a brush. All 'non-trivial force' is not created alike. Here, specifically, the majority employs 'non-trivial force' to mean tasing someone for two seconds in dart mode. But 'non-trivial force' also covers, among other things, firing a lead-filled beanbag round into someone's face with enough force to gouge out their eye, fracture their cranium, and leave a lead shot embedded in their skull. *See Deorle v. Rutherford,* 272 F.3d 1272, 1286 (9th Cir.2001). Any reasonable officer might know that the constitution would prohibit firing a lead-filled beanbag round into Blondin's face from short range. But tasing him for two seconds? That's a much closer call. Thus, in my view, asking whether law regarding the use of 'non-trivial force' was clearly established is not a fair benchmark by which to gauge an reasonable officer's understanding of the legality of his actions. Moreover, I fail to see how the cases relied upon by the majority made the 'contours [of Blondin's right] sufficiently clear that every reasonable official would have understood that what [Sgt. Shelton did] violated that right.'. . While precedent need not be squarely on all fours, . . . we nevertheless require '*closely analogous* pre-existing case law' to show that the law is clearly established. . . . Here, the cases which the majority concludes set forth clearly established law are far from closely analogous. . . .One final point. In three recent cases involving the use of tasers in dart mode, we granted officers qualified immunity upon concluding that the law was not sufficiently clear as of 2005 and 2006 to render the alleged constitutional violations clearly established. . . And, as the district court correctly recognized, '[b]y May 2008, the state of the law in this circuit was no clearer; no Supreme Court or Ninth Circuit opinion was issued in the interim.' The majority nevertheless asserts that *Mattos, Brooks,* and *Bryan* are distinguishable in 'one critical respect: Blondin engaged in no behavior that could have been perceived by Sgt. Shelton as threatening or resisting.'. . This assertion, however, is not only shaded with the benefit of hindsight, it is inconsistent with undisputed facts in the record. Blondin *did* engage in behavior that could have objectively been perceived as resisting, if not threatening: for fifteen seconds he refused to comply with officers' repeated orders to back away from a

dangerous, volatile scene. Accordingly, Blondin's purported lack of resistance cannot justify departing from the holdings in *Mattos, Brooks,* and *Bryan*. . .In sum, I believe that the law did not clearly establish that Sgt. Shelton's conduct violated Blondin's constitutional rights. I therefore would affirm the district court's holding that the officers are entitled to qualified immunity on Blondin's excessive force claim.")

But see ***Gravelet-Blondin v. Shelton***, 665 F. App'x 603, 605 (9th Cir. 2016) ('[T]he outcome of our earlier panel opinion does not control the outcome here. In our prior opinion reviewing the district court's grant of summary judgment for the defendants, we examined the discovery record and construed all factual disputes in Blondin's favor. . . Based on that record and the construction of facts in the light most favorable to the nonmoving party, we held that a reasonable jury could conclude that Blondin's tasing and arrest violated the Fourth Amendment. . . But now, on appeal from a jury verdict in the defendants' favor, we review a different record—the facts revealed at trial—and this time we construe them in favor of the defendants—the opponents to the present motion. . . We also ask a different question: whether a reasonable jury could find that Blondin's tasing and arrest *were not* in violation of the Fourth Amendment. *See Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001). We cannot reverse the jury's determination if it is supported by substantial evidence. . .Reviewing the record at trial in the light most favorable to the defendants, we conclude that there was substantial evidence to support a conclusion that Sergeant Shelton's use of the taser against Blondin was not excessive.")

A.D. v. California Highway Patrol, 712 F.3d 446, 454, 455 (9th Cir. 2013) ("By March 23, 2006—the day that Markgraf shot Eklund—it was clearly established that a police officer, who acts with the purpose to harm unrelated to a legitimate law enforcement objective, violates the rights protected by the Fourteenth Amendment due process clause. . . .Further, because we are confined to the jury's factual finding that Markgraf acted with a purpose to cause Eklund's death unrelated to any legitimate law enforcement objective, we are essentially compelled to deny Markgraf qualified immunity—it would be 'clear to a reasonable officer' that killing a person with no legitimate law enforcement purpose violates the Constitution. . . This is one of those rare cases in which the constitutional right at issue is defined by a standard that is so 'obvious' that we must conclude—based on the jury's finding—that qualified immunity is inapplicable, even without a case directly on point. . . .Applying the principles of *al-Kidd* and *Anderson* to this case, we could not say that it is clearly established law (for purposes of qualified immunity) that whatever 'shocks the conscience' violates due process. However, the Supreme Court has defined the law of due process that governed Markgraf's conduct with more particularity. A reasonable police officer in Markgraf's position would have known that acting with a purpose to harm unrelated to a legitimate law enforcement objective (such as arrest, self-defense, or the defense of others) violates due process. Where, as here, a jury has determined that the officer acted with such a purpose, we must conclude that he violated clearly established law and deny him qualified immunity.")

Ellins v. City of Sierra Madre, 710 F.3d 1049, 1064, 1066 (9th Cir. 2013) ("The district court held that even assuming a First Amendment violation, Defendants had 'no indication' that Diaz's

conduct was unlawful. The district court reasoned that there was no case law that specifically held 'that a police officer suffers a First Amendment violation when a certifying officer delays approval of an application that requires a certification of the applicant's good moral character.' However, the district court framed the inquiry much too narrowly. The question is not whether an earlier case mirrors the specific facts here. Rather, the relevant question is whether 'the state of the law at the time gives officials fair warning that their conduct is unconstitutional.'. . Viewing Diaz's actions in the light most favorable to Ellins, we conclude that she acted unreasonably in light of clearly established law. . . . [I]n light of the Supreme Court's longstanding and unequivocal precedents protecting employee speech, we conclude that a reasonable official in Diaz's position would have known that delaying Ellins's application to the P.O.S.T. program because of his union activity, which resulted in a lower salary than that to which he otherwise would have been entitled, violated Ellins's First Amendment rights; that in leading a union vote Ellins acted as a private citizen addressing a matter of public concern; and that depriving Ellins of salary in retaliation for his protected speech was unconstitutional.")

Ellins v. City of Sierra Madre, 710 F.3d 1049, 1068 (9th Cir. 2013) (Rawlinson, J., concurring in the judgment) ("The majority relies primarily upon the Seventh Circuit's decision in *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir.2006), where the court held, without any analysis, that the employee's speech as a union representative was not made as a public employee. . .The two district court cases from district courts in D.C., *Baumann v. District of Columbia*, 744 F.Supp.2d 216, 224 (D.D.C.2010), and *Hawkins v. Boone* 786 F.Supp.2d 328, 335 (D.D.C.2011) simply parroted the Seventh Circuit's ruling in *Fuerst*, again without any analysis. I am not confident that reliance on these cases supports concluding that Ellins was speaking as a private citizen when he criticized Chief Diaz. There is no doubt in this Circuit that whether an employee speaks as a private citizen is a question of fact rather than an issue of law. . . The record in this case is devoid of any description of Ellins's job duties. . . For all we know, Ellins's job duties could encompass his union responsibilities. . . In sum, I agree with the majority that this case should be remanded. However, upon remand all questions of fact, including whether Ellins spoke as a public employee or as a private citizen, should be resolved by the factfinder. For that reason, I concur only in the judgment affirming in part, reversing in part and remanding for further proceedings.")

Maxwell v. County of San Diego, 708 F.3d 1075, 1082, 1083 (9th Cir. 2013) ("The Sheriff's officers found Kristin facing a preexisting danger from her gunshot wound. There is evidence they affirmatively increased that danger by preventing her ambulance from leaving. This arguably left Kristin worse off than if the ambulance had been allowed to bring her to an air ambulance that had advanced medical capabilities and was ready to fly her to a trauma center. The Sheriff's officers argue that our danger creation cases are distinguishable because they did not involve first responders securing a crime scene. But 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . The existence of a crime scene does not change our analysis. It was irrelevant to the delay of the ambulance. The ambulance contained no witnesses or evidence apart from the victim herself and her wounds. Lowell had confessed and was in custody. The Sheriff's officers had found the gun used in the crime. The crime scene was

sealed. The Sheriff's officers also argue they lacked the *mens rea* to be held liable under § 1983, claiming the record does not show 'deliberate indifference ... to known or obvious dangers.'. . We reject the argument. It was obvious that delaying a bleeding gun shot victim's ambulance increased the risk of death. Finally, the Sheriff's officers appear to argue that the Maxwells must show that they acted with a 'purpose to harm' Kristin since this case involved a medical emergency calling for split-second decisions. . . This contradicts their earlier recognition that the appropriate standard is one of deliberate indifference. It also nonsensically suggests that a medical emergency faced by third parties justified the decision to prevent those parties from responding to that emergency.")

Maxwell v. County of San Diego, 708 F.3d 1075, 1083, 1084 (9th Cir. 2013) ("We note there are few cases discussing the reasonability of detaining witnesses solely for investigative purposes. In most cases, the lack of on-point precedent would compel us to grant qualified immunity. . . Nevertheless, 'in an obvious case, [general] standards can "clearly establish" the answer, even without a body of relevant case law.' *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). This is an obvious case. Although detention of witnesses for investigative purposes can be reasonable in certain circumstances, such detentions must be minimally intrusive. . . .We conclude that the Sheriff's officers were on notice that they could not detain, separate, and interrogate the Maxwells for hours.")

Maxwell v. County of San Diego, 708 F.3d 1075, 1090, 1093 (9th Cir. 2013) (Ikuta, J., dissenting) ("The facts of this case are undeniably tragic. But despite the ill-fated sequence of events, the Sheriff's deputies who secured the crime scene did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known,'. . . by delaying the ambulance's departure for a few minutes, if at all, or detaining the Maxwells while they obtained and executed a search warrant for the Maxwells' home. Accordingly, qualified immunity protects all the deputies from suit for civil damages. . . .Instead of citing relevant case law, the majority makes the unsupported and conclusory statement that 'it was obvious' that the deputies violated Kristin's due process right to bodily security. . . But only in retrospect is it 'obvious' that the brief delay may have raised the risk that Kristin would die from her injuries. This very term, the Supreme Court reprimanded the Ninth Circuit for judging the reasonableness of officers' conduct 'with the 20/20 vision of hindsight' rather than 'from the perspective of a reasonable officer on the scene.' *Ryburn,* 132 S.Ct. at 992(quoting *Graham v. Connor,* 490 U.S. 386, 396–97 (1989)). . . . Contrary to the Court's direction, the majority's eyes here are focused on the rearview mirror. Given that Kristin's medical condition initially appeared stable and that paramedics were actively tending to her at the time of the alleged delay, the danger was not so obvious that a decision to briefly delay the ambulance shows deliberate indifference.")

Ford v. City of Yakima, 706 F.3d 1188, 1193-96 (9th Cir. 2013) ("In this Circuit, an individual has a right 'to be free from police action motivated by retaliatory animus but for which there was probable cause.' *Skoog,* 469 F.3d at 1235. That right was violated when the officers booked and jailed Ford in retaliation for his protected speech, even though probable cause existed for his initial arrest. Ford's criticism of the police for what he perceived to be an unlawful and racially motivated

traffic stop falls 'squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech ... is categorically prohibited by the Constitution.'. . .[T]he evidence must be sufficient to establish that the officers' desire to chill Ford's speech was a but-for cause of their conduct. In other words, would Ford have been booked and jailed, rather than cited and arrested, but for the officers' desire to punish Ford for his speech? . . . .Ford does not contend that police officers lacked probable cause to arrest him for violating the city noise ordinance. But Officer Urlacher's probable cause to arrest Ford does not necessarily mean that booking and jailing him was constitutional. . . While the issue of causation ultimately should be determined by a trier of fact, Ford has provided sufficient evidence for a jury to find that the officers' retaliatory motive was a but-for cause of their action, thus satisfying the causation element of a First Amendment retaliation claim for the purposes of qualified immunity. . . Taken in the light most favorable to Ford, the facts establish that the officers' alleged conduct violated his right to be free from police action motivated by retaliatory animus, even if probable cause existed for that action. . . . [T]his Court's 2006 decision in *Skoog* established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action. . . . Thus, *Duran* clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights, while *Skoog* clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action. The officers' conduct in this case falls squarely within the prohibitions of *Duran* and *Skoog.* While the precise issue of retaliatory booking and jailing has not been addressed in this Circuit, 'closely analogous preexisting case law is not required to show that a right was clearly established.'. . *Duran* addressed a retaliatory arrest and *Skoog* applied to a retaliatory search and seizure, but the unlawfulness of a retaliatory booking and jailing was nevertheless apparent from those cases. After *Duran,* any reasonable police officer would have known that it was unlawful to use his authority to retaliate against an individual because of his speech. Likewise, any reasonable police officer would have understood that *Skoog's* prohibition on retaliatory police action extended to typical police actions such as booking and jailing. Therefore, this case involved the kind of 'mere application of settled law to a new factual permutation' in which we assume an officer had notice that his conduct was unlawful. . . A reasonable officer would have understood that he did not automatically possess the authority to book and jail an individual upon conducting a lawful arrest supported by probable cause. Washington law clearly enumerates the limited factors that would allow a police officer to book and jail an individual who has been arrested for a misdemeanor. CrRLJ 2.1(b)(2). A reasonable officer would have been aware of the law governing his ability to book and jail an individual he lawfully has arrested. Moreover, a reasonable officer would have been aware that Washington law explicitly states that its rules 'shall not be construed to affect or derogate from the constitutional rights of any defendant.' CrRLJ 1.1. Thus, a reasonable police officer would have understood that he could not exercise his discretion to book an individual in retaliation for that individual's First Amendment activity.")

Ford v. City of Yakima, 706 F.3d 1188, 1197-1204 (9th Cir. 2013) (Callahan, J., dissenting) ("This case raises an issue of first impression. It is not a case of retaliatory arrest. Nonetheless, our review is informed by cases suggesting that, in order to state a claim for retaliatory arrest, a plaintiff must

show a lack of probable cause for the arrest. *See Reichle v. Howards*, ––– U.S. ––––, ––––, 132 S.Ct. 2088, 2095 (2012) (noting that evidence of probable cause "could be thought similarly fatal to a plaintiff's claim that animus caused his arrest, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury"). *But see Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1232 (9th Cir.2006) (noting "that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation"). The police had probable cause to arrest Ford for violating the city noise ordinance and he does not argue otherwise. . . .Ford seeks monetary damages in an action under 42 U.S.C. § 1983 based on the assertion that the police officers violated his constitutional rights when, after detaining him for violating the city noise ordinance, they decided to book him based, in part, on his post-detention statements, rather than just issuing a ticket. . . .[H]ere we are concerned not with speech that might give rise to an arrest, but with speech made after a person has been lawfully detained. This is a critical distinction. It is well settled that once an individual is lawfully detained, his or her rights may be restricted for legitimate penological and custodial reasons. . . . Accordingly, Ford's case is analogous to the situation presented in *Reichle*, where the Supreme Court noted that 'the right in question is not the general rule to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.'. . The Court held that it 'has never held that there is such a right.' *Id.* Similarly, Ford has no right not to be booked based on his post-detention statements where the booking is supported by probable cause. . . .The Supreme Court expressed a preference for requiring the showing of the absence of probable cause and approvingly cited decisions by other circuit courts requiring a showing of a lack of probable cause. . . .Rather than focus on whether an officer's action had a chilling effect on the plaintiff, the proper inquiry under cases such as *Reichle* is whether the officer had probable cause to book the detained individual in light of his statements. In other words, did Ford's post-detention statements give the officers reason to believe that Ford might harm himself or others, injure property, or breach the peace? . . . . If the officer has probable cause to book a detained individual based, in part, on the person's post-detention actions or statements, there is no causation; and thus, there is no cause of action for violation of a constitutional right. *See Hartman*, 547 U.S. at 260. The reasons underlying the Supreme Court's opinion in *Reichle* also require a showing of a lack of probable cause in a § 1983 action based on the plaintiff's post-detention speech. Ford's claim of retaliation presents a 'tenuous causal connection between the defendant's alleged animus and the plaintiff's injury' similar to that presented in retaliatory prosecution and arrest cases. . . . [U]nlike probable cause for an arrest or for prosecution, for which there is considerable case law, there is little judicial guidance on how to evaluate an officer's decision to book a lawfully detained individual. Thus, requiring the pleading and proving of a lack of probable cause is necessary to shield officers from being second guessed in civil actions brought by those they lawfully detained. . . . [E]ven if the statement in *Skoog* that a plaintiff need not plead the absence of probable cause survives the Supreme Court's statement in *Reichle* that it 'has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause,' . . . here, the district court's finding that the officers' 'desire to cause the chilling effect' was *not* a 'but-for cause' of Ford's booking terminates the case, even under *Skoog.* . . . Even if I were to agree with the majority that Ford had a constitutional right not to have the officers consider his comments while he was detained, which I

do not, I could not agree that this right was 'clearly established.' That is to say, the officers were not on notice that deciding to book Ford based, in part, on his comments while detained, violated his rights under the First Amendment. . . . [T]he extent to which *Skoog* itself clearly established a cause of action for alleged police retaliation despite the presence of probable cause for the officer's action is doubtful. The clarity of this rule is further muddied by the spirit, if not the holding, of the Supreme Court's subsequent opinion in *Reichle*, 132 S.Ct. 2088. . . . The majority states that police officers have been on notice since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech. . . But all of the cases on which the majority relies concerned actions to arrest or to search based on individuals actions as free private persons. . . Had the officers initially detained Ford based on his speech, the majority's broad axiom might apply. But that is not what Ford alleges. He alleges only that the officers decided to book him instead of giving him a ticket based on what he said *after he was legally detained.* . . . Because an officer's use of a detained person's statements raise substantially different considerations from an officer's reactions to the statements of a free person, the cases cited by the majority did not reasonably put the officers on notice that in telling Ford that he had talked himself into jail, they were chilling Ford's constitutionally protected right to free speech. If we are going to impose such etiquette upon peace officers, we must first clearly so hold, and not expect them to glean such a 'vague' constitutional rule from Ninth Circuit cases that appear to be out of step, if not inconsistent, with recent Supreme Court decisions.")

Chappell v. Mandeville, 706 F.3d 1052, 1064, 1065 (9th Cir. 2013) ("We conclude that the law did not clearly establish that the conditions that Chappell experienced constituted an 'atypical and significant hardship.' At the time of Chappell's contraband watch, we had explained that the 'atypical and significant hardship' is context-dependent and requires 'fact by fact consideration,' *Keenan*, 83 F.3d at 1089. We confirmed this only a year after the contraband watch took place, noting that '[t]here is no single standard for determining whether a prison hardship is atypical and significant' and that analysis under this standard requires 'case by case, fact by fact consideration.'. . Indeed, we had noted prior to April–May 2002 that at least three factors from *Sandin* should be considered in each case: (1) whether the conditions of confinement 'mirrored those conditions imposed upon inmates in analogous *discretionary* confinement settings, namely administrative segregation and protective custody,' (2) the duration and intensity of the conditions of confinement; and (3) whether the change in confinement would 'inevitably affect the duration of [the prisoner's] sentence.'. .We are not aware of any court that, as of April–May 2002, had applied the *Sandin* test, or similar temporary, investigatory confinement, to hold that a contraband watch was an 'atypical and significant hardship' apart from the ordinary conditions of prison management. The only similar case in which we had considered a due process claim was *Mendoza*, where the prisoner had been placed on 'feces watch.'. . That case, however, was pre-*Sandin* and thus did not apply the "atypical and significant hardship" test. *Id.* Moreover, no other jurisdiction had applied the 'atypical and significant hardship' test to any factually similar cases before April–May 2002 either. Because there was no case law holding that contraband watch, or any similar regime, is an 'atypical and significant hardship,' and the 'atypical and significant hardship' test is so fact-specific, Mandeville and Rosario did not have fair notice on whether the conditions that

Chappell experienced violated a state-created liberty interest that would trigger due process protections. Thus, Mandeville and Rosario are also entitled to qualified immunity on Chappell's due process claim.")

Chappell v. Mandeville, 706 F.3d 1052, 1057-62 & n.4 (9th Cir. 2013) ("We hold that as of April–May 2002, when Chappell was placed on contraband watch, the law was not clearly established as to whether the conditions Chappell experienced—either in isolation or combination—violated the Eighth Amendment, made applicable to the states through the Fourteenth Amendment. . . .[O]ur case law did not clearly establish that in April–May 2002 that the constant illumination of Chappell's cell was unconstitutional. . . .Since, at the time Chappell's contraband watch took place, no court had ruled on whether contraband watch constitutes a legitimate penological purpose that would justify continuous lighting, and Chappell was subjected to continuous lighting for only seven days and did not claim that he was deprived of sleep or intentionally kept awake, Mandeville and Rosario did not have fair notice that their actions were unconstitutional. Given our decision in *Keenan* and the decisional law in other circuits, we have some doubt that the conditions that Chappell experienced under contraband watch even amounted to Eighth Amendment violation, but we do not reach this question since, at a minimum, the law was not clearly established that the contraband watch was unconstitutional and thus Chappell's Eighth Amendment claim can be resolved on qualified immunity grounds. . . . The law was not clearly established as of April–May 2002 with regards to mattress deprivation either. . . .Viewing the facts in the light most favorable to Chappell, in addition to the continuous lighting and the mattress deprivation, Chappell alleged that he was taped into two pairs of underwear and jumpsuits, placed in a hot cell with no ventilation, chained to an iron bed, shackled at the ankles and waist so that he could not move his arms, and was forced to eat like a dog. The district court adopted the magistrate's finding that these conditions had the 'mutually enforcing effect of sleep deprivation that any reasonable officer would know comprised unconstitutional conditions of confinement.' We disagree. . . .[T]he focus of the inquiry under qualified immunity is whether the defendants had fair notice that their actions were unconstitutional. In April–May 2002, there were no cases in this jurisdiction that involved a contraband watch similar to the one that occurred here. . . .Because no court had held that conditions similar to those Chappell experienced were unconstitutional in the face of the important penological purpose of discovering contraband, we hold that Mandeville and Rosario are entitled to qualified immunity on Chappell's Eighth Amendment claim. . . .Because Mandeville and Rosario are entitled to qualified immunity, we do not consider whether these conditions amounted to an actual Eighth Amendment violation. Our holding is limited to a finding that the law was not clearly established as to whether the conditions that Chappell was subjected to, both in isolation and combination, violated the Eighth Amendment.")

Chappell v. Mandeville, 706 F.3d 1052, 1070, 1072 (9th Cir. 2013) (Berzon, J., dissenting in part) ("Whether constant illumination violates the Eighth Amendment in a particular case is a fact-specific inquiry. But contrary to the majority's suggestion, . . .officials do not enjoy qualified immunity simply because the precise facts at issue in their particular case have not been addressed previously. Officials can 'still be on notice that their conduct violates established law even in novel

factual circumstances.'. . If new facts alone triggered qualified immunity, then officials would rarely if ever be held accountable in cases involving 'fact-driven' claims, such as the Eighth Amendment claim at issue here. . . We therefore must begin with what *was* the clearly established Eighth Amendment law regarding prison conditions at the time of Chappell's contraband watch, and then proceed to determine whether a reasonable prison official could have considered the conditions of Chappell's contraband watch constitutional in light of those precedents. In April–May 2002, it was clearly established that it is unconstitutional to cause a prisoner harm by subjecting him to constant lighting. *Keenan* pronounced in 1996 that '*[t]here is no* legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination.'. . .A reasonable officer would have known that, in combination, the twenty-four-hour bright light, the absence of a mattress, and the extensive bodily restraints risked depriving Chappell of sleep, in violation of the Eighth Amendment.")

Jackson v. California Dept. of Corrections and Rehabilitation, No. 12–15880, 2013 WL 681178, *1 (9th Cir. Feb. 26, 2013) (not published) ("At the time of the defendants' conduct in 2007, it was not clearly established that a cross-gender strip search in a non-emergency situation may be unreasonable. . . The fact that California law does not permit non-emergency cross-gender strip searches does not strip the defendants of their qualified immunity. . . Thus, because the state of the law in 2007 did not give the defendants fair warning of the potential unlawfulness of their conduct, they are entitled to qualified immunity.")

Mueller v. Auker, 700 F.3d 1180, 1188 (9th Cir. 2012) ("[T]he district court stated that '[t]he Court's research, and the parties' briefing do not reveal any cases which have laid out the constitutional guidelines for resolving parental [non-religious] objections to medical treatment....' Five years later, the Muellers still have not provided us with any cases specific enough to the emergency room facts and circumstances of this case to advance their cause. We have not uncovered a decision identifying a Fourteenth Amendment violation 'on facts even roughly comparable to those present in this case.' *Ryburn*, 565 U.S. at ——, 132 S.Ct. at 990. Nowhere can we find any clearly established law which would have required a judicial hearing before Detective Rogers or the Department of Health and Welfare took the actions that they did when facing these dangers. . . . In effect, the Muellers ask us to repeat the analytical mistake we made in *Brosseau*, where we approached this issue based upon general tests and abstract constitutional propositions instead of focusing on the precise factual scenario confronted by the officers. . . .Idaho law permits a police officer to place a child in shelter care *without a court order* when necessary to prevent serious physical injury. . . . The Muellers' late assertion in their reply brief that this law is 'obviously unconstitutional' is of no help to them on this issue, because at the time the disputed decisions were made, no clearly established law existed to that effect. Moreover, the existence of a state statute authorizing an official's disputed conduct weighs in that official's favor, so long as the statute itself does not offend the Constitution, and I.C. § 16–1612 does not.")

Marsh v. County of San Diego, 680 F.3d 1148, 1159 (9th Cir. 2012) ("As already noted, this is the first case to address the federal privacy interest in death images. While we believe the right is

sufficiently grounded in federal law, we can't fault a state actor for failing to anticipate our ruling. Because it wouldn't have been 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted,' . . . Coutler is entitled to qualified immunity.")

Karl v. City of Mountlake Terrace, 678 F.3d 1062, 1073-75 (9th Cir. 2012) ("We . . . consider whether existing law at the time of Caw's conduct in 2008 provided him 'fair notice' that the First Amendment prohibits retaliating against an employee for providing subpoenaed deposition testimony during another person's civil rights lawsuit. . . .Although there is no case in our circuit with the same facts as those presented here, a reasonable official in Caw's position would have known that it was unlawful to retaliate against an employee for providing subpoenaed deposition testimony in connection with a civil rights lawsuit alleging government misconduct. First, a reasonably competent official would have known that a public employee's subpoenaed deposition testimony addresses a matter of public concern when it is given in connection with a judicial or administrative proceeding involving allegations of 'significant government misconduct.'. . It has been clearly established since at least 2004 that judicial and administrative proceedings are matters of public concern when they seek to expose 'potential or actual discrimination, corruption, or other wrongful conduct by government agencies or officials.'. . Caw was therefore on notice that Wender's § 1983 action was a matter of public concern, for any reasonable official would know that unlawfully retaliating against a public employee for his protected speech activities constitutes 'significant government misconduct.' Furthermore, we have held that it was clearly established since at least 2007 that testifying pursuant to a subpoena in a judicial or administrative proceeding of public concern constitutes protected speech. . . Although none of our earlier cases specifically addressed subpoenaed deposition testimony as opposed to testimony in open court, our holdings have not been so narrowly cabined that Caw could reasonably have believed subpoenaed deposition testimony was excluded from the First Amendment's ambit of protection. . . Second, a reasonable official would also have known that a public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment. . . . *Garcetti* in no way altered Karl's clearly established First Amendment right to give subpoenaed deposition testimony in the Wender litigation in her capacity as a private citizen, without facing retaliation as a result. Finally, it was clearly established at the time of Caw's conduct that a subordinate officer can be liable under § 1983 for retaliating against an employee even if he also has legitimate, non-retaliatory motives. Under the 'mixed motive' analysis established by *Mt. Healthy*, the intensely fact-bound question is simply whether the employer 'would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct.'. . Furthermore, we held in 1999 that 'a subordinate cannot use the nonretaliatory motive of a superior as a shield against liability if that superior never would have considered a dismissal but for the subordinate's retaliatory conduct.'. .Thus, the relevant principles were all clearly established long before the events in question, such that 'every reasonable official would have understood that what he is doing violate[d]' Karl's First Amendment right to be free from retaliation.")

Henry A. v. Willden, 678 F.3d 991, 1000-03 (9th Cir. 2012) ("In this case, the district court's qualified immunity analysis was too narrow. The district court looked at Plaintiffs' detailed factual allegations and essentially determined that Defendants were entitled to qualified immunity because the 'very action[s] in question' had not 'previously been held unlawful.'. . Instead, the district court should have (1) determined the contours of a foster child's clearly established rights at the time of the challenged conduct under the 'special relationship' doctrine of substantive due process, and (2) examined whether a reasonable official would have understood that the specific conduct alleged by Plaintiffs violated those rights. . . Using the correct analysis, we conclude that Plaintiffs have alleged violations of their clearly established constitutional rights, and the individual defendants are not entitled to qualified immunity at this stage of the litigation. . . . Having examined the relevant contours of a foster child's clearly established due process rights to adequate safety and medical care, we conclude that a reasonable official would have understood that at least some of the specific conduct alleged by Plaintiffs violated those rights. . . . It may be that Plaintiffs cannot prove these allegations, or that they can only prove some of their less serious allegations, such as the failure to provide standardized periodic health screenings. If that turns out to be the case, the individual defendants can again raise the defense of qualified immunity at a later stage in the proceedings. . . But at this stage, when we accept as true all well pleaded facts in the complaint, Plaintiffs have alleged violations of their clearly established constitutional rights, and qualified immunity is not appropriate. We reverse the district court's dismissal of the damages claims in Count One. . . . We [also] reverse the district court's dismissal of Count Two for failure to state a claim under the state-created danger doctrine. Because *Tamas* also held that these rights were clearly established, we reject the district court's conclusion that qualified immunity provides an alternative ground for dismissal.")

Hunt v. County of Orange, 672 F.3d 606, 615, 616 (9th Cir. 2012) ("Hunt's First Amendment right to be free from demotion for campaigning against Carona was clearly established as of June 2006. . . . However, the critical question here is whether a reasonable official in Carona's position should have known that Hunt was not a policymaker whose political loyalty was important to the effective performance of his job. . . . We conclude, like the district court, that Carona could have reasonably but mistakenly believed that Hunt's demotion was not unconstitutional, given the unique nature of his job as Chief of Police Services for the City of San Clemente. Although Hunt's position had no department-wide policy-making responsibility, influence, or control, as the jury found, Hunt exercised discretion over the implementation of OCSD policy within San Clemente, influenced OCSD policy as it affected San Clemente, and formulated plans to implement OCSD policy in San Clemente. While Hunt had to secure authority before speaking with the public, when he did so, it was on behalf of the OCSD. We have carefully analyzed the development of the policymaker exception, its underlying purpose, the high burden on the government to prove that political fidelity was a necessary requirement of Hunt's job, and balanced the nine-factor *Fazio* analysis that requires a fact-dependent inquiry. Even if Carona engaged in the appropriate analysis and wrongly concluded that Hunt was a policy-maker such that demoting him was constitutional, we cannot say that he acted objectively unreasonably in concluding he could demote Hunt without violating his constitutional rights.")

Rosenbaum v. Washoe County, 663 F.3d 1071, 1076-79 & n.2 (9th Cir. 2011) ("In the context of an unlawful arrest, then, the two prongs of the qualified immunity analysis can be summarized as: (1) whether there was probable cause for the arrest; and (2) whether it is *reasonably arguable* that there was probable cause for arrest–that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity. . . . Framing the reasonableness question somewhat differently, the question in determining whether qualified immunity applies is whether all officers would agree that there was no probable cause in this instance. *See Ashcroft*, 131 S.Ct. at 2083 (holding that an official is not entitled to qualified immunity where '*every reasonable official'* would have understood that he was violating a clearly established right (emphasis added) (internal quotation marks and citation omitted)). . . . The Court uses the language 'all reasonable officers' or 'every reasonable officer' to explain that it must be *clear* that the conduct is unlawful; qualified immunity will attach whenever reasonable officers could disagree about whether the facts in the particular case give rise to probable cause. The law does not imply, however, that police officers are the ultimate arbiters of constitutional questions. The lawfulness of their conduct does not turn on whether all, or most, officers *think* that the law is clearly established. For example, if the Supreme Court has issued an opinion condemning racial profiling, but 90 percent of the police in a given geographic area think racial profiling is just fine, an officer would not be entitled to qualified immunity simply because his fellow officers disagree with a clear Supreme Court ruling. . . .This is not a case where courts disagree about the contours of a constitutional right or where officers may be confused about what is required of them under various circumstances. As our analysis establishes, the statute is unambiguous, and not susceptible to the reading that the county suggests. Therefore, no reasonable officer could believe that Rosenbaum's conduct violated this statute. Considering the facts in the light most favorable to Rosenbaum, all reasonably competent officers would have agreed that he was not committing a crime. There is no scalping law in Nevada; it is simply not a crime to sell tickets to a fair–even when the tickets were received for free. His t-shirt did not suggest fraud, nor were the ticket buyers duped by the sale. The district court's grant of summary judgment on the grounds of qualified immunity for an unlawful arrest is reversed.")

Heyne v. Metropolitan Nashville Public Schools, 655 F.3d 556, 568 (6th Cir. 2011) ("Taken as a whole, the Amended Complaint's factual allegations, which we must accept as true, plausibly suggest that Manuel's ability to impartially determine the appropriate discipline in relation to the September 5, 2008 incident had been manifestly compromised–by virtue of his knowledge of and expressed concern about student discipline statistics, his instructions to faculty and staff concerning discipline of African-American students, and his reaction to communications with the parents of D.A. These are the kinds of specific facts, indicating the presence of pre-existing bias, that this Court has recognized could give rise to a valid claim for infringement of the due process right to an impartial decisionmaker in the context of student discipline. . . Viewing the allegations in the light most favorable to plaintiff Heyne, as we must, we conclude that a reasonable school official in Manuel's alleged position should have known that his impartiality was compromised and that his participation in the discipline decision-making process was not permissible. The

impropriety of Manuel's alleged conduct in failing to disqualify himself should have been apparent based on *Goss, Newsome,* and other precedent directly on point. . . Heyne's right to an unbiased decisionmaker was thus clearly established when Manuel acted. . . Therefore, we hold that Heyne has stated a facially valid claim against Manuel under § 1983 for violating his right to procedural due process. The district court's denial of Manuel's motion to dismiss based on qualified immunity is AFFIRMED . . . . Read in the light most favorable to Heyne, the Amended Complaint contains well-pled factual allegations we must accept as true suggesting that Manuel suspended Heyne for ten days based in part on Heyne's race. Heyne's factual allegations state a plausible claim against Manuel for violation of his right to equal protection. . . Heyne's right not to be disciplined based on his race was clearly established at the time of Manuel's actions. . . Therefore, we hold that Heyne has stated a claim against Manuel under § 1983 for violating his right to equal protection. The district court's denial of Manuel's motion to dismiss based on qualified immunity is AFFIRMED.")

Dougherty v. City of Covina, 654 F.3d 892, 899, 900 (9th Cir. 2011) ("[W]hile the 'totality of circumstances' could, in some instances, allow us to find probable cause to search for child pornography, Officer Bobkiewicz's conclusory statement tying this 'subject,' alleged to have molested two children and looked inappropriately at others, to 'having in [his] possession child pornography' is insufficient to create probable cause here. . . . The law in this circuit had not been clearly established regarding whether allegations of sexual misconduct or molestation at a place of work provide probable cause to search a residence for child pornography in the absence of an explanation tying together the two crimes. Neither this court nor the Supreme Court has addressed this question. Further, as discussed *supra,* other Circuit Courts of Appeal have split on similar questions. . . Therefore, because the law was not clearly established at the time of the alleged events, the district court did not err in holding Bobkiewicz and the other police officers are entitled to qualified immunity.")

Ammons v. Washington Dept. of Social and Health Services, 648 F.3d 1020, 1026-34 (9th Cir. 2011) ("Courts are given the discretion to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . Here, it is difficult to assess whether the facts alleged by Ammons establish the alleged constitutional violation without setting forth the governing law. Therefore, we first examine the clearly established law with respect to the alleged Fourteenth Amendment violation, and then determine whether the facts before us support such a violation. . . .[A]t the time the events alleged in this case took place, it was clearly established that LaFond and Webster, as state officials, had a duty to exercise professional judgment to provide safe conditions for Ammons and the other patients at CSTC. . . .In light of the clearly established law that hospital officials must provide safe conditions for involuntarily committed patients, we now examine the circumstances under which state hospital officials may be held responsible for failing to do so. . . . *Youngberg* and *Neely* serve as pre-existing, clearly established law as to what conduct supports infringement of the Fourteenth Amendment rights of involuntarily committed hospital patients. At the time of the alleged events, then, it was clear that the actions of LaFond and Webster violated the Constitution if they ran afoul

of the objective *Youngberg* professional judgment standard as applied in *Neely*. . . . Under *Neely*, a jury could find that a reasonable administrator, exercising professional judgment with respect to providing safe conditions, would have taken Resident A's allegation into account when assigning and supervising staff members in cottages where female patients resided. While LaFond had no cause to discipline Grant, because he had been exonerated of the molestation charge, she certainly had reason, in light of her duties with respect to the safety of her patients, to manage and monitor his duties more carefully. Instead, LaFond allowed Grant to gain unfettered and unmonitored access to the female residents, and to spend time with them on a one-on-one basis. . . . We hold that, under the facts alleged and produced, LaFond's apparent inaction and poor supervision with respect to the safety of Ammons and the other female patients support a finding that she failed to exercise professional judgment, and thereby violated the Fourteenth Amendment."[footnotes omitted])

Gerhart v. Lake County, Mont., 637 F.3d 1013, 1025 (9th Cir. 2011) ("Gerhart's constitutional right not to be intentionally treated differently than other similarly situated property owners without a rational basis was clearly established at the time his permit application was denied. . . . Because *Willowbrook* clearly establishes Gerhart's constitutional right to not be intentionally treated differently than other similarly situated property owners without a rational basis, we conclude that the individual Commissioners are not entitled to qualified immunity on Gerhart's equal protection claim.")

Clairmont v. Sound Mental Health, 632 F.3d 1091, 1110 (9th Cir. 2011) ("In *Robinson,* we held that, as early as 2005, it was clearly established that a public employee's voluntary testimony relating to discrimination was a matter of public concern. . . In light of our then existing case law, we conclude that, in 2007, it was clearly established that Clairmont's subpoenaed testimony related to an issue of public concern. In addition, as stated in *Robinson,* it was clearly established by 2005 that for a government employer's legitimate administrative interests to outweigh an employee's right to engage in protected speech, the disruption had to be 'real, not imagined.'. . .When we resolve all factual disputes and draw all reasonable inferences in Clairmont's favor, as we must, there is no support for Wilson's argument that Clairmont's testimony caused workplace disruption the quelling of which outweighed Clairmont's interest in engaging in protected speech. It was clearly established at the relevant time that Wilson's proffered evidence of disruption in the workplace was woefully insufficient.")

Tamas v. Department of Social & Health Services, 630 F.3d 833, 846, 847 (9th Cir. 2010) ("The Fourth Circuit in *Doe* held that its precedent did not clearly establish such a right because its prior cases did not involve foster children within the custody and control of the state when the state made foster care placement decisions. . . However, unlike the Fourth Circuit, we previously held in 1992 that '[o]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child.'. . We may also look to the law of other circuits to determine if a principle is clearly established. [collecting law of other circuits]

Based on these cases, we conclude that it was clearly established in 1996 that Appellees had a protected liberty interest in safe foster care placement once they became wards of the state.")

Community House, Inc. v. City of Boise, Idaho, 623 F.3d 945, 968-70 (9th Cir. 2010) ("It is true that when reviewing a denial of qualified immunity, 'our appellate jurisdiction is limited to questions of law.'. . However, we have power to consider qualified immunity even where facts are disputed, so long as we 'assum[e] that the version of the material facts asserted by the non-moving party is correct.'. . We have made such an assumption and thus have jurisdiction to consider the second prong of *Saucier's* test. It would be quite incongruous if a public official's right to an immediate appeal from a denial of qualified immunity were to evaporate simply because the district court failed or chose not to complete the required *Saucier* analysis. . . . [E]ven if it was clearly established that the FHA applied to Community House, a reasonable official could not have known that the single-men-only policy violated the statute. It was not until the earlier appeal that we determined what types of justifications could validate a facially discriminatory, men-only policy–an issue already subject to a circuit split. *Cmty. House I,* 490 F.3d at 1050. The council members questioned the BRM regarding the policy, were assured that the women could stay at the City Light shelter and that it would be safer to house men and women in separate facilities, and even verified the BRM's claims of fewer police calls. These were reasonable actions, especially considering that this court later determined that a discriminatory policy based on legitimate, non-stereotypical safety concerns would in fact pass muster under the FHA.")

Dunn v. Castro, 621 F.3d 1196, 1205 (9th Cir. 2010) ("The right at issue here is not an abstract right to familial association. By so holding, the district court erred by defining the question at too high a level of generality and evaluating that question without regard to the relevant fact-specific circumstances. Like the Court in *Overton,* we do not hold or imply that incarceration entirely extinguishes the right to receive visits from family members. . . Nor do we deprecate the value of the relationship between Dunn and his children. The relationship between a father or mother and his or her child, even in prison, merits some degree of protection. The pertinent inquiry in this case, however, goes beyond an ordinary father's interest in sharing a relationship with his child. It is rather whether a reasonable officer could have believed that Dunn–a lawfully incarcerated prisoner who was reasonably believed to have engaged in improper conduct with a minor–could be temporarily deprived of his visitation privileges with his own children. That constitutional question 'is by no means open and shut.'. . At the time of the challenged restriction on Dunn's visitation privileges, federal courts had held that prisoners do not have an absolute right to visitation, as such privileges are necessarily subject to the prison authorities' discretion, provided their administrative decisions are tied to legitimate penological objectives. Thus, we conclude that the right of a prisoner to receive visits from his children in the factual circumstances of this case was not clearly established in 2004, when the restriction was imposed.")

Crowe v. County of San Diego, 608 F.3d 406, 429-32 (9th Cir. 2010) (second amended opinion) ("In contrast to the facts in *Chavez,* the prosecution of Michael and Aaron did not cease with the boys' interrogations. Rather, the boys were indicted and the case against them continued for a year,

up and until the eve of trial. During this time, statements obtained during the boys' interrogations were used in several pre-trial proceedings, including a '*Dennis H.* Hearing,' the grand jury proceedings, and a '707 Hearing.' Following *Stoot*, we hold that the use of Michael's and Aaron's statements in the pre-trial proceedings gives rise to a Fifth Amendment cause of action. . . . In summary, we hold that a Fifth Amendment cause of action against the relevant defendants arose when Michael and Aaron's coerced statements were introduced against them during pre-trial proceedings. Further, the defendants are not entitled to qualified immunity. In 1998, when defendants interrogated Michael and Aaron, the clearly established rule in this Circuit was that a § 1983 cause of action for a violation of the Fifth Amendment's Self-Incrimination Clause arose as soon as police employed coercive means to compel a statement. *See Cooper*, 963 F.2d at 1242; *see also Stoot*, 2009 WL 2973229, at *14-15) (denying qualified immunity for a similar claim). As such, defendants cannot claim the protection of qualified immunity. . . . [In addition] The interrogations violated Michael's and Aaron's Fourteenth Amendment rights to substantive due process. . . . Further, defendants are not entitled to qualified immunity because it was clearly established, at the time of the boys' interrogations, that the interrogation techniques defendants chose to use 'shock the conscience.' Defendants had the benefit of this Court's holding in *Cooper*, as well as Supreme Court case law directing that the interrogation of a minor be conducted with 'the greatest care,' *In re Gault*, 387 U.S. at 55. Just as in *Cooper*, here, '[q]ualified immunity is manifestly inapplicable.'").

Edgerly v. City and County of San Francisco, 599 F.3d 946, 958, 959 (9th Cir. 2010) ("We conclude that the Officers are not entitled to qualified immunity for their alleged strip search of Edgerly by visually inspecting his genitalia or buttocks. As we explained above, without reasonable individualized suspicion, a strip search like that alleged here is unconstitutional. . . The law on this point was clearly established at the time of this search: we have previously held that it was clearly established in 1989 'that it is unlawful to strip search an arrestee brought to a jail facility on charges of committing a minor offense, unless the officer directing the search possesses Aa reasonable suspicion that the individual arrestee is carrying or concealing contraband.'". . . Because *Bull* did not disturb our cases requiring individualized suspicion for strip searches of arrestees not classified for housing in the general jail population, *Bull's* overruling of *Giles* in no way affects our conclusion that the law was clearly established here. . . . In light of this clearly established law, no reasonable officer could have believed that the police station search, as described by Edgerly at trial, was lawful.").

Elliot-Park v. Manglona, 592 F.3d 1003, 1008, 1009 (9th Cir. 2010) ("The right to non-discriminatory administration of protective services is clearly established. . . Nevertheless, the officers argue that it wasn't clearly established that investigation and arrest are protective services. But the very purpose of section 1983 was to provide a federal right of action against states that refused to enforce their laws when the victim was black. It hardly passes the straight-face test to argue at this point in our history that police could reasonably believe they could treat individuals disparately based on their race. The officers argue that Elliott's equal protection rights weren't clearly established because she can't find a case similar to hers–like a sobriety check and arrest

case or a traffic case–where the court found an equal protection violation. But there doesn't need to be a prior case with materially similar facts in order for a right to be clearly established. . . We have recognized the absurdity of requiring equal protection plaintiffs to find a case with materially similar facts. In *Flores v. Morgan Hill Unified School District,* we held that public school administrators who failed to respond to gay students' harassment complaints were not entitled to qualified immunity. . . . *Flores* found that school administrators were on notice that they had to treat gay students the same as straight students based on a case holding that state employees in general can't irrationally discriminate on the basis of sexual orientation. . . The same holds true here. It's been long established that state employees can't treat individuals differently on the basis of their race. The three officers thus had a more than fair warning that failure to investigate and arrest Babauta because of race violated equal protection.")

Stoot v. City of Everett, 582 F.3d 910, 927 (9th Cir. 2009) (amended opinion)("At the time of the interrogation, Jensen was on notice under clearly established law that if he failed to provide Paul with appropriate *Miranda* warnings or physically or psychologically coerced a statement from Paul, the use of the confessions *could* ripen into a Fifth Amendment violation. That there was some uncertainty as to precisely what 'use' in a criminal case would suffice does not matter. Qualified immunity is accorded so that reasonable officers are not deterred in carrying out their duties vigorously. . .The qualified immunity evaluation must therefore focus on an officer's duties, not on other aspects of the constitutional violation. That the allegedly coerced confession did not 'ripen' into a Fifth Amendment violation until it was 'used' against Paul in a criminal case does not change this analysis, as Jensen had no reason to believe that the statements would not be used against Paul. . . . As we have already explained in Part B above, a properly-instructed jury could find that some 'use' of Paul's statements was reasonably foreseeable to Jensen at the time of the interrogation. We thus join the Second Circuit in holding that an officer is not entitled to qualified immunity where '[a] reasonable fact finder could conclude that it was not reasonable for an officer to believe that it was constitutional to coerce a confession and then to hand that information to a prosecutor-without divulging the means by which the confession was acquired-for use in a criminal case.'").

Hopkins v. Bonvicino, 573 F.3d 752, 776 (9th Cir. 2009)(requirement that a police officer establish independent probable cause before taking individuals into custody solely on the basis of a citizen's arrest was not clearly established in 2003).

Tennison v. City and County of San Francisco, 570 F.3d 1078, 1093, 1094 (9th Cir. 2009) ("The Inspectors argue that, even if a constitutional right was violated, such a constitutional right was not clearly established in 1990. The Inspectors, however, define the right too narrowly. They argue that they did not have a duty to disclose a confession that was made after a guilty verdict was rendered, that was 'inherently unbelievable,' and that was given by someone who earlier had denied involvement in the murder. . . . The Inspectors received a Mirandized confession by someone who had been named by a reliable witness, known to the officers, who recounted events surrounding the murder in detail, and whose account contradicted that of the prosecution's

witnesses. The evidence certainly 'undermines confidence in the outcome of the trial.'. .Thus, it would have been clear to a reasonable officer that such material should have been disclosed to the defense.").

Eng v. Cooley, 552 F.3d 1062, 1075, 1076 (9th Cir. 2009) ("The Defendants did not argue before the district court, and do not argue before this court now, that Eng's rights were not clearly established with respect to any speech *not* spoken pursuant to his official employment duties. Relying on *Garcetti*(decided in 2006), the Defendants assert only that 'the law was not clearly established [in 2001] as to the nature of First Amendment protection for public employee speech *expressed pursuant to official job duties.*' This observation is beside the point. *Garcetti* makes clear that if Eng's comments about the leaks to the IRS *were* spoken pursuant to his official job duties, then he cannot recover regardless of the state of the law in 2001, since there is no private First Amendment interest in 'speech that owes its existence to a public employee's professional responsibilities.'. . And if the statements were *not* spoken pursuant to Eng's job duties, the Defendants do not dispute that Eng's free speech interest was clearly established. Nor could they. *Garcetti* concluded only that 'work product' that 'owes its existence to [an employee]'s professional responsibilities' is *not* protected by the First Amendment. . . Prior to *Garcetti*, the Defendants therefore may have been uncertain whether the Task Force report itself was protected, but only insofar as they might reasonably have believed that it *was* protected when in fact it was *not.* There could be no confusion, however, that when Eng 'comment[ed] upon matters of public concern' 'as a citizen' and *not* pursuant to his job responsibilities, his speech *was* protected by the First Amendment–that rule had long been the law of the land. . . Thus, assuming Eng's version of the facts to be true, he had a clearly established right to comment on the leak to the IRS.. . . Geragos's and Eng's respective First Amendment interests in Geragos's speech to the press were also clearly established at the time of the alleged retaliation. The clarity of Geragos's interest in his own speech (regardless of Eng's standing to vindicate that interest) is beyond dispute. With respect to Eng's personal interest, by 2003, the right to retain and consult an attorney 'implicate[d] ... clearly established First Amendment rights of association and free speech.'. . It was also clearly established that 'an individual's First Amendment rights of association and free speech are violated when a police officer retaliates against her for retaining an attorney.'. . An individual's personal First Amendment interest in his or her lawyer's speech on his or her behalf is a natural corollary of the First Amendment right to retain counsel. . . . Although we have not previously addressed a case precisely like this one, ' Aofficials can still be on notice that their conduct violates established law even in novel factual circumstances."'. . . Because this case involved 'mere application of settled law to a new factual permutation,'. . . we conclude that Eng's personal First Amendment interest in Geragos's speech was clearly established by 2003. *Denius, DeLoach,* and *Velazquez* were sufficient to put the Defendants on notice of the common sense conclusion that the government may not retaliate against a public employee for speech spoken by the employee's lawyer on the employee's behalf.").

Foster v. Runnels, 554 F.3d 807, 815, 816 (9th Cir. 2009) ("There is no question that an inmate's Eighth Amendment right to adequate food is clearly established. . . .Cole nevertheless argues that

her actions were reasonable and that because there is no Ninth Circuit authority on point, she had no way of knowing that her conduct was unlawful. These arguments are unavailing. . . . The decisions from this Circuit and others alerting prison officials of their obligations to provide inmates with nutritionally adequate meals on a regular basis should have given Cole sufficient notice of the contours of the Eighth Amendment right. Cole cannot seek shelter in the reasonableness of her actions on the basis of the July 27 memo outlining the in-cell feeding policy for Facility C. . . Indeed, the memo issued by the HDSP warden on September 12 suggests that forfeiture of meals or an activity for failing to remove coverings from all windows was never an official HDSP policy, but rather a measure temporarily implemented in Facility C. Furthermore, Cole's conduct was not reasonable because she took no other action to ensure that her obligation to provide Foster with meals was met. Consequently, she is not entitled to qualified immunity.")

CarePartners, LLC v. Lashway, 545 F.3d 867, 883, 884 (9th Cir. 2008) ("[T]he assertion of an unsuccessful defense to a violation of a constitutional right does not render the right 'unsettled' or not 'clearly established.' Notwithstanding the fact that the *Soranno's Gasco* court did not make a specific holding regarding the application of the 'public concern' requirement and *Pickering* balancing test beyond the public employee context, that panel addressed a regulated entity's precise claim of retaliation by government officials as a result of the entity's owners' public comments and petition to the courts to challenge a regulatory act. The scope of the rights at issue here were particularized enough at the time of the violation to satisfy the *Saucier* test for 'clearly established' law. The State employees also argue that this court should not rely on *Soranno's Gasco* because that decision relied in part on a causation test from the public employee context, *Mt. Healthy*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. Far from being persuasive, this tends to bolster the argument that the public concern should not be grafted onto the regulated entity context because the *Soranno's Gasco* court knew of the causation test and yet decided not to apply it to the regulated entity's retaliation claim. Finally, we reject any suggestion that the State employees could have believed, 'reasonably but mistakenly,' that their conduct did not violate a clearly established constitutional right. . . The speech and petition rights at issue have been clearly established in this circuit since 1989. At least at the summary judgment stage, absent some type of extraordinary showing that is not present here, a court could hardly find that the government officials 'reasonably but mistakenly' believed that they could retaliate against a regulated entity and its owners for exercising their First Amendment rights.")**.**

Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept., 533 F.3d 780, 794 (9th Cir. 2008) ("Here, it was clear that the officers could not apply a time, place or manner restriction on speech to the Plaintiffs' activities around the school without advancing any significant state interest by doing so. But the officers could have made a reasonable mistake in believing that ' 626.8 applied to Plaintiffs' conduct and thus advanced a significant state interest. . .There was no case law determining whether ' 626.8 does or does not apply to the circumstances the officers faced. . . And, although we believe that our reading of the statute is one California courts would adopt, that conclusion is premised in part on the practice of avoiding unconstitutional interpretations of statutes, not solely on the language of the statute. Moreover, as we have noted,

there is some question whether the heckler's veto consideration applies where the target audience consists of children. As far as we have been able to determine, there is no case law holding either that it does or that it does not. In these circumstances, we cannot conclude that the law was sufficiently clear that a reasonable officer would know that it was unlawful to request the Plaintiffs to cease driving their truck around the area.")

Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept., 533 F.3d 780, 798 (9th Cir. 2008) ("The deputies cannot receive qualified immunity for their unreasonably lengthy detention of Kulas and Padberg. The deputies' constitutional duty to act diligently and pursue a means of investigation likely to confirm or dispel their suspicions quickly was clearly established on the date of the detention in this case. . .Moreover, it should have been readily apparent to a reasonable officer that ' 626.8 provided no basis for a detention, as no violation of the statute occurred unless the Plaintiffs stayed on the premises after being asked to leave.").

Fogel v. Collins, 531 F.3d 824, 833 (9th Cir. 2008) ("Although we have concluded that the officers violated the First Amendment when they arrested Fogel, impounded his van, and forced him to remove his message, we cannot say that existing precedents would have alerted the police officers that we would find a violation. . . . As the district court pointed out, in no case had a court held on identical or closely comparable facts that the speech was protected by the First Amendment. That is, in May 2004, when the officers acted, there was no reported case in which a person in the post-September 11 environment satirically proclaimed himself or herself to be a terrorist in possession of weapons of mass destruction. We do not, by our invocation of September 11, 2001, suggest that the First Amendment provides less protection than before September 11. Rather, we recognize that what might previously have been understood as relatively harmless talk might, in the immediate aftermath of September 11, have been understood to constitute a real threat.")**.**

Beck v. City of Upland, 527 F.3d 853, 861, 864, 865, 870, 871 (9th Cir. 2008) ("In this instance, . . . the officers, relying on *Smiddy I*, maintain that they cannot be held liable for violating Beck's First or Fourth Amendment rights by arresting him, because an independent prosecutor authorized prosecution before the officers sought and obtained an arrest warrant. . . We disagree. . . . We see no reason to limit *Hartman's* probable cause requirement solely to First Amendment retaliatory arrest and prosecution cases. Rather, its logic extends to Fourth Amendment false arrest cases like Beck's, at least to the extent that the plaintiff must prove the absence of probable cause to rebut the presumption of independent prosecutorial judgment, when a prosecutor's actions are interposed between the actions of investigating officials and the arrest. Ordinarily, however, the plaintiff bears the burden of proving the absence of probable cause anyway in a Fourth Amendment false arrest case. Proving lack of probable cause is usually essential to demonstrating that the plaintiff's Fourth Amendment rights were violated. As a practical matter, consequently, *Hartman* will rarely add to the plaintiff's ultimate burden in a § 1983 false arrest case. . . . To summarize: We hold, first, that to the degree *Smiddy I* could be understood under our case law to apply to a First Amendment-based retaliatory arrest or prosecution cause of action, *Smiddy I* is inconsistent with *Hartman* and cannot stand. In such cases, we will not separately inquire, through application

of a presumption or otherwise, into the prosecutor's actual state of mind. Instead, a showing of a 'retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision' will suffice to rebut the presumption of regularity and settle the causation issue. . . Second, in any constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution, it is necessary, if not sufficient, that a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution show the absence of probable cause. . . . We have already explained that, on this summary judgment record, Beck was arrested in retaliation for his speech and that the arrest was without probable cause. Those explanations satisfy the first step of the qualified immunity inquiry with regard to the First and Fourth Amendment issues, and we will not repeat them here. . . All that remains is to determine whether the pertinent law was clearly established at the time of the incidents in this case. . . It was. Regarding the First Amendment cause of action: Arresting someone in retaliation for their exercise of free speech rights was violative of law clearly established at the time of Beck's arrest. . . . Regarding the Fourth Amendment cause of action: As we have discussed, the California courts limited ' 69 'threat' violations to threats of violence as early as 1984.")**.**

Clement v. City of Glendale, 518 F.3d 1090, 1096 (9th Cir. 2008) ("Officer Young did not violate Clement's clearly established right by calling for her car to be towed. The constitutional requirement at issue–that pre-towing notice be given before a car with a valid PNO certificate may be removed from a parking lot matching the owner's address–was not clearly established at the time of Officer Young's actions. Neither the text of the Constitution nor our caselaw clearly spoke to the balance between the rights of citizens to predeprivation notice and the authority of police to enforce registration statutes. While due process generally requires notice before the government may deprive a citizen of his property, . . . our caselaw recognizes many exceptions. . . We have never held that municipalities must always notify vehicle owners before towing. In fact, our most recent decision involving municipal towing of unregistered vehicles– admittedly in a different context–found there to be no right to pre-deprivation notice. . . It would not have been unreasonable for Officer Young to have interpreted this caselaw as not requiring that notice be given before towing an unregistered vehicle with a valid PNO certificate. We affirm the district court's grant of summary judgment in favor of defendant Young.").

Inouye v. Kemna, 504 F.3d 705, 714 (9th Cir. 2007) (as amended) ("Having held, first, as we must under *Saucier*, that there was a constitutional violation on the facts alleged, we now turn to the question at the heart of the parties' dispute: was the pertinent Establishment Clause law 'clearly established' on this point such that a reasonable official would know that his or her conduct was illegal? . . .. We find that it was. The vastly overwhelming weight of authority on the precise question in this case held at the time of Nanamori's actions that coercing participation in programs of this kind is unconstitutional. . . . By 2001, two circuit courts, at least three district courts, and two state supreme courts had all considered whether prisoners or parolees could be forced to attend religion-based treatment programs. Their unanimous conclusion was that such coercion was unconstitutional.")**.**

Porter v. Bowen, 496 F.3d 1009, 1026, 1027 (9th Cir. 2007) ("We conclude that the application of First Amendment doctrine to vote swapping was not clearly established in 2000 (or, indeed, until our decision today). First, no court had ever addressed the constitutionality of efforts to halt vote swapping when Jones threatened Appellants with prosecution. Jones therefore had no on-point decision to rely on when he received complaints about Appellants' websites. Second, although it is true that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances,'. . . this case does not involve the mere application of settled law to a new factual permutation. To the contrary, we have had to wrestle with difficult and unsettled questions about the First Amendment interests implicated by vote swapping and the weight of the countervailing interests asserted by the State. Finally, Jones was not the only Secretary of State to determine that vote swapping was illegal under state law; so too did his counterparts in Oregon and Minnesota, on grounds similar to those cited by Jones (though the Secretaries of State of Maine, Michigan and Nebraska reached the opposite conclusion). Taking these considerations into account, we hold that Jones is entitled to qualified immunity . He did not have 'fair warning' that his actions were unconstitutional,. . . nor would a 'reasonable official' in his position have understood that threatening the owners of vote-swapping websites with prosecution constituted a violation of the First Amendment . . . .")

Preschooler II v. Clark County School Bd. of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007) ("In light of the clear constitutional prohibition of excessive physical abuse of schoolchildren, and the heightened protections for disabled pupils, no reasonable special education teacher would believe that it is lawful to force a seriously disabled four year old child to beat himself or to violently throw or slam him. Existing law plainly prohibits excessive hitting, dragging or throwing of public school children.").

Morgan v. Morgensen, 465 F.3d 1041, 1043, 1045, 1046 (9th Cir. 2006) ("[W]e hold that, under certain circumstances, dangerous prison working conditions can give rise to an Eighth Amendment claim, not-withstanding the fact that the prisoner initially obtained his specific employment assignment through a voluntary application process within the prison system. We further hold that a prison official is not entitled to qualified immunity when he orders a prisoner to continue operating prison work equipment that the official has been warned and has reason to believe is unnecessarily dangerous. . . . Regardless of how a prisoner obtains his work, once he is employed and not in a position to direct his own labor, his supervisors are not free to visit cruel and unusual punishments upon him. Morgan did not apply to work with a dangerously defective printing press. . . . For our purposes, we conclude that the evidence, viewed in the light most favorable to Morgan, shows that Canady violated Morgan's constitutional right not to be compelled to perform work that endangered his health and caused undue pain. As an initial matter, Canady argues that he is entitled to qualified immunity as a matter of law, because at the time of the alleged violation, there existed no case law in this circuit, and there was a conflict among the other circuits, as to whether a prisoner could make out an Eighth Amendment violation when he alleges that a prison official compelled him to continue working with defective prison equipment. Canady argues that given

the state of the law, he could not have known that he was violating Morgan's clearly established constitutional rights. Canady's view is not entirely correct. At the time of the alleged constitutional violation, there did exist a conflict among other courts as to whether a prisoner could make out an Eighth Amendment claim when he alleged that a prison official ordered him to work with prison equipment that the official has been told is dangerously defective. . . There was, however, case law within this circuit governing prison officials' conduct in the situation that Canady confronted.")

Sissoko v. Rocha, 440 F.3d 1145, 1167 (9th Cir. 2006) ("Rocha first contends that it was not clear that the Fourth Amendment applies to aliens whose presence here is unlawful. Although Rocha is correct that no Supreme Court case has squarely held that the Fourth Amendment applies to such aliens, . . . directly on-point Supreme Court case law is not required for a right to be 'clearly established.'. . Our own case law provided Rocha with 'fair and clear warning,'. . . that immigration officers dealing with aliens whose presence here may be unlawful must be solicitous of Fourth Amendment protections.").

Kennedy v. City of Ridgefield, 439 F.3d 1055, 1066 (9th Cir. 2006) ("It is beyond dispute that in September 1998, it was clearly established that state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced. This court first recognized the theory of state-created danger liability almost ten years before the events in this case in *Wood*. . . We have explained before that the responsibility for keeping abreast of constitutional developments rests 'squarely on the shoulders of law enforcement officials. Given the power of such officials over our liberty, and sometimes over our lives, this placement of responsibility is entirely proper.'. . We conclude that no reasonable officer in Shields's position, knowing what he knew, could have concluded that Kennedy had no right not to be placed in physical danger by his deliberately indifferent action."), *reh'g en banc denied,* 440 F.3d 1091 (9th Cir. 2006).

Kennedy v. City of Ridgefield, 439 F.3d 1055, 1068 (9th Cir. 2006) (Bybee, J., concurring in part and dissenting in part) ("We have never before recognized a state-created danger cause of action on facts remotely analogous to these. In the sixteen years since we invented the state-created danger exception to *DeShaney*, we have approved it on fewer than five occasions. In these cases we have narrowly construed the exception to encompass only claims in which the government's act was directed toward a specific plaintiff, rather than the public at large; the government acted affirmatively, rather than simply failed to act; the government's act caused the harm, rather than merely increased the risk; and the government's action constituted deliberate indifference to the known or obvious danger, rather than mere negligence, or even gross negligence. Ignoring these elements, the majority today extends the state-created danger doctrine to a situation in which it cannot be said with any measure of confidence either that the government's act caused the plaintiff's harm or that the government acted with the requisite level of culpability. Even if I thought Officer Shields had violated our state-created danger gloss on the Due Process Clause, the violation was surely not so obvious that he should have known at the time that he was violating Kennedy's constitutional rights. Consequently, even assuming a constitutional violation, I would

hold that Officer Shields is nonetheless entitled to qualified immunity."), *reh'g en banc denied*, 440 F.3d 1091 (9th Cir. 2006).

Atkins v. County of Riverside, No. 03-55844, 2005 WL 2219461, at *4 (9th Cir. Sept. 14, 2005) (not published) ("Miller is not entitled to qualified immunity as to the fabrication of evidence and *Brady* claims. . . *Devereaux* holds that the right not to be subjected to criminal charges on the basis of deliberately fabricated false evidence is 'clearly established.' . . And as for the *Brady* claim, a police officer in 1988 should have been aware of his obligation to not withhold exculpatory evidence. [citing cases] In addition, it seems sufficiently obvious that 'common sense' would instruct a police officer to not withhold exculpatory evidence.").

Meyers v. Redwood City, 400 F.3d 765, 774 (9th Cir. 2005) ("Even if we thought that the officers crossed a line established by *Harris*, the officers are surely entitled to qualified immunity because they could not have known that they were violating the Plaintiffs' 'clearly established' constitutional rights. . . Even with a copy of *Harris* in their back pockets, the officers could not have determined at what point in the middle of this messy repossession they deprived Meyers of her property without due process of law. Meyers may have every right to be unhappy with the situation, but the officers cannot be faulted for attempting to settle this late-night confrontation peacefully. In these circumstances, it would not 'be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'").

Johnson v. Hawe, 388 F.3d 676, 685 (9th Cir. 2004) (amended opinion on denial of reh'g) ("The principles of *Flora* and its progeny were well-established at the time of Johnson's arrest. At the very least, these cases stand for the following two propositions: (1) 'public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby [do not] enjoy a privacy interest which they may assert under the statute'; and (2) the Privacy Act may not be 'transform[ed] ... into a sword available for use against individuals by public officers acting in their official capacity.'. . Any reasonable officer should have understood these rules to preclude Johnson's arrest under the circumstances. Although *Flora* involved officer statements made during an arrest, no subsequent authority limited its reach to those facts. Moreover, *Flora's* plain language suggests a broader application sufficient to preclude Chief Nelson from arresting Johnson for recording him during the performance of his official duties in public. Moreover, in light of the many Washington cases dealing with unlawful arrests under the Privacy Act, a reasonable police officer should have been aware of the 1998 Washington Attorney General's Opinion No. 11, which determines that communications over police dispatch radio are not private. . . Finally, even if these two points were not sufficiently clear to preclude Johnson's arrest, any reasonable officer should have known under the well-established precedent of *Katz* that there could be no reasonable expectation of privacy in the police radio transmissions which Chief Nelson knowingly exposed to the public through his open car windows. No exigent circumstances existed in this case that could justify a reasonable mistake on the part of chief Nelson. . . Therefore defendants are not entitled to qualified immunity.").

Kwai Fun Wong v. United States, 373 F.3d 952, 970, 976 (9th Cir. 2004) ("The INS officials do not contest that Wong was entitled to constitutional protections on her return despite her brief departure. They argue only that the extent of Wong's constitutional rights was not clearly established, because she was an alien lacking entry papers upon her return. As a result, the INS officials maintain, a reasonable official would not have known that Wong was entitled to the full panoply of protections offered by the Constitution. . . . Despite the limited scope of the officials' argument, we must address to some degree the extent of Wong's entitlement to constitutional rights. *Saucier* counsels that we must first determine whether a constitutional right has adequately been alleged by the plaintiff before turning to the 'clearly established' prong. . . . We therefore conclude that Wong's allegations of invidious discrimination are sufficient at this pleading stage to make out a Fifth Amendment discrimination claim arising out of the INS officials' actions with respect to revocation of Wong's temporary parole status and post-return rejection of her adjustment of status applications. . . . Because of the uncertainty surrounding the constitutional status of an alien in Wong's unusual position during the period after her return, we conclude that Wong has not alleged violations of clearly established law.").

Galvin v. Hay, 374 F.3d 739, 745-47 (9th Cir. 2004) ("Plaintiffs ask us to reverse the district court's ruling that, although *Baugh* held that it was constitutionally impermissible to require RWHP to promise not to engage in civil disobedience in return for a permit, the law on this issue was not clearly established at the time defendants acted. We decline to do so. We agree with the district court that, before *Baugh,* the contours of the constitutional right violated by the defendants' denial of the permit were not 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.' . . . *Baugh* was . . . the first case to consider whether a permit conditioned on an agreement to refrain from illegal activity imposes a valid time, place, and manner restriction in a public forum or, instead, an unconstitutional restriction on freedom of speech. . . .*Baugh's* conclusions have firm support in the case law relied upon. Nonetheless, there was no case at that juncture that had addressed the question whether conditioning a march permit on a promise to abide by the law when there was a history of organized civil disobedience by the same group along the same route is an insufficiently tailored manner restriction. The Park Police's determination to impose the condition, while mistaken under the First Amendment, was at the time (although it would not be now) a legal error that reasonable officials could make in light of then-existing precedents. Nor, as in *Hope*, where '[a]rguably, the violation was so obvious that [the Court's] own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution,' . . . was the invalidity of imposing the restriction at issue self-evident, even in the absence of 'fundamentally similar' precedents. . . An official charged with enforcing the trespassing law and faced with a group that had engaged in prior unlawful activity could well think that conditioning another permit on promises to refrain from unlawful acts would allow legal but not illegal activity and thus protect First Amendment rights. We conclude that the district court was correct in granting defendants' motion for summary judgment for the permit denial on the ground of qualified immunity.").

Walker v. Gomez, 370 F.3d 969, 977, 978 (9th Cir. 2004) ("Walker has not brought to our attention, and our independent research does not reveal, case law involving the particular circumstances presented by this case. The second prong of the *Saucier* inquiry operates at a high level of specificity. It is insufficient that the broad principle underlying a right is well-established. . . . While it is well-established that racial discrimination in the assignment of prison jobs is unconstitutional, . . . it has not been clearly established that such race-based differentiation is unconstitutional in the context of a prison-wide lockdown instituted in response to gang-or race-based violence. Defendants are therefore entitled to qualified immunity.").

Lee v. Gregory, 363 F.3d 931, 936 (9th Cir. 2004) ("[W]e do not determine whether Gregory knew or did not know he was causing the arrest of the wrong man when he turned the SDSO on to Julian. That is an issue reserved to the trier of fact at trial, if a trial takes place. We merely hold that the district court did not err in finding that the disputed facts, viewed in the light most favorable to Julian, create a triable issue of fact: whether Gregory knew he was causing the arrest of the wrong man. If established, such wrongful arrest would be sufficient to constitute a constitutional violation. We further hold that clearly established law provides notice to a reasonable officer that arresting a man pursuant to a facially valid warrant that the officer knows does not apply to the man arrested is unlawful. The district court correctly denied Gregory's motion for summary judgment made on qualified immunity grounds.").

Cox v. Roskelley, 359 F.3d 1105, 1113 (9th Cir. 2004) ("Defendants knew or should have known that there would be 'some public disclosure' of the charges contained in the termination letter of a public employee embroiled in a dispute of public interest. By 1998, it was clearly established that such public disclosure meant that the procedural protections of due process applied. . . . . In combination, *Roth*, *Vanelli*, *Mustafa*, *Buxton*, and the operation of Washington's public disclosure law preclude a viable 'head-in-the-sand' defense on the part of County officials. We reiterate that, even in the absence of a Ninth Circuit case directly on point, government officials may still be fairly warned of potential constitutional deprivations. . . Here, however, there is much more than *Buxton*; because of the public disclosure provisions of state law, our own cases such as *Vanelli* plainly informed Defendants of their obligations. . . Accepting as true Cox's assertion that the Notice of Termination in his personnel file contained stigmatizing information and, in light of Washington law mandating disclosure of all materials contained in an employee's personnel file, we hold that placement of the Notice of Termination in Cox's personnel file without a name-clearing hearing violated Cox's due process rights under the Fourteenth Amendment. We further hold that the contours of the right to a name-clearing hearing upon placement of stigmatizing material in a personnel file were clearly established, such that a reasonable official in these defendants' position would have known that his conduct was unlawful.").

Vance v. Barrett, 345 F.3d 1083, 1092, 1094 (9th Cir. 2003) ("The utter lack of precedent and standards is dispositive that the law concerning an unconstitutional condition predicated on a procedural due process claim in a prison setting was not clearly established. The prison officials are thus entitled to qualified immunity for Vance's unconstitutional conditions claims. . . .Although

Vance's retaliation claim is similar to his unconstitutional condition claim, our past precedent is much more developed in this area.. . . .Although there was no precedent specifically on point for the due process claim, our precedent is clear that prison officials could not retaliate against inmates for the exercise of their constitutional rights.").

Serrano v. Francis, 345 F.3d 1071, 1080, 1081 (9th Cir. 2003) ("Serrano has alleged both that he possesses a protected liberty interest in his being free from restraint in a unit that is not designed for disabled persons and that Francis violated his constitutional right to have live witness testimony at the hearing. Accordingly, he has checked off the list both components of his claim for the purposes of the first prong of the qualified immunity analysis. . . Thus, we proceed to the second *Saucier* prong–the 'purely legal' issue of whether the law at the time of the alleged constitutional violation was clearly established. . . We conclude that it was not. . . .this court has never before addressed the contours of the initial component of Serrano's claim–whether a disabled inmate's freedom from restraint in a facility that is not designed for disabled persons may, as a matter of law, constitute a protected liberty interest. . . . With regard to the conditions of administrative segregation for disabled inmates, the contours of the protected liberty interest have not been determined with sufficient specificity that Francis had fair warning that his levying of the punishment via failing to allow live witness testimony would deprive Serrano of his constitutional right to be free from this type of restraint. . . Although we need not look to a case with identical or even 'materially similar' facts to determine whether Francis had fair warning, . . . we note that *no* case in this circuit touches on the proper conditions for the liberty interest rights of disabled inmates in administrative segregation. We have discussed disabled inmates' rights in the context of Eighth Amendment claims [citing cases]. . . . And the Supreme Court has discussed disabled inmates' rights in the context of Americans with Disabilities Act claims.[citing *Yeskey*] But we have never discussed disabled inmates' rights in the context of claims involving protected liberty interests. . . . Although we note that the prison failed miserably in providing adequate facilities for the disabled Serrano during his spell in solitary confinement, we cannot hold Francis liable for a constitutional violation, the contours of which had never before been fleshed out. Those contours are fleshed out as of today. Accordingly, although we find deplorable the conditions under which Serrano was kept following Francis' decision, we will affirm the dismissal of the due process claim under Federal Rule of Civil Procedure 12(b)(6) on the basis of qualified immunity.").

Meredith v. Erath, 342 F.3d 1057, 1063 (9th Cir. 2003) ("At the time of the search, July 10, 1998, it was not clearly established in this (or any other) circuit that simply handcuffing a person and detaining her in handcuffs during a search for evidence would violate her Fourth Amendment rights. .. Our decision today makes it clear that such conduct, absent justifiable circumstances, will result in a Fourth Amendment violation. . . . [A] reasonable agent in Erath's position would have known, in July 1998, that to place and keep Bybee in handcuffs that were so tight that they caused her unnecessary pain violated her Fourth Amendment right to be free from an unreasonable seizure.").

Martinez v. City of Oxnard, 337 F.3d 1091, 1091, 1092 (9th Cir. 2003) ("We return to this case following remand from the United States Supreme Court. In 2001, we affirmed the district court's grant of summary judgment denying qualified immunity to Sergeant Ben Chavez. *Martinez v. City of Oxnard,* 270 F.3d 852 (9th Cir.2001) ('*Martinez I*'). We entertained at that time only the interlocutory appeal from the district court's denial of qualified immunity to Chavez. The Supreme Court reversed our holding Chavez was not entitled to qualified immunity because Martinez had a Fifth Amendment right against self-incrimination regardless of whether his statements were used against him in criminal proceedings, *Chavez v. . Martinez,* 123 S.Ct. 1994, 2001, 2007 (2003); however, the Court left open the possibility that Chavez's coercive interrogation of Martinez violated his then clearly established due process rights under the Fourteenth Amendment. *Id.* at 2008. We hold that, if the facts as alleged are proven true, it did. Accordingly, Chavez is not entitled to qualified immunity on Martinez's Fourteenth Amendment substantive due process claim. . . .If Martinez's allegations are proven, it would be impossible not to be shocked by Sergeant Chavez's actions. A clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation.").

Bingham v. City of Manhattan Beach, 341 F.3d 939, 947, 948 (9th Cir. 2003) ("Schreiber contends that the district court failed properly to address the 'clearly established' prong. He posits a novel twist to the 'clearly established' inquiry, contending that because it is not clearly established that damages may be obtained under § 1983 for an unlawful traffic stop, qualified immunity should apply. This argument misunderstands the second part of the qualified immunity inquiry. The question is whether the constitutional right, not the right to damages under § 1983, is clearly established in law. . . . The qualified immunity cases are not concerned with whether there exists a body of case law known to the officer regarding whether or what type of damages are available for the violation of a person's constitutional rights. Rather, in determining whether qualified immunity is available, those cases merely inquire whether the right at issue was clearly established in law. It has been settled law since the 1970's that in order for a police officer to initiate an investigatory stop of a motorist, there must at least exist reasonable suspicion that the motorist is engaging in illegal activity. . . . Accordingly, we affirm the district court's denial of Schreiber's motion for summary judgment on qualified immunity grounds with respect to the traffic stop.")

Flores v. Morgan Hill Unified School District, 324 F.3d 1130, 1137 (9th Cir. 2003) ("As early as 1990, we established the underlying proposition that such conduct violates constitutional rights: state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection. . . It is not necessary to find a case applying the principle to a particular category of state officials, such as school administrators. The defendants were officers of the state who had fair warning that they could not accord homosexual and bisexual students less protection on account of such students' sexual orientation.").

Ganwich v. Knapp, 319 F.3d 1115, 1125 (9th Cir. 2003) ("It may be argued that judges should not expect police officers to read *United States Reports* in their spare time, to study arcane

constitutional law treatises, or to analyze Fourth Amendment developments with a law professor's precision. We do not expect police officers to do those things. We do, however, expect officers to think twice before embarking on a course of conduct, such as the one here, that is unusual, unfair, and unduly coercive. When the officers seized the plaintiffs, with no probable cause to arrest them, and then used the threat of continued incommunicado detention to coerce them to submit to police interrogation, the officers exceeded the generous leeway that the qualified immunity doctrine allows.").

Franklin v. Fox, 312 F.3d 423, 443 (9th Cir. 2002) ("Although we are bound by the court's holding in *Franklin v. Duncan* that Franklin suffered a Sixth Amendment deprivation, we conclude that a reasonable official in Murray's position could have believed that his actions did not violate Franklin's Sixth Amendment rights. As the Supreme Court stressed in *Saucier v. Katz*, '[t]he concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made.' 533 U.S. at 205. By virtue of the decisions in *Franklin v. Duncan,* it is now a matter of clearly-established law in this circuit that facilitation of an interrogation such as that provided by Murray is unlawful. At the time Murray acted, however, an official may have reasonably believed the opposite to be true.").

Rudebusch v. Hughes, 313 F.3d 506, 517, 518 (9th Cir. 2002) ("Although Rudebusch has established an equal protection violation, we must still ask whether a 'reasonable official' in Hughes' position 'would understand that what he is doing violates that right,' *Saucier,* 533 U.S. at 201, keeping in mind that 'officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.'. . With this perspective in mind, we conclude that Hughes is entitled to qualified immunity. Our conclusion rests on a single factor–timing. The law in this area was not clearly established at the time Hughes made his decision nor did Hughes have the benefit of post-decision analyses and information. We start with the proposition that at the time of the decision, the *general* rules were well enough established, for example, that the Fourteenth Amendment requires all racial classifications to survive strict scrutiny. . . But the *specific* contours of the law pertaining to pay equity were not well developed or sufficiently clear at the time.").

Cruz v. Kauai County, 279 F.3d 1064, 1069, 1070 (9th Cir. 2002) ("Dela Cruz has not met his burden of proving that the right allegedly violated here was 'clearly established' at the time of the alleged violation. The right violated here, according to the complaint and evidence favorable to Dela , was the Fourth Amendment right not to have a prosecutor, in order to obtain a bail revocation, personally attest to a false statement of a biased source with no investigation of the statement's truth or falsity. Unfortunately for Dela Cruz, he has not cited any case that establishes such a right, nor is it self- evident. The situation is not one that appears to have been addressed, even tangentially, in the case law. . . .Because there was no clearly established right at the time Soong acted, an objectively reasonable person in Soong's position could not have known that he may have been acting in violation of Dela Cruz's rights by appending his own affidavit reciting the complaint of a third person to the bail revocation application, without having investigated the

truthfulness of the third party's assertions. Consequently, Prosecutor Soong is entitled to qualified immunity.").

Devereaux v. Abbey, 263 F.3d 1070, 1074, 1075 (9th Cir. 2001) ("Undertaking the first step of the two-step qualified immunity inquiry, we are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. Perhaps because the proposition is virtually self-evident, we are not aware of any prior cases that have expressly recognized this specific right, but that does not mean that there is no such right. Rather, what is required is that government officials have 'fair and clear warning' that their conduct is unlawful.").

Navarro v. Block, 250 F.3d 729, 733, 734 (9th Cir. 2001) ("[T]he explicit holding of *Trevino II* is clear: local legislators who implement their state-created power to indemnify police officers from punitive damage awards in good faith on a discretionary, case-by- case basis are entitled to qualified immunity. . . .This much is clear after *Trevino II* and *Cunningham:* local legislators are not entitled to qualified immunity if they implement their state-created power to indemnify police officers from punitive damage awards in bad faith.").

Robinson v. Prunty, 249 F.3d 862, 867 (9th Cir. 2001) ("Robinson's evidence paints a gladiator-like scenario, in which prison guards are aware that placing inmates of different races in the yard at the same time presents a serious risk of violent outbreaks. The defendants' awareness of and indifference to this risk is demonstrated by the alleged frequency with which such outbreaks occur, by the alleged jokes made by the guards to Robinson before they released a Mexican-American inmate into the yard with him, and by the alleged fact that guards failed to intervene while Robinson was attacked by another inmate. We agree with the district court that if Robinson's gladiator-like scenario is true, then no reasonable prison official could have believed that his or her conduct was lawful. We therefore hold that the district court did not err in denying qualified immunity to the defendants.").

Cunningham v. Gates, 229 F.3d 1271, 1293 (9th Cir. 2000) ("Plaintiffs contend that since *Trevino* the law has been clearly established that a policy of indemnifying punitive damage awards violates constitutional rights. The Cunningham/Soly incident occurred nearly one year before we decided *Trevino*. As a matter of chronological necessity, it was not clearly established before or at the time of the Cunningham/Soly incident that voting to indemnify officers against punitive damage awards could violate constitutional rights. Thus, even assuming that these decisions somehow promoted the alleged use of excessive force in the Cunningham/Soly incident, the council members are clearly entitled to qualified immunity for lawsuits based on pre-*Trevino* decisions to indemnify officers against punitive damage awards.").

Devereaux v. Perez, 218 F.3d 1045, 1053, 1055 (9th Cir. 2000) ("After reviewing relevant case law, we conclude that there is no constitutional due process right to have child witnesses, in a child sexual abuse investigation, interviewed in a particular manner or pursuant to a certain protocol.

Devereaux has failed to show that the state defendants violated a constitutional right that is sufficiently particularized so that a reasonable official would understand that any due process right was violated. . . . Here, the underlying substantive constitutional right–whatever that might be–must in some way balance the rights and interests of the legal guardians (whether parents or foster parents), the child, and the public. The need to subject this abstract substantive constitutional right to a balancing test which weighs the interest of a parent against the interests of the child and the state makes the qualified immunity defense difficult to overcome, especially in light of the requirement that the substantive constitutional right be 'clearly established' at the time of the alleged violation.").

Devereaux v. Perez, 218 F.3d 1045, 1060 (9th Cir. 2000)(Kleinfeld, J., dissenting) ("The basis for the majority decision, a requirement of case law telling social workers how to interview children in a sex abuse case, is . . . an excessive demand for specificity. Sometimes officials lack qualified immunity despite the absence of a case in point, as in *Lanier*, and sometimes they enjoy qualified immunity despite the presence of a case in point, where the law is undeveloped or conflicting. . .The test is not whether there is case law, but whether the conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'. . . The presence or absence of case law bears on whether the right is clearly established, but is not necessarily determinative either way.").

Diruzza v. County of Tahama, 206 F.3d 1304, 1313, 1314 (9th Cir. 2000) ("Under *Elrod* and *Branti*, decided by the Supreme Court in 1976 and 1980, and under Ninth Circuit case law decided prior to 1995, it was clearly established that a non-policymaking public employee in a sheriff's office is protected from retaliation for the exercise of First Amendment rights. While neither the Supreme Court nor this court has previously ruled on deputy sheriffs in Tehama County, such a ruling is not necessary. . . . It was thus clearly established, at the time defendants acted, that deputy sheriffs were not per se policymakers in California. . . It was clearly established, as a matter of law, that the actual duties performed by a deputy sheriff determined whether he or she was a policymaker and therefore subject to partisan dismissal, or a non-policymaker and therefore protected from such dismissal.").

Diruzza v. County of Tahama, 206 F.3d 1304, 1318 (9th Cir. 2000) (O'Scannlain, J., dissenting) ("Despite the fact that the Supreme Court's reasoning in this area has shifted, that the circuits are split on the question, and that the four Article III judges who have examined the very question in this case are equally divided on whether the First Amendment protects DiRuzza's disloyalty, the court concludes that the Sheriff and Undersheriff could have known in 1995 that DiRuzza had a clearly established right not to be fired under these circumstances.").

LSO, Ltd. v. Stroh, 205 F.3d 1146, 1157, 1158, 1160 (9th Cir. 2000) ("Not surprisingly, the parties propose rather different formulations of the right at issue in this case. LSO contends that the right at issue is 'the right to be free from content-based discrimination.' The Officials state that the issue is whether there was law clearly establishing that they 'would violate LSO's freedom of

expression by advising LSO of the existence of the ABC regulations, and further advising that said regulations apply to conduct on ABC-licensed premises.' LSO's proposed formulation is too general . . . . Likewise, the Officials' formulation is too particularized. . . . Our goal is to define the contours of the right allegedly violated in a way that expresses what is really being litigated. In this case we are not called upon to decide if, in 1997, the Government generally had the power to censor speech based on content, or whether an official generally could inform someone of the existence of a particular state law without violating the First Amendment. . . . Instead, the Officials argue that they could reasonably have believed in 1997 that liquor regulations were subject to an exception to the general rules of the First Amendment, such that LSO's right to display artwork that violated Section 143.4 on the premises of an ABC licensee was questionable. Thus, we are asked to decide whether, under the circumstances, it was clear that LSO had the right to exhibit non-obscene art on the premises of an ABC licensee free of interference from state officials, even though some of the art fell within the proscriptions of a state liquor regulation governing expressive content at licensed establishments. . . . We conclude that in 1997 no reasonable official could have believed that Section 143.4 could constitutionally be employed to impede LSO's right to display non-obscene art on the premises of an ABC licensee.").

South v. Gomez, No. 99-15976, 2000 WL 222611, at *1 (9th Cir. Feb. 25, 2000) (not reported) ("Battalino claims that he is entitled to qualified immunity because inmates suffering from gender dysphoria (more commonly known as transsexualism), such as South, have no clearly established right to female hormone therapy. Battalino attempts to define the right at issue too narrowly. Our precedents make clear that with respect to prisoner medical claims, the right at issue should be defined as a prisoner's Eighth Amendment right 'to officials who are not Adeliberately indifferent to serious medical needs.'". . . We have repeatedly rejected attempts by defendants to define the right allegedly violated with greater specificity.").

Schwenk v. Hartford, 204 F.3d 1187, 1203-05 (9th Cir. 2000) ("In Mitchell's view, he cannot be held liable under the GMVA unless there is a Ninth Circuit opinion (or, presumably, a Supreme Court opinion) holding: (1) that the statute in question is constitutional; and (2) that the statute applies specifically to the sexual assault on a male to female transsexual state prison inmate by a male prison guard. . . . Mitchell is not entitled to qualified immunity from Schwenk's GMVA claim on the basis of the absence of a court opinion confirming the statute's constitutionality. . . . [A]lthough we now hold that a violation of state laws regarding rape or sexual assault necessarily constitutes a violation of the GMVA regardless of the actor's motivation, state of mind or emotions, we also hold that the law regarding gender motivation and animus was not clearly established at the time of the assault. Accordingly, we find that Mitchell is entitled to qualified immunity with respect to Schwenk's GMVA claim.").

Kelly v. City of Oakland, 198 F.3d 779, 784, 785 (9th Cir. 2000) ("A federal right to be free of same-sex harassment in the form of a hostile environment had not been established in the period 1989-1994. Consequently, neither Wirkkala nor the City can be held liable under § 1983 or § 1985. However, Kelly's case against McNab rested also on his claim that McNab bargained with him by

offering a better official evaluation in return for sexual favors. Evidence of this bargaining was afforded by Kelly's testimony and was sufficient to prove quid pro quo harassment. . . The federal right to be free from such demeaning demands was clear without need for a specific holding by a court that such conduct violated an employee's civil rights. Where unlawfulness is apparent, qualified immunity does not exist.").

California Attorneys for Criminal Justice v. Butts,195 F.3d 1039, 1049, 1050 (9th Cir. 1999) ("The defendants next contend that their reliance on training and training materials entitles them to qualified immunity. The district court rejected this argument holding that 'following orders' will only insulate officers from liability when 'reliance is objectively reasonable.'. . . The fact that Los Angeles and Santa Monica may have trained their police to violate the rights of individuals does not provide any defense for these officers. Their policy contradicts the safeguards provided by *Miranda*, and, at the very least, is in direct conflict with *Cooper*. . . . Furthermore, training officers that inadmissible statements may nevertheless be used for impeachment purposes hardly sanctions this tactic of routinely and intentionally ignoring requests to speak to an attorney. For all of the reasons set forth in the preceding section of this opinion, a reasonable police officer should have known that this conduct was improper and violated the rights of McNally and Bey, whether or not the conduct was endorsed by training materials."), as *amended on denial of reh'g and reh'g en banc* (Jan. 8, 2000).

B.C. through Powers v. Plumas Unified School District, 192 F.3d 1260, 1268 (9th Cir. 1999) ("When the dog sniff in this case occurred, it was not clearly established that the use of dogs to sniff students in a school setting constituted a search. As such, the unlawfulness of defendants' conduct 'in light of preexisting law,' was not 'apparent.'").

Brewster v. Bd. of Ed. of Lynwood Unified School Dist., 149 F.3d 971, 983, 987 (9th Cir. 1998) ("[A]s is the case with respect to public-employee free speech claims, . . . because procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims 'can rarely be considered "clearly established" at least in the absence of closely corresponding factual and legal precedent.' [cites omitted] Indeed, without specific direction from cases applying it, the *Mathews* standard is perhaps even less amenable to the discovery of clearly established law than are the *Pickering* test and other multifactor balancing tests that arise in constitutional jurisprudence. . . . [N]owhere is the uncomfortable coexistence of balancing tests and *Harlow*'s 'clearly established rights' standard more apparent than in this case, in which a plaintiff laid claim to two separate constitutional rights, each of which depends upon an ad hoc weighing of competing interests. Because we conclude that neither Brewster's First Amendment rights under *Pickering* nor his procedural due process rights under *Mathews* were 'clearly established,' as required by *Harlow*, the school officials are entitled to immunity from monetary damages.").

Moran v. State of Washington, 147 F.3d 839, 847 & n.5 (9th Cir. 1998) ("Because the underlying determination pursuant to *Pickering* whether a public employee's speech is constitutionally

protected turns on a context-intensive, case-by-case balancing analysis, the law regarding such claims will rarely, if ever, be sufficiently 'clearly established' to preclude qualified immunity under *Harlow* and its progeny. We are certainly not the first to recognize this self-evident tenet of qualified immunity jurisprudence. . . . And today we join the chorus of voices from other circuits that have specifically observed the difficulty of finding clearly established law under *Pickering*. . . . We are certainly not endorsing a per se rule today; we recognize that there will be the occasional case in which existing case law is so closely on point that the law relating to a public-employee-speech claim might be said to be clearly established. Nor are we suggesting a formal evidentiary 'presumption' that somehow increases a public employee's burden of showing that the law under *Pickering* is clearly established in her favor. We are merely observing that, as a simple matter of logic, the context-specific, fact-intensive nature of the *Pickering* inquiry will generally preclude the law regarding public-employee-speech claims from being sufficiently clearly established to defeat qualified immunity.").

Watkins v. City of Oakland, 145 F.3d 1087, 1092-93 (9th Cir. 1998) ("Watkins argues that at the time of the incident the law governing the use of excessive force was clearly established. Officer Chew would confine the issue more narrowly to whether there was clearly established law at the time of the incident that the use of 'bite and hold' by police dogs constituted excessive force. Following our prior decision in *Chew*, we agree with appellants that Oakland's 'bite and hold' policy did not violate clearly established law concerning the use of excessive force at the time of the incident. . . . However, Watkins makes a different claim of excessive force than that described by Officer Chew. He argues that the duration and extent of force applied in effecting arrest after the officers caught up with Nero [the police dog] amounted to an unconstitutional application of force. . . . We agree that it was clearly established that excessive duration of the bite and improper encouragement of a continuation of the attack by officers could constitute excessive force that would be a constitutional violation. Therefore, we affirm the district court's denial of qualified immunity to Officer Chew on summary judgment.").

Oona, R.S., by Kate S. v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998) ("In *Petaluma*, when we held that the school officials' duties were not clearly established in 1990, we noted the Supreme Court's 1992 *Franklin* decision and recognized that the result might well be different in a claim of immunity for conduct that occurred after *Franklin* was decided. Because *Franklin* was decided in February 1992, and the conduct here complained of began in October 1992, this is such a case. The holding adumbrated by the majority in *Franklin* is required today: Title VII standards apply to hostile environment claims under Title IX. We expressly recognized that hostile environments include peer harassment in *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir.1991). Accordingly, we hold that the defendants are not entitled to immunity for their failure to take steps to remedy the hostile environment created by the male students in Oona's class.").

Hyland v. Wonder, 117 F.3d 405, 411-12 (9th Cir. 1997), *amended and reh'g en banc denied*, 127 F.3d 1135 (9th Cir. 1997) ("Appellees insist that because there was no previous Ninth Circuit case involving a volunteer, no reasonable official would have known that the action of firing Hyland

violated the First Amendment. The Supreme Court and our case law do not require that degree of specificity. . . . It was clearly established in 1988 that the government could not take action against an individual who. . . received a valuable benefit analogous to employment, because that individual exercised his First Amendment right to speak out on a matter of public concern.").

Somers v. Thurman, 109 F.3d 614, 622 & n.5 (9th Cir. 1997) ("[I]t is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex. Whether or not such a right exists, however, there is no question that it was not clearly established at the time of the alleged conduct. Because Somers's lawsuit seeks only monetary damages, not injunctive relief, we do not decide whether such a right exists. . . . This is not to say that an abusive cross-gender visual body cavity search was per se reasonable under the Fourth Amendment in 1993 or today. . . . [T]he purposeful subjection of prisoners to verbal assaults during strip searches performed by officials of the other sex serves no administrative purpose and might present a question under the Fourth Amendment. We need not wrestle with this question today because Somers' conclusory allegations fail to describe conduct that is sufficiently abusive to strip the officials of their qualified immunity.").

Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997) ("To whatever extent it may be 'clear' today that a plaintiff may base a federal harassment claim on conduct perpetrated by a person of the same gender, courts were undecided on the issue at the time of [Defendant's] alleged conduct. Moreover, that [Plaintiff's] purported right existed is not the only reasonable conclusion one must have drawn from the extant authority.").

Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996) ("[A]t the time of the alleged misconduct in this case, persons in custody had the established right to not have officials remain deliberately indifferent to their serious medical needs. The defendants argue that the right in question was phrased too broadly, and instead should be whether arrested rape victims have a clearly established right to receive immediate medical and psychological treatment. We do not agree.").

Kelley v. Borg, 60 F.3d 664, 666-67 (9th Cir. 1995) ("The magistrate judge in this case held that the right allegedly violated was a prisoner's right, under the Eighth Amendment, to have prison officials not be 'deliberately indifferent to serious medical needs.' . . . He further found that this right was clearly established. Appellants argue that the magistrate judge defined the right too broadly. They believe that the proper characterization of the right at issue is: '[D]id plaintiff, after complaining about foul smells, have a clearly established right, then or now, for defendant correctional officers to immediately remove him from his cell in the Security Housing Unit during a lock down, when they first were required to at least inform their superior officer that they needed to remove an inmate, be it any inmate, from his cell?' We believe that the magistrate judge correctly defined the right at issue. Appellants 'misapprehend the level of generality at which a law must be clearly established.' Appellants are correct that broad rights must be particularized before they are subject to the clearly established test. . . . What Appellants fail to realize, however,

is that the right at issue in the present case has already been particularized. The magistrate judge did not ask whether the Eighth Amendment generally is clearly established. He asked whether Eighth Amendment rights in the prison medical context are clearly established. And he correctly found that they are. Under the Eighth Amendment, prisoners have a right to officials who are not 'deliberately indifferent to serious medical needs.'To hold that the magistrate judge should have defined the right at issue more narrowly, and included all the various facts that Appellants recited in their proposed definition, would be to allow Appellants, and future defendants, to define away all potential claims.").

Doe v. Petaluma School District, 54 F.3d 1447, 1451 (9th Cir. 1995) (not clearly established at time that school administrator had duty to prevent peer sexual harassment.).

Browning v. Vernon, 44 F.3d 818, 823 (9th Cir. 1995) ("[Defendants] argue for a rule where every violation of a duty must be litigated at least once in a case involving the exact factual circumstances as those presently involved before the official may be held liable for violating that duty. *Anderson v. Creighton*, however, holds that it is not necessary that a prior decision rule 'the very action in question' unlawful to deny a defendant the protection of qualified immunity.").

Grossman v. City of Portland, 33 F.3d 1200, 1209-10 (9th Cir. 1994) ("As with most legal matters, there are no absolutes here. On the one hand, an officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity. [footnote omitted] On the other, as historical events such as the Holocaust and the My Lai massacre demonstrate, individuals cannot always be held immune for the results of their official conduct simply because they were enforcing policies or orders promulgated by those with superior authority. Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity. Similarly, an officer who unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance, will not be entitled to immunity even if there is no clear case law declaring the ordinance or the officer's particular conduct unconstitutional. [citing *Chew*] In the end, however, an officer who reasonably relies on the legislature's determination that a statute is constitutional should be shielded from personal liability.").

Franklin v. Foxworth, 31 F.3d 873, 879 (9th Cir. 1994) (Reinhardt, J., concurring) ("Specific precedent declaring the particular conduct involved unlawful is not required in order to foreclose a qualified immunity defense; rather, the 'law' in question need only be sufficiently clear that a reasonable official would not fail to perceive it .... [E]ven in the absence of relevant case law, if the manner of implementation of an otherwise constitutional policy is not only unconstitutional but clearly so, the officer 'will be deemed to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known."'*quoting Chew* and *Harlow*).

Chew v. Gates, 27 F.3d 1432, 1449-50 (9th Cir. 1994) ("[W]e do not mean to suggest...that officers will be entitled to qualified immunity if they authorize the use of a new weapon or tactic which violates constitutional norms, simply because there is no case stating that the specific weapon or tactic involved violates the Constitution... [I]f new weapons or tactics are sufficiently similar in design, purpose, effect, or otherwise to weapons or procedures that have been held unconstitutional, so that a reasonable officer would have known that a court's holding of unconstitutionality would be extended to the new weapon or tactic, then qualified immunity will not apply. Similarly, even if a policy is longstanding and no case has declared it unconstitutional, officers authorizing its continued use will not be entitled to qualified immunity after a case has authoritatively declared unlawful other procedures that are not 'meaningfully distinguishable.' ...Finally, we do not mean to suggest that all actions taken pursuant to a longstanding policy are necessarily immunized. An officer who unlawfully implements an official policy or ordinance in an egregious manner or in a manner which clearly exceeds the reasonable bounds of the policy is not entitled to qualified immunity, whether or not there is a case on point declaring such actions unconstitutional. . . [E]ven in the absence of relevant case law, if the manner of implementation of an otherwise constitutional policy is not only unconstitutional but patently so, the officer will be deemed to have violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'").

Figueroa v. United States, 7 F.3d 1405, 1413 (9th Cir. 1993) ("While we acknowledge that a broader understanding of deprivation of liberty may have emerged later . . . we hold that in 1987 there was no clearly established constitutional right not to be placed in a position of danger by a government employer absent some sort of governmental restriction on an individual's physical freedom to act to avert potential harm.").

Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993) ("[Plaintiff] argues that it was clearly established at the time he was segregated in the HIV unit that prison inmates have First Amendment rights, including freedom of association. [Plaintiff] misconstrues the level of generality at which a law must be 'clearly established.' . . . . The relevant, properly particularized question, . . . is whether it was clearly established that inmates are entitled to be free of prison regulations that restrict their association with members of the general prison population.").

Redmond v. San Jose Police Dep't., No. 14-CV-02345-BLF, 2017 WL 5495977, at *11, *13 (N.D. Cal. Nov. 16, 2017) ("As of April 17, 2013, the date of the incident in question, the constitutional right to be free from retaliation while recording police activity in a public place was clearly established in the Ninth Circuit. *Fordyce*, 55 F.3d at 439. This is because the First Amendment protects a 'right to film matters of public interest.' *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). A majority of other circuits agree. [citing cases] Therefore, on the day in question, Redmond had 'a clearly established right to record police officers carrying out their official duties.'. . Even crediting Defendants' contention that Officer Pfiefer had non-retaliatory justifications to arrest Redmond for her failure to obey his commands, the law is clearly established in the Ninth Circuit that there is a right to be free from retaliation even if the officer had probable

cause to arrest. . . Accepting, as the Court must, Redmond's contention that Officer Pfiefer grabbed her phone and punched her in an attempt to stop her from recording, a reasonable officer would have known that he cannot retaliate against a citizen for recording the police in a public place, even if the officer was also acting to protect the safety of officers or to arrest her based on probable cause. . . In light of *Fordyce,* which Redmond relies on in her opposition, no reasonable officer under the circumstances would believe that Officer Pfiefer's alleged actions were lawful under the First Amendment. . . . According to Redmond, she was a bystander who was recording the police, from a safe distance, as they tackled and arrested her boyfriend. That Officer Pfiefer contends Redmond was 'a suspect' who was threatening as she approached the officers with her arm outstretched, presents a factual dispute for the jury to determine before qualified immunity can be resolved. Redmond's right to record the officers—under the circumstances that she testifies to—was clearly established. Accordingly, Defendants' motion for summary judgment as to the retaliation claim against Officer Pfiefer is DENIED.")

Geier v. Davis, No. 16-CV-01980-JSC, 2017 WL 1133219, at *2 (N.D. Cal. Mar. 27, 2017) ("The Ninth Circuit recently held that the First Amendment prohibits prison officials from opening a prisoner's mail from his attorney outside of the prisoner's presence. *Hayes v. Idaho Dept. Corrections,* No. 14-35078, slip op. at 14, 2017 WL 836072 (9th Cir. Mar. 3, 2017) (agreeing with other circuits). The question, therefore, is whether that law was clearly established when Plaintiff's mail from his attorney was opened in November 2014 and June 2015. The answer is no. '[A] right is clearly established only if its contours are sufficiently clear that "a reasonable official would understand that what he is doing violates that right." In other words, "existing precedent must have placed the statutory or constitutional question beyond debate."'. . . A court determining whether a right was clearly established looks to 'Supreme Court and Ninth Circuit law existing at the time of the alleged act.'. . In November 2014 and June 2015 there were no decisions from the United States Supreme Court or the Ninth Circuit holding that the opening or reading of mail from an attorney to a prisoner in the prisoner's absence violates the prisoner's First Amendment rights. . . . The Ninth Circuit did not resolve the question of whether that violated Plaintiff's First Amendment rights until this month. Although the issue had been resolved in other circuits, . . . a prison official working within the Ninth Circuit could reasonably think that whether the First Amendment required the inmate's presence when opening mail from the inmate's lawyer was not 'beyond debate' because the Ninth Circuit and Supreme Court did not require the inmate's presence either when opening mail from the inmate's attorney or from a court. Because the First Amendment right was not 'clearly established' in November 2014 and June 2015, Defendants are entitled qualified immunity on Plaintiff's First Amendment claim.")

Borges v. City of Eureka, No. 15-CV-00846-YGR, 2017 WL 363212, at *10 (N.D. Cal. Jan. 25, 2017) ("For the purposes of the qualified immunity analysis, defendants argue in their motion that, '[t]o the extent any [constitutional] violation is found to have occurred, such a violation would not have been clearly established and qualified immunity should apply.'. . Defendants offer no further support for this argument. However, in their supplemental briefing, defendants note that, 'particularly with respect to plaintiff's Fourth and Fourteenth Amendment denial of medical care

claims against the County [officers], the case law is not clearly established,' which the Court interprets as an attempt to support their earlier argument that there was no clearly established constitutional right that could have been violated. . .Defendants' arguments fail to persuade. While the legal *standard* to evaluate such conduct may be unclear, the nature of the constitutional violation is not. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that the state of the law need only be sufficiently clear to give defendants fair notice their conduct was illegal). Here, just as in *Castro*, '[t]he contours of the right required only that the individual defendants take reasonable measures to mitigate the substantial risk to [the decedent].'. . Thus, the officers' obligations did not change, even though the court in *Castro* was (and is also here) applying a new, objective 'deliberate indifference' standard to the analysis of the Fourteenth Amendment claim. . .A reasonable officer would have known that ignoring serious signs of medical distress would violate a detainee's constitutional rights, regardless of which legal standard is ultimately applied to analyze the violation. Therefore, qualified immunity does not bar the claim against the County officers.")

Bremer v. Cty. of Contra Costa, No. 15-CV-01895-JSC, 2016 WL 6822011, at *6, *11 (N.D. Cal. Nov. 18, 2016) ("The Ninth Circuit has not yet addressed whether *Kingsley*'s objective standard also applies to pretrial detainee's suicide claims; before *Kingsley*, it had left open the question of whether the Eighth and Fourteenth Amendments required a different analysis in suicide claims. *See Lolli*, 351 F.3d at 419 n.6. In the papers, Defendants argued that the subjective standard applies and Plaintiff did not contend otherwise. But at oral argument, Plaintiff for the first time contended that the objective standard applies. . . .The Court need not decide whether the subjective or objective standard applies here as no reasonable jury could find the Individual Defendants were deliberately indifferent under either standard. . . .Even if the right at issue is stated broadly for the purposes of argument—*i.e.*, the right of a suicidal pretrial detainee to be free from deliberate indifference by not being fed without constant monitoring—Plaintiff identifies no precedent clearly establishing it. In fact, Plaintiff does not cite a single case in their opposition to Defendants' qualified immunity argument. Nor did Plaintiff identify any authority at oral argument. The Court's own search did not reveal any cases, either. . . Because Plaintiff cannot show that David had a clearly established right to be constantly monitored when given food or otherwise, the deputies are entitled to qualified immunity on Plaintiff's Section 1983 claims.")

Austin v. Univ. of Oregon, No. 6:15-CV-02257-MC, 2016 WL 4708540, at *4–5 (D. Or. Sept. 8, 2016) ("Plaintiffs assert that they had a right to due process prior to potential deprivation of a property interest in their status as admitted university students in good standing, their ability to pursue public higher education and athletic participation, the economic benefit from an existing scholarship, a hypothetical future scholarship at another school, and future potential NBA careers. . . While the right to due process is 'clearly established,' the same cannot be said of the proposed interests, whether they be characterized as property or liberty interests, at issue in this case, as they have no parallels 'beyond debate' in relevant precedent. The parties dispute whether there exists such precedent here, but the answer is clear: there is no Supreme Court, Ninth Circuit, or Oregon District Court case that, at the time of the events giving rise to this case, clearly establishes the

property rights Plaintiffs assert, nor is there any apposite statute establishing the same. While Plaintiffs point to a number of out-of-district cases that, at best, indirectly establish such a right, the parties correctly turn their focus to one Ninth Circuit case, *Stretten v. Wadsworth Veterans Hosp.*, 538 F.2d 361 (9th Cir. 1976) (an appointed and employed medical resident had an interest in his position and continued education derived therefrom), and one Supreme Court case, *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729 (1975) (a junior high school student had a right to not be subject to a prolonged suspension, based on an Ohio education statute), which arguably come the closest to recognizing these rights. I find that *Goss* does not clearly establish the rights asserted here, given that it involved middle school public education under a relatively broad Ohio state statute establishing a right to such education. . . There is no analogous Oregon law applicable to college education that would create a corollary to *Goss* in this case. Turning to *Stretten*, I find that case can only *arguably* be interpreted to confer a right similar to that at issue. While I agree that *Stretten* is the more analogous of the two cases, as it involves a right to higher education, I find that it is sufficiently distinct so as to fall short of the 'beyond debate' standard articulated in *Al-Kidd*. Namely, the medical resident from *Stretten* was appointed to a four-year position but terminated allegedly without process after only one. The Ninth Circuit found that the plaintiff in that case had an interest in keeping his position to maintain his income, complete his residency, continue to benefit from the education derived from the residency, and protect his professional reputation. . . Here, the Plaintiffs are unpaid college student athletes who were denied the renewal on the subsequent term of their otherwise renewable one-year scholarships, from which they benefited the full promised year. Given the stark contrast between the rights conferred and then withdrawn in *Stretten* and those alleged in the case at hand, I find that Plaintiffs have failed to plead a clearly established constitutional right for the purposes of a qualified immunity analysis. Because there is no relevant precedent that clearly establishes the proposed constitutional rights at issue, per the standard articulated in *Al-Kidd*, 563 U.S. at 741, the Individual Defendants are entitled to qualified immunity from the due process claims asserted against them. Further, because those claims are asserted only against the Individual Defendants in this case and therefore do not survive against the University, the due process claims are DISMISSED with prejudice.")

Engert v. Stanislaus Cnty., No. 1:13-CV-00126 LJO, 2015 WL 3609315, at *18 (E.D. Cal. June 8, 2015) ("The question is whether the present case and earlier cases are sufficiently similar that Paris and Glinskas would have had fair warning that their actions were unlawful. . . Here, the evidence, viewed in a light most favorable to Plaintiffs, reveals two officers who affirmatively cleared an unarmed civilian to participate in an eviction, despite the existence of information suggesting, among other things, that the occupant might be violent and might possess high-powered weapons. The Court finds that, taken together, *Woods* and *Grubbs I* put Defendants on notice that their conduct was potentially unlawful. These cases stand for the proposition that officials may not take affirmative actions to place a civilian into a dangerous situation where common sense indicates a high risk of serious harm. Here, if Plaintiffs' facts are accepted, Defendants did just that by inviting Engert to begin drilling the front door. Viewing the facts in a light most favorable to Plaintiffs, this case cannot meaningfully be distinguished from *Woods* and *Grubbs I.*Contrary to Defendants' assertions, this case does not present a mere 'qualm' with law

enforcement strategy akin to that addressed in *Johnson.* There, the Ninth Circuit found the danger creation exception could not apply because there was no evidence of an affirmative act. . . Here, as discussed above, at least one additional affirmative act took place-inviting Engert to the door of the Property. Existing Ninth Circuit precedent put Paris and Glinskas on notice that this conduct could trigger Fourteenth Amendment liability. Paris's and Glinskas's motion for summary judgment that they are entitled to qualified immunity as to Plaintiffs' Fourteenth Amendment claim therefore is DENIED. This denial is without prejudice to appropriate post-trial motions, depending on factual findings by the jury.")

Nawabi v. Cates, No. 1:13-CV-00272-LJO-SA, 2015 WL 2414682, at *27-28 (E.D. Cal. May 20, 2015) ("The Court finds no binding precedent, and lower court cases are unclear, on when or if it would be a violation of an inmate's Eighth Amendment rights to be housed in an area where Valley Fever is prevalent. While Plaintiff alleges that he was subjected to Cruel and Unusual Punishment by being housed in areas where Valley Fever is prevalent, at least a million individuals live in the San Joaquin Valley and are exposed to Valley Fever. Similarly, tens of thousands of individuals live, work, and raise families in the areas that are the most endemic. Neither the State of California nor the federal government have implemented any standards or restrictions on exposure to Valley Fever. Similarly, there have been no recommendations issued to any sector of the general public to relocate out of the area. Prison officials could reasonably believe that since the government has not found it unsafe for non-imprisoned individuals to reside in areas in which Valley Fever spores are prevalent that it would not violate the Eighth Amendment to incarcerate inmates in these same areas. . . Finally, it is clear that even for those individuals that are at a higher risk from Valley Fever, exposure to Valley Fever is a risk that society tolerates. The Seventh Circuit found it would be inconsistent to find that prisoners are entitled to a healthier environment than substantial numbers of non-imprisoned Americans. . . More than half of the individuals who reside in the endemic areas belong to the racial groups which Plaintiff identifies as high risk. . .The Court finds that it is not beyond debate whether housing inmates in prisons in areas endemic for Valley Fever, a naturally occurring soil-borne fungus which can lead to serious illness, would violate their rights under the Eighth Amendment. . . For the reasons stated, the Court finds that the right alleged here is not clearly established. Defendants did not have fair notice that exposing inmates to an environmental risk of Valley Fever would violate the Eighth Amendment. . . Therefore, the Court finds that Defendants are entitled to qualified immunity on Plaintiff's claims arising out of being housed at a prison where they were exposed to Valley Fever. . . It is recommended that Defendants' motions to dismiss on the ground that they are entitled to qualified immunity be granted.")

Garcia v. City of King City, No. 14-CV-01126-BLF, 2015 WL 1843944, at *3 (N.D. Cal. Apr. 8, 2015) ("Though the Court is unaware of a case in which a court expressly holds that a police chief cannot receive personal financial gain from the unconstitutional actions of his subordinates - unconstitutional actions he allegedly ratified and approved—'[c]ertain actions *so obviously run afoul of the law* that an assertion of qualified immunity may be overcome even though court decisions have yet to address "materially similar" conduct.' *Hope v. Pelzer,* 536 U.S. 730, 753 (2002) (emphasis added). . . . The acts pled by Plaintiffs in the SAC so obviously run afoul of the

law that Defendant Baldiviez would not be entitled to qualified immunity were they proven true. *Any* reasonable police officer, let alone the police chief, would have known that such conduct violates the Constitution.")

Am. Humanist Ass'n v. United States, 63 F.Supp.3d 1274, 1286-87 (D. Or. 2014) ("Defendants argue that they are unaware of any Supreme Court precedent or circuit court decision issued before or during the period where the alleged violation occurred that has held that Humanism is a religion for the purposes of the Establishment Clause, However, as noted above, the Supreme Court in *Torcaso,* referred to 'Secular Humanism' as a religion. . . Moreover, in *McCreary County, Ky. v. American Civil Liberties Union of Ky.,* the Supreme Court said that the touchstone of the Establishment Clause was the 'principle that the First Amendment mandates government neutrality between religion and religion, and *between religion and nonreligion.*'. . Thus, whether Humanism is a religion or a nonreligion, the Establishment Clause applies. In addition, the Seventh Circuit has held that a prison violated inmates' constitutional rights when it refused to allow an Atheist study group on the grounds that it was not a religion. *Kaufman v. McCaughtry,* 419 F.3d 678 (7th Cir.2005). This year, the Seventh Circuit laid it out even more clearly, 'when making accommodations in prisons, states must treat atheism as favorably as theistic religion,' and that, '[w]hat is true of atheism is equally true of humanism, and as true in daily life as in prison.' *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk,* 758 F.3d 869, 873 (7th Cir.2014). Although this decision was issued after the alleged violations occurred, the court does not find the Seventh Circuit's opinion to be revelatory or a departure from existing doctrine. Rather, the court simply summarized the law as it is commonly understood. Thus, the court finds that the right was clearly established and that defendants have not presented sufficient evidence to demonstrate that the individual defendants are entitled to qualified immunity.")

Estate of Hernandez-Rojas ex rel. Hernandez v. United States, 62 F. Supp. 3d 1169, 1184 (S.D. Cal. 2014) ("In sum, the record shows that Vales was on notice that the use of a Taser as a pain compliance device on an individual who was already knocked to the ground, was handcuffed, and compliant had a substantial risk of death or serious bodily injury. Viewing the evidence in the light most favorable to Plaintiffs, Vales had 'fair warning' that the force he used, multiple deployments of the Taser, was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts.")

Kirby v. City of East Wenatchee, No. 12–CV–190–JLQ, 2013 WL 2396008, *1, *2 (E.D. Wash. May 31, 2013) ("Defendants' Motion to Reconsider asks the court to re-think what it has already spent many hours on when it issued its ruling. First, Defendants contend that the Supreme Court decision authored by Justice Scalia in [*al-Kidd*] 'reformulated' the standard for the second prong of the qualified immunity analysis 'going from *"a* reasonable official standard to an "every reasonable official" rule.'. . Defendants suggest that this reformulation strengthens their position and was misapplied by the court. Notably, this court's decision quoted and applied the rule set forth in *al Kidd.* While it is not clear whether *al Kidd* actually changed any longstanding legal rules, if it did, it did so without comment. Confirming this court's belief that *al Kidd* did not alter

the standard, the Supreme Court's more recent statement of the definition of 'clearly established' is as follows:

[t]o be clearlystablished, a right must be sufficiently clear that ***every*** reasonable official would [have understood] that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate.... [T]he right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to ***a*** reasonable official.

Reichle v. Howards, —— U.S. ——, 132 S.Ct. 2088, 2093–94, 182 L.Ed.2d 985 (2012) . . . The *Reichle* decision applies the 'a reasonable official' standard, whereas there is no further mention of the 'every reasonable official' language in the opinion. . . The court has applied the proper standard.")

Price v. City of Sutherlin, 945 F.Supp.2d 1147, 1157 (D. Or. 2013) ("While defendants are correct that, prior to the events in question, neither the Supreme Court nor the Ninth Circuit had fully examined an officer's use of a Taser, it was nonetheless clearly established that 'force is only justified when there is a need for force.'. . Viewing the facts in the light most favorable to plaintiff, a reasonable officer would have had 'fair warning' that the use of painful, albeit non-lethal, force to restrain or subdue a non-threatening, nonresistant, unarmed suspect was excessive. . . Therefore, defendants' motion is denied as to plaintiff's excessive force claim.")

De Contreras v. City of Rialto, 894 F.Supp.2d 1238, 1252, 1255, 1256 (C.D. Cal. 2012) ("The Supreme Court recently emphasized the high burden that must be met for a plaintiff to overcome qualified immunity, replacing *Anderson's* language of '*a* reasonable official' with '*every* reasonable official' and stating that 'existing precedent must have placed the statutory or constitutional question *beyond debate.*' *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2083 (2011) (emphasis added). The Supreme Court has also held that, 'in an obvious case, [the *Graham* standards for excessive force] can clearly establish the answer, even without a body of relevant case law' and that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' *Hope v. Pelzer*, 536 U.S. 730, 738, 741 (2002). . . . The Eleventh Circuit has recently held that police officers using a taser were not entitled to qualified immunity where no threat, or escape, was imminent. *Fils v. City of Aventura*, 647 F.3d 1272, 1289, 1292 (11th Cir.2011). Nevertheless, the Supreme Court's opinion in *al-Kidd* appears to require us to hold that because there was no established case law recognizing taser use as excessive in similar circumstances, immunity is required. . . . The incident at issue here occurred in August 2010, before the Ninth Circuit's final decisions in *Bryan*, *Brooks*, or *Mattos*, the cases providing the most extensive and recent guidance on tasers as a use of force. Hence, the Court finds that Lee is entitled to qualified immunity because the law regarding a second application of a taser, after a first application that was objectively reasonable, was not then clearly established. Specifically, it was not clearly established how firing a taser at a threatening suspect affects the degree of threat that every reasonable officer would perceive after that first tasing. In fact, despite the many ways in

which multiple tasings, particularly in the incapacitating dart mode, would appear to shift the *Graham* balance to weigh against reasonableness, the Ninth Circuit has given this factor only brief consideration. . . . Of the more recent Ninth Circuit cases, only *Brooks* concerned multiple taser applications, and that was in the context of a taser in drive-stun mode. . . As the applicable law regarding the reasonableness of Lee's use of force was not clearly established at the time of the injury, Officer Lee is qualifiedly immune. In light of this finding, the Court declines to determine whether a jury could find reasonably that Lee violated De Contreras's Fourth Amendment rights. Therefore, the Court grants summary judgment in favor of Defendant Lee on De Contreras's Fourth Amendment claim.")

Fazaga v. F.B.I. , 885 F.Supp.2d 978, 984, 985 (C.D. Cal. 2012) ("The Agent Defendants are not entitled to dismissal of Plaintiffs' FISA claim based on qualified immunity. Plaintiffs have pleaded sufficient facts to demonstrate that, taken in the light most favorable to them, they are 'aggrieved persons' and that the Agent Defendants violated a clearly established statutory right created by FISA. FISA constitutes clearly established law governing electronic surveillance, including that of the kind engaged in by the Agent Defendants. Sections 1809 and 1810 clearly prohibit 'the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes,' 50 U.S.C. § 1801(f), "under color of law except as authorized by [FISA], chapter 119, 121, or 206 of Title 18 or any express statutory authorization that is an additional exclusive means for conducting electronic surveillance under section 1812 [of FISA].'. . The Agent Defendants argue that they are entitled to qualified immunity because it was not clearly established that Plaintiffs were 'aggrieved persons.' Specifically, the Agent Defendants argue that Plaintiffs did not have a clearly established reasonable expectation of privacy with respect to the situations in which they were electronically surveilled. The Court disagrees. FISA's 'aggrieved person' status is coextensive with standing under the Fourth Amendment for claims involving electronic surveillance. . . Thus, the law regarding the reasonable expectation of privacy in the Fourth Amendment context governs here and is clearly established. . . .A reasonable officer knows that there is a reasonable expectation of privacy in one's home, office, and in certain discrete areas of a mosque as described in the FAC. . . .")

Jackson v. CDCR Employees, No. 1:07–cv–01414–LJO–SKO PC, 2012 WL 443850, at *9 (E.D. Cal. Feb. 10, 2012) ("The Ninth Circuit's most recent decision in *Byrd* represents a sharp departure from *Somers,* and reasonable government officials will be wise to note that departure. In as much as the Ninth Circuit has now held that non-emergency cross-gender strip searches are unconstitutional as a matter of law, it is perhaps only the unwise who will continue to risk participating in or permitting the practice of routine, non-emergency, cross-gender strip searches, regardless of prison staffing concerns, including equal employment opportunity concerns. Nevertheless, the *Byrd* decision was issued in 2011. In 2007, at the time of the events at issue here, *Somers* was controlling and directly on point with respect to routine body cavity searches of male inmates by female officers. The Court finds that in 2007, the pre-existing law did not give

Defendants fair warning that it was unlawful to occasionally conduct routine cross-gender strip searches and it necessarily follows that it was not clearly established that the less direct participation of searching inmates' clothing and providing security coverage from the gun tower during these searches was unconstitutional. Accordingly, the Court finds that Defendants are entitled to qualified immunity on Plaintiff's Fourth Amendment claim against them." footnotes omitted)

Brawley v. Washington, No. C09-5382RJB, 2010 WL 1816654, at *11, *12 (W.D. Wash. May 3, 2010) ("Plaintiff has made a sufficient showing that by April of 2007 shackling inmates while they are in labor was clearly established as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. Defendants admit that Washington Department of Correction's own policy prohibited it. Although not binding authority, the Eight Circuit recently held that a female inmate's 'protections from being shackled during labor had ... been clearly established by decisions of the Supreme Court and the lower federal courts before September 2003.' *Nelson v. Correctional Medical Services,* 583 F.3d 522, 533 (8th Cir.2009). . . . As in *Nelson,* a reasonable factfinder could determine from the record in this case that the Defendants were not facing an emergency situation but nevertheless 'subjected [the Plaintiff] to a substantial risk of physical harm, to the unnecessary pain caused by the [shackles] and the restricted position of confinement ... [and] created a risk of particular discomfort and humiliation,' such that qualified immunity should be denied.")

Shilling v. Crawford, 536 F.Supp.2d 1227, 1234, 1235 (D. Nev. 2008) ("Despite a plaintiff's apparent ability to sue any person acting under color of state law, the United States Court of Appeals for the Eleventh Circuit recently held RLUIPA does not permit claims against officials in their individual capacities because construing RLUIPA to allow such suits would raise serious constitutional concerns. *Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir.2007). The Eleventh Circuit noted that Congress passed RLUIPA pursuant to its under Article I of the Constitution. . . The Court reasoned that federal statutes enacted under the spending power, which condition receipt of federal funds on a state's adherence to certain conditions, cannot subject a non-recipient of federal funds, such as a state official acting in his individual capacity, to private liability for damages. . . Thus, the Court reasoned that, as spending power legislation, RLUIPA cannot reach state officials in their individual capacities. . . Because only suits against individuals in their personal capacities implicate qualified immunity, the Eleventh Circuit held that qualified immunity would have no application to RLUIPA claims. . . The Eleventh Circuit is the only Circuit Court of Appeals that squarely has addressed this issue. Other Circuit Courts of Appeals have assumed without discussion that RLUIPA permits suits against state officials in their personal capacities. [citing cases] Plaintiff has sued Defendants in their official and individual capacities. No law in this jurisdiction directly addresses Plaintiff's ability to sue Defendants in their individual capacities under RLUIPA. . . Under the Eleventh Circuit's analysis, Plaintiff would have no individual capacity claim. The Court need not decide this novel issue here, however, because even if Plaintiff could bring an individual capacity claim under RLUIPA, Defendants would be entitled to qualified immunity. . . . That an inmate has a constitutional right to 'food sufficient to sustain them in good

health that satisfies the dietary laws of their religion' is clearly established in the Ninth Circuit. . . The issue here is whether Plaintiff had a clearly established right under RLUIPA to a kosher diet at HDSP, such that requiring him to transfer to a higher security prison to obtain the diet violated his clearly established right. Defendants offered Plaintiff a kosher diet at ESP in April 2004. Plaintiff has identified no law supporting the existence of a clearly established right to a dietary accommodation at a particular institution. Plaintiff also has failed to identify any controlling law as of April 2004 indicating Defendants' attempt to satisfy Plaintiff's request for a kosher diet by transferring him was unlawful under RLUIPA. In light of the lack of legal precedent on this issue, it would not have been clear to a reasonable official in April 2004 that offering Plaintiff a transfer to a higher security prison to accommodate his religious diet would violate Plaintiff's rights under RLUIPA. Defendants therefore are entitled to qualified immunity from Plaintiff's RLUIPA claim. Even if Plaintiff properly can assert a claim against Defendants in their individual capacities under RLUIPA, Defendants are entitled to qualified immunity . This Court therefore will grant summary judgment in Defendants' favor.")**.**

Thomas v. Baca, 2007 WL 2758741, at *15 (C.D. Cal Sept. 21, 2007) ("Although *Rutherford* and *Thompson* go far in establishing a clear right against floor-sleeping, *Thompson* involved an inmate who had neither bed nor mattress, and the court criticized that prison condition on Fourteenth Amendment grounds. Further, neither case speaks to the length of time LASD may allow inmates to wait to receive a bunk while still comporting with constitutional standards. Therefore, it was not unreasonable for Sheriff Baca to believe that the presence of a mattress cured any constitutional defect, and not to realize that floor-sleeping violated the Eighth Amendment as well as the Fourteenth. Accordingly, the Court finds that Sheriff Baca is entitled to qualified immunity and grants summary adjudication on that issue for Defendant in his individual capacity.")

Freitag v. California Dept. of Corrections, 2007 WL 1670307, at *5 (N.D. Cal. June 6, 2007) (on remand) ("Defendants. . . argue that *Ceballos* created such a change in the law that Defendants Ayers and Schwartz are entitled to qualified immunity on Freitag's First Amendment claim. The Court rejects this argument. . . The only rights at issue in this case that were not clearly established in light of *Ceballos* were a public employee's rights regarding speech made in the course of performing his or her official duties. *Ceballos* did not change the long-standing right of a public employee to speak out on matters of public concern as a citizen, as long as that right was not outweighed by the government's interests in suppressing such speech. . . Prior to *Ceballos,* there may have been some uncertainty regarding the legality of retaliating against a public employee who spoke as part of his or her official job responsibilities on a matter of public concern; however, there was no uncertainty–nor is there any now, following *Ceballos*–that a public employee speaking as a citizen on a matter of public concern is entitled to the protections of the First Amendment (unless the employer is justified in restricting such speech due to factors, such as disruption of the workplace, not present here). *Ceballos* did not establish a new right; it only narrowed the scope of an existing one. Freitag's First Amendment right to contact the director of the CDC, a state senator, and the Inspector General as a concerned citizen were clearly established

during the relevant time period, and Defendants could not have reasonably believed that their actions against Freitag were lawful."), *aff'd*, 2008 WL 1734181 (9th Cir. Apr. 11, 2008).

Yezek v. Mitchell, No. C-05-03461 THE, 2007 WL 61887, at *8 (N.D. Cal. Jan. 8, 2007) ("Even if the stop is viewed purely from a reasonableness perspective, Plaintiffs have raised a triable issue of fact as to whether the length and scope of the stop were reasonable . . . . Although Plaintiffs argue that the Fourth Amendment standard was clearly established, . . . the Supreme Court's decision in *Atwater* has altered the legal landscape to some degree, and the court finds it was not clearly established that, in the course of a traffic stop based on probable cause, Mitchell could not prolong the stop to take the photographs, and Mitchell could have reasonably believed the photographs were lawful. . . Some Courts have held that since *Atwater*, arrested persons do not have to be released as quickly as possible, although detentions must remain reasonable. . . Because no Ninth Circuit case has directly addressed the impact of *Atwater* on reasonableness requirements for a traffic stop, under the circumstances of this case, Mitchell is entitled to qualified immunity.")

Walters v. County of Maricopa, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *18 (D. Ariz. Aug. 22, 2006) ("[T]he Supreme Court's recent decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), does not retroactively make Walters' rights as of 2003 any less clearly established. As discussed above, this circuit accorded whistleblowers of all kinds clear First Amendment protection as of 2003. To be sure, *Garcetti* changes the law in this circuit, and if Romley acted today, he could persuasively argue that Walters's rights are not currently clearly established. But as noted above, the law has not changed enough to deprive Walters of First Amendment protection in this case. And although the policy of protecting officials from liability for their actions may suggest a different outcome where the law changes in a way favorable to defendants, the general touchstone for determining qualified immunity is fair notice . . . . Romley had fair notice in 2003 under Ninth Circuit precedent that retaliatory action based on Walters' good-faith whistleblowing was impermissible. The Supreme Court's overrule of *Ceballos* on the ground that Ceballos' particular job required the speech involved does not detract from the fair notice provided by those cases to Romley in 2003.").

Hepting v. AT & T Corp., No C-06-672 VRW, 2006 WL 2038464, at **30-34 (N.D. Cal. July 20, 2006) ("The court now determines whether the history of the alleged immunity and purposes of the qualified immunity doctrine support extending qualified immunity to AT & T. . . . AT & T contends that national security surveillance is 'a traditional governmental function of the highest importance' requiring access to the 'critical telecommunications infrastructure' that companies such as AT & T would be reluctant to furnish if they were exposed to civil liability. . . AT & T's concerns, while relevant, do not warrant extending qualified immunity here because the purposes of that immunity are already well served by the certification provision of 18 USC ' 2511(2)(a)(ii). . . . [T]he statutes in this case set forth comprehensive, free- standing liability schemes, complete with statutory defenses, many of which specifically contemplate liability on the part of telecommunications providers such as AT & T. . . . In sum, neither the history of judicially created immunities for telecommunications carriers nor the purposes of qualified immunity justify

allowing AT & T to claim the benefit of the doctrine in this case. . . . The court also notes that based on the facts as alleged in plaintiffs' complaint, AT & T is not entitled to qualified immunity with respect to plaintiffs' constitutional claim, at least not at this stage of the proceedings. Plaintiffs' constitutional claim alleges that AT & T provides the government with direct and indiscriminate access to the domestic communications of AT & T customers. . . . In *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (Keith), the Supreme Court held that the Fourth Amendment does not permit warrantless wiretaps to track domestic threats to national security, *id* at 321, reaffirmed the 'necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest,' *id* at 308, and did not pass judgment 'on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country,' *id*. Because the alleged dragnet here encompasses the communications of 'all or substantially all of the communications transmitted through [AT & T's] key domestic telecommunications facilities,' it cannot reasonably be said that the program as alleged is limited to tracking foreign powers. Accordingly, AT & T's alleged actions here violate the constitutional rights clearly established in *Keith*. Moreover, because 'the very action in question has previously been held unlawful,' AT & T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal. . . Accordingly, the court DENIES AT & T's instant motion to dismiss on the basis of qualified immunity. The court does not preclude AT & T from raising the qualified immunity defense later in these proceedings, if further discovery indicates that such a defense is merited.").

Aguilera v. Baca, 394 F.Supp.2d 1203, 1218-21, 1229 (C.D. Cal. 2005) ("In light of *Driebel*, the Court concludes that Plaintiffs were not seized when they were ordered to remain at work to be questioned by ICIB investigators. First, no force was used: Plaintiffs were never handcuffed, physically restrained, or placed in a holding cell. Second, the show of force was distinctly benign: only two officers supervised Plaintiffs, and their supervision of Plaintiffs appears to have been intermittent and not particularly intrusive. For instance, Plaintiffs were permitted to talk to one another, use their cell phones, drink from the water foundation, and use the bathroom unaccompanied by an escort. Third, Plaintiffs retained possession of their LASD-issued equipment, including their guns. Under these circumstances, it cannot be concluded that Plaintiffs were arrested or seized. . . . Taken together, *Garrity*, *Gardner*, and *Uniformed Sanitation Men* establish several propositions. First, *Garrity* establishes that testimony given under the threat of discharge constitutes compelled testimony within the meaning of the privilege against self-incrimination and thus may not be used in a subsequent criminal prosecution. This is the so-called *Garrity* immunity which automatically attaches to compelled testimony. Second, *Gardner* and *Uniformed Sanitation Men* establish that a governmental employer may not get around the self-executing *Garrity* immunity by threatening to terminate an employee for refusing to waive her *Garrity* immunity prior to testifying. Third, both Gardner and *Uniformed Sanitation Men* make it clear that a governmental employer may terminate an employee for refusing to answer questions regarding the performance of her duties so long as the employer does not terminate or threaten to terminate the employee for refusing to waive her immunity. . . . In light of the teachings of *Garrity*, *Gardner*, and *Uninformed Sanitation Men* and such recent cases as *Lingler*, *Hill*, and

Wiley, Plaintiffs' Fifth Amendment claim cannot stand. Plaintiffs were not compelled to answer Sgt. Kagy's questions or to waive their immunity. Since, as the Eighth Circuit has explained, the Fifth Amendment is violated 'only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers,'. . . no Fifth Amendment violation occurred here. . . . Because Plaintiffs were not seized within the meaning of the Fourth Amendment, Defendants did not violate Plaintiffs' Fourth Amendment rights. Because Defendants did not compel Plaintiffs to waive their rights under the Fifth Amendment or attempt to use Plaintiffs' statements against them in a subsequent criminal case, Defendants did not violate Plaintiffs' Fifth Amendment rights. Finally, because Defendants' conduct did not shock the conscience or constitute coercive police conduct analogous to that at issue in Cooper, Defendants did not violate Plaintiffs' due process rights under the Fourteenth Amendment. Finally, because the law governing Defendants' conduct was not clearly established at the time, Defendants are entitled to qualified immunity even if their conduct did violate Plaintiffs' rights."[footnotes omitted]).

Hillmon v. Alameida, No. F-03-6409 REC DLB P, 2005 WL 2030571, at *6 (E.D. Cal. Aug. 22, 2005) ("With respect to plaintiff's RLUIPA claim, as discussed, plaintiff's allegations are sufficient to state a claim for violation of RLUIPA. RLUIPA was enacted in 2000 and has not yet generated much case law. Given the very recent nature of the limited case law regarding RLUIPA, the court finds that plaintiff's right under RLUIPA to be exempted from the grooming policy based on his religious beliefs is not sufficiently clear that a reasonable official would understand that what he was doing violated that right. . . Accordingly, the court recommends that defendants' motion for qualified immunity on plaintiff's damages claims under RLUIPA be GRANTED.").

Seidman v. Paradise Valley Unified School District No. 69, 327 F.Supp.2d 1098, 1120, 1121 (D. Ariz. 2004) ("The alleged violation in this case took place between August of 2002, when the Seidmans' submitted their tile application and March 6, 2002, when the tiles were repeatedly rejected and the school asked the Seidmans to alter the inscriptions to remove any religious expression. It was clearly established at the time of the violation that restrictions on speech in the context of a limited public forum must be both viewpoint neutral and reasonable in light of the purpose served by the forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, ___ (1995). The notion that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint was also a well-settled principle of law at the time of the alleged violation in this case. *Good News Club*, 533 U.S. at 108, 112, 121 S.Ct. 2093 (decided in 2001). Additionally, it had also been clearly established that, in the Ninth Circuit, the viewpoint neutrality analysis applies to nonpublic forum, school-sponsored speech as well as private speech in a limited public forum. [citing cases] However, this is a most general level of analysis. When these principles of law are applied to the facts of this particular case, it cannot be said that the law was clearly established. Due to the nature of the speech that was involved, the facts of this particular case could not fall within a murkier area of First Amendment jurisprudence. The Court itself had difficulty attempting to find the balance in this case between the school district's right to protect and maintain

an educational environment suitable for elementary school children and the speaker's right to speak once the school had opened up the forum to certain forms of expression. It would be inappropriate 'to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinion.'. . Accordingly, the Court finds that the Individual Defendants are shielded by qualified immunity.").

Martiszus v. Washington County, 325 F.Supp.2d 1160, 1171, 1172 (D. Or. 2004) ("If there is one irreducible minimum in our Fourth Amendment jurisprudence, it is that a police officer may not detain an individual simply on the basis of suspicion in the air. No matter how peculiar, abrasive, unruly or distasteful a person's conduct may be, it cannot justify a police stop unless it suggests that some specific crime has been, or is about to be, committed, or that there is an imminent danger to persons or property. Were the law any different–were police free to detain and question people based only on their hunch that something may be amiss–we would hardly have a need for the hundreds of founded suspicion cases the federal courts decide every year, for we would be living in a police state where law enforcement officers, not courts, would determine who gets stopped and when. No less well established is the principle that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows–or should know–that much.").

Myers v. Baca, 325 F.Supp.2d 1095, 1115, 1116 (C.D.Cal. 2004) ("In arriving at the conclusion that the seizure of Plaintiffs was unreasonable, the Court relied most heavily on *Ganwich*. While *Ganwich* was very useful for purposes of this Court's Fourth Amendment analysis, *Ganwich* could not have informed Defendants as to the contours of Fourth Amendment law because the case was decided in 2003. However, in that the events in *Ganwich* took place in December 1999, the section of *Ganwich* addressing clearly established law speaks to the state of the law at the time of the facts giving rise to this case. . . Turning to *Ganwich*'s discussion of clearly established law highlights the differences between *Ganwich* and this case. During the second prong of the *Saucier* test, the *Ganwich* court focused on the principle that officers may only seize a person absent probable cause in a criminal investigation 'in a handful of well-defined situations' and that this was clearly not one of those situations. . . . Conversely, the seizure in the instant case was not carried out in the context of a criminal investigation, nor was it pursuant to a criminal investigation and a search of the business premises authorized by a warrant. Thus, the legal principles upon which the *Ganwich* court found the officers' conduct to be in violation of clearly established law are inapposite to this case. As such, *Ganwich* does not illuminate the state of the law in October 2001 in a relevant manner. Even if *Ganwich* had been decided by October 2001, there are key differences between it and this case such that a reasonable officer would not have fair warning of whether Plaintiffs' seizure was reasonable. Once again, the seizure in *Ganwich* was pursuant to a criminal investigation and a search of the business premises authorized by a warrant. Additionally, the detainees in *Ganwich* were held completely incommunicado for the length of their detention, unlike Plaintiffs here who were allowed to make certain arrangements by telephone. Third, in

Ganwich it was clear that police officers were seizing private citizens, unlike here where Defendants could reasonably have thought that they were acting in their capacities as persons of higher rank and that Plaintiffs chose to stay at the school out of a fear of losing their jobs rather than under threat of arrest and prosecution for criminal acts. This case did not provide a clear-cut constitutional violation, but only upon great reflection and analysis by the Court was that decision reached. The Court's extensive deliberation on the question of whether Plaintiffs' Fourth Amendment rights were violated is relevant in that the 'analysis used to determine whether a plaintiff alleges a violation of a constitutional right is instructive in determining whether that right was clearly established.'. . Moreover, whereas in most qualified immunity inquiries, courts are dealing with variations of fact patterns that fit into a general paradigm of legal principles, this case presents a series of facts that span a wide range of legal principles in a manner that heretofore has not been definitively adjudicated. Indeed, to this Court's knowledge, no published case has dealt with an amalgamation of fact and law in a manner that could put a police officer on fair warning of a person's rights in such a situation. The Court acknowledges the ample body of Fourth Amendment caselaw regarding arrests and other seizures pursuant to criminal investigations, workplace detentions, and the detention of minors by school officials. However, while some of the legal principles set forth in those cases are implicated here, such principles can only be applied to the peculiar facts of this case through complex legal reasoning. The Court thus holds that a reasonable officer could have reasonably believed that a Fourth Amendment violation had not taken place. In sum, notwithstanding the Court's finding that when the facts are viewed in the light most favorable to Plaintiffs, Plaintiffs were unreasonably seized, a reasonable officer, given the state of the law on October 19, 2001, could have reasonably but erroneously believed that Plaintiffs were not seized and that even if they were seized pursuant to a non-criminal internal investigation, such seizure was reasonable. Defendants receive the benefit of the doubt with respect to a reasonable mistake of law, and, therefore, Defendants are entitled to qualified immunity.").

TENTH CIRCUIT

Leiser v. Moore, 903 F.3d 1137, 1139-45 (10th Cir. 2018) ("We express no view on whether Plaintiff's constitutional rights were violated. We can resolve this appeal by considering only the clearly-established prong of the qualified-immunity defense. . . . In two published opinions this circuit has held that government disclosure of an individual's personal medical information violated the Constitution. . . . Plaintiff quite reasonably argues that these two precedents from our circuit, as well as a few similar decisions by other circuits, clearly establish the law supporting his constitutional claim in this case. But we are not persuaded. One reason is that there are factual differences between the precedential cases and the one before us. When our precedents were decided, the stigma of HIV was enormous. . . .A diagnosis of cancer is not nearly as opprobrious as a diagnosis of HIV was then. A further distinction is that the disclosure in this case had a plausible positive purpose—to encourage the support of family and friends—as opposed to the hostile purposes in our precedents. . . .The second reason is the difference in governing law: the development—or, perhaps more precisely, the clarification—of the relevant constitutional law by the Supreme Court in the interval between our precedents and this case. As we proceed to explain,

our precedents relied on a reasonable misreading of two Supreme Court opinions as establishing a right to informational privacy. More recently, however, the Supreme Court has made clear that the existence of such a right is an open question and it has not abandoned a third precedent which suggests that any right to informational privacy is limited. . . . [I]n recent years the Supreme Court *has* significantly elaborated on the applicable law, raising serious doubts about the assumptions of governing law on which we relied in our precedents on the disclosure of private medical information. . . . [I]t can no longer be said in the context of government disclosure of information that '[t]here is *no dispute* that confidential medical information is entitled to constitutional privacy protection.'. . The Supreme Court has stated that this is an open question—it has never held that there is a constitutional right to prevent government disclosure of private information. This is not to say that our precedents on this issue are incorrect or that they have been overruled. That is a matter we need not decide on this appeal. The question before us is only whether the law is clearly established that government disclosure to family and friends that a prisoner is suffering from cancer violates the prisoner's constitutional rights. Even if we assume that the disclosures in *A.L.A.* and *Herring* were unconstitutional, it is certainly unclear how far those opinions should be extended when we do not know the doctrinal boundaries of the protection against government disclosure. . . . We cannot say that it is clearly established that this court, in light of *NASA* 's characterization of *Whalen* and *Nixon* as expressing only dicta, would reject the kind of distinction between diseases that the Second Circuit expressed in *Matson*. In short, in our view clearly established law does not support Plaintiff's constitutional claim.")

Grissom v. Roberts, 902 F.3d 1162, 1170-72 (10th Cir. 2018) ("Where Grissom fails is in not providing clearly established law to support his claim. There is a great hurdle in his path, and he has not persuaded us that he surmounted it. That hurdle is this court's decision in his earlier challenge to his solitary confinement. In *Grissom II*, 524 F. App'x. 467, we affirmed the district court's summary judgment (based on its analysis of the *DiMarco* factors) rejecting his claim that his solitary confinement from June 2005 to the time of our decision had violated his right to due process. In particular, we held that his solitary confinement did not infringe a protected liberty interest. . . True, our prior opinion was not published precedent of this circuit. But, as explained above, even an unpublished opinion can demonstrate that the law was *not* clearly established at the time the opinion was issued, at least within the circuit of the court issuing the opinion, and particularly when considering qualified immunity for the same conduct impacting the same plaintiff. The question before us therefore boils down to whether something significant has happened since our opinion was filed. One matter of significance would be Supreme Court or Tenth Circuit precedent postdating our prior decision that has now clearly established law that had not been previously so established. But Grissom points to no such recent authority. Similar significance could attach to a substantial change in the facts concerning Grissom's solitary confinement between his prior appeal and this case. We therefore examine whether any of the facts relevant to the *DiMarco* factors are different. . . . Given Grissom's failure to point to any controlling Supreme Court or Tenth Circuit precedent that would change the established law since his prior appeal, and his failure to point to any factual changes since that appeal that would be

decisive under clearly established law, we are compelled to hold that the Prison Officials are entitled to qualified immunity on his due-process claim.")

Halley v. Huckaby, 902 F.3d 1136, 1144-47, 1149-51 (10th Cir. 2018) ("If a plaintiff demonstrates the officials violated a clearly established right, we consider a third question: 'whether extraordinary circumstances—such as reliance on the advice of counsel or on a statute—so prevented the official from knowing that his or her actions were unconstitutional that he or she should not be imputed with knowledge of a clearly established right.'. .We apply this standard to J.H.'s unlawful seizure and interference with familial relationship claims in turn. . . .We first consider whether J.H. has adequately shown a constitutional violation—one of the requirements in the qualified immunity analysis. We turn next to the second question: whether the law was clearly established at the time of the alleged violation. . . .[A]lthough there is clearly 'no "social worker" exception to the Fourth Amendment,'. . . we have not definitively decided what Fourth Amendment standard governs when social workers seize a child *at school*, rather than at home. In *Hunt*, we declined to decide precisely 'what Fourth Amendment test is most appropriate' when social workers seize a child at school. . . . Here, the officials took J.H. from school to a safe-house. They did not take J.H. from his home. As explained in *Hunt*, it has long been clearly established that any seizure at school without judicial authorization had to *at least* be reasonable under the minimal *Terry* reasonable-suspicion standard. In other words, the officials at least needed to have a reasonable suspicion of an imminent threat to the safety of the child. . . . It may very well constitute a best practice to interview a child at the safe-house during school hours *once seizing the child is justified in the first place.* Unless officials have judicial authorization, however, they cannot seize a child without at least having reasonable suspicion of imminent danger. . . . It was clearly established at the time of the seizure in this case that a social worker needs at least reasonable suspicion of abuse in order to seize a child at school. . . . This rule is sufficiently specific to constitute clearly established law placing officials on notice that the seizure here violated the Fourth Amendment. . . And even if it is a general rule of law, it applies here with obvious clarity. . . .Since the undisputed evidence at this stage supports Chief Goerke's claim that he merely relied on the DHS officials' directions, we conclude Chief Goerke is entitled to qualified immunity. Generally, '[a] police officer who acts "in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity as long as the officer's reliance was objectively reasonable."'. . And J.H. provides no cases clearly establishing that officers cannot rely on DHS officials just as much as on fellow officers. Chief Goerke thus did not violate clearly established law by relying on DHS officials' instructions without conducting his own investigation. . . .With no clearly established law to the contrary, we conclude Goerke's actions were a reasonable response to what he could have assumed to be an adequately supported child welfare investigation.")

Halley v. Huckaby, 902 F.3d 1136, 1156-58 (10th Cir. 2018) ("[As to the familial association claim,] [w]e need not decide whether the record here demonstrates a constitutional violation. Even if the officials *did* violate J.H.'s substantive due process rights, we conclude the right was not clearly established, and so the defendants are entitled to qualified immunity. In particular, we find

J.H. has not shown that reasonable officials would have known that the short seizure here would constitute an unwarranted interference with a family relationship—the second part of our test for substantive due process familial association claims. . . . As earlier explained, '[t]o determine whether the right was clearly established, we ask whether "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right."'. . In making this determination, we are mindful of two pitfalls. We can neither require *too much* factual similarity between an existing case and the case at hand, nor *too little.* There 'need not be a case precisely on point.'. . But at the same time, 'it is a "longstanding principle that clearly established law should not be defined at a high level of generality."'. . And while general statements of law can sometimes provide fair warning that certain conduct is unconstitutional, they only do so if they 'apply with obvious clarity to the specific conduct in question.'. . 'General legal standards therefore rarely clearly establish rights.'. .The facts here do not meet this high bar. Even if the officials had the requisite intent—thus satisfying the first part of our test—their actions still must constitute an undue burden on J.H.'s right of familial association. We are not aware of a case from our court or the Supreme Court clearly establishing that the short seizure and interview here would unduly burden J.H.'s relationship with his family members. . . . Aside from *Roska* and *Malik*, J.H. has not pointed to any other cases that could clearly establish the right at issue here. J.H. need not provide a case with exactly the same facts, of course. But he has not provided a case with even remotely similar facts. Nor has he shown that our general statements of law in this area demonstrate the unconstitutionality of the officials' actions here with 'obvious clarity.'. . Indeed, our general rule that interference with family relationships cannot be 'unduly burdened' is too general a proposition to have clearly established the alleged violation here. The officials would not have known that taking J.H. from school for a short interview would necessarily constitute an 'undue burden' or 'unwarranted intrusion' into a family relationship. . . . Having found that 'existing precedent' did not place the 'constitutional question beyond debate,' we hold that Huckaby and Deputy Calloway are entitled to qualified immunity for the Fourteenth Amendment claims against them. . . It would not have been clear at the time that the balance between the interview's interference in J.H.'s family relationship and the officials' health and safety concerns made their actions so burdensome to the family relationship as to violate substantive due process rights.")

Rife v. Jefferson, No. 17-7037, 2018 WL 3660248, at *3-10 (10th Cir. Aug. 2, 2018) (not published) ("[A] panel of this court has already held that, based on the relevant 'universe of facts,' Jefferson, Willis, and Dale violated the Fourteenth Amendment by displaying deliberate indifference to Rife's serious medical needs. . . Thus, the lone question before us in this appeal is whether the law was clearly established at the time of that violation. . . .In determining whether the law was clearly established, we ask whether Rife has 'identif[ied] an on-point Supreme Court or published Tenth Circuit decision; alternatively, "the clearly established weight of authority from other courts must have found the law to be as [he] maintains."' . . Of course, this isn't to say that Rife must direct us to a case that is '*exactly* on point.'. . . '[B]ut existing precedent must have placed the ... constitutional question beyond debate.'. . And to do that, a previous decision must be ' "particularized" to the facts of the case' before us. . . In other words, to demonstrate the law was

clearly established, Rife must identify a case in which a defendant 'acting under similar circumstances as' Jefferson, Willis, and Dale 'was held to have violated' the Eighth or Fourteenth Amendments. . . Thus, our task is to examine the cases that the district court relied on below and those that Rife cites on appeal and ask whether any of those cases satisfy this test. . . . In undertaking this inquiry, we first address whether Rife has identified a case that clearly establishes Jefferson's conduct violated the Fourteenth Amendment. We then turn to the question of whether he has identified such a case vis-à-vis Willis and Dale. . . . According to Rife, 'there are obvious parallels between *Garcia* and the case at bar.' . . We don't necessarily disagree. But Rife overlooks a critical distinction between the two cases: *Garcia* involved a finding of *municipal* liability. . . .To the extent that *Olsen*, 312 F.3d 1304, also involved a finding of municipal liability, we reach the same conclusion. . . . [I]f anything, the case against Jefferson is stronger than was the plaintiff's case against the arresting officer in *Olsen*. Here, in addition to verbally informing Jefferson about those aspects of his condition that weren't necessarily subject to 'notice[ ] by an outsider,' *Olsen*, 312 F.3d at 1317—including, critically, heart and chest pain—Rife also displayed readily discernable signs that he needed medical care as the result of his motorcycle accident. . . . Thus, we conclude that at the time of the alleged constitutional violation, existing circuit precedent would have 'put a reasonable official' in Jefferson's position 'on notice that his conduct was unlawful.'. . But this conclusion doesn't necessarily resolve the clearly-established question. That's because Jefferson asserts that '[e]ven assuming' there exists 'on-point circuit precedent involving materially similar facts to this case and finding that the defendant ... violated the Constitution, this [c]ourt's other precedents are so favorable to Jefferson's position that the law would still be unclear due to apparent contradictions in the precedent.'. .In support, Jefferson cites a series of cases in which we have held that medical professionals didn't violate the Constitution by misdiagnosing prisoners. . . . Jefferson's reliance on this line of authority is misplaced. As even he acknowledges, we held in *Rife I* that the 'specialized' deliberate-indifference standards that apply to medical professionals don't apply to 'laypersons such as [Jefferson].'. . And although Jefferson asserts that '[t]his development was unforeseen because neither this [c]ourt nor any other court of appeals had previously made such a distinction,' he fails to identify any cases holding that a layperson may successfully assert a misdiagnosis defense to a deliberate-indifference claim. Indeed, we expressly noted the dearth of such cases in *Rife I*. . . Thus, contrary to Jefferson's assertions, none of the misdiagnosis cases he cites 'would have indicated to a reasonable officer' in Jefferson's position that his 'conduct did not violate the Constitution.'. . The same is true of the cases from outside our circuit that Jefferson cites in his brief. According to Jefferson, 'it is difficult to see how even an on-point circuit precedent could render the law "clearly established" if the same conduct in another circuit would be constitutional.'. . But even assuming the cases Jefferson cites suggest that other circuits might reach a different conclusion about the constitutionality of Jefferson's conduct in this case, 'the decisions of one circuit court of appeals are not binding upon another circuit.'. . Thus, to the extent that Jefferson suggests another circuit's cases can disestablish the clearly established law of *this* circuit, we disagree. . . And in this circuit, it has been clearly established for more than a decade that when an arrestee not only informs an arresting officer of the internal symptoms of a serious medical condition but also displays outward signs of the need for medical attention, the arresting officer violates the Fourteenth Amendment by failing to seek such care. . . Accordingly,

Jefferson isn't entitled to qualified immunity, and we therefore affirm the district court's order denying his motion for summary judgment. . . . [With respect to defendants Willis and Dale] [w]hether *Olsen*'s individual-individual liability discussion clearly establishes as much is a closer question. Like the plaintiff in *Olsen,* Rife verbally informed Willis and Dale of his internal discomfort: he 'repeatedly complain[ed] of stomach pain' as Willis and Dale were moving him to the holding cell. . . .Nevertheless, we cannot say that *Olsen* places the constitutional question here 'beyond debate.'. . Recall that when they booked him into the jail, Willis and Dale didn't know (or even have reason to suspect) that Rife had been thrown from his motorcycle, let alone that he might have suffered any internal injuries as a result. That's because when Jefferson delivered Rife to the jail for booking, 'no one mentioned the motorcycle accident or said that [Rife] might have been injured.'. . Thus, Willis and Dale knew only that Rife was suffering from stomach pain—a common malady that doesn't necessarily require any sort of immediate medical intervention. And we simply cannot say that *Olsen* would place every reasonable official in Willis' and Dale's position on notice that every detainee who entered the jail complaining of stomach pain (even 'considerable' stomach pain, *Rife I*, 854 F.3d at 652 n.58), was constitutionally entitled to *immediate* medical treatment for that ailment. More importantly, unlike the arresting officer in *Olsen*—who apparently ignored the plaintiff's condition completely—Willis placed Rife on medical observation, a designation that 'required jail personnel to check on [Rife] every [15] minutes.'. . In light of this proactive conduct, we hold that *Olsen* doesn't place 'beyond debate' the question of whether Willis and Dale were deliberately indifferent to Rife's serious medical needs. . . Thus, we agree with Willis and Dale: the district court erred in defining the right at issue here at too 'high [a] level of generality.'. . That is, the district court characterized the law as clearly established without first 'identify[ing] a case where an officer acting under similar circumstances as [Willis and Dale] was held to have violated the [Eighth or Fourteenth] Amendment.'. . But that doesn't necessarily mean we must reverse. On appeal, Rife cites two additional cases in support of his assertion that Willis and Dale violated his clearly established rights: *Mata*, 427 F.3d 745, and *Sealock*, 218 F.3d 1205. Yet in arguing that *Mata* and *Sealock* would have put reasonable officials in Willis and Dale's position on notice that their conduct violated his Fourteenth Amendment rights, Rife doesn't discuss the facts of either case. Thus, he necessarily fails to demonstrate that either case is '"particularized" to the facts' present here. . . Nevertheless, we have sua sponte reviewed the facts of both cases, and we find them distinguishable. . . . In short, neither the cases the district court relied on below nor any of the cases that Rife cites on appeal clearly establish that Willis and Dale violated Rife's Fourteenth Amendment rights. . .Accordingly, because Willis and Dale are entitled to qualified immunity, we reverse the portion of the district court's order denying their motion for summary judgment.")

Bailey v. Indep. Sch. Dist. No. 69 of Canadian Cty. Oklahoma, 896 F.3d 1176, ____ (10th Cir. 2018) ("The district court concluded that McDaniel was entitled to qualified immunity because Bailey's letters did not address a matter of public concern, and therefore Bailey had not adequately stated a violation of his First Amendment rights. As discussed above, we disagree with that conclusion. However, to defeat qualified immunity, Bailey must do more than establish that McDaniel violated his constitutional rights. . . He must also show that the constitutional right at

issue was clearly established at the time of the violation. . . .A general test defining the elements of a constitutional violation, such as the *Garcetti/Pickering* test, will not provide clearly established law in anything but 'an obvious case.'. . As described above, we hold that a sentencing decision is a matter of public concern for the purposes of the First Amendment. But this proposition was not clearly established in our circuit at the time McDaniel acted. Bailey has cited the *Garcetti/Pickering* test and an Eighth Circuit case with facts similar to this one. . . He also relies on the Supreme Court's decision in *Cox Broad. Corp.*, which concerned whether a state may sanction the truthful publication of judicial records. . . These cases are insufficient to demonstrate the existence of clearly established law. In other words, they would not give a reasonable official in McDaniel's position particularized notice that his termination of Bailey for writing letters to a sentencing judge would violate Bailey's First Amendment rights. Therefore, McDaniel is protected by qualified immunity.")

Moya v. Garcia, 895 F.3d 1229, 1250-51 (10th Cir. 2018) (McHugh, J., concurring in the result in part and dissenting in part), *amended opinion on denial of rehearing en banc* ("In my view, the complaint plausibly alleges that Sheriff Garcia, Warden Caldwell, and Warden Gallegos violated Plaintiffs' constitutional rights. But I recognize that conclusion is not foretold. No opinion from this court or the Supreme Court has ever clearly established that a jailer violates the Constitution by detaining an individual lawfully arrested in anticipation of an untimely scheduled arraignment. That principle of law, to be sure, is clearly established in at least two of our sister circuits, but that is not enough for the law to be clearly established here. I would thus affirm the district court's order insofar as it dismissed Plaintiffs' claims against the sheriff and wardens on the basis of qualified immunity, and so I partially concur in the majority's result. But because municipalities are not entitled to qualified immunity, I would reverse and remand to the district court for further proceedings against the County.")

N.E.L. v. Douglas County, Colorado, No. 17-1120, 2018 WL 3239239, at *7 n.18 (10th Cir. July 3, 2018) (not reported) ("N.E.L. and M.M.A. assert that the district court incorrectly concluded that clearly established law is proved when the plaintiff proffers case law with closely analogous facts. They contend that the appropriate test for proving clearly established law is found in *Hope v Pelzer*, 536 U.S. 730, 739–40 (2002), which they argue requires plaintiffs to proffer case law that 'only provide[s] "fair warning" that an officer's conduct would violate the constitution.'. . But as we have noted, *Hope v. Pelzer* appears to have fallen out of favor, yielding to a more robust qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016) (citing *Mullenix*, 136 S. Ct. at 308, 312 (2015)).")

Perry v. Durborow, 892 F.3d 1116, 1120-27 (10th Cir. 2018) ("[W]hen a defendant asserts a qualified-immunity defense at summary judgment, we require the plaintiff 'to shoulder' a heavy two-part burden to survive the defendant's assertion. . . First, '[t]he plaintiff must demonstrate on the facts alleged ... that the defendant violated his [or her] constitutional or statutory rights.'. . Second, the plaintiff must demonstrate 'that the right was clearly established at the time of the alleged unlawful activity.'. Here, the district court ruled that Perry made both of these showings.

Specifically, it ruled that on the facts as alleged, Perry demonstrated (1) Durborow violated her Fourteenth Amendment right as 'a female inmate to be protected from sexual assault' and (2) that right was clearly established at the time of the alleged violation. Critically, Durborow opts not to dispute the district court's ruling that he violated Perry's constitutional rights. Instead, he focuses solely on the second prong of the qualified-immunity analysis. That is, Durborow argues only that even assuming Perry demonstrated a constitutional violation, he is nevertheless entitled to qualified immunity because, as of February 25, 2013, no 'clearly established law ... would ... have put a reasonable official in [his] position on notice that his supervisory conduct' violated Perry's constitutional rights. . . Accordingly, the only question before us in this appeal is whether the district court erred in ruling that the law was clearly established. Nevertheless, we begin by sketching the general contours of the constitutional inquiry to provide a framework for our subsequent discussion of the clearly-established analysis. . . . [T]o satisfy the first prong of the qualified-immunity test in this case, Perry had to demonstrate that Durborow *personally* violated her constitutional rights. . . To do that here, Perry had to 'show an "affirmative link" between' Durborow and the rape. . . And to demonstrate such an 'affirmative link,'. . . Perry had to establish '(1) personal involvement; (2) causation, and (3) state of mind[.]'. . . For the reasons discussed above, we assume that Perry successfully demonstrated Durborow personally violated her Fourteenth Amendment rights under this framework. Nevertheless, Durborow is entitled to qualified immunity unless Perry can also show that the law was clearly established at the time of the constitutional violation. . . . Critically, just as the constitutional-violation question in this case didn't turn on whether Clements violated Perry's constitutional rights by raping her, the clearly-established-law question doesn't turn on whether existing precedent would have put a reasonable detention officer in Clements' position on notice that raping Perry would violate her constitutional rights. Instead, to satisfy the second part of the qualified-immunity test in the context of Perry's supervisory-liability claim against Durborow, Perry must show that as of February 25, 2013, 'clearly established law ... would ... have put a reasonable official in [Durborow's] position on notice that his *supervisory conduct* would' violate Perry's constitutional rights. . . In other words, Perry must 'identify a case where an offic[ial] acting under similar circumstances as [Durborow] was held to have violated' the Constitution. In ruling that Perry made this showing, the district court first cited Durborow's knowledge that male detention officers were routinely entering the female pod in violation of the Jail's emergencies-only policy. The court then cited Durborow's knowledge that the Jail's surveillance system didn't monitor the female pod's individual cells, its showers, or its mechanical room. And the court reasoned that the existence of these known 'blind spots' allowed male detention officers who entered the female pod in violation of the Jail's emergencies-only policy to remain there for substantial periods of time 'without surveillance.'. . Taken together, the district court said, these circumstances 'gave rise to an increased risk of sexual assault of female inmates' such that 'a reasonable jury could find that Durborow was deliberately indifferent to the[ir] health and safety,' in violation of the Eighth and Fourteenth Amendments. . . And because 'it is clearly established that a prison official's deliberate indifference to sexual abuse by prison employees violates' the Constitution, the district court reasoned, Durborow wasn't entitled to qualified immunity. . . But as Durborow points out, the district court cited only two cases to support this conclusion . . . The

court cited *Cox* for the threshold principle that a 'plaintiff must show that the constitutional right was clearly established when the conduct occurred.'. . And it cited *Keith II* for the general proposition that 'it is clearly established that a prison official's deliberate indifference to sexual abuse by prison employees violates the Eighth Amendment.'. . We agree with Durborow that these statements of law define the right at issue here at an unacceptably 'high level of generality.'. . . [B]efore the district court could determine the law was clearly established, it had to 'identify a case where an offic[ial] acting under similar circumstances as [Durborow] was held to have violated' the Eighth or Fourteenth Amendments under a theory of supervisory liability. . . *Cox* is not such a case. . . .Nor is *Keith II*, which we decided almost four years after Perry alleges Clements raped her. . . . True, we stated in *Keith II* that it has been clearly established since 2007 that inmates have a constitutional right 'to be free from attack by' prison employees and 'to expect reasonable protection from [prison] officials ... and a reasonable response when sexual misconduct occur[s].'. .But in determining whether Durborow was entitled to qualified immunity, the district court should have looked to the ' "particularized" ... facts' of the cases upon which *Keith II* relied in reaching that conclusion, not to *Keith II*'s 'general statements of the law.'. . Accordingly, to the extent the district court failed to tether its clearly-established analysis to the ' "particularized" ... facts' of any case decided before February 25, 2013, the district court erred. . . . On appeal, Perry cites additional cases not relied upon by the district court and argues these cases would have put a reasonable official in Durborow's position on notice that his conduct in this case violated the Constitution. . . .[I]n each of these cases [*Tafoya*, 516 F.3d 912, *Gonzales*, 403 F.3d 1179, and *Lopez*, 172 F.3d 756], the defendant-supervisors weren't just aware of the risk that such assaults might occur. Instead, in each of these cases, the defendants were aware that those known risks had, in fact, *already previously materialized*. Here, on the other hand, the district court declined to credit Perry's assertions that Durborow was aware of any previous sexual assaults at the jail as of February 25, 2013. . . .Thus, in the absence of any finding by the district court that Durborow was aware of at least one previous assault at the Jail, neither *Tafoya*, 516 F.3d 912, *Gonzales*, 403 F.3d 1179, nor *Lopez*, 172 F.3d 756, were sufficient to 'place[ ] the ... constitutional question' in this case 'beyond debate.'. . In reaching this conclusion, we do not mean to suggest that '[a] prior case' must have 'identical facts' before it will put reasonable officials on notice that their specific conduct is unconstitutional. . . And we recognize that there are indeed factual similarities between this case and *Tafoya*. In particular, the defendants in both cases were sheriffs who knew of blinds spots in their jails' video surveillance systems and also knew that male officers were violating policies designed to restrict their contact with female inmates. . . Nevertheless, the fact that Durborow was unaware of any previous sexual assaults at the Jail remains a critical distinction. And in light of this distinction, *Tafoya* wouldn't have 'put a reasonable official in [Durborow's] position on notice that his supervisory conduct' in this case—which amounted to knowingly allowing the Jail's male detention officers to enter the female pod in violation of policy and without adequate supervision and monitoring—violated the Constitution. . . In short, the district court erred in concluding that the law was clearly established without first 'identify[ing]' in its order 'a case where an officer acting under similar circumstances as [Durborow] was held to have violated' the Eighth or Fourteenth Amendments. . . And in the absence of a finding that Durborow was aware of any previous incidents of sexual assault at the

Jail, none of the cases that Perry identifies on appeal 'place[ ] the ... constitutional question' in this case 'beyond debate' either. . . Accordingly, Durborow is entitled to qualified immunity. We therefore reverse the district court's order denying Durborow's motion for summary judgment and remand with directions to enter summary judgment in his favor.")

Stevenson v. Cordova, 733 F. App'x 939, ___ (10th Cir. 2018) ("Turning to Eighth Amendment case law, we have not found a Supreme Court decision or a published Tenth Circuit case that is sufficiently on point. . . Nor have other circuit court decisions addressed a correctional officer's use of a taser in sufficiently analogous circumstances such that the constitutional question is beyond debate.")

Matthews v. Bergdorf, 889 F.3d 1136, 1152-53 (10th Cir. 2018) ("Plaintiffs state a cause of action against caseworkers Feather and Schraad-Dahn under the state-created danger exception. This leaves us with the question of whether the law surrounding the state-created danger exception as applied to the alleged facts was clearly established at the time of the two caseworkers' purported malfeasance. To show the law was clearly established, 'the plaintiff does not have to show the specific action at issue had been held unlawful;' rather the alleged unlawful 'conduct must have been apparent in light of preexisting law.'. . In 2001, we held a state caseworker could be held liable under the state-created danger exception for instructing a mother to stop making abuse allegations against the children's father. . . We reasoned that by actively discouraging the mother from reporting suspected wrongdoing, the caseworker increased the children's vulnerability to their father's abuse. . .We see little distinction between the affirmative act of instructing an individual to cease reporting evidence of abuse as occurred in *Currier* and the affirmative act of warning an individual so that the latter might cover up evidence of abuse as alleged here. . . Both acts effectively impede access to protective services, and perhaps additional sources of assistance, otherwise available to the victims. . . After we decided *Currier* in 2001, the law was well established in the Tenth Circuit such that a reasonable caseworker cognizant of the law would have understood the following: A caseworker's affirmative actions allegedly designed to shield and protect the Matthews in light of repeated child abuse and neglect referrals could give rise to constitutional liability under the state-created danger exception. Thus, the district court properly denied caseworker Feather's and Schraad-Dahn's defense of qualified immunity on this particular claim. For the reasons stated, however, the district court erred in denying the remaining named caseworkers qualified immunity on Plaintiffs' state-created danger claims. . . . Today we have pronounced no new law; we have done nothing more than apply binding precedent. To allow Plaintiff's complaint to proceed on claims that have no basis in constitutional jurisprudence would thwart the aims of qualified immunity and impose excessive discovery costs on Defendants absent legal justification.")

McCoy v. Meyers, 887 F.3d 1034, 1048-54 & n.22 (10th Cir. 2018) ("Even if Mr. McCoy was, as he maintains, lying face down with his hands behind his back and with several officers pinning him, . . . a reasonable officer in the Appellees' position could conclude that he was not subdued when the allegedly excessive force occurred. Under these circumstances, the preexisting precedent

would not have made it clear to every reasonable officer that striking Mr. McCoy and applying a carotid restraint on him violated his Fourth Amendment rights. The cases cited by Mr. McCoy—*Dixon*, *Casey*, and *Weigel*—involved force used on individuals who either did not pose a threat to begin with or were subdued and thus no longer posed any threat. . . .Based on the foregoing, Mr. McCoy has failed to show clearly established law prohibiting the Appellees' pre-restraint use of force. . . . Although *Dixon*, *Casey*, and *Weigel* are not factually identical to this case, they nevertheless made it clear that the use of force on effectively subdued individuals violates the Fourth Amendment. In light of those cases, it should have been obvious to the Appellees that continuing to use force on Mr. McCoy after he was rendered unconscious, handcuffed, and zip-tied was excessive. *Dixon*, *Casey*, and *Weigel* clearly establish that the Fourth Amendment prohibits the use of force without legitimate justification, as when a subject poses no threat or has been subdued. . . .And in light of *Dixon*, *Casey*, and *Weigel*, the violation in this case is not necessarily 'rare' but is 'apparent.'. . Finally, this court's later decisions, though not controlling, accord with our clearly established law determination here. . . In *Perea*, for example, we relied primarily on *Dixon* in holding that it was 'clearly established [on March 21, 2011] that officers may not continue to use force against a suspect who is effectively subdued.'. . Likewise, in *Estate of Booker*, we relied on *Weigel*, *Casey*, and out-of-circuit cases in holding that it was clearly established on July 8, 2010 that officers may not use force—namely, pressure on back, tasering, and neck restraint—'on a person who is not resisting and who is restrained in handcuffs.'. . .In sum, qualified immunity applies (1) to Mr. McCoy's claims based on the pre-restraint force, due to the lack of clearly established law, but (2) not to the claims based the post-restraint force, which violated Mr. McCoy's clearly established right to be free from continued force after he was effectively subdued. . . . In *Casey*, this court adopted a 'sliding scale' approach to clearly established law in the excessive force context. . . We have since stated that 'our sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity.' *Lowe v. Raemisch*, 864 F.3d 1205, 1211 n.10 (10th Cir. 2017). We do not rely on the sliding scale here and thus need not decide its validity. And nothing in recent Supreme Court precedent questions our merits holding in *Casey*, which—along with *Dixon* and *Weigel*—should have put the Appellees on notice that the post-restraint force was excessive.")

Doe v. Hutchinson, 728 F. App'x 829, ___ (10th Cir. 2018) ("Hutchinson relies heavily on *White v. Pauly*, 137 S. Ct. 548 (2017), which stated it was 'again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality' but instead 'particularized to the facts of the case.'. . That case reversed a decision of this court denying qualified immunity to officers because it 'failed to identify a case where an officer acting under similar circumstances as [defendants] was held to have violated the Fourth Amendment.'. . It held that 'general statements of the law' are not sufficient to 'create clearly established law outside an obvious case.'. .We have previously held 'the law holding that sexual harassment is actionable as an equal protection violation has long been clearly established.'. . In *Sh.A.*, defendant was a fifth-grade teacher who repeatedly touched two boys in his class. . . We rejected the defendant's argument that he was entitled to qualified immunity because 'the contours of an equal protection claim by a student on the basis of sexual harassment by a teacher were [not] clearly

established in 1997 and 1998 when the conduct at issue took place,' holding that 'a reasonable teacher would have known in the spring of 1997 that sexual harassment which gives rise to a violation of equal protection in the employment context will also do so in the teacher-on-student context.'. . Hutchinson argues that because the facts alleged in the complaint differ from those at issue in *Sh.A.*, which involved physical touching, he is entitled to qualified immunity under *Pauly*. But *Sh.A.* did more than hold that the facts presented violated plaintiffs' equal protection rights, it clearly established the proposition that 'sexual harassment which gives rise to a violation of equal protection in the employment context will also do so in the teacher-on-student context.'. . At the time of Hutchinson's alleged conduct, we had repeatedly held in the employment context that sexual harassment was an actionable equal protection theory. . . And we had applied that rule to hostile environment claims, explaining that '[t]he law on discrimination arising from a hostile environment in the workplace is well established,' having been fleshed out by numerous decisions from the Supreme Court and this court with respect to § 1983 and Title VII. . . Accordingly, the question is not whether the facts of *Sh.A.* were sufficiently similar to those alleged in Doe's complaint, but whether our case law would make it clear to reasonable officials that Hutchinson's alleged conduct created a hostile environment. We have already concluded that Doe's allegations sufficiently allege a pervasively hostile environment. The law was clearly established that Hutchinson's full course of conduct may be considered, including statements that were not explicitly gender-based and those made to others of which Doe was aware. . . As was the proposition that we must consider context including 'the ages of the harasser and the victim.'. . Moreover, our hostile environment jurisprudence includes many cases not involving physical contact. . . In light of the foregoing, we conclude that any reasonable high school teacher would have understood that the conduct alleged created a hostile environment in violation of Doe's equal protection rights.")

Sandberg v. Englewood, Colorado, 727 F. App'x 950, 963 (10th Cir. 2018) ("Sandberg does not cite to any Tenth Circuit or Supreme Court case addressing whether a person who is the subject of the police action has a First Amendment right to record police activities. Rather, as with his Second Amendment argument, he urges us to look to an alleged 'clearly established weight of authority from other courts [that] found the law to be as the plaintiff maintains.'. . It is true that the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have all held that 'the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.' [collecting cases] Yet, these cases do not provide Sandberg with a clearly established weight of authority for two reasons. First, some of them post-dated the May 14, 2014 events in this case. . . Second, the cases are factually distinguishable. All of the cases Sandberg cites only involve a bystander or third party recording the police, and do not involve the person who is the subject of the police action. . . Sandberg does not point to a case in which the videographer was also the subject of the police action. As such, it was not clearly established that officers violate the First Amendment when they prevent a person who is the subject of the police action from filming the police. The district court correctly granted Johnson and Fieger qualified immunity on Sandberg's First Amendment claim.")

Knopf v. Williams, 884 F.3d 939, 946-47, 949-51 & n.10 (10th Cir. 2018) ("The following considers only the second requirement to overcome qualified immunity —whether the law was clearly established—and determines the district court erred in denying Mayor Williams summary judgment. Mr. Knopf did not meet his burden of showing that any violation of the First Amendment he may have suffered was based on clearly established law. . . .The district court's discussion of the second qualified immunity prong consisted only of the general statement that 'it is clearly established that a public employer cannot retaliate against an employee for exercising their First Amendment right to free speech.'. . Mr. Knopf relies on the district court's statement and similarly argues that at the time of his dismissal, it was clearly established that a public employer cannot retaliate against an employee for speaking on matters of public concern. . . But these are general statements of law. As the Supreme Court has cautioned, we must not 'define clearly established law at a high level of generality.'. . These statements merely repeat the generic *Garcetti/Pickering* standard— 'the First Amendment protects a public employee's right ... to speak as a citizen addressing matters of public concern.'. . Instead, for Mr. Knopf to meet his burden, 'the clearly established law must be particularized to the facts of the case.'. . .The key question is whether Mayor Williams 'reasonably [could] have believed, at the time he fired [Mr. Knopf], that a government employer could fire an employee on account of" speech stemming from almost 30 years of high-level involvement with an ongoing project. . . Mr. Knopf has not shown that such a belief was unreasonable based on then-existing law. Because it would not have been 'beyond debate' to a reasonable official that Mr. Knopf's email exceeded the scope of his official duties, . . . Mayor Williams is entitled to qualified immunity on the particular facts of this case. . . . The dissent's approach to qualified immunity analysis under the first element of *Garcetti/Pickering* runs counter to precedent. Instead of 'identify[ing] a case where an [official was] acting under similar circumstances,'. . . the dissent 'would apply clearly established general principles derived from Supreme Court precedent—from *Lane v. Franks* . . . and *Garcetti* . . . to determine whether the government employee's speech fell outside the scope of his job duties.'. . The dissent fails to cite a Supreme Court or Tenth Circuit case supporting its approach. . . .The dissent's lens, which is limited to *Lane* and *Garcetti*, should widen to consider relevant 'Supreme Court or Tenth Circuit decision[s], or the weight of authority from other courts' in determining whether clearly established law applies to this case. . . .The dissent also suggests, again without precedent, that the first step of *Garcetti/Pickering* warrants different treatment than other qualified immunity cases because of its focus on the plaintiff-employee's speech as opposed to the defendant-official's conduct. . . But we rarely focus on one party's conduct in qualified immunity analysis. . . The question here, as in other contexts, considers the conduct of both parties: would a reasonable person in Mayor Williams's position have understood Mr. Knopf to have spoken outside his official duties? . . . . Based on the foregoing opinion and Judge Briscoe's concurrence, this court reverses the district court's denial of qualified immunity on Mr. Knopf's First Amendment retaliation claim. . . . Our 'sliding scale' approach to qualified immunity in Fourth Amendment excessive force cases comes closest to supporting the dissent's approach, but not nearly close enough. Under that approach, we have stated that '[t]he more obviously egregious the conduct in light of prevailing [Fourth Amendment] constitutional principles, the less specificity is required from prior case law to clearly establish the violation.' *Casey v. City of Fed. Heights*,

509 F.3d 1278, 1284 (10th Cir. 2007). *But see Lowe v. Raemisch*, 864 F.3d 1205, 1211 (10th Cir. 2017) (stating that "our sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity"). Here, it is far from obvious that Mr. Knopf's communication at issue occurred outside his official duties. *See* Concurrence at —— ("[I]t is a close question" whether "Mr. Knopf's email did not fall within the scope of his official duties as a City employee").")

Knopf v. Williams, 884 F.3d 939, 951, 954-57 (10th Cir. 2018) (Briscoe, J., concurring) ("I agree with Judge Matheson that 'Knopf did not meet his burden of showing that any violation of the First Amendment he may have suffered was based on clearly established law.'. . But I also conclude, as a preliminary matter, that Knopf failed to establish that defendant Williams violated his First Amendment rights by declining to reappoint him. . . .In the end, although it is a close question, I agree with the district court that Knopf's email did not fall within the scope of his official duties as a City employee. Thus, I conclude that the district court did not err in analyzing the first step of the *Garcetti/Pickering* framework. . . .I conclude, contrary to the determination made by the district court, that the interests expressed by Williams and the City were significant enough to outweigh Knopf's interest in speaking to Boal. Consequently, I conclude that Knopf failed to establish that Williams violated his First Amendment rights by failing to reappoint him as City Planner. . . .In denying summary judgment in favor of Williams, the district court also concluded that Knopf established that the law applicable to his First Amendment retaliation claim was clearly established at the time that Williams decided not to reappoint him as City Planner. Judge Matheson concludes, and I agree, that the district court erred in reaching this conclusion. . . .As discussed above, it is a very close question whether, under step one of the *Garcetti/Pickering* framework, Knopf's email was made pursuant to his official duties or was, instead, a matter of private speech. The difficulties posed by that analysis highlight why it may not have been clearly established in late 2015 that Knopf's email constituted protected First Amendment speech, rather than simply work-related speech. Moreover, Knopf has not pointed to any case that is remotely factually similar from 2015 or before, i.e., a case in which a court held that a similar email constituted protected First Amendment speech by a public employee. . . Thus, I conclude that it was entirely reasonable for Williams to 'believe that, as a legal matter, [Knopf] w[as] speaking in [his] capacity as [an] employee[ ] of the [City]' rather than as a private citizen. . . Likewise, Knopf has not pointed to a single case that is remotely factually similar in terms of discussing whether a public employee can be terminated (or not reappointed) in response to having sent an email to another public employee regarding a matter of public concern. Thus, again, he has failed to demonstrate that it was clearly established, in late 2015 or early 2016, that it was unconstitutional for a supervisor to terminate a subordinate for having sent an email like the one that Knopf sent. In short, Knopf has failed to identify clearly established law that is 'particularized' to the facts of his case. . . That is because, as of late 2015 and early 2016, the outcome of the *Pickering* balancing test, as applied to the facts presented in this case, did not place 'beyond debate' the questions of whether Knopf spoke as a private citizen when he sent his email and, in turn, whether it was proper for Williams to discipline Knopf for sending the email. . .

Consequently, Williams was entitled to qualified immunity from Knopf's First Amendment retaliation claim.")

Knopf v. Williams, 884 F.3d 939, 957-63 & n. 3, 967 (10th Cir. 2018) (Ebel, J., dissenting) ("Plaintiff Paul Knopf claims his government boss, Evanston's Mayor Kent Williams, declined to reappoint Knopf as City planner in retaliation for Knopf engaging in speech protected by the First Amendment. I would affirm the district court's decision to deny the Mayor qualified immunity from Knopf's damages claim at the summary-judgment stage of this litigation. My conclusion is contrary to both of the other opinions in this case. I would, in particular, not require for purposes of the qualified-immunity analysis that Knopf identify factually on-point precedent that clearly established that the speech in which Knopf engaged—sending an email to the City attorney expressing concern about the possible misuse of City money in a greenway development project—fell outside the scope of Knopf's job duties as City planner, which is the first prong of the *Garcetti/Pickering*. . . test. This initial predicate inquiry in the five-part *Garcetti/Pickering* analysis that applies to Knopf's First Amendment claim turns, not on the defendant's alleged misconduct, but instead on the legal question of the precise and nuanced job duties required of Evanston's planner. There was only one Evanston planner with Knopf's job duties and responsibilities, so to require him to come up with preexisting precedent clearly establishing his job duties is not only impractical—it is in fact not possible. Requiring Knopf to come up with such precedent before he can defeat a qualified-immunity defense is to tell Knopf, and countless other government employees with unique jobs, that they have been disenfranchised from being able to assert their constitutional rights—here, First Amendment rights—against their employer. A government employee like Knopf will rarely, if ever, be able to identify a prior Supreme Court or Tenth Circuit case holding that a person with his particular job title and his same accompanying duties, engaging in the same speech under similar circumstances, was acting beyond the scope of his unique job duties. Instead, I would apply clearly established general principles derived from Supreme Court precedent—*from Lane v. Franks*. . . and *Garcetti* . . . to determine whether the government employee's speech fell outside the scope of his job duties. Of course, on the other four *Garcetti/Pickering* inquiries, I do agree that there has to be prior factually relevant precedent to defeat qualified immunity. But I believe that requirement is satisfied here. . . .Contrary to both my colleagues in the majority opinion, I conclude that, although there must be a prior case that clearly establishes the First Amendment violation under *Garcetti/Pickering*'s factors two through five, I would not require a prior case that clearly establishes, at the first *Garcetti/Pickering* inquiry, that an employee in Knopf's position would have been speaking outside the scope of his job duties when he sent an email to the City attorney, another City department head, complaining about the possible misuse of city money in a development project that the person in Knopf's position was not overseeing. . . .I conclude, as the district court did, that Knopf sufficiently established a First Amendment claim that, on the merits, was sufficient to survive the Mayor's summary-judgment motion. The qualified-immunity question, which I address next, is whether Knopf's claimed First Amendment violation was clearly established at the time the Mayor refused to reappoint Knopf City planning director. . . .Although, as just mentioned, ordinarily to defeat a qualified-immunity defense, the plaintiff must identify a case

clearly establishing the unconstitutional nature of the defendant government official's challenged conduct, I would not require, as the majority does, that Knopf locate a factually on-point case clearly establishing that a city department head, like Knopf, would be acting outside the scope of his job duties, analogous to Knopf's employment responsibilities, if he sent an email to the City attorney, a co-equal city department head, complaining about the misuse of city money in a development project *that the person in Knopf's position was not overseeing.* The fact of the matter is that a senior government employee will rarely, if ever, be able to find such a close factually analogous prior case addressing whether a person with his same job title and responsibilities, employed by the same employer or one with a closely similar job description and employment duties and reporting responsibilities, engaging in the particular speech at issue, was acting outside the scope of his or her official or ordinary job responsibilities as those job responsibilities were both legally and factually applied to this particular plaintiff. Even if a plaintiff-employee could somehow find a prior case addressing the job responsibilities of his exact or closely comparable government position, whether speech undertaken in a particular case fell outside his job duties as applied would still turn on myriad details unique to a given case—including not only the plaintiff-employee's (1) official job duties, but also (2) the informal customs developed around the performance of those duties and (3) further nuances involving, for example, the plaintiff-employee's understanding from his supervisors of how and what exactly the plaintiff's job entails in the particular factual scenario presented. It will be virtually impossible for any plaintiff-employee to find such a closely analogous prior Supreme Court or Tenth Circuit case, unless the prior case happened to involve this same plaintiff or, at the very least, involved another employee of the same government employer with a similar job description who chose a closely similar route to protest a similarly serious transgression of government law and ethics. That is just not a realistic possibility. To require the plaintiff to find such a directly analogous prior case would essentially grant all government employers qualified immunity on any employee's First Amendment claim at the first *Garcetti/Pickering* prong before even getting to the substance of the alleged wrongdoing. It is not surprising, then, that Knopf could not cite to any prior Supreme Court or Tenth Circuit case with closely analogous facts addressing whether a government employee was acting outside the scope of his job duties. That should not be fatal to Knopf's First Amendment retaliation claim. Nor do I think such a close factually analogous case is required at this first step in the *Garcetti/Pickering* analysis. The usual qualified-immunity inquiry—asking whether 'at the time of the [official's] conduct, the law was sufficiently clear that every reasonable official would understand what he is doing is unlawful,'. . . focuses on the defendant *government official's conduct.* In contrast, the inquiry at the first step of the *Garcetti/Pickering* analysis focuses instead on whether the *plaintiff-employee's* speech fell within that *employee's job duties.* That question presents a legal determination. Although the second and third *Garcetti/Pickering* inquiries are also legal questions, this first prong presents a very different inquiry. . . That first inquiry may turn, at least in part, on legal authorities such as government regulations or job descriptions setting forth the employee's job responsibilities and authority to act for his government employer. To remain true to the purpose of the qualified-immunity analysis, of course, it must be clear to a reasonable person in the defendant government official's position that the plaintiff-employee was acting outside his job duties. But who better to

make that determination, which is typically a sui generis legal question, . . . than the court in the unique context of the case before it? . . . .Here, as in these other cases [discussed], it was clearly established at the time that the Mayor declined to reappoint Knopf that a government employee's speech made outside the scope of his job duties was protected by the First Amendment. And the Supreme Court's clearly established principles for making that determination, set forth in *Garcetti* and Lane and applied by prior Tenth Circuit cases, provide sufficient guidance for us to determine whether it was clear to a reasonable government employee that the plaintiff employee's speech was constitutionally protected because it fell outside his job duties. That was enough to satisfy the first *Garcetti/Pickering* inquiry under the qualified-immunity analysis. Applying these clearly established principles here, then, it would have been clear to a reasonable person in the Mayor's position that Knopf sent his email outside the scope of his job duties. The Mayor would, or should, have been aware that Knopf had no official duties as to the phase of the greenway development project that was the subject of the email, and that he did not have general oversight responsibilities for the department head involved in that phase of the project. The Mayor also would, or should, have been aware that Knopf sent the email to someone outside Knopf's chain of command, the City attorney. In fact, this was one of the Mayor's primary complaints about Knopf's email, that it bypassed the Mayor, who was Knopf's supervisor. Moreover, the Mayor would, or should, have been aware that any citizen with concerns over the misuse of City money in the greenway development project could have sent such an email to the City attorney expressing those concerns. Further, the Mayor knew or should have known that the underlying allegations of financial favoritism had been discussed at a public city council meeting. The facts that Knopf did not make his concerns public and that the email concerned information that Knopf may have acquired because of his government job do not preclude the conclusion that sending that email was outside the scope of Knopf's job duties. . . .I conclude, contrary to both the majority and the concurrence, that Knopf has established a First Amendment violation of his right to free speech sufficient to defeat summary judgment, has shown that it was clear to a reasonable person in the Mayor's position that Knopf's email fell outside the scope of Knopf's ordinary job responsibilities, and that the First Amendment violation was otherwise clearly established at the time the Mayor refused to reappoint Knopf City planning director. On that basis, I would affirm the district court's decision to deny the Mayor's summary judgment motion asserted he is entitled to qualified immunity.")

Scott v. Mid-Del Sch. Bd. of Educ., 724 F. App'x 650, ___ (10th Cir. 2018) ("In *Garcia*, elementary-school officials administered two beatings to a nine-year-old girl, immobilizing her and using a paddle that was split into two pieces so that 'when it hit, it clapped and grabbed,' and resulted in severe injuries. . . Similarly here, Ms. Scott alleged that Mr. McGuire caused numerous physical injuries to B.P. by hitting him with the bathroom-stall door and pushing him back against the stall. She further alleged that Mr. McGuire blocked B.P. in the stall and cursed and bullied him while he was in the vulnerable position of having his pants down. Although the facts of *Garcia* are not identical to those here, 'we do not require plaintiffs to produce a factually identical case, but allow some degree of generality in factual correspondence.' *Armijo ex rel. Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1260 (10th Cir. 1998). At the Rule 12(b)(6) stage, the district

court found that the complaint stated a claim of conscience-shocking behavior by Mr. McGuire. Mr. McGuire's alleged conduct sufficiently resembles the conduct we held unconstitutional in *Garcia* such that 'a reasonable official in [his] position would have known that [his] actions violated [B.P.'s] clearly established right,' *T.D.*, 868 F.3d at 1213. He was therefore not entitled to qualified immunity at this stage of the proceedings.")

Poore v. Glanz, 724 F. App'x 635, ___ (10th Cir. 2018) ("[W]e reject the argument that defendants are entitled to qualified immunity because this court has not previously held that the precise combination of policies implemented by Glanz constituted deliberate indifference. We have recognized 'it is clearly established that a prison official's deliberate indifference to sexual abuse by prison employees violates the Eighth Amendment.'. . And because 'a prison official's failure to protect an inmate from a known harm may constitute a constitutional violation,' we have further held it to be clearly established that inmates possess 'a constitutional right to expect' that jail officials will 'reasonabl[y] protect[ ]' them from such abuse. . . Principles regarding supervisory liability in this context are also firmly established. In Dodds, we explained that 'the clearly established prong of the qualified immunity inquiry asks whether the contours of the *right* the plaintiff claims the defendant violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . We concluded it was 'clearly established by 2007 that officials may be held individually liable for policies they promulgate, implement, or maintain that deprive persons of their federally protected rights.'. . We have held corrections supervisors liable for failing to protect inmates from sexual abuse from staff on several occasions. . . .[D]efendants correctly point out that other facts not present in this case supported a finding of deliberate indifference in *Keith I*, *Tafoya*, and *Keith II*. But the qualified immunity analysis is not 'a scavenger hunt for prior cases with precisely the same facts'; the relevant inquiry is 'whether the law put officials on fair notice that the described conduct was unconstitutional.'. . 'We cannot find qualified immunity wherever we have a new fact pattern.'. . Although each of the conditions identified by Poore taken individually would not constitute a clearly established violation of Poore's Eighth Amendment rights, the confluence of factors in this case impels us to affirm the district court's denial of qualified immunity. . . A reasonable official in Glanz's position, who had his subjective knowledge of the dangers posed by conditions in the north wing, would have been on fair notice that his conduct was unlawful.")

Marin v. King, 720 F. App'x 923, (10th Cir. 2018)) ("Plaintiffs cite no authority—from the Supreme Court, our circuit, or any other circuit—demonstrating it was clearly established that such a statement made to an affiant by a private citizen volunteer, not employed or paid by any government entity, can serve as a basis for a *Franks* violation, even when the individual acted under color of state law for purposes of § 1983. Instead, the federal cases Plaintiffs cite to—*Kennedy*, *DeLeon*, *Wapnick*, *Calisto*, and *Pritchard*—all involved paid city employees with delineated investigatory roles. Accordingly, these cases do nothing to establish that a reasonable individual in Ms. Ferguson's or Dr. Norris's position on the Task Force, as a private citizen without law enforcement training or training regarding constitutional rights, would have recognized that he or she was violating Plaintiffs' constitutional rights by making knowingly and intentionally, or

recklessly, false statements to Mr. Salas. And, within the context of qualified immunity, the burden falls squarely on the plaintiff to identify case law demonstrating that a defendant's conduct violated clearly established law such that a reasonable person in the defendant's position would have known she was violating the plaintiff's rights. . . In an attempt to overcome the absence of case law establishing that a private citizen volunteer commits a constitutional violation by providing a false statement that is later innocently incorporated into a search warrant affidavit, Plaintiffs contend that a reasonable jury could find Ms. Ferguson and Dr. Norris were not merely citizen advisors but acted as law enforcement officers. Plaintiffs cite, among other things, evidence that Ms. Ferguson requested insignia that would show the 'law enforcement' capacity of the Task Force members; that Ms. Ferguson was the Task Force's 'coordinator'; and that Dr. Norris was the Task Force's 'forensic veterinarian.' They also cite evidence indicating that neither Mr. Salas nor Ms. Ferguson viewed Ms. Ferguson's role as merely advisory. But Plaintiffs' argument that a jury could conclude that Ms. Ferguson and Dr. Norris were law enforcement officers runs contrary to language in Plaintiffs' complaint relative to Plaintiffs' supervisor liability claim against Mr. King and Mr. Suttle. Specifically, Plaintiffs alleged that 'King and Suttle knew that Ferguson was not a peace officer, a law enforcement officer of any other sort, held no public office, and had had no training in law enforcement or the constitutional rights of citizens.'. .And, once again, Plaintiffs provide no federal authority for the proposition that private citizens—who are not employed or compensated by the state and who do not receive any law enforcement training or training on constitutional rights—can be considered law enforcement officers. Indeed, our review of federal law has not yielded any authority treating a private citizen volunteer as a law enforcement officer for purposes of assessing a qualified immunity defense.")

Pauly v. White, 874 F.3d 1197, 1211, 1213-14, 1222-23 (10th Cir. 2017) (***Pauly III***), *cert. denied,* 138 S. Ct. 2650 (2018) ("After reading plaintiffs' brief in opposition to the officers' petition for certiorari and plaintiffs' supplemental brief to us after the Supreme Court vacated our judgment, we are convinced that we misstated the facts in *Pauly I*. Originally, we had the following view of Officer White's role in the altercation: 'Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the brothers to "Come out or we're coming in." Almost immediately upon Officer White's arrival, one of the brothers shouted "We have guns."' *Pauly I*, 814 F.3d at 1076 (internal citations omitted). But this was not an accurate portrayal of the events that unfolded on that rainy night in rural New Mexico almost six years ago. Unfortunately, we were misled by defendant's briefs on appeal. . . From the beginning, defendants framed the case as one where Officer White entered the situation without participation in, or knowledge of, the alleged reckless conduct of the officers that escalated into a gunfight, and plaintiffs responded accordingly. Our review of the record on remand shows otherwise. It turns out that if the facts are viewed in the light most favorable to plaintiffs, Officer White's reckless or deliberate conduct unreasonably created a need for him to shoot Samuel Pauly. . . . [C]ontrary to our determination in *Pauly I*, . . . we are now persuaded a reasonable jury could find that Officer White participated in the events leading up to the armed confrontation and heard the other officers threaten the brothers by saying, 'Come out or we're coming in.'. . A reasonable jury could thus conclude that Officer White acted recklessly by precipitating the need to use deadly

force. . . .As we explained above, in *Pauly I* we analyzed Officers Mariscal and Truesdale together while analyzing Officer White separately because we thought the facts warranted it. . . Although we now recognize that a reasonable jury could find Officer White's pre-seizure conduct to be just as reckless as Officers Mariscal and Truesdale, we still believe the facts warrant a separate qualified immunity analysis because Officer White is the only officer who actually shot Samuel Pauly. . . .Turning to this case, we look first to Officer White, as he is the one who actually 'seized' Samuel Pauly by shooting him. Viewing the facts in the light most favorable to plaintiffs, the district court determined that the brothers were in their home when Officers Mariscal and Truesdale—and Officer White shortly thereafter—approached their house while it was dark and raining and, without knocking on the door, made threatening comments about intruding into the home. In response, the brothers shouted 'We have guns,' hoping to scare off their perceived home invaders, and all three officers took cover. In particular, Officer White took cover behind a rock wall approximately fifty feet away from the house. Samuel Pauly opened the window of his home and pointed his gun aimlessly into the dark in the direction of Officer White. Within five seconds of Samuel pointing his gun out of the window, Officer White shot Samuel in the heart without first identifying himself or warning Samuel to put down his weapon. To analyze the reasonableness of Officer White's actions, we turn to the ubiquitous three factor test from *Graham v. Connor*. . . .Based on the record in the present case, viewed in the light most favorable to plaintiffs, Officer White did not have probable cause to believe there was an *immediate* threat of serious harm to himself or to Officer Mariscal. This is especially true considering Officer White may have participated in the reckless conduct that lead to his perceived need to shoot Samuel Pauly. Thus, Officer White's use of deadly force was not objectively reasonable and violated Samuel Pauly's constitutional right to be free from excessive force. . . .The district court relied on *Allen*, 119 F.3d at 841, in concluding that Officer White had violated clearly established law. It stated that '[s]ince 1997, it has been clearly established in the Tenth Circuit "that an officer is responsible for his or her reckless conduct that precipitates the need to use force."'. . . But this statement suffers from the same lack of specificity as does the general propositions from *Graham* and *Garner* that 'use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness,' which, by itself, 'is not enough.'. . The statement in *Allen*, that the reasonableness inquiry includes an evaluation of an officer's actions leading up to the use of force, is absolutely relevant in determining whether a police officer acted unreasonably in effecting a seizure, as we illustrated above. But it cannot alone serve as the basis for concluding that an officer's particular use of excessive force was 'clearly established,' *Pauly II*, 137 S.Ct. at 552. Accordingly, *Allen* is of little help in this case because the facts are completely different. Because there is no case 'close enough on point to make the unlawfulness of [Officer White's] actions apparent,' *Pauly I*, 814 F.3d at 1091 (Moritz, J., Dissenting) (alteration in original) (quoting *Mascorro*, 656 F.3d at 1208), we conclude that Officer White is entitled to qualified immunity. . . .Officer White is entitled to qualified immunity because his alleged use of excessive force was not clearly established in the circumstances of this case. It therefore cannot serve as the basis of liability for Officers Mariscal and Truesdale. . . And neither Officer Mariscal nor Truesdale committed a constitutional violation in his own right. Thus, there is no basis for holding either of them liable under § 1983. Accordingly, we REVERSE the district court's denial of summary judgment to Officers Mariscal,

Truesdale, and White, and REMAND with instructions to enter judgment in favor of each officer.")

Pauly v. White, 874 F.3d 1197, 1219 n.7 (10th Cir. 2017) (***Pauly III***), *cert. denied*, 138 S. Ct. 2650 (2018) ("[T]he concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits. *See, e.g.*, *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995) (holding that evidence of pre-seizure conduct was irrelevant to reasonableness); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (same); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (same); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (same). The Supreme Court very recently had an opportunity to resolve this issue but declined to do so[.] [referencing language in *Mendez*] Thus, at least for now, *Sevier* and *Allen* remain good law in this circuit.")

Pauly v. White, 874 F.3d 1197, 1223 (10th Cir. 2017) (***Pauly III***) (Moritz, J., concurring), *cert. denied*, 138 S. Ct. 2650 (2018) ("I agree with the majority that White is entitled to qualified immunity because the contours of the constitutional right at issue aren't clearly established. . . But unlike the majority, I would decline to address the constitutional question.")

Brown v. City of Colorado Springs, 709 F. App'x 906, ___ (10th Cir. 2017) ("Brown asks us to do exactly what the Supreme Court has told us not to do—define clearly established law based on *Graham* and *Garner*. . . The Supreme Court rejected this same argument in *Pauly*, declaring that '*Garner* and *Graham* do not by themselves create clearly established law.'. .The district court properly recognized that 'there is no precedent for the claims in this case.'. . In the Supreme Court's words, '[t]his alone should have been an important indication' that officers didn't violate a clearly established Fourth Amendment right. . . Just as the plaintiff in *Pauly* had failed to show that an 'officer acting under similar circumstances as [the officer-defendant] was held to have violated the Fourth Amendment,' Brown has failed to cite a case holding that an officer acting under similar circumstances as presented here had violated the Fourth Amendment. . . Instead, Brown relies on cautionary language from flashbang cases to show that the officers in this case violated a clearly established Fourth Amendment right when they detonated an explosive device while executing an arrest warrant. For a variety of reasons, we are unpersuaded that those cases provide Brown much help. . . .Brown cannot show any Supreme Court or Tenth Circuit decision on point or that the clearly established weight of authority from other circuits prohibited the officers' conduct in this case. . . Thus, we must reverse the district court's denial of qualified immunity to the Defendants on Brown's individual-capacity claims.")

Malone v. Bd. of County Commissioners, 707 F. App'x 552, ___ (10th Cir. 2017) (" 'For the law to be "clearly established," there ordinarily must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other circuits must point in one direction.'. . The Supreme Court has warned not to define a clearly established right 'at a high level of generality.'. . Instead, 'the clearly established law must be particularized to the facts of the case.'. . 'This is not to say that an official action is protected by qualified immunity unless the very

action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'. . 'A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . 'Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'. . For example, in *Mullenix*, an excessive-force case, the Supreme Court rejected as too general the 'rule that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'. . Instead, the relevant inquiry into whether the law at issue there was clearly established had to incorporate the particular facts presented in that case, asking: whether it was clearly established that the use of deadly force against 'a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer' violated the Fourth Amendment. . . Mullenix also cited to *Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004) (per curiam), in which the Supreme Court framed the question as 'whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the "situation [she] confronted": whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.'. . .Applying the Supreme Court's guidance here, the parties do not cite, nor could we find, any Supreme Court or Tenth Circuit case that is sufficiently close factually to the circumstances presented here to establish clearly the Fourth Amendment law that applies to our case. The cases Malone mentions in his brief are not sufficiently analogous.")

T.D. v. Patton, 868 F.3d 1209, 1212-13 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1270 (2018) ("We agree with the district court that Ms. Patton violated T.D.'s substantive due process right by knowingly placing T.D. in a position of danger and knowingly increasing T.D.'s vulnerability to danger. . . She recommended to the juvenile court that T.D. be placed and remain in Mr. Duerson's temporary custody despite her admitted concerns about T.D.'s safety in the home, her knowledge of Mr. Duerson's criminal history that included a conviction for attempted sexual assault against a minor in his care, and notice of evidence that Mr. Duerson was potentially abusing T.D. She failed to inform the juvenile court about her concerns and knowledge of Mr. Duerson's criminal history and made her affirmative recommendations out of fear of being fired. . . . Ms. Patton acted recklessly and in conscious disregard of a known and substantial risk that T.D. would suffer serious, immediate, and proximate harm in his father's home. Her conduct, taken as a whole, shocks the conscience and thus amounts to a substantive due process violation under the Fourteenth Amendment. Based on the facts and legal determination in this court's *Currier* decision, a reasonable official in Ms. Patton's shoes would have understood she was violating T.D.'s constitutional rights. In both *Currier* and here, county social workers removed children from their mothers' homes and placed them in their fathers' homes, where the children were abused. The social workers in both cases failed to alert the juvenile court of relevant facts undermining the fathers' fitness as caretakers and recommended that the fathers assume custody of the children—despite being on notice that the fathers' homes were places of danger. And, in

both cases, the social workers failed to investigate whether the fathers were abusing their children, despite being on notice of evidence suggesting abuse. Ms. Patton's conduct sufficiently resembles the conduct we held unconstitutional in *Currier* such that a reasonable official in her position would have known that her actions violated T.D.'s clearly established right. She was therefore not entitled to qualified immunity.")

Starrett v. City of Lander, 699 F. App'x 805, ___ (10th Cir. 2017) ("On appeal, Mrs. Starrett has offered no case to meet her burden of showing that the law was clearly established that she was entitled to resist Sergeant Romero's attempt to follow Mr. Starrett into the house to retrieve his shoes by shutting the door and telling him he could not enter because he did not have a warrant. Nor has she pointed us to any case that '*squarely governs* the case here[.]'. . Instead, she relies on three older Supreme Court cases stating there is a common-law right to resist an unlawful arrest. . . But that right 'has given way in many jurisdictions to the modern view that the use of force is not justifiable to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.' . . In any event, none of the cases is sufficiently 'particularized to the facts of [this] case[.]'. .We conclude that, given the 'unique set of facts and circumstances' this case presents, . . . Sergeant Romero and Officer Ramsey had arguable probable cause to arrest Mrs. Starrett for interference under Wyo. Stat. Ann. § 6-5-204(a). The district court therefore properly determined that the officers are entitled to qualified immunity on the unlawful arrest claim. . . . As in the district court, Mrs. Starrett has on appeal failed to 'identify a case where an officer acting under similar circumstances as [Officer Ramsey] was held to have violated the Fourth Amendment.'. . Instead, she outlines *Graham*'s general excessive-force principles. But the *Graham* factors 'do not by themselves create clearly established law,'. . . and, given the unique circumstances here, '[t]his is not a case where it is obvious that there was a violation of clearly established law under ... *Graham*.'. . We therefore conclude that Officer Ramsey was entitled to qualified immunity on the excessive-force claim.")

Apodaca v. Raemisch, 864 F.3d 1071, 1074-79 (10th Cir. 2017), *cert. denied*, 138 S. Ct. ___ (U.S. Oct. 9, 2018) ("We conclude that even if the alleged prohibition on outdoor exercise had violated the Eighth Amendment, the underlying constitutional right would not have been clearly established. The right would not have been clearly established because existing precedent would have left the constitutional question within the realm of reasonable debate. The underlying right turns on our opinion in *Perkins*. But *Perkins* can be read either expansively or narrowly. Under an expansive reading, *Perkins* would squarely prohibit the alleged denial of outdoor exercise for eleven months. But, under a narrow reading, *Perkins* would apply only to denials of *out-of-cell* exercise—a situation not present here. We need not decide which reading is correct. Because *Perkins* is ambiguous, our opinions do not clearly establish that an eleven-month deprivation of outdoor exercise would violate the Eighth Amendment. . . .A constitutional right is clearly established when a Tenth Circuit precedent is on point, making the constitutional violation apparent. . . This precedent cannot define the right at a high level of generality. . . Rather, the precedent must be particularized to the facts. . . But even when such a precedent exists, subsequent Tenth Circuit cases may conflict with or clarify the earlier precedent, rendering the law unclear.

See Lane v. Franks, 134 S. Ct. 2369, 2382-83 (2014). A precedent is often particularized when it involves materially similar facts. . . But the precedent may be adequately particularized even if the facts differ, for general precedents may clearly establish the law when the defendant's conduct '"obvious[ly]"' violates the law. . . Thus, a right is clearly established when a precedent involves '"*materially similar conduct*"' or applies '"with *obvious clarity*"' to the conduct at issue. . . .The plaintiffs allege a deprivation of the right to exercise outdoors for roughly eleven months. For the sake of argument, we may assume that this deprivation would violate the Eighth Amendment. Even with this assumption, the warden and director would enjoy qualified immunity because the underlying constitutional right had not been clearly established. Roughly three decades ago, we recognized a consensus in the case law regarding the importance of outdoor exercise for prisoners: 'There is substantial agreement among the cases ... that some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates ....' *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam). But we also made clear that a denial of outdoor exercise does not per se violate the Eighth Amendment. . .In the absence of a per se violation, courts must examine the totality of the circumstances. *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 810 n.8 (10th Cir. 1999). These circumstances include the length of the deprivation. . . .The plaintiffs rely on our published opinion in *Perkins v. Kansas Department of Corrections*. In *Perkins*, a prisoner invoked the Eighth Amendment, alleging a continuing inability to exercise outside of his cell for more than nine months. . . The district court dismissed the claim, and we reversed. . . In reversing, we expressed our holding in terms of the denial of 'outdoor exercise.'. . But, as noted above, the plaintiff in *Perkins* had alleged the inability to exercise not only outdoors but also anywhere outside of his cell. . .The resulting issue is whether our holding was

• expansive, prohibiting the extended denial of exercise *outdoors* or
• narrow, prohibiting only the extended denial of exercise outside of the *cell*.

The plaintiffs embrace the expansive interpretation of *Perkins*. . . . The warden and director embrace the narrow interpretation of *Perkins*, insisting that it applies only to deprivations of out-of-cell exercise. This interpretation also appears reasonable based on the content of *Perkins* and the later unpublished opinion in *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008). . . .[A] narrow interpretation is supported by our unpublished opinion in *Ajaj*, where we held that a year-long deprivation of outdoor exercise did not violate the Eighth Amendment. . . . If *Perkins* is read broadly, *Ajaj* might appear to conflict with *Perkins*. . . Which reading of *Perkins* is correct? We need not decide that today. For now, it is enough to conclude that the question is within the realm of reasonable debate, for *Perkins* can be read either expansively or narrowly. . . .At a minimum, *Perkins* would not render the warden and director 'plainly incompetent' for failing to recognize a constitutional prohibition against an eleven-month ban on outdoor exercise. *Perkins*'s ambiguity means that our circuit has not clearly established a right to outdoor exercise over an eleven-month period. As a result, the warden and director are entitled to qualified immunity.")

Lowe v. Raemisch, 864 F.3d 1205, 1208-12 & n.10 (10th Cir. 2017), *cert. denied*, 138 S. Ct. ___ (U.S. Oct. 9, 2018) ("The law is clearly established when a Supreme Court or Tenth Circuit precedent is on point or the alleged right is clearly established from case law in other circuits. . . The precedent is considered on point if it involves '"*materially similar conduct*"' or applies

‘“with *obvious clarity*”’ to the conduct at issue. Because the prior case must involve materially similar conduct or apply with obvious clarity, qualified immunity generally protects all public officials except those who are ‘“plainly incompetent or those who knowingly violate the law.”’ Mr. Lowe’s claim involves the disallowance of exercise outdoors rather than outside of his cell. In precedential opinions, we have reached four conclusions on the constitutionality of denying outdoor exercise to inmates:

1. The denial of outdoor exercise could violate the Eighth Amendment ‘under certain circumstances.’
2. The denial of outdoor exercise does not create a per se violation of the Eighth Amendment.
3. Restricting outdoor exercise to one hour per week does not violate the Eighth Amendment.
4. The denial of outdoor exercise for three years could arguably involve deliberate indifference to an inmate’s health under the Eighth Amendment.

These conclusions permit reasonable debate on the constitutionality of disallowing outdoor exercise for two years and one month. We have said that denying outdoor exercise could violate the Constitution under some circumstances, but we have not defined those circumstances. Thus, the constitutional inquiry would depend on a case-by-case examination of the totality of circumstances. . . .[W]e lack any on-point precedent regarding the constitutionality of disallowing outdoor exercise for a period approximating two years and one month. . . .Even when no precedent involves facts ‘materially similar’ to ours, the right can be clearly established if a precedent applies with ‘obvious clarity.’. . When the public official’s conduct is egregious, even a general precedent would apply with obvious clarity. . . .Even in the absence of egregious conduct, the constitutional violation may be so obvious that similar conduct seldom arises in our cases. . . .Ultimately, we consider whether our precedents render the legality of the conduct undebatable. *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016).[10] [fn. 10: We have described these principles in terms of a sliding scale. . . But our sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016). The possibility of a conflict arises because the sliding-scale approach may allow us to find a clearly established right even when a precedent is neither on point nor obviously applicable. . . We need not decide today whether our sliding-scale approach conflicts with Supreme Court precedent. As explained in the text, the defendants lacked clearly applicable precedents showing whether denial of outdoor exercise for two years and one month was sufficiently serious to violate the Eighth Amendment.] On this record, however, the deprivation of outdoor exercise for two years and one month would not have obviously crossed a constitutional line. Thus, the underlying right was not clearly established and the defendants are entitled to qualified immunity. . . .Qualified immunity is unavailable to officials who ‘knowingly violate the law.’. . Mr. Lowe applies this principle, arguing that the two officials knew that they were violating the law because a district court had already found a constitutional violation based on similar conditions at the same prison. . . We reject this argument based on a key factual distinction with the prior district court case, a conflict with Supreme Court precedent, and the existence of an erroneous assumption. First, the deprivation in the district court’s earlier case spanned *twelve years*. *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1138 (D. Colo. 2012). Here the alleged deprivation was far shorter: *two years and one month*. Second, the Supreme Court rejected a nearly identical argument in *Ashcroft v. al-Kidd*, 563 U.S.

731 (2011). There the Court concluded that a district court opinion, which identified the same defendant (Attorney General Ashcroft) and said that his actions were unconstitutional, did not clearly establish the underlying right because a district court's holding is not controlling in any jurisdiction. . .Third, Mr. Lowe assumes that a defendant's knowledge affects the availability of qualified immunity. We reject that assumption, for there is a single standard: 'whether it would have been clear to a reasonable officer that the alleged conduct "was unlawful in the situation he confronted."' If this standard is met, the defendant would be either plainly incompetent or a knowing violator of the law. . . For these reasons, the district court's *Anderson* ruling does not preclude qualified immunity.") [footnotes omitted]

Sause v. Bauer, 859 F.3d 1270, 1274-75 (10th Cir. 2017) ("[W]e assume that the defendants violated Sause's rights under the First Amendment when, according to Sause, they repeatedly mocked her, ordered her to stop praying so they could harass her, threatened her with arrest and public humiliation, insisted that she show them the scars from her double mastectomy, and then 'appeared ... disgust[ed]' when she complied—'all over' a mere noise complaint. . . But this assumption doesn't entitle Sause to relief. Instead, Sause must demonstrate that any reasonable officer would have known this behavior violated the First Amendment. . . Sause argues she can make this showing because it was clearly established that she had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'. . Alternatively, she asserts, '[t]he right to be free from official retaliation for exercising one's First Amendment rights [was] also clearly established.'. .We don't disagree with Sause's articulation of these general rights. But the Supreme Court has repeatedly and consistently warned us 'not to define clearly established law at [this] high level of generality.'. . Instead, '[t]he dispositive question is "whether the violative nature of [the defendants'] *particular conduct* is clearly established."'. . In other words, 'the clearly established law must be "particularized" to the facts of the case.'. . Thus, before we may declare the law to be clearly established, we generally require (1) 'a Supreme Court or Tenth Circuit decision on point,' or (2) a showing that 'the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'. .Here, Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here—i.e., a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation. In other words, 'this case presents a unique set of facts and circumstances.'. . And '[t]his alone' provides 'an important indication ... that [the defendants'] conduct did not violate a "clearly established" right.'"), *cert. granted and judgment reversed by* ***Sause v. Bauer***, 138 S. Ct. 2561 (2018) (per curam).

Sause v. Bauer, 859 F.3d 1270, 1279-80 (10th Cir. 2017) (Tymkovich, C.J., concurring) ("I fully join in Judge Moritz's opinion and agree that the officers' conduct here did not violate clearly established First Amendment precedent. I write separately to emphasize that Ms. Sause's

allegations fit more neatly in the Fourth Amendment context. And, I must add, either the officers here acted with extraordinary contempt of a law abiding citizen and they should be condemned, or, if Ms. Sause's allegations are untrue, she has done the officers a grave injustice by manufacturing such reprehensible conduct. . . .If true, Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home. The officers deny the alleged conduct, although we assume for purposes of a motion to dismiss that the allegations are true. And we do not know whether the district court would find a constitutional violation in these circumstances or, if so, whether any violation would be clearly established. But Ms. Sause did not make a Fourth Amendment claim on appeal and has only appealed the First Amendment cause of action. I agree First Amendment law is not clearly established for the reasons articulated by Judge Moritz in her well-written opinion."), *cert. granted and judgment reversed by* ***Sause v. Bauer***, 138 S. Ct. 2561 (2018) (per curam).

Pompeo v. Bd. of Regents of the University of New Mexico, 852 F.3d 973, 990 (10th Cir. 2017) ("In assessing defendants' claims of qualified immunity, we are mindful of the Supreme Court's admonition to 'define the clearly established right at issue on the basis of the specific context of the case.' . . Pompeo claims a right to use language in a course assignment that her professors found to be inflammatory without being criticized or pressured to make revisions. Because we conclude that such a right is not clearly established, the district court's grant of summary judgment in favor of defendants is **AFFIRMED**.")

Garcia v. Escalante, 678 F. App'x 649, ___, ___ (10th Cir. 2017) ("[A]kin to *White*, 'this case presents a unique set of facts and circumstances,'. . . that 'alone' should be 'an important indication' to us that Defendants' conduct did not run afoul of clearly established law[.] . . .In sum, guided by *Mullenix* and its progeny, we adhere to our view that there is no clearly established law that would have put Defendants—like 'every objectively reasonable officer,' *Aldaba*, 844 F.3d at 877, in a similar position—on notice in March 2009 that their arrest and prosecution of Plaintiff for possessing hydrocodone without a valid prescription was lacking in probable cause, and therefore violative of the Fourth Amendment, notwithstanding Plaintiff's presentation to them of a thirteen- or fourteen-month-old prescription.")

Vogt v. City of Hays, Kansas, 844 F.3d 1235, 1240-42, 1247-48 (10th Cir. 2017), *cert. dismissed as improvidently granted,* 138 S. Ct. 1683 (2018) ("Following *Chavez*, a circuit split developed over the definition of a 'criminal case' under the Fifth Amendment. The Third, Fourth, and Fifth Circuits have stated that the Fifth Amendment is only a trial right. . . .In contrast, the Second, Seventh, and Ninth Circuits have held that certain pretrial uses of compelled statements violate the Fifth Amendment. . . .Different approaches have emerged because the *Chavez* Court declined to pinpoint when a 'criminal case' begins. . . Like the Supreme Court, we have not yet defined the starting point for a 'criminal case.'. . .Like the Supreme Court, we have declined until now to unequivocally state whether the term 'criminal case' covers pretrial proceedings as well as the trial. Precedents like *Stover* provide conflicting signals without squarely deciding the issue. Nonetheless, today's case requires us to decide whether the term 'criminal case' covers at least

one pretrial proceeding: a hearing to determine probable cause. . . .To decide this issue, we join the Second, Seventh, and Ninth Circuits, concluding that the right against self-incrimination is more than a trial right. . . .Until today, the applicability of the Fifth Amendment to pretrial proceedings remained unsettled, for the Supreme Court had declined to decide 'the precise moment when a "criminal case" commences'. . . and we had declined to decide whether the Fifth Amendment applied to pretrial proceedings. . . And outside our circuit, courts had disagreed about the applicability of the Fifth Amendment to pretrial proceedings. . . Thus, when the police officers acted, they could not have known that the Fifth Amendment would be violated by the eventual use of the compelled statement to develop investigatory leads, initiate a criminal investigation, bring charges, or support the prosecution in a probable cause hearing. As a result, the alleged constitutional violation was not clearly established. In similar circumstances, the Ninth Circuit Court of Appeals took a different approach. That court interpreted the Fifth Amendment to apply in a pretrial hearing to determine whether to release or detain the defendant. . . This interpretation required the court to determine whether a police detective enjoyed qualified immunity after compelling a statement that was later used in a hearing to determine release or detention. . . To decide qualified immunity, the court considered the underlying purpose of qualified immunity, which was to prevent deterrence of reasonable officers trying to carry out their duties. . . This purpose led the court to 'focus on [the] officer's duties, not on other aspects of the constitutional violation.'. . Focusing on the officer's duties, the court declined to permit qualified immunity because the police detective had been on notice that coercion of a confession could ripen into a Fifth Amendment violation. . . And once the police detective coerced a confession and turned it over to the prosecutor, the detective's role in the constitutional violation was complete. . . Thus, the Ninth Circuit did not tarry over whether the detective would have known which uses would violate the Fifth Amendment; he knew all along that coercing a confession could lead to a Fifth Amendment violation. . . As a result, the Ninth Circuit determined that the detective was not entitled to qualified immunity. . .We respectfully disagree with this approach. The Ninth Circuit appeared to acknowledge that its test would allow police officers to incur personal liability for contributing to a constitutional violation that had not been clearly established. . . But qualified immunity protects officers from liability when the misconduct did not violate a clearly established right. . . The four police officers allegedly compelled a statement used before trial but not in an actual trial. Until now, the precedents had not clearly determined whether these uses would have violated the Fifth Amendment. Thus, even if the police officers could have anticipated the eventual use in a probable cause hearing, they could not have known that this use would violate the Fifth Amendment. Thus, we reject the approach taken in the Ninth Circuit. . . .Because it was not clearly established in 2013 or 2014 that the pretrial use of Mr. Vogt's statements would violate the Fifth Amendment, the four police officers are entitled to qualified immunity.")

Browder v. Casaus, 675 F. App'x 845, ___ (10th Cir. 2017) ("As we noted in *Browder I*, no one contends that Casaus acted with the specific intent to harm—the high end of culpability. . . We further recognized that a jury might ultimately conclude that his actions in '[s]peeding and jumping red lights' amounted to nothing more than negligence, below the level of culpability. . . But on the facts alleged in the complaint, applying the middle, deliberate-indifference standard, we held a

jury might also conclude that speeding through city streets for almost 9 miles 'through eleven city intersections and at least one red light—all for [Casaus's] personal pleasure, on no governmental business of any kind' showed a 'conscious contempt of the lives of others' sufficient to shock the conscience and state a substantive due process claim. . . .In *Browder I,* we found the law clearly established that a police officer could be liable 'for driving in a manner that exhibits "a conscience-shocking deliberate indifference" *to the lives of those around him*.'. . And *Browder I*'s general statement is entirely consistent with Supreme Court precedent, which has broadly characterized the risks posed by speeding police officers as encompassing 'all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.'. . Accordingly, we agree with the district court that, in order to show Casaus violated their Fourteenth Amendment rights, the Browders had to show only that Casaus acted with deliberate indifference to the risk his conduct posed to the motoring public in general—not to Lindsay and Ashley specifically. . . . Casaus attempts to resurrect his *Browder I* argument that, at the time of the accident, it wasn't clearly established that the commission of a traffic infraction by an officer in a police car could amount to a constitutional violation. But in *Browder I*, we held it was clearly established that Casaus's alleged conduct—speeding and running a red light for no law enforcement reason—could give rise to a substantive due process claim. . . Unwilling to let this argument go, Casaus points out that *Browder I* relied for this proposition on *Lewis*, where the Supreme Court 'expressly noted when a private person suffers a serious physical injury "due to a police officer's *intentional misuse* of his vehicle" a viable due process claim can arise.'. . Casaus suggests the term 'misuse' isn't defined and could include negligent conduct. Consequently, Casaus reasons, a reasonable officer couldn't be expected to know what type of misuse of a police vehicle could give rise to a constitutional claim. While this argument suffers from numerous flaws, . . . we need not expansively consider them. The bottom line is that we've already held that extant authority 'was more than enough to make clear to any reasonable officer in 2013 (the time of the accident) that the conduct alleged here could give rise to a claim under the Fourteenth Amendment.'. . That holding is both the law of the case and binding circuit precedent. Accordingly, we affirm the district court's denial of Casaus's motion for partial summary judgment.")

Muhammad v. Hall, 674 F. App'x 810, 813 (10th Cir. 2017) ("We agree with the district court. Assuming (without deciding) that Ms. Muhammad's reports and prior litigation qualified as constitutionally protected activity, the facts set forth in the second amended complaint show that Ms. Hall was ready and willing to hire Ms. Muhammad, but was prevented from doing so by her superior. Thus, the second amended complaint does not plausibly establish that Ms. Hall caused Ms. Muhammad to suffer an injury or that Ms. Hall was motivated to do so by retaliation. This court has not yet decided whether a subordinate employee can be liable for First Amendment retaliation when he or she merely acts at the direction of a superior who desires to retaliate. *See Trant v. Oklahoma*, 754 F.3d 1158, 1170 n.5 (10th Cir. 2014) (stating that '[w]e have never held that true subordinate employees may be liable for First Amendment retaliation claims' and declining to decide the issue). . . Further, the other circuits are not of one mind. *Compare King v. Zamiara*, 680 F.3d 686, 696 (6th Cir. 2012) ('Individuals who aid in the implementation of an adverse action at the instructions of a superior will be liable along with their superior if they knew

or should have known that the adverse action was unlawful.'), *with Johnson v. Louisiana*, 369 F.3d 826, 831 (5th Cir. 2004) ('[O]nly final decision-makers may be held liable for First Amendment retaliation employment discrimination under § 1983.'). Because Ms. Muhammad did not establish the *Worrell* elements, we need not decide the question here. . . But this lack of precedent also means that the law is not clearly established, so that Ms. Hall would be entitled to the protection of qualified immunity on this claim.").

Big Cats of Serenity Springs, Inc. v. Rhodes, 843 F.3d 853, 864, 868-69 (10th Cir. 2016) ("If we were writing on a blank slate, we might be persuaded that *Bivens* is a relic of another era, and that Congress is perfectly capable of policing federal misconduct. But given our case law, Supreme Court precedent, and the factual context present here, we are constrained to find that Big Cats may proceed. Big Cats alleges a garden-variety constitutional violation (hardly a new context), the regulatory scheme is plainly unavailable to remedy the alleged misconduct, and no special factors place AWA inspectors outside *Bivens*. We therefore agree with the district court that Big Cats' *Bivens* claim may go forward unless the inspectors are entitled to qualified immunity. . . . Because we see no meaningful difference between the *Colonnade* inspection scheme and the one here, reasonable APHIS inspectors should have known they could not forcibly enter a business facility to perform an inspection, absent a warrant or an exception to the warrant requirement. Big Cats alleges facts showing that the agents cut the locks to conduct a non-emergency inspection where the regulations did not provide for forcible entry. The law is clearly established that inspection officials cannot enter business premises without a warrant in those circumstances.")

Keith v. Koerner, No. 15-3219, 2016 WL 7176605, at *12-13 (10th Cir. Dec. 9, 2016) ("[A]t the time of the constitutional violation in October 2007, it was clearly established that Ms. Keith not only had a right to be free from attack by Mr. Gallardo, she also had a constitutional right to expect reasonable protection from TCF officials such as Warden Koerner and a reasonable response when sexual misconduct occurred. And Ms. Keith presented sufficient evidence that these clearly established rights were violated. She presented evidence of inappropriate behavior by Mr. Gallardo, systemic problems within the maintenance program, and misconduct throughout the facility. To be sure, the misconduct fell along a broad spectrum, ranging from undue familiarity to confirmed sexual assault. But we must consider the totality of the circumstances, including all instances of employee misconduct. Moreover, we must consider the evidence of limited investigation and lax discipline for both undue familiarity and sexual misconduct, evidence which supports an inference that a culture existed where TCF employees faced no real consequences for misconduct. Importantly, the evidence includes the inadequate investigation of the sexual misconduct allegations against Officers Bohn and Templeton, and the slack discipline imposed on Officer Bohn. In other words, viewing the evidence as a whole, a reasonable jury could conclude that Warden Koerner created an atmosphere where policies were honored only in the breach, and, as a result, he failed to take reasonable measures to ensure inmates were safe from the risk of sexual misconduct by TCF employees. Because Ms. Keith possessed a clearly established constitutional right and presented evidence of a constitutional violation by Warden Koerner, summary judgment was inappropriate on qualified-immunity grounds.")

Gutierrez v. Cobos, 841 F.3d 895, 903-07 (10th Cir. 2016) ("As in *Smith* and *Rojas*, we conclude the district court properly granted summary judgment. "This isn't to say [Plaintiffs] lacked (or possessed) a meritorious case," but "clients ... are usually bound by their lawyers' actions—or, as here, inactions." *Smith*, 707 F.3d at 1162. Plaintiffs failed to carry their burden of showing that Deputy Maynes violated clearly established federal law because their counsel did not make any legal argument in the district court to rebut qualified immunity. We therefore affirm the district court's grant of summary judgment on Count III. . . .Plaintiffs dispute the hot-pursuit exception applies here. They argue Deputy Maynes had probable cause to suspect Ms. Gutierrez of only misdemeanor offenses. . . and they contend '[p]robable cause to arrest for a misdemeanor, by itself, does not justify warrantless entry into a home under the hot pursuit exception.'. . Further, they argue that, as of 2009, it was clearly established that 'a police officer could not enter a home without a warrant while in hot pursuit of a suspected misdemeanant.'. . We reject this argument because the law is unsettled even now as to whether an officer's hot pursuit of a misdemeanor suspect into a home violates the Fourth Amendment. In *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam), the Supreme Court explained that 'federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect.'. . In reversing the Ninth Circuit's decision to deny qualified immunity to an officer on this issue, the Court emphasized that its earlier cases had not decided this question. . . And the Court pointedly declined to express any view on the constitutionality of warrantless entries made in hot pursuit of misdemeanor suspects. . . As for Tenth Circuit authority, Plaintiffs cite *Mascorro v. Billings*, 656 F.3d 1198 (10th Cir. 2011), and although they acknowledge a 2011 decision cannot serve as clearly established law in 2009, Plaintiffs nevertheless appear to argue that *Mascorro*'s discussion of 'serious offenses' and its citation to an earlier case, *Bledsoe v. Garcia*, 742 F.2d 1237 (10th Cir. 1984), supply the clearly established law they need. . . We disagree. . . . *Mascorro* . . . requires a 'serious offense' along with other exigent circumstances, but *Mascorro* did not define 'serious offense' or establish that warrantless entries made in hot pursuit of all misdemeanor suspects necessarily violate the Fourth Amendment. . . . Neither *Mascorro* nor *Bledsoe* can do the work Plaintiffs need to meet their burden, and they cite no other hot-pursuit cases. We therefore affirm the district court's grant of summary judgment to Deputy Maynes on Count I because Plaintiffs failed to demonstrate that it was 'beyond debate,'. . . in 2009 that the Constitution prohibited a warrantless entry based on hot pursuit in the circumstances presented here. . . . Plaintiffs alleged that Deputy Maynes violated Ms. Flores's Fourth Amendment rights in two respects. First, in Count III, Plaintiffs alleged Deputy Maynes used excessive force against Ms. Flores. But, as already discussed, the district court granted summary judgment to Deputy Maynes on this claim, and on appeal Plaintiffs waived review of the excessive force claim as to Ms. Flores . . . . Second, in Count II, we understand Plaintiffs to allege that Deputy Maynes unreasonably seized Ms. Flores when he tased her because, irrespective of the amount of force used, he had no legal justification to seize her at all. They argue any seizure of Ms. Flores was unreasonable because she 'was not suspected of committing any crimes.'. . .On Count II, we must again affirm the grant of summary judgment. Plaintiffs failed to show the law was clearly established in 2009 that a tasing under these circumstances was a seizure,

and we therefore need not address whether Deputy Maynes had the reasonable suspicion or probable cause necessary to seize Ms. Flores. . . . Plaintiffs do not cite authority that clearly establishes Ms. Flores was seized. Although they cite several taser cases, . . . these cases concerned excessive force claims and did not establish that the tasing of Ms. Flores necessarily constituted a seizure. Plaintiffs not only failed to provide legal authority showing it was clear in 2009 that a tasing under these circumstances was a seizure, they did not even provide general authority showing when other methods of police restraint constitute seizures in like circumstances. . . . At oral argument, Plaintiffs candidly acknowledged they did not cite a case establishing when use of a taser effects a seizure. . .We do not and need not decide here whether Ms. Flores was seized. Because Plaintiffs did not proffer clearly established authority that Ms. Flores was seized, they did not carry their burden to rebut qualified immunity on this illegal seizure claim.")

Vasquez v. Lewis, 834 F.3d 1132, 1137-39 (10th Cir. 2016) ("Currently, twenty-five states permit marijuana use for medical purposes, with Colorado, Alaska, Oregon, Washington, and Washington, D.C. permitting some recreational use under state law. . . Thus, the Officer's reasoning would justify the search and seizure of the citizens of more than half of the states in our country. It is wholly improper to assume that an individual is more likely to be engaged in criminal conduct because of his state of residence, and thus any fact that would inculpate every resident of a state cannot support reasonable suspicion. Accordingly, it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate. And we cannot think of a scenario in which a combination of otherwise innocent factors becomes suspicious because the individual is from one of the aforementioned twenty-five states or the District of Columbia. Even under the totality of the circumstances, it is anachronistic to use state residence as a justification for the Officers' reasonable suspicion. Absent a demonstrated extraordinary circumstance, the continued use of state residency as a justification for the fact of or continuation of a stop is impermissible. . . .In sum, Vasquez's conduct does not create reasonable suspicion. What we have here is a driver traveling from Colorado to Maryland, on a major interstate; in an older car despite owning a newer car; with blankets and a pillow obscuring items in the back seat; who did not have items visible that an officer expected to see; and who was and continued to be nervous when pulled over by officers late at night. Such conduct does not raise an inference of reasonable suspicion. Thus, we conclude that the Officers violated Vasquez's Fourth Amendment rights in searching his car. . . We next turn to whether it was clearly established, at the time of the incident, that the Officers' actions violated Vasquez's constitutional rights. . . . We have previously held, under strikingly similar circumstances, that an officer—in fact, one of the officers before us now—did not have reasonable suspicion to further detain a defendant after issuing a speeding warning. . . . In both cases, Jimerson detained an individual because: he thought the car was unusual (Vasquez's older car and Wood's rented car); the car had 'unusual' but typical items in it (Vasquez's items covered by blankets and Wood's trash wrappers and maps); and the driver was nervous, leaving a drug source state, and passing through Kansas. The facts of these cases are almost indistinguishable. The district court erred in concluding that the differences between Wood and this case were significant. . . Wood 'place[s] the statutory or

constitutional question beyond debate' and provides 'contours [that] are sufficiently clear that a reasonable offic[er] would understand that what he is doing violates that right.'. . Thus, at the time of the detention, it was clearly established that the Officers did not have reasonable suspicion based upon the articulated circumstances.")

Vasquez v. Lewis, 834 F.3d 1132, 1140-42 (10th Cir. Aug. 23, 2016) (Tymkovich, C.J., dissenting) ("This case presents a close call on reasonable suspicion. But the essence of qualified immunity is to give government officials protection in resolving close calls in reasonable ways. Because the majority employs a divide-and-conquer analysis specifically rejected by the Supreme Court and because Vasquez cannot identify clearly established law necessary to overcome qualified immunity, I respectfully dissent. . . .Vasquez points to no Supreme Court or Tenth Circuit case with sufficiently analogous facts. He and the majority rely on a case where we held the police lacked reasonable suspicion where the driver 'had fast food wrappers and other trash in his car, he had open maps out, he misidentified the place where he picked up his rental car, and he described somewhat expensive travel plans despite being temporarily employed.'. . I disagree that *Wood* clearly defines the absence of reasonable suspicion here, especially given the multiple times we have affirmed district court decisions finding reasonable suspicion while citing and distinguishing *Wood*. . . .Most notably, the two cases differ in the degree of unusual travel plans. The court in *Wood* declined to give any weight to Wood's 'unusual' travel plans—driving a rental car from Sacramento to Topeka. . . . Vasquez's travel plans are sufficiently distinct as to allow a reasonable officer to be more suspicious. Vasquez asserted he was moving, but no items in his car aligned with his story. Vasquez was driving in the middle of the night, apparently sleeping in his car. Vasquez was driving a newly-purchased twenty-year-old car, despite owning a new car, and had a flimsy, even implausible, explanation as to why. . . Because reasonable officers may differ regarding whether Vasquez's detention violated the Fourth Amendment, I would affirm the district court's finding of qualified immunity.")

Culver v. Armstrong, 832 F.3d 1213, 1217-20 (10th Cir. 2016) ("In this case, we exercise our discretion and proceed directly to the qualified immunity standard's second inquiry. We need not go so far as the district court and decide (1) whether Defendant had probable cause to arrest Plaintiff, *i.e.*, whether a constitutional violation occurred. Rather, we need only decide (2) whether an officer in the situation Defendant confronted could have reasonably believed he had probable cause to arrest Plaintiff, *i.e.*, whether the constitutional right was clearly established in the factual context of this case. . . . Plaintiff seriously misunderstands the nature of our qualified immunity inquiry. He tells us the law was clearly established at the time of his encounter with Defendant because a warrantless arrest absent probable cause has been unlawful from time immemorial. . . . Simply to say the law has long recognized one's right to be free from arrest absent probable cause casts way too high a level of generality over our inquiry. . . .That Defendant cited Plaintiff for public intoxication alone is inconsequential. We measure probable cause against an objective standard. That an officer may not have subjectively believed probable cause existed to arrest a suspect for a certain crime does not preclude the Government from justifying the suspect's arrest based on any crime an officer could objectively and reasonably have believed the suspect

committed. . . .The facts of this case, when considered together with the Wyoming Supreme Court's construction of Wyo. Stat. Ann. § 6-5-204(a) in *Tillett* and *Newton*, arguably were sufficient to warrant a prudent officer in believing Plaintiff had committed or was committing the criminal offense of 'interfer[ing] with ... a peace officer while engaged in the lawful performance of his official duties' in violation of Wyoming law. And this means that at the time of his encounter with Defendant, the law was not clearly established in Plaintiff's favor, such that a reasonable officer would have known that seizing Plaintiff was against the law.")

Wright v. Collison, 651 F. App'x 745, 748-49 (10th Cir. 2016) ("We dispose of the claims against Sheriff Stanley on the clearly-established-law prong. '[W]e inquire whether, under [Mr. Wright's] version of the facts, then-extant clearly established law would have given Sheriff [Stanley] fair warning that he could be held liable for his conduct under a supervisory-liability theory for violating [Mr. Wright's due-process] rights.'. . .Although Sheriff Stanley argued that Mr. Wright had not presented evidence that the suggested remedies were feasible (and Mr. Wright has not disputed that a sheriff was required to take all prisoners brought for booking), the district court said it should not weigh the evidence on the matter. It concluded that Sheriff Stanley's supervisory conduct could be considered unconstitutional because it was clearly established that 'prison officials have a duty to protect prisoners from violence at the hands of other prisoners.'. . But the law governing a sheriff's obligations *in these circumstances* was not clearly established. The issue is whether case law existing as of August 2011 would alert any reasonable sheriff that he had a constitutional duty to reduce overcrowding by any of the measures suggested by Mr. Wright. But neither Mr. Wright nor the district court has cited such case law. Sheriff Stanley is entitled to qualified immunity.")

Wright v. Collison, 651 F. App'x 745, 750 (10th Cir. 2016) ("At the time of Mr. Wright's beating, the law was clearly settled that prison authorities had a constitutional obligation to act to protect a prisoner who had been plausibly threatened with serious harm by fellow inmates. . . A defendant is not entitled to qualified immunity simply because the threat and the surrounding circumstances in his or her case are not identical to those in any precedent. If the evidence reveals that the threat of serious injury is plausible, the duty to protect is clear. As for whether Officers Collison and Cannon acted with deliberate indifference, we believe that a reasonable juror could believe that their decision to put Mr. Wright in the cell, rather than keeping him in their custody while deciding where best to place him, showed not just negligence but the requisite recklessness. We therefore affirm the court's denial of the qualified-immunity motions by Officers Collison and Cannon.")

Columbian Fin. Corp. v. Stork, 811 F.3d 390, 393 (10th Cir. 2016) ("Columbian Financial alleged violation of a clearly established right to procedural due process when commission officials seized the bank's assets and placed them under FDIC receivership without a predeprivation hearing or a prompt postdeprivation hearing. In our view, Ms. Stork and Mr. Thull enjoy qualified immunity on this claim because the alleged conduct would not have violated a clearly established constitutional right. Thus, we agree with the district court's decision to dismiss the claims for damages against Ms. Stork and Mr. Thull.")

Sanchez v. Hartley, 810 F.3d 750, 760-61(10th Cir. 2016) ("[W]e conclude that the defendants should have realized that the knowing or reckless use of a false confession to institute legal process would violate a clearly established constitutional right. The purported uncertainty did not involve the constitutionality of the conduct; instead, the purported uncertainty involved whether the violation would

• constitute malicious prosecution or false imprisonment and

• involve the Fourth Amendment or the Fourteenth Amendment's right to procedural due process.

In our view, the defendants misread our precedents, which by 2009 had clearly recognized malicious-prosecution claims under the Fourth Amendment after the initiation of a legal process resulting in an unreasonable seizure. . . The district court properly held that Mr. Sanchez had adequately alleged the violation of a clearly established constitutional right. As a result, we uphold the denial of the defendants' motion to dismiss on the basis of qualified immunity.")

> *See also* ***Sanchez v. Hartley***, No. 13-CV-1945-WJM-CBS, 2017 WL 4838738, at *22–23, *30 (D. Colo. Oct. 26, 2017) ("The Court is fully aware of the Supreme Court's recent emphasis on defining clearly established rights with specificity, *see, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 552 (2017), but the specificity Dickson seeks is absurd. *Pierce* established as of 2004 that a government official responsible for investigating a crime can be liable for malicious prosecution if that official knowingly or recklessly supplies false evidence against the accused. Dickson cannot reasonably claim that he needed further notice specifically that he could be liable even where other police officers, the prosecutor, the judge, etc., could have discovered for themselves that he introduced false evidence into the investigation. . . In short, no Defendant can claim qualified immunity in this case *if* there is a genuine dispute of fact over whether that Defendant subjectively formed the opinion, or recklessly disregarded a serious suspicion, that Sanchez's confession was false. Stated somewhat differently, is there enough evidence from which a reasonable jury could agree with Sanchez that a particular Defendant has been lying about his or her state of mind since 2009? The Court must keep this question in mind for the remainder of its analysis. The Court now turns to the elements of Sanchez's claim that Defendants have variously challenged. . . .Sanchez has shown he is prepared to introduce competent evidence of the six factual scenarios that the Tenth Circuit endorsed as sufficient to establish knowledge or reckless disregard. The Tenth Circuit has further established that knowledge or reckless disregard in these circumstances would strip an official of qualified immunity. . . Thus, the qualified immunity question as to each Defendant turns on genuine disputes of material fact that a jury must resolve, and this case must accordingly be set for trial.")

Henderson v. Glanz, 813 F.3d 938, 953 (10th Cir. 2015) ("Ms. Henderson has provided no authority clearly establishing that an officer violates the Eighth Amendment when that officer, as here with DO Thomas, has no subjective knowledge of risk of assault to an inmate, leaves to attend

to a medical emergency, and does so believing the inmate is in a locked room under the guard of another officer. Moreover, although DO Thomas may have violated Jail policy by leaving the medical unit in the care of only DO Johnson, Ms. Henderson offers no authority to show this was a clearly established constitutional violation. Because Ms. Henderson has not carried her burden to show violation of a clearly established constitutional right, the district court erred in denying DO Thomas qualified immunity.")

Callahan v. Unified Gov't of Wyandotte Cty., 806 F.3d 1022, 1027-30 (10th Cir. 2015) ("We have discretion to decide which prong of the qualified immunity analysis to address first. . . Because we conclude that Plaintiffs have not carried their burden in showing that the law was clearly established, it is unnecessary to address whether Defendants had probable cause. In this circuit, to show that a right is clearly established, the plaintiff must point to 'a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'. . The law is also clearly established if the conduct is so obviously improper that any reasonable officer would know it was illegal. . . Without such conduct, case, or consensus, we may not second-guess judgments of law enforcement with the benefit of hindsight. Plaintiffs and the district court confounded this inquiry by engaging in generic, overbroad, and conclusory analyses on the question of clearly established law. Both assert that the law was clearly established that an officer must have probable cause to make a warrantless arrest. Of course it was. But such a sweeping pronouncement of the law could not put Defendants on fair notice that their conduct was illegal. Presenting the issue so broadly is at odds with the Supreme Court's consistent admonishment 'not to define clearly established law at a high level of generality.'. . Though 'a case directly on point' is not required, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . The proper and properly-focused inquiry is whether the law was clearly established that an officer could not arrest an entire small group when he knows some unidentifiable members, if not all members, of that group have committed a crime. This question of probable cause in multi-suspect situations is far from beyond debate. Plaintiffs and the district court relied upon *Ybarra v. Illinois* to remind us that probable cause must be particularized to the individual who is searched or seized. . . Indeed, *Ybarra* may have served as a case on point if *Maryland v. Pringle*—which the district court appears to have overlooked in its clearly established law analysis—had never been decided. But *Pringle* makes the question debatable at the very least, and therefore precludes a finding that the law was clearly established. . . .Before we hold officers liable, we must ensure that they were fairly put on notice that their actions were unlawful. The contours of the law must be sufficiently drawn so that a reasonable officer knows when he is acting outside of those lines—the law must be clearly established. That was simply not the case here. Though *Ybarra* requires particularized probable cause, *Pringle* raises questions regarding how that requirement is satisfied in multi-suspect situations. The officer in *Pringle* knew a crime had been committed but could not identify the perpetrator. He was presented with three suspects, none of whom were independently suspected prior to the stop. Evidence of a "common enterprise" existed, and so the officer could reasonably infer that all present were involved in the crime. In such a scenario, the Supreme Court seemed satisfied that *Ybarra's* particularized probable cause requirement was met. . . But what if there

were ten passengers, not three? What if the suspects were in a house, not a car? What if they were engaged in theft, not drug dealing? The Court did not establish a clear standard for applying *Pringle* beyond its specific facts. But neither are the facts of this case so distinct from *Pringle* that an officer could not reasonably assume it applied. Simply put, *Pringle's* application to this case is debatable. . .We cannot ask officers to make a legal determination—that law professors probably could not agree upon—without any guidance from the courts and then hold them liable for guessing incorrectly. Qualified immunity exists to prevent exactly that. Plaintiffs offer us no other case on point to establish that Defendants violated their clearly established rights by arresting the entire unit.")

Toler v. Troutt, 631 F. App'x 545, 547-48 (10th Cir. 2015) ("We disagree with the district court's framing of what had to be clearly established. In stating that deliberate indifference to an inmate's medical needs is a clearly established constitutional violation, . . . the district court's parameters were overly broad. If such a general statement of the constitutional violation that must be clearly established were sufficient, qualified immunity would almost never be granted. In this case, the proper inquiry is whether it was clearly established that Dr. Troutt's conduct—prescribing a medication in treating Mr. Toler's medical condition that was different than the medication recommended by consulting physicians—was deliberately indifferent to Mr. Toler's medical needs. Not only was this not clearly established, but the law was clearly established to the contrary. . . . *Alloway*, which the magistrate judge relied on to establish the predicate constitutional violation, offers no support for a clearly-established-law argument. In addition to being a single nonprecedential decision of a panel of our court, it is distinguishable from the situation here because it involved a complete denial of medication, as opposed to the substitution of alternative medicines as in this case, and applied a forgiving abuse of discretion standard to the granting of injunctive relief. . . . The bottom line is that Mr. Toler identifies no decision clearly establishing the proposition that exercising medical judgment in prescribing one course of treatment over another constitutes deliberate indifference to a serious medical need. He cannot identify such precedent because our controlling precedent clearly establishes the law to the contrary.")

Maresca v. Bernalillo Cnty., 804 F.3d 1301, 1310-12 (10th Cir. 2015) ("The arrests at issue here were not supported by probable cause because Fuentes lacked an objectively reasonable basis to believe that the Marescas' truck was stolen. An unreasonable mistake of fact cannot furnish probable cause. . . .Moreover, in determining whether there is probable cause, officers are charged with knowledge of any 'readily available exculpatory evidence' that they unreasonably fail to ascertain. . . .In this case, such readily available exculpatory evidence included the stolen-vehicle description already on Fuentes's computer screen before the arrest, which did not match the Marescas' truck in style, make, model, year, color, license plate number, or registration status; and the corrective information that dispatch presumably would have provided had Fuentes waited for verification, in accordance with her training. These steps were not taken. . . .The sole basis for arresting the Marescas was Fuentes's mistaken and unreasonable belief that their truck was stolen. That belief arose because Fuentes mistyped the Marescas' license plate number into her computer, thereby triggering the stolen vehicle report. We do *not* hold that a mere typing error in entering a

license plate number would make it unreasonable for the officer to rely on the result of the database inquiry. In the often unpredictable and fast-paced context of traffic stops, we cannot require perfection—only reasonable behavior. Our conclusion that it was unreasonable for Fuentes to arrest the Marescas is based upon all the circumstances of the case and, in particular, Fuentes's failure to use readily available information—already on the computer screen in front of her and from the dispatcher—to verify that the Marescas' vehicle was reported stolen before arresting them. . . .Every application of the Fourth Amendment's reasonableness standard is fact-dependent, and the myriad circumstances officers confront do not lend themselves to bright-line rules. Thus, we do not suggest that an officer must *always* double-check a database hit or await confirmation from dispatch that the hit is accurate. There are undoubtedly circumstances that would justify a reasonably prudent officer's decision to bypass such steps. However, in the circumstances of this case, which did not suggest any likely threat to the arresting officers or any need for immediate action preventing verification, a reasonable officer would be expected to confirm the accuracy of her information in light of the disparity between the vehicle described on the stolen vehicle report and that driven by the Marescas. In fact, Fuentes could have detected her error by merely reading (or rereading) the computer screen right in front of her that reported the database result. . . . Therefore, the undisputed facts establish that Fuentes violated the Fourth Amendment when she arrested the Marescas without probable cause. And it was clearly established, at the time of this arrest, that an officer must have probable cause to arrest an individual, and the officer must reasonably investigate readily available exculpatory evidence 'before invoking the power of warrantless arrest and detention.'. . We therefore conclude that Fuentes is not entitled to qualified immunity on the Marescas' unlawful arrest claim, and, to the contrary, the Marescas are entitled to summary judgment against Deputy Fuentes on that claim.")

Maresca v. Bernalillo Cnty., 804 F.3d 1301, 1315-16 (10th Cir. 2015) ("[W]e reject the officers' argument that the Marescas' excessive force claim fails as a matter of law because any injuries the Marescas suffered were '*de minimis.*' As an initial matter, it is not clear that a § 1983 excessive force claim raising excessive force issues beyond mere handcuff use would fail at the summary judgment stage if the plaintiff alleged and submitted evidence of only *de minimis* injury. . . . Generally, since *Cortez,* the Tenth Circuit has required a showing of more than *de minimis* injury only in Fourth Amendment excessive force cases based on handcuffing. . . Here, however, we need not decide whether the Marescas need to show more than *de minimis* injury because the Marescas presented evidence that each of them suffered psychological and emotional injury that significantly exceeded any *de minimis* requirement. . . .Under *Cortez,* we must consider whether the Marescas have an excessive force claim that is separate from and in addition to their unlawful arrest claim. The reasonableness of the force used during an arrest ordinarily involves questions of fact for the jury. . . That is the case here. Because there are genuine disputes of facts that are material to the question of whether the deputies used excessive force to arrest the Marescas—including whether the deputies pointed their weapons at members of the Maresca family and whether the deputies made nine-year-old M.M. lie on the highway with her hands behind her back—summary judgment is not appropriate on this claim for any party.")

[*See also* ***United States v. Rodella***, 804 F.3d 1317, 1327-29 (10th Cir. 2015)([T]his court's post-*Cortez* cases reflect the view that the holding in *Cortez* is limited to handcuffing cases. . . Moreover, the Supreme Court's decision in *Wilkins v. Gaddy* . . . effectively rebuts any assertion that *Cortez's* 'de minimis injury' requirement is applicable beyond handcuffing-only cases. . . . Notably, the Eighth Circuit has applied *Wilkins* to Fourth Amendment excessive force claims generally, while carving out a narrow exception for handcuffing-only claims. Specifically, in *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir.2011), the Eighth Circuit rejected the notion 'that evidence of only *de minimis* injury necessarily forecloses a claim of excessive force under the Fourth Amendment.'. . . The Eleventh Circuit has also applied the holding in *Wilkins* to an excessive force claim brought under the Fourth Amendment. . . . In light of the authorities discussed above, we reject the central premise of Rodella's argument, i.e., that there is a de minimis injury requirement for Fourth Amendment excessive force claims in cases which involve more than handcuffing. . . As a result, we conclude Rodella's challenge to the sufficiency of the evidence underlying his conviction for violating 18 U.S.C. § 242 is without merit.")]

Arden v. McIntosh, 622 F. App'x 707, 711 (10th Cir. 2015) ("[W]e examine the state of the law in August 2010 to determine whether it was clearly established that in serving a community caretaking function, a police officer was prohibited from removing firearms from the home of the suicidal homeowner. Deputy Bondell was faced with the following circumstances: a 911 emergency call reported a suicidal party/drug overdose; she arrived to find Mr. Arden in his bedroom, incoherent and unresponsive to the point of needing help to walk to the ambulance, so he could be taken to the hospital where he was placed on a mental health hold; she observed several firearms in plain sight, some in Mr. Arden's bedroom within his reach; and she was aware that Mr. Arden had attempted suicide just ten days earlier. We have found no authority clearly establishing that firearms may not constitutionally be removed from a residence under these circumstances. . . Therefore, we conclude that a reasonable officer could believe that she was authorized to remove the firearms temporarily. This is sufficient to establish Deputy Bondell's qualified-immunity defense as a matter of law.")

McInerney v. King, 791 F.3d 1224, 1238 (10th Cir. 2015) ("Although there is no Tenth Circuit or Supreme Court precedent dealing with the exact factual scenario we have here, 'there will almost never be a previously published opinion involving exactly the same circumstances,' and '[w]e cannot find qualified immunity wherever we have a new fact pattern.'. . To be sure, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . Simply put, Officer King had fair notice that his conduct in entering Ms. McInerney's house without a warrant was unlawful. Moreover, based on the existing case law at the time of Officer King's warrantless entry—both those cases finding exigent circumstances and those holding such circumstances were not present—it was clearly established that the circumstances he confronted did not constitute exigent circumstances. Finally, it was clearly established that officers may not create exigent circumstances to justify their actions. Thus, the district court erred in granting Officer King summary judgment based on qualified immunity.")

Waugh v. Dow, 617 F. App'x 867, 878-79 (10th Cir. 2015) ("The law governing the constitutional assessment of Deputy Dow's conduct, as to both the state-created danger theory and the deliberate-indifference standard for actions taken with time for actual deliberation, was clearly established at the time of the operative events—as evident from the precedent cited throughout this decision. While none of this precedent involved a citizen-assistance situation like that here, '[a] previous decision need not be materially factually similar or identical to the present case; instead, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . And this circuit has noted that 'the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'. . Applying these standards to the record developed thus far, we agree with the district court that a reasonable officer in Deputy Dow's position would have understood that his conduct—involving the creation of, and a conscience-shocking deliberate indifference to, a substantial risk of serious and immediate harm to Mr. Waugh—violated Mr. Waugh's constitutional rights.")

Browder v. City of Albuquerque, 787 F.3d 1076, 1082-83 (10th Cir. 2015) ("Having determined that, taking the facts alleged as true, Sergeant Casaus violated the constitutional rights of Ashley and Lindsay Browder one more question still remains: were those rights clearly established at the time at issue in this case such that 'every reasonable official would have understood that what he [was] doing' violated them? . . . Unless we can say so much, Sergeant Casaus rightly reminds us, he remains entitled to qualified immunity, whatever he may have done. In deciding the 'clearly established law' question this court employs a 'sliding scale' under which 'the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'. .. After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt. . . . Ours is perhaps a case along these lines. We've encountered plenty of cases involving officers responding to emergency calls who unintentionally cause traffic accidents. But we haven't encountered many cases involving deadly traffic accidents with officers speeding on their own business—presumably (hopefully) because such things happen rarely. Even so, the Supreme Court and this court have both spoken unmistakably to this situation. In *Lewis*, the officer was using his police car to respond to an emergency and the Court held he didn't violate the Constitution. But the Court also expressly noted when a private person suffers a serious physical injury '"due to a police officer's *intentional misuse* of his vehicle"' a viable due process claim can arise. . . As early as 1996, this court warned that an officer who kills a person while speeding at 60 miles an hour on surface streets absent any emergency and in violation of state law invites a Fourteenth Amendment claim. *Williams v. City and County of Denver*, 99 F.3d 1009 (10th Cir.1996), *vacated*, 140 F.3d 855 (10th Cir.1997). Though this court eventually vacated the *Williams* panel decision and remanded the case for reconsideration in light of *Lewis*, the result proved the same in the end precisely because *Lewis* itself made the same point the *Williams* panel had. *See Williams v. City and County of*

Denver, Civ. Act. No. 90 N 1176, at 16 (D.Colo. Sept. 28, 1999). Indeed, in *Green* this court noted *Williams's* warning with approval. 574 F.3d at 1298 n. 5. And it proceeded to hold that, as of 2006, it was clearly established 'a police officer *could* be liable under the Fourteenth Amendment' for driving in a manner that exhibits 'a conscience-shocking deliberate indifference' to the lives of those around him. . . Taken collectively, we believe all this was more than enough to make clear to any reasonable officer in 2013 (the time of the accident) that the conduct alleged here could give rise to a claim under the Fourteenth Amendment.")

Quinn v. Young, 780 F.3d 998, 1007-14 (10th Cir. 2015) ("[T]he salient Fourth Amendment questions presented are (1) whether the Officers possessed probable cause to arrest Mr. Quinn and Ms. Gonzalez for committing larceny in this sting operation; and (2) whether extant clearly established law in July of 2010 would have placed a reasonable, similarly situated police officer on notice that *no* probable cause existed for the warrantless arrests in this sting operation—more specifically, that no probable cause existed that Mr. Quinn and Ms. Gonzalez intended to permanently deprive another of property. As our qualified-immunity jurisprudence permits us to do, we exercise our discretion to proceed straight to the latter question and resolve this claim on the clearly-established-law prong of our qualified-immunity test. . . That is, without deciding whether the Officers violated Plaintiffs' Fourth Amendment rights by effecting the arrests at issue, we conclude that any constitutional violation would not have been apparent based on the clearly established law existing at that time. It follows ineluctably that the Officers are entitled to qualified immunity on Plaintiffs' Fourth Amendment claim. . . .Our qualified-immunity conclusion is predicated upon the specific factual context of the Officers' conduct—a larceny sting operation—which presents a set of 'circumstance[s] unique in itself' under extant clearly established law. . . As we detail below, Plaintiffs have not directed us to any clearly established law involving such sting operations or an analogous law-enforcement setting, nor did the district court rely on any such law. This caselaw void is significant and ultimately determinative because we cannot confidently conclude that a reasonable officer engaged in a sting operation, such as the one here, would have had fair warning based on the holdings of non-sting cases regarding the quantum and quality of proof necessary to establish probable cause for a larceny offense, especially with respect to a suspect's specific intent—that is, the intent to permanently deprive another of property. We are not alone among the circuit courts in recognizing that sting operations present unique questions relating to suspect culpability, particularly regarding the question of intent. . . .Ultimately, having carefully reviewed the specific non-sting authorities that Plaintiffs identify here, and upon which the district court relied, we determine that the Officers would not have had fair warning that their arrests of Mr. Quinn and Ms. Gonzalez were lacking in probable cause, including regarding the intent element. In other words, in the context of the Tact Plan's backpack sting operation, we conclude that no constitutional violation would have been apparent to the Officers based on the extant clearly established law. As explained below, the district court's clearly-established-law analysis was conducted at too high a level of generality—both with respect to our caselaw and with respect to New Mexico law. And Plaintiffs' attempt to bolster the district court's analysis through further authorities is unavailing. In sum, because the district court did not rely upon, and Plaintiffs have not identified, any extant clearly established law that would have given the Officers

fair warning that they lacked probable cause to effect arrests of Mr. Quinn and Ms. Gonzalez in their larceny sting operation, we conclude that the Officers are entitled to qualified immunity and the district court erred in finding to the contrary. . . .At bottom, by relying upon *Keylon* in such a general sense, the district court committed error. . . *Keylon* provides negligible support for the proposition that the law was clearly established that arresting Mr. Quinn and Ms. Gonzalez in this backpack sting operation would violate their Fourth Amendment rights to be free from unlawful seizure. . . . Accordingly, for the reasons stated herein, we must reject the district court's generalized clearly-established-law analysis. Putting a finer point on the matter, we cannot agree with the district court's conclusion that *Keylon* or *Miller* could 'be said to arguably place the [O]fficers on notice that their actions were unconstitutional[]'. . . when they arrested Mr. Quinn and Ms. Gonzalez in this larceny sting operation. . . . Even putting aside the truth that there are no cases in the extant clearly established law that precisely correspond to the facts of the instant case—involving a larceny sting operation—Plaintiffs cannot overcome the fact that there are no cases within the relevant temporal period that even slightly resemble these facts. And we know from our precedent that the correspondence must be 'substantial.'. . Therefore, Plaintiffs' reliance on *Lawmaster* as support for a generalized clearly-established-law analysis—of the type the district court undertook here—is unavailing.")

Seifert v. Unified Gov't of Wyandotte Cnty./Kansas City, 779 F.3d 1141, 1150-52, 1159 (10th Cir. 2015) ("We hold that under *Lane v. Franks,* 134 S.Ct. 2369 (2014), Plaintiff's testimony was protected by the First Amendment; that there is a triable issue of fact about whether Plaintiff was removed from investigations and had his commission revoked because of his testimony in *Bowling;* and that the Unified Government is potentially liable because the actions of Sheriff Ash represented municipal policy. On the other hand, we hold that Sheriff Ash and Undersheriff Roland are entitled to qualified immunity on Plaintiff's § 1983 claim because when they acted the law was not clearly established that Plaintiff's testimony was protected by the First Amendment. . . .[T]he Court [in *Lane*] did not hold that all testimony is protected. It did not address 'whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties.'. . . Here, Plaintiff's testimony was protected speech. It concerned his work but was not part of it. Although Defendants assert that testifying was a routine part of Plaintiff's job as a reserve deputy, they cite no supporting evidence. And the testimony he gave at the *Bowling* trial was nothing like the routine testimony of law-enforcement agents in support of criminal prosecutions. Plaintiff testified for a private party, not his public employer; in a civil lawsuit, not a criminal prosecution; against law-enforcement entities, not for them; and in compliance with a subpoena, not an employer mandate. His testimony was not among 'the type of activities that [he] was paid to do.'. . .Was the law clearly established in 2009 and 2010, when Ash and Roland committed the alleged misconduct, that testimony by a law-enforcement officer about matters observed while on duty could be protected by the First Amendment? We think not. The Supreme Court did not address the specific issue before *Lane* was handed down in June 2014, neither did we, and in 2010 other circuits were divided. [collecting cases] And *Lane* held that the individual defendant in that case was entitled to qualified immunity because 'no decision of this Court was sufficiently clear to cast doubt' on controlling lower-court precedent. . . We hold that

Ash and Roland did not have 'reasonable warning that [their] conduct ... violated constitutional rights' and are therefore entitled to qualified immunity.")

Ragsdell v. Reg'l Hous. Alliance of La Plata Cnty., 603 F. App'x 653, 655-56 (10th Cir. 2015) ("Neither the Supreme Court nor our court has ever applied the Fourteenth Amendment's Equal Protection Clause to unequal treatment based on a failure to accommodate an employee's disability. To the contrary, both courts have suggested that the Equal Protection Clause does not apply in these circumstances. For example, the Supreme Court has observed that '[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.'. . And, we have rejected an equal protection claim by a disabled job applicant, reasoning that 'nothing in the United States Constitution requires the City to accommodate [the disabled applicant's] condition.'. . Other courts have reached similar conclusions. . .In the absence of precedential or widespread support, Ms. Lopez lacked notice of a constitutional requirement to accommodate Mr. Ragsdell's disability. . . .For the sake of argument, we may assume that Ms. Lopez's conduct was irrational and violated Mr. Ragsdell's right to equal protection. But, these assumptions would not preclude qualified immunity, for Mr. Ragsdell 'must do more than simply allege the violation of a general legal precept' such as the rational-basis standard for equal protection. . . He must also show that existing law would have alerted Ms. Lopez to the unlawfulness of her actions. . . .Against the existing legal backdrop, Ms. Lopez would have had little reason to expect a court to regard denial of accommodation to Mr. Ragsdell as unconstitutional under the rational-basis standard.")

McDonald v. Wise, 769 F.3d 1202, 1215 (10th Cir. 2014) ("Mayor Hancock. . .was in a position to provide due process, and the right to a name-clearing hearing in these circumstances is a clearly established constitutional right. *See Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). Thus, Mayor Hancock is not entitled to qualified immunity.")

Al-Turki v. Robinson, 762 F.3d 1188, 1195(10th Cir. 2014) ("We are unpersuaded by Defendant's [prison nurse] argument that facts unknown to her at the time of her conduct can now insulate her actions from liability because these then-unknown facts do not precisely align with the facts of previous Tenth Circuit cases. Taking the facts in the light most favorable to Plaintiff, Defendant violated clearly established law by choosing to ignore Plaintiff's repeated complaints of severe abdominal pain and requests for medical assistance, thus completely denying him any medical care 'although presented with recognizable symptoms which potentially create[d] a medical emergency.'")

Van De Weghe v. Chambers, 569 F. App'x 617, 619, 620 (10th Cir. 2014) ("[E]ven if the officers and prosecutor had probable cause for thinking him guilty of evidence tampering, Mr. Van De Weghe insists they didn't have probable cause to believe he'd committed some of the other crimes he was charged with—including theft and perjury. But even if we assume this is just as Mr. Van

De Weghe alleges, he still faces a problem. He still has not identified any clearly established law suggesting that a claim for malicious prosecution lies when one charge is supported by probable cause but other simultaneous charges arising from the same set of facts are not. Put differently, he hasn't borne his burden of demonstrating that the law is clear that an individual may pursue a claim for malicious prosecution when at least *some* of the charges against him *were* supported by probable cause. The failure to carry that burden is fatal to his claim. . . Though this court bears no obligation to conjure arguments for the parties, as it happens our own research has turned up little that might've helped Mr. Van De Weghe carry his burden anyway. The Third Circuit has expressly held that probable cause to pursue one charge 'preclude[s] the plaintiff from proceeding with [a] malicious prosecution claim with respect to any' other charge brought simultaneously against her and arising from the same set of facts. . . True, at least two other circuits disagree, reasoning that 'when it comes to prosecution, the number and nature of the charges matters'—extra charges may impose extra costs and each may be attacked separately. . . But this court hasn't definitively spoken to the question either way. We have case law suggesting that a malicious prosecution claim arises when 'there was no probable cause to support the ... prosecution,' a formulation that at least arguably leans the Third Circuit's way. . . But in an unpublished decision we seem to have assumed something closer to the Second and Seventh Circuit's view, though without acknowledging or considering the split of authority. . . In these circumstances—without a binding opinion from the Supreme Court, with uncertain signals in this court, and with other courts unmistakably divided—it becomes difficult to conjure how Mr. Van De Weghe might have cleared the 'clearly established law' hurdle even if he had tried.")

Estate of Booker v. Gomez, 745 F.3d 405, 427-29, 434 (10th Cir. 2014) ("[A] reasonable jury could conclude that the Defendants' use of substantial pressure on Mr. Booker's back, a two-minute carotid hold on his neck, and a taser while Mr. Booker was subdued and struggling to breathe in a prone position demonstrated the requisite level of culpability for a due process violation. We hold that the Plaintiffs met their burden to show the Defendants violated Mr. Booker's constitutional rights because a reasonable jury could conclude the Defendants engaged in excessive force in violation of the Due Process Clause. . . .We have therefore 'adopted a sliding scale to determine when law is clearly established' in which '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'. . . Defendants assert that Plaintiffs cannot rely on Fourth Amendment case law to show that any violation of Mr. Booker's constitutional rights was clearly established. They argue the 'Plaintiffs failed to identify any due process case involving a use of force in a correctional setting that would have put any of the deputies on notice that the force that was used—either individually or collectively—was unconstitutional.'. .The Defendants are mistaken. As noted above, Fourth Amendment case law addressing whether force is 'reasonable' is relevant to the first due process excessive force factor: the relationship between the amount of force used and the need presented. . . Cases finding force to be unreasonable necessarily imply that the use of force was disproportionate to the need presented. Indeed, the *Graham* Fourth Amendment excessive force factors are consistent with the disproportionate force analysis under the Fourteenth Amendment: (1) the severity of the offense, (2) whether the subject posed an

immediate threat to the safety of officers or others, and (3) whether the subject resists officers. . . .Here, despite any uncertainty about which constitutional amendment governs the Plaintiffs' excessive force claim, the 'legal norms' underlying the three—factor due process analysis-proportionality, injury, and motive—were clearly established at the time of Mr. Booker's death. *Weigel* (pressure on back), *Casey* (taser), and the weight of authority from other jurisdictions (neck restraint). . . put Defendants on notice that use of such force on a person who is not resisting and who is restrained in handcuffs is disproportionate. . . .Mr. Booker was handcuffed, prone on his stomach, and not resisting while much of the disproportionate use of force occurred. We conclude not only that a reasonable jury could find the Defendants violated Mr. Booker's due process right, but also that this right was clearly established at the time of their conduct. We therefore affirm the district court's denial of summary judgment on Plaintiffs' excessive force claim. . . .Here, the contours of the right are clearly established such that any reasonable officer in the Defendants' position (and with their training) would have known that failing to check Mr. Booker's vital signs, perform CPR, or seek medical care for three minutes when he was limp and unconscious as a result of the Defendants' use of force could violate the Constitution. . . .In light of the foregoing, any reasonable officer in the Defendants' position—having rendered Mr. Booker unconscious by use of force with at least a two-minute carotid neck hold, roughly 140 pounds of pressure on his back, and an eight-second taser stun—should have known that failing to check Mr. Booker's vitals or seek immediate medical attention could evince deliberate indifference to a serious medical need. Accordingly, the conduct alleged by the Plaintiffs—if proven at trial and accepted by the jury—violated clearly established law.")

Cillo v. City of Greenwood Village, 739 F.3d 451, 466 (10th Cir. 2013) ("We . . . hold that the individual defendants are not entitled to summary judgment based on the second requirement for § 1983 qualified immunity because Sgt. Cillo's First Amendment right to associate with a Union was a clearly established right at the time of his termination.")

Panagoulakos v. Yazzie, 741 F.3d 1126, 1129-31 (10th Cir. 2013) ("As the 'clearly established' prong resolves this case, we begin with it. . . .All roads lead to the same conclusion in this case; we need address only one. Even assuming *arguendo* that clearly established law demonstrated that Officer Yazzie no longer had probable cause to detain Panagoulakos after her review of the protective order. . . , Panagoulakos would still bear the burden of showing that clearly established law imposed a duty on Officer Yazzie to release him. In other words, Panagoulakos must show that, even though probable cause supported his initial arrest, clearly established law gave fair warning to Officer Yazzie that following her review of the protective order it was her constitutional duty to release him. There is only one standard to which the parties point that could impose such a duty. In *Thompson v. Olson*, the First Circuit held that 'following a legal warrantless arrest based on probable cause, an affirmative duty to release arises only if the arresting officer ascertains beyond a reasonable doubt that the suspicion (probable cause) which forms the basis for the privilege to arrest is unfounded.'. . For Panagoulakos to prevail, the Tenth Circuit must have adopted the *Thompson* standard, and it must be clearly established that the *Thompson* standard required his release under these facts. . . Quite to the contrary, we have never applied the *Thompson*

standard in a published opinion. . . . Nor has the 'clearly established weight of authority from other courts' imposed a duty to release under these circumstances. . . A handful of other courts have adopted some form of the *Thompson* standard. [collecting cases] But those courts do not represent the 'clearly established weight of authority of other courts.'. . The majority of courts have never imposed such a duty, much less under circumstances similar enough to make 'the contours of the right ... sufficiently clear that a reasonable official' in Officer Yazzie's position would understand that her actions violated that right. . .In short, Officer Yazzie is entitled to qualified immunity because no clearly established law imposed on her a duty to release Panagoulakos following his lawful arrest after the traffic stop.")

Panagoulakos v. Yazzie, No. 13–2003, 2013 WL 6698134, *5-*8 (10th Cir. Dec. 20, 2013)(Holloway, J., dissenting) ("It is clear, in my view, that there was no probable cause for Officer Yazzie to file a criminal complaint against Mr. Panagoulakos, the Plaintiff, after Officer Yazzie had reviewed the protective order which she quite mistakenly believed provided such probable cause. . .The majority's holding that the officer is entitled to qualified immunity for her mistake of law is contrary to our precedents, most notably *Courtney v. Oklahoma*, 722 F.3d 1216, 1223 (10th Cir.2013). Accordingly, I respectfully dissent. . . .Defendant Yazzie was tasked with taking Plaintiff to the police station and with examining the protective order to see if Plaintiff was in violation of the law for being in possession of a firearm. It is undisputed that the order did not forbid Plaintiff from possessing a firearm. Defendant Yazzie, however, did not know the law and erroneously believed that all persons subject to protective orders are forbidden from possessing firearms. Finding no affirmative statement in the protective order to authorize Plaintiff's firearm possession, Defendant Yazzie did not merely fail to release Plaintiff, she took affirmative steps to insure his continued detention, which led directly to his being held in jail for eleven days on the completely invalid charge of violation of a protective order by possession of a firearm. The majority duly notes this act by Officer Yazzie, but its analysis completely ignores it. . . . In another recent case, our court addressed this issue in a case with closely analogous facts and held that an officer should have been denied qualified immunity for the continued detention of the plaintiff when facts learned during the initial detention would have made it clear to a reasonable officer in the defendant's position that she 'lacked lawful authority to extend the stop.' *Courtney v. Oklahoma*, 722 F.3d 1216, 1223 (10th Cir.2013). . . .Similarly, here a reasonable officer would have known that there was no probable cause to believe that Mr. Panagoulakos had committed the offense of possession of a firearm in violation of a protective order. . . .The magistrate judge here went on to consider whether Officer Yazzie might nevertheless be entitled to qualified immunity, focusing on whether the officer's mistake of law was one that could be considered reasonable. . Because the requirements of both state and federal law were clear and unambiguous, and both had been established law 'for a long time,' the court held that the mistake was not reasonable. . . . Further, '[t]he face of the actual Order of Protection vitiated the probable cause that existed at the time of Plaintiff's initial arrest, and Plaintiff was therefore unlawfully detained.'. .For these reasons, I am convinced that the district court was correct not only in denying Officer Yazzie's motion for summary judgment based on qualified immunity, but also in granting partial summary

judgment in favor of Mr. Panagoulakos on his claim that his Fourth Amendment rights were violated by Officer Yazzie.")

Blackmon v. Sutton, 734 F.3d 1237, 1239-43 (10th Cir. 2013) ("The jurisprudential terrain between arrest and conviction remains today only partially charted. Over the last several decades, the Supreme Court has elaborated in considerable detail the standards of care prison administrators must satisfy to avoid inflicting 'cruel and unusual' punishment on convicted prisoners in violation of the Eighth Amendment. . . The Court has, as well, expounded on what force officers may and may not use to effect an arrest consistent with the Fourth Amendment and its prohibition of 'unreasonable searches and seizures.'. . But at least so far the Court has done comparatively little to clarify the standards of care due to those who find themselves between these stools—held by the government after arrest but before conviction at trial. . .We know that after the Fourth Amendment leaves off and before the Eighth Amendment picks up, the Fourteenth Amendment's due process guarantee offers detainees some protection while they remain in the government's custody awaiting trial. . . But we do not know where exactly the Fourth Amendment's protections against unreasonable searches and seizures end and the Fourteenth Amendment's due process detainee protections begin. Is it immediately after arrest? Or does the Fourth Amendment continue to apply, say, until arraignment? Neither do we know with certainty whether a single standard of care applies to all pretrial detainees—or whether different standards apply depending where the detainee stands in his progress through the criminal justice system. Might, for example, the accused enjoy more due process protection before a probable cause hearing than after? All these questions remain very much in play. . .The defendants make much of these lingering questions, going so far as to suggest they preclude the possibility they could have violated the clearly established legal right of any pretrial detainee in 1997, the time of the events in question in this lawsuit. But that argument proves a good deal too much. In the defendants' world, officials who engaged in sadistic and malicious conduct in 1997 would have violated the defined rights of convicted inmates, but the same conduct would not have violated the rights of pretrial detainees because of the comparative ambiguity surrounding their rights. Though the law of pretrial detention may not have been precise in all its particulars in 1997, though it may remain comparatively ambiguous today, things have never been quite as topsy turvy as that. Pretrial detainees are not men without countries, persons without *any* clearly defined legal rights. By 1997, it was beyond debate that a pretrial detainee enjoys *at least* the same constitutional protections as a convicted criminal. . . Conduct that violates the clearly established rights of convicts necessarily violates the clearly established rights of pretrial detainees. By 1997, it was clearly established as well that prison officials run afoul of the Eighth Amendment's prohibition of cruel and unusual punishments when they exhibit 'deliberate indifference' to a convicted inmate's 'serious medical needs.'. . It was clearly established, too, that *Estelle's* standard gives way to a more onerous test when 'guards use force to keep order.'. . In deference to the need to maintain order in a prison environment, liability will not attach in these particular circumstances unless the challenged force is 'applied ... maliciously and sadistically for the very purpose of causing harm.'. .Neither is this the end to what we know with certainty about the state of the law in 1997 regarding pretrial detainees. By then the Supreme Court had held that the Fourteenth Amendment's guarantee of due process prohibits *any*

punishment of those awaiting trial. Punishment may be constitutionally acceptable for persons convicted of crimes—at least so long as it doesn't amount to 'cruel and unusual' punishment as defined by *Estelle* and *Hudson.* But punishment is *never* constitutionally permissible for presumptively innocent individuals awaiting trial. . . Where exactly do we draw the line between what does and doesn't constitute 'punishment'? Historically, the government has enjoyed the authority to detain until trial those defendants who pose a flight risk. And no doubt those who find themselves detained in this manner experience a great many restrictions on their liberty—restrictions many of us would regard as punishment in themselves. But when do these restrictions pass, as a matter of law, from constitutionally acceptable to constitutionally impermissible? *Bell* tells us the answer turns on the answers to two questions. First, we must ask whether an 'expressed intent to punish on the part of detention facility officials' exists. . . If so, liability may attach. If not, a plaintiff may still prove unconstitutional punishment by showing that the restriction in question bears no reasonable relationship to any legitimate governmental objective. . . .With these (clearly established) legal principles in hand, we can now turn to Mr. Blackmon's primary complaint: the many hours he spent shackled to the Pro–Straint chair. The district court analyzed his claim under *Hudson's* demanding Eighth Amendment 'malicious and sadistic' test for cruel and unusual punishments—and, even then, it found that Mr. Blackmon succeeded in stating a triable claim. We don't need to travel so far, however, to reach the same destination. While *Hudson* forbids a certain class of punishments for convicted prisoners (cruel and unusual ones), *Bell* forbids punishment altogether for pretrial detainees like Mr. Blackmon. And there is ample evidence in this case that the defendants at least sometimes used the Pro–Straint chair to punish their young charge. To be very clear, we do not doubt that the defendants often had a legitimate (nonpunitive) purpose for using the chair, or that its use was often reasonably related to that purpose. While awaiting trial—on charges of rape that were eventually thrown out—Mr. Blackmon was deeply distraught. The eleven-year-old attempted suicide and repeatedly banged his head dangerously against walls. No one disputes that the defendants had a legitimate interest in restraining him from these attempts at self-harm. Neither do we understand Mr. Blackmon to suggest that the use of restraints like the Pro–Straint chair is never a reasonable way to achieve this legitimate purpose. Indeed, we are confident Mr. Blackmon remains alive today thanks to the intervention of facility staff and they are due no small measure of credit for that. The problem is that the factual record in this case points in more than one direction. Much of it suggests that the defendants usually used the restraint chair in a reasonable effort to prevent Mr. Blackmon from killing or seriously injuring himself. But viewing the record in the light most favorable to Mr. Blackmon as we must, it *also* suggests the defendants *sometimes* shackled him with the express purpose of punishing him, in clear violation of *Bell's* first test. At least one defendant allegedly instructed others—openly—to use the chair as 'punishment.' The record evidence suggests the possibility, too, that on other occasions officials shackled Mr. Blackmon without *any* legitimate penological purpose, in clear violation of *Bell's* second test. Sometimes, Mr. Blackmon alleges, he was shackled to the chair for long stretches when there was no hint he posed a threat of harming himself or anyone else. Other times, Mr. Blackmon was placed in the chair because of a legitimate threat of self-harm but then arguably kept there for extensive periods after any threat of self-harm had dissipated. On one occasion, too, the boy was stripped out of his clothes and forced to wear a paper gown while

restrained in the chair. All of this, says Mr. Blackmon's expert, left him with severe mental health problems. And in *none* of these instances does the record appear to reveal a legitimate penological reason for the defendants' actions. The district court held that facts like these preclude the entry of qualified immunity at summary judgment and we cannot disagree. By 1997, the defendants were on notice that they could not use restraints with the express purpose of punishing or without *some* legitimate penological purpose in mind. Yet the record here suggests they may have used restraints in both forbidden ways at least some of the time. In fact, as the district court observed, by 1997 this court had already held that the use of force without any 'disciplinary rationale' runs afoul even of the Eighth Amendment's protections for convicted prisoners. . . Under *Bell* and the Fourteenth Amendment, surely no less could have been said by then for pretrial detainees.")

Esparza v. Bowman, No. 12–2140, 2013 WL 1760932, *5 & n.5 (10th Cir. Apr. 25, 2013) ("Chief Bowman remains entitled to qualified immunity unless Mrs. Esparza can show that her First Amendment right to be free from retaliatory arrest was clearly established at the time of her arrest. We conclude she has. 'The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.'. . Indeed, there can be no doubt that 'the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.' *Hartman v. Moore,* 547 U.S. 250, 256 (2006). Consequently, accepting the facts as found by the district court on summary judgment, Mrs. Esparza has submitted sufficient evidence to overcome Chief Bowman's assertion of qualified immunity. Based on the evidence submitted thus far, we conclude that Mrs. Esparza has satisfied her burden to allege a violation of her clearly established right to be free from retaliatory arrest. . . . The Supreme Court's decision in *Reichle v. Howards,* 132 S.Ct. 2088, 2094 (2012) does not alter our analysis because the evidence before the district court was sufficient to show that Mrs. Esparza's arrest was not otherwise supported by probable cause.")

Schwartz v. Booker, 702 F.3d 573, 587, 588 (10th Cir. 2012) ("Booker and Peagler assert entitlement to qualified immunity because no Supreme Court or Tenth Circuit case has ever 'held that a government employee[,] who was not involved in limiting an individual's liberty, has a constitutional duty to protect that individual,' and, therefore, 'Ms. Booker [and] Ms. Peagler did not have "fair warning" that their alleged conduct could result in liability.'. . Booker and Peagler's argument broadly is one of 'the level of generality at which the constitutional right must be "clearly established."'. . They do not dispute that case law has clearly established that foster children have a Fourteenth Amendment constitutional right to be reasonably safe while in the State's custody. . . Rather, they contend that because no case law explicitly delineates their interpretation of the special-relationship exception—an argument contrary to their previous assertion that the case law explicitly requires such participation—the law was not clearly established. Booker and Peagler's argument is untenable. . . . Since 1985, case law in this circuit and the established weight of authority has clearly established that state officials could violate foster children's substantive due process rights if they knew of an asserted danger to a foster child or failed to exercise professional judgment with respect thereto. Booker and Peagler's singular argument regarding the construction

of the special relationship doctrine does not negate that the contours of foster children's constitutional rights were clearly delineated in this circuit as well as other circuits. Accordingly, reasonable DHS officials overseeing the cases of foster children were on notice that such conduct would violate a foster child's constitutional right. . . Consequently, it was apparent, in light of pre-existing law, to a reasonable official in Booker's and Peagler's positions that failing to investigate the child abuse referrals and dismissing Chandler's case without investigation was an abdication of duty that would violate Chandler's substantive due process right to be reasonably safe from harm as a foster child.")

Stewart v. Beach, 701 F.3d 1322, 1330-33 (10th Cir. 2012) ("Stewart argues that Judge Robinson's definition of the constitutional right at issue was too narrow. Again, Judge Robinson's definition was 'whether it was clearly established that [Beach and Wilson] violated [Stewart's] First Amendment free exercise right by requiring him to cut his hair for security reasons.'. . Stewart asserts that the Supreme Court and the Tenth Circuit emphasize a broader standard and advocates for Judge Belot's definition: 'the right to reasonably exercise one's religion in prison[.]'. . . We disagree with Stewart's contention that a broader standard is necessary. . . . For example, in *Reichle v. Howards*, the Supreme Court recently reiterated its long-held view that 'the right allegedly violated must be established, not as a broad proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official.'. . Applying this test to the free-speech claim before it, the Court concluded that 'the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause.'. .So too here, Judge Robinson's formulation of the First Amendment free-exercise right at issue is more specific—to be free from having to cut one's hair for prison security reasons based on one's sincerely held religious beliefs. We might add that cutting is apparently required because Stewart's hair could not be combed out. . .. The additional level of specificity is helpful to focus on case law that would have given Beach and Wilson 'reasonable warning that the conduct then at issue violated constitutional rights.'. . Contrary to Stewart's suggestion, a more precise definition does not lead to an *overreliance* on factual similarity but to a *proper* reliance. . . Applying Stewart's formulation would encompass a very broad spectrum of conduct directed at prisoners and result in the examination of cases that would not have given Beach and Wilson the requisite warning under the facts of this case. . . .In the absence of controlling authority, we may conclude that a constitutional right is clearly established if there is a 'robust consensus of cases of persuasive authority.'. . To that end, we have reviewed all of the extra-circuit cases Stewart has identified, as well as those cases Judge Robinson discussed in her order. We agree with Judge Robinson's conclusion that they cut both ways. In some cases, courts have found that prison regulations requiring haircuts or prohibiting beards violate a prisoner's free exercise rights. [collecting cases] In other cases, courts have found that such regulations did not offend the First Amendment because the regulations were reasonably related to legitimate penological interests. [collecting cases] . . . In sum, from our survey of these cases, the most we can say is that Beach and Wilson had warning that enforcement of a grooming policy that required hair be capable of being combed out (or cut) *might* violate Stewart's free exercise right if the policy was not reasonably related to legitimate penological interests. But we cannot say

that it was clearly established that their enforcement of the KDOC policy violated Stewart's constitutional rights. We therefore conclude that Beach and Wilson are entitled to qualified immunity on Stewart's First Amendment claim.")

Brown v. Montoya, 662 F.3d 1152, 1171 (10th Cir. 2011) ("Although *Gwinn* did not specifically resolve what level of procedural protections are due before a person may be directed to register as a sex offender outside of prison, its holding that an inmate is entitled to certain minimal procedural protections before being classified as a sex offender in prison clearly establishes that directing a person to register as a sex offender outside of prison triggers at least that level of process. Mr. Brown alleges that Officer Montoya did not provide him with any process, much less the level of procedural protections owed to a prison inmate before being classified as a sex offender. Accepting as true Mr. Brown's allegation that Officer Montoya had no factual basis to believe that his victim was a minor, it should have been apparent to a reasonable officer that classifying Mr. Brown as a sex offender violated his clearly established procedural due process right.")

Koch v. City of Del City, 660 F.3d 1228, 1241, 1246 (10th Cir. 2011) ("For the purposes of our qualified immunity inquiry, therefore, the relevant question is this: *Could a reasonable officer in Officer Beech's position have believed that Ms. Koch had a legal obligation to answer questions about Ms. Lance's whereabouts, such that refusal to answer would constitute obstruction?* Put another way, was it clearly established that Ms. Koch had a right *not* to answer these questions? . . . . As discussed above, at the time of Ms. Koch's arrest, there was neither Supreme Court nor Tenth Circuit precedent, nor clearly established weight of authority from other courts, recognizing a right to refuse to respond to an officer's questions during a *Terry* stop. A reasonable officer could therefore believe that, under the circumstances of this case, Ms. Koch was required to answer questions regarding Ms. Lance's whereabouts, and that her refusal to do so constituted a willful delay or obstruction of an officer's duty. Accordingly, the district court did not err in granting summary judgment in favor of Officer Beech on his qualified-immunity defense to Ms. Koch's false-arrest claim. We emphasize that our conclusion is specific to the facts of this case. We hold only that in this case, a reasonable officer could believe that Ms. Koch had information regarding Ms. Lance's location, that under the circumstances Ms. Koch was required to convey this information, and thus that her refusal to do so constituted obstruction. Summary judgment was therefore appropriate.")

Mascorro v. Billings, 656 F.3d 1198, 1208, 1209 (10th Cir. 2011) ("The constitutional right was clearly established for purposes of qualified immunity if it would have been clear to a reasonable officer at the time the officers entered the Mascorro house that their entry was unlawful under the circumstances presented. . . For a right to be clearly established there must be Tenth Circuit or Supreme Court precedent close enough on point to make the unlawfulness of the officers' actions apparent. . . In the alternative, 'the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'. .Relevant precedent clearly prohibits police from routinely entering a person's home to effectuate a warrantless arrest (even if the officers have probable cause to believe the person committed a felony), . . . and a minor offense does not permit

warrantless entry into the home except in the most extraordinary of circumstances. . . . Our focus must be on whether an exception to bedrock constitutional principles clearly exists. There appears to be no relevant precedent announcing such an exception in cases such as this. While hot pursuit of a felon might be sufficient, neither the Supreme Court nor this Court . . . has ever found an entry into a person's home permissible based merely on the pursuit of a misdemeanant; additional circumstances have always dictated the result. . . . No reasonable officer would have thought pursuit of a minor for a mere misdemeanor traffic offense constituted the sort of exigency permitting entry into a home without a warrant.")

Tiscareno v. Anderson, 639 F.3d 1016, 1022-24 (10th Cir. 2011), *reh'g granted and opinion vacated in part by* ***Tiscareno v. Anderson*** 2011 WL 1549519 (10th Cir. Apr. 26, 2011) (not reported) ("Beyond police officers, we have extended *Brady* obligations to other personnel in the police department who are actively involved in a particular investigation. . . We have never addressed the question of whether someone like Anderson, the head of a child services agency, is subject to *Brady* duties. Courts examining somewhat similar situations have generally refused to deem social workers or child services agencies subject to *Brady's* requirements. . . . Although in a criminal prosecution, intent of the prosecutor and the investigative team is irrelevant, in a § 1983 context, all that is clearly established is that an investigator must not knowingly or recklessly cause a *Brady* violation. . . Turning to the facts of this case, we must determine if Tiscareno has alleged facts sufficient to show that Anderson violated any clearly established principle. Even a generous reading of the case law fails to establish clearly that Anderson's actions amounted to a constitutional deprivation. Several factors distinguishing this case from our past precedent make this apparent. First, Tiscareno does not allege that Anderson or DCFS actually participated in the investigation. . . In cases in which courts have held investigative agents and agencies are subject to *Brady*, the agent or agency has been involved in the 'particular' investigation. . . But Tiscareno alleges that Anderson is liable for *failing* to investigate and for improperly delegating DCFS's investigative responsibility to the doctors with whom DCFS worked. Further, Tiscareno does not allege that Anderson acted recklessly or in bad faith. . . Absent a specific reckless or intentional act on Anderson's part to withhold exculpatory evidence from the prosecutor and thus the defendant, we may not conclude that he violated clearly established law. . . . Anderson is entitled to qualified immunity because he acted reasonably in light of clearly established law. It was not clearly established at any time during the investigation of N.M.'s abuse that a child services agency, under state reporting requirements, had a duty pursuant to *Brady* to unearth, or train others to reveal, exculpatory evidence.")

Clark v. Wilson, 625 F.3d 686, 691, 692 (10th Cir. 2010) ("Although *Sandin* addresses liberty interests, we interpret it to extend the same analysis to protected property interest inquiries. . . We have since applied the *Sandin* analysis beyond the context of prison conditions. In *Steffey v. Orman*, for example, we held that a prisoner did not have a protected property interest in a money order sent to him by another prisoner's mother. . . . Because it is based on the 'legitimate expectations' methodology expressly abrogated by *Sandin*, *Gillihan's* holding that prisoners have a protected property interest in the funds in their prison trust accounts is no longer good law and,

hence, not 'clearly established' in this circuit. . . As in *Steffey*, we cannot find Clark had a protected property interest in the frozen funds without first applying the *Sandin* test to his claim. But we have never before addressed the question of whether freezing a prison account in response to a garnishment summons imposes an atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life. Neither did any Supreme Court decision on point or clearly established authority from other circuits exist at the time of Wilson's actions. . . In sum, because neither the Supreme Court nor any court of appeals had applied *Sandin's* 'atypical and significant hardship' test to the freezing of a prison account by 2007, Wilson did not violate a clearly established constitutional right and hence is entitled to qualified immunity.")

Mink v. Knox, 613 F.3d 995, 1011 (10th Cir. 2010) ("[I]t was clearly established in this circuit that speech, such as parody and rhetorical hyperbole, which cannot reasonably be taken as stating actual fact, enjoys the full protection of the First Amendment and therefore cannot constitute the crime of criminal libel for purposes of a probable cause determination.").

Brammer-Hoelter v. Twin Peaks Charter Academy, 602 F.3d 1175, 1186, 1187 (10th Cir. 2010) ("More than twenty years ago, we held in *Luethje* that a school's interest in efficient functioning does not justify a broad ban on the discussion of 'school problems' with anyone except the school's principal. The minor differences between the ban in *Luethje* and the ban in this case–the distinction between 'school problems' and, in this case, the broader category of 'school matters,' and the addition in *Luethje* of one individual with whom these matters could be discussed–only make the unlawfulness of this ban more apparent. Although Defendants have asserted one governmental interest that the defendants in *Luethje* did not assert, an interest in deterring the disclosure of confidential student information, we are not persuaded that a reasonable official would conclude that this interest alone would justify almost the same restraint that we found unconstitutional in *Luethje*, particularly where this interest could easily be satisfied by a less sweeping restraint on speech. We therefore hold that Dr. Marlatt is not entitled to qualified immunity on the claim that her directives constituted an illegal prior restraint on speech.").

Brammer-Hoelter v. Twin Peaks Charter Academy, 602 F.3d 1175, 1186, 1188 (10th Cir. 2010) ("In this case, a reasonable administrator could have concluded from our preexisting precedent that each meeting by school employees to discuss various school-related matters would be considered a 'single instance of speech' and should be analyzed as a whole to determine whether it was protected by the First Amendment. Further, because the vast majority of speech that occurred at each meeting was unprotected speech relating to personal disputes with the school's administration and other matters of solely internal significance, . . . we conclude controlling precedent would not have put a reasonable administrator on notice that the speech at each meeting, viewed in the aggregate, was protected by the First Amendment. We therefore hold Dr. Marlatt is entitled to qualified immunity because the protected nature of Plaintiffs' speech was not clearly established at the time she took the alleged retaliatory actions.").

Benshoof v. Layton, No. 09-6044, 2009 WL 3438004, at *4 (10th Cir. Oct. 27, 2009) ("It does not appear that this court has considered a case in which an inmate was placed in a cell with hundreds of fire ants and, while suffering numerous painful stings, was refused a transfer and effective means of eradicating the pests for six days. But such a high degree of factual similarity is not required to conclude that the law was clearly established . . . .[T]his court held in *Ramos v. Lamm* that 'a state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well being.' 639 F.2d 559, 568 (10th Cir.1980). Thus, prison officials must provide living space with 'reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities.' *Id. Ramos* is sufficient to put a reasonable officer on notice that it would be unconstitutional to house an inmate in a cell containing a swarm of stinging insects and to refuse the inmate either a transfer to another cell or any effective means of eradicating the infestation.")**.**

Green v. Post, 574 F.3d 1294, 1305 n. 10 (10th Cir.2009) (discussing how unpublished opinions cannot constitute clearly established precedent in the Fourth and Tenth Circuits, but may be used in the Sixth and Ninth Circuits).

Cassady v. Goering, 567 F.3d 628, 643, 644 (10th Cir. 2009) (unlawfulness of overbroad, general search warrant, that authorized seizure of all possible evidence of any crime prohibited by law of any jurisdiction, and not just of suspected narcotics activity that caused officer to apply for search warrant, was clearly established at time, and no reasonable officer could have believed that warrant was valid)

Wilkins v. DeReyes, 528 F.3d 790, 805, 806 (10th Cir. 2008) ("Under the version of facts presented by Plaintiffs and accepted by the district court on summary judgment, the officers intentionally coerced matching false statements, and a reasonable officer should have known no probable cause existed without the statements. The officers are therefore not entitled to qualified immunity on the malicious prosecution claim.")

Price-Cornelison v. Brooks, 524 F.3d 1103, 1114, 1115 (10th Cir. 2008) ("*Watson* . . . was sufficient to put Brooks on notice that providing Price-Cornelison less police protection than other domestic violence victims because she is a lesbian would deprive her of equal protection of the law, at least in the absence of an articulated rational governmental reason for such discrimination. This is true even assuming that Brooks was acting according to a County policy of affording less police protection to lesbian victims of domestic violence, because *Watson* would have put Brooks on notice that applying such a policy could result in a constitutional violation. . . . In any event, Brooks does not argue here that he is entitled to qualified immunity because he was following official policy, nor does he attempt to argue that there is a rational basis for such a policy; instead, he denies that there is such a policy.")

Milligan-Hitt v. Board of Trustees of Sheridan County School Dist. No. 2, 523 F.3d 1219, 1233 (10th Cir. 2008) ("Plaintiffs acknowledge the import of our ruling in *Jantz*, but argue that it became clear as early as 1996 that 'government action that discriminates against homosexuals

can[not] pass muster under the Equal Protection Clause merely because the community may disapprove of homosexuality," . . . when the Supreme Court decided *Romer v. Evans*, 517 U.S. 620 (1996). We do not think *Romer's* holding was so clear, and do not think it clearly overruled *Jantz's* holding that municipal officials may sometimes defer to community standards when discriminating on non-suspect grounds.").

Gruenwald v. Maddox, No. 07-3245, 2008 WL 1766890, at *5 (10th Cir. Apr. 17, 2008) ("The court is mindful that correctional officers have a significant responsibility in instituting order and discipline in our nation's prisons. Nevertheless, this responsibility does not come with the attendant right to use prisoners as personal punching bags. There no doubt may be times when prisoners agitate correctional officers or act in an otherwise unruly fashion. However, the Eighth Amendment demands that correctional officers respond to such incidents in a fashion that is appropriate for the situation. Because Gruenwald's allegations demonstrate that the officers violated his Eighth Amendment rights, the court has little difficulty in concluding that his claims clear the second hurdle of the qualified immunity analysis as well. . . . We conclude that it would have been clear to a reasonable officer in the shoes of Buchanan, Maddox, or Myers, that the malicious and sadistic infliction of pain exhibited in this case was unlawful.").

Archuleta v. Wagner, 523 F.3d 1278, 1285, 1286 (10th Cir. 2008) ("The arrest warrant gave Deputy Mandelko cause for processing and detaining Ms. Archuleta, but whether a strip search is permissible is a separate inquiry based on whether a detainee will be placed in the general prison population and whether the officer has reasonable suspicion that a detainee has hidden drugs, contraband, or weapons. . . In this case, Ms. Archuleta was not placed in the general prison population and a reasonable officer could not have suspected Ms. Archuleta of harboring a weapon. The arrest warrant itself could not provide Deputy Mandelko with reasonable suspicion for a strip search. . . . Ms. Archuleta thus has satisfied the first step of the two-step qualified-immunity inquiry by demonstrating that her constitutional rights were violated. We now consider whether those rights were clearly established at the time of the search. . . . [A] detainee who is not placed in the general prison population cannot be strip searched if the searching officer does not *at least* have reasonable suspicion that the detainee possesses concealed weapons, drugs, or contraband. As Ms. Archuleta alleges she *never* intermingled with the general prison population and we have held Deputy Mandelko *could not* have had reasonable suspicion that Ms. Archuleta possessed a weapon based upon the allegations in the complaint, we hold that the law in these circumstances was clearly established.").

Mecham v. Frazier, 500 F.3d 1200, 1206 (10th Cir. 2007) ("Mecham cites to an unpublished opinion from this circuit, *Martinez v. New Mexico Dep't of Public Safety*, 47 F. App'x 513 (10th Cir.2002), to support her position that, at the time of her arrest, the law was clear that the force used in her case was excessive. In *Martinez*, officers used mace on a suspect who had already been removed from her car and handcuffed. Under these specific circumstances, the court found the use of mace was not reasonable as a matter of law since the suspect was already out of the car, handcuffed, and no longer a danger to herself or others. The circumstances facing the officers in

Mecham's case were quite different. The pepper spray here was used to subdue and remove an uncooperative and unresponsive, belligerent traffic violator from the car she still controlled, not to further incapacitate an already subdued suspect. An unpublished opinion, moreover, even if the facts were closer, provides little support for the notion that the law is clearly established on this point.")

Meyer v. Bd. of County Com'rs of Harper County, Oklahoma, 482 F.3d 1232, 1242 (10th Cir. 2007)("[W]e reject the district court's conclusion that evidence of deliberately submitting false information to influence Western State to admit the plaintiff is irrelevant to the qualified immunity analysis. We do not, of course, disagree with the general point that subjective good faith or bad faith of government actors is ordinarily irrelevant to the objective inquiry whether a reasonable officer would have realized that his conduct was unlawful. . . .But deliberate misconduct is something different. It is clearly relevant to the objective inquiry. In short, a reasonable officer would know that he cannot rely on deliberate falsehoods to establish probable cause to deprive a person of her liberty. We held in *Snell v. Tunnell*, 920 F.2d 673, 698-699 (10th Cir.1990), that officials who relied on false information to obtain a search warrant for the home of foster parents were not entitled to qualified immunity. The district court found *Snell* irrelevant because it did not involve a mental health detention. That focus was much too narrow. Instead, the broader principle is directly relevant here, and *Snell* is not the only case in which we have enunciated the broader principle. Put most directly, 'conduct [may be] so bad that case law is not needed to establish that this conduct cannot be lawful.' *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir.2002). We have cited that language with approval and have also noted that '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'").

Casey v. West Las Vegas ISD, 473 F.3d 1323, 1333, 1334 (10th Cir. 2007) ("It has long been established law in this circuit that when a public employee speaks as a citizen on matters of public concern to outside entities despite the absence of any job-related reason to do so, the employer may not take retaliatory action. . . . The advice Ms. Casey directed to the Board, as her supervisor, is no longer viable as a basis for a First Amendment retaliation claim after *Garcetti*. Ms. Casey's indirect report to federal Head Start officials likewise implicated responsibilities she held by virtue of her administration of a federally funded program and thus cannot supply the basis for a First Amendment claim. But we find different in character Ms. Casey's statements to the New Mexico Attorney General regarding alleged violations of the Open Meetings Act, violations that she had no apparent duty to cure or report and which were not subject to her control. We hold that, even after *Garcetti*, a claim based on these statements remains legally viable, and we remand the matter for further proceedings consistent with this opinion.")**.**

Suasnavas v. Stover, 196 F. App'x 647, 2006 WL 2458678 , at *9 (10th Cir. 2006) ("Lastly, we also agree with the district court that the Luethjes have alleged sufficient facts to show a violation of a clearly established constitutional right. Although *Trujillo* did not explicitly recognize a right of familial association between grandparents and grandchildren, we made it clear in *Trujillo* that

the right of familial association extends beyond the context of 'parent, spouse, or child,'. . . and we cited specific legal authority recognizing the importance of the familial relationship between grandparents and grandchildren . . . . In addition, *Trujillo* clearly recognized the paramount importance of the parent/child relationship, even if the child is an adult. We therefore believe that *Trujillo* gave defendants 'fair warning that their [alleged] conduct was unconstitutional.'").

Gomes v. Wood, 451 F.3d 1122, 1136, 1137 (10th Cir. 2006) ("As of April 2000, we had announced the emergency circumstances exception to the notice and hearing requirement, *see Hollingsworth*, 110 F.3d at 739, and we had had two occasions to apply that standard: in *Hollingsworth* itself and in *Malik*, 191 F.3d at 1315. However, in neither case was their any evidence whatsoever of an immediate threat. . . . Moreover, as of April 2000, we had not yet identified as an important consideration the time available to state officials to seek and obtain judicial authorization for the removal without jeopardizing the safety of the child. Nor had we held that the reasonable suspicion standard applies to the determination of whether emergency circumstances exist. Additionally, we had stated that 'considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse.'. . In applying that case law to the circumstances confronted by the defendants, we conclude that 'officers of reasonable competence could disagree' as to whether there were emergency circumstances justifying the removal of Rebekah without a hearing.")

Hill v. Fleming, No. 04-1166, 2006 WL 856201, at *6 (10th Cir. Apr. 4, 2006) (not published) ("The law on whether certain adverse conditions of confinement create a liberty interest continues to develop, as evidenced by the Supreme Court's recent decision in *Wilkinson v. Austin*. In *Wilkinso*n, the Court determined the government created a liberty interest subject to procedural due process protections when officials placed an inmate indefinitely in a super-max prison where almost all human contact was prohibited and which made him ineligible for parole. . . Obviously, the duration and conditions of Mr. Hill's administrative detention were not as onerous, nor was the duration of his sentence affected. More importantly, for the purpose of determining qualified immunity, the prison officials in Mr. Hill's case did not have the benefit of the 2005 *Wilkinson* decision or any of its implications on prisoners' liberty interests at the time of Mr. Hill's confinement. Thus, based on the wealth of cases considered, the established law at the time of Mr. Hill's confinement would not put prison officials on notice of a liberty interest created by the type of deprivation presented, including the 399-day duration or other conditions of his confinement.").

Moore v. Guthrie, 438 F.3d 1036, 1042, 1043 (10th Cir. 2006) ("We have identified the 'classic' danger creation case to be *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), where police officers impounded the plaintiff's car and abandoned her in the middle of the night in a high crime area where she was raped. . . This is a narrow exception, . . . which applies only when a state actor 'affirmatively acts to create, or increases a plaintiff's vulnerability to, danger from private violence,' *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir.2001). It does not apply when the injury occurs due to the action of another state actor. In the instant case, since Plaintiff was injured by a

Simunition bullet fired by a fellow police officer and not a private third party, the danger creation doctrine is inapplicable. Plaintiff also contends that he has sufficiently pleaded a violation of his right to bodily integrity under the 'special relationship' doctrine. The special relationship doctrine is another exception to the general principle that government actors are not responsible for private acts of violence. . . As just discussed, however, because this case does not involve a private act of violence by a third party, this theory is also inapplicable to the facts alleged by Plaintiff. More importantly, we have specifically held that the special relationship doctrine is not triggered in an employment relationship, which is presumed consensual. . . Last, it should be noted that, even if either the danger creation or special relationship theory were applicable, it would not relieve Plaintiff of his duty to allege actions that shock the conscience. As required under the second prong to defeat a qualified immunity defense, Plaintiff argues that his violated right was clearly established at the time of his injury. . . . Although Plaintiff does not need to find a case with an identical factual situation, he still must show legal authority which makes it 'apparent' that 'in the light of pre-existing law' a reasonable official, in Chief Guthrie's position, would have known that having police officers wear riot helmets rather than Simunition face masks would violate their substantive due process right of bodily integrity. . . First, as discussed earlier, the Supreme Court has only recognized a right to bodily integrity under the Fourteenth Amendment in very limited circumstances, not including working in a safe environment. Second, courts have declined to find a violation of substantive due process in circumstances similar to, or more shocking than, that alleged by Plaintiff. Therefore, we cannot say that it was clearly established that Chief Guthrie and the City of Evans violated Plaintiff's constitutional right to bodily integrity by requiring him to wear his riot helmet during training.")**.**

Maldonado v. City of Altus, 433 F.3d 1294, 1315, 1316 (10th Cir. 2006) ("We have already held that Plaintiffs have produced sufficient evidence to sustain claims that they were denied statutory rights under ' 1981 and constitutional equal protection. Accordingly, we must address whether the rights at issue had been clearly established by 2002, when the English-only policy was adopted. Assessing whether a right has been clearly established depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. . . . Plaintiffs have not called to our attention, nor have we found, any cases from either the Supreme Court or this circuit establishing the right to speak a foreign language in the workplace. Further, published authority from other circuit courts suggests that English-only rules as applied to bilingual speakers are generally not discriminatory. . . Thus, we affirm the district court's grant of qualified immunity to the individual defendants on Plaintiffs' claims under 42 U.S.C. § 1983. The individual defendants are likewise entitled to qualified immunity on Plaintiffs' claims under 42 U.S.C. § 1981.").

Beedle v. Wilson, 422 F.3d 1059, 1071 (10th Cir. 2005) ("In sum, we do not agree with the district court's ruling that at the time the Hospital brought its suit for libel against Mr. Beedle, it was not clearly established that the Hospital was a governmental entity. Our cases had made clear that a public trust hospital in Oklahoma is deemed a governmental entity for § 1983 purposes. Similarly, as discussed in the previous section, ample authority had made clear that the filing of a malicious libel action by a governmental entity against a citizen contravenes the First Amendment of the United States Constitution. These two series of cases demonstrate it was clearly established when the Hospital filed its suit against Mr. Beedle that the Hospital was a governmental entity barred from bringing a malicious libel action. Consequently, the district court erred in dismissing the claims against Mr. Wilson and Mr. King in their individual capacities on qualified immunity grounds.").

Smith v. Wampler, Nos. 01-1455 / 01-1481, 2004 WL 1752377, at *4, *5 (10th Cir. Aug. 5, 2004) (unpublished) ("Here, Smith has not alleged Wampler pointed his firearm at him; instead he claims Wampler physically threatened to hit him with a pistol. Threatening to hit someone with a pistol is significantly different than pointing the pistol at them. However, Wampler did much more than merely hold his firearm in a fashion ready for immediate use. The physically threatening gesture was accompanied by racial epithets and threats to reincarcerate Smith while Smith was on the floor, handcuffed, and making no attempt to resist. Even though Smith's criminal activity was severe (drug possession and possible distribution), the totality of the circumstances demonstrates Wampler's conduct was not reasonable. . . . Having concluded Wampler's conduct constituted an unreasonable seizure in violation of the Fourth Amendment, we now turn to whether the law at that time, based on these facts, clearly established a constitutional violation. It did not. Smith urges a generalized analysis. He maintains the standard–that an officer's actions in executing a search must be reasonable–was clearly established in 1994, therefore, Wampler's conduct was unreasonable and he should have known it violated the constitution. That argument strikes us as a tautology and not particularly helpful because it tends to fuse or combine the separate qualified immunity inquiries: (1) whether there has been a violation of a specific constitutional right; and (2) whether the law clearly established the officer's conduct was impermissible at the time of the violation. . . . [T]he appropriate question here is whether a reasonable officer in late December 1994, under the facts described, would have known the physical and psychological intimidation of Smith was unreasonable, and thus unconstitutional. Wampler would not have reasonably known his conduct violated the Fourth Amendment. In *Holland*, we adopted other circuits' rationale in holding that pointing a firearm at a non-threatening, non-resistant person during a search was excessive force in violation of the Fourth Amendment. . . . In *Holland* and the cases cited therein, the conduct considered was the threat of deadly harm, a significantly different threat than the force in this case. Smith claims Wampler threatened to hit him with a pistol, not that Wampler pointed the firearm at him. This difference, standing alone, is sufficient to show that the law established in 1994 was unclear and not universally applicable to the factual situation here.").

Pierce v. Gilchrist, 359 F.3d 1279, 1297-1300 (10th Cir. 2004) ("In response to the district court's denial of qualified immunity, Dr. Gilchrist argues that there are no 'actual specific details of concrete cases which indicate' that her alleged conduct violated clearly established law. . . Dr. Gilchrist points to factual differences between her alleged conduct and the facts of the cases cited by the district court and concludes that these distinctions prevent those cases from clearly establishing the law as applied to her conduct. . . . Dr. Gilchrist overemphasizes the degree of specificity required of prior cases to clearly establish the law. . . . *Hope* thus shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional. . . . The degree of specificity required from prior case law depends in part on the character of the challenged conduct. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. . . . No one could doubt that the prohibition on falsification or omission of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986, in the context of information supplied to support a warrant for arrest. . . . We have no doubt that, in light of these holdings, an official in Dr. Gilchrist's position in 1986 had "fair warning" that the deliberate or reckless falsification or omission of evidence was a constitutional violation–even though the arrest had already occurred. There is no moral, constitutional, common law, or common sense difference between providing phony evidence in support of an arrest and providing phony evidence in support of continued confinement and prosecution. Even if there were no case directly on point imposing liability on officials whose falsification of evidence occurred at the post-arrest stage, an official in Dr. Gilchrist's position could not have labored under any misapprehension that the knowing or reckless falsification and omission of evidence was objectively reasonable. Qualified immunity is designed to protect public officials who act in good faith, on the basis of objectively reasonable understandings of the law at the time of their actions, from personal liability on account of later-announced, evolving constitutional norms. Dr. Gilchrist's alleged misconduct did not stem from a miscalculation of her constitutional duties, nor was it undertaken in furtherance of legitimate public purposes that went awry. Rather, as alleged, Dr. Gilchrist engaged in a deliberate attempt to ensure the prosecution and conviction of an innocent man. Such conduct, if it can be proven at trial, violated Mr. Pierce's constitutional rights with 'obvious clarity.'").

SH.A., as Parent and Next Friend of J.A. v. Tucumcari Municipal Schools, 321 F.3d 1285, 1288, 1289 (10th Cir. 2003) ("Mr. Dominguez concedes, as he must, that the law holding that sexual harassment is actionable as an equal protection violation has long been clearly established. . . However, he maintains that the court erred in drawing upon the standard set out in employment cases and applying it to teacher-on- student sexual harassment. He argues that he is entitled to qualified immunity because no opinion by the Tenth Circuit had announced the standard applicable to this particular type of sexual harassment, nor had the weight of authority from other circuits done so. Mr. Dominguez' argument asks this court to require exact correspondence between prior cases and the instant facts. Significantly, we rejected a similar argument made by the defendants in *Johnson,* the case relied upon by the district court. . . . . In light of *Johnson* and *Franklin,* we conclude that a reasonable teacher would have known in the spring of 1997 that sexual harassment

which gives rise to a violation of equal protection in the employment context will also do so in the teacher-on-student context.").

Johnson v. Martin, 195 F.3d 1208, 1218 (10th Cir. 1999) ("We therefore conclude that, during the period of time that Mr. Martin allegedly engaged in the acts of sexual harassment, a public official's reasonable application of the prevailing law would lead him to conclude that to abuse any one of a number of kinds of authority for purpose of one's own sexual gratification (including the abuse of the authority granted a municipal building inspector) would violate the Equal Protection Clause. . . .As a result, the defendants are not entitled to qualified immunity on the grounds that the law regarding sexual harassment of nonemployees was not clearly established during the period from October 1994 to January 1996.").

Murrell v. School District No. 1, Denver, 186 F.3d 1238, 1251 (10th Cir. 1999) ("The School District asserts the individual defendants are entitled to qualified immunity because there has previously been no case holding an individual school employee liable for sexual harassment under the Fourteenth Amendment. This argument carries the concept of 'clearly established' to an extreme we decline to adopt. We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make reasonable applications of the prevailing law to their own circumstances. . . .[T]he fact that we have said other supervisory municipal employees may be held liable under the Fourteenth Amendment for deliberate indifference to the discriminatory conduct of third parties was sufficient to make apparent the unlawfulness of such deliberate indifference by a school employee exercising supervisory authority over students.").

Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226, 1241 (10th Cir. 1999) ("We are satisfied that a supervisor's liability for failing to train subordinates or to implement a policy to prevent a sexual assault on a severely disabled child like James was clearly established as of February 1995 when the instant assault occurred. Applying the Supreme Court's reasoning in *Canton*, the Tenth Circuit has clearly established that a supervisor may be individually liable for failing to adopt or implement policy or training of subordinates to prevent deprivations of constitutional rights. . . While here the assault was committed by a private actor, the Tenth Circuit has also clearly established that a state official may be liable for the violence committed by private actors under the 'danger-creation' doctrine. . . . Therefore, the contours of the right, which plaintiff-appellant asserts was violated, were clearly established as of February 1995 and the defense of qualified immunity fails.").

Lee v. Waters, No. 98-6160, 1999 WL 41949 (10th Cir. Feb. 5, 1999) (unpublished) ("The Prison Litigation Reform Act, 42 U.S.C. § 1997e, requires the court to dismiss any § 1983 claim regarding prison conditions if it 'seeks monetary relief from a defendant who is immune from such relief.' 42 U.S.C. § 1997e(c)(1). In this case, the defense of qualified immunity, asserted by the defendants in their motion to dismiss, or in the alternative for summary judgment, supports the district court's entry of judgment in favor of the defendants. . . . Because there is no clearly

established right to attend a disciplinary hearing when such competing concerns exist, i.e., no unqualified right to attend a disciplinary hearing, by conducting the hearings in Mr. Lee's absence after he refused to comply with this condition, prison officials did not violate a clearly established due process right of which a reasonable person would have known.").

Brasko v. City of Caney, Nos. 97-3027, 97-3047, 97-3029, 97-3046, 1997 WL 759093, at *3 (10th Cir. Dec. 9, 1997) (unpublished) ("It is clearly established in this circuit that '[a]n allegation of sexual harassment is actionable under § 1983 as a violation of the Equal Protection Clause.'. . . As the city council members point out, however, there is no factually identical authority establishing the liability of an individual city council member for failure to act on a city employee's claim of sexual discrimination. Thus, the question we must decide is whether it was clearly established 'within a sufficiently analogous factual setting' that the individual city council members would have understood that their failure to act would violate plaintiffs' rights. . . . This law, permitting liability of an employer for an employee's alleged wrongdoing, was not sufficiently particularized for individual city council members to be held liable for the alleged sexual harassment by an employee, who apparently does not work directly for the city council. No authority indicates an appropriate response by individual city council members to an employee's complaints to them of sexual harassment. Thus, it was not clear that reasonable city council members with knowledge of the alleged harassment would understand that their individual failure to act could violate plaintiffs' equal protection rights such that they could be held individually liable.").

Clanton v. Cooper, 129 F.3d 1147, 1156-57 (10th Cir. 1997) ("[W]e do not think that Clanton's failure to cite cases clearly establishing the unconstitutionality of knowingly transmitting false information over the NCIC computer system is fatal to her claim. The purpose of the requirement that the law be 'clearly established' before its violation may waive qualified immunity is to insure that officials may reasonably anticipate when their actions might give rise to liability for damages. . . . In the present case, we think that the knowing transmission of false statements over the NCIC computer system, in order to cause unjustifiedly extended incarceration of a suspect, is sufficiently similar to the swearing knowingly (or with reckless disregard of the truth) of false information in a warrant application, proscribed by *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), that a reasonable official would have known it to be illegal. We therefore hold that Cooper enjoyed no qualified immunity to engage in such activity.").

Lawmaster v. Ward, 125 F.3d 1341, 1351 (10th Cir. 1997) ("While qualified immunity was meant to protect officials performing discretionary duties, it should not present an insurmountable obstacle to plaintiffs seeking to vindicate their constitutional rights. Therefore, while it is true there are no decisions expressly prohibiting officers from leaving guns submerged in water or prohibiting officers from leaving cigar or cigarette ashes in a home, it is well established the Fourth Amendment is in place to preserve the sanctity of the home to the largest extent consistent with the reasonable exercise of law enforcement duties. . . Concomitantly, the law is well established officers may only engage in conduct that reasonably furthers the purpose for which they are in the home; those officers who execute a warrant in an unreasonable manner violate the Constitution.

. . . We conclude no reasonable officer in the position of the Agents in this case would believe that leaving a gun submerged in a water bowl, and leaving ashes in bedding was reasonably necessary to the search for a machine gun and parts.").

Foote v. Spiegel, 118 F.3d 1416, 1425, 1426 (10th Cir. 1997) ("It was clearly established in May 1994 that a strip search of a person arrested for driving while under the influence of drugs but not placed in the general jail population is not justified in the absence of reasonable suspicion that the arrestee has drugs or weapons hidden on his or her person. . . . The belief that Foote had drugs hidden in a body cavity because she was suspected of driving while under the influence of drugs, when no drugs had been found in her vehicle, on her passenger, or in a pat-down search, was unreasonable.").

Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996) ("Our observation in [*United States v.*] *Merkley* that '[t]here are no hard-and-fast rules regarding the reasonableness of force used during investigatory stops,' *Merkley*, 988 F.2d at 1063, merely illustrates that the excessive force inquiry requires the court to determine 'whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them.' [citing *Graham*] We therefore conclude the district court did not err by ruling that the law governing excessive force cases was clearly established on June 18, 1992.").

Liebson v. New Mexico Corrections Dep't, 73 F.3d 274, 278 (10th Cir. 1996) ("While the facts of this case need not precisely mirror those addressed in prior precedent in order to preclude qualified immunity , [cite omitted], Ms. Liebson must demonstrate a substantial correspondence between the conduct in question and prior law establishing that defendants' actions were clearly prohibited. [cite omitted] Under the facts alleged by Ms. Liebson, we cannot conclude that extension of the custodial relationships addressed in *DeShaney* to Ms. Liebson's employment situation was sufficiently obvious to put a reasonable state official on notice that his conduct was constitutionally proscribed.").

Trigalet v. Young, 54 F.3d 645, 648 (10th Cir. 1995) ("We have found no opinion decided between 1986 and 1990 holding that an officer could be held liable under section 1983 to a third party injured as a result of police chasing a fleeing felon.").

Pallotino v. City of Rio Rancho, 31 F.3d 1023, 1026 (10th Cir. 1994) ("[T]here is no clearly established right, under the Fifth Amendment, to ignore police requests at the scene of an investigation for a witness's name and address.").

Lankford v. City of Hobart, 27 F.3d 477, 480 (10th Cir. 1994) ("[W]e hold that on May 22, 1989, with this court's opinion in *Starrett v. Wadley*, . . . it became clearly established that sexual harassment can constitute a violation of equal protection and give rise to an action under 42 U.S.C. 1983.").

Calhoun v. Gaines, 982 F.2d 1470, 1475 (10th Cir. 1992) ("The standard adopted by this Court requires that there be some, but not necessarily precise, factual correspondence between previous cases and the case at bar. . . In essence, this standard requires officials to know well developed legal principles and to relate and apply them to analogous factual situations.").

Jantz v. Muci, 976 F.2d 623, 629 (10th Cir. 1992) ("Examining the case law as it existed in 1988, we do not find a clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation."), *cert. denied*, 113 S. Ct. 2445 (1993).

Floberg v. Oklahoma Dept. of Corrections, 962 F.2d 17 (10th Cir. 1992) (Table) (although right of access to courts was established, it was not clear that policy of initiating disciplinary actions against employees who refused to sign polygraph waivers was in violation of right . . . .").

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990) (In this circuit, precise factual correlation between then-existing law and case at hand is not required. . . . government officials expected to relate established law to analogous factual settings).

Manzanares v. Roosevelt County Adult Det. Ctr., No. CIV 16-0765 JB/KRS, 2018 WL 4150885, at *18 n.10 (D.N.M. Aug. 30, 2018) ("If a district court in New Mexico is trying -- as it does diligently and faithfully -- to receive and read the unwritten signs of its superior courts, it would appear that the Supreme Court has signaled through its per curiam qualified immunity reversals that a nigh identical case must exist for the law to be clearly established. As former Tenth Circuit judge, and now Stanford law school professor, Michael McConnell, has noted, much of what lower courts do is read the implicit, unwritten signs that the superior courts send them through their opinions. . . Although still stating that there might be an obvious case under *Graham* that would make the law clearly established without a Supreme Court or Circuit Court case on point, . . . the Supreme Court has sent unwritten signals to the lower courts that a factually identical or a highly similar factual case is required for the law to be clearly established, and the Tenth Circuit is now sending those unwritten signals to the district courts[.] . . . Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. . . The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case. It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: 'Are the facts here anything like the facts in *York v. City of Las Cruces*?' Thus,

when the Supreme Court grounds its clearly-established jurisprudence in the language of what a reasonable officer or a 'reasonable official' would know, . . . yet still requires a highly factually analogous case, it has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers,' *Kisela v. Hughes*, 138 S.Ct. at 1162 (Sotomayor, J. dissenting). The Court concludes that the Supreme Court is doing the latter, crafting its recent qualified immunity jurisprudence to effectively eliminate § 1983 claims against state actors in their individual capacities by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong. . . The Court disagrees with the Supreme Court's approach. The most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted § 1983 remedy. As the Cato Institute noted in a recent amicus brief, 'qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based.' *Pauly v. White*, No. 17-1078 Brief of the Cato Institute as Amicus Curiae Supporting Petitioners at 2, 2018 WL 1182773 (U.S. Supreme Court, filed Mar. 2, 2018)( )("Cato Brief"). 'The text of 42 U.S.C. § 1983 ... makes no mention of immunity, and the common law of 1871 did not include any across-the-board defense for all public officials.' Cato Brief at 2. 'With limited exceptions, the baseline assumption at the founding and throughout the nineteenth century was that public officials were strictly liable for unconstitutional misconduct. Judges and scholars alike have thus increasingly arrived at the conclusion that the contemporary doctrine of qualified immunity is unmoored from any lawful justification.' Cato Brief at 2. *See generally* William Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. 45 (2018)(arguing that the Supreme Court's justifications for qualified immunity are incorrect). Further, as Justice Clarence Thomas has argued, the Supreme Court's qualified immunity analysis 'is no longer grounded in the common-law backdrop against which Congress enacted [§ 1983], we are no longer engaged in interpret[ing] the intent of Congress in enacting the Act.' *Ziglar v. Abbasi*, ___ U.S. ____, 137 S.Ct. 1843, 1871, 198 L.Ed.2d 290 (2017)(Thomas, J., concurring). . . .The judiciary should be true to § 1983 as Congress wrote it. Moreover, in a day when police shootings and excessive force cases are in the news, there should be a remedy when there is a constitutional violation, and jury trials are the most democratic expression of what police action is reasonable and what action is excessive. If the citizens of New Mexico decide that state actors used excessive force or were deliberately indifferent, the verdict should stand, not be set aside because the parties could not find an indistinguishable Tenth Circuit or Supreme Court decision. Finally, to always decide the clearly established prong first and then to always say that the law is not clearly established could be stunting the development of constitutional law. . . And while the Tenth Circuit -- with the exception of now-Justice Gorsuch, *see* Shannon M. Grammel, *Justice Gorsuch on Qualified Immunity*, Stan. L. Rev. Online (2017) -- seems to be in agreement with the Court, *see, e.g., Casey*, 509 F.3d at 1286, the Supreme Court's per curiam reversals appear to have the Tenth Circuit stepping lightly around qualified immunity's clearly established prong, *see, e.g, Perry v. Durborow*, 892 F.3d 1116, 1123-27 (10th Cir. 2018); *Aldaba II*, 844 F.3d at 874; *Rife v. Jefferson*, ___ Fed.Appx. ____, ____ – ____, 2018 WL 3660248, at *4-10 (10th Cir. 2018)(unpublished); *Malone v. Board of County Comm'rs for County of Dona Ana*, 707 Fed.Appx. at 555–56; *Brown v. The City of Colorado Springs*, 709 Fed.Appx. 906, 915–16 (10th

Cir. 2017), and willing to reverse district court decisions should the district court conclude that the law is clearly established, *but see Matthews v. Bergdorf*, 889 F.3d 1136, 1149-50 (10th Cir. 2018)(Baldock, J.)(holding that a child caseworker was not entitled to qualified immunity, because a caseworker would know that 'child abuse and neglect allegations might give rise to constitutional liability under the special relationship exception'); *McCoy v. Meyers*, 887 F.3d 1034, 1052-53 (10th Cir. 2018)(Matheson, J.)(concluding that there was clearly established law even though the three decisions invoked to satisfy that prong were not 'factually identical to this case,' because those cases 'nevertheless made it clear that the use of force on effectively subdued individuals violates the Fourth Amendment').

Estate of Smart v. City of Wichita, No. 14-2111-JPO, 2018 WL 3744063, at *18-19 (D. Kan. Aug. 7, 2018) ("In the absence of precedent squarely governing 'the specific facts at issue' in this Fourth Amendment case, the court cannot find Officers Chaffee and Froese's actions 'plainly incompetent' or 'in knowing violation of the law' when their actions are judged from the perspective of an officer on the scene forced to make split-second judgments in an indisputably chaotic situation. No one disputes shots were fired into a crowd of hundreds gathered in a one-block area during the early morning hours. Officers were confronted with a chaotic situation and the need to quickly disarm the shooter to protect innocent bystanders. Following the shots, the bulk of the crowd ran south, while Smart ran north. It was not egregious for Officers Chaffee and Froese to shoot at Smart under the mistaken perception that he was the active shooter. It further was not a plain or knowing violation of the law for Officer Chaffee to have shot Smart in the seconds after Smart had fallen to the ground. Again, plaintiffs have not cited, and the court has not found, a factually similar case that would make the unlawfulness of Officer Chaffee's actions apparent. To be sure, the Tenth Circuit has stated repeatedly the general rule that continued use of force against a subdued suspect who no longer presents a threat of danger or escape violates the Fourth Amendment. But under the *White* Court's strict interpretation of 'clearly established' (i.e., that '"clearly established law" should not be defined "at a high level of generality"' and 'must be "particularized" to the facts of the case'), this general rule, although 'absolutely relevant in determining whether a police officer acted unreasonably, ... cannot alone serve as a basis for concluding that an officer's particular use of excessive force was "clearly established."' There is no case 'close enough on point' to render it 'beyond debate' that Officer Chaffee's shooting of Smart, in the four-to-five seconds after Smart fell, was unconstitutional. As noted above, all of the witnesses agree that the entire incident–from the initial shots to the end of the offices' shots—lasted a matter of seconds. The scene was chaotic, with a large number of people in the area. No precedent suggests a reasonable officer in this situation necessarily would have perceived Smart to have dropped his gun, mentally registered that fact, concluded Smart was no longer a threat (even given other factors such as the large crowd and Smart's continued mobility), and reacted by ceasing fire, all within that four-to-five second period. . . .If the facts are as plaintiffs say they are, this is an undeniably tragic case involving the shooting death of an unarmed young man. But applying binding precedent, the court concludes plaintiffs have not shown that settled Fourth Amendment law prohibited Officers Chaffee and Froese's actions. Because the law did not establish 'beyond debate' that the officers' actions were unconstitutional, defendants are entitled

to qualified immunity on plaintiffs' excessive-force claim. Defendants' motion for summary judgment on plaintiffs' § 1983 claim against Officers Froese and Chaffee is granted." [footnotes omitted]) *See also* ***Estate of Smart v. City of Wichita,*** No. 14-2111-JPO, 2018 WL 5112448, at *1 n.5 (D. Kan. Oct. 19, 2018) (denying reconsideration) ("The court undertook the first-prong analysis, even though under *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) it was permitted to jump to the 'clearly established' second prong without determining whether a constitutional violation occurred, because the court shares the concern expressed by many scholars that the recent tendency of courts to skip to the second prong has 'all but halted the development of new precedents to rely on in the future.' Brief for Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner at 4, *Almighty Supreme Born Allah v. Milling*, No. 17-8654 (S. Ct. July 2018), 2018 WL 3388318, at *4. *See also, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1817-18 (2018) (noting the paradox that results from "simultaneously allowing courts to decide qualified immunity motions without reaching the underlying constitutional questions and requiring plaintiffs to produce circuit or Supreme Court opinions finding constitutional violations in cases with nearly identical facts"); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1885, 1897 (2018) ("The exercise of *Pearson* discretion in favor of not deciding often leaves important, recurring, and non-fact-bound constitutional questions needlessly floundering in the lower courts."); *Id*. at 1902-03 ("[T]here is some satisfaction for plaintiffs when a court acknowledges the Constitution has been violated and some hope that a 'holding' on these particular facts will serve to remove similar conduct from the realm of 'bad guesses in gray areas' which typically results in a grant of qualified immunity."); ECF No. 205 at 10 n.26 ("In the interest of further defining Fourth Amendment rights, the court undertakes the first prong of the immunity analysis, even though the court could grant Officers Froese and Chaffee's request for immunity based solely on plaintiffs' failure to satisfy the second prong.").")

Myers v. Brewer, No. 17-2682, 2018 WL 3145401, at *8–9 (D. Kan. June 27, 2018) ("The parties disagree over the definition of the right that must have been clearly established for defendant Brewer to lose the protection of qualified immunity. Plaintiff urges the court to apply the general principle that '[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'. . Defendant Brewer, on the other hand, argues that the right is an alleged right not to be shot with a beanbag gun when the suspect is advancing on the officer, yelling belligerently, and refusing to comply with directions. The court determines that the appropriate definition is somewhere between the two. It is the right not to be shot with a high-speed projectile (even a less-lethal one) at close range when unarmed and making no apparent move to attack an officer or bystander. In this situation, the *Graham* factors indicate that the force was unjustified— even if there is not a Tenth Circuit case that has said that shooting a beanbag pouch out of a shotgun, at very close range, at a non-threatening suspect is unreasonable. . . .Taking plaintiff's allegations as true, the court determines that plaintiff has adequately alleged that defendant Brewer violated this clearly established right. The video does not present a clear contradiction to plaintiff's allegations on this issue. While it appears that plaintiff moved forward from the shed, the court cannot make other determinations about the nature of his movement and what it reasonably conveyed to

defendant Brewer. The court cannot make factual findings on the scene based on the video at this stage of the proceedings. Defendant Brewer is not entitled to qualified immunity at this time.")

Harper v. Tirello, No. 16-CV-0121-CVE-FHM, 2018 WL 3040891, at *5-8 (N.D. Okla. June 19, 2018) ("In *Kingsley*, the Supreme Court held that the same objective-reasonableness standard that applies in Fourth Amendment excessive-force claims also applies in Fourteenth Amendment excessive-force claims asserted by pretrial detainees. . . Thus, the same need for specificity, *i.e.*, the need for existing precedent that squarely governs the specific facts at issue, exists in the Fourteenth Amendment excessive-force context. . . .On this record, the situation defendants confronted was one that required them to extract from a jail cell a pretrial detainee who (1) had been classified as an 'assault risk' based on his behavior during his stay in the jail, (2) had just caused a disruption in a common area of the jail, precipitating a lock down, (3) refused to comply with defendants' repeated verbal orders to get on the ground, and (4) had no apparent physical disabilities that would prevent him from complying with those orders. Harper fails to cite any existing case law clearly establishing that Pirtle's use of a Taser in this situation was unlawful. . . . Because Harper failed to meet his burden to demonstrate that the defendants' conduct in this case violated clearly established law, all four defendants are entitled to qualified immunity as to Harper's Fourteenth Amendment excessive-force claim.")

Nelson v. City of Albuquerque, No. CV 10-0553 JB/DJS, 2017 WL 4776730, at *39–40 & n.44 (D.N.M. Oct. 20, 2017) ("The Tenth Circuit has recognized a sliding scale for qualified immunity's clearly-established inquiry. . . Since *Casey*, however, the Tenth Circuit may have walked back its holding that a sliding-scale is the appropriate analysis. *See Aldaba v. Pickens*, 844 F.3d 870, 876 (10th Cir. 2016)("*Aldaba II*"). In *Aldaba II*, the Tenth Circuit reconsidered its ruling in *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015)("*Aldaba I*"), that officers were not entitled to qualified immunity after the Supreme Court vacated its decision in light of *Mullenix v. Luna*, 136 S. Ct. 305 (2015)(per curiam). In concluding that they had previously erred in *Aldaba I*, the Tenth Circuit determined:

We erred ... by relying on excessive-force cases markedly different from this one. Although we cited *Graham*, 490 U.S. 386 (1989) to lead off our clearly-established-law discussion, we did not just repeat its general rule and conclude that the officers' conduct had violated it. Instead, we turned to our circuit's sliding-scale approach measuring degrees of egregiousness in affirming the denial of qualified immunity. We also relied on several cases resolving excessive-force claims. But none of those cases remotely involved a situation as here.

Aldaba II, 844 F.3d at 876. The Tenth Circuit further noted that its sliding-scale approach may have fallen out of favor, because the sliding-scale test relies, in part, on *Hope v. Pelzer*. . . and the Supreme Court's most recent qualified immunity decisions do not cite *Hope v. Pelzer*. . . . *White v. Pauly*, is one of several cases the Supreme Court has decided in the past several years reversing Courts of Appeals on qualified immunity's clearly-established prong. . . In each, the Supreme Court concluded that there was not a Court of Appeals or Supreme Court case factually specific enough to preclude qualified immunity. [citing string of Supreme Court decisions] With that string of Supreme Court rulings emphasizing the need for factually specific cases to conclude

that a law was clearly established, the Court rules that the Defendants are entitled to qualified immunity. The Court was unable to locate any Tenth Circuit or Supreme Court cases decided before 2009 that were factually specific enough to the officers' conduct to put them on notice that their conduct was unconstitutional. That reality alone dictates that the officers are entitled to qualified immunity. Nelson's briefing only offers arguments that the conduct is so egregious under *Graham* that the officers are not entitled to qualified immunity. . . While recognizing that the Supreme Court has left open the door that an 'obvious case' under *Graham* may be clearly established for qualified immunity, . . . the Court concludes that this one is not an obvious case. The Court has already determined that a reasonable jury could have found for the Defendants, which forecloses the possibility that this is an obvious case. . . .The Court rules, accordingly, that the officers are entitled to qualified immunity.[44] [fn. 44: As former Tenth Circuit judge, and now Stanford law school professor, Michael McConnell, has pointed out, much of what lower courts do is read the implicit, unwritten signs that the superior courts send them through their opinions. . . If a district court in New Mexico is trying -- as it does diligently and faithfully -- to receive and read the unwritten signs of its superior courts, it would appear that the Supreme Court has signaled through its per curiam qualified immunity reversals that a nigh identical case must exist for the law to be clearly established. . . Although still stating that there might be an obvious case under *Graham* that would make the law clearly established without a Supreme Court or Circuit Court case on point, *White v. Pauly*, 137 S. Ct. at 552, the Supreme Court has sent out unwritten signals to the lower courts that factually identical or a highly similar factual case is required for the law to be clearly established, and the Tenth Circuit is now sending those unwritten signals to the district courts. *See Malone v. Board of County Comm'rs for County of Dona Ana*, 2017 WL 3951706, at *3 (10th Cir. Sept. 8, 2017)(unpublished). But factually identical or highly similar factual cases are not the way the real world works. Cases differ. Many cases, such as this one, have so many facts that are unlikely to ever occur again in a significantly similar way. Nevertheless, the Supreme Court has crafted their recent qualified immunity jurisprudence to effectively eliminate § 1983 claims by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong. *See Saenz v. Lovington Mun. Sch. Dist.*, 105 F. Supp. 3d 1271, 1297 n.4 (D.N.M. 2015)(Browning, J.).")

McHenry v. City of Ottawa, No. 16-2736-DDC-JPO, 2017 WL 4269903, at *9 (D. Kan. Sept. 26, 2017) ("Here, the court characterizes the right at issue as a right to be free from deadly force when a suspect did not show his hands after officers had received a report that the suspect possessed a gun, but the officers were 30 yards away in protected positions, Mr. Jennings did not charge the officers, Mr. Jennings was known to the officers to be suicidal, and Mr. Jennings did not threaten anyone. As demonstrated by the case law outlined above, Mr. Jennings had a clearly established right to be free from excessive force under these circumstances. Because the Complaint alleges a constitutional violation of clearly established law, Count I sufficiently alleges a violation of § 1983.")

Jackson v. City of Wichita, Kansas, No. CV 13-1376-KHV, 2017 WL 106838, at *13-15 & n.39 (D. Kan. Jan. 11, 2017) ("Defendants assert that even if Martin and Knowles may have violated a

constitutional right, the right was not clearly established on July 10, 2012. . . The Court agrees. Defendants are entitled to qualified immunity if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *White v. Pauly*, No. 16-67, 580 U.S. ——, 2017 WL 69170, at *4 (Jan. 9, 2017) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). . . .At the status conference on December 20, 2016, the Court expressed its inclination to deny defendants' motion for summary judgment on plaintiffs' claims under Section 1983, both on the substantive issue and the question of qualified immunity. In light of *White*, which the Supreme Court decided just two days ago, the Court now reaches a different conclusion on the issue of qualified immunity. . . .Plaintiffs assert that under Tenth Circuit law, reasonable officers would have understood that defendants could not use lethal force 'where a person is not suspected of any crime, is only holding a knife, not a gun, and initially did not even have the knife in her hand until the officers escalated the situation, and the suspect was not charging the officers and made no slicing or stabbing motions *towards him* [sic], and did not threaten the officers.'. . In support of their argument, plaintiffs cite *Zuchel v. City & County of Denver, Colo.*, 997 F.2d 730 (10th Cir. 1993), and *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006). . . The facts of those cases, however, are not sufficiently analogous to put defendants on fair notice that it was objectively unreasonable to use lethal force in the facts of this case. . . . Unlike decedent in Zuchel, Karen Jackson clearly held a knife and refused repeated police commands to stop and drop the knife. Moreover, Karen Jackson used the knife to violently stab herself—which especially in light of her refusal to drop the knife and stop approaching the officers, could lead a reasonable officer to believe that she would use the weapon against them. . . .Far from clarifying the issue, excessive force cases which involve suspects with knives reveal a 'hazy legal backdrop' against which defendants acted. . . .Many facts in this case are similar to *Larsen*. While Karen Jackson had not threatened violence against others, she had used the knife to stab herself several times—which showed a potential to use the knife violently. The officers responded to a call at night. When they arrived, they encountered an individual with a knife. They repeatedly told her to put down the knife. It was a large knife. Karen Jackson refused to cooperate with repeated orders to drop the weapon. Although Karen Jackson held the knife at waist level and not above her shoulder, she pointed the knife toward the officers. Karen Jackson continued approaching the officers with the knife and after she stopped, she took another step toward the officers. The distance between Karen Jackson and the officers was about 15 feet. As noted, in *Larsen*, the Tenth Circuit agreed with the district court that as a matter of law, the officer's use of deadly force was objectively reasonable. . . The Tenth Circuit found that the facts presented a 'prototypical case' in which police officers were 'forced to make split-second judgments,' and that even if the officer's assessment of the threat was mistaken, it was not objectively unreasonable. . . In light of this precedent and its similarity to the facts of this case, plaintiffs cannot show that the asserted right was clearly established under Tenth Circuit law. In other words, under the facts of this case and in light of the Tenth Circuit ruling in *Larsen*, a reasonable officer in defendants' position could have believed that his or her conduct was legally justified. In short, whether a reasonable officer confronted with the same circumstances would have probable cause to believe that he or she faced an immediate threat of serious physical harm—and would be justified in responding by lethal force—is 'far from beyond debate.'. . Plaintiffs assert that the law is clearly established that defendants 'cannot create

a situation where force is allegedly needed and then claim the protections of qualified immunity.'. . Plaintiffs lay out excessive force principles at a general level, however, and do not point to pre-existing law that makes apparent the unlawfulness of defendants' conduct in this case. . . Although their argument is not clear, plaintiffs apparently assert that the law clearly established that Martin and Knowles could not unreasonably escalate the situation by 'pulling their guns and yelling at Karen [Jackson] even though they both knew that she was "mental" and ... was not suspected of a crime.'. . Plaintiffs point to no case law which clearly establishes such a proposition on particularized facts similar to this case. . . On this record, plaintiffs have not shown that settled Fourth Amendment law prohibited defendants from drawing their weapons and ordering Karen Jackson to put down her knife. Because the law did not establish 'beyond debate' that defendants' actions were unconstitutional, they are entitled to qualified immunity on the excessive force claims.")

Richard v. City of Wichita, No. 15-1279-EFM-KGG, 2016 WL 5341756, at *6 (D. Kan. Sept. 23, 2016) ("Defendants . . . argue that qualified immunity shields the individual officers from liability under § 1983. 'Although summary judgment provides the typical vehicle for asserting a qualified immunity defense, [the Court] will also review this defense on a motion to dismiss.'. . But by asserting a qualified immunity defense in a 12(b)(6) motion, Defendants subject themselves to a more challenging standard of review. . . To overcome Defendants' claim of qualified immunity, Plaintiff must plausibly allege that (1) Defendants deprived Stacy of a constitutional right; and (2) the right was clearly established at the time. . . As noted above, Plaintiff has stated a plausible claim that Defendants violated Stacy's Fourth Amendment right to be free from excessive force. So the only determination left for the Court is whether that right was clearly established. . . . The inquiry is not whether the general right to be free from excessive force is clearly established; rather, the inquiry is whether the right was clearly established under the particular facts of the case. . . The Court must not be too general. Instead, it must determine 'whether the violative nature of particular conduct is clearly established.'. .Here, the particular conduct alleged by Plaintiff is that Defendants recklessly or deliberately created an unnecessary need for lethal force. Numerous Tenth Circuit cases have held that such conduct can constitute a violation of the Fourth Amendment. . . Accordingly, Plaintiff has alleged that the officers violated a clearly established constitutional right. Defendants' motion to dismiss on qualified immunity grounds is denied.")

Williams v. Miller, No. 15-CV-0028-JED-FHM, 2016 WL 4537750, at *7-8 (N.D. Okla. Aug. 30, 2016) ("Viewing the facts in the light most favorable to Plaintiff, TCSO's policies and procedures do not authorize Defendant's conduct. Plaintiff was not behaving dangerously or violently during the incident, and Plaintiff was showing his hands in surrender when Defendant stunned him with a Taser. . . . In summary, Plaintiff controverts many of Defendant's material facts and asserts that Defendant stunned him with a Taser although he was not acting aggressively or posing a threat. Viewing the facts in the light most favorable to Plaintiff, the Court concludes that the *Graham* factors, as reemphasized in *Kingsley*, weigh in favor of Plaintiff. Therefore, based on the evidence presented in the summary judgment record, a reasonable jury could find that Defendant's actions violated Plaintiff's constitutional rights. . . .Having concluded that Defendant's use of a Taser

violated the Constitution, the Court next determines whether it was clearly established, prior to May 17, 2014, that using a Taser to compel compliance from a pretrial detainee who is neither acting aggressively nor actively resisting efforts to restrain him constitutes a violation of the detainee's constitutional rights. After reviewing the state of the law in the Tenth Circuit, as well as the 'weight of authority from other courts,'. . . the Court concludes that it was. . . .Here the law at the time of the incident put Defendant on notice that using a Taser to coerce compliance with a command from a detainee who was not acting aggressively and whom the officer had not attempted to restrain in any other manner was a violation of that detainee's constitutional rights.")

Estate of Redd v. Love, No. 2:11-CV-00478-RJS, 2015 WL 8665348, at *14 (D. Utah Dec. 11, 2015) ("Here, the court cannot conclude it was clear to every reasonable officer on June 10, 2009, that it would be unlawful to deploy twelve SWAT-like agents and an unarmed cultural specialist to execute a warrant, and then call an additional nine federal personnel to help search a home and catalog evidence. As stated above, the Estate cites, and the court has found, no case—in the Tenth Circuit or otherwise—on point. But because a case on point is not required, the court examines two analogous Tenth Circuit cases addressing the reasonableness of a decision to deploy a SWAT team to execute a warrant to determine whether it would have been apparent to every reasonable officer that a violation occurred here on the facts presented in light of preexisting law in this Circuit. [Court examines *Holland* and *Whitewater*] Against this backdrop, it would not have been clear to every reasonable officer in Agent Love's position that his conduct amounted to a constitutional violation. That the facts here differ from those in *Holland*—namely, that Dr. Redd was charged with a nonviolent crime and has no known history of violence—does not mean it would have been clear to a reasonable officer that a different result on the constitutional question would follow in this case. The *Holland* court did not suggest it would have held differently if the suspect was charged with a nonviolent crime and had no history for violence. Nor did the *Holland* court indicate how it would have held if there was a need to collect a large amount of evidence, as was the case here. And in *Whitewater*, the court made no mention of those factors in arriving at its decision. Instead, the *Whitewater* court focused its analysis on the *Holland* rule. Although it is unpublished and non-precedential, *Whitewater*, if anything, shows Agent Love did not violate Dr. Redd's constitutional rights, because, as in *Whitewater*, there is no evidence that Agent Love deployed SWAT-like agents knowing they would use excessive force, intending to cause harm, or with instructions to use excessive force. Qualified immunity operates 'to protect officers from the sometimes hazy border between excessive and acceptable force ... to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'. Here, not every reasonable officer would have been on notice that it would be unlawful to deploy twelve SWAT-like agents and a cultural specialist to execute a warrant and then call nine additional agents to help search a home and catalog substantial physical evidence for a nonviolent offense at the home of a nonviolent person. Agent Love is entitled to qualified immunity.")

Herrera v. Santa Fe Public Schools, 956 F.Supp.2d 1191, 1194, 1256 (D.N.M. 2013) ("Although the Court finds that Romero requesting that ASI New Mexico guards perform pat-down searches of all of the Capital High Prom attendees violated the Plaintiffs' constitutional rights, the Plaintiffs'

right to be free from these suspicionless pat-down searches was not clearly established at the time of the Prom in April, 2011. Additionally, with respect to C. Herrera's § 1983 claim, although there is a genuine issue of fact whether Romero saw the ASI New Mexico guard require C. Herrera to lift her dress, and expose her bare leg, above her knee, even if Romero did see that conduct, it was not clearly established in April, 2011, that a school search to that extent violated C. Herrera's constitutional rights. . . . The Court concludes that it was not clearly established at the time of the prom in April, 2011, that ordering suspicionless pat-down searches for all prom attendees violated the Plaintiffs' constitutional rights.")

Kerns v. Board of Com'rs of Bernalillo County, 888 F.Supp.2d 1176, 1236 (D.N.M. 2012) (Browning, J.) ("In the end, and at least for the foreseeable future, it may be difficult for plaintiffs in § 1983 cases to overcome qualified immunity defense in exigent circumstances cases. Like in baseball, ties go to the runner, *see Coleman v. McLaren,* 631 F.Supp. 749 (N.D.Ill.1985)("In the legal version of baseball's 'ties go to the runner,' the party that fails to satisfy its burden of proof (here plaintiff) must lose."); in the exigent circumstances area, ties and even close calls go to the police, or other government official. Only the most extreme cases will go to the jury. Perhaps this is what the Supreme Court intended, however, when it said: 'Qualified immunity ... protects "all but the plainly incompetent or those who knowingly violate the law."' *Ashcroft v. al-Kidd,* 131 S.Ct. at 2085 (quoting *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). Despite the broad language of § 1983, all other innocent citizens will be without a remedy when their constitutional rights—less well-established—are violated.")

Zamora v. City of Belen, 383 F.Supp.2d 1315, 1336 (D.N.M. 2005) ("[E]ven assuming Valdez' actions constituted a constitutional violation, Valdez is nevertheless entitled to qualified immunity because a reasonable investigating officer would not have known that–after disclosing all relevant evidence to the prosecuting attorney–he had an independent duty to present such evidence to the grand jury. Zamora provides no case–Tenth Circuit or otherwise–to support his legal theory. Having no case law to the contrary, and concluding that, based on the law at the time the action occurred, a reasonable officer would have not known such conduct violated the law, Valdez is entitled to qualified immunity on Zamora's malicious prosecution claim.")

Sanders v. Bd. Of County Commissioners of Jefferson County, 192 F. Supp.2d 1094, 1123 (D. Colo. 2001) ("None of these cases, nor, indeed, any other reported cases of which I am aware involve issues of police conduct during a school shooting of the horrific magnitude as Columbine. As the Tenth Circuit teaches, however, 'a precise factual correlation' is not required. . . Of significance, though, is the police involvement in the *Kneipp* and *Ross* cases. In both cases, the victim suffered physical harm as a result of the affirmative acts of the police officers. I conclude that as of April 20, 1999, the 'danger-creation' jurisprudence was clearly established in the Tenth Circuit and in sister circuits so that, in light of Plaintiffs' well pleaded allegations, reasonable officers in the Command Defendants' position would have understood that their actions violated Mr. Sanders constitutional right to substantive due process. Thus, at this Rule 12 stage, it is premature to grant qualified immunity to the Command Defendants as to Claim One. . . . Given

the unparalleled and unimaginable events at Columbine, the question is a close one. Again however, the facts need not precisely mirror the facts of a precedent setting case . . . . Under the unique circumstances of the case, the alleged unlawfulness was apparent in light of existing law. I conclude that *Uhlrig* and *Armijo* define the contours of the special relationship doctrine in the Tenth Circuit sufficiently so that reasonable officers in the Command Defendants' position would have understood that their actions violated Mr. Sander's constitutional right to substantive due process. Consequently, in light of Plaintiff's well-pleaded allegations, I will deny the Command Defendants qualified immunity as to Claim Two.").

Guseman v. Martinez, 1 F. Supp.2d 1240, 1258 (D. Kan. 1998) ("At the time of this incident it was not clearly established that this method of restraint could violate the Fourth Amendment. Plaintiffs cite no case holding such conduct to be a constitutional violation and, in fact, *Phillips* and *Cottrell* found similar conduct to be lawful under the Fourth Amendment. The court rejects plaintiffs' argument that the officers are not entitled to immunity because they should have known that the use of such 'deadly force' was unlawful. Almost any type of force can cause death in aberrant circumstances. The limits on the use of 'deadly force' under the Fourth Amendment, however, apply only to 'that force which is reasonably likely to cause death.' . . .That cannot be said of the prone method of restraint even though it has the potential to cause death in certain circumstances. There is no evidence that the probability of death is so high as to be considered 'likely' when such restraint is used. . . . Given the state of the law, a reasonable officer in the defendants' position could have believed their conduct to be lawful.").

ELEVENTH CIRCUIT

Robinson v. Lambert, No. 18-11033, 2018 WL 5255238, at *5-6 (11th Cir. Oct. 22, 2018) (not reported) ("At the time of the alleged conduct, the standard for excessive force was 'whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.'. . But the factors used to assess whether force was excessive were the same. . . It is well established in our case law that an officer cannot continue to use force after there is no longer a need for it. . . .And we have made clear that if a detainee stops resisting, the use of force is no longer justified. . . . We find that this well-established principle applies to this case with obvious clarity. Based on Robinson's version of the facts, he was pinned against the wall with his arms behind his back while Officers Lambert and Peterkin pushed him back and forth for approximately 30 to 45 seconds. At no point during this interaction did he resist. After Robinson had been pinned against the wall for at least 30 seconds without resisting, any objectively reasonable officer would know that Robinson had been subdued. The continued use of force became unnecessary and unjustified. But Lambert proceeded to push Robinson face-down on the desk, and then shove him with enough force to break his arm. Based on then current law, this gratuitous display of force allows us to 'draw a reasonable inference' that Lambert acted with 'the very purpose of causing harm' and was consequently excessive. . . . We conclude that Lambert's use of force was a clearly established violation of Robinson's constitutional right. The law provided that the continued use of force after there is no longer a need

for it is excessive. And the law provided that threatening to cause further injury indicates sadistic intent. Coupling Lambert's continued use of force after Robinson was subdued with his threat to inflict further injury, it is plain as a matter of obvious clarity that Lambert used force 'maliciously and sadistically with the very purpose of causing harm.'. .Thus, he is not entitled to qualified immunity.")

J W by & through Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1259-63 (11th Cir. 2018) (per curiam) ("We need not decide whether the Fourth Amendment or the Fourteenth Amendment governs the students' decontamination claims to resolve the SROs' qualified immunity arguments. Assuming that those claims are properly brought under the Fourth Amendment, and that the SROs violated the Fourth Amendment by not adequately decontaminating the students, the relevant law was not clearly established at the time of the SROs' conduct. . . .The question for us, therefore, is whether the 'state of the law' in 2009, 2010, and 2011 'gave the [SROs] fair warning that their ... treatment of [the students]' as to decontamination 'was unconstitutional.'. . The students rely on our 2008 decision in *Danley* to argue that their right to adequate decontamination was clearly established. . . . *Danley* certainly holds that, under certain circumstances in a prison setting, an officer violates the Fourteenth Amendment if he does not timely and adequately decontaminate (or provide timely and adequate decontamination services to) a prisoner who is suffering from the prolonged effects of an incapacitating chemical spray. For a couple of reasons, however, we do not believe that *Danley* provided fair and clear notice to the SROs that their decontamination efforts (or lack thereof) violated the students' Fourth Amendment rights. . . . The district court, we think, understandably determined that the SROs did not engage in best practices, and that they could have done more for the students in their decontamination efforts. But assuming that their failure to go further violated the Fourth Amendment, the rights of the students to be decontaminated to the degree demanded were not clearly established under the circumstances presented. . . . Alternatively, the students argue that the SROs' conduct was 'so far beyond the hazy border between excessive and acceptable force' that they had to have known that they were violating the Constitution even in the absence of 'fact-specific case law.'. . Although we empathize with the students, two of whom vomited after being sprayed with Freeze +P, we are not persuaded by their argument. The students' complaint is that the SROs did not do enough to decontaminate them. Again, we agree with them, and with the district court, that the SROs did not do all that they could have done. They did not, for example, provide the students with access to water to wash or shower. But it is not fair to characterize the SROs' conduct as the complete failure to take any decontamination action at all. The SROs provided the students with some fresh air or air conditioning following the use of Freeze +P, and the students were seen by paramedics who chose not to administer treatment (and who on two occasions told the students not to put water on their faces). For purposes of qualified immunity, it is not insignificant that the methods used by the SROs—passage of time, exposure to fresh air, and evaluation by paramedics—were at least partially consistent with their training and, at least to some degree, with the instructions provided by Aerko International, the manufacturer of Freeze +P. Again, assuming that the SROs fell short of the Fourth Amendment minimum, they were not faced with an "obvious clarity" scenario. Recognizing that cases from other lower federal courts cannot create clearly established law

for qualified immunity purposes, we note, as well, that the other chemical spray cases we have found—mostly in the prisoner/denial of medical care context—have arisen in different factual scenarios and do not set out definitive or minimum constitutional standards for the decontamination of those who suffer from exposure. So, even if we could look outside the Eleventh Circuit and the Alabama Supreme Court, the published case law would not have provided the SROs with 'obvious clarity' about the purported unconstitutionality of their conduct.")

Glasscox v. City of Argo, 903 F.3d 1207, 1216-20 (11th Cir. 2018) ("Applying the *Graham* factors to the evidence viewed in Mr. Glasscox's favor yields only one possible conclusion: that he was no longer resisting at least after the second taser shock and was attempting to comply with commands; thus, Officer Moses's repeated firing of his taser, which caused Mr. Glasscox injury, 'was wholly unnecessary, and grossly disproportionate to the circumstances.'. . As our precedent makes clear, '[t]he use of a taser beyond the arrestee's complete physical capitulation repeatedly in a short period where an arrestee was mostly cooperative and made no attempt to flee would be excessive.'. . This is such a case. Mr. Glasscox stopped his truck; turned it off; held his hands where Officer Moses could see them; removed his seatbelt at the officer's command; at least after the second taser shock, made no attempt to resist or flee; and repeatedly voiced his intention to cooperate. Yet Officer Moses tased him again and again. And as to Officer Moses's argument that Mr. Glasscox's failure to get out of the truck quickly put him in danger from nearby traffic, the additional, rapid deployments of the taser under these circumstances only prolonged Officer Moses's exposure to that danger. Under the circumstances as construed in Mr. Glasscox's favor, any reasonable officer in Officer Moses's position would have believed that continued taser shocks were unnecessary; a jury could find that Officer Moses's repeated tasing of Mr. Glasscox amounted to excessive force. . . Having concluded that Mr. Glasscox has at this stage shown that Officer Moses used excessive force under the circumstances, we address whether a reasonable officer in Officer Moses's circumstances would have had fair warning that repeatedly deploying his taser, when Mr. Glasscox was not resisting and was attempting to comply with the officer's commands, was unconstitutionally excessive. . . .The crucial question here is whether the state of the law gave police officers 'fair warning' that their conduct was unconstitutional. . . . [W]e conclude that it was clearly established on the date of Mr. Glasscox's arrest that the repeated tasing of a suspect who had ceased any resistance was unlawful. . . *Oliver* and *Smith* together dictate this result. We address these authorities in turn. . . . In light of this clearly established law, no objectively reasonable officer in Officer Moses's position could have thought it was lawful to use a taser repeatedly on an arrestee who was not resisting, even if that arrestee had previously offered resistance and was not yet restrained. *Oliver* settled any question whether repeated taser deployment could constitute excessive force even if an earlier deployment was justified. And *Smith* removed any doubt that an officer's use of substantial force on an arrestee who, although not yet restrained, had ceased any resistance or threatening behavior, is excessive. Together, *Smith* and *Oliver* clearly establish that the repeated tasing of a subdued arrestee who has ceased any resistance or threatening conduct is excessive force in violation of the Fourth Amendment. Alternatively, under the unusual circumstances of this case, it would be obviously clear to any reasonable officer that the display of force was excessive. It is clear from precedent

that 'gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force.'. . . Accepting the evidence in the light most favorable to Mr. Glasscox, we conclude that, because Officer Moses used gratuitous and excessive force on an arrestee who was not resisting arrest, 'no particularized preexisting case law was necessary for it to be clearly established that what [Officer Moses] did violated [Mr. Glasscox's] constitutional right to be free from the excessive use of force.'. . . Officer Moses may have been justified in deploying his taser to subdue Mr. Glasscox, who had just led him on a high speed chase for several miles on the interstate. But instead of using the taser on Mr. Glasscox and then giving him time to respond to orders, Officer Moses issued repeated taser shocks in rapid succession. Mr. Glasscox, helpless to comply or stop the taser shocks, cried out and writhed in pain and during the brief intervals between shocks told the officer that he would comply. We hold, viewing the evidence in the light most favorable to Mr. Glasscox, that Officer Moses's repeated deployment of the taser amounted to excessive force prohibited by the Fourth Amendment. Because our law clearly established that such a use of force was excessive, the district court properly denied qualified immunity.")

Cozzi v. City of Birmingham, 892 F.3d 1288, 1297-98 (11th Cir. 2018) ("Considering now the totality of the circumstances, we ask 'whether reasonable officers in the same circumstances and possessing the same knowledge as [Thomas] could have believed that probable cause existed to arrest' Cozzi. . . We need not decide whether the evidence Thomas possessed—the statements of two tipsters that Cozzi resembled the perpetrator shown in the *Crime Stoppers* video, confirmation that the informant had accurately provided Cozzi's address and a description of his vehicle, and a plastic bag with 32 pills found inside Cozzi's home—was sufficient to establish arguable probable cause because we must also consider the information tending to exculpate Cozzi that was available to Thomas when he made the arrest. Thomas had been told the readily verifiable exculpatory fact that the perpetrator's multiple tattoos did not match Cozzi's single tattoo. And setting aside the 32 pills we have already discussed, the search of his residence had failed to turn up even arguable evidence of the robberies. Of course, 'a police officer is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest,' but the officer may not turn a blind eye to evidence suggesting that a suspect is innocent by 'choos[ing] to ignore information that has been offered to him or her' or by 'elect[ing] not to obtain easily discoverable facts.'. . Viewing the facts in the light most favorable to Cozzi, Thompson told Thomas that Cozzi could not have been the perpetrator because Cozzi did not have multiple tattoos like the perpetrator in the photograph. . .Despite having been given plainly exculpatory and easily verifiable information, Thomas did not look at Cozzi's tattoo before arresting him. Under our precedent, this failure was unreasonable. . . .With Cozzi handcuffed and standing right outside the house when Thompson told Thomas about the tattoo discrepancy, Thomas 'unreasonably disregarded' evidence establishing that Cozzi was not the perpetrator of the crimes. . .Under the totality of the circumstances, Thomas therefore lacked arguable probable cause to arrest Cozzi. Because Cozzi was arrested without arguable probable cause, '[t]he second qualified immunity inquiry is, in the context of this case, straightforward: our binding precedent clearly established, at the time of [Cozzi's] arrest, that an arrest made without arguable probable cause violates the Fourth Amendment's prohibition on unreasonable searches and seizures.'. . In arresting Cozzi without

arguable probable cause, Thomas violated clearly established law and thus is not entitled to qualified immunity.")

Saunders v. Sheriff of Brevard County, 735 F. App'x 559, ___ (11th Cir. 2018) (Martin, J., dissenting in part) ("Oberist Saunders filed suit against officials at the Brevard County Jail on account of the squalid conditions he was forced to live in while imprisoned there. Rather than allow Mr. Saunders to present his evidence to a jury, my colleagues in the majority rely on the doctrine of qualified immunity to end his case here. This case involves the denial of basic human necessities, which is a well-established constitutional right, even for prisoners. Our Circuit precedent, properly applied, would give Mr. Saunders an opportunity to redress the harms inflicted on him. My review of the record reveals that Mr. Saunders has substantiated two independent Eighth Amendment violations that should survive summary judgment. The first is based on Corporal Wright's deliberate indifference to the unsanitary conditions in the acute pod where Mr. Saunders was housed for at least 69 days. The second is based on Corporal Wright's deliberate indifference to Mr. Saunders's panic attack and self-harming behavior on August 3, 2008. The District Court denied qualified immunity to Corporal Wright, and I think it was right to do so. I therefore dissent from the opinion issued by my colleagues reversing the District Court decision in this regard. . . .Under *Baird* and *Novak*, a reasonable officer in Corporal Wright's position would have known that the unsanitary conditions in the acute pod violated the Eighth Amendment. . . It's true that neither *Baird* nor *Novak* involved the precise circumstances at issue here. But '[e]xact factual identity with a previously decided case is not required.'. .Despite certain factual differences between the facts in *Baird* and *Novak* and the facts here, this precedent made clear that two specific aspects of the unsanitary conditions in the acute pod constituted unconstitutional conditions. . . First, *Novak* noted that 'proximity to human waste' often constitutes a 'deprivation of basic elements of hygiene' in violation of the Eighth Amendment. . . Mr. Saunders has shown that he was directly exposed to human waste and other bodily fluids for extended periods of time, including where he slept and ate. Second, this Court expressly held that conditions lacking 'the provision of hygiene items[ ] violate[ ] the minimal standards required by the Eighth Amendment.'. . The record here shows that the jail prohibited inmates in the acute pod from having many basic 'hygiene items,' including toothbrushes, toothpaste, eating utensils, clean sleeping mats, and most importantly hand soap. . . . In sum, *Baird*, *Brooks*, and *Novak* gave Corporal Wright 'fair warning' that the unsanitary conditions of the acute pod—particularly the combination of proximity to human waste and the lack of hand soap—violated Mr. Saunders's Eighth Amendment rights. . . Because Corporal Wright's Eighth Amendment violation was clearly established, he is not entitled to qualified immunity. . . .The majority assures us that it 'take[s] no particular pleasure,' in the outcome of this case, . . .but we are judges, whose job demands application of the constitutional principles, not expressions about our feelings. And the majority opinion is mistaken when it declares 'we have no other choice' but to foreclose this suit. . . This court can recognize the flagrantly unconstitutional conditions of confinement, and in fact is obligated to do so. Instead, the majority opinion downplays the conditions Mr. Saunders faced, describing them as 'troubling' and 'unpleasant.'. . These adjectives do not accurately describe the gratuitous cruelty Mr. Saunders

endured at the Brevard County Jail. Our Constitution does not turn a blind eye to these types of conditions, and neither should we.")

Benjamin v. City of Miami, 727 F. App'x 635, ___ (11th Cir. 2018) (Granting qualified immunity on motion to dismiss where "[Plaintiff] alleged that [Detective] violated his right to due process when he misadvised him of his right to counsel, refused to notify him that [lawyer] was present at the police station and wanted to speak with him, and lied to [lawyer] about his potential client's interrogation and whereabouts." Court concluded it was not clearly established that such conduct "shocked the conscience" for purposes of substantive due process claim.)

Crocker v. Beatty, 886 F.3d 1132, 1136-38 (11th Cir. 2018) ("Beatty contends that the 'nature of cell phones' leads to easily-destroyed evidence that disappears quickly. This, according to him, is itself sufficient reason to find exigent circumstances here. Taken to its logical conclusion, his interpretation would permit police officers to seize now-ubiquitous cell phones from any person, in any place, at any time, so long as the phone contains photographs or videos that could serve as evidence of a crime—simply because the 'nature' of the device used to capture that evidence *might* result in it being lost. Not so. The Fourth Amendment draws a line well short of this awesome breadth of government power that no court, to our knowledge, has come close to recognizing. The Constitution requires Beatty's argument to fail. . . .The right to be free from warrantless seizures of personal property, absent an applicable exception, was clearly established to the point of obvious clarity in 2012. . . The exigent circumstances exception was similarly clearly established at the time of the Crocker-Beatty confrontation. . . Beatty's argument, however, is that the *application* of this exception to the seizure of cell phones—in particular, Internet-connected smart phones like Crocker's iPhone—was not clearly established in 2012. But this argument asks far too much. The novelty of cutting-edge electronic devices cannot grant police officers *carte blanche* to seize them under the guise of qualified immunity. This is not how our analysis operates. Even in 'novel factual situations,' we must deny qualified immunity when clearly established case law sends the 'same message' to reasonable officers. . . Our case law has sent a consistent message, predating 2012, about the warrantless seizure of personal property and how exigent circumstances may arise. The technology of the iPhone simply does not change our analysis. To hold otherwise would deal a devastating blow to the Fourth Amendment in the face of sweeping technological advancement. These advancements do not create ambiguities in Fourth Amendment law; the principles remain as always. Because of this, Beatty is not entitled to qualified immunity.")

Gates v. Khokhar, 884 F.3d 1290, 1296-1304 (11th Cir. 2018) ("Fair warning is most commonly provided by materially similar precedent from the Supreme Court, this Court, or the highest state court in which the case arose. . . However, a judicial precedent with identical facts is not essential for the law to be clearly established. . . Authoritative judicial decisions may 'establish broad principles of law' that are clearly applicable to the conduct at issue. . . And occasionally, albeit not very often, it may be obvious from 'explicit statutory or constitutional statements' that conduct is unconstitutional. . . In all of these circumstances, qualified immunity will be denied only if the

preexisting law by case law or otherwise 'make[s] it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue.'. .A defendant who asserts qualified immunity has the initial burden of showing he was acting within the scope of his discretionary authority when he took the allegedly unconstitutional action. . . Assuming the defendant makes the required showing, the burden shifts to the plaintiff to establish that qualified immunity is not appropriate by showing that (1) the facts alleged make out a violation of a constitutional right and (2) the constitutional right at issue was clearly established at the time of the alleged misconduct. . . .Even without actual probable cause, however, a police officer is entitled to qualified immunity if he had only 'arguable' probable cause to arrest the plaintiff. . . Moreover, when an officer has arguable probable cause to arrest, he is entitled to qualified immunity both from Fourth Amendment claims for false arrest and from First Amendment claims stemming from the arrest. . . .Whether an officer has probable cause or arguable probable cause, or neither, 'depends on the elements of the alleged crime and the operative fact pattern.'. . The rationale behind qualified immunity is that an officer who acts reasonably should not be held personally liable merely because it appears, in hindsight, that he might have made a mistake. The concept of arguable probable cause therefore allows for the possibility that an officer might 'reasonably but mistakenly conclude that probable cause is present.'. . . Viewing the facts in the light most favorable to Plaintiff, we think Defendants had actual probable cause to arrest Plaintiff for violating Georgia's mask statute. But even assuming they lacked actual probable cause, these officers clearly had arguable probable cause. . . . The Georgia Supreme Court has instructed that, in assessing whether a mask-wearer acts with the requisite criminal intent, one must consider the surrounding circumstances. *See Miller*, 260 Ga. at 674, 398 S.E.2d 547; *Daniels*, 264 Ga. at 463–64, 448 S.E.2d 185. Given the circumstances of this case, an objectively reasonable officer in Defendants' position could have believed that Plaintiff was either actually trying to intimidate or reasonably would have known that his conduct would provoke a reasonable apprehension that he was doing so, which is, in relevant part, the intent element imported into the statute by the Georgia Supreme Court in *Miller* and *Daniels* for purposes of sustaining a conviction. Like some other protesters, Plaintiff was wearing a mask that covered his entire face, and thus concealed his identity, during this night-time protest. That conduct might be sufficient by itself to suggest an intent to intimidate. But there is more: the calculus changed dramatically when the police repeatedly asked the masked protesters to remove their masks, else be arrested. Notwithstanding this command, Plaintiff nonetheless persisted, in what could reasonably be perceived as defiance of this lawful order by the police. A reasonable officer could infer that Plaintiff intended to intimidate based on such conduct, or, at the least, infer that Plaintiff could reasonably foresee that his behavior would be viewed as intimidating. . . . That Plaintiff now alleges he did not hear Whitmire's warnings to remove his mask is immaterial. For purposes of our qualified immunity analysis, 'we look only to whether a reasonable officer, *knowing what [Defendants] knew at the time*, objectively could have believed probable cause existed.'. . Here, over a loud speaker, the police issued multiple warnings directing protestors to remove their masks. Given all the surrounding circumstances, an objective officer could reasonably have interpreted Plaintiff's refusal to comply with multiple orders to remove his mask as a gesture intended to intimidate. . . . In concluding that arguable probable cause to arrest was

lacking, the district court relied on Plaintiff's allegation that he never intended to intimidate anyone through his wearing of the V for Vendetta mask. Ergo, the court concluded, arguable probable cause evaporated. This approach was error. It is not Plaintiff's post-hoc explanation of his actions that counts. What matters is what a reasonable police officer under the circumstances could infer from those actions. A reasonable officer could infer that, in disobeying Whitmire's commands to remove his mask, Plaintiff actually intended to intimidate or, at the least, acted with 'reasonable foresight' that his conduct would do so. . . . In short, and for all of the above reasons, we conclude that Defendants, at the very least, had arguable probable cause to arrest Plaintiff for violation of the mask statute. We disagree with the district court's conclusion to the contrary. . . .Reframing the analysis to conform with the direction of the Supreme Court, the dispositive question is whether it was already clearly established, as a matter of law, that at the time of Plaintiff's arrest, an objective officer could not have concluded reasonably that probable cause existed to arrest *Plaintiff under the particular circumstances Defendants confronted*. . . Again, resolution of the clearly-established test does not depend on whether a judge might decide later that probable cause was lacking in fact. Instead, the test asks whether already existing law was so clear that, given the specific facts facing this particular officer, one must conclude that 'every reasonable official would have understood that what he is doing violates' the Constitutional right at issue. . . That judges disagree about a constitutional issue is itself evidence that a right is insufficiently clearly established for purposes of denying qualified immunity. . . Plaintiff does not cite, and we have not found, any already existing law that clearly established—beyond debate—the unlawfulness of an arrest under the circumstances present here. . .And that is not surprising, given our conclusion that, at the very least, Defendants arguably had probable cause to arrest. Because we conclude—as a matter of law—that Defendants violated no already clearly established right, we thus conclude that the district court erred in denying Defendants' motion to dismiss based on qualified immunity. Accordingly, we reverse the district court's denial of that motion.")

Gates v. Khokhar, 884 F.3d 1290, 1305-09 (11th Cir. 2018) (Kathleen Williams, DJ, dissenting in part) ("Although I agree that official immunity warrants dismissal of the state-law claims against Appellants, I do not agree that the officers are entitled to qualified immunity on Gates's federal claims. More specifically, I believe that Gates has adequately pled that Appellants lacked actual or arguable probable cause to arrest him for wearing a Guy Fawkes mask during an admittedly peaceful protest in downtown Atlanta. Therefore, I would affirm the district court's finding that Gates's First and Fourth Amendment claims should survive a motion to dismiss. . . . Even assuming that the 'clearly established right' must be defined more narrowly than an 'arrest without probable cause ... violates the Fourth Amendment,' the specific right at issue here—whether individuals can be subject to arrest for wearing a mask during a peaceful protest—was 'clearly established' at the time of Gates's arrest. This Circuit has unambiguously held that '[our] [d]ecisions ... have put police officers on notice for decades that protestors present on public property have a First Amendment right to peacefully express their views, in the absence of narrowly tailored ordinances restricting the time, place, or manner of the speech.'. . .But even beyond the clearly established right to peacefully protest that is set out in the First Amendment, it would be unreasonable for the officers to believe that the Anti–Mask Act was intended to cover the type of protected speech at

issue here. As the *Miller* court declared in defending the constitutionality of the Anti–Mask Act twenty years ago, '[i]t would be absurd to interpret the statute to prevent non-threatening political mask-wearing.'. . . Thus, under any reading of what constitutes a clearly established right, there can be no doubt that 'every reasonable official would have understood' that if Gates was engaging in 'non-threatening political mask-wearing,' there was no probable cause for arrest under the Anti–Mask Act and the officers cannot be shielded from suit by qualified immunity. . . .There can be no doubt that the order to remove the masks was directed at what would be constitutionally-protected expression. . . unless it was brought outside the ambit of the First Amendment through some exception—here, the threat of violence or intimidation that was criminalized by the Anti–Mask Act. . . As discussed above, the record at this juncture does not demonstrate that such a threat existed at the time the order was given, and so there was no legal basis for ordering Gates to remove his mask. . .To the contrary, the order itself constituted an impermissible incursion on Gates's right to free speech, and, as the Supreme Court explained in *Wright v. State of Ga.,* 373 U.S. 284, 292, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963), '[o]bviously, ... one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution.' *See also Brown v. State of La.*, 383 U.S. 131, 141, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). To say that arguable probable cause arose when the police ordered Gates to remove his mask even if he was not violating the Anti–Mask Act prior to the order being given, would render Fourth and First Amendment protections meaningless: A Fourth Amendment claim cannot be defeated because a citizen continues to engage in protected political speech in contravention of an order she has no lawful obligation to obey. And her non-criminalized, peaceful self-expression cannot be characterized as 'threatening' and stripped of constitutional protection simply because a police officer orders her to stop. In sum, nothing in the complaint or attached documentation supports a finding that a reasonable officer could have believed that Gates's conduct evidenced an intent to threaten or intimidate, as required under the Anti–Mask Act. The complaint alleges that Gates was wearing a mask 'to express himself' during a 'peaceful protest' in downtown Atlanta, and that he was improperly arrested after the police gave an 'unconstitutional ... order' to remove his mask and he did not do so. The arrest report attached to the complaint similarly states that 'Mr. Gates was arrested for wearing a mask' while participating in a protest, with no mention of threats or intimidation. Based on these allegations, it is clear that Gates's behavior is a far cry from the 'terrorization by masked vigilantes' that the Anti–Mask Act was designed to prevent. *Miller*, 260 Ga. at 672, 398 S.E.2d 547. Instead, the record describes the type of 'non-threatening political speech' that has unambiguously qualified as protected expression since the *Miller* decision in 1990. For that reason, I respectfully dissent.")

Brand v. Casal, 877 F.3d 1253, 1264-65, 1269-70 (11th Cir. 2017) ("Just like the officer in *Fils*, Deputy Pardinas tased Mrs. Brand even though she was not violent or aggressive and was not resisting arrest. So in the same way we did in *Fils*, we again recognize that our law was clearly established that the use of a taser under such circumstances was excessive force. . . The District Court therefore properly denied Deputy Pardinas qualified immunity on the Brands' excessive force claim. . . . *Rettele* gave law enforcement officers fair warning that they cannot force an arrestee to expose her intimate body parts 'longer than necessary to protect their safety.'. . This is

exactly what these deputies did to Mrs. Brand. In light of *Rettele's* statement that involuntary exposure becomes unreasonable 'once the police [are] satisfied that no immediate threat [is] presented,'. . . a reasonable officer in the defendants' position would have known that forcing Mrs. Brand to expose her breasts for over an hour, when it was entirely unnecessary to protect the officers' safety, violated the Fourth Amendment. . . .Given these explanations and articulations of the right to bodily privacy, no reasonable officer would have concluded that the constitutional principle of *Rettele* turned on whether the couple in that case was forced to show their genitals rather than only the woman's breasts. . . Forcing a woman to expose either body part against her will is a 'degrading and humiliating method[ ]' of conducting a seizure, which the Fourth Amendment protects against. . . . A reasonable officer would have known that subjecting Mrs. Brand to the indignity of exposing herself to countless strangers for an extended period of time—for no legitimate law-enforcement purpose—violated those constitutional protections. We conclude, therefore, that the defendants' violation of Mrs. Brand's right to bodily privacy was clearly established. We affirm the District Court's denial of qualified immunity on the Brands' bodily-privacy claim.")

Salter v. Mitchell, 711 F. App'x 530, ___ (11th Cir. 2017) ("At the time of Salter's suicide, decisional precedent had clearly established that a jailer acts with deliberate indifference if he has subjective knowledge of a strong likelihood that an inmate would attempt suicide and deliberately fails to take any action to prevent that inmate's suicide. . . Ms. Salter has not met her burden of pointing to any case law that says 'beyond debate' that jail staff is not allowed to rely on a general practitioner's determination about an inmate's mental health. The facts here do not show that Defendants violated clearly established law nor that they acted with deliberate indifference while monitoring Salter on a health watch. Therefore, the judgment of the district court is reversed and remanded with instructions to find that the three Defendants are protected under the law of qualified immunity from suit and liability under the facts of this case.")

Gaines v. Wardynski, 871 F.3d 1203, 1207-14 (11th Cir. 2017) ("Because the district court here defined "clearly established law" at too high a level of generality, we reverse. . . .For purposes of this appeal, we will accept as true that Dr. Wardynski passed Gaines over for promotion because her father had criticized him and the Board about a matter of public concern and that doing so violated her First Amendment rights (the first prong). . . This case turns on whether those rights were 'clearly established' by controlling law when Dr. Wardynski did what he did (the second prong). . . .The second and third methods [set out in *Vinyard* for determining whether law is "clearly established"] are generally known as 'obvious clarity' cases. . . They exist where the words of the federal statute or constitutional provision at issue are 'so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful,' or where the case law that does exist is so clear and broad (and 'not tied to particularized facts') that 'every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.'. . Cases do not often arise under the second and third methods.. . . .Because failing to promote an employee after her father had criticized her employer is not so egregious as to violate the First Amendment on its face with respect to her

constitutional rights, and because there are no 'broad principles' in case law clearly establishing that every reasonable official in that situation would know that the challenged conduct would violate her First Amendment rights, this is not one of the rare and exceptional 'obvious clarity' cases. . . Thus, we will focus our attention on the remaining (first) method to establish fair warning. . . . As noted, to establish fair warning under this method, plaintiff may point to prior case law (from the Supreme Court of the United States, the Eleventh Circuit, or the highest court in the relevant state) that is 'materially similar. . . .This court has stated many times that ' "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant."'. . It is particularly difficult to overcome the qualified immunity defense in the First Amendment context. . . .In sum, at the time relevant to this case, it was not clearly established that it would violate an employee's free speech rights to take adverse action because her father had engaged in protected speech. It might be fair to say in that situation that the employer knew or should have known that he was violating the *father's* First Amendment rights. . . However, it was not clearly established under the controlling law that it 'would violate the constitutional rights *of the [employee]*.'. . Thus, Dr. Wardynski was entitled to qualified immunity (and summary judgment) on the freedom of speech claim. . . .The question in this case is not whether there is a First Amendment right to intimate association; there is. Nor is the question whether a public employee can be subjected to an adverse employment action for exercising that right; she can't. Nor is the question whether the employee will prevail if the adverse action infringed on her right to intimate association; she will. The question we are called to decide is more narrow: was it clearly established in 2013 (by the U.S. Supreme Court, this court, or the Supreme Court of Alabama) that it would violate the right to freedom of intimate association to take an adverse action against an employee whose father publicly criticized her employer? None of the circuit cases that Gaines has cited involved the same or similar facts. . . . Ultimately, counsel for Gaines had to concede at oral argument that 'there certainly are no cases that we've cited dealing with the protection of a child from retaliation based upon the conduct of a parent.' In the absence of any controlling case involving that situation on sufficiently similar facts, Dr. Wardynski did not have notice and 'fair warning' that he was violating Gaines's right to freedom of intimate association. Accordingly, Dr. Wardynski was entitled to qualified immunity, and summary judgment should have been granted on that claim as well. . . . Because the case law that Gaines has relied upon was not particularized to the facts of the case, but rather it merely set out First Amendment principles at a high level of generality, it was not 'apparent' that passing her over for promotion based on things her father said would violate *her* constitutional rights. Thus, Dr. Wardynski is entitled to qualified immunity on both the freedom of speech claim and the freedom of intimate association claim.")

Woodyard v. Alabama DOC, 700 F. App'x 927, 932-33 (11th Cir. 2017) ("Some of our sister circuits' decisions suggest that Woodyard's report to Leggett might be enough to show that Leggett had subjective knowledge of the risk Woodyard faced. . . But in determining whether a particular constitutional violation is clearly established, we look to our own binding precedent, the binding precedent of the Supreme Court, and the binding precedent of the 'highest court in the state where the action is filed.'. . And no decision from the United States Supreme Court, this Court, or the Alabama Supreme Court clearly established that the information available to Leggett was

sufficient to apprise him of the risk Woodyard faced and require him to take preventative action. . . .In *Rodriguez* the officers were aware of both the threats made against the inmate and the gang-related nature of those threats. The assault in this case was not gang-related. All Leggett was aware of was Anderson's threats, Anderson's drunkenness, and the fact that Anderson and Woodyard had an argument a few minutes before Woodyard spoke to Leggett. A reasonable officer could conclude that, because of the violence associated with gangs and the lack of gang involvement in the dispute between Anderson and Leggett, this situation was different from the one the officers in *Rodriguez* faced. A gang's threat to kill someone for leaving the gang (or really for almost any other reason) could reasonably be considered more credible than a drunk inmate's threat to kill someone because they didn't hand over 'goods.' That distinction is enough to prevent *Rodriguez* from clearly establishing that Leggett's conduct was unconstitutional. . . .Until binding precedent clarifies the circumstances in which threats between inmates are sufficient to allow the jury to impute knowledge of such risks to an officer, we cannot say that in the circumstances of this case a refusal to act on a threat (or threats accompanied by drunkenness) amounted to a clearly established constitutional violation. For those reasons, the district court did not err by granting summary judgment to Leggett on Woodyard's failure to prevent claim.")

Johnson v. Conway, 688 F. App'x 700, 706, 709, 707 n.2 (11th Cir. 2017) ("Here, like the district court, albeit for different reasons, we do not reach the question of whether Johnson's constitutional rights were violated because he has not shown that the detention officers violated a clearly established right. . . . It bears repeating that 'generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity.'. . No 'materially similar case' declares the detention officers' conduct unconstitutional, and the broad principles of law on which Johnson relies do not apply with 'obvious clarity' to the specific situation facing the detention officers. . . Because Johnson has not shown that the detention officers violated a clearly established right in the specific context of this case, we affirm the grant of qualified immunity to Revels, Bailey, and Davis. . . .*Kingsley* was decided after the incident giving rise to this case and so is not directly relevant to the inquiry of whether the law was 'clearly established at the time of the misconduct.'. . For this inquiry we look to our pre-existing law, which applied the subjective-malice standard abrogated by *Kingsley*. . . The district court concluded that, because the evidence was insufficient to meet the subjective standard (and therefore to prove a constitutional violation under the prior precedent), the officers could not have been on notice that their conduct was unlawful. Appearing to concede that he cannot meet the subjective-malice standard, Johnson contends that *Kingsley* 'did nothing to change the standard of conduct for detention officers' and that pre-existing law in this Circuit clearly established an objective standard of conduct that applies with obvious clarity in this case. *See Kingsley v. Hendrickson*, 801 F.3d 828, 832–33 (7th Cir. 2015) (holding that "*before and after* the Supreme Court's decision in [*Kingsley*], the standards for the amount of force that can be permissibly employed remain the same"). For instance, since before the time of this incident, as both parties appear to agree, this Circuit applied the same objective factors to Fourteenth Amendment excessive-force claims as the Supreme Court articulated in *Kingsley*. *See Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir.

2007). Likewise, the broad principles of law articulated in *Ort*, *Danley*, and *Williams*, are largely the same as those articulated in *Kingsley*. Accordingly, we assume without deciding that Johnson is correct that an objective standard of conduct was clearly established by pre-existing case law. *Cf. Kingsley*, 135 S. Ct. at 2474–75 (explaining that "the use of an objective standard adequately protects an officer who acts in good faith"). It makes no difference to the ultimate outcome, however, because Johnson has not shown that the broad principles of law on which he relies clearly established the objective unreasonableness of the detention officers' conduct, nor has he shown that the evidence is sufficient to meet the subjective 'malicious or sadistic' standard.")
'malicious or sadistic' standard.")

Crews v. Paine, 686 F. App'x 540, 546 (10th Cir. 2017) ("Neither the district court nor Officer Crews cite any authority holding an unbiased decisionmaker *personally* liable under § 1983 for an adverse action allegedly traceable to another's improper animus. Indeed, such a holding would appear contrary to basic limits on personal liability under § 1983, which, eschewing principles of respondeat superior, make 'each Government official ... only liable for his or her own misconduct.'. . In any event, given the absence of precedent clearly establishing personal liability under § 1983 based on a cat's paw theory, Chief Eaton would be entitled to qualified immunity from liability on the basis of such a theory. *See, e.g.*, *Estate of B.I.C. v. Gillen*, 761 F.3d 1099, 1104 (10th Cir. 2014) (summary judgment on basis of qualified immunity required when theory of liability relied on by plaintiff was not clearly established).")

Stephens v. DeGiovanni, 852 F.3d 1298 (11th Cir. 2017) ("In deciding whether an officer is entitled to summary judgment based on qualified immunity, the question of whether the force used by the officer in the course of an arrest is excessive is a ' "pure question of law,"' decided by the court. . . . Under Stephens's version of the events at the time of his encounter with Deputy DeGiovanni, he had complied with all Deputy DeGiovanni's investigation questions and was not resisting or attempting to flee. Deputy DeGiovanni had no reason to use the force he did on Stephens that resulted in severe and permanent physical injuries as well as psychological trauma. Under the objective-reasonableness standard of *Graham*, '[a]n officer will be entitled to qualified immunity if his actions were objectively reasonable—that is, if a reasonable officer in the same situation would have believed that the force used was not excessive.'. . 'No reasonable police officer could believe that' the force Deputy DeGiovanni exerted on compliant, non-resisting Stephens, evidenced by his severe, permanent injuries, 'was permissible given these straightforward circumstances.'. . . Stephens's arrest injuries are particularly compelling, because, as eyewitness Greenwood averred, Stephens was cooperating by responding to all Deputy DeGiovanni's inquiries and not resisting whatsoever, not even raising his voice. Instead of the similar-case method for resolving Fourth Amendment, excessive-force cases, this case requires the obvious-clarity-method analysis, based on Deputy DeGiovanni's objectively unreasonable, excessive force in arresting Stephens on misdemeanor charges. . . . On these obvious-clarity facts, 'no particularized preexisting case law was necessary for it to be clearly established that what [Deputy DeGiovanni] did violated [Stephens's] constitutional right to be free from the excessive use of force' in his arrest. . .We vacate the judge's order granting summary judgment to Deputy

DeGiovanni on Stephens's excessive-force claim and remand for further proceedings consistent with this opinion. . . .Accepting Stephens's version of the events involved in his arrest, this is an obvious-clarity case under the jurisprudence of the Supreme Court and our circuit for a § 1983 Fourth Amendment, excessive-force claim. While we affirm the denial of Stephens's claim of false arrest because of his nolo contendere plea, we vacate the grant of summary judgment to Deputy DeGiovanni on Stephens's excessive-force claim.")

Young v. Borders, 850 F.3d 1274, 1275, 1280-87 (11th Cir. 2017) (Hull, J, joined by Tjoflat, J., concurring in the denial of rehearing en banc), *cert. denied*, 138 S. Ct. 640 (2018) ("Although orders denying rehearing en banc also have no precedential effect, our colleagues have written two lengthy dissents to this order denying rehearing en banc. Two of the original panel members now write to explain the errors in those dissents. First, although the district court ruled that Deputy Sylvester's conduct violated no 'clearly established law' as of July 15, 2012, the dissents fail to identify any cases with facts similar to the undisputed facts here, much less any similar cases where an officer was held to have violated the Fourth Amendment. [citing *White v. Pauly*] Second, the dissents omit key, undisputed facts in their recitations of what defendant Deputy Sylvester saw, was told, and then did on this night when he tragically shot and killed Mr. Scott, an innocent young man. Here are the complete facts that show what happened that summer night and why the panel properly found no reversible error in the district court's qualified immunity ruling. . . . The district court concluded that Sylvester was not required to wait and see what might happen if he did not stop Mr. Scott[.] . . . The district court concluded that Deputy Sylvester's split-second decision to use deadly force was objectively reasonable under the total circumstances—a reasonably perceived imminent threat of serious physical harm—and was not a constitutional violation. . . . Although the district court ruled on the constitutional violation issue, our panel did not need to decide it. This is because the district court also concluded that '[e]ven if ... Sylvester violated Scott's constitutional rights ... by using excessive force, Sylvester would be entitled to qualified immunity because he violated no clearly established right.'. . The panel simply and correctly found 'no reversible error in the district court's ultimate qualified immunity rulings.' At a minimum, no clearly established federal law as of July 15, 2012[3] gave fair and clear notice to Deputy Sylvester that his conduct in these unique circumstances was objectively unreasonable and unlawful, and thus 'no reversible error' was shown. We explain why the district court did not err on the clearly established prong. . . .In the last five years, the Supreme Court has issued a number of opinions reversing federal courts that denied qualified immunity, often because they applied the clearly established analysis at too high a level of generality and without regard to the particular facts of prior case law. . . . In *White*, the Supreme Court reiterated 'the longstanding principle that "clearly established law" should not be defined "at a high level of generality."'. . . The Supreme Court explained that federal courts that relied on *Graham, Garner*, and their circuit court progeny, instead of identifying a prior case with similar circumstances, have 'misunderstood' the 'clearly established' analysis because those excessive force cases do not create clearly established law outside of an 'obvious case'. . . .Like White, '[t]his is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*' because 'this case presents a unique set of facts and circumstances,' which is 'an important indication' that Deputy Sylvester's

'conduct did not violate a "clearly established" right.'. . With the help of hindsight, the dissents impermissibly second-guess Sylvester's split-second decision to use deadly force. The dissents define clearly established federal law at too high a level of generality, in contravention of the Supreme Court's precedent requiring a case with particularized and similar factual circumstances in order to create 'clearly established' federal law. . . . Although identical facts are not required, there still must be particularized facts that made clear to Deputy Sylvester that his force action was unlawful. . . . Here, the panel was required to find 'no reversible error' because there is no prior case with facts remotely similar, much less particularized facts similar, to the facts in this case. More importantly, even the contours of the law in this type of unusual factual situation were not sufficiently clear such that a reasonable officer, in Defendant Sylvester's situation, would understand that what he is doing violates clearly established federal law. . . . Taken together, what these two prior cases (cited by the dissent) [*Lundgren* and *Menuel*] do illustrate is the wide variety of difficult and complex facts in excessive force cases. These two cases, however, do not closely, or even similarly, resemble the facts of this case, which means qualified immunity protects Deputy Sylvester. . . . This is a difficult and unique case that is not answered by either our precedent or Supreme Court precedent. To find Sylvester's use of force objectively unreasonable, that conclusion must 'follow immediately' from the principles of our past precedents. . . That is not the case here. The panel's unpublished, non-precedential affirmance of the district court's qualified immunity ruling is not incongruous with this Circuit's precedent in excessive force cases. En banc consideration is thus not necessary to 'maintain uniformity of the court's decisions' under Federal Rule of Appellate Procedure 35. . . .We need not decide whether Deputy Sylvester's conduct before the door opened violated the Constitution because no clearly established federal law gave Sylvester fair and clear notice that his conduct constituted an illegal search. . . .In this case, Deputy Sylvester stood on the ground immediately surrounding the stoop to Apartment 114 as he knocked on the front door. Under a Fourth Amendment analysis, Sylvester entered the curtilage of Mr. Scott's home without a warrant, and his conduct at the door took place in a constitutionally protected area. . . The question becomes whether his conduct fell within the knock and talk exception to a warrantless search. . . .Once again, we need not decide the constitutional violation issue. At a minimum, no clearly established federal law on July 15, 2012 gave fair and clear notice to Sylvester that his conduct before the door opened was an illegal search. 'Our Court looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation.'. . In doing so we also only look at the state of the law on the date of the challenged conduct. . . The dissent does not cite any Supreme Court, binding Eleventh Circuit, or Florida Supreme Court case that would have put Deputy Sylvester on fair and clear notice that the time and manner of his approach on July 15, 2015 was illegal. Instead, relying on cases from other circuits, the dissent argues that it is clearly established federal law that Deputy Sylvester's behavior was 'a raid' and exceeded the scope of the permissible knock and talk exception because it was 1:30 a.m., he unholstered his weapon, and he knocked so loudly. In those cases, however, the officers made warrantless entries using a coercive show of force. In contrast, the officers' actions here are dissimilar and do not rise to the level of a 'show of force' found impermissible in those other cases. . . . In conducting its qualified immunity analysis, the district

court's decision viewed the facts in the light most favorable to the plaintiffs. When there were disputes in the record, it accepted the plaintiffs' version of these tragic facts as true. The district court thoroughly and diligently reviewed the facts and legal issues in this case. At a minimum, the district court committed 'no reversible error' because no clearly established federal law gave clear and fair notice that Deputy Sylvester's conduct was unlawful. The panel's affirmance is not en banc worthy under Federal Rule of Appellate Procedure 35.")

Young v. Borders, 850 F.3d 1274, 1291-92, 1294-1300 (11th Cir. 2017) (Martin, J., with whom Wilson, Rosenbaum, and Jill Pryor, JJ., join, dissenting from the denial of rehearing en banc) *cert. denied*, 138 S. Ct. 640 (2018) ("Although the Supreme Court recently reminded us that 'clearly established law should not be defined at a high level of generality,' it also restated the exception to this rule: 'general statements of the law' can still create clearly established law in 'obvious case[s].' *White v. Pauly* . . . We have said that officials need only have 'reasonable warning' that their conduct violated constitutional rights. . . . Contrary to what the District Court found, there were two clear constitutional violations here. First, the reflex shooting and killing of Mr. Scott, as he opened the door to his house then tried to step back inside, was manifestly unreasonable under these circumstances. Second, the aggressive police tactics that led to this tragedy far exceeded the scope of a consensual, information-gathering 'knock and talk.' By accepting these violations as business as usual, the panel opinion weakens core constitutional rights and gives dangerous guidance to police officers. . . . [W]hen viewed together, *Lundgren* and *Menuel* demonstrate the straightforward line courts observe, with people holding a gun in their own house as a constitutionally guaranteed tool of self-defense on one side, . . . and people who go beyond that to menace police with their gun on the other. . . . On the facts as we must view them here, Mr. Scott was on the right side of this line because he did not threaten the officers with his gun. He merely held it pointing safely at the ground while he was in his own home, and he had even started to retreat. Deputy Sylvester immediately reacted by rapidly firing six bullets at Mr. Scott, killing him practically the moment he opened the door. Under our caselaw, this was not even close to reasonable. . . .Any ambiguity surrounding the fact of Mr. Scott's retreat should have been resolved in favor of the plaintiffs. . . It is the job of a jury to decide why Mr. Scott was backing inside his home. So too must a jury decide whether Deputy Sylvester's subjective belief was objectively reasonable. . . . The officers in Mr. Scott's case try to shoehorn their tactics into the knock and talk exception, saying that they only intended to ask for information as visitors, and they would have left Apartment 114 if no one had answered. The District Court and the panel accepted these statements and, in the process, rejected the plaintiffs' claims. But the facts, properly viewed in the light most favorable to the plaintiffs, tell a very different story. Unlike consensual visitors, the officers: (1) approached Mr. Scott's home at 1:30 a.m.; (2) tactically surrounded the only exit; (3) drew loaded guns; and (4) repeatedly slammed on the door without identifying themselves. . . In circumstances like these, the implied consent underlying the knock and talk exception disappears, because no 'background social norms' could possibly validate the officers' conduct. To the contrary, American social norms and laws empower people to protect themselves from armed intrusions into their homes. . . The officers here weren't ready to talk with Mr. Scott—they were ready for a raid. . . .The concurrence's claim that these officers, who tactically surrounded Mr.

Scott's home with their guns loaded, were there to greet Mr. Scott and chat, . . . is flatly inconsistent with its other claim that the officers were entitled to conclude that the armed motorcyclist may have been inside Apartment 114. . . The concurrence tries to have it both ways: for the excessive-force violations, it says the officers had every reason to think there was an armed and dangerous criminal in Apartment 114. Then for the knock and talk violation, it says the officers were just there for a friendly talk with people who 'were not suspects.'. . Which is it? The combination of police tactics used here is egregious. As far as I can tell, no Court of Appeals has reviewed a knock and talk case involving all the aggressive tactics used here, namely: (1) approaching well after midnight; (2) taking tactical positions to the sides of a home's only exit; (3) drawing guns; and (4) forcefully knocking without identifying themselves. . . . Although there are court rulings addressing different aspects of the behavior here, I found no case in which law enforcement did all of these things at once. The concurrence says I have not cited cases that are factually similar to this one. . . There are not a lot of cases like this, and I hope that is because police don't often shoot and kill innocent people who answer a knock at their door. It is the job of this Court to identify cases in which unconstitutional police tactics led to the senseless loss of life, and then let juries sort out how things went wrong. . . .I appreciate that police must make difficult decisions in tense situations. And that is why qualified immunity often shields them from suit. But there are limits to this doctrine. When police clearly violate a person's constitutional rights, as here, it is our role to confront that violation of the law and to ensure as best we can that it is not repeated. I don't believe the panel's summary affirmance performed that role. Instead, it gave a pass as reasonable to the actions of police in surrounding a randomly selected home in the dead of night, occupied by someone not a suspect; drawing loaded weapons; pounding on the door until the beleaguered occupant opened it; and then shooting him on sight, only because he was holding a gun. If these actions are constitutional, as the panel suggests, then the Second and Fourth Amendments are having a very bad day in this Circuit.")

Young v. Borders, 850 F.3d 1274, 1300-02 (11th Cir. 2017) (Jill Pryor, J., with whom Wilson, Martin, and Rosenbaum, JJ., join, dissenting from the denial of rehearing en banc), *cert. denied*, 138 S. Ct. 640 (2018) ("I join in full Judge Martin's thorough and thoughtful dissent. I write separately to add an observation about the incentives we create for police officers, and the guidance we provide for district courts, when we cloak fast-acting officers with qualified immunity based on unreasonably escalated circumstances that they alone create. . . .Deputy Sylvester and his fellow officers created a situation in which anyone they would confront behind that door would feel panicked. There was absolutely no objectively reasonable justification for this escalation by the officers, as Judge Martin explains in her dissent. The district court nonetheless held, based on the 'totality of the[se] circumstances,' that 'it was not unreasonable for Sylvester to believe that his life was in danger in the *instant* the door opened and to *immediately* take action in self-defense.'. . The panel, without any additional explanation, agreed. I cannot. When police unilaterally manufacture alarm and urgency that the situation at hand clearly does not warrant, the law does not—and must not—grant them qualified immunity for a deadly split-second decision. To be sure, in analyzing an officer's entitlement to qualified immunity we must view the situation from the eyes of a reasonable officer 'on the scene who is hampered by incomplete information and

forced to make a split-second decision between action and inaction,' *Crosby v. Monroe Cty.*, 394 F.3d 1328, 1334 (11th Cir. 2004) (emphasis added), in 'circumstances that are tense, uncertain, and rapidly evolving,' *Graham v. Connor*, 490 U.S. 386, 397 (1989). But here, Deputy Sylvester almost certainly would have avoided a forced split-second deadly decision had he and his fellow officers not unreasonably contrived the tense, uncertain, and rapidly evolving circumstances at Mr. Scott's door. . . . We have never before held that police can, without justification, provoke a panic, and then hide behind it by claiming that 'everything happened fast.'. . Nor should we now. Deputy Sylvester and his fellow officers say they were approaching Mr. Scott as a member of the community, not as a known criminal or even a suspect or person of interest. Indeed, in Deputy Sylvester's own words, the officers merely intended to 'knock[ ] on that door .... to get information.'. . The mere fact that Mr. Scott answered the door with a lawfully carried gun at his side could not reasonably have changed the officers' approach once they laid eyes on him. Instead of setting up such a show of force that the neighbors perceived the event as a raid and then reacting immediately to the sight of Mr. Scott with the use of deadly force, reasonable officers should have proceeded slowly and deliberately with their original plan. The panel stamps a seal of approval on the district court's theory that, because everything happened so fast, the officers' actions were reasonable. I am deeply troubled by an analysis that rewards officers with qualified immunity when they move faster, rather than slower, in circumstances that do not in and of themselves warrant a vertiginous tactical approach. It simply cannot be that where, as here, the facts we must credit demonstrate that the officers alone created urgency and escalated the situation to an approach akin to a raid, without any reasonable justification, those very circumstances entitle the officers to qualified immunity. . . Respectfully, I dissent from the denial of rehearing en banc.")

Watts v. City of Miami, 679 F. App'x 806, 809-10 (11th Cir. 2017) ("We are compelled to conclude that the district court erred. *Collier* is not sufficiently similar to the facts at issue in this case as to constitute 'relevant case law' that put the officers on notice, nor did it lay down a general rule that violations of the DPPA are always violations of clearly established law. This Court in *Collier* addressed a situation in which executive-level DHSMV officials were selling driver records to third-party mass marketers without the consent of the drivers. . We concluded that this was a violation of clearly established law, because '[t]he language of Sections 2721(b)(11)–(13) unambiguously requires the consent of individuals before their motor vehicle record information may be released' for sale to marketers. Id. at 1310–11. This is very different from the Defendant's behavior in this case, where the officers obtained information about Watts for their own use. Moreover, *Collier* does not stand for the principle that all DPPA violations are so obviously clear that qualified immunity can never protect an official from suit under the DPPA. Rather, *Collier* represents the more common sense judgment that where a violation is readily apparent from the plain language of an act, the plaintiff need not point to any particular case addressing the obvious import of the statute. This Court found it clear from the DPPA's text that consent was required for information released to marketers. . . But as we've said before, '[o]bvious clarity cases are "rare" and present a "narrow exception" to the general rule of qualified immunity.'. . To fall into this category, a prohibition must be so clear that 'no reasonable officer could have believed that [the Defendants'] actions were legal.'. . It is not obviously clear that an officer obtaining the

information for his own use is not within the permissible use of § 2721(b)(1), 'use by any government agency, including any court or law enforcement agency, in carrying out its functions,' or of § 2721(b)(14), 'any other use specifically authorized under the law of the State that holds the record, if such use is related to ... public safety.' To overcome the qualified immunity defense under this standard, Watts was required to show that no reasonable officer in the Defendants' position could have believed that he was accessing her DAVID information for a permissible use under the DPPA. Watts never made this showing, and the district court, nonetheless, misapplied *Collier* to conclude that all DPPA violations are obviously clear, and did not otherwise address the issue. . . . In short, '[i]n the absence of [any] caselaw to the contrary, [the Defendants], though [possibly] mistaken, could have reasonably believed' that their DAVID accesses were permitted uses under the DPPA. *Dukes v. Deaton*, —— F.3d ——, 2017 WL 370854, *5 (11th Cir., Jan. 26, 2017). We, therefore, agree with the Defendants that Watts did not show that the officers had 'clear notice ... that [accessing] the information in question violated federal law.'. . . Because Watts failed to show that the officers accessed her information for a purpose that was clearly not permitted by the DPPA, we need not address whether their actual purpose was permitted under the DPPA. . . Accordingly, we conclude that the district court erred in denying the Defendants qualified immunity.")

May v. City of Nahunta, 846 F.3d 1320, 1329-32 (11th Cir. 2017) ("Having determined that Officer Allen is entitled to qualified immunity on the issue of whether the seizure was justified at its inception, we now address whether the manner of the seizure was unreasonable. Because we determine that questions of fact exist with respect to whether the seizure was conducted in an extraordinary manner, unusually harmful to May's privacy interests, . . . we conclude that the district court erred in granting Officer Allen qualified immunity for his conduct during the seizure. . . .Officer Allen arrived at May's home to assist EMTs in responding to a 911 call. Based on the EMTs' statements to Officer Allen, the government interest was the promotion of safety, the elimination of self-harm, and the investigation of mental-health concerns. Balancing the government interest against May's interest in bodily sanctity and personal security, we conclude that Officer Allen's actions exceeded the scope of the underlying justification and that he failed to use reasonable means to rectify the situation. Thus, while Officer Allen had at least arguable probable cause to seize and transport May to the hospital for evaluation, the manner in which he chose to do so was unreasonable, thereby violating May's Fourth Amendment rights. . . . [I]t was clearly inappropriate for a male officer to lock himself in a room with a woman in a state of undress under the circumstances, particularly after she asked him to leave. . . .Our final inquiry concerns whether, under the circumstances, May's right to be free from a seizure in which she was compelled—by threat of deadly force—to disrobe in front of a male police officer, with whom she remained alone in a locked room for twenty minutes, was clearly established on August 3, 2011. We conclude that it was. . . . Applying the obvious clarity test to May's version of the facts, we hold that an objectively reasonable officer would have known to refrain from engaging in degrading and humiliating methods when preparing to transport a person of the opposite gender for a psychological evaluation. Given our prior holding that searches performed in an 'abusive fashion' may violate the Constitution, *Evans*, 407 F.3d at 1281, an objectively reasonable officer

would have known that, under the circumstances, it was unreasonable to use the threat of deadly force to compel a female civilian to disrobe in that manner. Indeed, if established, Officer Allen's conduct is representative of the type of unnecessarily invasive and demeaning intrusion that is undoubtedly within the sphere of what the Fourth Amendment prohibits.")

Bailey v. Wheeler, 843 F.3d 473, 481 n.8, 484-86 (11th Cir. 2016) ("We agree with Wheeler's implicit concession that Bailey alleged sufficient facts to show that he engaged in protected speech when he complained to his chief, and again in his termination appeal, that Douglas County law-enforcement officers were involved in racial profiling and other inappropriate and unconstitutional conduct. The Supreme Court has emphasized that public employees do not forfeit all their First Amendment rights by simple virtue of their public employment. . . Clearly, if officers are systematically violating minority citizens' constitutional rights, that is a matter of public concern. Nor does it matter that Bailey expressed concerns related to law enforcement when he was an officer or that he did so to his chief, instead of publicly. . . Indeed, law-enforcement officers are 'members of a community most likely to have informed and definite opinions' on appropriate law-enforcement conduct. . . For this reason, 'it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.'. . Rather, the 'controlling factor' is whether the public employee made his expressions pursuant to his specific job duties. . . If he did not, he engaged in protected speech. Here, nothing in the record demonstrates that one of Bailey's duties as a police officer was to report unconstitutional conduct by not only Police Department officers but also Sheriff's Office deputies. . . .We have said that a plaintiff may show that 'the contours of the right were clearly established in [one of three] ways.'. . First, a plaintiff may identify a materially similar case from relevant precedent. . .When a plaintiff proceeds in this way, we consider 'whether the factual scenario that the official faced is fairly distinguishable from the circumstances facing a government official in a previous case.'. .Second, a plaintiff may rely on a 'broader, clearly established principle [that] should control the novel facts [of the] situation.'. . We have explained that when a plaintiff proceeds in this way, he must show that case law established the principle with 'obvious clarity ... so that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.'. . This category also applies when '[t]he reasoning, though not the holding of prior cases ... send[s] the same message to reasonable officers in novel factual situations.'. . .Finally, a plaintiff may satisfy the 'clearly established' requirement when the defendant's conduct 'lies so obviously at the very core of what the [First Amendment] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.'. . Similarly, we recognize the obvious-clarity exception where conduct is 'so bad that case law is not needed to establish that the conduct cannot be lawful.'. . Here, the reasoning of *Bennett* and the broad principle it establishes should have put Wheeler on notice that he could not potentially endanger Bailey's life in retaliation for Bailey's exercise of his First Amendment rights. But even if it did not, we think the conduct alleged in this case is so egregious that Wheeler did not need case law to know what he allegedly did was unlawful. . . .If a law-enforcement officer may not issue $35 in parking tickets or use his position to harass and intimidate individuals in retaliation for exercising their First Amendment rights, a law-enforcement officer certainly may not use his position to

potentially seriously endanger a person's life in retaliation for exercising First Amendment rights. We think that is obvious under the case law. But even if it were not, it is certainly obvious, as a general proposition and without reference to case law, that issuing the BOLO Wheeler issued in this case, under the circumstances that existed at the time, allegedly in retaliation for Bailey's speaking up about alleged civil-rights abuses, clearly violated Bailey's First Amendment rights. Law-enforcement officers are sworn to protect and defend the lives of others. It is completely antithetical to those sworn duties for a law-enforcement officer to use his position to harness the power of an entire county's law-enforcement force to teach a lesson to—and potentially very seriously endanger—someone who had the temerity to speak up about alleged abuses. For these reasons, we agree with the district court's assessment that the operative complaint sufficiently alleges that Wheeler violated Bailey's clearly established constitutional right. So we affirm the district court's denial of Wheeler's motion to dismiss the § 1983 claim. 'Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.' President Harry S. Truman, Special Message to the Congress on the Internal Security of the United States (Aug. 8, 1950). Our First Amendment demands that a law-enforcement officer may not use his powerful post to chill or punish speech he does not like. If he does so, he may not hide behind the veil of qualified immunity.")

Shuford v. Conway, 666 F. App'x 811, 817 & n.1 (11th Cir. 2016) (per curiam) ("*Kingsley*'s 2015 ruling requiring a pretrial detainee to show that the force purposely or knowingly used against him was objectively unreasonable, came after the incidents that are the subject of this suit, so it does not govern our 'clearly-established' analysis here. However, since before the time of these incidents, this Circuit applied the same objective factors to Fourteenth Amendment excessive force claims as the Supreme Court articulated in *Kingsley*. . . *See Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007) (per curiam). . . . We agree with what the Seventh Circuit noted on remand in *Kingsley*—that the Supreme Court's holding only eliminated the requirement that a plaintiff show the official acted with subjective malice, not 'the standard[ ] for the amount of force that can be permissibly employed.' *Kingsley v. Hendrickson*, 801 F.3d 828, 832–33 (7th Cir. 2015). '[*B*]*efore and after* the Supreme Court's decision in this case, the standards for the amount of force that can be permissibly employed remain the same .... the law clearly established that the amount of force had to be reasonable ....'(emphasis in orginal). . . . And in any event, the Supreme Court reminded us that the central holding of *Kingsley*— that 'a pretrial detainee can prevail by providing only objective evidence'— had been the law since *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979).")

Shuford v. Conway, 666 F. App'x 811, 817-18 (11th Cir. 2016) (per curiam) ("A plaintiff can show the constitutional right violated was clearly established in three different ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence

of case law. . . . These plaintiffs have made their showing by way of the second category. We have long made clear that '[p]rison officials step over the line of constitutionally permissible conduct if they use more force than is reasonably necessary in an existing situation.' *Ort v. White*, 813 F.2d 318, 325 (11th Cir. 1987). *Ort* also established that a constitutional violation 'occurs in this context where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.'. . More recently in 2008, we held that '[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting—whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated—that use of force is excessive.' *Danley v. Allen*, 540 F.3d 1298, 1309 (11th Cir. 2008). . . .Plaintiffs' version of the facts applied to the principles from our longstanding precedent demonstrate a violation of clearly established law sufficient to pass the summary judgment stage. . . Again, the RRT [Rapid Response Team] entered the plaintiffs' cells at a time when they were not resisting or displaying any sort of threatening behavior. Despite the fact that the need for force had completely subsided, the RRT deployed substantial force against the plaintiffs. This violated plaintiffs' constitutional rights under the law clearly established by the Supreme Court and this Circuit at the time. The law therefore gave 'fair warning' to defendants 'that their conduct crossed the line of what is constitutionally permissible.'. . We therefore reverse the district court's finding that the alleged violation was not 'clearly established.'")

Jacoby v. Baldwin County, 666 F. App'x 759, 764-66 (11th Cir. 2016) ("The standard we previously used to determine whether a defendant used excessive force under the Fourteenth Amendment — which required the plaintiff to show that the defendant applied the force 'maliciously or sadistically for the very purpose of causing harm,' *see Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) — has been abrogated by *Kingsley v. Hendrickson*, 576 U.S. —, 135 S. Ct. 2466 (2015). In that opinion, the Supreme Court held that 'a pretrial detainee must show only that the force ... used against him was objectively unreasonable.'. . As a result, we proceed with the Fourteenth Amendment violation inquiry of the qualified immunity analysis under *Kingsley's* objective unreasonableness standard. The evidence construed in Jacoby's favor shows that after he was pepper sprayed, his face was rubbed in pepper spray on the floor, washed with water for two to three seconds and then he was left alone in the restraint chair for more than eight hours while still in his pepper-sprayed clothes. During that time he urinated on himself and cried for help because he burned from his pepper-sprayed and urine-soaked clothing. . . . Viewing the facts in the light most favorable to Jacoby, as we must at this stage, there is a genuine issue of material fact about whether Rowell and Keers' actions were objectively unreasonable and in violation of Jacoby's Fourteenth Amendment right to be free from excessive force. . . Rowell and Keers contend that even if there is a question of fact about whether they violated Jacoby's constitutional rights, they are still entitled to qualified immunity because the alleged unlawfulness of their conduct was not clearly established at the time it occurred. While *Kingsley*'s objective unreasonableness standard governs the existence of a constitutional violation, that decision was issued after the restraint chair incident took place, so it plays no part in our determining whether the unlawfulness of Rowell and Keers' conduct was clearly established at the time it occurred. . . Instead, in order to determine whether the clearly established requirement is met in this case, we

look to *pre-Kingsley* case law, which applied the old 'sadistic or malicious' standard for excessive force. Our analysis here is governed by our decision in *Danley v. Allen*, 540 F.3d 1298 (11th Cir. 2008), *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 709–10 (11th Cir. 2010). In the *Danley* case, the defendant-officers sprayed the plaintiff with pepper spray for three to five seconds, pushed him into a small, poorly ventilated cell, and closed the door. . . After twenty minutes (ten of which the plaintiff spent begging to be let out), the jailers removed him from the cell, allowed him to take a two minute shower, and then placed him in a larger, but still poorly ventilated, group cell. . . The plaintiff continued to suffer from the pepper spray's effects and eventually 'almost blacked out' from breathing difficulties. . . After at least twelve hours of suffering, the plaintiff was released from the jail. . . This Court held that the officers' use of force against the *Danley* plaintiff was excessive and in violation of the Fourteenth Amendment, noting that '[w]hen jailers continue to use substantial force against a prisoner who has clearly stopped resisting — whether because he has decided to become compliant, he has been subdued, or he is otherwise incapacitated — that use of force is excessive.'. . And when an inmate has stopped resisting 'there is no longer a need for force, so the use of force thereafter is disproportionate to the need.'. . The *Danley* decision's legal principle that jailers cannot continue to use force against a compliant inmate clearly established the unlawfulness of Rowell and Keers' alleged conduct. . . The facts as they stand at this point in the proceedings are that Rowell and Keers left Jacoby unattended in the restraint chair after pepper-spraying him, rubbing his face in pepper spray on the floor, and providing clearly inadequate decontamination. They left him there for more than eight hours in his pepper-sprayed and urine-soaked clothes with no opportunity for relief. . . Those circumstances create a fact question about whether there was an excessive continuation of the use of force after Jacoby was already subdued or restrained, and our decision in *Danley* clearly establishes the right to be free from that kind of excessive force. The district court erred in granting summary judgment to Rowell and Keers on Jacoby's excessive force claims against Rowell and Keers.")

McBride v. Houston County Health Care Authority, 658 F. App'x 991, 999-1000 (11th Cir. 2016) ("Next, we must decide whether McBride's constitutional right was clearly established at the time of Johnson's conduct; if not, Johnson is entitled to qualified immunity. . . .There are three ways in which [the plaintiff] may show that the right violated was clearly established: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law. . . This case falls into the second category: The broad principles of our case law clearly establish the constitutional right violated. [collecting cases] As discussed above, viewing the evidence in McBride's favor, her condition—a headache and sore throat so painful that McBride had been unable to eat or drink for days and a serious rash resulting in the skin on McBride's lips peeling off—along with her screaming for help, indicated the need for medical care which Johnson failed to provide. Reasonable jailers would have been aware that Johnson's conduct as described here violated clearly established constitutional rights. Accordingly, the district court did not err in denying Johnson's motion for summary judgment on qualified immunity grounds.")

Bratt v. Genovese, 660 F. App'x 837, __ (11th Cir. 2016) ("We are . . . not persuaded by George's reliance on *Coffin v. Brandau*. 642 F.3d 999 (11th Cir. 2011). In *Coffin*, we considered whether the law was clearly established that Fourth Amendment protection extended to open and attached garages for qualified-immunity purposes. . . *Coffin* does not address George's problem of whether a warrantless entry into a residence for the purposes of a misdemeanor arrest is authorized by § 901.15(1). But *McClish v. Nugent* does. 483 F.3d 1231 (11th Cir. 2007). In *McClish*, we held that arresting someone inside his or her home without a warrant violates the Fourth Amendment even if probable cause exists, when exigent circumstances do not also exist. . . Under *McClish*, the law had been clearly established at the time of Bratt's arrest, and the district court did not err in denying qualified immunity to George on summary judgment.")

Jacoby v. Baldwin County, 835 F.3d 1338, 1345-46 (11th Cir. 2016) ("*Bell* effectively creates a two-part test. First, a court must ask whether any 'legitimate goal' was served by the prison conditions. Second, it must ask whether the conditions are 'reasonably related' to that goal. And, to defeat Sheriff Mack's claim of qualified immunity, Mr. Jacoby must point to precedent that would give Sheriff Mack 'fair warning' that these requirements would not be met under the conditions of confinement Mr. Jacoby says he experienced. . . We hold that Mr. Jacoby has failed to make this showing. He has pointed to no caselaw clearly establishing that putting him in a cell with two other inmates was unconstitutional punishment in violation of *Bell*. To the contrary, in *Bell* itself the Supreme Court held that 'double-bunking' (placing two inmates in a cell intended for one) does not constitute punishment. . . Neither has Mr. Jacoby pointed to any caselaw clearly establishing that having to sleep on a mattress on the floor violated his constitutional rights. In fact, in *Hamm*, this Court held that '[t]he fact that [a pretrial detainee] temporarily had to sleep upon a mattress on the floor or on a table is not necessarily a constitutional violation.'. . .Taken in the light most favorable to him, Mr. Jacoby's allegations establish that he was temporarily forced to sleep on a mattress on the floor near the toilet. . . His circumstances are not enough like those described in *Chandler*, *Brooks*, and *Jordan* for those cases to clearly establish that his conditions of confinement were unconstitutional. We therefore affirm the District Court's ruling on Mr. Jacoby's substantive due process claim.")

Carollo v. Boria, 833 F.3d 1322, 1334-35 (11th Cir. 2016) ("Against the backdrop of this Circuit's precedents and the Supreme Court's guidance in *Pickering* and *Garcetti*, we conclude that reasonable public officials would have known at the time of Carollo's termination that it violated the First Amendment to terminate a colleague for speaking about matters of public concern that are outside the scope of his ordinary job responsibilities. Carollo has plausibly pled that at least some of his speech was about matters of public concern and outside the scope of his ordinary job responsibilities, and with respect to the remainder of his speech, we are remanding to the district court to permit Carollo to amend his poorly-drafted complaint to cure the defects that we identify. . . The district court therefore did not err in concluding that Carollo's First Amendment right to such speech was clearly established at the time of his termination.")

Bussey-Morice v. Kennedy, 657 F. App'x 909 (11th Cir. 2016) (*Bussey II*) ("Here, we find that the alleged illegality of Kennedy's actions and the other officers' inactions were not clearly established at the time of the incident. So we do not decide whether a constitutional violation took place. . . .First, we agree with the district court that no decision from the United States Supreme Court, this Court, or the Florida Supreme Court has clearly established that use of pressure-point techniques, use of an officer's knee to hold an individual's head in place, or placing a pillowcase over an individual's head, constitutes excessive force under circumstances sufficiently similar to this case. While Bussey-Morice cites a number of cases in support of her argument to the contrary, none of these cases contain the necessary factual proximity that is required to satisfy the analogue test for whether a right is clearly established. . . .Nor do any of the other cases on which Bussey-Morice relies regarding the *established* unlawfulness of Kennedy's conduct bear enough factual similarity for us to find for Bussey-Morice under the first test. Consequently, Bussey-Morice had to demonstrate that this case presents one of those rare circumstances in which, as a matter of obvious clarity, Kennedy's conduct violated the Fourth Amendment. We find that she cannot. . . . In light of the fact that so many of Kennedy's actions were both measured to the degree of resistance exhibited and authorized as acceptable methods of police practice, we cannot find, that as a matter of obvious clarity, Kennedy violated Bussey's Fourth Amendment rights.")

D.H. by Dawson v. Clayton County Sch. Dist., 830 F.3d 1306, 1318-20 (11th Cir. 2016) ("Simply put, while McDowell's decision to strip search D.H. was justified at its inception, his decision to force D.H. to stand fully nude in front of his peers made the search excessive in scope. There was no exigency that prevented McDowell from asking D.H. to pull his waistband away from his body, from taking D.H. to a private place, or from excusing the other students to an area outside of his office. . . . Because McDowell violated D.H.'s constitutional rights, we next examine whether clearly established law put McDowell on notice that he was doing so. . . .Viewing all reasonable inferences in favor of D.H., we conclude that a reasonable official in McDowell's position would not have believed that requiring D.H. to strip down to his fully naked body in front of several of his peers was lawful in light of the clearly established principle that a student strip search, even if justified in its inception, must be 'reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'. . .Accordingly, we affirm the district court's denial of McDowell's motion for summary judgment based on qualified immunity. . . . Whether D.H. pulled the waistband of his underpants away from his body or completely removed his underpants is a genuine issue of material fact for a jury to decide. If McDowell instructed D.H. to pull down his underpants, and D.H. did so, then McDowell violated a constitutional right under clearly established law and is liable under § 1983. However, if McDowell only instructed D.H. to pull the waistband of his underpants briefly away from his body and did not otherwise indicate to D.H. that he had to strip fully nude, then McDowell did not violate a clearly established constitutional right and is entitled to qualified immunity against D.H.'s § 1983 claim. Because a genuine issue of material fact exists, the district court erred in granting D.H's motion for partial summary judgment as to liability and leaving only damages for trial. . . .Should the jury find that D.H. merely pulled the elastic waistband of his underpants away from his body at McDowell's direction, then McDowell is entitled to qualified immunity. However,

should the jury find that D.H. pulled his underpants down to his ankles at McDowell's direction, then McDowell is liable under § 1983 and the jury should also determine damages.")

Ziegler v. Martin County. Sch. Dist., 831 F.3d 1309, 1324-25 (11th Cir. 2016) ("We now hold, when government officials need to conduct breathalyzer or urine tests on students, the testing must be accomplished in a reasonably expeditious time period; once exonerated by the test, the student must be free to go. Like urine testing for drugs, breathalyzer testing for alcohol must be conducted quickly before the alcohol or drugs physiologically dissipate in the student's system. . . .When a student is tested as alcohol or drug free, there is no justification for continuing to detain the student with such definitive exculpatory evidence. We conclude each student from the party bus who tested alcohol free reasonably should have been free to leave without being detained until all the students had been tested. . . . Detaining a student after he or she was found to be alcohol free was not 'reasonably related' to the reason for the detention 'in the first place' of determining if the student passengers on the party bus had been drinking. . . . Clearly, the individual School Defendants, Laws, Iuliucci, Kane, and Officer Brush were acting within the scope of each's respective authority at JBHS in the search of the party bus, which led to the subsequent detention of all the students on the bus for breathalyzer testing for alcohol, the crux of the Students' case. At oral argument, their counsel conceded he did not know of any case directly on point, where students were detained for a breathalyzer or drug test and, although tested alcohol or drug free, had to remain until all students were tested. We have not found such a case either. On the facts of this case, the individual School Defendants are entitled to qualified immunity, because there was no binding clearly established law. . . at the time to inform them they had violated the party-bus students' Fourth Amendment rights by continuing to detain them after they were breathalyzed and found to be alcohol free.")

Bowen v. Warden Baldwin State Prison, 826 F.3d 1312, 1324-25 (11th Cir. 2016) ("[T]he administrator alleges that Deputy Warden Underwood and Officer Davis were *actually aware* of a substantial and seemingly conspicuous risk posed to Mr. Bowen by allowing him to remain in the small cell with Merkerson. . . Even assuming that these defendant officials were unaware of Mr. Bowen's removal request or Merkerson's mother's warning, this lack of awareness does not serve to negate or even to discount the facts they allegedly did know. We conclude, therefore, that the administrator has set forth in his second amended complaint sufficient facts showing that Deputy Warden Underwood and Officer Davis were both 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and ... also dr[e]w the inference.'. . Because this was the sole disputed element of his claims against these defendants, dismissal was inappropriate. . . .Deputy Warden Underwood and Officer Davis were therefore on notice in March 2010 that 'the law of this Circuit, as expressed in *Cottone*, clearly established that the defendants' total failure to investigate—or take any other action to mitigate—the substantial risk of serious harm that [Merkerson] posed to [Mr. Bowen] constituted unconstitutional deliberate indifference to [Mr. Bowen's] Eighth Amendment rights.'. . . These defendants therefore are not entitled to qualified immunity at this stage of the proceedings.")

Davila v. Marshall, 649 F. App'x 977, 982 (11th Cir. 2016) ("While a case need not be 'on all fours, with materially identical facts' in order to preclude qualified immunity, it does need to give the officials 'reasonable warning that the conduct at issue violated constitutional rights.'. . Neither *City of Hialeah* nor *Cruz* did that. And Davila has not pointed to any other precedent that clearly established that prison officials were required to hand over his Spanish language bible without delay, or that they were compelled to provide him his other four bead necklaces. He has therefore not met his burden of showing that Marshall and Durden were not entitled to qualified immunity. The district court did not err in granting Marshall and Durden summary judgment based on qualified immunity with respect to Davila's First Amendment claim.")

Taylor v. Taylor, 649 F. App'x 737, 746-47 (11th Cir. 2016) ("Here, taking the facts in the light most favorable to Ms. Taylor, Deputy Taylor, during the course of a permissible arrest, grabbed Ms. Taylor without warning, slammed her against a patrol car several feet away, causing her head to hit the car first, and then handcuffed her. Ms. Taylor suffered a spiral fracture in her hand and bruising to her hand, forearm, right upper eyelid, and chest. Although the injury Ms. Taylor suffered was more severe than the injury in *Nolin*, the amount and type of force used in both cases is similar. Significantly, Ms. Taylor has not responded to Deputy Taylor's assertion that *Nolin* is on point. And we see nothing in the record to distinguish *Nolin.* Accordingly, we are constrained to conclude that, under our precedent, the force used to subdue and arrest Ms. Taylor was not excessive. . . [E]ven if we were to conclude that Deputy Taylor used objectively unreasonable, and more than *de minimis*, force against Ms. Taylor, she still bears the burden of overcoming the defense of qualified immunity by showing that Deputy Taylor had adequate notice that his conduct was unlawful. . . We are unable to conclude that she has. Ms. Taylor has not identified a case with a materially similar factual scenario that supports her position. . . Indeed, *Nolin* is the case with the most similar facts that we have found, and it is plainly unfavorable to her. Given the similarity of *Nolin*, Ms. Taylor also cannot show that a broader, clearly established principle applies with 'obvious clarity' to the particular factual situation faced by Deputy Taylor, or that the conduct at issue so obviously violated the Constitution that existing case law is unnecessary. . . As a result, Ms. Taylor has not shown that Deputy Taylor violated a clearly established right.")

Maldonado v. Unnamed Defendant, 648 F.3d 939, 955-56 (11th Cir. 2016) ("The judge did not err in concluding the defendants were entitled to qualified immunity concerning the May 26, 2011, incident. Maldonado is correct the right of prison inmates to be free from retaliation for filing grievances concerning the conditions of their confinement is clearly established. . . But he failed to show that Corporal Kennard had violated that right by pepper-spraying him on May 26, 2011. . . Maldonado contended he was pepper-sprayed in retaliation for attempting to initiate a sexual harassment investigation against another officer. Yet, he testified Corporal Kennard escorted him into his cell after he had refused to obey an order to lock down, and, while inside the cell, 'a few words [were] said,' and that was when Corporal Kennard pepper-sprayed him. . . Consequently, under Maldonado's own version of the facts, it is not clear Corporal Kennard pepper-sprayed Maldonado in retaliation for his attempt to file a grievance or to subdue him and obtain his compliance with the officer's orders. Maldonado therefore did not show no reasonable officer

would have taken the same action as Corporal Kennard under the circumstance; consequently, qualified immunity applies. . . In contrast is the December 23, 2010, incident as to entitlement to qualified immunity. Maldonado's account of the event alleges, after placing him in the restraint chair and rendering him defenseless, Officers Ramsey and Maher threatened Maldonado would regret bringing any lawsuits against them, then beat him, broke his finger, and burned him with a lighter. Maldonado acknowledged he was removed from his cell after jamming his cell door in violation of jail rules but contended he did not physically resist the officers, and his injuries were sustained after he was placed in the restraint chair, when officers would have no disciplinary reason for using force against him. Based on this account of the facts, Maldonado showed Officers Ramsey and Maher violated his clearly established rights by retaliating against him for engaging in protected conduct. . . Therefore, the officers were not entitled to summary judgment on this claim, based on qualified immunity; we reverse the district judge's granting summary judgment on this claim.")

Perez v. Suszczynski, 809 F.3d 1213, 1222-23 (11th Cir. 2016) ("Suszczynski was thus on fair notice at the time of the shooting from both the Supreme Court and Eleventh Circuit that the use of deadly force has constitutional limits, and that his use of deadly force would be justified only if a reasonable officer in his position would believe Arango posed an immediate threat of serious physical harm. Under the Estate's version of events, these circumstances did not exist: witnesses for the Estate testified in their depositions that Arango was subdued, unarmed, and not resisting arrest when Suszczynski fatally shot him. In fact, the facts alleged reflect behavior so inherently violative of the Fourth Amendment that it should be obvious to any reasonable officer that this conduct was unlawful. The unprovoked shooting of a compliant individual is 'conduct [that] lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [should have been] readily apparent to the official.'. . Indeed, this conduct lies 'so far beyond the hazy border between excessive and acceptable force that [Suszczynski] had to know he was violating the Constitution.'. . Even in the absence of the aforementioned precedent, the unlawfulness of Suszczynski's alleged actions would be apparent to any reasonable officer—the deadly force used was 'grossly disproportionate.'. . Accordingly, qualified immunity does not apply.")

Claridy v. Golub, 632 F. App'x 535, 569-70 (11th Cir. 2015) ("Assuming, as the district court did, that Plaintiff was lying face-down on the sidewalk, with his hands behind his back and submitting to arrest, all of the relevant factors suggest that Defendant's second use of the taser against him was unreasonable. The crime for which Plaintiff was being arrested was not serious. . . Plaintiff did not present a threat to Defendant or anyone else as he lay face-down on the sidewalk with his hands behind his back. Finally, according to Plaintiff, he was not resisting and had submitted to arrest when Defendant discharged his taser a second time. We agree with the district court that the use of the taser under these circumstances would violate the Fourth Amendment. . . .In several decisions issued prior to this incident in May 2009, we held that the 'gratuitous use of force when a criminal suspect is not resisting arrest' is unreasonable and violates the Fourth Amendment. . . .These cases gave Defendant fair warning that the second tasing, which allegedly occurred while

Plaintiff was lying face-down on the sidewalk, complying with Defendant's instruction to put his hands behind his back, and submitting to arrest for, at most, a minor offense, was unconstitutional. Thus, construing the evidence in the light most favorable to Plaintiff, Defendant is not entitled to qualified immunity on the § 1983 claim.")

Moore v. Pederson, 806 F.3d 1036, 1048-55 (11th Cir. 2015) ("It is true that as of November 15, 2008, when the incident in this case occurred, the law was clearly established in this Circuit that an officer may not conduct a warrantless arrest without both probable cause and either exigent circumstances or consent. . . And here, Pederson had no warrant, and he similarly lacked exigent circumstances and consent. But, as discussed above, none of the cases that stand for the principle that a warrantless arrest may not be conducted in the home without both probable cause and either exigent circumstances or consent involved a *Terry* stop. When an officer lawfully conducts a *Terry* stop, Fla. Stat. § 843.02 authorizes the officer to arrest a person who refuses to provide identification in response to requests. . . Neither exigent circumstances nor probable cause is necessary. So Pederson suggests that, had he been correct in thinking that he could execute a valid *Terry* stop in the home, he would not have needed either exigent circumstances or consent to effect the arrest of Moore, even though he had to reach into Moore's home. . . . We need not determine whether Pederson's theory on this particular issue is correct because, in any case, we cannot find that, at the time of the events in this matter, the law was clearly established with respect to the bounds of consent to enter the home for the purpose of effecting an arrest. We recognize, of course, the clearly established general proposition that consent is not freely and voluntarily given when a person merely acquiesces to a claim of lawful authority. . . But '[o]bvious clarity cases' are 'rare.'. . To rely on that "narrow exception," we must find that the officer's acts were 'so egregious that preexisting, fact-specific precedent was not necessary to give clear warning to every reasonable ... officer that what the defendant officer was doing must be "unreasonable" within the meaning of the Fourth Amendment.'. . Here, we cannot do that. . . .[U]nder *McClish,* a reasonable officer would not be on clear notice before today that Moore's actions did not constitute the type of 'surrender' that can qualify as consent for the purpose of entering a home to effect an arrest. . . . [B]efore today, a reasonable officer could have understood Moore's actions in turning around and presenting his hands in response to the officer's instructions as surrender, and consequently, as consent under *McClish.* . . . To be clear, for the reasons we have already described, we strongly reject any suggestion that a person 'surrenders' and therefore 'consents' to arrest in his home simply because he recognizes the officer's authority or 'submit[s] to' or 'acquiesce[s]' in the arresting officer's commands or because he does not close the door of his home in response to an officer's announcement that he is under arrest. Today we clearly establish as the law of this Circuit that merely following an officer's commands—without any separate affirmative act or speech demonstrating *voluntary* and *free* consent—does not constitute 'surrender' and therefore consent to an officer's entry into the home to effect the arrest. Nor does failure to close the door. But we have 'emphasized that *fair and clear notice* to government officials is the cornerstone of qualified immunity.'. . And in light of *McClish* and *Berkowitz,* we cannot say that, as of November 15, 2008, Pederson had 'fair and clear notice' that a person does not 'surrender' and therefore consent to entry of his home for purposes of effecting an arrest, by 'acquiesc[ing]' in or 'submit[ting] to' the

arresting officer's announcement that he is under arrest and by turning around and presenting hands for cuffing in response to instructions to do just that (and not closing the door of his home instead). As a result, qualified immunity shields Pederson from liability for his wrongful entry into Moore's home to arrest him. . . .Because the law was not clearly established until today that Pederson lacked probable cause to arrest Moore since he could not conduct a *Terry*-like stop in the home absent exigent circumstances, and further, because the law was not clearly established until today that Moore's actions in acquiescing to Pederson's instructions did not amount to consent to enter the home, the district court properly granted Pederson qualified immunity. . . .Home may be where the heart is, . . . but it cannot be where the government is—at least for purposes of conducting a *Terry*-like stop, in the absence of exigent circumstances. Today we clearly establish this as the law in this Circuit. But since the law was not clearly established on this point when Pederson engaged in the *Terry*-like stop of Moore while Moore was in his home, the district court did not err when it granted qualified immunity to Pederson on this issue. The district court likewise did not err in granting qualified immunity to Pederson regarding his arrest of Moore while Moore was in his home. The law was not clearly established at the time of the arrest that Moore's compliance with Pederson's demands that he turn around and present his hands for cuffing did not constitute consent.")

Moore v. Pederson, 806 F.3d 1036, 1055-58 & n.5 (11th Cir. 2015) (Proctor, District Judge, concurring) ("Let me be very clear. I agree that Pederson could not have lawfully executed a *Terry* stop in this case, at least while Moore was inside his home. Likewise, I agree that Moore, standing inside his home, was free to decide not to answer the Deputy's questions. . . Finally, I also agree that it was unlawful for Pederson to have arrested Moore. But that is not all this case involves. . . . On this unique set of facts, the primary question for us to consider is whether a reasonable officer would understand that reaching across the threshold to arrest Moore in the course of what Pederson erroneously believed to be a *Terry* stop violated a clearly established constitutional right. . . .It is unreasonable to expect a police officer to synthesize cases and extract from them purely legal principles untethered to the facts with which he is confronted. . . But that is exactly the standard to which the dissent holds Pederson. In my view, the two cases relied upon by the dissent on the issue of the warrantless arrest are not sufficiently similar to this case to put Pederson on notice that he was violating clearly established law. . . .It should not be lost on us that the three judges on this panel have differing views of how the qualified immunity calculus should play out under these facts. If three judges, reviewing a *grant* of qualified immunity in the district court, have approached this question so differently, what chance did Pederson have (as he stood outside Moore's door that night) to determine that clearly established law precluded Moore's arrest? . . . . Indeed, in fairness, we should expect law enforcement officers to know *less* about the law than judges. Deputy Pederson was not plainly incompetent and did not knowingly violate the law. He is entitled to qualified immunity in this case.")

Moore v. Pederson, 806 F.3d 1036, 1059-62 (11th Cir. 2015) (Martin, J., concurring in part, dissenting in part) ("I believe that the cases the Majority relies on to identify a Fourth Amendment violation clearly established it. The distinctions the Majority attempts to draw between our Circuit

precedent and Mr. Moore's case are, in my view, foreclosed by our precedent or require us to find facts favorable to the officer seeking a judgment in his favor, which we are not permitted to do. . . . *McClish* draws a clear line: police may not reach through the doorway of a home to execute a warrantless arrest. Deputy Pederson crossed this line when he reached into Mr. Moore's home to arrest him. . . . The question of whether an arresting officer can infer implied consent to enter a home to make an arrest was not left open by *McClish.* It was expressly answered in the negative. . . . The Majority is right to point out that we must determine whether a constitutional rule is clearly established 'in light of the specific context of the case, not as a broad general proposition.'. . But the rule that an officer may not infer consent to reach into a home to execute an arrest is not a broad general proposition. . . . *McClish* held that reaching into a suspect's home to arrest him is an unlawful physical intrusion. As in *McClish,* Deputy Pederson here 'violated [Mr. Moore]'s Fourth Amendment rights by reaching through [Mr. Moore]'s open doorway to effect the arrest when [Mr. Moore] was standing near the doorway but fully within the confines of his home.'. . .The Majority holds that 'the law was not clearly established until today that Moore's actions in acquiescing to Pederson's instructions did not amount to consent.'. . For the reasons I have set out above, I believe our consent precedent clearly foreclosed the distinction the Majority makes here. But even if implied consent were a basis for extending qualified immunity to Deputy Pederson, this distinction is irrelevant unless we also assume the fact that Deputy Pederson could have inferred consent from Mr. Moore's reaction to his commands. . . .Construing the evidence in Mr. Moore's favor, as we must, there is no basis for finding 'both the existence of consent and that the consent was not a function of acquiescence to a claim of lawful authority but rather was given freely and voluntarily.'. . When it decides this case based on what an objectively reasonable officer might have inferred from Mr. Moore's conduct, the Majority neglects the requirement that '[t]he evidence of the non-movant is to be believed' and that 'all justifiable inferences ... be drawn in his favor.'. . So even if I accepted, as the Majority does, that qualified immunity for Deputy Pederson turned on whether an officer could have objectively inferred consent, his version of the facts as the non-movant would require sending Mr. Moore's case back for a trial.For both of these reasons, I respectfully dissent from the opinion of the Majority.")

Brooks v. Warden, 800 F.3d 1295, 1303-04, 1306-07 (11th Cir. 2015) ("Brooks alleges that Powell refused to allow Brooks to lower the waist-chains that bound him so that he could use the toilet while in the hospital. As a result, Brooks was forced to defecate into his jumpsuit and sit in his own feces for two days during his three-day hospital stay. Brooks also alleges that Powell refused to allow the nurses to clean Brooks or offer him an adult diaper, and that Powell and the other guards laughed at Brooks and mocked him throughout the ordeal. These serious allegations state an Eighth Amendment violation under our caselaw. . . .Indeed, every sister circuit (except the Federal Circuit) has recognized that the deprivation of basic sanitary conditions can constitute an Eighth Amendment violation. . . .Having determined that Powell's alleged conduct violated the Eighth Amendment, we turn to whether the Eighth Amendment right at issue 'was clearly established such that a reasonable official would understand that what he is doing violates that right.'. . . The district court found 'no clearly established law' warned Powell that his alleged actions constituted an Eighth Amendment violation. But both *Baird* and *Novak* (neither mentioned

by the district court) should have been sufficient to put Powell on notice. *Baird* recognized that Eighth Amendment violations can arise from 'conditions lacking basic sanitation,' including inadequate provision of hygiene items such as toilet paper. .. *Novak* noted that 'deprivation of basic elements of hygiene' was a 'common thread' running through prison conditions cases, including several involving proximity to human waste. . . It's true that neither case involved the precise circumstances at issue here. . . . . *Baird* and *Novak,* together, would have provided 'fair and clear warning' that Brooks's alleged treatment would violate the Eighth Amendment. . .What's more, a reasonable official should not have needed *Baird* or *Novak* to know that Powell's alleged actions violated Brooks's Eighth Amendment rights. This is the 'rare case[ ] of "obvious clarity,"'. . . in which 'conduct is so egregious that no prior case law is needed to put a reasonable officer on notice of its unconstitutionality[.]'. . Forcing a prisoner to soil himself over a two-day period while chained in a hospital bed creates an obvious health risk and is an affront to human dignity. Laughing at and ridiculing an inmate who is forced to sit in his own feces for an extended period of time is not merely unreasonable, but an act of 'obvious cruelty.'. . Any reasonable officer should have known that such conduct was at war with the command of the Eighth Amendment. Although qualified immunity is a 'muscular doctrine,' it cannot save Powell here.")

Hill v. Cundiff, 797 F.3d 948, 979 (11th Cir. 2015) ("The district court also erred in granting summary judgment to Assistant Principal Dunaway on Doe's § 1983 equal protection claim. The district court found Dunaway was entitled to qualified immunity because it could not identify sufficiently similar case law involving a sexual harassment sting operation. This was error. Drawing all reasonable inferences in favor of Doe, Dunaway acquiesced to and ratified Teacher's Aide Simpson's plan to send Doe alone into a bathroom with a known sexual harasser and have Doe pretend to initially welcome the harasser's sexual advances. It is not surprising the district court could not find similar case law. That is because 'every objectively reasonable government official facing the circumstances' would know this irresponsible plan violated the Equal Protection Clause. . . We therefore reverse.")

Watkins v. U.S. Postal Employee, 611 F.3d 549, 553(11th Cir. 2015) (per curiam) ("Watkins has made no supportable allegations that any constitutional right to sing in the lobby of a post office was clearly established at the time of the incident. Instead, Watkins's refusal to stop singing may be fairly classified as disruptive. According to his complaint, Watkins was singing while in the service line and while White was attempting to assist him. Refusing service to a disruptive customer does not violate any clearly established and obvious federal law; nor were White's actions so clearly violative of the Constitution that White had to know that her response was impermissible regardless of prior case law. . . Thus, as an independent and additional basis for affirming the district court, we find that White was protected by qualified immunity and appropriately dismissed as a defendant. . .There is no support for the assertion that Watkins had a First Amendment right to sing any sort of song in the post office lobby while standing in the service line. . . In sum, while singing in the rain may result in a glorious feeling, singing in the post office is not a constitutional right. We affirm the district court.")

Valderrama v. Rousseau, 780 F.3d 1108, 1122-23 (11th Cir. 2015) ("In *Gee* we recognized that a brief delay in the treatment of apparently mild injuries does not constitute deliberate indifference. . . The facts of this case are fundamentally different from the facts in *Gee.* Here, there is evidence that Mr. Valderrama's injuries were life-threatening, that Detective Rousseau and Sergeant Smith subjectively knew that he needed medical treatment, and that the delay at issue was two to five times longer than the delay in *Gee.* Given these differences, *Gee* does not control or foreclose us from concluding it was clearly established that Sergeant Smith and Detective Rousseau acted with deliberate indifference. Additionally, were the jury to find that Sergeant Smith delayed seeking care and lied about Mr. Valderrama's injuries so that she and Detective Rousseau could craft a story to justify the shooting, then our prior case law clearly establishes that delay caused for this reason constitutes deliberate indifference. We have explained that when officials 'ignore without explanation a[n arrestee's] serious condition that is known or obvious to them, the trier of fact may infer deliberate indifference.'. . Here, the officers did more than 'ignore without explanation' a serious medical need—they acted with apparent self-interest, and one lied about the nature of Mr. Valderrama's life-threatening injuries. Any reasonable officer in the same circumstances and possessing the same knowledge would have known that police officers cannot seek to protect themselves from the potential legal and professional ramifications of injuries inflicted by one of the officers while an arrestee bleeds through his clothing from a gunshot wound. . . .In conclusion, Mr. Valderrama has presented facts from which a jury could find that Sergeant Smith and Detective Rousseau acted with deliberate indifference. Moreover, it is clearly established law that the officers' conduct constituted deliberate indifference. We thus agree with the district court that Sergeant Smith and Detective Rousseau are not entitled to qualified immunity from Mr. Valderrama's deliberate indifference claims and affirm the district court's decision.")

Berry v. Leslie, 767 F.3d 1144, 1147, 1150, 1152, 1154, 1160, 1161 (11th Cir. 2014) ("We first held nineteen years ago that conducting a run-of-the-mill administrative inspection as though it is a criminal raid, when no indication exists that safety will be threatened by the inspection, violates clearly established Fourth Amendment rights. *See Swint v. City of Wadley,* 51 F.3d 988 (11th Cir.1995). We reaffirmed that principle in 2007 when we held that other deputies of the very same Orange County Sheriff's Office who participated in a similar warrantless criminal raid under the guise of executing an administrative inspection were not entitled to qualified immunity. *See Bruce v. Beary,* 498 F.3d 1232 (11th Cir.2007). Today, we repeat that same message once again. We hope that the third time will be the charm. . . .The sole question that we address on this appeal is whether the district court correctly concluded that Vidler and Leslie are not entitled to qualified immunity on summary judgment. . . .[T]he plaintiffs contend that the search of Strictly Skillz, which they allege was undertaken with an inordinate display of force, failed to conform to the Fourth Amendment's requirement for reasonableness. Because we have twice held, on facts disturbingly similar to those presented here, that a criminal raid executed under the guise of an administrative inspection is constitutionally unreasonable, we agree. . . .Because the facts of this case—when viewed in the light most favorable to the plaintiffs—adequately establish that the 'inspection' of Strictly Skillz amounted to an unconstitutional search and that the unconstitutionality of such a search was clearly established at the time that the search was

executed, the plaintiffs have met their burden, and the district court properly determined that qualified immunity is inappropriate at this juncture. . . .Where, as alleged here, officers participate in a search that was clearly established to be illegal from its inception, they are simply not entitled to qualified immunity any more than an officer who enters and searches a person's home without a warrant or an applicable warrant exception. This is not a case where a group of officers entered a location to execute a validly obtained search warrant, and, without the approval of the other officers participating in the authorized search, one or two officers went off on an unconstitutional frolic of their own. Here, the entire search itself was unlawful from the beginning, and Vidler and Leslie, who fully participated in it, could reasonably be found to have violated the rights of all of the barbers searched and all of the barbers with a Fourth Amendment interest in Strictly Skillz's space, regardless of what each officer did one on one to each particular plaintiff barber. Each officer's discrete actions in what was clearly an unlawful search from the outset are not the focus of our inquiry here. Rather, the conduct under scrutiny is the officers' core participation in the warrantless search itself. . . Vidler and Leslie were not alleged to have engaged in segregable conduct outside of the clearly unlawful search that was otherwise occurring while they happened to be present and engaging in lawful activity. Instead, Vidler and Leslie were entrenched participants in the warrantless search, which, from the start, violated the Fourth Amendment. It has long been clearly established that a warrantless administrative inspection must be narrowly tailored to the administrative need that justifies it. Here—where the authorized purpose of the inspection was simply to check for barbering licenses and sanitation violations, and there is no indication that the defendants had any reason to believe that the inspection would be met with violence—the manner in which the supposed inspection of Strictly Skillz was undertaken was unreasonable from its inception and was, in fact, a search. Our cases and those of the Supreme Court have long and repeatedly put officers on notice of these facts.")

Calderin v. Miami-Dade Police Dep't, 600 F. App'x 691, 695-96 (11th Cir. 2015) ("W]hether Calderin was resisting or evading arrest also fits nicely into the analysis contained in *Mercado.* In *Mercado,* as is the case here, the plaintiff failed to comply with instructions from the officers. . . In some ways, failing to comply with officer instructions may be considered resisting arrest or at least akin to it. Nonetheless, we held that the plaintiff 'was not actively resisting arrest' and noted the fact that he did not struggle with the officers. . . Similarly, here, we cannot say that Calderin was resisting arrest, even though he was not complying with officer instructions. With two of the governmental interest factors weighing heavily against Officer Schottenheimer and another barely, if at all, weighing in his favor, the balance between the intrusion and the governmental interest tips the scale against Officer Schottenheimer. His initial firing of his weapon was an unreasonable use of force under the circumstances. The same can be said of the subsequent shots fired during Calderin's flight because, taking the facts in the light most favorable to Calderin, Officer Schottenheimer knew that Calderin was unarmed after the first shot and did not pose a threat of immediate harm to others. . . Therefore, Officer Schottenheimer violated Calderin's constitutional right to be free from unreasonable seizures. . . We must now determine whether the right Officer Schottenheimer violated was clearly established. A right is clearly established where there exists 'a materially similar case that has already decided that what the police officer was doing was

unlawful.'. . We have already discussed *Mercado,* which we decided approximately six years before the shooting here. The facts of that case were sufficiently similar to put Officer Schottenheimer on notice that his conduct would violate Calderin's constitutional right. In fact, *Mercado* is nearly indistinguishable on the material facts. Calderin's right, then, was clearly established when Officer Schottenheimer violated it.")

Berry v. Leslie, 767 F.3d 1144, 1164 (11th Cir. 2014) (Pryor, J., concurring in part and dissenting in part) ("I part ways with the majority because it conflates two distinct questions: whether a search violates clearly established law, and who can sue whom on the basis of that violation. The majority relies on *Swint's* conclusion that the officers in *Swint* knew the planned raid violated 'clearly established Fourth Amendment rights,' to draw the unrelated conclusion that mere participation in such a raid is enough to expose any officer to liability to any plaintiff. . . But the central issue in *Swint* was whether the officers would have been on notice that the raid violated clearly established Fourth Amendment rights. The answer to that question does not establish *whose* Fourth Amendment rights they violated. Perhaps for that reason, neither the district court in its order nor the barbers in their brief even cite to *Swint* at all. That is, the decision that the majority cites as clearly establishing what these individual officers should have known was never even mentioned by either the learned district judge or the plaintiffs' own counsel. Because Durant, Trammon, and Anderson failed to prove a causal link between Deputy Leslie's conduct and their constitutional deprivations, I respectfully concur in part and dissent in part. I would reverse the denial of summary judgment for the claims brought by Anderson, Durant, and Trammon against Leslie and render partial summary judgment in his favor.")

Brannon v. Finkelstein, 754 F.3d 1269, 1278, 1279 (11th Cir. 2014) ("In the context of a First Amendment retaliation claim, we have recognized that a defendant 'will only rarely be on notice that his actions are unlawful' because applying the *Pickering* balancing 'involves legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules.' *Maggio v. Sipple,* 211 F.3d 1346, 1354 (11th Cir.2000) (internal quotation marks and alteration omitted). Likewise, in determining contested issues of causation, the defendant is entitled to qualified immunity '[w]here the facts assumed for summary judgment purposes ... show mixed motives (lawful *and* unlawful motivations) and pre-existing law does not dictate that the merits of the case must be decided in plaintiff's favor.' *Foy v. Holston,* 94 F.3d 1528, 1535 (11th Cir.1996). As we have noted earlier, when Brannon's work was reduced following his testimony at the Aleman hearing, the Public Defender's office simultaneously drastically reduced its overall budget for hiring expert witnesses like Brannon. The evidence also suggests that while Brannon's referrals dropped in absolute terms, his proportional share of the Public Defender's office's work remained constant. And it is not disputed that, when Finkelstein removed Brannon from the wheel rotation system, Brannon had recently and publicly expressed his ill-will towards the Public Defender's office. Brannon was thus susceptible to cross-examination on the subject whenever he testified on a Public Defender's client's behalf, which in turn could compromise the effectiveness of his testimony. Under the specific facts and circumstances of this case, in which there exists evidence of both lawful and unlawful motivations for Finkelstein's actions, 'pre-existing law does

not dictate that the merits of the case must be decided in [Brannon's] favor.' *Id.* Thus Finkelstein is entitled to qualified immunity in his individual capacity on the retaliation claim.")

Gennusa v. Canova, 748 F.3d 1103, 1113, 1114 (11th Cir. 2014) ("It has long been clear that the electronic interception of oral conversations constitutes a search under the Fourth Amendment. . . It has also long been clear that in ordinary criminal cases the warrantless interception of private phone calls violates the Fourth Amendment because it infringes the reasonable expectation of privacy of the conversants. . . And, finally, it has long been clear that even in sensitive cases involving domestic threats to national security law enforcement officials need a warrant before electronically intercepting private communications. . . The cases establishing these principles—*Berger, Katz, U.S. District Court,* and *Mitchell*—and their reasoning, *see Hope,* 536 U.S. at 743, made it obvious and apparent to any reasonable law enforcement official in June of 2009 that the Fourth Amendment requires that a warrant be secured before non-custodial privileged communications between attorneys and their clients—communications which are normally entitled to be kept confidential as a matter of law—can be electronically monitored, intercepted, or recorded. That the attorney-client conversations here took place inside an interview room at a sheriff's office does not mean that Det. Marmo and Sgt. Canova lacked clear notice that their warrantless electronic surveillance was illegal. As the Supreme Court has explained, '[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances," as long as the "state of the law [at the relevant time] gave [them] fair notice that their [actions] w[ere] unconstitutional,'. . . and that is the case here. Although locale can matter, . . . it is not dispositive. . . . Here Mr. Studivant had not been arrested, and his liberty had not been curtailed in any way. His status therefore did not result in a diminished expectation of privacy. . . . The district court therefore correctly held that Det. Marmo and Sgt. Canova were not entitled to qualified immunity for their warrantless monitoring and recording of the privileged attorney-client conversations between Mr. Studivant and Ms. Gennusa.")

Caldwell v. Warden, FCI Talladega, 748 F.3d 1090, 1100-03 (11th Cir. 2014) ("[A]t this summary judgment juncture, the defendants do not dispute the objective component of the second element of Caldwell's claim. That is, the defendants do not dispute that—if they had actual, subjective knowledge that Caldwell faced a substantial risk of serious harm from inmate Pinson—their alleged failure to make any attempt, or take any action, to minimize that risk and their returning Caldwell, almost immediately, back into the locked cell with inmate Pinson was objectively unreasonable. Nor do the defendants dispute that—if they had such subjective knowledge of the risk that Caldwell faced—the third element—causation—is satisfied. Stated more simply, the only part of plaintiff Caldwell's deliberate indifference claim that the defendants contest is the subjective component of the second element: whether there is sufficient evidence from which a jury could find that the defendants actually (subjectively) knew that Caldwell faced a substantial risk of serious harm from inmate Pinson. . . .A reasonable jury could infer from these facts that the defendants actually knew that Caldwell faced a substantial risk of serious harm from inmate Pinson. . . . [A] jury need not infer that the defendants *intended* that inmate Pinson harm Caldwell or that they actually *believed* that inmate Pinson would harm Caldwell. It is enough that

a jury be able to infer from the evidence that the defendants actually knew of a *substantial risk* that inmate Pinson would *seriously harm* Caldwell. . . .Because the record contains sufficient evidence from which a reasonable jury could find the subjective element of Caldwell's Eighth Amendment failure-to-protect claim, the district court erred in granting the defendants' motion for summary judgment on that basis. . . .The only remaining issue relevant to the defendants' qualified immunity defense is whether, by September 9, 2009, preexisting law clearly established that the defendants' conduct violated the Eighth Amendment. . . .Prior to the conduct in this case, this Court already clarified that a prison guard violates a prisoner's Eighth Amendment right when that guard actually (objectively and subjectively) knows that one prisoner poses a substantial risk of serious harm to another, yet fails to take any action to investigate, mitigate, or monitor that substantial risk of serious harm. . . .Here, similar to the case in *Cottone,* there was a known, violent inmate (Pinson) who was housed in a separate unit for violent and disruptive inmates and who had already threatened his cellmate's (Caldwell's) safety through the intentional and dangerous act of setting their shared, locked cell on fire. And, almost immediately after Caldwell was rescued from that fiery cell, Caldwell specifically told the defendants that he feared that his life was in danger if he was returned to the locked cell with inmate Pinson. Armed with actual, subjective knowledge of inmate Pinson's prior violence before coming to the SMU, inmate Pinson's recent violence against plaintiff Caldwell, and Caldwell's reported fear of being placed in a small, locked cell with inmate Pinson again, the defendants—like the defendants in *Cottone*—took no action. . . . When viewed in plaintiff Caldwell's favor, the facts show that, shortly after extinguishing a sizeable cell fire, the defendants simply locked Caldwell back in the cell with inmate Pinson and walked away. By the time of the fire and assault in September 2009, the law of this Circuit, as expressed in *Cottone,* clearly established that the defendants' total failure to investigate—or take any other action to mitigate—the substantial risk of serious harm that inmate Pinson posed to plaintiff Caldwell constituted unconstitutional deliberate indifference to Caldwell's Eighth Amendment rights. Thus, the defendants are not entitled to qualified immunity at this summary judgment stage. We have not forgotten that the facts and reasonable inferences set forth and analyzed in this opinion are presented in the light most favorable to plaintiff Caldwell. We are aware that Caldwell may not be able to prove such facts to the satisfaction of the jury and that the jury may elect not to draw inferences from the circumstantial evidence in Caldwell's favor. Nevertheless, at this summary judgment stage, and given plaintiff Caldwell's version of the events, the defendants have not shown that they are entitled to qualified immunity.")

Kothmann v. Rosario, 558 F. App'x 907, 912 (11th Cir. 2014) ("As discussed above, by 1986, it was well settled in this Circuit that intentionally refusing to provide medically necessary treatment constitutes deliberate indifference and violates the Eighth Amendment. . . As also discussed, we accept as true the complaint's allegations that Rosario knew hormone treatment to be the accepted, medically necessary treatment for Kothmann's GID. Thus, at the time of Kothmann's incarceration in 2010, the state of the law was sufficiently clear to put Rosario on notice that refusing to provide Kothmann with what she knew to be medically necessary hormone treatments was a violation of the Eighth Amendment.")

Gilmore v. Hodges, 738 F.3d 266, 277-81 (11th Cir. 2013) ("A constitutional violation may be clearly established either by similar prior precedent, or in rare cases of 'obvious clarity.' With either method, the touchstone is whether the right would be apparent to a reasonable officer. Under the first approach, we look only to binding precedent—holdings of cases drawn from the United States Supreme Court, this Court, or the highest court of the state where the events took place. . . .The Plaintiffs claim that the officers had fair notice that failing to provide Weinberg with hearing aid batteries was unconstitutional, because precedents from this Court have held that the deprivation of a medical device necessary to remedy a serious medical condition violates the Constitution. *See Farrow*, 320 F.3d at 1246–48 (dentures); *Newman*, 503 F.2d at 1331 (eyeglasses and prostheses). The problem with the Plaintiffs' position is that it is stated far too generally and at a very high order of abstraction. The qualified immunity inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'. . An official's awareness of an abstract right 'does not equate to knowledge that his conduct' may infringe that right. . . Hearing loss that can be remedied with a hearing aid has never previously been held to be a serious medical need by the Supreme Court, this Court, or the Florida Supreme Court. . . .Though we now hold that significant and substantial hearing loss that can be remedied by a hearing aid is a serious medical need, our preexisting case law did not provide Defendants with fair warning that their actions violated Weinberg's constitutional rights. While vision and hearing impairments each can cause substantial harm, the nature of those harms and the capacity to discern them may not be the same. A finding that vision impairment may give rise to a serious medical need does not lead ineluctably to the same answer for hearing loss. . . .[W]ithout any prior binding case law classifying hearing loss that can be remedied with a hearing aid as a serious medical need, we cannot say that the state of the law put Hodges and Newsome on fair notice that their failure to provide Weinberg with hearing aid batteries was unlawful. Nor is this a case where the officers' conduct 'so obviously violates the constitution that prior case law is unnecessary.'. . Obvious clarity cases are 'rare,'. . . and present a 'narrow exception' to the general rule of qualified immunity. . . . These obvious clarity cases take two forms. First, a broad statement of legal principle announced in case law may be sufficient if it establishes the law ' "with obvious clarity" to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.'. . Alternatively, obvious clarity is recognized if the conduct is 'so bad that case law is not needed to establish that the conduct cannot be lawful.'. . Plaintiffs do not point to any general principle announced in Eleventh Circuit, U.S. Supreme Court, or Florida Supreme Court case law that clearly applies to the failure to provide hearing aid batteries. (Nor indeed has any circuit court of appeals ever held in a published opinion that substantial hearing loss amounts to a serious medical need for purposes of deliberate indifference qualified immunity analysis.) While this Court recognized a violation when inmates were deprived of dentures in *Farrow* and eyeglasses and prostheses in *Newman*, these cases stopped short of stating a general principle applicable to all medical devices, including hearing aids. The first obvious clarity exception does not apply. Equally inapplicable here, the second obvious clarity exception is relevant only when conduct is so egregious that no prior case law is needed to put a reasonable officer on notice of its unconstitutionality. . . . We hold that a pretrial detainee who suffers from substantial hearing loss that may be remediated by a hearing aid may state a claim for

deliberate indifference to a serious medical need under the Due Process Clause of the Fourteenth Amendment if an officer on notice intentionally ignores the untreated condition. Not all hearing loss is a serious medical need, not all hearing loss creates a substantial risk of harm, not all hearing loss can be remediated by a hearing aid, and not all officials will know of an inmate's condition or its extent. However, accepting Defendants' concessions, Weinberg sufficiently established at the summary judgment stage that his substantial hearing loss was a serious medical need, and that Hodges and Newsome were aware of his condition and refused to provide him with the hearing aid batteries he needed to be able to hear. Thus, put differently, Weinberg's account would have been enough to take that issue to a jury. But in the absence of any clearly established law on the matter, the officers were nonetheless entitled to qualified immunity, and the judgment of the district court is therefore **AFFIRMED**.")

Wilkerson v. Seymour, 736 F.3d 974, 978-80 (11th Cir. 2013) ("Obviously, probable cause and arguable probable cause may differ, but it is tautological that a constitutional arrest must be based on a reasonable belief that a crime has occurred, rather than simply unwanted conduct. . . . Although qualified immunity protects officers who are reasonably mistaken that a crime has been committed, it does not insulate officers from liability for arrests where it is clear that the conduct in question does not rise to the level of a crime, under the facts known at the time. . . To hold otherwise would eviscerate the concept of probable cause and would permit officers to arrest disagreeable individuals who may be exercising their constitutionally protected rights to free speech, albeit in a loud manner. Officers need not have actual probable cause to make an arrest, and an arrest may be for a different crime from the one for which probable cause actually exists, . . . but arguable probable cause to arrest for *some* offense must exist in order for officers to assert qualified immunity from suit. . . . *Jones* did not preclude all failure to intervene claims against a present, but non-arresting, officer in false arrest cases. Although not made explicit in *Jones*, we based our different holdings as to the non-arresting officer on both the degree of participation in the arrest and the amount of information available to the non-arresting officer, because a non-arresting officer does not have a duty to investigate the basis of another officer's arrest. . . Additionally, with respect to the second aspect of the claim, we rejected the argument that one officer 'is somehow charged with presuming that [the arresting officer] must have put the alleged false confession in the arrest affidavit' or that he 'was required to undertake an investigation of the arrest affidavit to determine what [the arresting officer] was doing and what [he] put in the arrest affidavit to continue Jones's detention.'. . What is made explicit in *Jones* is that a participant in an arrest, even if not the arresting officer, may be liable if he knew the arrest lacked any constitutional basis and yet participated in some way. . . . These facts are therefore substantially different from those in *Jones* where the non-arresting officer participated in the transportation, arrest, and report, while fully aware, based on his personal observations, that the basis for the arrest was fabricated. . . As Sergeant Parker was permitted to rely upon the account of Officer Seymour, which did not raise any obvious concerns as to the existence of probable cause, he is entitled to qualified immunity from Wilkerson's false arrest claim. There is no constitutional requirement for a supervising officer to complete a full on-scene investigation of the basis for an arrest for conduct

he did not observe. Accordingly, the district court's denial of his motion for summary judgment was in error.")

Leslie v. Hancock County Bd. of Educ., 720 F.3d 1338, 1349 (11th Cir. 2013) ("No clearly established law bars the termination of a policymaking or confidential employee for speaking about policy. The correct application of the *Pickering* balance to a policymaking or confidential employee who speaks about policy is not established with [such] obvious clarity by the case law [ ] that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted. . . The members of the Board are entitled to qualified immunity in their individual capacities if Leslie and Richardson were policymaking employees who spoke about policy.")

Cooper v. Rutherford, 503 F. App'x 672, 674-77 (11th Cir. 2012) (per curiam) ("With regard to both the unreasonable seizure claim and the substantive due process claim, . . . our analysis begins and ends with the clearly established prong. Assuming, without deciding, that Officer Black committed a constitutional violation, Appellees have not demonstrated that Black's conduct violated clearly established law. . . Appellees have not provided us with any cases suggesting that Black's alleged conduct violated the Fourth or Fourteenth Amendments. Therefore, Appellees have not carried their burden of showing that the alleged constitutional violations were clearly established under prevailing United States Supreme Court, Florida Supreme Court, or Eleventh Circuit law. . . . Regarding the Fourth Amendment unreasonable seizure claim, Appellees point to two cases, *Brendlin v. California* . . . and *Vaughan v. Cox,* . . . that they believe clearly establish that the events on March 26, 2010, amount to a seizure for the purposes of the Fourth Amendment. However, the facts underpinning those cases are not materially similar to the case at bar and neither clearly establishes that a Fourth Amendment seizure occurred. In *Brendlin*, the Supreme Court merely held that when officers stop a car during a routine traffic stop, the driver and passengers alike are seized. . . .The Supreme Court never mentioned the use of deadly force, hostages, innocent bystanders, or any other facts that are remotely similar to the case at bar. Therefore, even if the Supreme Court intended *Brendlin* to apply to the events that took place in this case, it could not have provided Officer Black with fair notice that a seizure was taking place and thus cannot be used to satisfy the requirement that the law be clearly established. . . . Meanwhile, this court in *Vaughan* certainly clearly established that if a passenger-suspect is shot by a bullet intended to stop his fleeing during a chase with police officers, then he is seized for purposes of Fourth Amendment analysis. . . However, this court just as clearly acknowledged the difference between the events in *Vaughan* and the exact situation in this case—when an innocent bystander or hostage is accidentally shot by police officers chasing a fleeing suspect. . . Therefore, preexisting case law does not clearly establish that Appellees were seized when Officer Black's bullet accidentally struck them during the confrontation with the armed bank robber. Nor is this a case involving an instance in which 'a general constitutional rule already identified in the decisional law ... appl[ies] with obvious clarity to the specific conduct in question[.]'. . The existing case law regarding whether Appellees were seized for the purposes of the Fourth Amendment is far from settled, as evidenced by the varying decisions from our sister circuits analyzing similar situations. [citing

cases] Moreover, even if we determine that it is clearly established that Appellees were seized for the purposes of the Fourth Amendment, we are unaware of any case that clearly establishes that Officer Black's actions were constitutionally unreasonable. The district court determined that the other officers who fired their weapons acted reasonably because the use of deadly force against the fleeing armed bank robber was appropriate, *see Robinson v. Arrugueta,* 415 F.3d 1252, 1255 (11th Cir.2005), and they only fired between four and six times. However, the district court also found that Officer Black was unreasonable for firing 24 times. We agree that deadly force against the armed robber was appropriate, but we cannot find a single case in this circuit or from the Supreme Court that clearly establishes that a large number of shots fired makes a reasonable use of deadly force unreasonable. In fact, this court recently held that '[a] police officer is entitled to continue his use of force until a suspect thought to be fully armed is "fully secured."'. .Once the car started moving forward, Officer Black was faced with the choice of either allowing the suspect to escape with multiple hostages and perhaps leading police on a high speed chase through the busy streets of Jacksonville or ensuring that the suspect could not leave the Wendy's parking lot. We cannot say that it is clearly established he made the wrong choice and committed a constitutional violation. Because 'preexisting law [did not] provide [Black] with fair notice that' firing 24 shots was unreasonable in these circumstances, he is entitled to qualified immunity as to Appellees' Fourth Amendment claim for unreasonable seizure. . . . For the same reasons Officer Black is entitled to qualified immunity for Appellees' Fourth Amendment claims, he is also entitled to qualified immunity for the Fourteenth Amendment substantive due process claims. If Officer Black's actions did not constitute a seizure of Appellees, then the non-custodial nature of the interaction precludes liability unless Officer Black's actions were 'arbitrary or conscience shocking.'. . Again, assuming without deciding that Officer Black violated Appellees' constitutional rights, we conclude that it was not clearly established that his actions violated the Substantive Due Process Clause of the Fourteenth Amendment. . . . There is no case law from this circuit or the Supreme Court that clearly established that Officer Black's actions shock the conscience. Therefore, we conclude that he is entitled to the defense of qualified immunity as to Appellees' substantive due process claims.")

Doe v. Braddy, 673 F.3d 1313, 1318-20 (11th Cir. 2012) ("A decision about a substantive due process violation requires an exact examination of the circumstances. For substantive due process purposes, we have never addressed the question of harm caused to a person situated as John Doe was situated: one in no custodial relationship with the state—in the specific context of a third-party minor injured by another child in an adoptive home setting. But we have said that, if the plaintiff alleging the rights violation is in no custodial relationship with the state, then state officials can violate the plaintiff's substantive due process rights only when the officials cause harm by engaging in conduct that is 'arbitrary, or conscious shocking, in a constitutional sense.'. . .For qualified immunity purposes in this case, the federal law applicable to the specific circumstances of this case was not close to established clearly at the pertinent time. The general legal propositions discussed above about substantive due process and non-custodial relationships are vague in themselves, and more so in their possible application to the circumstances of a case like this one, involving, among other things, an adoptive home setting and a victim not in the custody of the

government. Moreover, qualified immunity's 'clearly established' test does not operate at a high level of generality. . . .In no way did *Waddell*—an opinion cited by Plaintiffs—clarify or particularize the liability standard (even roughly) for a case of this kind. [footnote omitted] *Waddell* explicitly declined to declare the precise liability standard to be employed in non-custodial substantive due process cases even of the kind presented in *Waddell.* So, *Waddell,* like the other decisions Plaintiff cites, cannot apply to the facts of this case with 'obvious clarity' and, therefore, is incapable of having provided the social workers 'fair warning' of the alleged unlawfulness of their acts. And all the child-injury cases cited by Plaintiffs are too readily distinguishable, involving children injured while *in state custody* and, thus, cannot provide 'fair warning' in the particular circumstances of this case: a child injured while *not in state custody*. . . .This case is not the rare case where the officials' conduct was so egregious that the officials should have known their acts were contrary to federal constitutional commands, even in the absence (as is true here) of relevant case law. Such cases are 'exceptional' and 'rarely arise.'. . .To rule against the individual defendants in this case would definitely break new ground. The contours of John Doe's claimed due process right were not at all clear in the circumstances, and the alleged unlawfulness (under the preexisting federal law) of the social workers' acts was far from obvious. [footnote omitted] No truly relevant case law applied with 'obvious clarity' to what the social workers were doing. The preexisting law gave no 'fair warning' of the alleged unlawfulness (under federal law) of their acts in advance of their acts. Given the circumstances, the developed federal law at the time stopped well short of clearly establishing the unlawfulness of the social workers' conduct. So under the law, the individual defendants have the right to immunity.")

Pourmoghani-Esfahani v. Gee, 625 F.3d 1313, 1318 (11th Cir. 2010) ("Questions of deliberate indifference to medical needs based on claims of delay are complicated questions because the answer is tied to the combination of many facts; a change in even one fact from a precedent may be significant enough to make it debatable among objectively reasonable officers whether the precedent might not control in the circumstances later facing an officer. No preexisting law clearly established that an approximately two-to-five-minute delay of medical care–either while Plaintiff moved from the waiting room to her cell or then while the cellmate waited for a guard to respond to her signaling–is a constitutional violation, especially with facts like this case. . . Plaintiff acknowledges that no precedent supports her position but still contends that the law was, at the pertinent time, already clearly established because the violation was so obvious that every objectively reasonable officer in Defendant's position would have known that what Defendant did following the struggle was not enough. . . The constitutional violation of deliberate indifference was not obvious given the preexisting law, even if we are mistaken in concluding that the Constitution's prohibition of deliberate indifference was *not* violated at all.")

Camp v. Correctional Medical Services, Inc., 400 F. App'x 519, 2010 WL 4058138, at *1 (11th Cir. Oct. 18, 2010) ("Even after *Hope,*. . . it is not enough to defeat a qualified immunity defense that under the facts of the case the *Pickering* . . . balance tilts in favor of the plaintiff's free speech. Instead, the balance must tilt decidedly in favor of the plaintiff's speech in order for the defendants to have fair and clear notice that they were violating the plaintiff's constitutional rights.")

Bryant v. Jones, 575 F.3d 1281, 1309 (11th Cir. 2009) ("[A] right may be clearly established irrespective of whether courts have specifically deemed the cause of action as being available under a particular legal theory. Accordingly, the question is not whether a reasonable officer would know that a discriminatory retaliation claim was available under Title VII or § 1981; rather, the salient question is whether the state of the law at the time provided officials fair warning that their discriminatory retaliatory conduct was unlawful. . . Furthermore, even if Drew's misguided interpretation of the 'clearly established' prong of the qualified immunity test was correct, it is well-established in this circuit that claims for retaliation are cognizable pursuant to § 1981.")

Bryant v. Jones, 575 F.3d 1281, 1300 (11th Cir. 2009) ("Because a reasonable official would have known that discriminating against county managers on account of their race was unlawful, the district court ruled correctly in denying the defendants qualified immunity.").

H.A.L. ex rel Lewis v. Foltz, 551 F.3d 1227, 1231, 1232 (11th Cir. 2008) ("In *Taylor v. Ledbetter*, 818 F.2d 791 (1987) (en banc), we decided that a foster child can state a 42 U.S.C. § 1983 cause of action under the Fourteenth Amendment if the child is injured after a state employee is deliberately indifferent to a known and substantial risk to the child of serious harm. . . In some circumstances, we accept that the constitutional rule identified in *Taylor* can give a fair warning to foster-care workers. Although the injury sustained in *Taylor* was a beating-induced coma and the injury here is sexual abuse and although other unimportant differences exist, we accept that *Taylor* clearly established decisional law that applied, at the pertinent time, with obvious clarity to Defendants in this case–assuming that the true facts are the same as those alleged–and that Defendants had fair warning that their conduct (doing nothing to protect the children, given the circumstances) violated clear federal law. Defendants can therefore be held personally liable for the childrens' injuries. On the alleged facts, no reasonable person in Defendants' place could have believed that, by doing nothing to protect the children, they could carry out their duties consistently with the Constitution. Defendants contend that they should be afforded qualified immunity because their knowledge of D.C.'s and R.S.'s sexual aggression was not tantamount to knowing subjectively that D.C. and R.S. actually were sexually abusing H.A.L., J.H.L., and S.L.L. Plaintiffs were sexually abused. But in the light of *Taylor*, the issue here is not whether Defendants actually knew or drew the inference that Plaintiffs were sexually abused: it is whether Defendants–who could have (among other things) removed Plaintiffs from the Shick home– actually knew, and were deliberately indifferent to, a substantial risk of Plaintiffs being sexually abused in the Shick home.").

Battle v. Webb, No. 08-12696, 2008 WL 4772098, at *3 (11th Cir. Oct. 31, 2008) ("The *Groh* decision issued in 2004. Prior to that date, the case law of this circuit did not clearly establish that Webb's conduct was improper. . . Thus, at the time Webb searched Battle's business, the existing case law arguably permitted Webb's conduct. The warrant in Battle's case incorporated Webb's affidavit and Webb explained that he did not leave a copy of the affidavit at the time of the search

due to confidentiality concerns. In light of the case law at the time of the search, we cannot conclude that the rights were clearly established.”)**.**

Battiste v. Sheriff of Broward County, 2008 WL 63700, at *2 (11th Cir. Jan. 7, 2008) (“Although government officials may be liable for a failure to train subordinates under some circumstances, the plaintiff cites no case, and we have found none, that would have given an official fair warning that a police chief, faced with past unjustified arrests by his department at public protests, must train ‘borrowed’ law enforcement officers from other jurisdictions to arrest only upon probable cause. Because Chief Timoney did not have fair warning that his failure to train borrowed officers violated the Constitution, he is entitled to qualified immunity on Count XIV as well.”)

Al-Amin v. Smith, 511 F.3d 1317, 1330-36 (11th Cir. 2008) (“Applying *Turner*’s factors to this case, we conclude that our well-established law in *Taylor* and *Guajardo*-that inmates have a constitutionally protected right to have their properly marked attorney mail opened in their presence-is not changed by *Turner* and remains valid, well-established law. . . . Given this Court’s precedent in *Taylor*, *Guajardo*, and *Lemon*, we conclude that: (1) a reasonable official would have known in 2004-05 that opening properly marked, incoming attorney mail outside the inmate’s presence is unlawful and unconstitutional; and (2) *Turner* did not change our well-established law in that regard. Al-Amin would be home free on his access-to-courts claim but for the Supreme Court’s actual injury decision in *Casey*. . . . Subsequent to *Taylor*, *Guajardo*, and *Lemon*, the Supreme Court clarified that ‘actual injury’ is a constitutional prerequisite to an inmate’s access-to-courts claim. . . . Because Al-Amin has not shown the requisite actual injury, the district court erred in denying defendants qualified immunity on Al-Amin’s access-to-courts claim. . . . Because Al-Amin has stated a free speech violation and because actual injury is not a constitutional prerequisite to a free speech claim, the only remaining question is whether Al-Amin’s free speech right to have his attorney mail opened only in his presence was clearly established at the time of defendants’ conduct. . . . Defendants argue that they did not have ‘fair warning’ that opening mail from Karima outside Al-Amin’s presence was a free speech violation and that, therefore, they are entitled to qualified immunity on Al-Amin’s free speech claim. . . Defendants stress that our binding precedent in *Taylor*, *Guajardo*, and *Lemon* was based on the constitutional right to access the courts, not the right to free speech, and thus Al-Amin’s free speech right was not clearly established. The question becomes whether, for qualified immunity purposes, defendants have ‘fair warning’ when reasonable officials know that their precise conduct (opening an inmate’s attorney mail outside his presence) is unlawful and a constitutional violation, but they do not know that it violates not only one constitutional right (the right to court access), but also a second constitutional right (the right to free speech). . . . . The problem with defendants’ argument is that the ‘clearly established’ inquiry for qualified immunity focuses on the defendant’s conduct and whether given a particular factual situation, a reasonable official would know his conduct was unlawful and unconstitutional. . . We have never required that, in order for an official to know his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful. Rather, what courts have said is that a high degree of factual similarity with conduct previously held unlawful and unconstitutional is required

to give a reasonable official fair and clear warning (or notice) that his particular conduct is unlawful and unconstitutional. . . . In this case, exact factual identity exists between prior case law and defendants' factual conduct. Specifically, our precedent, as discussed above, clearly establishes that a prison official violates an inmate's constitutional rights when the official opens attorney mail outside the inmate's presence. . . Thus, we conclude that defendants had fair and clear notice that opening Al-Amin's attorney mail outside his presence was unlawful and violated the Constitution.").

Goebert v. Lee County, 510 F.3d 1312, 1331 (11th Cir. 2007) ("Like the jail administrator in Carswell, Captain Weaver had reason to know that Goebert, a pretrial detainee, had a serious medical problem that needed attention, but he chose to do even less than the defendant official in Carswell did. Weaver chose to disbelieve, without investigation, everything Goebert said simply because she was an inmate, and his reply to her complaint misstated the jail's policy on medical procedures to her. Telling an impoverished inmate that she cannot have the medical care she direly needs to save the life of her child unless she can pay for it is as bad or worse than yelling into a crowded room for someone else to get her to a doctor. A reasonable corrections officer would have known that this conduct was unlawful. Weaver is not entitled to qualified immunity . The district court should not have granted summary judgment in his favor.")

Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1208, 1209 (11th Cir. 2007) ("In *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir.2002), we considered three ways in which the law could be clearly established. First, conduct may be clearly established as illegal through explicit statutory or constitutional statements. *Id.* at 1350. Second, certain 'authoritative judicial decision[s]' may establish broad principles of law that are clearly applicable in a variety of factual contexts going beyond the particular circumstances of the decision that establishes the principle. *Id.* at 1351. Third, and most common, is the situation where case law previously elucidated in materially similar factual circumstances clearly establishes that the conduct is unlawful. *Id.* at 1351-52. None are applicable. The first category is inapplicable because the Equal Protection Clause would not have provided the defendants with fair warning under these circumstances. Under well-established qualified immunity doctrine, the Fourteenth Amendment's broad command that no state shall 'deny to any person within its jurisdiction the equal protection of the laws' may, as it does here, simply operate at too high a level of generality. . . . The second category, 'authoritative judicial decisions,' is also inapplicable. In *Vinyard,* we described this second category as involving 'precedents [that] are hard to distinguish from later cases because so few facts are material to the broad legal principle established in these precedents.' . . *Olech* and *Executive 100* are not such cases. The legal principle established in *Olech* and, less explicitly, in *Executive 100*–that the Fourteenth Amendment forbids the denial of equal protection even when the plaintiff is only a 'class of one'–is certainly broad. This principle does not, however, fit *Vinyard's* definition of a precedent that is 'hard to distinguish from later cases because so few facts are material to the broad legal principle.' . . To the contrary, as our substantive analysis shows, the precise facts of a case are critical in evaluating a 'class of one' claim. This leaves only the third category, cases where binding precedent 'has said that "Y Conduct" is unconstitutional in "Z Circumstances."'. . This

is the most common scenario, because 'most judicial precedents are tied to particularized facts and fall into this category.' . .In the third category, the inquiry is whether the facts of a previous case are 'fairly distinguishable' from the case before the court . . . *Olech* and *Executive 100* are 'fairly distinguishable' from the present case.").

Watts v. Florida Intern. University, 495 F.3d 1289, 1300 (11th Cir. 2007) ("The factual circumstances of this case are unusual. There were no decisions in 1997 addressing the free exercise rights of graduate students in a practicum. Watts seems to have admitted as much because he urged us to craft a new constitutional standard for precisely this situation, explaining that applying either employee speech or student speech cases to student internships is like trying to put 'the proverbial square peg in a round hole.' To decide unusual cases courts sometimes have to cut down pegs and bore out holes, but when such carpentry is necessary qualified immunity is appropriate. Because the individual defendants were not on notice that they were violating Watts' clearly established constitutional rights, the district court correctly granted them summary judgment in their individual capacities.").

Epps v. Watson, 492 F.3d 1240, 1245, 1246 (11th Cir. 2007) ("Prior to Epps' termination, we issued *Terry*. Although in the context of a sheriff's office instead of a tax commissioner, *Terry's* premise clearly established that 'the limited and defined role[ ] [a clerk] tend[s] to play do[es] not support the need for political loyalty to the individual sheriff.'. . 'Although the facts of the case are not identical,' as here Epps was a clerk under the Tax Commissioner and not a sheriff, *Terry's* 'premise has clear applicability in this case.'. . We find that Watson did have 'fair notice' that such alleged conduct is unconstitutional, as the law here was 'clearly established.'")

Andujar v. Rodriguez, 486 F.3d 1199, 1205 (11th Cir. 2007) ("Andujar has not cited, and we have not found, a case holding that the Constitution requires a paramedic who has treated a detainee's immediate medical needs to transport the detainee to a medical facility for non-urgent treatment rather than release the detainee to police officers for booking, relying on the police officers to later transport the detainee for further treatment. Thus, there was no factually similar caselaw that would have put Newcomb and Barea on notice that their conduct violated the Constitution. Moreover, while there was caselaw establishing the general legal proposition that a government official who intentionally delays providing medical care to an inmate, knowing that the inmate has a serious medical condition that could be exacerbated by delay, acts with deliberate indifference, . . . we cannot say that this general rule applied 'with obvious clarity to the specific conduct in question.'").

Porter v. White, 483 F.3d 1294, 1306-08 & n.11 (11th Cir. 2007) ("We hold that the no-fault standard of care *Brady* imposes on prosecutors in the criminal or *habeas* context has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process. . . . Although our binding precedent in *McMillian* establishes that the correlative duty on the part of law enforcement officials is to turn over exculpatory evidence to the prosecution, . . . neither *McMillian* nor any other binding precedent . . . elaborates on the scope of

that duty. For example, although *McMillian* did hold that the law was clearly established as of 1987 and 1988 that a police officer had a duty not to intentionally withhold exculpatory evidence from the prosecution, . . . the opinion did not address whether less-than-intentional conduct on the part of a police officer would violate the duty. . .Thus, it is for the alleged breach of this correlative duty–Fairbanks's duty as a law enforcement official to turn over exculpatory evidence to the prosecution–and the loss of liberty resulting therefrom, that Porter must be deemed to be seeking compensation in this case. We address as a matter of first impression whether Porter must demonstrate that Fairbanks acted with a level of culpability consisting of more than mere negligence. . . . On the authority of *Daniels* and *Cannon*, we hold that mere negligence or inadvertence on the part of a law enforcement official in failing to turn over *Brady* material to the prosecution, which in turn causes a defendant to be convicted at a trial that does not meet the fairness requirements imposed by the Due Process Clause, does not amount to a 'deprivation' in the constitutional sense. Thus, a negligent act or omission cannot provide a basis for liability in a § 1983 action seeking compensation for loss of liberty occasioned by a *Brady* violation. . . . We conclude below that the evidence in this case would, at best, support only an inference of mere negligence on the part of Fairbanks; therefore, like the Court in *Daniels*, we have no reason to consider whether, in the context of a claim like Porter's, 'something less than intentional conduct, such as recklessness or Agross negligence," is enough to trigger the protections of the Due Process Clause.'").

Mathews v. Crosby, 480 F.3d 1265, 1275 (11th Cir. 2007) ("Crosby argues that even if Mathews can establish a constitutional violation, Crosby is protected by qualified immunity because Mathews has failed to show that it was clearly established at the time of the beatings that a warden could face liability under § 1983 predicated on his failure to take reasonable steps in the face of a history of widespread abuse or his adoption of custom or policies which resulted in deliberate indifference. We disagree. By 1999, it was clearly established that a warden, the person charged with directing the governance, discipline, and policy of the prison and enforcing its orders, rules, and regulations would bear such liability.")**.**

Collier v. Dickinson, 477 F.3d 1306, 1311, 1312 (11th Cir. 2007) ("Having found that the statutory rights created by the DPPA [Driver Privacy Protection Act] are enforceable both directly and under Section 1983, we must now ask whether the law was sufficiently established to have provided fair warning to Defendants that they were violating the law. . . . We find that the plain language of the statute and the case law gave clear notice to Defendants that releasing the information in question violated federal law. The words of the DPPA alone are 'specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity.'")

Valdes v. Crosby, 450 F.3d 1231, 1244 (11th Cir. 2006) ("Crosby argues that even if Mario Valdes established a constitutional violation, he is protected by qualified immunity because while it may have been clearly established that Valdes' constitutional rights would be violated if he were beaten to death by guards using excessive force, it was not clearly established at the time of Valdes' death that a warden could face liability under § 1983 predicated on his failure to take reasonable steps in

the face of a history of widespread abuse or his adoption of custom or policies which result in deliberate indifference. We disagree. At the time of Valdes' death in 1999, it was clearly established that a warden, the person charged with directing the governance, discipline, and policy of the prison and enforcing its orders, rules, and regulations, would bear such liability.")

Tinker v . Beasley, 429 F.3d 1324, 1327-31 (11th Cir. 2005) ("The circumstances under which coercive interrogation that does not result in a confession or other self-incrimination may constitute a violation of substantive due process rights is an issue of first impression for our circuit. . . . The Supreme Court and our circuit have offered scant guidance as to what conduct shocks the conscience. . . .Tinker argues that, because the conduct of which she complains would be a constitutional violation in a criminal procedure context, it is also necessarily a conscious-shocking constitutional violation in the context of substantive due process. Beasley and Watson correctly respond that the two inquiries focus on different questions. The coerced-confession inquiry looks at the state of mind of the suspectB'whether [a suspect's] will was overborne' by the totality of the circumstances surrounding the giving of a confession. . . The shocks-the-conscience inquiry, in contrast, looks at the objective unreasonableness of the officers' conduct. Because we are making the second of the two inquiries, we must focus on Beasley and Watson's conduct asking only whether this particular conduct–falsely informing a suspect about the status of her legal representation in the context of an otherwise already coercive interrogation–shocks the conscience. Although this is arguably a close case in that it implicates Tinker's right to counsel, . . Beasley and Watson were trying to solve a murder and bank robbery case in which Tinker had been named by a deceased victim as the shooter. When Tinker asked for her attorney, the officers falsely told her that he had abandoned her, convinced her to sign a waiver-of-rights form, and proceeded to interrogate her multiple times over the course of three days. Although the bank teller's identification of Tinker later proved to have been made in error, the officers were justified in believing they had the right person in custody at the time of the interrogation. Accordingly, although this situation presents slightly 'more egregious' circumstances than those described in *Moran*, we are not prepared to find the officers' conduct 'sufficiently arbitrary for constitutional recognition as a potentially viable substantive due process claim.' . . This case falls more in line with those cases in which police misconduct is untoward and upsetting, and yet does not rise to a level that shocks the conscience. . . . Accordingly, we reverse the order of the district court and find officers Beasley and Watson are entitled to qualified immunity as to Tinker's § 1983 substantive due process claim.")

Akins v. Fulton County, 420 F.3d 1293, 1305, 1306 (11th Cir. 2005) ("Plaintiffs argue that *Poole v. Country Club of Columbus, Inc.* provides fair warning that Gates's actions constituted constructive discharge. . . The district court held, to the contrary, that *Poole* cannot serve as fair warning because it merely held that a reasonable jury could find that the plaintiff had suffered constructive discharge, not that those acts actually constituted a constructive discharge. In categorically holding that *Poole* cannot serve as fair warning of the unlawfulness of a defendant's conduct, the district court erred. The practical effect of our holding in *Poole* is that the facts of the case constitute constructive discharge as a matter of law. Of course, based on the posture of

the case, these facts were viewed in the light most favorable to the plaintiff. This does not alter the effect of the holding: that the facts of Poole, if believed, constitute constructive discharge. A holding by this Court that a particular set of facts raises a question of material fact sufficient to preclude summary judgment serves as fair warning to officials. . . Because Gates's conduct occurred after we issued the opinion in *Poole*, and because the facts in that case are so similar to the ones we consider here with respect to Akins and Blount, Gates was on notice that his acts would constitute constructive discharge. With respect to Revell, however, her claim must fail because neither this Circuit nor the Supreme Court has yet to recognize the claim of 'constructive transfer' as an adverse employment action. Therefore, Gates was not put on notice that his actions would violate clearly established law. Thus, Gates is entitled to qualified immunity with respect to Revell's claim of First Amendment retaliation.").

Bennett v.Hendrix, 423 F.3d 1247, 1255, 1256 (11th Cir. 2005) ("We conclude that the law was clearly established at the time of the defendants' alleged actions that retaliation against private citizens for exercising their First Amendment rights was actionable. This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights.. . .Because this Court has held since at least 1988 that it is 'settled law' that the government may not retaliate against citizens for the exercise of First Amendment rights, . . . we hold that the defendants were on notice and had 'fair warning' that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983.").

Cook v. Gwinnett County School District, 414 F.3d 1313, 1320 (11th Cir. 2005) ("Thus, under the facts as found by the district court at summary judgment, Cook's interests in promoting safety and improving the competency, management, and organization of district bus drivers far outweighed the scant evidence that the district proffered in support of its workplace efficiency argument. We therefore conclude that the *Pickering* balance tilted conclusively in favor of Cook such that the defendants had fair and clear warning that their actions were unconstitutional . . . Moreover, after *Hope v. Pelzer*. . . we have emphasized that 'general statements of the law are perfectly capable of giving clear and fair warning to officials even where the very action in question has [not] previously been held unlawful.'").

Williams v. Consolidated City of Jacksonville, 381 F.3d 1298, 1298, 1299 (11th Cir. 2004) (Wilson, J., concurring in denial of reh'g en banc) ("I respectfully write a brief response to my colleagues who have dissented from the denial of rehearing en banc. This was a qualified immunity case. The opinion . . . concludes that Rayfield Alfred, Fire Chief for the Consolidated City of Jacksonville, Florida, was entitled to qualified immunity when he postponed creating four new captain positions, based allegedly on the premise that the next available candidates on the eligibility list were white males. . . . First, I agree with Judge Tjoflat that Fire Chief Alfred's conduct in *Williams* violated the constitutional rights of the plaintiffs. While the opinion recognizes that the action taken in this case was significantly different from the type of

discriminatory conduct our Circuit has previously found unlawful, the opinion states unequivocally that a decision not to create new jobs, based solely on the race and gender of the next eligible applicants, in the absence of an affirmative action plan, violates the Equal Protection Clause. . . .Where I disagree with the dissenters, however, is whether clearly established law had placed Alfred on notice of this misconduct so as to strip him of his entitlement to qualified immunity. No Eleventh Circuit or Supreme Court authority would have established to Chief Alfred that he could not hold up on creating new jobs until there was a more diverse applicant pool. . . . [N]o case existed in 1999 that clearly established the unconstitutionality of the conduct in *Williams*. Until *Williams*, we had not yet dealt with a situation in which a decision-maker opted not to create entirely new jobs on the basis of race. In fact, as far as I am able to determine, no Circuit has to date. In addition, in *Williams*, the parties never even reached the point where an actual employment decision as to hiring or firing could have been made; the captain positions simply had not been created. Eleventh Circuit case law in no way previously had proscribed such conduct. Thus, while I agree fully with Judge Tjoflat that Alfred's conduct was unconstitutional, it certainly had not been clearly established as unconstitutional at the time in question. Consequently, en banc review was unnecessary.").

Williams v. Consolidated City of Jacksonville, 381 F.3d 1298, 1306, 1307 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of reh'g en banc) ("In *Hope v. Pelzer*, the Supreme Court declared that we had placed a 'rigid gloss on the qualified immunity standard' that was 'not consistent with [its] cases .'. . Our post-*Hope* decisions demonstrate that we have not yet achieved a consensus on what the elusive phrase 'clearly established' means. In particular, we do not have a unified standard on how to interpret our holding in *Vinyard v. Wilson*. . . that 'some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts.' This case is the perfect vehicle for explaining the reach of this crucial holding in *Vinyard*. Consequently, if reheard en banc, this case would have had enormous precedential value and could dramatically clarify the law to the benefit of future parties and panels. In this particular case, the exact qualified immunity standard we apply is not important. Alfred's behavior was so patently unconstitutional, so clearly prohibited by precedent, that he could not expect immunity under any reasonable standard. However we choose to interpret the phrase 'clearly established law,' even a brief consideration of Alfred's acts reveal them to be beyond the bounds of constitutional propriety. The hair that the panel sought to split–that no previous case had involved an employer declining to create a new position on racial grounds. . .is unpersuasive. The panel's approach requires a degree of specificity in precedent that none of our prior opinions demands and that effectively eviscerates our circuit's repeated condemnation of all racial discrimination and race-based decisionmaking in public employment. . . . . Furthermore, if the 'clearly established' prong of the qualified immunity test is interpreted unduly strictly, it will effectively prevent further development of wide areas of constitutional law. An attorney deciding whether to represent the victim of a constitutional violation will be extremely reluctant to bring a case when there is no precedent squarely on point. If an unreasonably high 'clearly established' hurdle precludes many cases involving arguable constitutional violations from being brought, then the stream of precedents recognizing certain

governmental acts as constitutional violations will dry up. This, in turn, will further reduce the number of 'clearly established' constitutional violations, which will further reduce the number of § 1983 cases brought, and the cycle will continue.").

Williams v. Consolidated City of Jacksonville, 381 F.3d 1298, 1308 (11th Cir. 2004) (Barkett, J., dissenting from denia l of reh'g en banc) ("I agree with Judge Tjoflat that en banc review is warranted in this case. Under the panel's own analysis, its qualified immunity holding cannot be reconciled with the Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Hope*, the Court found that our circuit's 'rigid gloss on the qualified immunity standard,' which required that the facts of previous cases be 'materially similar' to those of the case under review, was 'not consistent with [the Supreme Court's] cases. . . Intentional governmental discrimination solely on the basis of race has been held to violate the Equal Protection Clause since long before the events that gave rise to this case. The panel found as much in holding in the first instance that a decision not to create new positions that is based solely upon the race and gender of the next eligible candidates for promotion, in the absence of a valid affirmative action plan, violates the Equal Protection Clause. . . Once committed to the proposition that Chief Alfred's action, although 'significantly different than the types of discriminatory employment actions we formerly found unlawful,' was 'essentially an intentionally discriminatory race-and-gender-based employment decision,' . . . *Hope* requires that we consider his action to be a violation of clearly established law.").

Kesinger ex rel Kesinger v. Herrington, 381 F.3d 1243, 1250 (11th Cir. 2004) ("We have found no preexisting case law involving materially similar facts that would give a reasonable police officer fair and clear warning that shooting a crazed man, intent upon causing harm to himself and others, including the officer who had retreated as far as possible, and has acted in self defense, violated the Constitution. . . Here Herrington acted in self defense. He did not violate the Constitution or any clearly established law. He is entitled to qualified immunity.").

O'Rourke v. Hayes, 378 F.3d 1201, 1210 & n.4 (11th Cir. 2004) ("Hayes . . . had the benefit of not only *Steagald* but *Pembau*r itself. Thus, his conduct was clearly established as unconstitutional not only by the reasonably specific Fourth Amendment principles articulated in the cases discussed above, but by the factually indistinguishable case of *Pembaur*. [footnote] Either of these separate theories would have been enough for us to conclude that his conduct was 'clearly established' as unconstitutional. We also hasten to add that *Pembaur* is eerily on point to a degree of specificity that far transcends the minimum threshold a plaintiff must meet to demonstrate that a constitutional right is 'clearly established' based on a factually indistinguishable case. . . The simple fact that he had an arrest warrant for Brown did not authorize him to enter the office where O'Rourke worked.").

Magluta v. Samples, 375 F.3d 1269, 1283 (11th Cir. 2004) ("In the instant case, we conclude that ample federal law existed at the time of the challenged conduct to give fair warning to the defendants that it was unconstitutional to hold Magluta in solitary confinement for 500 days for

the purpose of punishment and with virtually no procedural protection in the form of periodic reviews.").

Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1277, 1278 (11th Cir. 2004) ("This circuit was recently chastised by the Supreme Court for taking an unwarrantedly narrow view of the circumstances in which public officials can be held responsible for their constitutional violations. . . The law of this circuit used to be that a government actor could be denied qualified immunity only for acts that are 'so obviously wrong, in light of the pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing.' [citing *Lassiter*] The Supreme Court, specifically citing *Lassiter* (along with a handful of other Eleventh Circuit cases), held that '[t]his rigid gloss in the qualified immunity standard ... is not consistent with [the Supreme Court's] cases.' . . . *Hope* reminds us that we need no longer focus on whether the facts of a case are 'materially similar to prior precedent.' . . . Since *Hope*, many of our cases have applied its standard to the exclusion of our earlier, more rigorous doctrinal tests. [citing cases] Turning to Holloman's claims, we find that, as of May 16, 2000, the *Tinker-Burnside* standard was clearly established and sufficiently specific as to give the defendants 'fair warning' that their conduct was constitutionally prohibited. We do not find it unreasonable to expect the defendants–who hold themselves out as educators–to be able to apply such a standard, notwithstanding the lack of a case with material factual similarities.").

Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1302, 1303 (11th Cir. 2004) (Wilson, J., concurring in part and dissenting in part) ("The majority holds that Holloman's constitutional right to put his fist in the air during the recitation of the Pledge is clearly established because the *Tinker-Burnside* standard was 'sufficiently specific' to give the defendants fair warning. . . I respectfully disagree with both the majority's analysis and conclusion.. . . The *Tinker-Burnside* test is whether the student expression 'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.'. . [T]eachers cannot be expected to readily determine what conduct falls within the Court's definition of 'material and substantial interference with appropriate discipline.'. . Reasonable people certainly can disagree about how the Court will apply such a general standard, especially to the facts of the instant action. . . . I do not think that the balancing test we use in our Free Speech cases established with 'obvious clarity' that a student can raise his fist in the air during the curriculum portion of the school day. . . . In the alternative, the majority states that Holloman's right to raise his fist in the air during the Pledge is clearly established under *Barnette*. . . . *Barnette* holds that a student cannot be compelled to speak. *Barnette* says nothing about a student's right to speak. Holloman 'spoke' by raising his fist. Thus, *Barnette* is not relevant to this inquiry. For the reasons that I articulated above for why I believe Holloman's expression is distinguishable from the expression in *Tinker* and *Burnside*, I would hold that the law was not clearly established that Holloman had a right to raise his fist in the air during the recitation of the Pledge in class.")

Ray v. Foltz, 370 F.3d 1079, 1082, 1083 (11th Cir. 2004) ("We reject defendants' argument that '*Taylor* merely generally establishes that a foster child's constitutional rights may be violated,'

while not making it 'apparent that any *specific* conduct violates a foster child's constitutional rights.' Even were the facts of *Taylor* not substantially similar to those here, *see Hope v. Pelzer, . . .Taylor* clearly established that foster children have a liberty interest, pursuant to the substantive due process clause of the fourteenth amendment, in being free from the type of abuse inflicted upon R.M. Although R.M. was not reduced to a coma as was the child in *Taylor,* his injuries were sufficiently similar that no reasonable argument can be made that *Taylor* did not put defendants on notice that deliberate indifference to the risk of this harm would subject them to potential liability. . . .Thus, there can be no question under the facts alleged, that the injuries sustained by R.M. violated his well-established constitutional right in this circuit to be reasonably safe in his foster home. Nevertheless, the Rays cannot proceed upon this allegation alone. The law also requires that the Rays be able to claim that the defendants were *deliberately indifferent* to the violation of this right. . . . The Rays must be able to allege that the defendants had actual knowledge that R.M. was being abused (or at substantial risk of being abused) or that they deliberately chose not to learn of the abuse. In the absence of such allegations, the Rays have not stated a claim under Section 1983.")

Durruthy v. Pastor, 351 F.3d 1080, 1092-94 (11th Cir. 2003) ("The fact that Pastor may have violated an internal guideline may subject her to internal sanction, but it does not undermine objective facts–the Plaintiff was walking in the middle of a busy intersection at a chaotic time with specific knowledge that the police were trying to clear that street, and he was not required to be in the street–that otherwise establish probable cause, let alone arguable probable cause. Simply put, the internal guideline does not convert an illegal act suddenly into a legal one. Moreover, even though we believe Pastor had probable cause to arrest Durruthy for violating Fla. Stat. ' 316.130, she would also be 'entitled to qualified immunity if there was [even] *arguable* probable cause for the arrest.' *Jones*, 174 F.3d at 1283 (emphasis added). Here, Pastor was faced with making a close call on a difficult day, under chaotic circumstances. She had no knowledge that Durruthy previously had been allowed, by unknown officers and under unspecified conditions, to shoot pictures in the street. A reasonable officer could have believed, in light of the information Pastor possessed, that she had probable cause. . . . We add that even if Durruthy had actually alleged the violation of a constitutional right, such a violation was not clearly established. . . . Durruthy also claims that Pastor used excessive force when she arrested him. . . .Here, even if the force applied by Pastor in effecting the arrest– forcing Durruthy down to the ground and placing him in handcuffs–was unnecessary, plainly it was not unlawful. The amount of force used was de minimus. . . . Notably, Durruthy had not been restrained at the time the force was applied, distinguishing the instant case from two cases on which the district court relied.").

Durruthy v. Pastor, 351 F.3d 1080, 1095, 1099 (11th Cir. 2003) (Stahl, J., dissenting) ("Whether under a standard of probable cause or arguable probable cause to arrest, the facts of this case, made all the more apparent and troubling by videotape evidence of the arrest, preclude any notion that Officer Pastor, or any reasonable police officer, could have believed that probable cause to arrest existed. Qualified immunity is inappropriate here, especially at the summary judgment stage. . . . The unique facts here on their own establish the egregiousness and illegality of Officer Pastor's

conduct. Pastor 'did not need specific case law to give her fair warning that an arrest in these circumstances could violate Plaintiff's Fourth Amendment rights.' *Durruthy*, 235 F.Supp.2d at 1298. The majority opinion sets the bar prohibitively high and tips the balance contemplated by qualified immunity away from the Constitution. Aggrieved individuals will have less incentive to challenge unwarranted and unconstitutional government actions because monetary compensation for their harms is unavailable. In the end, unconstitutional government action is more likely to go unchallenged and unchanged. That is our ultimate concern.").

Kirkland v. Greene County Bd. of Educ., 347 F.3d 903, 905 (11th Cir. 2003) ("Notwithstanding that his actual conduct may have violated the Constitution, Morrow argues that at the time of the incident the right to be free from corporal punishment was not clearly established. Morrow misses the point. The issue here is not whether *any* corporal punishment violates the Constitution, but whether the nature and extent of the force applied here was constitutional. Although *Neal* elaborated upon our case law after this incident occurred, the Supreme Court had already held that the deliberate infliction of physical pain by school authorities as punishment for misconduct implicated Fourteenth Amendment liberty interests. [citing *Ingraham v. Wright*] Similarly, the Supreme Court of Alabama had already noted that 'the infliction of corporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.' [citing *C.B. v. Bobo,* 659 So.2d 98, 103 ("la.1995)]").

Grayden v. Rhodes, 345 F.3d 1225, 1245, 1248, 1249 (11th Cir. 2003) ("In light of the Supreme Court's decision in *West Covina*, a reasonable code enforcement officer could readily have concluded that Rhodes was under no obligation to provide notice, pre- deprivation or otherwise, of the tenants' right to challenge the condemnation decision because the remedial procedure available to the tenants was established by a published, generally available source,§30A.11 of the City Code. . . . At the time of eviction in June 2000, a reasonable code enforcement officer could reasonably have concluded, in light of West Covina, that§30A.11 of the Orlando City Code, a publicly available document, placed the tenants on notice of their right to challenge Rhodes' condemnation decision. [footnote omitted] Although we conclude in Part A that this case is distinguishable from West Covina and warrants a different outcome, we cannot say that a reasonable code enforcement officer would have believed in June 2000 that the law clearly entitled the plaintiffs to notice above and beyond that already provided in§30A.11 of the City Code.").

Grayden v. Rhodes, 345 F.3d 1225, 1251, 1257 (11th Cir. 2003) (Birch, J., concurring in part and dissenting in part) (Relying on both *Vinyard* and *Lanier* and concluding "Under *Mullane*, 'X Conduct' is the case-specific civil deprivation of substantial property rights, permanently and irreversibly, without prior, personal notice 'reasonably certain to inform those affected,' whose identity and whereabouts are known, even in the case where the substance and frequency of the proceedings are published by statute and publicly promulgated. 'X Conduct' is also what happened here: the drumhead condemnation of, and eviction from, house and home with minimal, and questionable, statutory notice that assaults the letter and spirit of the uncompromising

demands in *Mullane*, *Schroeder*, *Memphis Light*, *Mennonite*, and *Tulsa*, all of which apply in this case with 'obvious clarity.'" Rhodes is not entitled to qualified immunity.").

Snider v. Jefferson State Community College, 344 F.3d 1325, 1328-30 (11th Cir. 2003) ("Although this Court (1997) and the Supreme Court (1998)–during the time in which the alleged harassment was occurring–had concluded that a same-sex sexual harassment claim was actionable under Title VII against a private employer, this precedent could not fairly put Defendants on notice that their alleged conduct clearly violated a federal *constitutional* right. . . . Although some people may well have reasonably guessed earlier that same-sex sexual harassment was a violation of the Equal Protection Clause, the answer was debatable, not free from cloudiness and truly settled, before our 2003 decision–with its six-page explaining opinion–in *Downing,* . . .and officials cannot be 'expected to predict the future course of constitutional law.'. . Neither the Supreme Court's decision in *Oncale,* . . nor our decision in *Fredette,*. . . provided clear notice to government officials that same-sex sexual harassment violated the Equal Protection Clause. [footnote omitted] . . . We cannot say that the Equal Protection Clause or case law before *Downing* provided Defendants with fair and clear warning that a male supervisor sexually harassing male employees would violate the employees' federal constitutional rights. Although officials, when the preexisting law applies with obvious clarity, can be put on notice that their conduct violates established law even in novel factual circumstances, we stress that officials cannot be 'expected to predict the future course of constitutional law.' . . . Because the pre-existing case law available to Defendants at the time of the alleged harassment did not make apparent that the Equal Protection Clause protected against same-sex sexual harassment, Defendants are entitled to immunity.").

Snider v. Jefferson State Community College, 344 F.3d 1325, 1331-33 (11th Cir. 2003) (Barkett, J., concurring in part and dissenting in part) ("[T]here is no difference between the scope of Title VII and the scope of the Equal Protection Clause concerning intentional discrimination in the form of disparate treatment in the public workplace. . . . For this reason, once Title VII was clarified as proscribing intentional same-sex sexual harassment, a reasonable official was given fair notice that such conduct in the public workplace also violated the Equal Protection Clause. . . .Therefore, to the extent that the Plaintiffs' claims are predicated on sexually harassing conduct that occurred prior to May 22, 1997 (the date we issued *Fredette*), I agree with the majority that the law at that time concerning same-sex sexual harassment in public employment was sufficiently unsettled that the Defendants are shielded by the doctrine of qualified immunity. However, I would remand to the district court for further proceedings as to any claims alleged to have arisen after our decision in *Fredette,* when a reasonable official in the Defendants' position was given fair notice that the conduct alleged here violated the Equal Protection Clause.").

Vaughan v. Cox, 343 F.3d 1323, 1331-33 (11th Cir. 2003) ("[W]e simply cannot conclude as a matter of law that a reasonable jury could not find that Deputy Cox's actions were unreasonable under the standards for using deadly force articulated in *Garner.* Accordingly, we conclude under the first prong of the *Saucier* analysis that Vaughan has alleged facts which could support a jury's finding that Cox violated Vaughan's Fourth Amendment rights. Thus, the district court erred in

granting the Defendants summary judgment on the ground that no Fourth Amendment violation occurred. The issue is one for the jury. . . . Having concluded that the facts alleged could establish a constitutional violation, we now turn to the second prong of the *Saucier* analysis and ask whether it would have been clear to an objectively reasonable officer that Deputy Cox's conduct was unlawful. . . .In determining whether the contours of a constitutional right are clearly established, we examine cases that announce general constitutional rules and cases that apply those rules to factual circumstances to determine if a reasonable public official, who is charged with knowledge of such decisions, would have understood the constitutional implications of his conduct. With regard to this inquiry, the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration. The 'salient question,' the Court said, is whether the state of the law gave the defendants 'fair warning' that their alleged conduct was unconstitutional. . . . As noted above, the constitutionality of a police officer's use of deadly force is evaluated in light of *Garner*. . .In contrast, the standard for determining whether an officer who may not have been constitutionally permitted to use deadly force should still be entitled to qualified immunity is distinct, albeit similar. . .Under that standard, an officer will be entitled to qualified immunity if he had 'arguable probable cause' to employ deadly force; in essence, we decide whether 'the officer reasonably could have believed that probable cause existed' to use deadly force. . . . Taking the facts as alleged by Vaughan, an objectively reasonable officer in Deputy Cox's position could not have believed that he was entitled to use deadly force to apprehend Vaughan and Rayson. Under *Garner,* a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect only when the suspect poses an immediate threat of serious harm to police officers or others. In this case, the danger presented by Vaughan and Rayson's continued flight was the risk of an accident during the pursuit. Applying *Garner* in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to summary judgment, on qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment. But Cox is not foreclosed from asserting a qualified immunity defense at trial. If the jury were to accept Cox's version of the facts, the qualified immunity analysis would be changed. If Rayson and Vaughan's collision with Cox's cruiser was not accidental, or if Rayson intentionally swerved towards Cox's cruiser, the jury could conclude that Cox had probable cause to believe that Rayson had 'committed a crime involving the infliction or threatened infliction of serious physical harm.'. . And, under those facts, the risk presented by Cox's allowing Rayson and Vaughan's flight to continue is starkly different. Rather than the simple risk of an unintended accident, Cox may have been faced with the danger of intended harm brought about by Vaughan and Rayson. Cox may seek special interrogatories to the jury to resolve factual disputes going to the qualified immunity defense.").

Williams v. Consolidated City of Jacksonville, 341 F.3d 1261, 1270-73 (11th Cir. 2003) ("In this case, the Equal Protection Clause on its face was not enough to put Chief Alfred on notice that his actions were unlawful; therefore, we turn to case law to determine whether it was clearly

established in 1999 that Chief Alfred's actions were unconstitutional. . . .Although in some cases we have relied upon that broad equal protection principle to clearly establish the unlawfulness of intentionally discriminatory employment actions, . . . on the unique facts of this case, that broad principle did not clearly and fairly warn Chief Alfred that a decision not to create new positions that were proposed by a subordinate official was unlawful. . . . Accordingly, we must consider whether our precedent was similar enough to put Chief Alfred on notice that his actions were unlawful. . . .Chief Alfred did not make a decision concerning an *existing* or viable position. Instead, the decision at issue was whether to *create* four permanent high-level positions in the fire department as proposed by a subordinate official–a decision that involves the core structure of the fire department. As we find this distinction significant, we conclude that the above case law did not put Chief Alfred on notice that it was unconstitutional to make a decision not to *create* four new high-level positions as proposed by a subordinate official based solely upon the race or gender of the next eligible candidates. Although we recognize that under *Hope* the exact unlawful action at issue need not have been resolved by previous case law, . . . we find it significant that the actions at issue in this case took place in a markedly different context than the other cases . . . . Specifically, all of the cases discussed above dealt with typical employment decisions that were made concerning an *existing* vacancy or a viable position. The decision at issue here, however, was whether or not to *create* four new high-level positions. . . . Although intentional race- and gender- based discrimination is unlawful, none of the cases set forth by the plaintiffs fairly and clearly put Chief Alfred on notice that the decision at issue in this case was unlawful."), *reh'g en banc denied*, ***Williams v. Consolidated City of Jacksonville***, 381 F.3d 1298 (11th Cir. 2004).

Omar ex rel Cannon v. Lindsey, 334 F.3d 1246, 1249, 1250 (11th Cir. 2003) (per curiam) ("Defendants assert that they are entitled to qualified immunity unless the allegations in the instant case are essentially indistinguishable from the facts of *Taylor*. They contend that Eleventh Circuit decisional law has repeatedly emphasized that a government actor does not have adequate notice that her conduct is wrongful unless precedent with an identical fact-pattern has unambiguously declared it to be so. . . Unsurprisingly, this stringent test was satisfied only in the rarest of circumstances, and § 1983 litigants in the Eleventh Circuit have generally found qualified immunity to be a nearly insuperable obstacle. This, however, is no longer the law. Last spring, the Supreme Court handed down a decision that clarifies how a court is to determine whether a particular right was 'clearly established' for the purposes of a qualified immunity analysis. In *Hope v. Pelzer*, 122 S.Ct. 2508 (2002), the Supreme Court overruled the Eleventh Circuit, holding that its exacting qualified immunity doctrine was too strict. . . . [T]he Supreme Court ruled that salient cases like *Gates v. Collier*, 501 F.2d 1291 (5th Cir.1974), furnished the guards with sufficient notice even though the facts in *Gates* were not perfectly congruent with the facts in *Hope*. This analytical flexibility reflects a deeper elaboration of what the Supreme Court meant in *United States v. Lanier*, 520 U.S. 259, 271 (1997) when it wrote that 'general statements of the law are not inherently incapable of giving fair and clear warning.' The germane issue in a qualified immunity analysis, in other words, is not whether there is factually identical precedent but, instead, whether 'in light of preexisting law the unlawfulness [of the alleged conduct is] apparent.' . . . Defendants, in essence, are in the awkward position of arguing that even though

they were idle while Plaintiff was subjected to obscene abuse, including being maced and starved, they would have stepped in had the mother begun to pound him into a permanent coma because, after all, beating toddlers into a coma is what the constitution, as explicated by *Taylor*, prohibits. . . .As the Supreme Court explained in *Hope*, however, our constitutional jurisprudence is not so bereft of good sense and flexibility that decisions in one case do not apply under similar but nevertheless different facts in another. Assuming the factual allegations of Plaintiffs complaint to be true, the Court concludes that Plaintiff had a 'clearly established' right not be brutalized the way in which he alleges he was, and, therefore, that Defendants cannot assert a defense of qualified immunity at this stage.").

Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003) ("[J]ust as there was no supervision of known violent inmates in *LaMarca* and *Hale*, in this case guards D'Elia and Williams did not monitor and supervise Charles, a known violent inmate who posed a substantial risk of serious harm to the other inmates. . . . We conclude that prior factually similar case law gave fair and clear warning to D'Elia and Williams that it was their duty to monitor and to supervise known violent inmates who posed a substantial risk of serious harm to other inmates. . . . . The law of this circuit 'clearly establishes' that their total failure to monitor a known violent inmate housed in Unit 1, a housing unit for mentally ill inmates, constitutes unconstitutional deliberate indifference to Cottone's Fourteenth Amendment rights. Thus, given the plaintiffs' version of the events, defendants D'Elia and Williams are not entitled to qualified immunity at this Rule 12(b)(6) stage.").

Thomas v. Roberts, 323 F.3d 950, 953-56 (11th Cir. 2003) ("Plaintiffs appear to argue that *T.L.O.*'s balancing test should have put Defendants on notice that a 'strip search' would be unlawful. If the salient question is whether *T.L.O.* gave the defendants 'fair warning' that a 'strip search' of an elementary school class for missing money would be unconstitutional, then the answer must be 'no.' *T.L.O.*'s balancing test will, in most instances, call for school officials to speculate as to whether a court applying the balancing test to specific facts would find a search unreasonable. As this court has noted, where the applicable legal standard is a highly general one, such as 'reasonableness,' preexisting caselaw that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law. . . .The facts of *T.L.O.* are so different from the facts in this case that *T.L.O.* offers little guidance: Defendants could not have compared their situation with the situation in *T.L.O.* and found that the comparison fairly and clearly warned that a "strip search" of this kind would be unconstitutional. . . . Plaintiffs cite to *Wilson v. Layne* . . . Plaintiffs insist that 'consensus or persuasive authority' from other circuits may create clearly established law. Plaintiffs then direct us to six opinions from other circuits that deal with strip searches. [footnote omitted] As we have stated, only Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can 'clearly establish' law in this circuit. . . . Factually similar cases are not *always* necessary to establish that a government actor was on notice that certain conduct is unlawful. If the plaintiff in a § 1983 action can show that 'the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the

unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw,' then the official is not entitled to qualified immunity. [citing *Mattox*] This exception is a narrow one, applying only when the conduct in question is so egregious that the government actor must be aware that he is acting illegally. . . . While we have found this 'strip search' of the students absent particularized suspicion to be unconstitutional, we do not believe that the search is conduct so egregious that the unconstitutionality of it would be readily apparent to Defendants absent clarifying caselaw. . . . In conclusion, while *Hope* admonishes us to be less rigid when evaluating caselaw to determine whether a public official had fair warning that his actions would be unlawful, nothing in *Hope* changes the outcome of this case.").

Willingham v. Loughnan, 321 F.3d 1299, 1300-04 (11th Cir. 2003) ("The Supreme Court decision in *Hope v. Pelzer* . . . did not change the preexisting law of the Eleventh Circuit much. [FN1] [In footnote 1, the Court explained that A[t]he Supreme Court's decision in *Hope* definitely did change the law of the Circuit some. . . . In cases like *Hope,* the law of the Circuit is not now what it was."] So, the result in this case, which is a case that has been remanded to us from the Supreme Court for reconsideration in the light of *Hope,* remains the same. We have reconsidered our previous decision. We conclude the law still demands that the individual defendants be protected by the defense of qualified immunity. . . . In many–if not most–instances, the apparency of an unlawful action will be established by (if it can be established at all) preexisting caselaw which is sufficiently similar in facts to the facts confronting an officer, such that we can say every objectively reasonable officer would have been on "fair notice" that the behavior violated a constitutional right. . . . It is not news to us that official conduct may be so egregious that further warning and notice beyond the general statement of law found in the Constitution or the statute or the caselaw is unnecessary; when we first decided this case, we did not believe that precedents with materially similar facts are always needed to overcome the defense of qualified immunity. . . . The Supreme Court, in *Hope,* cautions against a 'rigid gloss on the qualified immunity standard' that would require materially similar, preexisting cases in all circumstances when the qualified immunity defense is to be overcome. . . Such a 'rigid gloss' would be in variance with the law of the Supreme Court and the law of this Circuit. We have denied qualified immunity in the absence of precedents with similar facts. [reviewing cases] . . . . The specific question before us here is whether, considering the pertinent facts, the Officer Defendants violated federal law that was already clearly established in 1987, by shooting Plaintiff within a 'split second' after she attempted to kill one officer and assaulted another. . . . In accord with *Hope,* we have considered again whether, in the light of general constitutional rules on deadly force that had already been identified in the decisional law, this use of deadly force would have been seen as plainly unlawful by all objectively reasonable officers; and the answer is "no" given the circumstances, including that the shooting occurred within a split second of an attempted murder on a fellow officer. No general decisional rules applied with obvious clarity to these circumstances in such a way as to give fair notice that what these defendants were doing clearly violated federal law. And, as was the situation with our earlier decision, Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida which had already decided that the use of deadly force on a Plaintiff–(1) who had just attempted to murder one police officer and assaulted another, (2) who

was not under police control, and (3) was close by a source of weapons–was unconstitutional. Our earlier conclusion remains unaffected by the Supreme Court's decision in *Hope.* We must still conclude the Officer Defendants are entitled to the defense of qualified immunity. We reinstate our prior opinion and judgment and supplement our earlier discussion of qualified immunity with this opinion." [footnotes omitted]).

Holmes v. Kucynda, 321 F.3d 1069, 1078, 1081 (11th Cir. 2003) ("As the Supreme Court recently clarified in *Hope,* the fact pattern of prior cases used to show that a right is clearly established need not be 'fundamentally similar' or even 'materially similar' to the facts alleged. . . Rather, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' . . Thus, the nub of the inquiry is whether 'the state of the law [at the time of the alleged violation]' gave the officials 'fair warning that their [acts were] unconstitutional.' . . . This circuit's case law has clearly established that '[m]ere presence at the scene of a crime, without more, does not support a finding of probable cause to arrest.'[citing cases]").

Vinyard v. Wilson, 311 F.3d 1340, 1350-55 & n.27 (11th Cir. 2002) ("Prior to *Hope,* this Court en banc in *Marsh* likewise emphasized that "*fair and clear notice* to government officials is the cornerstone of qualified immunity." *Marsh,* 268 F.3d at 1031 (emphasis added). Moreover, the Supreme Court in *Saucier* and *Hope,* as well as this Court en banc in *Marsh,* explained that such *fair and clear notice* can be given in various ways. . . . First, the words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the *total absence of case law*. This kind of case is one kind of 'obvious clarity' case. For example, the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful. . . . Second, if the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then turn to case law. When looking at case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts. . . . But for judge-made law, there is a presumption against wide principles of law. And if a broad principle in case law is to establish clearly the law applicable to a specific set of facts facing a governmental official, it must do so 'with obvious clarity' to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted. . . . Third, if we have no case law with a broad holding of 'X' that is not tied to particularized facts, we then look at precedent that is tied to the facts. That is, we look for cases in which the Supreme Court or we, or the pertinent state supreme court has said that 'Y Conduct' is unconstitutional in 'Z Circumstances.' We believe that most judicial precedents are tied to particularized facts and fall into this category. When we have written of the circumstances of two cases as being materially different, we are saying the same thing for which the Supreme Court–and sometimes this Court–has used a different phrase: 'distinguishable in a fair way,' in *Saucier* . . . and 'fairly distinguishable,' in *Pace v. Capobianco,* 283 F.3d 1275, 1283 (11th Cir.2002). . . When fact-specific precedents are said to have established the law, a case that is fairly distinguishable

from the circumstances facing a government official cannot clearly establish the law for the circumstances facing that government official; so, qualified immunity applies. On the other hand, if the circumstances facing a government official are not fairly distinguishable, that is, are materially similar, the precedent can clearly establish the applicable law. . . . For the first and second type of notice or warning, *Hope* instructs that '[a]lthough earlier cases involving Afundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.' . . . For the third type of notice or warning, the Supreme Court in *Hope* explained that '[i]n some circumstances ... a very high degree of prior factual particularity may be necessary.' . . . The Supreme Court opinion at times speaks of *Hope* as an 'obvious clarity' case in the manner of *United States v. Lanier* . . . The *Hope* Court decision relied heavily on *Gates v. Collier.* Given the dearth of limiting facts in *Gates, Hope* appears to be a preexisting case law decision where the facts in *Hope* were not fairly distinguishable from those in *Gates v. Collier.* Few (or perhaps no) facts set out in *Gates* limit the scope of the *Gates* principle that handcuffing prisoners to fixed objects for punishment for long periods violates the Constitution . . . . Although the 'obvious clarity' standard is often difficult to meet, we conclude that the law in 1998 was clearly established that Stanfield's conduct, as Vinyard describes it, during the jail ride violated an arrestee's constitutional rights. Considering Vinyard's version of the events, no factually-particularized, preexisting case law was necessary for it to be very obvious to every objectively reasonable officer facing Stanfield's situation that Stanfield's conduct during the jail ride violated Vinyard's constitutional right to be free of the excessive use of force. To be more specific, no objectively reasonable police officer could believe that, after Vinyard was under arrest, handcuffed behind her back, secured in the back seat of a patrol car with a protective screen between the officer and the arrestee, an officer could stop the car, grab such arrestee by her hair and arm, bruise her and apply pepper spray to try to stop the intoxicated arrestee from screaming and returning the officer's exchange of obscenities and insults during a short four-mile jail ride." [footnotes omitted]).

Rodriguez v. Farrell, 280 F.3d 1341, 1349, 1350 (11th Cir. 2002) ("Assuming, *arguendo,* that Sgt. Farrell and Officer Szczepanski's mistaken arrest of Rodriguez was unreasonable in the constitutional sense and that Rodriguez, thus, has stated a claim for unconstitutional arrest, the constitutional violation–at the time of the arrest–was not already clearly established: Rodriguez cited to no case (nor can we find one) in this Circuit or from the United States Supreme Court or Florida Supreme Court that has ever held an officer, under any set of circumstances, liable for misidentifying an arrestee when *executing* a *valid* arrest warrant. . . . At the time of the pertinent arrest, no precedent had decided that an officer committed a constitutional violation by mistakenly *executing* a *valid arrest* warrant against the wrong person. Closer to the point, no precedent had decided that the nighttime arrest, in conjunction with a traffic stop, of a person–who had been riding in an automobile in which unlawful drugs were being carried, and who was admittedly within five inches of the height of a fugitive for which a valid warrant for arrest (for offenses including a drug offense) was in existence and known to the arresting officers–violated the Federal Constitution when the arrested person shared with the fugitive (1) similar birth dates, social security numbers, addresses, birth places and tattoos as well as (2) the identical name, sex, race

and age. . . Therefore, we conclude that, if Sgt. Farrell's and Officer Szczepanski's mistake in arresting Rodriguez was not, as a matter of law, a 'reasonable' one, it was, at least, an arguably reasonable one in the light of the unsettled, preexisting law.").(emphasis in original), *pet. for reh'g and suggestion for reh'g en banc denied,* 290 F.3d 1276 (11th Cir. 2002).

Skrtich v. Thornton, 280 F.3d 1295, 1304, 1305 (11th Cir. 2002) ("The defendant-officers contend that because there is no case addressing excessive force used *in the context of a cell extraction,* prison guards are completely insulated from federal liability for any and all excessive force used in cell extractions. The fact that the beating took place in the context of a cell extraction does not materially distinguish this case from our precedent. The facts, viewed in the light most favorable to Skrtich, demonstrate that Skrtich was incapacitated by the shock from the electronic shield. The argument that beating a prisoner for noncompliance with a guard's orders after the prisoner had ceased to disobey or resist turns the "clearly established law" of excessive force on its head and changes the purpose of qualified immunity in excessive force cases from one of protection for the legitimate use of force into a shield for clearly illegal conduct. The law of excessive force in this country is that a prisoner cannot be subjected to gratuitous or disproportionate force that has no object but to inflict pain. *Whitley,* 475 U.S. at 320-21. This is so whether the prisoner is in a cell, prison yard, police car, in handcuffs on the side of the road, or in any other custodial setting. . . The use of force must stop when the need for it to maintain or restore discipline no longer exists. *Id.* Long before the defendants acted, the law was clearly established that correctional officers could not use force maliciously or sadistically for the very purpose of causing harm.*").*

Rowe v. Fort Lauderdale, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002) ("Case law is not always necessary to clearly establish a right. A right may be so clear from the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official. . . Also, a general constitutional rule set out in preexisting case law may apply with obvious clarity to the specific circumstances facing the official. . . The official's conduct may be so egregious that an objective and reasonable official must have known it was unconstitutional even without any fact-specific caselaw on point. . . Such exceptions are rare, however. The general rule is that '[g]eneral propositions have little to do with the concept of qualified immunity. If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.' . . This case, where Rowe is alleging that Lazarus's actions constituted 'malicious prosecution,' falls squarely within the general rule. Rowe can only prove that Lazarus's actions violated Rowe's clearly established rights by pointing us to case law that was extant at the time of Lazarus's acts, which concluded that conduct 'materially similar' to Lazarus's violated a federal right.").

Marsh v. Butler County, 268 F.3d 1014, 1031-34(11th Cir. 2001) (en banc) ("When looking at the preexisting case law, courts, dealing with qualified immunity defenses, must always keep in mind the great distinction between following a precedent and extending a precedent. Two sets of circumstances may be 'nearly' the same, but 'nearly' can make a great legal difference at the edge.

Because fair and clear notice to government officials is the cornerstone of qualified immunity, courts must diligently analyze the preexisting case law to determine whether it really did provide plain notice to every reasonable government official that the pertinent conduct, in the specific circumstances, would clearly violate preexisting federal law. . . . When the facts of previous precedents are necessary to give clear warning that certain conduct in specific circumstances will violate federal law, we must look at the facts in the precedent and at the facts that confronted the government official in the case before the court. The two sets of facts must be materially similar. For qualified immunity purposes, a preexisting precedent is materially similar to the circumstances facing an official when the specific circumstances facing the official are enough like the facts in the precedent that no reasonable, similarly-situated official could believe that the factual differences between the precedent and the circumstances facing the official *might* make a difference to the conclusion about whether the official's conduct was lawful or unlawful, in the light of the precedent. Thus, every fact need not be identical. But minor variations in some facts (the precedent lacks an arguably significant fact or contains an additional arguably significant fact not in the circumstances now facing the official) might be very important and, therefore, be able to make the circumstances facing an official materially different from the preexisting precedents, leaving the law applicable–in the circumstances facing the official–*not* clearly established when the defendant official acted. To apply properly this 'materially similar' principle, the court, surveying the relevant area of law, must discern the facts that were material to the federal law violation in similar preexisting cases. [footnote omitted] These facts then must be compared to the facts alleged in the case before the court. If there is an absence of a fact (or the presence of an additional fact) in the case before the court, the court must determine whether that fact *might* make a difference to any reasonable official who had to determine whether his conduct violated federal law in the circumstances in the immediate case. If the court determines that the variance might make a difference, the precedent–when factual particularity is needed to establish the law–cannot clearly establish the law applicable to the circumstances facing the defendant. . . . We conclude, considering the preexisting case law of this circuit (which had cases with very similar facts) and of the Supreme Court (which made it plain that lack of physical injury did not mean that no Eighth Amendment violation had been established), that no reasonable sheriff could have concluded that the alleged conditions at the Jail failed to pose a substantial risk of serous harm, although no serious injury was alleged to have occurred at the Jail before the injuries suffered by Plaintiffs. That the alleged jail conditions posed no substantial risk of serious harm is incapable of being convincingly argued, considering the preexisting law.).

Marsh v. Butler County, 268 F.3d 1014, 1039, 1040 (11th Cir. 2001) (en banc) ("Considering the absence of preexisting precedent dealing with the release of sick or injured inmates, we must conclude that a reasonable sheriff, in July 1996, could determine that the fact of his having a policy of releasing sick or injured inmates–that is, giving inmates their liberty–could make all the difference on whether a medical-needs-related violation of the Federal Constitution would arise for the sick or injured inmates. Not only was the legal landscape, in July 1996, totally barren of cases deciding that giving a sick or injured prisoner his liberty would violate his federal rights, . . . the only case to our knowledge that had earlier discussed the pertinent legal point reached the

opposite conclusion. . . . The decided cases, preexisting the inmate release underlying this suit, said that the decisive fact which obligated a prison official to provide medical care to a prisoner is the fact of the prisoner's involuntary confinement, confinement that prevented the prisoner from obtaining care from other sources. By releasing a prisoner (for example, at a public place), a sheriff can enable the prisoner to obtain care from other sources (something that eventually happened in this very case). A reasonable Sheriff in 1996 could believe that releasing sick and injured inmates was lawful. The 'fact of confinement' in the preexisting cases limited the duty of jailers and–more important for qualified immunity purposes–removed the power of the preexisting precedents to put sheriffs on fair and clear notice that releasing injured prisoners certainly would constitute deliberate indifference to an inmate's serious medical needs.").

Lewis v. McDade, 250 F.3d 1320, 1321 (11th Cir. 2001) (*denying petition for rehearing en banc*) (Edmondson, J., and Dubina, J., concurring) ("No party or judge has presented us with a materially similar case that would have put Defendant on clear notice that his behavior– in the light of the fact that the female employees (now Plaintiffs) willingly participated in the mutual teasing and joking that constituted the sexual conduct in the office–violated the Constitution. When, as here, the legal consequences of a set of facts is unclear under the preexisting law at the time of the event, qualified immunity applies.").

Lewis v. McDade, 250 F.3d 1320, 1322, 1333 (11th Cir. 2001) (*denying petition for rehearing en banc*) (Barkett, J., dissenting) ("In finding that no pre-existing case was sufficiently similar, the court takes the clearly established inquiry to a level of specificity that runs afoul of the Supreme Court's holdings in *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), and *United States v. Lanier,* 520 U.S. 267, 269 (1997) . . . . Although manifestations of sexual harassment may differ, its purpose and intent is readily discernible from a range of acts that need not be explicitly catalogued or itemized in order to put any reasonable person on notice that the conduct constitutes sexual harassment. . . .It is . . . ludicrous to hold that a reasonable district attorney would not know that, *inter alia,* throwing coins down his female employees blouses and photographing their buttocks constitutes sexual harassment unless a pre-existing case had found identical conduct unconstitutional.").

Chesser v. Sparks, 248 F.3d 1117, 1123 (11th Cir. 2001) ("Chesser cites no case, and our independent research has uncovered none, holding that a statement such as Chesser's, made in the same or similar context, satisfies the first prong of the *Pickering* test. [footnote omitted] Because 'case law, in factual terms, has not staked out a bright line,' *Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir.1993), indicating that Chesser's speech was a matter of public concern, a reasonable government official in Sparks's position would have had no reason to believe that the Constitution protected Chesser's statement that the County's refusal to pay overtime wages would violate the FLSA.").

Denno v. School Board of Volusia County, 218 F.3d 1267, 1274, 1275 (11th Cir. 2000) ("The instant case involves display of the Confederate flag during school hours and on school premises.

We do not believe that it would be unreasonable for a school official to believe that such displays have uncivil aspects akin to those referred to in *Fraser*, in that many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed. . . We cannot conclude that only a plainly incompetent school official would have viewed the instant circumstances as implicating legitimate school functions relating to civility, and thus subject to the school's authority under the more flexible *Fraser* standard to balance the freedom of one student to advocate unpopular and controversial views at school against the school's countervailing interest in teaching students the boundaries of socially appropriate behavior. . . . The balancing analysis under the *Fraser* standard would be analogous to that discussed by this court in a case involving a public employer's discharge of an employee because of the employee's comments to the press on matters of public concern. . . . Similarly, we cannot conclude that a *Fraser* balancing of the circumstances in the instant case would lead to the inevitable conclusion that the individual defendants here violated the First Amendment rights of the students. We cannot conclude that the prohibition of the displays of the Confederate flag in this case are 'so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing.'").

Priester v. City of Riviera Beach, 208 F.3d 919, 926-28 & n.6 (11th Cir. 2000) ("In the context of Fourth Amendment excessive force claims, we have noted that generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity. . . . A narrow exception exists to the rule requiring particularized case law to establish clearly the law in excessive force cases. When an excessive force plaintiff shows "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw," the official is not entitled to the defense of qualified immunity. . . . Although the clearly-excessive-even-in-absence-of-case-law standard is a difficult one to meet, we think that, on the facts of this case, the law was clearly established in February 1994 (the date that this incident occurred) that what Defendant Wheeler did violated Plaintiff's constitutional rights. The Defendants' version of the facts and Plaintiff's version were not similar, but were sharply at odds on almost every important point. The jury accepted Plaintiff's version. . . . On Plaintiff's version of the facts, which we must accept, Defendant Wheeler ordered and allowed his dog to attack and bite Plaintiff; threatened to kill Plaintiff when Plaintiff kicked the dog in an effort to resist the unprovoked attack; and let the dog attack Plaintiff for at least two minutes. Considering these facts, no particularized preexisting case law was necessary for it to be clearly established that what Defendant Wheeler did violated Plaintiff's constitutional right to be free from the excessive use of force. No reasonable police officer could believe that this force was permissible given these straightforward circumstances. . . . Cushing observed the entire attack and had the time and ability to intervene, but he did nothing. No particularized case law was necessary for a reasonable police officer to know that, on the facts of this case and given that the duty to intervene was clearly established, he should have intervened. . . . . We do not decide today that qualified immunity could

never protect a defendant that a jury has found used excessive force. We simply say that, on these facts, no reasonable officer could have concluded that the amount of force used was reasonable.").

Maggio v. Sipple, 211 F.3d 1346, 1354, 1355 (11th Cir. 2000) ("Because the analysis of First Amendment retaliation claims under the *Pickering-Connick* test 'involve[s] legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules ... a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful.' [citing *Martin v. Baugh*] To establish that the defendant was on notice, the plaintiff must 'either produce a case in which speech materially similar to [hers] in all *Pickering-Connick* respects was held protected, ... or show that, on the facts of [her] case, no reasonable person could believe that both prongs of the test had not been met.'").

Kyle K. v. Chapman, 208 F.3d 940, 943 (11th Cir. 2000) ("Defendants in this case are not decision makers as defined in *Youngberg*. Instead they are the direct care workers whose primary responsibility is carrying out the directions of the officials who determine patient care. Plaintiffs have cited no case in which non-professionals such as these defendants were held to have violated the rights alleged. Whether the *Youngberg* standards should apply to non-professionals may be arguable, but with no clearly established law to that effect, defendants are entitled to qualified immunity on this claim.").

McElligott v. Foley, 182 F.3d 1248, 1260 (11th Cir. 1999) ("Well before the actions here, we established the Eighth Amendment principles that govern this case. Indeed, virtually all the precedents cited to support our conclusion that there was sufficient evidence for a jury to conclude that Dr. Foley and Wagner were deliberately indifferent to Elmore's serious medical needs were decided before this case arose. Given the abundance of caselaw from our circuit defining the parameters of deliberate indifference, we cannot say that defendants lacked fair warning that their conduct violated the Eighth Amendment.").

Sanders v. Howze, 177 F.3d 1245, 1249, 1250 (11th Cir. 1999) ("The core qualified immunity issue in this case is whether, prior to November 8, 1989, case law of this circuit had 'clearly established' the federal statutory or constitutional rights of a suicidal jail inmate vis a vis his jailers in a concrete factual context so as to make it obvious to a reasonable jailer that his actions violate federal law. . . . We disagree with the district court's analysis. Indeed, the statements made in the district court's opinion are mere conclusory statements or 'sweeping propositions of law' which instruct a government actor not to be 'deliberately indifferent' without defining that term or providing the requisite guidance to him for stripping him of qualified immunity. . . . When considering whether the law is clearly established, the specific facts of the cases relied upon as precedent are important. . .The facts need not be the same as the facts of the immediate case but they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.").

Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999) ("While officers have been subject to liability for failing to intervene when another officer uses excessive force, . . . there is no previous decision from the Supreme Court or this Circuit holding that an officer has a duty to intervene and is therefore liable under the circumstances presented here. There is no controlling authority clearly establishing that once a police officer knows another officer has fabricated a confession in a police report for a warrantless arrest, that police officer has a constitutional duty to intervene to stop the other officer's conduct.").

Moniz v. City of Ft. Lauderdale, 145 F.3d 1278, 1282-83 (11th Cir. 1998) ("[A]ccepting as true Moniz's assertion that appellant Donisi informed him that he had recommended two of the top five scoring African-American candidates for promotion in order to increase the number of African-American sergeants, a justification consistent with the promotional goal articulated in the consent decree, appellants are entitled to qualified immunity unless Moniz can demonstrate that appellants should have known, based on clearly established law as of 1993 and 1995, the years in which the challenged promotions were awarded, that their use of race as a factor in making promotions consistent with the consent decree was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. . . . We are aware of no legal authority –and Moniz points to none–that would have put appellants on notice that their consideration of race as a factor in making promotion decisions consistent with a consent decree the validity of which remained unchallenged would violate Moniz's equal protection rights.").

Ensley v. Soper, 142 F.3d 1402, 1406 (11th Cir. 1998) ("Any case law that a plaintiff relies upon to show that a government official has violated a clearly established right must pre-date the officer's alleged improper conduct, involve materially similar facts, and 'truly compel' the conclusion that the plaintiff had a right under federal law.").

Martin v. Baugh, 141 F.3d 1417, 1420 (11th Cir. 1998) ("Because both prongs involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the *Pickering-Connick* test. . . Consequently, a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful. Unless the plaintiff can either produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected . . . or show that, on the facts of his case, no reasonable person could believe that both prongs of the test had not been met, he cannot defeat a defense of qualified immunity.").

Gold v. City of Miami, 138 F.3d 886, 888 (11th Cir. 1998) (Barkett, J., dissenting from denial of rehearing en banc) ("Under *Lanier*'s fair warning standard, the police officers are not entitled to qualified immunity in this case. First, at the time of Gold's arrest, the Supreme Court had specifically held that speech critical of police officers is constitutionally protected. Second, . . . the Florida Supreme Court had specifically reversed, as violative of the First Amendment, disorderly conduct convictions of defendants who had not only used expletives, but also made threatening comments to police officers–conduct far more egregious than Gold's. Finally, every

other circuit that has addressed the issue of qualified immunity in a situation similar to that present here has had no trouble concluding that a police officer is not entitled to qualified immunity in these circumstances.").

Badia v. City of Miami, 133 F.3d 1443, 1446 (11th Cir. 1998) ("[I]t is not clearly established in this Circuit that an EEOC charge and a federal court complaint involving an otherwise purely personal matter are speech on a matter of public concern that are entitled to First Amendment protection.").

Smith v. Mattox, 127 F.3d 1416, 1419-20 (11th Cir. 1997) ("Fourth Amendment jurisprudence has staked no bright line for identifying force as excessive. Thus, unless a controlling and factually similar case declares the official's conduct unconstitutional, an excessive-force plaintiff can overcome qualified immunity only by showing that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw. . . . [A]ssuming as we must that Smith was offering no resistance at all, the considerable effort and force inferable from the grunt, Smith's sensation of a blow, and the broken arm was obviously unnecessary to restrain even a previously fractious arrestee. We thus conclude that this case falls within the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw. This does not mean, of course, that Mattox will not ultimately be entitled to immunity. If a jury, for example through special interrogatories, indicates that it believes Mattox's testimony that Smith continued to resist arrest until his arm was broken, it will be appropriate for the district court to revisit the issue whether Mattox's force was patently unreasonable.").

Jones v. City of Dothan, 121 F.3d 1456, 1459, 1460 (11th Cir. 1997) ("The magistrate judge's qualified immunity analysis falls short of the fact-intensive inquiry that the qualified immunity standard demands. . . . Rather than basing its analysis solely on a general proposition, the magistrate judge should have applied the facts of this case and asked whether, as of February 11, 1994, it was clearly established that it was unconstitutional for officers to patdown a man suspected of repeatedly harassing a woman and chasing her from her place of employment where the officers neither handcuffed nor placed the man in a patrol car, and where the officers expected to remain in the man's presence pending identification by the victim.").

Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997) ("Given that what constitutes legally proscribed disorderly conduct is subject to great subjective interpretation of specific facts–for example, the words used, the tone used, the decibels used, and the reaction of onlookers–we are constrained to conclude that a reasonable officer in the same circumstances and possessing the same knowledge as the officers in this case could have reasonably believed that probable cause existed to arrest Gold for disorderly conduct. The evidence, viewed in the light most favorable to Gold, reflects that Gold twice used profanities in a loud voice, in a public place, and in the presence of others. At the time, no cases clearly established that those actions did not constitute legally proscribed disorderly conduct.").

Lancaster v. Monroe County, 116 F.3d 1419, 1426 (11th Cir. 1997) (law was clearly established that "sheriffs and jailers cannot place or keep a chronic alcoholic in jail without any medical supervision, when the defendants are aware that the alcoholic is suffering from a severe form of alcohol withdrawal.").

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 823, 825 n.3, 828 (11th Cir. 1997) (en banc) ("The principles of qualified immunity set out in *Lassiter* . . . continue to be the guiding directives for deciding cases involving the question of a state actor's entitlement to qualified immunity in this circuit. . . . Our job . . . is to decide a narrow legal issue in light of our binding circuit precedent: on May 1, 1992, the date on which the relevant conduct at issue in this case occurred, was the law clearly established such that all reasonable teachers standing in the defendants' place reasonably should have known that the search to locate allegedly stolen money violated Jenkins' and McKenzie's Fourth Amendment rights? Applying the principles explicitly stated in *Lassiter*, we conclude that, at the time these events took place, the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible. . . . The dissent contends that the Supreme Court's recent decision in *United States v. Lanier* . . . calls into question our conclusion that *T.L.O.*, while establishing general principles that necessarily must govern any Fourth Amendment analysis of a school search, did not explicitly apply those principles to specific facts such that the defendants–and any reasonable individuals faced with the same circumstances–should have known that their conduct in this case violated clearly established constitutional norms. *Lanier*, however, is entirely consistent with both the reasoning and result reached by our court in this case. . . . It is true that the Court described the appropriate standard as being whether the unlawfulness is apparent in light of preexisting law. Although this circuit has elaborated and said that 'preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about)' the unlawfulness of the challenged conduct, *Lassiter*, 28 F.3d at 1150, we do not believe that our elaboration indicates a standard substantively different from that of the Supreme Court. The Court in *Lanier* does not address or alter in any way our understanding of the underlying purpose or legal framework with respect to qualified immunity; rather, the Court's holding equates the standard of specificity required to provide fair warning in a criminal context under ' 242 with that required to clearly establish the law for purposes of civil liability. . . . [A]lthough general principles of law can provide fair warning, they do not necessarily provide such warning unless the constitutional rule at issue may be applied 'with obvious clarity.' As acknowledged by the dissent, the question is whether *T.L.O.* established 'with obvious clarity' that the school search at issue was unconstitutional. Put simply, we do not think this is an 'easy' case, nor do we view *T.L.O.* as applicable to the instant facts 'with obvious clarity.'").

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 827 n.4 (11th Cir. 1997) (en banc) ("The Supreme Court in *Lanier* simply did not address the extent to which decisions of the "lower courts" must, should, or may be considered in deciding whether a constitutional right has been clearly

established, nor did it identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place. We therefore do not construe *Lanier* as being in conflict with our precedent regarding the relevant decisional law to which we must look in analyzing a claim of qualified immunity.").

Foy v. Holston, 94 F.3d 1528, 1536-37 (11th Cir. 1996) ("To prevail on a claim about family privacy, parents need to prove that a state actor interfered with a protected liberty interest without sufficient justification. This constitutional tort requires no element of intent. . . . Violations of the right to family association are determined by a balancing of competing interests. . . So, state officials who act to investigate or to protect children where there are allegations of abuse almost never act within the contours of 'clearly established law.'").

Riley v. Newton, 94 F.3d 632, 637 (11th Cir. 1996) ("Our case law does not speak to whether a joint investigation which culminates in the military person arresting a civilian is a violation of the Posse Comitatus Act. Assuming, however, that a willful use of a military person to make an arrest would be a violation of the Act under the plain words of the statute, . . . no case law makes it clear that Glisson could be said to have wilfully used Newton to make an arrest. . . . Absent case law defining "wilful use" as the failure to prevent military personnel from making arrests when participating in a joint investigation, Glisson cannot be said to have violated clearly established law.").

Cooper v. Smith, 89 F.3d 761, 765 (11th Cir. 1996) ("In this qualified immunity context, we then have to determine whether the inevitable conclusion of the *Pickering* balance is that Cooper's discharge was unlawful. . . . An analysis of the case law reveals that it was clearly established at the time Smith refused to renew Cooper's commission that it was a violation of Cooper's First Amendment rights to take adverse action against him for cooperating with an official law enforcement investigation.").

McMillian v. Johnson, 88 F.3d 1554, 1565 (11th Cir. 1996) ("We do not view the absence of a case factually similar to the extraordinary allegations in this case as an indication that the law was not clearly established that confining a pretrial detainee on death row to punish him is unconstitutional. *Bell*'s prohibition on any pretrial punishment, defined to include conditions imposed with an intent to punish, should have made it obvious to all reasonable officials in [each defendant's] place that holding McMillian on death row to punish him before he was tried violated McMillian's due process rights.").

Suissa v. Fulton County, 74 F.3d 266, 270 (11th Cir. 1995) (per curiam) ("Our focus must . . . be a narrow one: whether the law was clearly established at the time of Hubbard's alleged actions that an unsuccessful attempt to influence speech violates the First Amendment. The facts of the speech retaliation cases involve retaliation after speech occurs, which is not 'materially similar' to unsuccessful attempts to prevent or influence protected speech. [cite omitted] Both situations

involve speech and the First Amendment, but that is far too general a level of abstraction for qualified immunity purposes.").

Dolihite v. Maughon, 74 F.3d 1027, 1041 (11th Cir. 1996) ("Although *Romeo* establishes that the involuntarily civilly committed have certain due process rights and that those rights are at least as extensive as the rights of the criminally institutionalized, that broad legal truism is insufficient to clearly establish the law for purposes of overcoming the appellants' qualified immunity claims in this case.").

Pickens v. Hollowell, 59 F.3d 1203, 1206 (11th Cir. 1995) ("The merits question . . .is whether it violates the Fourth Amendment for law enforcement officers to arrest based upon a warrant supported by probable cause if they know that the statute of limitations period has run. But this case is not here for a review on the merits; it is here for a review of the district court's qualified immunity ruling. The qualified immunity issue is whether . . . the law was clearly established that the Fourth Amendment forbade an arrest based upon an otherwise valid warrant if the arresting officers knew the statute of limitations period had run.").

Swint v. City of Wadley, 51 F.3d 988, 1001 (11th Cir. 1995) ("This Court has recently joined the First, Sixth and Ninth Circuits in purporting to narrow the scope of *Graham*, by holding 'that a non-seizure Fourteenth Amendment substantive due process claim of excessive force survives *Graham*.' [citing *Wilson v. Northcutt*] However, ... [a]t the time of these raids, the law was not clearly established that excessive force in connection with a search violated not only the Fourth Amendment but also the Due Process Clause.").

Rodgers v. Horsley, 39 F.3d 308, 311 (11th Cir. 1994) ("The question in this case is not whether, in general, involuntarily committed patients have a legally cognizable interest under the Fourteenth Amendment to safe conditions. They do. Instead, the question in this case, as in all qualified immunity cases, is fact specific: in May 1991, was it clearly established in this circuit that it was unconstitutional for a mental institution to fail to supervise a patient for fifteen minutes in the smoking room, when she was on close watch status for a health problem, when the institution had a history of some 'sexual contact' involving patients other than plaintiff but no history of rape for the past twelve years, where a previous patient who was to be similarly monitored disappeared, apparently escaped through a bathroom window, and fell to her death on a ledge below, and where the plaintiff had never before complained of unwanted sexual contact from either the patient accused, any other patient, or any member of the staff? The answer is 'NO.'").

Alexander v. University of North Florida, 39 F.3d 290, 291-92 (11th Cir. 1994) ("As we explained in [*Lassiter*], qualified immunity for government officials is the rule, liability and trials for liability the exception . . . . Plaintiffs rely mainly on the decision in *Cornelius v. Town of Highland Lake* . . . to satisfy the burden. . . . *Cornelius*, at most, creates some ambiguity about whether a state may owe a duty of protection to someone outside the traditional custodial relationship. But, nothing in *Cornelius* comes close to the 'clearly established' standard required to overcome the qualified

immunity defense in this case. . . . In addition, no case has been called to our attention in which neither the assailant nor the victim was in custody and in which the special duty to protect has been found and applied to support liability.").

Spivey v. Elliott, 29 F.3d 1522, 1527 (11th Cir. 1994) ("There are no bright lines here. Because no reported case addressed this kind of residential school, the district court and the parties were forced to interpret analogous cases. The district court held that no liberty interest was implicated. On the other hand, we hold that our analysis leads us to an opposite conclusion. Where there is so much room for differing interpretations, we cannot say the contours of the right were clearly established. In *Taylor*, we extended the right held by involuntarily committed mental patients to involuntarily placed foster children. In a circumstance such as this where an eight-year-old hearing impaired child is in the State's care 24 hours a day five days a week, the facts are sufficiently analogous to *Taylor* to create a relationship between the child and the State such that the State has a duty to protect the child from harm. While it is logical to extend the analysis in *Taylor* to these facts, we cannot say that the extension was so obvious as to put the defendants on notice of potential wrongdoing. Because this right was not clearly established . . . the defendants are entitled to qualified immunity.").

Lassiter v. Alabama A & M University, Bd. of Trustees, 28 F.3d 1146, 1149-50 (11th Cir. 1994) (en banc) ("For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law. [citing *Anderson*] Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases. The most common error we encounter, as a reviewing court, occurs on this point: courts must not permit plaintiffs to discharge their burden [footnote omitted] by referring to general rules and to the violation of abstract 'rights' .... For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.").

Harris v. Coweta County, 21 F.3d 388, 394 (11th Cir. 1994) ("The contours of unreasonable delay in providing treatment for serious medical needs were defined with enough particularity to allow a reasonable sheriff with Sheriff Hammett's information to understand whether his actions were lawful. Under the clearly established legal norms, a reasonable sheriff would have known that delaying prescribed treatment for a serious medical need for several weeks for a nonmedical reason may violate an inmate's constitutional rights.").

Adams v. St. Lucie County Sheriff's Department, 998 F.2d 923 (11th Cir. 1993) (per curiam) (*en banc*), adopting dissenting opinion of Judge Edmondson, 962 F.2d 1563, 1575-76 (11th Cir. 1992) ("Because plaintiff has failed to produce clearly established law showing that the police in 1985 would reasonably know they were 'seizing' decedent by ramming the fleeing car, defendants are entitled to summary judgment on qualified immunity grounds . . . . Even if I assumed that the law

in 1985 clearly established that striking a car constituted a seizure, I would still conclude that defendants were due qualified immunity because plaintiff has produced *no* case law to support the idea that the method of seizure was unreasonable within the context of the Fourth Amendment and the facts of this case.").

Howard v. Wilkinson, No. 617CV1473ORL40GJK, 2018 WL 1583638, at *7-8 & n.6 (M.D. Fla. Apr. 2, 2018) ("The Officer Defendants next argue that there 'was no clearly established law proscribing a takedown of a resisting detainee.'. . They insist that, in the aftermath of the *Kingsley* decision clarifying the elements of a Fourteenth Amendment excessive force claim, there was 'a dearth of on-point factual law in the pretrial detainee context' informing officers of what they can and cannot do. . .That is, in the absence of opinions applying *Kingsley* in factually similar cases, there was no 'clearly established' use of force law the Officer Defendants could have violated. This argument is, of course, absurd. 'For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."'. . Even in novel factual circumstances, 'officials can still be on notice that their conduct violates established law....' . . . So a right can be clearly established before a Court speaks directly to the precise factual circumstances. At the time of the incident, the Eleventh Circuit had firmly established the right of a non-resisting individual to (i) be free from being pepper sprayed gratuitously, and (ii) not be slammed head first into a hard floor. . . Furthermore, the Officer Defendants overstate the 'upheaval' in use of force caselaw occasioned by the Supreme Court's decision in *Kingsley*. . . That case merely eliminated the requirement imposed by several Circuit Courts—including the Eleventh—that plaintiffs prove an officer's subjective awareness that their use of force was unreasonable to make out an excessive force claim. . . It did not otherwise abrogate the decisional excessive force law in this Circuit. In light of the continued viability of excessive force cases pre-dating *Kingsley*, a reasonable official occupying the Officer Defendants' position would understand that their actions violated Mr. Howard's Fourteenth Amendment rights. . . This conclusion is fortified by the extreme force alleged in the Complaint and lack of a compelling justification to use such force. . . .It is worth noting that the allegations of the Complaint might plausibly state a claim for excessive use of force under the pre-*Kingsley* Eleventh Circuit law, which required that officials act 'maliciously and sadistically to cause harm.'. . In such an inquiry, *Fennell* instructed courts to consider factors similar to the *Kingsley* factors. . . ("[1] the need for the application of force; [2] the relationship between the need and the amount of force that was used; [3] the extent of the injury inflicted upon the prisoner; [4] the extent of the threat to the safety of staff and inmates; and [5] any efforts made to temper the severity of a forceful response."). That is to say, even under pre-*Kingsley* law (which was more favorable to officer-defendants), reasonable officials in the Officer Defendants' shoes would have been on notice that their conduct violated Mr. Howard's Fourteenth Amendment rights. The Court therefore has no difficulty finding that they would have been on notice post-*Kingsley*.")

Esposito v. Stone, No. 8:14-CV-2414-T-33EAJ, 2015 WL 5440599, at *8-9 (M.D. Fla. Sept. 15, 2015) (Applying the *Kingsley* factors, "[t]he Court has determined that a reasonable jury could find that a constitutional violation occurred. The next inquiry is whether the constitutional

violation was clearly established. In determining whether a right is clearly established, '[t]he relevant, dispositive inquiry ... is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . .The Eleventh Circuit has explained, 'Claims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause instead of the Eighth Amendment's Cruel and Unusual Punishment Clause, which applies to such claims by convicted prisoners.'. . 'However, the applicable standard is the same, so decision law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.'. .These cases uniformly hold that gratuitous use of force against an individual who is not resisting is excessive. [collecting cases] After considering the numerous authorities explaining that police officers may not punch non-resisting arrestees and that unnecessary and gratuitous use of force is unconstitutional, and considering the evidence in the light most favorable to Esposito, the Court must conclude that the constitutional violation alleged was clearly established. Defendants' motion for summary judgment, including Defendants' request for qualified immunity, is accordingly denied. In denying summary judgment, the Court underscores that its analysis is based on the version of the facts set forth by Esposito, which drastically and irreconcilably clashes with the version of the facts described by the Defendant Officers.")

Evans v. Bayer, 684 F.Supp.2d 1365, 1374-77 (S.D. Fla. 2010) ("Regardless of the standard used, Evans's speech falls under the wide umbrella of protected speech. It was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior. Therefore, the Court finds that Evans had a constitutional right. The next inquiry is whether it was a clearly established right. . . . Bayer argues that there is no established rule on student internet speech. This confusion certainly exists as to a number of questions (e.g., whether the speech was on campus or off; and the level of disruption or distraction tolerable). . . . Bayer relies on *Doninger v. Niehoff,* 527 F.3d 41 (2d Cir. 2008), and *Kubany v. The School Board of Pinellas County,* 839 F.Supp. 1544 (M.D. Fla. 1993), for the proposition that the right was not clearly established. However, these cases involved off-campus conduct that resulted in disruption on-campus. While they establish certain parameters of unprotected speech, the speech at issue here is categorically different. . . . While the controlling precedent may be unclear, this confusion cannot save Bayer when his actions do not even comport with the requirements for the regulation of on-campus speech. . . . [T]he Court finds that the right in question was clearly established.")

Mobley v. Manahugh, No. 8:07-cv-1833-T-33EAJ, 2009 WL 4562175, at *5, *6 (M.D. Fla. Dec. 2, 2009) ("Mobley alleges that Mark Montague and Michael Spirk unlawfully entered and searched his motel room on May 5, 2003. Mobley's claims have no merit because the protection of qualified immunity applies regardless of whether the government official's error is a mistake of fact, mistake of law, or a mistake based on mixed questions of law and fact. [citing *Groh v. Ramirez*] In 2003, the controlling law held that a co-occupant did not have the authority to consent to the search of premises that were jointly controlled or occupied if the target of the search was present and non-consenting. . . Here, the Defendants were mistaken about the facts and law in that

they believed that a co-occupant could consent to a search over the objection of a present and non-consenting occupant. There is no evidence in this case that the Defendants intentionally and knowingly violated the law May 5, 2003. Moreover, there is no evidence, such as omitting or secreting Mobley's denial of consent, which lends itself to any suggestion the Defendants acted in bad faith. Defendants believed that Ms. Ramos could legally give consent to search the motel room and that she did so. . . . Qualified immunity still shields an officer from suit, even when a decision is constitutionally deficient, where an officer reasonably misapprehends the law governing the circumstances. . . The Defendants misapprehended the law regarding whether Ms. Ramos had the authority to consent but are still entitled to qualified immunity.")**.**

Foster v. Raspberry, No. 4:08-CV-123 (CDL), 2009 WL 2355854, at **6-8 (M.D. Ga. July 29, 2009) ("The qualified immunity question presented in this case is whether Fourth Amendment law 'clearly established' that a strip search of a student for an iPod-without individualized suspicion-was unconstitutional. . . . . The Court finds that the Eleventh Circuit's decision in *Thomas* put Defendants on notice that the search of King violated King's Fourth Amendment rights. . . . One may ask: if the defendants in *Redding* were entitled to qualified immunity because the law on student strip searches was not clearly established until *Redding* was decided in 2009, then why are Defendants here not also entitled to qualified immunity for this search that occurred in 2007? The Court finds that the law in the Eleventh Circuit was clearly established in 2007 and that *Redding*, at least insofar as the Eleventh Circuit is concerned, did not change that. The controlling law at the time of this search was the Eleventh Circuit's holding in *Thomas.* The existing Eleventh Circuit precedent was not divergent. In the Eleventh Circuit, an intrusive search of a student over a non-dangerous item without individualized suspicion is a direct violation of that student's constitutional rights under the *T.L.O.* standard. *Redding* did not change this clearly established Eleventh Circuit law. In fact, it essentially confirmed what the Eleventh Circuit had held in *Thomas.* Therefore, at the time of the search here, it was clearly established that such strip searches were unconstitutional in this Circuit and *Redding* did not alter that established precedent. The reason the defendants in *Redding* were entitled to qualified immunity is that the law in the Ninth Circuit was not as clear at the time of the *Redding* search. . . . .The Court finds that in the Eleventh Circuit, *Thomas* was sufficiently on point to put school officials on notice that a search of the type allegedly conducted here was a violation of a student's constitutional rights under the Fourth Amendment. *Redding* did not announce a new legal principle, at least not for the Eleventh Circuit; rather it essentially confirmed what was already the clearly established law in this Circuit.").

Buckner v. Shetterley, No. 3:06-CV-79 (CDL), 2008 WL 5234279, at *2, *3 (M.D. Ga. Dec. 15, 2008) ("The Court finds that Eleventh Circuit precedent establishes, with obvious clarity, that a government official is prohibited from intentionally providing false information to law enforcement without probable cause and thereby directly causing a Fourth Amendment violation. The 'federal right to be free from prosecutions procured by false and misleading information' is well-established in the Eleventh Circuit. [citing cases] Defendant seeks to distinguish these cases by pointing to the fact that Defendant is not a law enforcement official. . . .The jury in this case found that Defendant intentionally provided false information to the police without probable cause,

and as a direct result, Plaintiff suffered a violation of her Fourth Amendment rights. Under these circumstances, the Court finds that existing case law provided Defendant with ample warning that her conduct would violate Plaintiff's constitutional rights.").

H.Y. ex rel. K.Y. v. Russell County Bd. of Educ., 2007 WL 1128890, at *13 (M.D. Ala. Apr. 16, 2007) ("To the extent that Defendants try to distinguish *Thomas*, those efforts are unavailing. Their contention that no student was required to remove his or her clothing is inaccurate. As stated previously, viewing the evidence in the light most favorable to Plaintiffs, all of the Plaintiffs were required to lift their shirts and most of them were required to drop their pants. Defendants did not have individualized suspicion. At the time of the strip searches, the object of the search was twelve dollars. The strip searches here were similar to those in *Thomas.* To be sure, there are factual differences. The searches here were not conducted in groups of four or five, no student in this case dropped his or her underwear, and the students in *Thomas* were in fifth grade while the students here were in seventh grade. Despite the factual differences, the Court concludes that the facts of this case are similar enough to those of *Thomas* to give Defendants fair warning that the strip searches they conducted violated the Fourth Amendment. To grant qualified immunity under these circumstances would be to return to the 'materially similar' standard that the Supreme Court rejected in *Hope.*").

Rauen v. City of Miami, No. 06-21182-CIV, 2007 WL 686609, at *19 , *20 (S.D. Fla. Mar. 2, 2007) ("In Counts Seven, Nine, Eleven, and Thirteen of the TAC, Plaintiffs allege that specific Individual Defendants directed the use of the police skirmish line to suppress protest of the FTAA meetings, resulting in violations of Plaintiffs' First Amendment rights. The Individual Defendants are entitled to qualified immunity unless their actions violated clearly established federal law. . . . In this case, Plaintiffs allege that they were peacefully protesting, Rauen on the grass near the Bayfront Amphitheater and Hartman on the east side of Biscayne Boulevard, when they were confronted by the skirmish line, struck with less lethal weapons, and forced to discontinue their protest. . . Plaintiffs allege that the Individual Defendants directed the unlawful activity of the skirmish line officers in order to suppress constitutionally-protected expressive activity. . . Taking Plaintiffs' allegations as true, clearly established federal law, at the time of the FTAA protests, made clear that the government's activity in suppressing peaceful protest in a public forum, in the absence of a compelling government interest in doing so, . . . was a violation of Plaintiffs' First Amendment rights. . . . Defendants frame the issue as whether it was clearly established that it was 'unconstitutional to use less-than-lethal weapons to disperse a crowd at a large public demonstration.'. . .Framing the issue in this manner does not compel a different result. First, the fact that less lethal weapons were used is irrelevant in the First Amendment context. Plaintiffs allege that Defendants infringed their First Amendment rights by forcing them to discontinue expressing themselves via peaceful protest. The method by which Defendants allegedly did this is irrelevant. Second, the text of the First Amendment does not contain an exception for large gatherings of people. . . Defendants had no rational reason to believe that they were entitled to violate the First Amendment's protections simply because many protestors, as opposed to one or a few, were present. . . The fact that Defendants acted in the context of a large

demonstration does not alter the clearly established law set forth above. Defendants were aware, or should have been aware, that Plaintiffs were entitled to exercise their right to peacefully protest in the absence of a compelling government interest in quashing their protest. The mere fact that a large number of people are gathered does not constitute a 'compelling government interest' in limiting the First Amendment rights of the people present at the protest; to hold otherwise would be to eviscerate the First Amendment's protections. Because it was clearly established that Defendants could not constitutionally suppress the peaceful protests of Plaintiffs and others in a public forum in the absence of a compelling government interest, and because Defendants have not argued that such an interest existed, the undersigned finds that the Individual Defendants are not entitled to qualified immunity on Counts Seven, Nine, Eleven, and Thirteen of the TAC.")**.**

Brown v. Smith, No. 5:05-CV-475 (DF), 2006 WL 1890192, at *7, *8 (M.D. Ga. July 10, 2006) ("Here, as in *LaMarca*, Plaintiffs allege that Defendant improperly and inadequately trained and supervised his staff, failed to investigate incidents of alleged sexual assaults, and granted staff virtually unrestricted access to inmates, thereby creating a permissive environment which allowed ill-intentioned staff members to prey on female inmates. While the two cases are not factually indistinguishable, the facts of *LaMarca* and the facts in the instant case are sufficiently similar to have made Defendant aware of the minimum constitutional standards for jail administration before his alleged constitutional violations. Although the sexual assaults at issue in *LaMarca* were committed by inmates against fellow inmates, and the sexual assaults here were allegedly committed by jailers against inmates, this distinction only strengthens the Court's opinion that Defendant had adequate notice that his failure to address reports of sexual misconduct by his employees could subject him to individual liability under § 1983. After the Eleventh Circuit recognized in *LaMarca* that a prison supervisor can be held liable for his failure to train and supervise his employees to prevent inmate violence, any reasonable prison or jail supervisor would conclude that his failure to implement training and supervisory measures to prevent sexual assaults by his own employees could also subject him to supervisory liability under § 1983. In sum, the Court finds that *LaMarca* made it apparent that a prison supervisor's failure to respond to numerous reports signaling an atmosphere within the prison that subjected inmates to the continuous threat of violence, including sexual assault, was unlawful, and could subject him to supervisory liability under § 1983. Accordingly, the Court concludes that the Plaintiffs' allegations against Defendant, if proven, will establish a violation of clearly established law.").

Phillips v. Irvin, No. 05-0131-WS-M, 2006 WL 1663677, at *15 n.38 (S.D. Ala. June 14, 2006) ("*Vinyard* and *Lee* are hardly unique in the landscape of Eleventh Circuit jurisprudence. To the contrary, other Eleventh Circuit decisions have either found excessive force violations or denied qualified immunity where law enforcement officers have engaged in unnecessary use of force after arresting and subduing a suspect. [citing cases] Upon reviewing this body of precedent, one court has astutely observed that '[c]ases in which the language of the Fourth Amendment itself has been sufficient to put the officer on notice that his conduct was in violation of the law appear to be cases involving the use of significant force after an arrestee has been subdued. For example, beating a suspect, kicking a suspect, or slamming the head of a suspect [into] the ground is conduct which

deprives the law enforcement officers of qualified immunity when the suspect was handcuffed and did not struggle or resist the officers in any way and did not attempt to flee.' *Johnson v. Wright*, 423 F.Supp.2d 1242, 1258 (M.D.Ala.2005) (citation omitted). This case fits neatly within that paradigm. Thus, as of March 2003, it was clearly established in the Eleventh Circuit that the use of significant force against a compliant, non-resistant arrestee who had already been subdued and handcuffed was unconstitutional under the Fourth Amendment.").

Johnson v. City of Clanton, Alabama, No. 2:04-CV-117-F, 2005 WL 1618556, at *11 (M.D. Ala. July 7, 2005) ("Cases in which the language of the Fourth Amendment itself has been sufficient to put the officer on notice that his conduct was in violation of the law appear to be cases involving the use of significant force after an arrestee has been subdued. . . . In light of the allegations in this case, the Court is persuaded that Wright and Olgilvie had fair warning that the conduct in which they were allegedly engaged violated the Fourth Amendment's prohibitions on excessive force. Moreover, the Court finds that at this stage in the litigation it cannot say that based on the facts as alleged and the reasonable inferences from those facts, a reasonable officer could have believed that he had probable cause to arrest Plaintiff. Arrest without probable cause is a violation of clearly established law under the Fourth Amendment. Accordingly, Wright and Olgilvie are not entitled to qualified immunity at this stage in the litigation and their motions to dismiss on that ground must be denied.")

Braswell v. Bd. of Regents of the University System of Georgia, 369 F.Supp.2d 1371, 1378-80 (N.D. Ga. 2005) ("Until recently, in the Eleventh Circuit, the rule was that a plaintiff must show that the federal right in question has been defined by prior cases with 'concrete circumstances' and 'materially similar' facts. . . This stringent requirement was satisfied only in the rarest of circumstances, making qualified immunity a 'nearly insuperable obstacle' in the Eleventh Circuit. . . In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court rejected the 'materially similar' facts test developed by the Eleventh Circuit to determine whether a right is clearly established. . . . The Court described the 'materially similar' facts test as a 'rigid gloss on the qualified immunity standard [that] is not consistent with our cases.' . . .Thus, the Supreme Court rejected the Eleventh Circuit's 'materially similar' facts test in favor of a 'fair warning' test. In the wake of *Hope*, the Eleventh Circuit has given texture to the requirement that an official must have fair warning that his action violates a claimant's rights. In *Vinyard v. Wilson*, 311 F.3d 1340, 1349-55 (11th Cir.2002), the Court of Appeals identified three categories of cases in which the unlawfulness of an official's conduct is deemed clearly established: (1) where specific words in the federal statute or constitutional provision render the law applicable to the challenged conduct; (2) where judicial decisions clearly apply to a wide variety of factual circumstances; and (3) where precedents involve materially similar facts. . . As the first two categories suggest, a plaintiff may overcome the qualified immunity defense without relying on fact-specific case law when a preexisting constitutional rule applies with 'obvious clarity' to the conduct in question. . . . Even since *Hope*, courts have been hesitant to hold that the case-by-case First Amendment retaliation analysis espoused in *Pickering* and *Connick* applies with obvious clarity to a defendant's conduct. . . Here, where Braswell was terminated in response to her self-serving, insubordinate and unnecessarily

harmful prepared statement, *Pickering* and *Connick* do not apply with 'obvious clarity' to preclude her termination. Braswell has failed to cite any Eleventh Circuit or United States Supreme Court case which would have given the Defendants reasonable notice that, taking into consideration the context, content, and forum of Braswell's speech, terminating her would subject the Defendants to section 1983 liability for retaliatory discharge. Consequently, Adams, Crumley and Evans are entitled to qualified immunity as to Braswell's claim of retaliatory discharge.").

Calhoun v. Thomas, 360 F.Supp.2d 1264, 1278, 1279 (M.D. Ala. 2005) ("Thus, even more so than in *Hope*, it does not take hindsight or tortured reasoning to arrive at the conclusion that relevant case law indicates that the use of force in this case was clearly established to be unconstitutional at the time the events allegedly occurred. Thomas and Wheeler's conduct in this case is not comparable to a split-second decision where an officer is physically threatened. They had Calhoun alone in an interrogation room, handcuffed and legcuffed, when they allegedly maliciously assaulted him not to restrain or subdue him, but for the very purpose of forcing him to make a statement, and to punish him for a robbery and shooting of which he had not yet been accused. . . . . The only genuine legal issue with respect to Calhoun's excessive-force claim is whether Calhoun was protected by the Fourth Amendment, as an arrestee, or the Fourteenth Amendment, as a pretrial detainee, at the moment the force was allegedly inflicted. This marginal uncertainty as to Calhoun's legal status during the events in question does not entitle Thomas and Wheeler to qualified immunity. Even if they mistakenly believed that Calhoun was protected under the Fourteenth Amendment at the time the force was inflicted and not the Fourth Amendment, as this court has concluded, their actions still violated clearly established law. Taken as true, Calhoun's version of events indicates that Thomas and Wheeler explicitly told him they were going to make him miserable until he gave them a statement about the robbery and shooting, and told him they wanted him to suffer. There is no question that by such statements and actions, they indicated an express desire to punish Calhoun. . . . [T]he abundance of Eleventh Circuit and Supreme Court case law compels the conclusion that, adopting Calhoun's version of events as true, Sheriff Thomas and Deputy Wheeler violated his clearly established constitutional right, regardless of whether that right is identified as a Fourth Amendment right to be free from unreasonable seizures or a Fourteenth Amendment substantive due process right. Even if Calhoun was in fact protected under the Fourteenth Amendment rather than the Fourth Amendment at the time the alleged events occurred–or even if the officers themselves were unclear as to Calhoun's legal status–qualified immunity is inappropriate under the circumstances alleged.").

Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F.Supp.2d 1305, 1336, 1337 (S.D. Fla. 2004) ("It is fair to say, I think, that there is significant internal disagreement among the judges in the Eleventh Circuit about what *Hope* means. Some cases state that *Hope* is nothing more than a blip on the radar screen of qualified immunity, and suggest that the Eleventh Circuit's prior jurisprudence was not out of step with Supreme Court decisions. [citing *Willingham*] Other cases describe *Hope* as a sea change in Eleventh Circuit qualified immunity law. [citing *Holloman ex rel. Holloman*] Fortunately, this is not a case where post-*Hope* conflicts in Eleventh Circuit law affect the result. Even under the most narrow reading of *Hope*, it is easy

to conclude that the Commissioners are not entitled to qualified immunity. The Commissioners had before them at least three cases that gave them fair warning that their applications of the MWBE programs to A & E contracts were unconstitutional: *Croson*, *Adarand*, and *ECA*. Each held that affirmative action programs like the MWBE programs could not be enacted or maintained without a strong basis in evidence of discrimination (or a sufficient probative basis of discrimination for gender-conscious remedies).")

Alderman v. McDermott, No. 6:03CV41ORL22KRS, 2004 WL 1109541, at *13, *15 (M.D. Fla. Apr. 27, 2004) ("This Court's research reflects no materially similar case finding that an undercover law enforcement officer's intentional ramming of a non-fleeing suspected misdemeanant's vehicle without warning, causing it to crash, constitutes an unreasonable seizure in violation of the Fourth Amendment. [footnote omitted] Nevertheless, the Court finds that if the facts alleged here are true, then they present one of those exceptional circumstances where the law enforcement officer's 'conduct 'was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.' . . . In concluding that Officer McDermott is not entitled to summary judgment on the basis of qualified immunity, this Court notes that he is not foreclosed from raising the defense at trial. . . If the jury accepts his version of the facts–that the collision was the result of negligence or intentional conduct on the part of Mr. Alderman–then qualified immunity would bar Mr. Alderman's claim under § 1983. At trial, Officer McDermott 'may seek special interrogatories to the jury to resolve factual disputes going to [his] qualified immunity defense.'") .

Golthy v. Alabama, 287 F.Supp.2d 1259, 1266, 1267 (M.D. Ala. 2003) (Given *DeShaney* and its progeny, which establish that there is no duty to protect the public from assaults by third parties, and cases such as *White*, in which this rule was applied to employers, the court must conclude that this case falls within the third category of 'fair warning' analysis described [in *Vinyard*] and even if the Individual Defendants violated the constitution, they were not given fair warning that their conduct was violative of the constitution. Further, the Title VII precedent governing harassment by third parties which creates a hostile work environment would not have given the Individual Defendants fair warning that their failure to prevent a physical attack by a non-employee violated Freddie Golthy Jr.'s constitutional rights. [citing *Snider*] Consequently, even if there were a constitutional violation for intent to discriminate by an employer in failing to respond to threats of violence from a non-employee, the Individual Defendants would be entitled to qualified immunity because they did not have fair warning that the failure to respond to this type of harassment was a constitutional violation.")**.**

Gaines v. Choctaw County Commission, 242 F. Supp.2d 1153, 1165, 1166 (S.D. Ala. 2003) ("In *Vinyard*, the Eleventh Circuit identified three methods by which the law may be clearly established. 'First, the words of the pertinent federal statute or federal constitutional provision in some cases will be specific enough to establish clearly the law applicable to particular conduct and circumstances even in the total absence of case law.' . . Second, in some instances, judicial decisions may set forth a statement of principal not tied to particular facts with such ' Aobvious

clarity" to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.' . . Third, if there is no obvious clarity from either constitutional, statutory or judicial authority, then cases involving materially similar facts may establish a bright line of appropriate conduct. . . The case at hand falls into the middle category. There need not be materially similar cases on point because the specific legal principles are clear. The Eleventh Circuit set forth the applicable general principle in *Adams v. Poag*: 'Our cases have consistently held that knowledge of the need for medical care and an intentional refusal to provide that care constitutes deliberate indifference.' . . Even viewed in the abstract, without benefit of prior application to similar facts, the principle applies with obvious clarity here because the Sheriff's alleged conduct is so egregious. The Sheriff knew that Rowe, whom the Sheriff arrested in the hospital while he was being treated for renal failure and pneumonia, had a serious medical condition. Indeed, the Sheriff removed Rowe from the hospital against the advice of his physician. To make matters worse, the Sheriff provided no medical care to the decedent for days, if not weeks, despite the family's appeals. When treatment was provided at a local clinic, the Sheriff again ignored medical advice to hospitalize Rowe. No reasonable person in the Sheriff's position could have believed taking a seriously ill person out of the hospital, placing him in jail without medical care and refusing to readmit him to the hospital was appropriate conduct. Even if the general principle were not sufficiently clear, the Eleventh Circuit has stated the principle even more narrowly, making it unmistakably obvious that the Sheriff's alleged conduct was unlawful. In *Lancaster* the court cited an earlier decision, *Morrison v. Washington County*, 700 F.2d 678 (11th Cir.1983), for the proposition that ' Athe removal of [the] seriously ill patient from a hospital and his confinement in a jail with no medical facilities under the observations of untrained personnel" amounted to deliberate indifference.'").

Randles v. Hester, No. 98CV1214, 2001 WL 1667821, at *6, *7 (M.D. Fla. June 27, 2001) (not reported) ("The instant case differs from *Hope* in two significant ways. First, review of pertinent case law preceding the complained of events establishes that there are materially similar cases which proscribe the exposure of inmates to infectious disease or threat of future ills. . . . The second important aspect that distinguishes this case from *Hope v. Pelzer*, *supra*, lies in the difference between cases involving disciplinary action and cases involving conditions of confinement. In *Hope*, the Eleventh Circuit stressed the necessity of finding a materially similar case which could serve as a bright line rule against which the defendant's *disciplinary actions* could be measured for reasonableness. In this respect, when the complained of actions fall within the realm of punishment, as opposed to conditions of confinement, it is crucial to find factually similar cases in order to judge the reasonableness of the nature and manner of the punishment; that is, a bright-line test must be met. In the context of exposure to a substantial risk of harm to an inmate's health as a result of general prison conditions . . ., the courts have found it unnecessary for a prisoner plaintiff to point to 'a prior case holding the very action in question to be unlawful.' . . . . Notwithstanding the absence of a factually identical case involving deliberate indifference to an inmate's forced exposure to contaminated blood, the Court concludes that Plaintiff's allegations qualify this case as one fitting into that 'slender category of cases' where the prison official's conduct lies so obviously at the very core of what the Eighth Amendment prohibits that the unlawfulness of the

conduct was or should have been readily apparent to the official. *See Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir.2000); *Smith v. Maddox,* 127 F.3d 1416, 1419 (11th Cir.1997). This case evidences a situation where there exists a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful. *Wilson v. Layne,* 526 U.S. 603 (1999). Given the holdings of *Estelle v. Gamble, Farmer v. Brennan, Powell v. Lennon, Helling v. McKinney, Gates v. Collier,* and *Hutto v. Finney, supra,* all of which were cases decided well before the acts Plaintiff complains of, the Court finds that Plaintiff's right not to be forcibly exposed to a substantial risk of harm due to dangerous and potentially fatal blood borne contagion without available protective clothing and equipment was a clearly established federal right of which a reasonable person would have known.").

McCall v. Dep't of Human Resources, 176 F. Supp.2d 1355, 1369 (M.D. Ga. 2001) ("In *Taylor,* the Eleventh Circuit held that deliberate indifference by state officials to the safety and welfare of a child in foster care constitutes a violation of the child's substantive due process rights and is actionable under § 1983. Thus, the law that Plaintiff accuses Defendants Almand, Mitchell, and Gibson of violating has been clearly established since 1987, which was well before the conduct at issue in this case occurred. . . Moreover, the complaint satisfies the Eleventh Circuit's heightened pleading standard because it alleges facts in sufficient detail for the Court to conclude that the facts of this case are materially similar to the facts of *Taylor.* Consequently, the Court finds that pre-existing law (*Taylor*) establishes a bright-line rule that truly compels the conclusion that all reasonable officials in the circumstances confronted by Defendants Almand, Mitchell, and Gibson should have known that their conduct would violate the Due Process Clause of the Fourteenth Amendment. If, after discovery or at trial, Plaintiff cannot prove that Defendants Almand, Mitchell, and Gibson acted with deliberate indifference to Rayshom's safety and welfare, then they will be entitled to qualified immunity. At this stage of the proceedings, however, Plaintiff has adequately alleged facts that, if proved, indicate that Defendants Almand, Mitchell, and Gibson are not entitled to qualified immunity.").

Conner v. Tate, 130 F. Supp.2d 1370, 1378, 1379 (N.D. Ga. 2001) ("The Eleventh Circuit's insistence on factually similar case law clearly outlining the constitutional or statutory rights involved is important because qualified immunity is most often analyzed in the context of constitutional violations. When constitutional violations are at issue there is generally no clear text from which an officer could know if his actions are unlawful. For instance, the right to be free from unreasonable searches and seizures has almost no practical significance until a court delineates what is reasonable. It is in this context that the Eleventh Circuit, through the doctrine of qualified immunity, protects officials who are not clearly outside the bounds of constitutional law. The Court feels, however, that the present case is different. Here a statutory violation is alleged, and the plain meaning of the statute leads to a clear result. The Wiretap Act prohibits disclosure of the contents of illegally obtained communications. 18 U.S.C. § 2511(1)(c). This is precisely the conduct which Plaintiff alleges the individual Defendants engaged in. The Court is required to accept all allegations in the Complaint as true when evaluating the Defendants' Motion for Partial Judgment on the Pleadings. Although there is no case in the Eleventh Circuit

which specifically holds that when police officers disseminate the contents of an illegally obtained electronic communication they have violated the Federal Wiretap Act, the Court holds that the statute itself qualifies as clearly established law. The individual Defendants are not, therefore, at this stage of the litigation entitled to the qualified immunity defense.").

VII. ROLE OF THE JUDGE/JURY

Salazar-Limon v. City of Houston, Tex., 137 S. Ct. 1277, 1278 (2017) (Alito, J., with whom Thomas, J. joins, concurring in the denial of certiorari) ("[T]his Court applies uniform standards in determining whether to grant review in cases involving allegations that a law enforcement officer engaged in unconstitutional conduct. We may grant review if the lower court conspicuously failed to apply a governing legal rule. . . The dissent cites five such cases in which we granted relief for law enforcement officers, and in all but one of those cases there was no published dissent. . . The dissent has not identified a single case in which we failed to grant a similar petition filed by an alleged victim of unconstitutional police conduct. As noted, regardless of whether the petitioner is an officer or an alleged victim of police misconduct, we rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case. . . The case before us falls squarely in that category. This is undeniably a tragic case, but as the dissent notes, . . . we have no way of determining what actually happened in Houston on the night when Salazar–Limon was shot. All that the lower courts and this Court can do is to apply the governing rules in a neutral fashion.")

Salazar-Limon v. City of Houston, Tex., 137 S. Ct. 1277, 1278-79, 1281-83 (2017) (Sotomayor, J., with whom Ginsburg, J., joins, dissenting from the denial of certiorari) ("Just after midnight on October 29, 2010, a Houston police officer shot petitioner Ricardo Salazar–Limon in the back. Salazar–Limon claims the officer shot him as he tried to walk away from a confrontation with the officer on an overpass. The officer, by contrast, claims that Salazar–Limon turned toward him and reached for his waistband—as if for a gun—before the officer fired a shot. The question whether the officer used excessive force in shooting Salazar–Limon thus turns in large part on which man is telling the truth. Our legal system entrusts this decision to a jury sitting as finder of fact, not a judge reviewing a paper record. . . . . Three Terms ago, we summarily reversed the Fifth Circuit in a case 'reflect[ing] a clear misapprehension of summary judgment standards.'[citing *Tolan v. Cotton*] This case reflects the same fundamental error. I respectfully dissent from the Court's failure to grant certiorari and reverse. . . .The question before the lower courts was whether the facts, taken in the light most favorable to Salazar–Limon, entitled Thompson to judgment on Salazar–Limon's excessive-force claim. . . Although such cases generally require courts to wade through the 'factbound morass of "reasonableness,"'. . . here the question whether Thompson's use of force was reasonable turns in large part on exactly what Salazar–Limon did in the moments before Thompson shot him. Indeed, the courts below needed to ask only one question: Did Salazar–Limon turn and reach for his waistband, or not? If he did, Thompson's use of force was reasonable. If he did not, a jury could justifiably decide that the use of force was excessive. Given that this case turns in large part on what Salazar–Limon did just before he was shot, it should be obvious

that the parties' competing accounts of the event preclude the entry of summary judgment for Thompson. Thompson attested in a deposition that he fired his gun only *after* he saw Salazar–Limon turn and 'ma [k]e [a] motion towards his waistband area.'. . Salazar–Limon, by contrast, attested that Thompson fired either 'immediately' or 'seconds' after telling Salazar–Limon to stop—and in any case *before* Salazar–Limon turned toward him. . . These accounts flatly contradict each other. On the one, Salazar–Limon provoked the use of force by turning and raising his hands toward his waistband. On the other, Thompson shot without being provoked. It is not for a judge to resolve these 'differing versions of the truth' on summary judgment . . .; that question is for a jury to decide at trial. The courts below reached the opposite conclusion only by disregarding basic principles of summary judgment. The District Court reasoned that Salazar–Limon 'offered no controverting evidence' against Thompson's testimony that he turned and reached for his waistband before he was shot, . . . and the Fifth Circuit similarly reasoned that Salazar–Limon had not 'submitted any other controverting evidence' regarding that fact. . . . This is plainly wrong. Salazar–Limon's own testimony 'controverted' Thompson's claim that Salazar–Limon had turned and reached for his waistband. The sworn testimony of an eyewitness is competent summary judgment evidence. And Salazar–Limon's testimony 'controverted' Thompson's; indeed, the two contradict one another in every material way. Salazar–Limon needed no other evidence to defeat summary judgment. . . .This is not a difficult case. When a police officer claims that the victim of the use of force took some act that would have justified that force, and the victim claims he did not, summary judgment is improper. The Fifth Circuit's decision should be reversed. Only Thompson and Salazar–Limon know what happened on that overpass on October 29, 2010. It is possible that Salazar–Limon did something that Thompson reasonably found threatening; it is also possible that Thompson shot an unarmed man in the back without justification. What is clear is that our legal system does not entrust the resolution of this dispute to a judge faced with competing affidavits. The evenhanded administration of justice does not permit such a shortcut. Our failure to correct the error made by the courts below leaves in place a judgment that accepts the word of one party over the word of another. It also continues a disturbing trend regarding the use of this Court's resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. See, *e.g.*, *White v. Pauly*, 580 U.S. ——, 137 S.Ct. 548, 196 L.Ed.2d 463 (2017) (*per curiam*); *Mullenix v. Luna*, 577 U.S. ——, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (*per curiam*); *Taylor v. Barkes*, 575 U.S. ——, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015) (*per curiam*); *Carroll v. Carman*, 574 U.S. ——, 135 S.Ct. 348, 190 L.Ed.2d 311 (2014) (*per curiam*); *Stanton v. Sims*, 571 U.S. ——, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (*per curiam*). But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on '"society as a whole[.]"'. . than does the erroneous denial of summary judgment in such cases. We took one step toward addressing this asymmetry in *Tolan*. . . We take one step back today. I respectfully dissent.")

Tolan v. Cotton, 134 S. Ct. 1861, 1866-68 (2014) ("Courts have discretion to decide the order in which to engage these two prongs. . . But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. See *Brosseau v. Haugen*, 543

U.S. 194, 195, n. 2, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*); *Saucier, supra,* at 201; *Hope, supra,* at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'. . Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'. . In making that determination, a court must view the evidence 'in the light most favorable to the opposing party.'. . Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case.'. . Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions. . . In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party[.] . . . Considered together, [the] facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. And while 'this Court is not equipped to correct every perceived error coming from the lower federal courts,'. . . we intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents. . .The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party. Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting. This is not to say, of course, that these are the only facts that the Fifth Circuit should consider, or that no other facts might contribute to the reasonableness of the officer's actions as a matter of law. Nor do we express a view as to whether Cotton's actions violated clearly established law. We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law. . . .The judgment of the United States Court of Appeals for the Fifth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.")

Thomas v. Nugent, 539 F. App'x 456, 461 (5th Cir. 2013) ("Thomas asserts that just as in *Newman,* the *Graham* excessive-force factors clearly establish the answer in this case such that a body of relevant case law is unnecessary. But as with *Bryan, Newman* is also distinguishable from the facts of this case. In *Newman,* the suspect had committed no crime, posed no threat to anyone's

safety, and did not resist the officers or fail to comply with a command. . .In fact, the plaintiff claimed he was tasered repeatedly despite never being given any command by the officers . . . . In contrast, Pikes was arrested pursuant to an active felony warrant, attempted to evade arrest, was subdued only through the threat of deadly force, and did not comply with the officers' repeated requests to cooperate in effectuating the arrest. Thus, this case does not provide an 'obvious' example of excessive force such that Thomas satisfied her burden to demonstrate that Officer Nugent's use of force was unreasonable under clearly established law."), *cert. granted*, 134 S. Ct. 2289 (2014), *vacated and remanded in light of* ***Tolan v. Cotton,*** 134 S. Ct. 1861 (2014) (*per curiam*).

See also ***Dawson v. Anderson County, Tex.***, 566 F. App'x 369 (5th Cir. 2014), *infra, pet. for reh'g and reh'g en banc denied*, 769 F.3d 326 (5th Cir. 2014).

In ***Hunter v. Bryant***, 502 U.S. 224, 228 (1991) (Per Curiam), the Supreme Court reversed a judgment of the Ninth Circuit denying qualified immunity to federal agents who had arrested, without probable cause, someone they suspected of threatening the President's life. In criticizing the approach taken by the Ninth Circuit, the Court noted:

> The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment...based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' . . . This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial.... Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Scott v. Harris, 127 S. Ct. 1769, 1776 & n.8 (2007) ("The question we need to answer is whether Scott's actions were objectively reasonable. . . . JUSTICE STEVENS incorrectly declares this to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' . . At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, . . . the reasonableness of Scott's actions–or, in JUSTICE STEVENS' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' . . . is a pure question of law.") (emphasis original).

Scott v. Harris, 127 S. Ct. 1769, 1784, 1785 (2007) (Stevens, J., dissenting) ("Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury. . . Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. . . .In my judgment, jurors in Georgia should

be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.").

Brosseau v. Haugen, 125 S. Ct. 596, 598, 601-04 (2004) (per curiam) (Stevens, J., dissenting) (" In my judgment, the answer to the constitutional question presented by this case is clear: Under the Fourth Amendment, it was objectively unreasonable for Officer Brosseau to use deadly force against Kenneth Haugen in an attempt to prevent his escape. What is not clear is whether Brosseau is nonetheless entitled to qualified immunity because it might not have been apparent to a reasonably well trained officer in Brosseau's shoes that killing Haugen to prevent his escape was unconstitutional. In my opinion that question should be answered by a jury. . . .[T]he Court's search for relevant case law applying the *Garner* standard to materially similar facts is both unnecessary and ill-advised. [citing *Hope* and *Lanier*] Indeed, the cases the majority relies on are inapposite and, in fact, only serve to illuminate the patent unreasonableness of Brosseau's actions. Rather than uncertainty about the law, it is uncertainty about the likely consequences of Haugen's flight–or, more precisely, uncertainty about how a reasonable officer making the split-second decision to use deadly force would have assessed the foreseeability of a serious accident–that prevents me from answering the question of qualified immunity that this case presents. This is a quintessentially 'fact-specific' question, not a question that judges should try to answer 'as a matter of law.' . . .Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury. . . The bizarre scenario described in the record of this case convinces me that reasonable jurors could well disagree about the answer to the qualified immunity issue. My conclusion is strongly reinforced by the differing opinions expressed by the Circuit Judges who have reviewed the record. . . .The Court's attempt to justify its decision to reverse the Court of Appeals without giving the parties an opportunity to provide full briefing and oral argument is woefully unpersuasive. If Brosseau had deliberately shot Haugen in the head and killed him, the legal issues would have been the same as those resulting from the nonfatal wound. I seriously doubt that my colleagues would be so confident about the result as to decide the case without the benefit of briefs or argument on such facts. . . At a minimum, the Ninth Circuit's decision was not clearly erroneous, and the extraordinary remedy of summary reversal is not warranted on these facts. . . . In sum, the constitutional limits on an officer's use of deadly force have been well settled in this Court's jurisprudence for nearly two decades, and, in this case, Officer Brosseau acted outside of those clearly delineated bounds. Nonetheless, in my judgment, there is a genuine factual question as to whether a reasonably well-trained officer standing in Brosseau's shoes could have concluded otherwise, and that question plainly falls with the purview of the jury.").

D.C. CIRCUIT

Robinson v. Pezzat, 818 F.3d 1, 9, 11 (D.C. Cir. 2016) ("[W]e think it quite obvious that the uncorroborated nature of Robinson's testimony had nothing at all to do with the question before the district court: did Robinson present a genuine dispute of material fact as to whether Wrinkles

posed an imminent threat to Pezzat's safety? Corroboration goes to credibility, a question for the jury, not the district court. Perhaps a jury will disbelieve Robinson because her testimony was uncorroborated, but at this stage of the litigation, the district court must 'believe[ ]' her testimony and must not make '[c]redibility determinations.'. . . A jury could regard the years-old veterinary report and Wrinkles' barking at the police—as would most any self-respecting dog—to be of limited probative value to the question of exactly what happened when Pezzat opened the bathroom door. If the jury believed Robinson's testimony that Wrinkles was lying down, it could reasonably conclude that the dog acted aggressively toward Pezzat only after being shot. Finally, a jury could either credit Robinson's testimony that the dog ran up the stairs to escape McLeod or conclude that Wrinkles' behavior after being shot was of limited probative value. To sum up, then, viewing the facts and all reasonable inferences most favorably to Robinson, we believe that a jury could conclude that Pezzat acted unreasonably in shooting Wrinkles. Summary judgment was therefore inappropriate.")

Flythe v. D.C., 791 F.3d 13, 18-22 (D.C. Cir. 2015) ("Although deciding deadly force cases typically requires that we 'slosh our way through the factbound morass of reasonableness,'. . . here we need consider only one question: What happened when Tremayne Flythe turned to face Officer Eagan? If, as Officer Eagan claims, Flythe attacked him with a knife, then Eagan reasonably responded to an imminent threat. . . But if, as Ms. Flythe contends, Tremayne obeyed Officer Eagan's command to 'stop' and turned around to surrender, then Eagan's actions were patently unreasonable. . . On this question, we may affirm the district court's grant of summary judgment only if, after viewing the facts in the light most favorable to Ms. Flythe and drawing every reasonable inference in her favor, we can say that no rational trier of fact could disbelieve Officer Eagan's account. . . . An African proverb teaches that only when lions have historians will hunters cease being heroes. Put another way, history is usually written by those who survive to tell the tale, and in this case the only survivor is Officer Eagan. Tremayne Flythe is dead and, although several witnesses observed the two men face each other, none can testify as to exactly what happened between them. Under these circumstances, where 'the witness most likely to contradict [the officer's] story—the person [he] shot dead—is unable to testify,' courts, as the Ninth Circuit has explained, 'may not simply accept what may be a self-serving account by the police officer.'. . Instead, courts must 'carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts.'. . Courts 'must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.'. . Every circuit to have confronted this situation—where the police officer killed the only other witness to the incident—follows this approach. For example, the Seventh Circuit has explained that '[t]he award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify.'. . Accordingly, 'a court must undertake a fairly critical assessment of the forensic evidence ... to decide whether the officer's testimony could reasonably be rejected at a trial.'. . In this case, record evidence casting doubt on Officer Eagan's testimony abounds. Indeed, in several significant respects Eagan's testimony conflicts with that of every other witness, as well as the physical

evidence. . . . That an individual at one point posed a threat does not grant officers an irrevocable license to kill. Justification for deadly force exists only for the life of the threat. As the Supreme Court has explained, 'police officers are justified in firing at a suspect in order to end a severe threat to public safety ... *until* the threat has ended.'. . Here, the threat to Vazquez had ended by the time Eagan confronted Flythe, and Eagan never claimed that he viewed Flythe as an immediate threat. . . .Accordingly, whether Eagan acted reasonably *does* turn on whether, as he alleges, Flythe attacked him with a knife. And given all of the evidence discussed above—the inconsistencies between Eagan's testimony and the testimony of other witnesses, the physical evidence, and the evidence raising questions about Eagan's personal credibility—and drawing all inferences in Ms. Flythe's favor, we believe that a reasonable jury could conclude that Tremayne Flythe never threatened Officer Eagan with a knife. True, a jury could also conclude that he did, but '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ... on a motion for summary judgment.'. . We shall therefore reverse the district court's grant of summary judgment to Officer Eagan.")

Lash v. Lemke, 786 F.3d 1, 6-7 (D.C. Cir. 2015) ("Lash insists, relying on *Tolan,* that we cannot define the 'context' for this case by concluding as a matter of law that he was resisting arrest. Doing so, he argues, would 'import[ ] genuinely disputed factual propositions' into the qualified immunity analysis, exactly as *Tolan* forbids us to do. . . We disagree: Here, there is no genuine dispute regarding Lash's conduct. Multiple videorecordings of the episode make perfectly clear that Lash resisted the officers' efforts to arrest him. He pulled his arms free from the officers' efforts to restrain them twice in succession. The first of these, Lash argues in his affidavit, was no more than a natural reaction to being seized when he did not know who had seized him. But Lash does not even acknowledge, much less attempt to justify, the second occasion on which he pulled away. Much worse, Lash further claims that as soon as he realized that officers were trying to arrest him he immediately acquiesced and allowed them to put his arms behind his back. And in his brief he insists that the officers 'began to place [his arms] behind his back' while he 'continued to insist he had done nothing wrong.' But it is plain from multiple videorecordings that each of these claims is a 'visible fiction.'. . Even when each of Lash's arms was firmly held by a uniformed USPP officer, Lash continued to resist, straining to remain upright despite the officers' efforts to destabilize him and force him to the ground. Nor did Lash allow the officers to move his arms behind his back before handcuffing him. His arms remained extended even as the officers attempted to restrain him and were never pinned until after Lemke used her Taser. Just as in *Scott,* the video record here makes the normal factual solicitude for the nonmovant at summary judgment both unnecessary and inappropriate. No matter what Lash claims now, we know to a certainty that he resisted arrest because we can see him doing so. . . .The videorecordings in the record provide us all we need to determine what a reasonable officer would have known at the scene. And we do not hesitate to conclude from the videorecording that there is 'no genuine issue of material fact' regarding Lash's active resistance.")

Pitt v. District of Columbia, 491 F.3d 494, 509, 510 (D.C. Cir. 2007) ("We reverse the district court's order insofar as it grants the defendants' motion for judgment as a matter of law on the plaintiff's claim for arrest without probable cause under § 1983. In this case, the district court erred by considering the jury verdict from the common law false arrest claims in its qualified immunity analysis. As explained above, whether a right is 'clearly established'–that is, whether an objectively reasonable officer would have believed his conduct to be lawful, in light of clearly established law–is a question of law that must be resolved by the court, not the jury. We reverse the district court on this issue and remand for a determination of whether the defendants are entitled to qualified immunity on the § 1983 false arrest claims.").

Polk v. District of Columbia, 121 F. Supp.2d 56, 65 (D.D.C. 2000) ("The court is mindful that qualified immunity is an issue that should be decided as a matter of law at the earliest possible stage of a case. . . Where the qualified-immunity issue centers on whether a violation of rights has occurred at all, or on whether the rights allegedly invaded were clearly established at the time the alleged violation occurred, the Court is confronted with a pure issue of law that it may resolve at the earliest possible stage of litigation. . . Where, however, the applicability of qualified immunity 'turns on the facts known by the public officials at the time of the challenged conduct,' and there is a genuine dispute with respect to the existence of such facts or the defendants' knowledge thereof, the issue of qualified immunity is subject to determination by the factfinder at trial.").

FIRST CIRCUIT

Ciolino v. Gikas, 861 F.3d 296, 298-306 (1st Cir. 2017) ("We are faced with the question of whether to sustain the district court's post-verdict denial of qualified immunity to Sergeant Gikas. . . We affirm. The jury found that Gikas violated Ciolino's Fourth Amendment right to be free from excessive force. Responding to special questions on the verdict form, the jury also found that Ciolino failed to comply with police orders and taunted K-9 dogs immediately prior to his arrest and that Gikas had probable cause to arrest Ciolino on the night in question. The jury did not answer one of the special questions, which asked whether Ciolino was 'inciting the surrounding crowd immediately prior to his arrest.' The district court then denied Gikas's post-verdict motion for judgment as a matter of law, rejecting Gikas's argument that he was entitled to qualified immunity. We agree with the district court that a reasonable officer in Gikas's position would have understood that Gikas's actions violated Ciolino's Fourth Amendment right to be free from excessive force. . . . In this case, the jury has already found that Gikas violated Ciolino's Fourth Amendment right to be free from excessive force. Gikas has not challenged the sufficiency of the evidence supporting that verdict, either in his post-verdict motion in the district court or before us. As a result, we address the second prong: whether the right that Gikas violated was 'clearly established' at the time Gikas acted. . . 'The second prong, in turn, has two elements: "We ask (a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated

the right."'. . The first element of prong two is easily satisfied. The legal contours of Ciolino's right were clear and a reasonable officer would have had 'clear notice' of it. . . . Gikas focuses his argument on the second element of prong two: whether a reasonable officer would have understood that Gikas's actions were unconstitutional under the particular circumstances he confronted. . . . We agree with the district court that a reasonable officer in Gikas's position 'would have understood that what he [wa]s doing violate[d]' Ciolino's Fourth Amendment right. . . . The record before us does not support Gikas's argument that he had to make a split-second judgment and that the atmosphere outside the Club was so highly combustible that he had to arrest Ciolino as he did. The video, although it captures only 24 seconds, refutes Gikas's argument. Notably, the video shows that Sergeant Pickles, the officer whose dog Ciolino taunts just before the arrest, barely reacts to Ciolino's behavior and certainly does not treat Ciolino as a threat. Nor do the other officers on the scene. And no officer on the scene testified that Ciolino was posing an immediate threat of violence and had to be removed. Even Gikas himself testified that he did not perceive Ciolino as an active threat; rather, his goal in removing Ciolino forcibly from the sidewalk was to prevent Ciolino from having an 'opportunity to [incite] the crowd,' which 'could instigate a larger problem.'. . .Finally, we reject Gikas's argument that he acted in a manner consistent with his training and police protocol when he took Ciolino to the ground with force. . . Gikas testified at trial that he had been taught to employ 'open-hand' techniques to subdue arrestees who have refused to obey verbal commands and that he used such a technique on Ciolino, rather than a more extreme use of force, after perceiving that Ciolino had refused police instructions to 'move along' and to leave the K-9 dogs alone. If anything, Gikas's actions appear to be contrary to the training he says he received on the spectrum of police responses. A reasonable officer might well have laid hands on Ciolino, either to arrest him or to remove him, but would have used a less aggressive technique, such as seizing and securing Ciolino's hands, rather than taking the actions Gikas did. The record contains no evidence that Gikas was trained to 'jump[ ] immediately to the extreme end of the "open-hand" force category,'. . . rather than to control Ciolino with a less forceful technique. Nor is there any evidence that Gikas was trained to regard a disobeyed order to 'move along' as equivalent to a disobeyed order to submit to arrest. . . Gikas gave Ciolino no warning at all that he was under arrest before Gikas decided to use force.We conclude, as did the district court, that Gikas's actions not only violated Ciolino's Fourth Amendment right but also fell outside the 'margin of error,' . . . that qualified immunity provides.")

Fernandez-Salicrup v. Figueroa-Sancha, 790 F.3d 312, 326 (1st Cir. 2015) ("[T]here are genuine disputes over material facts which prevent us from evaluating whether Rosado violated Fernández's rights. Those same disputed facts also prevent us from evaluating the qualified immunity question. Even assuming probable cause for Fernández's arrest was lacking, thus satisfying the first requirement for qualified immunity, we would then look to whether the right was 'clearly established' at the time of the violation. There is little question that it is clearly established law that an individual cannot be arrested absent probable cause. . . However, whether or not a reasonable officer, similarly situated, would have understood that Rosado's actions violated this right is a fact-intensive question. It involves understanding what Rosado knew as she approached the gate and exactly what transpired upon Fernández opening it. These are questions

for a factfinder, and until they are answered, we are unable to determine, as a matter of law, whether Rosado's 'conduct was "so deficient that no reasonable officer could have made the same choice[ ] under the circumstances."'. . Accordingly, the district court's entry of judgment against Rosado on Plaintiffs' Fourth Amendment unconstitutional arrest claim must be reversed and remanded for trial.")

Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 51 n.10 (1st Cir. 2010) ("The district court erroneously submitted the question of qualified immunity to the jury. Whether defendants are entitled to qualified immunity 'is a legal question for the court to decide.' *Rodríguez-Marín,* 438 F.3d at 83. The jury's role is to 'determine any preliminary factual questions' so that the court can determine the 'legal issue of the official's reasonableness.'")

Rodriguez-Marin v. Rivera-Gonzalez, 438 F.3d 72, 83, 84 (1st Cir. 2006) ("An official is entitled to qualified immunity unless (1) 'the plaintiffs' allegations, if true, establish a constitutional violation,' (2) 'the right was clearly established at the time of the alleged violation,' and (3) 'a reasonable [official], similarly situated, would understand that the challenged conduct violated that established right.' . . The first two prongs of this test are questions of law for the court to decide. . . The third prong is also a question of law, but factual questions, to the extent they are antecedent to this determination, must be determined by a jury. . . While preliminary factual questions regarding qualified immunity are sent to the jury, the legal question of the availability of qualified immunity is 'ultimately committed to the court's judgment.' . . Defendants first contend that the district court erred in failing to instruct the jury on qualified immunity. Defendants, however, are not entitled to a jury instruction regarding qualified immunity, since it is a legal question for the court to decide. . . Defendants are entitled to have a jury determine any preliminary factual questions, but defendants have not stated, either at trial or on appeal, precisely what factual questions would need to be resolved before the court could determine the legal issue of the official's reasonableness. In finding that defendants politically discriminated against plaintiffs, the jury found that defendants intentionally violated plaintiffs' constitutional rights. Thus, it appears that any factual finding the jury could make would not benefit defendants. We find no error.")**.**

Acevedo-Garcia v. Monroig, 351 F.3d 547, 563 (1st Cir. 2003) ("The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment. Indeed, we have recognized that a certain flexibility exists in the procedures and that in any event the judge is certainly not obliged to submit the ultimate issue to the jury. . . Accordingly, there was no error, let alone plain error, in the district court's refusal to submit the proposed qualified immunity instructions to the jury.").

Kelley v. LaForce, 288 F.3d 1, 7 & n.2, 8, 9 (1st Cir. 2002) (correcting and superceding decision at 279 F.3d 129) ("Although '[w]e recognize that the immunity question should be resolved, where possible, in advance of trial,' pre-trial resolution sometimes will be impossible because of a dispute as to material facts. . . In such a case, the factual issues must be decided by the trier of fact . . . thereby precluding summary judgment. . . Only after the facts have been settled can the court

determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella. . . . The reasonableness of the officers' conduct, in this case, turns on the officers' knowledge. If the police knew that Kelley was the owner of the Pub, then their action might have amounted to a confiscation of property without any process. . . However, if the police reasonably believed LaForce to be the owner, then their action might not have been unreasonable. . . In sum, assuming, but not deciding, that the appellants adequately alleged a violation of a clearly established due process right, the district court was faced with a material factual dispute as to whether the defendants' conduct was reasonable so as to entitle them to immunity. This factual dispute needed to be resolved by a trier of fact and was an inappropriate matter for summary judgment. . . . . We have previously noted that the Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury.")

Ringuette v. City of Fall River, 146 F.3d 1, 6 (1st Cir. 1998) ("Something of a 'black hole' exists in the law as to how to resolve factual disputes pertaining to qualified immunity when they cannot be resolved on summary judgment prior to trial. To avoid duplication, judges have sometimes deferred a decision until the trial testimony was in or even submitted the factual issues to the jury.").

Swain v. Spinney, 117 F.3d 1, 10 (1st Cir. 1997) ("We recognize that the immunity question should be resolved, where possible, in advance of trial. . . . There are . . . factual issues, potentially turning on credibility, that must be resolved by the trier of fact. Only after the resolution of these conflicts may the trial court apply the relevant law on objective reasonableness.").

St. Hilaire v. City of Laconia, 70 F.3d 20, 24 n.1 (1st Cir. 1995) ("While this court has not had the occasion to explore fully the allocation of functions between judge and jury where facts relevant to the immunity defense are in dispute, we have said that 'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat. . . . The precise question of whether the judge may intercede and play that fact finder role appears not to have been clearly decided by the Supreme Court. Some courts, consonant with the Seventh Amendment, have preserved the fact finding function of the jury through special interrogatories to the jury as to the disputes of fact, reserving the ultimate law question to the judge. ").

Hegarty v. Somerset County, 53 F.3d 1367, 1373-74 (1st Cir. 1995) ("[T]he qualified immunity inquiry takes place prior to trial. . . and requires no factfinding, only a ruling of law strictly for resolution by the court. Thus, under the policy-driven 'objective legal reasonableness' analysis governing our inquiry, even expert testimony relating to appropriate police procedures in the circumstances confronting the officers may not afford certain insulation against summary judgment in the 'qualified immunity' context.").

Lowinger v. Broderick, 50 F.3d 61, 66 n.7 (1st Cir. 1995) ("[T]his case does not present the scenario of the 'rare case' described in *Prokey v. Watkins*, . . . in which a determination of qualified

immunity as a matter of law, after assuming all facts in a plaintiff's favor, is 'impossible' due to conflicting evidence as to the 'underlying historical facts.' . . . . Here, there is no dispute about what [defendant] knew at the time but, rather, the dispute is over whether his perception was accurate. Only the former is relevant to the qualified immunity analysis.").

Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir. 1994) ("[T]he court explicitly told the jury that finding lack of probable cause to arrest, and the use of excessive force, was not sufficient to find for [Plaintiff] unless they found that the arrest was made clearly without probable cause, and clearly with excessive force. The court explained to [Plaintiff's] counsel upon counsel's objection that it was embellishing the traditional language because 'I think this is how qualified immunity, if you will survives.' The court added: ['I don't think we put to the jury the issue of qualified immunity, but that concept survives. And I think it survives in this guise. It's not simply the question whether there was probable cause or not. It's, the question is whether the reasonable police officer would know that there was not probable cause and went ahead anyway and arrested him.['] The court responded similarly after [Plaintiff's] counsel objected to the 'clearly with excessive force' instruction: '[T]his is how they get their benefit, if you will, of qualified immunity. It has to be clear to the officers that what they're doing is not authorized by the situation.'. . . If the court was placing some element of qualified immunity into the jury instructions, this was not the proper time or manner to do it. Qualified immunity, which is a question of law, is an issue that is appropriately decided by the court during the early stages of the proceedings and should not be decided by the jury. [cites omitted] The language of the court's instructions and the court's explanation for that language appear very similar to the standard for qualified immunity.").

Prokey v. Watkins, 942 F.2d 67 (1st Cir. 1991) ("Whether...a reasonable policeman, on the basis of the information known to him, could have believed there was probable cause is a question of law, subject to resolution by the judge not the jury....Nevertheless, if what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder.").

Hutchins v. McKay, No. 3:16-CV-30008-MAP, 2018 WL 443446, at *5 (D. Mass. Jan. 16, 2018) ("Resolution of whether McKay and Romero made a reasonable mistake of fact when they entered the street-level door to 53 Daytona Street -- like assessments of reasonableness generally -- must await development at trial and resolution by the jury, or possibly the court. A factfinder may conclude that the officers' mistake was *not* reasonable, or that the officers, contrary to their testimony, entered the kitchen from the second-floor landing without authorization, an act that could not be dismissed as a mistake. These issues must await further proceedings. . . . Defendants' contention that the officers, to the extent that they violated Plaintiff's constitutional rights, enjoyed the protection of qualified immunity will not wash, for two reasons. . . First, if the officers merely made a reasonable mistake of fact -- and this question must await trial -- they have no need of qualified immunity. They committed no violation of the Fourth Amendment, period. On the other hand, if their mistake is found to be *not* reasonable, then their entry through the street-level door

into Plaintiff's dwelling constituted a violation of clearly established Fourth Amendment law. No principle of qualified immunity will protect them.")

Rodriguez v. Sancha, No. CV 12-1243(PAD), 2016 WL 1247208, at *11-12 (D.P.R. Feb. 24, 2016) ("The Court should deny a defendant qualified immunity if: (1) the facts a plaintiff has either alleged or shown establish a violation of a constitutional right; and (2) the constitutional right at issue was clearly established at the time of the defendant's alleged violation. . . Clearly established, in turn, means that the contours of the right are sufficiently clear such that 'a reasonable official would understand that what he is doing violates that right.'. . That is, 'a right is clearly established if, at the time the defendant acted, he was on clear notice that what he was doing was unconstitutional.'. . Only if it is determined that the law was clearly established should the court address 'the particular conduct in question,'. . . to decide whether an objectively reasonable official would have believed that his conduct was lawful 'in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct.'. . Determining reasonableness, however, is more problematic, because while the first part of the inquiry deals with abstract legal rules, the final step depends on the facts of a given case. . . The standard is an objective one, that is, whether it was clear to an objectively reasonable official situated similarly to Defendants, that the actions taken (or omitted) contravened the clearly established right. . . Based on the analysis above, the question would be whether Defendants would have reasonably understood that failure to train the officers in the PRPD could lead to a violation of Plaintiffs' constitutional rights. While the answer to that question is a possible yes, reasonableness is a question of fact for the jury to analyze. . . In such a case, the factual issues must be decided by the trier of fact, thereby precluding summary judgment. Qualified immunity in the instant case should therefore be denied without prejudice, so Defendants may raise the defense again at the trial, where the Court will resolve the issue of qualified immunity after the return of a verdict.")

Wilson v. Dunford, No. Civ.A. 02-CV10250GAO, 2004 WL 883404, at *1 (D. Mass. Apr. 16, 2004) ("Over the objections of both parties, I submitted the issue of qualified immunity to the jury. I did so because I considered the issue of the 'objective reasonableness' of the defendant's belief that his actions did not violate the plaintiff's Fourth Amendment rights was one that the jury ought to decide. In other words, I considered the parties' difference as to whether the belief was objectively reasonable to be a 'factual' dispute. In coming to this conclusion, I was conscious of the admonition in *Swain v. Spinney*, 117 F.3d 1, 9-10 (1st Cir.1997), that the qualified immunity inquiry is 'highly fact specific.' Thus, I concluded that the jury ought not only to resolve any subsidiary factual issues, but ought also to decide whether the defendant's conclusion that his actions were lawful under the circumstances was 'objectively reasonable.' Upon reconsideration and review of relevant case law, I conclude this was error. The cases repeatedly emphasize that the issue of 'objective reasonableness' is one for the court to decide as a matter of law. . . The 'factual disputes' that are appropriate for the jury apparently relate (the cases are a bit opaque on this question) to the circumstances in which the defendant acted. In this case, there was no material factual issue in the evidence about the underlying factual circumstances relevant to the issue of qualified immunity.").

Suboh v. Borgioli, 298 F.Supp.2d 192, 199, 200 (D. Mass. 2004) ("At the summary judgment stage, this Court ruled–and the First Circuit affirmed–that Borgioli was not entitled to summary judgment on qualified immunity grounds. . . Qualified immunity did not, however, completely fall out of the case once the First Circuit affirmed that it was not warranted on summary judgment. On the contrary, to the extent that there were still facts in dispute that were arguably determinative as to whether a reasonable officer would have believed (erroneously), like Borgioli, that no process of any sort was due to Suboh, Borgioli still had the affirmative defense of qualified immunity available to him. . . Rather than putting the question of reasonableness directly to the jury, however, this Court instead should have asked the jury to resolve any remaining relevant factual disputes bearing on reasonableness, and then ruled on the ultimate question of qualified immunity itself. . . . As such, this Court's charge to the jury–essentially importing a reasonableness test into Suboh's burden of showing that her procedural due process rights were violated–was erroneous in two respects. The issue of reasonableness was relevant only to the question of qualified immunity, a question of law for the Court (not the jury) on which Borgioli (not Suboh) bore the burden of proof.").

Howes v. Hitchcock, 66 F. Supp.2d 203, 211 (D. Mass. 1999) ("The First Circuit has consistently maintained that, in regard to the issue of qualified immunity, 'the objective reasonableness determination is for the judge to make, and not for the jury.'" [citing *Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir.1987), *Prokey*, and *Tatro*]).

Natal v. City of New Bedford, 37 F. Supp.2d 74, 75, 76 (D. Mass. 1999) ("Turgeon seeks summary judgment on grounds that (1) his use of deadly force was reasonable, and (2) he is entitled to qualified immunity. While the first is a defense to liability and the second a defense to suit, both inquiries entail essentially the same analysis. . . If, however, this Court grants Turgeon's summary judgment motion on the issue of liability rather than qualified immunity, Natal's claims against the City, Tierney, and Benoit are moot. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding that municipal and supervisory liability are "quite beside the point" when no constitutional injury has occurred at the hands of the police officer). Accordingly, this Court first considers the issue of liability on the merits.").

Medeiros v. Dracut, 21 F. Supp.2d 82, 86, 87 (D. Mass. 1998) ("Summary judgment motions in the qualified immunity context raise a complex question as to the appropriate roles of judge and jury. The ultimate question of qualified immunity is one of law and should be decided by the court. . . At the same time, factual disputes over the precise circumstances an officer faced–disputes ordinarily resolved by a jury at trial– surely affect the ultimate question of whether a reasonable police officer could have believed his actions were in accord with a plaintiff's constitutional rights. . . The First Circuit has acknowledged the dilemma where facts relevant to the immunity defense are in dispute. . . Nevertheless, where there are no disputed issues of material fact relevant to immunity, the First and other Circuits appear to preserve for the court the ultimate question of the reasonableness of an officer's actions.").

SECOND CIRCUIT

Outlaw v. City of Hartford, 884 F.3d 351, 356, 367-72 (2d Cir. 2018) ("On the cross-appeal, we conclude that Allen's contentions are without merit given that, as qualified immunity is an affirmative defense, the burden was on Allen to prove by a preponderance of the evidence any factual predicates necessary to establish that defense; that in order to avoid having the court instruct the jury that he had that burden, Allen chose not to have submitted to the jury the fact questions as to which he now wants favorable answers presumed; that the jury's answers to the interrogatories accompanying its verdict did not imply the factual findings that Allen imputes to the jury; and that the pertinent factual findings by the district court are not inconsistent with the jury's answers to questions that were posed. . . .Qualified immunity is an affirmative defense on which the defendant has the burden of proof. *See, e.g., Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); *Rogoz v. City of Hartford*, 796 F.3d at 247. 'To the extent that a particular finding of fact [i]s essential to an affirmative defense, ... it [i]s incumbent on [the defendant] to request that the [factfinder] be asked the pertinent question.' *Kerman*, 374 F.3d at 120. . . Usually, if a jury trial has been properly demanded, the factfinder for such questions will be a jury. . . . The jury may be asked to make its findings by answering special interrogatories. . . When such interrogatories are used, of course, the court will need to give the jury proper 'instructions and explanations,'. . . to enable the jury to make its findings in accordance with, *inter alia*, the proper allocation of the burden of proof. However, the parties may agree to forgo their Seventh Amendment rights, either entirely or with respect to specified issues. . . . These rules mean that the parties, directly or through their attorneys, are allowed to agree to forgo their Seventh Amendment rights on specified factual questions and have those questions decided by the court. . . . In the present case, the district court properly, and without objection, charged the jury as to, *inter alia*, what it must find Outlaw had proven by a preponderance of the evidence in order to return verdicts in his favor on his claims of excessive force in violation of the federal and state constitutions. . . . We presume, absent any indication to the contrary, that the jury followed the court's instructions, and that the jury, having found that Allen intentionally or recklessly subjected Outlaw to force that was 'excessive,' did not then conclude that so much of the force as was excessive was justified. . . . Allen argues that the jury must have found justification for the total amount of force he used because, he says, '[t]he *only* reasonable interpretation of the jury finding Officer Allen liable for excessive force and at the same time not liable for assault is that Officer Allen reasonably believed *the* force was *necessary to protect* himself, Detective Gordon, or third parties *from the Plaintiff's use or imminent use of force*'. . . and that it was 'very wrong' for 'the District Court [to] ma[k]e findings of fact in contravention of the *jury's finding* that Officer *Allen believed* force was necessary *to prevent harm to himself, another officer, or a third party*'. . . . This argument is factually, doctrinally, and logically flawed. The factual flaw is, of course, that there were no jury findings as to Outlaw's conduct or Allen's beliefs. The jury was not asked whether Outlaw used force, or threatened force, or appeared to do so. The jury was not asked what Allen saw or believed. The doctrinal flaw is that what Allen himself 'believed' is not a consideration in determining qualified immunity for a federal constitutional violation but rather is an element only

in the state-law concept of justification[.]. . . As discussed above, the federal standard for qualified immunity is what a reasonable officer in Allen's position would have believed, not what Allen himself believed. . . . A third logical flaw inheres in Allen's total disregard of the principle that, as to the facts necessary to establish his entitlement to qualified immunity, he had the burden of proof. . . .Allen does not suggest that he made any principled attempt to have questions as to facts that could show his entitlement to qualified immunity submitted to the jury. To the contrary, although the transcript of the charge conference indicates that defendants initially wanted to have the jury asked some questions of that nature, the transcript also makes clear, as indicated in Part I.C. above, that defense counsel made a strategic choice to forgo submission of such questions to the jury. The apparent reason was that the district court stated—properly—that as to any such questions the court would have to instruct the jury that the burden of proof as to those matters was on the defendants, and that defense counsel preferred not to have the jury so instructed. Since the court insisted that the jury be instructed properly, defense counsel proposed that no such questions be submitted to the jury and that all of the requisite factual determinations be made by the court. Outlaw, who bore no responsibility for seeing that a sufficient record was created for an affirmative defense, expressly consented. Thus, as defendants wished, questions with regard to 'qualified immunity for federal claims' and 'qualified immunity for state law claims' were deleted . . . all mentions of the concept of a qualified immunity defense were deleted . . . and an explanation that as to some issues in the case the plaintiff does not have the burden of proof was deleted[.]. . As to the entirety of the qualified immunity defense, defense counsel said, 'Your Honor has that on your lap, period'. . . and the court accordingly made findings as to facts about which the jury was deliberately not asked. We cannot allow Allen now to put words in the jury's mouth. While Allen argues that, in asking the court to make factual findings, he did not consent to have the court make findings inconsistent with those made by the jury, that argument is inconsequential. The jury made none of the factual findings he wishes to impute to it. Finally, we note that Allen makes no attempt to argue that the evidence at trial was insufficient to support the district court's factual findings. Ironically, he argues that 'there was no finding by the jury that it necessarily believed' the various witnesses' 'testimony concerning [Outlaw's] version of the facts'. . . . However, in contrast to the lack of any instructions to the jury on defendants' qualified immunity defense, the jury was instructed that '[i]n order for the *plaintiff* to establish [that he was deprived of a constitutional right], *he must show* ... by a preponderance of the evidence,' *inter alia*, '*that the defendants committed the acts alleged by the plaintiff*.'. . The jury so found with respect to Outlaw's constitutional claims. In sum, we conclude that Allen's arguments that the jury necessarily made factual findings that (a) would entitle him to qualified immunity, and (b) were contrary to the posttrial factual findings made by the court, are meritless. The jury made no findings, express or implicit, as to whether Allen carried his burden of establishing any factual predicate for his defense. The court, having been asked by the parties to make findings of fact with respect to the qualified immunity defense, had the authority to make credibility assessments and draw such inferences as it believed appropriate. Its findings of fact, described in Part I.C. above, are amply supported by the trial record. We affirm so much of the judgment as awarded Outlaw damages against Allen.")

Grice v. McVeigh, 873 F.3d 162, 169, 173-76 (2d Cir. 2017) (Parker, J., dissenting) ("The majority, by granting qualified immunity to Sergeant Anthony McVeigh and Officer Frank Farina of the Greenburgh, New York police department, absolves them of the arrest of Gregory Grice. Grice was an indisputably innocent 16-year old young man who was arrested while standing at a location where he had every right to be and doing what he had every right to do. The majority mischaracterizes Grice's detention as a *Terry* stop. It was no such thing: it was an arrest and the facts that we are obligated to accept for purposes of this appeal establish that there was no probable cause for the arrest. Because McVeigh and Farina are not entitled to qualified immunity, I respectfully dissent. . . . Once we assume for purposes of this appeal Grice's version of the facts, we are dealing with a record that establishes the following. (i) Grice was at all times where he had every right to be and was doing what he had every right to do; (ii) Grice had evidence, previously accepted by the police, which established his innocence and that evidence was made available to McVeigh at the outset of the encounter; (iii) Grice never engaged in any threatening, unsafe, or suspicious behavior, and was at all times calm and cooperative; (iv) Grice never trespassed, nor did McVeigh or Farina have any first-hand basis to conclude that he did; (iv) yet, once it became clear that Grice posed no terrorist threat, McVeigh told the MTA police that he saw Grice trespassing. The majority in large part ignores these elements of Grice's story, and turns instead to the contradictory version presented on appeal by McVeigh and Farina. The majority, without discussion, condones this bait-and-switch. I would not. . . Turning to the merits, I agree that McVeigh had sufficient suspicion for a *Terry* stop and, indeed, he would have been derelict had he not inquired as to what Grice may have been doing. But Grice's detention was not a *Terry* stop, but an arrest. . . . [I]f a generalized fear of terrorism coupled with the possession of a cell phone is sufficient to justify an arrest, then our Fourth Amendment is in real jeopardy. . . . In any event, the fact that some terrorists use cell phones is beside the point. McVeigh should have easily and quickly determined that Grice was a train buff, not a terrorist. As we have seen, Grice had on his person correspondence with the police corroborating his explanation of what he was doing. Notwithstanding our law that handcuffing is the 'hallmark of an arrest,' the majority concludes that Grice's handcuffing did not constitute an arrest because 'McVeigh's intent [was] to handcuff Grice for protection rather than pursuant to arrest.'. . None of this is correct. Because McVeigh lacked probable cause to arrest Grice, he had no legal right in these circumstances to handcuff Grice for Grice's protection. And because McVeigh had no basis whatever to believe that Grice was either armed or dangerous, he had no right to handcuff Grice for McVeigh's protection. Handcuffs are not a tool that police officers can casually use whenever they choose. Their use is not justified because it is a easy or convenient way for the police to go about their business. As our case law makes clear, handcuffing is a significant intrusion on a citizen's dignity and liberty. . . .The majority rests its opinion entirely on its conclusion that Grice was the subject of a valid *Terry* stop supported by reasonable suspicion. Because it concluded Grice was not arrested—a necessary element of Grice's claims for false arrest, failure to intervene, and supervisory liability—it felt no need to assess whether McVeigh and Farina had probable cause, the other core question underlying Grice's claims. I need engage no prolonged discussion on this question because my views make clear that I would easily conclude that McVeigh and Farina lacked probable cause to arrest Grice. I would therefore send each of Grice's claims to a jury. . . .At a

trial, McVeigh and Farina could well be exonerated by a jury that has been presented with the relevant facts. A jury could conclude that, given the circumstances the officers faced, they acted appropriately. Juries very frequently reach just this result. But where, as here, the record is pock-marked with contradictions, whether the officers are entitled to exoneration should be determined by a jury selected from the community the officers are committed to serve and not by judges dealing with a record such as this one.")

Estate of Jacquez v. City of New York, 706 F. App'x 709, ___ (2d Cir. 2017) ("The district court's special interrogatories were not erroneous. . . Despite Appellants' argument that they were 'sandbagged,'. . . the district court informed the parties of its intent to provide the jury with special interrogatories at a pre-trial conference, and again on the first day of trial. Much of the testimony at trial discussed the events leading up to the final shot. It was reasonable for the district court to ask the jury specific factual questions the answers to which would assist the district court in determining whether Flores was entitled to qualified immunity with respect to the final shot. Whether Jaquez was pushing himself off the floor and holding a knife at the time of the final shot were plainly relevant to the question of whether Flores acted reasonably in shooting him again. Submitting these interrogatories to the jury did not mislead the jury or inadequately inform it of the law. The district court did not exceed the bounds of its discretion in issuing these special interrogatories.")

Callahan v. Wilson, 863 F.3d 144, 149-52 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 161 (2018) ("Defendants-Appellees suggest that *Rasanen* may no longer control in light of the Supreme Court's decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). . . . *Plumhoff* did not, however, involve any claim of instructional error, nor does the opinion alter the authorities on which *Rasanen* relied regarding the appropriate jury charge concerning the fatal shooting of suspects in the circumstances presented here. In particular, *Plumhoff* involved an application of *Scott v. Harris*, 550 U.S. 372 (2007), which was decided several years before *Plumhoff* and was discussed at length in *Rasanen*[.] . . .Nor does the Supreme Court's recent decision in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), undermine *Rasanen*'s holding as to the requirements for a jury charge in the type of excessive force case presented here. . . . Importantly, *Garner* articulated the probable cause requirement for police shooting cases upon which this Court relied in *Rasanen*. . . Thus, as relevant here, we conclude that neither *Plumhoff* nor *Mendez* overrules *Rasanen*, which remains the controlling law of this Circuit. Defendants do not attempt to distinguish *Rasanen* on the facts, which is unsurprising given the similarity between the circumstances of the shooting in that case and the underlying facts here. Accordingly, we are bound to follow *Rasanen* in this case. . . . Unlike in *Rasanen*, the charge here did refer to the probable cause necessary for an officer to reasonably use deadly force. But the instruction did not track the language from *Rasanen*, and we conclude that it is materially different from the language we approved there, even with the reference to 'probable cause.' In *Rasanen*, we held that the jury 'must' be instructed that the use of deadly force is '*unreasonable unless* the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others,' 723 F.3d at 334 (emphasis added); here, the jury was instructed that an officer '*may* use deadly force ... *if*'

the officer has the requisite probable cause[.] . . . Although these two formulations both refer to the probable cause requirement for the use of deadly force, they are not functionally equivalent. In *Rasanen*, we explicitly distinguished between the permissive 'may/if' language and the restrictive 'unless/only' language by reference to the New York State Police administrative manual before the jury in that case. . . The relevant provision in that manual used nearly identical language to the charge here, stating: 'A[n officer] may use deadly physical force against another person when they reasonably believe it to be necessary to defend the [officer] or another person from the use or imminent use of deadly physical force.'. . . In concluding that this formulation did not correctly instruct the jury, we explained that the problem with the 'may/if' language is that it 'is not framed in exclusive and restrictive terms.'. . That formulation was insufficient because it did not convey that an officer's use of deadly physical force is reasonable, and therefore legally permissible, only in a specific circumstance. . .Thus, the charge given to the jury here—which used the same permissive 'may/if' language that we specifically rejected in *Rasanen*—was deficient. This error in the formulation of the specific deadly force instruction was compounded by the balance of the charge regarding excessive force, which further weakened the probable cause requirement. . . .Even though the jury was told that Officer Wilson would have been permitted to use deadly force *if* he had probable cause to believe that Callahan posed a significant threat of death or serious injury, our required charge is more demanding; under *Rasanen*, such probable cause is the *only* situation in which Wilson was permitted to use deadly force, and the jury must be so instructed.")

Callahan v. Wilson, 863 F.3d 144, 154-56 (2d Cir. 2017) (Raggi, J., concurring in part and dissenting in part), *cert. denied,* 138 S. Ct. 161 (2018) ("At the outset, I recognize that this panel is bound by *Rasanen*'s holding that in a civil action against a police officer for the unconstitutional use of deadly force, a district court cannot charge a jury that the standard for assessing the officer's use of such force is simply 'reasonableness.' Rather, the court must charge that the constitutional use of deadly force requires the officer to have had probable cause to believe that the person killed posed a significant threat of death or serious injury to the officer or to others. . . I note only that *Rasanen* continues to set this court apart from our sister circuits, which construe the Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), to 'abrogate' the use of any special standards for deciding when the use of deadly force is constitutionally excessive and to 'reinstate[ ] "reasonableness" as the ultimate—and only—inquiry.' [collecting cases] Moreover, since *Rasanen*, the Supreme Court has reiterated that the 'settled and *exclusive* framework' for analyzing claims of excessive force is 'reasonableness.'. . Insofar as neither *Mendez* nor *Plumhoff* spoke to the issue of how juries should be charged in excessive force cases, the majority concludes that they do not overrule *Rasanen*. . . But neither did *Tennessee v. Garner*, 471 U.S. 1 (1985), or *O'Bert ex rel. O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003)—the cases on which *Rasanen* relied to identify a probable-cause charging requirement—speak to jury charges. Indeed, *Garner* arose in the context of a bench trial, and the issue in *O'Bert* was the denial of summary judgment to a defendant who invoked qualified immunity to avoid trial. . . I do not pursue the matter further, however, because even following *Rasanen*'s holding, as this panel must, I would not identify charging error in this case. The jury instructions on the reasonable use of deadly force in *Rasanen* failed to make *any* mention of a need for probable cause to believe that the suspect posed a significant threat of

death or serious physical injury. . . By contrast, the district court here cited such probable cause as the *only* example of when an officer might permissibly use deadly force:
A police officer is entitled to use reasonable force. A police officer is not entitled to use any force beyond what is necessary to accomplish a lawful purpose. Reasonable force may include the use of deadly force.
A police officer *may use deadly force against a person if a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others.*
App'x 605 (emphasis added). The majority nevertheless concludes that this charge is constitutionally inadequate because the jury could have construed 'may,' in the italicized text, as merely illustrative and, therefore, thought that deadly force might also be 'reasonable' in other circumstances where the cited probable cause was lacking. . . I cannot agree.")

Beal v. Beller, 847 F.3d 897, 905 (7th Cir. 2017) ("Once again, the question before us is not whether the evidence seized from Beal as a result of the Detectives' stop-and-frisk should be suppressed. That question arose in the state criminal proceeding, and it was resolved favorably to Beal. (The Detectives are not bound by that ruling, since they are being sued in their individual capacity; but it bears noting that the state court's conclusion is of no help to them.) The question we must resolve is whether summary judgment in the Detectives' favor in this section 1983 suit was proper. We conclude that it was not. The validity of their decision to stop Beal will depend on the trier of fact's resolution of a number of disputed facts: Was the tip anonymous? Did Beal take any action that was sufficiently suspicious to justify the stop? Did the Detectives have any other information that provided at least reasonable suspicion to stop (and then frisk) Beal? The existence of these disputed facts is also enough to defeat the Detectives' assertion of qualified immunity. See, *e.g.*, *Johnson v. Jones*, 515 U.S. 304 (1995). We make no predictions about the ultimate outcome of a trial. For present purposes, it is enough to say that summary judgment for the Detectives should not have been granted.")

Figueroa v. Mazza, at 825 F.3d 89, 100, 108 (2d Cir. 2016) ("When a plaintiff alleges that a law enforcement officer's official conduct renders him personally liable in damages, our inquiry is not whether the officer *should have* acted as he did. Nor is it whether a singular, hypothetical entity exemplifying the 'reasonable officer'—a creature akin to the 'reasonable man' of the law of torts, . . .*would have* acted in the same way. It is instead whether *any* reasonable officer, out of the wide range of reasonable people who enforce the laws in this country, *could have* determined that the challenged action was lawful. . . . Turning to the facts before us, we conclude that Samuel's failure-to-intervene claims—even assuming that the assault lasted less than twenty seconds—were for the jury to decide. Taking into account all the circumstances and viewing them favorably to Samuel, as required in reviewing a trial court's decision to override the role assigned to the jury, we cannot hold that the assault occurred so quickly that the defendant officers lacked time to intercede as a matter of law. Samuel testified that, at the time he was assaulted, he was sitting in the back of a police cruiser and Failla and Chan were sitting in front. . . Nothing in the record suggests that they would have for any reason found it difficult to reach into the backseat, exit the vehicle to assist

Samuel, or communicate with the officer who committed the assault. Yet—according to Samuel's testimony—both officers sat passively through the entire event. . . In light of the officers' placement relative to Samuel, the apparent absence of any obstacles that might have hindered their ability to intercede, and the assault's stated duration, a reasonable juror could infer that defendants became, by their inaction, 'tacit collaborator[s]' in the unlawful conduct alleged. In sum, in entering judgment for defendants on Samuel's failure-to-intervene claims, the District Court erred by engaging in improper fact-finding and by misapplying the relevant legal standard. As to those claims, the judgment will be vacated and the cause remanded.")

Brown v. City of New York, 798 F.3d 94, 102-03 (2d Cir. 2015) ("The officers could be entitled to a summary judgment only if there existed a *per se* rule that an arrestee's refusal to submit to the easy application of handcuffs always permitted police officers to use substantial force, including taking a person to the ground and incapacitating her with pepper spray, to accomplish handcuffing. We know of no such rule. Indeed, by focusing only on resistance to the arrest, such a rule would disregard the three-factor analysis that the Supreme Court required in *Graham.* Even resistance sufficient to result in conviction for resisting arrest does not preclude a finding of 'excessive force in effectuating the arrest.'. . Here, on the undisputed facts, even shaded with the officers' account of the episode, no reason appears why, with Brown standing, each officer could not have simply held one of her arms, brought it behind her, and put handcuffs on her wrists. Or they could have simply surrounded her, at least for a few moments, making it clear that she could not leave until she submitted to handcuffing. . .We do not mean to imply that the availability of a less aggressive way of accomplishing an arrest necessarily means that the technique that was used is thereby shown to have been excessive. Police officers must be entitled to make a reasonable selection among alternative techniques for making an arrest. But when the amount of force used by two police officers involves taking a 120–pound woman to the ground and twice spraying her directly in the face with pepper spray, the availability of a much less aggressive technique is at least relevant to making the ultimate determination of whether excessive force was used. The assessment of a jury is needed in this case. Even though most of the facts concerning the application of force are undisputed, a jury will have to decide whether Fourth Amendment reasonableness was exceeded when Brown was taken to the ground after refusing to put her hands behind her back and when officers struggled with her on the ground and used pepper spray to accomplish handcuffing. And even if Brown's unwillingness, while standing, to offer her hands for handcuffing and, while on the ground, to offer her left arm to complete the handcuffing is found to be resisting arrest, that non-threatening form of resistance would be only one factor to be considered along with the minor nature of the disorderly conduct violation, the absence of actual or threatened harm to the officers, and the degree of force, including taking her to the ground and twice applying pepper spray. . . . The continuum along which the excessiveness of force in making an arrest is assessed is not marked by visible signposts. A court's role in considering excessive force claims is to determine whether a jury, instructed as to the relevant factors, could reasonably find that the force used was excessive. In this case, the majority and the dissent differ on that legal issue. That division, not uncommon in cases considering the sufficiency of evidence, leaves the

factual determination of excessiveness to a jury, whose collective common sense, informed by their life experiences, may well exceed that of all the members of this panel.")

Rogoz v. City of Hartford, 796 F.3d 236, 249-50 (2d Cir. 2015) ("In addition to making a credibility determination and resolving against Rogoz the material factual issue of whether Watson had identified himself to Rogoz as a police officer, the district court failed in other respects to view the record in the light most favorable to Rogoz.…Viewed in [the light most favorable to Rogoz], there was no resistance by Rogoz to the officers' orders, no history of crimes of violence, and no disobedience; he was entirely compliant; he was already subdued. . . . The court also failed to view the evidence in the light most favorable to Rogoz in analyzing the amount of force that was employed against him. In discussing excessive force principles, the court referred neither to any break or fracture of any of Rogoz's bones, nor to any violent conduct such as a jump onto Rogoz's back. . . . Having framed the issue as whether '[s]ome degree of force' and 'plac [ing]' 'weight' on a suspect's back could be reasonable, the court found that Watson was entitled to qualified immunity on the basis that the law was not clearly established that such force would violate a suspect's rights under the Fourth Amendment. However, actions by officers far less extreme than jumping on the back of a prone and compliant suspect, and apparently resulting in injuries far less serious than broken spines and ribs, had long been held sufficient to support a Fourth Amendment claim of use of excessive force. . . . Finally, had the district court properly disregarded defendants' contention that Watson had identified himself to Rogoz as a police officer in the Lawrence Street area—as it was required to do on a summary judgment motion, since a jury would be entitled to discredit such trial testimony by Watson—the court could not have found that the law was insufficiently clear for Watson to know he was violating Rogoz's Fourth Amendment rights. Without Watson's identifying himself as an officer, there was no evidence whatever that Rogoz had disobeyed any police order or had in any way resisted arrest.")

Simpson v. City of New York, 793 F.3d 259, 269 (2d Cir. 2015) ("On the facts viewed in the light most favorable to Ms. Simpson, a passenger was stuck on the lift at the front of the bus. The bus driver directed the crowd, which included Officer Nelson and Ms. Simpson, to 'Go around, go around' to the back entrance of the bus, and he opened the back doors. Ms. Simpson and the other passengers then moved to the back entrance and boarded. Once on the bus, Ms. Simpson waited in line behind other passengers to swipe her MetroCard. Officer Nelson stopped Ms. Simpson, ordered her not to pay her bus fare, and demanded that she follow him off the bus. On these facts, no reasonable officer could have concluded that Ms. Simpson intended to commit theft of services any more than a reasonable officer could have concluded that a person at the grocery store directed to a checkout counter and waiting in line to pay for produce intended to commit petit larceny. Add to this scenario the reasonable inference that Officer Nelson (1) was upset by having been rebuffed and (2) was merely demonstrating his dominance, and any pretense of reasonableness flies out the window. Because the facts bearing on whether Officer Nelson is entitled to qualified immunity are in dispute, the grant of summary judgment on that basis is vacated.")

Jackson v. City of New York, 606 F. App'x 618, 620 n.2 (2d Cir. 2015) ("Because Jackson did not object to the district court's decision to charge the jury on qualified immunity—either below or on appeal—any such argument is waived or at least forfeited. *See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. Pelella,* 350 F.3d 73, 87 (2d Cir.2003) (waiver); *Presidential Gardens Assocs. v. U.S. ex rel. Sec'y of Hous. & Urban Dev.,* 175 F.3d 132, 141 (2d Cir.1999) (forfeiture). We express no view as to the propriety of that procedure here. *Compare Stephenson v. Doe,* 332 F.3d 68, 81 (2d Cir.2003) (observing that "ultimate legal determination of whether qualified immunity attaches to a law enforcement agent's actions is a question of law better left for the court to decide" (internal quotation marks omitted)), *with Taravella v. Town of Wolcott,* 599 F.3d 129, 135 (2d Cir.2010) (noting that qualified immunity presents "mixed question of law and fact," and "[a]lthough a conclusion ... as a matter of law may be appropriate where there is no dispute as to the material historical facts, if there is such a dispute, the *factual* question must be resolved by the factfinder" (emphasis added) (internal quotation marks omitted)).")

Henry v. Dinelle, 557 F. App'x 20, 22 (2d Cir. 2014) ("Henry claims that the district court erred by instructing the jury on qualified immunity, and by including an interrogatory on the verdict form relating to qualified immunity. But Henry himself asked the court to give the jury a qualified immunity instruction, and specifically approved the qualified immunity instructions that the court gave. By requesting and approving the qualified immunity instruction, Henry invited the errors of which he now complains. He therefore cannot challenge them on appeal.")

Rasanen v. Doe, 723 F.3d 325, 333 (2d Cir. 2013) ("In a case involving use of force highly likely to have deadly effects, an instruction regarding justifications for the use of deadly force is required. . . . Although the Supreme Court's decision in *Scott* clarified that a special instruction based on *Garner* is not necessary (or even appropriate) in *all* deadly-force contexts, we have since made clear that this limitation does not apply in the original *Garner* context: the fatal shooting of an unarmed suspect.")

Rasanen v. Doe, 723 F.3d 325, 340, 344 (2d Cir. 2013) (Raggi, J., dissenting) ("Following *Scott,* two of our sister circuits have rejected challenges to jury charges in deadly force cases that relied only on 'the general rubric of reasonableness.' *Noel v. Artson,* 641 F .3d 580, 587 (4th Cir.2011); *see Acosta v. Hill,* 504 F.3d 1323, 1324 (9th Cir.2007) (concluding that requirement of 'deadly force instruction' in addition to 'excessive force instruction based on the Fourth Amendment's reasonableness standard' was 'explicitly contradict[ed]' by and 'clearly irreconcilable with' *Scott* (internal quotation marks omitted)). In reaching a different conclusion here, the majority creates an unwarranted circuit split. . . .In sum, *Garner, O'Bert, Scott,* and *Terranova* do not make it clear and obvious that juries in all excessive force shooting cases must be charged that there is a probable cause precondition to the use of deadly force. Thus, the district court's asserted failure to give such a charge in this case cannot be deemed plain error.")

Terranova v. New York, 676 F.3d 305, 307-09 (2d Cir. 2012) ("During trial, the district court originally proposed to give instructions to the jury that included a separate 'deadly force' charge

with regard to the factors outlined by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), as preconditions to the lawful use of deadly force. However, the district court ultimately removed that instruction, concluding that, under *Scott v. Harris*, 550 U.S. 372 (2007), it was inappropriate to instruct the jury on the *Garner* factors in cases with dissimilar facts. The resulting jury instructions informed the jurors that they were to decide whether the force used was objectively reasonable and specified the various factors that might affect that determination, such as the severity of the violation, the threat posed by the appellants, whether the appellants attempted to evade the police, and what other options, if any, were available to the Troopers. The jury rendered a verdict in favor of the Troopers. Appellants then filed motions for judgment notwithstanding the verdict and for a new trial, which were denied. This appeal followed. . . . [A]bsent evidence of the use of force highly likely to have deadly effects, as in *Garner*, a jury instruction regarding justifications for the use of deadly force is inappropriate, and the usual instructions regarding the use of excessive force are adequate. . . . The present matter is easily distinguishable from *Garner* given the type of force used—a traffic stop as opposed to firing a gun aimed at a person. While a traffic stop poses some risks, it is designed only to apprehend suspects and, here, prevent injury to other motorists as well as appellants. It is not designed to achieve those goals by seriously injuring the suspects. The appropriate inquiry is, therefore, whether the force used was objectively reasonable. The absence of a deadly force instruction neither misled the jury nor left them uninformed as to the applicable law.")

Weather v. City of Mount Vernon, 474 F. App'x 821, 2012 WL 1193673, at *1-*4 (2d Cir. Apr. 11, 2012) (not published) ("The district court, following the procedure set forth in *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir.2003), asked the jury questions relevant to qualified immunity via special interrogatories. On the basis of the jury's answers to those special interrogatories, it denied qualified immunity to Marcucilli. . . .The majority of appellants' arguments rest on the contention that Weather's constitutional rights were not violated by Marcucilli's use of force. But such contention is largely foreclosed by the jury's verdict, which found that Weather 'proved by a preponderance of the evidence that the defendant, Sergeant Marcucilli, intentionally or recklessly applied excessive force on Mr. Weather on January 12, 2007 in a manner that was objectively unreasonable under the circumstances.' Only an appeal from the denial of a motion under Fed. R. Civ. Pro. 50 to set aside the verdict would theoretically avail appellants on this prong. Such a standard is high, however . . . . We have here a well-developed factual record and special interrogatories which indicate that Marcucilli did not 'reasonably believe that a reasonably prudent police officer would have acted ...' *Oliveira*, 23 F.3d at 648–49. Appellants point to no evidence in the record which support a finding that a reasonable officer in Marcucilli's position would not have known that his behavior was unlawful. Further, all of the circumstances which appellants point out as evidence that supported Marcucilli's use of force were either expressly or implicitly rejected by the jury, whose findings were amply supported by the trial evidence. The law protecting a person against excessive force in this situation is clearly established. Weather was breaking no law, was not resisting arrest, and was not placing himself or others in danger. No reasonable officer would believe that 'twisting Mr. Weather's arm behind his back and pushing or shoving him into the brick wall outside the school' was a lawful use of force in this circumstance, and appellants

point us to no cases that indicate otherwise. Further, as the district court wrote on this point that 'no evidence was presented at trial to suggest that Sergeant Marcucilli made a mistake regarding his legal obligations such that would excuse his actions.' Any 'belief that his conduct was lawful' would not be reasonable, given the facts found by the jury.")

Lore v. City of Syracuse, 670 F.3d 127, 148, 161, 162 (2d Cir. 2012) ("As to Guy, the jury found that he made negative comments about Lore to news reporters; that he was aware at that time that Lore had filed an EEOC complaint; that Guy's comments constituted materially adverse employment action; that Lore's discrimination complaints were a motivation for Guy's acts of retaliation; and that as a result of his retaliatory acts, Lore suffered actual damages in the amounts of $100,000 for harm to her reputation and $150,000 for pain, suffering, and emotional distress. . . . However, the jury answered 'Yes' to the question of whether Guy was entitled to qualified immunity. . . . Over Lore's objection, the district court instructed the jury on federal law principles governing public officials' entitlement to qualified immunity with respect to Lore's § 1983 claims, and the Verdict Form included a question to be answered, if the jury found that Guy retaliated against Lore, as to whether Guy was entitled to qualified immunity. Lore contends that the ultimate question of Guy's entitlement to qualified immunity was a legal question for the court, not a question for the jury, and that the court should have ruled, based on the jury's factual findings, that Guy was not entitled to immunity. We agree in part. Once any material factual questions had been answered by the jury, the ultimate matter of Guy's entitlement to qualified immunity should have been determined by the court. Bearing in mind that the claims submitted to the jury against Guy were both those asserted under § 1983 for violation of Lore's First Amendment right to file grievances and complain of discrimination and those asserted under the HRL, we conclude that the court should have determined that Guy (a) was entitled to qualified immunity on the § 1983 claim but (b) did not establish his state-law entitlement to immunity for violation of the HRL. . . . Here, questions as to what situation confronted Guy, what acts he performed, and his motivation in performing those acts were questions of fact; they were to be—and were—answered by the factfinder. In light of those factual findings, the question of whether it would be clear to a reasonable public official, engaging in that conduct in that situation, that his conduct was unlawful was a question of law. We conclude that although the district court properly put the fact questions to the jury, it erred in having the jury decide the ultimate legal question, in light of the facts established, of whether Guy, in his personal capacity, was entitled to qualified immunity. That legal question should have been answered by the court.")

Tracy v. Freshwater, 623 F.3d 90, 98, 99 (2d Cir. 2010) ("Unquestionably, infliction of pepper spray on an arrestee has a variety of incapacitating and painful effects . . .and, as such, its use constitutes a significant degree of force. Accordingly, a number of our sister circuits have made clear that it should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer. [citing cases] Here, if a jury credited Tracy's version of the events and determined that Freshwater applied pepper spray after Tracy had already been handcuffed and was offering no physical resistance of police commands, it might well conclude that the use of that pepper spray was unreasonable under

the circumstances. The district court thus erred in taking that issue away from a jury at the summary judgment stage.")

Aczel v. Labonia, 584 F.3d 52, 54-58 (2d Cir. 2009) ("With the consent of the parties, the court distributed to the jurors a special verdict form, in accordance with Rule 49(b)(1), Fed.R.Civ.P. This was in the form of a questionnaire, which asked the jurors to answer specific factual questions from which the ultimate verdict and judgment might be derived. In Part A, as to each of Plaintiff's claims, the form asked whether Plaintiff had proved the facts necessary to establish a violation of his rights. As to each claim of violation of a federal constitutional right that the jury found Plaintiff had established, the form asked whether Defendant had proved entitlement to qualified immunity. . . . [The jury] exonerated Labonia on every claim except use of excessive force, answering 'Yes' to question A2, thus indicating its finding that Labonia violated Plaintiff's right under the Fourth Amendment to be free of excessive force. As to this claim, however, the jury also answered question A2(a) stating that Labonia 'proved ... entitlement to qualified immunity by proving [his] reasonable and objective belief that the force used was reasonable under the circumstances at the time of the arrest.' Consistent with the instruction to answer question B 1 on proximately caused damages if the jury gave a 'Yes' answer to any question in Part A, the jury entered $12,078.61 as the 'amount of compensatory damages [Plaintiff has] proved were proximately caused by' Labonia's wrongful acts. . . . The jury, however, found facts which entitled Defendant to qualified immunity. Unless some flaw in the proceedings necessarily invalidated that finding, the district court acted within its discretion in relying on it to grant judgment to Defendant. . . . The crucial finding was of facts that entitle Lebonia to immunity. If the jury's findings to that effect are credited, under *Harlow* they mandate judgment in favor of Defendant, regardless of whether Defendant violated Plaintiff's rights and caused him damages. . . .The finding that Labonia's use of excessive force caused damage to Aczel in the amount of $12,078.61 did not contradict the finding of facts which entitled Libonia to immunity from judgment. They addressed different issues. . . . If the jury's award of damages may represent a desire on the jury's part to make an award of damages that was not justified by the law or the court's instructions, there is no impropriety or abuse of discretion in the district court's striking of the illegal award and entering judgment in favor of the defendant based on the jury's finding of entitlement to qualified immunity.").

Higazy v. Templeton, 505 F.3d 161, 170 (2d Cir. 2007) ("The matter of whether a right was clearly established at the pertinent time is a question of law. In contrast, the matter of whether a defendant official's conduct was objectively reasonable, i.e., whether a reasonable official would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact. . . . Moreover, '[a]lthough a conclusion that the defendant official's conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the material historical facts, if there is such a dispute, the factual questions must be resolved by the factfinder.' . . 'Though Aimmunity ordinarily should be decided by the court," that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise, jury consideration is normally required....' *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir.1994).")**.**

Zellner v. Summerlin, 494 F.3d 344, 368 (2d Cir. 2007) ("Once the jury has resolved any disputed facts that are material to the qualified immunity issue, the ultimate determination of whether the officer's conduct was objectively reasonable is to be made by the court. . . . To the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question.").

Husain v. Springer, 494 F.3d 108, 131-34 (2d Cir. 2007) ("The state of the law in Spring 1997 was such that, when President Springer nullified the election in response to the content published in the *College Voice*, it was clear that her actions violated the First Amendment rights of the student journalists. There can be no question that a reasonable official in President Springer's position should have been aware that the *College Voice* was a public forum, limited only with respect to the speakers who could participate and not with regard to the subject matters on which the newspaper could discuss, and thereby entitled to protection under Supreme Court law governing such fora. . . . [A]lthough no court had specifically held at the time that the *nullification of an election* on the basis of views expressed by a student newspaper violated the First Amendment where such nullification chilled future speech, the 'unlawfulness' of Springer's actions was 'apparent' 'in the light of pre-existing law.' . . . Because President Springer's conduct violated clearly established law, she is entitled to qualified immunity only if it was objectively reasonable for her to believe that her actions were lawful at the time she nullified the election. . . . Defendants assert that President Springer decided to nullify the election because she believed doing so was necessary to vindicate Election Rules 2 and 5. Although we, like the district court, conclude that those rules did not justify Springer's conduct, it is possible that a jury might find that it was 'objectively reasonable' for Springer, at the time she acted, to believe that her nullification was the lawful implementation of these content-neutral election rules. But, while such a conclusion *by a jury* may be permissible, it nonetheless is inappropriate for a court, at the summary judgment stage, to find that Springer is entitled to qualified immunity on this basis. . . . [E]ven if there were no factual dispute regarding President Springer's reliance on the election rules, it would still be inappropriate to resolve the qualified immunity question on summary judgment. We noted that a jury *might* find that it was objectively reasonable for Springer to believe that a nullification of the election on the basis of the election rules was lawful, because such nullification involved only the enforcement of content-neutral regulations. But a reasonable jury could equally well conclude the opposite, i.e., that any reliance on the rules was not an objectively reasonable basis for nullification of the election.")

Husain v. Springer, 494 F.3d 108, 135-37 (2d Cir. 2007) (Jacobs, C.J., concurring in part and dissenting in part) ("I concur in the majority's result insofar as it affirms the dismissal of some claims, but I dissent insofar as it reverses the grant of qualified immunity. I concede that this short opinion of mine does not consider or take into account the majority opinion. So I should disclose at the outset that I have not read it. I suppose this is unusual, so I explain why. . . . This is a case about nothing. Injunctive relief from the school's election rules is now moot (if it was

ever viable); and plaintiffs' counsel conceded at oral argument that the only relief sought in this litigation is nominal damages. Now, after years of litigation over two dollars, the majority will impose on a busy judge to conduct a trial on this silly thing, and require a panel of jurors to set aside their more important duties of family and business in order to decide it. . . . President Springer's decision to re-run the election was (to apply the governing standard) not unreasonable in light of clearly established law. . . . [I]t cannot be said that in 1997 there was a clear line between [i] a viewpoint-based reprisal against a campus newspaper and [ii] the implementation of neutral and constitutional election standards. In any event, a school administrator should not have to become a constitutional-law professor in order to save herself from personal liability when giving a needed lesson in fair play.").

[*See also Sigal v. Moses*, 2008 WL 5055596, at *8 (S.D.N.Y. Nov. 21, 2008) (in case very similar to *Husain*, President of University is denied qualified immunity because she Ahas not sustained her burden of proof of showing that her action to nullify the Spring 1998 election was objectively reasonable in light of the legal rules under the First Amendment that were clearly established at that time.")]

McClellan v. Smith, 439 F.3d 137, 149 (2d Cir. 2006) ("The District Court generally failed to heed the rule that resolution of genuine factual issues is inappropriate on motions for summary judgment based on qualified immunity. . . The District Court's finding that '[t]he variations in [Smith's] testimony all arise from the detailed, fast-moving series of events' involving Smith and McClellan cannot serve to validate Smith's version of the events.")**.**

Kent v. Katz, 125 F. App'x 334, 2005 WL 387943, at *1 (2d Cir. Feb. 17, 2005) (unpublished) ("Plaintiff's second argument is that qualified immunity should have been decided by the court as a matter of law and not been given to the jury. We have indicated, though have not definitively held, that the ultimate question on qualified immunity should be resolved by the court as it is a question of law. *See, e.g., Stephenson v. Doe*, 332 F.3d 68, 80 n. 16 (2d Cir.2003) . . . Insofar as the defense in this case was that it was reasonable for defendant to believe his conduct was lawful because the conduct (the relevant wrist-hold restraining maneuver) was consistent with his police training, the jury was required to make the factual determination whether defendant in fact believed his conduct to be consistent with his training. Thus, even if the ultimate legal decision had been left to the Court, the jury's factual finding that defendant's actions were consistent with his police training (and that he believed them to be consistent) indicates that those actions would not be found 'clearly unlawful.'").

Kerman v. City of New York (Kerman IV), 374 F.3d 93, 111, 112, 117, 119, 120 (2d Cir. 2004) ("In sum, in remanding for trial in *Kerman II*, we implicitly held that it was sufficiently clear in light of preexisting law that Kerman had a right not to be detained or involuntarily hospitalized by an officer who (on Kerman's version of the facts) did not know, and who patently ignored opportunities to determine, the seriousness of Kerman's condition and whether he was dangerous to himself or others. In light of the *Kerman II* decision, it was not open to the district court to

decide on remand that that right was not clearly established. . . . In short, neither *Blissett* nor *Oliveira* allows a district court to grant judgment as a matter of law on essentially the same record on which this Court has ruled that summary judgment is inappropriate because there exist factual issues that must be tried. . . . In sum, we agree with Kerman's contentions that the district court's ruling that Crossan was entitled to qualified immunity as a matter of law was contrary to the law of this case as established in *Kerman II.* And to the extent that the court's immunity rulings were based on the court's own factual findings that the jury neither made nor would have been compelled to make, the rulings infringed Kerman's Seventh Amendment right to have the facts found by a jury. . . . We conclude that when the law-of-the-case doctrine precludes the granting of a motion for judgment as a matter of law on a given issue prior to submission of the case to the jury because the appellate court has held, on substantially the same evidentiary record, that as to that issue there are questions of fact that must be resolved by the jury, it would be inappropriate to conclude that a party's failure to make such a motion prior to submission of the case to the jury constituted a waiver of its right to request judgment in its favor after the jury has returned a verdict and has resolved the pertinent factual disputes in its favor. Here, where the record at trial was virtually the same as the record before this Court in *Kerman II*, . . .judgment as a matter of law prior to jury findings of fact was precluded by our decision in *Kerman II*, and we thus reject the contention that Crossan waived his defense by failing to make a motion for the forbidden relief. This conclusion does not, however, mean that there was not a waiver of a different sort, for Crossan, who had the burden of proving his defense of qualified immunity, failed to ask that the jury be given interrogatories that were sufficiently specific to permit it to resolve the factual disputes that were material to his defense. Although, . . .the ultimate question of whether a defendant official is entitled to qualified immunity is one for the court, when the relevant factual disputes have been resolved by a jury the court must base its legal ruling on the facts as found by the jury. . . . At the new trial, however, no precise questions as to the actual events and circumstances were submitted to the jury. . . . Crossan pursued his qualified immunity defense simply by requesting that the jury be asked to make a finding as to whether his decision to detain and hospitalize Kerman was supported by probable cause. The district court likewise, in colloquy with counsel, identified the only factual question to be put to the jury on Crossan's qualified immunity defense as whether Crossan had '[p]robable cause to send [Kerman] to the hospital.' . . Accordingly, the court gave no other instruction with respect to qualified immunity. The jury was asked, in accordance with Fed.R.Civ.P. 49(b), to answer the 17 interrogatories described in Part I.E. above and to return a 'general verdict'. . . Those interrogatories, which were 'approved by both sides[']counsel,' . . . made no distinction between Crossan's position as to immunity on the seizure and false imprisonment claims and his position as to the merits of those claims. . . . In the circumstances of this litigation, if the requisite fact questions had been submitted to the jury, and if the jury had answered them favorably to Crossan, the district court would then have had the authority, despite the absence of a Rule 50 motion, to make the ultimate legal determination of whether Crossan was entitled to qualified immunity on the Fourth Amendment claim, or whether there was privilege on the state-law claims, based on the jury's factual findings. To the extent that a particular finding of fact was essential to an affirmative defense, however, it was incumbent on Crossan to request that the jury be asked the pertinent question. Not having made such a request,

Crossan was not entitled to have the court, in lieu of the jury, make the finding. The material factual issues as to Crossan's defenses not having been resolved by the jury, we reverse the district court's ruling that Crossan's decision to detain and hospitalize Kerman was protected by privilege or qualified immunity.").

Cowan ex rel Estate of Cooper v. Breen, 352 F.3d 756, 764, 765 (2d Cir. 2003) ("As the case proceeds to trial, it should be noted that although the factual disputes in the instant case that must be resolved by the jury go both to the excessive force and to the qualified immunity questions, the qualified immunity issue is 'a question of law better left for the court to decide,' *Warren*, 906 F.2d at 76. Thus, if the jury finds that Breen used excessive force against Cooper, the court should then decide whether Breen is entitled to qualified immunity. *Stephenson*, 332 F.3d at 80. Because this determination relies on the resolution of questions of fact, we recommend, as we did in *Stephenson,* that interrogatories on the key factual disputes be presented to the jury. . . Answers to questions such as whether Cooper drove her car towards Breen, whether Breen was in the zone of danger, and if so, whether he safely could have gotten out of the way, may not only help focus the jury's attention on the excessive force aspect of the inquiry, but also may help the court resolve the ultimate question of whether it would be clear to a reasonable officer in Breen's position that his conduct was unlawful in the situation he confronted.").

Stephenson v. Doe, 332 F.3d 68, 78-81 & n.16 (2d Cir. 2003) ("In this case, despite apparent agreement during the proceedings that the qualified immunity issue would be decided by the court if the jury found excessive force through the use of special interrogatories, the judge submitted both issues to the jury in his charge. But there was no basis by which the jury could assess whether qualified immunity attached to Dingler's use of excessive force. The jury was not presented with any evidence or instructions or even argument about possible ambiguities in the law with respect to the circumstances in this case or about Dingler's state of knowledge about the law, presumably because the parties believed that the court would submit specific interrogatories and decide qualified immunity itself as it had indicated that it would. . . . Rather, the jury was repeatedly told that the excessive force instruction represented 'clearly established law.' On excessive force, the court specifically instructed the jury that the use of deadly force to effect arrest was unlawful unless an officer had probable cause to believe, in light of all the facts known by and confronting him, that the suspect posed a serious physical threat to him or to others and sufficient warnings were given. The court later emphasized that this law was clearly established for purposes of qualified immunity. Under those instructions, the jury returned a verdict of liability on excessive force, apparently crediting Stephenson's account that he was not given adequate warning and was unarmed and fleeing when he was shot and rejecting Dingler's testimony that he believed Stephenson was armed and that his own life was in danger. Yet under the same "clearly established law," the jury nevertheless found that Dingler was also entitled to qualified immunity. Conceding at least an apparent inconsistency, Dingler argues that the excessive force and qualified immunity inquiries are distinct, and that this Court should reconcile the jury's findings based on the record. According to Dingler, the jury may have believed that Stephenson did not objectively pose a threat of harm to Dingler but that Dingler's subjective belief of threatened harm was a

mistake of fact that, in view of the evidence, the jury credited as reasonable. . . . [A]s the Supreme Court clarified in *Saucier*, claims that an officer made a reasonable mistake of fact that justified the use of force go to the question of whether the plaintiff's constitutional rights were violated, not the question of whether the officer was entitled to qualified immunity. . . . The qualified immunity inquiry, by contrast, concerns an 'officer's mistake as to what the law requires' and acknowledges that 'reasonable mistakes can be made as to the legal constraints on particular police conduct.' . . Accordingly, we conclude that the qualified immunity verdict is legally inconsistent with the verdict on excessive force and should not stand. . . . It appears to us, particularly given the absence of evidence, instruction or argument submitted to the jury on the qualified immunity issue, that the instructions on excessive force and qualified immunity conveyed the same concept for both so that the jury in effect was told to decide twice what an objectively reasonable police officer would do in the situation that Dingler faced. . . . We do not suggest that allowing a jury to decide both the excessive force and the qualified immunity issues will always throw doubt on the validity of the jury's verdict. But on this record, we believe that it does . . . . It is at least questionable, however, whether as a general matter in the context of an excessive force claim a jury should decide the ultimate issue of qualified immunity, in addition to the factual disputes that may bear on the issue. It seems to us that a jury would have a difficult time making that *legal* determination, especially without an evidentiary hearing on the state of the law at the time of the alleged violation. . . . [U]nder all the circumstances we reluctantly remand this case for a new trial despite the burden this places on the parties and the court. . . . On remand, the district court should substantially follow the procedure it outlined, and the parties agreed to, during precharge conferences. The court should charge the jury on excessive force, but not on qualified immunity. If the jury returns a verdict of excessive force against Dingler, the court should then decide the issue of qualified immunity. [footnote omitted] We have said that the ultimate legal determination of whether qualified immunity attaches to a law enforcement agent's actions is 'a question of law better left for the court to decide.' [citing *Warren*] We have recognized that qualified immunity is in essence a legal decision whether on the basis of the law as it existed at the time of the particular incident, the lawfulness of the officer's conduct was reasonably clear or was a matter of doubt. Juries are hardly suited to make decisions that require an analysis of legal concepts and an understanding of the inevitable variability in the application of highly generalized legal principles. Moreover, such an analysis would seem to invite each jury to speculate on the predictability of its own verdict. . . We realize, however, that there may be factual disputes overlapping the excessive force and qualified immunity issues that the jury must find. . . . We believe that use of special interrogatories in this case resolves the difficulty of requiring the jury to decide 'what the facts were that the officer faced or perceived' and requiring the court to make the ultimate legal determination of whether qualified immunity attaches on those facts. . . . Therefore, if there is a retrial and if Dingler asserts a qualified immunity defense that depends on disputed factual issues, it will be helpful to focus the jury's attention both in the charge and by use of a few pointed interrogatories on the key factual disputes that may affect the resolution of the qualified immunity issue, such as whether Dingler gave warnings to Stephenson, whether Stephenson was armed with a weapon, and whether Dingler actually believed Stephenson was armed.").

Mitarotonda v. Gazzola, No. 98-6160, 1999 WL 39013, at *1 (2d Cir. Jan. 27, 1999) (unpublished) ("The general rule is that qualified immunity should be addressed on summary judgment prior to trial. *See Lee v. Sandberg*, 136 F.3d 94, 102 (2d Cir.1997). Therefore, submitting the issue of qualified immunity to the jury is only appropriate if determining the objective reasonableness of defendant's conduct requires fact finding. *See Olivera v. Mayer*, 23 F.3d 642, 649-50 (2d Cir.1994).").

Tierney v. Davidson, 133 F.3d 189, 194 (2d Cir. 1998) ("[W]e have held that when the facts that bear on the circumstances are not in dispute, the issue of whether the defendants acted reasonably should be determined by the court on a motion for summary judgment.").

McCardle v. Haddad, 131 F.3d 43, 50, 51 (2d Cir. 1997) ("Where the qualified immunity defense has not been resolved prior to trial, it may be presented to the jury or it may be decided by the court as a matter of law. . . If the case proceeds to trial, the defense cannot properly be decided by the court as a matter of law unless the defendant moves for judgment as a matter of law ("JMOL") in accordance with Fed.R.Civ.P. 50. . . . There is no provision for a JMOL motion to be made for the first time after trial. . . . The qualified immunity defense can be waived, either by failure to raise it in a timely fashion . . . or by failure to raise it with sufficient particularity . . . .").

Oliveira v. Mayer, 23 F.3d 642, 649-50 (2d Cir. 1994) ("[W]e think the District Court erred by not submitting the qualified immunity issue to the jury. Though we have decided as a matter of law that the plaintiffs were arrested and this arrest was without probable cause, these holdings do not necessarily mean that it would be unreasonable for a jury to conclude it was objectively reasonable for the police to believe that their detention of the plaintiffs was only a *Terry* stop or that they possessed probable cause to make an arrest. [cite omitted] Significantly, the trial before the District Court revealed some factual disputes concerning various aspects of the encounter between the police and the plaintiffs . . . . The District Court should have let the jury (a) resolve these factual disputes and (b) based on its findings, decide whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law when they detained the plaintiffs." [footnote omitted]).

Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir. 1992) (if, even when all facts as alleged by the nonmoving party are regarded as true, the moving party is still entitled to judgment as a matter of law, then factual disputes, however genuine, are not material, and their presence will not preclude summary judgment).

Posr v. Doherty, 944 F.2d 91, 96 (2d Cir. 1991) (whether officers reasonably believed their use of force was not excessive was properly a jury issue).

Finnegan v. Fountain, 915 F.2d 817 (2d Cir. 1990) (once disputed factual issues are resolved, application of qualified immunity is ultimately a question of law for the court to decide).

Warren v. Dwyer, 906 F.2d 70 (2d Cir. 1990) (if there are unresolved factual issues which prevent an early disposition of qualified immunity defense, jury should decide these issues on special interrogatories...ultimate legal determination whether, on facts found, a reasonable officer should have known he acted unlawfully, is question of law for court to decide), *cert. denied*, 498 U.S. 967 (1990).

Gibbs v. City of Bridgeport, No. 3:16-CV-635 (JAM), 2018 WL 4119588, at *6-8 (D. Conn. Aug. 29, 2018) ("If there is fundamental uncertainty about what the officer or an objectively reasonable officer would have realized or 'processed,' then the proper course is for there to be evidence presented at trial on this issue so that the jury may make appropriate factual determinations and so that the Court in turn may reconsider the issue of qualified immunity in light of the jury's factual determinations. . . . I understand Detective Borona's insistence that he did not know that Stukes had dropped the gun at the time that he fatally shot him, but I must evaluate whether the other evidence of record is enough to raise a genuine fact issue about what in fact Detective Borona knew. . . . Because Stukes retained the rifle in his hands as he raced toward the street corner, he remained a threat notwithstanding the fact that he was now fleeing and with his back to Detective Borona. It is clear to me that Detective Borona did not violate the Fourth Amendment when he fired his first shot at Stukes. . .But the same can't be said about Detective Borona's second shot. It was fired *after* Stukes dropped the rifle and—viewing the facts as I must in the light most favorable to plaintiff—after Detective Borona knew that Stukes had dropped the rifle. Although Detective Borona maintains he could not and did not see Stukes drop the rifle, the video does not conclusively establish what he could or could not see, much less does it establish what he actually saw and realized. What the video shows is Detective Borona advancing at least a car's length down the sidewalk right next to where the rifle lay before then firing the second and fatal shot. True enough, the video does not show Detective Borona looking down toward the rifle before he took his second shot. But it does show that very soon after the second shot he stopped the pursuit and turned to look at the rifle on the ground. His actions are arguably consistent with his knowing beforehand that the rifle had been dropped there. For that matter, it took another 30 seconds after Detective Borona fired the second shot for him to use his radio to call for help or reinforcements and despite the fact that—as the video shows—Stukes continued to run away even after Detective Borona shot him a second time. This delay in alerting other police units supports an inference that Detective Borona knew that Stukes was unarmed and no longer posed an immediate continuing danger. All in all, a genuine fact issue remains about whether Detective Borona knew that Stukes had dropped the rifle. To the extent that Detective Borona might suggest there were other reasons to believe Stukes was dangerous even without the rifle, the evidence is scant and readily contestable on this point as well. Because there is a genuine fact issue about whether Detective Borona had probable cause to believe that Stukes was armed or imminently dangerous at the time that he shot him for a second time, it follows that a genuine fact issue remains for trial about whether Detective Borona used excessive force in violation of the Fourth Amendment.")

Ortiz v. City of New York, No. 15CV2206(DLC), 2018 WL 1989595, at *8–9 (S.D.N.Y. Apr. 27, 2018) ("For the reasons discussed above, the request for qualified immunity is unnecessary here.

If the jury had found that Ortiz was credible, and that Vasquez viciously and without provocation attacked him from behind, injuring his knee and sending him to the ground, then Vasquez would not be entitled to qualified immunity for such conduct. Any reasonable officer in that situation would have understood that such conduct violated Ortiz's rights. But, the defendants succeeded in proving that that sequence of events did not occur. Accordingly, the only evidence regarding force that remains available for consideration is the force that Vazquez (and Hanna) used as they restrained Ortiz while waiting for the arrival of the ambulance. That force was minimal and entirely reasonable. Placing their hands on his shoulders and moving Ortiz to a seated position on the ground did not constitute an excessive use of force, and plaintiff's counsel does not argue otherwise. Nor, of course, do such limited actions by the officers explain the serious knee injury that Dr. Dassa described to the jury. There is simply a complete absence of evidence as to how Ortiz injured his knee, once the jury rejected his description of Vasquez' unprovoked attack on him. Accordingly, if it were necessary to reach the issue of qualified immunity, Vazquez has shown that he would be entitled to qualified immunity because a reasonable officer confronted with a very intoxicated Ortiz would have been entitled to use the force exerted by Vasquez (and Hanna) to restrain Ortiz. This use of force was objectively reasonable and Vazquez did not violate Ortiz's clearly established rights. Plaintiff argues that Vazquez waived any qualified immunity defense. He did not. Defendants explicitly reserved the right to submit a proposed charge on qualified immunity and to submit proposed special interrogatories on the qualified immunity defense. . . Vazquez has argued, at every turn, that he is entitled to qualified immunity. He has not waived his argument. Finally, Ortiz argues that the Rule 50 motion should have included a more expansive description of the qualified immunity request. With respect to specificity, the requirement is simply that the qualified immunity defense be explicitly articulated. *See, e.g., Provost v, City of Newburgh*, 262 F.3d 146, 161-62 (2d Cir. 2001). Defendants met this requirement. In their Rule 50 motion, defendants stated, on the record, that they sought judgment as a matter of law on qualified immunity grounds. They renewed that motion after the jury returned its verdict. . .Defendants' January 12, 2018 motion for judgment as a matter of law is granted.")

Gerskovich v. Iocco, No. 15 CIV. 7280 (RMB), 2017 WL 3236445, at *7 & n.11 (S.D.N.Y. July 17, 2017) ("To be clear, the Court is not here ruling whether or not qualified immunity is a defense to Plaintiff's retaliation claim. While the Court recognizes that the qualified immunity issue should be resolved relatively early in the proceedings, material issues of fact presented here (related to probable cause to arrest) must first be resolved by the jury.[11] [fn. 11: The Court intends to resolve the qualified immunity issue soon after the jury has determined whether or not the Defendants had probable cause to arrest the Plaintiff. See *Golodner v. City of New London*, 443 Fed.Appx. 622, 624 (2d Cir. 2011) ("[T]he existence of probable cause is a complete defense to a claim of retaliatory arrest.").] . . . That is, whether or not Defendants are entitled to qualified immunity against Plaintiff's retaliation claim is contingent upon how the jury resolves the issues of where Plaintiff was standing, what he was doing (e.g. being disorderly or photographing the demonstration), and whether he had been asked to leave the premises. The threshold (or preliminary) question is whether Captain Iocco had probable cause to arrest Plaintiff. If the jury

were, for example, to decide that Defendants had probable cause to arrest Plaintiff, Plaintiff's retaliation claim would, as noted at footnote 11, likely become moot for the reason that 'the existence of probable cause is a complete defense to a claim of retaliatory arrest.'. . If the jury were to decide that Defendants did not have probable cause to arrest Plaintiff, it would then be appropriate further to examine Plaintiff's First Amendment claim, including the issue of Defendants' qualified immunity.")

Daniel v. Rivera, No. 14-CV-00259 (PKC), 2016 WL 5947289, at *3 (S.D.N.Y. Oct. 13, 2016) ("After reviewing the evidence, the Court concludes that there are genuine issues of material fact in dispute as to the reasonableness of Officer Rivera's use of force. Critical to Officer Rivera's motion are the video recordings of the foot pursuit, which he contends unequivocally show that immediately before each time he discharged his weapon, K.C. 'bladed' his body, which made it appear as if K.C. was about to fire his imitation handgun. . . Rivera specifically testified that K.C.'s 'shoulders were both pretty much bladed in my direction with his hands up.'. . While the video shows that K.C. turned his head to look back at the officers in pursuit on several occasions, the extent to which K.C. 'bladed' his body towards Officer Rivera, if at all, is a matter open to reasonable interpretation. . . Viewing the evidence in a light most favorable to K.C., a reasonable jury could conclude that K.C.'s motions did not pose an immediate risk of harm to Officer Rivera or others.")

Bombard v. Volp, 2:13-CV-58, 2014 WL 4411601, *9 (D. Vt. Sept. 8, 2014) ("In this case, questions of fact remain as to whether Bombard was fleeing arrest, whether he should have heard Officer Volp's warnings, or whether he ever acknowledged Officer Volp's presence. As discussed previously, a reasonable factfinder could also conclude that Bombard did not present a danger to himself or others. It is undisputed that Bombard was shot in the head. If it was not reasonable for Officer Volp to believe that Bombard (1) presented a danger and (2) was resisting arrest, it is clearly established that he should not have utilized a Taser shot to the head to bring a running suspect into custody. . . It was also objectively unreasonable for Officer Volp to believe that his conduct was lawful. . . . Here, the same factual disputes with regard to reasonableness on the constitutional claim bar summary judgment on the basis of qualified immunity. . . The Court therefore declines to grant summary judgment on the basis of qualified immunity, and Officer Volp's motion for summary judgment is DENIED.")

Sterlin v. City of New York, No. 11 Civ. 0715(JPO), 2014 WL 2560595, *3-*5 (S.D.N.Y. June 6, 2014) ("Even if a plaintiff can demonstrate that a police officer arrested him without probable cause, the officer is not liable if it was objectively reasonable for the officer to believe that he did have probable cause. . . This qualified immunity standard is known as 'arguable probable cause,' and it protects officers from personal liability where, although the officer made the wrong call, he was making a close call and he acted reasonably under the circumstances. . . The objective reasonableness of an officer's conduct is a mixed question of law and fact-if there is disagreement about what the officer knew or did, that question must be resolved by the jury. *Zellner,* 494 F.3d at 371 (quoting *Kerman v. City of New York,* 374 F.3d 93, 109 (2d Cir.2004)). There is

disagreement in this case over what Sergeant Panopoulos knew when he directed Captain Cody and Lieutenant Phelan to arrest Sterlin. Panopoulos claims that he saw Sterlin exchange a small object for cash on Amsterdam Avenue between 102nd and 103rd Streets. Sterlin claims that Panopoulos did not see anything of the sort; rather, in the vicinity of the block where Panopoulos claimed to be watching, Sterlin merely walked down the street. A jury would be entitled to credit Sterlin's testimony over Panopoulos's. If they did, Panopoulos would be liable for false arrest, and he would not be entitled to qualified immunity. The Court would hold that Panopoulos lacked arguable probable cause to arrest Sterlin. No reasonable officer could conclude that Sterlin's conduct, as Sterlin described it, constituted probable cause for arrest. Therefore, what Panopoulos observed Sterlin do on Amsterdam Avenue between 102nd and 103rd Streets is a genuinely disputed material fact underlying Sterlin's false arrest claim. The Court denies summary judgment on the federal and state false arrest claims against Panopoulos. . . . As is the case with a false arrest claim, even if a police officer's use of force is objectively unreasonable, he is entitled to qualified immunity if the law did not give him 'fair warning' that his conduct was unconstitutional. . . Courts must define 'clearly established' rights (rights of which officers have fair warning) on the basis of the specific context of a use of force, not as general rules governing when an officer may strike a blow. . . The question is whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . But when deciding a summary judgment motion, 'courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions.' *Tolan,* 2014 WL 1757856 at *4 (per curiam) . . .A reasonable jury could find that Sterlin did not resist arrest in any way, and that, in the absence of such resistance, Captain Cody and Lieutenant Phelan used excessive force by handcuffing Sterlin and then throwing him into the back of their SUV. This conclusion is supported by Sterlin's testimony and photographs showing bruising on his upper arms. Even if Cody and Phelan believed that Panopoulos witnessed Sterlin make a hand-to-hand drug sale, this crime is not violent, and it is not otherwise serious enough to merit throwing a sixty-three-year old man into an SUV, while he was handcuffed, because his limited mobility kept him from climbing into the SUV himself. Sterlin posed no threat to the officers-again, he was handcuffed, and there was no indication that he would try to hurt them. Nor was there any indication that he would attempt to flee. Sterlin complied with all of the officers' directions. Under these circumstances, if Cody and Phelan truly threw Sterlin into the back of their SUV while he was handcuffed, they would not be entitled to qualified immunity. No reasonable officer could believe that this was a reasonable use of force under the circumstances. The officers were on fair notice that, when an older man with limited mobility makes a small-time drug sale, and there is no indication that he intends to become violent or flee, it is unreasonable to pick him up and throw him into a car while he is handcuffed in a manner that causes bruising. The factual dispute over whether the officers threw Sterlin into the SUV, and whether he was acting in a manner that justified that use of force, is therefore a dispute that is material to the excessive force claims against Cody and Phelan.")

Alla v. Verkay, 979 F. Supp. 2d 349, 370 (E.D.N.Y. 2013) ("Special interrogatories are vehicles to allow the jury to resolve 'key factual disputes' bearing on the legal determination of qualified immunity. *Cowan ex rel. Estate of Cooper v. Breen,* 352 F.3d 756, 765 (2d Cir.2003). The Court

had no duty to present interrogatories to the jury that were undisputed and could only confuse or mislead the jury. The Court also declined to present the proposed interrogatories to the jury because even affirmative responses would have been insufficient to give rise to qualified immunity. Though it was reasonable for Verkay to believe that Gad Alla was a suspect in the stabbing, that belief on its own did not justify the punch. At least four officers were present in the room; Gad Alla was greatly outnumbered. The officers provided highly inconsistent and at times incredible testimony about the actions leading up to Verkay's punch. Further, there was absolutely no testimony that Gad Alla took any actions that resembled reaching for a weapon. Moreover, as noted, by finding that the second arrest was not supported by probable cause, the jury necessarily credited Gad Alla's testimony that he was compliant during the first arrest. Verkay argues that his second proposed interrogatory would have shown whether the jury believed Verkay's account (that Gad Alla was not yet handcuffed when punched) or Gad Alla's account (that he was already handcuffed when punched). But, as Gad Alla's counsel pointed out, the poorly phrased question would not actually resolve the issue. If the jury had answered in the affirmative, the Court would have had to assess qualified immunity guided only by a finding that Verkay had used *some amount* of force before the handcuffing. Such a finding may well have been based on Verkay's own testimony that he grabbed Gad Alla's arm and pushed him, and would not, therefore, necessarily mean that Verkay *punched* Gad Alla before Gad Alla was handcuffed. Verkay made no attempt to clarify the proposed interrogatory, perhaps hoping that the ambiguity would strengthen his case. Since Verkay's proposed interrogatories would not, even if answered in his favor, have supplied a factual predicate for qualified immunity, the Court's decision not to submit them to the jury does not entitle Verkay to a new trial.")

Kogut v. Cnty. of Nassau, 06-CV-6695 JS WDW, 2013 WL 3820826, *15 (E.D.N.Y. July 22, 2013) ("[A]lthough there is somewhat of a split of authority, . . . the better course of action is for the Court to decide qualified immunity as a matter of law after the jury has resolved the factual issues in dispute [citing *Lore v. City of Syracuse* and *Warren v. Dwyer*].

Terranova v. Torres, 603 F.Supp.2d 630, 631, 632 & n.3 (S.D.N.Y. 2009) (Young, J., D. Mass., sitting by designation) ("The reasonableness of the Officers' conduct, at the summary judgment stage, is 'a pure question of law' once the court has 'determined the relevant set of facts and drawn all inferences in favor of the non-moving party to the extent supportable by the record.'[citing *Scott v. Harris*] . . . . The problem, of course, is that the drawing of reasonable inferences and the evaluation of the reasonableness of the Officers' conduct are matters constitutionally for the jury. Evaluating such matters at the summary judgment stage has led at least one prominent critic to question the constitutionality of summary judgment. Suja Thomas, Why Summary Judgment is Unconstitutional, 93 Va. L.Rev. 139 (2007). Still, it must be that there is **some** state of facts so clear that no reasonable jury could do aught but recognize it. The Supreme Court apparently thought it had such a case in *Scott,* 'the only case in which the Supreme Court has invoked brute sense impressions to justify its decision.' Dan M. Kahan, David A. Hoffman, and Donald Braman, Whose Eyes are You Going to Believe? *Scott v. Harris*and the Perils of Cognitive Illiberalism, 122 Harv. L.Rev. 837, 903 (2009). As these authors point out, 'a form of judicial humility,' i.e., a

generous acceptance of a wide range of jurors' perceptions, *id.* at 905, is the best way to make this work. I try to exercise such humility in ruling on every motion for summary judgment. *See* Arthur Miller, The Pre-Trial Rush to Judgment, 78 N.Y.U. L.Rev. 982 (2003). . . .Although a jury may ultimately reject the Motorcyclists' version of events and find that the Officers acted reasonably, summary judgment is inappropriate where, as here, there are genuine issues of material fact surrounding the reasonableness of the seizure.")

Bradley v. Jusino, No. 04 Civ. 8411, 2008 WL 417753, at *4, *5 (S.D.N.Y. Feb. 14, 2008) ("Although there may have been substantial evidence supporting the jury's determination that Jusino was entitled to qualified immunity , the Court erred in submitting the question of qualified immunity to the jury. Under the Second Circuit's decision in *Stephenson v. Doe*, 332 F.3d 68 (2d Cir.2003), and its progeny, Jusino's qualified immunity defense was a question of law for the Court to resolve. . . . Although the Second Circuit has not explicitly ruled that the issue of qualified immunity must always be resolved by the court, precedent in this circuit offers strong support for the conclusion that the issue is most appropriately left for the court to determine after the jury has found all material facts. . . . Although *Stephenson* involved excessive force, rather than false arrest, its reasoning is directly applicable. Therefore, as a special interrogatory was not used in the initial trial in this case, and such factfinding by the jury is required in order for the Court to properly rule upon the qualified immunity issue, the Court must retry the false arrest claim in addition to the qualified immunity defense. As the *Stephenson* court concluded, there is a high likelihood of confusion, as well as 'a risk that the effect of having an Aout" (by finding qualified immunity) affected the care with which the jury conducted' its inquiry of the underlying claim. . . Therefore, upon retrial, the jury will be presented with specific interrogatories for resolution of any contested material facts pertaining to the false arrest claim, and based on the jury's responses, the Court will resolve the issue of the qualified immunity defense.").

Lee v. McCue, 2007 WL 2230100, at *3, *4, *6 (S.D.N.Y. July 25, 2007) ("The plaintiff argues that defendants have waived the qualified immunity defense by failing to submit any proposed special findings or interrogatories to be answered by the jury that would serve as a factual predicate for a post-verdict decision on the legal question of qualified immunity . In *Kerman III*, the Second Circuit reversed the district court's post-verdict grant of qualified immunity to the defendant police officer where the jury found that the officer lacked probable cause, and no special interrogatories had been submitted to the jury to elicit factual findings that would enable the court to resolve the qualified immunity motion. 374 F.3d at 118-120. The *Kerman III* court found that the defendant's failure to submit special interrogatories to the jury constituted an effective waiver of the qualified immunity defense. *Id. See also Matthews v. City of New York et al.,* 2006 WL 842392 (E.D.N.Y. March 27, 2006). Other courts have similarly suggested that when unresolved factual disputes prevent an early disposition of the qualified immunity defense, the better practice is for a jury to decide what facts the officer faced or perceived on special interrogatories, and for the court to make the ultimate legal determination of whether qualified immunity attaches on those facts. *See Stephenson v. Doe,* 332 F.3d 68, 81 (2d Cir.2003); *Warren v. Dwyer,* 906 F.2d 70, 76 (2d Cir.1990). It is also undoubtedly the defendant's burden to request special interrogatories that

would elicit the necessary factual findings from the jury. *Matthews,* 2006 WL 842392 at *8, n. 3.Defendants failed to follow the procedures that were set out in *Kerman III* and subsequent cases when they did not request the submission of special interrogatories to the jury. However, the Second Circuit's decision in *Kerman III* does not appear to preclude the court from ruling on defendants' motion, as long as the ruling is based on the *plaintiff's* version of the facts elicited at trial. This I intend to do. . . . Since the defendants never submitted any proposed special interrogatories to the jury with respect to what Officer McCue and Sergeant Manganiello faced or perceived on the morning of May 7, 2003, this court told the parties that the defendants' post-verdict request for qualified immunity had to be based exclusively on the plaintiff's version of the facts, i.e, the plaintiff's trial testimony. Although the jury was not compelled to credit every aspect of Mr. Lee's testimony in reaching its verdict, the defendants never made any attempt to ascertain, for purposes of their post-trial qualified immunity motion, which parts of the plaintiff's testimony, if any, the jury might have disbelieved. The court is therefore constrained by Rule 50, as it was prior to the trial by Rule 56.1. to decide defendants' motion based on the plaintiff's version of the facts, and to draw all available inferences in the plaintiff's favor. . . . The inquiry thus properly framed, the court is compelled to deny defendants' post-verdict motion for judgment as a mailer of law on the grounds of qualified immunity . The plaintiff's version of the facts at trial–the only version of the facts that is relevant for purposes of this motion–did not differ in the any material regard from the one presented at the summary judgment stage. . . . Accepting the plaintiff's version of the facts as true, as this court must on the defendants' motion for judgment as a matter of law, no reasonably competent police officer could find that there was arguable probable cause to arrest the plaintiff for either harrassment or the obstruction of governmental administration. Indeed, given the nearly identical nature of the plaintiff's testimony al trial and the testimony in the record at the summary judgment stage, this court is barred from finding otherwise.")

Blake v. City of New York, 2007 WL 1975570, at *5 (S.D.N.Y. 2007) ("The Second Circuit disfavors sending the qualified immunity issue to the jury because it is a complex, purely legal question that is likely to cause confusion. . . . In accordance with the procedures outlined in *Cowan* and *Stephenson*, the Court will charge the jury on excessive force but not qualified immunity . The Court will submit special interrogatories to the jury on the central factual issues in this case. If the jury determines that the officers used excessive force, and if Defendants then renew their motion for qualified immunity , the Court will determine as a matter of law whether qualified immunity attaches based on the answers to the special interrogatories.")**.**

Matthews v. City of New York, No. CV-02-715 (CPS), 2006 WL 842392, at *8 & n.3 (E.D.N.Y. Mar. 27, 2006) ("In order to preserve a qualified immunity defense, defendant Royall should have requested special interrogatories. However, as was the case in *Kerman,* the only questions submitted to the jury were questions of liability, '[a]nd to the extent that the court's immunity rulings [would be] based on the court's own factual findings that the jury neither made nor would have been compelled to make, the rulings [would] infringe[ ] [plaintiff]'s Seventh Amendment right to have the facts found by a jury.'. . Here, defendant Royall did not request that the jury be

asked to respond to factual interrogatories about the events that had transpired that day, nor did he set forth interrogatories in his proposed verdict form. The fact that Royall failed to request the appropriate factual interrogatories precludes me from granting the relief he now requests. I conclude that defendant Royall 'effectively waived' the defense of qualified immunity. Accordingly, the jury's verdict against defendant Royall on plaintiff Kevin Matthews's false arrest and malicious prosecution claims stands. . . [W]hile it is for the Court to make the ultimate legal determination of whether a right was clearly established and whether a reasonable officer would have known he was acting unlawfully, that determination can only be made on the facts found by the jury, and it is the defendant's burden to request special interrogatories to elicit those factual findings.").

Lovelace v. City of New York, No. 02-CV-5398(FB)(JMA), 2005 WL 552387, at *4, *5 (E.D.N.Y. Mar. 9, 2005) (not reported) ("Whether an officer's conduct was objectively reasonable, 'i.e., whether a reasonable official would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact.' . . Where material facts are in dispute, and 'contrasting accounts present factual issues as to the degree of force actually employed and its reasonableness, a defendant is not entitled to judgment as a matter of law on a defense of qualified immunity. . . Given the factual disputes in the present case regarding who initiated the use of force and the amount of force used, a grant of summary judgment based on qualified immunity is inappropriate. Instead, the issue of qualified immunity should be determined at trial." [citing *Stephenson v. Doe* and *Warren v. Dwyer*]).

THIRD CIRCUIT

Santini v. Fuentes, 795 F.3d 410, 420 (3d Cir. 2015) ("[M]aterial factual disputes exist as to whether Santini's constitutional rights were violated. The existence of those disputes compels us to find that the District Court's grant of summary judgment was inappropriate, as was its denial of Santini's motion to reconsider that decision. [citing *Curley*] We also find that those factual issues must be resolved by a jury, not a judge. . . We accordingly vacate in part the decisions of the District Court and remand this case for further proceedings consistent with this Opinion.")

Curley v. Klem, 499 F.3d 199, 208-11 & n.12 (3d Cir. 2007) (***Curley II***) ("The point of immunity is to protect someone from the burden imposed by litigation itself. It is supposed to be 'an *immunity from suit* rather than a mere defense to liability....' . . . Hence, the Supreme Court has instructed that '[i]mmunity ordinarily should be decided by the court long before trial.'. . .That is well and good when there are no factual issues in a case, but often the facts are intensely disputed, and our precedent makes clear that such disputes must be resolved by a jury after a trial. . . . The fundamental challenge lies in the nature of the questions that compose the test. Since they are mixed questions of law and fact, one is left to ask who should answer them. As we noted in *Curley I*, '[a] disparity of opinion exists among our sister circuits as to whether a judge or jury should make the ultimate immunity determination.'. . The First, Fourth, Seventh, and Eleventh Circuits have all indicated that qualified immunity is a question of law reserved for the court. The Fifth,

Sixth, Ninth, and Tenth Circuits have permitted the question to go to juries. Precedent from the Second and Eighth Circuits can be viewed as being on both sides of the issue, with the evolution being toward reserving the question for the court. . . . . Our precedents too have evolved. Our recent precedents say that the court, not a jury, should decide whether there is immunity in any given case. . . . [T]he *Carswell* approach, despite its limitations, . . . appears to have taken root and to represent the pattern and practice both in our Circuit and much of the rest of the country. We therefore take the opportunity to reiterate and clarify a central message from that case: whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury. . . When a district court submits that question of law to a jury, it commits reversible error. . . . When the ultimate question of the objective reasonableness of an officer's behavior involves tightly intertwined issues of fact and law, it may be permissible to utilize a jury in an advisory capacity, . . . but responsibility for answering that ultimate question remains with the court." [footnotes omitted])

Curley v. Klem, 499 F.3d 199, 212 n.14 (3d Cir. 2007) (***Curley II***) ("We note that in the Supreme Court's recent decision in *Scott*, 127 S.Ct. 1769 (2007), the Court stated that, because the case 'was decided on summary judgment, there [had] not yet been factual findings by a *judge* or jury....' *Id.* at 1774 (emphasis added). Without wanting to read too much into that statement, since it may refer to nothing more than a case in which the parties waive any right to a jury, it appears the Court at least contemplated a circumstance where a judge may resolve factual issues. Certainly the dissent in *Scott* was concerned about judicial fact finding.").

Curley v. Klem, 499 F.3d 199, 214 (3d Cir. 2007)(***Curley II***) ("Confusion between the threshold constitutional inquiry and the immunity inquiry is also understandable given the difficulty courts have had in elucidating the difference between those two analytical steps. . . At the risk of understating the challenges inherent in a qualified immunity analysis, we think the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified immunity question is whether the officer was reasonably mistaken about the state of the law.")

Curley v. Klem, 499 F.3d 199, 224-26 (3d Cir. 2007) (***Curley II***) (Roth, J., dissenting) ("'Objective reasonableness' can be a jury issue to the extent it applies to the question of whether, as a factual matter, a violation was committed. However, 'objective reasonableness' is most definitely not a jury issue to the extent it applies to the question of whether, as a legal matter, a right was clearly established. Whether a right was clearly established is the 'key immunity question'; we have never permitted a jury to answer that question. Indeed, we never would have said so because determining whether a right is clearly established–which requires a review of the applicable case law–is clearly outside the expertise of the jury. There is simply nothing in *Sharrar* or *Karnes* that permits submission of the ultimate question of qualified immunity , i.e., *Saucier* step two, to the jury. . . . . Courts, including this one, create confusion by talking about 'objective reasonableness' in the Fourth Amendment context without specific reference to either *Saucier* step one or two. The use of the term 'objective reasonableness' without reference to factual or legal reasonableness is what

has made this area of the law so confusing and it is why our precedents appear at times to say contradictory things with regard to the respective roles of judge and jury in determining objective reasonableness. I will try to clarify matters. If there are no disputed material facts, the court must determine the objective reasonableness of a mistake of fact (here, whether it was objectively reasonable for Klem to mistake Curley for the perpetrator). However, if there are triable issues of material fact, the jury must determine the objective reasonableness of that mistake of fact. With regard to the objective reasonableness of a mistake of law (here, whether it was objectively reasonable for Klem to believe that the law permitted him to use of deadly force against Curley in the situation at hand), the court should always determine this issue, because doing so requires a review of case law, which is not a task appropriate for the jury. . . . If there are no disputed material facts, the court should make this determination as soon as possible. However, if factual disputes relevant to this legal analysis do exist, the court will have to postpone making this determination until the jury resolves all the relevant factual disputes, because determining what actually happened is a prerequisite to determining whether the law clearly established that a particular action was permitted or prohibited by the Fourth Amendment under those circumstances. . . . After the jury resolves these relevant fact disputes, presumably through the use of special interrogatories, . . . the court is then capable of deciding whether or not the law clearly permitted or prohibited the conduct constituting the constitutional violation.").

Harvey v. Plains Township Police Department, 421 F.3d 185, 194 n.12 (3d Cir. 2005) ("The parties appear to be in disagreement over the proper role of the jury in qualified immunity determinations. Although the courts of appeals are not unanimous on this issue, this Court has held that 'qualified immunity is an objective question to be decided by the court as a matter of law.' [citing *Carswell*] 'The jury, however, determines disputed historical facts material to the qualified immunity question.'. . . 'A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity.'. . At this stage, however, the summary judgment standard requires the Court to resolve all factual disputes in Harvey's favor and grant her all reasonable inferences, obviating any need to look to a jury.").

Carswell v. Borough of Homestead, 381 F.3d 235, 242, 243 (3d Cir. 2004) ("The importance of the factual background raises the question of whether the decision as to the applicability of qualified immunity is a matter for the court or jury. The Courts of Appeals are not in agreement on this point. We held in *Doe v. Groody*, 361 F.3d 232, 238 (3d Cir.2004), that qualified immunity is an objective question to be decided by the court as a matter of law. . . The jury, however, determines disputed historical facts material to the qualified immunity question. *See Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir.1997). District Courts may use special interrogatories to allow juries to perform this function. *See, e.g., Curley*, 298 F.3d at 279. The court must make the ultimate determination on the availability of qualified immunity as a matter of law. . . Several other Courts of Appeals have adopted a standard similar to ours. [footnote citing cases] In contrast, other Courts of Appeals have held that District Courts may submit the issue of qualified immunity to the jury.[footnote citing cases]").

Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002) (***Curley I***) ("We note that the federal courts of appeals are divided on the question of whether the judge or jury should decide the ultimate question of objective reasonableness once all the relevant factual issues have been resolved. . . . . We addressed the issue in *Sharrar*, in which we observed that the "reasonableness of the officers' beliefs or actions is not a jury question," 128 F.3d at 828, but qualified that observation by later noting that a jury can evaluate objective reasonableness when relevant factual issues are in dispute, *id.* at 830-31. This is not to say, however, that it would be inappropriate for a judge to decide the objective reasonableness issue once all the historical facts are no longer in dispute. A judge may use special jury interrogatories, for instance, to permit the jury to resolve the disputed facts upon which the court can then determine, as a matter of law, the ultimate question of qualified immunity.").

Gruenke v. Seip, 225 F.3d 290, 299, 300 (3d Cir. 2000) ("The evaluation of a qualified immunity defense is appropriate for summary judgment because the court's inquiry is primarily legal: whether the legal norms the defendant's conduct allegedly violated were clearly established. . . Nevertheless, some factual allegations, such as how the defendant acted, are necessary to resolve the immunity question. . . . [T]his admittedly fact-intensive analysis must be conducted by viewing the facts alleged in the light most favorable to the plaintiff. . . . Finally, when qualified immunity is denied, any genuine disputes over the material facts are remanded, to be settled at trial.").

Sharrar v. Felsing, 128 F.3d 810, 826-28 (3d Cir. 1997) ("We have recently noted the 'tension ... as to the proper role of the judge and jury where qualified immunity is asserted.'. . . To some extent that tension may be attributable to our effort to comply with the Supreme Court's instruction that qualified immunity defenses be resolved at the earliest possible point in the litigation while recognizing the difficulty in applying that instruction in situations where there are disputes of relevant fact. . . . A review of our opinions in the last three or four years discloses that we have not always followed what appears to be the Supreme Court's instruction that the reasonableness of an official's belief that his or her conduct is lawful is a question of law for the court, although other courts have interpreted the opinion in that way. . . . We do not suggest that there may never be instances where resort to a jury is appropriate in deciding the qualified immunity issue. . . . We thus hold, following the Supreme Court's decision in *Hunter*, that in deciding whether defendant officers are entitled to qualified immunity it is not only the evidence of 'clearly established law' that is for the court but also whether the actions of the officers were objectively reasonable. Only if the historical facts material to the latter issue are in dispute, as in *Karnes*, will there be an issue for the jury. The reasonableness of the officers' beliefs or actions is not a jury question, as the Supreme Court explained in *Hunter*.") The court indicated, however, that where there was a factual dispute to be resolved by the jury, the jury should decide the issue of objective reasonableness as well. 128 F.3d at 830, 831.

Sherwood v. Mulvihill, 113 F.3d 396, 401 n.4 (3d Cir. 1997) ("As we recently noted, tension exists as to the proper role of the judge and jury where qualified immunity is asserted. . . The Supreme

Court has held that the application of qualified immunity is a question of law. *Siegert*, 500 U.S. at 232. In contrast, the existence of probable cause to support a warrant, when raised in a section 1983 action, is a question of fact. . . This may prove problematic in attempting to resolve immunity issues in the early stages of litigation where a genuine and material factual dispute exists concerning probable cause.").

Karnes v. Skrutski, 62 F.3d 485, 491 (3d Cir. 1995) ("While the qualified immunity defense is frequently determined by courts as a matter of law, a jury should decide disputed factual issues relevant to that determination.").

Taylor v. Ambrifi, No. 115CV03280NLHKMW, 2018 WL 3377155, at *3 (D.N.J. July 11, 2018) ("In this case, the Court must deny summary judgment and employ the special interrogatory procedure for the jury to resolve the disputed facts regarding Plaintiff's excessive force claims against Ambrifi and Harris. Ambrifi and Harris relate entirely different scenarios from that proffered by Plaintiff, and Plaintiff has provided sufficient evidence, by way of eye witness testimony and video recordings, which if believed by a jury, would cast doubt on the reasonableness of Ambrifi's and Harris's actions. Thus, after a jury has answered special interrogatories regarding what occurred between Plaintiff and Ambrifi, and what occurred between Plaintiff and Harris, the Court will then determine whether each of the officer's use of force was objectively reasonable in order to ultimately determine whether either of them is entitled to qualified immunity.")

Berry v. City of Philadelphia, No. CV 14-2608, 2016 WL 2939502, at *4-5 (E.D. Pa. May 20, 2016) ("The survival of Plaintiff's excessive force claim depends on whether it was objectively reasonable for Officer Boone to believe that the use of deadly force was necessary to prevent Berry from causing serious bodily injury to Officer Bellon or others. . . Several factual narratives could be consistent with the surveillance video. (Slow Motion Video.) These factual disputes bear directly on the reasonableness of the perceived threat. Therefore, a jury must resolve the question of whether Officer Boone violated Berry's Fourth Amendment rights. . . . Even when a plaintiff can show a violation of constitutional rights, qualified immunity may shield an officer from trial. . . In the second step of the *Saucier* analysis, courts must consider whether the right violated was clearly established at the time of the incident. . . . Since the Third Circuit's 1999 decision in *Abraham*, the contours of the right to be free from the use of excessive force have been clear. . . Therefore, in this case, the same disputed facts that preclude summary judgment on the first *Saucier* prong make qualified immunity inapposite here. If, as Plaintiff argues, Officer Boone shot Berry without a reasonable belief that deadly force was necessary to prevent serious injury to Officer Bellon, he would not be entitled to qualified immunity, because a reasonable officer in Officer Boone's position would have known that these actions violated a constitutional right.")

Brandt v. Monte, No. 06-0923, 2009 WL 235417, at *8, *9, *12 (D.N.J. Jan. 29, 2009) ("To determine whether a reasonable official would know that his conduct was unlawful, the Court must decide whether the official could have made a reasonable mistake of law, and if not, whether he

could have made a reasonable mistake of fact. [citing *Pearson v. Callahan* and *Curley v. Klem*] Here, Plaintiff alleges that he was forcibly medicated pursuant to an emergency declaration in the absence of an emergency to induce his consent. The Court must therefore decide, given the circumstances confronting the Ancora Defendants, (1) whether they could reasonably have believed that issuing the Emergency Certificate as a pretext was lawful, and if not, (2) whether they could reasonably have believed that Plaintiff presented a genuine emergency. . . . As to the first inquiry, the Court holds that no reasonable person in the Ancora Defendants' position could have believed that issuing the Emergency Certificate pretextually, in the absence of a genuine emergency, was lawful. . . . The second inquiry–whether the Ancora Defendants made a reasonable mistake of fact–presents a more difficult question. Regardless of whether Plaintiff actually presented an emergency, the Court must decide whether an objective person in the Ancora Defendants' position reasonably could have believed, given the circumstances before them, that Plaintiff presented an emergency. . . . Although fact-specific, the Third Circuit has held that this is a legal determination to be made by the Court, based on an analysis of the 'totality of the circumstances.'. . . Confronted with conflicting evidence, the Court is at a loss in determining what actually occurred in the treatment team meeting. . . . As the decision of whether the Ancora Defendants reasonably perceived an emergency is contingent upon the credibility-centered factual determination of what circumstances they confronted, the Court cannot decide the legal issue without first resolving the factual dispute. In these cases, the Third Circuit has instructed that District Courts may 'utilize a jury in an advisory capacity, but responsibility for answering th[e] ultimate question remains with the court.'. . . This suggests that the Court may resolve the mistake-of-fact question in one of three ways: (1) present special interrogatories to the jury (in an advisory capacity) at the conclusion of trial, (2) hold a pretrial hearing before an advisory jury, which would answer special interrogatories, or (3) hold a pretrial hearing at which the parties would present more evidence to the Court, with the Court as factfinder (for the sole purpose of resolving qualified immunity. The Court notes that the latter two options have the advantage of resolving this matter before trial, so the Ancora Defendants, if held to be qualifiedly immune, would not undergo the burdens of defending against these claims at trial. *See Curley*, 298 F.3d at 278 (noting the "imperative [of] decid[ing] qualified immunity issues early in the litigation"). However, the Court is mindful that holding a 'mini-trial' before a specially empaneled advisory jury would impose a new set of burdens on the litigants. Thus, the Court will allow the parties to confer and decide jointly which of these procedures shall be used.").

Kelly v. Rogers, No. 1:07–cv–1573, 2012 WL 2153796, *1 n.2 (M.D. Pa. June 13, 2012) ("The sole dispute in this action was whether qualified immunity applied to Defendant's conduct. Because the Court is not empowered to resolve the factual disputes underlying the qualified immunity determination, and because a jury is not entitled to make the ultimate finding on qualified immunity, the Court determined that a trial solely for the purpose of resolving the disputed questions of fact, followed by the Court resolving the qualified immunity question based on those facts, was the correct procedure.")

Boone v. Pennsylvania Office of Vocational Rehabilitation, No. 1:CV-04-0588, 2006 WL 1620222, at *7 (M.D. Pa. June 8, 2006) ("Defendants next argue that the court's denial of their request for a supplemental qualified immunity instruction constituted prejudicial error. Defendants cite to *Harvey v. Plains Township Police Department*, 421 F.3d 185, 194 n. 12 (3d Cir.2005) as support for the premise that the issue of reasonableness, with respect to whether Mr. Nasuti and Secretary Schmerin would reasonably have known that the right at issue was a clearly established one, should have been submitted to the jury. However, Defendants' interpretation incorrectly interprets the language of *Harvey* regarding the role of a jury in qualified immunity determinations. The *Harvey* court noted that, although it was drawing a factual inference in favor of the plaintiff for purposes of summary judgment, that disputed material fact should be left to the jury to consider at trial. . . However, the fact left to the jury was not the legal concept of reasonableness of the police officer defendant's action for immunity purposes, but whether the police officer in fact acted in the manner alleged– specifically whether the police officer ordered the landlord to open the door prior to the search in question. . . *Harvey* contains the well-settled principle that ' Aqualified immunity is an objective question to be decided by the court as a matter of law."' . . Moreover, the *Harvey* court clearly made a reasonableness decision once it had drawn the factual inference required. . . There were no historical facts material to the qualified immunity issue disputed in the instant case. Therefore, the court correctly declined to give a qualified immunity instruction.")

Brooks v. Price, No. Civ.A. 02-230-KAJ, 2003 WL 22768704, at *1 (D.Del. Nov. 17, 2003) ("The defendant, though he raised qualified immunity as an affirmative defense in his Answer. . . , did not at any point ask the court for a ruling on the defense and has chosen this last moment to raise the issue by seeking jury instructions that would put the question of immunity before the jury. . . The plaintiff has objected, arguing that the defendant has waived any claim to qualified immunity by failing to raise the matter by dispositive motion prior to the deadline for such motions set in the court's scheduling order. . . The defendant responds that he is not required to raise the matter by dispositive issue, that application of the doctrine may involve questions of fact which are reserved for the jury, and that he should therefore be permitted to place the question of immunity before the jury. . . . [D]espite the defendant's decision to forego seeking an early ruling on the defense, it remains a bar to liability if the proper factual predicate has been laid. . . . The defendant is wrong, however, in believing that the question can be placed before the jury. The question is one for the court.").

Hill v. Algor, 85 F. Supp.2d 391, 401 (D.N.J. 2000) ("Generally, the applicability of qualified immunity is a question of law. . . However, where factual issues relevant to the determination of qualified immunity are in dispute, the Court cannot resolve the matter as a question of law.").

Doherty v. Haverkamp, No. 93-5256, 1997 WL 297072, *7 (E.D. Pa. May 28, 1997) (not reported) ("The determination of the ultimate liability question on which plaintiff bears the burden of proof. . . likewise depends upon the objective reasonableness of the arrest or investigatory stop at issue. Consequently, the determination of whether defendants have proved that they are protected by qualified immunity is often quite close to, if not co-extensive with, the factual/legal question of

whether liability for a Constitutional violation may be imposed upon defendant(s). In the context of qualified immunity, the issue of the objective reasonableness of a defendant's conduct may be determined as a matter of law if there are no disputed issues of material fact concerning the indicia of probable cause, or if it is clear that a reasonably well-trained officer, possessed of the information available to the defendant, would have believed that he had probable cause to detain or arrest under the circumstances. . . As noted, however, where there are disputed issues of fact concerning the information possessed by the arresting officer which impacts the objective reasonableness of relying thereon, or disputed issues of fact concerning information developed during an investigatory stop which impacts whether probable cause to stop or arrest continued for the duration of the detention, the question whether the arresting officer is protected by qualified immunity, like the ultimate question of liability, is a matter for the factfinder.").

Zimmerman v. York, No. Civ.A. 94-4076, 1998 WL 111808, *9 (E.D. Pa. Feb. 9, 1998) (not reported) ("In *Sharrar*, the court noted that Third Circuit jurisprudence has not, in the past, been entirely clear with respect to when this issue should likewise be decided as a matter of law. . . [T]he Court of Appeals has now specifically stated, however, that the objective reasonableness of an officer's conduct is likewise an issue of law for the Court, unless 'the historical facts material to [that] issue are in dispute.'. . Here, as noted, the circumstances leading to plaintiff's arrest were described with rather remarkable consistency by all of the witnesses to the incident, including plaintiff himself. In this case, therefore, it is appropriate to determine, as a matter of law, whether defendant York's conduct was objectively reasonable.").

FOURTH CIRCUIT

Estate of Jones by Jones v. City of Martinsburg, W. Virginia, No. 17-1003, 2018 WL 1151558, at *5 (4th Cir. Mar. 5, 2018) (not reported) ("Even though Jones did not release the knife when instructed to do so, a reasonable jury could consider the totality of the facts and still find that the officers exercised excessive force. Most critically, it is not clear that Jones continued to pose an immediate threat of physical harm to the officers at the time they shot and killed him. The video evidence shows that when the officers backed away, drew their firearms, and formed a semi-circle around Jones, Jones remained on the ground. At least one police officer stated that Jones 'did not make any overt acts with the knife towards the officers' once they stepped back. Furthermore, the officers reported that Jones lay on his right side on the sidewalk with the knife in his right hand, which would further support a reasonable jury finding that Jones was not wielding the knife when the officers shot him. The district court's analysis wholly fails to account for these facts and the reasonable inferences that could be drawn from them in the Estate's favor. Instead, the district court incorrectly assumed that the deceased's possession of a knife and the fact that he resisted arrest necessarily rendered the officers' use of deadly force reasonable. In doing so, the district court erred by considering the facts in the light most favorable to the officers, concluding that the Defendants-Appellees' version of events was essentially undisputed despite discrepancies among the officers' accounts, and reasoning that Jones's continuing grasp on the knife from where he lay on the ground—beaten, choked, and tased—indisputably constituted an immediate threat to the

officers' safety at the time he was shot. . . Because genuine issues of material fact remain which underlie the determination of whether the force the officers used was excessive, we conclude that summary judgment was improper on the Estate's § 1983 claim against the officers for use of excessive force in violation of Jones's Fourth Amendment rights, as well as on the related § 1983 claim brought against the city. Accordingly, we reverse and remand the case to the district court for further proceedings on these claims.")

Gandy v. Robey, 520 F. App'x 134, 145-47 (4th Cir. 2013) ("The district court submitted interrogatories # 3 and # 4 to the jury in an effort to sort out the question of qualified immunity. Under the approach established in *Saucier*, analysis of a qualified immunity claim involves a two-step procedure 'that asks first whether a constitutional violation occurred and second whether the right violated was clearly established.'. . As previously suggested, the district court intended interrogatory # 3 to resolve the first question of whether Robey committed a constitutional violation by asking the jury:

Has the plaintiff, Terry A. Gandy, established by a preponderance of the evidence that defendant Neal Patrick Robey violated David Charles Gandy's Fourth Amendment *right to be free from excessive use of force*, or his Fourteenth Amendment [right] not to be deprived of life without due process of law, when he shot David Charles Gandy?

J.A. 961 (emphasis added). The jury answered 'yes' to this question. In interrogatory # 4, which the district court intended to resolve the second question of whether Robey was entitled to qualified immunity despite the constitutional violation, the jury was asked:

Do you find that at the time that he shot David Charles Gandy, Deputy Neal Patrick Robey had a reasonable belief that Mr. Gandy posed an *imminent threat* of causing death or serious bodily injury to Deputy Robey or to other persons present at the scene?

J.A. 962 (emphasis added). The jury answered 'yes' to this question as well, but then reached a general verdict in Terry's favor, awarding her $267,000 in compensatory damages. In responding affirmatively to special interrogatory # 3, the jury concluded as a factual matter that Deputy Robey's act of shooting David constituted excessive force, in violation of the Fourth Amendment. This finding is inconsistent with the jury's answer to special interrogatory # 4, in which the jury concluded that Deputy Robey had a reasonable belief that David posed an imminent threat of causing death or serious bodily injury to persons present at the scene of the incident. The inconsistency between the answers to these two questions is apparent because the factual question presented in interrogatory # 4, whether Deputy Robey reasonably believed that David posed a threat of imminent harm, is a core component of the issue addressed by special interrogatory # 3, namely, whether the force employed by Deputy Robey was excessive. As the Supreme Court held in *Graham v.. Connor,* 490 U.S. 386 (1989), an analysis of the reasonableness of a particular use of force 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, *whether the suspect poses an immediate threat to the safety of*

the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' *Id.* at 396 (emphasis added). This court, too, has made clear that the question of whether a suspect posed an immediate threat of harm to an officer is a factor relevant to the analysis of an excessive force claim under the Fourth Amendment. [citing cases] Accordingly, the factual question of whether an individual poses a threat of danger is a component of, and is subsumed by, the broader question of whether the officer's use of force to seize an individual was excessive in violation of the Fourth Amendment. Unfortunately, special interrogatories # 3 and # 4 permitted the jury to answer these interrelated questions in an inconsistent manner. According to the jury, Deputy Robey reasonably believed that David posed an imminent threat of serious harm, yet the jury concluded that Deputy Robey used excessive force in preventing David from carrying out such a threat of harm. In addition to being inconsistent with each other, of course, these interrogatory answers are inconsistent with the general verdict awarding Terry $267,000 in compensatory damages. Despite its conclusion that Robey reasonably perceived an immediate threat from Gandy, it awarded damages as a result of his conduct. These inconsistencies implicate Fed. R. Civ. P 49(b)(4) and leave us no choice but to remand for a new trial.")

Gregg v. Ham, 678 F.3d 333, 338, 339 (4th Cir. 2012) ("Ham contends that he is entitled to a new trial on the § 1983 claim because the district court improperly submitted the legal question of qualified immunity to the jury. Because Ham did not object to the jury instruction at trial, we review for plain error. . . .[I]n *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir.2005), we explained that if 'a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury.'. . . Here, the district court asked the jury, 'Could defendant Jon E. Ham, based upon the totality of the circumstances, have reasonably believed that plaintiff had given him knowing and voluntary consent to search her home?'. . Neither party objected to the court's instruction. Relying on the rule announced in *Willingham*, Ham now contends that the jury instruction constituted plain error because it required the jury to answer the legal question of qualified immunity. We need not resolve this issue, however, because even assuming the instruction was improper, there was no error because Ham was not entitled to a qualified immunity defense.")

International Ground Transportation v. Mayor and City Council of Ocean City, 475 F.3d 214, 219, 220 n.3 (4th Cir. 2007) ("[D]espite the general bar to municipal liability set out in *Heller*, a situation may arise in which a finding of no liability on the part of the individual municipal actors can co-exist with a finding of liability on the part of the municipality. Namely, such a verdict could result when the individual defendants successfully assert a qualified immunity defense. This case presents exactly this situation.. . . We hold, therefore, that when a jury, which has been instructed on a qualified immunity defense as to the individual defendants, returns a general verdict in favor of the individual defendants but against the municipality, the verdict is consistent and liability will lie against the municipality (assuming the verdict is proper in all other respects). . . We do not intend our holding here to approve the submission of qualified immunity to juries. Entitlement to

qualified immunity is a legal question to be decided to the court, although factual issues underlying the qualified immunity analysis may be submitted to a jury. . . Nonetheless, we find it necessary to hold as we do here because the parties do not maintain that the district court erred in submitting qualified immunity to the jury.").

Schultz v. Braga, 455 F.3d 470, 479 (4th Cir. 2006) ("In sum, there remain genuine issues of material fact as to the circumstances leading up to Agent Braga's decision to fire his weapon at Schultz, including whether Agent Braga heard and registered the conflicting command of Agent Stowe to unlock the door and whether, in view of the conflicting command and all of the other facts and circumstances surrounding it, a reasonable officer in Agent Braga's position could have believed that Schultz was making a noncompliant, dangerous movement warranting the use of deadly force to protect himself and others from an immediate and deadly threat. There are, undoubtedly, a number of other factual scenarios that the jury might endorse under which Agent Braga might still be entitled to qualified immunity as a matter of law, but these are matters for the district court to revisit, where appropriate, on remand.").

Helsabeck v. Fabyanic, 173 F. App'x 251, 2006 WL 871003, at **3-5 (4th Cir. Mar. 30, 2006) (not published) ("Helsabeck argues that the district court erred in submitting the qualified immunity interrogatory to the jury. . . . Because Helsabeck failed to object to submission of the interrogatory to the jury at trial, we review for plain error. . . . In reviewing for plain error, the initial question is whether an error occurred. In *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir.2005), we held that the question of a defendant's entitlement to qualified immunity under a particular set of facts must be decided by the court, not by the jury. The district court in the present case therefore committed error when it submitted the qualified immunity interrogatory to the jury. . . . Although it is clear that the district court committed error under *Willingham*, that case was not decided until more than one year after the jury delivered its verdict in favor of Fabyanic. The applicable law in this circuit was unsettled at the time of trial. . . . The third question is whether the error affected Helsabeck's substantial rights, that is, whether it was prejudicial. . . . In this case, there is no way to conclude that the error did not affect the outcome. The outcome here–the finding that Fabyanic was entitled to qualified immunity–can be attributed to nothing other than the error–submission of a specific interrogatory on qualified immunity to the jury. The error therefore affected Helsabeck's substantial rights. . . The final issue is whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. We conclude that it does not, and we therefore decline to notice this error even if it was 'plain.'").

Willingham v. Crooke, 412 F.3d 553, 559-60(4th Cir. 2005) ("We reject Willingham's contention that our prior decision–holding that Sergeant Crooke was not entitled to summary judgment on the basis of qualified immunity–finally disposed of the qualified immunity defense because the evidence presented at trial was essentially the same as the evidence forecasted in the summary judgment record. Because the prior appeal concerned Willingham's challenge to the grant of summary judgment to Sergeant Crooke, we were required to view the evidence in the light most favorable to her. . . And, in affirming the denial of summary judgment we decided only that the

forecasted evidence, when viewed in the light most favorable to Willingham, established a violation of clearly established law. . . The jury, however, was not required to view the facts in the light most favorable to Willingham, and thus could reasonably have found in favor of Willingham with respect to some facts but not others. Because we did not decide what a reasonable officer would have known regarding the lawfulness of his actions under any other version of events, the qualified immunity defense remained viable after our decision. . . Although we reject Willingham's first contention, we agree with her second. The question of whether Sergeant Crooke was entitled to qualified immunity under the facts found by the jury–i.e., whether a reasonable officer would have known that his actions violated the law–should not have been submitted to the jury. . . . There is no question that when the historical facts are undisputed, whether a reasonable officer should have known of the illegality of his conduct is a question of law for the court. . . The existence of disputed material facts–which must be submitted to a jury, . . .does not alter the 'essentially legal' nature of the question of whether the right at issue was clearly established. . . Indeed, we indicated in *Knussman v. Maryland*, 272 F.3d 625, 634 (4th Cir.2001), that this legal question should not be submitted to the jury. There, the district court submitted to the jury both disputed factual issues and the ultimate question of whether the defendant was entitled to qualified immunity on the basis that he could reasonably have believed that his actions were lawful. Although the defendant did not challenge the submission of that question to the jury, we noted our disapproval of the practice . . . . The issue having now come before us, we hold that the legal question of a defendant's entitlement to qualified immunity under a particular set of facts should be decided by the court, not by the jury. . . . As we explained in *Knussman*, juries are ill-suited to make the determinations of law required by the qualified immunity analysis. . . Therefore, to the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury.").

Knussman v. Maryland, 272 F.3d 625, 634 (4th Cir. 2001) (*Knussman IV*)("Before turning to our analysis of whether Mullineaux is entitled to qualified immunity, we pause to note that, although the jury may be suited for making factual findings relevant to the question of qualified immunity, we believe it is far better for the court, not the jury, to answer the ultimate legal question of whether a defendant is entitled to qualified immunity. . . The nature of the analysis–requiring an examination of current federal law and federal law as it existed at the time of the alleged violation–makes for an awkward determination by the jury, at best. But, since the issue has not been raised, we will leave for another day the question of whether it is ever appropriate for a jury to answer the ultimate legal question of a defendant's entitlement to qualified immunity.").

Hoy v. Simpson, 182 F.3d 908 (Table), 1999 WL 427193, at *5, *6 (4th Cir. June 25, 1999) (per curiam) ("[A]ppellant contends . . . the question whether a defendant is entitled to qualified immunity is always a question of law and thus should never be submitted to the jury. . . Although we find nothing inherently confusing about two separate instructions that accurately convey that an alleged constitutional violation requires an inquiry into the defendant's subjective awareness

while a defense to liability for that violation does not, appellant's related contention–that qualified immunity should never be left to the jury–is less easily dismissed. For the instructions given in this case would seem to allow the jury to find that an individual defendant was in fact deliberately indifferent to Brown's serious medical needs, but that he was immune from liability because a reasonable officer would not know that such indifference constituted a violation of federal law. Appellant's argument, and it is not without support, is that this latter conclusion would rest on a determination that it was not 'clearly established,' in the particularized sense that our caselaw requires, . . . that deliberate indifference to an intoxicated pre-trial detainee's medical need would violate that detainee's constitutional rights to due process. This determination, appellant contends, is for the court to make. . . We need not decide whether allowing the jury to make this determination was error, however, because the jury's clear verdict that the defendants were not deliberately indifferent precluded any consideration of the qualified immunity question, and thus any error in giving the instruction was harmless.").

Buonocore v. Harris, 65 F.3d 347, 359-60 (4th Cir. 1995) ("If a plaintiff has alleged a clearly established right, summary judgment on qualified immunity grounds is improper as long as there remains any material factual dispute regarding the actual conduct of the defendants.").

Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994) ("Though it focuses on the objective facts, the immunity inquiry must be filtered through the lens of the officer's perceptions at the time of the incident in question. Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the 'actual' facts, and allows them to focus instead on what the police officer reasonably perceived. [citing *Gooden*] In sum, the officer's subjective state of mind is not relevant to the qualified immunity inquiry but his perceptions of the objective facts of the incident in question are.").

Taylor v. Farmer, 13 F.3d 117, 120-21 (4th Cir. 1993) (denying immunity and distinguishing facts from ***Gooden***, where defendants' observations and eyewitness reports were contradictory, not corroborative, where exigent circumstances did not exist, where detectives did not exercise reasonable care in investigation, and where conduct guided by settled standards for search and seizure.)

Rainey v. Conerly, 973 F.2d 321, 324 (4th Cir. 1992) ("This case is distinguishable from this court's recent decision in *Gooden*. In *Gooden*, the *en banc* court addressed a similar situation in which the applicability of qualified immunity arguably depended on resolution of conflicting versions of the facts. The majority ultimately concluded that resolution of what actually happened was irrelevant to the qualified immunity claim, because the appropriate focus was on the perceptions of the officers.... Unlike *Gooden* where what actually happened did not need to be resolved by the trier of fact in order to reach a decision on the applicability of qualified immunity, in this case a determination of what actually happened is absolutely necessary to decide whether

[defendant] could reasonably have believed that his actions were lawful. [Defendant] does not claim. . . that he operated under a mistaken, but reasonable, perception of the facts. Instead, the crux of the dispute revolves entirely around the level of force utilized by [defendant] in removing [plaintiff] from the vestibule....The determination of what actually happened depends exclusively on an assessment of the credibility of the respective witnesses. This assessment is a disputed issue of fact and, therefore, cannot be resolved on summary judgment or directed verdict.").

Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992) ("[T]he narrow threshold question whether a right allegedly violated was clearly established at the appropriate level of inquiry and at the time of the challenged conduct is always a matter of law for the court, hence is always capable of decision at the summary judgment stage. Whether the conduct allegedly violative of the right actually occurred or, if so, whether a reasonable officer would have known that conduct would violate the right, however, may or may not be then subject to determination as a matter of law. If there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must to reserved for trial.").

Coates v. Daugherty, 973 F.2d 290, 293 (4th Cir. 1992) ("[T]he magistrate judge instructed the jury on the qualified immunity question. Neither party challenges the propriety of submitting this question to the jury nor the contents of the instruction; thus we do not consider these questions ....").

Gooden v. Howard County, Maryland, 954 F.2d 960, 965-66 (4th Cir. 1992) (*en banc*) (reasonableness of officers' response must be gauged against reasonableness of their perceptions; different accounts as to what occurred need not signify a difference of triable fact; in absence of a genuine dispute about reasonableness of officers' perceptions, issue of qualified immunity is ripe for summary judgment).

Compare ***Gooden***, *supra*, 954 F.2d at 970-74 (Phillips, J., joined by Ervin, Murnaghan, Sprouse, and Butzner, JJ. dissenting) ("...the majority essentially... shifts the burden to the plaintiff as non-movant, either resolving conflicting inferences arising from conflicting versions of critical historical facts in favor of the defendants in an exercise of raw factfinding, or simply sweeping aside as immaterial the existence of flat conflict in the evidence as forecast on certain critical issues. With all respect, I think the majority, out of concern that summary judgment doctrine, regularly applied, might thwart the underlying purposes of qualified immunity doctrine, has simply declined here to apply those aspects unfavorable to the defendants with full and proper rigor.... The importance of this case...lies in the classic problem it poses of accommodating qualified immunity doctrine's preference for pre-trial establishment of the defense, with summary judgment's insistence that, desirable as this may be, it cannot be done if genuine issues of fact material to the defense exist.").

Rhodes v. Clemmons, No. 7:13-CV-192-RJ, 2016 WL 3766307, at *1-2 (E.D.N.C. July 11, 2016) ("The court, in its discretion, is unpersuaded that trifurcation of the issues in this matter would serve to expedite, economize, or avoid prejudice. It appears that if the issues are separated as urged by Defendants, some evidence related to liability and/or damages would necessarily need to be presented during other phases of the trial, resulting in overlapping evidence and potential confusion of the jurors. While the question of whether Defendants are entitled to immunity under the facts found by the jury is a question of law reserved for the court, *Willingham v. Crooke*, 412 F.3d 553, 559 (4th Cir. 2005), such requirement in no way compels the need for bi– or trifurcation of the issues. . . Indeed, proceeding in the manner suggested by Defendants, with three trial phases, each consisting of separate issues and findings by the jury and/or the court, would seem in this instance to create a scenario ripe for confusion and resulting prejudice to either Defendants or Plaintiff, or both. Defendants have simply not satisfied their burden to show that separation of the issues will promote greater convenience and economy in this matter and will not result in undue prejudice to any party. The court therefore in its discretion denies Defendants' request. . . . Defendants seek to use special interrogatories to resolve factual issues bearing on Defendants' entitlement to qualified immunity. Plaintiff objects to the use of special interrogatories on the grounds that they are not required, their use would unnecessarily complicate and confuse the jury, and the jury's decision on liability would necessarily subsume their responses to the interrogatories. In any event, Plaintiff argues the interrogatories as proposed by Defendants misstate the law and are premature. Alternatively, Plaintiff seeks to reserve his ability to propose his own special interrogatories should the court allow them to be submitted to the jury. The court agrees that the motion to use special interrogatories is premature, as there may be additional factual disputes that arise or anticipated factual disputes that do not arise at trial. . . Accordingly, the court denies Defendants' motion without prejudice, and it will consider a request to use special interrogatories again at the appropriate time during the trial.

Thompson v. Farmer, 945 F. Supp. 109, 114-16 (W.D.N.C. 1996) ("Taken together *Mitchell* and *Johnson* establish a continuum along which the court makes qualified immunity decisions. On one end of the continuum is a case like *Mitchell* or *Siegert* where the plaintiff fails to allege conduct that violates a clearly established legal norm. The other end of the continuum is cases like *Johnson* where the plaintiff does allege conduct that violates a clearly established legal norm, but there is a factual dispute concerning whether the conduct alleged by the plaintiff actually occurred. In between the two extremes created by *Mitchell* and *Johnson* there is a related question that arises in cases where the law is clearly established (as in this case), the facts are undisputed (as Farmer's argument assumes), and the only issue that remains is whether the officer's belief that his actions comported with the law is objectively reasonable. Farmer's argument implicates this precise issue because he has argued that if the facts are as he alleges–he was leaning in the car and being dragged along-side the vehicle–then the question of whether his actions were objectively reasonable is a question of law for the Court. Put another way, Farmer argues that since the (assumed) facts and the law are established it is up to this Court to decide whether his belief that he had probable cause to believe that Thompson represented a significant threat of death or serious injury to himself was objectively reasonable. So this portion of Farmer's argument presents the following question: in

cases where the law is clear and the facts are clear but the Court determines that reasonable persons could differ over whether a reasonable government official "should have known that his conduct was illegal" *Pittman*, 87 F.3d at 119, does the Court or the jury make the ultimate immunity determination? The answer is not entirely clear. . . . This Court is sympathetic to the view that the issue of whether Farmer's use of force was objectively reasonable under the circumstances because he had probable cause to believe that Thompson posed a significant threat of serious injury to himself is a question of fact for the jury. . . . If the objective reasonableness of Farmer's use of deadly force–the liability inquiry–is a question of fact, why shouldn't the question of an objectively reasonable (but reasonably mistaken) use of force–the immunity inquiry–be a question of fact? The case law in the Fourth Circuit is not entirely clear. . . . As noted earlier, this Court believes that there is much to recommend the notion that the objective reasonableness of an officer's actions is a question of law for the Court where reasonable persons could differ as to whether the officer's actions were reasonable under the circumstances. Perhaps the Court of Appeals will use Farmer's interlocutory appeal to put this Court at ease with respect to this issue if the law governing appellate jurisdiction allows such good works.").

FIFTH CIRCUIT

Westfall v. Luna, 903 F.3d 534, 548-49 (5th Cir. 2018) ("The district court relied on *Scott* to disregard Westfall's account of the events leading up to the body-slam. But the standard is a demanding one: 'a court should not discount the nonmoving party's story unless the video evidence provides so much clarity that a reasonable jury could not believe his account.'. . In *Darden*, for example, we held that videos did not meet that difficult standard because they did not show what happened during an important twenty-five seconds of the encounter, a period of time for which the parties provided different accounts. . . In *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013), we held the same thing about videos that were 'too uncertain' to discount the plaintiff's version of the events and where it was 'unclear exactly what or who precipitate[d] and what constitute[d] that struggle.'. . Here, the audio is similarly unhelpful. The audio does not indicate how, if at all, Westfall physically resisted the officers' alleged attempts to restrain her. Furthermore, the audio is unclear as to the sequence of events, including when exactly Luna slammed Westfall to the ground. Thus, there is a fact issue as to whether a reasonable officer would have concluded that there was a need for force. And taking the facts in the light most favorable to Westfall—that she was attempting to enter her house but not actively resisting the officers—a jury could reasonably find that the *degree* of force Luna used—slamming Westfall onto her brick porch—did not match the need.")

Thomas v. Williams, 719 F. App'x 346, 350-52 & n.4 (5th Cir. 2018), *petition for cert. filed,* No. 17-1641 (U.S. June 4, 2018) ("In evaluating a qualified immunity defense, this court 'considers only the facts that were knowable to the defendant officers.'. . 'Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued.'. .The Thomases rely only on observations that Williams made during the course of executing the warrant, not facts Williams was actually aware of when he submitted his probable cause affidavit

to the judge. . . Because the Thomases do not present any evidence that Williams knew the statements were false or acted with reckless disregard for the truth *at the time he swore the affidavit*, the district court properly held that Williams was entitled to qualified immunity. . . . As Williams did not violate any clearly established law by executing a search warrant at a residence that he thought was the location described in the search warrant, the district court appropriately found that Williams's qualified immunity defense was applicable and he did not violate the Thomases' Fourth Amendment rights by entering their home without a warrant. Even if some Fourth Amendment rights were violated, the rights were not clearly established. The prevailing law does not instruct that unintentionally executing a search warrant at the wrong location automatically violates the Fourth Amendment and precludes an officer's qualified immunity defense. Accordingly, Williams could not have been 'plainly incompetent' or 'knowingly violat[ing] the law.'. . . As the district court found, it is undisputed that Williams first conducted a sweep, which led him to decide to abort the search, and no such search was ever conducted. This protective sweep does not constitute a search, so Williams merely entering the Thomases' residence does not constitute a 'search.'. . Moreover, the record does not reflect that Williams remained in the residence to perform an unconstitutional search; he remained in the residence to explain to the Thomases what had happened and to ask questions about the suspect. It was not objectively unreasonable for Williams to conduct a protective sweep and remain in the Thomases' home to explain the circumstances under which the officers inadvertently entered their home. Accordingly, because Williams did not perform a search after realizing he was at the wrong location, Williams did not violate any clearly established constitutional law. . . The district court, again, properly granted Williams qualified immunity on this issue. . . . The dissent attacks this conclusion, urging that it fails to consider the evidence in the light most favorable to the Thomases. Importantly, it never mentions the burden-shifting in the qualified immunity context: plaintiffs must show that a defendant is *not* entitled to qualified immunity. . . The dissent also would have this court place an unrealistic burden on police officers that would essentially void well-established law that officers should not be liable for honest mistakes. Its position would force officers to act only upon completely vetted information; it is no secret that a main tenet of an officer's job is to act and react, in the most reasonable manner possible, while circumstances are rapidly unfolding in real time. To provide otherwise would allow no leeway in an officer's judgment—leeway explicitly provided for under the qualified immunity doctrine—and would also place the public's safety in jeopardy.")

Thomas v. Williams, 719 F. App'x 346, 354, 357 n.3 (5th Cir. 2018) (Dennis, J., dissenting), *petition for cert. filed*, No. 17-1641 (U.S. June 4, 2018) ("In *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), the Supreme Court took the unusual step of granting certiorari simply to correct this court's misapplication of the summary judgment standard. The Supreme Court then unanimously and summarily vacated this court's affirmance of summary judgment to a defendant-officer on the basis of qualified immunity. . . The Court stated, '[T]he Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to [the nonmovant] with respect to the central facts of this case' and 'fail[ed] to credit evidence that contradicted some of its key factual conclusions,' and thereby 'improperly "weighed the evidence" and resolved disputed issues in

favor of the moving party.'. . Statistically speaking, it is highly unlikely that the Supreme Court would repeat this strong remedy in the instant case, but the majority appears bent on providing a very good candidate for this course of action. Because the majority opinion fails to view the evidence in the light most favorable to the nonmovant, fails to credit evidence that contradicts its key factual conclusions, and makes additional serious legal errors, I must respectfully dissent. . . .[I]n affirming the district court's summary judgment dismissal of the Thomases' claims, the majority opinion fails to view the evidence in the light most favorable to the nonmovants with respect to the central facts of this case, fails to credit evidence that contradicts its key factual conclusions, improperly weighs the evidence and resolves disputed issues in favor of the moving party, and makes serious legal errors regarding the scope of the Fourth Amendment. I respectfully dissent. . . . The majority opinion faults this dissent for not mentioning 'the burden-shifting in the qualified-immunity context,' pursuant to which 'plaintiffs must show that a defendant is *not* entitled to qualified immunity.'. . It is, of course, the Thomases' burden to show that Williams's conduct violated their clearly established rights. They have carried their burden by providing the opposing summary-judgment evidence discussed above, which the majority opinion ignores. The majority opinion's invocation of 'burden-shifting' as if it modifies the well-established rule that 'courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment,' *Tolan*, 134 S. Ct. at 1866, is emblematic of the majority opinion's misapprehension of the summary judgment standard.")

Darden v. City of Fort Worth, Texas, 880 F.3d 722, 729-33 (5th Cir. 2017) (on denial of rehearing), *cert. denied,* 138 S. Ct. ___ (2018) ("[I]n the present case, eyewitnesses claim that Darden put his hands in the air when the officers entered the residence, complied with the officers' commands, and did not resist arrest. Yet Officer Snow allegedly threw Darden to the ground and twice shocked him with a Taser while he was being beaten by Officer Romero. In light of our prior case law, Officer Snow should have known that he could not use that amount of force on an individual who was not resisting arrest. It is worth pointing out that a jury may ultimately conclude that Darden did not comply with the officers' commands and was actively resisting arrest. Under those facts, Officer Snow's decisions to force Darden to the ground and tase him might have been reasonable. . . However, on the record before us, there are genuine disputes of material fact as to whether Darden was actively resisting arrest and whether the force Officer Snow used was clearly excessive and clearly unreasonable. . . . [W]e must determine whether a jury could find that Officer Romero used excessive force when he allegedly choked, kicked, and punched Darden and forced Darden into a prone position to handcuff him behind his back. As an initial matter, we note that this was not a situation where an officer arrived at the scene with little or no information and had to make a split-second decision. Rather, Officer Romero acknowledges that he stood at his post near the front door for a while and observed the interaction between Darden and Officer Snow before running into the house to assist. In other words, Officer Romero saw whether Darden was resisting and saw how much force had already been used on Darden. He needed to take those perceptions into account in assessing how much additional force, if any, was necessary. . . [W]e have found that a police officer uses excessive force when the officer chokes, punches, or kicks a suspect who is not resisting arrest. . . Thus, if a jury finds that no reasonable officer on the scene

would have perceived Darden to be actively resisting arrest, then a jury could also conclude that Officer Romero used excessive force by choking Darden and repeatedly punching and kicking him in the face. . . Darden's right to be free from such force was also clearly established at the time of Officer Romero's alleged misconduct. The law is clear that the degree of force an officer can reasonably employ is reduced when an arrestee is not actively resisting. . . Moreover, at the time of the alleged misconduct it was clearly established that violently slamming or striking a suspect who is not actively resisting arrest constitutes excessive use of force. . . In the case at bar, eyewitnesses testified that Officer Romero choked, punched, and kicked Darden, even though Darden was purportedly complying with the officers' orders and not resisting arrest. Officer Romero also forced Darden—an obese man—onto his stomach, pushed his face into the floor, and pulled Darden's hands behind his back. All the while, other people in the residence were repeatedly yelling that Darden could not breathe. If the plaintiff's version of events is true, Officer Romero's actions were plainly in conflict with our case law at the time of the alleged misconduct. . . . As is analyzed above, a jury could conclude that no reasonable officer would have perceived Darden as posing an immediate threat to the officers' safety or thought that he was resisting arrest. Therefore, viewing the facts in the light most favorable to Darden, Officer Romero's actions—choking, punching, and kicking Darden—were objectively unreasonable in light of clearly established law at the time of the incident.")

Orr v. Copeland, 844 F.3d 484, 491-95 (5th Cir. 2016) ("While *Scott* empowers a district court to disregard testimony that is at odds with video evidence, the holding below would prevent summary judgment from being granted in the absence of video evidence, effectively stripping all officers of qualified immunity if their actions were not recorded. This fundamentally flips the burden back onto the government official. . . Second, the district court was not permitted to disregard the testimony of the two eyewitnesses. There is no evidence to suggest that the pair was biased, and the district court specifically found that the heirs '[did] not offer any evidence to contradict the eyewitnesses' statements.' Because their testimony was 'uncontradicted and unimpeached,' the district court was required to give it credence. Failure to do so amounted to an inappropriate 'credibility determination[ ].'. .We now turn to the question of whether Copeland was entitled to qualified immunity, applying the correct evidentiary standard for summary judgment articulated above. Giving full weight to the undisputed eyewitness testimony, we hold that the district court erred in denying Copeland's motion for summary judgment on qualified immunity grounds. . . . Here, after Bradley ignored Copeland's verbal commands and initial efforts to restrain him, Copeland deployed his taser. When the taser malfunctioned, he resorted to physical force—kicks, punches, and hammer strikes—to attempt to take down the suspect. Considering the totality of the circumstances including the size differential of the combatant and the duration of the altercation, which one eyewitness referred to as a 'fight to the death,' Copeland's conduct prior to the shooting was neither excessive nor unreasonable. . . .Here, undisputed evidence demonstrates that Copeland used deadly force to protect himself. By the time Copeland drew and fired his weapon, Bradley—who was physically larger and stronger than Copeland—had already disobeyed verbal orders, put Copeland in a headlock, wrestled Copeland to the ground, and repeatedly reached for Copeland's firearm. One eyewitness described the altercation as a 'fight to the death.' Under the totality of the

circumstances, a reasonable officer could have believed that his life was in danger. The heirs claim that they have proffered enough evidence to raise genuine issues of material fact and should survive summary judgment. Specifically, they claim that the testimonies of Copeland's firearm expert Greg Karim and crime scene reconstruction expert Janice Johnson call into question the accuracy of the reenactment photos. They also claim that the lack of DNA evidence on Copeland's radio wire challenges Copeland's story that Bradley attempted to choke him with the chord. But the heirs have failed to provide any evidence challenging the principle dispositive 'fact material to whether [Copeland] was justified in using deadly force': that Bradley repeatedly reached for the officer's firearm. . . This court has repeatedly found that it is objectively reasonable for an officer to use deadly force even if he merely *believes*—albeit reasonably—that the suspect is reaching for a weapon. . .Copeland, Brenda Miller, and Zachary Rife all stated that prior to the shooting, Bradley attempted to grab Copeland's pistol. Absent evidence to the contrary, the court is required to accept this testimony as true. . . The heirs have thus failed to satisfy their burden of establishing that Copeland's use of lethal force was unreasonable. . . . Because the heirs have failed to demonstrate a constitutional violation, we hold that they have failed to satisfy their burden of showing that Copeland is not entitled to qualified immunity.")

Bone v. Dunnaway, 657 F. App'x 258 (5th Cir. 2016) ("We have distinguished, for purposes of qualified immunity, cases in which officers face verbal resistance but no fleeing suspect, from those in which officers face some form of verbal or physical resistance *and* a fleeing suspect. In the former cases, we have denied qualified immunity at the summary judgment stage. [collecting cases] In the latter cases, we have affirmed grants of qualified immunity. [collecting cases] . . . .This distinction also drove the outcome for one plaintiff in *Tolan v. Cotton*, 573 F. App'x 330, 330 (5th Cir.) (no qualified immunity where officers shot suspect who was neither physically resisting officers nor attempting to flee), *on remand from* 134 S. Ct. 1861 (2014), . . . while resulting in a different outcome for his mother, *see Tolan v. Cotton*, 713 F.3d 299, 308 (5th Cir. 2013) (holding that officer's 'grabbing [the plaintiff's] arm and shoving her against the garage door' after she refused to comply with verbal commands to facilitate a search was not unconstitutional under clearly established law), *vacated on other grounds*, 134 S. Ct. 1861 (2014), *aff'd in relevant part*, 573 F. App'x 330, 331 (2014) ("It goes without saying that all other [than the son's] dismissals ... are not affected by [the Supreme Court's] holding."). . . . [I]f Bone's version of the events is true, there was no verbal command that she stop, no arrest, and no flight, and Jones's degree of force was clearly prohibited under our precedent. Given this factual dispute, which turns on the credibility of Jones and Bone, we cannot resolve the qualified immunity question as a matter of law. Accordingly, we conclude that Jones is not entitled to summary judgment on qualified immunity grounds.")

Salazar-Limon v. City of Houston, 826 F.3d 272, 278-79 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1277 (2017) ("Salazar contends that the district court erred because it resolved disputed issues of material fact in Officer Thompson's favor. Specifically, Salazar asserts that the district court erred by finding that: 1) the highway was dimly lit; 2) Officer Thompson adequately warned Salazar prior to the shooting; 3) Salazar turned sharply towards Thompson; and 4) Salazar reached for his

waistband, making threatening movements with his hands. Of the four issues, only one need be addressed—whether Salazar reached for his waistband before being shot. Unless Salazar has presented competent summary judgment evidence that he did not reach toward his waistband (for what Officer Thompson perceived to be a weapon), Officer Thompson's decision to shoot was not a use of unreasonable or excessive deadly force. . .Here, the record evidence shows that Officer Thompson testified that: 1) he saw Salazar reach for his waistband; 2) his view of Salazar's waistband was obscured (either by Salazar's low-hanging shirt, the angle at which Salazar turned, or some combination of the two); and 3) he perceived Salazar's movements to be consistent with those of an arrestee reaching for a concealed weapon. In the proceedings before the district court, however, Salazar did not deny reaching for his waistband. . . nor has he submitted any other controverting evidence in this regard. To the point, Salazar has not presented *any* competent summary judgment evidence to controvert or challenge Officer Thompson's testimony noted above. And, in the absence of such controverting evidence, we cannot assume that Salazar 'could or would prove the necessary facts' to survive summary judgment. . . Thus, based on our precedent and the undisputed facts, considering the totality of the circumstances—which include Salazar's resistance, intoxication, his disregard for Officer Thompson's orders, the threat he and the other three men in his truck posed while unrestrained, and Salazar's actions leading up to the shooting (including suddenly *reaching towards his waistband*)—it seems clear that it was not unreasonable for an officer in Officer Thompson's position to perceive Salazar's actions to be an *immediate* threat to his safety. . . And, it follows that it was not 'clearly excessive' or 'unreasonable' for Officer Thompson to use deadly force in the manner he did to protect himself in such circumstances. . . Accordingly, we agree with the district court that Salazar's constitutional rights were not violated; and, we hold that the district court did not err in granting Officer Thompson qualified immunity.")

Byrd v. City of Bossier, 624 F. App'x 899, 904 (5th Cir. 2015) ("While the photograph *tends* to discredit Byrd's testimony, it does not blatantly contradict it. Unquestionably, Byrd was not yet handcuffed at the time the photograph was taken. But although the photo shows the Officers using physical contact to restrain Byrd, the photo does not necessarily depict the Officers 'striking' Byrd in the manner that caused his injuries. A jury could conclude that the Officers were not yet using force when the photo was taken: rather, Short held Byrd's forearm, without resistance, to put Byrd's hands behind his back. Or a jury could conclude that the photo supports Byrd's version of events because it was taken mere seconds before the Officers successfully cuffed Byrd. Following that, the Officers might have proceeded to dunk Byrd's head underwater and beat him in the manner he described. Finally, the photo does not necessarily show that Byrd resisted arrest, though that is one rational conclusion that could be drawn from it. A jury could conclude that Byrd—recently rescued from the water—was flailing or grasping for a branch. A jury may not find Byrd's narrative credible, but the photograph does not blatantly contradict it. Accordingly, the district court erred in refusing to consider Byrd's deposition testimony in its summary judgment analysis. *See Tolan v. Cotton,* —— U.S. ——, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014) (per curiam).")

Dawson v. Anderson Cnty., Tex., 769 F.3d 326, 327, 328 (5th Cir. 2014) (Haynes, J., joined by Dennis and Graves, JJ., dissenting from denial of reh'g en banc) ("The Supreme Court's recent decision in *Tolan v. Cotton* reminds us that, for summary judgment motions based on qualified immunity, the facts must be viewed in context and in the light most favorable to the nonmovant. . . After Dawson was arrested and brought to the jail, she was asked to 'squat and cough' while undressed in the presence of four armed jailers. The stated reason for the 'squat and cough' was that the jailers needed to determine whether Dawson had secreted contraband or weapons on her person. Dawson testified that she complied with the initial command to 'squat and cough.' Anderson County contends she did not comply at all. The jailers asked Dawson to 'squat and cough' again, allegedly stating that they would make her 'squat and cough' 'all night long.' Dawson refused. At some point, the jailers responded by shooting her with a pepperball gun to force compliance. As we must view the facts in the light most favorable to Dawson, we must assume she did comply with the initial command. Assuming Dawson complied, a jury could infer that the jailers were not concerned about safety at all but rather were issuing unreasonable orders for sport. . . In that light, it would be unreasonable for a jailer to take Dawson's refusal to comply for the jailer's amusement a second time (after already squatting and coughing), without more, as license to begin shooting pepperballs at her. No case law suggests this sort of procedure can be conducted for any reason other than to assure officers there is nothing hidden inside the cavity. As such, summary judgment was improper. I recognize, however, that the fact that a case is wrongly decided on the merits is not, by itself, a basis for en banc rehearing. . . This case presents larger questions that would benefit from en banc consideration. Where is the line between a legitimate security protocol and government oppression? What standard should apply when the alleged victim of police abuse has been arrested but is not yet processed for pretrial detainment? Both questions are worthy of this full court's attention. I therefore dissent from the court's decision not to rehear this case en banc. I agree that Supreme Court precedent makes a strip search with a 'squat and cough' arguably permissible for an initial search. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington,* 132 S.Ct. 1510 (2012). But does *Florence* mean an officer can make a naked, defenseless arrestee 'squat and cough' 'all night long?' Once an arrestee 'squats and coughs,' how many more times must she comply? Is an arrestee required to follow any order from a group of armed jailers, regardless of how ridiculous, or face a pepperball to force compliance? Where is the line? Dawson argues that since she complied once, and no officer indicated a problem with the first 'squat and cough,' requiring her to 'squat and cough' 'all night long' just to humiliate her is not a legitimate basis upon which to use force, such as a pepperball shot, to obtain compliance. I submit that we cannot and should not tolerate unnecessary harassment and humiliation of arrestees for the amusement of officers.")

Dawson v. Anderson County, Tex., 566 F. App'x 369, 370, 371 (5th Cir. 2014), *pet. for reh'g and reh'g en banc denied*, 769 F.3d 326 (5th Cir. 2014) ("Appellant first claims that the use of the pepperball gun constituted excessive force in violation of the Fourth Amendment. . . Contrary to her jailers, Dawson stated she initially complied with their directive to 'squat and cough' during the strip search. This initial compliance removed any need for the pepperball gun (which left small marks and broke the skin) and, she contended, its use therefore was excessive. The defendants

responded with a claim of qualified immunity. To overcome this defense, Dawson must show an injury caused by actions that were objectively unreasonable in light of clearly established law. . . 'The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.'. .We cannot conclude that all reasonable officers would believe that the use of force in this case violated the Fourth Amendment, because it is undisputed that Dawson did not comply with successive search commands given at her arrestee intake encounter. Even crediting her that she obeyed at first, Dawson admitted refusing a renewed command to 'squat and cough.' Law enforcement officers are within their rights to use objectively reasonable force to obtain compliance from prisoners. . . Measured force achieved compliance with the officers' search directives in this case, again, crediting, as we must, Dawson's contention that she complied at first but then refused a search order given twice believing it to be abusive. Measured force. . . used on an arrestee who refuses immediately successive search orders cannot be deemed objectively unreasonable under our qualified immunity caselaw. We next consider Dawson's argument that the search was conducted in an unreasonable manner. . . Dawson's assertion is that, in addition to using a pepperball gun, the defendants laughed at her and made abusive comments. We have held previously that verbal abuse by a jailer alone does not give rise to a § 1983 claim. . . We have already held that the use of the pepperball gun in this case was objectively reasonable, and we do not find that her assertions about laughter and taunts combine to overcome defendants' qualified immunity.")

Dawson v. Anderson County, Tex., 566 F. App'x 369, 371-74, 376-79 (5th Cir. 2014), *pet. for reh'g and reh'g en banc denied*, 769 F.3d 326 (5th Cir. 2014) (Dennis, J., dissenting) ("The majority concludes that Dawson has failed to present a genuine issue of material fact regarding whether the Defendants . . . violated clearly established Fourth Amendment law by repeatedly shooting at her with a pepperball gun during a strip search in which she was undressed, unarmed, and surrounded by multiple officers. The majority fails to view the evidence in the light most favorable to Dawson and disregards reasonable inferences that jurors could draw from the record to conclude that under clearly established law, the officers used excessive force and conducted a strip search in an unreasonable manner in violation of Dawson's Fourth Amendment rights. Accordingly, I respectfully dissent and would reverse and remand for trial. . . .Although a summary-judgment motion premised upon qualified immunity shifts the burden to the plaintiff, this burden shift does not alter the requirement that a court view all evidence and make all reasonable inferences in the light most favorable to the plaintiff. . . The majority fails to view the evidence in the light most favorable to Dawson, as it must at this procedural posture. Employing similar reasoning as the district court, the majority affirms the summary-judgment order as to Dawson's excessive-force claim, . . . concluding that not all reasonable officers would have known that the use of the pepperball gun here violated the Fourth Amendment because it is 'undisputed that Dawson did not comply with successive search commands given at her arrestee intake encounter.'. . .When the evidence is viewed in the light most favorable to Dawson, the record establishes that she was initially compliant, was not yelling or arguing with the officers, and that after telling officers that she would not comply with a harassing request to squat and cough all

night, she was met with near-immediate use of force, while she was undressed, unarmed, and did not pose any threat to the officers' safety. The majority improperly credits the Defendants' version of events when it concludes that Dawson's conduct was undisputedly non-compliant and thus reasonably warranted 'measured force' to 'achieve [ ] compliance with the officers search directives.'. . By describing Dawson's alleged non-compliance as 'undisputed' and characterizing the officers response as 'measured'—disregarding testimony that creates an inference that the officers' immediately resorted to force without sufficient negotiation—the majority, like the district court, fails to view the record evidence in the light most favorable to Dawson. Accordingly, I respectfully dissent and would reverse the grant of summary judgment on this issue. . . .Without applying the *Graham* factors, the majority summarily concludes that because Dawson was non-compliant, the officers' use of force was objectively reasonable to achieve compliance and thus the Defendants are entitled to qualified immunity. I disagree. Applying the *Graham* factors to the record evidence viewed in the light most favorable to Dawson, I would find that she presented sufficient evidence to create a genuine issue of material fact to dispute the Defendants' claims that the use of the pepperball gun was objectively reasonable under clearly established law. First, Dawson was in custody for two misdemeanor charges, neither of which involve accusations of violence. . . . Application of the second *Graham* factor—the individual's threat to officer safety—similarly supports a conclusion that Defendants' conduct was not objectively reasonable. Viewing the evidence in the light most favorable to Dawson, she was compliant with the officers' instruction to submit to a strip search, obediently agreed to squat and cough upon the officer's first instruction to do so, was unarmed, unclothed, stood within one to two feet of the dress-out room's wall, was surrounded by multiple armed officers, and did not attempt to strike an officer. On this record, viewing the evidence in her favor, Dawson did not pose a threat to the officers' safety. Lastly, the third *Graham* factor—whether the plaintiff actively resisted the officers—also supports a conclusion that the officer's use of force was objectively unreasonable. Crediting all reasonable inferences in Dawson's favor, she presented record evidence that she never resisted the officers' lawful directives. Rather, the evidence regarding her refusal to squat and cough after she initially complied with officers' orders may reasonably be construed as a verbalized denial to consent to an unlawful, abusive order and thus would not qualify as 'active resistance' and would not justify the officer's resort to force. . . On this record, viewing the evidence in Dawson's favor, a jury could reasonably conclude that the officers resorted to the use of force without threat to their safety, in violation of Dawson's clearly established Fourth Amendment rights, and that therefore, summary judgment for Defendants was improper. . . Under *Graham*, a reasonable officer would have sufficient notice that using a pepperball gun to repeatedly shoot a naked, possibly pregnant, compliant, non-threatening detainee who merely stated she would not comply with an abusive command, clearly constitutes excessive force in violation of the Fourth Amendment. Although Dawson was unable to point to case law forbidding this exact conduct, that alone is insufficient to warrant qualified immunity. . . .In addition to the excessive force-claim, . . . Dawson alleges that the strip search was conducted in an unreasonable, unconstitutional manner, in violation of the Fourth Amendment. . . . Dawson contends that the search was unreasonably conducted because she was verbally harassed, laughed at, and, despite her compliance with the officers' initial orders, shot repeatedly with a pepperball gun. The majority opinion reasons that the use of the pepperball

gun was not objectively unreasonable and an unreasonable search claim may not be established by allegations of mere verbal abuse alone, and affirms summary judgment on this claim. Because I disagree with the majority's finding that the use of the pepperball gun here was not unreasonable, I would consider the allegations of verbal harassment in the context in which it occurred and not in isolation from the officers' use of the pepperball gun. While mere verbal threats and gestures may not be cognizable under § 1983, the combination of taunting and harassing language with the use of excessive force would violate clearly established law as an unreasonable manner of conducting a search. . . . Dawson has presented summary-judgment evidence that during the strip search, despite her compliance and non-threatening behavior, she was surrounded by multiple officers, was verbally abused, was seen undressed by a male officer, and was shot at repeatedly with a pepperball gun. . . . Rather than viewing the totality of the circumstances as alleged by Dawson, the majority again improperly discredits and disregards evidence that gives rise to a genuine issue of material fact regarding the reasonableness of the search. I respectfully dissent from the majority opinion and would hold that the district court's summary-judgment order in favor of the Defendants should be reversed and the case remanded for further proceedings regarding Dawson's excessive-force and unreasonable-search claims.")

Ramirez v. Martinez, 716 F.3d 369, 379 (5th Cir. 2013) ("The district court properly determined that a reasonable officer would view Martinez's use of force under Ramirez's version of the facts to be clearly excessive and objectively unreasonable under the circumstances. Thus, a jury must determine the facts at trial. . . . Next, the district court did not misapply the law in holding Deputy Martinez's alleged excessive and unreasonable force under Ramirez's version of the events violated clearly established law. . . . Here, Ramirez alleged he posed no threat to the officers and yet was tased twice, including once after he was handcuffed and subdued while lying face down on the ground, in violation of clearly established law. Therefore, the district court did not err in denying Martinez qualified immunity on Ramirez's claim for excessive force. Ramirez's version of the facts, which the district court found supported by the summary judgment record, does not indicate the district court committed a 'purely legal' error, *Kinney*, 367 F.3d at 347, and we lack jurisdiction to review the district court's finding 'that a genuine issue of fact exists regarding whether [Martinez] did, in fact, engage in ... conduct [that was objectively unreasonable in light of clearly established law].'")

Ramirez v. Martinez, 716 F.3d 369, 380-83 (5th Cir. 2013) (Edith H. Jones, J., dissenting) ("With respect to my colleagues, I must dissent to the extent the majority opinion denies qualified immunity to Officer Ramirez for his alleged use of unconstitutionally excessive force against arrestee Martinez. Between this opinion and another recently issued in this court, *Newman v. Guedry,* 703 F.3d 757 (5th Cir.2012), we seem to have departed from the Supreme Court's clear and repeated statements regarding qualified immunity for law enforcement officers. In brief, the Supreme Court has held that given the perilous circumstances under which much law enforcement work is carried out and the inevitable need for split-second decisions, a plaintiff must overcome two levels of unreasonableness to get to the jury on a claim for a Fourth Amendment violation. . . The plaintiff must first create a genuine issue of material fact that the force used under the

circumstances was objectively unreasonable. . . He or she must additionally show a genuine, material fact issue that the law was so 'clear,' under reasonably analogous circumstances confronted by the officer, that 'no reasonable officer' would have used that quantum of force. . . The standard thus shields all but the plainly incompetent officers or those who knowingly violate the law. . .The standard also explicitly operates to 'protect officers from the sometimes "hazy border between excessive and acceptable force."'. . What this court's recent decisions seem to suggest, however, is that officers can be liable even if they are well within that hazy border. . . . Fortunately, the majority does not treat this case as an indictment of the use of tasers, but rather an incident that must be considered in totality through the lens of Ramirez's self-serving testimony. . . But as I have noted, *Saucier* found qualified immunity appropriate even though there was a factual dispute concerning the suspect's degree of resistance. The totality of circumstances in *Saucier* furnishes strong support for granting qualified immunity as a matter of law here. First, there was reasonable cause to believe Ramirez violated Texas law. Second, Ramirez admits he resisted handcuffing and pulled his arm away, and thus actively resisted arrest. Third, *Saucier* reiterates that the right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof.'. . Fourth, as in *Saucier,* the degree of force used here could not have been extreme; the majority opinion refers only to Ramirez's claims of cuts and bruises, taser burn marks, and temporary pain. Finally, the entire confrontation lasted about a half minute and included scuffling after Ramirez was on the ground. Officer Martinez had to react instinctively to a 'tense, uncertain and rapidly evolving' situation. . . Balancing all these circumstances, a jury could not find that no reasonable officer would have tased Ramirez two times. Even if Officer Martinez made a mistake on the second tasing, *Saucier,* echoing the line of consistent Supreme Court precedent, should shield his reasonable but mistaken conduct from suit as well as liability. . . Although I deplore official misconduct as much as does the majority, the bars to holding law enforcement officers personally liable for damages are necessarily and properly high. Taking this case to a jury, in my view, significantly erodes the protection of qualified immunity. I respectfully dissent.")

Poole v. City of Shreveport, 691 F.3d 624, 633 (5th Cir. 2012) ('The dissent effectively turns the qualified immunity analysis on its head by trying to contort this inquiry into one that evaluates the subjective merits of an officer's actions. The doctrine of qualified immunity, however, 'shield[s] [officers] from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'. . Where a plaintiff resists as Poole did, and officers react with force that corresponds to the resistance, as both Stalnaker and Creighton did, it cannot be said that the officers' force is objectively excessive or clearly unreasonable; the Supreme Court therefore requires qualified immunity. . . Irrespective of the dissent's subjective evaluation of this excessive force case which indisputably resulted in a serious injury, summary judgment does not require us to accept absurd factual allegations that are contradicted by videotape evidence. . . Instead, it demands that we ask, ultimately, whether Poole has shown that Stalnaker's and Creighton's actions were objectively excessive and clearly unreasonable in light of Fourth Amendment law. . . Neither Poole nor the dissent persuade us that he has.")

Poole v. City of Shreveport, 691 F.3d 624, 635, 636, 644 (5th Cir. 2012) (Elrod, J. concurring in part and dissenting in part) ("The majority opinion's disagreement about the videotape evidence only underscores why this case should go to a jury. Nowhere does the majority opinion indicate that Creighton would be entitled to qualified immunity under my understanding of the facts. Thus, at bottom, ours is a factual dispute, not a legal one, and thus a jury should resolve it. . . . It is true that we must 'view[ ] the facts in the light depicted by the videotape.' . . That does not mean, however, that we may usurp the jury's province to resolve factual disputes. . . . In summary, viewing the facts in the light most favorable to Poole, Poole has demonstrated that Creighton's use of force violated his constitutional rights. Specifically, after Poole was pulled over for a minor traffic violation, put up no active resistance, and gave no indication that he intended to flee, . . . Creighton used clearly excessive and unreasonable force that undisputedly broke Poole's arm and dislocated his elbow. . . . Having demonstrated that Poole has satisfied prong one of the qualified immunity analysis under *Graham* and this circuit's case law, I turn briefly to prong two. The majority opinion does not decide prong two of the qualified immunity analysis because it concludes that Poole cannot show a constitutional violation, but it notes that the parties do not dispute that the right at issue was clearly established at the time of the alleged misconduct. . . Poole has satisfied prong two because he has shown that 'at the time of the challenged conduct, [December 19, 2006,] "the contours of [the] right [were] sufficiently clear" that every "reasonable official would have understood that what he [was] doing violate[d] that right."'. . Several pre–2006 cases from our circuit put Creighton on notice that the actions Poole has alleged would have violated Poole's rights.")

Brown v. Sudduth, 675 F.3d 472, 482 (5th Cir. 2012) ("Brown's contention that the district court erred in presenting the issue of qualified immunity to the jury is meritless. A jury may be given the issue of qualified immunity if that defense was not resolved on summary judgment. *Melear v. Spears*, 862 F.2d 1177, 1184 (5th Cir.1989).")

Porter v. Epps, No. 09-60324, 2011 WL 4471051, at *1-*6 (5th Cir. Sept. 28, 2011) (In an appeal after a jury verdict for the plaintiff, where jury was instructed on qualified immunity and district judge denied motion for a jmol made by Commissioner of Mississippi Department of Corrections, the Court of Appeals reversed, noting "[t]he issue is whether Epps's actions, in light of his duty to ensure Porter's timely release from prison, were objectively unreasonable. . . Porter's § 1983 claim is predicated on Epps's conduct in (1) failing to promulgate adequate policies in the records department; (2) failing to train and supervise the employees in the records department; and (3) denying Porter's third-step appeal. . . .[W]e must consider whether Epps's actions were objectively unreasonable in light of the clearly established law that a prison official must ensure an inmate's timely release from prison and that such an official may be liable for failure to promulgate policy or failure to train/supervise if he acted with deliberate indifference to constitutional rights. . . . [R]eview of the record reveals that there was insufficient evidence to support a jury finding that Epps's failure to promulgate policy was objectively unreasonable in light of clearly established law. The evidence did not show that a reasonable person would have had actual or constructive

notice that MDOC's policies with regard to the records department would result in instances of false imprisonment. . . . In sum, no reasonable juror could determine that it was 'obvious that the likely consequence[ ]' of not adopting more specific policies in the records department would be a deprivation of civil rights. While it is unfortunate that the records department erred in interpreting the sentencing order for Porter, this error does not support a finding that Epps's policies involving the records department were objectively unreasonable. Accordingly, Epps is entitled to qualified immunity in this regard. . . . There is insufficient evidence to support a finding that Epps's training or supervision of the employees in the records department was objectively unreasonable. . . . [T]he fact that an employee erred in one instance does not provide sufficient evidence to show that Epps's alleged actions in failing to train were objectively unreasonable. Accordingly, Epps is entitled to qualified immunity on this issue.")

Meadours v. Ermel, 409 F. App'x 784, 2011WL 334679, at *1-*3 (5th Cir. Feb. 3, 2011) ("This appeal raises a single issue: whether the jury instructions communicated, as they must, that qualified immunity is available only when police officers' actions are objectively reasonable. The parents of decedent Robert Meadours sued under § 1983 for his shooting death by police who were attempting to subdue him during a delusional outburst. In an earlier appeal, this court held that material factual issues surrounding the reasonableness of the officers' actions existed, which deprived this court of appellate jurisdiction. . . On remand, at the trial's conclusion, the district court read a jury charge based on the Fifth Circuit's pattern instructions. The jury returned a verdict in favor of the officers and answered the following interrogatory in the negative: 'Do you find by a preponderance of the evidence that the Defendant's use of force was clearly excessive to the need and was objectively unreasonable?' Meadours's parents appeal. . . . In the present case, the district court read an extended jury charge related to the officers' assertion of qualified immunity. The bulk of this instruction quotes the Fifth Circuit Pattern Jury Charge. Appellants take issue with the last paragraph:

> [If you find] either (1) that the Defendants were plainly incompetent or that (2) they knowingly violated the law regarding Robert Meadours's constitutional rights, you must find for the Plaintiffs. If, however, you find that the Defendants had a reasonable belief that their actions did not violate the constitutional rights of Robert Meadours, then you cannot find them liable even if Robert Meadours's rights were in fact violated as a result of the Defendants' objectively reasonable actions.

They contend that the district court could not express the words 'knowing violation' or ask whether 'the Defendants had a reasonable belief' without transforming the objective test for immunity into a subjective one. We disagree. Appellants argument divorces the contested language not only from the surrounding instructions, but also from the body of Supreme Court precedent defining qualified immunity. . . . First, assuming *arguendo* that the challenged language was potentially misleading, the other instructions dispelled any ambiguity. Considering the instructions as a whole, their repeated emphasis on 'objectively reasonable' conduct as assessed by 'a reasonable officer on the scene' leaves no room for a juror to apply a subjective test. Five instructions endorsing objectivity trump two that are at worst unclear. Second, the language with which Appellants take issue is

rooted in Supreme Court precedent. The Court in *Malley* stated that qualified immunity is unavailable for 'the plainly incompetent or those who knowingly violate the law.'. .[A]s a substantive matter, this instruction favors plaintiffs. It allows the jury to reject qualified immunity on the basis of a particular defendant's knowledge, even where a reasonable officer would *not* have known that his actions violated the plaintiff's rights. Appellants also contend that the district court erred in stating that if 'Defendants had a reasonable belief' about the constitutionality of their actions, 'then you cannot find them liable even if Robert Meadours's rights were in fact violated as a result of the Defendants' objectively reasonable actions.'. . . Instructing the jury to evaluate the defendant's views does not affect the requirement of objective reasonableness. As an added precaution, the instruction repeats the objective standard at the end. If any doubt exists in a reasonable juror's mind about the 'belief' at the beginning of the sentence, it could not survive the clarification at the sentence's conclusion: 'objectively reasonable actions.'. . . Evaluated either in the context of the other instructions or in isolation, the challenged language in the jury charge is a correct statement of the law. It did not relieve the officers who shot Meadours from demonstrating that their actions were objectively reasonable.")

Goodman v. Harris County, 571 F.3d 388, 400, 401 (5th Cir. 2009) ("Ashabranner seeks a new trial because the district court refused to submit his proposed interrogatory to the jury. The interrogatory he proposed, Ashabranner argues, set forth the second prong of qualified immunity–whether no reasonable officer could have believed that the use of deadly force against Michael was lawful. While admitting that the district court instructed the jury on qualified immunity, Ashabranner argues that, by failing to set forth a specific interrogatory on the second prong of qualified immunity, the district court committed an abuse of discretion. . . .As previously noted, the defense of qualified immunity is a two-step inquiry: the allegation that a 'clearly established constitutional right' was violated and the determination that 'the official's conduct was *objectively* reasonable under clearly established law existing *at the time of the incident.*'. . . The jury was asked: 'Do you find by a preponderance of the evidence that Defendant Deputy Constable Terry Ashabranner's use of force was clearly excessive to the need and was objectively unreasonable.' The jury answered 'Yes.' Ashabranner sought the following interrogatory: 'Do you find, from a preponderance of the evidence that no reasonable officer possessing knowledge of clearly established law and the information known by Deputy Ashabranner on April 14, 2002, could have believed that his use of force against Michael Goodman on April 14, 2002 was lawful?' A plain reading of the jury instruction belies Ashabranner's assertion of error. The instruction asks whether the use of force was objectively unreasonable, the very requirement set forth in step two of the qualified immunity analysis–the step Ashabranner now argues that the district court ignored. Furthermore, as Ashabranner admits, the district court instructed the jury on the defense of qualified immunity. Thus, when taken as a whole, it cannot be said that the district court failed to properly set the ultimate issues of fact before the jury. The district court therefore did not abuse its discretion.").

Lytle v. Bexar County, Tex., 560 F.3d 404, 409-15, 417, 418 (5th Cir. 2009) ("Although *Saucier*'s rigid 'order of battle'–requiring courts to always address the constitutional issue of whether alleged

conduct violated the constitution–is now advisory under *Pearson*, our ultimate conclusion that O'Donnell is not entitled to qualified immunity mandates a full *Saucier* inquiry. . . . [T]he reasonableness of an officer's conduct under the Fourth Amendment is often a question that requires the input of a jury. This is not only because the jury must resolve disputed fact issues but also because the use of juries in such cases strengthens our understanding of Fourth Amendment reasonableness. . . . Our standard of review on this interlocutory appeal–namely, whether a reasonable jury could enter a verdict for the non-moving party–emphasizes the importance of juries in cases of alleged excessive force. Indeed, we can find no constitutional violation when an officer's conduct, even viewed in the light most favorable to the plaintiff, falls into that category of conduct that is reasonable as a matter of law. In such cases, we would hold that no rational jury could find that the officer acted unreasonably. But in those cases where the officer's conduct is less clear and an assessment of reasonableness mandates a number of factual inferences, the case falls within the province of a jury. Thus, when determining whether the officer's alleged conduct violated the constitutional right to be free from unreasonable seizures, we must remain mindful of the role that the jury can play in this determination. This approach comports with the Supreme Court's decision in *Scott*. . . . [W]hen facts are disputed and significant factual gaps remain that require the court to draw several plaintiff-favorable inferences, ... we must consider what a factfinder could reasonably conclude in filling these gaps and then assume the conclusion most favorable to the plaintiff. What this means for the present interlocutory appeal is that we can only find no constitutional violation if, even under the version of the facts most favorable to Lytle, O'Donnell's conduct was objectively reasonable. In such a case, no rational jury could conclude that O'Donnell violated the Fourth Amendment, and any genuinely disputed fact issues would be thus immaterial because their resolution would not alter the ultimate conclusion. But if a factfinder *could* conclude that O'Donnell violated the constitution, we must move on to the qualified immunity question. . . . [B]ecause we must look at all of the facts and circumstances relevant to the reasonableness of O'Donnell's conduct, he is mistaken to focus entirely on the threat of harm. Even were we to agree with O'Donnell as to the threat the Taurus posed, we would be remiss not to consider O'Donnell's conduct in response to that threat. It is unclear how firing at the back of a fleeing vehicle some distance away was a reasonable method of addressing the threat. Indeed, there is some evidence in the record that O'Donnell had been previously informed of the potential danger and futility of shooting at a vehicle. Were a jury to accept Lytle's version of the facts, it might very well be troubled by O'Donnell's act of firing his sidearm at the back of a vehicle three or four houses down the block of a residential area when he was unlikely to have a shot at–and apparently was not aiming for–the driver. A jury might also find that O'Donnell's act of firing at a vehicle driving away from him in a residential area posed a risk that the shots might strike an unintended target. Thus, even if we assumed that the Taurus posed a significant threat of harm, a jury could conclude that O'Donnell's conduct in response to that threat was unreasonable. In other words, under the plaintiff's version of the facts, O'Donnell's conduct itself weighs against a conclusion of reasonableness. . . . Although it stated that '[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death,'. . . the Court's decision in *Scott* did not declare open season on suspects fleeing in motor vehicles. . . .

Nearly any suspect fleeing in a motor vehicle poses some threat of harm to the public. As the cases addressing this all-too-common scenario evince, the real inquiry is whether the fleeing suspect posed such a threat that the use of deadly force was justifiable. . . .When we consider the totality of the circumstances, we conclude that O'Donnell's conduct may not have been objectively reasonable. A rational jury could conclude that the Taurus did not pose an especially significant threat of harm such that the use of deadly force was justified. Further, when weighing the threat of harm posed by the Taurus against O'Donnell's chosen course of conduct–firing at the back of the vehicle from some distance–the jury could conclude that O'Donnell's conduct was not a reasonable response to any threat. We emphasize this last point: the facts in this interlocutory appeal merely indicate that O'Donnell's conduct is not beyond question. We are holding only that a jury considering all relevant circumstances–O'Donnell's conduct, the threat of harm to O'Donnell and the public, etc.–could determine that O'Donnell acted unreasonably. The meager record at this point of the proceedings has mandated a number of inferences, and the factual assumptions on which we have decided this appeal might bear little resemblance to what the factfinder ultimately determines. But it is the job of the factfinder, not this court, to ultimately resolve the factual disputes and make the inferences that fill the gaps in the facts. . . . We therefore conclude that a jury could determine that O'Donnell acted unreasonably in firing at the back of the Taurus and thus violated Heather Lytle's constitutional rights. This is sufficient to affirmatively answer the constitutional violation question of our inquiry. We thus turn to the question of whether those rights were clearly established at the time of the incident. . . . It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others. . . .This holds as both a general matter, *see Garner*, 471 U.S. at 11-12, and in the more specific context of shooting a suspect fleeing in a motor vehicle, *see, e.g., Kirby*, 530 F.3d at 484; *Vaughan*, 343 F.3d at 1332-33. The right in question was therefore clearly established on February 28, 2006, and this is sufficient to affirmatively answer the qualified immunity question of our inquiry.")

Lytle v. Bexar County, Tex., 560 F.3d 404, 418, 419 (5th Cir. 2009) (Smith, J., dissenting) ("I respectfully dissent. The majority errs, primarily in light of *Scott v. Harris*. . . The situation faced by the officers in *Scott* and the instant case are not different in any way that should make a difference. *Scott* is the clearly-established law that governs here for purposes of the qualified immunity analysis. . . . For purposes of summary judgment, we cannot credit O'Donnell's disputed claim that the Taurus was backing toward him. The other facts, however, are not contested, and they closely mirror the considerations addressed in *Scott*, in which the Court asked whether, consistent with the *Fourth Amendment*, [an officer can] attempt to stop a fleeing motorist from continuing his public-endangering flight. . . . The same result [reached in *Scott*] is called for here. It makes no difference if the dangerous suspect was three or four houses away instead of backing toward the officer. The obvious risk to the public was the same, as was the need for the officer to take action. The blame for the passenger's death falls squarely on the suspect, not the officer, who had no intention of hitting an innocent occupant of the Taurus with his shot. Officer O'Donnell did not violate the Fourth Amendment.")

Mesa v. Prejean, 543 F.3d 264, 269 (5th Cir. 2008) ("The issue of qualified immunity is a question of law, but in certain circumstances where 'there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.' *Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir.1993).").

Sikes v. Gayton, 218 F.3d 491, 493, 494 (5th Cir. 2000) ("It is clear . . .that regardless of whether the trial court submits the issues of liability and qualified immunity in one or two interrogatories, the central focus is on whether the trial court correctly and clearly instructed the jury. In making this determination, jury interrogatories are considered 'in conjunction with the general [jury] charge' to determine if 'the interrogatories adequately presented the contested issues to the jury. . . . In the case at bar, the court was very clear in instructing the jury on the defense of qualified immunity' . . . . Thus, the question we must address is whether the court abused its discretion in deciding to combine the issues of liability and qualified immunity into a single interrogatory. . . . The court gave the following interrogatory:

> Considering all of the instruction in the jury charge, do you find that Plaintiff Robert D. Sikes proved by a preponderance of the evidence that on August 22, 1995, Defendant Juan F. Gaytan violated Plaintiff's Eighth Amendment constitutional right to be free from cruel and unusual punishment.

In denying the defendant's request for a separate jury interrogatory on qualified immunity, the trial court concluded that giving separate interrogatories created the possibility of confusing the jury, resulting in the return of 'irreconcilable' answers. It is plausible that a jury could be confused by an interrogatory asking whether the force Gaytan used against Sikes amounted to cruel and unusual punishment, and then being asked in an immediately following interrogatory whether the conduct of Gaytan was reasonable. Indeed, finding that the force used against Sikes was cruel and unusual would ordinarily seem to preclude the possibility of a finding that actions of Gaytan were reasonable. Still, we are constrained also to say that a plausible argument can be made that a separate interrogatory on qualified immunity, supported by a clear jury instruction, arguably could clarify rather than confuse the issue before the jury. In the light of this equipoise, we must conclude that the district court did not abuse its discretion in this case by giving a single jury instruction on the issues of liability and qualified immunity.").

Sikes v. Gayton, 218 F.3d 491, 494, 495 (5th Cir. 2000) (Garza, Reynaldo, J., dissenting) ("[S]everal failures to direct the jury's attention to the qualified immunity issue trouble me in this case. First, the jury instructions did not even use the term 'qualified immunity.' Second, the jury instructions merely used qualified immunity-type language as part of a single paragraph on liability. Third, there was no separate special interrogatory which told the jury to consider qualified immunity. Fourth, and perhaps most troubling, even if we give the instructions the benefit of the doubt, we will find that the jury charge and the interrogatories are inconsistent. Let us say we assume that the jury charge provided to the jury instructions on both excessive force and qualified

immunity but an interrogatory only as to excessive force. The jury could well have understood the difference between the substantive claim of excessive force and defense of qualified immunity, but then could have been confused as to the odd disappearance of qualified immunity in the interrogatories. In other words, assuming that the jury instructions explain that liability in this case had two prongs, i.e. that Sike's Eighth Amendment rights were violated and that the officer's behavior was unreasonable, the interrogatory contradicted the instructions when it told the jurors that they only need find that Sike's Eight Amendment rights were violated in order to find Gaytan liable. . . . Given the facts of this case, we should require that qualified immunity be discussed in a separate special interrogatory. At a minimum, we should require that the jury instructions and interrogatories do not actively mislead the jury into believing that the qualified immunity issue has dropped out of consideration.").

McCoy v. Hernandez, 203 F.3d 371, 376 (5th Cir. 2000) ("McCoy argues that the district court erred when it submitted the question of whether the officers were entitled to qualified immunity to the jury. McCoy contends that only the court may decide the qualified immunity issue. However, we have previously held that while qualified immunity ordinarily should be decided by the court long before trial, if the issue is not decided until trial the defense goes to the jury which must then determine the objective legal reasonableness of the officers' conduct.").

Snyder v. Trepagnier, 142 F.3d 791, 799, 800 (5th Cir. 1998) ("Snyder argues that the district court erred in submitting the question of Trepagnier's qualified immunity to the jury. We disagree. While qualified immunity 'ordinarily should be decided by the court long before trial,'. . . if the issue is not decided until trial, the defense is not waived but goes to the jury, which 'must determine the objective legal reasonableness of [the] officer's conduct by construing the facts in dispute.' [citing *Melear* and *Presley*] Here, important factual questions remained for trial. Specifically, the jury needed to determine what sequence of events occurred, and, in particular, whether Snyder had a gun-or, if he did not actually have a gun, whether Trepagnier reasonably believed he did. Accordingly, there is no doubt that the district court properly decided to submit the issue of qualified immunity to the jury."), *cert. dism'd*, 119 S. Ct. 1493 (1999).

Hare v. City of Corinth, 135 F.3d 320, 327-29 (5th Cir. 1998) ("On this appeal, objective reasonableness has been confused with the separate subjective standard of deliberate indifference. . . . [I]n addressing qualified immunity, the test is objective reasonableness. And, again, objective reasonableness is a question of law for the court. . . . the subjective deliberate indifference standard serves only to demonstrate the clearly established law in effect at the time of the incident . . . . And, under that standard. . . the actions of the individual defendants are examined to determine whether, as a matter of law, they were objectively unreasonable. . . . It is important to underline our narrow holding: we do not address arguments concerning the material fact issues designated by the district court. Instead, we hold that the undisputed facts, viewed in the light most favorable to the nonmovant, do not constitute objectively unreasonable conduct when applied against the deliberate indifference standard.").

Pierce v. Smith, 117 F.3d 866, 871 (5th Cir. 1997) ("The issue of whether and when a right is clearly established is typically treated as a question of law. . . Likewise, to the extent that the relevant discrete, historic facts are undisputed, as they essentially are here, the question of the objective reasonableness of the defendant's conduct–i.e., whether at the time and under the circumstances all reasonable officials would have realized the particular challenged conduct violated the constitutional provision sued on–is also a question of law.").

Palmer v. Lares, 42 F.3d 975, 978-79 (5th Cir. 1995) ("In examining the jury instructions this Court has become aware of an error in the charge of which Appellant did not complain. Appellant argued that the lower court merely used the wrong standard of harm in instructing the jury. As discussed above the lower court did not err in this respect; however, the lower court improperly incorporated the inquiry of qualified immunity in its jury charge. . . . The magistrate judge failed to instruct the jury on the first prong of the [qualified immunity] inquiry. The magistrate judge should have first instructed the jury to determine whether Appellant had established a violation of his Eighth Amendment rights to be secure from excessive force. After this instruction, the court should have instructed the jury as to the law in effect at the time of the incident. The court omitted the first prong and instructed the jury to evaluate the reasonableness of the defendants' conduct under the law in effect at the time of the incident.").

Gibson v. Rich, 44 F.3d 274, 277 n.7 (5th Cir. 1995) ("The district court erred in believing that there were disputed facts which prevented the qualified immunity summary judgment from being granted. The district court held that Gibson's allegation that he was not drunk put the issue of intoxication in dispute. However, the district court errs in dwelling on the issue of whether or not Gibson actually was drunk instead of on the issue of whether Rich was reasonable in believing Gibson was intoxicated. Despite Gibson's allegation otherwise, all facts in evidence indicate that Rich was justified in believing that Gibson was intoxicated.").

Harper v. Harris County, 21 F.3d 597, 601 (5th Cir. 1994) ("[T]he evidence reveals that a genuine issue of material fact remains regarding the use of excessive force and the objective reasonableness of using such force, so [Defendant] is not entitled to summary judgment. Of course, [Defendant] still may assert qualified immunity at trial.").

Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993) ("It must be recognized that even though *Bryant* diminished the jury's role in qualified immunity cases, it did not entirely abolish it . . . . Rule 56 still has vitality in qualified immunity cases if the underlying historical facts . . . that are material to the resolution of the [question] whether the defendants acted in an objectively reasonable manner in view of the existing law and facts available to them [are in dispute.] . . . . Because the record as it presently stands appears to suggest disputed issues of material fact relevant to the officers' qualified immunity defense, the defense cannot prevail as a matter of law, and this court is without jurisdiction to consider their interlocutory appeal.").

Presley v. City of Benbrook, 4 F.3d 405, 410 (5th Cir. 1993) ("Immunity's shield against suit is lost, of course, when police officer defendants go to trial. At that point, if–and this is a big if– there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.").

Enlow v. Tishomingo County, 962 F.2d 501, 510 (5th Cir. 1992) (where facts relied on to establish probable cause for arrest were in dispute, qualified immunity from Fourth Amendment claim remains a fact-disputed issue.)

Fraire v. City of Arlington, 957 F.2d 1268, 1269-70 (5th Cir. 1992) ("Almost all excessive force cases are very fact intensive...[a]nd, although there are differing versions of some of the facts in this case, the discrepancies do not rise to the level of genuine issues of material fact.").

White v. Walker, 950 F.2d 972, 976 (5th Cir. 1991) ("The entitlement to qualified immunity may be established as a matter of law by the district court. But if there are triable issues of fact about whether an officer could reasonably believe his conduct legal, then a jury should evaluate the question.").

Matthews v. LeBlanc, No. CV 17-8800, 2018 WL 2198508, at *1–2 (E.D. La. May 14, 2018) ("Matthews contends that the issue of qualified immunity is a question of law for the Court to decide and that, as such, the issue cannot be presented to the jury. Matthews' counsel maintains that the defendants can 'cite to no law to support' the position that a jury may be instructed on qualified immunity. Further, she avers that she has been unable 'to find any case out of the Fifth Circuit in recent years wherein the Fifth Circuit found it appropriate for a trial court to direct the issue to a jury.'. .These statements are, quite simply, baffling, and possibly knowingly untrue. At the final pretrial conference on May 3, 2018, the Court directed Matthews' counsel to Fifth Circuit Civil Pattern Jury Instruction § 10.3, which—interestingly enough—provides an instruction for district court judges in the Fifth Circuit to use when instructing a jury on the issue of qualified immunity. Had Matthews' counsel taken the time to peruse the pattern instruction and the notes that follow, she would have discovered a citation to *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000), a case in which the Fifth Circuit explicitly disagreed with the very argument she now espouses. Further, had Matthews' counsel exercised even a bit more diligence by, for example, reading *McCoy* or conducting a modicum of legal research, she would have found additional cases like *Waganfeald v. Gusman*, 674 F.3d 475 (5th Cir. 2012), *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *Presley v. City of Benbrook*, 4 F.3d 405 (5th Cir. 1993), and *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989), all of which make perfectly clear that the issue of qualified immunity may be decided by a jury in certain circumstances. What makes Matthews' counsel's objection all the more egregious, however, is the fact that she did not even need to look past her own filing cabinet to find recent case law in which a federal judge flatly rejected the arguments she raises here. Matthews' counsel served as counsel for the plaintiff in *Hill v. Kilbourne*, No. 11-778, 2015 WL 1143074 (M.D. La. March 12, 2015) (deGravelles, J.). In that case, she filed a virtually identical objection and memorandum in support. The Court referred to

the pattern jury instruction on qualified immunity and cited *McCoy* and *Waganfeald* in overruling the objection. Nevertheless, Matthews' counsel bizarrely continues to insist that there is no legal authority to suggest that the issue of qualified immunity may be submitted to the jury in some cases. In support of her position, Matthews' counsel points the Court to *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010), in which the Fifth Circuit observed that '[w]hether an official's conduct was objectively reasonable is a question of law for the court, not a matter of fact for the jury.' This, Matthews' counsel argues, is the end of the matter: qualified immunity simply cannot be decided by the jury. *Brown*, however, cannot be read in a vacuum. Despite the seeming clarity of its language, *Brown* can easily be reconciled with cases like *Melear*, *Presley*, *Snyder*, *McCoy*, and *Waganfeald*, all of which openly anticipate that qualified immunity may sometimes be appropriately submitted to the jury and none of which *Brown* purported to overrule. . .In stating that objective reasonableness in the qualified immunity context is a question of law to be kept from the jury, the *Brown* court relied on *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999), which in turn relied on *Mangieri v. Clifton*, 29 F.3d 1012 (5th Cir. 1994). In *Mangieri*, the panel differentiated between those cases in which the facts are well-established and those in which there are 'underlying historical facts in dispute that are material to the resolution of the question[ ] whether the defendants acted in an objectively reasonable manner.'. . With respect to the former, 'the district court is to make a determination of the objective reasonableness of [an] official's act as a matter or law.'. . With respect to the latter, the district court may find itself 'unable to make the determination of the objective reasonableness of the officer's activities "without settling on a coherent view of what happened in the first place,"' in which case qualified immunity may be addressed by the jury. . . Taken together, this family of cases stands for a rather straightforward proposition. When 'there is general agreement as to the factual events that gave rise to [the] lawsuit,'. . . the issue of qualified immunity should be decided as a matter of law by the court via pretrial motion at the earliest possible stage. When, however, the underlying facts of the case are in dispute and the issue has not been decided before trial, qualified immunity may be sent to the jury.")

SIXTH CIRCUIT

Osberry v. Slusher, No. 17-4242, 2018 WL 4360979, at *9-11 (6th Cir. Sept. 13, 2018) (not reported) ("[W]e make no factual findings here. Instead, 'when the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of a claim of immunity.'. . And at this early stage, we must accept Osberry's version of the arrest as true. Thus, Osberry was not actively resisting arrest when the Officers removed her from the vehicle and tased her. The Officers are not entitled to qualified immunity on the excessive force claim. . . To be sure, we are deciding only that the Officers are not entitled to qualified immunity on a motion under Rule 12. This is an important point. At the pleadings stage, we must decide whether the complaint states a plausible claim that the Officers violated Osberry's clearly established constitutional rights. . . Considering only the complaint, this is an easy case: the Officers violated Osberry's rights when they forcibly removed her from the vehicle (with no probable cause to do so), threw her against the vehicle, and applied a taser to her stomach

(even though she was not resisting arrest). But Osberry's complaint does not necessarily tell the full story. And if we consider the Officers' answer, this case potentially becomes more complicated because Osberry drove into the middle of 'an active crime scene that involved a barricaded subject who was potentially dangerous.'. . In other words, Osberry's clearly established rights—and the reasonableness of the Officers' conduct—may be tougher to determine if the Officers were actually dealing with an active crime scene and a dangerous, barricaded subject. At summary judgment, the Officers can establish these facts and will be free to raise the same argument.")

Harris v. Klare, 902 F.3d 630, 638, 641-43 (6th Cir. 2018) ("The parties agree that Klare was summoned to the scene after the initial stop and after the decision to summon the drug dog had been made by other officers, and Harris has presented no evidence that Klare actively participated in the investigation of the minivan. The question here, then, is whether a reasonable jury could infer that after arriving at the scene, Klare became aware that there was, at most, only a reasonable suspicion of drug activity and that she also became aware that the drug dog had failed to alert on the minivan prior to her search of Harris. Only if no reasonable jury could find that Klare knew both of these facts prior to the search is she protected by qualified immunity. Factual determinations of this sort are generally best left to the jury, and so it is here. Klare's uncontroverted deposition testimony was that when she arrived at the scene, she spoke with other officers about 'their investigation' and that, although she could not remember specifically what the officers told her, they had said that 'they had seen some things that they believed could be consistent with the possibility of a meth lab or some other drug activity.' Given that Klare was at least aware that the suspicion was based on having seen items in the minivan, and that she was in the vicinity of the minivan and the investigating officers, a reasonable jury could infer that she became aware of the basis of the suspicion, either by viewing the minivan herself or through discussion with the investigating officers. Nor can we say that a reasonable jury could not infer that Klare knew that the drug dog had failed to alert to the presence of contraband. Although the record contains no direct evidence regarding whether Klare observed the drug dog's inspection of the vehicle or was informed as to the results upon its conclusion, it does reveal that the relevant events all occurred within a small area and that Klare was within that area. The alerting of a drug dog to contraband, or the lack thereof, is an easily observable act in which Klare would have been quite interested, and a reasonable jury could infer that, standing nearby as she was, Klare observed the drug dog's activity. We conclude therefore that there is a sufficient factual basis on which a reasonable jury could find that Klare is unprotected by qualified immunity. Although the facts are disputed, Harris has sufficient proof from which a reasonable jury could find that at the time of the search, Klare did, in fact, know that the drug-dog's sniffing was completed, that the search of the minivan had failed to indicate the presence of any drugs, and that there was no other lawful basis to detain Harris. . . .When a minor, untutored in her Fourth Amendment rights, seized for over an hour and in the presence of numerous armed police officers, with her arms secured behind her back and facing the choice of consenting to a search or being kept from the restroom, fails to resist that officer's search of her person, a reasonable jury could find that this non-verbal consent was not voluntarily given. . . .That a reasonable jury could find that Harris's consent was involuntary does not entail, of course, that a reasonable jury could find that no reasonable officer in Klare's position

could be mistaken about that fact. . . .That the facts surrounding Klare's search of Harris do not precisely match those in *Beauchamp* does not prevent our holding that a reasonable jury could find that Klare is unprotected by qualified immunity. Police officers are sometimes 'forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving,' and we must adjudge those decisions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'. . But the situation in which Harris and Klare found themselves was neither tense, nor uncertain, nor rapidly evolving, and we ought not require a jury to be overly deferential to the decisions made by Klare that day. Because a reasonable jury could credit Harris's account of events, they could find that Klare unreasonably searched her without her voluntary consent and that Klare is not entitled to qualified immunity.")

McGee v. Knolton, 736 F. App'x 105, ___ (6th Cir. 2018) ("Knolton 'must be willing to concede the plaintiff's version of the facts.'. . We thus exercise our jurisdiction to hear Knolton's appeal accepting McGee's version of the facts. 'However, where the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.' [citing *Pouillon v. City of Owosso*] . . . .Knolton points to one undisputed fact that he argues entitles him to qualified immunity: the short time between his visual identification of McGee's vehicle and Stewart radioing 'shots fired.' Knolton argues that because he faced a 'tense and highly uncertain' situation and 'only had mere seconds to make a life or death decision,'. . . his conduct was reasonable as a matter of law. However, eyewitnesses testified that there was a pause of several seconds between Knolton's first two shots and his second set of three shots. Even assuming arguendo that Knolton's initial shot was reasonable, that does not mean his fifth shot was as well. . . Additionally, '[e]ven a split-second decision, if sufficiently wrong, may not be protected by qualified immunity.'. . We lack jurisdiction to resolve factual disputes. . . and must view the facts in the light most favorable to McGee: i.e., that the officers did not identify themselves as law enforcement; that McGee was at all times turning to the right, and away from Knolton, to exit the parking lot; and that McGee was driving slowly as Knolton walked twenty-three feet beside the vehicle and then shot McGee through the side window. If the jury believes Plaintiff's version of the facts, Knolton's conduct violated the Fourth Amendment. Therefore, the district court did not err in denying summary judgment.")

Knowlton v. Richland County, Ohio, 726 F. App'x 324, ___ (6th Cir. 2018) ("These facts put the Court in the unusual situation where the testimony of all three deputies involved in the deadly shooting contradicts the objective facts of that event. . . Because Brian Garber was unarmed and produced no 'pop,' the Court can only conclude that one of the deputies fired the first shot and that none of the deputies fired in response to any gunshot sound from Brian Garber. Thus, each of the deputies is either mistaken or lying about shooting in response to a gunshot sound from Brian Garber or otherwise. This is not a question of law for the Court, but a question of fact and credibility for a jury to decide. . . We agree. We lack jurisdiction to resolve factual disputes, . . . and we must view the facts in the light most favorable to Knowlton: i.e., that although the Officers did not perceive that deadly force was necessary, one of the Officers nevertheless shot Garber, and the other Officers fired in response to that Officer's shot. . . The record contains adequate

evidentiary support for Knowlton's theory, under which Garber's Fourth Amendment right to be free from excessive force was violated. . . . *Pollard* and *Simmonds* are both distinguishable. In both cases, the officers' belief that they faced immediate danger did not rest only on indications that Bynum and Simmonds were armed; the belief also rested on Bynum's and Simmonds' menacing gestures, which were reasonably interpreted as demonstrating an intention to shoot. In the absence of that indicium of immediate threat here, the Officers point to the 'pop' sound as the factor precipitating the shooting. However, because Garber did not have a gun, and investigators were unable to find a source or explanation for the 'pop' or 'bang,' whether the Officers actually heard the sound, and whether it was coming from Garber, as opposed to one of their fellow Officers or some other source, are disputed material facts that preclude summary judgment. . . .Given the Officers' testimony that the threat Garber posed was not imminent and did not justify using deadly force until the Officers heard the 'pop' sound, together with the evidence that one of the Officers fired at Garber without hearing any sound, the district court did not err in in denying summary judgment on the qualified immunity issue.")

Wesley v. Campbell, 864 F.3d 433, 441-42 (6th Cir. 2017) ("Rigney contends that the district court did not provide adequate instructions on the defense of qualified immunity. Specifically, Rigney proposed that the jury be instructed that '[i]f you find that Officer Rigney could have reasonably believed that probable cause existed based on the content of her warrant application, then you will find in her favor on the unlawful arrest claim.' She also proposed the following special verdict: 'Considering Instructions 6 and 7, do you find that Officer Rigney could have reasonably believed she had probable cause to apply for a warrant for Mr. Wesley's arrest?' The district court denied both proposed instructions. The district court did not abuse its discretion in denying Rigney's motion for a new trial based on the omission of this jury instruction, because qualified immunity is a question of law to be determined by the judge. *Pouillon v. City of Owosso*, 206 F.3d 711, 718 (6th Cir. 2000). 'Questions of fact may be relevant to this determination, but the ultimate question is one of law: if the finder of fact determines that the officers undertook certain actions, could any reasonable police officer have believed that those actions did not violate [the plaintiff's] constitutional rights?'. . . Further, Rigney's proposed instructions are inconsistent with the objective nature of the qualified immunity analysis.")

Jackson v. Washtenaw County, 678 F. App'x 302, 307-09 (6th Cir. 2017) ("Based on the evidence before us, a reasonable officer on the scene could have believed that Jackson was actively resisting and no longer suffering from the Taser-induced shock. Although we assume the truth of the non-moving party's evidence, as the district court below noted, Plaintiff submitted no 'other witnesses' statements to the contrary' and '[t]he expert reports ... do not go to whether Mr. Jackson was resisting at the time he was arrested.'. .The closest evidence that Plaintiff provides is her expert's report that states 'Mr. Jackson was struggling for his life, not against the deputies' and that a 'person being Tased thrashes around from pain and the inability to breath[e].' That report relies entirely on the police and hospital reports for its factual basis, and cannot create new evidence from the old. It can, of course, suggest the best reading of that evidence for Plaintiff that we may adopt when reviewing a motion for summary judgment, but conclusory statements are insufficient.

Jackson's initial physical reaction to the Taser was to lock up and become immobile. The deputies realized that this state was a result of the tasing and reacted sympathetically and helpfully. But when Jackson's status changed and he began to pull against their grip to bring his arms forward, the deputies believed that he had '[re]gained control of himself.' Then, minutes later, Jackson began to 'thrash[ ] around.' If Jackson was still, or once again, reacting to the shock of the first Taser, it would not have been 'objectively apparent to a reasonable observer.'. . The third tasing took place fifteen seconds later, after continued struggling on the floor. The record before us shows that the Taser was used contemporaneously with Jackson being rolled onto his stomach. Unfortunately, Jackson is not available to provide his account, which may or may not have differed from that in the police reports and the audio tape. We have found in other cases that the accounts of the plaintiff or a witness can sustain a case beyond summary judgment where a court might have been compelled to grant qualified immunity based solely on the facts given by the reporting officers. . . But based on the facts provided, even in the light most favorable to Plaintiff, we cannot say that the force used was unreasonable. . . . Shortly after this Taser use, Jackson moved his head toward Farmer's trapped arm and attempted to bite her. She punched Jackson in the jaw to prevent the bite. Farmer's actions were reasonable given there existed probable cause to believe that harm was imminently threatened. . . The fourth and final use of a Taser came just over a minute after the third tasing. By this time, the deputies had managed to secure one of Jackson's hands by handcuffing it to his belt. But Jackson continued to pull away from the deputies. Urban tased Jackson again before Farmer and Reich were able to handcuff Jackson's right arm to the other pair of handcuffs on his left arm. We have found that where resistance continues, repeated attempts to induce compliance are permissible. . . Thus, there is no genuine issue of material fact that the actions taken by Defendants were reasonable responses to the resistance (real or perceived) made by Jackson, we affirm the district court's grant of qualified immunity.")

Jackson v. Washtenaw County, 678 F. App'x 302, 309-13 (6th Cir. 2017) (Donald, J., dissenting) **(**"Accepting as true the facts presented by Plaintiff, as we must when faced with a motion for summary judgment, I believe that there remain material issues of fact as to whether Jackson actively resisted and whether the Defendants' actions were reasonable. I would reverse the district court's grant of summary judgment as to the excessive force claim, and remand the case for further proceedings. I respectfully dissent. . . .As the majority correctly notes, the Fourth Amendment clearly establishes the right to be free from excessive force. What is less clear is whether an individual, who becomes incapacitated by taser-induced effects and subdued, has a constitutional right to be free from subsequent tasings; and if so, whether that right was clearly established at the time of this incident. . . . I agree with the majority that the major question presented in this case is whether Jackson *actively* resisted arrest. Where we part ways is with the finding that the record conclusively shows that Defendants' continuous tasing of an already-incapacitated and pinned-down suspect was a reasonable response to the resistance they perceived. . . .[A] jury could conclude that Jackson's uncontrollable convulsions, as described by Defendants, caused him to only *passively* resist the officers after he was tased. This case does not appear to be the type of case that lends itself to a summary review of a police incident report to yield a one-sided conclusion as to whether a suspect actively resisted arrest. The fact that Jackson was suffering from taser-

induced effects at the moment he started resisting is telling as to his volitional capacity to resist, which, as Plaintiff argues, creates a question of fact for a jury. . . .As the majority notes, we do not have testimony from decedent Jackson describing, in his own words, which movements he could and could not control as we have had in previous cases. Regardless, considering the facts of the incident in the light most favorable to Plaintiff, both the expert report and the timing of Jackson's resistance are sufficient to suggest that Jackson may not have been actively resisting arrest. Therefore, I cannot agree that the interaction at issue follows the typical course of active resistance that would justify multiple tasings. . . . This Court's precedent denouncing the use of excessive force on subdued and involuntarily resisting individuals has dated back to at least 2002. . .Therefore, a reasonable officer would have known that repeatedly tasing someone who had already exhibited all the signs of being incapacitated and in distress would violate the right to be free from excessive force. Defendants could not have reasonably believed that their repeated tasings of Jackson, after recognizing Jackson's dire need for medical assistance and pinning him down, was not wrong. This is not a case where the evidence is so objectively compelling that no reasonable juror could believe Plaintiff. The Plaintiff has presented sufficient evidence for a jury to rationally determine that Defendants used excessive force against Jackson and should be denied qualified immunity. . . This case is not as clear-cut as the majority would make it seem. The record viewed in the light most favorable to the non-moving party, Jackson, demonstrates that a genuine issue of material fact exists as to the reasonableness of Defendants' decision to continuously tase Jackson. For this reason, I respectfully dissent.")

Pennington v. Terry, 644 F. App'x 533, 548-51 (6th Cir. 2016) (Karen Nelson Moore, J., dissenting) ("I would hold that there is a genuine dispute of material fact as to whether the use of force was excessive, that appellant has not waived his argument on appeal, and that neither officer is entitled to qualified immunity. . . .The majority's error is in treating the videotape as if it depicts *all* details clearly such that the majority can simply view the videotape, compare it to Pennington's version of the incident, and conclude that the videotape forecloses his claim. . . .What the majority has done is make its own factual determinations. And in making these determinations, the majority has overlooked the genuine disputes of material fact that the videotape creates. Because it is not clear whether the taser touched Pennington or whether he reacted to it, these questions deserve to go to a jury. It is not our place to decide them. Taking the evidence, blurry as it is, in the light most favorable to Pennington, the majority should have concluded that a reasonable jury could find that Harris's taser touched Pennington and that Pennington reacted with two cries. The videotape is far too unclear and Pennington's claim far too nuanced for the videotape to warrant summary judgment.")

Withers v. City of Cleveland, 640 F. App'x 416, 422 (6th Cir. 2016) ("In light of its holding that Zola committed no constitutional violation, the District Court did not reach the clearly established prong of the qualified immunity analysis, and the City of Cleveland made no arguments regarding this prong on appeal. Although we only decide the issue before us, we emphasize that the law was clearly established that an officer may not use deadly force against a suspect unless 'the officer has probable cause to believe the suspect poses a significant threat of death or serious physical

injury to the officer or others.'. . Because there are disputes of fact that relate directly to this issue, it appears that Zola cannot establish that he is entitled to qualified immunity based on the clearly established prong of the qualified immunity analysis. In *Tolan v. Cotton,* 134 S.Ct. at 1866, the Supreme Court explained that a court should not resolve disputes of fact in the qualified immunity analysis, just as our court observed in *Lopez v. City of Cleveland,* quoted in the introductory paragraphs of the opinion.")

Withers v. City of Cleveland, 640 F. App'x 416, 428 (6th Cir. 2016) (Griffin, J., dissenting) ("For all the majority's efforts at manufacturing disputed issues of fact, the record makes two things unalterably clear: (1) officers stopped instructing Withers to come out as they proceeded to search the basement, and (2) Zola acted quickly in response to a suspicious movement by a potentially armed fugitive. I would hold that under the totality of the circumstances, which include a suspected armed and dangerous felon lying in wait in a dark basement making a sudden and unexpected movement without announcing an intention to surrender, Zola acted reasonably in using deadly force. I would therefore affirm the district court's decision to grant Zola summary judgment on qualified immunity grounds.")

Ortiz ex rel. Ortiz v. Kazimer, 811 F.3d 848, 851-54 (6th Cir. 2016) ("On appeal, the officers concede (quite refreshingly) the relevant facts for immunity and summary-judgment purposes: that Kazimer 'slammed' or 'tackled' a 'surrendered' suspect, then 'pinned' him down while Crisan watched nearby. . . We consider each claim against each officer in turn. . . . This use of force was clearly established as excessive before 2010. The just-cited cases support the point, as do many others saying that the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law.'. . .These facts may have justified the use of *some* force against Juan. But they do not justify the *amount* of force allegedly used here. Kazimer's purported level of force—slamming Juan (rather than, say, grabbing him) and pressing Juan against the hot car for fifteen minutes (rather than, say, removing him from the scene)—rises to the level of clearly excessive for summary-judgment purposes. . . . Kazimer adds that much of what the eyewitnesses purported to see is unlikely. Could Kazimer *actually* have slammed a disabled boy half his size against an SUV? Could he *actually* have pressed him against the hot car for fifteen minutes, even after giving the 'ALL OK' signal to the police dispatcher? We have wondered the same thing. But the eyewitness accounts aren't 'blatantly contradicted by the record,' and that means we cannot disregard them on summary judgment. . . We thus follow the time-tested Civil Rule 56 standard, accept the eyewitness accounts, and affirm the denial of Kazimer's qualified immunity defense. . . .It is well to remember that the officers may not have done anything wrong. They may have diligently pursued an armed-robbery suspect, used a reasonable amount of force in a chaotic situation to detain him, and eased up seconds later once they found out he did not commit the robbery. That's exactly what their testimony suggests, and they will have the chance to give their version of events to a jury. But because we must accept the *plaintiffs'* evidence-supported story at this stage of the case, we agree with the district court that the officers do not deserve summary judgment on these claims.")

Lopez v. City of Cleveland, 625 F. App'x 742, 747 (6th Cir. 2015) ("'This Court has established that summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force.'" *Sova v. City of Mt. Pleasant,* 142 F.3d 898, 903 (6th Cir.1998). Thus, where the reasonableness of the officers' use of force depends on which version of the facts one accepts, 'the jury, not the judge, must determine liability.'. . In this case, there are contentious factual disputes about the nature of Lopez's movements just before the shooting. Those disputes go to the heart of whether it was reasonable for Defendant Officers to use deadly force. Because the reasonableness of their actions depends on which version of the facts one accepts, the question must go to the jury. Accordingly, we reverse the district court's grant of summary judgment to Defendant Officers on Plaintiff's Fourth Amendment claim.")

Newman v. Twp. of Hamburg, 773 F.3d 769, 772-73 (6th Cir. 2014) ("Newman responds that only a jury may make the probable cause determination. He is half right. If he presents sufficient evidence that would allow a reasonable jury to find that no probable cause existed for his arrest, he indeed may take his claim to a jury. But the point of Civil Rule 56 is to prevent claims from going to a jury when the court, after drawing all inferences in favor of the non movant (here Newman), determines that no reasonable jury could make such a finding. That is this case. Where the requisite material facts are not in dispute, as is true here, probable cause 'retains its legal character' and must be decided by the court. . . As shown, ample uncontradicted evidence supported Newman's arrest and prosecution for murder. In this instance, no reasonable jury examining all the evidence—the guns, the hair, the walkie-talkies, the drug connection—could find that the authorities lacked probable cause. Newman persists that the Sixth Circuit's habeas decision based on insufficiency of the evidence shows that probable cause did not exist. But this argument conflates two standards of proof—the modest requirement that probable cause exist to prosecute someone and the stringent requirement that proof beyond a reasonable doubt exist to find him guilty. . . The court granted Newman's petition because, without more evidence placing him at the scene of the crime, reasonable doubt remained. . . To be sure, the panel said the evidence amounted only to a 'reasonable speculation' Newman was present. . . But, contrary to Newman's reading, this was not a reference to the Fourth Amendment's 'reasonable suspicion' standard. Read in context, the panel was referring to reasonable doubt in the sense of whether the State had met its burden of establishing proof beyond a reasonable doubt of Newman's guilt—the only issue before it. In a malicious-prosecution action, however, reasonable doubt is not the question. . . 'Because there is no requirement that the defendant to a malicious-prosecution charge must have evidence that will ensure a conviction, not every failed criminal prosecution will sustain a subsequent malicious-prosecution suit.'. . That perfectly describes Newman's case. Our prior opinion held only that there was insufficient evidence to convict Newman beyond a reasonable doubt. It said nothing about probable cause.")

Cook v. Bastin, 590 F. App'x 523, 529 (6th Cir. 2014) ("The closest the police reports come to implying that Hatter was on top of Campbell is Wallace's statement that Hatter was 'on' Campbell's back. . . Dickey's ADC report uses similar language. . . The Estate assumes that being 'on' Campbell's back unequivocally means that Hatter was on top of Campbell. It could mean that,

but it could also mean that Hatter was off to Campbell's side with his arms wrapped around Campbell's waist and his body hovering above Campbell's back. Wallace's and Dickey's statements simply do not establish what the Estate wants them to establish. If all the record contained were statements about Hatter being 'on' Campbell, we might be inclined to find a genuine dispute. But these statements are not all we have to rely upon. The depositions make clear that while Hatter was 'on' Campbell, he was not lying on top of Campbell or pressing his weight into Campbell. Hatter testified that he was kneeling on the floor, holding Campbell by the waist. . . . Dickey's testimony also places Hatter near Campbell's waist and confirms that Hatter did not place his body weight on Campbell. . . Smith testified that Hatter was on his knees with his arms wrapped around Campbell and that Hatter was not on top of Campbell. . . Lastly, Wallace testified that Hatter was not on top of Campbell. . .In short, there is no evidence to suggest that the officers or Hatter were on top of Campbell, as the accounts consistently place them kneeling and squatting beside Campbell.")

Cook v. Bastin, 590 F. App'x 523, 532 (6th Cir. 2014) (White, J., dissenting) ("I respectfully dissent. The district court improperly found as fact that 'the officers positioned themselves in a way that they were not applying direct pressure to Campbell's back or blocking his airways,'. . . when the evidence on that point was conflicting. Several hours after the incident, Officer Bauman, who had arrived on the scene after Defendant Smith, stated that Hatter was 'straddling' Campbell and 'holding his shoulders to the ground.'. . Defendant Smith stated on the day of the incident that Hatter 'bear hugged Mr. Campbell holding him to the floor.'. . And Defendant Wallace stated that Hatter 'was on Campbell's back, Officer Smith was holding Mr. Campbell's feet, and I was knelt down on the blanket holding Mr. Campbell's right shoulder. Mr. Campbell was struggling harder and harder to get up.'. . Summary judgment was improper given the conflicting testimony regarding whether weight or pressure were applied to Campbell's back as he lay in prone restraint.")

Standifer v. Lacon, No. 14-3055, 2014 WL 5286618, at *4-6 (6th Cir. Oct. 16, 2014) ("Standifer finally alleges that Lacon performed an unconstitutional 'takedown' on her after she kicked him in the groin. The district court disagreed, relying on the dash-cam video to find that Standifer actually just lost her balance and fell after kicking Lacon. . . For us to affirm on this ground, the video would have to unequivocally show that Standifer merely fell and was not pushed down—so unequivocally, in fact, that any reasonable jury would *necessarily* conclude that Standifer fell down on her own. . .The video is not so unequivocal. Rather, a reasonable jury could accept either side's story: Lacon may have pushed Standifer down; or she may have merely fallen. It matters not what *we* would conclude if we were jurors; it only matters that reasonable minds can differ. And they can. Thus, the video here, unlike the one in *Scott*, does not 'utterly discredit[ ]' Standifer's side of the story, . . . and the dispute over whether Standifer was in fact pushed down is not for us to decide. We must instead adopt Standifer's plausible version of the facts as we ordinarily do in this context, and, after doing so, we must assume that Lacon pushed her to the ground. But a point Standifer seems to miss: 'Not every push ... violates the Fourth Amendment.'. . Standifer barely addresses this part of Lacon's argument. . . Assuming arguendo that Standifer

was pushed down, the question of whether Lacon's conduct was 'objectively reasonable' *is* a pure question of law for us, as judges, to decide. . . . Even if Lacon pushed Standifer to the ground, it was objectively reasonable to do so. Although serious injury resulted, the video shows that Lacon did not slam, shove, or throw Standifer to the ground; at most he guided her down by pulling her arms up and pushing the rest of her body down—a reasonable response after being kicked in the groin. . . . . No case that Standifer cites or that we found changes this conclusion. Her cases all deal with police 'slamming' people—*even when they did not resist.* . . . Thus, unlike some other Sixth Circuit cases, there are no 'factual disputes' as to whether Standifer 'posed a threat or actively resisted arrest . . . she undisputedly did. As a matter of law, none of Lacon's actions violated the Fourth or Fourteenth Amendments.")

Cass v. City of Dayton, 770 F.3d 368, 373-74 (6th Cir. 2014) ("Cass asserts that summary judgment was improper under *Tolan v. Cotton,* which held that where material facts are disputed—when, for example, there is contradictory testimony concerning a fact—a court must resolve that dispute in favor of the nonmoving party at the summary judgment stage. . . Unlike in *Tolan,* the material facts in this case are not disputed; this dispute centers on whether those facts, when viewed in Cass's favor, amount to a violation of Jordan's clearly established constitutional rights. This type of dispute is apt for disposition at summary judgment because the only question is whether the defendants were entitled to judgment as a matter of law.")

Margeson v. White Cnty., Tenn., 579 F. App'x 466, 471-73 (6th Cir. 2014) ("In the instant case, the issue is not whether the Officers' use of deadly force was reasonable in the first instance—it is undisputed Mr. Margeson pointed a rifle at them from his front door, and that any objectively reasonable law enforcement officer in that situation might fear for his own life and respond with deadly force. The issue, rather, as the district court correctly observed, is whether the *amount* of force used was reasonable, given the allegation that the Officers continued to shoot Mr. Margeson after he no longer posed any reasonable threat, and given the evidence suggesting that as many as 43 shots were fired at Mr. Margeson between the three officers. . . . Appellants argue that 'Plaintiff [has failed] to establish *any* proof that Mr. Margeson was shot while incapacitated or while he no longer posed a threat.' We disagree. Among other things, the proffered evidence in this case includes two independent reports suggesting that the Officers fired 43 shots at Mr. Margeson and an audio recording of the incident that undermines the Officers' deposition testimony about the sequence of events after the initial volley of shots. While the number of shots fired is not itself dispositive, the large number in this case is certainly relevant, since a jury could reasonably infer that Mr. Margeson became incapacitated, and was therefore unable to pose a threat after having been shot with the first few bullets. . . We do not intend to suggest that any number of shots is categorically reasonable or unreasonable; our reasonableness analysis hinges on the *totality* of the circumstances. We acknowledge, however, that such a high number of shots factors into those circumstances. Viewing the facts in the light most favorable to Mr. Margeson, a jury could certainly conclude that shooting at a man 43 times, including at least 12 shots after he had fallen to the ground, amounts to an unreasonable and excessive use of force, under the circumstances described here. A jury could also conclude, on the other hand, that the Officers' actions were

reasonable, based on Mr. Margeson's alleged failure to surrender, even after having been shot down. Either way, there are disputed facts at issue that only a jury can properly decide. Based on the disputes on the timing and sequence of the shooting in the recording which, when viewed favorably to Mr. Margeson, seem to suggest that at least twelve additional shots were fired at Mr. Margeson after he had fallen to the ground with multiple gunshot wounds, the district court was correct to conclude that the reasonableness of the Officers' actions was a question of fact that should be submitted to a jury. The factual disputes in this case including the total number of shots fired, the circumstances that led the Officers to continue shooting at Mr. Margeson, and whether the Officers continued to shoot at him after any reasonable threat had dissipated—are critical to the ultimate reasonableness inquiry. Accordingly, because the law regarding use of force is clearly established, and because genuine issues of material fact abound in this case, summary judgment is not appropriate.")

Sheffey v. City of Covington, 564 F. App'x 783, 796 (6th Cir. 2014) ("Essentially, in each of the cited cases, while the reviewing court took the mental illness of the arrestee into account, the totality of the circumstances was considered with regard to the reasonableness of the force utilized by the arresting officers. We acknowledge that, pursuant to *Champion*, the mental illness of Mr. Hughes should be considered to some extent, but it also appears clear that the district court did consider this from the viewpoint of what the officers knew and could perceive at that time of the incident. The officers' actions cannot be said to be unreasonable based upon the mental illness or perceived mental disturbance of Mr. Hughes, due to the fact that Mr. Hughes was known to be armed in a school zone with children present, that he consistently acted as if he was reaching for his waistband, that he attempted to flee the area, and also that he violently physically resisted arrest. . . . For the foregoing reasons, the district court's grant of summary judgment in favor of the responding officers is AFFIRMED.")

Sheffey v. City of Covington, 564 F. App'x 783, 796-99 (6th Cir. 2014) (Donald, J., dissenting) ("Let us recall, for a moment, that a man is dead; that the cause of his death was the use of 'electrical stun devices,' or tasers, by three different officers, at twelve different times, in five undifferentiated minutes. Recall that eight of those times occurred in less than one minute and that one officer alone used his taser on the man six times. Neither the two officers who originally joined that officer, nor the two others who later arrived, interceded on the man's behalf. Recall further that the man was fifty-two years old. Let us consider that the deceased was mentally ill; that he had lived alone in Covington, Kentucky for twenty-five years with no arrests, indictments, or convictions. Consider that in responding to a 911 call about his unusual behavior, police officers failed even to notice the deceased, much less to register him as a threat, and drove benignly by him without stopping despite his six-foot, six-inch, four-hundred-pound frame. Only after a second call did police officers finally search out, repeatedly shock, and forcefully subdue Leroy Hughes. The suspected crime that precipitated their conduct was a misdemeanor. Let us bear in mind that when police officers encountered Leroy Hughes, he did not appear armed—the misdemeanor at issue was, after all, concealment. Yet upon encountering him, the officers asked no questions. Instead, the encounter that ended in a man's death began with an order to get on the ground, issued by an

officer crouching behind a car door with his gun drawn. Bear in mind that only after officers had delivered more than 14,400 volts to his body, driven him to the ground, and shackled his arms and legs did they 'sp[eak] to [Leroy] Hughes in an effort to find out his name and other identifying information[.]'. . Let us acknowledge the obvious tension between the inference that Leroy Hughes sought to flee and the fact that he 'took several fast-paced steps' toward one of the officers. . . Even assuming that Leroy Hughes sought to flee, quickness was not likely a defining characteristic of his six-foot, six-inch, four-hundred-pound frame. Acknowledge the irony in the representation that Leroy Hughes 'violently resisted arrest' when he had not fully turned to view the second officer who shocked him before he was tackled by two or three others. Acknowledge further that his lone attempt to use any of the ordnance later recovered from his pockets—a handgun, a speed loader, four magazines, two boxes of ammunition, assorted loose bullets, and a knife—came after the first two of the twelve taser shocks and consisted of his throwing a box of ammunition at an officer as he stated that the handgun was not loaded. . . . If we recall, consider, bear in mind, and acknowledge the totality of the circumstances that led to the death of Leroy Hughes, we cannot fail to recognize that it is error to affirm the grant of summary judgment in favor of the officers who seized him. We who sit in relative safety behind a bench, garbed in black robes and guarded by federal marshals and county sheriffs sworn to protect us, must never forget 'that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force necessary in a particular situation.'. . . That Leroy Hughes was allegedly armed, mentally ill, and in the vicinity of two elementary schools is a searing indictment in an age framed by horrific tragedies in Aurora and Columbine, Colorado; Tucson, Arizona; and Newtown, Connecticut. And combined with his uncommonly large size and continuous reaching toward his waistband, it is little wonder that police officers found it necessary to intervene. Less clear, however, is whether the officers' chosen intervention, which resulted in the death of Leroy Hughes, was reasonable. For as much as the deaths in Colorado, Arizona, and Connecticut thread the tapestry of rapidly evolving circumstances that police officers must consider, so, too, do the deaths of Amadou Diallo, Sean Bell, Oscar Grant, and Jonathan Ferrell. And while a hundred reasonable arrests may go unmentioned for every egregious exception, we cannot ignore the seeds of systemic inequalities sown in our Nation's history and lain bare by diligent review. [citing *Floyd v. City of New York*] Nor can we fail to mourn the bitter fruit those seeds have spawned, even as we strive to root it out. Leroy Hughes may have been confused, due to his schizophrenia, rather than resistant or non-compliant. This is a factor that the trier of fact must weigh along with all the other evidence. . . When confronted by police, Leroy Hughes, who moved toward, rather than away from, an arresting officer, may or may not have attempted to flee. Although Leroy Hughes carried considerable concealed ordnance, he neither threatened nor attempted to use it. And any violence attributable to Leroy Hughes appears to have been precipitated by, rather than having provided a reason for, the use of force against him. But Leroy Hughes is dead. Whatever actually happened on December 3, 2008, the determination of the facts on which the reasonableness of the police officers' conduct in this case depends is reserved for the jury, as the finder of fact. . . And even assuming a definite set of facts, until all inferences have been drawn in favor of Leroy Hughes, whether the officers' conduct was reasonable remains, itself, a material question of fact. . . My colleagues in the majority fail to respect the role that the jury

should play in this matter and, consequently, endorse the usurpation of that role in the face of genuine issues of material fact. Because I cannot reconcile such an endorsement with the distinct roles of the trial judge and the jury, I respectfully dissent." footnotes omitted)

Krause v. Jones, 765 F.3d 675, 681 (6th Cir. 2014) ("The concurrence questions the officers' decision to enter the bedroom with their weapons set to fire automatically. But it is not clear why. Krause had shown no concern for his own safety or that of others and had threatened many times to shoot the officers if they entered. Once Krause delivered on his threat and fired at Officer Jones, all agree that Officer Jones could reasonably fire back and could keep firing 'until the threat [was] over.' *Plumhoff*, 134 S.Ct. at 2022. And all agree that nothing in the record suggests that Officer Jones kept firing even after he knew Krause no longer posed a threat. If it is true that officers may fire '15 shots' in a '10–second span' *when the suspect is not even shooting at the officers*, as *Plumhoff* allowed, *id.*, it must be true that officers may return fire with an automatic weapon when they are being fired upon. Indeed, Krause does not argue that, accepting that Krause shot at Office Jones, Officer Jones could not respond with shots from an automatic weapon. Not one of the cases cited by the concurrence contradicts this rule. The concurrence adds that 'There was no need for Matthew Krause to die.' We agree and have considerable sympathy for his family. But as the record confirms, the reason Matthew Krause died was that he fired first. Officer Jones had every right in such a dangerous situation, proved dangerous the minute he entered the room, to engage the automatic-fire function on his gun before entering the room and to use it after entering the room and being fired upon. The plaintiffs offer no evidence, case law, custom or anything else that says otherwise.")

Krause v. Jones, 765 F.3d 675, 682-85 (6th Cir. 2014) (Marbley, J., concurring in part and concurring in the judgment) ("I write separately . . . to express my disagreement with the court's conclusion that it was reasonable for Officer Jones to shoot Krause twenty times. . . The majority flatly announces that the number of rounds fired by Jones 'flow[ed] from the reasonable decision' of the officer to engage the automatic-fire function of his weapon. . . I find such a decision to be neither reasonable nor inevitable. The majority notes that, if an officer is justified in firing, he may continue to fire until the threat has ended. . . But this analysis ignores any consideration of the decisions—and the reasonableness thereof—made by police in the run-up to their entrance. Indeed, the majority has no trouble concluding that, after waiting ten hours for Krause to exit his house, waiting a minute longer was unnecessary. True, the majority concedes, 'the plan did not end well.'. . But the majority appears to sanction the officers' conduct in arriving with blood and thunder, detonating a flash bang despite the fact that Krause was sleeping, and pre-engaging the automatic-fire modes on their weapons, thereby ensuring that a single trigger pull would result in a fusillade. . . .Once Krause fired, it is clear that the officer's decision to return fire was reasonable. But surely this court is able to question also the pre-shooting conduct by law enforcement. [collecting cases that consider pre-shooting conduct] If officers had decided, for example, to carry with them a grenade launcher, or call down a strike from a Predator drone, or take other actions which recklessly created excessive risk, this court would be justified in asking whether officers acted unreasonably in their preparations. . . It is equally appropriate that we inquire why officers were

justified in entering with their weapons set to fully-automatic fire. I cannot accept the blind conclusion that this action was reasonable. What is more, it is deeply troubling to see that, before launching their raid against the sleeping Krause, police considered other options, including the truly outrageous possibility of 'using the SWAT team's tank to bring down the exterior wall of the bedroom and to seize Krause in that way.'. . This deliberation is disturbing not for the fact that police opted for a different choice, but because such a shockingly militarized option was even a consideration in the apprehension of a low-level drug dealer. In comparison, the officers' choice merely to use fully-automatic rifles, riot shields, and flash-bang grenades seems almost reserved. . . . This court cannot condemn the actions of officers 'from the peace and safety of [our] chambers with the 20/20 vision of hindsight.'. . . But it is equally incumbent on us, in discharging our duty to 'say what the law is,' that we craft a jurisprudence that will empower officers to eliminate a threat while still encouraging them to preserve life. . . . There was no need for Matthew Krause to die. Despite his threats that he might 'come out shooting,' as officers prepared to enter his bedroom he was asleep, posing a danger to no one. In facing such a suspect, police must do more than merely select from an array of deadly options that threaten an unreasonable risk of death—at least when safer, simpler options remain. It is not our duty to second-guess law enforcement. But is emphatically our duty to ensure that the law reflects our society's commitment to saving lives, not meaninglessly taking them. For these reasons, I respectfully concur in part and concur in the judgment.")

Simmonds v. Genesee County, 682 F.3d 438, 446, 447 (6th Cir. 2012) (Merritt, J., dissenting) ("The court predetermines the facts of this case by finding *as a fact* that Kevin Simmonds yelled, 'I have a gun' and pointed a silver object out of the window as though he were firing a pistol at the five officers who had his truck blocked. . . These so-called 'facts' on which it upholds the summary judgment are very much contested by the parties. They are the most crucial, contested facts in the case. The police officers testified as a unit that they believed Kevin had a silver gun because he had his hands and arms extended in a firing position out of the driver's side of the truck and appeared to be pointing a shiny object at one of the officers. They testified that, at that point, two of the officers immediately opened fire and killed Kevin. The problem is, of course, there was no gun at all. The officers and the court respond that Kevin must have been pointing his cell phone at them out of the window. But this seems highly unlikely because the cell phone was found resting inside the truck on the seat, not where it would have dropped from Kevin's hands when he was killed. At least one officer conceded that any weapon would likely have fallen onto the ground outside the driver's side door of Kevin's truck. A neutral fact finder could easily find that there was no gun and no threat of deadly force. As to the officers' claim that Kevin yelled, 'I have got a gun,' our court finds as fact that this statement was made but was 'inaudible.' But two facts could easily lead a jury to find that the officers' claim is false and that its falsity completely undermines the defense. . . .Based on the clarity of these other sounds, it is unlikely that the victim ever said he had a gun. But this issue is not for me to decide or for the court to decide because it is a classical example of a factual issue for the jury. Anyone who listens to the audio recording could certainly doubt that the officers are telling the truth. They may have simply invented a story in order to claim that they were in mortal danger. It would not be the first time police have invented such a defense.

We should not just accept as gospel the word of witnesses who have a strong motivation to lie when other evidence calls their veracity into question. The question for the jury is whether the claimed "I have a gun" statement was 'inaudible,' as the majority argues, or simply 'invented' falsely by the officers as a defense. There is a second piece of evidence that weighs strongly against the majority's 'inaudible' thesis. Officer Shanlian, a sixth officer, who remained back down the farm road near the Simmonds' home, some 400 feet away, testified that he also heard Kevin's 'I have a gun' statement. Kevin's voice would have carried through trees at least the distance of a football field for Shanlian to hear it. If Kevin's voice was that loud, it seems highly unlikely that the statement could have been "inaudible." More likely, it was simply invented. Thus, I would reverse and remand the case for trial. Our Court's effort to predetermine the facts in favor of the officers and prevent a trial of the case is inconsistent with the Seventh Amendment and our long, common law tradition of calling on juries to resolve factual disputes. This principle is particularly important when an individual is killed by state officers and the issue is one of whether there was a gross abuse of governmental power. Judges, like others, are sometimes predisposed to believe what they want to believe, but we should resist that temptation here and let the jury decide after the parties have fully developed the case. At present, the case remains a puzzle. Why did the police rush so quickly, aggressively, and impulsively to hem Kevin in, surrounding him like an animal with guns drawn? Why was his family back at his house not allowed to intervene to avoid such a confrontation? Were reasonable steps taken by the police to consider the situation carefully and avoid shooting a man who was perhaps mentally ill and, in fact, unarmed? These are relevant questions unmentioned by the majority that would be better considered by the jury after the full development of the case by competent counsel.")

Green v. Throckmorton, 681 F.3d 853, 866, 867 (6th Cir. 2012) ("Green was pulled over for committing two fairly common traffic violations, Throckmorton did not claim to have seen or smelled any drugs or alcohol during the stop, and Green was able to substantially complete all the field sobriety tests given to her except for the HGN test—and her performance on that test cannot be ascertained from the video because her back was facing the camera. These differences, when combined with Green's seemingly rational behavior during the stop, could lead a jury to conclude that there was no probable cause to arrest Green for driving while impaired and that Throckmorton was plainly incompetent in thinking that there was. We understand, of course, the difficulty inherent in making on-the-fly determinations regarding possible driving impairments, just as we recognize the severity of drunk driving and 'the potential consequences of an incorrect call had [Green] ultimately proven to be impaired.'. . But this difficulty and these consequences *always* exist when an officer stops someone for a traffic violation. Yet officers do not have free rein to administer field sobriety tests to whomever they please and then to arrest that person for making the slightest misstep while performing the tests. Whether that is what happened in this case is a question for the jury.")

Brown v. Callahan, 623 F.3d 249, 253 (6th Cir. 2010) ("If the defendant's actions violated a clearly established constitutional right, the court then asks whether qualified immunity is still appropriate because the defendant's actions were 'objectively reasonable' in light of 'law which

was clearly established at the time of the disputed action.'. . Whether an official's conduct was objectively reasonable is a question of law for the court, not a matter of fact for the jury.")

McKenna v. Edgell, 617 F.3d 432, 439-43, 445 (6th Cir. 2010) ("We conclude that whether the officers were entitled to qualified immunity depends on whether they acted in a law-enforcement capacity or in an emergency-medical-response capacity when engaging in the conduct that McKenna claimed violated the Fourth Amendment. . . If the officers acted as medical-emergency responders, then McKenna's claim would amount to a complaint that he received dangerously negligent and invasive medical care. Under a function-dependent view of *Peete,* if any right to be free from such unintentional conduct by medical-emergency responders exists under the Fourth Amendment, it is not clearly established. . . If the defendants acted in a law-enforcement (e.g., investigative or prosecutorial) capacity, however, McKenna's claim does not 'look[ ] like a medical malpractice claim,'. . rather, his claim is that he was subject to an unreasonable seizure and search. It is certainly clearly established that police violate the Fourth Amendment when they handcuff people whom they neither suspect of criminal wrongdoing nor believe to be a danger to themselves or others. . . . We stress that whether the officers acted as law enforcement or as medical responders is an objective inquiry. . . It is not relevant, therefore, whether Officers Edgell and Honsowetz had a law-enforcement or a medical-response intent; the focus must be on what role their actions reveal them to have played. . . . The issue is then whether this objective determination of the role that the officers played at McKenna's home is for the jury or for the court. . . We hold that it is properly a jury question because 'the legal question of immunity is completely dependent upon which view of the [disputed] facts is accepted by the jury.'. . . The dissent insists that the ultimate characterization of the historical facts found by the jury–that is, whether the conduct looked like law-enforcement or medical-emergency-response work–is a legal question for the court. One complication with this approach is that we have sometimes reserved for the jury determinations that appear to be legal in civil-rights suits under the Fourth Amendment. The reasonableness of officer conduct in excessive-force cases is a question for the court. *Scott v. Harris*, 550 U.S. 372, 381 n. 8 (2007); *Muehler v. Mena*, 544 U.S. 93, 99 (2005). But we ask the *jury* to determine whether a set of facts amounted to exigent circumstances. . . And, inconsistently, we have at times asked the jury and at times reserved for the court the issue of whether a set of facts provided officers with probable cause. . . . It may be questioned why we have assigned some Fourth Amendment inquiries in civil suits to the court and others to the jury, but we need not reach into that thicket to resolve the instant case. The objective question in this case involves a highly factual characterization, not a legal concept at the center of Fourth Amendment law like reasonableness in the use of force, exigent circumstances, or probable cause. The law enforcement/medical-emergency responder distinction matters only in the narrow class of cases in which *Peete* [*v. Metro. Gov't of Nashville & Davidson County*, 486 F.3d 217, 219 (6th Cir.2007)] might bar suit. And while this question involves more than determining what acts took place, juries are often asked to go beyond the finding of historical facts and to make objective characterizations in their role as factfinders. . . . We also hold that even if the question of the officers' objective role is viewed as a question for the judge and not the jury, qualified immunity still does not apply. On the most plaintiff-friendly view of the facts that could have been found by the jury, we too conclude

that the officers acted in a law-enforcement capacity. . . . We could hold as a matter of law that police officers who are dispatched to a location by a 911 call for medical attention–a fact emphasized by the dissent–always act in a medical-response capacity, regardless of the other facts in the record. This proposal would be an illogical and dangerous rule. It cannot be that an officer receives *Peete* protection simply because he was invited to the scene of a medical emergency. This proposition overlooks the possibility that an encounter that begins as medical in nature may evolve into one that is investigatory. More importantly, such a rule would give officers who respond to 911 calls free rein to rifle through callers' homes in search of incriminating evidence and to physically abuse callers in ways unrelated to anyone's safety. We decline to immunize misconduct of this sort; instead, we allow this case to stand on the judgment of the jury, in whose hands qualified-immunity cases that turn on disputed facts have traditionally rested.").

McKenna v. Edgell, 617 F.3d 432, 446, 447 (6th Cir. 2010) (Rogers, J., dissenting) ("I agree that the relevant inquiry in this case is whether, viewed objectively, the actions of Officers Edgell and Honsowetz indicated that they acted as law enforcement officers or as emergency medical responders. Because the nature of the officers' actions is a mixed question of law and fact, this court should review the legal aspect of that determination de novo. Under de novo review, Officers Edgell and Honsowetz acted as emergency medical responders, and thus they are entitled to qualified immunity. Officers Edgell and Honsowetz are entitled to qualified immunity if their activities, objectively viewed, indicate that they were acting as medical responders as opposed to law enforcement officers. . . The jury's determination does not control the legal aspect of this issue. The Supreme Court has held: In determining whether a Fourth Amendment violation occurred we draw all reasonable factual inferences in favor of the jury verdict, but as we made clear in *Ornelas v. United States*, [517 U.S. 690, 697-99 (1996)], we do not defer to the jury's legal conclusion that those facts violate the Constitution.")

Jefferson v. Lewis, 594 F.3d 454, 461-63 (6th Cir. 2010) ("In this case, Officer Lewis asserts that he saw a person standing in the doorway with a hand holding something shiny outstretched toward him and, at the same time, saw a flash that he believed to be a muzzle flash from a gun. Jefferson, however, asserts that her hand never left the doorknob, that there is no evidence of a car passing that could have produced the flash, and that there was no ambient light source that could have produced the flash. We believe that whether Officer Lewis had probable cause to believe that he was in danger of serious harm turns, in large part, on the resolution of this factual dispute. Because Jefferson has produced adequate evidentiary support for her version of events and because we must accept her version of events as true for purposes of this interlocutory appeal, we agree with the district court that the jury must decide whether Jefferson's Fourth Amendment rights were violated. . . . The second *Katz* inquiry is whether the right was clearly established and whether Officer Lewis's actions were objectively unreasonable in light of that clearly established right. In other words, in light of the undisputed facts and viewing any factual disputes in the light most favorable to Jefferson, was Officer Lewis's decision to fire at the individual standing in the doorway objectively unreasonable in light of a clearly established right to be free from deadly force? In this case, this turns on whether (a) Officer Lewis actually did see a flash in the doorway

that he believed to be a muzzle flash from a gun and, (b) if so, whether that belief and his response were reasonable. If the answer to those two questions is an unequivocal 'yes' even under Jefferson's version of events, then Officer Lewis is entitled to qualified immunity regardless of whether there was a constitutional violation. However, absent an unequivocal affirmative, the question of qualified immunity must be submitted to the jury. . . . In light of the competing inferences one might draw from [the] facts and their effect on the question of whether Officer Lewis's actions were objectively unreasonable, we agree with the district court that the jury should find the facts that determine whether Officer Lewis is entitled to qualified immunity. . . .Based on the record as it currently stands, we find that the district court did not err in denying Officer Lewis qualified immunity at the summary judgment stage. My colleagues concur in this conclusion but not necessarily in the full opinion. We therefore **AFFIRM** the district court's decision and **REMAND** this case for trial.").

Dunn v. Matatall, 549 F.3d 348, 352-55 (6th Cir. 2008) ("Although conceding that the videotape is an accurate account of the events surrounding the arrest, Dunn argues that the district court erred in granting summary judgment to the Officers because the question of whether the Officers used excessive force should be answered by a jury. . . . The Supreme Court recently clarified the summary-judgment standard for excessive-force claims, rejecting the argument that the question of objective reasonableness is 'a question of fact best reserved for a jury.' . . . Dunn does not contest the events as seen on the video, and, in fact, asserted at oral argument that the video must control. Instead, Dunn argues that a jury must watch the video and decide whether the Officers used excessive force. This argument, however, is directly contradicted by *Scott,* which instructs us to determine as a matter of law whether the events depicted on the video, taken in the light most favorable to Dunn, show that the Officers' conduct was objectively reasonable. . . .Considering the *Graham* factors, from the Officers' perspectives on the scene and not using hindsight, we conclude that the video shows that the Officers acted reasonably in attempting to neutralize a perceived threat by physically removing Dunn from his vehicle after he led Officer Matatall on a car chase and then appeared to refuse the Officers' commands to exit the car. . . . Overall, given the heightened suspicion and danger brought about by the car chase and the fact that an officer could not know what other dangers may have been in the car, forcibly removing Dunn from the car to contain those potential threats was objectively reasonable. Contrary to Dunn's suggestion, nothing in our opinion today gives officers carte blanche to use unjustified force every time a suspect flees. Officers may use only an amount of force that is objectively reasonable under the circumstances, and there is no indication that the Officers did anything other than just that.")

Phillips v. Roane County, Tenn., 534 F.3d 531, 539 (6th Cir. 2008) ("The district court concluded that the first step of the qualified immunity inquiry–whether the Estate had shown a constitutional violation–and the merits of Phillips's deliberate indifference claims were identical, since both concerned the reasonableness of the correctional officers' conduct in light of the circumstances the officers faced. On this basis, the district court found summary judgment based on qualified immunity inappropriate. . . But we believe that the district court erred in deferring the qualified immunity analysis to the jury. . . . [I]n a suit against government officials for an alleged violation

of a constitutional right, the court–not the jury–must consider the 'threshold question' of whether 'the facts alleged show the officer's conduct violated a constitutional right.' . . We review *de novo* whether those facts as alleged by the Estate establish a prima facie case of deliberate indifference to serious medical needs, and whether that right was clearly established.")

Carpenter v. Bowling, No. 07-3100, 2008 WL 1931360, at *5 (6th Cir. May 2, 2008) ("The resolution of Carpenter's excessive-force claim in the end turns on several genuine issues of material fact, including at a minimum these: Was Carpenter walking toward, cursing at or otherwise threatening Kirby at the time of her arrest? Did the officers repeatedly body slam or crush Carpenter against the van and jerk back unreasonably hard on her arms? And did Carpenter resist the arrest or the officers' attempt to handcuff her? '[W]hen the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury, the jury becomes the final arbiter of a claim of immunity.' *Bouggess v. Mattingly*, 482 F.3d 886, 888 (6th Cir.2007) (internal quotation marks and alteration omitted).").

Humphrey v. Mabry, 482 F.3d 840, 846 (6th Cir. 2007) ("The issue of qualified immunity may be submitted to a jury only if 'the legal question of immunity is completely dependent upon which view of the [disputed] facts is accepted by the jury.'").

Sell v. City of Columbus, 127 F. App'x 754, 2005 WL 742745, at *10(6th Cir. Apr. 1, 2005) ("Given this conflicting evidence, we have a case where 'the jury becomes the final arbiter of [the officer's] claim of immunity....' . . . Qualified immunity is ultimately a question of law properly addressed by the judge, but a jury trial is nonetheless necessary where, as here, 'the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury.' . . The question before us is complicated, however, by the fact that the district court did in fact conduct a jury trial on the plaintiffs' claims against the *City of Columbus*. In that trial, the jury was explicitly asked whether the plaintiffs' due process rights were violated and, in particular, whether 'an emergency existed, and [whether an] immediate vacation of the premises [was] necessary to protect the plaintiffs' health and safety....' The jury returned a verdict for the city, unanimously agreeing that the Code Enforcement Officers did not 'violate Plaintiffs' constitutional due process rights by ordering an immediate vacation of the premises .' In light of this finding by the jury, the question becomes whether the grant of qualified immunity was harmless error. . . The jury considered the same question with regard to the *City of Columbus* as it would have considered with regard to the Code Enforcement Officers. Its implicit finding that the defendants had demonstrated that 'an emergency existed, and [an] immediate vacation of the premises [was] necessary' leads to the conclusion that the individual defendants were indeed entitled to the defense of qualified immunity. The district court's grant of qualified immunity to the individual defendants, in sum, was erroneous. But in light of the jury's verdict in favor of the City of Columbus, we conclude that the grant of qualified immunity was a harmless error.").

Hale v. Kart, 396 F.3d 721, 728 (6th Cir. 2005) ("When no material dispute of fact exists, probable cause determinations are legal determinations that should be made by a court. . . . All of these

Sixth Circuit cases stand for the proposition that a jury trial is appropriate where reasonable disputes of material fact exist on facts underlying a probable cause determination. However, where only one reasonable reading of the facts is possible, i.e., where the facts that relate to probable cause are not in dispute, the question of probable cause retains its legal character and should be decided by the judge. We admit that some of these Sixth Circuit cases are confusing and many of the factual recitals in them do not lend themselves to a clear understanding of exactly what facts were in dispute. Nevertheless, the rule that probable cause is a legal question seems clear. If disputed factual issues underlying probable cause exist, those issues must be submitted to a jury for the jury to determine the appropriate facts. Similarly, with qualified immunity, a court can submit to the jury the factual dispute with an appropriate instruction to find probable cause and qualified immunity if the factual inquiry is answered one way and to find probable cause and qualified immunity lacking if the inquiry is answered in another way. However, the jury does not decide whether the facts it has found are legally sufficient to amount to probable cause or entitlement to qualified immunity.").

Sallier v. Brooks, 343 F.3d 868, 873 (6th Cir. 2003) ("The determination of whether particular kinds of correspondence qualify for the constitutional protection accorded a prisoner's 'legal mail' is a question of law properly decided by the court, not one of fact that can be submitted to a jury. . . Had the court found certain correspondence to be constitutionally protected legal mail, it should then have granted qualified immunity on any claims involving those items of correspondence that the defendants could have opened without violating constitutional rights that were clearly established at the time and of which a reasonable person would have known. . . After dismissing the claims for all correspondence that was either not legal mail or for which the defendants had qualified immunity, the court should have submitted the remaining claims to the jury for a verdict on the factual dispute of whether such correspondence was actually opened outside of Sallier's presence.").

Vakilian v. Shaw, 335 F.3d 509, 517, 518 (6th Cir. 2003) ("Where qualified immunity is asserted, the issue of probable cause is one for the court . . . . Only where the evidence creates a genuine issue of material fact should the matter proceed to trial. Here, viewing the facts in the light most favorable to the plaintiff, we find there is no dispute of material fact as to the events leading up to Vakilian's arrest.")

Fisher v. City of Memphis, 234 F.3d 312, 317 (6th Cir. 2001) ("While the issue of qualified immunity normally rests with the court, in cases arising under the Fourth Amendment's reasonableness standard the applicability of qualified immunity will often turn on the resolution of contested factual issues. . . . In this case, the district court charged the jury to consider whether Officer Taylor's use of deadly force had been objectively unreasonable; that is, to resolve the continuing factual dispute as to the car's behavior as it came towards Officer Taylor. There was no error in such instructions.").

McCloud v. Testa, 227 F.3d 424, 432 (6th Cir. 2000) ("As the district court repeatedly noted, there may remain trial issues as to whether the plaintiffs' positions actually do or do not fall outside the *Branti* exception. Once those questions have been decided, if Testa is not saved by a *Branti* exception, he may still be entitled to a verdict in his favor if, based on the jury's factual findings, the court determines he could not have reasonably known he was violating a given plaintiff's rights." citing *Pouillon*).

Boyd v. Baeppler, 215 F.3d 594, 599, 602-04 (6th Cir. 2000) ("[T]he issue that is material here is not whether Boyd was fleeing, but whether Boyd pointed his weapon at the officers and thus posed an immediate threat to them. The district court did not address this issue at all. . . . Whether Boyd actually fired the weapon is wholly immaterial here. The issue is whether or not he threatened to do so. . . . That the defendants did not see or hear Boyd fire the weapon does not affect whether the police officers, acting reasonably under the circumstances known to them, acted in defense of their own safety and the safety of officers through the use of deadly force. . . . The question of law on this case is clear–it is about the conduct of police acting in self-defense, not about pursuit of a fleeing felon or suspect, reasonably thought to be armed and dangerous. . . . The speculation of plaintiff's expert is not sufficient evidence to create a genuine issue of material fact. In view of the uncontroverted evidence in support of the testimony of both officers Baeppler and Wilsman, any jury conclusion to the contrary would necessarily be founded on mere speculation, not on the evidence. Therefore, we REVERSE the denial of summary judgment for both officers Baeppler and Wilsman and find as fact that Boyd, as perceived by reasonable police officers in the circumstances presented here, was armed and remained an imminent threat and a danger until he finally dropped his weapon after officer Baeppler fired his last shots.").

Boyd v. Baeppler, 215 F.3d 594, 604-06 (6th Cir. 2000) (Daughtrey, J., dissenting) ("The majority awards summary judgment to officers Baeppler and Wilsman because it finds, as a matter of law, that Adolph Boyd posed a threat to their safety that made the use of deadly force objectively reasonable. In so doing, the majority discounts the plaintiff's evidence suggesting the existence of genuine issues of material fact that should, under *Johnson v. Jones* . . . preclude our assertion of jurisdiction here. Because I believe that our court lacks jurisdiction to decide this appeal . . and therefore that our decision today preempts the jury's role in deciding the sufficiency of the plaintiff's evidence, . . . I must respectfully dissent. . . . The majority dismisses Dr. Tucker's testimony as based on mere probabilities, and any conclusions a jury might reach from it as mere speculation. In so doing, the majority again makes a determination as to which evidence it finds most credible, and thus again wrongfully assumes the role of factfinder. To my mind, this is a classic battle of the medical experts, the outcome of which we must leave to the jury to decide at trial. . . . Today the majority holds otherwise, and its decision continues the unfortunate trend noted by other members of this court of a panel 'arrogating unto itself the role of resolving on appeal the factual disputes presented by a qualified immunity defense in a § 1983 action.'. . . Because I believe that the record supports the district court's conclusion that genuine disputes remain regarding whether the defendants' conduct was reasonable, I therefore dissent.").

Pouillon v. City of Owosso, 206 F.3d 711, 718 (6th Cir. 2000) ("[T]he question of qualified immunity, which was improperly submitted to the jury under general instructions, is rather a question of law for determination by the judge. Questions of fact may be relevant to this determination, . . . but the ultimate question is one of law: if the finder of fact determines that the officers undertook certain actions, could any reasonable police officer have believed that those actions did not violate Pouillon's constitutional rights?").

Scott v. Clay County, 205 F.3d 867, 881 (6th Cir. 2000) (Clay, J., dissenting) ("This Circuit's unfortunate practice of arrogating unto itself the role of resolving on appeal the factual disputes presented by a qualified immunity defense in a § 1983 action, as represented by the majority opinion herein, continues the troubling trend followed by this Court in the improperly decided case of *Claybrook v. Birchwell*.").

Kain v. Nesbitt, 156 F.3d 669, 671-73 (6th Cir. 1998) ("When making a qualified immunity analysis, it is important to remember that the defendant is, in essence, saying: 'If the plaintiff's version is credited, what I did, judged today, arguendo would be wrongful, but at the time I acted, no reasonable officer would have known he was acting wrongfully.'. . If an officer committed no wrong, then qualified immunity is not implicated. Defendants often reply to suits of this nature by seeking dismissal or summary judgment. The summary judgment request often asserts qualified immunity as one basis for granting the motion. If the defendant's motion is granted on any of the grounds asserted, the plaintiff has an immediate right of appeal. If the motion is denied, however, the defendant may appeal only as to the qualified immunity issue. . . It is for this reason that the analytical compartments must be kept relatively watertight and the trial court in its rulings must differentiate between the various theories advanced by the defendant for dismissal. An illustration may be helpful. If a plaintiff in a § 1983 action alleges she was the victim of the use of excessive force by the police, this would be adequate initially under a notice pleading analysis to state a claim. If the defendant responded by making a claim of qualified immunity, then, at this point, plaintiff's complaint does not meet the heightened pleading requirement we enunciated in *Veney* . . . . If plaintiff were to then amend by saying that the excessive force consisted of handcuffing her in connection with an arrest, the claim would fail because it would be apparent on its face that no constitutional violation had been pleaded. In such an instance the claim would be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure or summary judgment. It would not be necessary to make a qualified immunity analysis. If, however, the plaintiff were to amend and state the excessive force consisted of the defendant intentionally and maliciously handcuffing her so tightly that she lost circulation in both her wrists and suffered physical injury, then the qualified immunity analysis would have to be made. Part of the analysis would be a determination as to whether there were any genuinely disputed questions involving material facts. It would matter not, for example, that the officer denied handcuffing her tightly. This would merely generate a genuinely disputed question of fact, which is for the trier of fact to resolve, not the judge. This would be true notwithstanding that the trial judge found the officer to be more credible than the plaintiff, because it is not for the court to make credibility determinations at this stage of the proceeding. . . . If plaintiff's version as to the nature and degree

of force used is credited, which the district court failed to do, a jury question is created as to whether the force used was excessive. The law as to excessive force has been long-settled, and Officer Nesbitt may not advance a claim that he did not know the force he could use must be reasonable. What Officer Nesbitt argues, in essence, is that the degree of force he used was objectively reasonable. However, where the force used and the manner in which it was used is as plaintiff alleges here, the issue of reasonableness is a fact question, not a legal issue to be decided by the court. We would emphasize that we are not concluding that every excessive force claim creates a jury issue. We reference the example given earlier where the only excessive force claimed was being handcuffed in the course of an arrest. Such an allegation does not state a claim on which relief can be granted.").

Greene v. Reeves, 80 F.3d 1101, 1105-06 (6th Cir. 1996) ("The district court opinion does not strictly follow the *Hunter* mandates against placing qualified immunity in the hands of a jury and against requiring the most reasonable interpretation of events. . . . The court's unfavorable comparison of the officials' investigation to more thorough investigations in other child pornography cases further manifests questionable logic. . . . The comparison is not relevant to the issue of whether the officials reasonably concluded from the one photo that there was probable cause to arrest Greene and Hill for violating Kentucky law, and it is certainly not relevant with respect to whether any reasonable officer would have known that in so concluding, a matter over which many persons could honestly disagree, the actions taken plainly violated established constitutional rights. This is and, since *Harlow*, has been the single ultimate standard for applying qualified immunity. To the extent that the district court's holding represents the application of some other or lesser standard, it is in error.").

Williams v. Pollard, 44 F.3d 433, 435 (6th Cir. 1995) ("If the material facts regarding the objective reasonableness of Pollard's actions had been disputed, then the trial court would have been correct in holding that the issues of fact must go to the jury, with the ultimate question of qualified immunity, of course, then to be determined by the court.").

Cameron v. Seitz, 38 F.3d 264, 273 n.2 (6th Cir. 1994) ("[T]he district judge appears to have instructed the jury on the issue of qualified immunity. The issue of qualified immunity is a question of law and generally should be decided by the judge . . . .").

Jeffers v. Heavrin, 10 F.3d 380, 381 (6th Cir. 1993) ("[P]robable cause determinations, even if wrong, are not actionable as long as such determinations pass the test of reasonableness.Reasonableness is a question of law to be decided by the trial judge.").

Henderson ex rel Henderson v. Jackson, No. 15-10807, 2016 WL 3125214, at *2, *9-10 (E.D. Mich. June 3, 2016) ("After the crash, Otis Henderson, the plaintiff's decedent, immediately exited the vehicle from the rear passenger seat and fled on foot. According to Jackson, Henderson was holding his waistband as he ran, which gave the impression that he may have a weapon. The 13-second video taken from a nearby store confirms that Henderson's left hand was at his waistband;

however, it is not clear whether he is holding a weapon or merely holding up his pants. Jackson jumped out of his vehicle and gave chase. . . .The defendants argue that Jackson's actions were reasonable because he believed that Henderson had pointed a gun at him as he was fleeing. But that version of the events does not account for the plaintiff's evidence, discussed earlier, that Henderson did no such thing. The plaintiff posits that Jackson, without warning, fired at an unarmed man who was running away from officers, and there is evidence to support that contention. Fact questions presented by the record preclude the qualified immunity defense at this summary judgment stage of the case.")

Peabody v. Perry Tp., Ohio, No. 2:10–cv–1078, 2013 WL 1327026, *5-*7 (S.D. Ohio Mar. 29, 2013) ("It is not for this Court to conclusively decide whether the force used was deadly force—only whether a reasonable jury could, or could not, find that the amount of force used created a substantial risk of serious bodily injury or death. The Court further notes that if this case is not viewed as one in which a reasonable jury could find lethal force, then Officer Bean would be entitled to qualified immunity. That is, if the situation were the exact same but Hook's flight from arrest was not over an eight foot fence, no reasonable jury could find that the amount of force used was excessive. The Court would not second guess Officer Bean's split-second decision to tase Hook instead of tackling him or letting him escape. . . Even if the Court were to conclude that the reasonableness of Officer Bean's choice to use the Taser on Hook as he fled across a flat parking lot was a close call, it would defer to the Officer's choice. . . This situation, however, is different. Because a reasonable jury could find that Officer Bean utilized deadly force, this Court reviews his decision in a broader sense in that it considers the use of lethal force in the absence of an immediate threat to the safety of Officer Bean or the public. In this respect, the law is clear that deadly force requires a suspect to pose an 'immediate threat either to the officer or others.'. . The Court here does not ignore Officer Bean's contention that it was reasonable for him to consider that Hook posed a threat to the public in and around Dick's Sporting Goods. . . Nevertheless, the type of threat posed by Hook is not of the nature or quality of that in which an officer may employ lethal force. . . .Therefore, if a jury determines that Officer Bean utilized lethal force, he violated Hook's Fourth Amendment right to be free from excessive force. . . .Having determined that the evidence as to whether Officer Bean utilized deadly force presents sufficient disagreement to require submission to a jury, the Court turns to the second step of the qualified immunity analysis which considers whether the constitutional right at issue was clearly established. A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he or she is doing violates that right. . . It is clearly established constitutional law that an officer cannot shoot a fleeing felon in the back in the absence of the suspect posing an imminent threat to the officer or others. . . The Court finds that the contours of the right to be free from lethal force in the circumstances before it are sufficiently clear that every reasonable official would have understood that the use of lethal force on Hook violated his constitutional rights.")

Jones v. Graley, 2008 WL 343087, at *4 (S.D. Ohio Feb. 6, 2008) ("It is the Court's duty to answer whether the officer's actions were objectively reasonable. . . As the *Scott* Court explained, 'At the

summary judgment stage ... once we have determined the relevant set of facts and drawn all inferences in favor of the non-moving party to the extent supportable by the record, ... the reasonableness of [the officer's] actions ... is a pure question of law.'").

Fuller v. Cuyahoga Metropolitan Housing Auth., 2008 WL 339464, at *6 (N.D. Ohio Feb. 6, 2008) ("Post-*Scott* . . . the question of whether a § 1983 plaintiff's Fourth Amendment constitutional rights were violated is generally not a question of fact best reserved for a jury, as Fuller repeatedly argues. . . . [T]he Sixth Circuit has concluded, 'the standard articulated by the Supreme Court in *Scott* clearly dictates that it is a pure question of law for the court to determine whether, viewing the facts in the light most favorable to the plaintiff, the officers' actions were objectively reasonable under the circumstances.'. . Previous Sixth Circuit authority instructing 'that such a determination is for a jury in the first instance is directly contrary to subsequent Supreme Court authority.'. . Accordingly, the threshold determination on Fuller's § 1983 claims–whether a constitutional violation occurred–is one the Court must determine as a matter of law."), *aff'd.*, 2009 WL 1546372 (6th Cir. June 3, 2009).

SEVENTH CIRCUIT

Edwards v. Jolliff-Blake, No. 17-1848, 2018 WL 5668775, at *7-8, *11 (7th Cir. Nov. 1, 2018) (Hamilton, J., dissenting in part) ("Plaintiffs' claims against defendant Jolliff-Blake should be remanded for trial. As recognized by Judge Chang, the first district judge to handle this case, both Officer Jolliff-Blake and the 'John Doe' informant who testified have significant credibility problems. Those credibility problems call into question the foundation for the search warrant. A jury should decide the claims against Jolliff-Blake. . . . The central claim in this lawsuit is that Officer Jolliff-Blake made false statements, either knowingly or recklessly, to the judge who issued the search warrant. . . The plaintiffs contend that Officer Jolliff-Blake was at least reckless in obtaining a search warrant for their home based on what he was supposedly told by an unreliable heroin addict, one who was desperately 'dope-sick' and desperate to tell the police something—or anything. It's not surprising that heroin addicts are sources of information about where to buy heroin. But the key questions are what Officer Jolliff-Blake knew when he sought the warrant, and whether he had obvious reasons to doubt the information he reported to the judge. . . . To be clear, if we accept the defendants' *final* version of the facts here, then all defendants were entitled to summary judgment. The majority's account of the law applicable to the defense's final version of the facts is correct. The search of the plaintiffs' home was a fruitless fiasco, but it did not violate the Fourth Amendment if it was based on a mistaken but honest judgment to trust what the informant told the police. But I disagree with my colleagues because two genuine issues of material fact are at the heart of plaintiffs' claims against Officer Jolliff-Blake. Conflicting testimony from Jolliff-Blake and 'Doe' means that neither's testimony can or should be accepted for purposes of summary judgment. The first issue is the sheer identity of the 'John Doe' informant upon whom the search warrant application was based. The second is which house 'John Doe' supposedly told Jolliff-Blake was where he had bought heroin. The majority accepts as undisputed the final answers provided in discovery by Jolliff-Blake and then by Doe. As explained below, however,

those final answers conflicted with repeated, sworn testimony from both Jolliff-Blake and John Doe on the same subjects. . . . I do not contend that trivial variations in a witness's testimony always require denial of a summary judgment motion based on his testimony. The contradictions here, however, go to the heart of the case: who was 'John Doe,' where did he say he bought the heroin, and did the police have any business trusting him? If Jolliff-Blake cannot keep his sworn testimony straight on these matters, it is a mistake to say the courts *must* accept the final, defense-friendly version of his testimony. Consistent with our pattern instructions, this case presents issues for trial, not summary judgment. The majority's decision to accept Jolliff-Blake's explanations for his conflicting testimony and impeachment takes this court well outside the proper role for summary judgment. Maybe this fiasco of a search was the result of an honest but too-credulous officer's mistake in crediting 'Doe.' That's what my colleagues believe. But that's not our decision to make. Maybe we are just seeing a cover-up for the fiasco. The evidence also permits a reasonable inference that Jolliff-Blake's and Doe's defense-friendly account of any facts simply does not deserve to be believed. Plaintiffs' claims against Jolliff-Blake should be tried. To that extent, I respectfully dissent.")

Miller v. Gonzalez, 761 F.3d 822, 827-29 (7th Cir. 2014) ("Sometimes the heftiness of the evidence on one side, or the credulity of a particular litigant makes our task of suspending factual and credibility determinations difficult, but whatever the difficulty, we must stick to the task on summary judgment. . . That is, summary judgment is not appropriate 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'. . We must therefore construe the record in the light most favorable to the nonmovant and avoid the temptation to decide which party's version of the facts is more likely true. . . The district court concluded that Miller lacked sufficient evidence that Gonzalez's blow was intentional. But it is difficult to imagine—short of an admission from Gonzalez—what other evidence Miller could present of Gonzalez's intent. The district court discredits Miller's assertion that Gonzalez could see him when he jumped over the fence, reasoning that Gonzalez had no reason to know where in the 'dark, overgrown yard' Miller was hidden. But according to Miller, Gonzalez *could* see him from outside the yard and knew that he was subdued. Miller asserts that the officer was considerably taller than the chain-link fence, the area was illuminated by nearby lighting, and Gonzalez had enough time to see Miller on the ground because Miller was prostrate for ten to twelve seconds before Gonzalez jumped over the fence and struck him. Under this version of events, it is an unremarkable stretch to conclude that Gonzalez may have, as Miller alleges, deliberately dropped his knee with his body's full weight onto Miller's jaw, even though Miller was no longer resisting arrest. The district court appears to have been crediting Gonzalez's version of the facts instead. The district court concluded that 'Officer Gonzalez was in pursuit on foot and followed the plaintiff and another officer over the fence and into a yard. In doing so, he stumbled and fell and his knee landed on the plaintiff's jaw.'. . But this was Gonzalez's account of events from his affidavit, not Miller's. A jury could also infer from the exchange immediately thereafter that Gonzalez did indeed intend to injure Miller. Miller exclaimed, 'You ain't have to break my jaw!' and Gonzalez replied 'I told you not to run.' Of course one interpretation is that Gonzalez was merely stating the unremarkable truism that [he] had ordered Miller to halt and he disobeyed. But Miller's alternate interpretation—that Gonzalez

was implying that he was retaliating against Miller for his decision to run—is not inherently implausible. . . Deciding which inference to draw from the conversation is the task of a fact finder. . . The district court also concluded that it is too implausible that Gonzalez could have aimed for and struck Miller's face in the dark, but the question of implausibility begs the question: According to Miller, when Gonzalez arrived at the enclosed yard, he could see for at least ten seconds that Miller lay motionless on his stomach, at gunpoint, and with his arms outstretched. Despite Miller's exhibited and observed passivity, Gonzalez jumped the fence and used the weight of his body to strike Miller's jaw. The district court's decision ultimately rests on the proposition that an accidental use of force cannot be excessive under the Fourth Amendment. But whether Gonzalez's use of force was accidental is precisely the disputed question-a question that cannot be resolved on this record given the competing versions of the event. . . . If Miller is believed, Gonzalez saw him subdued at gunpoint, lying motionless and spread-eagled on the ground, and then deliberately brought down his knee on Miller's jaw with enough force to break it. The officers concede that under Miller's version of events (which we must credit at this point) he demonstrated only 'passive resistance,' that is, lying with his arms outstretched and obeying every order except for the order to move his hands behind his back. . . Under the aforementioned factors elucidated by the Court in *Graham* (suspected crime, threat to officers, and resistance), the law is clearly established that police officers cannot use 'significant' force on suspects who are only passively resisting arrest. . .This prohibition against significant force against a subdued suspect applies notwithstanding a suspect's previous behavior—including resisting arrest, threatening officer safety, or potentially carrying a weapon.")

Miller v. Gonzalez, 761 F.3d 822, 830 (7th Cir. 2014) (Cudahy, J., dissenting in part) ("I agree that the judgment for Officer Stange must be affirmed. But, I am also convinced that there is insufficient evidence supporting Mr. Miller's claim that somehow Officer Gonzalez jumped over the fence in an obscure area and deliberately broke Mr. Miller's jaw while he was lying on his stomach. The evidence Mr. Miller has presented simply does not create a plausible story, even viewing the skimpy evidence in Miller's favor as we must on summary judgment review. Accordingly, I would affirm the judgment for Officer Gonzalez as well.")

Estate of Escobedo v. Martin (Escobedo II), 702 F.3d 388, 398 n.4 (7th Cir. 2012) ("This case presents the rare instance where judgment as a matter of law on qualified immunity grounds is granted after a jury verdict. The Supreme Court has "'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'". . . Here, prior to trial the record was not sufficiently developed to grant qualified immunity to the defendants. As facts came to light at the trial, it became appropriate to grant qualified immunity to Officers Straub, Martin and Brown at the close of the Estate's case, and later to grant qualified immunity to the defendant commanders after the jury verdict in their favor.")

Vinning-El v. Evans, 657 F.3d 591, 595 (7th Cir. 2011) ("For the reasons we have explained, to decide whether chaplain Sutton has qualified immunity, the district judge must determine whether he reasonably attempted to determine whether Vinning-El has a sincere belief that his religion

requires a vegan diet. To put this slightly differently, the judge needs to know whether Sutton used the tenets of Moorish Science to disqualify Vinning-El, or only as a reason to suspect that Vinning-El may have been seeking a vegan diet for personal rather than religious reasons. Qualified immunity poses a question for the court, not a jury. See *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). The district judge must hold a hearing and make whatever findings are required to resolve the qualified-immunity defense. If the judge concludes that Sutton based his decision on the tenets of Moorish Science, rather than his understanding of Vinning-El's own religious beliefs, then Sutton is not entitled to immunity, and it will be necessary to hold a jury trial to determine whether Vinning-El actually had a sincere religious belief in the necessity of a vegan diet. (Even if Sutton acted for the wrong reason, and thus lacks immunity, Vinning-El cannot prevail unless he establishes that his sincere religious beliefs require a vegan diet.)")

Purtell v. Mason, 527 F.3d 615, 622, 623, 626 (7th Cir. 2008) ("The district judge declined to decide whether Officer Mason was entitled to qualified immunity on the First Amendment claim because she thought 'there [was] a genuine issue of material fact as to whether [the officer] acted in an objectively reasonable manner when he asked Jeffrey Purtell to take down the tombstones.' This was error. The historical facts were undisputed. Whether Officer Mason's actions were reasonable is the second half of the qualified-immunity inquiry. Whether the facts established a constitutional violation (the first half of the immunity inquiry) requires a determination and application of the proper legal standard for fighting words. These were questions for the court, not the jury. . . . Officer Mason's mistake in thinking he could constitutionally order Purtell to dismantle the tombstone display on pain of arrest was one a reasonable officer might make in this situation. Although the fighting-words doctrine has been with us for decades, it has not been entirely clear (as we have explained) whether speech that injures but does not incite an immediate breach of the peace is protected or unprotected. And Officer Mason reasonably may have misunderstood the immediacy requirement of the fighting-words doctrine in the context of this case. He did have a fight on his hands, and he reasonably believed he had the authority to force the removal of the irritant in order to keep the peace. In misapprehending the constitutionally protected status of the Purtells' tombstone speech, Officer Mason did not violate clearly established rights. . .First Amendment line-drawing is often difficult, even in hindsight. Officer Mason's on-the-street judgment, though mistaken, is entitled to qualified immunity.")

Bell v. Irwin, 321 F.3d 637, 640, 641 (7th Cir. 2003) ("The Bells' principal theme on appeal is that, however these things may appear to the police and federal judges, only a jury is empowered to determine whether the officers' conduct was reasonable. Plaintiffs seek to equate constitutional-tort litigation to common-law tort litigation, in which negligence is a matter of degree to be resolved by a jury even if all of the facts have been stipulated, provided that a reasonable argument may be made both for or against the view that the defendant was negligent. Here is where the phrase 'constitutional tort' may mislead, for the Constitution is not a form of tort law. It creates legal rules. Permitting the jury freedom to determine for itself whether particular conduct was reasonable within the meaning of the fourth amendment would introduce the *ex post* reassessment that *Graham* decried. . . . When material facts are in dispute, then the case must go to a jury,

whether the argument is that the police acted unreasonably because they lacked probable cause, or that they acted unreasonably because they responded overzealously and with too little concern for safety. But when material facts (or enough of them to justify the conduct objectively) are undisputed, then there would be nothing for a jury to do *except* second-guess the officers, which *Graham* held must be prevented. Since *Graham* we have regularly treated the reasonableness of force as a legal issue, rather than an analog of civil negligence. . . This appears to be the accepted rule; the Bells do not cite, and we could not find, any post-*Graham* appellate opinion holding that the reasonableness of using force is a jury question even if no factual disputes require resolution. . . . Judges rather than juries determine what limits the Constitution places on official conduct.").

McNair v. Coffey, 279 F.3d 463, 475-78 (7th Cir. 2002) (on remand from Supreme Court after *Saucier*) (Coffey, J., concurring in part and dissenting in part) (extensive discussion of verdict forms and interrogatories in qualified immunity cases).

Jones v. Johnson, 26 F.3d 727, 728 (7th Cir. 1994) ("The magistrate judge . . . concluded that plaintiff had not adduced sufficient evidence to dispute the officers' version of the arrest – which, if accepted, entitles them to immunity if not to prevail outright. But the judge concluded that because the excessive force claim had to be tried, and because the plaintiff might come up with more evidence before trial, the false arrest claim also should be tried. This approach is mistaken. Summary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted. Immunity claims should be resolved as early in the case as possible– and by the court rather than the jury."), *aff'd on other grounds,* 115 S. Ct. 2151 (1995).

Nelson v. Streeter, 16 F.3d 145, 149 (7th Cir. 1994) ("An official is entitled to immunity only if uncontested or uncontestable facts reveal that his acts did not invade the plaintiff's clearly established constitutional rights. . . The motion [for summary judgment] can be granted only if there is no genuine issue of material fact bearing on the entitlement to immunity. [cites omitted] It is unresolved whether the official can ask the district judge to find the facts, if they are contested, rather than letting the factual issues that bear on immunity be resolved by the jury . . . along with the merits. [cites omitted] The question has not been raised in this case so we leave it for another day.").

Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993) ("[W]hile we do not foreclose the possibility that [the officer] did not use excessive force to seize [plaintiff], we believe that the case should be settled by a jury, based on whether a reasonable officer in [defendant's] place could believe that [plaintiff] presented a danger to his safety or the safety of others."). *Compare id.* at 247 (Bauer, C.J., dissenting) ("On the uncontested facts of this case, I believe the police officer acted in an objectively reasonable manner.").

Maxwell v. City of Indianapolis, 998 F.2d 431, 435, 436 (7th Cir. 1993) ("[N]o one disputes that the constitutional right to be arrested without probable cause is well established, as it was prior to [plaintiff's] arrest. Therefore, rather than alleging the violation of some broad constitutional right,

such as the right to be free from unreasonable seizures, [plaintiff] must demonstrate that reasonable officers confronting the specific facts and relevant law in this case would have known that their conduct violated [plaintiff's] constitutional rights. The rub here lies in the substantial, if not complete, overlap of the issue of immunity and the principal issue on the merits. The three officers attempt to draw a distinction by contending that the relevant inquiry is into 'arguable probable cause,' which is another way of asking whether they had probable cause to think they had probable cause. . . . This assumes, however, that probable cause, itself measured on a shifting scale, is independent of what an arresting officer could reasonably have known. If that were true, the belief of the three police officers that the match between [plaintiff] and [fugitive] created probable cause would be grounds for granting immunity, irrespective of the actual existence of probable cause. But the conduct of the police officers would then depend on their subjective good faith, rather than an objective standard. We require the latter.").

Biddle v. Martin, 992 F.2d 673, 676 (7th Cir. 1993) (adopting 8th Cir. approach, *see* ***Cross v. City of Des Moines***, where issue of probable cause.). *See also* ***Gordon v. Degelmann***, 1993 WL 286470, *2, *3 (N.D.Ill. July 28, 1993) (not reported) (noting that "before *Biddle*, the rule in this circuit sent the issue of probable cause in Section 1983 actions to the jury. *Biddle* clearly changes that rule."), *aff'd on other grounds*, 29 F.3d 295 (7th Cir. 1994).

Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992) ("The question of a defendant's qualified immunity is a question of law for the court, not a jury question . . . When the issue of qualified immunity remains unresolved at the time of trial, . . . the district court may properly use special interrogatories to allow the jury to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity.")

Apostol v. Landau, 957 F.2d 339, 342 (7th Cir. 1992) (when considering issue of qualified immunity on motion for summary judgment, district court should consider all undisputed evidence in record, in light most favorable to non-movant; if undisputed facts indicate defendants' conduct did not violate clearly established law, then defendants entitled to qualified immunity; if there are issues of disputed fact upon which immunity turns, or if defendants' conduct found to have violated clearly established law, not proper to grant summary judgment for defendants).

Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991) (qualified immunity is question of law for district judge and not jury, to be determined within framework of particular facts of case).

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (same); ***Rakovich v. Wade***, 850 F.2d 1180 (7th Cir.) (*en banc*), *cert. denied*, 488 U.S. 968 (1988) (same).

Childs v. City of Chicago, No. 13-CV-7541, 2017 WL 1151049, at *6-9 (N.D. Ill. Mar. 28, 2017) (" 'The award of summary judgment to the defense in deadly force cases may be made only with particular care where the officer defendant is the only witness left alive to testify.'. . The Seventh Circuit has repeatedly cautioned district courts to grant summary judgment sparingly and look at

the evidence with a critical eye in deadly force cases in which, as in this case, the witness most likely to tell a different story cannot speak from the grave. [collecting cases] Mindful of the caution with which summary judgment should be approached in deadly force cases, the court determines that genuine disputes over facts material to whether Mariano's use of deadly force was objectively reasonable preclude summary judgment on the plaintiff's Fourth Amendment claim. The plaintiff argues that Mariano undisputedly lost sight of the person he was chasing several times and so could not be sure that Childs was the person he and Gonzalez initially pursued. The court need not determine whether the plaintiff is correct because even if Mariano was objectively reasonable in his identification, a jury could find that he lacked an objectively reasonable basis to believe that Childs had a gun or otherwise posed a physical threat to Mariano or others. . . . Viewing this record in the light most favorable to the plaintiff, Mariano had not been told that Childs had a gun. Nor had Childs shot at him. Childs, who did not comply with Mariano's orders to stop, turned toward Mariano then turned away and fled. Mariano fired at the head of the retreating Childs. Much of the forensic evidence can be reasonably viewed as contradicting Mariano's testimony on key aspects of the chase, though the defendants dispute that account. Because a reasonable jury considering the circumstances in their totality could credit the plaintiff's version of the facts and find that Mariano's use of deadly force was objectively unreasonable, summary judgment is inappropriate on the plaintiff's Fourth Amendment claim.")

Williams v. Vill. of Maywood, No. 13-CV-8001, 2016 WL 4765707, at *6 (N.D. Ill. Sept. 13, 2016) ("Viewing the evidence in the light most favorable to Plaintiff, as must be done here, the Court concludes that there is sufficient evidence in the record from which a reasonable jury could find that McCord was unarmed when he was shot, which would mean (in this case) that the shooting constituted excessive force in violation of the Fourth Amendment. This conclusion also means that Babicz's argument for qualified immunity, which depends entirely on the assertion that McCord was armed, . . . must be rejected. Accordingly, summary judgment on Plaintiff's excessive force claim is denied.")

Estate of Paul Heenan ex rel. Heenan v. City of Madison, No. 13-CV-606-WMC, 2015 WL 3460647, at *14 (W.D. Wis. June 1, 2015) ("Where factual disputes exist, a defendant must adopt *plaintiff's* version of the facts in asserting his right to be free from the excessive force inflicted on him was not sufficiently clear at the time of the shooting. . . Adopting *plaintiff's* version of the facts as the jury would have to do to find Heimsness liable at the time of the shooting, it has been clearly and long established that shooting an individual in the chest three times who did not pose an imminent threat to the safety of the officer or others violates that individual's Fourth Amendment right to be free from excessive force. Accordingly, while it is an arguably higher standard of proof for plaintiff and, therefore, a closer question, the court denies Heimsness's motion for summary judgment on qualified immunity grounds for the same reason the motion is denied on the merits—factual disputes preclude a finding under the first prong that plaintiff has not made out a constitutional violation, and those same factual disputes similarly preclude a determination of whether the particular constitutional right at stake was clearly established at the time of the shooting. . . Certainly, where the facts are sufficiently clear, it is preferable to grant

qualified immunity at summary judgment to spare a state actor the added disruption and expense of trial, and this court is willing to revisit the question of qualified immunity after trial, but in a case this heavily fact intensive, and more importantly heavily laden with material factual disputes, Heimsness's entitlement to qualified immunity must await trial.") [*See also* ***Estate of Heenan ex rel. Heenan v. City of Madison***, No. 13-CV-606-WMC, 2015 WL 3539613, at *2-4 (W.D. Wis. June 5, 2015) (refusing to certify as "frivolous" under *Apostol* interlocutory appeal from denial of qualified immunity)

Flint v. City of Milwaukee, No. 14-CV-333-JPS, 2015 WL 1261245, at *29 (E.D. Wis. Mar. 20, 2015) ("To wit, whether the City defendants are entitled to qualified immunity depends upon the jury's answers to each of the following questions: (1) whether the City defendants had probable cause to detain Flint on the felony animal cruelty offense; (2) whether the length of Flint's detention was unreasonable; and (3) whether the City defendants *intended* to prolong Flint's detention for an impermissible reason. After these disputes have been resolved by the jury, the City defendants are free to reassert their entitlement to qualified immunity in light of the jury's findings.")

Marshbanks v. City of Calumet City, No. 13 C 2978, 2015 WL 273221, at *5-6 (N.D. Ill. Jan. 20, 2015) ("Keeping in mind that police officers often make quick decisions in tense situations, a police officer's use of deadly force to apprehend an unarmed individual is not a 'legally hazy area.' As the Supreme Court held in 1985, '[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.'. Therefore, at the time Defendant Officers discharged their firearms at Chambers, it was clearly established that '[a]n officer's use of deadly force to apprehend a suspect is unreasonable, absent probable cause that the suspect is dangerous or has committed a violent crime.'. . Here, the factual disputes discussed above preclude a finding of qualified immunity at summary judgment. More specifically, viewing the facts and evidence in Plaintiff's favor, at least one Defendant Officer used deadly force after Chambers dropped his weapon and Chambers did not shoot at the police officers or the crowd creating a immediate threat of danger. Furthermore, a witness told one of the officers that the individuals who had committed the violent crime had departed from the scene. Defendant Officers' version of the facts, namely that Chambers' conduct was sufficiently threatening to warrant the use of deadly force, is a question for the jury to decide. Accordingly, summary judgment is inappropriate under the circumstances because the parties tell different stories of what happened on April 21, 2012. Indeed, Defendant Officers' testimony is inconsistent, especially as to when Chambers dropped his gun and the circumstances leading up to Defendant Officers discharging their weapons. As the Seventh Circuit instructs, 'since the *Graham* reasonableness inquiry "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly."'. . The Court therefore denies Defendants' summary judgment motion as Plaintiff's excessive force claim alleged in Count I.")

Moore v. City of Chicago, No. 13 C 483, 2014 WL 2457630, *6, *7 (N.D. Ill. May 30, 2014) ("Defendants assert that a reasonable officer standing in Officer Castelli's position 'could have believed, based upon the specific facts confronting her, the use of deadly force was permissible.'. . . Although qualified immunity is an entitlement not to stand trial, the general rule of summary judgment still applies: 'courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.' *Tolan,* 134 S.Ct. at 1866. As discussed at length above, Officer Castelli's sole basis for using deadly force–Jamaal's possession of an object she believed to be a gun–is in hot dispute. Absent Jamaal's possession of an object, this case does not fall in the 'hazy border between excessive and acceptable force'; a reasonable officer in Officer Castelli's position would have understood the use of deadly force to be excessive. . . Accordingly, because the question of immunity rests on a disputed fact, the court cannot grant summary judgment in Defendants' favor on the basis of qualified immunity.")

EIGHTH CIRCUIT

Patterson v. Kelley, 902 F.3d 845, 853 (8th Cir. 2018) ("[W]e conclude that Patterson failed to raise a genuine issue of material fact as to whether the defendants were deliberately indifferent to a general risk of harm to inmates in Barracks 13 and 14. The district court did not err in granting the defendants qualified immunity. . .Accordingly, we affirm the denial of Patterson's request for appointed counsel and the grant of summary judgment to the defendant-officials.")

Patterson v. Kelley, 902 F.3d 845, 853-58 (8th Cir. 2018) (Grasz, J. concurring in part and dissenting in part) ("I concur in part because, while the appointment of counsel would have been appropriate in this case, I agree with the majority that the district court's failure to do so was not reversible under our deferential abuse of discretion standard of review. I respectfully dissent with respect to the district court's grant of summary judgment and corresponding qualified immunity to the prison official defendants. Under our Constitution, Patric Patterson is afforded the right to protection against cruel and unusual punishment, including protection from violence at the hands of other prisoners. . . Claims brought to enforce this constitutional right are protected against summary dismissal where there is a genuine dispute of material fact. . . Because this procedural protection has been denied, any chance of Patterson vindicating his Constitutional right has been lost as well. Security video shows Patterson was brutally and repeatedly assaulted in an open prison barracks. The attacks were so violent he was left with only one eye and must now walk with the aid of a cane. Although the attacks were recorded by a security camera, no prison official was watching. Neither did they hear his cries, even though the video shows the attacks roused virtually the entire barracks. . . . I believe there is a genuine dispute of material fact as to whether the defendants were deliberately indifferent to the obvious risk of violence by inmates in the prison's open barracks, resulting in the lengthy and brutal beating openly inflicted on Patterson at the hands of another inmate, all unnoticed by any prison official. . . .My disagreement with the majority is based on its application of the summary judgment standard. Regardless of whether Patterson would ultimately prevail, at this stage of the litigation we are required to resolve factual disputes in his favor and grant him the benefit of all reasonable inferences. . . . I would conclude there is a genuine

dispute of material fact as to whether the risk of inmate violence in the open barracks in this particular prison constituted a substantial risk of serious harm. . . . Viewing the evidence in the light most favorable to Patterson, a reasonable factfinder could conclude that the defendants knew about the obvious risk of violence inmates like Patterson faced at the hands of other inmates in this barracks. Patterson's verified complaint states that the defendants knew of the substantial risk of inmate violence and knew that this risk was exacerbated by a lack of sufficient security and supervision. . . . The applicable legal standard here does not allow for summarily rejecting Patterson's claim without a trial. The Federal Rules of Civil Procedure contain a clear requirement that a movant seeking summary judgment must show that 'no genuine dispute as to any material fact' exists. The 'material fact' provision is a textual standard authorized by Congress. . . and this Court, under *de novo* review, must apply the rule as written. Under this standard, I believe Patterson's claim should survive. In sum, viewing the evidence in the light most favorable to Patterson and granting him the benefit of all reasonable inferences, I would conclude there is a genuine dispute of material fact precluding summary judgment. I would affirm the district court's denial of Patterson's motions for appointed counsel under our abuse of discretion standard of review, but reverse its grant of the defendants' motion for summary judgment.")

Hoyland v. McMenomy, 869 F.3d 644, 661-62 (8th Cir. 2017) (Colloton, J., dissenting) ("We have said that a prosecutor's pre-arrest advice that a seizure is permissible 'can show the reasonableness of the action taken,'. . . and a prosecutor's post-arrest judgment to press a charge similarly can shed light on whether the officers were objectively reasonable. The majority concludes that it is 'now for a jury to decide' whether the officers 'acted constitutionally.'. .. Respectfully, this conclusion confuses the roles of judge and jury. Juries find facts; as the majority acknowledges, 'we have no historical facts in dispute.'. . The district court thought there were factual disputes about whether Hoyland 'intended to interfere' with the performance of duties and whether Hoyland's conduct 'substantially frustrated' the officers. But the majority does not embrace these questions, and rightfully so. The facts of the incident are recorded on videotape and are undisputed. What Hoyland intended or whether the officers were substantially frustrated is not at issue. The question is whether *a reasonable police officer could have believed* there was probable cause that Hoyland acted with the requisite intent and that his conduct substantially frustrated or hindered the officers in the performance of their duties. This is a legal determination for the court. By confirming that there are no disputed historical facts and concluding on those facts that the police officers violated Hoyland's clearly established rights under the Fourth Amendment, the court effectively grants judgment as a matter of law for Hoyland on that claim. Police officers have a tough job. Decisions like this one make it tougher. By denying qualified immunity on undisputed facts, the majority necessarily concludes that the officers here were plainly incompetent or knowingly violated the law. In my view, the limited clearly established law concerning the Minnesota statute does not justify that conclusion when the analysis is properly particularized to the facts of this case. I would reverse the order of the district court and direct entry of judgment in favor of the officers based on qualified immunity.")

Hosea v. City of St. Paul, 867 F.3d 949, 959-60 (8th Cir. 2017) (Kelly, J., concurring in part and dissenting in part) ("Because I believe there is a genuine issue of material fact as to whether the officers used excessive force against Hosea, I respectfully dissent from Part II.B of the court's opinion. Viewing the facts in the light most favorable to Hosea and 'giving him the benefit of all reasonable inferences,' . . . each *Graham* factor weighs in his favor. First, although Hosea testified in his deposition that he and Steines were arguing and that Steines was crying when the officers entered, there was no indication that Hosea had committed any physical violence against Steines. . . Second, no reasonable officer could have concluded that Hosea 'pose[d] an immediate threat to the safety of the officers or others.'. . The officers tackled Hosea *after* he had begun to lower himself to the floor, three feet away from where Steines sat. Even if it was hypothetically possible for Hosea to stand back up and attack Steines, a reasonable officer would not have believed this mere possibility represented a realistic, immediate threat to Steines' safety. Finally, no reasonable officer would have concluded Hosea was 'actively resisting arrest.'. . Hosea testified he had already put his left knee and right hand on the floor when the officers tackled him. The court concludes that because Hosea was not yet completely on the floor, the officers could have believed he was passively resisting arrest. I disagree that a reasonable officer would think Hosea's seconds-long delay in fully reaching the floor—after informing the officers of his leg injury—constituted any form of resistance. 'It is the province of the jury to assess the credibility of the evidence, and if the jury accepts [Hosea's] account, it could fairly conclude that' the officers used excessive force against him. . . Accordingly, I would reverse and remand Hosea's excessive-force claim to the district court for trial.")

Wealot v. Brooks, 865 F.3d 1119, 1128 (8th Cir. 2017) ("In many cases, we have affirmed the grant of qualified immunity to officers who applied deadly force to an unarmed suspect because we concluded the officers held a reasonable belief the suspect was dangerous. . . .Yet, 'the record here does not conclusively establish the reasonableness of the officer[s'] actions.'. . The officers' key testimony about the gun is controverted by other witnesses, some of their own inconsistent statements, and some physical evidence. Wealot has sufficiently demonstrated there are at least two genuine disputes of material fact . . . Disputed factual issues and conflicting testimony should not be resolved by the district court.")

Partlow v. Stadler, 774 F.3d 497, 502-03 (8th Cir. 2014) ("Faced with these 'tense, uncertain, and rapidly evolving' circumstances, the officers made a split-second decision to apply deadly force. Even if Partlow intended to do no harm to the officers as he moved the shotgun, the officers' use of force was objectively reasonable. They had no way of knowing what Partlow planned to do. In his brief, Partlow does not argue that in turning to set down the shotgun, his movement was so obviously an attempt to comply with the officers' commands to drop the shotgun that a reasonable officer would have known that opening fire would constitute excessive force.")

Partlow v. Stadler, 774 F.3d 497, 503-04 (8th Cir. 2014) (Bye, J., dissenting) ("I disagree the officers are entitled to qualified immunity for the shooting of Michael Partlow. Instead, I believe a jury should determine whether the officers violated Partlow's Fourth Amendment right to be free

from excessive force. I therefore respectfully dissent from Part II.B. of the decision reversing the district court. The officers argue, and the majority agrees, it is undisputed the officers perceived themselves to be in danger, and thus they were warranted in shooting Partlow. In determining whether there is any genuine factual dispute, this court is supposed to 'view all of the evidence in the light most favorable to [Partlow], drawing all reasonable inferences in his favor.'. . In addition, '[w]e are prohibited from weighing evidence or making credibility determinations at this stage.'. . The majority fails to consider the evidence in the light most favorable to Partlow and improperly makes credibility determinations. For example, the majority credits the officers' testimony and announces, as if a non-disputed fact, that the officers observed Partlow move the gun and reasonably interpreted such movement as a threat. Partlow's evidence, however, raises a question of fact regarding whether Partlow did, in fact, move the shotgun in a way which the officers could have reasonably perceived as threatening. While it is true an act taken on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment, if the mistaken perception or belief is not objectively reasonable, then a constitutional violation occurs. . . Reasonableness is determined from the point of view of a reasonable officer in the situation, . . . but the facts most favorable to Partlow demonstrate a question of fact remains whether a reasonable officer would have shot Partlow without warning. A jury should determine whether it was objectively reasonable for the officers to have the allegedly-mistaken perception or belief Partlow posed an immediate threat to their safety, i.e., whether it was reasonable for the officers to believe Partlow was going to imminently shoot them. Evidence presented by Partlow indicates he was not threatening the officers; he was not holding the gun in a shooting position; he was talking on the phone rather than aiming the gun; he was turning his back to the officers at the time he exited the building; the officers were tactically hiding themselves; the officers failed to give Partlow any meaningful verbal warning before employing deadly force; Partlow responded to the officers by turning to place the gun on the ground rather than firing; and the most senior and experienced officer did not fire his weapon. Even given the fact Partlow was holding a gun, Partlow's 'evidence create[s] genuine issues of material fact concerning whether the force used was objectively reasonable in light of the facts and circumstances confronting [the officers].'. . A jury should also determine whether a warning under these circumstances was feasible. Partlow has presented evidence showing the officers failed to warn Partlow of their presence and failed to meaningly [sic] warn Partlow they intended to shoot. An officer's failure to assess the situation and give any feasible warning 'adds to the unreasonableness' of an officer's actions. . . Because the officers' actions are not protected by qualified immunity, I would affirm the district court.")

Williams v. Holley, 764 F.3d 976, 980 (8th Cir. 2014) ("Holley contends there is insufficient evidence for a reasonable juror to find his decision to use lethal force against Cletis was unreasonable. Holley, in essence, contends the court is bound to accept his version of events because he is the only surviving eyewitness of the altercation. Holley, however, overlooks the circumstantial evidence which shows possible inconsistencies with Holley's account of the shooting. As the district court found, the circumstantial evidence raised questions of fact regarding material aspects of Holley's account of the event. We must view these inconsistencies in the light

most favorable to Roseetta, giving Roseetta the benefit of all reasonable inferences. [citing *Tolan*]")

Smith v. City of Brooklyn Park, 757 F.3d 765, 773, 774 (8th Cir. 2014) ("In *Thompson*, an officer chased a suspect who ran between two buildings and climbed over a fence. . . According to the officer, the suspect 'got up from the ground, looked over his shoulder at [the officer], and moved his arms as though reaching for a weapon at waist level.'. . The suspect had turned his back toward the officer and 'obscured his hands from [the officer's] view.'. . The officer yelled for the suspect to 'stop,' but the suspect's 'arms continued to move'; the officer 'fired a single shot into [the suspect's] back just below his right shoulder blade.'. . The suspect died from the gunshot, and no weapon was recovered from his body. . . Another officer, 'who had followed most of the foot chase in a patrol car, stated that he attempted to look down the space between the two buildings where he had seen [the suspect] and [the officer] run, but that he neither saw nor heard the shooting, leaving [the officer] as the lone surviving witness to the shooting.'. . The deceased suspect's family members filed suit under § 1983 alleging excessive force in violation of the deceased's constitutional rights. . . The district court granted summary judgment to the officer, the officer's supervisor, and the city. . . On appeal, we 'conclude[d] that summary judgment was appropriate' where the officer's 'use of force, as he describe[d] it, was within the bounds of the Fourth Amendment, and all of the evidence presented to the district court [was] consistent with that account.'. . .[A]s in *Thompson*, we conclude that Officers Cudd and Glirbas describe a scene in which the use of deadly force was constitutionally permissible. Their account is strengthened by statements from other officers and the transcript of the 911 call. No genuine issues of material fact exist as to whether Kolski made threats and possessed a firearm. As the district court correctly found, '[t]here is no evidence in the record that Kolski was *unarmed* when he was killed.'")

Walton v. Dawson, 752 F.3d 1109, 1124 (8th Cir. 2014) (With respect to claim against jail administrator, Moore, "[t]he partial dissent . . . places weight on Walton's failure to express fear, which is evidence a reasonable jury *could*, but need not, credit. . . Credibility is the province of the jury, and after observing live testimony, a reasonable jury could easily credit Walton's explanation that he was too afraid (given Flennory's death threats) to express fear or call for help. . . . Apparently, the partial dissent disagrees with our view of the record in the light most favorable to Walton. . . 'If three reasonable judges disagree about the facts contained in the record, surely the factual dispute is genuine enough to require resolution by a reasonable jury.'. . This is especially true on an interlocutory appeal from the denial of qualified immunity, for we have no jurisdiction to supplant the district court's reasonable (i.e., not blatantly contradicted) interpretation of the factual record.")

Walton v. Dawson, 752 F.3d 1109, 1125, 1126 (8th Cir. 2014) ("Even if the district court is right that Sheriff Dawson may not have responded reasonably to Flennory's earlier assault of another inmate, that factual question alone is an insufficient basis to deny qualified immunity under *Farmer's* subjective standard. It is not enough to say a factual question exists: the factual dispute must be both 'genuine' and 'material.'. . All of Walton's evidence on subjective knowledge relates

only to Moore's knowledge, not Sheriff Dawson's. Contrary to the district court's wholesale pronouncement that both officials must have known the risk, the undisputed evidence supports Sheriff Dawson's claim of qualified immunity. Sheriff Dawson's response to the sexual assault (expressing justified outrage, reprimanding Bilinski, and disciplining Moore) gives every indication that he, unlike Moore, did not know inmates like Walton were in jeopardy. Having carefully reviewed the record in an effort to deduce what facts about Sheriff Dawson's own knowledge 'the district court, in the light most favorable to the nonmoving party, likely assumed,'. . . we have found nothing but 'speculation, conjecture, or fantasy' to rebut Sheriff Dawson's testimony that he did not know of the substantial risk posed by Moore's failure to train Bilinski, *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir.2009). Because guesswork is not enough to reach a jury, we conclude Sheriff Dawson is entitled to qualified immunity.")

Coker v. Arkansas State Police, 734 F.3d 838, 843 (8th Cir. 2013) ("When drawing all reasonable inferences in the light most favorable to Coker, we cannot conclude that Cartwright's use of force once out of view of the dash camera was objectively reasonable as a matter of law. Rather, a reasonable jury could find that the severity of Coker's injuries demonstrates excessive force, particularly Cartwright's decision to strike Coker using a metal flashlight after Coker was already on the ground and allegedly complying with Cartwright's demands. . .Without the aid of video or an understandable audio recording, it is impossible to determine what happened that night after Coker ran out of view of the camera without weighing Cartwright's version of events against Coker's story. Making credibility determinations or weighing evidence in this manner is improper at the summary judgment stage, and 'it is not our function to remove the credibility assessment from the jury.'. . We reverse and remand, leaving it to a jury to decide whose story is more plausible.")

Thompson v. King, 730 F.3d 742, 750 n.4 (8th Cir. Sept. 2013) ("Under the second prong of the qualified immunity analysis, the district court seems to have concluded that a jury question existed as to whether a reasonable officer in Officer King's position would have believed his conduct was lawful. Although a jury is to decide predicate facts, the ultimate question of qualified immunity is one for the court. *Littrell v. Franklin*, 388 F.3d 578, 584–85 (8th Cir.2004). That is, the court must determine objective legal reasonableness and 'whether the facts alleged ... support a claim of violation of clearly established law.'. . Thus, we make this legal determination based upon summary judgment facts viewed in the light most favorable to Thompson.")

Luckert v. Dodge County, 684 F.3d 808, 817 (8th Cir. 2012) ("Qualified immunity is a legal question for the court, not the jury, to decide in the first instance, based either on the allegations or, if material facts are in dispute, on the facts found by the jury. *See Littrell v. Franklin*, 388 F.3d 578, 584–85 (8th Cir.2004) (explaining "[t]he law of our circuit is clear .... [that] qualified immunity is a question of law for the court, rather than the jury, to decide"). Whether the official's conduct constitutes deliberate indifference is a question of fact for the jury").

Luckert v. Dodge County, 684 F.3d 808, 821 (8th Cir. 2012) (Bye, J., dissenting) ("The United

States Supreme Court has been clear on what the governing standard of review at this stage of the proceedings must be. As the Court recently explained, when 'defendants continue to urge qualified immunity [in a post-verdict motion], the decisive question ... is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense.' *Ortiz v. Jordan,* 131 S.Ct. 884, 889 (2011) (citing Fed.R.Civ.P. 50). In reviewing the appellants' challenge, therefore, we are bound to consider only whether the evidence presented at trial is sufficient to overcome their defense of qualified immunity. Based on the record before us, I am convinced the evidence is not only sufficient, it is indeed, overwhelming.")

Lee v. Anderson, 616 F.3d 803, 811 (8th Cir. 2010) ("The first question on the special verdict form asked the jury whether it found in favor of the plaintiff on the claim of excessive force. The form instructed the jury to proceed to the second question if its answer was yes. The second question asked: Was Andersen 'objectively reasonable in his belief that his use of deadly force was necessary to protect himself or another from apparent death or great bodily harm?' Lee objected to the second question, arguing that the issue of qualified immunity is a question of law for the court to decide. The district court overruled the objection, stating that the question was tailored to allow the jury to make predicate factual findings necessary for the court's qualified immunity ruling. The jury found that Andersen did not use excessive force against Fong Lee and thus did not reach the second question. Lee contends that the district court committed reversible error in submitting the second question to the jury and in failing to define 'objectively reasonable.' . . . Lee misstates the law when she argues that *Littrell v. Franklin,* 388 F.3d 578 (8th Cir.2004), 'held it would be reversible error to submit a question regarding qualified immunity to the jury.' In *Littrell,* we held that the district court erred in submitting to the jury the question whether the officer reasonably believed that his actions were objectively reasonable in light of clearly established law. . . In reaching our holding, we determined that carefully drafted special interrogatories may be submitted to the jury to resolve any questions of historical fact so that 'the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law.'. . The district court's stated purpose in submitting the second question to the jury was to allow the jury to make predicate factual findings, a practice that is permitted under *Littrell.* Given the jury instruction on excessive force, however, it appears that the second question reiterated the first question. Had the jury answered yes to the first question, it necessarily would have found that Andersen used force that was not reasonably necessary–that is, greater force than a reasonable officer would have used under similar circumstances–to protect himself or others from death or great bodily harm. But the jury found that Andersen did not use excessive force and thus never reached the second question. The finding of no excessive force mooted Andersen's affirmative defense of qualified immunity and rendered harmless any error in failing to define 'objectively reasonable.'")

Rohrbough v. Hall, 586 F.3d 582, 586, 587(8th Cir. 2009) ("We think that our prior cases are clear that the matter of whether the constitutional right at issue was 'clearly established' is a question of law for the court to decide. *See, e.g., Littrell v. Franklin,* 388 F.3d 578, 584- 85 (8th Cir.2004). We have explicitly held that in deciding this kind of case, the conduct 'was either

Areasonabl[e] under settled law in the circumstances," or it was not, and this is a determination of law.'. . Although language from our recent case, *Nelson v. Correctional Medical* Services. . . seems to suggest that the question is one for a 'reasonable factfinder,' we went on in *Nelson* to determine the matter for ourselves. . . . We do not believe, then, that *Nelson,* in making an isolated reference to a 'reasonable factfinder,' intended to overrule our precedents establishing that qualified immunity is a question of law, an issue that we have previously described as 'clear.' *Littrell,* 388 F.3d at 584. Once the facts are established, 'a court should always be able to determine as a matter of law whether or not an officer is eligible for qualified immunity–that is, whether or not the officer acted reasonably under settled law given the particular set of facts.'. . We note that Officer Hall's account of what happened between him and Mr. Rohrbough differs significantly from the facts assumed for purposes of summary judgment. Summary judgment is not appropriate where, as here, a dispute remains regarding facts material to the qualified immunity issue. . . But Officer Hall may continue to assert qualified immunity at trial, where the factual issues will be resolved by a jury.").

Richmond v. City of Brooklyn Center, 490 F.3d 1002, 1007 n.5 (8th Cir. 2007) ("In ruling on Officer Bruce's motion for judgment as a matter of law based on qualified immunity , the district court stated that 'the record ... contains evidence sufficient for a jury to conclude that the law prohibiting unreasonable searches–determined by the search's scope, manner, justification, and location–was clearly established at the time of the search, and that the law's application to Defendant's actions was evident.' The district court should have analyzed this question as a matter of law without regard to the jury's verdict.")**.**

Littrell v. Franklin, 388 F.3d 578, 581-87 (8th Cir. 2004) ("Officer Franklin did not raise the issue [of qualified immunity] until trial, when he asserted it as a defense. The district court presented the qualified immunity question to the jury in the form of an interrogatory. The verdict form posed four questions. The first asked, 'Do you find, from a preponderance of the evidence, that defendant Franklin used excessive force when he arrested plaintiff on February 9, 2001?' The jury responded, 'Yes.' The second interrogatory asked, 'Do you find, from a preponderance of the evidence, that defendant Franklin reasonably believed that his conduct on February 9, 2001, with respect to the plaintiff, was objectively reasonable in light of the legal rules clearly established at that time?' Again, the jury responded, 'Yes.' Because of its affirmative response to the second interrogatory, the jury was instructed not to answer the third and fourth questions on the verdict form, which pertained to damages. In accordance with the jury's response to the second interrogatory, the district court entered judgment in favor of Officer Franklin, finding that he was entitled to judgment as a matter of law on the basis of qualified immunity. . . .In Ms. Littrell's appeal, [footnote omitted] she argues that the district court's submission of the second interrogatory to the jury was erroneous because the reasonableness of an officer's actions in light of clearly established law is a question of law for the court, and not the jury, to determine. . . .The district court properly submitted the issue of excessive force to the jury, and the jury found that Officer Franklin violated Ms. Littrell's constitutional right to be free from excessive force. . . . After the jury found that Officer Franklin used excessive force when he apprehended Ms. Littrell, it found (in the form of its response to interrogatory number two) that he reasonably believed his

actions were objectively reasonable in light of clearly established law. Ms. Littrell contends that the district court erroneously submitted this second question to the jury because the court–not the jury–is charged with determining whether a defendant is entitled to qualified immunity. Ms. Littrell does not contend that the second interrogatory misstated the law of qualified immunity. Rather, she argues merely that the district court itself should have made the qualified immunity ruling. Ms. Littrell is correct. The law of our circuit is clear. The issue of qualified immunity is a question of law for the court, rather than the jury, to decide . . . . The issue of qualified immunity, however, is frequently intertwined with unresolved factual questions. Where, as in this case, factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories specific to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to make its own qualified immunity ruling. . . . On the facts of this case, special interrogatories should have asked (1) whether Ms. Littrell resisted arrest before Officer Franklin forcibly restrained her and (2) whether Officer Franklin knew Ms. Littrel was injured when he continued to handcuff and forcibly place her in the car. Specific findings on these questions of fact would have enabled the district court to address the legal issue of qualified immunity through reference to excessive force standards that are clearly established. . . . In short, where questions of historical fact exist, the jury must resolve those questions so that the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law. . . . The specific contours of a plaintiff's rights may be established through reference to prior cases. Carefully drafted interrogatories allow jurors to decide factual issues and preserve the ultimate legal determination for the court. It is error, however, to submit the ultimate question of qualified immunity to the jury. Our inquiry, however, does not end here. The district court relied on Fifth Circuit precedent when it submitted the qualified immunity question to the jury. . . . Ms. Littrell objected to neither this practice nor the content of the second interrogatory submitted to the jury. She does not argue that she offered alternate instructions that the district court rejected. We, therefore, review the district court's judgment only for plain error. . . . Submission of the qualified immunity issue to the jury was wholly consistent with the practice of the Fifth Circuit. Although different from our own practice, we do not think the Fifth Circuit's practice is fundamentally unfair or in any way threatens the integrity of the judicial process. Importantly, the Supreme Court has not censured the Fifth Circuit's practice. This is true even though there exists a split among the circuits as to the proper apportionment of responsibility between juries and judges in this context. [footnote omitted] Against this backdrop, we do not find that reliance on the practice of the Fifth Circuit resulted in the sort of error that we may properly characterize as plain error.").

Lampkins v. Thompson, 337 F.3d 1009, 1014 (8th Cir. 2003) ("As a threshold matter, Lampkins argues that, because the qualified immunity defense does not survive trial, special interrogatories related to that defense are improper *per se.* Although procedurally unusual, the qualified immunity defense is not waived or lost if a case proceeds to trial. *See Hill v. McKinley*, 311 F.3d 899, 902 (8th Cir.2002) (qualified immunity defense raised in answer not waived when first reasserted in *post-trial* motion). Since the qualified immunity defense persisted, special interrogatories related to that defense were not improper *per se*.").

Audio Odyssey, Ltd. v. Brenton First National Bank, 245 F.3d 721, 739 n.19 (8th Cir. 2001) ("The facts at trial may differ from those we have presented, but any reassessment of qualified immunity will ultimately be a question of law for the court."), opinion reinstated by ***Audio Odyssey, Ltd. v. Brenton First National Bank***, 286 F.3d 498 (8th Cir. 2002) (en banc).

Jones v. Shields, 207 F.3d 491, 499, 500 (8th Cir. 2000) (Richard S. Arnold, J., dissenting) ("Today the Court holds that Shields failed to show more than a de minimis injury, and that Jones's use of capstun was a justified and 'tempered response' to control the 'recalcitrant inmate' Shields. . . . The Court appears to be reviewing this case as if it were a jury. It looks at the evidence and draws reasonable inferences in favor of the defendant, rather than the plaintiff. I believe Shields's testimony, which must be taken as true in the present context, was sufficient to create a genuine issue of fact. . . . I am at a loss to understand how the Court can uphold a judgment as a matter of law on this record. To be sure, Shields had been recalcitrant, but at the time he was sprayed with capstun he was being completely obedient. There was no justification for the use of additional force at that point. . . . [T]he effect of the Court's opinion in this case is to give a blank check to prison employees to spray capstun in inmates' faces for no reason. Physical force cannot legitimately be applied to punish an inmate for past misconduct. It should be used only to compel compliance with a lawful order or to quell current disobedience. I suspect that the Magistrate and District Judges who handled this case will be as startled as I am at the result the Court reaches today. It is possible, perhaps even likely, that a jury would return a verdict for defendants, with or without Jones's testimony, but I cannot agree that sufficient facts to create a jury issue have not been made out. I respectfully dissent.").

Ludwig v. Anderson, 54 F.3d 465, 474 (8th Cir. 1995) ("Although it is a question of law whether particular facts entitle police officers to summary judgment based on qualified immunity, where, as here, 'there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be no summary judgment.'" *citing Greiner*, *infra*).

Engle v. Townsley, 49 F.3d 1321, 1323 (8th Cir. 1995) ("Whether an official should be granted qualified immunity for particular conduct is a question of law. [cite omitted] Not every immunity question can be decided on summary judgment, however, for there may be disputed issues of material fact which prevent it. [cite omitted] Whether a reasonable person would know that particular conduct violates a clearly established right may, for example, depend on the resolution of conflicting evidence about what the surrounding circumstances were at the time the official took the challenged action . . . If the factual circumstances are material to the qualified immunity analysis and remain disputed after initial discovery, . . . the issue cannot be resolved as a matter of law.").

Tilson v. Forest City Police Dept., 28 F.3d 802, 813 n.8 (8th Cir. 1994) (Lay, J., dissenting) ("[I]t was erroneous for the jury to be instructed on qualified immunity with respect to the arresting officers. It is clearly established that qualified immunity is a question of law and should be

decided by the court. . . That issue is not before us, however, because Tilson's counsel failed to object to the instruction or raise the issue on appeal.").

Greiner v. City of Champlin, 27 F.3d 1346, 1352 (8th Cir. 1994) ("Whether a given set of facts entitles the official to summary judgment on qualified immunity grounds is a question of law. . . But if there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be no summary judgment." cites omitted).

Arnott v. Mataya, 995 F.2d 121, 124 (8th Cir. 1993) ("[I]f an officer alleges conduct by the arrestee giving rise to probable cause and those facts are undisputed, the qualified immunity defense is available to the officer. . . . This does not mean, however, that courts may always decide questions of qualified immunity on summary judgment. If the arrestee challenges the officer's description of the facts and presents a factual account where a reasonable officer would *not* be justified in making an arrest, then a material dispute of fact exists. Where there is a genuine issue of material fact surrounding the question of plaintiff's conduct, we cannot determine, as a matter of law, what predicate facts exist to decide whether or not the officer's conduct clearly violated established law.).

Gainor v. Rogers, 973 F.2d 1379, 1385 (8th Cir. 1992) ("The cases are legion in this and other circuits which establish that where there are genuine issues of material fact surrounding an arrestee's conduct it is impossible for the court to determine, as a matter of law, what predicate facts exist to decide whether or not the officer's conduct clearly violated established law.").

Cross v. City of Des Moines, 965 F.2d 629, 632 (8th Cir. 1992) ("If a case involves a question of whether probable cause existed to support an officer's actions, the case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed.").

Audio Odyssey, Ltd. v. Brenton First National Bank, 284 F.Supp.2d 1159, 1170 n.10 (S.D. Iowa 2003) (on remand from en banc opinion) ("Audio Odyssey cites *Hummel v. City of Carlisle*, 229 F.Supp.2d 839 (S.D.Ohio 2002), and argues *Saucier* does not stand for the proposition that this court is called upon to resolve fact questions for the jury on qualified immunity. . . . Applying *Saucier*, the court [in *Hummel*] reasoned that the doctrine announced in that case 'has the effect of taking some jury questions away from the jury, but that is precisely why qualified immunity is a principle of law, not fact.' . . Contrary to Audio Odyssey's assertion, the *Hummel* court did reason that *Saucier* requires the court to make a reasonableness inquiry as a matter of law before the case can ever get to a jury.").

Cline v. Union County, 182 F. Supp.2d 791, 802 (S.D.Iowa 2001) ("At the summary judgment stage, a court determining qualified immunity must consider true those facts asserted by the plaintiff and properly supported in the record. . . A court cannot grant summary judgment on the qualified immunity issue, if a genuine dispute exists concerning predicate facts material to qualified immunity. . . An official asserting qualified immunity has the burden of proving the

defense. . . When a defendant asserts qualified immunity, the plaintiff has the burden to show that a question of fact precludes summary judgment. . . Once predicate facts are established, the reasonableness of the official's conduct under the circumstances is a question of law.").

NINTH CIRCUIT

Estate of Elkins v. Pelayo, 737 F. App'x 830, ___ (9th Cir. 2018) ("In *Cruz*, we stated: 'To decide this case a jury would have to answer just one simple question: Did the police see Cruz reach for his waistband? If they did, they were entitled to shoot; if they didn't, they weren't.' *Cruz*, 765 F.3d at 1079. Here, because the record contains reasons to doubt whether Officer Pelayo actually saw Elkins reach for his waistband, the decision similarly should be left to the jury. In summary, regarding Plaintiffs' Fourth Amendment claim, a reasonable jury could find on the evidence presented that Elkins was not reaching for his waistband or that, even if he was, the use of deadly force in this case was excessive.")

Estate of Elkins v. Pelayo, 737 F. App'x 830, ___ (9th Cir. 2018) (N.R. Smith, J., dissenting) ("In making its decision, the majority ignores the Supreme Court's constant admonition to determine issues of qualified immunity at the earliest stage of litigation by failing to apply the summary judgment rules related to the doctrine of qualified immunity. Let me explain. . . .Reviewing all of the evidence in the record, there is simply no evidence contradicting Officer Pelayo's testimony. Instead, the evidence corroborates Officer Pelayo's statements. First, Elkins was carrying a methamphetamine pipe near his waistband. Plaintiffs admit that '[g]iven that Elkins landed from a significant height in a crouching position, it is possible that Elkins reached towards the methamphetamine pipe because it was digging into his abdomen or had caused him pain.' In addition, the district court noted that '[s]uspects have been known to discard contraband when fleeing from the police.' Second, Plaintiffs note that Elkins was wearing baggy pants and may have reached for his waistband to pull them up. Surveillance video from the gas station supports this theory. In the video, Elkins appears to reach for and grab his waistband while fleeing his vehicle on foot. Third, Officer Pelayo's contemporaneous statements confirm these uncontroverted facts. . . As the officers approached Elkins after the shooting, Officer Pelayo was yelling 'Why were you reaching? Do you have a gun? Do you have a gun? Why were you reaching for your waistband?' Finally, the testimony of Sergeant Ynclan and Detective Guzman is consistent with Officer Pelayo's statement that Elkins reached for his waistband. In sum, Officer Pelayo was pursuing a suspect, known to use deadly force to escape capture. When Officer Pelayo saw the suspect reach into his waistband, he believed the suspect was attempting to retrieve a weapon. As a result, Officer Pelayo responded with deadly force. . . . Facing a nearly identical factual situation, we have already determined that the use of deadly force is objectively reasonable. In *Cruz*, officers were pursuing a reportedly armed suspect who displayed 'dangerous and erratic behavior.'. . We determined that '[i]t would be unquestionably reasonable for police to shoot [such] a suspect ... if he reaches for a gun in his waistband, or even if he reaches there for some other reason.'. . Thus, it was reasonable for Officer Pelayo to use deadly force when he saw Elkins reach into his waistband even though Elkins was not in fact armed. . . Consequently, his conduct did not violate Elkins' constitutional

rights. On the other hand, even if Officer Pelayo's actions somehow violated a constitutional right, Plaintiffs have not satisfied the second prong of the qualified immunity analysis. . . .Here, even the majority admits Officer Pelayo's use of deadly force may not have violated Elkins' rights. Indeed, *Cruz* appears to foreclose any other conclusion. . . Thus, Officer Pelayo is entitled to qualified immunity. . . . We may not absolve Plaintiffs of their burden of presenting evidence sufficient to survive summary judgment, no matter the tragic circumstances in a case. Here, there is no evidence to contradict Officer Pelayo's statement that Elkins (who had previously tried to run over an officer with his car to escape capture) reached for his waistband. Rather, all of the circumstantial evidence is consistent with Officer Pelayo's statement. Thus, no reasonable jury could find that Elkins did not reach. The majority fails to cite any evidence in the record sufficient to convince a reasonable jury that Elkins did not reach for his waistband. Construing the facts cited by Elkins in his favor, 1) Officer Pelayo was not told that Elkins was armed with a gun, 2) the officers did not find a weapon when they searched Elkins after the shooting, and 3) Elkins' wounds had a back-to-front trajectory. However, none of this evidence shows that Elkins did not reach into his waistband. . . . [T]he fact that the officers did not find a weapon when they searched Elkins does not prove that Elkins did not reach into his waistband. Rather, it merely evidenced that he did not reach into his waistband to retrieve a weapon. Instead, there are other reasons Elkins may have reached into his waistband. As previously noted, Elkins may have reached to grab the methamphetamine pipe or to pull up his baggy pants. . . .Faced with these facts, the majority misapplies the summary judgment standard to reach its outcome. . . . Here, there is no evidence that Elkins did not reach for his waistband nor is there evidence that contradicts Officer Pelayo's statement. Thus, we must grant summary judgment; we cannot deny summary judgment based on mere speculation or 'some metaphysical doubt.'")

Rodriguez v. County of Los Angeles, 891 F.3d 776, 794-96 (9th Cir. 2018) ("We accept the jury's findings of fact, 'including the [appellants'] subjective intent,' unless the appellants demonstrate that those findings were unsupported by the evidence. . . But while 'only the jury can decide the disputed factual issues, ... only the judge can decide whether the right was clearly established once the factual issues are resolved.'. . . [T]he jury here was instructed that it had to find that (1) appellants 'used excessive and unnecessary force under all of the circumstances'; (2) appellants 'acted maliciously and sadistically for the purpose of causing harm'; and (3) 'the acts of the [appellants] caused harm to the [appellees].' As we explained above, Rodriguez has forfeited any argument that his claim should have been analyzed under the more lenient, purely objective, due process standard. Appellants argue that their use of force was justified by the appellees' resistance. In effect, they attack the jury's finding that they violated the Eighth Amendment by acting 'maliciously and sadistically.' This argument is meritless. . . . Appellants also argue that the law regarding their conduct was not clearly established. Though we do 'not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'. . . Though we defer to the jury's reasonable view of the facts, 'the "clearly established" inquiry is a question of law that only a judge can decide.'. . .Analogous Supreme Court and circuit cases decided well before 2008 gave these deputies notice that the malicious and sadistic use of force in responding to a prison disturbance violated the Eighth

Amendment. . . . Given these precedents, no reasonable officer in appellants' positions would have believed that beating a prisoner to the point of serious injury, unconsciousness, or hospitalization solely to cause him pain was constitutionally permissible.")

Easley v. City of Riverside, 890 F.3d 851, 856-58 (9th Cir. 2018) ("Courts are 'permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'. . If the second prong is dispositive, courts need not analyze the first. . . In this case, the district court analyzed only the second prong and concluded that summary judgment was warranted. . . . Here, taking the facts and allegations in the light most favorable to Easley, Macias' use of deadly force was objectively reasonable. It is an undisputed fact that Macias was concerned about the presence of a gun. Watkins, Macias's partner, had shouted 'Gun' or 'He's got a gun' when Easley ran away from the Chevrolet and the patrol car. Macias then saw Easley grab his waistband as he ran. It is undisputed that as he ran, Easley pulled an object from his right pants' pocket with his left hand and threw it away from his body. Macias shot Easley within two to four seconds of the object leaving Easley's hand. . . Easley stated that he threw the gun in a motion similar to throwing a Frisbee across his body; this would necessarily involve some upper body or shoulder movement. Based on these undisputed facts, a reasonable officer may have reasonably feared that Easley had a gun and was turning to shoot him. Thus, viewing the critical evidence in the light most favorable to Easley, we conclude that Macias is entitled to qualified immunity. We need not, and do not, resolve the remaining disputed issues of fact in Macias' favor to reach this result. . . . Macias' application of deadly force was a proportional response because 'the Fourth Amendment does not require' a police officer to be 'omniscien[t], and absolute certainty of harm need not precede [an officer's] act of self-protection.'. . . The district court committed no error when it sua sponte raised the issue of qualified immunity and addressed it on summary judgment because the district court retains this authority and because Macias raised and preserved qualified immunity as a defense. On the merits, the district court correctly granted qualified immunity to Macias and summary judgment in his favor because his application of deadly force was objectively reasonable under the Fourth Amendment.")

Easley v. City of Riverside, 890 F.3d 851, 858-61 (9th Cir. 2018) (Pratt, J. (S.D. Iowa), dissenting) ("In order to ensure Officer Macias is insulated from liability at this pre-trial stage in the present litigation, the district court and today's majority have stretched too thin the established bodies of law concerning both summary judgment and qualified immunity. . . .Because Easley's Seventh Amendment right to trial by jury is at stake, we must 'assiduously avoid deciding disputed facts or inferences' in our quest to determine whether this record contains any genuine factual disputes necessitating trial. . . . This case presents a particular class of summary judgment ruling: whether a law enforcement officer, alleged to have used unconstitutionally excessive or deadly force, is entitled to qualified immunity and cannot be sued under § 1983. . . . Over time, this Court's recitations of the separate laws of summary judgment and qualified immunity began to mutate and coalesce, and the two bodies of law have been occasionally folded into one symbiotic permutation:

> [A]t summary judgment, an officer may be denied qualified immunity in a Section 1983 action 'only if (1) the facts alleged, taken in the light most favorable to the party asserting injury, show that the officer's conduct violated a constitutional right, and (2) the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood [his] conduct to be unlawful in that situation.'

This abbreviated standard, in my view, gives short shrift to the importance of careful examination and construction of the factual record on summary judgment; to the courts' duty to fastidiously decline to make findings of fact; and to plaintiffs' constitutional rights under the Seventh Amendment, which necessarily hang in the balance. The U.S. Supreme Court has expressly held that summary-judgment standards are not different or lowered in the context of a claim to qualified immunity. *Tolan*, 134 S. Ct. at 1866. It cannot be enough for a court merely to *say* that it affords every fact and inference to the party opposing the motion; the court must affirmatively endeavor to do so. . . In this case, I perceive genuine, material factual disputes in the record that the district court and the majority have either improperly purported to resolve or improperly ignored. In doing so, they have inadvertently encroached upon the constitutional province of the jury and upon Easley's Seventh Amendment rights. . . Concerning the district court's approach to this case, the record shows the court made impermissible credibility determinations and engaged in other affirmative fact finding. . . The court found Macias's controverted testimony to be credible, finding that Macias 'saw the profile of the gun' when Easley removed it from his pocket and threw it away. The court went one step further and held there was 'no evidence' to the contrary. . . . [I]n drawing all inferences in Easley's favor to conform with the law of summary judgment, we may not find or presume either (1) that the object Easley threw during the foot chase was or was not visibly identifiable or (2) that Macias did or did not 'see the profile" of a gun. . . .The majority has avoided these two summary-judgment pitfalls, but it has joined the district court in three others. First, the district court and the majority have improperly considered the fact that Easley conceded *post facto* that the object thrown was in fact a gun. The standard is that the record must be evaluated 'from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight.'. . The majority's consideration of knowledge gained after the incident is contrary to both the proper standard concerning reasonableness and the principles of summary-judgment evidence. Therefore, we can give no weight to Macias's claim in his briefing that he 'correctly thought [Easley] was armed,' and I reject the majority's apparent reliance on the fact that the object thrown was 'later determined to be a gun.'")

Easley v. City of Riverside, 890 F.3d 851, 862-65, 868 (9th Cir. 2018) (Pratt, J. (S.D. Iowa), dissenting) ("Concerning the doctrine of qualified immunity, I agree in general terms with the majority's recitation of the applicable law. In essence, there are three inquiries we must perform to determine whether an official is entitled to qualified immunity: (1) whether the official's conduct violated a plaintiff's constitutional right; (2) whether the constitutional right asserted by the plaintiff was clearly established in the law as it was at the time of the official's conduct; and (3) whether the law at the time would have made it clear to a reasonable official that the alleged

conduct was unlawful under the circumstances. . . . [T]he district court has conflated the first inquiry—whether an official's exercise of force was unreasonable and therefore a violation of a constitutional right—with the third inquiry—whether a reasonable officer would have understood particular conduct to be unlawful.[6] [fn. 6 The district court purportedly based its decision on the second and third prongs of the qualified-immunity test, but it also relied solely on a reasonable-force analysis, which alone answers only the first prong. The majority states the district court relied on the second and third prongs, then proceeds to review the district court's ruling; however, its ultimate conclusion that Macias's 'application of deadly force was objectively reasonable' suggests it relies on the first prong.] . . . .Though each inquiry turns on a determination of objective reasonableness, the two questions are neither identical nor coextensive. The first asks whether the use of force was reasonable, while the third asks whether a reasonable official would have known the force used was unreasonable under the law. . . .The first inquiry asks whether the defendant official 'violated a federal statutory or constitutional right.'. .The dispositive consideration for the district court was whether there were objective identifiers that Easley 'pose[d] an immediate threat to the safety of" Macias. . . I do not agree that the evidence—construed pursuant to the summary-judgment standard—reflects an indisputable, objectively perceptible, and immediate threat. There remain genuine disputes about, *inter alia*, Macias's line of sight on the gun and the timing between Easley's self-disarming and Macia's decision to fire on him. Therefore, it is possible for a jury to conclude on this record that Macias first reasonably suspected Easley was armed, then clearly observed Easley divest himself of the suspected firearm, and finally decided—*after* sufficient time to recognize Easley was unarmed and not dangerous—to fire upon him. The district court avoided this conclusion in part by deciding that the timing of this event is immaterial for summary-judgment purposes. I disagree. It is, for example, self-evident, that if an officer observes a suspect disarm himself and then pursues the suspect on foot *away* from the discarded weapon for thirty seconds, he may not then decide to fire upon the suspect and claim in good faith that he was in fear of the suspect using the discarded weapon to hurt him. Likewise, it is clear that if an officer observes a suspect remove a firearm from his pocket toward the officer and the officer shoots the suspect before the firearm leaves the suspect's hands, the officer's fear was reasonable even if the suspect later claims it was his intent to discard the weapon. This case, then, presents a complex line-drawing exercise: at what point between these two extremes does a fear of immediate harm become unreasonable? . . . .Of course, if a jury were to determine that fewer than four seconds passed or that Macias could not have objectively seen or known that Easley had disarmed himself, this calculus changes. That is why the matters of timing and of Easley discarding his firearm remain genuine, triable issues of material fact. It does not settle the issue to say simply that Easley was shot 'within two to four seconds of throwing the gun.' . . I therefore dissent from the majority's conclusion that Macias's 'application of deadly force was objectively reasonable' as a matter of law. . . . When, as here, triable issues of fact preclude resolution of an official's entitlement to qualified immunity, then the immunity question is 'transformed from a doctrine providing immunity from suit to one providing a defense at trial.'. . On remand, 'special interrogatories to the jury can be used to establish disputed material facts,' which the district court can then rely upon to determine Macias's eligibility for qualified immunity as a matter of law. ")

Reese v. County of Sacramento, 888 F.3d 1030, 1037-40 (9th Cir. 2018) ("Here, the jury found Deputy Rose violated Reese's right to be free from excessive force under the Fourth Amendment. . . . Rose's entitlement to qualified immunity therefore turns on whether Reese's right was clearly established at the time of the incident in 2011. Joining other circuit courts from around the country, this Court recently determined that the 'clearly established' prong of the qualified immunity analysis is a matter of law to be decided by a judge. *Morales v. Fry*, 873 F.3d 817, 824–25 (9th Cir. 2017). . . . We recognized, however, that '[a] bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.'. . In arguing that his right to be free of excessive force under these circumstances was clearly established, Reese relies on the jury's answer to Question 14, their finding that it did not appear that Reese posed an immediate threat of death or serious physical injury to Rose at the time Rose fired his shot. Reese contends that by making this finding, the jury determined Rose violated Reese's clearly established right not to be subjected to deadly force when he posed no immediate threat to Rose or others. As *Morales* confirmed, however, the question of whether the right was clearly established is solely for the judge to decide, not the jury. . . Thus, although the jury's finding that Reese posed no immediate threat of death or serious physical injury to Rose addresses the first prong of the qualified immunity analysis, it does not answer the purely legal question of whether the right was clearly established in this context. Therefore, the district court was within its authority to determine, as a matter of law, whether Deputy Rose was entitled to qualified immunity, even where a jury determined that he violated Reese's Fourth Amendment right to be free from excessive force. . . .We agree with the district court that Reese has not identified any sufficiently analogous cases showing that under similar circumstances, a clearly established Fourth Amendment right against the use of deadly force existed at the time of the shooting. The jury determined that when Reese answered the door to his apartment, he had a knife in his hand in an elevated position. Upon seeing Reese in the doorway with the knife, which was very close to where Rose was standing, Brown immediately fired a shot from his rifle at Reese, but missed. After Brown fired the shot, he saw Reese back into the apartment and drop the knife. Rose, who saw Reese when he first opened the door, lost sight of Reese when he backed up into his apartment and after Brown fired at him. Rose then advanced toward the doorway and was surprised to see Reese standing in the apartment. Rose stated that he could not see Reese's hands but upon seeing him, shot Reese in the chest from three to five feet away. Notably, while the jury found that Reese did not brandish the knife at Rose, they also found that at the time Rose fired his shot, he did not see Reese's hands. Although Reese goes to great lengths to remind this Court that we do not demand a case with 'materially similar' factual circumstances or even facts closely analogous to his case, *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), none of Reese's cited cases demonstrate that the contours of his Fourth Amendment right were sufficiently clear such that 'any reasonable official in [his] shoes would have understood that he was violating it.'. . Critically, Reese points to no case that considered the relevant question whether Deputy Rose, having come within striking distance of a suspect who had held a knife a fraction of a second before, was objectively unreasonable in using deadly force before determining whether the suspect still possessed the knife. . . .Reese's reliance on our decision in *Hughes v. Kisela*, 862 F.3d 775

(9th Cir. 2016), only confirms that the law was not clearly established here. In *Hughes*, we reasoned that an officer's shooting of a plaintiff who was approaching a third party while holding a kitchen knife at her side violated the plaintiff's clearly established rights, where the facts viewed in the plaintiff's favor showed that she was not 'angry or menacing,' officers knew only that she has been using the knife to carve a tree, and the plaintiff did not understand orders to drop the weapon. . . After Reese's appeal was argued, the Supreme Court summarily reversed our decision in *Hughes*, concluding that it was 'far from an obvious case,' and that none of our precedents squarely governed the facts involved. *Kisela v. Hughes*, —– U.S. ——–, 138 S.Ct. 1148, 1153, —– L.Ed.2d —— (2018). Given that Rose had greater reason to perceive a threat here, and no luxury of time or distance to discern whether Reese still posed such a threat, the Supreme Court's decision in *Kisela v. Hughes* further illustrates that Rose is entitled to qualified immunity. None of Reese's cases 'squarely govern' the situation that Rose confronted such that they would have given Rose clear warning that his use of deadly force was objectively unreasonable. . . Absent a showing by Reese that the right was clearly established at the time, Rose is entitled to qualified immunity on the Fourth Amendment excessive force claim. We therefore affirm the district court's ruling that Deputy Rose is entitled to qualified immunity on that claim.")

Demaree v. Pederson, 887 F.3d 870, 884 (9th Cir. 2018) (per curiam) ("To recap: We do not here deal with a 'general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment,' which 'is of little help in determining whether the violative nature of particular conduct is clearly established.'. . Instead, we have here a very specific line of cases, culminating in *Rogers* and *Mabe,* which identified and applied law clearly establishing that children may not be removed from their homes without a court order or warrant absent cogent, fact-focused reasonable cause to believe the children would be imminently subject to physical injury or physical sexual abuse. *Rogers*, the last in the series before the events in this case, summarized that law and explained why qualified immunity was inapplicable: 'Prior to the events in question, we had repeatedly held that a family's rights were violated if the children were removed absent an imminent risk of serious bodily harm. A reasonable social worker would need nothing more to understand that she may not remove a child from [his or her] home on the basis of a [situation] that does not present such a risk.'. . *Mabe, Rogers*, and their predecessors thus gave clear notice of the law to social workers responsible for protecting children from sexual abuse and families from unnecessary intrusion. We accordingly reverse the district court's grant of qualified immunity to Pederson and Van Ness.")

Bonivert v. City of Clarkston, 883 F.3d 865, 879-81 (9th Cir. 2018) ("The instance of force at issue on appeal is Combs' use of his taser in 'drive-stun' mode inside Bonivert's home. . . In *Mattos*, we recognized that use of a taser in drive-stun mode on a person who 'actively resisted arrest,' but posed no 'immediate threat to the safety of the officers or others,' constituted excessive force. 661 F.3d at 445–46. The events of this case took place in 2012, the year after we decided *Mattos*. The constitutional right was clearly established for qualified immunity purposes. . . .The Supreme Court has cautioned that attempting to decide excessive force cases at summary judgment requires courts to 'slosh our way through the factbound morass of "reasonableness,"'

with predictably messy results. . . That is precisely what happened when the district court granted summary judgment. Once the officers broke the windowpane and unlocked the back door, a chaotic and confusing scene unfolded, generating equally confusing and chaotic evidence. To begin, based on the taser video, the district court concluded that Bonivert appeared to move beyond the threshold of the door towards the officers in a manner that caused them to reasonably view Bonivert as a threat, which in turn justified deployment of the tasers in dart mode and the officers' forced entry into the home. The two seconds of video that depict Bonivert's retreat are inconclusive, especially since the shaky footage comes from a taser. . . . The district court decided that the officers' tackling of Bonivert and the repeated use of tasers in drive-stun mode was warranted based on the following disputed facts: Bonivert attacked Combs; Bonivert screamed at the officers and yelled profanities; and Bonivert continued to struggle and failed to obey the officers' commands. Each of these conclusions was based on conflicting testimony, and drew upon the officers' version of events rather than Bonivert's testimony. . . .Taken in the light most favorable to Bonivert, the evidence reflects that Bonivert remained inside the home at all times; that Bonivert did not threaten or advance toward the officers; that Bonivert posed no immediate threat to the officers; that Combs threw Bonivert across the back room; that Bonivert did not resist arrest; and that Combs tasered Bonivert several times in drive-stun mode notwithstanding Bonivert's compliance. The evidence does not justify the district court's conclusion that 'no reasonable jury could find the use of force within the home excessive.' To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. . . But in weighing the evidence in favor of the officers, rather than Bonivert, the district court unfairly tipped that inquiry in the officers' favor. . . Thus, genuine issues of fact 'prevent[ ] a determination of qualified immunity at summary judgment [such] that the case must proceed to trial.'")

Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1130-32d (9th Cir. 2017) ("Here the officers' use of force began appropriately enough: Despite Jones's large size and the fact that he had run away from a traffic stop, he had neither threatened Hatten nor committed a serious offense, and he didn't appear to have a weapon. Based on these facts, Hatten believed that something less than deadly force was justified, so he used his taser to subdue Jones. This decision was consistent with our case law, as we've held that use of tasers can be intermediate force. . . Using a taser to stop Jones and place him under arrest was reasonable under the circumstances. As the situation evolved, however, the justification for the use of force waned. The four other officers at the scene gave somewhat inconsistent accounts about their continued use of force. What is clear is that Hatten continued to apply his taser to Jones and English also applied his taser twice, even as Jones was being handcuffed. By the time Jones was prone and surrounded by multiple officers, there would have been no continuing justification for using intermediate force: Jones was on the ground after his body 'locked up' as a result of repeated taser shocks; he had no weapon and was making no threatening sounds or gestures. There is a triable issue of fact as to whether the officers were reasonable in the degree of force they deployed at that point. . . .Based on this evidence, a jury could reasonably conclude that the officers knew or should have known that their use of tasers created a substantial risk of serious injury or death. Thus, there are triable issues of fact as to

whether the officers' continuous and simultaneous tasing was reasonable under the circumstances, and whether the officers were on notice that the force they used could cause serious injury or death. . . . [C]ontinuous, repeated and simultaneous tasings are different from isolated shocks. . . . Such force generally can't be used on a prone suspect who exhibits no resistance, carries no weapon, is surrounded by sufficient officers to restrain him and is not suspected of a violent crime. Given that there was clearly established Fourth Amendment law and a jury could reasonably conclude that the officers used excessive force, the question of qualified immunity must proceed to trial.")

Longoria v. Pinal County, 873 F.3d 699, 704-11 (9th Cir. 2017) ("We acknowledge at the outset that in the last five years, the Supreme Court has reversed a number of federal courts, including ours, in qualified immunity cases because we failed to abide by the longstanding principle that ' "clearly established law" should not be defined at a high level of generality.'. . This has been a particular problem in cases presenting novel factual circumstances involving car chases. Here, although preceded by a car chase, the shooting occurred after the pursuit ended and Longoria's vehicle was disabled, as described above. This is not one of those cases occurring mid-pursuit against a 'hazy legal backdrop.'. . Nor is this like other recent cases the Court has reversed. We do not rely on a factor mentioned in prior case law but not clearly established such that a reasonable officer would be on notice to conform his conduct accordingly, . . . or define a constitutional violation at too high a level of generality to be clearly established[.]. . Here we must assess Rankin's reasonableness in using deadly force against Longoria, who was unarmed, was surrounded by law enforcement officers, had been shot by bean bag rounds and a taser, and was in the process of putting his hands over his head reflexively or in an effort to surrender. Rankin claims that when Longoria turned to raise his hands he threatened him or his fellow officers with a 'shooter's stance.' Because of the many material, disputed facts in this case, Rankin's credibility or the accuracy of his version of the facts is a central question that must be answered by a jury. We cannot decide as a matter of law that qualified immunity is appropriate at the summary judgment phase. . . .Defendants argue that Rankin reasonably perceived a black or silver weapon in Longoria's hands and then saw Longoria assume a 'shooter's stance.' The district court relies on a single frozen frame from one of the videos to find that 'uncontroverted video evidence shows that Mr. Longoria came up with both hands in front of him facing Defendant Rankin's direction.' It does not mention any black or silver weapon. Deputy Rankin did not however see a frozen frame, disaggregated from the context of the rest of the footage. He watched events unfold in real-time as the two videos played at their ordinary speed portray. These videos provide some of the most important evidence as to what occurred before and during the shooting and what Rankin actually saw. This evidence alone raises material questions of fact about the reasonableness of Rankin's actions and the credibility of his post-hoc justification of his conduct. . . Viewing the two videos in the light most favorable to Longoria, the moment Rankin describes as a 'shooter's stance' is not perceptible. While Rankin relies on a single frozen frame of the iPhone video to illustrate the 'shooter's stance,' all that demonstrates is the existence of a genuine dispute of material fact. . . The full record only heightens this and other factual disputes. . . . In addition to the question whether Rankin actually perceived that Longoria assumed a 'shooter's stance' when he shot and killed him, there is, inter alia, a material dispute as to: whether Rankin heard commands to use

non-lethal force or the other officers' shouts that Longoria was holding his wallet behind his back; whether Rankin, who has 20/20 vision, reasonably perceived a weapon in Longoria's hands from his position as he said he did; whether Longoria was in fact reacting to the non-lethal force deployed by other officers rather than assuming a 'shooter's stance'; and whether, as a matter of fact, Rankin could have had enough time to perceive the alleged 'shooter's stance' at the moment he claims to have done so and then shoot Longoria in response to that observation at the time the videos show he shot him. . . The district court resolved all of those disputed facts in favor of Rankin. Viewing all of these facts in the light most favorable to Longoria, a reasonable jury could conclude that Rankin knew or should have known that Longoria was not armed, that Rankin never perceived a 'shooter's stance,' and that Rankin knew or should have known that Longoria was either surrendering in response to the non-lethal force of the bean bag rounds and taser or reacting in some manner to their effects upon him but was by no means threatening to shoot at Rankin or any of the other officers. . . . The immediacy of the threat and Rankin's objective reasonableness in the totality of the circumstances depend upon the resolution of disputes of material facts that must be resolved against Rankin at this stage of the proceedings. We cannot say as a matter of law that Rankin acted reasonably. The question of whether a constitutional violation occurred is therefore a matter for the jury to determine. . . . The law governing this case is clearly established: 'A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. While locating the outer contours of the Fourth Amendment may at times be a murky business, few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'. .Thus, Longoria's Fourth Amendment right not to be shot dead while unarmed, surrounded by law enforcement, and in the process of surrendering is clearly established such that a 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'[9] [fn. 9: Within the specific context of Longoria's death, shot with his empty hands in the air above his head, this constitutional right is so clearly established that it has become the anthem in many protests of other police shootings: 'Hands up, don't shoot!'] . . . If, however, Rankin reasonably perceived that Longoria posed a threat of serious physical harm to Rankin or other officers, then he could have lawfully used deadly force. There is no dispute in this case about these propositions. We are presented here with a pure question of fact and not a question of law or of mixed fact and law. Rankin contends that he in fact perceived that Longoria assumed a 'shooter's stance' and that Longoria appeared to be armed. Longoria, on the other hand, asserts that Rankin did not see, nor could he in fact have seen, what he claimed caused him to believe that Longoria assumed a 'shooter's stance' and that he appeared to be armed. 'Where the facts are disputed, their resolution and determinations of credibility "are manifestly the province of a jury."'. . This case turns on disputed facts, including the credibility of Rankin. . . . We may not usurp the jury's role as the arbiters of fact, nor can our analysis at summary judgment change simply because the videos that show these disputed events unfolding in real-time may be called into question by a single frozen frame that does not represent what an officer actually saw at the time the events unfolded. . . Defendants are not entitled to qualified immunity because there is a material issue of fact as to whether Rankin violated Longoria's clearly established constitutional

right. We therefore reverse the district court's grant of summary judgment and remand for a jury to determine whether Rankin's use of deadly force was lawful.")

Morales v. Fry, 873 F.3d 817, 819-26 (9th Cir. 2017) ("The primary issue in this appeal is whether the 'clearly established' prong of the qualified immunity analysis should be submitted to a jury. Following the lead of nearly all of our sister circuits, we conclude that it is a question of law that must ultimately be decided by a judge. . . . [Q]ualified immunity was conceived as a summary judgment vehicle, and the trend of the Court's qualified immunity jurisprudence has been toward resolving qualified immunity as a legal issue before trial whenever possible. This approach presents a dilemma when, as here, a qualified immunity case goes to trial because disputed factual issues remain. Qualified immunity is then transformed from a doctrine providing immunity from suit to one providing a defense at trial. . . Nonetheless, comparing a given case with existing statutory or constitutional precedent is quintessentially a question of law for the judge, not the jury. A bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved. . . . Nearly all our sister circuits agree with the position we adopt here. The First, Second, Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits take the view that whether a right is clearly established is a legal issue for the judge to decide, although special interrogatories to the jury can be used to establish disputed material facts. [collecting cases] The Tenth Circuit also considers this the 'better approach,' although it acknowledges certain rare and 'exceptional circumstances where historical facts are so intertwined with the law' that the court can permissibly 'define the clearly established law for the jury' and then allow the jury to 'determine [whether] what the defendant actually did ... was reasonable in light of the clearly established law.' *See Gonzales v. Duran*, 590 F.3d 855, 860-61 (10th Cir. 2009). . . .By contrast, only the Fifth Circuit has unequivocally endorsed the jury determining whether the right was clearly established if qualified immunity is not decided until trial. *See McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000). The Officers argue that the jury instructions were proper because we have previously allowed the issue of qualified immunity to be asserted at trial, citing three cases: *Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994), *Ortega v. O'Connor*, 146 F.3d 1149, 1155 (9th Cir. 1998), and *Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988). None of these cases is persuasive. . . . [T]o the extent that *Ortega* and *Thorsted* suggested that the 'clearly established' prong could be submitted to the jury, we conclude that those cases are clearly irreconcilable with intervening Supreme Court authority. . . .For these reasons, the district court erred in submitting the 'clearly established' inquiry to the jury. The district court did not determine as a matter of law what the 'established law' was nor did it offer the jury the opportunity to decide separately any factual determinations related to this prong of qualified immunity. . . .Here, the special verdict forms only asked the jury:

Question 1: Do you find for Plaintiff Maria Morales on her federal-law (§ 1983) claim for unlawful arrest against Defendant Sonya Fry?

Answer: _ (Yes) X (No)

Question 2: Do you find for Plaintiff Maria Morales on her federal-law (§ 1983) claim for excessive force against Defendant Sonya Fry?

Answer: _ (Yes) X (No)
Because the jury answered 'No' to both questions, we cannot determine if they found a constitutional violation. One possibility is that the jury believed Officer Fry's version of events, found no underlying constitutional violation, and so did not need to consider application of the clearly established rule set out in Jury Instruction Nos. 20 and 21. And even if the jury did so, whatever it found under these instructions would be surplusage. In that scenario, the jury would have found against Morales regardless. The district court's ability to make a contrary finding would have been extremely constrained. However, another very realistic scenario is that the jury believed Morales's version of events, found one or more underlying constitutional violations, but also concluded that Fry reasonably believed her actions were in accordance with the law (although it was not defined for the jury). Had there been a jury finding of a constitutional violation, the question of clearly established law then would have been put to the district court on a Rule 50(b) motion. The district court could then have either granted or denied Fry qualified immunity. We have no way of divining which scenario actually happened. As a result, we cannot conclude that it is more probable than not that Morales would have lost her claims against Fry had the jury been properly instructed. Consequently, we must vacate the verdict with respect to Morales's unlawful arrest and excessive force claims against Officer Fry and remand for a new trial on these claims. On remand, the district court has discretion to employ either a general verdict form, or submit special interrogatories to the jury regarding the disputed issues of material fact. . . Either way, once the jury returns its verdict, the ultimate determination of whether Officer Fry violated Morales's clearly established rights is a question reserved for the court.")

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1013, 1016-17 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2680 (2018) ("[V]iewing the facts in the light most favorable to plaintiffs, as we must at this stage of the proceedings, Gelhaus deployed deadly force while Andy was standing on the sidewalk holding a gun that was pointed down at the ground. Gelhaus also shot Andy without having warned Andy that such force would be used, and without observing any aggressive behavior. Pursuant to *Graham*, a reasonable jury could find that Gelhaus's use of deadly force was not objectively reasonable. . . . [T]he dissent's accusations are as seismic as they are unconvincing. Moreover, the dissent's analysis is flawed because it rests upon a misreading of the district court's factual finding regarding the movement of Andy's gun. It bears repeating: even though we must assume for purposes of this interlocutory appeal that the barrel 'began' to rise as Andy turned, we must also assume—as the district court expressly found—that it potentially rose, as an incident of Andy's turning motion, only 'to a slightly-higher level [that did not] pos[e] any threat to the officers.'. . Mindful of that possibility, and viewing the evidence in the light most favorable to the plaintiffs, the district court found that Andy did not 'point the weapon at the officers *or otherwise threaten them with it*.'. . And that is why, taking the facts as we must regard them, a reasonable jury could find that Gelhaus deployed deadly force while Andy was merely standing on the sidewalk holding a gun that was pointed down at the ground. This conclusion echoes the district court's findings, which govern this interlocutory appeal. By contrast, the dissent's version of the event violates a fundamental principle of our summary judgment jurisprudence—that 'all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor,'. . . and selectively accepts

Gelhaus's word at face value with respect to the movement of Andy's gun, thereby contravening *Cruz*.")

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1017-21 & n.17 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2680 (2018) ("[T]he district court asked whether the law was clearly established such that an officer on October 22, 2013, would have known that the use of deadly force was unreasonable 'where the suspect appears to be carrying an AK-47, but where [the] officers have received no reports of the suspect using the weapon or expressing an intention to use the weapon, where the suspect does not point the weapon at the officers or otherwise threaten them with it, where the suspect does not "come at" the officers or make any sudden movements towards the officers, and where there are no reports of erratic, aggressive, or threatening behavior.'. . The district court held that the law was clearly established that under those circumstances, Gelhaus's use of deadly force was unreasonable. . . It did not identify a specific precedent that put Gelhaus on notice that his conduct was unconstitutional. The district court erred by failing 'to identify a case where an officer acting under similar circumstances as [Deputy Gelhaus] was held to have violated the Fourth Amendment.' *White*, 137 S. Ct. at 552. However, *George v. Morris* serves that function. *Harris* and *Curnow* were also on the books to provide Gelhaus with guidance. . . . The dissent conjures its own 'framing'—'that the use of deadly force without an objective threat is unreasonable'—and criticizes the use of that fictitious frame to the extent that it applies here. We employ no such frame. Nor do we rely on general excessive force principles. Rather, we ask whether the law was clearly established that the use of deadly force was unreasonable in a situation where the factual predicates enumerated in Part I.B are assumed to be true. Somewhat distilled, this is a situation where, among other things, the suspect appears to be carrying an AK-47, but where [the] officers have received no reports of the suspect using the weapon or expressing an intention to use the weapon, where the suspect does not point the weapon at the officers or otherwise threaten them with it, where the suspect does not 'come at' the officers or make any sudden movements towards the officers,' where the officers do not witness any 'erratic, aggressive, or threatening behavior,' and where the suspect was not warned that deadly force would be deployed despite the officers having ample opportunity to do so. . . . At bottom, taking the facts as we must regard them at this stage of the proceedings, Gelhaus, like the deputies [in *George v. Morris*], shot without warning, without objective provocation, and while the gun was trained on the ground. Because *George* 'squarely governs' the circumstances that Gelhaus confronted, Gelhaus violated Andy's clearly established right to be free of excessive force in this context. . . . Though *George* is sufficient, *Harris* and *Curnow* also gave Gelhaus warning that his use of deadly force was not objectively reasonable. [discussing cases] In light of *George*, *Harris*, and *Curnow*, and taking the facts as we must regard them at this stage of the proceedings, there is no room for Gelhaus to have made 'a reasonable mistake' as to what the law required. . . Qualified immunity may also apply, however, where the government official makes a reasonable 'mistake of fact.'. . Here, Gelhaus could not have reasonably misconstrued the threat allegedly posed by the position of Andy's gun because, on the facts as we must regard them, it never rose to a position that posed any threat to the officers. Accordingly, the only question is whether Gelhaus could have reasonably misconstrued Andy's turn as a 'harrowing gesture.'. . .Based on the present

record, Gelhaus could not reasonably have misconstrued Andy's turn as a 'harrowing gesture.'. . . In short, prior to and during Andy's turn, Gelhaus simply did not witness *any* threatening behavior. Thus, the only reasonable inference is that Andy was turning naturally and non-aggressively to look at the person who shouted from behind. If anything, Gelhaus should have *expected* Andy's turn, for it did not contravene Gelhaus's command, and it may have been an effort to comply. . . .If the jury finds, for instance, that Andy briefly glanced backwards and was aware that the officers were following him, it may find that he intentionally disobeyed the order to drop the gun, that he turned aggressively, and that his weapon was not pointed at the ground. On those facts, even if Gelhaus committed a Fourth Amendment violation, his conduct likely did not violate clearly established law given that 'a furtive movement, harrowing gesture, or serious verbal threat' can justify deadly force against someone who is armed. . . Conversely, if plaintiffs' version of the facts prevails and the jury concludes that Andy posed no imminent threat to the officers, then Andy's right to be free of excessive force in this context was clearly established at the time of Gelhaus's conduct. . . Because Gelhaus's entitlement to qualified immunity ultimately depends on disputed factual issues, summary judgment is not presently appropriate.")

Estate of Lopez v. Gelhaus, 871 F.3d 998, 1022, 1025-32 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2680 (2018) (Wallace, J., dissenting) ("The facts of this case are tragic. A boy lost his life—needlessly, as it turns out. We know now that he was carrying only a fake gun, albeit a realistic-looking one. Deputies Gelhaus and Schemmel therefore never were in any real danger and deadly force was not necessary. In view of these facts, the inclination to hold Deputy Gelhaus liable for shooting Andy Lopez is understandable. But it is a well-settled rule that a court may do so only if precedent clearly established at the time of the shooting that the use of deadly force in the circumstances Deputy Gelhaus faced was objectively unreasonable. I do not agree with the majority that such a case existed on the day Andy died. Respectfully, I therefore dissent. The majority opinion exhaustively recounts the facts of the case, but for me, they are largely irrelevant. One critical fact—the upward motion of the fake gun—resolves the qualified immunity issue in Deputy Gelhaus's favor. . . . The majority says it is deferring to the district court's findings, but it is not. Rather than perform these interpretive changes, I would take the district court at its word and decide this appeal on the understanding that the gun was beginning to rise when Deputy Gelhaus committed to using deadly force. . . .I agree with the majority's conclusion that the district court erred by failing to conduct the necessary analysis identifying a precedential case or cases it believed would have put Deputy Gelhaus on notice that his conduct was unconstitutional. . . Rather than conclude there and decide the appeal, the majority attempts to perform on its own the district court's task by identifying three cases—not one of which appears anywhere in the district court's order—that purportedly served as notice to Deputy Gelhaus that he could not constitutionally use deadly force against Andy. More important than the district court's omission, which should require reversal, is that the plaintiffs themselves have never argued that these cases clearly established Andy's right, either in response to Deputy Gelhaus's motion for summary judgment or in their answering brief on appeal. . . . In my view, all of the cases cited are distinguishable on their facts from the one before us and therefore cannot perform the function the majority ascribes to them, even if it were appropriate for the majority to attempt to do so. . . .The

disputed facts the majority points to—whether Andy looked backwards at the officers, whether Deputy Gelhaus yelled at Andy to drop the gun more than once, whether the patrol car chirped more than once, whether Andy held the gun in his right or left hand, and the angle between the ground and Deputy Gelhaus at which Andy pointed his gun—are simply not material to the qualified immunity analysis. Taking together the district court's findings and undisputed facts, this case involves the use of deadly force against a hooded individual armed with a replica assault rifle indistinguishable from a real one, who turned to face an officer while raising the rifle after the officer had activated his patrol car lights and siren and yelled at the individual to drop the rifle. These facts are not sufficiently similar to the facts of *George*, *Harris,* or *Curnow* to have put Deputy Gelhaus on notice that his use of deadly force violated Andy's Fourth Amendment right to be free from excessive force. . . Without these cases, the majority is left only with the statement it cites at the beginning of its clearly established law analysis: that we may deny qualified immunity 'in novel circumstances.'. . It is doubtful how much of this statement, if any, has survived the Supreme Court's intervening decision in *White*. . . To the extent it retains any vitality, it likely would be confined to those cases where the officer's conduct is an 'obvious' violation of a constitutional right. . . This assuredly is not such 'an obvious case.'. . As shown by the majority's painstaking evaluation of the objective reasonableness of Deputy Gelhaus's use of force, this case is not obvious, but clearly quite close. Whether Deputy Gelhaus acted unreasonably turns on such minute details as how high the gun barrel had risen, whether it might have been feasible to give a warning, and just how aggressive Andy's turning motion was. By contrast, cases found to be 'obvious' involve much clearer constitutional transgressions. . . Our case is not the 'rare' one 'in which the constitutional right at issue is defined by a standard that is so "obvious" that we must conclude ... that qualified immunity is inapplicable, even without a case directly on point.'. . Accordingly, the district court's denial of immunity cannot be affirmed on this basis either. . . . Deputy Gelhaus misjudged the threat that Andy posed, and Andy's death is the heartbreaking result of that miscalculation. In circumstances like these, it is imperative that we do justice. But justice does not invariably require punishing the officer. A reasonable mistake of law or fact is not enough to impose liability. . . The law affords relief only when an officer transgresses a boundary clearly established by precedent at the time he acts. If no such case exists, the officer cannot be held liable even if his conduct, the court believes in retrospect, may be unreasonable. This is the situation that we face. The facts of the cases that the majority relies on to reach the opposite conclusion are materially different from the real facts before us. Those cases therefore could not have given Deputy Gelhaus notice that using deadly force against Andy would violate his constitutional right. Although all are sympathetic to Andy's family, as anyone should be, I am duty-bound to conclude that we must provide Deputy Gelhaus with the 'breathing room to make reasonable but mistaken judgments about open legal questions' that qualified immunity affords him. . . For these reasons, I dissent.")

Hung Lam v. City of San Jose, 869 F.3d 1077, 1085-88 & n.5 (9th Cir. 2017) ("Officer West argues that she is entitled to a new trial, because the jury instructions were erroneous in three regards: (1) the district court did not give special interrogatories to the jury; (2) the district court did not give a deadly force instruction to the jury; and (3) the district court erred by failing to

instruct the jury that an officer's 'bad tactics' are insufficient to establish constitutional liability. . . . Officer West first argues that, in qualified immunity cases involving disputed issues of material fact (like here), the district court is *required* to give special interrogatories to the jury. She is mistaken as to the precedent in our circuit. Instead, '[t]he decision "whether to submit special interrogatories to the jury is a matter committed to the discretion of the district court."'. . . The district court found special interrogatories were unnecessary. In its discretion, the district court reasoned that, if the jury found Anderson's version of the facts to be true, then Officer West would not be entitled to qualified immunity, because it is a violation of clearly established law for an officer to use deadly force against someone who poses no threat of serious harm to the officers or others. The district court did not abuse its discretion by declining to give special interrogatories based on this rationale. We recognize that other circuits have encouraged or required district courts to use special interrogatories in qualified immunity cases involving disputed issues of material fact. However, Officer West has provided no authority from this circuit supporting the proposition that special interrogatories are *required* for the purpose of evaluating a post-verdict qualified immunity defense. Additionally, Officer West failed to submit proposed special interrogatories to the district court and provides no explanation, consistent with our case law, as to how the district court abused its discretion by declining to give special interrogatories. Officer West next argues the district court's instructions failed to convey the proper standards as to objectively reasonable force. Specifically, Officer West argues that *Tennessee v. Garner* established a constitutional justification for the use of deadly force—an officer can use deadly force if she is confronted with an imminent risk of death or serious bodily injury—and that, by failing to instruct the jury on this specific justification, the court left the jurors inadequately informed as to the law. We disagree. . . . [T]he Supreme Court's more recent decision in *Scott v. Harris* rejected the view that *Garner* created a special rule in deadly force cases. . . . Rather, the Court explained, '*Garner* was simply an application of the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation.'. . We have since recognized that *Scott* overruled our prior precedent and district courts are no longer required to give a separate deadly force instruction. . . Therefore, Officer West's argument that the district court was required to give a separate deadly force instruction fails as a matter of law. . . . Officer West argues the district court erred by failing to give an instruction that explained to the jury that Fourth Amendment liability cannot be premised solely on an officer's 'bad tactics.' . . . Following the pattern jury instructions, the district court submitted the case to the jury under the general rubric of reasonableness. The district court's charge covered the appropriate legal standard and left counsel more than enough room to argue the facts in light of that standard. We cannot hold that the district court abused its discretion by declining to single out one factor in the reasonableness inquiry, when the instructions properly charged the jury to consider all of the circumstances. . . .'When a qualified immunity claim cannot be resolved before trial due to a factual conflict, it is a litigant's responsibility to preserve the legal issue for determination after the jury resolves the factual conflict.'. . To preserve the determination of qualified immunity, a defendant must make a motion for judgment as a matter of law under Rule 50(a). . . The Rule 50(a) motion may be filed 'at any time before the case is submitted to the jury.'. . If the district court denies the Rule 50(a) motion, the defendant must then renew the motion for judgment as a matter of law under Rule 50(b) to preserve the qualified immunity defense. . .

However, a 'failure to file a Rule 50(a) motion precludes consideration of a Rule 50(b) motion for judgment as a mater of law.'. . Once there has been a trial, the filing of a motion for summary judgment or raising the defense in a pre-trial submission is not sufficient to avoid a waiver. . . Officer West did not file a Rule 50(a) motion for judgment as a matter of law before the case was submitted to the jury, nor did Officer West file a renewed motion for judgment as a matter of law pursuant to Rule 50(b) after the verdict was rendered. Thus, Officer West never provided the district court an opportunity to rule on the question of whether, on the facts established at trial, she was entitled to qualified immunity. Therefore, Officer West did not preserve her post-trial assertion of qualified immunity for appeal. Following *Tortu*, if an officer has forfeited her qualified immunity defense by failing to follow proscribed procedures for the preservation of the defense, we should not consider it for the first time on appeal. . . Officer West argues that the district court's failure to give special interrogatories to the jury deprived her of a qualified immunity determination. That argument is without merit. Without properly preserving qualified immunity and providing the district court a forum to rule on the defense, it was Officer West, not the district court, who precluded a qualified immunity determination. Officer West also contends that, by requesting that the district court give special interrogatories to the jury, she properly raised qualified immunity . . . Our precedent, as explained above, forecloses this argument.")

Reed v. Lieurance, 863 F.3d 1196, 1205-07, 1211-12 (9th Cir. 2017) ("Here, we find that the district court improperly invaded the province of the jury when, at the summary judgment stage, it resolved factual disputes material to the question of probable cause. Reviewing the record before the district court at summary judgment, we find that it is possible a jury could conclude that Deputy Lieurance had probable cause to believe Reed's presence at the observation point would likely obstruct the haze and also that Reed possessed the requisite specific intent.Alternatively, a reasonable jury could conclude that Deputy Lieurance knew that Reed presented little to no risk of obstructing the operation while parked on the gravel road up the hill over half a mile from the planned route of the haze, and thus there was at best a low probability that Reed might 'impede the performance of a peace officer's law duty.'. . .[E]ven if a jury concluded Deputy Lieurance had probable cause to believe Reed was obstructing the haze, a jury could conclude Deputy Lieurance lacked probable cause to believe that Reed had the necessary specific intent to impede the haze. . . .Moreover, a jury could find Deputy Lieurance issued the citation for one or more reasons that do not satisfy the Fourth Amendment. First, a jury could conclude that Deputy Lieurance's argument that Reed was 'obstructing' the haze was pretextual, and that his real motivation in detaining and citing Reed was tied to the Campaign's recent lawsuit limiting the use of helicopters in hazing. Alternatively, there are some facts in the record tending to show that Deputy Lieurance, like the officer in *Kalispell*, issued the citation because of Reed's alleged refusal to follow an order, as opposed to any genuine likelihood that Reed would obstruct the haze. . . .Construing the facts in Reed's favor, we cannot conclude that as a matter of law, a reasonably prudent officer in Deputy Lieurance's situation would have had probable cause to believe Reed committed obstruction. Thus, Defendants are not entitled to summary judgment on Reed's unlawful seizure claim. . . .Here, in ruling that Defendants were entitled to judgment as a matter of law on this claim, the district court improperly resolved numerous factual disputes reserved for

the jury. For example, the district court quite inexplicably applied a 'presumption' that Deputy Lieurance obeyed the law. The district court also found it was 'undisputed' that the presence of Reed's vehicle parked on the gravel road presented a safety risk and interfered with the hazing operation; the district court credited Defendants' evidence regarding the buffalo's dangerousness and unpredictability. And the district court found it 'undisputed' that Agent Tierney directed Reed not simply to go north or south from Conservation Lane, but to go north of the southbound blockade or south of the northbound blockade. Puzzlingly, the court also determined that the fact that later on the same day observers were permitted to come within fifty yards of the haze was 'of no reasonable evidentiary value in determining the issues in this case.' Lastly, the court found that Reed 'was given the opportunity, at least at the south end of this no-drive zone, to ... view the haze operation as it crossed the highway.' Based on these findings—which can only reasonably be understood as factual findings and credibility determinations—the district court concluded that the restriction on Reed's First Amendment activities was reasonable as a matter of law because it was justified by safety reasons, limited in time and location, and left open a reasonable alternative. The court did not explicitly address the question of content-neutrality. Upon close review of the record, we find that contrary to the district court's conclusions, Reed presented evidence sufficient to create material factual disputes as to all three relevant inquiries: content neutrality, narrow tailoring to a significant government interest, and the existence of alternatives. . . . Second, Reed presented a First Amendment retaliation claim at trial. Reed presented sufficient evidence for a jury to conclude that Deputy Lieurance's 'desire to chill [Reed's protected activity] was a but-for cause of' the threat to take Reed to jail.")

Willis v. City of Fresno, 680 F. App'x 589 (9th Cir. 2017), *cert. denied*, 2017 WL 3036679 (Oct. 02, 2017) ("The district court did not err by denying Officer Catton qualified immunity. The evidence presented at trial established that if Willis had been reaching for the gun, deadly force was justified. Since the jury concluded that the force used was not justified, it must have concluded that Willis was not reaching for the gun and thus did not pose an immediate threat of harm when Officer Catton fired. The constitutional right to be free from the use of deadly force absent an immediate threat of harm to officers or others was clearly established at the time Officer Catton acted. *See Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). All reasonable officers would have known that using deadly force on an individual who poses no immediate threat to the officer or others violates the Fourth Amendment.")

Lowry v. City of San Diego, 858 F.3d 1248, 1261 & n.1 (9th Cir. 2017) (en banc) (Thomas, J., dissenting) ("Here, construing the facts and drawing reasonable inferences in Lowry's favor, a jury could find that the force used was severe, that the government's interest in the use of that force was not especially strong, and, therefore, that the use of a police dog was unreasonable. . . .The majority emphasizes that the reasonableness of a particular use of force is a 'pure question of law' once the facts are established. . . However, '[w]here the objective reasonableness of an officer's conduct turns on disputed issues of material fact, it is "a question of fact best resolved by a jury."' *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011) . . . Because Lowry has succeeded

in raising material disputes of fact, as detailed below, it is the task of the jury to resolve those fact disputes and draw any relevant inferences from them.")

Newmaker v. City of Fortuna, 842 F.3d 1108, 1116-17 (9th Cir. 2016) ("We hold that the district court erred in granting qualified immunity to Officer Soeth. Summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt. . . Qualified immunity should not be granted when other evidence in the record, 'such as medical reports, contemporaneous statements by the officer[,] the available physical evidence, [and] any expert testimony proffered by the plaintiff' is inconsistent with material evidence proffered by the defendant. . . The version of events offered by Officer Soeth and Sergeant Ellebrecht to the district court is materially contradicted by evidence in the record. Their versions of events changed over time. The version they presented to the district court was suggested to them by Investigator Hislop. Both their original version of events (that Officer Soeth shot Newmaker twice in quick succession while he was standing up and swinging the baton at Ellebrecht) and their second version of events (that Officer Soeth first shot while Newmaker was standing and swinging the baton, and quickly shot again as Newmaker attempted to stand back up while swinging the baton) conflict with the autopsy report and with the video evidence. A reasonable jury could conclude that Soeth and Ellebrecht were wrong when they claimed that Newmaker grabbed the baton. In the alternative, a reasonable jury could conclude, given the trajectory of the bullets through Newmaker's body, that even if Newmaker had grabbed the baton Officer Soeth could not have fired his first shot while Newmaker was standing up and swinging the baton. . . Because this case 'requires a jury to sift through disputed factual contentions' — including whether the officers were telling the truth about when, why, and how Soeth shot Newmaker — summary judgment was inappropriate.")

Figueroa v. County of Los Angeles, 651 F. App'x 709, 712-13 (9th Cir. 2016) ("Mr. Figueroa argues that the district court erred by permitting the jury to determine whether Deputy Perez was entitled to qualified immunity. Specifically, Mr. Figueroa contends that the jury should not have been permitted to decide whether Mr. Figueroa's constitutional right to be free from excessive force was so clearly established that Deputy Perez should have known his conduct was unlawful. 'Qualified immunity is a question of law, not a question of fact.' *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008). However, our case law has not been entirely consistent with regard to who may decide aspects of qualified immunity that involve disputes of material facts. *Compare Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) ("The determination of whether the facts alleged could support a reasonable belief in the existence of probable cause or reasonable suspicion is ... a question of law to be determined by the court."), *with Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) ("Though we may excuse [a] reasonable officer for [making mistakes of fact or law that lead to unconstitutional acts], it sometimes proves necessary for a jury to determine first whether the mistake was, in fact, reasonable." (citations omitted)). In this case, the material facts were contested. On the one hand, if the facts were as alleged by Mr. Figueroa, Deputy Perez may have violated a constitutional right that was clearly established. However, if the facts were as alleged by Deputy Perez, Deputy Perez's conduct did not violate any clearly established constitutional right. Thus, the court could allow the

jury to determine which version of the facts was true. . . However, this district court went a step further and instructed the jury on qualified immunity. Under *Johnson*, such deference to the jury (as to whether Deputy Perez's belief that his use of force was not unconstitutional was reasonable) may have been acceptable. However, under *Act Up!*, it was clearly an error. For purposes of this case, we need not decide whether *Johnson* or *Act Up!* controls because any error committed by the district court under *Act Up!* was harmless. First, the jury's responses to the questions on the verdict form do not suggest that the jury believed Deputy Perez had violated Mr. Figueroa's constitutional rights. Rather, the jury's responses suggest it believed that, although the force used was perhaps more than necessary (resulting in a broken arm), Deputy Perez reasonably believed that he needed to use such force to control the situation under these particular circumstances. That determination, as Mr. Figueroa admits, was a question of fact properly before the jury. In other words, the jury was permitted (under both *Johnson* and *Act Up!*) to decide whether Deputy Perez reasonably believed the amount of force he used was necessary under the circumstances. Such finding established that no constitutional right had been violated. Because the jury in effect determined that there had been no violation of a constitutional right, there could be no liability and therefore no need for additional qualified immunity analysis. Second, the right Mr. Figueroa alleges was violated was not so clearly established that a reasonable person in Deputy Perez's situation should have known that his actions in 'the specific context of this case' were unlawful. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (internal quotation marks omitted); *see also Pearson v. Callahan*, 555 U.S. 223, 243 (2009). Because this determination is purely a question of law, we may decide the issue without deference to the district court or the jury. Thus, even if, as Mr. Figueroa contends, the jury impermissibly weighed in on a purely legal question, such error was harmless because we, in an independent analysis of legal precedent, also find that the right was not clearly established. The district court's order denying Sergeant Gonzalez relief from default is vacated and the award of attorneys' fees is vacated. The district court's order denying Mr. Figueroa's motion for a new trial against Deputy Perez is affirmed. The case is remanded to the district court. Costs are awarded to defendants.")

Rosales v. Cty. of Los Angeles, 650 F. App'x 546, 549 (9th Cir. 2016) ("Because the underlying facts turn on a credibility determination that a jury should make, we do not decide whether each deputy can be held liable for the alleged blunt force to Rosales' abdomen or back. We disagree, however, with the district court's conclusion that 'plaintiff[s] cannot state whether particular officers used force against [Rosales]' or participated in that use of force. Given the circumstantial evidence and the inconsistencies in each deputy's testimony, a reasonable jury could infer any one of the four deputies applied blunt force to Rosales' abdomen or back. Other deputies who had 'some fundamental involvement' in that conduct would also be liable as integral participants. *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007). To the extent the district court required evidence that '*each* officer defendant used excessive force,' that conclusion was error. *See Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (" '[I]ntegral participation' does not require that each officer's actions themselves rise to the level of a constitutional violation."). . . . Qualified immunity is likewise 'premature' at this stage because it 'may depend on the jury's resolution of disputed facts and the inferences it draws therefrom.' *Santos v. Gates*,

287 F.3d 846, 855 n.12 (9th Cir. 2002). We therefore vacate the district court's grant of qualified immunity to Deputy Chaverra and decline the invitation to grant immunity to the other deputies.")

Collender v. City of Brea, 605 F. App'x 624, 629 (9th Cir. 2015) ("The video does not clearly show Julian's hand movement just prior to the shooting. Contrary to the approach taken by the dissent, this disputed fact must be construed in the light most favorable to the Collenders. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014) (per curiam). As such, the district court properly denied summary judgment. *See George*, 736 F.3d at 838 ("If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. On this interlocutory appeal, though, we can neither credit the deputies' testimony that [the decedent] turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Given [the non-moving party's] version of events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive."). . . .The parties agree that it was clearly established at the time of the shooting that '[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'the suspect pos[ing] a threat of serious physical harm.'. . . Thus, the district court properly determined Neel is not entitled to qualified immunity on the basis that the constitutional right was not clearly established.")

Collender v. City of Brea, 605 F. App'x 624, 629-30 & n.1 (9th Cir. 2015) (Graber, J., dissenting) ("The majority relies on a series of factual disputes that are not relevant to the question whether qualified immunity applies. The majority notes, for example, that the parties dispute whether Collender's left hand actually entered his left front pants pocket. . . The majority also points out that the parties offer 'alternative reasons why [Collender] moved his hand downward.'. . But those facts are not relevant to the determination whether a reasonable officer in Neel's position would have feared for his life. The *relevant* facts are not in dispute. It is undisputed that Collender was a suspect in an armed robbery, in which a handgun was used, that had occurred a few hours before the night-time fatal encounter and that Collender had threatened to kill the robbery victim's family. It is also undisputed that, shortly before Neel shot him, Collender had reached into the back seat of his car. The video shows that, as Neel approached Collender on a dark street, Collender's hands were raised, initially. But Collender quickly leaned slightly to the side and reached one hand down to his hip, where it was out of sight. He was wearing a loose, untucked shirt. At that moment, any reasonable officer would have thought that Collender could be reaching for a gun in his pocket or waistband, and any reasonable officer would have feared for his life. . . . Any observer reviewing the video will see the same gesture. What the panel members 'see' differently is not the gesture itself; rather, we interpret differently the significance of that gesture and how a reasonable officer would respond to it. . . . There is no claim of police provocation. Although the majority disposition asserts that there is a dispute, . . .no evidence contradicts Neel's testimony that Collender had stalked Neel's car and had failed to obey some of his commands, nor does any evidence contradict Neel's testimony that he subjectively feared for his life at the moment he fired his weapon. Plaintiffs' *belief* as to Neel's state of mind, without evidence supporting that belief, is not cognizable evidence. . . . In any event, the evidence that Plaintiffs offered suggested that Neel was

too quick to fear for his life, but no evidence even hints that he was not, in fact, fearful. In the circumstances described above, the use of deadly force was reasonable. . . .Accordingly, I would reverse.")

Cruz v. City of Anaheim,765 F.3d 1076, 1077-80 (9th Cir. 2014) ("Nobody likes a game of "he said, she said," but far worse is the game of "we said, he's dead." Sadly, this is too often what we face in police shooting cases like this one. . . . Usually when we're deciding whether to grant summary judgment for the police in deadly force cases we must wade through the 'factbound morass of "reasonableness."' Not so here: It would be unquestionably reasonable for police to shoot a suspect in Cruz's position if he reaches for a gun in his waistband, or even if he reaches there for some other reason. Given Cruz's dangerous and erratic behavior up to that point, the police would doubtless be justified in responding to such a threatening gesture by opening fire. Conversely, if the suspect *doesn't* reach for his waistband or make some similar threatening gesture, it would clearly be unreasonable for the officers to shoot him after he stopped his vehicle and opened the door. At that point, the suspect no longer poses an immediate threat to the police or the public, so deadly force is not justified. . . Thus, we need not worry about the intricacies of police procedure or nuanced questions of force proportionality. To decide this case a jury would have to answer just one simple question: Did the police see Cruz reach for his waistband? If they did, they were entitled to shoot; if they didn't, they weren't. But for a judge ruling on the officers' motion for summary judgment, this translates to a different question: Could any reasonable jury find it more likely than not that Cruz *didn't* reach for his waistband? In ruling for the officers, the district court answered this question 'No.' The evidence it relied on in reaching this conclusion—indeed, the only evidence that suggests this is what happened—is the testimony of the officers, four of whom say they saw Cruz make the fateful reach. . . But in the deadly force context, we cannot 'simply accept what may be a self-serving account by the police officer.'. . . Because the person most likely to rebut the officers' version of events—the one killed—can't testify, '[t]he judge must carefully examine all the evidence in the record ... to determine whether the officer's story is internally consistent and consistent with other known facts.'. . This includes 'circumstantial evidence that, if believed, would tend to discredit the police officer's story.'. . In this case, there's circumstantial evidence that could give a reasonable jury pause. Most obvious is the fact that Cruz didn't have a gun on him, so why would he have reached for his waistband? . . . Cruz probably saw that he was surrounded by officers with guns drawn. In that circumstance, it would have been foolish—but not wholly implausible—for him to have tried to fast-draw his weapon in an attempt to shoot his way out. But for him to make such a gesture when *no* gun is there makes no sense whatsoever. A jury may doubt that Cruz did this. Of course, a jury could reach the opposite conclusion. It might believe that Cruz *thought* he had the gun there, or maybe he had a death wish, or perhaps his pants were falling down at the worst possible moment. But the jury could also reasonably conclude that the officers lied. In reaching that conclusion, the jury might find relevant the uncontroverted evidence that Officer Linn, one of Cruz's shooters, recited the exact same explanation when he shot and killed another unarmed man, David Raya, two years later under very similar circumstances. Like Cruz, Raya was tracked down after a confidential informant told police that he had a gun and that he 'wasn't going back to prison,' and, as with

Cruz, the tip led to an altercation with Anaheim police that ended with an unarmed Raya biting the dust. Perhaps the most curious similarity: According to the officers who shot the two unarmed men, both reached for their waistbands while the police had their guns trained on them. . . . 'They both reached for the gun' might be a plausible defense from officers in the line of duty. 'They both reached for no gun' sounds more like a song-and-dance. A jury might find implausible other aspects of the officers' story. For starters, *four* of the officers said they saw Cruz reach for his waistband. A jury might be skeptical that four pairs of eyes had a line of sight to Cruz's hand as he stood between the open car door and the SUV. There is also the fact that Cruz was left-handed, yet two officers attested that they saw Cruz reach for his waistband with his right hand. A reasonable jury could doubt that Cruz would have reached for a non-existent weapon with his off hand. Then there is the officers' claim that Cruz had 'exited' the Suburban, and 'stood in the doorway,' but after he was killed they had to cut him free from his seat belt because he was 'suspended' by it. How does a man who has 'emerged fully' from a vehicle, and 'turn[ed] to face forward,' end up hanging from his seat belt after he's shot? Maybe it's possible. But it's also possible that the officers didn't wait for Cruz to exit his car—or reach for his waistband—and simply opened fire on a man who was trying to comply with their instructions to '[g]et down on the ground.' The testimony of the only non-police eyewitness, Norman Harms, indicates that Cruz's feet indeed made it out of the car, but that Cruz was 'slipping on the ground, like kind of falling down,' as if he were 'tripping.' This paints a different picture than the officers' testimony that Cruz had fully emerged from his SUV and was poised to attack. Based on Harms's testimony, a jury might find that Cruz was trying to get out of the car (as he was ordered to do multiple times after he opened his door) but got caught in his seat belt. Were a jury to believe this version of events—which seems no less likely than a man shot while standing next to a vehicle becoming suspended by a seat belt—this would certainly cast doubt on the officers' credibility and lead the jury to find for plaintiffs. Given these curious and material factual discrepancies, the district court erred in ruling that only an unreasonable or speculative jury could disbelieve Officers Phillips, Vargas, Stauber and Linn's version of events. As to these officers and the *Monell* defendants (the City of Anaheim, Chief Welter and Deputy Chief Hunter), we reverse. We make no determination about the officers' credibility, because that's not our decision to make. We leave it to the jury.")

Bowles v. City of Porterville, 571 F. App'x 538, 540-41 (9th Cir. 2014), as amended (May 1, 2014) [Note: *Tolan v. Cotton* decided May 4th] ("Plaintiffs do not question McGuire's subjective fear. Nor do they appear to question that Bowles stopped a second time and pivoted to face the officer. In addition, Plaintiffs do not deny that a cologne bottle found at the scene had a metallic and cylindrical top. Instead, they argue that a jury could conclude that Bowles did not have a cologne bottle in his hand. But the evidence shows that Bowles was responsible for the presence of the cologne bottle. When Bowles was running the officers had seen bulges in his pockets, and a search of Bowles after he was shot revealed at least one more cologne bottle. Plaintiffs' allegations that McGuire improperly moved the cologne bottle do not create a material issue of fact because they do refute that Bowles had been carrying the cologne bottles. Similarly, Plaintiffs' argument that Bowles may have been crouching when he was shot does not raise a material issue of fact. It is pure speculation to suggest that Bowles was attempting to lie down as previously ordered by the

officers. Bowles had previously ignored the officers' commands and more importantly, there is no suggestion that crouching was inconsistent with preparing to fire a gun. Furthermore, McGuire fired a single shot. This distinguishes the situation from instances in which the officers continued firing after avoiding the immediate threat. *See Curnow v. Ridgecrest Police,* 952 F.2d 321, 325 (9th Cir.1991); *Perrin v. Gentner,* 177 F.Supp.2d 1115, 1120–21 (D.Nev.2001). Given Bowles' fleeing, the darkness, the officers' prior restraint, and the presence of a cologne bottle with a metallic cylindrical top, there is no other possible reason for McGuire's fear that Bowles was about to shoot him. While one might speculate as to other causes for McGuire's real but mistaken fear, Plaintiffs have not pointed to any evidence that might support such speculation. . . McGuire was required to make a 'split second judgment' in a situation that was 'tense, uncertain, and rapidly evolving.'. . His testimony is 'internally consistent and consistent with other known facts.'. . Accordingly, the district court properly concluded that McGuire's apprehension was reasonable. The district court's grant of summary judgment is **AFFIRMED.")**

Bowles v. City of Porterville, 571 F. App'x 538, 541-46 (9th Cir. 2014), as amended (May 1, 2014) (Korman, J., sitting by designation, dissenting) ("Joseph Bowles ('Bowles') was shot and killed by California Highway Patrol Officer Chris McGuire ('Officer McGuire') in the early morning hours of October 20, 2009. The shooting came at the culmination of a chase that began after Officer McGuire observed Bowles 'looking into vehicles, placing his hands kind of over his eyes to, to allow him to look inside of the vehicles[.]'. . Although Officer McGuire did not see Bowles make any contact with any of those vehicles with his hands, Officer McGuire testified that he 'just had reasonable suspicion that he was attempting to commit a crime based on the several minutes of surveillance we had with him up to that point[.]' . . After Officer McGuire's colleague, Officer McCord, approached Bowles and identified himself as a police officer, Bowles ran and the chase began with Officers McGuire and McCord in pursuit. . . Officer McCord eventually dropped back and did not witness Office McGuire fire the shot that killed Bowles. These events were ultimately followed by a complaint filed by Bowles's parents, pursuant to 42 U.S.C. § 1983, alleging, *inter alia,* that the use of deadly force against their son constituted an unreasonable search and seizure. The complaint was based on the holding of the Supreme Court in *Tennessee v. Garner* that a 'police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'. . . Officer McGuire, however, has asserted the affirmative defense of qualified immunity based on his claim that he feared that Bowles was going to shoot him. The district court granted McGuire's motion for summary judgment. On this appeal, after holding that 'the pivotal issue is whether McGuire, or an officer in McGuire's position, would reasonably fear that Bowles was going to shoot him,'. . . the majority concludes that Officer McGuire's fear that he was in danger of being shot was reasonable and that the evidence is insufficient as a matter of law for a jury to conclude otherwise. I am unable to agree that this case is appropriate for summary judgment. In my view, the majority unjustifiably fails to apply the applicable legal standards for a motion for summary judgment in a case in which the victim of a shooting by a police officer is dead and the entire case rests largely on the deposition testimony of the defendant. Moreover, while the majority bases its holding on its review of 'the totality of the circumstances,' my view of those circumstances leads me to conclude that this case is one that must be resolved by a jury. I turn first to the applicable legal

standards, and then to a careful analysis of the underlying facts. Because the majority resolves the pivotal issue in this case solely by crediting the testimony of Officer McGuire, it is useful to begin with the admonition that where a motion for summary judgment is based on such testimony, a district judge 'must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify.'. . The district judge 'may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.'. . This is a corollary of two well settled principles. First, '[i]t is clear that qualified immunity is an affirmative defense, and we think it equally clear that the burden of proving the defense lies with the official asserting it.' *Benigni v. City of Hemet,* 879 F.2d 473, 479 (9th Cir.1988). Second, this consideration aside, 'the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.'. . .Against this legal backdrop, the holding of the majority that summary judgment is appropriate in this case is impossible to justify. Office McGuire bore the burden of proof. The facts relating to the shooting were peculiarly within his knowledge and the jury was not compelled to accept and believe his self-serving testimony that is implausible on its face. Officer McGuire testified that, during the course of the chase, Bowles stopped twice. When he stopped the first time and faced Officer McGuire, the latter ordered him to get on the ground. . . At that moment, when they were approximately five feet apart, Officer McGuire 'could just tell that [Bowles] had items in both of his front pockets, but [he] did not know what these items were.'. . Officer McGuire then drew his weapon and again ordered Bowles to get to the ground. . . The chase resumed when 'shortly after that Mr. Bowles started running away again.'. .According to Officer McGuire, it was at this point when Bowles stopped and turned that he saw 'a metallic cylinder object in his hands,' which led Officer McGuire to believe that Bowles had a weapon. . . When asked how the object was positioned in Bowles's hands, Officer McGuire answered that '[h]e had his, both his left and right hand coupled together extended out in front of him, with his elbow slightly bent, and the metallic object was protruding from within his hands as he had them cupped together.'. . The object which Officer McGuire testified he saw in Bowles's hands, and which led to the shot that killed him, was a cologne bottle. In order to credit Officer McGuire's testimony, a jury would have to believe that after stopping, Bowles removed a cologne bottle from one of his front pockets and pointed it at a police officer who had his gun drawn and was no more than ten feet away. While the majority has apparently seen fit to credit this improbable tale, a jury could decide otherwise. . . . [I]n the present case, concern about 'an early determination of qualified immunity,'. . . did not prevent full pretrial discovery that included taking the deposition of Office McGuire. Moreover, as I have demonstrated, the case is hardly an appropriate one for creating an unsupported and unjustified exception to the normal rules that govern the consideration of a motion for summary judgment. If Officer McGuire should prevail on a defense of qualified immunity, then that judgment must be made by a jury. I conclude with where I began, with the words from *Scott v. Henrich,* 39 F.3d 912 (9th Cir.1994). In a case such as this, 'the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this

evidence could convince a rational factfinder that the officer acted unreasonably.'. . I dissent because, unlike the majority, I believe that the evidence in this case could convince a rational factfinder that the officer acted unreasonably.")

Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154, 1166, 1167 (9th Cir. 2014) ("The district court found that the boys and Sandoval stated claims for excessive use of force, but that governmental interests in officer safety, investigating a possible crime scene, and controlling an interaction with possible burglars outweighed the intrusions upon the Sandovals' rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to ... disputed material fact[s].'. . For instance, the court justified the use of force against the boys on the grounds that they were 'potentially noncompliant,' and against Sandoval and Henry on the grounds that they were 'acting irrationally' and 'not complying with the officers' commands,' and that the police were continuing to investigate a 'potential' or 'possible crime scene.' Each of these conclusions was based on conflicting testimony, and drew upon the officers' version of events rather than the Sandovals' testimony. . . . Taken in the light most favorable to the Sandovals, the evidence reflects that the boys complied with the officers' commands at all times; that the officers detained Henry despite what they concede was his full compliance outside the house and despite their knowledge that he had committed no crime; and that, by the time Sandoval returned home, the officers knew or had come to assume that Henry lived in the home and that none of the boys had been in the house illegally. . .The evidence does not justify the district court's conclusion that the officers had a 'reasonabl [e] belie[f] that the three young men were committing a burglary'. . . or that the officers were investigating a 'potential crime scene' during the contested exercises of force. To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. . . But in weighing the evidence in favor of the officers, rather than the Sandovals, the district court unfairly tipped the reasonableness inquiry in the officers' favor. We reverse the grant of qualified immunity to the officers on the Sandovals' excessive force claims.")

Green v. City and County of San Francisco, 751 F.3d 1039, 1052, 1053 (9th Cir. 2014) ("In this case, the district court found that Sergeant Kim was protected by qualified immunity based on the finding that Sergeant Kim did not violate any constitutional right. However, as the preceding analysis makes clear, this remains an open question for the jury, and Sergeant Kim cannot be granted qualified immunity at summary judgment on this basis. Instead, we proceed to the second step of the qualified immunity inquiry, that is, whether 'the right at issue was clearly established at the time of the incident such that a reasonable officer would have understood her conduct to be unlawful.'. . This requires two separate determinations: (1) whether the law governing the conduct at issue was clearly established and (2) whether the facts as alleged could support a reasonable belief that the conduct in question conformed to the established law. . . Both are questions of law to be determined by the court in the absence of genuine issues of material fact. . . Here, the first element is satisfied as a matter of law. It was established at the time of the incident that individuals may not be subjected to seizure or arrest without reasonable suspicion or probable cause, especially when the stop includes detention and interrogation at gunpoint, and that highly intrusive measures

may not be used absent extraordinary circumstances. . . .We must then determine whether an officer, given the specific facts at issue, 'could have reasonably believed at the time that the force actually used was lawful under the circumstances.'. . This requires us to look at what Sergeant Kim knew at the time and whether it was sufficient to support a reasonable officer's belief that his actions were lawful. . . While also generally a question of law to be determined by the court, there are disputed material facts here that prevent us from making such a finding at this juncture. . . For example, it is disputed whether Sergeant Kim had reason to believe that Officer Esparza had not visually confirmed the plate, and how much force was actually used in effecting the stop. These are both material facts that preclude a determination as to qualified immunity at the summary judgment stage. Moreover, even if material facts did not preclude this determination, Sergeant Kim would not be entitled to qualified immunity based on the facts as currently alleged. . . .When viewing the facts in the light most favorable to Green, we cannot make a determination as a matter of law that Sergeant Kim 'could have reasonably believed at the time that the force actually used was lawful under the circumstances.'. . Instead, this question must go before a jury.")

A.D. v. California Highway Patrol, 712 F.3d 446, 456, 457-59 (9th Cir. 2013) ("Markgraf argues that we should disregard the jury's finding and analyze, objectively, whether he *could have* acted with a legitimate objective. However, the verdict precludes us from hypothesizing about whether Markgraf could have believed that a legitimate law enforcement objective existed. . . . According to the jury's view of the facts, Markgraf shot Eklund without a legitimate law enforcement objectives. . .We would not be deferring to that view if we now held that Markgraf was entitled to qualified immunity, because he *could have* believed a legitimate law enforcement objective existed under the circumstances. . . Although such an inquiry might be appropriate when a defendant asserts qualified immunity in a motion for summary judgment or a pre-verdict JMOL motion, the jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict. Markgraf is not without recourse just because the jury has rendered a verdict against him. He could have directly attacked the sufficiency of the evidence to support the jury's verdict on appeal, but he did not. However, even if he had done so here, we agree with the district court that there was sufficient evidence to support the jury's verdict at trial. . . . Therefore, we affirm the district court's denial of Markgraf's renewed motion for JMOL. The jury reasonably found that Markgraf shot Eklund with a purpose to harm unrelated to the legitimate law enforcement objectives of arrest, self-defense, or defense of others. It was clearly established before their encounter that such conduct violated Plaintiffs' substantive due process rights. Therefore, Markgraf is not entitled to qualified immunity. . . . While in a Fourth Amendment case we could choose not to accept the jury's conclusion that the officer's conduct was unreasonable, here, we cannot disregard the jury's reasonable finding of fact that Markgraf acted with a subjective bad intent. Further, unlike a motion to dismiss or motion for summary judgment, we must defer to the facts as they were reasonably found by the jury—we do not draw our own inferences from them. . . . In practice, our analysis might have the effect of foreclosing qualified immunity defenses in similar cases where a jury finds that a defendant has violated the constitution by acting with a prohibited intent. However, we do not hold that a court *cannot* conduct an objective qualified immunity analysis after a jury

verdict. . . Rather, post-verdict, a court must apply the qualified immunity framework to the facts that the jury found (including the defendant's subjective intent).")

Borquez v. City of Tucson, 475 F. App'x 663, 2012 WL 1201677, at *1, *2 (9th Cir. Apr. 11, 2012) ("The district court properly granted judgment as a matter of law on the excessive force claim, because Sergeant Fabian Pacheco was entitled to qualified immunity. As reflected by the special verdict form, the jury found that Borquez 'grabbed the arm of Defendant Fabian Pacheco as they encountered each other near the front door' of the residence. At the time his arm was grabbed, Pacheco was escorting an arrestee (Borquez's adult son) to a police vehicle. Pacheco shoved Borquez, and Borquez stumbled, hitting his head against a wall and injuring his knee as he fell to the ground. Given the jury's finding that Borquez grabbed Pacheco's arm, we conclude that it would not have been sufficiently clear to every reasonable officer whether Pacheco's shove was unlawful under these conditions. . . Therefore, Pacheco is entitled to qualified immunity. Borquez unpersuasively argues that the district court's grant of judgment as a matter of law is inconsistent with the jury's finding that Pacheco used excessive force. Although we give deference to the jury's verdict, whether a right is clearly established is a pure question of law that is reserved for a court to decide. . . This is a threshold determination that is distinct from the merits of the claim. . . . [On false arrest claim,] [t]he jury's finding that Borquez did not use or threaten to use physical force 'to knowingly obstruct, impair or hinder the enforcement of the penal law or the preservation of the peace' is not dispositive. Though the jury may have concluded that Borquez did not in fact commit the offense of interfering with governmental operations, that does not preclude probable cause to make an arrest.")

Conner v. Heiman, 672 F.3d 1126, 1131 & n.2 (9th Cir. 2012) ("After *Hunter*, this Court altered its approach to resolving questions of qualified immunity. *See Act Up!/Portland*, 988 F.2d at 873. Under the current approach, a district court should decide the issue of qualified immunity as a matter of law when 'the material, historical facts are not in dispute, and the only disputes involve what inferences properly may be drawn from those historical facts.' *Peng*, 335 F.3d at 979–80. Only where 'historical facts material to the qualified immunity determination are in dispute' should the district court submit the issue to a jury. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1211 (9th Cir.2008). . . . *Torres* stands for the principle that the district court should submit the question of qualified immunity to the jury only if the parties materially dispute what officers knew at the time they arrested a suspect. Put another way, while determining the facts is the jury's job (where the facts are in dispute), determining what objectively reasonable inferences may be drawn from such facts may be determined by the court as a matter of logic and law.")

Luchtel v. Hagemann, 623 F.3d 975, 982 (9th Cir. 2010) ("Police officers need not use the least intrusive means available to them, *see Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994), yet these officers applied the least amount of force necessary to subdue Luchtel by pinning her to the ground and handcuffing her. They did not deploy a taser despite Luchtel's violent, aggressive, and unpredictable behavior. They did not use batons or other weapons, such as pepper spray. There is no allegation that the officers punched or kicked Luchtel or applied knee strikes. Luchtel does not

point to any record evidence that the officers engaged in any unnecessary manipulation of her arms. There is no claim or testimony that they wrenched her arms up or gratuitously intensified pain in the handcuffing process. Luchtel contends that she was 'held to the floor for at least ten minutes while handcuffed with a broken arm and dislocated shoulder.' Given Luchtel's hostile and aggressive behavior, it was reasonable to hold her in that position until she could be removed safely from her neighbor's home on a stretcher with restraints. Even accepting that it was the officers' conduct that caused the break in Luchtel's arm, it can't be disputed that Luchtel's active resistance was a contributing cause to whatever injuries she sustained. Although Luchtel's physical injuries and any limitations from them are distressing, it's not correct to put the blame at the officers' door absent evidence that excessive force was used. Given the totality of circumstances, including the context of the arrest, we conclude that there is no genuine issue of fact that a reasonable level of force was used.")

Luchtel v. Hagemann, 623 F.3d 975, 985 (9th Cir. 2010) (Beezer, J., concurring in part and dissenting in part) ("In our judicial system, the jury is tasked with determining the credibility of witnesses and divining from the various testimonies what *really* happened. Because summary judgment deprives a party of the opportunity to have the jury examine the facts, we must view the evidence in the light most favorable to the party who is not seeking summary judgment, here, the plaintiff, Karey Luchtel. Rather than view the evidence in Ms. Luchtel's favor, the court's opinion ignores key testimony from a neutral witness that supports Ms. Luchtel's case and relies instead on the Seattle Police Department officers' version of events. This case should have gone to the jury on the excessive-force and assault-and-battery claims, and I dissent.")

Rodriguez v. Maricopa County Community College Dist., 605 F.3d 703, 707 (9th Cir. 2010) ("The district court characterized the central question of our qualified immunity analysis-whether defendants violated a clearly established right of which a reasonable person would have known-as a factual inquiry, and denied immunity on the grounds that '[a] genuine issue of material fact exists as to whether the acts or omissions of Defendants ... were objectively reasonable.' Plaintiffs claim that we lack jurisdiction to review this determination, and that the question of qualified immunity must therefore go to a jury. But the contours of the right at issue, and the reasonableness of defendants' actions, is not a question of fact-it's a question of law. *See*, *e.g.*, *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir.1997). In answering that question, we may not disregard material factual disputes identified by the district court. *Gates*, 229 F.3d at 1286. But we undoubtedly have jurisdiction to determine whether, taking the facts in the light most favorable to plaintiffs, defendants would have violated a constitutional right of which a reasonable government official would have been aware.")

Tortu v. Las Vegas Metropolitan Police Dept., 556 F.3d 1075, 1085 & n.9 (9th Cir. 2009) ("In applying the Supreme Court authority, we conclude that a qualified immunity analysis consists of two steps. The first step analyzes whether a constitutional right was violated, which is a question of fact. The second examines whether the right was clearly established, which is a question of law. Step two serves the aim of refining the legal standard and is solely a question of law for the judge.

. . . The dissent contends that a new trial can properly be granted on the independent ground of qualified immunity. The determination of qualified immunity at step two is strictly a legal question of whether, even though the facts alleged by the plaintiff make out a constitutional violation, that constitutional right was not clearly established. That issue could have been raised by a motion under Rule 50(a), as was done in *Torres*, 548 F.3d at 1210. However, without the requisite Rule 50(a) motion, this purely legal issue could not be revived under Rule 50(b). There is no authority that this legal issue could be revived as a ground for a new trial under Rule 59.")

Tortu v. Las Vegas Metropolitan Police Dept., 556 F.3d 1075, 1090, 1091 (9th Cir. 2009) (Smith, J. concurring in part, dissenting in part) ("When the facts are undisputed and the jury has properly found a violation of constitutional rights, then determining whether those rights are clearly established (based on those same undisputed facts) is a question of law. However, when the facts are disputed and a trial does not resolve which facts are a violation of a constitutional right, a court cannot determine, as a matter of law, whether those rights are clearly established. . . . Those are the very circumstances of this case. From reading their opinions, both the district court and the majority agree that punching Tortu on the head would be an action in which Engle could engage and yet be entitled to immunity in these circumstances. Only when applying the qualified immunity analysis to Tortu's testicle injury do they disagree. Yet the jury was never asked the basis of their finding of unreasonable force, therefore the majority's analysis fails. Again, we are not here on summary judgment with de novo review and construing the facts in Tortu's favor. We also should not speculate (as the majority seemingly does) as to which facts the jury found to be in violation of Tortu's constitutional rights, and decide if those rights were clearly established. A new trial to determine those facts is therefore not an abuse. We must be certain 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'")

Bollinger v. Oregon, 305 F. App'x 344, 2008 WL 5213433, at *1 (9th Cir. Dec. 11, 2008) ("The district court did not err in submitting the issue of qualified immunity to the jury. That defense was not precluded under the law of the case doctrine and Bollinger did not move for judgment as a matter of law (JMOL) at the close of evidence. . . .The district court did not err in precluding Bollinger's proposed witnesses from testifying about whether the law was clearly established. *See Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir.1993) ('The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court.').").

Torres v. City of Los Angeles, 548 F.3d 1197, 1210, 1211 (9th Cir. 2008) ("As Defendants argue, qualified immunity is a question of law, not a question of fact. . . But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to Torres, they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated Torres' constitutional right, and the right at issue was clearly established. Plaintiffs here appeal the grant of a Rule 50(a) motion made after completion of the trial but before a jury verdict. While the Supreme Court has encouraged resolution of the qualified immunity issue early on in the lawsuit,

such as at the summary judgment stage, . . . Defendants chose not to move for summary judgment on qualified immunity grounds, acknowledging that 'triable issues of material fact exist regarding probable cause for Plaintiff's arrest.' Thus, the case proceeded to trial before a jury. However, the same issues of material fact also prevent the court from granting the officers' motion for judgment as a matter of law . . . Indeed, we have explained that 'sending the factual issues to the jury but reserving to the judge the ultimate Areasonable officer" determination leads to serious logistical difficulties.' . . . [I]n this case historical facts material to the qualified immunity determination are in dispute.").

Franet v. County of Alameda Social Services Agency, Nos. 06-16039, 06-16120, 2008 WL 3992332, at *1, *2 (9th Cir. Aug. 14, 2008) (not published) ("There was sufficient evidence for the jury to conclude that Castro's actions in seizing the children without a warrant were unreasonable . . . . As the jury found that Castro's conduct violated Franet's constitutional rights and the judge found that those rights were clearly established, Castro is not entitled to qualified immunity for the removal. . . . However, we reverse the jury's award of $50,000 to Franet for Castro's actions in taking the daughter for a sexual assault examination without Franet's consent or knowledge. While the jury was permitted to decide if Castro's conduct was reasonable, the district judge failed to find that the law giving parents the right to authorize their children's medical examinations was well-established. The decision of whether or not a right is clearly established is the province of the judge, not the jury, and the law on this right was not clearly established. . . . We affirm the district court's jury instructions on qualified immunity . The reasonableness of Castro's conduct in removing the children was an issue of fact for the jury to determine. . . The given instruction

> [Y]ou are asked to determine whether Karen Castro was justified by a reasonable belief that her actions were lawful. This reasonable inquiry is an objective one. The question is whether a reasonable social worker under those same circumstances would believe she had a reasonable basis for removing Plaintiff's children.

is a 'classic qualified immunity instruction.' *See Ortega v. O'Connor*, 146 F.3d 1149, 1155 (9th Cir.1998).").

Smith v. City of Hemet, 394 F.3d 689,704 n.7 (9th Cir. 2005) (en banc) ("Defendants suggest an additional ground upon which the order for summary judgment could be affirmed: qualified immunity. Whether the officers are entitled to qualified immunity may depend in large part on factual determinations the jury will be required to make. Certainly, the use of a police canine and pepper spray could, under clearly established law, have constituted the use of excessive force in some circumstances, in which case the officers would have been put on notice that their conduct would be unconstitutional. . . .We choose, however, not to resolve the issue of qualified immunity on this appeal, preferring to allow the district court to consider that question initially.").

Grant v. City of Long Beach, 334 F.3d 795, 796 (9th Cir. 2003) (denying reh'g and reh'g en banc) ("The opinion filed December 16, 2002, appearing at 315 F.3d 1081 (9th Cir.2002) is amended as follows: At 315 F.3d at 1090, delete the last sentence in the second full paragraph

which reads 'Therefore, the district court properly submitted the issue of qualified immunity to the jury and entered judgment upon its verdict.'").

Ortega v. O'Connor, 146 F.3d 1149, 1155-56 (9th Cir. 1998) ("Although the district court declared that it would not instruct the jury on qualified immunity, the plaintiff and the defendants jointly proposed to the district court, and the court accepted, a jury instruction that applied a 'reasonableness' test not, as the district court had suggested, to the search itself, but instead to the defendants' beliefs regarding the search. More important, that instruction stated that the reasonableness inquiry as to public officials' beliefs is determined under an objective standard – whether a reasonable officer would have believed he had a reasonable basis for the search. . . . The instruction, in fact, provided a classic qualified immunity instruction. . . . Here, the district court's "extra" reasonableness test. . . constituted an appropriate and proper instruction to the jury on the second prong of the defendants' qualified immunity defense–whether a reasonable state official could have believed his conduct was lawful–the prong as to which the existence of factual disputes requires the jury's determination.").

Fettig v. Amity Public School Dist., Nos. 96-36164, 96-36223, 96-36227, 1998 WL 19509, *1 (9th Cir. Jan. 15, 1998) (unpublished) ("To determine if Defendants are entitled to qualified immunity on this interlocutory appeal, we may consider whether Plaintiffs' rights were clearly established as a matter of law when Defendants allegedly violated those rights. *Johnson v. Jones*, 515 U.S. 304, 311 (1995). When the facts are not in dispute, we also may consider whether, as a matter of law, Defendants acted reasonably. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir.1993). However, we are not permitted to determine the reasonableness of Defendants' conduct, should such determination involve disputed facts. *Ram v. Rubin*, 118 F.3d 1306, 1308 (9th Cir.1997); *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir.1996).").

Thompson v. Mahre, 110 F.3d 716, 719-21 (9th Cir. 1997) ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh Amendment, require submission to a jury. . . . We agree with amici that denial of a defense motion for summary judgment on qualified immunity merely leaves the issue for trial, and does not destroy the defense. . . . in the course of pretrial proceedings, the parties stipulated to bifurcation and bench trial of the qualified immunity issue. . . . By stipulating to and participating without objection in this proceeding, Sergeant Steen waived the right to trial by jury of issues of fact relating to the qualified immunity issue under Federal Rule of Civil Procedure 38(d). . . . Thus what took place was not a summary judgment denying qualified immunity, but rather a trial on the issue of qualified immunity, to the court without a jury.").

Escobar v. Scutella, 97 F.3d 1459 (Table), 1996 WL 547983, *2 (9th Cir. Sept. 25, 1996) ("While it remains an open question whether judge or jury should make the ultimate immunity decision in cases necessitating trial, . . . we have held that it is not reversible error for the question to be

resolved by the jury, where the jury's underlying factual findings allow for only one conclusion." [citing *Sloman*, 21 F.3d at 1468]).

Acosta v. City and County of San Francisco, 83 F.3d 1143, 1147 (9th Cir. 1996) ("Instead of relying on the factual findings implicit in the jury's verdict in favor of the Acostas, the district court granted Yawczak qualified immunity based on its own contrary factual findings. The Acostas argue that regardless of whether it is the judge or the jury who makes the ultimate determination on the issue of qualified immunity, that decisionmaker must rely on the jury's factual findings as to the disputed issues of fact. They are correct. Regardless of who makes the ultimate determination as to qualified immunity, the jury, not the judge, must decide the disputed 'foundational' or 'historical' facts that underlie the determination.").

Dupard v. Kringle, N0. CV-88-22JET, 1996 WL 56098, *6 (9th Cir. Feb. 9, 1996) (Table) ("The district court did not err by instructing the jury on qualified immunity. Although ordinarily the question of qualified immunity should not be decided by the jury, here the marshals' qualified immunity turned on the resolution of disputed facts concerning '"what the officer and claimant did or failed to do,"' and thus a qualified immunity instruction was appropriate. [cites omitted] This particular 'qualified immunity' instruction, however, was misleading. The instruction wrongly focuses on whether the 'defendant[s] reasonably believed that' they were using a reasonable amount of force. The relevant inquiry is whether a reasonable marshal in the defendant's position could have believed his actions were lawful.").

Sinaloa Lake Owners Ass'n. v. City of Simi Valley, 70 F.3d 1095, 1099 (9th Cir. 1995) ("In this case, qualified immunity is not being decided at an early summary judgment stage but, instead, after an evidentiary trial of the case. Following our opinion in *Sinaloa I*, reversing the judgment on the pleadings and remanding for trial, no motion for summary judgment was made. The first motion for judgment based on qualified immunity was made after the conclusion of the plaintiffs case in chief. Although the court ruled as to the subordinate DSOD officials, it did not rule as to Doody until the presentation of all the evidence was complete. The court obviously deemed it important to consider all the evidence before the ruling. Thus, the earliest stage at which the district court deemed it appropriate to rule on qualified immunity for Doody was after the presentation of all the evidence. The district judge observed that the historical facts of what the DSOD officials knew, the action that was taken to breach the dam, and the person who made that decision were not in dispute. He noted that both the plaintiffs and the defendants relied on the same records, but characterized the reasonableness of the action differently. We have recently discussed the dilemma of the appropriate procedure to follow when qualified immunity is not decided at the summary judgment stage, but is presented as a defense at trial. The difficulty presented is what is appropriate for the judge to decide and what should be submitted to the jury when the facts are in dispute. Here, we are not faced with that issue because the essential facts relating to the defense of qualified immunity are not in dispute. It is important to recognize that although facts relating to the underlying issue of whether there was or was not a violation of due

process were in dispute, the essential facts concerning the defense of qualified immunity were not in dispute.").

Hervey v. Estes, 65 F.3d 784, 789 (9th Cir. 1995) ("Hervey also argues that a jury should determine whether the affiant's false statements were material; in other words, could the magistrate have issued the warrant in the absence of the contested statements. At the summary judgment stage on the issue of qualified immunity, however, Hervey is not correct. [footnote omitted] Although the practical effect of this rule is to reserve to the court the issue of the materiality of the false statements, that is the result of our decision in *Branch*.").

Mendoza v. Block, 27 F.3d 1357, 1359-60, 1363 (9th Cir. 1994) ("Mendoza claims we must reverse because the district court improperly resolved disputed questions of fact without a jury. However, Mendoza waived any objection to the evidentiary procedure used by the court, even if the use of such a procedure would otherwise have been erroneous. Prior to trial, Mendoza moved for the district court to decide the qualified immunity issue....Both the original *Act-Up!* opinion, upon which Mendoza based his motion, and the subsequent superseding opinion state that disputed factual issues should be decided by the trier of fact. [cite omitted] Mendoza was therefore fully informed that factual disputes should be resolved by the trier of fact. In order to preserve an issue for appeal, a party must make known to the court any objection to the court's action.... Mendoza argues that the trial court erred in determining whether the deputies' conduct was objectively reasonable because in making such a determination the trial court made the same inquiry as would be made on the merits of the excessive force claim. He claims that there was sufficient evidence for a jury to find excessive force and that the trial court was not entitled to take that determination from the jury. Because Mendoza did not raise any objection to the court's decision to determine the objective reasonableness of the deputies' conduct, and ... asked the court to decide the entire question of qualified immunity, he did not preserve this issue for appeal.").

Sloman v. Tadlock, 21 F.3d 1462, 1468 (9th Cir. 1994) ("Where . . . officials are forced to go to trial because their right to immunity turns on the resolution of disputed facts, early determination [of the qualified immunity issue] is not possible. Although some of the reasons for the existence of the immunity doctrine are moot when trial is necessary, other equally important ones remain . . . . These reasons do not, however, suggest that a judicial determination at this stage is necessarily better than a jury verdict. The advantage of timing is already lost. [footnote omitted] In fact, sending the factual issues to the jury but reserving to the judge the ultimate 'reasonable officer' determination leads to serious logistical difficulties. Special jury verdicts would unnecessarily complicate easy cases, and might be unworkable in complicated ones. [cite omitted] . . . . The holdings and rationale of *Hunter* and *Act Up!*, though helpful, do not decide this case. Nor need we decide here whether judge or jury should be the ultimate decider once disputed foundational facts have been decided by the jury. In this case, the factual findings the jury must have made in imposing liability on [defendant] would require the district court to deny him qualified immunity in any event. Therefore, even if the court erred in sending the qualified immunity determination to the jury, the error was harmless.").

Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993) ("We interpret *Hunter* to hold that the question of whether a reasonable officer could have believed probable cause (or reasonable suspicion) existed to justify a search or an arrest is 'an essentially legal question,'. . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.").

Act Up!/Portland v. Bagley, 988 F.2d 868, 874-75 (9th Cir. 1993) (Norris, J., dissenting) ("*Act Up!/ Portland v. Bagley* holds that the second prong of the qualified immunity test–whether 'agents acted reasonably under settled law in the circumstances,' [citing *Hunter v. Bryant*]–is no longer a jury question, but a question of law for the court. In so holding, *Act Up!* repudiates the settled law of seven circuits, including our own. [footnote omitted] *Act Up!* also defies our common law tradition, which since time immemorial has considered the reasonableness of human conduct to be a quintessential jury question. Finally by dividing the fact-bound question of the reasonableness of official conduct into two parts–with the jury resolving questions of evidentiary fact such as what officers knew and what they did and the court deciding the ultimate question of the reasonableness of their actions–*Act Up!* divides the decision-making process between judge and jury in a way that will cause procedural nightmares for district judges and civil rights litigants. . . . *Act Up!* disclaims any responsibility for inflicting such damage on the fabric of qualified immunity law, citing as the villain the Supreme Court's three-page summary reversal in *Hunter v. Bryant*. *Act Up!*'s reliance on *Hunter*, however, is misguided. In accusing the Supreme Court of overruling the settled law of seven circuits, without benefit of briefs or argument and without discussing or even citing that body of caselaw, *Act Up!* reads *Hunter* in a way that attributes to the Court an act of judicial arrogance and, indeed, irresponsibility. The Supreme Court rarely. . . makes new law in summary reversals, and it did not do so in *Hunter*.")

Barlow v. Ground, 943 F.2d 1132 (9th Cir. 1991) (question of whether reasonable official would know she is violating clearly established law was question for jury).

Floyd v. Laws, 929 F.2d 1390 (9th Cir. 1991) (trial court did not abuse discretion by issuing jury instruction on qualified immunity).

Ting v. U.S., 927 F.2d 1504 (9th Cir. 1991) (qualified immunity could not be resolved as a matter of law in light of factual conflict surrounding shooting); ***Thorstead v. Kelly***, 858 F.2d 571 (9th Cir. 1988) (same).

Shannon v. County of Sacramento, No. 2:15-CV-00967 KJM DB, 2018 WL 3861604, at *7–8 (E.D. Cal. Aug. 14, 2018) ("Whether Jones is entitled to qualified immunity depends on how the jury resolves the core factual disputes related to his firing the first shot. *See Gelhaus*, 871 F.3d at 1021 (deciding the same). Although qualified immunity should generally be determined at the earliest possible point in litigation, granting summary judgment ' "is inappropriate where a genuine

issue of material fact prevents a determination of qualified immunity until after trial on the merits.'". . Here, the jury could find that Mr. Shannon was not blinded by the floodlights, that Mr. Shannon knew the command to drop his gun came from deputies, and that Mr. Shannon turned towards the deputies with his gun in a threatening position if not pointed directly at them. If the jury returned such a verdict, Jones would likely be entitled to qualified immunity. Conversely, if plaintiff's version of the facts prevails and the jury concludes Mr. Shannon posed no imminent threat to the deputies, then his right to be free of excessive force in this context was clearly established at the time of the shooting, as outlined in *Harris*, 126 F.3d at 1204 ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed."), and *Curnow*, 952 F.2d at 325 ("officers could not reasonably have believed the use of deadly force was lawful because [plaintiff] did not point the gun at the officers and apparently was not facing them when they shot him the first time."). Because Jones's entitlement to qualified immunity depends on disputed facts that must be resolved by a jury, granting summary judgment on this question would be premature. . . Although mindful of the Supreme Court's emphasis on qualified immunity as 'an immunity from suit rather than a mere defense … [that] is effectively lost' once a case goes to trial, and the Court's emphasis on 'the importance of resolving immunity questions at the earliest possible stage in litigation,'. . . this court is not able to resolve qualified immunity in this case on the current record. This court is not alone among trial courts to reach such a conclusion in factually complex cases. . . The court DENIES defendants' motion for summary judgment on the excessive force claim to the extent it derives from Jones's initial shot. . . .The same approach set out above guides the court's qualified immunity analysis with respect to the deputies' decision to fatally shoot Mr. Shannon. Whether either deputy is entitled to qualified immunity for this use of force depends on how the jury resolves core factual disputes regarding Mr. Shannon's conduct immediately before the deputies' fatal shots were fired. . .The jury may find that Mr. Shannon refused to drop his second gun, despite repeated commands to do so; that he intended to commit suicide by cop and yelled at and taunted the officers to shoot him; that he refused, for approximately three minutes, to respond to the deputies' commands to disarm; and that the deputies' simultaneous, split-second decision to shoot was a response to Mr. Shannon's pointing his gun directly at the them. After such a verdict, the officers would likely be entitled to qualified immunity because a reasonable officer could find using deadly force in that scenario was reasonable. . . But again, the jury could believe a different narrative: That Mr. Shannon never yelled suicidal commands; that the deputies' estimate that they ordered him to disarm for three minutes before fatally shooting him was inaccurate; and that Mr. Shannon never pointed his gun at the deputies. In March 2014, it was clearly established that deadly force is unjustifiable when the only provocation is holding a gun in a non-threatening position. . . Because the deputies' entitlement to qualified immunity depends heavily on whether the fact finder believes uncorroborated testimony, granting summary judgment on this question here too would be premature.")

McGregor v. Kitsap County, No. C17-5436 RBL, 2018 WL 2317651, at *4 (W.D. Wash. May 22, 2018) ("At summary judgment. . . the Court must view the evidence in the light most favorable to McGregor as the nonmoving party. McGregor presents testimony that she discarded the handgun

and emerged from behind the woodpile unarmed, as ordered by Deputy Corn. . . The record also suggests that McGregor was contained, that deputies were aware that McGregor was suicidal and had a history of mental illness, that there was substantial distance (114 feet) and cover between McGregor and the officers limiting any potential threat, that she was not warned prior to the use of deadly force, and that a deputy trained in crisis negotiation was en route. The Court cannot determine as a matter of law that Deputy Sapp's decision to shoot an unarmed, suicidal person in the midst of a mental health crisis from 114 feet away was objectively reasonable, especially when the deputies might have chosen not to engage Plaintiff while awaiting the arrival of a trained negotiator.[7] If the situation was as Plaintiff presents it, there was no pressing reason for Deputy Sapp to use deadly force, and McGregor has alleged a viable excessive force claim. . . . Despite Defendants contention that there is no case law dealing with sufficiently similar facts, 'case law has clearly established that an officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others.'. . . Additionally, there are decisions in this circuit putting Defendants on notice that it is unreasonable for a police officer to shoot a mentally or emotionally disturbed individual, who does not pose a flight risk or threat to others. *Deorle*, 272 F.3d at 1282–83; *Glenn v. Washington Cty.*, 673 F.3d 864, 875–76 (9th Cir. 2011). Defendants attempt to distinguish this case from existing case law by arguing that Deputy Sapp knew that McGregor was armed and feared for the safety of himself and his fellow officers. But again, Defendants' motion for summary judgment is largely based on its own version of disputed facts. The circumstances that Defendants ask the Court to measure Deputy Sapp's conduct against are not as straightforward as Defendants suggest. Because the reasonableness of Deputy Sapp's decision to shoot McGregor depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by a jury. . . The Court cannot conclude as a matter of law that Deputy Sapp's belief that deadly force was warranted was reasonable under the circumstances.")

Thomas v. Cannon, No. 3:15-05346 BJR, 2017 WL 2954920, at *2 (W.D. Wash. July 10, 2017) ("Defendants move for qualified immunity as to Plaintiffs' excessive force claims. Defendants pled qualified immunity as an affirmative defense in their answer to the complaint, but did not seek relief on the issue until the instant motion. While it is preferable to have the question of qualified immunity resolved before trial thus preempting the expense and effort involved in a trial, it is not always the case that this can be done. *See Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008) (noting that "[w]hile the Supreme Court has encouraged resolution of the qualified immunity issue early on in the lawsuit," triable issue of fact may preclude summary judgment on the issue). If, as here, there are factual disputes as to what took place and whether a defendant's conduct violated a plaintiff's constitutional rights, such disputes must be resolved by the jury. . . If the jury finds that the plaintiff's constitutional rights were violated, then the question as to whether a reasonable officer would have known that the conduct was unlawful is one for the court to decide. . . Therefore, the Court instructs counsel to jointly propose a verdict form that presents to the jury the factual issues that it must resolve with respect to Defendants' qualified immunity defense. In the event the jury finds the necessary underlying constitutional deprivation,

this Court will determine the qualified immunity issue as a matter of law while taking into account the jury's factual findings.")

Clifford v. Clark, No. 2:11-CV-02591-MCE, 2015 WL 2235404, at *4-5 (E.D. Cal. May 11, 2015) ("[A]ccording to Defendant, there is no genuine dispute over material issues of fact in this case because Clifford's capability of making a controlled reach for the gun is not material. The central issue in any excessive force case is 'whether it was objectively reasonable under the circumstances for the officer to believe that the individual posed an immediate threat to their safety, warranting the immediate use of deadly force, rather than less severe alternatives.'. . Defendant's inconsistent description of the events leading up to the shooting is material to determining Defendant's credibility and the reasonableness of the force used against Clifford. If the jury finds that Defendant is not credible, it could find that Clifford was not reaching for the gun. The jury could then find that the use of force was not objectively reasonable under the circumstances. Thus, it was not clear error for the Court to hold that there are remaining material issues of fact that must be resolved by a jury. Finally, Defendant asserts that he is entitled to the second prong of qualified immunity, namely, that the use of force was appropriate because the suspect 'posed an immediate threat to the safety of the officer or others.' Defendant's reliance on the defense of qualified immunity is unavailing. At summary judgment, resolution of the qualified immunity defense turns on whether the undisputed facts and the inferences to be drawn therefrom, viewed in the light most favorable to the non-moving party, show a violation of clearly established federal constitutional rights. *See Tolan v. Cotton,* ––U.S. ––––, ––––, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014). Again, the immediacy of the threat encountered by the Defendant turns on his credibility as to the facts of the encounter. Defendant fails to establish that this Court's previous ruling was clearly erroneous, and thus his instant argument fails as well.")

Estate of Lopez ex rel. Lopez v. City of San Diego, No. 13CV2240-GPC-MDD, 2014 WL 7330874, at *9 (S.D. Cal. Dec. 18, 2014) ("Defendants repeat their arguments that the totality of the circumstances would lead an objectively reasonable officer to believe that Officer Walb faced a life threatening situation. . . However, if a jury were to find that Lopez was getting down and did not keep his hand in his pocket or make some similar threatening gesture, and that Officer Walb violated his Fourth Amendment rights by shooting him while he posed no significant threat, the violation would be clearly established under the law set forth in *Garner* governing the use of deadly force to effect a seizure of a suspect. Therefore, the Court concludes that summary judgment on qualified immunity against Plaintiffs' Fourth Amendment claim is not warranted.")

White v. Cnty. of San Diego, No. 13-CV-1166-MMA RBB, 2014 WL 8764094, at *9-10 (S.D. Cal. Dec. 12, 2014) ("First, as set forth in detail above, genuine issues of material fact exist regarding Astorga's shooting of White, specifically whether White indeed posed an 'immediate threat' to Deputy Burk's safety, whether it should have been apparent to Astorga that White may have been suffering from some sort of emotional disturbance, and whether alternative, non-lethal means of force were feasible. Upon construing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that Astorga used an unreasonable or excessive amount of force against

White in shooting him, thereby violating White's Fourth Amendment rights. Accordingly, whether Astorga is entitled to qualified immunity turns on the second *Saucier* inquiry—whether White's right was clearly established. . . . Defendants assert that Astorga's conduct was not clearly unlawful because a reasonable officer would believe that using deadly force was necessary to respond to the immediate safety threat that White posed to Deputy Burk. . .Defendants further contend that even if Astorga 'mistakenly perceived the imminence of the threat to Deputy Burk,' he would still be entitled to qualified immunity. As discussed in detail above, triable issues of fact exist regarding whether the deadly force Astorga used against White was objectively reasonable in light of the circumstances. These unresolved issues include how far away White was standing from Deputy Burk when Astorga shot him, and thus whether White indeed posed an 'immediate threat' to Deputy Burk's safety. The same issues of fact are material to determining whether a *reasonable* officer could believe—or be reasonably mistaken—that deadly force was lawful on the day in question. . . Accordingly, the Court finds Astorga is not entitled to qualified immunity as a matter of law. The Court finds genuine issues of material fact exist regarding whether Astorga's use of force in shooting White was objectively reasonable. The Court further finds that these unresolved issues of fact are also material to whether a reasonable officer could believe, or be reasonably mistaken, that the use of deadly force was lawful against White. Accordingly, Astorga is not entitled to qualified immunity as a matter of law.")

Morales v. Fry, C12-2235-JCC, 2014 WL 4966908, *3-*7 (W.D. Wash. Oct. 3, 2014) (appeal pending, argued on May 10, 2017) ("[I]t is well-recognized Ninth Circuit procedure for the court to determine the clearly established law, and then after instructing the jury on it, to allow the jury to decide fully both the defendant's violation of it and the applicability of qualified immunity, without the Court ever ruling on that issue itself. As our Court of Appeals held decades ago, 'there is no reason to think that allowing the jury rather than the judge to determine whether an officer's conduct was reasonable under the circumstances would be inimicable to the policies that animate immunity. On the contrary, evaluating the reasonableness of human conduct is undeniably within the core area of jury competence.' *Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir.1994). . . . [W]ith regard to the qualified immunity standard, the Court properly instructed the jury that even if Defendants had violated Plaintiff's constitutional right against unreasonable seizure, that they could not be held liable unless every reasonable officer would have known that the force used to effect the seizure was excessive and unlawful, in light of the clearly established law articulated in Jury Instruction Number 17. Thus, the question for the jury with regard to Brian Rees was simply whether he had violated the clearly established law on excessive use of force, as had been given to them in Jury Instruction Number 17. The jury found that Defendant Brian Rees had violated this clearly established constitutional law on excessive use of force. The jury's decision to find liability with regard to Officer Rees means also that they must have found that he was not entitled to qualified immunity, *i.e.,* that every reasonable officer would have known such force would be unlawful and excessive under the standards and factors articulated in Jury Instruction Number 17. The jury was given ample opportunity to find that Officer Rees was entitled to qualified immunity—they were instructed specifically in Jury Instruction Number 21 that if Officer Rees reasonably thought his use of force was not excessive/was lawful, then he should not be found

liable even if his actions were indeed unlawful. . . . On the evidence submitted at trial, a reasonable jury certainly could have concluded, given the uncontested evidence of Ms. Morales' very 'petite'. . . size and the number of officers who were already actively engaged in pinning her down behind the protective environs of a bike barricade . . . that even a brief burst of pepper spray to the face would have been completely excessive; *i.e., an obvious constitutional violation in the eyes of every reasonable officer*. . . .Granting a renewed motion for judgment as a matter of law and 'taking the verdict away from the jury' is an extreme measure, only to be contemplated when the verdict returned by the jury so departs from the evidence as to be void of reason. More than enough evidence was presented at trial to allow the jury to determine that Defendant Brian Rees had violated the clearly established law on excessive use of force, as provided in Jury Instruction Number 17. Thus, the question before the Court—could a reasonable jury have found that Brian Rees violated clearly established law by using an unreasonable degree of force-requires an affirmative answer." footnotes omitted)

Estate of Clifford v. Placer Cnty., CIV. S-11-2591 LKK/C, 2014 WL 4275959, *10, *11 (E.D. Cal. Aug. 28, 2014) ("The foregoing gives rise to a reasonable inference that Clifford was too impaired and confused to make a controlled reach for the gun on the passenger seat. The mere fact that Clifford had a gun in the car, without more, did not justify the use of deadly force. . . The key question here is 'whether a reasonable jury would necessarily find that' Clark 'perceived an immediate threat of death or serious physical injury at the time he shot' Clifford such that the use of deadly force was reasonable. . . Clark's description of events, if believed, is of a 'tense, uncertain, and rapidly evolving' situation during which Clifford refused to comply with orders to keep his hands on the steering wheel and became more hostile and aggressive before deliberately and in a controlled manner reaching for the gun. Clark avers that Clifford made a controlled full arm's length reach for the gun after failing to comply with repeated orders to keep his hands on the steering wheel and not reach for the gun. If this is true, no reasonable jury would conclude that Clark violated Clifford's Fourth Amendment rights and, in any event, this court would find Clark entitled to qualified immunity. Clark's description of Clifford as significantly impaired, moving slowly, and confused about what was going on, together with the toxicology report showing Clifford's blood alcohol level at .223, however, raise serious questions about whether Clifford was capable of making a controlled reach for the gun. These questions, in turn, give rise to a question about Clark's credibility which must be resolved by a jury. If a jury believes that Clifford was too impaired to make a controlled reach for the gun it could disbelieve Clark's asserted reason for shooting Clifford. And if the jury disbelieved Clark's testimony that Clifford made a controlled reach for the gun, it could disbelieve some or all of Clark's testimony concerning events leading up to the shooting. . . Viewed in the light most favorable to plaintiff and drawing all reasonable inferences therefrom, a reasonable jury could conclude that Clifford was too impaired to make a controlled reach for the gun and that Clark's asserted reason for shooting Clifford is not credible. If it so concluded, the jury could also find that Clark's use of deadly force was unreasonable and excessive and violated the Fourth Amendment. The second prong of the qualified immunity analysis requires the court to decide whether it would have been clear to a reasonable officer in Clark's position that his use of deadly force was unlawful in the situation he faced. The question

of whether a defendant is entitled to qualified immunity is a question of law for the court. . . However, the court only resolves that question of law if all material facts are undisputed and, taken in the light most favorable to the plaintiff, the facts show the defendant did not violate clearly established federal constitutional rights. . . .The same credibility question that precludes summary judgment on the merits of plaintiff's second and eighth claims preclude a finding that Clark is entitled to qualified immunity on these claims.")

Estate of Harvey v. Jones, No. C05-1170RSM, 2006 WL 909980, at *10 (W.D. Wash. Apr. 6, 2006) ("Courts have struggled with the qualified immunity analysis on summary judgment when there are issues of fact relevant to that analysis. . . While the question of clearly established law is for the Court, it is the jury that is 'best suited to determine the reasonableness of an officer's conduct in light of the factual context in which it takes place.'. . The Court recognizes that the existence of a factual dispute is, of itself, not a sufficient basis to deny summary judgment on a qualified immunity claim. . . However, once the Court has concluded that plaintiff's facts would establish a constitutional violation if proven true, and that the right violated is clearly established, the objective reasonableness of the officer's conduct must be determined in light of the facts of the case. Those facts are yet to be determined by a jury, and the final step of the qualified immunity analysis must await that determination. Accordingly, as to plaintiff's § 1983 claim based on the alleged use of excessive force during arrest, the motion for summary judgment on qualified immunity must be denied at this time.")

Phillips v. City of Fairfield, No. CIVS040377FCDPAN, 2005 WL 3500787, at *10 (E.D. Cal. Dec. 21, 2005) ("The question of immunity generally is not one for the jury. . . . However, if a genuine issue of material fact exists regarding the circumstances under which the officer acted, then the court should make the determination after the facts have been developed at trial.")

Burnett v. Bottoms, 368 F.Supp.2d 1033, 1042, 1043 (D. Ariz. 2005) ("The Ninth Circuit has repeatedly stated that whether the force used to arrest an individual is reasonable is 'ordinarily a question of fact for the jury.' . . Viewing the record in the light most favorable to Plaintiff on her excessive force claim, the Court finds that she has established the existence of disputed material issues of fact which may only be resolved by a jury. Because Plaintiff and the Defendants offer varying accounts of the events surrounding Plaintiff's arrest–namely whether Plaintiff resisted arrest, whether she intentionally caused herself to fall, whether the officers intentionally and unreasonably dropped her 'face down to the ground,' intentionally and unreasonably dragged her on her knees on the hot September Phoenix asphalt pavement, and unreasonably placed her in handcuffs that were excessively tight for an unreasonable period of time–the Court finds that summary judgment as a matter of law is inappropriate. How these facts are resolved by the jury through the use of special interrogatories will determine whether the officers' actions constituted excessive force in violation of the Fourth Amendment and whether the officers are entitled to qualified immunity as a matter of law. *See*, *Littrell v.. Franklin*, 388 F.3d 578 (8th Cir.2004)(district court improperly submitted the legal question of qualified immunity to the jury); *accord Alvarado v. Picur*, 859 F.2d 448, 451 (7th Cir.1988) (rejecting a jury instruction that told

jurors the defendants would be immune from suit if their actions did not violate clearly established law, reasoning '[h]ow was the jury supposed to determine the law on the dates in question? And, if the jury somehow could determine the law on the dates in question, how was it supposed to determine if that law was Aclearly established"?'). If the officers engaged in the conduct that Plaintiff alleges and if Plaintiff never resisted arrest or struggled and presented no threat to officer safety or the safety of others, a trier of fact could find that the officers used excessive force during the course of her arrest in violation of the Fourth Amendment. Additionally, if Plaintiff cooperated after she was handcuffed and officers still physically picked her up and carried her, dropped her face down to the ground, and placed her in excessively tight handcuffs which caused her wrists to bleed and refused to loosen them upon fair notice the handcuffs were too tight or were on for an unreasonable period of time, the officers would not be entitled to qualified immunity. Before September, 2002 when these events took place, it was clearly established that a police officer was not entitled to use such force against a handcuffed, secured, cooperative prisoner or arrestee.").

TENTH CIRCUIT

Shimomura v. Carlson, 811 F.3d 349, 357 (10th Cir. 2015) ("According to Mr. Shimomura, the video recording shows that Mr. Shimomura did not push his roller bag into Agent Carlson. But from where Officer Davis was positioned, he could reasonably believe that (1) he had seen Mr. Shimomura push his roller bag into Agent Carlson and (2) the contact resulted in at least slight physical injury. . . The reasonableness of that belief made probable cause at least arguable. Thus, even when we consider the evidence in the light most favorable to Mr. Shimomura, we conclude that Officer Davis is entitled to qualified immunity on the Fourth Amendment claim of unlawful arrest. . . . In reaching a contrary conclusion, the partial dissent points to
• Mr. Shimomura's allegation in the complaint 'that [Officer Davis] could not reasonably perceive evidence of bodily injury, such as pain' and
• uncertainty about what Officer Davis would have seen from his angle.
Dissent at 1–2. In our view, these two points do not create a genuine fact-issue on whether probable cause was at least arguable. Because the issue involves summary judgment, we must rely on the summary judgment record rather than Mr. Shimomura's allegations in the complaint. In support of the summary judgment motion, Officer Davis stated under oath that he had seen the roller bag strike Agent Carlson in the legs. . . Mr. Shimomura responded to the motion, presenting affidavits by himself and Agent Carlson. Agent Carlson's affidavit said that Officer Davis had seen the contact between the roller bag and Agent Carlson. . . Mr. Shimomura's affidavit was silent about what Officer Davis could see. Thus, for purposes of summary judgment, we have undisputed evidence that Officer Davis was able to see the contact between Agent Carlson and Mr. Shimomura's roller bag.")

Shimomura v. Carlson, 811 F.3d 349, 362-63 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part) ("I join the majority except as to its holding that Officer Davis is entitled to qualified immunity. . . .Just as a jury in *Tolan* should have decided whether the undisputed words,

in context, seemed threatening, a jury here should decide whether the undisputed contact, in context, seemed intentional or capable of causing bodily injury. We do not know what Officer Davis saw from his angle. All we have is the video, Shimomura's complaint, and affidavits presented on summary judgment. Those materials do not definitively settle the facts in Officer Davis's favor. A jury could find that even given his angle and how little time he had to process what had happened, it was unreasonable to think the contact was intentional or reckless. And a jury most certainly could find that there was no evidence of bodily injury. Having watched the video, I find it dubious that anyone viewing the contact from *any* angle could have reasonably thought that Agent Carlson felt pain. Although she later reported pain, it appears that this was not until after Shimomura's arrest. For those reasons, I respectfully dissent as to the conclusion that Officer Davis is entitled to qualified immunity.")

Abbo v. Wyoming, 596 F. App'x 709, 711-12 & n.4 (10th Cir. 2014) ("Although the governing case law likely supports a finding of probable cause, we begin and end our inquiry by asking whether the alleged infringed right was so clearly established that every reasonable official would have understood the troopers' actions violated the law. . . We conclude it was not. The troopers testified they smelled what they believed to be raw marijuana in Mr. Abbo's vehicle, and determined this gave them probable cause to search. . . Indeed, this court has repeatedly recognized the odor of raw marijuana establishes probable cause for a search. . . Once probable cause is established, troopers may search an entire vehicle. . . . Mr. Abbo contends the district court erred in determining the troopers actually smelled raw marijuana. He argues this was a disputed fact, and claims the district court improperly resolved it in favor of the troopers rather than Mr. Abbo, the non-moving party. In his Fed. R.App. P. 28(j) letter of November 17, 2014, Mr. Abbo quotes from *Tolan v. Cotton,* 134 S.Ct. 1861, 1866 (2014) (citation, quotations, and alterations omitted): '[b]y failing to credit evidence that contradicted some of its key factual conclusions, the court improperly weighed the evidence and resolved disputed issues in favor of the moving party.' We disagree. We understand the district court's opinion to find that the troopers smelled marijuana in a subjective sense, and not to establish that the troopers smelled what was, in fact, marijuana. The parties do not dispute this fact. Both troopers commented they smelled marijuana during their search. They subsequently testified under oath that they smelled raw marijuana in Mr. Abbo's car. At oral argument, counsel for Mr. Abbo conceded the troopers believed they smelled raw marijuana. . . The troopers' belief is not in question, and a mistake of fact does not defeat their determination of probable cause.")

Felders ex rel. Smedley v. Malcom, 755 F.3d 870, 885, 886 (10th Cir. 2014) ("[T]he district court held that the law was clearly established that facilitation of a dog's entry into a car without probable cause violates the Fourth Amendment, and that questions of fact remained as to whether Malcom facilitated Duke's entry prior to establishing probable cause. We agree with the district court's conclusion that the law was clearly established when Malcom conducted the dog sniff that facilitating a dog's entry into a vehicle without first establishing probable cause constitutes an improper search. . . . Malcom does not contest the district court's holding that the law was clearly established that an officer may not facilitate a dog's entry into the car prior to establishing probable

cause. Rather, he argues that the facts in the record do not suggest that he violated this rule. We disagree. When the district court concludes that a reasonable jury could view the facts a certain way, we take them as true. [citing *Tolan*] Thus, at this stage in the litigation, we cannot rule out the possibility that Bairett caused the car doors to remain open, Malcom was aware that Bairett caused the car doors to remain open, and Duke failed to properly alert before entering the vehicle. . .If that is what actually happened, then Malcom violated clearly established law. Malcom therefore cannot show that no factual disputes stand between him and qualified immunity. . . . Malcom asks us to assume an alternative fact pattern. . . . But, we cannot say, when viewing the facts in the light most favorable to Felders, that Malcom did not know Bairett intentionally held open the doors, or that Duke alerted before jumping in the car in the first place. It follows then that we cannot determine whether qualified immunity applies in this context. In sum, although phrased as legal inquiries, Malcom's arguments ultimately dispute the set of facts the district court determined for us and which *Lewis* requires us to assume. Because we conclude that issues of material fact exist as to whether Malcom's conduct violated Felders's clearly established constitutional rights, we agree with the district court that Malcom was not entitled to qualified immunity as a matter of law.")

Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1252-57 (10th Cir. 2013) ("Cavanaugh raises a more fundamental challenge to the jury instructions. She argues that the district court erred in submitting to the jury the question whether Officer Davis used excessive force. Cavanaugh contends the court should have given the jury special interrogatories to decide the factual disputes and made the legal determination itself whether Davis's conduct was reasonable under the circumstances. While the argument is not entirely without merit, the district court did not err in this case. . . .While Cavanaugh is correct that, generally, legal issues are for the court and factual issues for the jury, the excessive force question, like most Fourth Amendment inquiries, is a mixed question of law and fact. . . .As a general matter our cases hold that, where there are disputed issues of material fact, the question of reasonableness underlying a Fourth Amendment violation is for the jury. . . . Only where there are no disputed questions of historical fact does the court make the excessive force determination on its own, such as on summary judgment. . . . In this case, there were disputed issues of material fact relating to Officer Davis's use of the taser. . . . Due to these disputes of material fact, it was proper for the district court to send the question of whether Officer Davis's use of force was reasonable to the jury. But Cavanaugh contends the district court should have given the jury special interrogatories tailored to the *Graham* factors—and then the court should have applied the jury's findings to make the excessive force determination itself. Yet the cases she relies on for this proposition concern either (1) the court's evaluation of the excessive force issue at the summary judgment stage, or (2) the issue of qualified immunity, which involves both whether there was a constitutional violation *and* whether the violation was clearly established. None of the cases support the broad rule she seeks. . . In short, the court may rule on summary judgment that an officer's conduct was reasonable (or unreasonable) if the undisputed facts support such a conclusion. But the court's resolution of an excessive force claim as a matter of law, where there is no genuine issue of material fact, does not mean a jury cannot decide the question where there *are* disputed issues of material fact. . . .While our cases allow courts to broadly submit the

constitutional violation question to a jury where there are disputed historical facts, that practice is not without limits. In many cases, the better practice is for the district court to use special interrogatories, at least where qualified immunity is at issue. For example, had the jury found for Cavanaugh in this case, the Defendants may have filed a motion for judgment as a matter of law based on qualified immunity. Even though we previously held that under the version of facts presented by Cavanaugh, Officer Davis would not have been entitled to qualified immunity, there would have been no guarantee, without special interrogatories, that the jury found all the facts supporting such a determination. That is, the jury could have found there was a constitutional violation but nevertheless based that judgment on a set of facts less egregious than the one presented in Cavanaugh's case in chief—and thus the Defendants may have been entitled to qualified immunity. . . This is why, when qualified immunity is at issue, many courts have stated that the relevant disputed issues of fact must be resolved by the jury through special interrogatories, while the court must decide the qualified immunity question. . .We considered this question in some length in *Gonzales.* In that case, we endorsed two methods of submitting qualified immunity questions to the jury. The first was through special interrogatories, after which the 'court could then determine whether the defendant's conduct was objectively reasonable in light of the clearly established law.'. . The second method allows a court 'to instruct the jury to determine what the defendant actually did and whether it was reasonable in light of the clearly established law defined by the judge.'. . But we condemned a third method of 'simply allow [ing] the jury to determine what the clearly established law is, what the defendant actually did, and whether the defendant's conduct was objectively reasonable in light of the clearly established law found by the jury.'. .Even though *Gonzales* endorsed the second approach, it emphasized the approach should only be used 'rarely' in those circumstances 'when narrow issues of disputed material fact are dispositive of the qualified immunity inquiry.'. . '[T]he better approach,' we concluded, 'is for the court to submit special interrogatories to the jury to establish the facts.'. . And we emphasized that 'allowing the jury to evaluate the objective reasonableness of a defendant's conduct' would be done 'only because specific key, disputed facts were dispositive of the qualified immunity issue.'. . Other courts have noted that some factual disputes may go both to the constitutional violation question and to the qualified immunity question. What happens then? They have given the constitutional violation question to the jury through a general verdict, while also giving it special interrogatories on factual issues that are crucial for determining qualified immunity. . . Or, as we noted in *Gonzales,* the court can submit only special interrogatories to the jury, and then '[o]nce the jury determines the purely historical facts, the judge then decides the three legal questions of qualified immunity: whether the actions violated the plaintiff's constitutional rights, whether those constitutional rights were clearly established, and whether the objectively reasonable defendant 'would have known that his conduct violated that right.'". . Thus, for example, in this case, the court could have given interrogatories to the jury that pinned down whether a knife was visible or whether Officer Davis asked Cavanaugh to stop, both of which would have been relevant to whether a constitutional violation occurred in the first place and, if it did, whether Officer Davis should have known that his conduct violated Cavanaugh's rights. . . And then, assuming qualified immunity had been reasserted, the court could have decided the legal questions itself. Regardless of what the better practice may be (and it undoubtedly depends on the case), it is clear the district

court here did not abuse its discretion in refusing to submit special interrogatories to the jury. Where qualified immunity is not at issue, a court may submit the excessive force question to the jury. Accordingly, we reject this basis for challenging the district court's judgment.")

Bass v. Pottawatomie County Public Safety Center, No. 10-6215, 2011 WL 2193835, at **3-5 (10th Cir. June 7, 2011) ("The district court. . . gave two instructions regarding qualified immunity. In Instruction No. 16, the court instructed the jury as follows: If you find that Plaintiff has proven his claim, you must then consider the affirmative defense of Defendant Jerry Goodwill that his conduct was objectively reasonable in light of legal rules clearly established at the time of the incident at issue and that he is therefore not liable. This defense is known as qualified immunity. The qualified immunity defense recognizes that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here protection of a detainee, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to what the Constitution requires as protection of detainees in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the qualified immunity defense. . . In Instruction No. 17, the court then added the following: You are instructed that Defendant Jerry Goodwill cannot be held liable to Plaintiff in the event that you determine he is entitled to qualified immunity for his actions. If you find, after considering all the evidence before you, that the actions of defendant Jerry Goodwill were such that a reasonable person would have believed them to be lawful and not violative of some established statutory or constitutional right, which a reasonable person would have known, Defendant Jerry Goodwill is entitled to qualified immunity. . . These instructions clearly contemplated that the jury could find: (1) that Officer Goodwill was deliberately indifferent to Mr. Bass's safety and therefore violated Mr. Bass's constitutional rights; but (2) that Officer Bass was not liable to Mr. Bass for the violation because he made a reasonable mistake as to what the law required in terms of protecting Mr. Bass from other detainees. As the introductory sentence in Instruction No. 16 stated, '*[i]f you find that Plaintiff has proven his claim,* you must *then* consider the affirmative defense of Defendant Jerry Goodwill that his conduct was objectively reasonable in light of legal rules clearly established at the time of the incident and that he is therefore not liable.'. . Accordingly, there is a reasonable explanation that reconciles the jury's verdicts, and the explanation is that the jury found that Officer Goodwill violated Mr. Bass's constitutional rights, as necessary to support its verdict against the Jail under principles of municipal liability, but the jury did not impose liability against Officer Goodwill because it found that he nonetheless acted reasonably and was therefore entitled to qualified immunity. The Jail's facially appealing response to this explanation is that the jury could not have found that Goodwill both violated Bass's constitutional rights and that he acted 'objectively reasonably' ... [because] a jail employee who knowingly and recklessly disregards a substantial risk of serious harm to an inmate would, by definition, be acting in an objectively unreasonable manner which would preclude a qualified immunity defense. . . But this argument fails for two reasons. First, if correct, this argument means that the jury should not have been instructed on qualified immunity in this case, and the Jail has never made such an argument either below or before this court. Second, it ignores the leading Supreme Court case law in this area which establishes that the reasonableness inquiry for purposes

of the affirmative defense of qualified immunity is separate and distinct from the question of whether a government official had the mens rea required for the underlying constitutional violation. [citing *Saucier* and *Anderson*] In sum, because the jury was properly instructed that it could not impose liability on Officer Goodwill if he acted reasonably in the qualified immunity sense, even if it also found that he violated Mr. Bass's constitutional rights, the jury's verdicts were not facially inconsistent and there was no plain error.").

Lundstrom v. Romero, 616 F.3d 1108, 1119 (10th Cir. 2010) ("We note that a qualified immunity question may be submitted to a jury when disputed issues of material fact exist. *See Gonzales v. Duran*, 590 F.3d 855, 859 (10th Cir.2009). Where such factual disputes are present, the district court can 'submit special interrogatories to the jury to establish the facts' and '[b]ased on the jury's findings, the [district] court [can] then determine whether the defendant's conduct was [lawful] in light of the clearly established law.'").

Gonzales v. Duran, 590 F.3d 855, 859-61 (10th Cir. 2009) ("Qualified immunity is 'almost always' a question of law. *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1217 (10th Cir.2008). Like many other questions of law raised in pre-trial motions, the trial court often decides the issue before trial. *Id* . A trial court may submit a question of qualified immunity to the jury only '*Ain exceptional circumstances*"' [where] historical facts [are] so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated [the] right [at issue]."'. . Thus, the predicate for submitting a qualified immunity question to the jury is the existence of disputed issues of material fact–that is, the question of what actually happened.Where such factual disputes are present, there are three possible ways for a trial court to submit the qualified immunity question to the jury. First, the court could submit special interrogatories to the jury to establish the facts. Based on the jury's findings, the court could then determine whether the defendant's conduct was objectively reasonable in light of the clearly established law. Second, the judge could define the clearly established law for the jury. Then, the court could instruct the jury to determine what the defendant actually did and whether it was reasonable in light of the clearly established law defined by the judge. This second approach is the one apparently taken by the district court in this case. Third, the court could simply allow the jury to determine what the clearly established law is, what the defendant actually did, and whether the defendant's conduct was objectively reasonable in light of the clearly established law found by the jury. This last approach, of course, is clearly inappropriate. Although our cases have allowed the second approach, they have done so only when narrow issues of disputed material fact are dispositive of the qualified immunity inquiry. . .Consideration of the proper division of labor between courts and juries in civil actions suggests that the second approach should be used rarely for several reasons. First, an 'essential characteristic' of the federal court system is that it 'assigns the decisions of disputed questions of fact to the jury.'. . Legal questions are reserved to the courts. Second, in deciding whether a right is clearly established, an essential part of the qualified immunity inquiry, a court must assess whether the right was clearly established against a backdrop of the objective legal reasonableness of the actor's conduct. . . Letting the jury determine whether the officer's actions were reasonable in light of the clearly established law has

the potential of asking the jury to resolve a legal question. Third, allowing the jury to decide qualified immunity almost always generates an issue on appeal as to whether the circumstances were exceptional enough to warrant such a procedure. In those few cases where qualified immunity may turn on a jury's resolution of discrete factual questions, we think that the better approach is for the court to submit special interrogatories to the jury to establish the facts. . . We think that such a procedure is fully consistent with, and indeed better supported by, our past cases. . . . Our most recent cases favor a narrow approach where a jury decides only disputed historical facts underlying a qualified immunity defense.")

Gonzales v. Duran, 590 F.3d 855, 862-64 (10th Cir. 2009) (Ebel, J., concurring) ("I join the majority opinion completely and write this brief concurrence only to emphasize one point: if a district court submits the question of qualified immunity to the jury because there are disputed historical facts material to resolving the immunity question, the district court should submit to the jury only the disputed factual contentions underlying the immunity question and should reserve for itself the legal question of objective reasonableness. I agree with the majority that a court may submit the issue of qualified immunity to the jury only where there is a dispute of fact pivotal to determining whether the defendant is entitled to qualified immunity . I also agree with the majority that there were no such material facts in dispute with respect to the Gonzales' Fourth Amendment claims, but that the error in submitting the qualified immunity question to the jury on that claim was harmless. *See supra* at 14-15.However, I would prefer to conclude unequivocally that there were disputed material facts with respect to Jade Gonzales' Fourteenth Amendment claim. Thus, in my opinion, *if* the qualified immunity defense was submitted to the jury regarding the Fourteenth Amendment claim (and the majority opinion correctly notes that that proposition is far from clear), then I would conclude that there would have been no error in submitting that defense to the jury had the submission been limited to the factual components. But, I think the district court erred in phrasing the qualified immunity interrogatory in a manner that allowed the jury to resolve the legal question of whether the defendants' conduct was 'objectively reasonable' in light of the clearly established law. Nonetheless, I would find that Gonzales waived her right to rely on this error, and even if she had not, the error was harmless. On this basis, I concur with the majority and agree that this court should affirm. . . .While the district court may not have erred in submitting this particular qualified immunity question to the jury, it did err in how it stated the immunity question to the jury. Specifically, to the extent the interrogatory asked the jury to decide whether the defendants' conduct was objectively reasonable, the district court erred. Stating that a district court may 'submit the question of qualified immunity to the jury' when there are material disputed facts is somewhat misleading. Whether a defendant's conduct is objectively reasonable is always a question of law for the court. The only reason a district court does not resolve the qualified immunity question before the case goes to the jury is because there are underlying disputed historical facts necessary to resolution of that legal issue. The jury needs only to resolve those disputed facts to allow the court to resolve the legal question of objective reasonableness. Thus, the district court should have submitted specific fact-finding interrogatories to the jury that would have allowed it to resolve the material disputed facts, but the district court should have reserved for itself the question of whether the defendants' conduct was objectively reasonable in light of

clearly established law. . . . In this case, however, the district court's improper submission of the 'objectively reasonable' question to the jury does not mandate reversal. First, Gonzales waived this ground for relief by failing to object at trial to the phraseology of the interrogatory. . .Second, even if Gonzales had raised this issue, the error would be harmless because, as the majority explained in its harmless error analysis, . . .the jury separately reached the merits of Jade Gonzales' Fourteenth Amendment claim and concluded that the defendants committed no constitutional violation.").

Keylon v. City of Albuquerque, 535 F.3d 1210, 1217, 1218, 1220 (10th Cir. 2008) ("Because there were no disputed issues of material fact the question of qualified immunity should not have been submitted to the jury. Qualified immunity issues are almost always questions of law, decided by a court prior to trial. . . Many of our sister circuits have held that qualified immunity is never a question for the jury. . . However, we have recognized that '*in exceptional circumstances* historical facts may be so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated that right.' . . . Because any factual dispute in this case does not go to the question of the objective reasonableness of Officer Barnard's actions, this case is not an 'exceptional circumstance,' and the qualified immunity question should not have been submitted to the jury.").

Mecham v. Frazier, 500 F.3d 1200, 1203 (10th Cir. 2007) ("The district court held 'the question of objective reasonableness is one for the jury to decide.'. . While this proposition might hold where there are disputed issues of material fact, the question of objective reasonableness is not for the jury to decide where the facts are uncontroverted. . . . .Here, although the district court recognized 'there is no dispute as to the underlying events,' it nevertheless found the reasonableness determination was for the jury. In light of *Medina*, the district court should have decided qualified immunity as a matter of law. *See also Scott v. Harris*, __ U.S. __, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (deciding qualified immunity on undisputed facts).")

Cortez v. McCauley, 478 F.3d 1108, 1120 & n.15, 1121 (10th Cir. 2007) (en banc) ("In sum, we find that viewing the undisputed facts in the light most favorable to the Plaintiffs, an arrest without probable cause occurred. As we discuss below, no exigent circumstances would justify a warrantless arrest either. This conclusion does not, however, end our analysis. Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity. . . Therefore, when a warrantless arrest or seizure is the subject of a § 1983 action, the defendant is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff. . . . Some courts have referred to this standard as 'arguable probable cause.' . . . This principle may appear to be in some tension with the equally established principle that 'it is a jury question in a civil rights suit whether an officer had probable cause to arrest.'. . The tension is resolved in this case by the essential lack of dispute over the historical, predicate facts. The parties agree on the 'what happened' questions. In such a circumstance, for qualified immunity purposes, there is no such thing as a 'genuine issue of fact' as to whether an officer 'should have known' that his conduct violated constitutional rights. . . The

conduct was either objectively reasonable under existing law or it was not. . . We find the officers did not have 'arguable probable cause' to arrest Rick Cortez because, as mentioned above, the information relied on to conduct the seizure was not reasonably trustworthy information sufficient on its own to justify the seizure.")**.**

Trujillo v. Large, 165 F. App'x 619, 2006 WL 235262, at *1, *2 (10th Cir. Feb. 1, 2006) (not published) ("Qualified immunity presents two inquiries: (1) whether plaintiff asserted that defendant violated a constitutional or statutory right, and if so, (2) 'whether that right was clearly established such that a reasonable person in the defendant's position would have known that his conduct violated that right.' . . The court is to determine the legal questions of whether the plaintiff's claim asserts a violation of a constitutional right and whether the right was clearly established at the time. . . The jury should determine the defendant's objective reasonableness where this question depends on whose version of the facts are believed . . . . The issue before us is whether Detective Large was entitled to a jury instruction on qualified immunity which directed the jury to decide the objective reasonableness of Detective Large's conduct. Here, as in *Maestas*, the qualified immunity analysis 'hinges upon whose version of the facts are believed.'. . Consequently, the district court correctly had the jury determine the disputed material facts on the reasonableness element of the qualified immunity analysis. . . The court did not err in giving the challenged jury instruction.").

Maestas v. Lujan, 351 F.3d 1001, 1006-10(10th Cir.2003) ("In his Answer, Mr. Lujan pleaded qualified immunity as an affirmative defense to the § 1983 claim. To determine whether a plaintiff can overcome a qualified immunity defense, courts decide (1) whether the plaintiff has asserted a violation of a constitutional or statutory right, (2) whether that right was clearly established (3) such that a reasonable person in the defendant's position would have known that his conduct violated that right. . .Given the highly contested nature of material facts, the district court presented the final prong of the qualified immunity defense–the reasonableness element–to the jury. . . . Although issues of qualified immunity normally are questions of law decided prior to trial, in exceptional circumstances historical facts may be so intertwined with the law that a jury question is appropriate as to whether a reasonable person in the defendant's position would have known that his conduct violated that right. . . . But even under such special circumstances, whether plaintiff's claim asserts a violation of a constitutional right and whether this right was clearly established at the time remain questions of law. . . . This case, however, presents the exceptional situation in which the district court cannot complete its qualified immunity analysis without first determining disputed material facts. If Ms. Maestas and Mr. Lujan had engaged in a consensual relationship and Mr. Lujan was not her supervisor, a reasonable person in Mr. Lujan's position would not have known that his conduct violated Ms. Maestas's equal protection rights. . . . . Our holding here is limited. A jury question exists only when a disputed issue of material fact concerning the objective reasonableness of the defendant's actions exists. . . This ruling does not disturb our previous decisions holding that qualified immunity issues, except in special circumstances, present legal questions resolvable on summary judgment. . . Furthermore, because

our decision only restates existing law, and we have yet to see a flood of qualified immunity issues sent to juries, we doubt that the district courts will adopt such a practice now.").

Reiss v. Luchetta, 78 F.3d 597 (Table), No. 94-1489, 1996 WL 87051, *4 (10th Cir. Feb. 28, 1996) ("Because the existence of probable cause depends upon the reasonableness of an officer's conduct under particular circumstances, claims challenging the bases for arrests usually present factual questions that must be resolved by a jury. . . . Similarly, when a police officer asserts that he is entitled to qualified immunity from a claim that he has made an arrest without probable cause, factual questions often arise that require resolution by a jury.").

Walker v. Elbert, 75 F.3d 592, 598-99 (10th Cir. 1996) ("In ruling on the motion for summary judgment, the trial court found that the dress code did violate First Amendment rights, and that [defendant] Clark 'is not entitled to qualified immunity and summary judgment is inappropriate at this time because material facts are in dispute.' The dress code claim and the issue of qualified immunity were presented to the jury by a special question on the verdict form in the following manner: As of August 1991, clearly established law precluded the publication of a dress code that absolutely prohibited employees like Mr. Walker from wearing slogans at work. Should an employee in Mr. Clark's position reasonably have been aware of this law in August 1991? The jury answered 'No' to this question. Appellant claims that the district court erred in referring to the jury the issue of reasonableness as it related to qualified immunity. . . . While we do recognize that the ultimate question of a defendant's good faith immunity is frequently determined as a matter of law, a defendant may rely on special circumstances to raise an issue of fact to be determined by a jury. . . . . During trial in the case before us, the defendant Clark presented evidence of circumstances which would entitle the jury to find that a reasonable person in his position would not have known of the relevant legal standards. [footnote omitted] Whether defendant Clark was entitled to immunity as a matter of law, or whether he was entitled to immunity under a finding of fact by the jury, we find there was no error on the issue of the immunity defense.").

Frohmader v. Wayne, 958 F.2d 1024, 1028 (10th Cir. 1992) ("Courts may not resolve disputed questions of material fact in order to grant summary judgment .... courts, at the summary judgment level, are required to take the facts and reasonable inferences in the light most favorable to the party opposing summary judgment.").

Salmon v. Schwarz, 948 F.2d 1131, 1139 (10th Cir. 1991) (genuine issues of material fact "...undermine[d] any claim of objective reasonableness to support a qualified immunity summary judgment.).

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990) (qualified immunity is a legal, not a factual issue, which must be resolved in the first instance by the trial court)

England v. Hendricks, 880 F.2d 281, 283-84 (10th Cir. 1989) (questions of what current applicable law is, whether that law was clearly established at time of challenged conduct and

whether official acted in objectively reasonable manner are questions of law), *cert. denied*, 493 U.S. 1078 (1990).

Rozek v. Topolnicki, 865 F.2d 1154, 1157 (10th Cir. 1989) (facts in dispute were not material "because even if they were resolved in [plaintiff's] favor, defendants...would still be entitled to qualified immunity.")

Choate v. City of Gardner, No. 16-2118-JWL, 2018 WL 3389871, at *3–4 (D. Kan. July 12, 2018) ("In the present case, plaintiff alleges that, even if the officers acted reasonably at the exact moment of the shooting, they recklessly created their need to use force and thus acted unreasonably in the totality of the circumstances. Specifically, plaintiff argues that the officers should have taken physical control of decedent while she sat in bed with her empty hands above the covers, before she produced any gun. Defendants argue that the officers were not reckless as a matter of law, but the Court rejects that argument. Plaintiff has submitted the following evidence in support of her argument that defendants should have controlled decedent prior to the shooting: the officers were in the bedroom with decedent for over four minutes before the shooting occurred, during which time they made no attempt to restrain her or to remove her from the bed; the officers had been informed that decedent was intoxicated, was possibly suicidal, and had recently fired a gun; decedent appeared intoxicated or groggy, and she continually failed to respond verbally or physically to repeated questions and commands; Officer Mohny testified that he suspected that decedent had a gun under the covers, and Officer Breneman was worried that she had a gun there; Officer Breneman, who acted as lead officer during the incident and had the most contact with decedent in the bedroom, admitted that he had multiple opportunities to take physical control of decedent; the officers did not merely ask decedent for the location of her gun but actually invited decedent to produce the gun; and the officers declined to restrain decedent not because of any safety concerns, but rather because decedent was apparently naked. Viewed in the light most favorable to plaintiff, this evidence shows that the officers failed to restrain decedent (or at least her hands), even though she had a gun under the covers, despite the fact that her obvious impairment increased the likelihood that she would act erratically, including producing the gun as requested. In addition, the City's policies demanded that the officers control the situation they encountered first and foremost, and plaintiff's expert witnesses opined that the officers should have physically restrained decedent under these circumstances. Based on this evidence, a jury could reasonably find that defendant officers acted recklessly immediately prior to the shooting and that such conduct created any eventual need to use force against decedent. . .The Court also rejects defendants' argument that they are entitled to immunity because the law prohibiting their conduct was not clearly established. As noted above, the Tenth Circuit has stated that the requirement that officers' use of force be reasonable is clearly established. The Tenth Circuit has also made clear that an officer may be liable if his reckless conduct creates the need to use force. Finally, defendants argue that Officer Breneman cannot be liable because he did not fire upon decedent. Plaintiff alleges, however, that Officer Breneman's reckless conduct created the need for the other individual defendants to use force, and thus plaintiff has alleged Officer Breneman's personal participation in a constitutional violation. Defendants have not addressed his possible

liability in the context of plaintiff's reckless-creation theory (defendants did not address this issue in their reply brief), nor have defendants provided any authority to suggest that an officer must have fired the fateful shot in order to be liable for the use of excessive force. Accordingly, the Court denies each individual defendant's motion for summary judgment on plaintiff's claim under Section 1983.")

Choate v. City of Gardner, No. 16-2118-JWL, 2016 WL 2958464, at *4 (D. Kan. May 23, 2016) ("[A]s plaintiff notes, even if decedent did threaten an officer's safety, the officers could still be liable for the use of excessive force if their deliberate or reckless actions before the shooting unreasonably created the need to use force. Plaintiff argues that the officers acted unreasonably in failing to restrain or remove decedent or in failing to locate the gun before it was produced by decedent. From a review of the video recordings, it appears that the officers acted reasonably in patiently asking decedent to put clothes on and to leave the bed while asking about the location of a firearm. The videos, however, do not show decedent throughout the encounter; thus, the videos do not clearly and unequivocally refute the allegation that the officers acted recklessly prior to the shooting, such that the Court should foreclose the later consideration of evidence obtained from the officers during discovery. Accordingly, defendants have not shown that plaintiff's excessive force claim cannot succeed as a matter of law. Because the qualified immunity analysis is closely related to that substantive inquiry, and because the officers' need to act reasonably was clearly established in the law, the Court further concludes that defendants are not entitled to prevail at this stage on the basis of qualified immunity. The Court therefore denies defendants' motion to dismiss the excessive force claim.")

Gardetto v. Mason, 854 F. Supp. 1520, 1530-32 (D. Wyo. 1994) ("[T]he procedural question arises as to what happens if there is a genuine issue of material fact on the issue of qualified immunity, specifically, whether the defendant's actions were objectively reasonable, such that summary judgment is precluded. Since the district court cannot resolve this factual issue, is it left for the jury to decide ? If so, then how can this be reconciled with the notion that qualified immunity is an immunity from suit itself ? The Supreme Court recently addressed the former question. In *Hunter*, the Court summarily reversed the Ninth Circuit's holding that the issue of the defendant's reasonableness for purposes of qualified immunity '[was] a question for the trier of fact[.]' [cites omitted] The next sentence stated that the Ninth Circuit's holding was an erroneous statement of law because '[i]t routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial.' [citing *Hunter*] This statement, however, leaves several important questions unanswered. First, while it rejects the notion that the question of objective legal reasonableness is a factual issue for the jury ('decided by the court'), it is clear that the traditional summary judgment standards are fully applicable. There is, therefore, an inconsistency, in that it appears to be a question for the Court to decide, yet the Supreme Court's trilogy of 1986 summary judgment decisions–*Celotex*, *Liberty Lobby* and *Matsushita* [footnote omitted]–make it clear that the district court's role is limited to identifying factual issues and not resolving them. Second, it is unclear what the Court meant by the use of the modifier 'ordinarily.' This seems to imply that in most cases, the issue should be decided by the court; it does not,

however, speak to the 'non-ordinary' case. It appears that the way to reconcile these seemingly conflicting mandates is to understand that although a genuine issue of material fact precludes the entry of qualified immunity prior to trial, it does not prevent the defendant from reasserting the defense at trial. In other words, while a factual issue defeats the 'immunity from suit' component of the qualified immunity, the defendant will still retain the right to renew this motion at trial in an effort to avail himself of the 'immunity from liability' component of the defense. This seems to be the conclusion reached by the Tenth Circuit's recent decision in *Guffey v. Wyatt* . . . . [O]f course, the trial court's decision whether to find that the defendant was immune will necessarily depend on the evidence adduced at trial regarding the reasonableness of the defendant's conduct. The issue of how this defense should be reasserted 'at and after trial' was not addressed in any of the cases discussed above. Nonetheless, because the answers to several related issues are clear, this Court can infer the proper method for raising this defense during subsequent proceedings. First, the defendant bears the burden of establishing that his actions were reasonable, by a preponderance of the evidence, because qualified immunity is an affirmative defense under *Harlow* and *Gomez*. [cites omitted] Second, while the ultimate issue of whether the defendant is entitled to qualified immunity is a legal question, it appears that the underlying factual question as to the reasonableness component is a question for the trier of fact–since there was a genuine issue of material fact relating to this question in the first place. Thus, in order to reassert this claim 'at' trial, the Court would submit an interrogatory to the jury so that it may resolve this factual issue. [cites and footnote omitted] The Court can then determine the legal issue of qualified immunity based on the jury's answer to this interrogatory. The interrogatory would simply ask the jury whether the defendant has proven by a preponderance of the evidence that his actions were reasonable under the particular facts of the case at hand. The Court believes that this interpretation harmonizes *Hunter*, *Guffey* and *Dixon* with *Celotex*, *Liberty Lobby* and *Matsushita*. [footnote omitted].").

Anthony v. Baker, 808 F. Supp. 1523, 1527 (D.Colo. 1992) ("Although a claim of qualified immunity presents a question of law that ordinarily should be resolved by the court, it also contains within it potential issues of fact that may, in appropriate circumstances, be submitted to a jury.").

ELEVENTH CIRCUIT

Simmons v. Bradshaw, 879 F.3d 1157, 1164-67 & n.7 (11th Cir. 2018) ("[T]he question of what circumstances existed at the time of the encounter is a question of fact for the jury—but the question of whether the officer's perceptions and attendant actions were objectively reasonable under those circumstances is a question of law for the court. . . . The facts of the instant case involved contested factual issues bearing on Defendant's entitlement to qualified immunity. In its order disposing of the parties' motions for summary judgment, the district court expressly reserved the qualified immunity question for later determination:

If it were to credit Stephens' account of these events, a reasonable jury clearly could find that Deputy Lin violated his constitutional rights by employing excessive force. Yet, Deputy Lin would still be entitled to qualified immunity if the law were not clearly established. . . .Even though this

Court has concluded that Deputy Lin is not entitled to qualified immunity on Stephens' excessive force claim at the summary judgment stage, Deputy Lin is not precluded from pursuing the qualified immunity defense at the trial. . . Should the jury choose not to credit (in whole or in part) Stephens' version of the facts, or should the facts not be presented at trial as alleged here on summary judgment, the qualified immunity analysis may change.

Simmons v. Bradshaw, No. 14-80425, 2014 WL 11456548, at *8-9 (S.D. Fla. Dec. 31, 2014). Rather than submitting the contested factual issues—*i.e.*, the historical facts—to the jury at trial, however, the Court opted to give the following instruction:

Whether a specific use of force is excessive or unreasonable depends on factors such as the nature of any offense involved, whether a citizen poses an immediate violent threat to others, including the police officer, and whether the citizen resists or flees. In assessing these factors, you should consider whether an officer's belief that a citizen is posing an immediate violent threat is an objectively reasonable belief under the circumstances, notwithstanding that it is a mistaken belief. Where an officer's mistaken belief that a citizen poses an immediate and deadly threat is objectively reasonable under the circumstances, then that officer's use of deadly force is not excessive or unreasonable. On the other hand, where an officer's mistaken belief that a citizen poses an immediate and deadly threat is not objectively reasonable under the circumstances, then that officer's use of deadly force is excessive or unreasonable.

This instruction is problematic not only because it is an incorrect statement of the law, but moreover because it effectively delegated resolution of the issue of qualified immunity to the jury—presumably as to both facts and law—and thus the district court never decided whether Deputy Lin was entitled to his claimed defense of qualified immunity. . . Consistent with Supreme Court precedent, we have noted that the factual issues bearing on the excessive force inquiry are distinct from the legal issues bearing on a defendant's entitlement to qualified immunity. . . . In this case, however, the excessive force inquiry was not sufficiently divorced from the qualified immunity inquiry in that the instruction improperly conflated the two inquiries and presented the jury with both together. The jury was thus essentially forced to find either that Deputy Lin used excessive force and therefore was not entitled to qualified immunity, or that Deputy Lin did not use excessive force at all. . .This instruction was erroneous for two reasons. First, it is not the province of the jury to decide a defendant's entitlement to qualified immunity. . . Evidently, the district court believed that the jury instruction at issue properly covered both excessive force and qualified immunity. In its order denying in part the defendants' motion for a new trial, the district court stated that, '[i]n light of the jury instructions given in this case—which the jury is presumed to have understood and followed—the jury's verdict reflects an implicit finding that Deputy Lin did not commit an objectively reasonable mistake when he shot Dontrell Stephens.'. . This 'implicit finding' recognized by the district court, however, does not necessarily answer the qualified immunity question, which must be considered and resolved by the court as a legal issue. . . Because of these errors, Deputy Lin was not afforded the opportunity to have his claimed defense of qualified immunity determined by the court, as he was entitled to have. Furthermore, the errors were not harmless because this is not a case in which 'the jury verdict itself, viewed in the light of the jury instructions, and any interrogatories that were answered by the jury, indicate without doubt what the answers to the refused interrogatories would have been,

or make the answers to the refused interrogatories irrelevant to the qualified immunity defense.'. . Because the jury instructions did not accurately reflect the law, and moreover because Deputy Lin was improperly deprived of the opportunity to have his defense of qualified immunity considered by the district court, it was an abuse of discretion for the district court to have denied Deputy Lin's motion for a new trial. . . Accordingly, we will reverse and order a new trial. . . .Had the jury been afforded the opportunity to make specific factual findings relevant to the qualified immunity inquiry—including, for example, whether Stephens had committed a traffic infraction on his bicycle; whether Stephens dismounted from his bicycle and complied with Deputy Lin's commands following the stop; and whether Stephens possessed any weapons, threatened Deputy Lin, or attempted to flee—the district court could (and should) have then determined, as a matter of law, 'whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.'")

Simmons v. Bradshaw, 879 F.3d 1157, 1169-72 (11th Cir. 2018) (Wilson, J., dissenting) ("I would not disturb the jury's verdict on Dontrell Stephens' excessive force claim brought pursuant to 42 U.S.C. § 1983. The jury determined that Deputy Adams Lin used excessive force against Stephens in violation of the Fourth Amendment by shooting him four times at close range—rendering him a paraplegic—after stopping him for riding his bicycle on the wrong side of the road. Appealing the denial of their motion for a new trial, Deputy Lin and Sherriff Bradshaw argue that the district court abused its discretion by improperly instructing the jury in two ways: (1) by not allowing them to present a special interrogatory to the jury, asking whether Deputy Lin made a reasonable mistake; and (2) by refusing to give the jury a '20/20 hindsight' instruction, to let the jury know that it must judge the officer's reasonableness 'at the time of the events, not from hindsight.' But rather than address these specific issues, the majority opinion sets aside the jury's verdict for a different reason—that the jury instructions given did not accurately reflect the law, and that Deputy Lin was deprived of the opportunity to have his qualified immunity defense considered by the district court. Although the panel questioned counsel at oral argument about whether qualified immunity was improperly presented to the jury, the issue was neither briefed, nor appealed. I dissent because the jury instructions did properly state the law. And I disagree with the majority's determination that the district court improperly relinquished consideration of Deputy Lin's entitlement to qualified immunity to the jury rather than retain it for consideration by the district court judge himself. . . .The majority finds this instruction 'problematic not only because it is an incorrect statement of the law, but moreover because it effectively delegated resolution of the issue of qualified immunity to the jury—presumably as to both facts and law—and thus the district court never decided whether Deputy Lin was entitled to his claimed defense of qualified immunity.'. . I disagree on both accounts. The instruction is not an incorrect statement of the law, nor can it reasonably be construed as an improper delegation of the qualified immunity determination to the jury. Whether Officer Lin made an objectively reasonable mistake in believing that Stephens posed a threat is for the jury to decide in making its excessive force determination. . . .Qualified immunity's clearly-established-law requirement, however, looks at whether 'the *officer's mistake as to what the law requires* is reasonable, [and when it is reasonable] the officer is entitled to the immunity defense.'. . . Here, the trial court did

not ask the jury whether the officer made a reasonable mistake as to the law. The court merely asked the jury to determine whether excessive force was used. The trial court could not have separated the question of whether a mistake was reasonable from the question of whether the force was excessive. Doing so would contravene Supreme Court precedent. . . If Deputy Lin's mistake about whether Stephens posed a threat was reasonable, the force he used would not be considered as excessive. And if Deputy Lin's mistake about whether Stephens posed a threat was unreasonable, the force he used would be considered excessive. . . That is exactly what the given instructions said.

The court did not err in submitting the factual reasonableness determination to the jury because it *had* to submit it to the jury for it to determine whether there was excessive force. It is up to the jury to determine whether an officer's conduct was reasonable in light of the factual circumstances. Here, the jury determined that the force used by Deputy Lin was unreasonable. It is then up to the trial judge to decide whether qualified immunity is applicable by asking whether the officer's conduct was reasonable in light of clearly established law. . . As the majority states, the trial judge 'uses the jury's factual findings to render its ultimate legal determination as to whether it would be evident for a reasonable officer, in light of clearly established law, that his conduct was unlawful in the situation he confronted.'. . Here, the trial judge did just that. The judge relied on the jury's factual determination—that Deputy Lin's conduct was unreasonable and excessive—to find that Deputy Lin violated Stephens' Fourth Amendment right to be free from excessive force. The court, not the jury, determined that Stephens' right to be free from excessive force was clearly established under existing law. In any event, the district court had already considered, and rejected, Lin's qualified immunity claim—twice—when the defendants raised it in their motion for judgment as a matter of law and again in the renewed judgment as a matter of law. Therefore, I have no quarrel with the formalities of the district court's resolution of Deputy Lin's entitlement to qualified immunity. And taking the deferential nature of the abuse of discretion standard into account, I see no reversible error. . . Nonetheless, the issues briefed were whether the district court abused its discretion by: (1) not allowing the defendants to present special interrogatories asking whether Deputy Lin made a reasonable mistake; and (2) not allowing the defendants to present the '20/20 hindsight' instruction in an effort to let the jury know that it must judge the officer's reasonableness at the time of the events, and not from hindsight. First, the district court did not err when it declined to provide the jury with a mistaken belief interrogatory, which would have asked: Do you find by a preponderance of the evidence that Deputy Adams Lin made an objectively reasonable mistake when he perceived that Dontrell Stephens threatened Deputy Adams Lin with a firearm and posed an imminent threat of death or serious physical harm at the time that Deputy Adams Lin shot Dontrell Stephens?

This proposed interrogatory was covered by the given instructions. And there can be no error when 'the trial court[ ] refus[es] to give a requested instruction ... where the substance of that proposed instruction was covered by another instruction which was given.'. . Here, the court instructed the jury that Deputy Lin's use of deadly force could not be excessive if Deputy Lin's mistaken belief that Stephens posed an immediate and deadly threat was objectively reasonable under the circumstances. Thus, for the jury to reach the conclusion that Deputy Lin's use of force was excessive, it necessarily had to determine that his mistake was objectively unreasonable. And

because the jury found that Deputy Lin's use of force was excessive, it answered what would have been covered in the defendants' proposed instruction in the negative. The substance of the proposed interrogatory, then, was covered by the jury instructions delivered. And we do not have discretion to assume otherwise because we always assume the jury follows the instructions consistently with their verdict.")

Horn v. Barron, 720 F.App'x 557, ___ (11th Cir. 2018) (per curiam) ("Officer Barron argues that the district court erroneously found that Horn put forth sufficient evidence to create a material issue of fact about whether she resisted arrest and, therefore, whether the use of force was unreasonable and in violation of clearly established law. We agree. . . .Horn does not dispute that Officer Barron had probable cause to arrest her for disorderly conduct. Rather, she argues that the amount of force used by Officer Barron to effectuate her arrest, when viewed in the light most favorable to her, was illegally disproportionate under the circumstances and, therefore, violated her Fourth Amendment rights. . . . In denying summary judgment on qualified immunity, the district court concluded that this case presents two contradictory versions of what happened, Horn's version being that Officer Barron's use of force on her was gratuitous insofar as she merely pulled her arm away from him as a reflex to his touch and was not resisting him, and Officer Barron's version being that Horn resisted his efforts to seize her by jerking or snatching her arm out of his hold. Citing *Hall v. Bennett*, 447 F. App'x 921, 924 (11th Cir. 2011), for the proposition that 'two competing contradictory stories of what happened' creates a question of fact, the district court concluded that a question of fact existed as to whether the force Officer Barron used in arresting Horn was reasonable because, according to Horn, she was 'totally compliant.'. . . [A]ccording to Horn, she was not actively resisting arrest or attempting to flee, and there was no need for force beyond that which is ordinarily necessary to effectuate the arrest of a compliant individual. The district court then found that if the facts are credited to Horn, a reasonable jury could find that Horn's crime was not severe, that she was not resisting arrest or attempting to flee and simply pulled her arm towards herself in response to Officer Barron's touch, that the amount of force from the takedown was disproportionate to the need for such force, and that the use of force caused severe injury. We disagree. Even assuming that Horn was totally compliant with Officer Barron, he was allowed to use some force in effecting her arrest. And, even if the force applied by Officer Barron in effecting Horn's arrest—a soft hands, straight arm bar takedown technique, by which he gained control of her by taking hold of her left arm, putting his right arm over her left arm, and using gravity and his own weight to bring her to the ground—was unnecessary, it was not unlawful. Horn was not restrained at the time the force was applied by Officer Barron. For that reason, the cases on which the district court relied for its denial of summary judgment on qualified immunity are distinguishable from Horn's case. . . .Here, . . . Horn was not restrained and had, undisputedly, pulled her arm away from Officer Barron. The force that Officer Barron used, therefore, was not gratuitous. For these reasons, none of the cases relied upon by the district court would put Officer Barron on notice that he could not use a soft hands, straight arm bar takedown technique to handcuff Horn when she admits she pulled her arm away from him. The force used here by Officer Barron was no more severe than the force that we have described as *de minimis* and lawful in other materially similar cases. . . .Although Horn was not disobeying

a lawful command when she admittedly pulled her arm away from Officer Barron, a reasonable officer confronted with these facts would still be entitled to think that she was resisting and posed a threat of resisting further, given her prior volatile and aggressive behavior. Police officers are often called upon to make split-second judgments 'in circumstances that are tense, uncertain, and rapidly-evolving,' and the typical arrest involves some force and injury. . . Therefore, Officer Barron was entitled to use some degree of force to put her in the handcuffing posture. Officer Barron used a minimal level of force—a soft hands, straight arm bar takedown technique—to do so. He did not use a weapon, he did not hit, punch, or kick her, he did not have assistance from multiple officers, he did not 'throw' Horn to the ground with intentional, or gratuitous, unwarranted force, nor did he use any force against her after she was on the ground. He did not use any force intended to cause injury; rather, Horn's injury was the unfortunate result of Officer Barron's reasonable use of force. In light of the foregoing, the district court's denial of Officer Barron's motion for summary judgment on the basis of qualified immunity is erroneous.")

Hammett v. Paulding County, 875 F.3d 1036, 1046-47, 1052-54 (11th Cir. 2017) ("So strong is the public interest in protecting government officials in the reasonable discharge of their duties that such officials are insulated not only from damages, but even from the costs of going to trial; for this reason, in most instances interlocutory appeal of district court decisions denying qualified immunity is permitted. . . . In sum, a balance must be struck between the harm to individuals aggrieved by official misconduct and the harm to society resulting from a shackled executive apparatus. Qualified immunity is the path the courts have chosen. . . .The origins and purposes of qualified immunity remind us that although the circumstances of a case may be singularly unfortunate, regrettable facts do not automatically spell personal liability for police officers. We are bound to apply the reasonableness standard set forth by the Supreme Court and this Court. . . .From that vantage point, after the officers repeatedly announced their presence to no response in a dark house occupied by a known meth dealer, Hammett's actions easily could have appeared to be an ambush. Under these circumstances, Horsley and Whitener had probable cause to believe Hammett posed a threat of serious physical harm to Horsley. . . .Hammett's death is undoubtedly tragic. However, qualified immunity exists to protect public servants in precisely these circumstances. After discovery, Plaintiff has produced no evidence that suggests the 'split-second judgments' of Horsley, Whitener, or Mayfield violated the Fourth Amendment as they responded to the 'tense, uncertain, and rapidly evolving' events of that day. . . Summary judgment was appropriate, and they are to be spared the burden of defending themselves at trial.")

Hammett v. Paulding County, 875 F.3d 1036, 1057-59 (11th Cir. 2017) (Williams, District Judge., dissenting in part) ("Taken together, these factual findings could support a legal conclusion that the Defendant Officers acted unreasonably in employing deadly force. The majority concedes this point, acknowledging that '[i]f the evidence could legitimately be interpreted as Plaintiff insists it can, the officers' use of force might have been excessive.' They maintain, however, that no such interpretation or reasonable inference can be made. This is not the case. To the contrary, the factual findings outlined here, and by the Plaintiff below, are supported by the forensic and testimonial evidence in the record, by far more than a 'scintilla' as the majority dismissively suggests. Because

that is the case, the district court erred in granting summary judgment to Defendants Whitener and Horsley. I concede that the majority presents a feasible explanation of the events of October 17, 2012, but that recitation is neither the only reasonable interpretation of the evidence nor the interpretation most favorable to the Plaintiff. . . In holding otherwise, the majority has followed the same path as the district court below: they have weighed the evidence and made credibility determinations that fall squarely within the purview of a jury. It may well be that a jury finds that the subsequent statements of the officers are more persuasive than the initial statements, or that they credit the police officers' account and find it consistent with the forensic evidence. That does not change the fact, however, that, at the summary judgment stage, the evidence must be construed in the light most favorable to the nonmovant, regardless of whether the court feels that one party's version of events is more credible than the other's. . . Finally, I feel compelled to make an additional observation regarding the majority's decision today. I am concerned by the implications of the majority's view that Plaintiff's claim is undermined by the absence of opposing eyewitness testimony. By characterizing Plaintiff's legitimate interpretation of the physical and forensic evidence as 'pure speculation' and 'disputed by affirmative evidence ... most obviously, the officers' testimony,' the majority concludes that Plaintiff's interpretation of the physical evidence amounts to conjecture. Granting summary judgment on qualified immunity under these facts therefore sets up a paradigm where, no matter how many inconsistent accounts of an incident an officer gives and no matter what viable theory is supported by forensic evidence, a fourth-amendment claim arising out of a deadly shooting will never survive summary judgment, unless a third-party eye-witness can support Plaintiff's narrative or the plaintiff survives the shooting. This cannot be the evidentiary standard in qualified immunity cases. In circumstances where, as here, the evidence creates a genuine issue of material fact regarding the conduct of police officers during a deadly shooting, the case should go to trial, where both sides will have a full and fair opportunity to present their best evidence to a jury. That jury—and not this Court or the district court below—should then weigh the evidence, make factual findings, and determine the outcome of this case. For that reason, I respectfully dissent.")

Avery v. David, 700 F. App'x 949, 953 n.5 (11th Cir. 2017) (per curiam) ("The district court's order stated that 'a jury could find that every reasonable officer in Officer Davis's position would conclude that the force was unlawful' and therefore excessive. . . That reasoning conflates the excessive force and qualified immunity issues and seems to assume that the jury is to decide the qualified immunity issue. The law is clear that whether a defendant is entitled to qualified immunity is a question of law for the court, not a matter for the jury. [collecting cases]")

Montero v. Nandlal, 682 F. App'x 711, 714-17 (11th Cir. 2017) ("In reaching its verdict, the jury considered both a general verdict form and a special interrogatory. The general verdict form asked: Do you find from a preponderance of the evidence: (1) That Carlos Montero, as personal representative of the Estate of Richard Montero, deceased, has proved that Ramesh Nandlal intentionally used excessive or unreasonable deadly force upon Richard Montero during his arrest? . . . The jury answered this first question in the affirmative. In the block for damages, the jury indicated that Plaintiff was entitled to $540,000 in compensatory damages. Given that response,

the jury then proceeded to the special interrogatory, which asked: Do you find by a preponderance of the evidence that Deputy Nandlal made an objectively reasonable mistake when he perceived that Richard Montero posed an imminent threat of serious physical harm to the deputies or others at the time that Deputy Nandlal shot Richard Montero with his firearm? . . . The jury answered the special interrogatory in the affirmative. In response, Nandlal renewed his Rule 50 motion for judgment as a matter of law, arguing that insufficient evidence supported a finding of excessive force. He also argued that he was entitled to qualified immunity on the excessive force claim based on the jury's answer to the special interrogatory. Plaintiff argued that the evidence was sufficient to support the jury's finding of excessive force, and that the special interrogatory was improper and should not form the basis of judgment as a matter of law. The district court granted Nandlal's motion for judgment as a matter of law based on qualified immunity. Summarizing the trial testimony, the court noted that immediately prior to the shooting, Montero had engaged in a prolonged physical struggle with the deputies during which he had violently resisted arrest, knocked the deputies to the ground, tried to bite Nandlal, and ignored repeated commands to surrender. The district court also pointed out that the deputies had been unable to control Montero with hand maneuvers or by tasing him, and that Nandlal had warned Montero that he was in danger of being shot prior to firing at him. . . Based on those facts, and on the jury's finding in the special interrogatory, the court concluded that, 'the evidence presented at trial supports the jury's finding that Nandlal used excessive force against Montero but that Nandlal made an objectively reasonable mistake in doing so and is therefore entitled to qualified immunity.'. . . Given the inconsistent verdicts, the district court properly entered judgment in favor of Nandlal on the basis of the jury's answer to the special interrogatory. Relatedly, the district court did not abuse its discretion when it determined sufficient evidence supported the jury's special interrogatory finding. Finally, with respect to the second issue, the district court did not abuse its discretion in submitting the special interrogatory to the jury. The district court did not ask the jury to make a legal finding on the ultimate issue of qualified immunity. Instead, the special interrogatory asked the jury to make a factual determination about whether Nandlal made an objectively reasonable mistake. . . .Here, it is clear that this case involves Rule 49 rather than Rule 50. . . . When the jury returned an answer to the special interrogatory that was inconsistent with the general verdict, the district court was required to exercise one of three options: approve the answer notwithstanding the general verdict, direct the jury for further consideration, or order a new trial. Because the jury's finding that Nandlal made an objectively reasonable mistake was supported by evidence in the record, the district court was well within the scope of its discretion to enter judgment according to the special interrogatory notwithstanding the general verdict. . . .Qualified immunity is a legal question to be decided by the court and cannot be submitted to the jury. . .It is improper to even mention the term qualified immunity in the jury interrogatory; the jury is 'restricted to the who-what-when-where-why type of historical fact issues.'. . Here, the special interrogatory did not ask the jury to decide a legal question, nor did it mention the term qualified immunity. Rather, it asked a factual question–whether Nandlal made an objectively reasonable mistake–albeit at a higher level of abstraction than the Plaintiff would have preferred. Although the district court could have framed the questions more narrowly, e.g., whether Montero grabbed Nandlal's gun belt, or whether Montero was

subdued before the shooting, it was not required to. As such, we conclude that the district court did not abuse its discretion in propounding the special interrogatory.")

Montero v. Nandlal, 682 F. App'x 711, 718-20 (11th Cir. 2017) (Walker, J., concurring) ("I fully agree with the majority's decision to affirm the district court's grant of qualified immunity to Officer Nandlal. However, I arrive at that result by different reasoning. In short, I believe that (1) the district court abused its discretion by giving the jury what amounted to a question of law regarding Officer Nandlal's qualified immunity defense, and (2) that there is no inconsistency between the jury's general verdict and its answer to the special interrogatory. I ultimately conclude that no remand is required, however, because on the undisputed facts adduced at trial, Officer Nandlal was entitled to qualified immunity. . . The district court effectively gave the qualified immunity ruling to the jury by asking it to determine whether the officer made an objectively reasonable mistake. The court should have asked the jury to resolve specific factual disputes, such as whether Montero was out of control, or reaching for Nandlal's gun. *See Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) (noting that special interrogatories relating to a qualified immunity defense should be limited to the "who-what-when-where-why type of historical fact issues"). Based on the jury's answers to those questions, the court should have determined for itself and without jury input whether Nandlal made an objectively reasonable mistake of fact in believing that Montero posed such a threat to him as to warrant the use of deadly force, and thus whether he had arguable probable cause to use such force. . . . This method of resolving Nandlal's qualified immunity defense is consistent with the weight of federal precedent, which holds that the 'objective reasonableness' of an officer's use of force is a question of law for the court alone to resolve. [collecting cases] This precedent makes perfect sense because, in the context of an alleged violation of the Fourth Amendment, whether an officer's conduct is objectively reasonable in light of the surrounding circumstances is a question of constitutional law that only a court can decide. The reasonableness of an officer's use of force is subject to the same analysis as the Fourth Amendment standard for 'reasonable' seizure. . . .Thus, the question of what circumstances existed at the time that the defendant effected a seizure is a question of fact for the jury. The question of whether the defendant's actions or perceptions were 'objectively reasonable' under those circumstances is a question of constitutional law for the court. . . .I believe that the Plaintiff Estate's proposed special interrogatory, which asked discrete factual questions such as whether Montero attempted to grab a gun during the struggle, more accurately reflected the role of special interrogatories in resolving a motion for judgment as a matter of law on qualified immunity grounds. My view is that it was error for the district court to submit to the jury the question of whether Officer Nandlal made an 'objectively reasonable mistake,' and then to rely upon that finding to conclude that there was qualified immunity. . . .I further believe that the jury's finding in the general verdict that Officer Nandlal used excessive force can be reconciled with a finding that he is entitled to qualified immunity. . . . In other words, there is nothing inconsistent in a court concluding that the officer's conduct violated the Constitution, but that the officer reasonably believed that it did not. That is precisely what happened here in the context of the use of excessive force. In such a case, the verdicts are not inconsistent, and Fed. R. Civ. P. 49 is not implicated. Rather, the defendant is entitled to seek judgment as a matter of law on his qualified immunity

defense under Fed. R. Civ. P. 50. . . . To the extent that the majority believes the jury's verdicts were inconsistent because the general verdict form listed a specific dollar amount of damages to which the Estate was entitled, while the special interrogatory afforded Nandlal qualified immunity, I must disagree. The general verdict asked the jury whether Officer Nandlal intentionally used excessive force, and if so the amount of money in damages for which he was liable. The jury found that Nandlal did use excessive force, and calculated a damages amount. The jury then proceeded to answer in the affirmative what was (in the majority's interpretation) a question of fact: Whether Nandlal had made an 'objectively reasonable' mistake of fact as to Montero's dangerousness. Relying on that answer, the court (not the jury) confirmed that Officer Nandlal was entitled to qualified immunity, and therefore not liable. I believe the inconsistency issue would have been even easier to resolve had the jury simply been asked to determine discrete questions of narrative fact in the interrogatories, and the court alone had determined qualified immunity, but in any event there is no inconsistency here. The *jury* found Officer Nandlal liable for damages, but it also made a (consistent) finding, on the basis of which the *court* confirmed that qualified immunity applied. Such results are routinely sustained by appellate courts.")

Williams v. Deal, 659 F. App'x 580, 583 (11th Cir. 2016) (per curiam) ("A case involving a police officer's use of deadly force may present a special concern on summary judgment. '[T]he witness most likely to contradict [the police officer's] story—the person shot dead—is unable to testify.' *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (quotation omitted). In such circumstances it is 'wise to examine all the evidence to determine whether [the police officer's] story is consistent with other known facts.' *Maravilla v. United States*, 60 F.3d 1230, 1233–34 (7th Cir. 1995). A reviewing court 'undertake[s] a fairly critical assessment of the forensic evidence, the officer's original reports or statements and the opinions of experts to decide whether the officer's testimony could reasonably be rejected at a trial.' *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994). But if the circumstantial evidence doesn't contradict a police officer's direct testimony, conjecture cannot create a genuine issue of material fact. *See Rodriguez v. Farrell*, 280 F.3d 1341, 1353 n.20 (11th Cir. 2002).")

Wate v. Kubler, 839 F.3d 1012, 1021 (11th Cir. 2016) ("Construing the evidence in favor of Plaintiff, the unambiguous facts are that Barnes was no longer resisting at least after the first two tasings, and that Kubler's further use of the Taser was wholly unnecessary, and grossly disproportionate to the circumstances. Kubler had arrived on the scene six and a half minutes earlier, found Barnes bleeding from the face and observed Tactuk striking Barnes multiple times. The two officers immobilized Barnes face down on the sand. Barnes had no weapon and was awkwardly handcuffed, which, drawing inferences from the facts in a light favorable to Plaintiff, had a greater than normal effect of further neutralizing Barnes. The record establishes that while the first or maybe even the second Taser deployment may have been warranted, there is competent unambiguous evidence that by the third tasing, Barnes was handcuffed, immobile and still, such that a reasonable officer in Kubler's position would conclude that Barnes did not present a risk of flight, or a threat of danger to the officers or to the public. Under these circumstances, further shocks were unnecessary and grossly disproportionate, and a jury could find that Kubler's use of

a Taser on Barnes five times was unreasonable force. To be sure, Kubler and Tactuk both testified that Barnes continued to resist violently throughout all of the tasings, and other witnesses agreed that Barnes was still rising up, kicking, struggling and refusing to comply with the officers' commands. As noted by the Supreme Court in a similarly charged and disputed excessive force case, '[t]he witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system.'. . We are tasked at this summary judgment stage not with weighing the evidence, making credibility choices or determining the truth of the matter, but with deciding whether there is a genuine issue for trial, viewing the evidence and making reasonable inferences in the light most favorable to Plaintiff. . . .A reasonable officer in Kubler's position and under these circumstances would have had fair warning that repeatedly deploying a Taser on Barnes, after he was handcuffed and had ceased resisting, was unconstitutionally excessive. [court discusses precedent] In light of this precedent, a reasonable officer in Kubler's position would have had fair warning that repeatedly tasing Barnes after he was handcuffed and had ceased struggling and resisting was unreasonable under the Fourth Amendment. Kubler is not entitled to qualified immunity on Plaintiff's excessive force claim at this stage of the proceedings.")

Ayers v. Harrison, 650 F. App'x 709, 716-18 (11th Cir. 2016) ("During trial, Officer Harrison requested that the district court submit a number of special interrogatories to the jury, which were designed to elicit facts he believed were critical to his qualified immunity defense. Through these special interrogatories, Officer Harrison wanted to have the jury determine whether it believed that he identified himself to Rev. Ayers as a police officer, approached Rev. Ayers with his gun holstered, and only shot at Rev. Ayers once he began to drive towards him. The district court refused to submit the interrogatories to the jury, ruling that the questions were likely to cause confusion. The district court also found that the proposed interrogatories were irrelevant, and determined that, even if the jury answered all of the questions in Officer Harrison's favor, qualified immunity would still be inappropriate. . . After the jury returned its verdict, Officer Harrison renewed his objection to the district court's refusal to submit the special interrogatories through a motion for a new trial. He argued that, had the jury answered the interrogatories in his favor, the district court would be required to grant him qualified immunity because any Fourth Amendment violation under the circumstances would not have been clearly established. The district court denied the motion. On appeal, Officer Harrison argues that the district court committed error because, under *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002), the decision to submit special interrogatories 'is not discretionary with the court.' In *Johnson*, we reaffirmed the important role that special interrogatories serve at a trial like this one. Although the purpose of qualified immunity is to protect government officials from suit, there are times when a defendant's efforts to take advantage of the defense are unsuccessful at the motion to dismiss or summary judgment stages. . . In such cases, we emphasized that 'a defendant is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual determinations to the law and enter a post-trial decision on the defense.'. . We explained that, in this regard, special interrogatories can be a helpful tool, and cautioned that the failure to grant 'a timely request for jury interrogatories directed toward such

factual issues' could constitute error. . . We also clarified, however, that the denial of such a request 'may not be error, or if error may be harmless.'. . We held that reversible error would not occur if the jury verdict itself—when viewed in light of the jury instructions and any interrogatories that were answered by the jury—made the answers to the refused interrogatories irrelevant to the qualified immunity defense, or indicated without doubt what the answers to the refused interrogatories would have been. . . Officer Harrison argues that Ms. Ayers did not meet either of these exceptions. But the list in *Johnson* could not have been, and was not meant to be, exhaustive. And for several reasons, we conclude that the district court's failure to submit Officer Harrison's special interrogatories here was, at most, harmless error. First, as we noted earlier, a prior panel of this court denied Officer Harrison qualified immunity at the summary judgment stage of the case. . . And that panel's decision, on the facts presented at summary judgment, constitutes a legal ruling that is binding ... and may not be revisited in later proceedings. Consequently, once we deny defendants summary judgment on qualified immunity grounds because the plaintiff has alleged violations of clearly established rights, the defendants *may not later attempt to re-assert qualified immunity against those claims on purely legal bases* (e.g. by arguing that the rights do not exist or are not clearly established). The only remaining issues are questions of fact—i.e., whether the plaintiff can actually prove at trial that the alleged violations occurred. . . The prior panel based its denial of qualified immunity on the following basic facts (viewed in the light most favorable to Ms. Ayers): (1) despite conceding that he did not have probable cause to arrest Rev. Ayers, Officer Harrison (while dressed in plain clothes) approached Rev. Ayers without identifying himself as a police officer and drew his weapon; (2) Rev. Ayers thought he was being robbed and attempted to drive out of the gas station, but Officer Harrison fired two shots at his car, one of which struck Rev. Ayers in the abdomen; and (3) at the time of the fatal shot, Rev. Ayers did not present an immediate threat of harm to Officer Harrison or anyone else at the scene. *See Harrison*, 506 F. App'x at 884. The trial record here, as explained above, shows that Ms. Ayers presented more than sufficient evidence to the jury to support each of the basic facts on which the prior panel denied qualified immunity on interlocutory appeal. Second, as we have said, we are required to view the verdict in favor of Ms. Ayers as if the jury resolved '*every* relevant factual issue' in her favor and against Officer Harrison. . . So we must infer that the jury rejected Officer Harrison's factual contentions (e.g., that he approached the driver's side of Rev. Ayers' car, that he identified himself as a police officer to Rev. Ayers, that he did not approach Rev. Ayers with his gun drawn, and that he only fired his weapon after seeing Rev. Ayers' car strike Officer Oxner and then head in his direction). In sum, because Ms. Ayers presented ample evidence that allowed the jury to find the facts on which the prior panel denied qualified immunity to Officer Harrison, and because we have to infer that the jury resolved every relevant factual dispute in favor of Ms. Ayers, any error in failing to submit the special interrogatories to the jury in this case was harmless.")

Felio v. Hyatt, 639 F. App'x 604, 609-10 (11th Cir. 2016) ("We recognize that the struggle occurred inside of a single bedroom. But even if the defendants could argue that Mr. Felio still could have gotten up from the floor and thus remained within striking distance of Officer Hydrick, the individualized circumstances of this case would lead us to the same result. Our standard focuses on whether the 'suspect poses a threat of serious physical harm' and the immediacy of that harm.

. . Mrs. Felio's testimony suggested that the situation had stabilized before Officer Hyatt fired his gun, and that the room had been still for enough time that a reasonable officer would have recognized that Mr. Felio had stopped resisting. With Mr. Felio subdued, and Officer Hydrick's holstered gun no longer close to Mr. Felio's hands, which a jury could find were near the floor, there was not an immediate threat. . . Having determined that the plaintiffs' facts showed a Fourth Amendment violation, we also conclude that, at this juncture, the district court erred by granting Officer Hyatt qualified immunity. The Supreme Court held long ago that deadly force is not justified when the suspect is unarmed and poses no immediate threat to the law enforcement officers at the scene. . . Moreover, shooting a compliant individual is 'conduct [that] lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct [should have been] readily apparent.'. . Under Mrs. Felio's version of the facts, Officer Hyatt's actions violated a clearly established right, and qualified immunity does not apply. . . Therefore, we reverse the district court's grant of summary judgment to Officer Hyatt on the plaintiff estate's § 1983 claim for excessive force. 'Our holding today does not mean [Officer Hyatt] is entirely precluded from enjoying qualified immunity; there are numerous disputed issues of material fact, which a fact-finder may ultimately resolve in his favor.'. . Our holding is only that a trial is required for a jury to find the relevant facts.")

Speight v. Griggs, 620 F. App'x 806, 809-10 (11th Cir. 2015) ("In this circuit, there is no clearly established right to be free from the accidental application of force during arrest, even if that force is deadly. But we have long held that it is a violation of the Fourth Amendment for a police officer to *intentionally* 'use[ ] gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands.'. . So the outcome of this case turns on the issue of whether Officer Griggs intended to shoot D.M.C. But that issue is only 'genuine' for summary judgment purposes if 'the evidence is such that a reasonable jury could return a verdict' in the plaintiffs' favor, which is to say reasonably could find that Griggs intended to shoot D.M.C. . . Juries may infer intent, or the lack of it, from the surrounding circumstances and the defendant's conduct. . . And ordinarily, courts presume government officials have properly discharged their duties. . . Given the unique facts of this case, we are unable to say that no jury reasonably could find that Officer Griggs' shooting of D.M.C. was intentional. Griggs is a highly trained and by all accounts competent officer whose training, and the regulations he was supposed to follow, included the admonition that he must not place his finger on the trigger unless he was in a situation in which he intended to use deadly force. He admits that he had his finger on the trigger, and he admits that he pulled the trigger, though he denies doing so intentionally. There are conflicting stories from Officer Griggs and Officer Henry about the moments leading up to the shooting and the actions Griggs took to bring D.M.C. under control. Viewing the evidence in the light most favorable to the plaintiffs (as we must) and drawing all reasonable inferences in their favor (as we must) on this record and given these highly unusual circumstances we cannot say that a jury could not reasonably infer that Officer Griggs meant to fire his gun. For that reason we will vacate the district court's grant of summary judgment to Officer Griggs and remand the case for further proceedings.")

Teal v. Campbell, 603 F. App'x 820, 823 (11th Cir. 2015) ("Applying the *Graham* factors in this case, it is clear that this case involved a severe, serious crime. Teal had led the officers on a dangerous high-speed chase followed by dangerous flight on foot despite the approaching officer pointing his handgun at and ordering Teal to stop and hold up his hands. Thus, this factor points strongly in favor of the Defendants. With respect to the second and third *Graham* factors, as noted above, in the tense seconds while Teal was on the ground following his aggressive and dangerous flight from the officers and in the absence of any indication from Teal that he was surrendering, we cannot conclude that a reasonable officer under these circumstances would perceive Teal as no longer resisting or no longer a threat. These factors too favor the Defendants. . . .For the foregoing reasons, we are not persuaded that every reasonable officer in the shoes of these Defendants would conclude that the force used was unlawful. Accordingly, the judgment of the district court denying these Defendants the protection of qualified immunity is reversed.")

Teal v. Campbell, 603 F. App'x 820, 823-25 (11th Cir. 2015) (Martin, J., dissenting) ("In this excessive-force case, the Defendants moved for summary judgment, arguing they are entitled to qualified immunity. As is common in these cases, the Plaintiff, Daniel Teal, and the Defendants paint starkly different pictures of what happened between them. The District Court recognized that, on summary judgment, it must 'accept the Plaintiff[']s] version of the facts and draw all justifiable inferences in [his] favor.'. . Following this principle, the District Court accepted the version of the facts described by Mr. Teal. In reversing, the majority rejects Mr. Teal's version of the facts. I respectfully dissent. I will not restate the facts in detail. I agree with the majority's statement, except on the most relevant point. That point—the key question on which this appeal turns—is whether, after he fell to the ground, Mr. Teal signaled to the Defendants that he had surrendered, stopped fleeing, stopped resisting, and was no longer a threat. If he did, the majority seems to agree that the District Court was right to deny qualified immunity. . .The Defendants testified that Mr. Teal gave no such sign. They said he continued to resist after he fell to the ground in these ways: trying to stand up; struggling while they attempted to handcuff him; and refusing their commands to put his hands behind his back and instead lying on top of his arms. The majority insists Mr. Teal has adduced no evidence rebutting this testimony. It says it can find 'no evidence at all that [Mr. Teal] signaled in any way to the officers that he had surrendered and that he was no longer resisting and no longer a threat.' But the evidence to that effect is, well, evident. Mr. Teal testified that after he fell to the ground, he was 'flat on [his] stomach,' 'was stunned,' 'couldn't move,' and could not get up. As for his hands (and, literally, by extension, his arms), Mr. Teal testified that while he was lying flat on his stomach, his hands were 'behind [his] back on his side,' and were 'never' 'underneath [his] chest.'. . Mr. Teal's testimony and that of the Defendants are in direct conflict. The Defendants say he tried to stand up; Mr. Teal says he could not get up. The Defendants say he struggled and resisted their efforts to handcuff him; Mr. Teal says he was stunned and couldn't move. The Defendants say he refused their commands to put his hands behind his back; Mr. Teal says he was lying on his stomach and his hands were behind his back and never underneath him. Given this conflict, at the summary judgment stage of the proceedings our precedent compels us to 'draw all justifiable inferences in [Mr. Teal's] favor.'. . Specifically, we must accept Mr. Teal's story—that he *had* surrendered; he *had* stopped fleeing; he *had* stopped

resisting; he was *no longer* a threat; and his actions (or inactions, as the case may be) *would* have conveyed as much to the Defendants or any other reasonable police officer. Mr. Teal's statement that he 'was stunned,' 'couldn't move,' and could not get up seems to me to demand an inference that he had surrendered and was no longer trying to flee. Accepting his version of the facts, the inference must be that Mr. Teal was no longer a threat. If a person is on the ground, stunned, and can neither move nor get up, how can he flee? How can he pose a threat? How can he do anything but surrender? Likewise, if he was lying 'flat on [his] stomach,' and his hands were 'behind [his] back' and 'never' 'underneath [his] chest,' does that not demand an inference that he complied with the Defendants' commands to place his hands behind his back? This is a quintessential factual dispute. Plaintiff says the struggle happened one way; the Defendants say it happened another way. The District Court properly recognized that we are not in the business of settling disputes like this on summary judgment. As the Supreme Court has said time and again: 'it is clear ... that at the summary judgment stage the judge's function *is not himself to weigh the evidence and determine the truth of the matter."*. . In reversing, the majority faults the District Court for refusing to do what the Supreme Court has forbidden—weigh evidence on summary judgment. I recognize that when faced with the choice, most people are inclined to believe the story told by several police officers rather than by a felon who fled a DUI checkpoint, led the police on a high-speed chase, careened off the road, and continued to flee on foot. But countless qualified-immunity cases pit upstanding state actors against convicts. And just as in any other case, on summary judgment we must accept the plaintiff's facts and draw reasonable inferences in his favor. . . Of course, this does not mean that Mr. Teal's story is right. . . Neither does it mean that Mr. Teal will ultimately succeed at trial. He still must persuade a fact-finder to believe his story. And if he cannot, the police officers may then be entitled to qualified immunity. . . But trial, not summary judgment, is the time to decide whose story is right. The majority may be betting on the favored horse, but we must let them run the race before crowning the winner. It deserves mention that there is an even simpler way to correctly decide this case. Even if the majority disagrees with the way I have interpreted Mr. Teal's facts or with the inferences I have drawn in his favor, we need not conduct our own review of the facts. The Supreme Court has authorized us to simply 'take, as given, the facts that the district court assumed when it denied summary judgment.'. . We may then analyze the legal issue (i.e., whether the Defendants are entitled to qualified immunity) based on the facts as the District Court saw them. . . Taking this route would be appropriate here. The District Court's order was laudably comprehensive. It identified but rejected the Defendants' facts. It then identified Mr. Teal's facts and explained that it was required to accept the latter as true and draw inferences in Mr. Teal's favor. At each step, the District Court's findings were amply supported by the record. Indeed, the Defendants failed in their briefing on appeal to explain why the District Court's findings of fact were unsupported. The Defendants simply stated their own version of the facts, without ever confronting the District Court's findings or arguing they were incorrect. Despite our clear authority to accept the facts found by the District Court, . . . and our usual practice of 'affirm[ing] a district court's decision ... for any reason supported by the record,'. . . the majority ignores *Johnson* and disregards facts favorable to Mr. Teal, all with the result of reversing the District Court's denial of qualified immunity. The District Judge did careful work here, and followed the precedent. He should be affirmed.I therefore respectfully dissent.")

Hampton v. Atzert, 590 F. App'x, 942, 946-47 (11th Cir. 2014) ("[I]t is clearly established that killing a person merely to prevent his escape is not justifiable. Assuming, as we must, that Hampton held no weapon, received no warning from Atzert, and was running away from Atzert while partially restrained when he was shot, 'it would be clear to a reasonable officer that [shooting Hampton] was unlawful in the situation [Atzert] confronted.'. . Thus, the district court correctly held that it was '*possible* that Atzert was not justified in using deadly force to prevent Hampton's escape.'")

Barnes v. Zaccari, 669 F.3d 1295, 1308 (11th Cir. 2012) ("Therefore, the decisions of this court and the Supreme Court clearly established in May 2007 that (1) Barnes had a protected property interest and that (2) he was due some predeprivation process before VSU could deprive him of that interest. Because Barnes received no predeprivation process, we affirm the district court's denial of Zaccari's motion for summary judgment grounded on qualified immunity. However, Zaccari's qualified immunity defense does not drop out of the case. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1487 (11th Cir.1996). At trial, the district court can use a special verdict or written interrogatories to determine any disputed facts and the reasonable inferences drawn from those facts. *Id.* Once these issues are decided, Zaccari may reassert his qualified immunity defense in a motion for judgment as a matter of law.")

Chaney v. City of Orlando, No. 07-14169, 2008 WL 3906838, at *2, *5 (11th Cir. Aug. 26, 2008) (appeal after remand) ("Although a qualified immunity defense is typically considered early in a case, the qualified immunity issue may proceed to trial if the evidence, viewed in the light most favorable to the plaintiff, indicates that there are facts that do not support a qualified immunity defense. . . Through the use of special interrogatories, a jury 'decides the issues of historical fact that are determinative of the qualified immunity defense.'. . The court then has a duty and responsibility to 'apply the jury's factual determinations to the law and enter a post-trial decision' on a defendant's Rule 50(a) motion regarding a qualified immunity defense. . . . The determination of whether an officer is entitled to qualified immunity is one of law to be made by the court and not submitted to a jury.").

Chaney v. City of Orlando, 483 F.3d 1221, 1228 (11th Cir. 2007) ("The jury's findings should be excluded from the decision-making calculus on a Rule 50(b) motion, other than to ask whether there was sufficient evidence, as a legal matter, from which a reasonable jury could find for the party who prevailed at trial. Here, in ruling on Officer Cute's renewed motion under Rule 50(b), the court should have limited its inquiry as to whether there was sufficient evidence in the record to support a jury's finding of excessive force and its imposition of liability on Officer Cute. By placing an undue emphasis on the jury's particular findings as to probable cause–and by repeatedly making decisions on the Rule 50 motion through the lens of what the jury found–the court engaged in an erroneous analysis in deciding Officer Cute's renewed motion for judgment as a matter of law. As a result, we conclude that the analysis of district court's judgment granting Officer Cute judgment as a matter of law was flawed and that the judgment must be reversed. We remand this

case to permit the district court to address Officer Cute's renewed motion in a manner consistent with this opinion.").

Johnson v. Breeden, 280 F.3d 1308, 1317, 1318 (11th Cir. 2002) ("Even at the summary judgment stage, not all defendants entitled to the protection of the qualified immunity defense will get it. The ones who should be given that protection at the summary judgment stage are those who establish that there is no genuine issue of material fact preventing them from being entitled to qualified immunity. And that will include defendants in a case where there is some dispute about the facts, but even viewing the evidence most favorably to the plaintiff the law applicable to that set of facts was not already clearly enough settled to make the defendants' conduct clearly unlawful. But if the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial. Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a Rule 50(a) motion. . . That type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial. . . Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion asserting the defense, although the district court is free to change its mind. . . It is important to recognize, however, that a defendant is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual determinations to the law and enter a post-trial decision on the defense. When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty. . . A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury. . . . In a proper case, the use of special jury interrogatories going to the qualified immunity defense is not discretionary with the court. . . .But the failure to give requested jury interrogatories may not be error, or if error may be harmless, where the jury verdict itself, viewed in the light of the jury instructions, and any interrogatories that were answered by the jury, indicate without doubt what the answers to the refused interrogatories would have been, or make the answers to the refused interrogatories irrelevant to the qualified immunity defense. That is the conclusion we reach in this case.").

Willingham v. Loughnan, 261 F.3d 1178, 1185 n.9 (11th Cir. 2001) ("[W]e have said that when the question of qualified immunity turns on specific questions of fact, the use of special verdicts or written interrogatories can be very helpful to a judge in determining the legal question of whether qualified immunity applies. [citing *Priester* and *Cottrell*] But Defendant Officers did not request, nor did the court use special verdicts or written interrogatories to determine, disputed issues of fact in this case. Therefore, all lawfully disputed factual issues and all reasonable

inferences therefrom must be taken in the light most favorable to Plaintiff."), *opinion reinstated and supplemented by* ***Willingham v. Loughnan,*** 321 F.3d 1299 (11th Cir. 2003) (on remand from Supreme Court).

Vista Community Services v. Dean, 107 F.3d 840, 845-46 (11th Cir. 1997) ("The *Pickering* balancing test and the remainder of the qualified immunity inquiry must be done before a case is sent to the jury for its determination of whether a plaintiff was actually fired for his speech. To do otherwise deprives defendants of the benefit of their qualified immunity defense[.]").

Cottrell v. Caldwell, 85 F.3d 1480, 1487-88 (11th Cir. 1996) ("Where the defendant's pretrial motions are denied because there are genuine issues of fact that are determinative of the qualified immunity issue, special jury interrogatories may be used to resolve those factual issues. . . Because a public official who is put to trial is entitled to have the true facts underlying his qualified immunity defense decided, a timely request for jury interrogatories directed toward such factual issues should be granted. Denial of such a request would be error, because it would deprive the defendant who is forced to trial of his right to have the factual issues underlying his defense decided by the jury. We do not mean to imply, of course, that district courts should submit the issue of whether a defendant is entitled to qualified immunity to the jury. Qualified immunity is a legal issue to be decided by the court, and the jury interrogatories should not even mention the term. . . Instead, the jury interrogatories should be restricted to the who-what-when- where- why type of historical fact issues.").

Bendiburg v. Dempsey, 19 F.3d 557, 561, 562 (11th Cir. 1994) ("Our precedent suggests that a district court's submission of the factual component of a qualified immunity defense to the jury through a special interrogatory, without mentioning the term 'qualified immunity,' is proper. [citing *Stone* and *Ansley*] [Plaintiff] argues, however, that the district court incorrectly submitted the entire issue of qualified immunity to the jury. . . [W]e need not decide whether the district court improperly submitted the entire issue of qualified immunity to the jury or properly submitted only the factual component of that issue [because plaintiff failed to] voice an objection suggesting that the court was improperly submitting the issue of qualified immunity to the jury....").

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993) ("The objective nature of qualified immunity defines what fact issues are material for summary judgment purposes. To avoid summary judgment it is not enough for a plaintiff to produce evidence, which [if believed] would allow a fact-finder to find just that the government-agent defendant was, in reality, wrong about the facts on which the defendant acted. Instead, to defeat summary judgment because of a dispute of material fact, a plaintiff facing qualified immunity must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts."), *deleted from opinion by* 14 F.3d 583 (11th Cir. 1994).

Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992) ("The law is now clear... that the defense of qualified immunity should be decided by the court, and should not be submitted for decision by the jury....If there are disputed issues of fact concerning qualified immunity that must be resolved by a full trial and which the district court determines that the jury should resolve, special interrogatories would be appropriate.").

Adams v. St. Lucie County Sheriff's Department, 998 F.2d 923 (11th Cir. 1993) (per curiam) (*en banc*), adopting dissenting opinion of Judge Edmondson, 962 F.2d 1563, 1579 n.8 (11th Cir. 1992)("While the legal question of qualified immunity does not go to the jury,...today's court correctly notes, ...that the trial judge retains the power to determine the question in defendants' favor. I would add that, apart from finding qualified immunity on a directed verdict or a JNOV, the judge can and, when needed, should use special verdicts or written interrogatories to the jury to resolve disputed facts before the judge rules on the qualified immunity question.").

Ansley v. Heinrich, 925 F.2d 1339 (11th Cir. 1991) (jury should seldom, if ever, be instructed on qualified immunity; once defense has been denied at summary judgment stage, due to disputed issues of material facts, jury should determine factual issues without any mention of qualified immunity).

DaSilva v. Lamberti, No. 08-62106-CIV, 2010 WL 680925, at *2 & n.3, *4 (S.D. Fla. Feb. 24, 2010) ("In the instant case, the jury was asked whether they found by the preponderance of the evidence the following:
1. That Defendant Deputy Bures gave the canine warning?
2. That Deputy Bures ordered Plaintiff Dasilva to the ground?
3. That Plaintiff Dasilva continued to approach Deputy Bures until he was in the range of the canine bite?
4. That Plaintiff Dasilva stopped after he came off the porch and remained still?
5. That Deputy Bures released the leash before the canine made the initial contact with Plaintiff Dasilva?
. . .
The jury returned a general verdict in favor of BSO and Deputy Bures. In response to the special interrogatories, the jury found the following: Deputy Bures gave a canine warning; Bures ordered DaSilva to the ground; DaSilva continued to approach Bures until he was in range of the canine's bite; DaSilva did not stop after stepping off the porch and did not remain still; and Bures did not release the canine's leash before the canine made initial contact with DaSilva. Based on the jury's findings, Deputy Bures moved for dismissal of the claims on the ground of qualified immunity. . . The Court must now apply the law on qualified immunity to the factual findings made by the jury. . . . Taking the facts as found by the jury, the second and third *Graham* factors–the danger to the officer and the risk of flight–also weigh in Deputy Bures' favor. According to the jury's findings, Bures gave a canine warning and ordered DaSilva to the ground. DaSilva, however, failed to follow Deputy Bures' commands; instead, DaSilva continued advancing until he was within range of the canine's bite. The jury further found that Deputy Bures did not release the canine prior to the bite.

When faced with the same circumstances as Deputy Bures, a reasonable officer could have concluded that DaSilva posed both a potential risk to the safety of the deputies and the public and a potential risk of flight; the suspect sought was believed to be armed, and DaSilva's advancement, despite being ordered to the ground, raised a reasonable belief that he might attempt to flee. Accordingly, the Court finds that Deputy Bures did not violate DaSilva's Fourth Amendment right to be free from excessive force, and thus he is entitled to qualified immunity.")

Phillips v. Irvin, 2007 WL 2156413, at *1, *2 (S.D.Ala. July 26, 2007) ("With respect to the federal claim, defendant would submit the issue of qualified immunity to a jury, and proposes an instruction . . . under which the jury would decide whether 'a reasonable police officer ... would hold an objectively reasonable belief that his actions were constitutional' as a question of fact. In addition to being unrealistic and unworkable without providing the jury a lengthy tutorial on Fourth Amendment excessive force law, this charge is simply incorrect. Circuit precedent makes it absolutely clear that whether a reasonable officer would believe that his actions are constitutional is purely a question of law. . . . By contrast, only the 'predicate factual element[s] of the underlying constitutional tort' are questions of fact for qualified immunity purposes because they 'involve the determination of facts a party may, or may not, be able to prove at trial.'. . So, how, then, is a qualified immunity issue presented to a jury? The answer is, it isn't, at least not directly. As the Eleventh Circuit has explained, 'the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.'. . *Johnson* teaches that the proper means of submitting qualified immunity issues to a jury is through special interrogatories that 'should be restricted to the who-what-when-where-why type of historical fact issues' necessary to determine whether the predicate factual elements justify the legal application of the qualified immunity defense. . . This is the course that the Court urged the parties to follow when the issue arose at the Final Pretrial Conference; however, they have not done so. It is the responsibility of the parties to fashion special interrogatories that will elicit jury findings on any evidentiary disputes upon which the qualified immunity defense turns. The parties are therefore **ordered** to reexamine their proposed jury charges and verdict forms in light of the principles outlined in *Johnson.*").

Beaulah v. Muscogee County Sheriff's Deputies, 447 F.Supp.2d 1342, at 1376 n.44 (M.D. Ga. 2006) ("The Court's rulings should not be interpreted to suggest that Price and Stinson may not eventually be entitled to qualified immunity. . . . The Court simply finds today that based on the CI's affidavit, genuine issues of material fact exist to be tried, and thus Price and Stinson are not entitled to qualified immunity as a matter of law at the summary judgment stage. At trial, the Court intends to submit special interrogatories to the jury on the factual conflict that exists between Price and Stinson's testimony and the testimony of the CI. Based on the jury's resolution of the conflict in the evidence, the Court will make a ruling at that time on whether Price and Stinson are entitled to qualified immunity.").

VIII. QUALIFIED IMMUNITY AND FOURTH AMENDMENT CLAIMS

In ***Anderson v. Creighton,*** 483 U.S. 635 (1987), the Supreme Court held that the language of the Fourth Amendment proscribing Aunreasonable" searches and seizures did not preclude the possibility that an officer can act in an objectively reasonable fashion even though in violation of the Fourth Amendment. The Court noted that determinations of probable cause are often quite difficult and officials should be held liable in damages only where their conduct was clearly proscribed. In the wake of *Anderson,* a number of circuits employ the concept of Aarguable probable cause" in Fourth Amendment qualified immunity analysis. *See, e.g.,* ***Escalera v. Lunn,*** 361 F.3d 737 (2d Cir. 2004) (*infra*); ***Storck v. City of Coral Springs,*** 354 F.3d 1307, 1317 & n.5 (11th Cir. 2003) (*infra*).

Does *Anderson* control in Fourth Amendment Excessive Force Cases?

A. *Saucier v. Katz*

In ***Saucier v. Katz,*** 121 S. Ct. 2151 (2001), a majority of the Supreme Court held that in a Fourth Amendment excessive force case, the qualified immunity issue and the constitutional violation issue are not so intertwined that they Ashould be treated as one question, to be decided by the trier of fact." *Id.* at 2154. The Court determined that the analysis set out in *Anderson v. Creighton,* 483 U.S. 635 (1987) is not affected by the Court's decision in *Graham v. Connor,* 490 U.S. 386 (1989), and that A[t]he inquiries for qualified immunity and excessive force remain distinct, even after *Graham*." 121 S. Ct. at 2158 . *Graham* protects an officer who reasonably, but mistakenly, believed the circumstances justified using more force than in fact was needed. AThe qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.*

The respondent in *Saucier*, a sixty-year-old animals' rights advocate, filed a *Bivens* action in federal court, claiming that a military policeman used excessive force in arresting him when he attempted to unfurl a protest banner during a speech given by Vice President Gore at the Presidio Army Base in San Francisco. *Id.* at 2154. Because the district court had concluded there was a material issue of fact as to the reasonableness of the force used, and because the merits inquiry on the excessive force claim was considered to be identical to the immunity inquiry, summary judgment was denied. On interlocutory appeal, the Ninth Circuit affirmed the denial of qualified immunity to the officer, holding that the law on excessive force was clearly established by *Graham*, and that the question of objective reasonableness essential to the merits of the Fourth Amendment claim was identical to the question of objective reasonableness presented by the claim of qualified immunity. A determination of the reasonableness issue by the jury would resolve both the merits and the immunity questions. *Id.* at 2155.

In reversing the Ninth Circuit, Justice Kennedy, writing for the majority, reinforced, but did not apply, the Court's Ainstruction to the district courts and courts of appeal to concentrate at the outset on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found . . . ." 121 S. Ct. at 2159. Constrained by the limited question on which the Court had granted review and expressing doubt that a constitutional violation did occur, the Court Aassume[d] a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force. . . ." *Id.*

Assuming a constitutional violation, the next question that must be asked is whether the right was clearly established. On this question, the Court explained that A[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. The Court admonished that consideration of the question of whether the right was clearly established must be on a Amore specific level" than that recognized by the Ninth Circuit. *Id.* at 2155. On the other hand, the Court observed:

> This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard. Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.

Id. at 2157.

The Court concluded that given the circumstances confronting Officer Saucier and, given the lack of Aany case demonstrating a clearly established rule prohibiting the officer from acting as he did," the officer was entitled to qualified immunity. *Id.* at 2160.

Justice Ginsburg, joined by Justice Stevens and Justice Breyer, concurred in the judgment but disagreed with the Acomplex route the Court lays out for lower courts." *Id.* at 2160 (Ginsburg, J., joined by Stevens and Breyer, JJ., concurring in the judgment). For the concurring Justices, application of the *Graham* objective reasonableness standard was both necessary and sufficient to resolve the case. The only inquiry necessary was Awhether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully." *Id.* at 2161. Applying the *Graham* standard, Justice Ginsburg concluded that respondent Katz Atendered no triable excessive force claim against Saucier." *Id.* at _2162.

The concurring Justices did not share the majority's fears that eliminating the qualified immunity inquiry in excessive force claims would lead to jury trials in all Fourth Amendment excessive force

cases. *Id.* at 2163. Justice Ginsburg noted the not uncommon granting of summary judgment in excessive force cases where courts have found the challenged conduct to be objectively reasonable based on relevant undisputed facts. Where the determination of reasonableness depends on which of two conflicting stories is believed, however, there must be a trial. Once a jury finds, under the *Graham* standard, that an officer's use of force was objectively unreasonable, the concurrence concludes that Athere is simply no work for a qualified immunity inquiry to do." *Id.* at 2164.

Justice Kennedy wrote for the majority and was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas. Justice Souter joined in Parts I and II of the majority opinion but would have remanded the case for application of the qualified immunity standard. Justice Ginsburg wrote the opinion concurring in the judgment. She was joined by Justices Stevens and Breyer.

B. *Brosseau v. Haugen*

Brosseau v. Haugen, 125 S. Ct. 596, 598, 599 (2004) (per curiam) ("We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the Court of Appeals was wrong on the issue of qualified immunity. . . *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. . . . Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law. [citing *Hope v. Pelzer*]. . . . The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision. . . . We therefore turn to ask whether, at the time of Brosseau's actions, it was ' Aclearly established"' in this more ' Aparticularized"' sense that she was violating Haugen's Fourth Amendment right. . . The parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. . . .These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the ' Ahazy border between excessive and acceptable force."' . . The cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment.").

C. Post-*Saucier* Case Law

D.C. CIRCUIT

Johnson v. District of Columbia, 528 F.3d 969, 976, 977 (D.C. Cir. 2008) ("Despite the similarity of phrasing, the two *Saucier* reasonableness questions are distinct though overlapping. Accordingly, Part II.A of this opinion asks whether it was reasonable for Bruce to kick Johnson's groin, while Part II.B asks whether it was reasonable for Bruce not to know that it was unlawful to kick Johnson's groin. . . . The district court erred in concluding that Bruce was entitled to qualified immunity. Summary judgment was premature because there exists a genuine issue of material fact, namely, whether Johnson's prone position was threatening or suggested escape. That dispute can only be resolved by evaluating the conflicting testimony of Johnson and Bruce.").

FIRST CIRCUIT

Solis-Alarcon v. U.S., 662 F.3d 577, 581(1st Cir. 2011) ("Qualified immunity applies not only to the question whether a constitutional right exists but also to the judgment whether the general standard applies to the facts at hand. . . This extra layer of protection does not disappear merely because the underlying Fourth Amendment standard is itself one of reasonableness. The Supreme Court has drawn attention to the potential confusion, *Saucier*, 533 U.S. at 203-205 ("reasonable mistakes"); *Anderson*, 483 U.S. at 643-44 (possible to 'reasonably' act unreasonably); but, in the end, qualified immunity against personal liability exists even for constitutional mistakes and

'protects "all but the plainly incompetent or those who knowingly violate the law."'. . The Fourth Amendment standard is objective . . .and, where qualified immunity is asserted, the district judge may apply it on summary judgment so long as any disputed facts are assumed *arguendo* in favor of the non-moving party.")

Cox v. Hainey, 391 F.3d 25, 29-32 (1st Cir. 2004) (" The Supreme Court has set up a sequential analysis for determining whether a defendant violated clearly established rights of which a reasonable person would have known. . . This court has construed that framework to consist of three inquiries: '(i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right.' . . Under ordinary circumstances, the development of the doctrine of qualified immunity is best served by approaching these inquiries in the aforestated sequence. . . . The first prong of the qualified immunity analysis operates at a high level of generality, and Hainey, based on Cox's allegations, concedes this prong. . . . We accept this concession. The Fourth Amendment undoubtedly recognizes the right to be free from unreasonable seizures of the person. . . Hence, the undisputed facts, construed in the light most favorable to the appellant, make out a colorable claim of constitutional dimension. No more is exigible to satisfy the first part of the tripartite inquiry. We can be equally quick in executing the second step of the qualified immunity pavane. As said, Cox alleges that Hainey arrested him with insufficient information to constitute probable cause. The right to be free from arrest without constitutionally adequate probable cause is clearly established. . . That satisfies the second part of the tripartite inquiry. Even though the right to be free from an arrest without probable cause is clearly established, a further hurdle remains. In *Anderson,* the Supreme Court clarified the qualified immunity analysis by explaining that, although it was firmly established that warrantless searches, not subject to any recognized exception, violate the Fourth Amendment, more was needed before qualified immunity could be deemed irrelevant. . . The court below was required to determine whether the defendant had confronted particular circumstances in which the application of general principles did not yield a certain answer and, if that were the case, to determine whether the defendant had responded reasonably to that idiosyncratic fact pattern. . . In short, to set aside the buckler of qualified immunity 'the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense.'. . This guidance is pertinent here. In settings that invite balancing tests, it is often the case that the first two prongs of the qualified immunity inquiry do not satisfy *Anderson's* requirement of heightened specificity. This is particularly true of alleged false arrests, given the fact-dependent nature of the probable cause determination. No two probable cause equations are exactly alike and, therefore, in most of these situations precedent will take a court only so far. Thus, such cases frequently turn on the third prong of the qualified immunity inquiry, which channels the analysis from abstract principles to the specific facts of a given case. . . Under that prong, a defendant 'is entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest.' . . We turn to that requirement. . . . The qualified immunity doctrine is designed to afford officials an added measure

of protection against civil liability. To achieve that goal, the doctrine eschews a line that separates the constitutional from the unconstitutional and instead draws a line that separates unconstitutional but objectively reasonable acts from obviously unconstitutional acts. . . When properly drawn, that line 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'. . It follows that this suit may go forward only if the unlawfulness of the arrest would have been apparent to an objectively reasonable officer standing in Hainey's shoes. . . We now consider what Hainey knew and when he knew it. The point of our inquiry is to determine whether, at the time of the arrest, an objectively reasonable officer could have concluded that the salmagundi of facts added up to probable cause. . . . Although the existence vel non of probable cause is arguable–we regard that question as very close, but see no need to decide it definitively–it simply cannot be said, on this record, that probable cause clearly was lacking at the time of the arrest. . . .Qualified immunity therefore attaches.").

Stoddard v. Somers, No. Civ.A.03-10461-DPW, 2004 WL 2830704, at **9-11 (D. Mass. Dec. 7, 2004) ("The application of qualified immunity is most appropriate when there is a dispute about the proper interpretation of particular actions taken by the party alleging excessive force. . . . When there exist multiple explanations for observed actions, it is not the place of a court or, for that matter, a jury to supplant a police officer's judgment. . . . Again, however, as mentioned in addressing whether an unreasonable amount of force was used by the police, the handling of the situation is only of minor import because there is a very real dispute about the nature of the situation itself–namely, what, if anything, Stoddard did in the presence of the arresting officers. . . If Stoddard's version of events is credited, no amount of force would be reasonable, thereby making immaterial the dispute over the extent of the contact. . . .The defendant attempts to make this aspect of the case turn on an officer's freedom to interpret actions, rather than on–as it actually does– whether any actions were taken by the plaintiff. Somers implies that he is basing his arguments on inferences drawn in Stoddard's favor but, in fact, does the opposite. . . . Here, the case is one of *whether* he acted a certain way, not to what extent or why he did so. In this sense, it is distinguishable from a case such as *Roy* in which a court should refuse to second-guess an officer's response to particular actions taken by a suspect. Stoddard contends that he neither moved at all, nor said anything, and that he was neither armed nor holding anything. There is no indication that Stoddard was himself suspected of a crime, nor was there any background knowledge that would lead an officer to be concerned for his safety in Stoddard's presence. If inferences are properly drawn in Stoddard's favor, Somers would be hard-pressed to find a justification for his actions–indeed he doesn't try to. For purposes of summary judgment, inferences are so drawn [footnote omitted] and, therefore, I find that Somers does not enjoy the protection of qualified immunity at this stage of the proceedings and reserve the question of qualified immunity for a later date. . . . Although qualified immunity is designed to create a shield of protection permitting officers to make necessary decisions in often dangerous situations, the shield has limits. To extend the protection of qualified immunity to this case would be to impose a nearly insurmountable burden on the plaintiff. If events actually unfolded as the plaintiff contends but immunity were granted at the summary judgment stage–thereby precluding a fact-finder from resolving the key factual disputes–there would rarely be recourse for a plaintiff when it is his testimony against the

testimony of the police. To apply immunity here would subvert the summary judgment paradigm, flipping the inferences drawn and the allocation of burdens. That is not the purpose served by the doctrine. In the end, a jury may find Stoddard's version of events not credible. At this stage, however, it is sufficient to survive summary judgment. In sum, conceptualizing a jury drawing inferences in favor of the plaintiff, I cannot find that an objectively reasonable officer would deem it permissible to punch, hold down, and abuse a bystander to an arrest who had neither moved nor spoken.").

Gonzalez Perez v. Gomez Aguila, 312 F.Supp.2d 161, 170, 171 (D.P.R. 2004) ("In this case the analysis of defendants' qualified immunity defense turns upon the issue of whether Anthony was in fact carrying and firing an AK- 47. The three factors set forth in *Saucier v. Katz*, involve a determination of whether Anthony was in possession of the rifle. For example the severity of the crime factor presupposes the commission of a crime. If Anthony was not carrying a firearm, no crime was being committed. In addition, the determination of whether Anthony was in possession of the rifle also hinges on the officers' belief that he posed a threat to the officers or to others. Finally, the issue also relates to the officers' belief that the suspect was attempting to evade arrest by flight, or simply running away from an undoubtedly chaotic situation. . . . Consequently, given the conflicting evidence presented at trial, I find that there is a factual dispute regarding the reasonableness of the officers actions which in turn depends on the contested factual question of whether Anthony was carrying an AK-47. The defendants are, therefore, not entitled to the qualified immunity defense.").

Burbank v. Davis, 238 F. Supp.2d 317, 320 (D. Me. 2003) ("If this case reduced to the simple question of whether Davis's use of the knee kick to subdue the passively resisting defendant, although viewed by the jury as excessive force, was nonetheless objectively reasonable under the second part of the *Saucier* analysis, it would be a different case and might very well present an interesting qualified immunity question. The qualified immunity claim really reduces to the argument that because the injuries in this case were not serious, any officer in the Portland Police Department would be entitled to qualified immunity no matter what role he or she may have played in effecting this arrest. If the plaintiff is gratuitously hit in the back of the head instead of the face where more visible and photogenic marks are likely to appear, liability cannot attach. That argument misses the main point of the factual dispute in this record. Force applied to effectuate a lawful arrest is one thing; force applied after a suspect has submitted to arrest and is compliant is quite another thing. Davis's 'minimal injury' theory of the case is not supported by First Circuit case law, as I noted in my memorandum of decision on the earlier motion for summary judgment.").

Mulkern v. Cumberland County, No. 00-382-P-C, 2001 WL 1519409, at **23-25 (D.Me. Nov. 30, 2001) (not reported) ("As an initial matter, the County Defendants and the plaintiffs quarrel over whether a motion for summary judgment based on qualified immunity entails analysis of the underlying merits. . . The County Defendants have the better of the argument; the Supreme Court has directed that '[a] court required to rule upon the qualified immunity issue must consider

... this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? ... If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.' [citing *Saucier v. Katz*] . . . . The plaintiffs adduce no evidence that any of the individual defendants knew that Hale had suicidal tendencies, something that even Dr. Katz and the PHS nursing staff did not detect. . . Nor do the plaintiffs succeed in demonstrating deliberate indifference to serious medical needs. The Jail staff on several occasions requested that the medical staff attend to Hale or asked Hale directly whether he needed medical attention. While, in the opinion of Dr. Cohn, corrections officers who were aware of Hale's escalating behaviors should have sought medical help sooner, this does not establish as a legal matter that these officers subjectively appreciated and disregarded a risk of serious harm to Hale. . . . . At bottom, the plaintiffs' theory is that Hale was punished when he should have been medicated. . . With proper medication, Hale would not have misbehaved; without misbehavior, he would not have been confined to disciplinary segregation; without disciplinary segregation, he would not have acted out further or, ultimately, attempted to take his life. While this theory, tragically, is plausible on these facts, the hurdle to making out a constitutional violation based on failure to medicate adequately or the unwarranted infliction of punishment is high. Here, where there were repeated (if bungled) attempts to address Hale's problems with medication, and where there is no evidence that disciplinary segregation was imposed for any reason other than underlying misconduct (even if that misconduct stemmed from improper medical management), the plaintiffs fall short of making out a case of failings of constitutional magnitude on the part of the corrections officers entrusted with Hale's care.").

Caron v. Hester, No. CIV. 00-394-M, 2001 WL 1568761, at **7-10 (D.N.H. Nov. 13, 2001) (unpublished) ("A difficult question is presented in this case regarding the level of specificity with which it is appropriate to define the constitutional right Caron claims was violated. All can agree that the right not to be subjected to 'unreasonable' or 'excessive' force during the course of an arrest was, when Caron was taken into custody, clearly established. However, 'a reasonable official's awareness of the existence of an abstract right, such as a right to be free from excessive force, does not equate to knowledge that his conduct infringes the right.' . . . And, if the constitutional right Caron claims was infringed must necessarily be defined more precisely, it is far less clear that such a right was 'clearly established' at the time. The record demonstrates that the force employed by Hester against Caron was, objectively, de minimus. And, as the Supreme Court has observed, 'the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' . . . Except for Caron's preexisting shoulder injury, and the fact that it allegedly rendered him more fragile than an ordinary person, he would have suffered no discomfort or lasting effects from the manner in which Hester applied the handcuffs. Reduced to its essence, then, the question presented is whether Caron had a clearly established right not to be handcuffed behind his back after he allegedly informed Hester of his shoulder injury. He did not. Caron has pointed to no precedent that would support his necessary claim that, at the time of his arrest, it was clearly established that police officers use unlawful and excessive force when they handcuff a suspect behind the back, notwithstanding the

suspect's unsupported claim to suffer from an injury that either prevents, or would be exacerbated by, such conduct. . . . To be sure, as noted above, there are cases that involved police officers' use of excessive force against a suspect who had visible signs of an injury or medical condition that should have established the reasonable likelihood of a suspect's vulnerable condition and counseled against the level of force actually employed. . . . In cases of that sort, it is both logical and reasonable to expect police officers to recognize that the suspect is potentially more susceptible to injury than the ordinary citizen and to require the officers to act accordingly. In this case, however, the only 'evidence' of Caron's preexisting shoulder injury was his statement to that effect–a statement, no doubt, uttered by many suspects who, if given the choice, would prefer not to be handcuffed at all and, if they must be restrained in that manner, would prefer that the handcuffs be in front. Trooper Hester was not confronted with any objective manifestation of Caron's claimed shoulder problem. . . . Although the Court of Appeals for the First Circuit has yet to confront this particular issue, several other courts have done so and concluded, at a minimum, that a suspect who displays no visible signs of being unusually vulnerable or fragile, is not subjected to excessive force when a police officer uses customary, reasonable force in applying handcuffs or otherwise effecting an arrest. . . . In light of the current legal landscape, the court cannot conclude that Caron had a 'clearly established' right to be handcuffed in front (or not at all) after he informed Hester of his shoulder injury or, viewed somewhat differently, that he had a 'clearly established' right not to be handcuffed with his hands behind his back once he invoked a shoulder injury. Consequently, a reasonable officer would not have understood that attempting to handcuff Caron with his hands behind his back after he claimed to have a shoulder injury amounted to a violation of Caron's constitutional right to be free of excessive force. Trooper Hester is, therefore, entitled to qualified immunity.").

Cummings v.Libby, 176 F. Supp.2d 26 (D. Me. 2001) (*post-Saucier* decision denying qualified immunity to officer in excessive force case because material issues of fact were in dispute)**.**

SECOND CIRCUIT

Bryant v. Egan, 890 F.3d 382, 386 (2d Cir. 2018) ("Before trial, factual questions precluded a determination that Slezak and Egan were entitled to qualified immunity. And, as to the issues before us, that remains the case here. When determining whether factual questions remain on a post-trial claim, this Court may look to the undisputed facts adduced at trial and to any factual issues resolved by the trial. . . But in this case, the officers concede that '[n]early every fact material to [Bryant's] Fourth Amendment claims, including [his claim] premised on the Taser use, was disputed by the parties at trial.'. . And given the district court's conclusion that the jury's verdict—with respect to Slezak's tasering and Egan's failure to intervene—was against the weight of the evidence, that verdict no longer resolves those factual disputes. . . Fundamentally, then, this case is not in a meaningfully different posture than it was prior to trial, where the officers acknowledged that a finding of qualified immunity would have been premature. It remains premature now.")

Kass v. City of New York, 864 F.3d 200, 213 (2d Cir. 2017) ("Given the context in which Kass repeatedly refused to comply with the officers' orders—on a public sidewalk where pedestrians were passing, at a time of day when the sidewalks might shortly become more congested, and in close proximity to a public protest—and because Kass became increasingly hostile and resistant toward the officers, it was objectively reasonable for the officers to infer that Kass's continued defiance of their orders recklessly created a risk that he would 'cause public inconvenience, annoyance or alarm,' including a public disturbance. . . At the very least, competent police officers could reasonably disagree as to whether, by remaining on the sidewalk despite numerous requests to move on, Kass recklessly created such a risk. In sum, we conclude that Ernst and Alfieri had arguable probable cause to arrest Kass for violating both New York Penal Law § 195.05 and § 240.20(6) and are entitled to qualified immunity for Kass's federal false arrest and imprisonment claim. Any other conclusion, in our view, would not appropriately confine the denial of qualified immunity to officers who are 'plainly incompetent' or 'knowingly violate the law.'")

Jenkins v. City of New York, 478 F.3d 76, 87 (2d Cir. 2007) ("'Arguable' probable cause should not be misunderstood to mean 'almost' probable cause. The essential inquiry in determining whether qualified immunity is available to an officer accused of false arrest is whether it was objectively reasonable for the officer to conclude that probable cause existed. . . There should be no doubt that probable cause remains the relevant standard. If officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer.").

Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004)("Even if probable cause to arrest is ultimately found not to have existed, an arresting officer will still be entitled to qualified immunity from a suit for damages if he can establish that there was 'arguable probable cause' to arrest. Arguable probable cause exists 'if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.' . . Thus, the analytically distinct test for qualified immunity is more favorable to the officers than the one for probable cause; 'arguable probable cause' will suffice to confer qualified immunity for the arrest.").

Cowan ex rel Estate of Cooper v. Breen, 352 F.3d 756, 761, 762 (2d Cir. 2003) ("Breen argues that no constitutional violation occurred, and that even if there was a constitutional violation, he is entitled to qualified immunity. As explained above, whether a constitutional violation occurred focuses on whether the officer's conduct was objectively reasonable. Thus, if the analysis focuses on whether an officer made a reasonable mistake of fact that justified his conduct, what is being examined is whether there was a constitutional violation, not whether the officer is entitled to qualified immunity. . . Whether the officer is entitled to qualified immunity is resolved by the latter part of the *Saucier* analysis, which looks at an 'officer's mistake as to what the law requires,' . . . Thus, when Breen argues that his *conduct* was 'objectively reasonable,' . . . his contention is that there was no constitutional violation. When he argues instead that even if there was a constitutional violation he is entitled to qualified immunity, then his contention must be that his

belief that his conduct was *lawful* was reasonable. . . .Breen would be entitled to qualified immunity if he reasonably believed at the moment he fired at Cooper that she posed a significant threat of death or serious physical harm to him or others. But this question–whether it was reasonable for Breen to believe that his life or person was in danger–is the very question upon which we have found there are genuine issues of material fact. [footnote omitted] Because in this case genuine, material, factual disputes overlap both the excessive force and qualified immunity issues, summary judgment must be denied.").

Torres v. Village of Sleepy Hollow, 379 F.Supp.2d 478, 483, 484 (S.D.N.Y. 2005) ("It is no defense to a claim of qualified immunity that the defendant did not do what plaintiff said he did. At this early stage of a lawsuit, before discovery takes place, we are presuming that the plaintiff's version of events is true, so a court cannot take into account assertions by the accused officer that contradict the plaintiff's allegations. Nothing in *Saucier* can be read to deprive the plaintiff of his Seventh Amendment right to have a jury resolve all disputed issues of material fact. If plaintiff's version of the facts is wrong and defendant's is correct, then the defendant will prevail, not on the ground of qualified immunity, but because he did nothing wrong. To explain with example: in this case, as in so many others, plaintiff alleges that the defendant used excessive force against him. The right to be free from the use of more force than is reasonably necessary to effect a lawful arrest is certainly well-settled, and no reasonable police officer could possibly believe otherwise. Therefore, unless the facts as asserted by plaintiff in the complaint (and, under my rules, in his deposition). . .could never be found by a reasonable trier of fact to constitute excessive force (for example, if plaintiff alleged only that the defendant took him by the hand), an officer accused of using excessive force will ordinarily not be able to get out of a lawsuit prior to discovery on the ground of qualified immunity. If the officer's defense is that the force he used was not excessive–that is, the force used was reasonably necessary to effect the arrest–then the officer is asserting that he did not violate the plaintiff's constitutional rights, and while he may ultimately prevail on the merits, he is not entitled to dismissal of the lawsuit at an early stage.").

Bolden v. Village of Monticello, 344 F.Supp.2d 407, 421 (S.D.N.Y. 2004) ("Qualified immunity does not attach because plaintiffs have alleged with some particularity the use of more force than was reasonably necessary under the circumstances. Of course, as the case develops, the evidence may demonstrate that O'Connor and/or Deitz (1) did not conduct, authorize or witness any illegal strip search of the plaintiffs; (2) had probable cause to strip search some or all of the plaintiffs; (3) did not engage in the various humiliations alleged by plaintiffs; (4) were reasonably required to use force against some or all of the plaintiffs in order to secure the premises during the search. However, if the evidence exonerates defendants, it will be because they did not commit any constitutional violation–not because they are entitled to qualified immunity.").

Kent v. Katz, 327 F.Supp.2d 302, 308, 309 (D. Vt. 2004) ("Kent also moves for JMOL based on the excessive force and qualified immunity jury instructions. Kent does not contend that these instructions varied from the standard instructions on excessive force and qualified immunity. Instead, Kent argues that the instructions on excessive force and qualified immunity both required

the jury to determine whether Katz acted reasonably when using force to arrest Kent. According to Kent, the reasonableness inquiry for excessive force is essentially the same as that for qualified immunity. Therefore, Kent contends the jury rendered a legally inconsistent verdict when it determined that Katz had used excessive force against Kent, but was nevertheless entitled to qualified immunity on that claim. Kent failed to object to the excessive force and qualified immunity instructions at trial and is therefore barred from raising the objection now. . . Even in the absence of this procedural impediment, Kent's argument is without merit. The Supreme Court has held that the reasonableness inquiry in a qualified immunity determination is distinct from the reasonableness inquiry in an excessive force determination. . . In *Saucier*, the Court explained that the inquiry as to whether a police officer used excessive force hinges on the facts and circumstances facing the officer at the scene. . . An officer could be reasonably mistaken about a given fact, for example, whether a suspect was likely to fight back, and would therefore be justified in using more force than was needed. . . In contrast, in a qualified immunity determination the relevant question is whether the officer's mistake about the legality of his conduct was reasonable. . . . In its finding for Kent on the excessive force claim, the jury could have concluded that Katz was unreasonably mistaken about the facts and circumstances facing him during the incident with Kent and was therefore unreasonably mistaken about the appropriate level of force needed to arrest Kent. The jury also could have found that Katz reasonably believed the amount of force he used to arrest Kent was legal, and thus concluded that Katz was entitled to qualified immunity. These are legally consistent determinations that a reasonable jury could have reached.").

Tiffany v. Tartaglione, No. 00 Civ. 2283(CM)(LMS, 2004 WL 540275, at *2 (S.D.N.Y. Mar. 5, 2004) ("[B]ecause defendants did not raise [qualified immunity] at an early point in the proceedings, we find ourselves in just the sort of posture where the meaning of qualified immunity becomes muddy. As noted above, in *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court indicated that qualified immunity ought to be decided by the Court at the earliest possible opportunity–preferably at the outset of the case, which is the point at which plaintiff's well pleaded allegations are assumed to be true, and defendant's version of the facts has not even been developed. Here, the parties have engaged in extensive discovery, and defendants' version of events has taken on a life of its own. But as our own Court of Appeals made plain in its most recent discussion of this convoluted doctrine, in *Stephenson v. John Doe, Detective*, 332 F.3d 68 (2d Cir.2003), when the issue on the table is qualified immunity as a matter of law, the defendants' version of the facts is absolutely irrelevant. The only relevant inquiry on a motion for qualified immunity as a matter of law is whether the constitutional right that plaintiff claims was violated rests on law that is well-settled–because if it is, 'the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.'. . Claims that a public officer made a reasonable mistake of fact, as opposed to a mistake of law, 'go to the question of whether the plaintiff's constitutional rights were violated, not the question of whether the officer was entitled to qualified immunity.' *Stephenson*, 332 F.3d at 78 (*citing Saucier*, 533 U.S. at 205, 206).")

THIRD CIRCUIT

Istvanik v. Rogge, Nos. 01-3395, 01-3536, 2002 WL 31412508, at **1-3 (3d Cir. Oct. 28, 2002) (unpublished) ("[W]hen Rogge first raised the issue of qualified immunity in his Rule 50(a) motion, the district court followed the majority of courts of appeals that had ruled on that issue. The court reasoned that the standard for Fourth Amendment excessive force claims and the standard for qualified immunity collapse into a single objective reasonableness inquiry that must be decided by the jury. Under this majority view, a finding of excessive force precludes a finding of qualified immunity. . . . The district court therefore denied Rogge's Rule 50(a) motion and ultimately submitted the issue of his objective reasonableness to the jury. The jury concluded that Rogge used excessive force. Rogge then filed a post-trial motion under Rule 50(b) arguing once again that he was entitled to qualified immunity. However, before the district court ruled, the Supreme Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), in which the Court clarified the relevant analysis. . . . In adjudicating Rogge's Rule 50(b) motion for judgment as a matter of law, the district court applied *Saucier'* s two-step process and held that Rogge was entitled to qualified immunity, and therefore granted Rogge's motion for judgment as a matter of law. . . . The heart of Istvanik's excessive force claim is that Rogge applied the handcuffs too tightly when he was double-cuffed to a steel cot in the holding cell. In its *Saucier* analysis, the district court found that the first step was answered by the jury's finding that Rogge's actions constituted excessive force in violation of Istvanik's Fourth Amendment rights. In its analysis of the second step, i.e., whether the constitutional right was clearly established, the district court fully surveyed the state of the law and determined that, at the time of the incident, the question of whether tight handcuffing constitutes a violation of Fourth Amendment rights against excessive force was not established even in a general sense. Therefore, it clearly was not established in the particularized sense required for qualified immunity. . . We find no error in the district court's *Saucier* analysis. Quite frankly, if the various circuit courts of appeals and the district courts disagree on the question, we can hardly fault Officer Rogge, especially since it is apparent that he was dealing with a thoroughly uncooperative person who had been arrested for drunk driving.").

Curley v. Klem, 298 F.3d 271, 278-82 (3d Cir. 2002) (***Curley I***) ("As this Court has noted previously, . . . the imperative to decide qualified immunity issues early in the litigation is in tension with the reality that factual disputes often need to be resolved before determining whether the defendant's conduct violated a clearly established constitutional right. . . . Thus, while we have recognized that it is for the court to decide whether an officer's conduct violated a clearly established constitutional right, we have also acknowledged that the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue. . . .Our sister circuits agree upon this general prohibition against deciding qualified immunity questions in the face of disputed historical facts. [citing cases] Further, the prohibition does not appear at all inconsistent with the analytical framework recently detailed by the Supreme Court in *Saucier*. . . .[A]t this stage of the qualified immunity analysis, where we discern simply whether Curley alleges conduct in violation of a constitutional right, we must consider only the facts alleged by Curley, taken in the light most favorable to him. . . . We conclude that these facts, viewed in the light most favorable to Curley, are sufficient to support the claim that Klem's

shooting of Curley constituted an unreasonable seizure, violative of Curley's rights under the Fourth Amendment. While we recognize the great pressure and intensity inherent in a police officer's hot pursuit of a suspect known to be armed and highly dangerous, we find that under Curley's account of events, it was unreasonable for Klem to fire at Curley based on his unfounded, mistaken conclusion that Curley was the suspect in question. Having thus found that the facts alleged by Curley demonstrate the violation of a constitutional right, we next ask whether the right was clearly established or, more precisely, 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' . . . Based on this assessment of the circumstances confronting Klem, the District Court concluded that his decision to shoot was not objectively unreasonable. The problem with the District Court's analysis, however, is that it did not recognize the existence of disputed historical facts that are clearly material to the question of objective reasonableness. There are disputed issues of material fact with regard to at least two key events–the inspection of the suspect's vehicle and the actual confrontation between Klem and Curley. . . . A jury must resolve these issues before a court can determine whether it would have been clear to a reasonable officer that Klem's conduct was unlawful. Thus, we conclude that the District Court could not have properly viewed these unresolved factual issues in the light most favorable to Curley and still find that Klem's conduct was protected under the qualified immunity doctrine.").

Bennett v. Murphy (Bennett II), 274 F.3d 133, 136, 137 (3d Cir. 2001) ("After *Saucier* it is clear that claims of qualified immunity are to be evaluated using a two-step process. First, the court must determine whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation. If the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity. In this case it is clear that Bennett's submissions, viewed in the light most favorable to her, do make out a constitutional violation. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that the use of force contravenes the Fourth Amendment if it is excessive under objective standards of reasonableness. If, as the plaintiff's evidence suggested, David Bennett had stopped advancing and did not pose a threat to anyone but himself, the force used against him, i.e. deadly force, was objectively excessive. Once it is determined that evidence of a constitutional violation has been adduced, courts evaluating a qualified immunity claim move to the second step of the analysis to determine whether the constitutional right was clearly established. That is, in the factual scenario established by the plaintiff, would a reasonable officer have understood that his actions were prohibited? The focus in this step is solely upon the law. If it would not have been clear to a reasonable officer what the law required under the facts alleged, he is entitled to qualified immunity. If the requirements of the law would have been clear, the officer must stand trial. *Saucier's* holding regarding the availability of qualified immunity at the summary judgment stage does not mean that an officer is precluded from arguing that he reasonably perceived the facts to be different from those alleged by the plaintiff. An officer may still contend that he reasonably, but mistakenly, believed that his use of force was justified by the circumstances as he perceived them; this contention, however, must be considered at trial. . . . The decision in *Saucier* clarified what was not apparent before–that the immunity analysis is distinct from the merits of the

excessive force claim. We have concluded that the first prong of the two-step *Saucier* test is satisfied. Given the District Court's thorough familiarity with all of the aspects of this matter, it is appropriate that it be given the first opportunity to apply the second part of the *Saucier* analysis. We will, therefore, vacate the order of the District Court and remand this matter for further consideration.").

Griffin v. Hickson, No. CIV.A. 98-3805, 2002 WL 988003, at *7 (E.D. Pa. May 9, 2002) (not reported) ("[O]nce a civil rights plaintiff has surmounted the obstacles imposed by the first two components of the qualified immunity inquiry, the burden shifts to the law enforcement officers to demonstrate that 'the evidence [will] not support a reasonable jury finding that [their] actions were objectively unreasonable.' . . . Stated differently, if the evidence supports a reasonable finding that agents' actions were objectively unreasonable, they are not entitled to qualified immunity. As delineated, *supra*, the legal proposition that it is objectively unreasonable–and thus a Fourth Amendment violation–to use deadly force against an unarmed, unthreatening person is well settled and uncontroversial. . . In this case, . . . the record evidence would support both a reasonable finding that Griffin did not possess a gun at the time of the shooting and a similarly reasonable finding that the agents did not reasonably believe that Griffin possessed a gun. Nothing within defendants' pleadings or argumentation establishes contrarily. Moreover, the agents advance no contention as to the reasonableness of their actions other than the assertion that Griffin either actually or apparently was holding or fired a gun. . . Accordingly, insofar as plaintiffs' excessive force claim is concerned, defendants have not demonstrated that 'the evidence [will] not support a reasonable jury finding that [their] actions were objectively unreasonable.'").

Nardini v. Hackett, No. Civ.A. 00 CV 5038, 2001 WL 1175130, at *7 (E.D. Pa. Sept. 19, 2001) (not reported) ("The Supreme Court's recent decision in *Saucier v. Katz*, 121 S. Ct. 2151 (2001), has resolved a long-standing debate within the circuits regarding whether the qualified immunity analysis with its emphasis on 'objective reasonableness' is distinct from the Fourth Amendment 'objective reasonableness' inquiry under *Graham*. In *Katz*, the Supreme Court concluded that the qualified immunity analysis is indeed separate and appropriate in a Fourth Amendment excessive force context. . . . With this recent guidance from the Supreme Court, we are compelled to conclude that even if Plaintiff's allegations rise to the level of a constitutional violation, Defendants are entitled to qualified immunity. Reasonable police officers in Individual Defendants' position could reasonably conclude that the force applied in arresting Ms. Nardini was proper and not excessive in violation of her clearly established Fourth Amendment rights.").

Estate of Smith v. Marasco, No. Civ.A. 00-5485, 2004 WL 633276, at *11, *12 (E.D. Pa. Mar. 29, 2004) (on remand) ("[In *Saucier*] the Court held that the inquiries of excessive force and qualified immunity are distinct and offered the following explanation. In the case of excessive force, an officer is justified in the level of force used if the 'officer reasonably, but mistakenly, believed that a suspect was likely to fight back.'. .. In the case of qualified immunity, however, an officer is entitled to immunity if his mistake as to the amount of force that was legal under the

circumstances was reasonable. . . While this distinction appears to be clear on its face, we are uncertain how we are to assess whether an officer was reasonable in his understanding of the amount of force the law allows under certain circumstances without also determining whether the officer was reasonable his assessment of the threat he faced. Thus, even if we were to conclude, as the Third Circuit seems to urge, that the amount of force used in this case was a constitutional violation, we respectfully find that any mistakes made by the officers in determining the amount of force that could be legally used against Smith were reasonable. In doing so, we again rely on *Sharrer*. It seems to us that if we, as a federal court learned in the law, interpreted *Sharrar* as justifying the use of SERT and the tactics it employed in this case, then it seems reasonable that a police officer at the time of the incident would have come to the same conclusion.").

FOURTH CIRCUIT

Young v. Prince George's County, 355 F.3d 751, 757 (4th Cir. 2004) ("After considering the totality of the circumstances, we hold that Officer Hines reasonably sought to limit Young's access to his firearm by handcuffing him. We cannot, however, conclude as a matter of law that the force used by Officer Hines subsequent to Young's being handcuffed was reasonable. Officer Hines was confronted with a situation in which he pulled over two suspects for a minor traffic violation, namely the failure to have an operable trailer tail-light. Upon being stopped by Officer Hines, both Young and Pringle were fully cooperative. They promptly sat down on the curb and placed their hands on their heads when asked to do so by Officer Hines. Indeed, Young sought to assist and put Officer Hines at ease by immediately volunteering that he himself was a law enforcement officer, that his law enforcement credentials were in his automobile and that he was carrying a firearm. Given the cooperation of Young and Pringle, it is not readily apparent why Officer Hines, after handcuffing Young and Pringle, needed to grab Young from behind, place him in a headlock, spin him around and throw him head-first to the ground. Once Young and Pringle were both handcuffed, Officer Hines could have easily disarmed Young, who at no point resisted, without the use of such force. Even more questionable is Officer Hines's use of force once Young was lying face-down on the ground, handcuffed behind his back and disarmed. At this point, Young presumably posed little, if no, threat to Officer Hines. Nonetheless, Officer Hines proceeded to strike Young in the back of the head with his forearm and pound his knee into the center of Young's back. When Young complained about the use of such force, Officer Hines responded by telling Young to 'shut up' and further pounding his knee into Young's back. Defendants argue that the use of such force was reasonable because Young was armed. The fact that a suspect is armed, however, does not render all force used by an officer reasonable. The measures taken by an officer to disarm a suspect must be reasonable under the totality of the circumstances. Here, Young was stopped for a minor traffic violation, was completely cooperative and posed little, if no, threat once he was handcuffed behind his back. . . When viewed in this light, we believe that a reasonable jury could find excessive the force used by Officer Hines once Young was handcuffed. Based on the foregoing, the district court's grant of summary judgment on Young's excessive force claim was erroneous." [footnotes omitted]).

Martin v. Dishong, No. 02-1173, No. 02-1193, 2003 WL 194776, at *2 (4th Cir. Jan. 30, 2003) (unpublished) ("[W]e uphold the decision of the district court. As that court detailed in its order, the evidence in the summary judgment record would support different conclusions, depending on which evidence was believed by the trier of fact. One possible conclusion–that Dishong was standing outside his vehicle and Martin was driving directly toward him at the moment the fatal shot was fired–would support Dishong's assertion that he used deadly force to protect himself. But this assertion fails under other scenarios supported by other evidence, in which Dishong was safely inside or behind his vehicle. The district court correctly concluded that this dispute of fact precludes the entry of summary judgment based on the assertion that Dishong reasonably feared for his own safety when he fired the shot that killed Martin.")

Gomez v. Atkins, 296 F.3d 253, 261, 262 (4th Cir. 2002) ("In our assessment of whether Atkins is entitled to qualified immunity . . . the question is not whether there actually was probable cause for the murder warrant against Isidro, but whether an objective law officer could reasonably have believed probable cause to exist.").

Clem v. Corbeau, 284 F.3d 543, 552-54 (4th Cir. 2002) ("In sum, viewed in the light most favorable to Clem, the evidence is that Corbeau shot a mentally disabled, confused older man, obviously unarmed, who was stumbling toward the bathroom in his own house with pepper spray in his eyes, unable to threaten anyone. Of course, Clem ultimately may not be able to prove these facts, but, if he can, it would require no improper second- guessing, or the application of '20-20 ... hindsight' to conclude that Officer Corbeau violated Mr. Clem's Fourth Amendment right to be free from excessive police force. . . Having determined that Clem has alleged a violation of a constitutional right, we must now proceed to the second sequential step of the *Saucier* analysis–determination of whether Officer Corbeau is nonetheless entitled to qualified immunity from suit. . . . . To carry out this analysis, we must consult relevant case law to determine whether a closely analogous situation had been litigated and decided before the events at issue, making the application of law to fact clear. . . In doing so, however, we must also keep in mind the Supreme Court's warning that this is not a mechanical exercise, and that the test is not whether 'the very action in question has previously been held unlawful,' but rather, whether pre-existing law makes the unlawfulness of an act 'apparent.'. . . Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been 'specifically adjudicated' but also when it is 'manifestly included within more general applications of the core constitutional principle invoked'" . . . Thus, 'when Athe defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts" that the action was unconstitutional, closely analogous pre- existing case law is not required to show that the law is clearly established.' . . To hold otherwise would allow an officer who understood the unlawfulness of his actions to escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom before been litigated. . . . Well before 1998 it was clearly established that a police officer could not lawfully shoot a citizen perceived to be unarmed and non-dangerous, neither suspected of any

crime nor fleeing a crime scene. The decision to use deadly force in these circumstances simply does not lie near the 'hazy border between excessive and acceptable force,' and any mistaken belief to the contrary would not have been reasonable. . . Accordingly, Officer Corbeau is not entitled to qualified immunity, as a matter of law, on the present record.").

Cowles v. Peterson, 344 F.Supp.2d 472, 483, 484 (E.D. Va. 2004) ("It is not enough to find that the force used was unreasonable under the objective standards of the Fourth Amendment; the Court must also find that the objectively reasonable officer would have known that his conduct was unlawful. Although the two analyses may seem similar, the qualified immunity analysis of reasonableness contains an additional dimension. . . Officers will be entitled to qualified immunity where, although they correctly perceived all the relevant facts, they made 'reasonable mistakes as to the legality of their actions.' . . The key is whether existing law gave the officers fair warning that their conduct would be unconstitutional. . . .The question before the Court, taking the facts in the light most favorable to the Plaintiff, is whether an objective officer could reasonably believe that when an individual objects to a search of his car, but otherwise poses no threat to the officer, it is legally acceptable to strike that individual in the forehead twice with sufficient force to cause a contusion, and then when that individual flees from the assault, to throw the person to the ground, shove his head against the ground, and force his hands behind his back in such a way as to injure his shoulder. No objectively reasonable officer could believe this to be the case. It is clear from the Fourth Circuit's decision in *Jones* that it was well-established by September 2000 that when an individual does not pose an objective threat to an officer, the officer's right to use force is severely
limited . . . The Court notes that many of the incidents described in *Jones* involved more serious injuries than those which occurred in this case, but these cases also involved individuals whom the officers deemed dangerous enough to at least handcuff. . . Here, the Defendants were so confident in their relationship with and knowledge of Plaintiff that they made no attempts to even frisk him, never mind secure or restrain Plaintiff, before beginning the alleged search of Plaintiff's car. The Court cannot perceive of any objectively reasonable officer who would believe that the Constitution allowed him to strike a non-threatening free person in the forehead with any object, and then to tackle and injure that person when he fled from the assault. Accordingly, Defendants' motion for summary judgment on this issue is DENIED.")

Bartram v. Wolfe, 152 F. Supp.2d 898, 903, 904 (S.D.W.Va. 2001) ("[T]he second operative question under *Saucier* is this: Was it clearly established as objectively unreasonable in August 1998 to punch or otherwise batter a handcuffed suspect who was complying and cooperating with a law enforcement officer's instructions? Although one has difficulty finding a case directly on point for that proposition, this is one of those rare instances where the question ineluctably leads to an affirmative answer. . . . The conduct alleged here is not so much a reasonable mistake concerning the amount of force required, but rather a purposeful and gratuitous attack on a suspect who was neither resisting arrest nor posing a threat to anyone's safety.").

FIFTH CIRCUIT

Johnson v. Thibodaux City, 887 F.3d 726, 733-35 (5th Cir. 2018) ("According to the officers, they had probable cause to arrest Johnson for failing to provide identification, an alleged violation of Louisiana Revised Statute 14:108. That statute requires an 'arrested or detained party' to provide identification only when the officer is making 'a *lawful* arrest' or a '*lawful* detention.'. . . The statute could not extend more broadly. Under the Fourth Amendment, police officers may not require identification absent an otherwise lawful detention or arrest based on reasonable suspicion or probable cause. . . While officers are free to demand identification in the circumstances of a lawful stop or arrest, they 'may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.'. .The cases cited by the city are not to the contrary. . . . Thus, under both Louisiana law and the Constitution, Johnson was required to provide identification only if she was otherwise lawfully stopped. The officers would have no probable cause to arrest if the request for identification came during an illegal seizure. Accordingly, the verdict contains an implicit legal conclusion: Johnson was lawfully detained when the officers asked for identification. The city maintains that Johnson was lawfully detained because Amador had a valid justification for the initial traffic stop: to arrest Robertson on an outstanding warrant. We disagree. . . .The purpose of the stop was to arrest Robertson, who was known to have an outstanding warrant. The identification of Johnson had nothing to do with that purpose; none of the officers suspected Johnson of having a warrant or being connected to Robertson. Nor was there any evidence that would support a finding of reasonable suspicion. The only evidence the city points to is that Every attempted to get out of the vehicle earlier during the stop and that Johnson and Every were later on their cell phones. But Every then complied with Amador's command to close the door and remain in the vehicle, and the mere use of a cell phone does not establish a reasonable suspicion of criminal activity. More importantly, the officers who asked for Johnson's identification explicitly testified that they had no suspicion of ongoing or future criminal activity. Those officers explained that they asked for identification only because Johnson was already stopped. But again, asking for identification is not itself a reason to prolong a stop. This case is thus distinguishable from those in which officers developed enough reasonable suspicion to justify detaining passengers for reasons beyond the initial stop. . . .No such emerging facts were present here. The officers tried to identify Johnson merely because she was a passenger. Yet once the officers had effected their purpose for stopping the truck and discovered nothing establishing a reasonable suspicion that Johnson were involved in criminal activity, she should have been free to go. Therefore, the verdict was predicated upon an erroneous legal conclusion: that Johnson was lawfully stopped when the officers asked for identification. Because she was not lawfully stopped, she committed no crime by refusing. . . The officers could not have had probable cause to arrest, and the verdict 'cannot in law be supported' by the evidence. . . Accordingly, we remand for consideration of qualified immunity and, if necessary, of damages on Johnson's unlawful-arrest claims against Amador, Buchanon, Gaudet, and Thibodeaux.")

Simmons v. City of Paris, 378 F.3d 476, 480, 481(5th Cir. 2004) ("Defendants argue that they made an honest mistake in going into the Handley home and that they accordingly are entitled to qualified immunity. If the evidence was undisputed that this was all that occurred, defendants

would be correct, and they would be entitled to qualified immunity. However, plaintiffs offered evidence that defendants did not immediately depart after learning that they were in the wrong house. That is an issue to be resolved by a jury. Qualified immunity does not provide a safe harbor for police to remain in a residence after they are aware that they have entered the wrong residence by mistake. A decision by law enforcement officers to remain in a residence after they realize they are in the wrong house crosses the line between a reasonable mistake and affirmative misconduct that traditionally sets the boundaries of qualified immunity.").

Mace v. City of Palestine, 333 F.3d 621, 624 n.7 (5th Cir. 2003) ("Mace argues that *Saucier* requires us to make this determination [whether constitutional right to be free from excessive force was violated] based on the pleadings alone, and urges us to take her conclusory allegations of constitutional violations as definitive on this point. We do not read the Supreme Court's decision in *Saucier* to have changed the rules governing summary judgment. In ruling on a summary judgment motion of any kind, courts must consider 'the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any'. . . To limit a summary judgment inquiry based on qualified immunity to a consideration of the pleadings alone would destroy the central purpose of granting immunity from suit. . . . Finally, it is well established that a nonmovant cannot overcome summary judgment with conclusory allegations and unsubstantiated assertions.").

Mace v. City of Palestine, 333 F.3d 621, 627, 628 (5th Cir. 2003) (Wiener, Circuit Judge, concurring in part and dissenting in part) ("I remain mindful of our duty to avoid 'second-guessing' the 'split second judgment' of Chief Henderson and his officers during this unquestionably tense encounter with an inebriated, deeply disturbed and volatile young man. Given the conflicting eyewitness testimony, however, and viewing the disputed facts, as we must, in the light most favorable to Mace, as the non-movant, I simply cannot accept that, at this liminal stage of litigation, we can *hold* that Henderson's use of deadly force was objectively reasonable. . . Several questions, including (1) whether Revill was threatening to harm the officers, (2) whether he was advancing, or retreating, or standing still when he was shot, and (3) whether the overall situation was rapidly deteriorating (as the defendant, Henderson, claims) or steadily improving (as the disinterested witness, Frix, testified) cannot be resolved without weighing the evidence and evaluating the credibility of witnesses– functions exclusively reserved for the trier of fact.").

Branton v. City of Dallas, 272 F.3d 730, 744, 746 (5th Cir. 2001) ("Although we have just determined above that under present law Chief Click's punitive employment action against Branton because of her speech pointing out dishonest conduct by another officer violated the First Amendment, the question remains whether this was clearly established in January of 1997, when Click decided to strip her of all internal affairs investigative duties and to relegate her to taking down walk-in complaints. We conclude that, at that time, Branton's right had been defined at the appropriate level of specificity so that a court could determine that it was clearly established and that its contours had become sufficiently clear so that a reasonable official, identically situated, would understand that what he was doing violated that right. . . . After reviewing the foregoing

cases, we conclude that, at the time Branton spoke out, it was clearly established under facts 'not distinguishable in a fair way from the facts in the case at hand,' that Branton's speech revealing false testimony by a fellow police officer was protected and that 'the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.' . . Consequently, a reasonably objective public official, identically situated in Chief Click's position, would have known that adverse employment action against an employee for her speech concerning false testimony by a fellow officer would violate a clearly established constitutional right. Therefore, the defendants here are not entitled to summary judgment on their claim of qualified immunity.").

SIXTH CIRCUIT

Dunigan v. Noble, 390 F.3d 486, 489 n.2 (6th Cir. 2004) ("Prior to *Saucier*, a majority of Circuits, including our own, held the question of whether an officer was entitled to qualified immunity from an excessive force claim was identical to the inquiry on the merits of the claim. *See, e.g., Bass v. Robinson,* 167 F.3d 1041, 1051 (6th Cir.1999); *Katz v. United States,* 194 F.3d 962, 968 (9th Cir.1999) (collecting cases). Thus, under prior law the existence of a genuine factual dispute always precluded summary judgment.").

Mills v. City of Barbourville, 389 F.3d 568, 577 (6th Cir. 2004) ("Plaintiff's Fourth Amendment right was violated by the deficient affidavit supporting the warrant. Although officers are entitled to rely on a judicially-secured warrant for immunity in a Section 1983 action claiming illegal search, if the warrant is so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable, qualified immunity is not appropriate. . . . . Because the officers presented absolutely no information in the affidavit presented to the magistrate indicating that the place to be searched was connected to Lisa Mills, either through a sworn statement that Cox had identified the residence as the place of the drug purchase or through independent investigation corroborating that it was the home of Lisa Mills, the affidavit was 'so lacking in indicia of probable cause that official belief in the existence of probable cause is unreasonable.'").

Solomon v. Auburn Hills Police Department, 389 F.3d 167, 172-75 (6th Cir. 2004) ("In the case before us, the district court reached the correct decision in denying Officer Miller summary judgment, but its rationale intertwined the standard for determining qualified immunity and the standard for granting summary judgment. The district court failed to completely evaluate the second prong of the *Saucier* test. Instead of concluding whether or not Officer Miller acted objectively reasonable under the circumstances, the district court merely found that a jury question exists on that issue. This comes, however, as no surprise. As recognized by the concurring Justices in *Saucier*, the two-part test 'holds large potential to confuse.'. . Because we are to review the district court's decision de novo, the district court's confusion of the standard does not require reversal. Set forth below is the proper analysis for determining whether qualified immunity should result in summary judgment for a defendant–in this case, Officer Miller. . . . As instructed by the Court in *Saucier*, this court must 'concentrate at the outset on the definition of the constitutional

right and [then] determine whether, on the facts alleged, a constitutional violation could be found....' . . . . After the constitutional right has been defined, we still must inquire whether a violation of Solomon's right to be free from excessive force could be found. . . . Under the circumstances '[t]aken in the light most favorable to the party asserting the injury,'. . .Officer Miller's overly aggressive actions could have violated Solomon's Fourth Amendment right to be free from excessive force during an arrest. . . . Once a potential violation of a plaintiff's constitutional right has been established, we next decide whether that right was clearly established. In so deciding, we must ask 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted.' . . . If an officer, therefore, makes a mistake as to how much force is required, he will still be entitled to qualified immunity so long as that mistake was reasonable. . . Thus, to find Officer Miller shielded from his actions and therefore entitled to qualified immunity, we must find that Officer Miller's use of force under the circumstances was objectively reasonable. . . . In applying these considerations [the *Graham* factors] to the facts at hand, it would be clear to a reasonable officer that the amount of force used against Solomon by Officer Miller was unlawful. . . .Officer Miller's actions, in total, were excessive and resulted in Solomon suffering from bruising and a fractured arm. In viewing the facts in favor of Solomon, we conclude that no reasonable officer would find that the circumstances surrounding the arrest of Solomon required the extreme use of force that was used here. Officer Miller is no exception. Because Officer Miller's conduct was unlawful under the circumstances, he is not able to escape liability through qualified immunity.")

Solomon v. Auburn Hills Police Department, 389 F.3d 167, 176 (6th Cir. 2004) (Rogers, J., dissenting) ("It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense. . . In the instant case the objective facts are that an officer with a heavy build was legally trying to handcuff a person of slighter build who was physically trying not to be handcuffed. The precise amount of force needed to accomplish this without injury in the circumstances of this case is so obviously a difficult determination that the mere fact that injury occurred does not amount to evidence of unreasonable force. At worst it was a reasonable mistake for which qualified immunity is appropriate.").

Humes v. Gilless, Nos. 03-5630, 03-5631, 03-5632, 2004 WL 1794604, at *2, *3 (6th Cir. Aug. 10, 2004) (not published) ("We have no difficulty in assuming that defendants' actions violated plaintiffs' Fourth Amendment right to be free from unreasonable seizures. Plaintiffs, however, have failed to establish that any reasonable officer would have understood that his actions would violate that right under the circumstances of this case. . . While plaintiffs cite Supreme Court precedent establishing that for Fourth Amendment purposes, a seizure occurs when a person reasonably believes that she is not free to leave, plaintiffs have failed to cite any case, statute, rule, regulation, or other authority that would have put the officers in this case on notice that by

conducting a training exercise that interfered with other officers' freedom of movement, they were unreasonably seizing the other officers. . . . Though Defendants' actions might support a claim of unreasonable seizure, such a claim was (and is) not clearly established with respect to this law enforcement training situation. Accordingly, we find that defendants are entitled to summary judgment on the basis of qualified immunity.").

Reynolds v. City of Anchorage, 379 F.3d 358, 364, 366, 367 (6th Cir. 2004) ("The situation of the juvenile delinquent inmates of the Bellewood Home lay somewhere between that of prison inmates and students in school. The Bellewood inmates were not as closely confined or strictly controlled and supervised as prison inmates or detainees. Perhaps their expectations of privacy in that situation were somewhat greater than those of prisoners, but this slight difference appears insignificant. On the other hand, they were still subject to substantial restraint; they were required to live and remain in the Home and they were not free to leave it as they wished. Their confinement to the Home, like that of inmates in a prison, was punishment for prior criminal misdeeds. In comparison to students in school, whose mandatory attendance is not punishment for criminal misconduct but a method of insuring their education, the inmates of the Home were under substantially greater restraint and had a lesser expectation of privacy than do students. Applying this balancing approach, we conclude that Officer Watson's strip search of Reynolds was not unreasonable. . . .Even if our conclusion that the strip search did not violate the Fourth Amendment were to be rejected, we still would affirm the district court's summary judgment for Officer Watson dismissing the complaint. That is because we agree with the district court that Officer Watson had qualified immunity for conducting the search. . . . There has been no decision of the Supreme Court, this court or any courts within this circuit–or, as far as we know, of any other court–that has addressed the application of the Fourth Amendment to strip searches of juvenile delinquents in an institutional home in which they are confined. Moreover, as is shown by the analysis, in Part II above, of existing precedent that deals with the Fourth Amendment status of strip searches in other contexts, the question is close and difficult. It involves subtle legal distinctions and inferences that a reasonable police officer would not and could not be expected to make. In these circumstances, any mistake that Officer Watson may have made about her authority to conduct the strip searches was reasonable. It cannot be said that at that time it was clearly established that Reynolds had a constitutional right not to be so searched except pursuant to a valid search warrant.").

Rogers v. Gooding, No. 02-5891, 2003 WL 22905308, at * (6th Cir. Nov. 24, 2003) (unpublished) ("The *Saucier* holding is particularly instructive in this case. In holding that the defendants were entitled to qualified immunity in the *Saucier* case, the Court noted that the actions of the officers in dragging the protestor across a parking lot and violently shoving him into a van did not violate any clearly established principles. . . In that case, the officer was concerned that the protestor, who had unfurled a banner near a gate that was designed to separate the public from the speakers, was a threat to the Vice President. . . In this case, the facts and circumstances of the situation reveal that Gooding was faced with protecting the state legislators from the potential harm that could be caused by a large group of protestors, including Rogers. Rogers had gone into a restricted area and was actively led away from the area at 6:00 p.m. by Gooding, who told Rogers

that the doors would not be open until 7:30 p.m. Rogers then returned to the area ten minutes later. Upon his return, Rogers placed himself in an area where Gooding could not miss his presence, thereby implicitly defying Gooding's authority. When Gooding told Rogers to clear himself from the area, Rogers openly defied him. Based on the totality of the circumstances, a reasonable officer in Gooding's position could have believed that pushing Rogers out of the hallway was necessary to protect the legislators. Furthermore, Rogers has not directed this court or the district court to any cases or other law to establish that Gooding violated any clearly established rights. Thus, the district court did not err in finding that Gooding was entitled to qualified immunity.").

Minchella v. Bauman, No. 02-1454, 2003 WL 21957034, at *5 (6th Cir. Aug. 13, 2003) (unpublished) ("There cannot be a finding that the arrest involved excessive force and a finding that the Officers' actions were reasonable. By definition, that which is excessive is unreasonable. *See, e.g., Adams v. Metiva,* 31 F.3d 375, 388 (6th Cir.1994) (stating that the use of excessive force is an objectively unreasonable action in light of clearly established law) . . . We agree with the district court's initial determination that there exists a genuine issue of material fact whether the Officers' actions were excessive. Under the totality of the circumstances and the factual disputes that exist, we find summary judgment inappropriate and believe it necessary to reverse the district court's grant of summary judgment and remand this case for trial.").

Smith v. Kim, No. 02-2102, 2003 WL 21698915, at *4 (6th Cir. July 23, 2003) (not published) ("We believe that the difference in the testimony of the officers' and that of Smith's witnesses as to Smith's behavior during the incident is material. At minimum, the difference in the evidence is germane to the ultimate question of the officers' objective reasonableness. The jury must be the arbiter of the credibility of the evidence. We refuse to make such a determination today. Because we find that material facts are in dispute in this case, we hold that we have no jurisdiction to hear the appeal. For that reason, we do not reach the question of the objective reasonableness of the officers' behavior . . . .").

Smith v. Kim, No. 02-2102, 2003 WL 21698915, at *6, *8 (6th Cir. July 23, 2003) (not published) (Krupansky, J., dissenting) ("[T]he Supreme Court recently rejected the Ninth Circuit's approach, indistinguishable from that adopted by the majority opinion in the instant case, of denying summary judgment any time a material issue of fact remained on an excessive force claim. . . . Even assuming, *arguendo,* that the alleged facts were enough to prove the officers' conduct excessive under objective standards of reasonableness, pursuant to *Saucier,* this would not end the analysis. . . The court must also conduct a second, qualified immunity review, separate from the reasonableness inquiry, in which it must determine the officer's perception of the alleged violated right. . . In contrast to the *Graham* constitutional violation analysis, which focuses on the reasonableness of the officials' actions, the qualified immunity analysis probes whether the officers' belief in the state of the law was reasonable.").

Greene v. Barber, 310 F.3d 889, 898, 899 (6th Cir. 2002) ("Mr. Greene's supposed crime was not severe; he was being arrested for creating a low-level disturbance in a public place. He was not

threatening anyone's safety or attempting to evade arrest by flight. He does appear, however, to have been actively resisting arrest, and he does not contradict the officers' testimony that he refused to be handcuffed. On these facts, at least for purposes of analysis, we are prepared to concede that Lt. Barber's use of pepper spray might be found to have constituted excessive force under *Graham*. . . . Our conclusion as to Lt. Barber requires us to move on to the question whether the right to be free from the level of force used here was clearly established. . . In other words, we must decide whether it would have been clear to a reasonable police officer in Lt. Barber's position that his conduct was unlawful in the situation he confronted. . . We are satisfied that a reasonable officer in Barber's position would not necessarily have known that it might be unlawful for him to use pepper spray on a plaintiff who was actively resisting arrest. According to the Grand Rapids Police Department's Manual of Procedures, police officers are allowed to use oleoresin capsicum in one to two second bursts so long as they comply with the specifications of the 'Use of Force Continuum'–another departmental policy document. The Use of Force Continuum permits an officer to administer pepper spray to a person who is aggressively resisting arrest, either verbally or physically. It is undisputed that Mr. Greene was verbally resisting arrest in an aggressive manner. He has offered no evidence, moreover, to counter the officers' testimony that he was also resisting arrest physically. Given the fact that Lt. Barber was simply following established departmental procedures for dealing with non-cooperative arrestees, we do not think he should be deemed to have known that his conduct might be illegal. The district court thus acted properly in granting him qualified immunity on this score.").

Wilkey v. Argo, No. 01-5515, 2002 WL 1869440, at *5, *6 (6th Cir. Aug. 13, 2002) (unpublished) ("[W]e conclude that the record in the present case, when viewed in the light most favorable to Wilkey, would permit a jury to find that Argo used excessive force against Wilkey in violation of the Fourth Amendment's reasonableness standard. The district court therefore erred in concluding as a matter of law that Argo's use of force was objectively reasonable. Our decision does not, however, prevent the district court from considering on remand whether Argo was entitled to qualified immunity, an affirmative defense that Argo raised as an alternative basis for summary judgment. . . . Despite the linguistic similarity between the 'objective reasonableness standard' for evaluating excessive force claims, on the one hand, and the 'reasonable officer' inquiry involved in the qualified immunity analysis, on the other, the two standards are not coterminous.").

Ewolski v. City of Brunswick, 287 F.3d 492, 505 (6th Cir. 2002) ("Even if genuine issues of material fact did exist as to whether a reasonable officer would have perceived an immediate threat to the Lekans, we would still find summary judgment to be appropriate on the basis of the 'clearly established' prong of the qualified immunity test. As the above discussion indicates, we can find no controlling authority where a court has held similar conduct to be unconstitutional 'under facts not distinguishable in a fair way from the facts presented in the case at hand.' [citing *Saucier*] . . . . [A] reasonable officer could not anticipate that a court might decide exigent circumstances were absent where the danger of suicide was compounded by an apparent threat to the suspect's family.

Therefore, summary judgment for the officers on the grounds of qualified immunity is appropriate regarding the warrantless entry claim.").

Lucijanic v. City of Columbus, No. 2:04-CV-751, 2006 WL 1000225, at *4 (S.D. Ohio Apr. 13, 2006) ("Here, plaintiff's version of what happened after he was handcuffed and placed in the police van differs from that of the officers. In conducting a qualified immunity analysis, this court must review the evidence in a light most favorable to the plaintiff, taking all inferences in his favor. . .The use of mace on an arrestee who is handcuffed may constitute the excessive use of force in violation of the arrestee's Fourth Amendment rights. . . If the officers' version of the incident is accepted by a jury, the jurors could reasonably conclude that the use of mace was justified under the circumstances. . . However, if plaintiff's version is accepted, the jury could reasonably conclude that the force used was excessive. Since qualified immunity in this case depends on which version is accepted by the jury, genuine issues of fact preclude summary judgment on plaintiff's Fourth Amendment claim against the officers.")

Dorsey v. Barber, No. 5:04-CV-2151, 2005 WL 2211176, at *22 (N.D. Ohio Sept. 9, 2005) ("[T]he Court finds that while the initial stop may have been reasonable for the purposes of qualified immunity, the fact that Officer Begin almost immediately forced the Plaintiffs to lie face down on the ground and then refused to talk to them about why he was stopping them not objectively reasonable given that Plaintiffs did not try to resist or flee. There is also a question of fact as to whether it was objectively unreasonable, given the circumstances for the Defendants to continue to detain Plaintiffs in that manner after Defendant Dawson arrived, whether this is considered a detention or a de facto arrest. The Court further finds that Plaintiffs have pointed to sufficient evidence to raise doubt as to whether Defendants' use of force was objectively reasonable. For example, Defendant Woodward, another officer who arrived on the scene, stated in his deposition that he saw no reason for need for Plaintiffs to lie on the ground. . . . While the exact nature of Defendants Begin and Dawson's conduct remains in doubt, drawing inferences in favor of the nonmoving parties, Plaintiffs Dorsey and Clark have alleged 'sufficient facts supported by sufficient evidence' showing Defendants acted in an objectively unreasonable manner. . .The Court thus denies Defendants claims of qualified immunity.").

Mechler v. Hodges, No. C-1-02-948, 2005 WL 1406102, at *13 (S.D. Ohio June 15, 2005) (" In the instant case, Mechler was being arrested for failing to comply with an administrative subpoena duces tecum concerning taxes allegedly owed to the City of Milford, a misdemeanor. There is no evidence that Mechler posed any threat to the safety of the arresting officers or others. In addition, there is no evidence that Mechler physically resisted the arrest or was uncooperative. The issue of fact in this matter was whether the handcuffs were applied too tightly and whether Hodges ignored Mechler's complaints that the handcuffs were painful. . . . Viewing the facts in the light most favorable to Mechler, the Court finds that no reasonable officer would find that the circumstances surrounding Mechler's arrest required the use of force that was used here in the application of the handcuffs. Defendant Hodges is therefore not entitled to qualified immunity under the circumstances of this case.").

Dye v. City of Warren, 367 F.Supp.2d 1175, 1186-89 (N.D. Ohio 2005) ("In instances of excessive force claims, this Court considers the facts and circumstances of each particular case, taking into account such nonexhaustive factors as enunciated in *Saucier*, including 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'. . The first part of the *Saucier* test requires the Court to determine whether Mr. Dye has properly alleged a constitutional deprivation when viewing the evidence in the light most favorable to the plaintiff. . . . Even assuming, arguendo, that the alleged facts were material to prove the Chief's conduct excessive under objective standards of reasonableness, pursuant to *Saucier*, this would not end the analysis. . . The court must also conduct a second, qualified immunity review, separate from the constitutional reasonableness inquiry, in which it must determine the officers' perceptions of the alleged violated right. . . In contrast to the Graham constitutional violation analysis, which focuses on the reasonableness of the officials' actions, the qualified immunity analysis probes whether the officers' belief in the state of the law was reasonable. . . . Thus, even if the officer unreasonably used force in violation of the Fourth Amendment, qualified immunity should be granted if the officer had a reasonable, albeit mistaken, belief about the legality of the officer's actions. . . Thus, under the controlling analysis enunciated in *Saucier*, if Chief Mandopoulos and the unnamed officers reasonably, but mistakenly, believed that Mr. Dye's behavior created an imminent safety hazard to himself or others, the officers would be justified in using more force than might in fact have been needed. . . The alleged facts, taken in the light most favorable to the nonmovant, certainly indicate the officers could reasonably believe that Mr. Dye's erratic behavior created an imminent danger. The Warren police were entitled to qualified immunity for arresting Mr. Dye for disorderly conduct when his admitted erratic behavior raised questions concerning whether Mr. Dye would harm himself or others. Under those circumstances, it cannot be said there was a clearly established rule that would prohibit using the force the officers exercised to secure Mr. Dye and his vehicle. The volatility of Mr. Dye's behavior was witnessed during the second traffic stop by an independent observer who substantiated Mr. Dye's seeming instability and loss of control. In addition, the contours and cause for Mr. Dye's behavior that day were admitted by Mr. Dye's counsel in state court proceedings where he acknowledged that Mr. Dye's failure to maintain his medication during the time of the incident spawned his erratic behavior and loss of self-control. Finally, as the hospital records indicate, the sole physical consequence to Mr. Dye was an abrasion and contusion of the right wrist caused by Mr. Dye's admitted struggle against the handcuffs. Consequently, the officers could have reasonably been concerned for their safety, Mr. Dye's safety, and the safety of others in the plaintiff's vicinity, forcing the officers to make a difficult, split-second decision regarding the amount of force required to detain Mr. Dye.").

Leisure v. City of Cincinnati, 267 F. Supp.2d 848, 853, 855 (S.D. Ohio 2003) ("The Court finds that the facts in this situation, taken in the light most favorable to Plaintiffs, militate against a grant of qualified immunity to Defendant Roach. The first step of the qualified immunity analysis is met here because Plaintiffs' Second Amended Complaint adequately alleges that Thomas' Fourth Amendment right to be free from excessive force was violated. . . . The Court finds that

Plaintiff's allegations viewed under *Garner*, taken as true as required by the law at this stage of the proceedings, establish the basis for a constitutional violation. In the case at hand, Thomas was also a unarmed youth fleeing in the dark of night. Though Defendant Roach definitely had probable cause to arrest or stop Thomas based upon his flight, it is not so clear that Roach had a reasonable belief that Thomas was armed or dangerous. Defendant Roach argues that the flight was at night through the neighborhood with the highest crime in the city. However, in the same way that it was not enough in *Garner* that the events took place in the dark of night, darkness is also not enough in this case to warrant the use of deadly force. The Court likewise finds that the surroundings of a high-crime neighborhood is not enough of a reason to conclude, without more, that a fleeing suspect is armed and dangerous. Finally, Roach's knowledge that Thomas had a number of outstanding warrants, with nothing more, did not necessarily support the conclusion that Thomas was dangerous, as the facts ultimately demonstrated. . . .The dispositive question at the second step of the qualified immunity analysis is whether it was reasonable under the circumstances alleged for Officer Roach to pursue Thomas with his gun out and his finger on the trigger. . . . [T]he Court finds that a reasonable officer would be acutely aware of the constitutional principles surrounding the use of deadly force. If an officer lacks probable cause that a fleeing perpetrator presents a threat to the officer or to others, the use of deadly force to stop the perpetrator violates the Constitution. *Tennessee v. Garner*, 471 U.S. 1 (1985). There is no doubt that this constitutional violation was clearly established in April of 2001.").

Wingrove v. Forshey, 230 F. Supp.2d 808, 823 (S.D. Ohio 2002) ("The Court finds that the Defendants are not entitled to qualified immunity with respect to this claim. First, when viewed in the light most favorable to the Plaintiffs, the facts establish that the Defendants violated Delbert Bonar's right to be free from excessive force because the officers had no reasonable basis for believing that he posed an immediate threat at the time that they shot him. Second, the right to be free from excessive force was clearly established at the time of this incident. . . Third, the Defendants acted unreasonably in light of this clearly established right. Specifically, it was unreasonable for the Defendants to mistake either the water bottle or the phone for a gun. The room in which they were executing the warrant was small and well-lit. As such, it should have been fairly easy for the officers to discern precisely what Delbert was holding in his hand. Significantly, neither a water bottle nor a phone resembles a gun or a rifle in a manner that would make it reasonable for those items to be confused. Accordingly, viewed in that light, the Defendants could not have made a reasonable mistake of fact that would have justified their actions in light of the Plaintiffs' clearly established rights.").

Ferguson v. Leiter, 220 F. Supp.2d 875, 883 (N.D. Ohio 2002) ("[R]egardless of whether the officer believed that he thought he was going to be struck, Plaintiffs have not presented relevant, controlling authority from this jurisdiction, or a consensus from other jurisdictions, regarding the constitutionality of neckholds. . . . [T]he various studies presented by Plaintiffs do not establish that as of 1998, either the Supreme Court or any other court had ruled so as to clearly establish the unlawfulness of Leitter's actions. The studies, while interesting, and perhaps more relevant to

Plaintiff's failure to train claim, do not adequately establish that as of 1998; there existed clear legal authority as to the neck hold issue.").

Jones v. Marcum, 197 F.Supp.2d 991, 999-1003 (S.D. Ohio 2002) ("The Kettering Defendants do not argue that there are no facts giving rise to a genuine issue of material fact as to the reasonableness of the conduct of Officers Wabler and Marcum, such that a jury could not find them liable for violating the strictures of the Fourth Amendment; they argue only that when viewed in light of the law surrounding use of excessive force, the officers' actions could have been understood by them at the time of the incident in question as being reasonable. As such, they argue they are entitled to immunity from suit. . . . *Saucier* reaffirmed a principle previously announced in *Anderson,* . . . to wit, even if it is conceded that a genuine issue of material fact exists on the question of whether officers used excessive force, the law may not be so well established as to that particular set of facts to enable a court to conclude that in all instances, a reasonable officer would necessarily recognize that her conduct is unreasonable, and thus impermissible and unconstitutional. . . . . Although *Saucier* is consistent with its prior rulings, such as *Anderson* and *Hunter,* what is perhaps confusing about the logic employed therein is that the Court expressly stated that the paradigm of reasonableness that the Court is to use in its qualified immunity analysis, the Fourth Amendment, is the same as that to be used by the jury. . . In effect, what the Court has announced is that, before sending a Fourth Amendment question of disputed fact to the jury in a § 1983 case, it must pre-evaluate the reasonableness question by paying close attention to all of the facts, and even the potential subjective considerations that could have been going through the mind of the defendant officer at the time, and decide whether there is any doubt as to the question of reasonableness. If the plaintiff does not submit, and/or the court cannot find, authority putting beyond doubt the question of whether a reasonable officer should have known that he was violating the § 1983 plaintiff's rights by using excessive force, such that it is *clearly settled,* the Court must allow qualified immunity to attach. This doctrine has the effect of taking some jury questions away from the jury, but that is precisely why qualified immunity is a principle of *law,* not fact. . . . *Saucier* stands for the proposition that, even assuming that the plaintiff's version of the facts is correct, if it *cannot* be firmly concluded, after conducting a detailed evaluation of the defendant's conduct in light of those facts, such as Justice Kennedy did in writing for the Court in *Saucier,* that the law is clearly established as to what is reasonable under those specific circumstances, such that the officer should have known that the § 1983 plaintiff had a clearly established right not to be subjected to that conduct, then qualified immunity must attach; the case should not go to the jury. By contrast, the case should go to the jury, and *Brandenburg* should apply, where the Court *can* firmly conclude, again assuming that the plaintiff's version of the facts is true, that the law is clearly established under those facts, such that the officer should have known that the § 1983 plaintiff had a clearly established right not to be subjected to that conduct. It is then up to the jury to determine just what that conduct was in the final analysis. . . . [M]erely citing to *Saucier,* indeed, the mere existence of *Saucier* in the corpus of qualified immunity case law, is not itself a reason for the Court to recognize the applicability of the qualified immunity doctrine in a given case. *Saucier* does not hold that police will always be immune from § 1983 liability. Had the Supreme Court intended that to be the case, it certainly would have said

so. Thus, at some point, even the *Saucier* Court would have to recognize that police can be held liable under § 1983."). *See also* ***Hummel v. City of Carlisle,*** 229 F. Supp.2d 839, 851-56 (S.D. Ohio 2002) (same).

Daniels v. City of Columbus, No. C2-00-562, 2002 WL 484622, at *9, *10 (S.D. Ohio Feb. 20, 2002) (not reported) ("If the Court finds that the right allegedly violated was clearly established, the Court must then determine whether a reasonable officer in Officer Wingard's position should have known that his conduct violated that right. Normally, these are questions of law. There are, however, exceptions. In *Saucier,* the Supreme Court cautioned that the question of whether a defendant is entitled to qualified immunity cannot be fused with the question of whether excessive force was used. . . To submit both questions to a jury simply because the questions of objective reasonableness are intertwined defeats the purpose of qualified immunity. Nevertheless . . . . [w]here the exact character of the defendant's actions are in dispute, a jury must determine 'the credibility of the defendant's account of the need for force.' . . . .[W]hen the true nature of the defendant's actions turns on the parties' credibility, summary judgment is inappropriate. The Court acknowledges that there may be cases where the allegations are so frivolous and factual discrepancies so slight that no genuine issues of material fact exist. This, however, is not one of those cases. Whatever transpired during the investigatory stop, the end result was that Ms. Daniels suffered a serious shoulder injury.").

Leong v. City of Detroit, 151 F. Supp.2d 858, 864 & n.5 (E.D. Mich. 2001) ("Plaintiff argues that 'summary judgment is inappropriate where there are contentious factual disputes over the reasonableness of the use of deadly force.' [citing *Sova*] . . . . In light of the Supreme Court's decision in *Saucier,* this is not strictly true in all cases. Even if it were concluded, upon resolving all such factual disputes in the plaintiff's favor, that an officer's use of deadly force was unreasonable under the Fourth Amendment, the officer still would be entitled to qualified immunity if, under the present state of the law, a reasonable officer could have concluded–albeit mistakenly– that deadly force was authorized under the circumstances.").

SEVENTH CIRCUIT

Garvin v. Wheeler, 304 F.3d 628, 633 (7th Cir. 2002) ("In this instance, defendant Wheeler claims that *Saucier* . . . worked a fundamental change in the law of qualified immunity that should allow him to reopen his motion for summary judgment. But defendant Wheeler overstates the import of *Saucier*. *Saucier* was not a hallmark reformulation of the qualified immunity analysis. Instead, *Saucier* stressed that a trial court must engage in the two-part qualified immunity analysis (asking first whether a constitutional right was violated and second whether that right was clearly established) before it engages in other analysis. . . Judge Dillin did just that when he expressly noted that *Garner* governed an officer's use of deadly force and that if Wheeler's version of events were believable, then in that instance he would be entitled to qualified immunity. Judge Dillin, however, found that Officer Wheeler's version of events was less than credible and therefore that the plaintiffs had established that a reasonable officer could not have believed his action (fatally

shooting an unarmed suspect) to be reasonable. Thus, Judge Dillin did engage in the two-part qualified immunity test required by *Saucier*.").

Marshall v. Teske, 284 F.3d 765, 772 (7th Cir. 2002) ("*Saucier* held that even in cases in which the question of qualified immunity is factually intertwined with the question of whether officers violated the Fourth Amendment (in that case, by using excessive force), judges must still make an immunity determination separate from the jury's finding on whether the officers violated the plaintiff's constitutional rights. . . *Saucier* established a two-part qualified immunity inquiry. First, the court must ask whether, taken in the light most favorable to the plaintiff, the facts alleged show that the officers' conduct violated a constitutional right. . . If the facts alleged make out a constitutional violation, the court must then ask whether the right was clearly established. As we have discussed, viewing the facts in the light most favorable to Marshall, the officers violated his right not to be arrested without probable cause. The next step is determining whether Marshall's right not to be arrested under these circumstances was clearly established. The probable cause standard–requiring that an officer's knowledge of the facts be sufficient to warrant a prudent person in believing that the suspect had committed or was committing a crime–was clearly established at the time of this incident. . . Here, the facts and circumstances within the officers' knowledge were not sufficient to warrant a prudent officer to believe that Marshall had committed or was committing a crime. With regard to the drug lookout theory, the officers found no evidence on Marshall's person that identified him as a drug lookout. Nor did Teske find any weapons, drugs, or other evidence of a crime when he retraced Marshall's steps back to the point at which the chase began. Therefore, probable cause did not exist to arrest Marshall for being a drug lookout. Likewise, the officers lacked probable cause to arrest Marshall for knowingly resisting or obstructing their activities. The plain language of both the state statute and the city ordinance covering resistance and obstruction prohibit only knowing resistance or obstruction. Because the officers did not sufficiently identify themselves, a prudent person in their position would not have cause to believe that Marshall was knowingly resisting or obstructing.").

McNair v. Coffey, 279 F.3d 463, 464-68 (7th Cir. 2002) (on remand from Supreme Court after *Saucier*) ("Our initial decision in this case followed *Frazell* and concluded that a jury verdict in plaintiffs' favor on their claim that defendant used excessive force in arresting them precluded any possibility of qualified immunity for the arresting officer. . . . Plaintiffs contend that we should maintain our position despite [*Saucier*], but we conclude that it requires a change in outcome as well as analysis. . . . According to *Saucier*, the first question whenever a public official asserts qualified immunity must be whether that official violated the Constitution at all. . . The Court assumed, when writing *Saucier*, that this decision would be made before trial; it did not inquire what happens if the official concedes that his conduct was unconstitutional (as Coffey did, by not contesting the jury's verdict) and contends only that the right was not clearly established 'in light of the specific context of the case'. . . It is hard to see how these can be separated when the defendant's concession influences the inquiry. For the underlying constitutional question, made context-specific, must be something like: 'Does an excessive show of force, as opposed to an excessive use of force, violate the fourth amendment when undertaken in a dangerous

neighborhood after a suspect fails to surrender on demand?' Then the immunity question would be whether an affirmative answer to this question is 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.' . . . It is hard to answer the latter question about a reasonable public official's understanding if the former question has been framed poorly, answered incorrectly, or, in this appeal, not posed in the first place. Yet *Saucier* insists that it be posed and answered. . . . Viewing matters through the objective reasonableness standard, we conclude that, even taking the record in the light most favorable to the McNairs, a jury could not properly have found that Officer Coffey personally behaved unreasonably. . . . Plaintiffs have not cited even one post-*Graham* decision holding that an excessive number of squad cars or drawn guns can violate the fourth amendment by giving fright or offense, if the seizure is supported by probable cause and otherwise reasonable. At least two–one from this circuit–hold that a simple display of force along these lines does not violate the fourth amendment. See *Sharrar v. Fesling*, 128 F.3d 810 (3d Cir.1997); *Wilkins v. May*, 872 F.2d 190 (7th Cir.1989). . . . Although we do not foreclose the possibility that the circumstances of an arrest could become "unreasonable" without the application of physical force, nothing in the circumstances of this case approaches that line, so it is unnecessary to determine where it may be located. It is enough to say that a reasonable officer in Coffey's position would not have understood that what he was doing violated the McNairs' rights under the fourth amendment and therefore cannot be required to pay damages. The district court reached this conclusion also, and its judgment is affirmed.").

McNair v. Coffey, 279 F.3d 463, 471, 475 (7th Cir. 2002) (on remand from Supreme Court after *Saucier*) (Coffey, J., concurring in part and dissenting in part) ("I agree with the majority's decision only insofar that the jury's verdict must be set aside. However, I believe, unlike the majority, that the Supreme Court has made it clear in their remand and directed us to undertake a thorough review of the record. Upon review, I would dismiss this case on the basis that the McNairs failed to establish that Officer Coffey's conduct violated their constitutional rights, despite the jury verdict to the contrary. I am convinced, as a matter of law, that the McNairs failed to produce sufficient evidence to warrant submitting their Fourth Amendment claims to the jury in the first instance. . . . [I]t is a non-sequitur for us at the late stage of this litigation to cloak our decision in the language of immunity. When considering Coffey's post-verdict motion, I am convinced that we should use the same legal analysis as other cases, with the initial inquiry being whether there were sufficient facts to support the verdict rendered, in light of the applicable law. I agree that if the facts substantiated the view that Coffey violated the Constitution, then the proper recourse would be through the doctrine of immunity. But because his actions were reasonable in the first instance, he is entitled to a ruling that affirmatively characterizes his conduct as lawful and prudent, without any discussion of a defense that implies the existence of a valid antecedent claim against him. . . Based on the law of the land and my review of the evidence adduced at trial, I agree with the law enforcement officer that this case should never have gone to trial and, furthermore, should never have been submitted to the jury.").

King v. City of Indianapolis, 969 F.Supp.2d 1085, 1092 (S.D. Ind. 2013) ("The Court must consider the particularities and context of the right at issue in this case. Although the facts of this

case are similar to *Glik*, that case was decided months after the incident with Mr. King. Moreover, the additional facts present here, a person resisting arrest and tense crowd, distinguish the facts from *Smith* and *Glik.* The Court agrees with Mr. King that First Amendment interests are foundational and strong. However, the contours of the right in these circumstances had not been settled as of February 2011 by the Seventh Circuit. Although not dispositive, the circuit split is somewhat indicative of the uncertainty in this area of law, and also of the importance of the factual circumstances in each case. . . Moreover, *Smith* recognized that the right to video record police would be subject to reasonable time, place, and manner restrictions. The Court cannot say with certainty that it was clearly established in February 2011 that Mr. King's actions during a tense active arrest situation with crowd control concerns would not be viewed as subject to some reasonable restrictions. Therefore, Mr. King's right was not clearly established and Defendant Officers are granted qualified immunity on this claim.")

Buchanan v. City of Milwaukee, 290 F.Supp.2d 954, 963 (E.D. Wis. 2003) ("If the facts are as plaintiff describes them, Sullivan is not entitled to qualified immunity. Sullivan employed deadly force on a suspect who threatened no one but himself. As an objective matter, on February 21, 2000, a reasonable police officer would have known that it was unreasonable to use deadly force against a person who did not pose a threat of death or serious bodily harm. If the facts are as Sullivan claims, the result could be different. . . The Seventh Circuit has consistently held that if further factual development is necessary to determine whether the officer is entitled to qualified immunity the court may deny the officer's pre-trial motion. . . Because I cannot decide on summary judgment whose version of the facts is correct, I cannot determine as a matter of law whether Sullivan is entitled to qualified immunity. Therefore, defendant's motion for summary judgment on the grounds of qualified immunity must be denied.")

Brown v. City of Milwaukee, 288 F.Supp.2d 962, 974, 975, 979 (E.D. Wis. 2003) ("I must determine whether, in January of 1998, it would have been apparent to a reasonable police officer: (1) that he could not conduct a *Terry* stop based on a report that a woman driving a van on particular street had a gun, and (2) that he could not employ the highly intrusive tactics used to effectuate the seizure here. Taking the facts in a light most favorable to plaintiff, I conclude that while Garcia is entitled to qualified immunity from liability for the initial stop, he is not entitled to immunity from liability for the manner in which it was carried out. [footnote omitted] It has been well established since 1968 that in order to justify a *Terry* stop the activity of which the detainee is suspected must actually be criminal. . . As discussed, the mere possession of a gun, without more, is not a crime. However, I cannot conclude that the state of the law in 1998 was so clear that only a 'plainly incompetent' [footnote omitted] officer would have conducted a *Terry* stop. . . .[A]t the time Garcia conducted the *Terry* stop of plaintiff, his decision had some support in circuit precedent. Therefore, I find that he has qualified immunity from liability regarding the initial stop. However, Garcia is not immune from liability based on the manner in which plaintiff was seized. Garcia and the other officers surrounded plaintiff, shined lights at her to prevent her from seeing, pointed weapons at her, cocked them and bombarded her with profanity-laced threats to shoot, based only on an anonymous tip that she had a gun. This conduct, if proven, would constitute a violation of

plaintiff's clearly established rights. . . . Further, as an objective matter, the force allegedly used here was so plainly excessive that Garcia would have been on notice that he was violating the Fourth Amendment. . . . Construing the facts in plaintiff's favor, there is nothing to suggest that Garcia was justified in using force sufficient to cause the injury alleged: a reasonable officer would know that he should not twist the arm of a non-combative, fifty-five year old woman with force sufficient to tear a ligament and cause permanent injury.").

Threlkeld v. White Castle Systems,Inc., 201 F. Supp.2d 834, 841, 842 (N.D. Ill. 2002) ("Although the Seventh Circuit has not specifically addressed the viability of an excessive force claim for tight handcuffing, other circuit courts have recognized such a claim. [citing cases] A reasonable jury could conclude here that the Officers placed the handcuffs tighter than was reasonably necessary under the circumstances, and that their indifference to Ms. Threlkeld's complaints led to long-term injuries to her wrists. The Officers argue that, even if Ms. Threlkeld can make out a claim for excessive force, they are entitled to qualified immunity. . . .It is Ms. Threlkeld's burden to show that the right not to be handcuffed so tight that it causes lasting injury was clearly established at the time of her arrest, and she may do so by (1) pointing to a closely analogous case that established the right to be free from the type of force the police officers used on [her], or (2) showing that the force was so plainly excessive that, as an objective matter, the police officers would have been on notice that they were violating the Fourth Amendment. . . . Ms. Threlkeld points to no closely analogous case, but I must use my full knowledge of relevant precedents. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). My own research uncovered no cases from this circuit or the Supreme Court that are on all fours with the facts of Ms. Threlkeld's claim, and the cases from the Ninth and Sixth Circuits involved more egregious conduct by the police officers than is evident from the record here. The question is thus whether the Officers should have known, objectively, that they were putting the handcuffs on Ms. Threlkeld so tightly that they would cut into her skin and cause permanent damage . . . . However, too little is known, on this record, about the type of training that the Officers receive in handcuffing, and about the specific circumstances of the handcuffing, to conclude that the Officers' behavior was reasonable as a matter of law in light of the minimal degree of harm and risk of flight presented by Ms. Threlkeld at the time. . . Where '[k]ey facts [and circumstances] are unknown and disputed,' denial of summary judgment on the question of qualified immunity is proper.").

Estate of Thurman v. City of Milwaukee, 197 F. Supp.2d 1141, 1151 (E.D.Wis. 2002) ("In the present case the question of whether Miller was on notice that his conduct was unreasonable depends on the resolution of factual issues that are presently disputed. Taking the facts in the light most favorable to plaintiffs, Miller is not entitled to qualified immunity. As an objective matter, on August 3, 1996, a reasonable police officer would have known that it was unreasonable to precipitate a physical confrontation with a nonviolent and unarmed offender without calling for backup, without identifying himself as an officer, and with the intent to physically harm the offender. Qualified immunity is not designed to shield from civil liability the plainly incompetent. . . If Miller committed the acts alleged by plaintiffs his conduct may well fall into this category. Thus, summary judgment based on qualified immunity is inappropriate.").

Campbell v. Brizendine, No. IP 00-1443-C-B/S, 2001 WL 1399517, at *5 (S.D. Ind. Nov. 7, 2001)(not reported) ("Although the Seventh Circuit has noted that the Fourth Amendment protection against excessive force has long been clearly established, . . . Plaintiff has not offered evidence that Defendant should have been on notice that his conduct constituted excessive force, either by virtue of a closely analogous case or by the egregious nature of his actions.").

Palma v. Edwards, No. 99 C 4896, 2001 WL 1104716, at *3 (N.D. Ill. Sept. 19, 2001)(not reported) ("This Court has held that summary judgment based on qualified immunity is not proper when the question of immunity turns on issues of disputed fact. . . The Defendant argues that a recent Supreme Court ruling holding that even when there is a question of fact, summary judgment may still be granted on qualified immunity grounds if the officer's mistake as to the facts or law which caused the violation was reasonable. [citing *Saucier*] However, this case is distinguishable from the present case given that the respondent did not suffer any injury whereas in this case, Mr. Palma is deceased as a result of the shooting. . . It has been established that the extent of the injury inflicted is one of the factors considered in determining when the use of excessive force may give rise to a claim under Section 1983. . . Even without distinguishing *Saucier*, it has been illustrated that Officer Edwards' belief was not reasonable viewing the facts in a light most favorable to the Plaintiff.").

EIGHTH CIRCUIT

White v. Jackson, 865 F.3d 1064, 1080-81 (8th Cir. 2017) ("Defendants argue that we should affirm the grant of qualified immunity because Matthews is unable to identify the defendants who performed these acts. Defendants are correct that '§ 1983 liability is personal.'. . To prevail on a § 1983 claim, a plaintiff must show each individual defendant's personal involvement in the alleged violation. . . That does not mean however that a § 1983 excessive force plaintiff must be able to personally identify his assailants to avoid summary judgment. . . Testimony of the officers on the scene, including that of Vinson and Bates, confirms that Vinson and Bates physically removed Matthews from the culvert. Patterson confirmed that he deployed pepper spray. Payne testified that he observed the arrest and yelled at Matthews to stop resisting. When Matthews was handcuffed, he sat up and leaned against Payne's leg. Payne helped Matthews up and brought him to the paramedics. This is sufficient evidence to identify Vinson, Bates, Patterson, and Payne as officers who personally participated in Matthews's arrest. While the officers and Matthews vehemently disagree about whether Matthews was resisting and the extent and reasonableness of the force applied, these fact disputes cannot be resolved on summary judgment. Therefore, the district court erred in granting these defendants qualified immunity.")

Ulrich v. Pope County, 715 F.3d 1054, 1059 (8th Cir. 2013) ("The probable cause standard inherently allows room for reasonable mistakes by a reasonable person, but the qualified immunity standard affords law enforcement officials an even wider berth for mistaken judgments 'by

protecting all but the plainly incompetent or those who knowingly violate the law.'. . We recognize this accommodation for reasonable error is necessary 'because officials should not err always on the side of caution because they fear being sued.'. .Notwithstanding the distinction between the two legal concepts, an analysis of arguable probable cause necessarily includes consideration of probable cause. In analyzing whether *arguable probable cause* exists in this case, we must determine whether Mitchell and Thesing's arrest of Ulrich was based on an objectively reasonable—even if mistaken—belief that the arrest was based in *probable cause.* . . . Drawing inferences in favor of Ulrich, while viewing the facts from the perspective of a reasonable officer, we conclude that the district court did not err in finding that Mitchell and Thesing were entitled to qualified immunity on Ulrich's Fourth Amendment claim")

Parks v. Pomeroy, 387 F.3d 949, 955-57 (8th Cir. 2004) ("In the present case, the issue of whether Pomeroy used objectively unreasonable force when he fatally shot Parks is a question of fact. . . .Accordingly, we lack interlocutory appellate jurisdiction to review the district court's conclusion that plaintiff may be able to prove as a matter of fact that Pomeroy's use of force was not objectively reasonable. . . . Therefore, when the facts are taken in the light most favorable to plaintiff for purposes of the 'initial inquiry' under *Saucier v. Katz*, . . . we must assume that the amount of force used by Pomeroy was unreasonable. . . . However, our inquiry does not end there. . . . we now ask–not whether plaintiff may be able to establish a constitutional violation–but, rather, whether she may be able to establish a violation of a constitutional right of which the contours were so defined at the time of the shooting that a reasonable officer in Pomeroy's position would have understood that what he was doing violated the law. . . .Stated differently, Pomeroy is entitled to qualified immunity even if he wrongly, but reasonably, believed his actions were lawful. . . . In the present case, even if we assume that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks's hand. As in *Nelson*, the physical struggle between Parks and Gottstein was hostile and intense, the circumstances were extremely volatile and potentially deadly, and the events were evolving rapidly. Therefore, notwithstanding plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon de novo review, that–given the state of the law at the time and the particular facts of this case–Pomeroy did not violate a clearly established constitutional right.").

Parks v. Pomeroy, 387 F.3d 949, 959 (8th Cir. 2004) (Colloton, J., concurring in the judgment) ("For essentially the reasons discussed by the court in its immunity analysis, . . . I conclude that the evidence, taken in the light most favorable to Mr. Parks, does not establish that this tragic situation involved a violation of the Fourth Amendment. Even assuming that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, the undisputed facts remain that Pomeroy heard Officer Gottstein yell that he thought Parks was reaching for Gottstein's gun earlier in the encounter, the gun remained within reach of Parks during the ongoing struggle with Gottstein, and Parks refused to acquiesce in commands that he cease what the court rightly describes as a 'hostile and intense' struggle. Given these 'extremely volatile and potentially deadly' circumstances, . . . the evidence taken in the light most favorable to Parks does not support

a conclusion that Pomeroy's use of force was objectively unreasonable. Accordingly, I concur in the judgment.").

Wilson v. City of Des Moines, 293 F.3d 447, 449 (8th Cir. 2002) ("We affirm the decision of the District Court [denying qualified immunity.] We do so primarily because differences in the two officers' testimony about what happened during the crucial last moments of their encounter with Mr. Mozee raise a genuine issue of material fact about the reasonableness of what the officers did. . . . Because of the internal discrepancies and variations in the officers' testimony, among other things, there remain factual issues in dispute that prohibit a grant of summary judgment. The current record does not conclusively establish the reasonableness of the officers' actions or beliefs.").

Sinclair v. City of Des Moines, 268 F.3d 594, 596 (8th Cir. 2001) (per curiam) ("The district court properly granted summary judgment to the officers after considering the qualified immunity question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *See Saucier v. Katz,* 121 S.Ct. 2151, 2156 (2001) (holding that in excessive force cases, the question of qualified immunity must be the initial inquiry and, in resolving this question, the district court must specifically consider the facts alleged). Here the district court properly concluded that no constitutional or statutory right exists that would prohibit a police officer from using deadly force when faced with an apparently loaded weapon.").

Johnston v. Dek , No. 8:00CV324, 2002 WL 803368, at *3, *4 (D. Neb. Jan. 25, 2002) (not reported) ("The *Saucier* two-step analysis for qualified immunity claims does not assist in the resolution of this particular claim, because there are material facts remaining in dispute that must be decided by the trier of fact. Despite the Supreme Court's enthusiasm for ruling on the issue of qualified immunity early in the proceedings, . . . the Plaintiff's submission in opposition to the Defendant's Motion for Summary Judgment makes that impossible. Like the circumstances contemplated in Justice Ginsburg's concurring opinion in *Saucier,* this case 'turns on which of two conflicting stories best captures what happened on the street.' . . . At that crucial moment when Dek decided to shoot Johnston, the parties' sworn statements of what happened are diametrically opposed. Johnston states that he had stopped; his empty hands were in the air; and then Dek shot him. Dek and a witness state that Johnston never stopped his flight from Dek even after being ordered to stop; Johnston held a gun in his right hand; the gun was pointed in Dek's general direction; and the gun remained in Johnston's hand until Dek shot Johnston. These disputed facts are material facts because they are outcome-determinative. Moreover, the issues relating to the material facts are genuine. This Court cannot say that no reasonable jury could return a verdict in favor of Johnston.").

NINTH CIRCUIT

Brooks v. Clark Cty., 828 F.3d 910, 920-22 (9th Cir. 2016) ("[A]ssuming the allegations Brooks has made are true, was it 'beyond debate,' at the time Keener seized him, that the amount of force Keener employed violated the Constitution? If the answer is no—if Keener's actions did not *clearly* violate Brooks's rights under the Fourth Amendment—then Keener is entitled to qualified immunity, and his motion to dismiss must be granted. . . . Given the standard governing excessive force claims, the allegations in Brooks's complaint are not sufficient to survive a qualified immunity defense even at the motion to dismiss stage. Assuming all of Brooks's allegations are true, it still cannot be said that Keener's use of force was *indisputably* unconstitutional. That is, a reasonable marshal could have believed that the Fourth Amendment permitted him to use the amount of force Brooks claims Keener employed, even if the circumstances were exactly as Brooks describes. For that reason alone, Keener is entitled to qualified immunity, and the district court should have granted his motion to dismiss. . . . The district court concluded otherwise, but its analysis betrays a fundamental misunderstanding about how to assess a qualified immunity defense to an excessive force claim. In denying Keener's motion to dismiss based on qualified immunity, the district court reasoned that 'Keener's conduct could be inferred to have violated objective standards of reasonableness regarding the removal of Mr. Brooks from the courtroom.' Brooks takes the same tack, arguing simply that 'the well-pled allegations ... set forth that Keener's actions were not objectively reasonable.' Those propositions may be true, but they are not enough to defeat Keener's qualified immunity defense. The district court and Brooks's analysis says only that, on the merits, Keener's conduct may have violated the Fourth Amendment. But, crucially, they both have failed to consider the distinct question discussed above: whether, based on the allegations in the complaint, Keener's conduct could be inferred to have violated a 'clearly established' right. The answer is no, because as we have explained, the allegations in the complaint do not plausibly place the illegality of Keener's conduct 'beyond debate.' In other words, the district court here committed the same error the Supreme Court corrected in *Saucier v. Katz*: equating the excessive force question on the merits (did Keener employ an objectively unreasonable amount of force?) with the qualified immunity question (did existing law remove any doubt that such force was objectively unreasonable?). The two questions are not the same. . . . The Court has made clear that to defeat qualified immunity, Brooks must not only allege that Keener used an unreasonable amount of force, but also that *no reasonable officer could disagree* that Keener used an unreasonable amount of force. . . . As we have already discussed, Brooks's allegations do not suffice to overcome Keener's qualified immunity defense. The complaint should have been dismissed on those grounds.")

Menotti v. City of Seattle, 409 F.3d 1113, 1154 (9th Cir. 2005) ("The question before us then becomes whether a reasonable officer in Smith's position would have understood that he could not lawfully seize Skove's sign absent an arrest of Skove or exigent circumstances. We have rejected the position that a seizure could be made based on probable cause to arrest, when the arrest was not completed. Moreover, viewing the evidence in the light most favorable to Skove, we cannot say that the circumstances were indisputably exigent at the time and place Officer Smith confronted Skove and seized his sign. Because the exceptions to the Fourth Amendment's warrant requirement have been categorically defined, and because 'in the ordinary case, seizures

of personal property are unreasonable within the meaning of the Fourth Amendment ... unless ... accomplished pursuant to a judicial warrant issued by a neutral and detached magistrate after finding probable cause,'. . . we hold that a reasonable officer in Smith's position would have understood that his warrantless seizure of Skove's sign without an arrest and without exigency offended the guarantees of the Fourth Amendment.").

Carter v. Denison, No. 03-16509, 2004 WL 1895018, at *1 (9th Cir. Aug. 24, 2004) (not published) ("In determining that genuine issues of fact precluded summary judgment on the police officers' qualified immunity claim, the district court improperly collapsed the reasonableness element of the qualified immunity analysis with the reasonableness element of the excessive force analysis. The two issues are separate; the district court may not simply stop with a determination that a triable issue of fact exists on an element of the plaintiff's case, but must assume those facts are true and examine the legal issue of qualified immunity. . . . The officers were confronted with a nearly naked, clearly delusional person, wielding first a knife and then a rock, and who continuously flailed her arms and legs to resist being subdued. The officers' use of oleoresin capsicum spray, and their need to physically hold Parker down while she was being handcuffed and ankle cuffed, does not establish a Fourth-Amendment violation. The summary judgment record is clear that force was used only while Parker actively resisted, and used only while she posed an immediate threat to the safety of the officers. . . . In addition, a reasonable police officer confronting a nearly naked, delirious, and armed suspect, would reasonably believe that using force to subdue the individual and prevent injury to themselves and the public was justified. A reasonable officer would have reasonably believed that using oleoresin capsicum and pinning the suspect down while her hands and legs were being immobilized was lawful.").

Beier v. City of Lewiston, 354 F.3d 1058, 1071, 1072 (9th Cir. 2004) ("Finally, the officers argue that their arrest of Beier was reasonable given the lack of case law clearly establishing the distinction between prohibitions on 'visitation' and 'contact.' The relevant question at this stage of the qualified immunity analysis, however, is whether a reasonable officer could have believed Beier's arrest was supported by probable cause, 'in light of clearly established law and the information the [arresting] officers possessed.'. . [The officers] did not know the terms of the protection order, because they made no attempt to learn them. The officers are not entitled to qualified immunity on the basis of a mistaken interpretation of the order, even a reasonable one, that they did not actually make. To shift the focus of the inquiry, as the officers would have us do, away from their actual actions to hypothetical decisions they would have faced had they behaved reasonably cannot be reconciled with the policy precepts underlying the qualified immunity doctrine. The qualified immunity doctrine rests on a balance between, on the one hand, society's interest in promoting public officials' observance of citizens' constitutional rights and, on the other, society's interest in assuring that public officials carry out their duties and thereby advance the public good. Without some room to make mistaken but reasonable decisions, the fear of making an unforeseeable error and thereby incurring liability could dissuade public officials from pursuing their duties with vigor. Police officers charged with protecting public safety, for example, could become bystanders rather than law enforcers whenever faced with any but the most clear

circumstances implicating constitutional rights. . . Under the incentive structure thus embodied in the qualified immunity doctrine, it is of no moment that the officers might have reached the same outcome had they read the protection order. The officers' error in arresting Beier without learning the terms of the protection order was, for the reasons already surveyed, not one a reasonably competent officer should make. Assuming that it would have been reasonable for an officer who did read or otherwise learn the terms of the protection order to conclude that it had been violated, which we doubt, no officer faced with that down-the-line decision would be dissuaded from acting in accord with his or her reasonable understanding of the document because officers who did not read the document at all were liable in damages for failing to do so. Conversely, knowing they will be liable if they do not take the trouble to ascertain the terms of a protection order, officers will be encouraged to do so; while some may read such orders erroneously but reasonably, most, presumably, will interpret the terms properly, with the result that citizens' constitutional rights will be protected. To accord qualified immunity here because the officers in this case or other officers might have made a different, reasonable mistake with the same outcome would be to encourage police officers to arrest citizens without ascertaining the applicable legal prohibitions, thereby compromising the protection of the constitutional rights of citizens, with no countervailing benefit in advancing the public good. . . .We conclude that the officers could not have reasonably believed that Beier's arrest complied with the Fourth Amendment.Any reasonably competent officer would have ascertained the terms of the protection order before arresting Beier for failing to comply with it. Accordingly, the officers are not entitled to qualified immunity.").

Wilkins v. City of Oakland, 350 F.3d 949, 954, 955 (9th Cir. 2003) ("In *Saucier,* the Supreme Court explained that this rule is applied in the first stage of the qualified immunity analysis by inquiring whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted. . . That is, the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions, and there is no Fourth Amendment violation if the officer can satisfy this standard. . . The second step of the analysis, which the court reaches only if it determines that the alleged conduct violates a clearly-established constitutional right, is to inquire whether the officer was reasonable in his belief that his conduct did not violate the Constitution. This step, in contrast to the first, is an inquiry into the reasonableness of the officer's belief in the *legality* of his actions. . . . Even if his actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity. . . .Scarrott and Koponen could not have been reasonably mistaken as to the legality of their actions had they realized that Wilkins was a police officer. As a result, the officers' entitlement to summary judgment is determined solely by the application of the first stage of the qualified immunity analysis. The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to Officer Wilkins' status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury. We emphasize that our decision here does not affirm a reflexive denial of summary judgment whenever a material issue of fact remains to be resolved, a practice which the Supreme Court rejected in *Saucier.* Even applying the step-

by-step qualified immunity analysis outlined in *Saucier*, there is no question whether the officers' actions in this case violated clearly established law. They did. The only question for resolution is whether their belief in the necessity of their actions was objectively reasonable. That is, was it reasonable for them not to understand that the person they were shooting was another police officer? Because the answer to that question depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by a jury.").

Drummond v. City of Anaheim, 343 F.3d 1052, 1061, 1062 (9th Cir.2003) ("Viewing the evidence in the light most favorable to Drummond, we conclude that the officers had 'fair warning' that the force they used was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts. The officers allegedly crushed Drummond against the ground by pressing their weight on his neck and torso, and continuing to do so despite his repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance. *Any* reasonable officer should have known that such conduct constituted the use of excessive force. Moreover, not only did local newspaper publicity less than two months before the incident publicize cases of compression asphyxia, . . . and not only did prior federal cases describe the dangers of pressure on a prone, bound, and agitated detainee, . . . but the officers received training from their *own police department* explaining specifically that 'when one or more[officers] are kneeling on a subject's back or neck to restrain him, compression asphyxia can result [At]hat may be a precipitating factor in causing death."' Anaheim's training materials are relevant not only to whether the force employed in this case was objectively unreasonable, . . .but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable. The force allegedly employed by the officers was certainly not warranted, and reasonable officers would clearly have known that it was not. We need no federal case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case.").

Graves v. City of Coeur D'Alene, 339 F.3d 828, 847, 848 & n.25 (9th Cir. 2003) ("Though we above concluded that Dixon relied too heavily on the context of the hostile and volatile parade, rather than the individualized factors, we had the luxury of making our decision only after thoroughly reviewing the relevant legal authorities, and after applying the law to the facts removed from the intense anxiety to safeguard the public that Dixon and law enforcement officials felt at the Aryan Nations parade. Dixon did not have this same luxury. Police officers rarely, if ever, can objectively remove themselves from the immediate threats that they face, and yet they may have the obligation to risk their own lives to protect the public, while at the same time traversing difficult contours of constitutional law. . . . Given the volatile nature of the parade and the potential for grave injury that Dixon sought to interdict, we conclude that a reasonable officer in Dixon's situation could have believed that those circumstances carried enough weight to create probable cause when there was at least some individualized suspicion. We hold that Dixon is entitled to qualified immunity, because the law did not provide him clear guidance as to how much weight

he could give the explosively hostile circumstances of the Nazi parade in making his probable cause assessment. In the extraordinary circumstances of this case, Dixon made a reasonable mistake. . . . It is not inconsistent to hold that no reasonable jury could find probable cause but that Dixon is nonetheless entitled to qualified immunity. This is so because of the difference in the applicable standards. . . .The qualified immunity defense recognizes that officers make probable cause assessments in the field under pressure and therefore affords the officer leeway, permitting a reasonable mistake without resulting individual liability of the officer, when the law is not clearly established. . . Though both Dixon and the jury were incorrect to find probable cause to search Crowell's backpack, Dixon is nevertheless entitled to qualified immunity as the application of the probable cause requirement in context was not clearly established.").

Santos v. Gates, 287 F.3d 846, 855 n.12 (9th Cir. 2002) ("In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-part test for qualified immunity in excessive force cases. First, we examine whether a Fourth Amendment violation occurred; second, we look to see whether the officers violated clearly established law. The issue of qualified immunity was not raised in the Rule 50(a) motion in the trial court or in the parties' briefs on appeal. However, at the request of one of our members, the panel requested, sua sponte, that the parties be prepared to discuss the issue at oral argument and they did so. We therefore have the authority to decide that issue. Nevertheless, it is premature to do so at this time, because whether the officers may be said to have made a 'reasonable mistake' of fact or law, *Katz,* 533 U.S. at 205, may depend on the jury's resolution of disputed facts and the inferences it draws therefrom. Until the jury makes those decisions, we cannot know, for example, how much force was used, and, thus, whether a reasonable officer could have mistakenly believed that the use of that degree of force was lawful. While it does not affect our analysis, we should reiterate that contrary to the analytical structure stated to be applicable at the outset of the dissent, the appeal as presented by the defendants raises only the pure excessive force issue and not a qualified immunity claim.").

Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1129-31 (9th Cir. 2002) (on remand from Supreme Court after *Saucier*) ("Prior to the Supreme Court's decision in *Saucier v. Katz*, we had held that 'the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.' . . In *Saucier*, the Supreme Court instructs that these inquiries are distinct. . . . . We concluded in our prior opinion that, viewing the evidence in the light most favorable to the protestors, a rational juror could conclude that the use of pepper spray against the protestors constituted excessive force and that Lewis and Philip were liable for the protestors' unconstitutional injury. . . This analysis is consistent with *Saucier*'s first inquiry: viewing the facts in the light most favorable to the protestors, Lewis and Philip violated the protestors' Fourth Amendment right to be free from excessive force. Having answered *Saucier*'s first question in the affirmative, we turn to *Saucier*'s second inquiry, and conclude that it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances. . . . Defendants' repeated use of pepper spray was . . .clearly unreasonable. As we recently concluded, the use of pepper spray 'may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an

arrestee surrenders and is rendered helpless, *any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force*.' *LaLonde v. County of Riverside,* 204 F.3d 947, 961 (9th Cir.2000) (emphasis supplied). Because the officers had control over the protestors it would have been clear to any reasonable officer that it was unnecessary to use pepper spray to bring them under control, and even *less* necessary to *repeatedly* use pepper spray against the protestors when they refused to release from the 'black bears.' . . . . We are not prevented from denying defendants qualified immunity merely because no prior case prohibits the use of the precise force at issue in this case. In the first instance, the circumstances of *LaLonde*, although not identical to those in this case, are 'not distinguishable in a fair way from the facts presented in the case at hand' such that their results should be different. . . In addition, regional and state-wide police practice and protocol clearly suggest that using pepper spray against nonviolent protestors is excessive. The law regarding a police officer's use of force against a passive individual was sufficiently clear at the time of the events at issue in this case that the defendants cannot claim qualified immunity on the ground that they made a reasonable mistake of law. . . Moreover, in requiring that the law put a government officer 'on notice that his conduct would be clearly unlawful' before he could be held liable for violating the Constitution, the Supreme Court emphasized that it was not insisting that 'courts must have agreed upon the precise formulation of the standard.' . . As we recently noted, a law can be violated 'notwithstanding the absence of direct precedent ... [o]therwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.' [citing *Deorle*] Viewing the facts in the light most favorable to the protestors, we conclude that Philip and Lewis are not entitled to qualified immunity because the use of pepper spray on the protestors' eyes and faces was plainly in excess of the force necessary under the circumstances, and no reasonable officer could have concluded otherwise.")

Robinson v. Solano County, 278 F.3d 1007, 1015, 1016 (9th Cir. 2002) (en banc) ("We agree with the Fifth Circuit that '[a] police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 claim against him.' [citing *Petta v. Rivera,* 143 F.3d 895, 905 (5th Cir.1998)] . . . . The development of the law with respect to arrests and detentions now allows us to recognize as a general principle that pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger. . . The contours of that right were not at all clear in 1995, however. . . . We therefore conclude that while the facts, taken in a light most favorable to the plaintiff, would establish a violation of the Fourth Amendment, the law was not sufficiently established in this circuit in 1995 to override the officers' claim of qualified immunity. Nor was it established in other circuits. We therefore affirm the district court's dismissal of the Fourth Amendment claim on qualified immunity grounds.").

Clark v. City of Reno, No. 99-17346, 2001 WL 1507266, at *4 (9th Cir. Nov. 27, 2001) (Reinhardt, J., concurring in part and dissenting in part) (unpublished) ("Any error of material

fact or law the officers may have made with respect to the unlawful arrests was clearly not a reasonable error under *Katz.* When it came to *Katz*'s second prong, the panel majority simply blinked, perhaps deterred by the byzantine analytical contortions in which the Supreme Court compels lower courts to engage in qualified immunity cases of the type before us. All the majority accomplishes by its failure fully to resolve the qualified immunity issue is to force the parties to undergo a wholly unnecessary trial on the issue–a trial that can lead to only one legally sustainable result. Having held on this appeal that the detentions constituted unlawful arrests, and that the law in that respect was clearly established, it is inconceivable that (barring some circumstances not presented by the record before us) we could uphold a determination that the officers' failure to comply with well-established law was reasonable.").

Jackson v. City of Bremerton, 268 F.3d 646, 651-53 & n.5 (9th Cir. 2001) ("After *Saucier,* a qualified immunity analysis must begin with this threshold question: based upon the facts taken in the light most favorable to the party asserting the injury, did the officer's conduct violate a constitutional right? *Id.* at 2156. If no constitutional right was violated, the court need not inquire further. *Id.* If, however, a constitutional violation occurred, the second inquiry is whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right . . . . In this case, Jackson asserts: 1) she was sprayed with a chemical irritant prior to her arrest; 2) three officers pushed her to the ground to handcuff her and roughly pulled her up to her feet during her arrest; [footnote omitted] and 3) an officer 'rolled up the windows and turned up the engine in the July heat in order to Aadjust her attitude."' Assuming Jackson's version of the facts is correct, the nature and quality of the alleged intrusions were minimal. . . . On balance, applying the *Graham* analysis, we conclude that the use of force was not excessive in this case. Because no Fourth Amendment violation occurred, the district court properly granted summary judgment in the officers' favor. . . . In light of our holding, we need not reach the second step of *Saucier's* qualified immunity inquiry. However, were we to conclude that the force used was excessive, Jackson has not shown that the use of chemical irritants in overcoming resistance to a lawful arrest violated a clearly established constitutional right. A reasonable police officer could properly believe that the use of this level of force would not violate a clearly established constitutional right.").

Deorle v. Rutherford, 272 F.3d 1272, 1285, 1286 (9th Cir. 2001) (second amended opinion) ("Every police officer should know that it is objectively unreasonable to shoot–even with lead shot wrapped in a cloth case–an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and had not assaulted anyone; in addition, a team of negotiators essential to resolving such situations was en route. Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly

established. . . Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. . . . No reasonable officer could have believed that Rutherford's action in shooting Deorle with the 'less lethal' lead-filled beanbag round was appropriate or lawful. To the contrary, 'it would be clear to a reasonable officer that [Rutherford's] conduct was unlawful.' *Katz*, 121 S.Ct. at 2158. It does not matter that no case of this court directly addresses the use of such weapons; we have held that '[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.' *Mendoza*, 27 F.3d at 1362. Given all the circumstances, the error in judgment, such as it was, does not constitute a 'reasonable mistake' of fact or law on Rutherford's part. Viewing the facts in the light most favorable to the plaintiff, Rutherford was not entitled to qualified immunity for his use of excessive force.").

TENTH CIRCUIT

Marshall v. Columbia Lea Regional Hospital (Marshall II), 474 F.3d 733, 740-46 (10th Cir. 2007) (no qualified immunity for police officers for taking nonconsensual warrantless blood test for misdemeanor offense of driving under the influence in violation of New Mexico law; clearly established that such blood test fell outside exigent circumstances exception to Fourth Amendment's warrant requirement where driver had submitted to two breathalyzer tests, which were negative).

Denver Justice and Peace Committee, Inc. v. City of Golden, 405 F.3d 923, 931, 932 (10th Cir. 2005) ("In sum, we hold that *Muehler*, *Summers*, and *Ritchie* do not support an officer's categorical authority to conduct a pat-down search of any person who seeks to enter an area where a search warrant is being executed. This is not to say such a search would never be permitted. . . . We hold that the law was sufficiently clear at the time Ortiz conducted the pat-down search of Espinosa that Ortiz may not claim qualified immunity. . . . The Supreme Court has articulated narrow grounds that permit police officers to detain individuals who are present during the execution of a search warrant, without running afoul of the Fourth Amendment. A detention, however, remains distinct from a search. In addition, based on the allegations of Espinosa's complaint, it would have been clear to the officers executing the search warrant at the DJPC office that the circumstances of that search did not implicate the apprehension of danger or the presence of contraband that may have permitted detention of persons present at the scene, pursuant to *Summers*. Rather, the circumstances here fall squarely into a factual pattern where a pat-down search of an individual would be prohibited absent reasonable, individualized suspicion. *See Ybarra*, *Sporleder* and *Ward*. Officer Ortiz therefore cannot prevail on his defense of qualified immunity on the basis of the circumstances he has averred.").

Trusdale v. Bell, No. 02-6398, 2003 WL 23033375, at *3 (10th Cir. Dec. 30, 2003) (unpublished) ("Although Officer Bell's perception of the threat turns out, in hindsight, to have

been tragically mistaken, the objective reasonableness of his actions must be viewed from the 'on-scene perspective.' . . So viewed, the undisputed evidence in this case supports the objective reasonableness of his actions. In advance of entry into Mr. Trusdale's home, Officer Bell was briefed that Mr. Trusdale 'was a homicide suspect with a violent criminal history,' 'was known to carry a firearm at all times, even from room to room in his residence,' and that he had 'shot a police officer in Kansas.'. . Officer Bell was told that the suspects were heavily armed and were conducting a methamphetamine laboratory. The warrant Officer Bell was executing was a no-knock, high-risk warrant. After entering the premises, Officer Bell proceeded to the doorway of a dimly lit bedroom, where he saw Mr. Trusdale. The officer believed Mr. Trusdale was advancing on him, but this is disputed. Mr. Trusdale lifted his right arm; he was carrying an object that appeared to Officer Bell to be a gun. Officer Bell fired, either twice or thrice. Ultimately, it turned out that Mr. Trusdale was not carrying a gun, but only a Bic cigarette lighter. The legal question, however, is not whether the Officer was mistaken, but whether his actions were objectively reasonable in light of what he perceived at the time. We agree with the district court that the undisputed evidence supports summary judgment in favor of the officer. . . . The district court found that in the split second before Officer Bell fired it would not necessarily be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Attempting to refute the reasonableness of Officer Bell's actions, Mr. Trusdale points to several disputed factual issues. The question is whether any of those disputed issues is material. Mr. Trusdale states that he was in prison at the time of the homicide and therefore could not be a suspect, that he was not in possession of any firearms except for a wall-mounted shotgun, and that he had never shot a police officer in Kansas. These claims are beside the point, however. Officer Bell may have been misinformed, but he was reasonable to act on the basis of the information provided to him.").

Carr v. Castle, 337 F.3d 1221, 1226, 1227 (10th Cir. 2003) ("Here the Officers do not argue that the law regarding the use of deadly force in violation of an individual's right against unjust seizures was not clearly established at the time of the incident. Rather they contend that 'the use of deadly force against an individual who is running at an officer armed with a piece of concrete is not unconstitutional and certainly was not prohibited by clearly existing law.' But that does violence to the teaching of *Saucier* and like cases, for it credits the Officers' version of events rather than–as is proper–the factual matrix most favorable to Carr.").

Stuart v. Jackson, Nos. 00-1295, 00-1307, 2001 WL 1600722, at *8 & n.5 (10th Cir. Dec. 17, 2001) (not published) ("In contrast to the *Graham* constitutional violation analysis, which focuses on the reasonableness of the official's actions, the qualified immunity analysis probes whether the officer's belief in the state of the law was reasonable . . . . In so holding, the Court in *Saucier* rejected this court's precedents which conflated the Fourth Amendment and qualified immunity inquiries.").

Holland v. Harrington, 268 F.3d 1169, 1196, 1197 (10th Cir. 2001) ("As a general proposition, the law that a search or seizure must be objectively 'reasonable' under all the circumstances has been 'clearly established' for a long time . . . . Here, however, the inquiry as to clearly established

rights is more specific: 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' [citing *Saucier*] . . . . How do we evaluate whether a legal mistake is reasonable? A mistake of law may be 'reasonable' where the circumstances 'disclose substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did.' . . . We can find no substantial grounds for a reasonable officer to conclude that there was legitimate justification for continuing to hold the young people outside the residence directly at gunpoint after they had completely submitted to the SWAT deputies' initial show of force, or for training a firearm directly upon a four-year-old child at any time during the operation. Davis' supervision of the SWAT deputies during the raid furnishes the affirmative link between this violation and Davis' conduct; it appears uncontroverted that the SWAT deputies continued to point their weapons at the persons found on the Heflin property until Davis directed them to stop doing so at the conclusion of the search. This violation does not reflect a reasonable mistake of law for which Davis should enjoy the benefits of qualified immunity. This was an invasion of a clearly established constitutional right, and the officers' mistake as to what the law requires was unreasonable under all of the circumstances.").

ELEVENTH CIRCUIT

Black v. Wigington, 811 F.3d 1259, 1267-69 (11th Cir. 2016) ("The applications for the arrest warrants listed the marijuana, drug paraphernalia, and clothing that the officers found in the Blacks' trailer. This evidence suggested that the Blacks had committed the alleged crimes. The Blacks argue that the evidence from their trailer could not provide probable cause because it was obtained during an illegal search, but they wrongly assume that the exclusionary rule applies in this civil case. In a *criminal* case, a warrant based on evidence discovered during an illegal search might be invalid as 'fruit of the poisonous tree.'. . The fruit-of-the-poisonous-tree doctrine is a component of the exclusionary rule. . . But the exclusionary rule is not a 'personal constitutional right' or a requirement of the Fourth Amendment; it is a 'judicially created remedy' that is meant to prevent violations of the Fourth Amendment 'through its deterrent effect.'. . .The Supreme Court has never held that the benefits of the exclusionary rule outweigh its costs in a civil case. . . And our predecessor court has held that the exclusionary rule did not apply in a civil suit against police officers, . . . although it did not completely foreclose the possibility that the rule could apply in some contexts . . . . Two of our sister circuits, however, have held that the exclusionary rule and the fruit-of-the-poisonous-tree doctrine never apply in a civil suit against police officers. *See Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir.1999); *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir.1997). We now join our sister circuits and hold that the exclusionary rule does not apply in a civil suit against police officers. The cost of applying the exclusionary rule in this context is significant: officers could be forced to pay damages based on an overly truncated version of the evidence. And the deterrence benefits are miniscule. Police officers are already deterred from violating the Fourth Amendment because the evidence that they find during an illegal search or seizure cannot be used in a criminal prosecution—the primary 'concern and duty' of the police. . . Moreover, plaintiffs can still sue a police officer for the illegal search or seizure, regardless whether the officers can rely on illegally obtained evidence to defend themselves against other

types of claims. This threat of civil liability will adequately deter police officers from violating the Fourth Amendment, whether or not the exclusionary rule applies in civil cases. *See Hudson v. Michigan*, 547 U.S. 586, 597–98, 126 S.Ct. 2159, 2167–68 (2006). The 'additional marginal deterrence' of applying the exclusionary rule in this context 'would not outweigh the societal cost of excluding relevant evidence and decreasing the possibility of obtaining accurate factual findings.'. . . Accordingly, the officers can rely on the evidence that they found in the Blacks' trailer to prove that the arrest warrants were supported by probable cause. . . . The Blacks' claim of malicious prosecution fails because Deputy Kain, Deputy Stamatellos, and Investigator Wilson are entitled to qualified immunity. The evidence from the Blacks' trailer provided probable cause for the arrest warrants. It does not matter whether that evidence was discovered in compliance with the Fourth Amendment because the exclusionary rule does not apply in a civil suit against police officers.") [*See also* ***Campbell v. Casey***, 166 F.Supp.3d 144 (D. Mass. 2016)]

Skop v. City of Atlanta, 485 F.3d 1130, 1144 (11th Cir. 2007) ("When an officer plainly violates the legal rights of the people he serves, and when a reasonable officer in his position had fair warning that his conduct was unlawful, § 1983 suits exist to provide a vehicle for recourse. In a false arrest case such as this one, qualified immunity protects the police from such suits, but only up to the line defined by the arguable probable cause standard–whether 'reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] could have believed that probable cause existed to arrest.'. . Where, as here, the resolution of disputed critical facts determines on which side of this line the officer's conduct fell, summary judgment is inappropriate. Accordingly, we are constrained to reverse the district court's entry of final summary judgment for Brown and remand for further proceedings consistent with this opinion.").

Bashir v. Rockdale County, Georgia, 445 F.3d 1323, 1331 (11th Cir. 2006) ("We conclude that, under the law existing at the time, it was clearly established the deputies' conduct violated the Fourth Amendment. A reasonable law enforcement officer faced with these circumstances would have known he could not enter the home and arrest Bashir without a warrant, exigent circumstances, or consent. That doing so would offend the Fourth Amendment was clearly established by the precedent recounted above, including *Payton* . . . which sets forth the law with 'obvious clarity,' *Vinyard*, 311 F.3d at 1351. Moreover, *Gonzalez*, *supra*, is not 'distinguishable in a fair way' from the facts of this case. . . *Gonzalez* clearly established a reasonable officer in Deputy Davis's position could not infer consent from Bashir's conduct. Accordingly, Deputy Davis and the unnamed deputies are not entitled to qualified immunity, and the district court erred in granting summary judgment in their favor on Bashir's unlawful claim."). [*See also* ***Olson v. Stewart***, 737 F. App'x 438, ___ (11th Cir. 2018) ("[T]he District Court did rule that, even if Deputy Whitfield is entitled to qualified immunity on Ms. Olson's separately-pled excessive force claim, his use of force would remain relevant to the amount of damages Ms. Olson might recover on her false arrest claims. This comports with our Circuit precedent. *See Bashir v. Rockdale Cty.*, 445 F.3d 1323, 1332 (11th Cir. 2006) ("[T]he damages recoverable on an unlawful arrest claim include damages suffered because of the use of force in effecting the arrest.") . . .The District Court correctly denied qualified immunity to Deputy Whitfield on Ms. Olson's false arrest claims and

correctly ruled that Ms. Olson may recover damages for the force Deputy Whitfield used during her arrest.")]

Crosby v. Monroe County, 394 F.3d 1328, 1333, 1334 (11th Cir. 2004) ("In making an excessive force inquiry, we are not to view the matter as judges from the comfort and safety of our chambers, fearful of nothing more threatening than the occasional paper cut as we read a cold record accounting of what turned out to be the facts. We must see the situation through the eyes of the officer on the scene who is hampered by incomplete information and forced to make a split-second decision between action and inaction in circumstances where inaction could prove fatal. . . From that perspective, a reasonable officer could have believed that the force applied was reasonably necessary in the situation Deputy Terry found himself in that night. The circumstances were fraught with danger for the officers. Multiple shots had been fired, Crosby's neighbor was in fear for his life, and after the officers arrived on the scene a shot was fired from the direction of Crosby's house. As they approached, the officers saw Crosby carrying a shotgun and heard the sound of him ejecting a shell from the weapon. . . . Though Crosby was on the ground at the time Deputy Terry put his foot on Crosby's face, he had not yet been handcuffed. For all the officers knew, Crosby had other weapons concealed on his person–as it turned out, he actually did have another weapon on him–and raising his head to ask why he was being arrested could have been an attempt by Crosby to distract Terry and a prelude to actual resistance. Given the circumstances and the risks inherent in apprehending any suspect, an officer in Terry's position reasonably could have concluded that it was imperative to keep Crosby, who had not been entirely cooperative, completely flat and immobile until he had been successfully handcuffed.")**.**

Kingsland v. City of Miami, 382 F.3d 1220, 1233, 1234 (11th Cir. 2004) ("Viewed in the light most favorable to Kingsland, the facts support a conclusion that the arrest affidavit included recklessly or deliberately false statements that are material to a finding of arguable probable cause. If the defendants fabricated or unreasonably disregarded certain pieces of evidence to establish probable cause or arguable probable cause, as alleged, reasonable officers in the same circumstances and possessing the same knowledge as the defendants could not have believed that probable cause existed to arrest the plaintiff. Because a jury question exists as to whether the defendants constructed evidence upon which to base Kingsland's arrest, the question whether arguable probable cause for the arrest existed is aptly suited for a jury. Qualified immunity is, as the term implies, qualified. It is not absolute. It contemplates instances in which a public official's actions are not protected. . . The principles behind qualified immunity would be rendered meaningless if such immunity could be invoked to shelter officers who, because of their own interests, allegedly flout the law, abuse their authority, and deliberately imperil those they are employed to serve and protect. In fact, if the plaintiff's version of the facts is true, the defendants' conduct is patently objectively unreasonable and no reasonable public official would contend that such conduct was lawful. . . . Viewed in the light most favorable to Kingsland, the evidence shows that the arresting officers in this case behaved in an objectively unreasonable fashion and were therefore not entitled to qualified immunity. Given the significance of the disputed issues of fact

here, qualified immunity from suit is effectively unavailable, even though after a full trial the officers may yet prevail on the merits. Consequently, her suit against the defendants on the false arrest claim may proceed.").

Garrett v. Athens-Clarke County, 378 F.3d 1274, 1280, 1281 (11th Cir. 2004) ("Plaintiff next argues that the fettering (whether highly dangerous or not) was unnecessary because of Irby's compliance after having been sprayed with OC spray. Plaintiff adds that the force was particularly excessive after Irby's compliance in the light of his extended struggle, head wound, and exposure to OC spray without decontamination. Reviewing the evidence before us, we see no constitutional violation. As we have noted, defendants do not use excessive force if they act in an 'objectively reasonable' manner in the light of the facts and circumstances before them. . . In context, the force used by defendants was within the range of reasonably proportionate responses to the need for force and was not excessive. The district court said that defendants used unconstitutionally excessive force against Irby because they fettered him after he was made compliant by the OC spray. We disagree. In analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story. . . . After considering all of plaintiff's arguments, we conclude that, as a matter of law, defendants did not violate Irby's Fourth Amendment right to be free from excessive force. Even so, out of an abundance of caution, we also conclude that qualified immunity would apply even if the defendants had violated Irby's rights: no controlling case law had settled the applicable law; and given the circumstances, defendants' acts were not so far beyond the hazy border between excessive and acceptable force that every objectively reasonable officer, facing the circumstances, would have known that the acts violated the pre-existing federal law.").

Storck v. City of Coral Springs, 354 F.3d 1307, 1317 & n.5 (11th Cir. 2003) ("Based on our review of the record, we have little trouble finding that McHugh had arguable probable cause to arrest Storck for violating ' 843.02. . . . The analysis of arguable probable cause is not concerned with what *Storck* thought or knew, but rather, what a reasonable officer knowing what Officer McHugh knew could have thought. . . . Moreover, even if Storck had presented sufficient facts to allege a violation of a constitutional right–and on this record Storck has failed to do so–here such a right was not clearly established.").

Carr v. Tatangelo, 338 F.3d 1259, 1270 (11th Cir. 2003) ("In determining whether the officers in this case are entitled to qualified immunity, we analyze the precise circumstances immediately preceding Carr's being shot and not the earlier surveillance decisions or the events following the shooting. Under the Fourth Amendment objective reasonableness standard applied to the officers' defense of themselves and a fellow officer, Officers Fortson, Tatangelo, and Mercer are entitled to qualified immunity on Carr's Fourth Amendment, seizure argument."[footnotes omitted]")**.**

McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1245& n.16 (11th Cir. 2003) (per curiam) ("Officer Welker had probable cause to believe that McCormick had committed a violent

felony when he saw the bleeding Capuano and good reason to believe McCormick still posed a threat of violence when he saw McCormick armed with the stick. Even assuming McCormick's version of events, Officer Welker's surprise use of pepper spray to subdue McCormick was proportionate to the potential threat and reasonable under the circumstances. . . . In the alternative, McCormick has not carried the burden of demonstrating that the law was clearly established that the surprise use of pepper spray on a violent felony suspect violated the Constitution. Officer Welker would still have the benefit of qualified immunity at summary judgment.").

Lee v. Ferraro, 284 F.3d 1188, 1198-1200 (11th Cir. 2002) ("Having concluded that Lee has made a sufficient showing of excessive force, the second step in the *Saucier* analysis requires us to determine whether Ferraro is nonetheless entitled to qualified immunity on the ground that the law had not clearly established at the time of the incident that such force was excessive. There are two ways for a party to show that the law clearly established that a particular amount of force was excessive. The first is to point to a 'materially similar case [that has] already decided that what the police officer was doing was unlawful.' . . . Because identifying factually similar cases may be difficult in the excessive force context, we have recognized a narrow exception also allowing parties to show 'that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.' . . . Under this test, the law is clearly established, and qualified immunity can be overcome, only if the standards set forth in *Graham* and our own case law 'inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful.' . . . Simply put, the grossly disproportionate force used in this case was clearly established as a constitutional violation because no reasonable officer could have believed that Ferraro's actions were legal. Even though Ferraro undoubtedly possessed the lawful power to effect a custodial arrest and secure Lee with handcuffs, a reasonable officer could not possibly have believed that he then had the lawful authority to take her to the back of her car and slam her head against the trunk after she was arrested, handcuffed, and completely secured, and after any danger to the arresting officer as well as any risk of flight had passed. Once an arrestee has been fully secured, such force is wholly unnecessary to any legitimate law enforcement purpose. . . . Slamming the head of a handcuffed, subdued arrestee against the trunk of a car is objectively unreasonable and clearly unlawful. This conclusion seems to us to be even more self-evident where, as here, the crime involved nothing more than the improper use of a horn on a busy thoroughfare during rush hour traffic in a large metropolitan community.").

Pace v. Capobianco, 283 F.3d 1275, 1282, 1283 (11th Cir. 2002) ("Qualified immunity protects government officials, in their individual capacities, from suit unless the law preexisting the defendant official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances. . .The notice may come in different ways. . . But the preexisting law must give real notice of practical value to government officials, considering the specific circumstances confronting them, and not just talk of some generalized, abstract intellectual concept. This case is based on the Fourth

Amendment that prohibits 'unreasonable searches and seizures.' That 'unreasonable' seizures are prohibited was clearly established before 1998. But, this proposition is too broad and general to give policemen practical guidance. The kind of notice that will take away qualified immunity must be appropriately specific considering the context of the case. [citing *Saucier*] So, case law must be looked to for the needed notice of what conduct is 'unreasonable' within the meaning of the Fourth Amendment. In this case, Plaintiff–quite rightly–points to *Tennessee v. Garner* and *Graham v. Conner* as important. They are important decisions; and we know that sometimes general rules of law in judicial decisions can give enough warning to government officials, in certain circumstances to which the general rules apply with 'obvious clarity,' that qualified immunity will be lost. But when we look at decisions such as *Garner* and *Graham,* we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply with such obvious clarity to the circumstances of this case that only an incompetent officer or one intending to violate the law could possibly fail to know that what the police did here violated federal law. . . . We look at the cases to see if a bright line–before the pertinent day–had been established capable of giving fair warning to all objectively, reasonable officers standing in the defendants' places that shooting the decedent, in these circumstances, must violate federal law. We look for cases in which Fourth Amendment violations have been ascertained; and we look for fair warning, by studying whether the cases involved facts materially similar to those in this case: cases not fairly distinguishable from the case at hand. . . As far as we know, no such preexisting case exists. Plaintiff has identified no case demonstrating a clearly established rule prohibiting police officers from using deadly force in circumstances like those in this case: a case, among other things, where the fleeing suspect appeared to be dangerous by virtue of his hazardous driving during the long, nighttime car chase and where the suspect remained in his automobile with the engine running, even when almost surrounded by officers and where–*IF* the chase had ended at all–it had ended (at most) a very few seconds before the officers fired and, even then, the suspect's car started driving away again, causing more shots to be fired. . . Because the preexisting law did not warn defendants fairly that shooting the decedent in these circumstances would clearly violate federal law, defendants– if they violated federal law (which we strongly doubt)–are entitled to immunity.").

Willingham v. Loughnan, 261 F.3d 1178, 1186, 1187 (11th Cir. 2001) ("The question for the purposes of qualified immunity is this one: whether Defendant Officers violated clearly established federal law in 1987, by shooting Plaintiff within a "split second" after she attacked two officers–having just tried to kill one of them–while she, at the moment, was not in the physical control of the police and was standing unarmed but near the area from which she had already obtained four objects she had used as weapons, at least one of which was a potentially lethal weapon. The Supreme Court has recently offered guidance on how to address properly the question of qualified immunity in the context of excessive force cases. In *Saucier,* the Court decided that whether an officer behaved in an objectively reasonable manner in the context of the merits of the excessive force claim is a completely separate and distinct question from whether the officer behaved objectively reasonably under the clearly established preexisting law for qualified immunity purposes. . . . We (with reluctance and doubt) accept that the law would allow a reasonable jury to

find–given the Plaintiff's evidence, including evidence of Plaintiff being unarmed when shot, of the nature of the weapons she had used and the manner of their use, of the number of police officers present and their location and so on–that the amount of force applied by the Defendant Officers was not reasonable in this case, notwithstanding that Plaintiff had just finished battering and attempting to kill police officers. . . The crucial inquiry, however, is whether the law was already clearly established at the time of the incident that the use of deadly force was unlawful under the particular circumstances faced by the officers in this situation. An officer is entitled to qualified immunity if a reasonable officer, under the circumstances, might have thought that the use of force did not violate the federal law at the time of the incident. *See Saucier*, 121 S.Ct. at 2158-59. The principles and goals of the doctrine of qualified immunity are particularly important in cases like this one: where police officers are confronting an unpredictable and dangerous situation in which split-second decisions can make the difference between life and death. . . . Whatever the evidence at the civil trial also shows– given the fact of Plaintiff's 1992 criminal convictions–the factual situation confronted by the Officer Defendants in this case must be basically this one: 1) Plaintiff had just assaulted one officer, attempted to kill another officer; 2) she was not subdued; and 3) she was standing in the door to the kitchen where she had, just moments before, obtained weapons with which she had tried to kill one police officer and assaulted another. Unless the federal law in October 1987 was already clearly established that–under these circumstances– shooting Plaintiff, even if she was unarmed at the moment, did constitute excessive force in violation of the Fourth Amendment, the Defendant Officers are entitled to qualified immunity. Almost always, to establish the law clearly in the context of the Fourth Amendment, a materially similar case must have already decided that what the police officer was doing was unlawful. . . . Because the federal law was not already clearly established law in 1987 that it constituted excessive force in violation of the Fourth Amendment to shoot a person under the circumstances presented in this case, we conclude that the Defendant Officers are entitled to qualified immunity."), *opinion reinstated and supplemented by* ***Willingham v. Loughnan,*** 321 F.3d 1299 (11th Cir. 2003) (on remand from Supreme Court). [*see supra*]

Willingham v. Loughnan, 261 F.3d 1178, 1186 n.13 (11th Cir. 2001) ("*Saucier* directly rejects Plaintiff's main argument that a finding of excessive force precludes the qualified immunity defense. That Defendants' conduct has been ultimately determined to be unreasonable under the excessive force analysis does not decide whether the law was already clearly established at the time Defendants acted that what they were doing, given the circumstances, necessarily violated federal law."), *opinion reinstated and supplemented by* ***Willingham v. Loughnan,*** 321 F.3d 1299 (11th Cir. 2003)(on remand from Supreme Court).

Hernandez v. City of Miami, 302 F.Supp.2d 1373, 1378-80 (S.D. Fla. 2004) ("Officer Perez argues that he did not need to wait for Mr. Hernandez to point his gun at him and kill him. Although Officer Perez's general statement is correct, the problem with his argument is, again, that is not faithful to how the facts must be viewed at summary judgment. Had Officer Perez fired in the split second that Mr. Hernandez was grabbing his own gun, or even as Mr. Hernandez was dropping the gun in the passenger seat, there would not be a Fourth Amendment violation. No one would

(or should) second-guess an officer who fired at the moment he reasonably believed that his life was on the line. . . But this is not what occurred, at least not in the version of events that must be accepted for summary judgment purposes. Instead, Officer Perez shot Mr. Hernandez in the back after he had dropped his weapon and as he was running away unarmed. Moreover, Officer Perez shot Mr. Hernandez when he was about fifteen feet away from the police car, indicating that any threat had dissipated. Finally, Officer Perez did not give any sort of warning prior to firing. There are, of course, Eleventh Circuit decisions in Garner deadly force cases concluding that there was no Fourth Amendment violation. But in each of the cases the suspect was, at the moment of the shooting, threatening an officer or a member of the public, and there was no such threat here. Indeed, Mr. Hernandez had dropped his weapon and was running away unarmed. . . . . Taking Mr. Hernandez's version of events, no objectively reasonable officer in Officer Perez's position could have reasonably believed that he was entitled to use deadly force to apprehend Mr. Hernandez and prevent his escape.")**.**

Hendon v. City of Piedmont, 163 F.Supp.2d 1316, 1328 (N.D. Ala. 2001) ("The plaintiff has not cited nor has the court found a controlling Fifth Circuit case, an Eleventh Circuit case nor a Supreme Court case which, in a concrete and factually defined context, make it obvious to all police officers that Reil's conduct violated the law. There are controlling cases which suggest to the contrary. There has been no bright line staked out identifying Reil's conduct as excessive. Furthermore, this is clearly not a case where Reil should have known that he was violating the Constitution even without caselaw on the point. . .This is certainly not a *Priester* case. The plaintiff was clearly avoiding intervention by the police. This court cannot conclude that only an incompetent officer or a knowing violator would have reacted as did Reil.").

D. Post-*Brosseau* Case Law

SUPREME COURT

NOTE: While not a qualified immunity decision, the Court's recent decision in *Mendez* should be noted.

County of Los Angeles v. Mendez, 137 S. Ct. 1539, 1543-49 & n.* (2017) ("If law enforcement officers make a 'seizure' of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, may the officers nevertheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force? The Ninth Circuit has adopted a 'provocation rule' that imposes liability in such a situation. We hold that the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure. . . . The Court of Appeals did not disagree with the conclusion that the shooting was reasonable under *Graham*; instead, like the District Court, the Court of Appeals applied the provocation rule and held the deputies liable for the use of force on the theory that they had intentionally and recklessly brought about the shooting

by entering the shack without a warrant in violation of clearly established law. . . The Court of Appeals also adopted an alternative rationale for its judgment. It held that 'basic notions of proximate cause' would support liability even without the provocation rule because it was 'reasonably foreseeable' that the officers would meet an armed homeowner when they 'barged into the shack unannounced.'. . .The provocation rule, which has been 'sharply questioned' outside the Ninth Circuit, *City and County of San Francisco v. Sheehan,* 575 U.S. ——, ——, n. 4, 135 S.Ct. 1765, 1776, n. 4, 191 L.Ed.2d 856 (2015), is incompatible with our excessive force jurisprudence. The rule's fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist. . . .When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim. The basic problem with the provocation rule is that it fails to stop there. Instead, the rule provides a novel and unsupported path to liability in cases in which the use of force was reasonable. Specifically, it instructs courts to look back in time to see if there was a *different* Fourth Amendment violation that is somehow tied to the eventual use of force. That distinct violation, rather than the forceful seizure itself, may then serve as the foundation of the plaintiff's excessive force claim. . . This approach mistakenly conflates distinct Fourth Amendment claims. Contrary to this approach, the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional. An excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry. By conflating excessive force claims with other Fourth Amendment claims, the provocation rule permits excessive force claims that cannot succeed on their own terms. . . . *The* framework for analyzing excessive force claims is set out in *Graham*. If there is no excessive force claim under *Graham,* there is no excessive force claim at all. To the extent that a plaintiff has other Fourth Amendment claims, they should be analyzed separately.[*] . . . Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the 'totality of the circumstances.'. . On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it. . . We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here. . . . All we hold today is that *once* a use of force is deemed reasonable under *Graham,* it may not be found unreasonable by reference to some separate constitutional violation. Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand. . . .The Ninth Circuit's efforts to cabin the provocation rule only undermine it further. The Ninth Circuit appears to recognize that it would be going entirely too far to suggest that *any* Fourth Amendment violation that is connected to a reasonable use of force should create a valid excessive force claim. . . Instead, that court has endeavored to limit the rule to only those distinct Fourth Amendment violations that in some sense 'provoked' the need to use force. The concept of provocation, in turn, has been defined using a two-prong test. First, the separate constitutional violation must 'creat[e] a situation which led to' the use of force; second, the separate constitutional violation must be committed recklessly or

intentionally. . . Neither of these limitations solves the fundamental problem of the provocation rule: namely, that it is an unwarranted and illogical expansion of *Graham*. But in addition, each of the limitations creates problems of its own. First, the rule includes a vague causal standard. It applies when a prior constitutional violation 'created a situation which led to' the use of force. The rule does not incorporate the familiar proximate cause standard. Indeed, it is not clear what causal standard is being applied. Second, while the reasonableness of a search or seizure is almost always based on objective factors, . . . the provocation rule looks to the subjective intent of the officers who carried out the seizure. As noted, under the Ninth Circuit's rule, a prior Fourth Amendment violation may be held to have provoked a later, reasonable use of force only if the prior violation was intentional or reckless. . . . [B]oth parties accept the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation. . . .Thus, there is no need to dress up every Fourth Amendment claim as an excessive force claim. For example, if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*. The harm proximately caused by these two torts may overlap, but the two claims should not be confused. . . . The Court of Appeals also held that 'even without relying on [the] provocation theory, the deputies are liable for the shooting under basic notions of proximate cause.'. . In other words, the court apparently concluded that the shooting was proximately caused by the deputies' warrantless entry of the shack. Proper analysis of this proximate cause question required consideration of the 'foreseeability or the scope of the risk created by the predicate conduct,' and required the court to conclude that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'. . Unfortunately, the Court of Appeals' proximate cause analysis appears to have been tainted by the same errors that cause us to reject the provocation rule. The court reasoned that when officers make a 'startling entry' by 'barg [ing] into' a home 'unannounced,' it is reasonably foreseeable that violence may result. . . But this appears to focus solely on the risks foreseeably associated with the failure to knock and announce, which could not serve as the basis for liability since the Court of Appeals concluded that the officers had qualified immunity on that claim. By contrast, the Court of Appeals did not identify the foreseeable risks associated with the *relevant* constitutional violation (the warrantless entry); nor did it explain how, on these facts, respondents' injuries were proximately caused by the warrantless entry. In other words, the Court of Appeals' proximate cause analysis, like the provocation rule, conflated distinct Fourth Amendment claims and required only a murky causal link between the warrantless entry and the injuries attributed to it. On remand, the court should revisit the question whether proximate cause permits respondents to recover damages for their shooting injuries based on the deputies' failure to secure a warrant at the outset. . . .For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.")

On remand, the Ninth Circuit held that "unlawful entry into a residence by two sheriff's deputies, without a warrant, consent, or exigent circumstances, was the proximate cause of the subsequent shooting and injuries to the plaintiffs." Thus, a claim uner § 1983 was permitted. ***Mendez v. County of Los Angeles***, 897 F.3d 1067, 1071 (9th Cir. 2018). *See also id*. at 1078 ("Here, both the entry and the failure to knock and announce were proximate causes of the Mendezes' injuries.

Officers cannot properly escape liability when they breach two duties, each breach being necessary for the harm to occur, just because one of the duties was subject to qualified immunity. That would lead to the absurd result that an officer who breaches only one duty is liable, but that an officer who breaches multiple duties is not.").

D.C. CIRCUIT

Fenwick v. Pudimott, 778 F.3d 133, 137-40 (D.C. Cir. 2015) ("Our concurring colleague would have us decide this case at the first step and hold that, pursuant to *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014), the deputies' actions plainly complied with the Fourth Amendment. In our view, however, the constitutional question is hardly clear, and *Plumhoff*—a case in which the fleeing suspect led police on a protracted high-speed chase, . . .—has little to say about the quite different situation the deputies faced here. The officers in *Plumhoff* resorted to deadly force only after the suspect placed in peril the lives of dozens of innocent civilians during his 100 mile-per-hour flight and only after they sought to end the chase through non-lethal means. . . In this case, by contrast, although the deputies opened fire after Fenwick clipped Officer Pudimott with the car's side-view mirror, Fenwick posed no immediate threat to either officers or bystanders at the time of the shooting. . . Given these significant differences between this case and *Plumhoff*, we think the constitutional question is 'far from obvious,'. . . and that this case is therefore best resolved at the second step. We thus proceed directly to consider whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting. . . . This case features an 'added wrinkle': a videotape capturing the incident in question. . . . But in contrast to the videotape in *Scott*, which 'quite clearly' portrayed the events at issue, . . . the surveillance footage here does no such thing. . . .The videotape thus provides no 'ready answers to the factual dispute' and does little to affect our analysis. . . But other important wrinkles—namely, the *Heck* bar and collateral estoppel—constrain how we view the facts. As the district court explained, the Superior Court Judge, in finding that Fenwick committed felony assault on Pudimott, 'necessarily determined that [Fenwick] created "a grave risk of causing significant bodily injury" to Deputy Pudimott when, "without justifiable [and] excusable cause," he drove the car forward in a manner that put the deputy in danger of being hit.'. . . Although Fenwick urges us to ignore these 'bad facts,'. . . we are bound by *Heck v. Humphrey* and the Supreme Court's admonishment that 'a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'. . . That said, several facts weigh in Fenwick's favor, including (1) the deputies' concession in this court that Pudimott and Fischer fired on Fenwick only *after* the vehicle struck Pudimott, when Pudimott was no longer in the car's path, . . . (2) the Superior Court's findings that Fenwick did nothing to endanger Mickle or Fischer during his flight, . . .and (3) the surveillance footage showing no bystanders in the path of Fenwick's car. Thus distilled the record reveals, on the one hand, that the deputies confronted a fleeing motorist who posed no immediate threat to either officers or bystanders when they opened fire, and on the other hand, that the deputies had observed pedestrians and vehicles close by in the minutes leading up to the shooting and, just moments before firing, had seen the fleeing suspect 'create [ ] a grave risk of causing significant bodily injury to [an] officer.'. . With 'the specific

context of th[is] case' now in mind, . . . we turn to the officers' claim that their use of deadly force to apprehend Fenwick 'to protect one or more of the deputies or members of the general public from harm,'. . . violated no clearly established law. . . . We agree with the deputies that our inquiry begins and ends with Supreme Court precedent—in particular, *Brosseau v. Haugen*, 543 U.S. 194 (2004). . . .Reviewing these facts and relevant precedent, the Supreme Court 'express[ed] no view' on the Fourth Amendment question, but determined that the officer was entitled to qualified immunity as her actions 'fell in the hazy border between excessive and acceptable force.'. . For us to reach a different conclusion about qualified immunity in this case, Fenwick must show either that the deputies' conduct was 'materially different from the conduct in *Brosseau*' or that between the incident in *Brosseau* and January 2007—when Fenwick was shot—there 'emerged either controlling authority or a robust consensus of cases of persuasive authority that would alter our analysis.'. . Fenwick has done neither. He has made no attempt to distinguish *Brosseau*, and we doubt he could do so in a meaningful way. . . . Nor has Fenwick shown that *Brosseau's* analysis had become obsolete at the time the deputies shot him. . . For these reasons, unlike the district court, we see no genuine issue of material fact that precludes summary judgment for the deputies based on qualified immunity. Whether the deputies shot Fenwick while Pudimott was still in danger from Fenwick's car, or whether they shot him in the seconds after that danger had passed, *Brosseau* makes clear that the deputies' use of deadly force violated no law that was clearly established at the time of the shooting. In reaching this conclusion, we emphasize that nothing in this opinion should be read to suggest that qualified immunity will shield from liability every law enforcement officer in this circuit who fires on a fleeing motorist out of asserted concern for other officers and bystanders. Outside the context of a 'dangerous high-speed car chase,'. . . deadly force, as the Supreme Court made clear in *Garner,* . . . ordinarily may not be used to apprehend a fleeing suspect who poses no immediate threat to others—whether or not the suspect is behind the wheel. . . . Because Fenwick operated his car in a way that endangered an officer, in an area recently traversed by pedestrians and other vehicles no less, it was not clearly established that the deputies violated the Fourth Amendment by using deadly force to prevent his flight. Accordingly, we cannot say that Pudimott and Fischer had 'fair notice that [their] conduct was unlawful.'. . The deputies are therefore entitled to qualified immunity.")

Fenwick v. Pudimott, 778 F.3d 133, 140-42 (D.C. Cir. 2015) (Karen LeCraft Henderson, J., concurring in the judgment) ("I agree with my colleagues that the deputies are plainly entitled to qualified immunity. . . I further agree that our inquiry starts and ends with United States Supreme Court precedent. . . But in my view, it is the Supreme Court's more recent opinion in *Plumhoff v. Rickard,* 134 S.Ct. 2012 (2014), that controls Fenwick's case. And, in contrast with *Brosseau v. Haugen,* 543 U.S. 194 (2004), which speaks only to the second qualified-immunity—inquiry—'whether the deputies' use of deadly force violated law that was clearly established at the time of the shooting,' Maj. Op. 7—*Plumhoff* establishes that the deputies' actions were 'objectively reasonable in light of the facts and circumstances confronting them.'. . Accordingly, their actions did not violate Fenwick's Fourth Amendment rights at all. . . .Although Fenwick's case lacks the drama of the highspeed chase in *Plumhoff,* the factual differences between *Plumhoff* and Fenwick's case do not make the former inapposite. Rather, the principle animating *Plumhoff* is dispositive

here. As the district court, in summarizing the relevant portion of the superior court's findings, put it, Fenwick 'created a grave risk of causing significant bodily injury to Deputy Pudimott when, without justifiable or excusable cause, he drove the car forward in a manner that put the deputy in danger of being hit.'. . Based on the 'grave public safety risk' that Fenwick created, *Plumhoff* establishes that the deputies 'acted reasonably in using deadly force.'. .My colleagues consider 'the constitutional question' in this case to be 'close.'. . But the 'facts [that] weigh in Fenwick's favor' are largely immaterial. . . My colleagues also find significant 'the deputies' concession' that they 'fired on Fenwick only *after* the vehicle struck Pudimott, when Pudimott was no longer in the car's path.'. . But under *Plumhoff*, once Fenwick threatened bodily injury to Pudimott, the deputies were not obligated to stop firing 'until the threat ha [d] ended.'. . And nothing in the record demonstrates that a reasonable officer would have concluded, in the few seconds that passed after Fenwick's car struck Pudimott, that Fenwick was no longer dangerous. . . . Here, the deputies had every reason to believe that civilians 'might' be in harm's way if the deputies did not neutralize the threat Fenwick's reckless behavior posed. . . As my colleagues recognize, the deputies 'observed pedestrians and vehicles close by in the minutes leading up to the shooting.'. . . On these facts, the deputies' actions were 'objectively reasonable in light of the facts and circumstances confronting them,'. . . and I would hold that they are entitled to qualified immunity because they did not violate the Fourth Amendment.")

Arrington v. United States, 473 F.3d 329, 339, 340 (D.C. Cir. 2006) ("Appellant makes the claim, supported by sworn testimony, that he was disarmed, thrown to the ground, handcuffed, and severely beaten by appellees for ten minutes. Appellees maintain, also by sworn testimony, that in order to disarm appellant, who they believed had just shot a USPP officer in the face, it was necessary to hold him down and beat him for ten minutes, using their fists, a telescopic baton, and the grip of a handgun, and then instruct a patrol dog to bite his leg. If all of the evidence is viewed in the light most favorable to appellant, as required by Rule 56(c), appellees surely are not entitled to judgment as a matter of law. . . . Our dissenting colleague may or may not be right in her characterization of the facts. But fact finding is not the role of the appellate court. That the dissent strains mightily in this misplaced fact finding effort serves only to highlight the existence of a genuine issue of material fact. It is also noteworthy that three criminal juries have deadlocked on counts charging Arrington with attempting to murder a federal officer and discharging a firearm during a crime of violence. . . Obviously, the testimony of the police officers is not as clear cut as the dissent would have it. In any event, the trier of fact in this civil case will have an opportunity to sort this out.")**.**

Barham v. Ramsey, 434 F.3d 565, 572-75, 577 (D.C. Cir. 2006) ("In this case, it is clear that the 'threshold question' for evaluating Newsham's claim to qualified immunity must be answered in the affirmative, because 'the facts alleged show the officer's conduct violated a constitutional right,'. . . . The essence of plaintiffs' claim is that a diverse assemblage of people–including many who were engaging in political speech protected by the First Amendment and others who were merely there as observers or passersby–was caught in a mass arrest that was devoid of probable cause. . . . We have no trouble in concluding that plaintiffs' Fourth Amendment rights were clearly

established in the circumstances of the mass arrest. No reasonable officer in Newsham's position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park. . . . While we have no reason to doubt that unlawful activity might have occurred in the course of the protest–with some individuals engaging in disorderly conduct, for example–the simple, dispositive fact here is that appellants have proffered no facts capable of supporting the proposition that Newsham had reasonable, particularized grounds to believe every one of the 386 people arrested was observed committing a crime. . . . Our case law addressing large-scale demonstration scenarios does not suspend– or even qualify–the normal operation of the Fourth Amendment's probable cause requirements. Rather, this case law merely amplifies one essential premise that has a bearing on the case at hand: when compelling circumstances are present, the police may be justified in detaining an undifferentiated crowd of protestors, but only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order. . . . Having found that the mass arrest Newsham ordered violated clearly established constitutional rights, we now examine whether Chief Ramsey's involvement with the arrest deprives him of qualified immunity. Ramsey's participation in the arrests is distinct from Newsham's in a critical respect: he denies knowing that the park had not been cleared of law-abiding bystanders. If this claim is validated, Ramsey might be entitled to maintain his qualified immunity. The record assembled for summary judgment, however, does not permit a definitive resolution of this factual question. Thus, under the Supreme Court's holding in *Johnson*, 515 U.S. at 307, the District Court's decision denying Ramsey's motion for summary judgment is not appealable.").

Louis v. District of Columbia, 59 F.Supp.3d 135, 149-50 (D.D.C. 2014) ("Under the totality of the circumstances, no reasonable jury could find that the officers acted in an objectively unreasonable fashion when breaching the bathroom door. . . Even considering the evidence in the light most favorable to the plaintiff, Lieutenant Glover's decision, after hours of failed negotiation, to take advantage of an apparent opportunity to apprehend Louis without incident, was reasonable. . . That the plan failed is ultimately irrelevant to the question of whether the plan, as executed, was objectively reasonable. In the alternative, it is arguable that Officer Riggins would be protected by qualified immunity because he was merely following his superior officer's objectively reasonable order to breach the bathroom door. The Court recognizes that thirty years ago the D.C. Circuit refused to accept a 'just following orders' defense from defendants who had complied with an agency's approved policy. . . However, the D.C. Circuit did *not* foreclose the possibility of the defense applying in another case. . . Indeed, as other Circuits have held in cases more recent than *Hobson*, a 'just following orders' defense may establish qualified immunity when 'plausible instructions from a superior or fellow officer ... viewed objectively in light of the surrounding circumstances ... could lead a reasonable officer to conclude that the necessary legal justification for his actions exists.'. . Here, because there is no genuine dispute as to whether a reasonable officer in Officer Riggins's position would have concluded (correctly) that the 'necessary legal justification' existed for breaching the bathroom door, the Court concludes it is at least arguable that Officer Riggins is independently protected by qualified immunity pursuant to the 'just following orders' defense. Accordingly, in light of all of the facts and circumstances, no reasonable

jury could find that Officer Riggins's participation in the breach of the bathroom door or ultimate use of deadly force against Louis was so excessive that no reasonable officer could have believed it was lawful. Therefore, Officer Riggins is entitled to qualified immunity on plaintiff's section 1983 excessive force claim, and the Court will grant his motion for summary judgment as to Count V.")

FIRST CIRCUIT

Conlogue v. Hamilton, No. 17-2210, 2018 WL 4927553, at *4-5, *7 (1st Cir. Oct. 11, 2018) ("Even if we assume arguendo that Hamilton's action was contrary to a consensus of controlling authority, we are satisfied that an objectively reasonable officer standing in Hamilton's shoes would have thought it appropriate to deploy deadly force against an armed man who, after a nearly three-and-one-half-hour standoff in which he was repeatedly warned to drop his weapon, persisted in pointing a loaded semi-automatic firearm narrowly above the heads of three officers and within easy firing range. . . .We cannot say that an objectively reasonable police officer standing in Hamilton's shoes would have thought it a violation of the law to deploy deadly force in these highly charged circumstances. Under these circumstances, Hamilton reasonably perceived Conlogue to be an imminent threat, with no less drastic means of remediation at hand. . . . As we said at the outset, this is a tragic case. But the facts of record make pellucid that the police were faced with a nightmare scenario—a scenario in which an armed and disturbed individual wholly disregarded serial entreaties to disarm and engaged in a course of conduct that gradually elevated the level of threat. Tension mounted over time, and when the armed individual took actions that placed officers at imminent risk of serious bodily harm, Hamilton—reasonably concluding that no less drastic means of remediation were feasible—fired the fatal shot. Under the totality of the circumstances, we conclude that the district court's entry of summary judgment in Hamilton's favor on the basis of qualified immunity must be **Affirmed.**")

Stamps v. Town of Framingham, 813 F.3d 27, 35-42 (1st Cir. 2016) ("Where an officer creates conditions that are highly likely to cause harm and unnecessarily so, and the risk so created actually, but accidentally, causes harm, the case is not removed from Fourth Amendment scrutiny. . . .The defendants, however, argue that, as a matter of law, the Fourth Amendment does not apply to Duncan's conduct because the shooting itself was unintentional, and thus not 'means intentionally applied,' *Brower*, 489 U.S. at 597 (emphasis omitted). The heart of their argument is that regardless of Duncan's actions leading up to the moment he pulled the trigger, the inadvertence of the shot shields him from Fourth Amendment scrutiny. We cannot agree. The defendants' proposed rule has the perverse effect of immunizing risky behavior only when the foreseeable harm of that behavior comes to pass. . . .There is widespread agreement among the circuits that have addressed the issue that a claim is stated under the Fourth Amendment for objectively unreasonable conduct during the effectuation of a seizure that results in the unintentional discharge of an officer's firearm. [collecting cases] . . . .We find these cases relied on by the defendants to be distinguishable in light of *Brower's* clear command. To be sure, both *Dodd* and *Brower*

recognize that Fourth Amendment liability only attaches to intentional conduct. But to the extent that *Dodd*, or any of the other cases cited by the defendants, can be read for the proposition that unintended harms arising from intentional and unreasonable police conduct are never within the purview of the Fourth Amendment, they are not good law in light of *Brower*. . . Our decision today, on the other hand, flows necessarily from *Brower*. While in *Brower* 'the very instrumentality set in motion' was the tractor-trailer roadblock, here it was the assault rifle. In both cases, the instrumentality was set in motion in a highly dangerous fashion, and the resulting deaths were accidents. But in neither case does-nor should-the accidental result of the dangerous conduct prevent Fourth Amendment review. . . . We believe that the state of the law was clear such that a reasonable officer in Duncan's position would have understood that pointing his loaded assault rifle at the head of a prone, non-resistant, innocent person who presents no danger, with the safety off and a finger on the trigger, constituted excessive force in violation of that person's Fourth Amendment rights. . . In concluding that this case must go to a jury for determination, we rely on *Brower* and on our prior circuit precedent, and we confirm our ruling by observing that clearly settled Fourth Amendment law as of the time of Stamps's death fully cohered with commonly accepted precepts on appropriate use of firearms and appropriate police procedures. . . .This case bears a remarkable resemblance to *Mlodzinski.* Both cases involve officers pointing firearms at the heads of innocent, compliant individuals during the course of SWAT team raids at residences thought to be occupied by other individuals who were dangerous. And neither the sister nor the mother in *Mlodzinski,* nor Stamps, was thought to be dangerous. *Mlodzinski* affirms that as of at least August 2, 2006, the date of the raid at issue in that case, the state of the law was clear enough to put police officers on notice that a warrant to conduct a SWAT raid does not grant them license to aim their weapons at the heads of submissive and nonthreatening bystanders. . . As we recognized, this is especially true where, as here, a jury could find that the officer is not forced to act based on a split-second judgment about the appropriate level of force to employ. . . Reviewing the facts in the light most favorable to the plaintiffs, a jury could find that Duncan had adequate time to determine that there was no reasonable threat posed by Stamps and to calibrate his use of force accordingly. . . .In light of *Mlodzinski*, as well as long-standing precedent from other circuits, a reasonable officer in early 2011 would have understood that Duncan's conduct, as a jury could find it, violated clearly established Fourth Amendment law. [collecting cases] We acknowledge that each of these cases presented unique sets of facts that in some respects differ from the facts presented in the case at hand. Nonetheless, their factual differences do not obscure or detract from the straightforward rule that, collectively, they all espouse. When considered alongside *Mlodzinski,* these cases plainly put police officers in these circumstances on notice that pointing a firearm at a person in a manner that creates a risk of harm incommensurate with any police necessity can amount to a Fourth Amendment violation. On the facts as a jury might find them to be in this case (safety off, finger on the trigger, and gun pointed at the head of a prone person known not to pose any particular risk), it was clear under existing law that Duncan used his gun in a manner that unlawfully created such a risk. In light of what we have just said, we conclude that Duncan, 'in the "situation [he] confronted,"'. . . was on notice that his actions could be found violative of Stamps's Fourth Amendment right to be free from excessive force. Existing precedent places this conclusion 'beyond debate[.]'")

Mitchell v. Miller, 790 F.3d 73, 77-78(1st Cir. 2015) ("[T]he Supreme Court has urged us to 'think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case.'. . The district court took this approach, and we will likewise move straight to the second prong. . . .As the Supreme Court has since instructed, *'Brosseau* makes plain that as of February 21, 1999–the date of the events at issue in that case-it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger.' *Plumhoff,* 134 S.Ct. at 2023.")

McGrath v. Tavares, 757 F.3d 20, 29-31 (1st Cir. 2014) ("In sum, for McGrath to succeed on her Fourth Amendment claim, she must establish that Officer Tavares's shooting at Anthony was not objectively reasonable 'in light of the circumstances and the facts known to [him] at the time.'. . She cannot. As we just mentioned, Officer Tavares's use of deadly force was objectively reasonable because a reasonable officer in the same circumstances could have believed Anthony posed a threat of (at the very least) serious physical harm to his person when he fired shots one and two, and an identical threat to Officer Almeida when he fired shots three and four. . . A reasonable officer could have likewise concluded Anthony 'would once again pose a deadly threat for others' if he had resumed his flight. . .Moreover, Officer Tavares's third and fourth shots are also justified by Anthony's failure to abandon his attempt to flee after the initial two shots were fired, continuing to pose an imminent threat to the public. . . Because the record does not establish a Fourth Amendment violation, McGrath's claim cannot survive summary judgment. . . . In any event, even if a constitutional violation was established, Defendants would still be entitled to summary judgment based on qualified immunity because they did not violate clearly established law. . . . [T]he *Plumhoff* Court tells us that to overcome a qualified immunity defense in a case where a police officer fired at 'a fleeing driver to protect those whom his flight might endanger,' a plaintiff would have to show 'at a minimum' that the officer's conduct is 'materially different from the conduct in *Brosseau'* or that between February 21, 1999, and the date of the alleged constitutional violation 'there emerged either controlling authority or a robust consensus of cases of persuasive authority that would alter our analysis of the qualified immunity question.' . . McGrath cannot show either. The facts in this case are more favorable to the shooting police officer than the facts in *Brosseau.* First, the police officer in *Brosseau* fired at the driver when he 'had just begun to flee and ... had not yet driven his car in a dangerous manner.'. . Whereas here, Officer Tavares fired his weapon during a car chase 'that indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby.'. . Second, the suspect driver in *Brosseau* was not driving towards the police officer when the officer shot him, and thus, did not present as imminent of a threat to the police officer as in this case. . . .All things said, McGrath does not point us to any case since *Brosseau* that clearly establishes the unconstitutionality of using deadly force to end a car chase that threatened the physical safety of the police officers and others in the area.")

Kenney v. Floyd, 700 F.3d 604, 609, 610 (1st Cir. 2012) ("Officer McKay was not required to give up the chase after Kenney fled [citing *Scott v. Harris*] and was entitled to employ 'some degree of

physical coercion ... to effect [the second stop],' *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. Faced with an uncooperative motorist, who posed a continued risk of flight, Officer McKay's decisions to push Kenney's vehicle out of the roadway and then, once Kenney's car was stopped, to pepper spray Kenney, were reasonable under these circumstances. Officer McKay nudged Kenney's vehicle away from an active two-lane highway, which enhanced his own safety and reduced the likelihood of continued flight or injury to others on the roadway. Plaintiff did not proffer any evidence that the force Officer McKay exerted on Kenney's car threatened the safety of Kenney or his passenger. . . As to McKay's use of pepper spray, the district court explained that, '[u]nlike in cases where the use of pepper spray was held to constitute excessive force, Kenney was not a peaceful, compliant, and secured suspect who could pose no threat to the officer seeking to detain him.'. . Relying on the Eleventh Circuit's opinion in *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir.2002), which noted that '[c]ourts have consistently concluded that using pepper spray is reasonable ... where the plaintiff was either resisting arrest or refusing police requests,' *id.* at 1348, the district court concluded that Officer McKay's use of pepper spray here was reasonable. There is ample support for the district court's conclusion . . . and we agree.")

Asociacion De Periodistas De Puerto Rico v. Mueller, 680 F.3d 70, 81-84 (1st Cir. 2012) (appeal after remand) ("We need not follow the steps of the qualified immunity analysis sequentially. . . We also needn't follow the same analytical path as the district court. . . We therefore turn directly to whether reasonable officers would have known that their conduct was unlawful. . . . Taking the facts in the light most favorable to the plaintiff reporters, the agents' actions were still reasonable in light of the combustible situation that they faced. . . . Given the perceived noncompliance by the crowd inside the complex, the previous verbal threats, the presence of FBI personnel, civilians and evidence within the vicinity, and the serious concerns about maintaining control of the area, the agents reasonably could have concluded that the level of force that they used was appropriate. . . . The individual claims of plaintiffs Fernández and Lago require additional discussion. . . . To be sure, a jury might find that the agents were mistaken and that Lago had, in fact, not attempted to strike any of the agents. The jury could also find that he fell to the ground in confusion and pain. But it is also true that the defendants could reasonably have perceived Lago as one who resisted leaving the compound. Qualified immunity protects officers from their 'reasonable mistakes,'. . . and given the chaotic situation, we cannot conclude that the agents' actions constituted unreasonable mistakes. Fernández's situation is distinguishable from those of the other plaintiffs because he never intruded inside the gate and was on the street-side of the fence when he was pepper sprayed at very close range. He also claims that the FBI agent who sprayed him targeted him personally. . . .Fernández claims to have been singled out, but the agent says that he was attempting to spray agitated crowd members threatening the officers by the gate. While we take disputed facts in favor of the plaintiffs, Fernández's allegations regarding the subjective beliefs of the agent are pure speculation. . . Given the circumstances, we conclude that a similarly situated reasonable agent could have made the same decisions. . . In sum, we affirm the grant of summary judgment on the plaintiffs' Fourth Amendment claims on the grounds of qualified immunity.")

McInnis v. Maine, 638 F.3d 18, 22 (1st Cir. 2011) ("[L]iability for McInnis's arrest turns entirely on the fact element of the qualified immunity standard, on whether the arresting officer could reasonably have believed that McInnis was violating probation. As to this, the probation officer's representation was surely sufficient in and of itself, though in this case there was more. Randall confirmed the probation status when Deetjen prudently called him after McInnis denied it, and Deetjen had dealt with Randall for thirty years without any indication of shoddiness that might have discounted the reliability of Randall's word. As we explain more fully below, there was no genuine dispute as to these facts, which provided the officers with probable cause to believe McInnis was subject to arrest for violating the terms of a valid probation order, and they thus obviously qualified under the standard recognizing immunity 'so long as the presence of probable cause is at least arguable.'")

Sanchez v. Pereira-Castillo, 590 F.3d 31, 53, 55 (1st Cir. 2009) ("We. . .conclude that forcing a prisoner to undergo an invasive abdominal surgery for the purpose of determining whether or not he is hiding a cell phone in his rectum is a violation of a clearly established constitutional right. . . . Moreover, because the surgery described in the complaint and its attendant circumstances were so outrageous, we comfortably conclude that a reasonable officer would understand that, under the particular facts of this case, the surgery violated plaintiff's clearly established right to be free from an unreasonable search. . . . In summary, a reasonable doctor should have understood that the surgery at issue here, performed at the insistence of the correctional authorities and not for plaintiff's benefit, violated plaintiff's Fourth Amendment right to be free of unreasonable searches and seizures. The invasive surgery described in the complaint–conducted without the force of judicial authorization and for the sole purpose of extracting contraband that had resisted discovery in multiple rectal searches and two forced bowel movements–fell beyond any objective test of reasonableness. On the facts alleged, we do not need to identify the precise level of familiarity with the Fourth Amendment fairly chargeable to a physician acting as a state agent. No detailed knowledge of the law was required to understand that a physician should not perform invasive, non-medically required surgery on a prisoner in circumstances such as those described in the complaint. The conduct described in the complaint violated plaintiff's clearly established rights. A reasonable doctor would have understood as much.").

Morelli v.Webster, 552 F.3d 12, 18, 19, 24, 25 (1st Cir. 2009) ("The doctrinal intersection of qualified immunity principles and summary judgment principles is not well mapped. Plotting that intersection can present thorny analytic problems–problems that are magnified because of the desire to resolve claims of qualified immunity at the earliest practicable stage of litigation. . . The difficulty arises because the summary judgment standard requires absolute deference to the nonmovant's factual assertions (as long as those assertions are put forward on personal knowledge or otherwise documented by materials of evidentiary quality, . . . whereas qualified immunity, when raised on summary judgment, demands deference to the reasonable, if mistaken, actions of the movant . . . . In order to ease this inherent tension, we think it wise for courts to cabin these standards and keep them logically distinct, first identifying the version of events that best comports with the summary judgment standard and then asking whether, given that set of facts, a reasonable

officer should have known that his actions were unlawful. . . . Here, the facts, seen through the prism of the plaintiff's account, simply do not justify yanking the arm of an unarmed and non-violent person, suspected only of the theft of $20, and pinning her against a wall for three to four minutes with sufficient force to tear her rotator cuff. That is particularly so in view of the marked disparity in height and weight between the officer and the suspect, the absence of any evidence of either dangerousness or attempted flight, and the presence of a cadre of other officers at the scene. In short, the plaintiff's version of the relevant facts places Webster's actions outside the universe of protected mistakes. . . .Given the importance of reasonableness to the qualified immunity calculus in excessive force cases, the existence of such immunity frequently will hinge on the resolution of disputed facts. . . So it is here. In sum, we conclude that the plaintiff not only has made out a trialworthy issue as to whether Webster's use of a significant degree of force transgressed her Fourth Amendment right to be free from excessive force but also that she has made a showing adequate to thwart a qualified immunity defense. . . Because a rational jury could find, on this scumbled record, facts establishing that Webster's use of force was so objectively unreasonable and so plainly misguided that he should not be protected by the shield of qualified immunity, the district court erred in resolving this claim in advance of trial.")

Asociacion de Periodistas de Puerto Rico v. Mueller, 529 F.3d 52, 60-62 (1st Cir. 2008) ("The facts on the record, taken most favorably to the plaintiffs, reveal that without provocation, the defendants beat and applied pepper spray into the faces of the non-threatening plaintiffs to force them to exit the gated area. Thus, our proper inquiry is whether prior law makes clear that the use of such force against a group of non-threatening individuals was excessive. . . .Based on the plaintiffs' account of the events, this case falls within that category of obvious violations. . . According to the plaintiffs' account, the agents never gave them an opportunity to exit the area, but simply began hitting them and then, without warning, pepper sprayed them. Indeed, as discussed earlier, some of the individual plaintiffs were sprayed in the face, at close range, even after they had fallen down on the ground. Based on both a 'consensus of cases of persuasive authority,'. . . and the general prohibition against excessive force, we conclude that, according to the facts on this present record, the defendants should have been on notice that the actions attributed to them by the plaintiffs were in violation of the Fourth Amendment. . . . The defendants contend that they reasonably believed that the use of force was appropriate in view of the crowd's provocations and the escalating situation outside of the condominium complex. . . . One could imagine that even if a reasonable officer would have believed it appropriate to use pepper spray in response to an unruly mob (and thus be entitled to immunity), applying pepper spray into the face of an unthreatening journalist lying on the ground might well not be protected under the mantle of qualified immunity . *The appropriate analysis therefore requires an individualized inquiry of each plaintiff's circumstances.* Given this evidentiary gap, the district court's entry of summary judgment for the defendants on qualified immunity grounds was premature. However, this is not to say that qualified immunity should not be considered later, on a more fully developed record. Thus, we vacate the entry of qualified immunity for the defendants on the individual plaintiffs' claims and remand.").

Berube v. Conley, 506 F.3d 79, 85 (1st Cir. 2007) ("The undisputed facts demonstrate that the circumstances in which the officers found themselves were 'tense, uncertain, and rapidly evolving.'. . Conley was confronted by a much larger man charging her with what he has conceded was a dangerous weapon in his hand. We cannot say that any reasonable officer, confronted with the necessity to subdue an apparent attacker, would not have made the same choice. While one might regret Conley's failure to stop shooting as soon as Berube went down, immunity encompasses 'mistaken judgments.'. . Syphers and Vierling also faced a tense and uncertain situation when they rushed from the station to assist a fellow officer calling for help. They had heard firing from unidentified weapons and saw Berube rolling on the ground, refusing to obey their orders and potentially preparing to fire at them. Although Berube points to the Boren affidavit to dispute Syphers and Vierling's testimony that Berube's actions appeared to present a threat, there is no dispute that Berube did not obey the officers' commands to show his hands. Faced with the necessity of making a split-second judgment on a rainy night about how to neutralize the threat they perceived from Berube, the officers' actions cannot be said to have been 'plainly incompetent.'. . We conclude that on the undisputed facts, the conduct of the three officers 'can[not] be deemed egregious enough to submit the matter to a jury .'").

Jennings v. Jones, 499 F.3d 2, 17(1st Cir. 2007) (on rehearing) ("[W]e conclude that Jones' conduct was such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful. Indeed, even in *Smith*, which was decided six years before the incident at issue here, the court concluded that the law was clearly established against the use of increased force on a suspect no longer offering resistance because 'the unlawfulness of the conduct is readily apparent even without clarifying caselaw.'. . Other circuits have rejected qualified immunity without a prior case exactly on point. . . . When an individual has been forcibly restrained by several officers, has ceased resisting arrest for several seconds, and has advised the officers that the force they are already using is hurting a previously injured ankle, we cannot think of any basis for increasing the force used to such a degree that a broken ankle results. At the time of Jones' action, both existing caselaw and general Fourth Amendment principles had clearly established that this use of force was excessive in violation of the Constitution.").

Jennings v. Jones, 499 F.3d 2, 18, 19 (1st Cir. 2007) (on rehearing) ("The final prong of the qualified immunity analysis is 'whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.' . . . At first glance, this inquiry appears indistinguishable from that in the first prong. Both involve the reasonableness of the officer's conduct. However, the key distinction is that prong one deals with whether the officer's conduct was objectively unreasonable, whereas prong three deals with whether an objectively reasonable officer would have believed the conduct was unreasonable. . . . The third prong analysis seems nonsensical at first blush because, in effect, officers receive protection if they acted reasonably in exercising unreasonable force. In *Anderson v. Creighton*, 483 U.S. 635, 643, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court acknowledged the argument made by the appellant in that case that '[i]t is not possible ... to say that one Areasonably" acted

unreasonably.' However, the Court excused this apparent contradiction as merely linguistic . . . . Thus, qualified immunity affords protection to officers who reasonably, yet mistakenly, employ excessive force in violation of the Fourth Amendment. . . . We find that an objectively reasonable officer in Jones' circumstances would not have believed that it was lawful to increase the amount of force that he used after Jennings ceased resisting and stated that Jones was hurting him. . . Because the first and third prongs of the qualified immunity analysis are so closely related in these Fourth Amendment excessive force cases, the evidence that supports our conclusion on the first prong, that a reasonable jury could have found that the force Jones used was unreasonable, is likewise relevant here, on the third prong, to demonstrate that an objectively reasonable officer in Jones' position would have believed that the force used was unreasonable.").

See also ***Jennings v. Jones***, 587 F.3d 430, 445, 446 (1st Cir. 2009) (Lipez, J., concurring) ("This case demonstrates the importance of standards of review to the outcome of appeals. In the prior majority decision in this case, I wrote to vacate the district court's grant of judgment as a matter of law for defendant Jones because that ruling, in my view, was incompatible with the district court's obligation to consider whether the jury had 'a legally sufficient evidentiary basis' for its verdict. Fed.R.Civ.P. 50(a). My view on that issue has not changed. When the evidence presented at the first trial was considered in the light most favorable to the verdict–the applicable standard both in the district court and on appeal–the jury's judgment in favor of Jennings had to be upheld. The standards are very different, however, for motions seeking a new trial. In deciding whether to grant such a request, the district court is entitled to make its own judgment about the strength of the evidence, including the credibility of witnesses. . It follows that we, in turn, are obliged to afford wide latitude to the court's discretionary judgment about the strength of the evidence. . . The impact of the differing standards is apparent when we examine the 'critical factual dispute' at the heart of the prior majority decision: 'whether Jones *increased* the force he applied after Jennings already had ceased resisting for several seconds.'. . We concluded that, given the testimony of Jennings, Piccoli and Monroe, 'the only view of the evidence consistent with the principle that we take the facts in the light most favorable to the jury verdict' was that Jones had in fact increased the force he used to restrain Jennings. . . Based on that view of the evidence, we held that the district court improperly granted judgment for Jones on Jennings' excessive force claim. In this appeal, however, our focus has shifted. In evaluating Jones' motion for a new trial, the district court discussed the evidence that was essential to our previous decision–the testimony of Jennings, Piccoli and Monroe. It found their accounts of the increased use of force implausible in light of the videotapes and the officers' testimony, leading it to conclude that the jury's verdict was against the weight of the credible evidence. In reviewing that ruling, our focus is no longer on whether the evidence viewed in the light most favorable to the jury's verdict supports the verdict–it does–but on whether the district court abused its discretion in doubting the truthfulness of that evidence and ordering a new trial to avoid what it perceived as a miscarriage of justice. The change in the question has necessarily led me to a different answer in this second appeal. I agree with my colleagues that the district court did not abuse its discretion in concluding that a new trial was warranted. Hence, I join them in affirming the district court's judgment.").

Whitfield v. Melendez-Rivera, 431 F.3d 1, 8 (1st Cir. 2005) ("Although the Supreme Court has cautioned that in many cases the generalized holdings of *Garner* and *Graham* will not provide sufficient notice to police officers, the Court has also acknowledged that, in the obvious case, the standards announced in those decisions alone are sufficient to ' Aclearly establish" the answer.'. . Viewing the facts in the light most favorable to the verdict, the district court correctly concluded that a reasonable officer, similarly situated, would understand that his or her conduct violated the rights clearly established in *Garner* and *Graham*. This is especially true given the factual similarity between *Garner* and the present case. . . .Because the jury rejected the defendants' contention that Whitfield appeared threatening, the district court correctly concluded that Lebron and Mangome were not entitled to qualified immunity.").

Wilson v. City of Boston, 421 F.3d 45, 57-59 (1st Cir. 2005) ("We conclude that pre-1999 case law gave police officers ample warning that arresting and detaining someone incorrectly swept up in a mass arrest sting aimed at individuals with outstanding arrest warrants would violate her Fourth Amendment rights. While the parties have not identified any cases in which this issue has arisen in the context of an entirely innocent person who unwittingly was caught in a planned mass arrest, courts have addressed two closely related situations. First, it has been clearly established for decades that if one officer instructs another officer to make an arrest, the arrest violates the Fourth Amendment if the first officer lacked probable cause, regardless of how reasonable the second officer's reliance was. . . . Second, it was well established in other federal courts and in Massachusetts state court, if not in this circuit, that an arrest made on the basis of a facially valid warrant which turns out to have been cleared before the arrest violates the Fourth Amendment. . . . If it was clearly established that the Fourth Amendment proscribes an arrest based on a warrant that was once valid but has since been cleared, then *a fortiori* it was clearly established that the amendment proscribes an arrest based on a warrant that never existed in the first place. Taken together, the two principles cited above–that an arrest based on a request by another officer is lawful only if the first officer had probable cause, and that an arrest based on a facially valid, but actually recalled, warrant violates the Fourth Amendment–gave unmistakable warning to Massachusetts police that the Fourth Amendment prohibits arresting someone solely on the basis of a nonexistent warrant. We therefore conclude that the second prong has been satisfied. . . . The final prong of the qualified immunity analysis, often the most difficult one for the plaintiff to prevail upon, is 'whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.'. . Section 1983 actions 'frequently turn on the third prong of the qualified immunity inquiry, which channels the analysis from abstract principles to the specific facts of a given case.'. . . After confirming Wilson's identity and her lack of a warrant, Dunford ordered the officers to release her; subsequent delay arose from routine paperwork and time waiting for a 'cuff cutter' to arrive. Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . The delay in effecting Wilson's release, while undoubtedly exasperating to her, was due to simple administrative inefficiency, not plain incompetence or knowing violation of the law. Consequently, we affirm the district court's judgment in favor of Dunford.")

Justiniano v. Walker, No. 15-CV-11587-DLC, 2018 WL 4696741, at *6–7 (D. Mass. Sept. 30, 2018) ("Here, assuming *arguendo* that Trooper Walker used unreasonable force and that the right to be free from such force was clearly established at the time, the relevant inquiry for qualified immunity purposes is whether a reasonable, similarly situated officer would have understood Trooper Walker's conduct to violate Justiniano's rights. Viewing the facts in a light most favorable to the plaintiff, the court finds that a reasonable officer would not have clearly understood Trooper Walker's conduct to be unreasonable. Even accepting that one reasonably could wonder whether Justiniano was mentally troubled, a similarly situated officer would have concluded that Justiniano posed an imminent threat to Trooper Walker, to himself and to others, and would not have readily understood Trooper Walker's actions to violate Justiniano's rights. Among other things, the encounter took place on a busy roadway and Justiniano was already acting in an agitated state when Trooper Walker arrived on scene. Then, in short order, Justiniano threatened to kill Trooper Walker, failed to comply with his commands, continued to advance towards him, positioned his arms and hands as if he intended to fight, and then charged at Trooper Walker. Further, interwoven among these acts, Trooper Walker employed verbal de-escalation techniques, backed away, used pepper spray and called for backup. The tragic way in which the encounter ended tempts one to engage in wishful hindsight but the record compels this court to conclude that no reasonable officer standing in Trooper Walker's position would have understood that shooting at Justiniano in that context clearly violated Justiniano's constitutional rights. Accordingly, even assuming Justiniano's rights were violated, the violation was not obvious to a reasonable officer and qualified immunity therefore would shield Trooper Walker from liability.")

Rand, on behalf of Lawrence v. Lavoie, No. 14-CV-570-PB, 2017 WL 3891679, at *8–9 (D.N.H. Sept. 5, 2017) ("Reviewing the relevant law, by September 2013, a 'robust consensus of cases' had clearly established that an officer may not use deadly force to defend against a slowly approaching vehicle if it would have been clear to a reasonable officer in the defendant's position that the vehicle did not pose an imminent danger to any member of the public or another officer and the officer had sufficient opportunity to safely step outside its path. . . Accordingly, a reasonable officer in Lavoie's position would have recognized the unlawfulness of using deadly force in those circumstances. . . A number of Courts of Appeals have utilized this clearly established rule. The Ninth Circuit held in *Acosta* that an officer who used deadly force against a slowly approaching vehicle could be liable for violating the Fourth Amendment where a reasonable officer 'would have recognized that he could avoid being injured ... by simply stepping to the side.'. . The Third Circuit held in the alternative in *Abraham* that uncertainties as to whether an officer could 'get out of the way' of an oncoming car precluded summary judgment. . . Similarly, the Second Circuit held in the alternative that if an officer 'safely could have gotten out of the way' of an oncoming car, then his use of deadly force would have violated the Fourth Amendment. [citing *Cowan*] Last, the Seventh Circuit suggested in dicta that a vehicle does not pose a threat of serious bodily harm if an officer can avoid it. [citing *Estate of Starks v. Enyart*] Lavoie attempts to attack this clearly established law by citing cases where an officer's use of deadly force against an advancing driver was found reasonable. . . But even those Courts of Appeals that have found an officer's use of such force to be reasonable implicitly acknowledge

that, at some point, a reasonable officer must step aside instead of firing. For instance, in *Robinson v. Arrugueta*, 415 F.3d 1252 (11th Cir. 2005), the Eleventh Circuit emphasized that an officer confronted with an oncoming vehicle had, at most, 2.72 seconds to react to the vehicle. . .He therefore was entitled to qualified immunity because he had to make 'a split-second decision of whether he could escape before he got crushed.'. . *see also Thomas v. Durastanti*, 607 F.3d 655, 666 (10th Cir. 2010) (noting officer "had mere seconds to react" to an oncoming vehicle). If an officer has ample time to respond to a potential threat, however, the logic of *Robinson* does not apply. The same can be said for the rationales underlying similar cases decided by the First and Seventh Circuits after 2013. . . Lavoie's argument only reinforces the clearly established rule. Thus, even on the theory that Lawrence's vehicle was moving toward Lavoie when he fired, Lavoie would not be entitled to qualified immunity at this stage, and Rand's claim survives.")

Begin v. Drouin, No. 1:16-CV-00092-JCN, 2017 WL 1411470, at *8-9 (D. Me. Apr. 20, 2017) ("The issue in this case is whether at the time of the incident, the law was clearly established such that Defendant Drouin would have understood that she was violating Plaintiff's rights when she used deadly force without any warning or directive to Plaintiff, as Plaintiff was inflicting harm to himself with a knife with other people in the same room, but where Plaintiff made no verbal threats to or threatening moves toward Defendant Drouin or the others who were in the room. Decisions of the Supreme Court, circuit courts, including the First Circuit . . . and this Court, clearly established, before Defendant Drouin's encounter with Plaintiff in January 2015, that use of deadly force by a law enforcement officer is reserved for circumstances where a subject presents an immediate threat to the safety of the officer or others, and where the officer, when feasible, has provided the subject with a warning or instruction to cease the threatening conduct, but the subject persists in the conduct. [After surveying law from different Circuits, including First Circuit, court concludes that a] review of relevant case law thus reveals that at the time of the 2015 incident involving Plaintiff and Defendant Drouin, the contours of the constitutional protection from the use of excessive force were sufficiently clear such that a reasonable law enforcement officer would have understood that when a subject displays and uses a knife . . . to inflict self-harm in the presence of others, the use of deadly force is reasonable only when there is an immediate threat of harm to the officer or the others, and only after, if feasible, the officer provides a warning or instruction to the subject and the subject persists in threatening conduct. In short, this legal principle was not 'at a level of generality so high that officials [could not] fairly anticipate the legal consequences of specific action.'. . . Here, when viewed most favorably to Plaintiff, the record could support the following findings: (1) within a few seconds of entering the room in which Plaintiff was meeting with members of the ACT Team, Defendant Drouin shouted 'hey, hey, hey' and shot Plaintiff three times; (2) as Defendant Drouin approached, the person in the room closest to Plaintiff backed out of the way, and there was no one between Defendant Drouin and Plaintiff; (3) prior to discharging her weapon, Defendant Drouin did not instruct Plaintiff to drop the knife or otherwise warn him of the possible use of deadly force; and (4) before Defendant Drouin discharged her weapon, Plaintiff made no movement toward any other person and made no verbal threats to any other person. Given the findings that are supportable when the record is viewed most favorably to Plaintiff, whether Plaintiff posed an immediate threat to Defendant Drouin or others,

and whether a warning or instruction to Plaintiff was feasible under the circumstances are material factual issues in dispute. . . Accordingly, Defendants are not entitled to summary judgment based on qualified immunity.")

Blanchard v. Swaine, No. 08-40073-FDS, 2010 WL 4922699, at *8, *9 (D. Mass. Nov. 29, 2010) ("Blanchard contends that Swaine intentionally hit him with his cruiser. Among other things, he alleges that Swaine said 'I didn't mean to hit you that hard' after the collision. He points to witness testimony that there were no braking sounds and that Swaine's car was traveling 20 miles per hour when it hit him. A reasonable jury could find that this was a 'seizure.'. . A reasonable jury could also find that this seizure was unreasonable. At the time of the collision, Swaine knew that Blanchard was a suspected shoplifter evading arrest. However, he did not have information that Blanchard was armed in any way or otherwise presented a deadly threat. In those circumstances, a reasonable jury could find that the use of a police cruiser to stop pursuit was unreasonable. . . . Moreover, it would have been unreasonable for an officer to believe that his use of a police cruiser to stop pursuit was acceptable under the circumstances of this case, and a reasonable jury could find that such use violated Blanchard's constitutional rights. Drawing all reasonable inferences in favor of Blanchard, therefore, the Court finds that qualified immunity is not a bar to the § 1983 and battery claims against Swaine.")

Ray v. Donovan, Civil No. 05-239-P-H, 2006 WL 3741914, at *20 & n.33 (D. Me. Dec. 14, 2006) ("Prior to the issuance of *Calvi* the question of whether, drawing reasonable inferences in Ray's favor, there was a constitutional violation was a more difficult call. . . In the aftermath of *Calvi*, with its parenthetical reliance on *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir.2001), I conclude that Ray's claim does not survive summary judgment on the question of whether there was a constitutional violation apropos his handcuffing by Bergquist. . . . My lingering concern vis-a-vis this conclusion pertains only as to the question of whether Ray's assertion that he continued to complain to Bergquist about the handcuffs on his lengthy transport to the jail crosses a dividing line between constitutional handcuffing like that in *Calvi* and handcuffing that amounts to excessive force. However, the defendants have also asserted that they are entitled to qualified immunity. . . . . [E]ven if *Calvi* had not issued during the time that this motion was under consideration, given the state of the law in the First Circuit and the District of Maine concerning handcuffing a defendant during an arrest and for purposes of transport, Bergquist, who was principally responsible for the handcuffing and the transport, would be entitled to qualified immunity on Ray's excessive force claim.").

SECOND CIRCUIT

Terebesi v. Torreso, 764 F.3d 217, 237-39 & n.20 (2d Cir. 2014) ("It has become commonplace for defendants in excessive force cases to support their claims to qualified immunity by pointing to the absence of prior case law concerning the precise weapon, method, or technology employed by the police. . . As the Supreme Court has made clear, however, it is not necessary to find a 'case directly on point' in order to show that the law governing a plaintiff's claim is clearly established.

. . Some measure of abstraction and common sense is required with respect to police methods and weapons in light of rapid innovation in hardware and tactics. . . .[W]e conclude that no reasonable officer would think that his or her use of a stun grenade in the course of executing a search warrant was beyond the purview of the Fourth Amendment. . . .The question, then, is whether the use of stun grenades was reasonable under the particular circumstances alleged in this case. . . . The factors that other courts have considered in assessing whether a particular use of stun grenades was reasonable are no different from those that apply to other forms of force, lethal or non-lethal. In this case, we think it important to determine whether the officers first confirmed that they were tossing the stun grenade into an empty room or open space. . . . It also is more likely that using a stun grenade will be considered reasonable if the subject of the search or arrest is known to pose a high risk of violent confrontation. . . . By contrast, we do not think a reasonable officer would think that it was constitutional to use these devices in routine searches. Indeed, to the best of our knowledge, every appellate court to address the issue has found questionable the use of stun grenades in routine searches and seizures that do not pose high levels of risk to the officers or third parties. . . .On the facts presented at the summary judgment stage of this case, construed in the light most favorable to Terebesi, all of the stun grenade defendants knew or should have understood that the search warrant was for a personal-use quantity of drugs and that there was no reason to believe that Terebesi posed a risk of violence or resistance. It is true that, at the SWERT briefing, all of the officers were told that Terebesi habitually used crack cocaine, that he had recently been the victim of a shotgun attack, that he owned a handgun that was 'unaccounted for,' and that he held what might have been an unusually strong affection for his pet bird. But none of these facts suggested that Terebesi was ready to engage in violence, that he had any record of or propensity towards violence, that he had immediate access to weapons, or indeed that he was likely to offer any resistance at all. We therefore conclude that the record, as presented at summary judgment, presents material questions as to whether each defendant's decision to deploy stun grenades was reasonable under clearly established law, in light of his personal knowledge of the facts and circumstances surrounding the search. . . We therefore conclude that the district court properly denied the defendants qualified immunity at this stage of the proceedings.")

Terebesi v. Torreso, 764 F.3d 217, 240, 241 (2d Cir. 2014) ("Whether in this case the officers' actions were reasonable in light of clearly established law is not a question we may answer conclusively at this stage of the proceedings. As the district court recognized, the reasonableness of Sweeney's decision to fire his weapon depends in large part on whether Guizan did in fact attempt to wrest the weapon away from him, whether Sweeney was blinded by debris from the stun grenade explosion, and whether Sweeney reasonably believed he was taking fire once inside the house. The district court noted, moreover, that the credibility of Sweeney's recollection of these events was subject to genuine dispute. . . For the same reasons, we are unable to conclude at this juncture that Sweeney is entitled to qualified immunity for his decision to 'pin' Terebesi with his shield. Because Sweeney's claims to qualified immunity rely on these disputed facts, we have no jurisdiction to entertain them at this time. Weir, for his part, testified that he fired his weapon because he thought that Guizan was firing at Sweeney. The credibility of his recollection and the sufficiency of the asserted basis for his mistaken impression that Guizan was firing at the

officers are—like the factual arguments made by Sweeney—matters to be determined by the factfinder. We therefore affirm the decision of the district court insofar as it determined that defendants Sweeney and Weir were not entitled to qualified immunity at the summary judgment stage in connection with their roles in the raid of Terebesi's home.")

MacLeod v. Town of Brattleboro, 548 F. App'x 6, 2013 WL 6183023, *2 (2d Cir. 2013) ("Viewed objectively, MacLeod's actions immediately prior to being tased do not evince 'passive resistance' merely because MacLeod was not actually in the act of fleeing. . . Officer Emery used a Taser, once, to subdue an actively non-compliant suspect reasonably believed to be engaged in dangerous criminal activity and who posed a real and imminent threat to the safety of the officers and any bystanders. . . . In that situation, it was reasonable for Officer Emery—after repeated, clear commands that MacLeod return to the ground—to decided that using the Taser was required to effect the arrest. This avoided a 'hands-on' situation with an unrestrained, dangerous individual. . . Given the totality of these circumstances, no rational factfinder could conclude that the officer's course of action was unreasonable. Accordingly, Officer Emery's actions did not violate the Fourth Amendment.")

Zalaski v. City of Hartford, 723 F.3d 382, 389, 390, 393 (2d Cir. 2013) ("In short, if at least some reasonable officers in the defendant's position 'could have believed that [the challenged conduct] was within the bounds of appropriate police responses,' the defendant officer is entitled to qualified immunity. . . . Here, we need not, and do not, decide whether there was actual probable cause to arrest Zalaski and Oatis for disorderly conduct under Connecticut law because we conclude, in any event, that there was arguable probable cause to support the arrests. . . .On qualified immunity review, we need not here conclusively decide the scope of obstruction proscribed by Connecticut's disorderly conduct statute. We need only conclude, as we now do, that Connecticut has not so clearly limited obstruction to the condition of fully blocking pedestrian traffic as to foreclose a reasonable officer from making an *arguably* correct finding of probable obstruction based on plaintiffs' actions in blocking part of the steps at the Red Nose Run. This is not to suggest that an officer would have arguable probable cause to arrest an individual for disorderly conduct under the Connecticut statute based simply upon the person's presence in a location being utilized by others. We conclude only that the facts known to the police in this case—namely, that individuals were holding a large banner, positioned partially in front of a clearly visible point of ingress and egress to be used predominantly by young children—permitted reasonable officers to think that probable cause existed to support arrests for disorderly conduct.")

Swartz v. Insogna, 704 F.3d 105, 110 (2d Cir. 2013) ("Perhaps there is a police officer somewhere who would interpret an automobile passenger's giving him the finger as a signal of distress, creating a suspicion that something occurring in the automobile warranted investigation. And perhaps that interpretation is what prompted Insogna to act, as he claims. But the nearly universal recognition that this gesture is an insult deprives such an interpretation of reasonableness. This ancient gesture of insult is not the basis for a *reasonable* suspicion of a traffic violation or impending criminal activity. Surely no passenger planning some wrongful conduct toward another

occupant of an automobile would call attention to himself by giving the finger to a police officer. And if there might be an automobile passenger somewhere who will give the finger to a police officer as an ill-advised signal for help, it is far more consistent with all citizens' protection against improper police apprehension to leave that highly unlikely signal without a response than to lend judicial approval to the stopping of every vehicle from which a passenger makes that gesture. On the Plaintiffs' version of the facts, the stop was not lawful, and it was error to grant the Defendants summary judgment on the Plaintiffs' claim concerning the stop. . . Nor were the Defendants entitled to qualified immunity on this claim because a *reasonable* police officer would not have believed he was entitled to initiate the law enforcement process in response to giving the finger.")

Fortunati v. Vermont, 503 F. App'x 78, 2012 WL 5897166, *2 (2d Cir. Nov. 26, 2012) ("Plaintiffs also challenged the grant of qualified immunity to Defendants Protzman and Goodell, who deployed the TSU team. We conclude that the district court was correct; there was no 'clearly established' right in this Circuit to be free from the deployment of a police SWAT team. Appellees argue that the decision to deploy a police SWAT team can itself never amount to a Fourth Amendment violation. We need not decide that question, which this Circuit has not addressed. *See Estate of Smith v. Marasco*, 430 F.3d 140, 149–50 (3d Cir.2005) ("[A] decision to employ a SWAT-type team can constitute excessive force if it is not objectively reasonable to do so in light of the totality of the circumstances." (internal quotation marks omitted)); *Overdorff ex rel. Harrington*, 268 F.3d 1179, 1190 (10th Cir.2001) ("[T] he decision to deploy a SWAT team to execute a warrant must be 'reasonable.' "). *But see Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir.1996) ("Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir.1992) ("[P]re-seizure conduct is not subject to Fourth Amendment scrutiny.").")

Crowell v. Kirkpatrick, 400 F. App'x 592, 594, 595 (2d Cir. 2010) ("In this case, Plaintiffs were arrested for relatively minor crimes of trespass and resisting arrest and were not threatening the safety of any other person with their behavior. However, they were actively resisting their arrest at the time they were tased by the officers in this case, having chained themselves to a several hundred pound barrel drum and having refused to free themselves, even though they admitted they were able to release themselves from the barrel at any time throughout the encounter. Plaintiff Kilmurray admits that prior to the officers' use of their tasers, she had asked an acquaintance at the scene to call other members of their group to return to the property. Moreover, both Plaintiffs admitted that the officers at the scene considered and attempted several alternate means of removing them from the property before resorting to use of their tasers, that the officers expressly warned them that they would be tased and that it would be painful, and that the officers gave them another opportunity to release themselves from the barrel after this warning. Finally, both Plaintiffs were given opportunities again to release themselves from the barrel prior to the subsequent uses of the tasers. While we do not suggest that the use of a taser to effect an arrest is always, or even often, objectively reasonable, under the circumstances here, even construing the facts in the light most favorable to Plaintiffs, we conclude that it was. Because they had chained themselves to the

drum, Plaintiffs could not have been arrested and removed from the scene by more conventional means, and the apparently imminent arrival of some number of their compatriots added a degree of urgency to the need to remove Plaintiffs quickly, before the presence of other protestors made that more difficult to accomplish. The officers attempted to use other means to effectuate the arrest, none of which proved feasible, and used the taser only as a last resort, after warning Plaintiffs and giving them a last opportunity to unchain themselves from the barrel and leave the premises peacefully. Finally, Defendants set the taser on 'drive stun' mode, which typically causes temporary, if significant, pain and no permanent injury. *See Brooks v. City of Seattle*, 599 F.3d 1018, 1027 (9th Cir.2010) ("The use of the Taser in drive-stun mode is painful, certainly, but also temporary and localized, without incapacitating muscle contractions or significant lasting injury."), *rehearing en banc granted*, __ F.3d __, 2010 WL 3896202 (9th Cir. Sept. 30, 2010). Given the totality of those circumstances, it is difficult to see how a rational factfinder could conclude that the officers' actions were anything other than reasonable.")

Gilles v. Repicky, 511 F.3d 239, 247 (2d Cir. 2007) ("The district court found 'arguable probable cause' based on 'the awareness of a high level of terrorism alert, and the report that the license plate was stolen, together with his observation of fifty-five gallon drums covered with a blanket in an overweight vehicle headed towards New York City.' *Gilles*, 2006 WL 360171 at *4. The district court noted additionally the fact that Gilles slowed down to the posted speed limit when a marked patrol car approached. . . The problem with the district court's analysis is that these factors supported the initial stop and a brief investigative detention. Repicky himself did not believe that he had probable cause based on the facts known to him at the point Gilles was released from handcuffs and then asked or told to go to the police station. . . . Once the factors giving rise to the stop were investigated, and produced no reason to conclude that Gilles had committed a crime (other than speeding), the most Repicky retained were suspicions. No reasonable officer could conclude that he had probable cause to arrest Gilles at that point, and accordingly Repicky is not immune from suit on this basis.").

Green v. City of New York, 465 F.3d 65, 83, 84 (2d Cir. 2006) ("We hold that it was clearly established at the time of the incident under review that a competent adult could not be seized and transported for treatment unless she presented a danger to herself or others. . . . [T]he jury could conclude that, based on information readily available to Giblin, no reasonable officer would have concluded that Walter was incompetent to make decisions concerning his treatment or a threat to himself or others. . . We conclude that there are factual issues relevant to qualified immunity on Walter's Fourth Amendment seizure claim against Giblin and therefore reverse the district court's dismissal of this claim.")**.**

Jones v. Parmley, 465 F.3d 46, 61-63 (2d Cir. 2006) ("The court below appears to have extrapolated from *Atkins* the legal proposition that 'unless State Defendants had probable cause for the arrests that they made, any force that they used in making those arrests was excessive.' . . . The *Atkins* court clearly did not intend to create or substitute a new standard for arrests lacking probable cause, and the reasonableness test established in *Graham* remains the applicable test for

determining when excessive force has been used, including those cases where officers allegedly lack probable cause to arrest. This Court has remanded cases where a district court failed to reach an issue of qualified immunity, . . . but we have also addressed the merits of the issue itself on appeal, especially 'where the record plainly reveals the existence of genuine issues of material fact relating to the qualified immunity defense.'. . Because the extensive factual record reveals that material issues already exist concerning the excessive force claims which the district court did not dismiss, . . . we see no reason to remand this issue here, where as a matter of law, defendants would not be entitled to qualified immunity on the facts as alleged by plaintiffs. . . . In sum, after conducting a de novo review, we hold that the district court's ultimate determination in denying defendants' motion for summary judgment on the excessive force claims was correct despite its understandable reliance on dicta in *Atkins*.").

Cruz v. Ctiy of New Rochelle, No. 13CV7432 (LMS), 2017 WL 1402122, at *25-26 (S.D.N.Y. Apr. 3, 2017) ("Although Plaintiffs contend that the use of lethal force resulted from the officers' erroneous decision to employ Tasers, which they should have known would be ineffective in subduing Cruz, '[the officers'] actions leading up to the shooting are irrelevant to the objective reasonableness of [Officer Geertgen's] conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he [or she] made the split-second decision to employ deadly force.' *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996). Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claim of excessive force based on the use of lethal force. . . . [As in *Sheehan*], in this case, Defendants' initial attempt to enter Cruz's apartment to render emergency assistance to Cruz was lawful, and their entry after Sgt. Perri saw what he believed to be a knife in Cruz's hand, even after the door was held closed by the chain lock, was likewise lawful. Moreover, Defendants' use of force in this case was reasonable — first, they tried to subdue Cruz with Tasers, and when that did not work, the use of lethal force was justified. Defendants cannot be held liable under the Fourth Amendment based on 'bad tactics' or expert opinion that they failed to follow their training.")

Estate of Devine v. Fusaro, No. 3:14-CV-01019 (JAM), 2016 WL 183472, at *6 (D. Conn. Jan. 14, 2016) ("I conclude that there are three important factual circumstances that bear on the constitutional reasonableness of the defendants' use of force in this case. First, the police used a type of force that is designed to be less-than-lethal, rather than using deadly force. The degree of force is plainly relevant to its reasonableness. Second, the police used less-than-lethal force against a man whom they reasonably believed to be suicidal and to be armed with, and holding, a loaded gun while occupying public property. The presence of a dangerous weapon by an unstable person on public property is plainly of legitimate concern to law enforcement officers. Third, the police used less-than-lethal force after the passage of several hours of a stand-off and negotiations that had yet to succeed in convincing Devine to surrender his gun. The passage of time to allow consideration and resort to non-force alternatives is plainly significant to assessing the reasonableness of a later use of force by the police. Accordingly, for qualified immunity purposes, the appropriate inquiry here is whether an objectively reasonably law enforcement would have

known it to violate the Constitution to use less-than-lethal force against a suicidal and armed man on public property and who has refused to surrender his loaded gun after several hours of negotiation with the police. In light of this inquiry, it is clear to me that an objectively reasonable law enforcement officer would not have known that defendants' use of less-than-lethal force amounted to a violation of the constitutional rights of Timothy Devine. . . .The police are hardly to be faulted for devising strategies designed to use less-than-lethal force as an alternative to the more drastic and immediate use of deadly force. This is not to say that the guidance of a state police manual determines *ab initio* what conduct is constitutionally lawful. . . But the guidance of a departmental manual may be at least relevant to deciding whether any individual police officer within that department should know that what he or she was doing was unlawful."), *aff'd by* 676 F. App'x. 61 (2d Cir. 2017).

Whitfield ex rel Cobbs v. City of Newburgh, No. 08 CV 8516 (RKE), 2015 WL 9275695, at *19-22 (S.D.N.Y. Dec. 17, 2015) ("Despite its holding that the initial deployment of the K-9 was objectively reasonable as a matter of law, the court is mindful of the compounding effect of using the K-9 and the taser at the same time. Because a reasonable juror could conclude that the use of the taser while Cobbs remained engaged with the K-9 was objectively unreasonable, a juror could reach the same conclusion regarding the continued use of the police dog. That is, when viewing the facts in the light most favorable to plaintiff, a juror could conclude that the K-9 was not removed from Cobbs prior to the deployment of the taser, and it continued to bite Cobbs until the completion of the four taser cycles administered to Cobbs. Accordingly, a reasonable juror could conclude that the continued use of the K-9, compounded with the application of the taser, was excessive and in violation of the Fourth Amendment. In addition to this compounding effect, a reasonable juror could find the duration for which the force was used was objectively unreasonable under the circumstances, particularly if the juror concluded the force continued to be applied to Cobbs after he no longer posed a threat to the Officers, and that Cobbs was not afforded any time to recover between each use of force. . . [T]the question here is whether, when viewing the facts in the light most favorable to plaintiff, it was established or clearly foreshadowed by the Supreme Court or federal courts of appeals by July 8, 2007, that, in effectuating a lawful arrest, an officer's use of force is excessive if he or she uses a taser on an individual who no longer poses an immediate threat, is engaged with a police K-9, and is physically struck by an officer. The court finds that it was. . . .[V]iewing the evidence in the light most favorable to plaintiff, the court finds a reasonable juror could conclude the force used by the Officers was objectively unreasonable and in violation of the Fourth Amendment. Although Cobbs initially displayed resistance to arrest and fled into the living room, thereby resulting in the lawful deployment of the K-9, material factual disputes remain following the K-9's deployment, including whether the taser was deployed before the K-9 was removed from Cobbs; the duration for which Cobbs was tasered; whether Cobbs was physically struck by Officer Vasta and, if so, when, and how many times; and whether Cobbs continued to resist arrest, and if so, in what manner. . . As a result, for the same reasons that the Officers are not entitled to summary judgment on the merits of the excessive force claim, they are not entitled to summary judgment on the basis of qualified immunity.")

Estate of Jaquez v. City of New York, 104 F.Supp.3d 414, 419, 434-35, 437 (S.D.N.Y. 2015) ("When the Court sat down to write the opinion, it became clear that one moment of the altercation between Mr. Jaquez and the officers stood apart from the others: the final shot by Sgt. Flores that entered the back of Mr. Jaquez's head. While the Court grants qualified immunity to each defendant for all conduct preceding that final shot—including the forceful use of the shield, Tasers, Sage guns, and the initial use of live ammunition—it does not with regard to Sgt. Flores. Most situations do not require parsing the events of a single altercation to analyze each specific action a particular officer took. More typically, an event is susceptible to general categorization. Here, that is not the case. The circumstances immediately preceding Sgt. Flores's final use of force are sufficiently different from the remainder of the altercation that this Court must find a triable issue of fact as to Sgt. Flores only. . . .The Court renders its decision cognizant of the unusual circumstance of parsing individual moments so finely as to both grant and deny qualified immunity in connection with a single complex event. In sum, reasonable jurors applying their common sense could determine that it was objectively unreasonable to shoot Mr. Jaquez in the back of the head when he had already been shot at least four times, was surrounded by a team of officers suited up in their ballistics gear, and, even if he somehow maintained possession of the knife, was merely pushing up from the ground. Reasonable jurors could determine that as to that moment, the officers could have merely backed off or taken some form of alternative action. . . .The dispositive legal point is that a grant of qualified immunity as to the use of force—even lethal force—in the course of an event does not necessarily extend to all use of such force throughout the incident. While it may have been reasonable for Sgt. Flores to use lethal force earlier in the altercation when Mr. Jaquez threatened the officers with a knife, such authority does not extend indefinitely.")

Negron v. City of New York, 976 F.Supp.2d 360, 370, 371 (E.D.N.Y. 2013) ("Fair warning clearly establishing that conduct is unconstitutional may emanate only from 'Supreme Court and Second Circuit precedent existing at the time of the alleged violation.'. . As defendants correctly note, . . . there were no Supreme Court or Second Circuit decisions regarding excessive force and involving the use of a taser at the time of the events at issue here. . . Yet 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . In other words, the precise factual pattern at issue in a particular case need not have been ruled upon in a prior decision for it to be clear that an officer's conduct violated a constitutional right. As the Supreme Court has explained, 'We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'. . Applying this standard, the Sixth Circuit found the use of pepper spray to be sufficiently similar to deployment of a taser for pepper spray cases to provide a source of relevant clearly established law. . . . Pigott and Marchesona should have known that using a taser under the particular circumstances at issue here was unreasonable even despite the lack of precedent involving tasers used under similar circumstances. *Graham* did not merely announce that excessive force claims are properly analyzed under the Fourth Amendment, or that whether a particular use of force is reasonable depends upon a balancing of the degree of intrusion on the individual's rights against the governmental interests at stake. *Graham* also identified specific factors to be taken into account when undertaking this balancing, including 'the severity of the crime at issue, whether the suspect poses an immediate threat to the

safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'. . Morales had not committed a serious or violent crime. He did not pose an immediate threat to the safety of officers or others; he did not have a traditional weapon—a gun or a knife—but instead was holding only a long light bulb, and the officers closest to him could have retreated to a position out of reach of the bulb while still blocking Morales from fleeing. In fact, Morales was surrounded and could not flee. While passively resisting arrest by refusing to obey the officers' instructions, Morales was not actively resisting by fighting or struggling with the officers or attempting to escape. Finally, additional officers were on their way to the scene with an air mattress that presumably would have safely broken Morales' fall, and there was no pressing reason not to await their arrival. Any concern that it would be unjust to deny qualified immunity given the scant precedent outlining when taser use constitutes an unreasonable use of force is mitigated by the NYPD policy adopted several months before the events in issue. That policy, at a minimum, should have alerted the defendant officers to the severe dangers of using a taser, without warning, on an individual who could fall from an elevated and precarious position, and informed their consideration of the *Graham* factors. For all these reasons, and construing the evidence of the relevant facts and circumstances in the light most favorable to plaintiff, I conclude that a reasonable jury could find facts that would, under clearly established law, constitute a violation of Morales' Fourth Amendment rights, and that would render it objectively unreasonable for Pigott and Marchesona to have believed that their conduct was lawful. Defendants' motion for summary judgment with respect to plaintiff's Section 1983 claim is therefore denied.")

Doutel v. City of Norwalk, No. 3:11–CV–01164 (VLB), 2013 WL 3353977, *25 (D. Conn. July 3, 2013) ("Absent authority in this circuit reversing the holdings in *Garcha, McGuire,* and *Vaher*, the Defendants in this action are entitled to rely on the holdings of those cases. . . In light of this line of case law, it was objectively reasonable for the defendant Norwalk Police officers to believe that their seizure of the firearms in the Doutel household did not violate Mrs. Doutel's right to keep and bear arms, as the seizure of these arms did not prevent Mrs. Doutel from acquiring other weapons. In other words, it was reasonable for the officers to believe that Mrs. Doutel's interest in her *particular* weapons did not rise to a Second Amendment violation of her right to bear arms where her *general* right to keep and bear arms remained intact. In the absence of controlling authority recognizing a Second Amendment violation in similar circumstances for the seizure by law enforcement officials of a particular firearm, and in light of the scarcity of applicable Second Amendment case precedent in this circuit, the Defendants are entitled to qualified immunity as to Barbara Doutel's Second Amendment claim.")

Odom v. Matteo, No. 3:08-cv-1569 (VLB), 2011 WL 283946, at *9, *10 (D. Conn. Jan. 24, 2011) ("[E]ven had Maffeo been justified in his initial use of force, a reasonable jury could conclude that his subsequent Taser deployment on a purportedly non-threatening individual who was not attempting to escape and had conveyed to Maffeo that she suffered from a brain injury was unreasonable. . . . This conclusion is further supported by the fact that, based upon Odom's version of events, Maffeo tasered her not once, but three times, each time without warning. . . If the facts asserted by Odom are true, Maffeo's actions also violated Waterford Police Department policy

governing the use of Tasers. Under Department policy, a Taser may be deployed only on a subject who is 'actively resisting arrest,' not one is who engaged merely in 'passive resistance' as Odom contends she was doing in this case. . . Further, the policy requires an officer to give warning before deploying a Taser, which Odom claims Maffeo did not do. . . In sum, the use of a Taser is a significant use of force, and a reasonable jury could well find that its repeated deployment on an individual who is suspected of only minor traffic infractions, poses no immediate threat, is not attempting to escape, and has indicated that she suffers from a brain injury constitutes an excessive and unreasonable use of force.")

Crowell v. Kirkpatrick, 667 F.Supp.2d 391, 409-11 (D. Vt. 2009) ("Here it is clear that the Tasers were not necessary to prevent the Plaintiffs from fleeing (quite the opposite, in fact), and were not necessary as a means of self-defense. But the Plaintiffs were plainly resisting arrest, and in doing so took steps beyond mere noncompliance with police orders. Rather, they chained themselves to a 300 lb. object that the police could not move, thus eliminating some less forceful options for the Plaintiffs' removal that otherwise may have worked. . . . In law enforcement parlance, the Defendants attempted to resolve the situation with 'officer presence,' 'verbal communication,' and 'soft hand control,' before resorting to 'hard hand control' by using their Tasers. . . . Here, the Court agrees with the Defendants and these other courts that using a Taser as a last resort to effect the arrests of suspects who are resisting, who have repeatedly been given lawful orders with which they could have easily complied, and who received repeated warnings specifically about the use of pain compliance techniques, is not unreasonable, and does not rise to the level of a Fourth Amendment violation. . . . Finally, the Plaintiffs are mistaken to the extent they suggest that there is a per se prohibition against using force–even painful force–against resistors who are not violent or threatening. . . .Police officers 'are not required to use the least intrusive degree of force possible' to effect an arrest. Rather, the constitutional inquiry is whether the force used was reasonable under the circumstances. . . Because it was reasonable to use their Tasers, the Defendants are entitled to judgment as a matter of law on the Plaintiffs' excessive force claims.").

Lonegan v. Hasty, 436 F.Supp.2d 419, 432, 433 (E.D.N.Y. 2006) ("In addition to the Wiretap Act itself and the cases discussed above, the federal regulation prohibiting prison officers from monitoring attorney-client meetings except under narrow circumstances not present here would have put a reasonable officer in Hasty's position on further notice that surreptitious recording of plaintiffs' meetings with Detainees was unlawful. . . .The December 18, 2001 memorandum, advising wardens that audio-taping attorney meetings with Detainees was prohibited, would have provided a reasonable warden with additional notice that recording plaintiffs' communications with Detainees was beyond the legitimate scope of his or her duties. In sum, on the face of the complaint, no reasonable officer in Hasty's position could have believed that recording plaintiffs' communications with Detainees without prior judicial authorization was permitted by the Wiretap Act. Accordingly, Hasty is not entitled to qualified immunity with respect to plaintiffs' Wiretap Act claims.")

Lonegan v. Hasty, 436 F.Supp.2d 419, 439 (E.D.N.Y. 2006) ("In sum, at the time of the events at issue in this case, it was clearly established in this Circuit that plaintiffs had a constitutionally protected reasonable expectation of privacy in their communications with Detainees. A reasonable warden in Hasty's position would have been aware of the policies and regulations of his or her own agency prohibiting prison officers from recording attorney-client communications except under narrow circumstances not present here. A reasonable warden would also have been aware of the Wiretap Act's prohibition on the interception of oral communications, created, in part, to comply with the requirements of the Fourth Amendment, and the case law discussed above confirming that the Wiretap Act applies within the prison setting. And he or she would have been aware not only of the decisions in *Berger*, *Katz*, *Keith*, and *Mitchell*, but also of the decisions in *State Police Litigation*, which serve to eliminate any possible doubt that the act of recording conversations that took place in the Visiting Area between plaintiffs and Detainees violated the Fourth Amendment. Accordingly, on the facts alleged in the complaint, Hasty is not entitled to qualified immunity with respect to plaintiffs' Fourth Amendment claims.")

Cipes v. Graham, 386 F.Supp.2d 34, 41, 42 (D. Conn. 2005) ("Having found the defendant's conduct as alleged to be unconstitutional, the next inquiry is whether the law was 'clearly established,' which must be determined in the specific context of the case, not as a broad, general proposition. . . .The defendant points to the absence of any controlling case in which it has been held unreasonable to serve a misdemeanor warrant on a suspect at night, while plaintiff argues that the qualified immunity test is not limited to whether a case specifically addresses the facts of the case at bar, otherwise 'public officers [could] commit statutory violations so outlandish that they never have been the subject of a published appellate decision.' . . In some rare cases where the constitutional violation is patently obvious, plaintiff argues, it is unnecessary to identify judicial precedent to defeat qualified immunity. Plaintiff contends that midnight warrant executions are 'so rare' that this is such a case. The Court disagrees. . . . The violation alleged here clearly is not as obviously unconstitutional as the use of the hitching post in *Hope*. While police 'rousting' Cipes out of bed may have been frightening and degrading, it comes nowhere near the egregious conduct of the guards in *Hope*, which subjected the inmate to physical pain and extreme loss of dignity for hours. Moreover, the law applicable to this case is far from 'clearly established.' No Supreme Court or Second Circuit case exists which presents a circumstance similar or analogous to a nighttime execution of a misdemeanor arrest warrant with no exigent circumstances and no statutory or regulatory restrictions. Nor can it be concluded that reasonable police officers in defendant's position would have clearly understood from the existing law that their conduct was unlawful. In the absence of any controlling caselaw bearing on similar circumstances so as to have framed this issue with sufficient precision to put reasonable law enforcement officials on notice of the constitutional infirmity of such a nighttime misdemeanor warrant execution, the defendant is entitled to qualified immunity.").

THIRD CIRCUIT

Russell v. Richardson, 905 F.3d 239, 252 (3d Cir. 2018) ("*Garner*, of course, 'lay[s] out excessive-force principles at only a general level.'. . But "general statements of the law are not inherently incapable of giving fair and clear warning to officers.'. . For this reason, while *Garner* usually 'do[es] not by [itself] create clearly established law,' it may do so in an 'obvious case,'. . . for example, where the circumstances reflect 'the absence of a serious threat of immediate harm to others.'. . .This is such a case. According to the complaint, Richardson used deadly force against L.T. even though there was no indication L.T. was then engaged in any misconduct beyond disobeying his mother; immediately before the incident, L.T. was allegedly lounging in his bedroom; and L.T. allegedly exited his room wearing only underwear, making it implausible to a reasonable officer that he was hiding a weapon on his person. Accepting these allegations as we must at this stage, there was no 'serious threat of immediate harm to others,'. . . and '[t]he absence of any *Garner* preconditions to the use of deadly force' makes this an 'obvious case where ... *Garner* clearly establishes the law[.]'")

Bland v. City of Newark, 900 F.3d 77, 82-87 & n.8 (3d Cir. 2018) ("After oral argument, the District Court concluded that it was 'not in a position to grant or deny qualified immunity.'. . Instead, it held that a jury must first decide two issues of material fact: (1) whether the Audi's engine was revving (and thus whether the car was capable of moving) after it crashed into the scaffolding; and (2) whether the officers could see Bland's movements inside the vehicle. The District Court opined that the Supreme Court's decision in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), issued three years *after* the car chase, may decide the 'central' question of 'whether or not Corey Bland was an active threat to the officers at the terminus so as to justify their actions in using deadly force to end that risk.'. . Accordingly, it denied Defendants' motion, including with respect to the three officers who were neither present nor discharged their weapons at the terminus of the chase. Defendants moved for a stay of trial, which the District Court denied. We entered an order staying the district court proceedings pending the resolution of this timely interlocutory appeal. . . The Supreme Court has consistently held that officers either did not violate the Fourth Amendment or were entitled to qualified immunity when they used deadly force during car chases similar to the one at issue here. . . .Like the cases just mentioned, Bland's behavior threatened the safety of the officers, as well as the public at large. . . . Given the troopers' reasonable belief that Bland was armed, and the mortal threat that his conduct posed to those around him, the troopers who discharged their weapons at Lincoln Park did not violate Bland's clearly established constitutional rights. And because Thompson, Murphy, and Oliveira fired their weapons only at this location, they are plainly entitled to qualified immunity. . . . The events at the terminus of the car chase present a more complicated picture, but we reach the same conclusion because Bland identifies no caselaw indicating that the officers violated clearly established law extant in 2011. . . He instead states in conclusory fashion that 'every ... reasonable member of law enforcement should be aware that [the officers'] conduct would constitute excessive force.'. . In support, Bland argues that the officers were not in a position to see whether he made threatening movements inside the vehicle, and that the Audi's impact with the scaffolding rendered it inoperable, bringing the car chase to an end. . . As a result, Bland contends that *Brosseau* and *Scott* no longer control, and we should instead look to *Tennessee v. Garner* for guidance. . . .The officers here confronted

a scenario quite different from the one presented in *Garner*, where the officer pursued and shot a nondangerous suspect in the back of the head, even though the officer was 'reasonably sure' the suspect was unarmed. . .This becomes especially clear once we consider the officers' actions 'in light of the specific context of the case,' as we are required to do. . . The state troopers and Officer Del Mauro—all of whom were present at Lincoln Park—continued to pursue a fugitive who once again disobeyed traffic lights, drove at excessive speeds, and put pedestrians and motorists at great risk. Under Bland's version of events, at least one innocent civilian suffered harm by his flight when a state police car struck an occupied vehicle during the final leg of the pursuit. . . After the crash, Bland threatened to kill the officers, and the record provides no evidence that he attempted to surrender at any time. Though the Audi remained pinned against the scaffolding, the officers had previously seen Bland successfully free the car and continue to flee after the crash at Lincoln Park. And although the officers did not see a weapon, the police reports of an armed carjacking gave them reason to believe Bland was armed. . . This was the situation the officers confronted at the terminus of the chase when they discharged their weapons. Bland identifies no cases with similar facts that, in 2011, would have 'put every reasonable offic[er] on notice' that using deadly force in such a situation violated clearly established constitutional rights. . . Therefore, accepting (as we must) the truth of Bland's assertions regarding the Audi's immobility and the officers' ability to see Bland's hands, our conclusion remains the same: the actions taken by the State Troopers and Officer Del Mauro are protected by qualified immunity. But what about Newark Officers Torres and Martinez, who, according to Bland, 'arrived on the scene[and] joined in the shooting without knowing whether Mr. Bland was firing at them, and without ever first observing Mr. Bland to be in possession of any firearm'? . . . The Newark officers contend that video footage refutes this allegation, but we need not resolve that dispute. . . Here again, Bland has presented no caselaw demonstrating that the officers, who reasonably believed that Bland was armed, violated a clearly established right by joining in the chaotic scene and discharging their weapons. A recent Supreme Court decision demonstrates that Torres's and Martinez's actions did not violate clearly established rights. [discussing *Pauly*] So too here. In the absence of any controlling law to the contrary, Newark Officers Martinez and Torres likewise are entitled to qualified immunity. . . . Because Defendants are entitled to qualified immunity, we need not reach the underlying Fourth Amendment questions. . . Nothing in this opinion should be read to suggest that law enforcement officers violate the Fourth Amendment where, as here, they employ lethal force to neutralize a carjacking suspect reasonably perceived to be armed, dangerous, and unwilling to peacefully surrender.")

Fields v. City of Pittsburgh, 714 F. App'x 137, 143 (3d Cir. 2017) ("The Supreme Court in *Mendez* left open the possibility that, under the *Graham* test, a court should consider 'unreasonable police conduct prior to the use of force that foreseeably created the need to use it.'. . Fields, however, does not actually contend that a foreseeable consequence of Labella's slap was that the officers would at some later point need to Tase Fields to effectuate his lawful arrest and, in any event, his threatening behavior towards them — which provided the officers probable cause to arrest — was a superseding cause that broke the chain of proximate causation between the slap

and the Tasing. . . Fields has not established that his constitutional rights were violated, . . . so his § 1983 claim fails and we need not consider the issue of qualified immunity.")

Blair v. City of Pittsburgh, 711 F. App'x 98, __ (3d Cir. 2017) ("Blair likens his case to *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999), where we did not grant an officer qualified immunity (or even discuss the issue). There, an off-duty police officer pursued Abraham into a mall parking lot as Abraham fled from Macy's, where he had stolen some clothing. . . Abraham hit another car as he was backing out of his parking space; as he began driving forward, the officer shot and killed him. . . That case is unlike Blair's. To start, *Abraham* preceded *Mullenix*, *Brosseau*, and *Plumhoff*, in which the Supreme Court developed the contours of qualified immunity for excessive force claims against officers shooting fleeing suspects. Moreover, *Abraham* did not even discuss the issue of qualified immunity. Further, *Abraham* involved an off-duty officer's pursuit of a shoplifting suspect who had no gun: it was not at all clear that Abraham posed any threat to anyone at all. Here, while investigating shots fired, the Officers saw a vehicle approaching them down an alleyway, and saw Blair firing a gun at them. Clearly, the level of threat to public safety in Blair's case is not analogous to the threat presented in *Abraham*. . . Thus, the District Court properly granted the Officers qualified immunity.")

Davenport v. Borough of Homestead, 870 F.3d 273, 280-82 (3d Cir. 2017), *cert. denied*, 138 S. Ct. ___ (2018) ("Although we need not address these prongs in any particular order, . . . we exercise our discretion to address both '[b]ecause we believe this case will clarify and elaborate upon our prior jurisprudence in important and necessary ways.'. . . We first consider whether Schweitzer, Matakovich, and Kennedy's alleged conduct violated the rights secured to Davenport by the Fourth Amendment. Based on Davenport's version of facts, the District Court concluded that a reasonable jury could find that the officers intentionally shot at Davenport and that the pursuit posed no serious threat of immediate harm to others. This was error, as these assertions are 'blatantly contradicted by the record.'. . First, video evidence indisputably shows a heavy pedestrian presence during the course of the pursuit. And second, throughout the pursuit Burris continuously swerved between inbound and outbound lanes, which ultimately led to his colliding with three other vehicles. Considering the serious threat of immediate harm to others, no reasonable jury could conclude that the officers fired at the vehicle for any reason other than to eliminate that threat. Schweitzer shot at the vehicle with the knowledge that Burris refused to yield to officers' continued pursuit and swerved between lanes in an area with high pedestrian traffic. Matakovich and Kennedy shot at the vehicle with the additional knowledge that Burris continued the dangerous vehicular pursuit despite sustaining police fire. Given the serious threat of immediate harm to East Carson Street's many pedestrians, even if the officers knew that a passenger was in the vehicle, their conduct was objectively reasonable as a matter of law. . . As such, Schweitzer, Matakovich, and Kennedy are entitled to summary judgment because they did not violate Davenport's Fourth Amendment rights. . . .There is an additional and distinct basis on which we must reverse the District Court's denial of qualified immunity to Schweitzer, Matakovich, and Kennedy—their alleged conduct did not violate clearly established law. . . .The specific question presented by this case is whether, on January 13, 2013, the law clearly established

that an officer who, in an attempt to eliminate the serious threat of immediate harm to others created by a vehicle's flight shoots the vehicle's passenger, violates that passenger's rights under the Fourth Amendment. We hold that it did not. The District Court concluded that *Tennessee v. Garner* clearly established that the officers' alleged conduct was unlawful. . . .The Supreme Court, however, has applied *Garner*'s 'general' test for excessive force in only the 'obvious' case. . . And courts have found 'obvious' cases only in the absence of a serious threat of immediate harm to others. . . .In concluding that this was such an 'obvious' case, the District Court improperly ignored the serious threat of immediate harm to others posed by Burris's flight. The District Court justified limiting its analysis to the threat of harm posed by Davenport's conduct by citing *Plumhoff v. Rickard* for the proposition that 'Fourth Amendment rights are personal rights that may not be vicariously asserted.'. . But acknowledging the threat of harm posed by Burris's flight neither enhances nor diminishes Davenport's Fourth Amendment rights. Rather, as discussed above, *see* Part IV–A, *supra*, it is a necessary factor of our 'objective reasonableness' analysis. Given the serious threat of immediate harm to others that Schweitzer, Matakovich, and Kennedy sought to eliminate, *Garner* does not clearly establish their alleged conduct violated Davenport's constitutional rights. The Supreme Court has never addressed the rights of a passenger involved in a dangerous vehicular pursuit. And while, in the absence of applicable Supreme Court precedent, we may consider 'a robust consensus of cases of persuasive authority,'. . . Davenport cites no precedent from this Circuit, or any other, that is on point. Given this near absence of cases, we cannot conclude that Schweitzer, Matakovich, and Kennedy acted in a plainly incompetent manner when they attempted to address the serious threat of immediate harm to others posed by Burris's flight. . . For the reasons stated, the judgment of the District Court will be reversed in part and the case remanded with instructions to enter summary judgment on the basis of qualified immunity in favor of Schweitzer, Matakovich, and Kennedy.")

Johnson v. City of Philadelphia, 837 F.3d 343, 349-53 (3d Cir. 2016) ("*Scott* abrogates our use of special standards in deadly-force cases and reinstates 'reasonableness' as the ultimate—and only—inquiry. . . . This is not to say that the considerations enumerated in *Garner* are irrelevant to the reasonableness analysis; to the contrary, in many cases, including this one, a proper assessment of the threat of injury or the risk of flight is crucial to identifying the magnitude of the governmental interests at stake. But such considerations are simply the means by which we approach the ultimate inquiry, not constitutional requirements in their own right. . . .A proper Fourth Amendment analysis requires us to assess not only the reasonableness of Dempsey's actions at the precise moment of the shooting, but the 'totality of circumstances' leading up to the shooting. . . Building out from this principle, Plaintiff argues that even if Dempsey was justified in using deadly force after he was attacked, the seizure as a whole was unreasonable because Dempsey should never have confronted Newsuan in the first place. In support of this argument, Plaintiff cites a Philadelphia Police Department directive that instructs officers who encounter severely mentally disabled persons (including persons experiencing drug-induced psychosis) to wait for back-up, to attempt to de-escalate the situation through conversation, and to retreat rather than resort to force. . . Plaintiff points out that Dempsey knew or should have known that Newsuan was obviously disturbed;. . . that Dempsey knew Newsuan was naked and unarmed; and that

Dempsey also knew that he had responded to two prior calls to the same area without receiving any indication that the subject was endangering or threatening people. Plaintiff asserts that, under these circumstances, it was unreasonable for Dempsey to flout departmental policy by initiating a one-on-one encounter with Newsuan. We do not automatically discount Plaintiff's Fourth Amendment argument or the two presumptions on which it rests: that official police department policies may be considered among other things in the reasonableness inquiry. . . and that a 'totality of the circumstances' analysis should account for whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force. . . But there is no need for us to take up such constitutional considerations here, because Plaintiff's claim founders on a more fundamental tort requirement: proximate causation. Whether or not Dempsey acted unreasonably at the outset of his encounter with Newsuan, Plaintiff must still prove that Dempsey's allegedly unconstitutional actions proximately caused Newsuan's death. . . Under ordinary tort principles, a superseding cause breaks the chain of proximate causation. . . . While there is no precise test for determining when a civilian's intervening acts will constitute a superseding cause of his own injury, relevant considerations include whether the harm actually suffered differs in kind from the harm that would ordinarily have resulted from the officer's initial actions; whether the civilian's intervening acts are a reasonably foreseeable response to the officer's initial actions; whether the civilian's intervening acts are themselves inherently wrongful or illegal; and the culpability of the civilian's intervening acts . . .Although proximate causation is generally a question of fact, . . . it 'becomes an issue of law when there is no evidence from which a jury could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries.'. . Here, we conclude as a matter of law that Newsuan's violent, precipitate, and illegal attack on Officer Dempsey severed any causal connection between Dempsey's initial actions and his subsequent use of deadly force during the struggle in the street. Whatever harms we may expect to ordinarily flow from an officer's failure to await backup when confronted with a mentally disturbed individual, they do not include the inevitability that the officer will be rushed, choked, slammed into vehicles, and forcibly dispossessed of his service weapon. We therefore have little trouble concluding that Newsuan's life-threatening assault, coupled with his attempt to gain control of Dempsey's gun, was the direct cause of his death. Before continuing on, however, we sound a note of caution. The question of proximate causation in this case is made straightforward by the exceptional circumstances presented—namely, a sudden, unexpected attack that instantly forced the officer into a defensive fight for his life. As discussed above, that rupture in the chain of events, coupled with the extraordinary violence of Newsuan's assault, makes the Fourth Amendment reasonableness analysis similarly straightforward. Given the extreme facts of this case, our opinion should not be misread to broadly immunize police officers from Fourth Amendment liability whenever a mentally disturbed person threatens an officer's physical safety. Depending on the severity and immediacy of the threat and any potential risk to public safety posed by an officer's delayed action, it may be appropriate for an officer to retreat or await backup when encountering a mentally disturbed individual. It may also be appropriate for the officer to attempt to de-escalate an encounter to eliminate the need for force or to reduce the amount of force necessary to control an individual. . . Nor should it be assumed that mentally disturbed persons are so inherently unpredictable that their reactions will always sever the chain of causation between an officer's

initial actions and a subsequent use of force. If a plaintiff produces competent evidence that persons who have certain illnesses or who are under the influence of certain substances are likely to respond to particular police actions in a particular way, that may be sufficient to create a jury issue on causation. And of course, nothing we say today should discourage police departments and municipalities from devising and rigorously enforcing policies to make tragic events like this one less likely. . . The facts of this case, however, are extraordinary. Whatever the Fourth Amendment requires of officers encountering emotionally or mentally disturbed individuals, it does not oblige an officer to passively endure a life-threatening physical assault, regardless of the assailant's mental state.")

Johnson v. City of Philadelphia, 837 F.3d 343, 354-56 (3d Cir. 2016) (Roth, J., dissenting) ("While the members of the majority may be satisfied that Newsuan's attack on Officer Dempsey was sufficient to sever any causal chain, I believe that Newsuan's reaction was, unfortunately, all too foreseeable. Directive 136—the police regulation that Officer Dempsey supposedly violated—states that its main objective 'is to aid and protect the interests of the [mentally disturbed person], innocent bystanders, and family members in the immediate area, without compromising the safety of all parties concerned, including the police officers. This is best accomplished by DEESCALATING THE INCIDENT' (emphasis in original). . . The purpose of regulations like Directive 136 is clear—to reduce the risk of a deadly confrontation with an extremely vulnerable population. That such a regulation is necessary to reduce the risk of a deadly confrontation demonstrates that deadly confrontations are a foreseeable result of ignoring the regulation. . . . By knowingly violating a police department regulation designed to keep mentally disturbed individuals safe, Dempsey set into motion the confrontation that ultimately led to Newsuan's death – a confrontation whose foreseeability was the impetus for the establishment of Directive 136. . . .I am also not persuaded that Newsuan's attack was an unforeseeable result of his being tased by Officer Dempsey. Taking the facts in the light most favorable to the non-movant, Dempsey was aware that Newsuan was on PCP at the time of their encounter. The Philadelphia Police Department teaches its officers that a taser strike may fail to subdue a suspect on PCP due to the drug's effects on pain tolerance. . . It was therefore foreseeable to Officer Dempsey that his taser would be ineffective against Newsuan. The most favorable account of the facts prior to Newsuan's being tased is that Newsuan was 'approaching' Officer Dempsey—presumably in response to Dempsey's request that Newsuan 'come here.' A jury could reasonably conclude that Officer Dempsey, by firing his taser, took an 'immediate aggressive action' in violation of police department regulations and in doing so escalated the situation and created a risk of harm to both himself and to Newsuan. The death of individuals with mental health problems at the hands of the police continues to occur across the country. . . The first line of defense against these incidents is the establishment of police regulations designed to prevent interactions between police officers and mentally disabled people from escalating into deadly confrontations. Declaring that an officer who disregards such a regulation has not proximately caused a violent confrontation that the regulation is in place to prevent renders the regulation toothless. Given the available factual accounts of the events leading up to Newsuan's eventual death, including the possible disregard of a regulation that was designed to guard against violent confrontations, I cannot say that 'there

is no evidence from which a jury could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries.'. . For the above reasons, I respectfully dissent. I would reverse the judgment of the District Court and remand this case for further proceedings.")

Zion v. Nassan, 556 F. App'x 103, 107-09 (3d Cir. 2014) ("*Abraham* requires us to conclude that the pleadings contain facts demonstrating a Fourth Amendment violation. The facts we must accept state that the officers followed Haniotakis's car for a short time and were directed by dispatch or a superior officer to discontinue the pursuit. After Haniotakis collided with a parked car, he continued down the street 'at or below the posted speed limits,' which did not exceed twenty-five miles per hour. . .The shots were fired when Haniotakis was moving his vehicle forward, and the angle of the shots indicates that Nassan was not directly behind Haniotakis's car when the shots were fired. . .Continuing to drive at a relatively slow speed away from the police after a minor collision with a parked car does not create a level of danger to justify the use of deadly force. While the plaintiffs' allegations may not ultimately be proven, the facts as pled would clearly subject the officers to liability under *Abraham* because Haniotakis's behavior was no more dangerous than Abraham's and the level of force used was identical. The defendants argue that even if there was a Fourth Amendment violation, they are entitled to qualified immunity because two Supreme Court cases decided after *Abraham* altered the law and perhaps overruled *Abraham.* . . . The defendants maintain that *Brosseau* and *Scott* contradict *Abraham* to such a degree that it is no longer good law, and that consequently there was no clearly-established rule to guide the officers here. . . We disagree. First, we have continued to cite *Abraham* as good law. . . Second, as noted by the District Court, the shooting in *Brosseau* occurred before *Abraham* was decided (and occurred within a different judicial circuit); since the Court in *Brosseau* did not opine on the constitutional question but relied only on qualified immunity, its conclusion that the law was unclear at that time is of little consequence to our decision. Finally, unlike *Abraham,* neither *Brosseau* nor *Scott* contained facts comparable to those found in Zion's pleadings. Both *Brosseau* and *Scott* came to the Supreme Court after summary judgment motions, and the facts developed demonstrated a higher level of danger (to officers and the public) than the situation described in Zion's pleadings. And even with the higher level of danger in *Scott*, the Supreme Court specifically noted the fact that the officer's decision to bump the suspect's car was not as dangerous as deciding to shoot the suspect. . .In short, contrary to the defendants' arguments, *Scott* and *Abraham* are in fact in harmony: it may be reasonable for an officer to bump a car off the road to stop a reckless driver who is placing others in peril, while simultaneously unreasonable to shoot directly at a driver who is coming toward an officer when the officer has the opportunity to move out of the way. While it is entirely possible that discovery will show that Haniotakis's actions put the officers or the public in significant danger, the facts contained in the pleadings do not demonstrate danger that would justify the use of deadly force. Thus, it would be premature to grant the defendants qualified immunity at this stage of the proceeding.")

Lamont ex rel. Estate of Quick v. New Jersey, 637 F.3d 177, 184, 185 (3d Cir. 2011) ("The plaintiff argues that there is a triable issue on whether the troopers' continued use of force, even if initially justified, became excessive as the events unfolded. We agree. Even where an officer is

initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished. [citing cases] Here, the troopers opened fire as Quick yanked his right hand out of his waistband. At that point, the troopers reasonably believed that Quick was pulling a gun on them. But after Quick made this sudden movement, his right hand was visible to the troopers, who were standing between five and eight feet away and had their flashlights trained on him. . . . In our view, a jury could find that the troopers should have realized that Quick did not have a weapon some time thereafter and ceased fire. . . .Having determined that a jury could find that the troopers' use of force reached excessive proportions, we now move to the second qualified immunity question: whether the right at issue was clearly established. . . We conclude that it was. . . . It has long been the law that an officer may not use deadly force against a suspect unless the officer reasonably believes that the suspect poses a threat of serious bodily injury to the officer or others. . . In short, the dispute in this case is about the facts, not the law. The doctrine of qualified immunity is therefore inapposite.")

Giles v. Kearney, 571 F.3d 318, 327 (3rd Cir. 2009) ("No reasonable officer could agree that striking and kicking a subdued, nonresisting inmate in the side, with force enough to cause a broken rib and collapsed lung, was reasonable or necessary under established law.")

Hill v. Nigro, No. 07-3871, 2008 WL 510474, at *2 (3d Cir. Feb. 27, 2008) ("Even assuming arguendo that a genuine issue of material fact exists with respect to whether Hill attempted to run over Officer Nigro, the record is clear that a reasonable officer could have reasonably believed that Hill posed a significant threat of death or serious physical injury to others. During his guilty plea, Hill conceded that the police asked him to pull over, but that he refused and drove away at a speed high enough to cause the death or serious injury of anyone he hit. Indeed, while attempting to elude arrest, Hill crashed into another car and its driver had to be taken to the hospital for injuries he sustained. Under these circumstances, we conclude that summary judgment was properly entered in favor of Officer Nigro.")**.**

Gilles v. Davis, 427 F.3d 197, 206, 207 (3d Cir. 2005) ("Taking account of the entire episode and the information Davis possessed at the time, we hold Davis is entitled to qualified immunity because it would not have been clear to a reasonable officer that Gilles did not engage in disorderly conduct. . .While the Court of Common Pleas held Gilles' speech was insufficient to constitute disorderly conduct, it does not necessarily follow that the arresting officers are civilly liable for the arrest. Qualified immunity encompasses mistaken judgments that are not plainly incompetent. . . Under qualified immunity, police officers are entitled to a certain amount of deference for decisions they make in the field. They must make 'split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving.'")**.**

Harvey v. Plains Township Police Department, 421 F.3d 185, 193, 194 (3d Cir. 2005) ("Our dissenting colleague argues that our conclusion runs afoul of *Anderson v. Creighton* . . . because Dombroski 'could have believed that his conduct was lawful in light of the information in his possession.' We certainly agree, as we must, that *Creighton* requires a particularized inquiry,

involving consideration of both the law as clearly established at the time of the conduct in question and the information within the officer's possession at that time. However, we part ways when considering whether the information in Dombroski's possession could reasonably have supported the belief that his actions were constitutional. As an initial note, there is no need to 'particularize' the Fourth Amendment right implicated here beyond 'the basic rule, well established by [Supreme Court] cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional.' . . . As in *Groh*, there was no exigency here, and the *Groh* Court rejected, over a dissent, the notion that 'ample room' must be made for mistaken judgments of law or fact in cases in which no exigency exists. . . Thus, the simple question we are faced with is whether it was reasonable for Dombroski to infer consent from the knowledge in his possession. Our dissenting colleague notes that 'there is a presumption that a properly mailed item is received by the addressee.' However, we do not see how Dombroski could reasonably infer from the presumption of mailing that Harvey consented to anybody entering her apartment.'. . Our colleague seems to question what Dombroski should have done 'at what he understood to be a long prearranged appointment.' He should have done exactly what he was dispatched to do-keep the peace-and not affirmatively aid in the removal of property from Harvey's apartment. We stress that, at this stage, we must take for a fact that the officer ordered the landlord to open the door. This, and only this, is the action we find to be unreasonable, and clearly so.").

Bennett v. Murphy, 120 F. App'x 914, 2005 WL 78581, at **3- 6 (3d Cir. Jan. 14, 2005) ("At the outset we recognize that there is a degree of 'duplication inherent in [*Saucier's*] two-part scheme' as applied to excessive force cases. . . That is, the question whether the amount of force an officer used was unreasonable and violated the Fourth Amendment may be viewed as blending somewhat into the question whether the officer reasonably believed that the amount of force he used was lawful. But *Saucier* makes clear that the two inquiries are distinct: Even where an officer's actions are unreasonable under *Graham*'s constitutional standard (as *Bennett II* held was true of Murphy's conduct), that officer is still entitled to immunity if he or she has a reasonable 'mistaken understanding as to whether a particular amount of force is legal' in a given factual situation . . . Murphy thus asserts that even assuming his actions were constitutionally unreasonable, he made a reasonable mistake as to the legality of those actions. To support that assertion he puts forth two related arguments. First, he contends that *Garner*'s 'immediate threat' standard, while clearly established, offered no guidance in the particular situation he faced. In that respect we are of course mindful of the principle, which the Supreme Court recently reaffirmed in *Brosseau v. Haugen* . . . that the inquiry whether an injured party's constitutional right was clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' Applying that principle, *Brosseau* . . . stated that *Graham* and *Garner* 'are cast at a high level of generality' and provided little guidance as applied to the situation confronting the officer in that case: 'whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.' We agree of course that *Graham* and *Garner* set out a standard that is general in nature in the context addressed in *Brosseau*. And we also agree with the District Court that there are circumstances, such as those in *Brosseau*, in which the 'immediate threat' standard may be 'subject to differing interpretations in

practice' . . . . But we cannot say that the *Graham* and *Garner* 'immediate threat' standard is lacking in adequate substantive content as applied to the very different situation that Murphy addressed in Bennett's factual scenario: whether to shoot an armed distraught man who, although refusing to drop his weapon over the course of an hour-long standoff, had never pointed his single-shot shotgun at anyone but himself and who was not in flight at the time he was shot . . . As *United States v. Lanier*, 520 U.S. 259, 271 (1997) teaches, 'general statements of the law are not inherently incapable of giving fair and clear warning' to public servants that their conduct is unlawful. And because (as we held in *Bennett II*) the facts alleged by Bennett disclose no basis from which to conclude that David posed an immediate threat to anyone but himself, we conclude that this case is one in which the 'general constitutional rule already identified in decisional law ... appl[ies] with obvious clarity to the specific conduct in question' . . . Murphy's second and related argument is that in light of what he terms 'similar' cases involving deadly force, his mistaken application of the 'immediate threat' standard was reasonable. Murphy cites two of those cases, *Montoute* and *Leong*, in support of the proposition that he reasonably believed David could lawfully be shot because he had a weapon and refused to put it down. But in reality neither of those cases calls into question the rule, recognized as clearly established prior to this incident by the Ninth Circuit *in Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.1997), that under *Graham* and *Garner* '[l]aw enforcement officers may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.' . . . Murphy cites a number of other cases in his brief in attempted support of his contention that he could not reasonably understand what the law required in the circumstances he faced. To the contrary, the contrast between the situations confronting the officers in those cases . . . and the scenario in this case actually point in the opposite direction. On the facts as we must credit them, Murphy acted precipitately at a time and under circumstances totally lacking in the urgency posed by all of those cases: More than an hour had passed during the standoff with David, a period throughout which he had threatened to harm no one but himself; and when Murphy chose that instant to shoot to kill, David was at a standstill 20 to 25 yards from the nearest officer and fully 80 yards from Murphy himself. Surely Murphy cannot rely on such cases, all of them involving suspects who unquestionably posed an immediate threat of physical harm to police, in support of the contention that he reasonably believed it was lawful to shoot David, who posed no such threat. To be sure, those other cases may illustrate that the concept of excessive force 'is one in which the result depends very much on the facts of each case' [citing *Brosseau*] But as we have already explained, the facts alleged by Bennett, which we take as true for purposes of the qualified immunity inquiry, are such that any reasonable officer would understand, without reference to any other case law, that *Graham* and *Garner* prohibited shooting David. For that reason we conclude that Murphy is not entitled to qualified immunity.").

Martin v. City of Reading, 118 F.Supp.3d 751, 765-66 (E.D. Pa. 2015) ("Unlike the majority of cases charging law enforcement officers with using Tasers unreasonably, the question here is not whether a reasonable officer would know whether the pain inflicted by the electric shock of a Taser

crosses the 'hazy border between excessive and acceptable force.'. . The focus here is not on the qualitative characteristics of the particular type of weapon Defendant Errington chose to employ, but whether a reasonable officer would understand that attempting to effect Plaintiff's arrest by using force that carried with it a risk of serious injury or death violated Plaintiff's rights. . . .Thus, it matters not that no judge of this district or panel of the Third Circuit appears to have passed on the legality of using a Taser on an individual at risk of injury from a fall. Based on the Reading Police Department's policy that forbids the use of Tasers when 'the subject is in a position where a fall may cause substantial injury or death' and the fact that '[i]t is widely known among law enforcement ... that tasers should not be employed against suspects on elevated surfaces because of the risk of serious injury from a resulting fall,'. . . this Court cannot say that 'reasonable officials in [Defendant Errington's] position at the relevant time could have believed,' under Plaintiff's version of the events, that Defendant's Errington's choice to deploy his Taser was lawful[.]. . . Thus, affording Defendant Errington qualified immunity at this time is inappropriate in light of the genuine dispute between the parties of the facts bearing on his entitlement to immunity. This conclusion is consistent with the views of at least two Courts of Appeals and a number of district courts that have confronted excessive force claims arising out of the use of Tasers on suspects who were at a risk of falling. [collecting cases] Accordingly, Defendant Errington's Motion for Summary Judgment based on the doctrine of qualified immunity is denied.")

Stauffer v. Simpkins, No. CIV.A. 13-1094, 2015 WL 667012, at *3-5 (E.D. Pa. Feb. 13, 2015) ("Stauffer suggests in his complaint that he did not pose a dangerous risk to the police officers when they 'unloaded their firearms' into his car. He alleges that he only put his car in drive, he did not attempt to drive into the police officers, and none of the police officers were injured. . . Although Stauffer's excessive force claim may have merit under the reasoning of *Garner* if these facts and inferences are accepted, they directly contradict Stauffer's criminal convictions, which establish that he recklessly placed the officers in danger of death or serious bodily injury and caused bodily injury to one of the officers with a deadly weapon, i.e., his car. . . Furthermore, once these established facts are considered within the context of Stauffer's complaint, a jury could not find, under the reasoning of *Scott* and *Plumhoff,* that the police officers' use of force in response to Stauffer's action was objectively unreasonable. As Stauffer concedes, the police officers fired their guns only after they had surrounded Stauffer's car and Stauffer put the car in drive, i.e., when Stauffer placed them at risk of death or serious bodily injury. . . Even if Stauffer did not know that the men approaching him were police officers, his conduct posed a serious risk of danger to the officers, requiring them to act quickly to protect themselves. . . Similarly, although none of the police officers were seriously injured, the officers could not have known that they would be so fortunate at the time of the incident. . . Thus, because Stauffer cannot prevail on his excessive force claim when the legal elements established by his criminal convictions are considered, his claim must be dismissed pursuant to *Heck.* Stauffer claims *Garrison v. Porch,* 376 Fed. App'x 274, 277–78 (3d Cir.2010), precludes dismissal under *Heck.* The *Garrison* court reasoned that 'the fact that Garrison's threatened or attempted use of force was unlawful does not automatically mean that there is no use of force that [the police officer] could have used in response which could have risen to the level unreasonable and excessive.'. . In *Garrison,* the plaintiff was convicted of only simple

assault and resisting arrest for raising his arms in an attempt to strike a police officer who was trying to handcuff him for public urination. In contrast, Stauffer was convicted of aggravated assault, and three counts of simple assault and reckless endangerment because he placed the police officers in danger of death or serious bodily injury by driving his car, i.e., a deadly weapon, toward them and hitting one officer with the car. The cases are factually distinguishable and require different results under the Fourth Amendment's objective reasonableness test. Stauffer's reliance on *Abraham v. Raso,* 183 F.3d 279 (3d Cir.1999), which overruled a grant of summary judgment in favor of the police, also is misplaced. Abraham was killed while driving his car toward police and was never charged or convicted of a crime. . . The Court held only that disputed material facts existed on the excessive force claim brought by his estate. . . It had no occasion to apply *Heck,* which controls here. Even if Stauffer's criminal convictions could co-exist with his excessive force claim, the police officers would be entitled to immunity on that claim. . . Stauffer fails to identify any clearly established law that shows the police officers' conduct was unconstitutional. Instead, he argues that I must accept all of his allegations and deny immunity if he is entitled to relief under any set of facts consistent with those allegations. . . Although I agree that I must view all facts and inferences in the light most favorable to Stauffer, I cannot do so where they are inconsistent with matters of public record or items of judicial notice. . . Thus, I must reject Stauffer's claims that none of the officers were in danger or injured in the incident because these allegations contradict the elements established by Stauffer's criminal convictions, as shown by the state court docket and the Pennsylvania criminal statutes. . . Furthermore, when the elements established by Stauffer's convictions are considered with the other facts alleged in Stauffer's complaint, the police officers' conduct did not violate a clearly established law. . .Stauffer's excessive force claim is dismissed because it cannot be reconciled with his criminal convictions and because the police officers are entitled to qualified immunity for their alleged use of force.")

Brown v. Burghart, No. 10–3374, 2013 WL 1334183, *2, *3 (E.D. Pa. Apr. 3, 2013) ("Neither Trooper Burghart nor Trooper LeMaire had ever deployed their tasers in the field before encountering Mr. Brown. In fact, they had each received taser training only a handful of months prior to the encounter—Trooper Burghart received training in March 2008, and Trooper LeMaire received training in June 2008. One topic discussed at the training was the potential of tasers igniting flammable materials. For instance, the officers were trained that a taser could ignite certain types of alcohol-based pepper spray, chemicals present in methamphetamine labs, gasoline, gasoline vapors, and drinking alcohol. Both officers testified that they were aware, prior to August 24, 2008, that a taser could ignite flammable materials such as gasoline or gasoline fumes and that gas leaks and/or spills are possible at the scene of a motor vehicle accident. Neither officer gave a thought to the possibility of gasoline or gas vapors at the scene of Mr. Brown's arrest, however. The officers were also trained that the application of the taser was subject to the same statutory and case law requirements as any other law enforcement tool and that reasonableness in the use of force depended on the totality of the circumstances. . . .This Court has already held, and reaffirmed in ruling on Trooper Burghart's motion for reconsideration, that there are genuine issues of material fact as to whether Trooper Burghart violated Mr. Brown's constitutional rights when he deployed his taser in the presence of leaking gasoline, and that Trooper Burghart is not entitled to

qualified immunity because 'an officer familiar with legal precedent regarding the amount of force appropriate in the case of (1) an unarmed, but resisting suspect (2) who was not attempting to harm officers and, (3) aside from resisting arrest, had only committed traffic violations surely would not conclude that conduct risking lighting that suspect on fire was an appropriate amount of force.'. . Trooper LeMaire had the same opportunities to assess the situation as Trooper Burghart, so despite his attempts to reargue whether the use of a taser under these circumstances violated Mr. Brown's rights and whether the law was or was not clearly established for purposes of qualified immunity, . . . the only real issue remaining here is whether there are material factual disputes as to whether Trooper LeMaire had an opportunity to intervene. Here, Trooper LeMaire had slightly over four minutes between the last time he tasered Mr. Brown and Trooper Burghart's first taser deployment, and he had eight seconds between the first and second time Trooper Burghart used his taser during which Trooper LeMaire could have advised Trooper Burghart to refrain from tasering Mr. Brown. Trooper LeMaire argues, without citing to any case law, that Mr. Brown must show 'unequivocally' that Trooper LeMaire knew that there was spilled gasoline in order to hold him responsible for failing to intervene here. However, as previously discussed by this Court, the standard is not whether he subjectively knew about the gasoline, but what an objectively reasonable officer would have done under the same circumstances. Those circumstances included an overturned motor scooter, the knowledge that vehicle accidents may result in gasoline spills, and the knowledge that using a taser in the presence of flammable material causes a fire risk. . . Here, Trooper LeMaire arguably had two windows of opportunity to prevent his companion from using his taser under the dangerous circumstances facing the officers and Mr. Brown—the four minutes between his last taser use and Trooper Burghart's first, and the eight seconds between Trooper Burghart's first and second taser uses. There is no evidence that he did so or attempted to do so. Whether or not these two windows of time were enough to give Trooper LeMaire a reasonable opportunity to intervene is a question for the factfinder. Thus, the Court will not grant summary judgment in favor of Trooper LeMaire.")

Morais v. City of Philadelphia, No. 06-582, 2007 WL 853811, at *7, *8 (E.D. Pa. Mar. 19, 2007) ("Plaintiff's primary contention, however, is that Defendants' actions in breaching the apartment unreasonably created the need for the use of deadly force. Although, Defendant [sic] has potentially stated a Fourth Amendment violation for the shooting, the court will decline to decide whether such a claim can be successful, because such a right was not clearly established. . . . Assuming Plaintiff could establish a violation of the Fourth Amendment under the theory that the officers' actions unreasonablely created the need for deadly force, such a theory was not clearly established law. In arguing that Defendants' reckless actions and violations of police policy created the need for deadly force, Plaintiff attempts to blend his Fourth Amendment excessive force analysis with a claim under the Fourteenth Amendment state-created danger doctrine. The Third Circuit has deferred deciding 'for another day' whether a police officer's actions that create the need for deadly force may establish a Fourth Amendment violation. . . The Circuits that have addressed this issue have reached different conclusions. . . . Thus, as the Third Circuit has not yet adopted this approach, and other circuits have disagreed about its application, it cannot be said the officers violated a clearly established constitutional right.")

FOURTH CIRCUIT

Gorman v. Sharp, 892 F.3d 172, 175 (5th Cir. 2018) ("*Brower* and subsequent precedents foreclose liability under the Fourth Amendment in the absence of intentional conduct. Under the plain facts of this case, the shooting here of Gorman—as tragic as it was—was not 'willful[ly]' performed by Sharp. . . Nor was Gorman's 'termination of freedom of movement [accomplished] through means intentionally applied.'. . It is undisputed that Sharp genuinely believed he was using a dummy firearm. His only intention in pulling the trigger on co-instructor Gorman was to educate his audience as a firearms training instructor. Accordingly, we reverse the district court's denial of qualified immunity and remand with instructions that the district court dismiss the remaining Fourth Amendment claim against Sharp.")

Hensley on behalf of N. Carolina v. Price, 876 F.3d 573, 582-86 (4th Cir. 2017) ("If a jury credited the plaintiffs' evidence, it could conclude that the Deputies shot Hensley only because he was holding a gun, although he never raised the gun to threaten the Deputies. Indeed, he never pointed the gun at *anyone*. Moreover, the Deputies had ample time, under the plaintiffs' evidence, to warn Hensley to drop his gun or stop before shooting him, but they concede they never gave any such warning. Because the use of force in such circumstances would be objectively unreasonable, we must affirm the district court's summary judgment order denying the Deputies qualified immunity on the § 1983 claim. . . .The Deputies responded to a domestic disturbance at Hensley's home, but had no specific information about the situation. When they arrived shortly after dawn, Hensley and his daughters stepped out of the home and onto the porch. Hensley had a handgun, but never raised it toward the Deputies. According to the plaintiffs' evidence, if believed by a jury, Hensley made no threatening statements or actions toward anyone in the moments immediately preceding the shooting. Instead, Hensley stepped off the porch and into the yard, keeping the handgun pointed toward the ground at all times. Nevertheless, almost immediately after he stepped into the yard, the Deputies opened fire on Hensley and killed him without warning. If a jury credited the plaintiffs' version of the facts, it could reasonably conclude that because Hensley never raised the gun to the officers, and because he never otherwise threatened them, the Deputies shot Hensley simply because he had possession of a firearm. As we held in *Cooper*, such conduct violates the Fourth Amendment. . . . Because a jury crediting the plaintiffs' version of the facts could conclude that the Deputies were not in any immediate danger when they fired their weapons, the failure to warn Hensley also weighs against them. In the moments leading up to the fatal shooting, the Deputies watched Hensley descend the steps from the porch into the yard. They watched him pause and look back to the house. And they briefly watched as Hensley walked toward them. While this scene played out in front of them, the Deputies concede they never ordered Hensley to drop the gun or warned that they would shoot. While we have no doubt the circumstances confronting the Deputies were tense and fast moving, that fact alone does not obviate *Garner*'s warning admonition. . . .In sum, we conclude that the district court correctly denied the requested grant of qualified immunity. If a jury were to credit the plaintiffs' evidence, it could conclude that Hensley never raised the gun, never threatened the Deputies, and

never received a warning command. In that circumstance, the Deputies were not in any immediate danger and were not entitled to shoot Hensley. Under those circumstances, the Deputies are not entitled to qualified immunity.")

Hensley on behalf of N. Carolina v. Price, 876 F.3d 573, 592-96 (4th Cir. 2017) (Shedd, J., dissenting) ("Less than fifteen seconds elapsed from the time the officers pulled into the driveway until the time the shots were fired. During that time, both officers took defensive positions and postures—like Deputy Beasley throwing himself down on his front seat—that were consistent with their belief that they were seriously under threat and afraid for their lives. A reasonable officer would have believed that Deputy Beasley was under imminent threat of serious physical harm: Hensley began a continuous pattern of aggressive and threatening behavior from the moment the officers arrived and was within 30 feet of Deputy Beasley and armed with a gun—with no suggestion that he was slowing down or attempting to communicate with the Deputies—at the time the Deputies fired. . . .Viewed without 20/20 hindsight, this case falls within the heartland of cases in which we have consistently granted summary judgment to police officers using deadly force. . . .After erroneously concluding that the Deputies violated Hensley's right to be free from excessive force, the majority avoids ruling upon whether they are entitled to qualified immunity, instead finding that the Deputies waived the issue. . . .[E]ven if the Deputies did waive the argument that the law was not clearly established, I would still reach the issue. The majority speaks of waiver in absolute terms but, because waiver is judicially created, 'we possess the discretion under appropriate circumstances to disregard the parties' inattention.'. . .To be clear, the majority is *sua sponte* concluding that the Deputies waived this argument. The Plaintiffs did not raise waiver in their brief. To the contrary, their brief at several points discusses whether Hensley's right was clearly established. . . .Before today, when confronted by an armed person who had just committed a violent crime and was advancing towards them, an officer was entitled to believe that they were under imminent threat. Now, however, under the majority's rule, unless and until the officer has either issued a warning or waited for the armed individual to aim his weapon, further compounding the risk of officer harm, the officers must pause before taking action or face § 1983 liability. Because neither caselaw from our Court nor the Supreme Court supports § 1983 liability in such circumstances, I dissent.")

Jones v. Gross, 675 F. App'x 266, 269-70 (4th Cir. 2017) ("Here, all factors weigh in Gross's favor. Gross witnessed three masked men robbing a store, one of whom was holding a gun to a hostage's head. It was reasonable for Gross to believe that Jones--fleeing down a public road with a backpack at night and in the rain--was also armed and dangerous. . . The time between the robbers exiting the store and the shooting was undeniably brief, as Jones had not run the length of the store before he fell from the shot. Police officers must make swift decisions with limited information. Gross had probable cause to believe that Jones posed a threat to the safety of others while attempting to elude law enforcement. We therefore hold that, on the undisputed facts, Gross's use of lethal force was objectively reasonable and, therefore, Gross is entitled to qualified immunity. . . .Jones contends that summary judgment is not warranted because the parties dispute whether Gross fired his weapon in response to a shot from one of the robbers. However, this fact is

immaterial because it does not 'affect the outcome of the suit under the governing law.'. .Jones and Gross both agree that, after robbing the store, Jones and the two other men exited while holding an employee hostage. Gross then claims that the gunman pushed the employee to the ground and Gross 'saw the muzzle flash' as the robber 'took a shot' at him, at which point Gross returned fire. According to Jones, however, the weapon used in the robbery was an inoperable BB gun, which, even if it was operational, would not have emitted a muzzle flash. But Gross's actions were objectively reasonable regardless of whether he was returning fire. Gross, confronted in the dark and the rain with three masked robbers--one of whom had been holding a gun to a person's head--did not know whether that gun was real or functional. Given the robbers' evident willingness to put others at risk, Gross reasonably presumed that the robbers posed a threat to himself and others.")

Connor v. Thompson, 647 F.3d 231, 237-39 (4th Cir. 2016) ("As to the first factor, Carter had committed no crime known to Thompson. His uncle called 911 because Carter was suicidal and needed help. . . As to the third factor, nothing in the district court's view of the facts supports a conclusion that Carter intended to flee, nor was he actively resisting arrest. Viewed in the light most favorable to Appellee, the evidence would show that Carter slowly staggered down the steps in the general direction of the Deputy after his uncle said to follow him because Carter's ride to Holly Hill had arrived. Such behavior imparts no indication that would create a governmental interest in inflicting deadly force. . . Here, the parties' arguments center on whether the second factor nonetheless favored the use of force, namely, whether Carter's actions are reasonably believed to have constituted an immediate threat to Thompson or another person. Viewing the record in the light most favorable to Appellee, Carter possessed a paring knife, refused to comply with repeated commands to drop the weapon, and continued down the stairs (and thus closer to Thompson) rather than stopping. As for the knife, we have held 'the mere possession of a [deadly weapon] by a suspect is not enough to permit the use of deadly force.... Instead, deadly force may only be used by a police officer when, based on a reasonable assessment, the officer or another person is *threatened* with the weapon.'. . And while Carter stubbornly maintained possession of his knife, the assumed circumstances Thompson confronted do not establish that Carter threatened anyone with it. For the present inquiry, the district court appropriately assumed that Carter never raised his knife, changed hands, or acted aggressively with it. We have held that holding a weapon in a non-threatening position while 'ma[king] no sudden moves[ ] ... fail[s] to support the proposition that a reasonable officer would have had probable cause to feel threatened.'. . Thompson, moreover, had been informed that Carter was suicidal, which could have explained the reason for holding the knife. . . .Viewing the district court's assumed facts in totality, we fail to see how they would give a reasonable officer 'probable cause to believe that [Carter] pose[d] a significant threat of death or serious physical injury to the officer or others.'. . Those assumed facts depict a non-aggressive, partially incapacitated, non-criminal holding a knife in his own residence while providing no indication that the knife was about to be used to harm someone else. . . Using deadly force against such an individual is unconstitutional, and the district court, therefore, did not err by denying Appellants' motion for summary judgment on the question whether Thompson's actions violated Carter's constitutional rights. . .We turn, then, to the second inquiry in our

qualified immunity analysis: Was this constitutional violation clearly established when it occurred? . . . In this case, Thompson confronted a suicidal and obviously impaired but non-aggressive man who refused to drop a knife held in a non-threatening manner while 'slowly stagger[ing]' down stairs. . . The front door remained open behind Thompson at all times. We think the unconstitutionality of using deadly force in that specific context was apparent. Three decades ago, the Supreme Court set forth the requirement that police officers limit deadly force to situations where 'probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others' exists. . . And we have since held that officers who commit a violation 'manifestly included within' the 'core constitutional principle' announced in *Garner* are not entitled to qualified immunity. . .Thompson's violation fits within that principle. No reasonable officer could think that a suicidal, non-criminal individual holding a small paring knife and otherwise acting in a nonthreatening manner who had difficulty standing and walking presents justification to deviate from *Garner's* bright-line proscription. *Garner,* therefore, constitutes sufficient notice to bar qualified immunity in this case. . . There is also existing Fourth Circuit precedent concerning the use of force against an armed, but nonthreatening individual. Most specifically, we held that officers who acted in 2007 were not entitled to qualified immunity after deploying deadly force against an individual who 'stood at the threshold of his home, holding [a] shotgun in one hand,' but otherwise doing nothing 'to support the proposition that a reasonable officer would have had probable cause to feel threatened.'. . Accepting Appellee's version of events, Thompson, acting in 2012, had no less notice that deadly force was clearly unlawful when he fired as Carter descended two steps inside his home, refused to drop a paring knife, but otherwise did nothing to support the conclusion that he posed an immediate threat to anyone's safety.")

Krein v. Price, 596 F. App'x 184, 190 (4th Cir. 2014) ("Like the officers in *Waterman,* Price was in danger when he fired the first shot because he was directly in front of the vehicle. But just seconds later, he was on the passenger side of the vehicle and thus was no longer in danger of being hit. The other officer, Snyder, was similarly not threatened when Price fired the second time. As our decision in *Waterman* demonstrates, these types of fine distinctions must be made to give proper effect to the Fourth Amendment's prohibition on excessive force. Indeed, the overall circumstances in this case were less dangerous than in *Waterman.* There, the officers fired at Waterman in the context of a high-speed chase. Here, however, Krein's vehicle was effectively trapped by the troopers' vehicle and Krein was not driving at a high speed. Viewing the evidence in the light most favorable to Krein, Price and Snyder were not at serious risk of being struck by Krein's vehicle when Price fired the second shot. As such, Price's second shot violated the clearly established law this Circuit set out in *Waterman.*")

Krein v. Price, 596 F. App'x 184, 190-94 (4th Cir. 2014) (Hamilton, J., dissenting) ("In conducting its own *de novo* review of the record, the majority holds that Trooper Price acted unreasonably when he fired the second shot that injured Krein. . . With all due respect to the majority, in my view, Trooper Price reasonably believed that Krein posed a serious threat of physical injury to both himself and Trooper Snyder at the time he fired the second shot. Accordingly, I dissent from

the majority's denial of qualified immunity to Trooper Price. . . .While the majority's analytical framework may address the question of whether Trooper Price, Trooper Snyder, and the others on the scene were, as a matter of fact, out of danger at the time the second shot was fired, it does not address the outcome determinative question of whether Trooper Price reasonably believed a serious threat of physical injury was present. For obvious reasons, the majority consciously avoids the proper analytical inquiry. The majority does not want to address whether Trooper Price was reasonable in believing that he, Trooper Snyder, and/or the others on the scene were in danger when he fired the second shot. After all, it is hard to criticize a police officer for shooting at a driver who tries to run him over and then fires a second shot when the driver accelerates toward a fellow officer. Moreover, the majority's analytical tack allows it to avoid explaining exactly what allowances it is making for Trooper Price, who was confronted with rapidly developing circumstances in which both he and his partner were in peril. Finally, the majority's chosen analytical path allows it to avoid addressing how Trooper Price knowingly 'violate[d] the law' or was 'plainly incompetent' under the circumstances. . . A careful review of the record under the correct legal standard demonstrates that Trooper Price was reasonable in his belief that there was a threat of serious physical injury at the time he fired the second shot. . . .In this case, Trooper Price had just seconds to weigh everything before him. Krein was acting irrationally. He struck a police cruiser with his truck. He struck diesel fuel pumps in a lot with private citizens, including children, present. He ignored numerous commands from two state troopers pointing their guns at him by driving his truck at them, just like he previously had dangerously done to other police officers. . . . [U]like *Waterman*, the facts of this case simply do not support the conclusion that Trooper Price actually could have perceived the passing of the threat posed by Krein, especially since Krein was accelerating toward Trooper Snyder and, at the same time, Trooper Price was trying to move out of the way of the truck when he fired the second shot. The majority's use of *Waterman* highlights once again its flawed analysis. It says *Waterman* is analogous to this case because Trooper Price 'was no longer in danger of being hit' when he fired the second shot and because Trooper Snyder 'was similarly not threatened when Price fired the second time.'. . But, as noted above, the outcome determinative question is not whether the troopers were, in fact, out of danger at the time Trooper Price fired the second shot, but whether Trooper Price was reasonable in his belief that a serious threat of physical injury was present at the time he so fired. . . . In the final analysis, the majority applies a standard that requires perfection on the part of Trooper Price. He had to know and be 100% correct in his knowledge that he, Trooper Snyder, and/or the others at the scene were in danger of being seriously injured when he fired the second shot to avoid being liable under § 1983. Such a standard is incompatible with Supreme Court, as well as this court's, precedent. . . . The upshot of all of this is that the majority is penalizing a police officer who attempted to do the right thing under the tense, uncertain, and rapidly-evolving dangerous circumstances with which he was confronted. Qualified immunity is designed to protect all but the plainly incompetent. Trooper Price is a far cry from this, and it is my hope that the ensuing trial will be resolved in his favor. It follows that I would vacate and remand with instructions to grant Trooper Price qualified immunity.")

Streater v. Wilson, 565 F. App'x 208, 211-12 (4th Cir. 2014) ("Taking the facts and reasonable inferences in the light most favorable to Streater, we conclude that no reasonable officer would have believed J.G. presented a threat of immediate, serious injury justifying the application of deadly force. Significantly, we may separately consider non-continuous uses of force during a single incident to determine if all were constitutionally reasonable. *See Waterman v. Batton,* 393 F.3d 471, 481 (4th Cir.2005). Even if we were to conclude, therefore, that Officer Wilson could have reasonably perceived J.G. to be a threat prior to firing his first two shots, we cannot find that his third and fourth shots were justifiable as a matter of law. Officer Wilson himself admits that he had time to pause after the first two shots for a brief period to reassess the situation and decide whether further force was necessary under the totality of the circumstances. Contrary to his contention on appeal, therefore, we are not confronted here with the 'split-second judgments of a police officer to use deadly force in a context of rapidly evolving circumstances, when inaction could threaten the safety of the officers or others.'. . Nor do we risk judging an officer's conduct 'with the 20/20 vision of hindsight.'. . At the point when Officer Wilson chose to fire a third and then a fourth shot, he knew or should have known that J.G. was over 30 feet away, standing still, unarmed, complying with his orders, and making no attempt to escape. His mistaken belief that J.G. posed an immediate threat of serious physical injury to himself or to Officer Helms and civilians, who were even further away, was objectively unreasonable. We hold therefore that Officer Wilson's resort to deadly force violated J.G.'s Fourth Amendment rights. We must now determine whether J.G.'s right to be free from excessive force under these facts was clearly established at the time of the shooting. . . . [B]y the time Officer Wilson reassessed the objective facts on the evening of October 16, 2010, and decided to take what he called a 'kill shot,' J.G. had disarmed, was neither approaching nor threatening the officers or civilians, and based on the police broadcast and Streater's protests, was not a suspect in the domestic assault. Moreover, even accepting Officer Wilson's argument that these facts are not directly analogous to *Garner,* J.G.'s right to be free from the use of lethal force to effectuate a seizure under the totality of the circumstances was 'manifestly included within more general applications of the core [Fourth Amendment] principle[s].' *Pritchett v. Alford,* 973 F.2d 307, 314 (4th Cir.1992). We hold therefore that Officer Wilson violated J.G.'s clearly established Fourth Amendment rights.")

Cooper v. Sheehan, 735 F.3d 153, 159, 160 (4th Cir. 2013) ("The Officers rely on several decisions concluding that a police officer was entitled to qualified immunity after shooting an individual whom the officer mistakenly believed to be armed. In *Anderson v. Russell,* for example, the officers ordered a detainee to his hands and knees, and then shot him when he reached for a bulge in his waistband that turned out to be a radio. . .In an earlier decision, *McLenagan v. Karnes,* a bystander was shot as he ran toward a police officer moments after the officer learned that an armed arrestee was on the loose in the area. . . And in *Slattery v. Rizzo,* an officer shot a suspect who ignored commands to show his hands before turning quickly toward the officer with what turned out to be only a beer bottle in a clinched fist. . . If deadly force was justified in such circumstances, the Officers contend, it is even more appropriate in this setting, where Cooper wielded a shotgun in plain view. Instead of supporting the Officers' contentions, however, those decisions emphasize why the use of deadly force against Cooper was not constitutionally

permissible: in each of the above scenarios, the objective basis for the threat was real, but the gun was not. Here, the shotgun was real, but—taking the facts as the district court viewed them—the threat was not. When the Officers fired on Cooper, he stood at the threshold of his home, holding the shotgun in one hand, with its muzzle pointed at the ground. He made no sudden moves. He made no threats. He ignored no commands. The Officers had no other information suggesting that Cooper might harm them. Thus, the facts fail to support the proposition that a reasonable officer would have had probable cause to feel threatened by Cooper's actions. Importantly, the Officers never identified themselves—even when asked by Cooper. If the Officers had done so, they might have been safe in the assumption that a man who greets law enforcement with a firearm is likely to pose a deadly threat. . . Instead, we are constrained to agree with the district court that 'no reasonable officer could have believed that [Cooper] was aware that two sheriff deputies were outside,' as he stepped onto his back porch. . . As in *Pena v. Porter,* on which the court relied, Cooper's 'perfectly reasonable' rationale for bearing a firearm while investigating a nocturnal disturbance on his own property 'should have been apparent to [the Officers] at the time of the shooting. . . .With respect to the second part of the *Saucier* analysis, the precedent discussed herein amply demonstrates that the contours of the constitutional right at issue—that is, the right to be free from deadly force when posing no threat—were clearly established at the time the Officers shot Cooper. Accordingly, the district court properly denied, at the summary judgment stage, the Officers' invocation of qualified immunity from Cooper's § 1983 excessive force claims.")

Meyers v. Baltimore County, Md., 713 F.3d 723, 733-35 (4th Cir. 2013) ("We conclude that Officer Mee's first three deployments of his taser did not amount to an unreasonable or excessive use of force. During the period that Officer Mee administered the first three taser shocks, Ryan was acting erratically, was holding a baseball bat that he did not relinquish until after he received the second shock, and was advancing toward the officers until the third shock caused him to fall to the ground. Under these circumstances, Ryan posed an immediate threat to the officers' safety, and was actively resisting arrest. . . . Accordingly, we conclude that Officer Mee's first three uses of the taser were objectively reasonable and did not violate Ryan's Fourth Amendment rights. . .We next address the plaintiffs' argument that Officer Mee is not entitled to qualified immunity because his further use of the taser, administering the seven additional taser shocks, was not objectively reasonable and violated Ryan's clearly established constitutional rights. We emphasize that our analysis is based on the plaintiffs' version of the facts as drawn primarily from the depositions of Ryan's family members, including Billy who stated that he was inside the residence and directly observed Officer Mee's conduct. Although a jury ultimately may find that the officers' version of the events is more credible, we are not permitted to make such credibility determinations when considering whether a police officer properly was held immune from suit under the doctrine of qualified immunity. . . Our conclusion that Officer Mee's first three uses of the taser were objectively reasonable does not resolve our inquiry into the reasonableness of the seven additional taser shocks that he administered, because 'force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated.' *Waterman v. Batton,* 393 F.3d 471, 481 (4th Cir.2005). Here, the evidence showed that the justification for Officer Mee's first three uses of his taser had been eliminated after Ryan relinquished the baseball

bat and fell to the floor. At that point, several officers sat on Ryan's back, and Ryan only was able to move his legs. Moreover, according to Officer Gaedke, Ryan was silent and 'stiffened' his body, keeping it rigid while he was on the ground. Therefore, the above testimony from Billy and Officer Gaedke indicated that, after Ryan fell to the floor, he no longer was actively resisting arrest, and did not pose a continuing threat to the officers' safety. . . Nevertheless, Officer Mee continued to use his taser until he had rendered Ryan unconscious. The district court recognized that Officer Mee's actions implementing the seven additional taser shocks were inappropriate, concluding that 'the Court cannot say as a matter of law that Officer Mee's actions were objectively reasonable.'. . We agree but state the conclusion affirmatively: It is an excessive and unreasonable use of force for a police officer repeatedly to administer electrical shocks with a taser on an individual who no longer is armed, has been brought to the ground, has been restrained physically by several other officers, and no longer is actively resisting arrest. Because the plaintiffs' evidence supports the inference that such conduct occurred here, the plaintiffs have satisfied their initial burden at the summary judgment stage of demonstrating that Ryan's Fourth Amendment rights were violated. . . The second step of the qualified immunity analysis requires us to consider whether Officer Mee's objectively unreasonable conduct violated a constitutional right that was clearly established at the time the conduct occurred. . . The district court held that Officer Mee's actions did not violate a clearly established constitutional right. The court concluded that there was an absence of precedent 'offering guidance as to the point at which continued tasings become excessive when the suspect is *actively resisting.*'. . We disagree with the district court's conclusion, which was based on a false premise. Viewing the facts in the light most favorable to the plaintiffs, the evidence did not show that Ryan was actively resisting arrest at the time the seven additional taser shocks were administered. Instead, as stated above, the evidence showed that after Officer Mee's third use of the taser, Ryan fell to the floor and did not continue to resist arrest actively at that time. We repeatedly have held that it is not required that a right violated already have been recognized by a court in a specific context before such right may be held 'clearly established' for purposes of qualified immunity. . . Thus, the absence of a judicial decision holding that it is unlawful to use a taser repeatedly and unnecessarily under similar circumstances does not prevent a court from denying a qualified immunity defense. . . As the Supreme Court has emphasized, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . We also have stated in forthright terms that 'officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity.'. . The fact that the force used in the present case emanated from a taser, rather than from a more traditional device, is not dispositive. The use of any 'unnecessary, gratuitous, and disproportionate force,' whether arising from a gun, a baton, a taser, or other weapon, precludes an officer from receiving qualified immunity if the subject is unarmed and secured. . . Here, Ryan was unarmed and effectively was secured with several officers sitting on his back. In such circumstances, the seven additional taser shocks administered by Officer Mee were clearly 'unnecessary, gratuitous, and disproportionate.'. . Thus, based on the present record, because Ryan did not pose a threat to the officers' safety and was not actively resisting arrest, a reasonable officer in Officer Mee's position would have understood that his delivery of some, if not all, of the seven additional taser shocks violated Ryan's Fourth

Amendment right to be free from the use of excessive and unreasonable force. Accordingly, we hold that the district court erred in concluding that Officer Mee met his burden of proving that he was entitled to qualified immunity.")

Henry v. Purnell, 652 F.3d 524, 532-35 (4th Cir. 2011) (en banc) ("The objective circumstances of this case are that Purnell shot a fleeing suspected misdemeanant whom he had no reason to believe was a threat. Henry had an eleven-day old warrant issued for a misdemeanor–failure to pay child support. . . . The parties have stipulated, however, that the shooting here was based on a mistake of fact insofar as Purnell believed he was firing his Taser rather than his Glock. Based on this stipulation, Purnell attempts to defend the constitutionality of his actions by maintaining that he simply made an 'honest mistake.'. . But it is not the honesty of Purnell's intentions that determines the constitutionality of his conduct; rather it is the objective reasonableness of his actions. . . .For all of the reasons set out above, when the record is viewed in the light most favorable to Henry, Henry can show Purnell's actions were not objectively reasonable. . . Thus, the evidence forecasted in the record by Henry is sufficient to show that Purnell violated Henry's Fourth Amendment rights. . . . Here, Henry can show under prong one of the qualified immunity analysis that a reasonable officer would have realized he was holding a firearm when shooting. Under prong two, it would have been clear to a reasonable officer that shooting a fleeing, nonthreatening misdemeanant with a firearm was unlawful. This basic legal principle had been established by the Supreme Court years earlier in *Garner*. Purnell nevertheless argues that he is entitled to qualified immunity because it was not clearly established at the time of the shooting that it would be unconstitutional for an officer to fire his weapon at the suspect under these facts when he believed he was holding his Taser. But Purnell fails to understand that his subjective beliefs or intentions have no place in our constitutional analysis, which concerns the objective reasonableness of the officer's conduct in light of the relevant facts and circumstances. . . .In the end, this may be a case where an officer committed a constitutionally unreasonable seizure as the result of an unreasonable factual mistake. If he did, he is no more protected from civil liability than are the well-meaning officers who make unreasonable legal mistakes regarding the constitutionality of their conduct. . . Although officers are only human and even well-intentioned officers may make unreasonable mistakes on occasion, the doctrine of qualified immunity does not serve to protect them on those occasions.")

Noel v. Artson, 641 F.3d 580, 595 (4th Cir. 2011) (Wynn, J., concurring in the judgment) ("As noted in my colleagues' opinion, the events at issue in this case took place in a sequence–even if that sequence occurred over a short span of time. Officer Artson entered the Noels' bedroom and found Cheryl Noel holding a revolver. At that point, Officer Artson immediately fired two shots. Only after at least some amount of time had passed and Cheryl Noel had dropped her weapon did Officer Artson fire the third and fatal shot. While the parties dispute whether Cheryl Noel had moved her hand back toward her gun before the third shot was fired, the shots nevertheless occurred in a sequence. Under these circumstances, the district court could–and perhaps should–have instructed the jury that force justified at the beginning of an encounter is not justified later if the justification for the initial force has been eliminated. *Waterman*, 393 F.3d at 481. The district

court's decision not to do so, however, and the accurate, if more general, instructions that the court did give did not constitute an abuse of discretion. . . At the end of the day, this issue turns on neither the skill of the Noels' attorney nor the number of people who put effort into trying the Noels' case. Instead, the only relevant inquiry is whether the jury instructions pass muster. Here, they do. And while the district court was free to–and perhaps should have–given the jury a charge based on *Waterman v. Batton* to the effect that force used at the beginning of an encounter may not be justified later if the justification for the use of force has been eliminated, it was not an abuse of discretion for the district court to decline to do so.")

Brockington v. Boykins, 637 F.3d 503, 507, 508 (4th Cir. 2011) ("Drawing all inferences in favor of Brockington from the allegations in the SAC, there was a clear break in the sequence of events. Brockington's injuries may have been evident to Boykins after Brockington fell off the porch onto the concrete backyard below. Further, it is alleged that Boykins stood above Brockington execution style while fully discharging his clip so that gun powder residue got on Brockington's hands while Brockington waved away Boykins, further evincing the excessive nature of the force used. Whether or not Boykins thought his life was still in jeopardy is a fact that will be educed through discovery since it is unclear from the record before us. Again drawing all reasonable inferences in favor of Brockington, he was unarmed. Rather than shoot Brockington as he lay helpless on the ground, a reasonable police officer would have asked him to surrender, called for backup or an ambulance, or retreated, depending on the facts that emerge through discovery. . . . Importantly, it is not required that the exact conduct has been found unconstitutional in a previous case. . . Indeed, it is just common sense that continuing to shoot someone who is already incapacitated is not justified under these circumstances. Nevertheless, the Supreme Court did decide in *Tennessee v. Garner* that deadly force was not generally justified against a suspect who did not pose an immediate threat as Brockington did not if all facts are construed in his favor. In *Waterman*, the Court solidified this position. *Waterman* thus remains and was at the time these events took place controlling precedent in this Circuit.")

Bellotte v. Edwards, 629 F.3d 415, 424 (4th Cir. 2011) ("Qualified immunity is meant to protect against liability for 'bad guesses in gray areas.'. . This was not a bad guess. Not a single one of the officers' proffered rationales provides a reasonable, particularized basis to justify their conduct. . . . The officers contended at oral argument that a no-knock entry under these circumstances is 'so infrequent, so uncommon that it's a gray area.' To the contrary, we face here an unfortunate exception to the truism that '[t]he easiest cases don't even arise.'. . The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct. . . Because 'a man of reasonable intelligence would not have believed that exigent circumstances existed in this situation,'. . . we affirm the district court's holding that this no-knock entry violated the Bellottes' clearly established constitutional rights and does not warrant an award of qualified immunity.")

Witt v. West Virginia State Police, 633 F.3d 272, 276, 277 (4th Cir. 2011) ("*Scott* does not hold that courts should reject a plaintiff's account on summary judgment whenever documentary

evidence, such as a video, offers *some* support for a governmental officer's version of events. Rather, *Scott* merely holds that when documentary evidence 'blatantly contradict[s]' a plaintiff's account 'so that no reasonable jury could believe it,' a court should not credit the plaintiff's version on summary judgment. . . . In sum, the documentary evidence in this case–the dashboard video–does not 'blatantly contradict[ ]' Witt's account of the facts; therefore, it 'does not establish that the officers are entitled to summary judgment.'")

Melgar ex rel. Melgar v. Greene, 593 F.3d 348, 353, 356, 357, 360, 361 (4th Cir. 2010) ("In this case, we address a narrow and specialized Fourth Amendment problem. We are not dealing with the use of a canine to track someone who is guilty of a serious criminal offense. Likewise, this was not a hunt for someone who could pose a threat to the community, nor was the person being sought an adult. Rather, we are dealing with a juvenile, and one, moreover, who was on foot and not in a car. Although underage drinking was involved, the facts of the case mark it as more of a search for a missing person than for any criminal at large. . . . By any objective measure, . . . Greene was in a difficult position. However, we do not think he is entitled to summary judgment on the merits of the issue of Fourth Amendment reasonableness. We recognize that police were searching primarily for a missing person and that canines have a role to play in such searches because of their keen sense of smell. Nevertheless, there are several significant factual questions in this case that make merits resolution of the excessive force claim inappropriate for summary judgment. . . . Having declined to rule as a matter of law in the first stage of the *Pearson/Saucier* analysis, our next question is whether Officer Greene's conduct violated clearly established federal law. . . . Our resolution of this case on grounds of qualified immunity is not a mere matter of semantics. Rather, it allows plaintiff to continue to pursue his state law claim under Article 26 of the Maryland Declaration of Rights, while a ruling on the merits would foreclose that possibility. Article 26 is interpreted *in pari materia* with the Fourth Amendment, *see Mazuz v. Maryland*, 442 F.3d 217, 231 (4th Cir.2006) (abrogation on other grounds recognized by *Cole v. Buchanan County School Bd.*, 328 F. App'x 204, 207 (4th Cir.2009)); *Richardson v. McGriff*, 762 A.2d 48, 56 (Md.2000), but Maryland's law of qualified immunity does not similarly track federal law. As the Maryland Court of Appeals has explained, "[p]roof that the official acted in objectively reasonable reliance on existing law, which would exempt an official from liability under § 1983, may be relevant to whether the official committed a violation [of Maryland law], but it does not provide an immunity should a violation be found." *DiPino v. Davis*, 729 A.2d 354, 371 (Md.1999).. . . . Why would the dissent deny the individual officer qualified immunity when the plaintiff's state claim may proceed against both the public entity and the officer in state court? . . . We do, of course, recognize that objective reasonableness is the appropriate standard here, and indeed it is the one we have applied. The dissent is surely right that 'an officer's good intentions' do not make objectively unreasonable acts constitutional. . . By the same token, however, undisputed good intentions should not be used to make an officer a *more* inviting target for monetary damages. As to this officer, let it be said that he acted, not perfectly perhaps, in the lens of leisured hindsight, but that he did the best he could with what he had. For each of us, that's not so bad an epitaph.").

Melgar ex rel. Melgar v. Greene, 593 F.3d 348, 361, 362, 364 (4th Cir. 2010) (Michael, J., dissenting in part and concurring in part) ("I respectfully dissent from the majority's decision that Officer Johnathan Greene is entitled to qualified immunity. An objectively reasonable police officer would not use a find-and-bite dog to conduct a hasty and limited search for a missing thirteen-year-old boy who is highly intoxicated, harmless, and not wanted for a serious crime. . . . Oscar Melgar was seriously and permanently injured from the bite, re-bite, and grip of Officer Greene's dog. Melgar had a clearly established Fourth Amendment right to be free from this method of seizure brought about by Officer Greene. . . . We should not inch toward clearly established law bite by disabling bite. Bolder action is called for today, and the basis for that action is the widely known danger that find-and-bite dogs present. It is already clearly established that the improper deployment of a find-and-bite dog that mauls its target constitutes excessive force in violation of the Fourth Amendment. *Kopf*, 942 F.2d at 268. A police officer's deliberate use of such a dog to search for a missing and harmless boy like Melgar violates this clearly established right.").

Valladares v. Cordero, 552 F.3d 384, 390 (4th Cir. 2009) ("Officer Cordero argues that when viewing the facts in the light most favorable to James, a reasonable officer would not have known that he was violating a clearly established right because a reasonable officer would not have known that James had surrendered. Yet, in both James' affidavit and his deposition, James claims that Officer Cordero broke his jaw *after* slamming him into the car and *after* he either went 'limp' or 'loose.' Even if this Court disregarded James' testimony about going 'limp' or 'loose' because he later testifies that he was kicking while on the ground, James and Officer Cordero both testify that, after that point, the officer picked James up off the ground and neither party testifies that James resisted being lifted up. This signifies a point of surrender. Of course, Officer Cordero claims that he then placed James against his mother's car and handcuffed him. Nonetheless, James testifies that after Officer Cordero had him under full control he then forcefully shoved his face into his mother's car and broke his jaw. Again, this Court must accept James' version of the facts. In Officer Cordero's brief and during oral argument, counsel for the officer seemed to indicate that James should have verbally communicated his intent to surrender to the officer. This Court knows of no case, and Appellant does not cite a case, that requires a person to verbally communicate his or her wish to surrender before a reasonable officer is put on notice that further force is unnecessary. Such a requirement would create an unduly steep burden. A trial court must have the freedom to distinguish between the circumstances surrounding a person who says he is surrendering while continuing to fight and those surrounding a person who does not articulate that he is surrendering but clearly has ceased fighting. In this case, the district court properly determined that James surrendered before Officer Cordero broke his jaw. Moreover, the district court correctly determined that a reasonable officer would not have exerted the level of force that Officer Cordero used in the situation with which Officer Cordero was confronted.")

Orem v. Rephann, 523 F.3d 442, 447, 448 (4th Cir. 2008) ("While we recognize that 'not every push or shove, even if it may later seem unnecessary' is serious enough to entail a deprivation of a constitutional right, . . . the facts, here, when viewed in a light most favorable to Orem, evidence

that Deputy Rephann's use of the taser gun was wanton, sadistic, and not a good faith effort to restore discipline. Orem's behavior without question was reprehensible, but Deputy Rephann's use of the taser was an 'unnecessary and wanton infliction of pain.'. . . Nevertheless, Deputy Rephann argues that summary judgment is proper because Orem only suffered *de minimus* injury. Although *de minimus* injury can foreclose a Fourteenth Amendment claim, the district court properly recognized that Orem's injury consisted of far more than the resulting sunburn-like scar. . . . While Deputy Rephann makes much of the fact that the taser was only applied for 1.5 seconds, Orem did experience electric shock, pain, and developed a scar. . . . Because the facts, taken in a light most favorable to Orem, show that Deputy Rephann inflicted unnecessary and wanton pain and suffering, Orem has alleged a violation of her Fourteenth Amendment right to be free from excessive force. . . . Notwithstanding the qualified immunity standard's ample room for mistaken judgments, there is evidence bearing heavily against Deputy Rephann that, in these circumstances, the taser gun was not used for a legitimate purpose; such as protecting the officers, protecting Orem, or preventing Orem's escape. . . . Rather, Deputy Rephann used the taser to punish or intimidate Orem–a use that is not objectively reasonable, is contrary to clearly established law, and not protected by qualified immunity.").

Ingle v. Yelton, 2008 WL 398327, at *4, *5 (4th Cir. Feb. 14, 2008) ("The record reveals the following undisputed facts. The defendants knew that: (1) Christopher was suspected in a domestic shooting; (2) Christopher had fled arrest and engaged in a high speed chase; (3) moments earlier, Christopher had pointed his shotgun at an officer and refused to surrender; (4) finally, and crucially, all available evidence indicates that Christopher was lowering or pointing his shotgun at the officers when they began firing; none of Ingle's evidence suggests otherwise. A reasonable officer at the scene would have had probable cause to believe that Christopher posed a threat of serious physical harm. Even if the car window was closed and did interfere with his aim, '[t]he car window was no guarantee of safety when the pointed gun and the officers at whom it was aimed were in such close proximity.' *Elliott v. Leavitt*, 99 F.3d 640, 642 (4th Cir.1996). Because no constitutional violation occurred, the defendants are entitled to qualified immunity and summary judgment.")

Estate of Rodgers v. Smith, No. 05-1382, 2006 WL 1843435, at *7 (4th Cir. June 26, 2006) (not published) ("Even if the second volley of shots were unconstitutional, that unconstitutionality was by no means clearly established as of April 15, 2002. *Waterman* required us to decide whether it was clearly established in November 2000 that an officer may not use deadly force in the seconds after a serious threat had abated. . . We concluded that although other circuits had reached this conclusion prior to the relevant time, the Fourth Circuit had not. . . In light of the uncertainty of the law existing at the time of the incident, we held that the unconstitutionality of the use of force in the seconds after a threat has abated was not clearly established. . . Because the law on this point did not become clear until 2004, when *Waterman* was decided, we conclude that even if Officer Waters had violated the Constitution, he would be entitled to qualified immunity on the basis that the unconstitutionality of his actions was not clearly established at the time of the incident.").

McKinney v. Richland County Sheriff's Dep't., 431 F.3d 415, 418 n.2, 419 (4th Cir. 2005) ("The district court erroneously concluded that '[t]he assessment of whether the officer's conduct violated a constitutional right requires the court to determine whether an objective law officer could reasonably have believed probable cause to exist, not whether probable cause for the warrant did in fact exist.' . . The question at stage one of the qualified immunity analysis is not whether the officer was reasonable, but whether a constitutional right was violated. If the warrant was supported by probable cause, then McKinney's Fourth Amendment rights were not violated, regardless of whether Livingston's belief that there was probable cause was reasonable. . . . Even if we were to conclude that the warrant was not supported by probable cause, Livingston would nonetheless be entitled to qualified immunity because the absence of probable cause would not have been evident to an objectively reasonable officer in these circumstances. . . Both a prosecutor and a neutral and detached magistrate independently reviewed the evidence and concluded that there was probable cause. A reasonable officer would not second-guess these determinations unless probable cause was plainly lacking, which it was not.").

Turmon v. Jordan, 405 F.3d 202, 208 (4th Cir. 2005) ("We conclude that on March 10, 2001, it would have been clear to a reasonable officer that he could not point his gun at an individual's face, jerk him from his room, and handcuff him when there was no reasonable suspicion that any crime had been committed, no indication that the individual posed a threat to the officer, and no indication that the individual was attempting to resist or evade detention. The contours of the Fourth Amendment right to be free from excessive force during a seizure were set forth sixteen years ago by the Supreme Court in *Graham,* 490 U.S. at 396-97, 109 S.Ct. 1865. In addition, over the years this court has addressed the propriety of the use of force comparable to that used by Deputy Jordan, and we have consistently found such force to be proper only in situations in which there was at least reasonable suspicion to believe criminal activity was afoot. . . Because the facts alleged show that Jordan violated Turmon's Fourth Amendment right to be free from seizures carried out by excessive force and because that right was clearly established at the time, Jordan is not entitled to qualified immunity on the excessive force claim.")

Waterman v. Batton, 393 F.3d 471, 480-83 (4th Cir. 2005) ("In sum, the officers here were faced with a suspect well positioned to seriously injure or kill one or more of them with his vehicle–possibly within a fraction of a second–if they did not employ deadly force. According to the best information available, the suspect had used his vehicle as a weapon against another officer just minutes before. Based on this information and the other factors discussed, we hold as a matter of law that a reasonable officer could have believed at the instant of acceleration that Waterman presented a threat of serious physical harm. Appellants thus were entitled to qualified immunity regarding the initial group of shots. . . The Estate maintains that even if the initial shots were justifiable, the same was not true of the shots fired after Waterman's vehicle passed the officers and the officers were out of danger (the subsequent shots). . . . We . . . hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated. . . .Applying this principle here, we conclude that the record, viewed in the light most favorable to the Estate, shows that once Waterman's vehicle passed the officers, the

threat to their safety was eliminated and thus could not justify the subsequent shots. A factfinder could reasonably conclude that as the officers pursued Waterman's vehicle, they knew or should have known that Waterman had passed them without veering in their direction. Under these circumstances, a reasonable factfinder could determine that any belief that the officers continued at that point to face an imminent threat of serious physical harm would be unreasonable. . . Having determined that the record, when viewed in the light most favorable to the Estate, shows that the subsequent shots were unconstitutional, we now consider whether that unconstitutionality was clearly established on November 28, 2000, when the shooting occurred. We conclude that it was not and thus that Appellants were entitled to qualified immunity for the subsequent shots as well. . . . There is no relevant distinction between the facts in *Pittman* and those here. In both cases, the officers employing deadly force had information that the suspect had recently assaulted an officer with his vehicle. Also, both cases presented tense, rapidly changing situations, where the threat justifying the use of deadly force ended only seconds before the shots in question were fired. In light of our holding that Nelms' use of deadly force was not excessive under law that was clearly established in May 1992, the same must be true of the subsequent shots here. . . . The question thus becomes whether the excessiveness of the force employed here, although unclear in May 1992, was nonetheless clarified prior to November 28, 2000. We conclude that it was not. We have already noted that other circuits decided during this period that a passing risk to an officer does not authorize him to employ deadly force moments after he should have recognized the passing of the risk. [citing cases] However, this circuit did not. Indeed, as we have discussed, we issued a decision, *Rowland*, that was susceptible to the reading that an application of force that extends for but a few seconds cannot be parsed into temporal segments for the purpose of reviewing each act in light of the information the officer had at that moment. . . Considering the uncertainty created by *Pittman* and *Rowland* regarding whether an officer may legally employ deadly force in response to a threat of serious harm moments after he should have known that the threat had been eliminated, we hold that the unconstitutionality of the subsequent shots was not clearly established in Maryland in November 2000.").

Waterman v. Batton, 393 F.3d 471, 483, 484 (4th Cir. 2005) (Motz, J., dissenting) ("The hazards of police work simply do not authorize officers to engage in the unbridled use of force. No matter how exasperated an officer becomes, the Constitution does not permit him to shoot a motorist for speeding–unless a reasonable officer in the same position would have had probable cause to believe it necessary to protect himself or others from 'a threat of serious physical harm.'") . . . In this case, Officers Michael Batton, Kenneth Keel, and Christopher Heisey fired nine rounds of ammunition at a car driven by Josh Waterman, who sustained five gunshot wounds and died rapidly from those injuries. Ten minutes before the shooting, Josh Waterman had driven 51 m.p.h. in a 25 m.p.h. zone and failed to stop when signaled to do so by officers in squad cars, which may well have exasperated them. However, by the time of the shooting, Josh Waterman was neither speeding nor driving erratically–rather, he was passing through a toll plaza at 11 to 15 m.p.h.; and several eyewitnesses have sworn that none of the law enforcement officers at the toll plaza were in danger of being hit by Josh Waterman's car. The video of the shooting could well be interpreted as supporting or, at the very least, not definitively negating these accounts. A jury could,

nonetheless, conclude that a reasonable police officer, confronted with the situation facing Officers Batton, Keel, and Heisey, would have acted as they did or would not have realized that shooting Josh Waterman violated the Constitution. [citing *Saucier*] But so finding would require resolution of several genuine disputes of material fact, which we can no more resolve on interlocutory appeal than the district court could when ruling on the officers' motion for summary judgment.").

Estate of Jones v. City of Martinsburg, No. 3:13-CV-68, 2018 WL 4289325, at *4–6 (N.D.W. Va. Sept. 7, 2018) ("Here, the Fourth Circuit Court of Appeals held that 'genuine issues of material fact remain which underlie the determination of whether the force the officers used was excessive.'. . Thus, the Court will assume arguendo that the officers violated Jones's Fourth Amendment right to be free from excessive force and will skip to the second prong of the qualified immunity test—that is, whether 'every reasonable official' would have understood that his conduct violated the law. The analysis is based on the Plaintiff's version of the facts. Although a jury 'ultimately may find that the officers' version of events is more credible, we are not permitted to make such credibility determinations when considering whether a police officer' is immune from suit. . . Summarizing the facts in the light most favorable to the Plaintiff, the question becomes:

Did clearly established law in March 2013 prohibit officers from using deadly force against an individual who: (1) committed a misdemeanor; (2) resisted arrest; (3) fled from officers; (4) possessed a knife; (5) attempted to stab an officer with his knife; (5) refused commands to drop the knife; and (6) was on the ground, motionless at the time he was shot?

Wilson v. Prince George's County is instructive here. In that case, the Fourth Circuit held that, 'in October 2012, it was not clearly established that an officer would violate a suspect's Fourth Amendment right to be free from excessive force by shooting a person who: (1) was suspected of having committed a burglary and a battery; (2) was standing about 20 feet from the officer holding a knife, inflicting harm on himself and stumbling, but not threatening others or making sudden movements; and (3) was refusing to obey the officer's repeated commands to drop the knife at the time he was shot.' The Fourth Circuit held that the force was unreasonable, but concluded that the officer was entitled to qualified immunity. . . . Turning to the facts here, this case is not 'an obvious one' and the facts do not squarely align with the established precedent. When Jones was stopped by Officer Lehman, he was engaged in criminal activity, albeit a non-violent misdemeanor. The encounter quickly escalated when Officer Lehman asked Jones if he had a weapon and Jones admitted to having 'something.' Ultimately, Jones possessed a knife. Jones resisted arrest and fled from the officers. After catching and wrestling Jones to the ground, Jones attempted to stab one of the officers. Almost instantly the officers released Jones, who remained motionless on the ground. In the next four seconds, the officers commanded Jones to drop the knife, Jones lied [sic] motionless, and the officers discharged their firearms. At the time the officers discharged their firearms, Jones was not 'secured,' as defined by the clearly established law. After realizing that Jones had a knife, the officers released Jones and backed away. While Jones was unmoving, he was not handcuffed, bound, pinned, or secured in a police cruiser, jail cell, or interrogation room. Even assuming that Jones was effectively 'secured' when the officers discharged their firearms—in that he was no longer resisting arrest—he still was not secured *and* unarmed. . . . Accordingly,

the Court holds that, in March 2013, it was not clearly established that an officer would violate an individual's Fourth Amendment right to be free from excessive force by shooting a person who: (1) committed a non-violent misdemeanor; (2) resisted arrest and fled from officers; (3) was armed with a knife and attempted to stab an officer; and (4) was lying on the ground motionless at the time the shots were fired. Therefore, the officers are entitled to qualified immunity and summary judgment must be granted.")

Day v. Young, No. 1:15CV1477 (JCC/MSN), 2016 WL 5869794, at *3-7 (E.D. Va. Oct. 6, 2016) ("Plaintiff does not dispute . . . that he was fleeing, and thus resisting a lawful seizure, when Defendant deployed his Taser. Defendant is therefore entitled to qualified immunity with respect to his initial deployment of his Taser pursuant to *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907 (4th Cir. 2016), *cert. denied*, __ S. Ct. __, 2016 WL 2839881 (U.S. Oct. 3, 2016). . . .Earlier cases had held that police officers may not use a Taser on an individual not actively resisting arrest, but the law was 'not so settled...that "every reasonable official would have understood"' what was constitutionally required when an individual offered nonviolent resistance. . . The Court extrapolates from this that any right not to be tased while offering *mobile*, as opposed to stationary, non-violent resistance to a lawful seizure was not clearly established at the time of the events giving rise to this suit. As in *Armstrong*, Defendant deployed his Taser while Plaintiff was actively resisting detention and after issuing several verbal warnings. . . These are precisely the characteristics of the situation in *Armstrong* that left the applicable law 'not...settled.'. .While viewing the facts in the light most favorable to Plaintiff, Defendant may have been 'treading close to the constitutional line,'. . . the Court must conclude that the line was not clearly drawn before *Armstrong*. Accordingly, the Court finds that Defendant is entitled to qualified immunity with respect to his decision to deploy his Taser to prevent Plaintiff from fleeing after repeated warnings. . . .The Court must therefore determine whether Defendant's use of his Taser remained justified throughout the 42 seconds he maintained the Taser's electrical current. The Court finds that genuine issues of material fact preclude summary judgment on this issue. Specifically, the record fails to conclusively establish what effect the Taser had on Plaintiff and whether, when, and to what extent Plaintiff resisted detention during the 42 seconds Defendant maintained the Taser's electrical current. Moreover, these disputed issues of fact bear heavily on Defendant's entitlement to qualified immunity. Accordingly, Defendant's Motion must be denied with respect to his continuous use of a Taser on Plaintiff for 42 seconds. . . .Of particular importance to the Court's holding is a video of the incident shot by a bystander and admitted into evidence. . . In it, Plaintiff collapses as soon as he is struck by the Taser's probes. He proceeds to cry out, and at one point pleads with Defendant to stop. Given this evidence, Defendant's claim that the Taser caused Plaintiff no more than 'a tingling sensation' strains credulity. The video is sufficient that 'a reasonable jury' viewing it could find that the Taser subdued Plaintiff almost immediately. . . .Deploying a Taser at all constitutes a 'serious use of force.'. . To use a Taser on an individual continuously for 42 seconds, assuming the Taser to be at least partially effective, is a use of force that may fairly be characterized as extreme. . . . Defendant's Motion for Summary Judgment must therefore be denied as to his continuous use of a Taser on Plaintiff for 42 seconds. The Court will 'submit [the] factual questions to the jury and reserve for itself the legal question

of whether...[D]efendant is entitled to qualified immunity on the facts found by the jury.' *Yates v. Terry*, 817 F.3d 877, 882 n.2 (4th Cir. 2016) (quoting *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005)). The Court notes that the denial of qualified immunity on this basis is not immediately appealable . . . and so the parties should prepare for trial.")

Simpson v. Virginia, No. 1:16CV162 (JCC/TCB), 2016 WL 5390403, at *2–3 (E.D. Va. Sept. 27, 2016) ("As in *Armstrong*, the officers here were initially acting pursuant to a mental health custody order and, as a result, they were aware of Decedent's mental health issues. But that is where the similarities with *Armstrong* end. Going beyond merely resisting, Mr. Simpson barricaded himself inside his house, passed police a receipt indicating he had committed a crime by obtaining a shotgun illegally, and cut off communication with officers after they attempted to subdue him with a Taser. . . When officers deployed flashbangs, the Decedent responded by firing shots outside. . . Later, officers made the decision to deploy tear gas. . . Throughout the ensuing standoff, the Decedent remained barricaded inside his house, continued to intermittently fire shots outside, and refused to communicate with police. . . He later exited the house, firing shots as he did so. . . In contrast to *Armstrong*, Mr. Simpson committed a crime. This crime then made it possible for him to be armed and dangerous. Indeed, *Armstrong* does not establish that the Plaintiff's mental illness must always weigh *against* the use of force. Just like any other factor, there are circumstances, like those here, where mental illness will weigh in favor of the force deployed. The Fourth Circuit recognized this point in *Armstrong* itself, noting that '[m]ental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations.'. . To illustrate how mental illness may render the use of force less reasonable in some contexts and more reasonable in others, consider the sign post in *Armstrong*. Because the decedent was seated, anchoring himself to the sign post at the time that force was applied, and because that force led to his death, the Fourth Circuit held that 'the justification for the seizure [preventing a mentally ill man from harming himself] does not vindicate any degree of force [a Taser] that risks substantial harm to the subject.'. . If, on the other hand, the decedent had uprooted the sign post from the ground and began swinging it wildly at officers and passersby, the sign post's presence may have made the use of force more reasonable. Just as it would be patently absurd to say that the involvement of a sign post always cuts against the reasonability of the use of force, regardless of context, so it would be a distortion of the Fourth Circuit's reasoning in *Armstrong* to say that the decedent's mental illness always cuts against the use of force, regardless of context. The Court read and seriously considered *Armstrong* prior to granting Defendant's Motion to Dismiss. It determined then, and reaffirms now, that when one considers the totality of the circumstances in both cases, they are profoundly different and readily distinguishable.")

Jones v. Allen, No. CV PX-15-1173, 2016 WL 4890835, at *8-10 (D. Md. Sept. 15, 2016) ("If the testimony of Plaintiff and other eye witnesses are credited over the officers, a reasonable jury could find that Allen was never struck by the Honda; that when the initial shots were fired Allen was standing near the trunk of his police car; and that the Honda drifted out of the driveway and away from the officers at all times. . . . [T]aking the facts in the light most favorable to the Plaintiff, a reasonable jury could find that Defendant Officers lacked probable cause to believe that Barksdale

and Plaintiff posed any threat as they drove away from the officers. Undoubtedly, the Court is loathe to second guess police officers' split second decisions made in the line of duty. . . Nonetheless, it is constrained to deny summary judgment where the facts viewed in the light most favorable to Plaintiff demonstrate the officers' use of excessive force to detain Plaintiff. . . .Here, the law is clearly established that, at a minimum, after the vehicle passed the officers and no one was in danger, any further shots constituted excessive force in violation of Plaintiff's Fourth Amendment rights. In *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005), decided over a decade ago, the Fourth Circuit resolved unquestionably that any officer may not legally employ deadly force in response to a threat of serious harm moments after he should have known that the threat had been eliminated. Specifically, the Fourth Circuit held that continued firing of shots at a fleeing vehicle while it was moving away from the officers and no longer posed a threat constitutes excessive force. . . . .With regard to the initial shots fired, and when viewed most favorably to the Plaintiff, a reasonable fact finder could determine at trial that the Officers' initial shots constituted excessive force. If Plaintiff, Barksdale and Battle are believed, the Officers were never near the Honda, Barksdale never drove the Honda in Defendants' direction, and Allen was not hit by the vehicle or was placed at any risk of danger. . . Further under *Garner*, the Supreme Court held that an officer's use of deadly force is warranted *only* where fleeing suspects pose a risk of death or serious bodily injury to them or others. Thus, the use of such force here, where Barksdale and Battle's testimony is credited over the Defendants, renders the defense of qualified immunity unavailable to Allen and Powell.")

Simpson v. Virginia, No. 1:16CV162 (JCC/TCB), 2016 WL 3923887, at *13–14 (E.D. Va. July 21, 2016) ("Decedent's mental illness did not require Defendants to leave Decedent, a mentally ill, armed individual, to his own devices for several hours as he willfully violated court orders and resisted entering custody. Defendants were rightly hesitant to trust the judgment of a man who wanted to see if God would levitate his model of a local restaurant back into his house from the sidewalk in a sign of his righteous claim to ownership. Because the facts alleged cannot sustain a claim that Plaintiff's Fourth Amendment rights were violated by the unreasonable application of excessive force, the Court dismisses Plaintiff's § 1983 claims against the Doe Defendants. Even if the Doe Defendants' alleged actions were unreasonable in light of the circumstances, they certainly did not violate any clearly established law. Plaintiff does not point to, and this Court cannot find, any case law clearly establishing that any of the Doe Defendants' actions were unreasonable in light of the situation. As discussed above, the weight of Fourth Circuit and Supreme Court case law addressing situations similar to the one presented by this case strongly suggests that the Doe Defendant's actions were reasonable. . . The cases dealing with standoffs between police officers and armed, mentally ill individuals 'by no means clearly establish that [the Doe Defendants] conduct violated the Fourth Amendment.'. . There is therefore no way a reasonable jury could possibly find that the Doe Defendants' conduct as alleged violated a 'clearly established' right.")

Rockwell v. Rawlins, No. CIV.A. RDB-13-3049, 2014 WL 5426716, at *3, *4 & n.12 (D. Md. Oct. 23, 2014) ("In Plaintiffs' account, Detective Rawlins tased an unarmed suspect, who was precariously perched on a second floor ledge and who had terminated his flight and was attempting

to comply with police directions. . . .Under Detective Rawlins' version of the facts, however, Detective Rawlins made a split-second decision in order to neutralize the threat posed by an uncooperative and unpredictable individual who appeared to be reaching for something in his waistband. . . .Notably, the legal authorities quoted by the parties are in little-if any-conflict. While tasers may not constitute deadly force in some scenarios, . . . deadly force was clearly used in this case. Rockwell was standing on a narrow second-story ledge/roof, and there is no evidence to suggest that a reasonable police officer would not have expected Rockwell to fall if he was tased. As such, the main issue is whether a reasonable police officer would have believed that Rockwell posed such a substantial threat as to justify the use of deadly force. As noted above, the parties present two different accounts of the facts leading up to the tasing. It is not this Court's role to determine which story to credit at this stage of this proceeding; of course, that decision is for the jury. . . Accordingly, summary judgment will be denied with respect to Detective Rawlins' excessive force claims. . . .These factual questions also foreclose a determination of Detective Rawlins' qualified immunity at this stage. While Detective Rawlins has offered some legal support for his contention that a police officer may tase a fleeing suspect, this Court finds that it is clearly established that an officer may *not* tase a cooperating suspect where the tasing presents a very real risk of serious bodily harm.")

Meyers v. Baltimore County, Md., 814 F.Supp.2d 552, 559-62 & n.10 (D. Md. 2011) ("Even assuming the truth of Billy Meyers's version of events, no reasonable jury could conclude that Officer Mee used excessive force in delivering the first three Taser cycles to disarm and incapacitate Ryan. . . As an initial matter, it is important to note that while death tragically resulted in this instance, use of a Taser is not generally considered deadly force. . . . In the majority of police departments, the use of a Taser is considered roughly equivalent to the use of oleoresin capsicum gas, also known as pepper spray. . . .After Ryan fell to the ground in the small area between the dining room table and the wall, Officers Callahan, Zellers, and Romeo ordered Ryan to stop resisting and attempted to handcuff him in a struggle that lasted approximately two and a half minutes. There is significant dispute between the parties as to Ryan's level of resistance during this time. . . . Here, the Court cannot say as a matter of law that Officer Mee's actions were objectively reasonable. Some additional use of the taser, as a pain compliance tool deployed against an uncooperative subject, was almost certainly acceptable. There is no dispute that Ryan was able to prevent three officers, working in concert, from handcuffing him for several minutes. As noted earlier, additional tasings may be justified when initial tasings fail to have the desired effect and the subject continues to struggle. . . . Moreover, guidelines promulgated by the Department of Justice, which the Court considers probative of reasonableness, permit the use of a Taser against subjects who are 'actively resisting.' DOJ Taser Guidelines 23. Active resistance includes '[p]hysically evasive movements to defeat an officer's attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody.' *Id.* at 15. Courts have also found that use of a Taser can be reasonable even as against restrained or nonviolent subjects who resist arrest and refuse to comply with lawful police commands. For example, in *Buckley v. Haddock*, 292 F. App'x 791, 795 (11th Cir.2008) the Eleventh Circuit found no Fourth Amendment violation in a case in which a handcuffed suspect

arrested for speeding was tased three times because he resisted arrest by lying on the ground, refusing to stand, and crying. In *Schumacher v. Halverson*, 467 F.Supp.2d 939 (D.Minn.2006), the court found that police did not act unreasonably in tasing an inebriated man who resisted arrest by grabbing onto a basketball pole and refusing to let go. It is obvious, however, that an officer's purview to tase a noncompliant subject is not unlimited. The Department of Justice Guidelines state that additional Taser applications should be restricted to the minimum necessary to place the subject in custody. . . .There is simply insufficient evidence in the record to reflect whether it was actually necessary to deliver six additional shocks. Nevertheless, even assuming Officer Mee's Taser use to have been excessive in this respect, he is entitled to qualified immunity. . . . The question, properly presented, is whether clearly established law would have put an officer on notice that he must in some circumstances limit the use of his Taser in stun mode, even though the subject continues to struggle and resist officers' efforts to handcuff him. The answer is no. . . . Courts seem to be in rough accord that use of a Taser is impermissible when used in a sadistic manner, or against an individual who is in custody or otherwise poses no threat. . . . The main exception seems to involve protesters who refuse to comply with police orders to disperse. . . . Yet the Court's research reveals no authority, and certainly not a clearly established legal principal, offering guidance as to the point at which continued tasings become excessive when the suspect is actively resisting. A court with ample time to deconstruct a situation may determine in hindsight that alternative procedures would have been optimal, or that officers overstepped the amount of force strictly necessary to subdue a suspect. Such a judgment, however, is rarely more than 'indulge[nce] in unrealistic second-guessing.'. . The law does not countenance viciousness. Nor, however, does it require perfection. The interstice is composed of the 'mistaken judgments' that qualified immunity must protect if police are to do their jobs safely and effectively. . . The Defendants are entitled to summary judgment.")

FIFTH CIRCUIT

Cole v. Carson, 905 F.3d 334, 341-47 (5th Cir. 2018) (on remand) ("We will not revisit the first part of the qualified immunity inquiry in connection with any of the Coles' claims, nor the question of clearly established law as regards the Coles' Fourteenth Amendment claim against Carson. We hear this case on remand from the Court for further consideration in light of *Mullenix*. In *Mullenix*, the Court reversed a decision of this court in which we had found that a police officer violated clearly established law by shooting a fugitive during a car chase. In its decision the *Mullenix* Court addressed only the second part of the qualified-immunity inquiry: whether the officer's alleged conduct violated clearly established law. The Court's mandate here reaches only this second part of the qualified immunity inquiry in connection with the Coles' Fourth Amendment claim against Cassidy and Hunter, and, as we need not, we do not reach issues unaddressed by the mandate on remand. We reinstate our prior decision as concerns all other parts of the appeal and address only the existence of clearly established law as it informs the denial of Cassidy and Hunter's motion for summary judgment. Turning to that denial, we note that the district court did not weigh the evidence and resolve the factual disputes over the shooting of October 25, 2010, properly so. Rather it asked only whether a jury should 'resolve the parties' differing versions of the truth

at trial.' The district court determined that genuine disputes of fact remained, that these disputes were material, and should be resolved by a jury. Our inquiry is more circumscribed. . . . We ask whether, if all factual disputes are resolved in the plaintiffs' favor, Cassidy and Hunter are entitled to qualified immunity as a matter of law. If so, the officers are due summary judgment; if not, we affirm the district court. We take facts in a light most favorable to the non-movants, the Coles, and draw all justifiable inferences in their favor. We consider the circumstances leading up to the officers' conduct, but confine our inquiry to those facts knowable to the officers at the time. Within the limited scope of our inquiry, review is de novo. . . . It is significant that the Court's focus in *Mullenix* was upon generality. In some conceptual sense, a legal rule is necessarily general: it applies not only to the case in which it is articulated, but to all like cases. The *Mullenix* Court does not repudiate generality in this sense. Rather it repudiates a second variety of generality, one that does not reach all legal rules: generality as indeterminacy. A rule that is general in that it is indeterminate cannot be 'clearly established,' because a reasonable officer attempting to interpret and apply that rule in particularized circumstances will face legal uncertainty. The officer cannot be on notice of the proper course of action. In this scenario, *Mullenix* tells us that the qualified immunity doctrine insulates the officer from liability. On the other hand, a reasonable officer is capable of reasoning analogically from a determinate and categorical rule to conclude that given conduct is prohibited. Such rules, once articulated, are clearly established law. Here, a determinate and categorical rule applied to the facts facing Cassidy and Hunter: officers are prohibited from using deadly force against a suspect where the officers reasonably perceive no immediate threat. This no-threat rule was clearly established as early as 1985, when the Court articulated it in *Tennessee v. Garner*. In that case an officer shot a suspect in the absence of a reasonable perception of threat. Analyzing the case, the *Garner* Court began by describing a widely applicable standard governing the constitutionality of seizures, balancing the intrusiveness of a seizure against government interests. But it did not stop there. The Court also articulated a bright-line rule to govern the limit[ed] condition in which governmental officers face no threat from a suspect: 'Where the suspect poses *no immediate threat* to the officer and *no threat to others*, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.' The rule is categorical and determinate. It is general in the first sense of the term, but not in the second sense of indeterminacy. By October 25, 2010 the no-threat rule had been clearly established for twenty-five years, and had been applied many times in this circuit. . . . Cassidy and Hunter paint with too broad a brush when they argue that the Supreme Court's holdings preclude finding clearly established law in *Garner*. The officers fail to distinguish between the application of *Garner*'s 'sufficiency of threat' balancing inquiry and the bright-line no-threat rule also articulated in that case. Unquestionably, where facts establish that officers reasonably perceived some threat, *Garner* requires a balancing analysis to gauge the 'sufficiency' of the threat relative to the use of force. *Mullenix*, and several other decisions of the Court, conclude that this balancing exercise standing alone is too indeterminate to present as clearly established law. Rather, in these situations, '[p]recedent involving similar facts can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful.' There is, however, a threshold inquiry as to whether the facts sustain finding any reasonably perceived threat at all. In situations where they do not, the Court

has not repudiated application of *Garner*. On the contrary, it has repeatedly explained that, in what it calls 'obvious case[s],' *Garner* provides clearly established law. . . .Whether Cassidy and Hunter reasonably perceived a threat when they fired upon Cole is a factual question. It is one that the district court found genuinely disputed. Our inquiry takes the facts in a light most favorable to the Coles, and in that light a factual premise of our analysis is that there was no reasonably perceived threat. The cases to which Cassidy and Hunter direct us are inapposite, because they are all premised on factual findings of a threat. We cannot and will not revise the district court's identification of genuine fact disputes. Cassidy and Hunter are not entitled to qualified immunity at this point in the case. . . . . Immunity from trial is an important component of qualified immunity, but denial at this stage does not necessarily deprive the officers of the immunity defense as to liability. We decide only that it will be for a jury to resolve what happened on October 25, 2010, and whether Cassidy and Hunter are or are not entitled to the defense. For our purposes, the district court determined there was a genuine factual dispute. We hold this dispute is material. We AFFIRM the denial of Cassidy and Hunter's motion for summary judgment, otherwise REINSTATE our previous opinion in this case, and REMAND for further proceedings consistent with this opinion." [footnotes omitted])

Escobar v. Montee, 895 F.3d 387, 395-96 (5th Cir. 2018) ("Although, as with the suspect in *Cooper*, Escobar's hands were visible and he complied with Montee's commands, much unlike the situation in *Cooper*, Escobar had a knife within reach, and Montee had reason to believe he still posed a threat. Also unlike *Cooper*, Montee had been told that Escobar would have to be killed—by Escobar's own mother no less. A reasonable officer could easily conclude that Escobar's surrender was not genuine. . . . Given the information from Escobar's mother and the nature of the chase (at night, through multiple backyards in a residential neighborhood), Montee had reason to doubt the sincerity of Escobar's surrender. And because the knife remained within reach, Montee could reasonably believe that Escobar—if the dog was called off before handcuffing—would then try to harm someone. . . Accordingly, a reasonable officer could think Escobar posed a threat. . . . [B]ased on all the circumstances, it was objectively reasonable to permit Bullet to continue biting Escobar until he was fully handcuffed and subdued. Montee did not violate Escobar's Fourth Amendment rights.")

Vann v. City of Southaven, Mississippi, 884 F.3d 307, 309-10 (5th Cir. 2018) ("Treating the petition for rehearing *en banc* as a petition for panel rehearing, the petition for panel rehearing is GRANTED. The panel opinion, *Vann v. City of Southaven*, 876 F.3d 133 (5th Cir. 2017), is WITHDRAWN, and the following is substituted. . . 'A qualified immunity defense alters the usual summary judgment burden of proof. Once an official pleads the defense, the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law.'. .With respect to Jones, one of the two officers who shot Vann, it is undisputed that Jones shot Vann after his colleague, Logan, was knocked to the ground by Vann's car and as Vann's car approached Logan for a second time. Under these circumstances, Jones's use of force did not violate clearly established law. With respect to Logan, the other officer who shot Vann, even assuming *arguendo* that Logan used

excessive force, the question then becomes, was there law that put Logan on notice that shooting in the situation presented violated the constitution? It is the plaintiff's burden to find a case in his favor that does not define the law at a 'high level of generality.'. . In the district court, Plaintiff, Vann's representative, cited nary a pre-existing or precedential case. That alone dooms his case here. . . Even on appeal, Plaintiff fails to cite a case on point from this court or the Supreme Court that helps his case, instead relying on an out-of-circuit case. Accordingly, we AFFIRM the district court's grant of summary judgment to Jones, Logan, Yoakum, and Long.")

Hatcher v. Bement, 676 F. App'x 238, 243-45 (5th Cir. 2017) ("In this circuit, Fourth Amendment cases clearly establish—and did so by 2013—that when a suspect is on foot, an officer may shoot the suspect only if a reasonable officer could reasonably perceive that the suspect posed an immediate and significant threat to the officer or to others. Our application of this clearly established law in analogous or near-analogous cases provided fair warning to Bement that it would violate the Fourth Amendment to shoot a suspect that, at the time of the shooting, is bent over, squinting, wiping pepper spray from his eyes, and slowly walking away from all the officers. . . . Assuming the facts in the light most favorable to Hatcher's Estate, as we must in reviewing a summary judgment ruling, Hatcher posed an objectively lesser threat than the suspect in *Meadours*, who held a weapon when the officer fired. This court rejected the officer's claim of qualified immunity because there was a genuine, material dispute regarding whether the suspect nevertheless posed a threat at the time of the shooting. A similar material factual dispute exists here. If Hatcher was bent over, squinting, wiping pepper spray from his eyes, and slowly walking away from all the officers, then it would be unreasonable for Bement to believe that he posed a threat. Accordingly, Hatcher's Estate has presented a genuine dispute of material fact, precluding summary judgment.")

Blair v. City of Dallas, 666 F. App'x 337, 341-42 (5th Cir. 2016) ("The Supreme Court has made clear that 'so long as "a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot 'avoi[d] summary judgment by simply producing an expert's report that an officer's conduct *leading up to* a deadly confrontation was imprudent, inappropriate, or even reckless."'. . . The affidavit from William P. Flynn, a former law enforcement officer and an instructor at a police academy, primarily discusses whether the actions taken by the officers *before* they fired their weapons were reasonable. With respect to the shooting itself, the affidavit states that 'during the actual shooting ... both Officer Cantu's and Officer Aquino's conduct against David Blair ... was objectively unreasonable, unconstitutional and contrary to recognized and practiced police policies and procedures.' However, the affidavit does not explain why it may have been unreasonable for the officers to believe they were in danger when Blair opened his apartment door with flashlight in hand. Moreover, '[e]ven if an officer acts contrary to her training, ... that does not itself negate qualified immunity where it would otherwise be warranted.'. . Flynn's affidavit argues that the officers acted contrary to recognized police policies and procedures, but that contention is not enough by itself to create a material fact issue. Accordingly, we hold that Blair has failed to demonstrate that there is a genuine dispute as to any material fact. . . .In the instant case, there is no evidence that the officers knew Oliver and D.O. were inside the apartment

when they fired the shots. As a result, it appears that the officers' use of force was not deliberately applied to Oliver and D.O. This Court has not yet weighed in on whether an officer's use of force in such a circumstance constitutes a seizure within the meaning of the Fourth Amendment. Thus, under the second prong of the qualified immunity analysis, it is apparent that any right that may have been violated was not clearly established at the time of the officers' alleged misconduct. We affirm the district court's grant of summary judgment dismissing the claim that Oliver and D.O. were wrongfully seized.")

Mendez v. Poitevent, 823 F.3d 326, 333-34 (5th Cir. 2016) ("Plaintiffs . . . argue that the only relevant facts for our consideration are that, at the time of the shooting, Mendez had broken free, was running away from Poitevent, and had covered 15 feet. But we must consider all of the circumstances leading up to that moment, because they inform the reasonableness of Poitevent's decisionmaking. . . In other words, the question here is not, as plaintiffs assert, whether an officer violates the Fourth Amendment by shooting a suspect who is running away. Rather, it is whether an officer violates the Fourth Amendment by shooting a suspect who just fought the officer at length; disarmed him of his baton; prevented him from using his radio to call for backup; potentially attempted to obtain his gun; concussed and disoriented him; and broke free of his grasp; at the precise moment the officer's vision is impaired and he fears losing consciousness—and the evidence indicates that it was not apparent to Poitevent that Mendez was running away. In our view, using deadly force in such circumstances does not violate the Fourth Amendment. . . . In sum, we hold that Poitevent did not use excessive force because a reasonable officer in his situation could have believed that Mendez posed a threat of serious harm, justifying the use of deadly force. Thus, we affirm the district court's grant of qualified immunity.")

Pratt v. Harris Cty., Tex., 822 F.3d 174, 182-84 (5th Cir. 2016) ("Construing the facts in the light most favorable to him, Pratt ignored multiple requests and warnings from both Lopez and Medina. Indeed, Pratt aggressively evaded Lopez and Medina's attempts to apprehend him. Only after he continuously failed to comply, did either deputy deploy tasers; Medina used his taser only after Lopez's efforts to subdue Pratt were ineffective. The evidence showed that Medina cycled his taser only when Pratt continued to resist handcuffing. Once Pratt complied, and Goldstein was able to handcuff him, Medina stopped using his taser. But, when Pratt kicked an officer after being taken to the ground, Medina used his taser again; and, once again, officers were able to control him. It is also important that neither officer used their taser as the *first method* to gain Pratt's compliance. The record shows that both officers responded 'with 'measured and ascending' actions that corresponded to [Pratt's] escalating verbal and physical resistance.'. . In sum, Pratt has not shown that Lopez and Medina's use of tasers was 'clearly excessive' or 'unreasonable.' Accordingly, we hold that the district court did not err in granting both Lopez and Medina qualified immunity in this respect. . . .Although hog-tying is a controversial restraint, we have never held that an officer's use of a hog-tie restraint is, per se, an unconstitutional use of excessive force. We have, however, previously addressed the excessiveness and reasonableness of the restraint. . . .On appeal, Pratt argues that it is significant that the HCSD had a policy prohibiting the hog-tying of arrestees. Pratt also points out that Officer Wilks, the primary facilitator of Pratt's hog-tying, acknowledged his

belief that hog-tying was unconstitutional. . . Pratt further contends that her son had stopped resisting, at least temporarily, at the time he was hog-tied, but acknowledges that he had to be subdued earlier after 'giving up'. . . But, the constitutionality of an officer's actions, is neither guided nor governed by an officer's subjective beliefs about the constitutionality of his actions or by his adherence to the policies of the department under which he operates. . . Instead, we must examine whether the HCSD officers' conduct was excessive or unreasonable under the 'circumstances of [this] particular case.'. . Considering the record evidence, neither the circumstances surrounding the arrest nor our precedent support that the decision to hog-tie Pratt was an excessive or unreasonable one. . . First, as earlier observed, we have never held that hog-tying is a per se unconstitutional technique of controlling a resisting arrestee. Thus, an assertion of hog-tying alone does not constitute a claim of excessive force. . . . Turning to the excessiveness and unreasonableness of Deputies Wilks, Goldstein, and Salazar's conduct, the record evidence shows that Pratt ignored multiple requests and warnings from all three officers; and, he aggressively evaded their attempts to apprehend him, even after promising compliance. Construing the facts in the light most favorable to him, it is clear from the record that Pratt did not follow through on his offers to comply with the officers' requests. Instead, Pratt renewed resistance, broke free from the officers' grips, and kicked at officers attempting to restrain him (eventually kicking one officer in the groin twice). Furthermore, unlike the arrestee in *Gutierrez,* the officers who hog-tied Pratt were unaware of his use of drugs or alcohol when they hog-tied him, and Pratt does not contend that her son volunteered such information. Additionally, unlike the arrestees in *Gutierrez* and *Hill,* neither party contests that Pratt was only restrained for a very brief period. Thus, in the factual context of this case, the use of the hog-tie restraint was not unconstitutionally excessive, or unreasonable. To conclude, in the light of Pratt's 'on again, off again' commitment to cease resisting, his recurring violence, and the threat he posed while unrestrained, it was not, under the totality of the circumstances, 'clearly excessive' or 'unreasonable' for HCSD officers to restrain him as they did. For these reasons, we hold that the district court did not err in granting Wilks, Goldstein, or Salazar qualified immunity.")

Pratt v. Harris Cty., Tex., 822 F.3d 174, 185 (5th Cir. 2016) (Costa, J., concurring in the judgment) ("My colleagues' differing opinions on whether the force applied in this tragic case was excessive demonstrate that the constitutional question is a close call even for a judge who can spend days parsing the fine points of case law, let alone for an officer making split second decisions in the field. It is precisely for such situations—when the existence of a constitutional violation is not 'beyond debate'—that qualified immunity provides a defense.")

Pratt v. Harris Cty., Tex., 822 F.3d 174, 186, 189-91(5th Cir. 2016) (Haynes, J., concurring and dissenting) ("Wayne Pratt received the death penalty at the hands of three police officers for the misdemeanor crime of failing to stop and give information. The majority opinion concludes that the deputies' decision to hog-tie Pratt and apply force to his back while he was in this position was a reasonable response to Pratt's failure to stop and identify himself following an accident and his failure to comply with their instructions. . . . Qualified immunity cannot be interpreted to license officers to use deadly force under these facts. Because it was clearly established that officers in

Deputies Wilks, Goldstein, and Salazar's position should not have hog-tied Pratt in the manner they did, I respectfully dissent from the portion of the majority opinion affirming the district court's grant of summary judgment on qualified immunity grounds for Deputies Wilks, Goldstein, and Salazar's alleged use of excessive force in hog-tying Pratt. I concur in the remainder of the judgment. . . . In each of these cases [*Mullenix, Sheehan,* and *Plumhoff*], the officers faced an immediate threat of serious harm, as did others who might come into contact with the individual in question. Conversely, in the instant case, there is no indication that Pratt ever posed a serious threat of harm to any of the officers, nor any indication that the officers feared for their safety in any meaningful way that might justify the use of deadly force. This is not the 'split second' decision described in the concurring opinion. Thus, balancing Deputies Wilks, Salazar, and Goldstein's use of deadly force against the importance of the government's interests alleged to justify the intrusion leads inexorably to the conclusion that the deputies' alleged use of force in this case was excessive and constitutes a violation of Pratt's Fourth Amendment rights. . . .With respect to the second prong of the qualified immunity analysis, viewing the facts in the light most favorable to the plaintiff, it is apparent that the officers' actions in using excessive force violated clearly established law. As of May 10, 2010, the date on which the events in this case occurred, the Fifth Circuit had decided two cases directly addressing whether the use of hog-tie restraints constitutes excessive force in violation of the Fourth Amendment: *Gutierrez* and *Hill v. Carroll Cty.,* 587 F.3d 230 (2009). . . . The facts of this case fall squarely under the holding in *Gutierrez* . . . Here, the officers had reason to suspect that Pratt had abused drugs based on his erratic behavior, and the presence of a glass pipe and lighter in his hands takes this from mere unexplained erratic behavior into the 'on drugs' camp. . . Furthermore, Pratt was unarmed and posed a relatively little risk of harm to the officers despite his refusal to comply with their commands. At no point did Pratt attempt any kind of violence other than kicking at the officers while he was on the ground. Pratt never attempted to reach for the officers' weapons, nor did he pose any other threat of serious harm to the officers. Additionally, the officers did not discover that Pratt had stopped breathing until after an ambulance arrived, and the amount of time Pratt was actually hog-tied is a disputed fact. Furthermore, distinct from the facts in *Hill,* the officers did not attempt to use leg restraints before placing Pratt in a hog-tie restraint. Most importantly, unlike *Hill,* the officers here used both the hog-tie restraint and put a knee on his back, greatly impairing his ability to breathe. . . In light of the holding in *Gutierrez* and the similarities between it and the instant case, the state of the law at the time of the incident was sufficiently established to provide fair warning to Deputies Wilks, Salazar, and Goldstein that their alleged conduct violated Pratt's Fourth Amendment right to be free from the use of excessive force.")

Cass v. City of Abilene, 814 F.3d 721, 731-33 (5th Cir. 2016) ("Appellants argue that '[t]he district court erred in allowing the Individual Defendants to create a dangerous, deadly situation and then avoid liability for their acts due to the alleged "necessity" of having to respond with deadly force to the very situation they created.' We agree that by choosing to conduct the raid with surprise and with guns drawn, APD created a dangerous situation that led to Cass's death. Nevertheless, our precedent forecloses consideration of this context in evaluating Appellants' excessive force claim:

> The excessive force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer's shooting. Therefore, any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit.

Harris v. Serpas, 745 F.3d 767, 772 (5th Cir.) (internal citation, quotation marks, and modifications omitted), *cert. denied*, —— U.S. ——, 135 S.Ct. 137, 190 L.Ed.2d 45 (2014). Because Smith reasonably believed himself to be in immediate danger when he shot Cass, the shooting did not violate the Fourth Amendment and Smith is entitled to qualified immunity on Appellants' deadly force claim. . . . In a distinct Fourth Amendment excessive force claim, Appellants argue that APD's execution of the warrant was unreasonable, creating a dangerous situation with a high likelihood of serious bodily injury or death. Appellants cite evidence that Abilene Gold Exchange had a history of cooperating with police, none of the officers had ever been threatened by an employee of the business, and the alleged crime upon which the warrant was predicated—failure to properly report purchases of precious metals—was only a Class B misdemeanor. Appellants also argue that a fact issue exists as to whether the police announced themselves upon entry. Viewing this evidence in the light most favorable to Appellants, a reasonable juror could find APD's use of force, coupled with the failure to announce, to be objectively unreasonable in violation of the Fourth Amendment. . . Smith argues that the raid was justified by the presence of guns, Camp's felony conviction, a general sentiment that Camp and Cass had an 'anti-police attitude,' and the suspicion that Abilene Gold Exchange might be involved in criminal activity more serious than the bookkeeping violations that were the subject of the warrant. However, neither an unsubstantiated suspicion that crime may be afoot nor a general consensus among officers that business owners have an 'anti-police attitude' justifies a surprise tactical raid on a lawful business, particularly one with a history of cooperating with the police. Nor does the mere presence of guns or a decades-old nonviolent conviction automatically permit the use of force employed here by APD. . . Viewing the evidence in the light most favorable to Appellants, various APD officers had entered Abilene Gold Exchange on numerous occasions as part of criminal investigations without ever being threatened, giving APD no reason to expect a violent response. On these facts, a reasonable juror could find that Smith's use of force violated Cass's Fourth Amendment rights and unnecessarily created a dangerous situation that made Cass's death likely. However, Appellants also have the burden to show that Smith violated Cass's *clearly established* rights. Appellants' entire argument on this second prong of the qualified immunity test is that 'it is clearly established in the law that citizens are protected against unjustified, excessive police force.' This general statement is insufficient to meet Appellants' burden. . . .We note that the district court did not reach the 'clearly established' prong. Moreover, Smith entirely failed to argue that Cass's right was not clearly established, and on an ordinary affirmative defense, Smith would bear the burden of proving the defense. Nevertheless, our precedent dictates that 'once a defendant invokes qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity.'. . We conclude that on this record, Appellants have not shown a violation of clearly established law so as to satisfy this burden.")

Mason v. Lafayette City-Parish Consol. Gov't, 806 F.3d 268, 276-78 (5th Cir. 2015) ("The district court did not correctly analyze the summary judgment record. The district court appears to have relied entirely on the officers' account of events. For example, the district court accepts as 'uncontroverted' Faul's position that Mr. Mason's hand went toward the gun in his waistband before Faul released the canine. Babino's account of the shooting, which conflicts with the officers' accounts in several key respects, is absent from the district court's opinion despite having been discussed in the Masons' briefing. Babino's deposition contains an account of the shooting, and the facts she related are material to the Fourth Amendment question. When addressing excessive-force claims, courts have an obligation to 'slosh our way through the factbound morass of "reasonableness."'. . Additionally, the Supreme Court has recently emphasized that in an excessive-force case on summary judgment, like any other case, a court must accept as true the evidence of the nonmoving party and draw all justifiable inferences in that party's favor. . . The district court failed to give credence to, or even make note of, Babino's conflicting account of the shooting, which perhaps constitutes the Masons' strongest evidence. We must give full credence to Babino's testimony. . . .We have explained that 'an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased.'. . Although the record reflects that there was a break between the first five and last two shots that struck Mr. Mason, and that Mr. Mason lay on the ground when the final two shots were fired, the district court did not expressly address whether Faul's use of his firearm was justified throughout the encounter. We conclude that genuine issues of material fact arise regarding the final two shots that struck Mr. Mason, which requires reversal of the summary judgment in part, and we do not express an opinion as to whether Faul was entitled to qualified immunity for each of the first five shots. A reasonable jury could conclude that a reasonable officer in Faul's position would not have 'probable cause to believe that [Mr. Mason] pose[d] a threat of serious physical harm'. . . at the time the final two shots were fired. . . . In light of Babino's and Dr. Traylor's testimony, a reasonable jury could conclude that Mr. Mason lay incapacitated on the ground and did not move in a threatening manner before Faul fired the final two shots. . . Accordingly, a reasonable jury could conclude that Mr. Mason objectively posed no immediate threat, such that Faul violated the Fourth Amendment by firing the final two shots. We therefore must determine whether Faul is entitled to qualified immunity on the grounds that he did not violate clearly established law. The law is clearly established if there is factually similar, controlling case law from this court or the Supreme Court. . . The present case is an 'obvious one where *Graham* and *Garner* alone offer a basis for decision.'. . The constitutionality of the final two shots can be decided on the threshold issue—under *Garner*—of whether *deadly* force was permissible, i.e., whether Mr. Mason objectively posed an immediate threat. . . The second, more complex inquiry dictated by *Graham*—balancing the severity of the threat against other factors. . . —is not necessary here. A reasonable jury could conclude that when Faul fired the final two shots, Mr. Mason would have appeared incapacitated to an objectively reasonable officer. Shooting a clearly incapacitated suspect is inconsistent with *Garner*'s command that deadly force is unconstitutional when a 'suspect poses no immediate threat to the officer and no threat to others.'. . We therefore conclude that there are material fact questions as to whether Faul is entitled to qualified immunity for firing the final two shots.")

Mason v. Lafayette City-Parish Consol. Gov't, 806 F.3d 268, 282-89 (5th Cir. 2015) (Higginbotham, J., concurring in part and dissenting in part) ("As Quamaine Mason and his girlfriend, Racquel Babino, stepped outside of her apartment, they were met by three officers with guns drawn. Quamaine put his hands up and stood still. Officer Martin Faul and his police dog together attacked Quamaine, Faul shooting him seven times at point-blank range as he fell down struggling to fend off the dog. No other officer fired a shot. I concur in the rejection of immunity for the final two shots and the disposition of Appellants' other claims, but I dissent from the majority's refusal to address the district court's grant of qualified immunity for the first five shots that led to Quamaine's senseless death. . . Accepting the version of facts most favorable to Appellants, as we must, . . . I offer a narrative of events from which a reasonable jury could find that no reasonable police officer could have perceived an imminent threat to his own life or the life of another. . . . Quamaine stood still with his hands up and empty, complying with all police instructions. . . But holding his dog by its collar, Officer Faul and the dog charged Quamaine—the two were separated by less than the length of the dog's thirty-six-inch tether. . . .While the dog was on Quamaine, Officer Faul shot Quamaine seven times at point-blank range . . . . On the narrative sketched above, Officer Faul and the dog together attacked Quamaine even though the young man made no threatening movement whatsoever. . . . There is no doubt that Officer Faul's use of lethal force in these circumstances violated the Fourth Amendment. . . . The majority fully agrees with this analysis with respect to the final two shots, but it leaves the district court's grant of summary judgment in place with respect to the first five shots—refusing to address the appeal from that judgment. . . . I am at sea as to why the majority slices a single event into distinct segments—seven shots into five and two—then performs the proper analysis with respect to one segment—the final two shots—and then orders the district court to try again with respect to the other segment—the first five shots. This decision is especially puzzling when the issue is qualified immunity. As we have said before in this context, there is no reason to require the district court to address again a legal question that this Court reviews de novo. . . And we inevitably will face another appeal before this case can go to trial, at which evidence offered to the jury can hardly be segmented. The upshot is that the majority simply declines to 'express an opinion' with regard to a legal issue—the main issue of this case—that was squarely addressed by the district court, fully briefed by the parties, and remains the heart of this case. The majority also declines to vacate the district court's judgment with respect to the first five shots. To these eyes, that is indefensible. . . .Whatever the majority's reasoning, and with all due respect, I cannot concur in its opinion leaving the door open for another decision in Officer Faul's favor. This 'remand for consideration' implicitly holds that on this record the district court could conclude that Officer Faul enjoys qualified immunity as a matter of law for the first five shots and to these eyes that cannot be so. Appellees rely upon the principle that officers may use deadly force when threatened even if they negligently create circumstances leading to the need for force. . .That is, Appellees argue that Officer Faul was justified in using deadly force because even if he negligently released his attack dog, Quamaine reacted—in a reflexive attempt to fend off the dog—by moving his hands downward and unintentionally closer to the gun in his waistband. But that principle does not address the situation here, where an officer used both a dog and a gun together as part of the same

attack, the same direct and intentional deployment of deadly force. The doctrine regarding negligent creation of the circumstances requiring deadly force is necessary to avoid collapse of the jurisprudence of deadly force into a negligence action, but it is not without limit—for it would then blur and ultimately erase the effort of the law to limit the use of deadly force. And I do not read the extant cases to say otherwise. . . . Excessive force cases are highly fact specific, and two key circumstances distinguish this case from *Young* and its progeny. First, the officer's use of the dog to attack Quamaine did not merely set a risky scene before shots were fired. It was at all times an assault of dog and gun. The moment the dog did as trained, Officer Faul began firing away. That he continued to put two more rounds in his back after Quamaine was lying on his stomach is doubly relevant. It signifies both as an independent act, as the majority observes, but also for its powerful suggestion that Officer Faul intended his force to be deadly from the beginning. . . Officer Faul's multiple breaches of police protocol—including 'rush[ing] into ... the killing zone' without a plan, failing to take cover, and insisting on taking the lead despite being tethered to an attack dog—suggest the same. Though Officer Faul cannot be held liable for these negligent actions, a jury could certainly infer that they paint the picture of an officer eager to engage in a deadly confrontation. Second, in the *Young* cases, officers' actions created risky situations, but the suspects then chose to commit intervening acts which threatened the officers. . . The officers set the scene, but the tragic outcome was not inevitable; suspects were free to comply with officer commands. . .but instead chose to attack, flee, or reach for objects out of officers' view. Officers faced with these newly developed threats then responded reasonably in the moment. There was no intervening act in this case. To the extent Quamaine moved his hands, he cannot be faulted for reflexively attempting to protect himself from the dog. No reasonable officer would have perceived his reflexive movements as threatening. Indeed, given the firing sequence and trajectories, a reasonable jury could easily conclude that hand movement had nothing to do with this shooting. . . . Other circuits with rules similar to *Young* have recognized that officers may be liable for using excessive force when their actions cross the line from negligence to recklessness. . . Still others have recognized the principle that officers may be liable for excessive force when their actions *directly create* the justification for the force. . . . These cases chart a limit to *Young* comporting with common sense. At some point, an officer crosses the line between setting up a risky situation and actually himself directly causing the 'threat.' Officers are at risk in nigh every traffic stop as they approach a vehicle, as are the persons in that vehicle—so also with street confrontations. Yet no one will maintain that an officer can lawfully avoid all risk by simply shooting and asking questions later. So long as the suspect has his hands in the air—and certainly when three officers have drawn guns trained on him—an officer cannot simply shoot him, avoiding all risk to himself. If that is so, an officer cannot knock him down and shoot him because he then no longer has his hands up. That the officer has information that the suspect is armed does not work a different result. . . To say otherwise is to hold that a deadly attack upon a man standing with his hands in the air is not excessive force just because he has a gun in his waistband—an unconscionable result insupportable in law, and perversely confounding the current sanctioning of open carry of handguns. . . . Under Appellants' version of the facts, there was nothing that Quamaine Mason or indeed anyone in the area matching his description could do to escape Quamaine's fate. He was dead as soon as police were called. He complied with all orders until he was attacked by a dog and

police officer who shot him seven times at point-blank range. We have the responsibility of providing arresting officers all guidance in the use of deadly force that we can, as these cases are often close and difficult—and when these cases are close and difficult, we clothe the officers with post-hoc immunity. This attack of man and dog is far from that genre. We ought not decide this case—that decision belongs to a jury. Avoiding a trial is an important component of qualified immunity, but denial of qualified immunity does not deny Officer Faul his immunity defense from liability. It only concludes that he must be judged by a jury of his peers. . . Appellants should not have go through the time and expense of another interlocutory appeal to get this Court to recognize as much. I cannot join this newly minted form of abstention, and I respectfully dissent.")

Davis v. Romer, 600 F. App'x 926, 929-31 (5th Cir. 2015) ("Appellants' principal argument is that Romer's conduct caused the dangerous encounter. Specifically, Appellants contend that 'Romer's life was in danger because of his own intervening actions of attempting not once but twice, to grab a hold of a moving vehicle when Romer had a choice not to do so.'. . Appellants contend that the district court erred in interpreting this Court's precedent to limit its analysis to the circumstances existing at the moment Romer shot Thomas. Recently, this Court has rejected the same argument. [discussing precedent] Appellants recognize the above precedent and seek to distinguish it, stating that Davis and the minor children testified that Romer's arm was not trapped in the window as Romer claims. . . Appellants asserted at oral argument that Romer should have made the 'better decision ... to let [Thomas] go.' Appellants argue that Romer caused the danger by jumping on the running board of the vehicle. In other words, their argument is that instead of jumping on the vehicle Romer should have moved away from the fleeing vehicle. Appellants' argument that the 'officer[ ] could have moved away from the car is, unfortunately, a suggestion more reflective of the "peace of a judge's chambers" than of a dangerous and threatening situation on the street.' . . Viewing the evidence in the light most favorable to Appellants, there is testimony that Romer removed his arm from the window after Thomas began driving toward the service road. Nonetheless, this does not constitute a genuine issue of material fact because Appellants' brief concedes that Romer's arm was inside the vehicle at the time Thomas began driving away. . . Moreover, the evidence, including Davis's testimony, demonstrates that Thomas's driving away with Romer's arm inside the vehicle and Romer subsequently jumping on the vehicle's running board occurred very rapidly. Under such chaotic, dangerous circumstances, Appellants have not shown that Romer's conduct was objectively unreasonable. As previously discussed, the definitive question is whether Romer had a reasonable belief that Thomas posed a risk of serious harm at the time Romer used deadly force. Appellants have conceded that Romer was on the running board of the fleeing vehicle when he fired the fatal shots. We therefore conclude that at the time of the shooting, Romer had reason to believe that there was a serious threat of physical harm to him. . . .Appellants also point to the fact that Romer fired 12 rounds as opposed to a single shot in self-defense. . . The Supreme Court has rejected the argument that an officer's firing of 15 rounds constituted excessive force because 'if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.'. .Accordingly, because Romer's use of force was objectively reasonable, Appellants have not shown a Fourth Amendment violation. Thus, Appellants cannot show that Romer's use of deadly

force was objectively unreasonable under clearly established law at the time the incident occurred. . . The district court properly granted summary judgment as to the Fourth Amendment claim based on qualified immunity.")

Thompson v. Mercer, 762 F.3d 433, 437-41 (5th Cir. 2014) ("The district court correctly concluded that the Thompsons have not alleged a constitutional violation. A plaintiff does not overcome qualified immunity by merely alleging 'that a violation *arguably* occurred.'. . . Here, even construing the facts in the Thompsons' favor, there was no Fourth Amendment violation. . . . Upon reflection it seems that Keith—who was in possession of a firearm and had committed multiple felonies over the course of two hours—posed a significantly greater threat than the Scott suspect, an unarmed driver suspected only of speeding in a pursuit that lasted less than six minutes. So if the Scott chase 'closely resemble[d] a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury,'. . . the chase here posed all the greater risk. Accordingly, after multiple other attempts to disable the vehicle failed, it was not unreasonable for Mercer to turn to deadly force to 'terminate [the] dangerous high-speed car chase.'. .The Thompsons disagree, arguing that their son was no longer a risk because he was driving on a 'lonely' rural road and his vehicle had already been disabled. The argument is not persuasive. The Supreme Court has already rejected the defense that 'the roads were mostly empty.'. . Similarly, this court recognizes the 'inherent danger' of vehicular flight, 'even when no bystanders or other motorists are immediately present.'. . But more importantly, the Thompsons' characterization of the scene is belied by the video evidence. Even when Keith was driving along this 'virtually empty' country road, multiple cars had to pull over as Keith and his pursuit caravan raced back toward town. And rather than decreasing the inherent risk, the rural nature of the road made the pursuit all the more dangerous, as there was no shoulder for cars to pull onto, and visibility was often limited. . . .Even assuming *arguendo* that Mercer's use of force was excessive under the Fourth Amendment, that decision was not so unreasonable so as to deprive him of qualified immunity from § 1983 liability. To overcome the defense, the Thompsons must allege an infraction so egregious that 'no reasonable officer' could have believed the conduct constitutional. . . Consider, then, the circumstances facing the officer here. Mercer knew that this unidentified suspect had stolen a car and abducted a woman. He also knew that the pursuit had lasted for two hours, and that attempts to disable the vehicle had failed. He had been told that the suspect was armed and suicidal, and he saw that the suspect was headed toward a town a mile away. It was therefore manifestly reasonable for law enforcement to assume that the unknown suspect represented a tremendous risk to the officers and to the community that lay ahead. . . Thus, even if the force was excessive, that force was not *so* excessive that 'no reasonable officer' would have thought the conduct constitutional.")

Royal v. Spragins, 575 F. App'x 300, 304, 305 (5th Cir. 2014) (per curiam) ("Jeffery, a suicidal man, not only exited his car with his gun, but also began lowering the gun and pointing it at the officers. This was sufficient to give the officers full reason to believe that Jeffery posed a threat of serious harm to them. Under these circumstances, the use of deadly force was not clearly excessive or clearly unreasonable. . . . We decline Royal's invitation to stray from our precedents by

considering the officers' actions before the moment of the threat that resulted in the officers' shooting—here, the moment when Jeffery began lowering the rifle. Even assuming that Wichita Falls had a policy in place for dealing with suicidal persons and the officers were not aware of or did not follow the policy, the officers did not violate Jeffery's Fourth Amendment right to be free from excessive force as they acted reasonably when Jeffery began lowering his gun.")

Harris v. Serpas, 745 F.3d 767, 772-74 (5th Cir. 2014) ("Appellants argue that taken as a whole the officers' actions in this case were unreasonable. To the extent that Brian Harris became agitated and threatening, Appellants contend, it was only due to the provocation of the officers. Appellants point to the officers' awareness that Brian had not threatened his wife or children, and that they were only called to the home to assist Brian, who was depressed and had possibly taken an overdose of sleeping pills. Brian was engaged in lawful activity before and during the incident, Appellants contend, up until the officers roused him from his bed by breaching his bedroom door yelling commands and firing taser darts at him seconds later. Accordingly, Appellants assert that under the totality of the circumstances, the officers' use of force was unreasonable. The United States Supreme Court has long held that courts must look at the 'totality of the circumstances' when assessing the reasonableness of a police officer's use of force. . . This Court, however, has narrowed that test, holding that '[t]he excessive force inquiry is confined to whether the [officer] was in danger at the moment of the threat that resulted in the [officer's] shooting.'. . Therefore, any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this Circuit. . . .In the instant case, the taser video evidence confirms that Mr. Harris was holding a knife above his head at the moment Officer McGee fired his weapon. Notwithstanding, Appellants argue that the district court erred by 'making a finding of fact that [Officer] Kish was in imminent danger of being stabbed by an advancing Brian Harris' at the time of the shooting. Appellants contend that the parties' locations and movements in the room at the time of the shooting is a 'hotly contested' material factual issue that precludes summary judgment. The relevant law, however, does not require the court to determine whether an officer was in actual, imminent danger of serious injury, but rather, whether 'the officer reasonably believe[d] that the suspect pose[d] a threat of serious harm to the officer or to others.'. . Moreover, '[t]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'. . When looking at the 'moment of the threat' that resulted in Officer McGee's use of deadly force, it is clear from the taser video that Mr. Harris was standing up out of bed and had raised the knife above his head at the time the shots were fired. Accordingly, the district court properly held that under these circumstances, the officers reasonably feared for their safety at the moment of the fatal shooting. . . .We affirm the district court's opinion based solely on our examination of the moment when the fatal shooting occurred. We express no opinion regarding the appropriateness of the officers' conduct that preceded the moment of the shooting in this case. In summary, the taser video evidence confirms the district court's finding that Brian Harris was holding a knife in a stabbing position at the moment of the fatal shooting. Therefore, the district court properly concluded that the use of deadly force was not unreasonable. Accordingly, we AFFIRM the district court's grant of summary

judgment for the officers based on qualified immunity. As such, we also AFFIRM the dismissal of the *Monell* claim against the City of New Orleans.")

Williams v. City of Cleveland, Miss., 736 F.3d 684, 688 (5th Cir. 2013) ("Addressing *Saucier's* second prong, we find that the officers did not violate a right that was clearly established at the time of the alleged violation. We note that in previous Taser cases in which we have rejected qualified immunity for officers, the person tased was not attempting to flee. [collecting cases] . . . . Although the parties' experts witnesses disagreed on whether the Taser use and chokehold was excessive force, the undisputed facts lead us to the legal conclusion that the force exercised against Williams was, under the circumstances reflected in the record, reasonable. Our rule on qualified immunity is that '[u]se of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others.' *Mace v. City of Palestine,* 333 F.3d 621, 624 (5th Cir.2003). The deceased performed a push-up with both Goza and Perry on his back *after being tased three or four times* and after reaching for the officers' Tasers and Officer Goza's gun. He continued to pose a threat of serious harm throughout the struggle.").

Watson v. Bryant, 532 F. App'x 453, 458, 459 (5th Cir. 2013) (not published) ("It is irrelevant that Bryant may have neglected to follow best practices by attempting to handcuff a suspect while holding a gun, however tragic the result. . . . However inadvisable Bryant's actions were, the evidence does not show that it was objectively unreasonable for an officer to fail to reholster his weapon in the midst of handcuffing a potentially armed suspect. . . and we refuse to make such disarmament a constitutional requirement. Bryant thus is entitled to qualified immunity on Ms. Watson's Fourth Amendment claim.")

Hogan v. Cunningham, 722 F.3d 725, 735 (5th Cir. 2013) ("Viewing the facts in Hogan's favor, he approached his apartment door, told the Officers that they could not come inside, attempted to close the door, and was immediately tackled by two officers. In tackling him, the Officers caused him to fall on his back, and they fell on top of him. As a result, he suffered two broken ribs. We conclude that Hogan has not met his burden to show that existing precedent at the time of his arrest placed beyond debate the question of whether the use of such force amounted to a constitutional violation because the cases on which Hogan relies are distinguishable from the circumstances of this case.")

Newman v. Guedry, 703 F.3d 757, 763, 764 (5th Cir. 2012) ("Guedry contends that he had no reasonable warning that tasing Newman multiple times violated Newman's constitutional rights, because there was then no binding caselaw on the appropriate use of tasers. . . Lawfulness of force, however, does not depend on the precise instrument used to apply it. . . Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel. . .Furthermore, 'in an obvious case,' the *Graham* excessive-force factors themselves 'can "clearly establish" the answer, even without a body of relevant case law.'. . None of the *Graham* factors justifies Guedry's tasering Newman. As noted above, on Newman's

account, he committed no crime, posed no threat to anyone's safety, and did not resist the officers or fail to comply with a command. . . Therefore, taking the facts in the light most favorable to Newman at the summary-judgment stage, the officers' conduct was objectively unreasonable in light of clearly established law at the time of the incident.")

Newman v. Guedry, 703 F.3d 757, 763, 767-69 (5th Cir. 2012) (Barksdale, J., dissenting) ("The majority reduces the inquiry to a single question: whether the Officers applied more force than necessary to effectuate Newman's arrest. Dispensing with qualified immunity's second prong by casting this an 'obvious case', the majority hangs its analysis on *Graham*'s well-known excessive-force factors. . . But the cases it cites to support this proposition . . . are non-precedential and distinguishable on their facts. . . . A proper application of qualified immunity's second prong leads to holding the Officers' conduct was not objectively unreasonable in the light of clearly-established excessive-force law. A right is sufficiently clear, and thus 'clearly established', when 'every "reasonable official would have understood that what he is doing violates that right"'. . . . The majority's incantation that the right to freedom from excessive force was clearly established at the time of Newman's arrest . . . disregards the Supreme Court's admonition not to define clearly-established rights at a high level of generality. . . The fact-specific nature of excessive-force claims . . . requires viewing the Officers' actions prospectively, in the light of 'the circumstances *that appeared to the officer*', to determine whether such conduct was objectively reasonable. . . Equally important is the Officers' concomitant, obvious right to use 'measured and ascending responses', calibrated to physical and verbal resistance. . . .Therefore, the Officers are entitled to qualified immunity unless it was clearly established that the measured and ascending force they applied would have been objectively unreasonable to '*every* reasonable official' in like circumstances. . . 'It is not the critic who counts.... The credit belongs to [those] actually in the arena ... spend[ing] [themselves] for a worthy cause'. Theodore Roosevelt, Address at the Sorbonne, Paris: Citizenship in a Republic (23 Apr. 1910). Most regrettably, the tone and tenor of the majority opinion convey sarcasm and hostility for the Officers' conduct in a volatile, hostile, and dangerous situation; a situation in which split-second decisions must be made for the safety of all involved—citizen and police. The conduct resulting from those decisions may not be polite and pretty, but it is necessary. And, it may require more than hurt feelings. Nor is the interaction between officers and citizens a debating society. . . . And, more to the point here, the Officers' conduct is shielded by qualified immunity.")

Khan v. Normand, 683 F.3d 192, 195, 196 (5th Cir. 2012) ("[T]he dissent contends that the 'very limited' holding in *Gutierrez* renders the officers' conduct here a violation of a clearly established right. This is incorrect for at least three reasons. First, the brevity of Khan's restraint and the constant supervision similarly distinguish this case from *Gutierrez.* Indeed, *Gutierrez* explicitly based its holding on the officers' failure to monitor the decedent during the extended car ride, 'facts bearing heavily against the officers [that] are not in dispute.'. . Second, in determining that hog-tying 'may present a substantial risk of death or serious bodily harm' to certain drug-affected people, *Gutierrez* relied primarily on a study that (as this court subsequently noted) has been called into question by more recent scholarship. . . Third, even assuming the research in *Gutierrez*

accurately depicts the dangers of four-point restraints for someone in a drug-induced psychosis, *Gutierrez* dealt with officers who knew the decedent had—as he told the officers—'shot some bad coke.'. . The record contains no similar knowledge by the officers in the field, despite the subsequent autopsy report that found methamphetamine in his system, and there is evidence that the officers thought Khan may have been suffering from a mental illness, just as the complaint alleges. Under our precedent in *Hill* and *Gutierrez,* we cannot say that there has been a violation of clearly established law. Although this is a tragic incident, police officers must often make split-second decisions, and qualified immunity shields them from subsequent second-guessing unless their conduct was objectively unreasonable under clearly established law. . . Consequently, the defendants are protected by qualified immunity even if their conduct constituted excessive force.")

Khan v. Normand, 683 F.3d 192, 199-201 (5th Cir. 2012) (Emilio M. Garza, J., dissenting) ("[A]lthough the *Gutierrez* holding was 'very limited,' it applies squarely to the facts of this case. Like Gutierrez, Khan was a 'drug-affected person in a state of excited delirium' who was allegedly 'hog-tied and placed face down in a prone position.'. . Our decision in *Hill* did not unsettle the rule established by *Gutierrez,* and the law in this area was clearly established. . . . In addition to my disagreement with the majority's conclusions, I respectfully recommend that this court consider prohibiting the application of the four-point restraint to individuals who are in an apparent state of diminished mental capacity. This rule would not be novel. *See Cruz v. City of Laramie, Wyo.,* 239 F.3d 1183, 1188 (10th Cir.2001) ("We do not reach the question of whether all hog-tie restraints constitute a constitutional violation *per se,* but hold that officers may not apply this technique when an individual's diminished capacity is apparent."). The majority suggests that a four-point restraint in these circumstances is permissible if its application is brief and under 'constant supervision.' This strange necessity counsels another look at our law—the majority sanctions the use of a restraint that, when used on a certain group of vulnerable individuals, carries such a risk of death that it can only be applied legally if someone maintains constant vigilance and removes the restraint at the first sign of distress. Of course, I am mindful of the need to balance the individual's right to be free from excessive force against the tremendous demands placed on police officers in the field. It is no coincidence that two of the three four-point restraint death cases that have come before this court involved individuals who were experiencing some sort of psychotic episode. Those who have lost contact with reality can pose a grave danger to themselves, to police officers, and to the general public. But the law should also take account of the fact that these individuals may be uniquely susceptible to harm from a four-point restraint. Furthermore, a broad restriction on the four-point restraint may not substantially disturb current police practices. There is evidence that the hog-tie may already be dying its own slow death. . . . Indeed, my suggested holding would place no new prohibition on the defendant-officers in this case. The Jefferson Parish Sheriff's Office had already banned the hog-tie by the time of Khan's death. It may be time for a new restriction on the four-point restraint. Regardless, Nayeem Khan's family brought claims that, under this court's clearly established precedent, should have survived summary judgment. I respectfully dissent.")

Elizondo v. Green, 671 F.3d 506, 510 (5th Cir. 2012) ("We agree with the district court's conclusion that Green's use of deadly force was not clearly unreasonable. Ruddy ignored repeated instructions to put down the knife he was holding and seemed intent on provoking Green. At the time Green discharged his weapon, Ruddy was hostile, armed with a knife, in close proximity to Green, and moving closer. Considering the totality of the circumstances in which Green found himself, it was reasonable for him to conclude that Ruddy posed a threat of serious harm. Finally, in the absence of a constitutional violation, there can be no municipal liability for the City.")

Elizondo v. Green, 671 F.3d 506, 511, 512 (5th Cir. 2012) (DeMoss, J., specially concurring) ("I join the majority opinion in full because, under the current state of our law, the panel is correct in its legal judgments with respect to jurisdiction and liability. However, I once again feel compelled to write separately to express my disapproval of and disappointment with the actions of the City of Garland police department. We decide this case less than two months after a separate panel on which I sat issued similar opinions in the equally tragic case of *Rockwell v. Brown*, 664 F.3d 985 (5th Cir. Dec. 15, 2011) (DeMoss, J., specially concurring). In *Rockwell*, six City of Garland police officers responded to a domestic disturbance where Scott Rockwell, a diagnosed bipolar schizophrenic who had previously attempted suicide, was ranting and raving alone in his room. *Id.* He had threatened—but not harmed—his parents earlier that night, and was barricaded in his room when the officers arrived. *Id.* Yet in less than 30 minutes the officers armed themselves, ignored the parents' request to give Scott time to calm down, broke down his bedroom door, provoked a knife attack, and shot him four times. *Id.* It was the officers' job to prevent violence or suicide, yet they quickly escalated the situation to the point where they were legally justified to use deadly force against a mentally ill person who obviously needed help. *Id.* Sadly, Ruddy Elizondo's case is very similar to *Rockwell*. I firmly believe that Officer Green 'should have been trained to use better judgment in [his] approach to volatile and unfortunate situations such as this one.' *Id.* Officer Green was a very large man highly trained in self defense and armed with a night stick, taser, and firearm, while Ruddy was a short and obese teenager who was distraught, intoxicated, and contemplating suicide with a relatively small knife. Moreover, Officer Green had only been on the scene for a few seconds, backup was on the way, and emergency medical personnel was waiting outside when the shooting occurred. Deadly force should have been Officer Green's very last resort rather than his first reaction. Presumably Officer Green followed standard police protocol for domestic disturbances where a knife is involved, so I focus my criticism specifically at the City of Garland police department's training and tactical response programs. There must be effective ways for police officers to resolve volatile situations that avoid threatening or using deadly force. [footnote omitted] Forcing Ruddy's bedroom door open, yelling orders at him, and immediately drawing a firearm and threatening to shoot was a very poor way to confront the drunk, distraught teenager who was contemplating suicide with a knife. Either law enforcement procedures or our law must evolve if we are to ensure that more avoidable deaths do not occur at the hands of those called to 'protect and serve.' Saving lives remains job number one for every law enforcement agency, and it is imperative that they have better procedures in place to deal with those persons who are young, intoxicated, mentally ill, or otherwise likely to react poorly in already volatile situations. I firmly believe that the light of public concern must be shined on tragic cases such as

Scott Rockwell's and Ruddy Elizondo's if more deaths are to be prevented. Hopefully publication of this opinion will help to compel the City of Garland police department—and all law enforcement agencies—to re-evaluate their training and response procedures so that the use of deadly force remains the last resort in every situation.")

Rockwell v. Brown, 664 F.3d 985, 992, 993 (5th Cir. 2011) ("[T]he Rockwells, relying on case law from other circuits, urge this Court to examine the circumstances surrounding the forced entry, which may have led to the fatal shooting, in evaluating the reasonableness of the officers' use of deadly force. This argument is unavailing. It is well-established that '[t]he excessive force inquiry is confined to whether the [officer or another person] was in danger *at the moment of the threat* that resulted in the [officer's use of deadly force].'. . . At the time of the shooting, Scott was engaged in an armed struggle with the officers, and therefore each of the officers had a reasonable belief that Scott posed an imminent risk of serious harm to the officers. We need not look at any other moment in time. Accordingly, the officers' use of deadly force was objectively reasonable. Because we hold that Scott's Fourth Amendment right to be free from the use of excessive force was not violated, we need not consider the issue of whether that right was clearly established.")

Rockwell v. Brown, 664 F.3d 985, 996 (5th Cir. 2011) ("In light of the above case law and the overall dearth of binding Supreme Court and Fifth Circuit case law directly on point, we conclude that, at the time of the incident in this case, it was not clearly established that it was unreasonable for the officers to believe that the threat Scott posed to himself constituted an exigent circumstance. Consequently, we hold that the officers are entitled to qualified immunity on the Rockwells' claim for warrantless entry.")

Rockwell v. Brown, 664 F.3d 985, 996 (5th Cir. 2011) (DeMoss, J., specially concurring) ("We hold today that the six police officers who breached Scott Rockwell's bedroom door and ultimately shot him to death are entitled to qualified immunity under federal law and official immunity under Texas state law. Noting that the state of the law in these particular circumstances remains relatively primitive, I join the majority opinion in full. I write separately to express disapproval of and disappointment with the officers' actions during the course of this sad incident.")

Carnaby v. City of Houston, 636 F.3d 183, 188, 189 (5th Cir. 2011) ("Mrs. Carnaby argues that qualified immunity for the officers is inappropriate, because it was their own negligence in approaching Carnaby's vehicle instead of remaining behind cover that caused them to be placed in a position of vulnerability. That contention, however, has little bearing on our analysis, given the facts. The use of deadly force may be proper regardless of an officer's negligence if, at the moment of the shooting, he was trying to prevent serious injury or death. . . The officers were trying to prevent serious injury or death, so their use of force was reasonable, and we need not proceed further in the qualified-immunity analysis in regard to the officers.").

Hill v. Carroll County, Miss., 587 F.3d 230, 235, 237 (5th Cir. 2009) ("*Gutierrez* does not hold four-point restraint a per se unconstitutionally excessive use of force, nor does it extend beyond

its facts as a mirror of the then-unchallenged San Diego Study. . . Taken on their own terms, neither the San Diego Study nor *Gutierrez* raises a triable fact issue in this case where there is no evidence of drug abuse or drug-induced psychosis. . . . The deputies cannot be held responsible for the unexpected, albeit tragic result, of their use of necessary force. Judged from the perspective of an officer at the scene of Loggins's arrest and transportation, as *Graham, supra,* requires, the deputies had no objective basis not to use four-point restraints. Dr. Spitz's criticism, founded on the singularity of Loggins's death, is just the sort of hindsight that *Graham* cautioned against. On the other side of the excessive force ledger, the sheriff's office was called in because Loggins was in a fight. She refused to turn loose of her victim voluntarily. She fought with Deputy Spellman, assaulted him with his own flashlight and physically taxed two deputies as they restrained her legs and repeatedly tried to put her in a squad car before they resorted to four-point restraints. She continued to squirm, kick and twist even after being hog-tied. This level of demonstrated violence required stern control measures. A thorough review of the trial court record persuades us that summary judgment was warranted on Hill's excessive force claim. She failed to develop a material fact issue that the deputies' use of four-point restraints was unnecessary, excessively disproportionate to the resistance they faced, or objectively unreasonable in terms of its peril to Loggins. This holding should not be read to condemn or condone the use of four-point restraints. We conclude only that Hill did not meet her burden of proof in this case.")**.**

Manis ex rel. Plaisance v. Lawson, 585 F.3d 839, 846 (5th Cir. 2009) ("Before October 2005, Supreme Court precedent and cases in this circuit authorized deadly force when an officer had 'probable cause to believe that the suspect pose[d] a threat of serious physical harm.'. . Applying that precedent, this court upheld the use of deadly force when a suspect reached below an officer's sight line in defiance of contrary orders and appeared to retrieve a gun. . .Thus, far from clearly establishing that Zemlik's conduct was unlawful, the controlling authority in this jurisdiction did not prohibit his use of deadly force in the similar situation confronting him. Moreover, even if contrary authority existed, the 'cases taken together [would] undoubtedly show that this area is one in which the result depends very much on the facts of each case' and certainly would not 'clearly establish' that Zemlik's conduct violated the Fourth Amendment. *Brosseau v. Haugen,* 543 U.S. 194, 201, 125 S.Ct. 596, 600 (2004). Therefore, Zemlik's actions were objectively reasonable under clearly established law, and he is entitled to qualified immunity.")**.**

Club Retro LLC v. Hilton, 568 F.3d 181, 202, 203 (5th Cir. 2009) ("Based on the facts as alleged by plaintiffs in this case, Operation Retro-Fit was broader in scope and more extreme in manner than the administrative inspection laws permit. *Swint, Bruce,* and *Russo* all concluded that similar, arguably less extreme, searches were unconstitutional under existing Supreme Court precedent. The search of Club Retro deserves to be called what it was–a raid to discover evidence of criminal wrongdoing. Such raids are 'not the sort of conduct that was approved by the Supreme Court in *Burger*.'. . Operation Retro-Fit was therefore a violation of Club Retro, L.L.C.'s Fourth Amendment rights. . . . No reasonable deputy sheriff in defendants' positions could believe that the law permitting an official to accept a public invitation to enter a commercial establishment as would a typical citizen justifies a S.W.A.T. team assault by forty armed officers with weapons

drawn and a full search without a warrant that is supported by probable cause. Similarly, no reasonable deputy sheriff in defendants' positions could have concluded that such a raid–in which they, e.g., threatened individuals with weapons, threw employees to the ground, searched the attic and trashed the cash registers, broke down the door to a closed apartment, and blocked the exists [sic] to a club they believed to be overcrowded . . .was a lawful, warrantless administrative search to check for underage alcohol consumption or fire code violations.").

Deville v. Marcantel, 567 F.3d 156, 169 (5th Cir. 2009) ("Accepting Deville's version of events for summary judgment purposes, this case involved: a traffic stop for a minor traffic offense unsupported by probable cause; Deville's passive resistance to being removed from her car and separated from her grandchild, in compliance with her well-established rights under state law to resist an unlawful arrest (*i.e.*, an arrest unsupported by probable cause); the officer's threat of calling child protective services despite no indication that the child was in distress or that Deville intended to flee; an officer who others said smelled of alcohol beating on Deville's driver's window with a heavy flashlight and breaking the window; a rough extraction of Deville from the vehicle by both officers, causing a forceful blow to Deville's abdomen; and handcuffs applied so tightly that they caused severe nerve damage. These alleged facts are sufficiently egregious to warrant a denial of qualified immunity because a reasonable officer would have known that the degree of force was unconstitutionally excessive under the circumstances.").

Pasco ex rel. Pasco v. Knoblauch, 566 F.3d 572, 579-82 (5th Cir. 2009) ("[W]e hold that the district court erred in concluding that Knoblauch loses qualified immunity because he failed to follow his supervisor's order to end the chase. The district court also found that *Tennessee v. Garner*. . . established a clear Fourth Amendment rule making Knoblauch's actions unconstitutional because no innocent bystanders were present. . . . Considering the vast difference between an unarmed suspect fleeing on foot and a reckless, intoxicated driver speeding away from police in a vehicle, we hold that *Garner* did not establish a clear Fourth Amendment rule making Knoblauch's conduct unlawful based on the summary judgment record in this case. In 2000 neither the Supreme Court nor the Fifth Circuit had spoken directly to the question of whether an officer may attempt to end a high-speed car chase by bumping the suspect off of the road. However, in 2007 the Supreme Court confronted facts similar to this case in *Scott v. Harris*. . . . In reaching the conclusion in *Scott,* the Court did not cite to any existing cases dealing with this factual situation. The Court did, however, determine that *Garner* could not establish a clear Fourth Amendment rule governing car chases because that case involved a suspect fleeing on foot. . . *Scott* therefore reaffirms our conclusion that *Garner* did not clearly establish a rule making Knoblauch's conduct unlawful. In the absence of a specific rule governing the constitutionality of Knoblauch's actions, our inquiry turns on whether Knoblauch's actions were objectively reasonable. . . The Court's analysis of the reasonableness of the officer's actions in *Scott* is instructive. Though the specific facts of every car chase will be different, the Court acknowledged the generally inherent danger that suspects fleeing from police in vehicles pose to the public–even when no bystanders or other motorists are immediately present. At the moment the officer in *Scott* rammed the suspect's vehicle, it was not threatening any other vehicles or pedestrians. . . .This indicates that the holding

of *Scott* was not dependent on the actual existence of bystanders–rather, the Court was also concerned about the safety of those who could have been harmed if the chase continued. . . . The early morning hours, the rural nature of the area, and the fact that Pasco may have slowed down immediately before impact do not render Knoblauch's actions unreasonable. Like in *Scott,* it was Pasco himself who created this dangerous situation and put himself at risk when he fled from the officers. As indicated by the undisputed facts of the chase, it was reasonable for Knoblauch to believe that Pasco would continue to pose a danger to anyone he might encounter. Stuck between the choice of letting a presumptively intoxicated and reckless driver continue unabated or bumping the suspect off the road, Knoblauch chose the course of action that would potentially save the lives of individuals who had no part in creating the danger. Although this choice ended tragically with Pasco's death, the balancing test indicates that Knoblauch's actions were reasonable. . . . We find that Knoblauch's actions in terminating the serious threat posed by an intoxicated suspect fleeing down a narrow, curvy highway at excessive rates of speed did not violate clearly established law, and were reasonable under the circumstances. Accordingly, qualified immunity protects Knoblauch from suit..").

Arshad ex rel. Arshad v. Congemi, No. 08-30061, 2009 WL 585633, at *7 (5th Cir. Mar. 9, 2009) ("Here, Officer Miller had been called to the scene because of the accident, not because of Dr. Arshad's presence, and nothing appeared to be out of the ordinary upon his arrival. However, the situation escalated quickly as soon as Officer Miller asked Dr. Arshad to present her credentials. It is clear that Officer Miller first attempted to rely on verbal orders, but Dr. Arshad repeatedly refused to comply by presenting her credentials, refused to step away from the boy, continued to assert that it was her scene, and grew increasingly agitated. Only then did Miller attempt to arrest her simply by pulling her away by her arm, but she physically resisted arrest. In light of Dr. Arshad's behavior and her resistance to less forcible methods, it was not objectively unreasonable to use a forcible takedown to effect her arrest. That is especially true in light of the fact that she sustained, at most, only minor scrapes and bruises in the takedown itself and, unlike in *Gregory,* showed no signs of cardiopulmonary arrest–even shortness of breath–during or immediately after the struggle. The district court correctly concluded that Officer Miller's use of force was not excessive under the Fourth Amendment and that his actions were not objectively unreasonable. Accordingly, Officer Miller and all other individual defendants are entitled to qualified immunity on the excessive force claim.").

Hudspeth v. City of Shreveport, 270 F. App'x 332, 2008 WL 749547, at *5, *6 (5th Cir. Mar. 19, 2008) ("At issue, then, is whether Hudspeth 'posed a threat so serious as to justify a reasonable officer in [the defendant Officers'] position to respond with deadly force'. . . Of course, on summary judgment, the objective-reasonableness inquiry is a question of law; in other words, it cannot be decided if material fact issues exist. . . . [I]n the light of the videotape evidence, the Officers' actions were objectively reasonable. That Hudspeth pointed a cell phone in the Officers' direction, resisted interaction with them, tussled with Officer Ramsey, turned suddenly toward the Officers, and attempted to flee is shown by the videotapes and undisputed. The Officers had an articulable basis to believe Hudspeth was armed and could reasonably have perceived him as

posing a threat of serious bodily harm.. . Therefore, no genuine issue of material fact exists; and, as a matter of law, their actions were objectively reasonable. Plaintiffs' contentions to the contrary are unavailing. That Hudspeth was unarmed is also irrelevant. . . That Hudspeth had his back to the Officers at the instant deadly force was used is also irrelevant. . . Moreover, as stated, the proper inquiry is an objective one. . . . Despite Appellants' contentions, the alleged inconsistencies in Officer Hawthorn's testimony regarding why he fired at Hudspeth, or whether Hudspeth was aiming at Officer Hawthorn, or just pointing the cell phone in his general direction, for this reason, fail to create a genuine issue of material fact on the *objective* reasonableness of the Officers' actions. Along that line, also irrelevant are the Officers' *subjective* beliefs provided by testimony but not shown by the videotapes, namely whether any of the Officers truly thought: Hudspeth had a gun; their lives were in danger; or, Hudpseth was pointing the device (whether gun or cell phone) *at* an Officer. Further, the fact that Officer Ramsey stated over the radio that Hudspeth appeared to be talking on a cell phone while driving does not make summary judgment inappropriate. Obviously, Hudpseth's doing so during the high-speed pursuit did not preclude his having a weapon on exiting his vehicle. In asserting this radio-transmission raises a material-fact issue, Appellants gloss over the fact that Hudspeth, after exiting his vehicle and being approached by the Officer, pointed his cell phone, as most guns are held shortly before they are fired, at an Officer. Appellants have not carried their burden to show the Officers acted objectively unreasonably. Accordingly, as the district court held, the Officers are entitled to qualified immunity.")

Hathaway v. Bazany, 507 F.3d 312, 322 (5th Cir. 2007) ("The evidence before us–and the lack of specific facts to the contrary–requires a conclusion that Bazany fired his weapon and was struck by the Mustang in near contemporaneity. The only remaining question, then, is whether an officer would be justified in firing his weapon when threatened by a nearby accelerating vehicle, even if, owing to the limited time available to respond, the shot was fired when or immediately after the officer was hit. . . The evidence indicates that Bazany was in close proximity to a car that he had asked to pull over that then accelerated towards him, making perception of a serious threat reasonable. Given the extremely brief period of time an officer has to react to a perceived threat like this one, it is reasonable to do so with deadly force. . . It is this brevity, and the coordinate rapid response that it demanded from Bazany, that is the distinguishing factor in this case. This is not an instance, as in *Waterman*, where an officer fired after the perception of new information indicating the threat was past. Instead, the entirety of the officer's actions were predicated on responding to a serious threat quickly and decisively. That his decision is now subject to second-guessing–even legitimate second-guessing–does not make his actions objectively unreasonable given the particular circumstances of the shooting. . . . Because Bazany's actions were objectively reasonable, we conclude that he did not violate Jon-Eric Hathaway's Fourth Amendment rights.")

Mack v. City of Abiline, 461 F.3d 547, 555, 556 (5th Cir. 2006) ("Appellees' search of a car in an open parking lot without a search warrant, without probable cause, without a concern for officer safety, and without consent violates clearly established law. A reasonable officer would not think

the Constitution allows a random search of a vehicle where none of the above justifications apply.").

Martinez-Aguero v. Gonzalez, 459 F.3d 618, 626, 627 (5th Cir. 2006) ("Gonzalez could argue that Martinez-Aguero's Fourth Amendment rights were not clearly established because courts have split on the precedential value of *Verdugo-Urquidez*; because it is uncertain how the Court intended the 'substantial connections' test to be applied; and because the Court seemed explicitly to reserve the question whether illegal aliens would have Fourth Amendment rights on U.S. soil. . . . But, decisions pre-dating *Verdugo-Urquidez*, including cases from this circuit, state unequivocally that aliens are entitled to Fourth Amendment protection. . . Also, the inquiry into whether rights are clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' . . If Martinez-Aguero deserves any Fourth Amendment or due process protection at all, it surely must extend to the right to be free of entirely meritless arrests and the excessive use of force. *Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation, as Martinez-Aguero alleges.The logic of *Lynch* applies equally to arresting an alien without cause . . . .This reasoning is particularly compelling when an alien has made a good-faith effort to comply with federal requirements for obtaining a temporary visa and has made frequent use of a border-crossing card to visit the country in the past. On these facts, no officer would reasonably conclude that Martinez-Aguero lacked protection against suspicionless arrest.").

Sanders v. Vincent, No. 3:15-CV-2782-D, 2016 WL 5122115, at *8-11 (N.D. Tex. Sept. 21, 2016) ("At the time Officer Bagley informed Sanders that he was 'under detention,'. . . , he had the following information available to him: Sanders, wearing a backpack containing unidentified items, was videotaping the parking lot of the Addison Police Department without having requested permission to do so, informed the police department of his reasons for doing so, or even notified the police department that he would be doing so, and, when Officer Bagley approached Sanders, Sanders refused to tell Officer Bagley why he was videotaping the police department and refused to identify himself or provide Officer Bagley with identification. . . Under the totality-of-the-circumstances, these facts are sufficient to create a reasonable suspicion that criminal activity is afoot. . . .Sanders has failed to plausibly allege that Officer Bagley violated his Fourth Amendment rights when he initially detained Sanders for an investigation. To the extent Sanders bases his § 1983 claim on these allegations against Officer Bagley, the court grants defendants' motion to dismiss based on qualified immunity. . . . Sanders alleges that Officer Bagley used excessive force, in violation of his Fourth Amendment right against unreasonable seizure, when he took Sanders to the ground using a leg sweep. . . .Considering the *Graham* factors and judging the alleged use of force from 'the perspective of a reasonable officer on the scene,'. . . the court concludes that, viewed favorably to Sanders and accepted as true, the well-pleaded allegations in the amended complaint show that Officer Bagley used excessive force when he performed a leg sweep to take Sanders down. The facts pleaded in the amended complaint show that Sanders did not verbally or physically threaten Officer Bagley; he was not attempting to flee; he was not resisting arrest; he

was not given the opportunity to submit voluntarily to Officer Bagley's control; and he was never warned that if he did not submit to Officer Bagley's orders, physical force would be used against him. Even in light of Sanders' admitted failure to cooperate with Officer Bagley's requests during the investigatory detention, the facts alleged show that there was no need for force. . . Accepting these facts as true, the amount of force from the leg sweep would be disproportionate to the lack of need for force. . . . Having concluded that Sanders has plausibly pleaded that Officer Bagley used excessive force by performing a leg sweep to take Sanders down, the court next considers whether it was clearly established at the time of the incident that, under the circumstances alleged, the use of such force violated the Fourth Amendment. As discussed above, viewed favorably to Sanders and accepted as true, the well-pleaded allegations in the amended complaint show that Sanders posed little or no threat to Officer Bagley, and that the use of force was not justified under the circumstances. . . .While the 'Fourth Amendment's reasonableness test is "not capable of precise definition or mechanical application,"'. . . the test is clear enough that Officer Bagley should have known that he could not constitutionally use a leg sweep to forcibly take Sanders down when he never gave Sanders the opportunity to voluntarily submit to his control, Sanders was not attempting to flee or resisting arrest, and Sanders did not verbally or physically threaten Officer Bagley's physical safety. The court thus concludes that Officer Bagley is not entitled to qualified immunity at the pleading stage with respect to Sanders' excessive force claim.")

Schaefer v. Whitted, 121 F. Supp. 3d 701, 713-17 (W.D. Tex. 2015) ("As the above summarized cases make clear, it is axiomatic § 1983 provides redress only for gross or reckless abuses of power, but not for simple negligence. . . . However, *Young* and *Fraire* are silent where, as here, Plaintiff alleges Officer Whitted's unprovoked assault was not a negligent failure to follow police protocol, but instead independently qualifies as the precise type of objectively unreasonable conduct the Fourth Amendment is designed to protect against. Further, *Young* and *Fraire* did not involve suspects who were induced or forced by the officer to engage in the act that ultimately justified the shooting nor was the act arguably justifiable self-defense. . . Here, Schaefer's motion to secure his weapon—the only action serving to justify Officer Whitted's shooting—arose as a direct and perhaps justified response to an allegedly gross abuse of police power. Assuming the facts alleged are true, Officer Whitted cannot now hide behind Schaefer's reasonable response to an unconstitutional assault in order to justify the killing, especially where he was subjectively aware his actions would very likely evoke Schaefer's response. Accordingly, to the extent Officer Whitted 'manufactured' his own legitimate fear of serious bodily injury by recklessly and unjustifiably physically attacking Schaefer, the Court finds this case distinguishable from *Young* and its progeny. Indeed, facts alleged by Plaintiff substantiate allegations Officer Whitted used recklessly excessive force in violation of Schaefer's Fourth Amendment rights when he resorted to physical violence before first verbally ordering Schaefer to put down his gun and this conduct forced or induced Schaefer to instinctively move to secure his weapon. . . . Consequently, even if Officer Whitted was ultimately justified in believing his life was in jeopardy at the time he fired the fatal shots, he can still be held liable for recklessly abusing his power to generate the threat he seeks to use as the basis for his shooting. . . . [A]ccepting the facts alleged as true, physically assaulting Schaefer before commanding him to drop the gun was a reckless abuse of police power

directly inducing the action now used to justify the shooting. Under these circumstances, the Court finds Plaintiff states a Fourth Amendment claim against Whitted based on the assault, even where the shots themselves may be justified. . . . Under the second prong of qualified immunity, the Court must next decide whether 'the law was sufficiently clear that a reasonable officer would have known that his conduct violated the constitution.'. . . For the reasons this case is distinguishable from *Thomas,* so too is the law clear a reasonable officer would know assaulting a lawfully armed citizen without first announcing himself, giving a warning, or otherwise commanding the individual to disarm would rise to the level of a constitutional violation. . . . Further, it is clearly established the use of 'deadly force violates the Fourth Amendment *unless* "the officer has probably cause to believe the suspect poses a threat of serious physical harm either to the officer or to others."'. . This threat must be 'immediate.'. . The circumstances of the unprovoked assault and shooting described in the Amended Complaint are sufficiently grievous to compel the Court to deny qualified immunity at the motion to dismiss stage because a reasonable officer would have known the degree of force used was unconstitutionally excessive. Drawing all reasonable inferences in Plaintiff's favor, it is facially plausible the threat of physical harm was not immediate because Schaefer did not actually draw the weapon and point it in Officer Whitted's direction. If Plaintiff's allegations are true, and Schaefer merely turned away, extended his left harm to repel Officer Whitted, and used his right harm to secure his weapon, a jury might find it would have been apparent to a reasonable officer in Officer Whitted's position immediately shooting Schaefer twice in the chest was a violation of Schaefer's Fourth Amendment rights. . . .Whether Officer Whitted's was guilty of ordinary negligence that proximately caused an otherwise justifiable use of force, which would not give rise to constitutional liability, or whether Officer Whitted's use of force on Schaefer's property was reckless and objectively unreasonable, which would, is best left to be decided on a developed record at summary judgment. Considering the competing accounts of what occurred, and because excessive force cases such as this are exceedingly fact intensive, the issue of whether Whitted violated Schaefer's Fourth Amendment rights is not appropriate for adjudication on a motion to dismiss.")

Rakestrau v. Neustrom, No. 11–CV–1762, 2013 WL 1452030, *8-*11 (W.D. La. Apr. 8, 2013) ("As set forth more fully below, it is possible for an excessive force constitutional violation to arise in certain circumstances when a taser is used. This Court finds there exists a material issue of fact in dispute regarding the reasonableness of Guidry's conduct as to the second taser discharge which precludes summary judgment on the issue of whether excessive force was used, and therefore, whether there was a constitutional violation. However, that does not preclude consideration of the qualified immunity defense as this defense is distinct from the merits of an excessive force claim. . . . Since this Court cannot conclude as a matter of law whether a constitutional right was violated, the analysis must turn to whether Guidry's actions were objectively unreasonable in light of the law that was clearly established at the time of his actions. . . .In *Williams v. City of Cleveland, Ms.* 2012 WL 3614418 (N.D.Miss.8/21/2012), the court collected the case law on a national basis along with some outside sources pertaining to the use of tasers. The jurisprudence addressing taser use in excessive force claims generally falls into two categories. The first involves individuals over whom officers have not obtained control and are tasered while actively resisting arrest by

physically struggling with, threatening, or disobeying officers. [footnote collecting cases] In such cases courts conclude either that no constitutional violation occurred, or that the right not to be tasered while resisting arrest was not clearly established at the time of the incident thus entitling the officer to qualified immunity. The cases from the Fifth Circuit follow the same pattern. [citing cases] Many courts, including the Fifth Circuit, have upheld the use of even deadly force by police officers when suspects refuse to obey commands regarding the placement of their hands. . . This includes the use of taser guns and pepper spray. . .The second group involves a law enforcement official tasering an individual who had done nothing to resist arrest or was already detained and had been subdued. [footnote collecting cases] In the second group, courts have almost uniformly held that a § 1983 excessive force claim is available and this circuit is consistent in that regard as well. [citing cases] It is clear that the use of tasers in general is not objectively unreasonable, even where multiple discharges occur. It is not as clear when the use of tasers is objectively unreasonable in a specific context although one could possibly draw some conclusions from the jurisprudence cited. . . . The severity of the crime at the time was unknown to Guidry beyond the reasonable suspicion of a drug transaction. Depending upon the drug involved, and the amount involved, the crime could have been a felony or a misdemeanor. Rakestrau could have been in possession of a deadly weapon. In hindsight only, it was learned Rakestrau was in possession of a small amount of marijuana. It was Rakestrau's conduct which escalated events from a request for identification, to Guidry's use of soft hands to gain compliance, and when that failed, to Guidry's use of hard hands. When that failed, and Rakestrau appeared to be in a state to either fight or flee, Guidry deployed the taser. Four seconds after the cycle stopped, (1) after having been involved in an altercation with an individual larger than he, (2) who resisted being questioned or searched, (3) who still had not been searched for a weapon (4) whose hands were not visible and (5) with no backup present, Guidry decided to deploy the taser a second time. Guidry testified that Rakestrau moved and his hands were still under him (a fact that is somewhat contradicted by the eyewitnesses). It would not be plain to *every* reasonable officer that the use of the taser again was unlawful under these circumstances *unless* it was clear that Rakestrau was completely subdued, and therefore, not a flight risk, a threat to the safety of Guidry or capable of resisting arrest. This is particularly so given the language of the LPSO policy that 'additional discharges may be used to gain compliance.' Based on the information available from the video which this Court has viewed numerous times, this Court cannot conclude that none of the *Graham* factors was plainly present. . . . While the nine second cycle is troubling to this Court, given the conditions at the moment, when a five second cycle would have been the minimum, this Court cannot say that the additional four seconds, while perhaps constituting excessive force, violated clearly established law such that 'every reasonable official would have understood' Guidry's nine second discharge violated Rakestrau's right to be free from excessive force. Therefore, Guidry is entitled to qualified immunity and the claims against him in his individual capacity under 42 U.S.C. § 1983 must be dismissed.")

Buchanan v. Gulfport Police Dept., No. 1:08CV1299LG–RHW, 2012 WL 1906523, at *9-*11 (S.D. Miss. May 25, 2012) ("Excessive force cases based on tasing a suspect or detainee seem to divide themselves fairly neatly into two categories: (1) those that occur prior to the officers'

obtaining control over a suspect, and (2) those that occur after a suspect has been subdued. In the second category, courts have almost uniformly concluded that tasing constitutes excessive force. In the first category, where the suspect is resisting arrest or disobeying the officers' orders, tasing may not be considered excessive force. [collecting cases] Given the circumstances of this case, where Buchanan was initially non-compliant, where he was warned that he would be tased if he did not put the bat down, where he ultimately put his baseball bat on the ground, but refused to move out of reach of it, where the officers were in relatively close proximity to Buchanan and had reason to be concerned about his access to a weapon, and where the officers ultimately believed that he was reaching for the bat, this Court is of the opinion that no reasonable juror could find that the use of tasers constituted excessive force. . . . Even if the tasing amounted to excessive force, Defendants would be entitled to qualified immunity if their action did not violate clearly established law. . . . This event occurred in July 2007. This Court cannot identify any controlling precedent existing at that time that had held that use of a taser on a non-compliant suspect who has not been subdued, and whom police believe is reaching for a weapon, amounts to excessive force. Other jurisdictions reviewing this issue in similar time frames have reached the same result. [collecting cases] In fact, the Court has not found any precedent at all that would clearly establish that the use of tasers on Buchanan amounted to excessive force in this situation.")

Ramos v. Lucio, No. B-08-122, 2009 WL 700635, at *7 (S.D. Tex. Mar. 17, 2009) ("This Court concludes that, in light of the medical evidence presented in this case as well as the current state of the medical research, reasonable officers could disagree as to whether it is improper to hog-tie a suspect suffering from cocaine psychosis. Furthermore, there is no evidence that the officers were ever on notice that hog-tying posed a serious danger of substantial bodily harm or death. . . While the Fifth Circuit noted in *Gutierrez* that 'San Diego mailed copies of the San Diego Study to police departments around the nation ... in 1992,' there is no evidence in this case that the Cameron County Sheriffs Department received a copy nor that the individual officers would have received that information sixteen years later. . . Even if they did receive a copy, a study is not 'clearly established law.'").

Broussard v. Louisiana State Police, CIV A 05-0574, 2006 WL 3375398, at *6 & n.4 (W.D. La. Nov. 20, 2006) ("Defendants contend that they are entitled to qualified immunity because McFarland was in danger of death or serious bodily injury, and it was certainly not 'clear to a reasonable officer that [the] conduct [of Woodard] was unlawful in the situation [he] faced.' Defendants point out that Plaintiff's vehicle was in such close proximity to McFarland's vehicle, a fragment of glass from his headlight landed on the hood of McFarland's car after Woodard's first shot. While Plaintiff has testified by affidavit that he did not intend to hit any vehicle and that he did not point his vehicle at any of the officers' vehicles, Defendants argue that his testimony cannot raise a genuine issue of material fact when he was admittedly high on crack cocaine at the time of the pursuit. In support of their argument, Defendants have cited to *Brosseau* and suggested that, like the officer in that case, it was not clear to Woodard that he was violating Plaintiff's constitutional rights. The Court disagrees. First, as pointed out by Plaintiff, this case is distinguishable from *Brosseau* because there are disputed issues of fact. At the summary judgment

stage, even under the qualified immunity standard, the Court is required to view those facts in the light most favorable to Plaintiff. . . . If a jury were to believe Plaintiff's version of events, then Woodard was faced with the following situation: whether to use deadly force to seize a suspect who had possibly committed a misdemeanor traffic offense by having an expired temporary tag, fled from an officer in a chase that did not exceed the speed limit, was not endangering any civilians at the time of the shooting, was not endangering any officers, and with no information that the suspect was armed or otherwise dangerous. Under these circumstances, it is clear, under *Garner* and *Graham*, that Woodard's decision to use deadly force was a violation of Plaintiff's constitutional rights, and he is not entitled to summary judgment on the basis of qualified immunity. . . . Even if *Brosseau* were applied, the facts in this case are distinguishable from the 'hazy' situation faced by officer Brosseau: (1) officers had no knowledge that Plaintiff was a convicted or 'disturbed' felon or had any outstanding warrants, (2) officers did not believe Plaintiff to be armed (and he was not), (3) no civilians were present or in potential danger, and (4) no officers were on foot or unaccounted for. Similarly, if this case required particularized review, the Court's consideration of the case law available at the time of the incident shows that Woodard's actions were a clear violation of Plaintiff's Fourth Amendment right. *See, e.g.*, *Vaughn v. Cox*, 343 F.3d 1323 (11th Cir.2003); *Abraham v. Raso*, 183 F.3d 279 (3rd Cir.1999); *McCaslin v. Wilkins*, 183 F.3d 775 (6th Cir.1999). In each of these cases, the circuit courts denied summary judgment, and, at least in *Vaughn* and *McCaslin*, the suspect's conduct was more egregious than that of Plaintiff. In reaching this conclusion, the Court expresses no opinion as to whether Plaintiff's version of events will be found credible by the jury, only that Plaintiff has raised sufficient issues of fact for trial. Defendants' Motion for Summary Judgment on the Section 1983 claims against Woodard is DENIED.").

Brown v. Faison, No. Civ.A. 6:04-CV-016-C, 2005 WL 473681, at *6, *7 & n.12 (N.D. Tex. Mar. 1, 2005) (not reported) ("The greater the uncertainties of the situation, the greater the tolerance the general standard allows for reasonable mistakes about what is lawful. However, 'qualified immunity is not appropriate when the *Graham* analysis yields an answer that is clear beyond all reasonable doubt.'. . This Court is of the opinion that this general standard alone, without greater particularity, is sufficient to put a reasonable officer on notice that he may not use anything greater than minimal force to arrest an individual for a minor crime, where that individual is not resisting arrest and poses no threat of danger to the officer or anyone else at the time the force is applied. . . Under these circumstances and in a situation that is not otherwise 'tense, uncertain, and rapidly evolving,' which describes the facts of the instant case when viewed in the light most favorable to Plaintiff, no factor exists that would move the calculus of reasonableness into the hazy border area between excessive and acceptable force. . . Rather, in such a situation the general standard is sufficient to give fair and clear warning that the only appropriate level of force is none at all or a very minimal degree at most. Even though Faison's actions were within the bounds of reasonable conduct when he reached into Plaintiff's car and placed his hands on her to effect the arrest, no reasonable officer could possibly believe that, under the circumstances alleged, he possessed the lawful authority to hit her in the face, kick her leg, and grab her arms tight enough to cause bruising. If we accept Plaintiff's allegations regarding Faison's use of force in the face of

no resistance, then this Court must conclude that Faison's actions were not those that a reasonable officer would have believed were lawful. . . . Despite Faison's contention that 'in the heat of the moment,' Plaintiff could have reached for a concealed weapon (even though one did not exist), nothing in the situation as even he alleges it developed would indicate that it was objectively reasonable to believe such an occurrence was likely. From the perspective of Plaintiff's allegations, the tenseness of the situation appears to be largely Faison's creation, and not the result of her actions. While this Court is not crediting Plaintiff's allegations for any purpose other than the creation of a material fact issue, the Court is reluctant to throw the mantle of qualified immunity over an officer's actions, where those actions may be the unilateral cause of a 'tense, uncertain, and rapidly evolving' situation. Based on Plaintiff's allegations, the situation was far from that 'hazy border' where reasonable officers might disagree about the line between excessive and necessary force or about what particular force might be lawful under clearly established case law. . . . However, this Court does not need to rest its opinion on the general standard alone. At the level of greater particularity, the Fifth Circuit has sustained a jury's determination that an officer acted unreasonably and with excessive force against a woman who did not resist and did not pose any threat, when, after pursuing and stopping her for avoiding a checkpoint, the officer injured the woman by grabbing her by the arm, yanking her from her car, and spinning her around, causing her injury. *Brown v. Bryan County, Okla.*, 67 F.3d 1174, 1179-80 (5th Cir.1995), *vacated on municipal liability but not qualified immunity grounds*, *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). . . Other circuit courts had reached similar conclusions at the time Faison is alleged to have acted unreasonably. [citing cases] Quite simply, the general standard regarding reasonable force, as well as the particular holdings of cases from this and other circuits, was sufficient at the time of the alleged incident to put Faison on notice that his conduct, when viewed in the light most favorable to Plaintiff, was not lawful.").

Barlow v. Owens, No. Civ.A. G-04-557, 2005 WL 1719699, at **4-6 (S.D. Tex. July 22, 2005) ("Although the Court believes that Defendants are entitled to qualified immunity, in part because of the difficult standard a plaintiff must meet to overcome that immunity, the Court does respectfully note two serious systemic apprehensions about this case. First, the Court has noticed an escalating series of allegations in both the press and the filings in this Court revolving around claims of local police brutality and insensitivity. The Court certainly cannot decide this case on that basis, but as the local federal tribunal, the Court feels that it is important to bring to the attention of the Galveston Police Department the need for sensitivity and training in these areas. . . . Should it become evident that a widespread pattern of abuse of the power to effect warrantless arrests for misdemeanors exists, that would undermine part of the factual basis for the *Lago Vista* decision. . . . The Court's second concern is a broader apprehension about the rapidly burgeoning judicial sanction of warrantless searches and seizures. . . This is only the Court's respectful opinion, because the Court understands that unlike the Courts of Appeal or Congress, it is not a policy-making organ. However, the Court wants to note that judicial sanction of searches and seizures based entirely on a perceived need for strict law enforcement, rather than on constitutional principles, is the first step down the slippery slope to a police state, and this is especially true in

circumstances of wide apprehensions arising from acts of terror. Precedent is often created by cases in which police have had to deal with obnoxious and genuinely criminal citizens, but by deciding these cases without reference to the broader picture of a generally law-abiding populace deserving of constitutional protection creates an environment in which real abuse can occur. We live in a seriously troubled world, and the easy response to threats of violence and crime is to erode rights in an attempt to find safety. In the end, however, a heavy-handed approach only results in our loss of both. This case is a good illustration of the Court's concerns. By looking at the events step by step, the Court can trace the chain of legal (or at least arguably legal) behavior by Defendants, and this is all that is required to establish qualified immunity. At first glance, though, it seems absurd that a neighbor's report of some obnoxious but non-violent behavior by a teenage boy would result in such a violent arrest. . . Defendants have not pointed to any fact showing that they believed Moncebaiz constituted a genuine physical danger to themselves or others, at least until they tried to arrest him. Moncebaiz retreated to what was, for him, his home-he had nowhere else to go. A community needs police officers who zealously pursue criminals and suspected criminals. However, those officers should remember that the Constitution is the supreme law of the land; it is their duty to uphold that law as much as it is their duty to uphold laws against trespassing and disturbing the peace. If they fail to obey the law set forth in the Constitution, they are no better than the criminals they pursue. . . . The public must be able to trust the police to abide by the law and to respect the constitutional rights of all citizens. The Bill of Rights is no safeguard if the government and its agents choose to ignore it. Therefore, while the Court finds that Defendants are entitled to qualified immunity on Plaintiff's § 1983 claims, the Court urges Defendants and the Galveston Police Department to give thoughtful consideration to their ever-present obligation to uphold the Constitution and to protect the rights of all citizens.")

Ham v. Tucker, No. SA-01-CA-0837-RF, 2005 WL 356836, at *3, *5 (W.D. Tex. Jan. 31, 2005)(not reported) ("The incident before this Court occurred in September 1999, but the state of case law regarding excessive force was virtually identical to that which the Supreme Court had found to be unclear. As a result, this Court's earlier resolution of the qualified immunity question before it on Defendants' motion for summary judgment reflected this lack of clarity. Since 'the focus [in qualified immunity] is on whether the officer had fair notice that her conduct was unlawful,'. . . the Supreme Court's decision in *Brosseau* warrants a second review of Defendant Tucker's motion for summary judgment. . . . Under *Brosseau* then, it was not clearly established at the time of the incident in question that Deputy Tucker's conduct violated the Fourth Amendment. Since the focus is on whether Tucker had fair notice that his conduct was unlawful and the existing case law did not provide this notice, the Court is constrained to conclude that he did not have notice that his conduct violated the Constitution. . . The defense of qualified immunity thus shields Deputy Tucker from suit under the Fourth Amendment because he made a decision that, even if constitutionally deficient, reasonably misapprehended the law governing the situation with Ham that confronted him on the day in question. . . As a result, Deputy Tucker is entitled to a defense of qualified immunity and the Court hereby reconsiders its earlier denial of summary judgment on this point. As a result, the Court will grant Defendant's motion for summary judgment as to Plaintiff's Fourth Amendment claims against Deputy Tucker.").

SIXTH CIRCUIT

Stahl v. Coshocton County, No. 17-4112, 2018 WL 5733362 (6th Cir. Oct. 31, 2018) (not reported) ("This issue presents a close question, but in the end we agree with the conclusion reached by the district court. The dashboard camera video conclusively establishes that the shooting unfolded in seconds, without the benefit of calm reflection. Deputy Snyder had just witnessed Stahl's felonious assault of Deputy Sharrock. When the shots were fired, Stahl was accelerating in Deputy Snyder's direction. . . . We therefore affirm the grant of qualified immunity to Deputy Snyder with respect to his use of deadly force.")

Wilkerson v. City of Akron, No. 17-4108, 2018 WL 4959674, at *4 (6th Cir. Oct. 15, 2018) ("Danzy did not violate Thomas's clearly established Fourth Amendment rights. In the minute before Danzy fired, he and Stewart were wrestling a large and resistant suspect, one who managed to fight off two officers at once. No one disputes the scuffle. No one disputes that Thomas's gun discharged while the three men struggled on the ground. No one disputes that Thomas rapidly freed himself and started to run. And no one disputes the absence of evidence that he left the gun behind. In the moments preceding the decision to fire, a reasonable officer would have had probable cause to believe this suspect posed an immediate threat to both officers. Wilkerson insists that Thomas never pointed the gun at Danzy and suggests that Thomas's gun discharged accidentally under his body during the tussle. That does not affect the outcome. Either way, a reasonable officer in this setting would believe himself in serious danger, knowing Thomas had a gun and knowing it had discharged. Wilkerson adds that Thomas did not pose a threat to the officers when he ran away and, as the video suggests, grabbed at his falling trousers with both hands, making him unable to fire at the officers. But this fact and that inference do not change things. Once an officer reasonably believes a suspect is dangerous to him, other officers, or other citizens, he may use deadly force and may do so even if the suspect attempts to flee. . . That indeed is the fact pattern of one of our cases. *See Livermore*, 476 F.3d 397. Even if for a brief moment Thomas's falling pants occupied both of his hands, moreover, the moment remained brief. The interlude did not end the danger and did not give enough time to reassess the matter. . . Nor was a warning feasible. In the span of two seconds, Thomas had cleared several yards. Danzy was racing after him, aiming as he ran. As far as Danzy knew, Thomas still had the once-discharged weapon (as the evidence shows he did), and nothing prevented Thomas from turning to fire upon the officers. That reality distinguishes this dispute from Wilkerson's case citations, which involve scenarios in which officers had reason to doubt the seriousness of the threat. Not one of them involved encounters in which the reasonable officer would believe that the suspect was armed or about to fire. The court correctly granted summary judgment to Danzy on the undue-force claim.")

Stevens-Rucker v. City of Columbus, No. 17-3384, 2018 WL 3359554, at *6-8 (6th Cir. July 10, 2018) (not reported) ("We affirm based upon the reasoning of the district court. Sergeant Frenz was faced with an individual carrying a knife coming in his direction. He knew that person had already confronted another officer and that shots had been fired. Given the deference that we

accord the split-second decisions which officers are sometimes called upon to make, *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017), the facts—even when viewed in the light most favorable to plaintiff—justify the grant of qualified immunity. . . We now turn to the district court's analysis of the final four shots fired by Officer McKee after he emerged from a breezeway and was confronted by Mr. White standing in an open area. In addressing that confrontation, the district court elected to break the four shots into two separate volleys of two shots each. It granted qualified immunity to McKee for firing the first two of the four shots but denied him qualified immunity for firing the final two. . . .The district court correctly concluded that the record indicates that the first two shots fired by McKee were separated in time from the four subsequent shots; however, it failed to point to any evidence that the final four shots were likewise separated by such a significant gap in time that they must be viewed as distinct incidents requiring individualized analysis. Rather, the uncontroverted evidence supports a conclusion that the final four shots were fired in such rapid succession that they constituted a single event. Officer McKee testified in his deposition that only eight to ten seconds elapsed from the time that he fired his first shot at Mr. White until he fired his final shot. Moreover, according to his affidavit, 'only a second or even fractions of a second' separated his final two shots from his third and fourth shots. This timeline is uncontroverted by the record and leads us to conclude that McKee's firing of his weapon constituted two, not three, distinct incidents: the first includes the initial two shots, the second the final four. . . .Based upon the uncontroverted evidence, what the district court characterized as separate second and third salvos was, in our view, but a single shooting consisting of four shots fired within a second of one another. That was not enough time for Officer McKee to stop and reassess the threat level between the shots. He continued to use his firearm to stop what he justifiably perceived as an immediate threat to his safety. For these reasons, we conclude that Officer McKee is entitled to qualified immunity in all respects, and we therefore reverse the judgment of the district court to the extent that it conflicts with this decision.")

Stevens-Rucker v. City of Columbus, No. 17-3384, 2018 WL 3359554, at *10-12 (6th Cir. July 10, 2018) (not reported) (Stranch, J., concurring and dissenting) ("I agree that Officer Frenz's use of force and Officer McKee's first and second volleys of gunfire are entitled to qualified immunity and therefore concur with the majority on those issues. I do not, however, agree that the law and the facts of this case compel the result reached by the majority with respect to Officer McKee's third use of force and the Plaintiff's deliberate indifference claim. I respectfully dissent on those issues. The majority opinion today holds that police can shoot and kill a non-fleeing suspect who is already gravely wounded even when there is no immediate threat to the officers or the public. It reaches that conclusion by construing Officer McKee's final four shots as a single and continuous use of force rather than as the last two uses of force, as was argued by Stevens-Rucker and necessarily conceded by the Officers. The district court also held that Officer McKee used force in 'three distinct circumstances and ... each must be segmented and analyzed individually.' I think this case should have been analyzed on the facts argued by the parties and found by the district court. *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 n.1, 611 (6th Cir. 2015) (holding that in qualified immunity cases, we usually 'defer to the district court's factual determinations' and 'ideally ... look no further than the district court's opinion for the facts

and inferences cited expressly therein'). . . .By lumping the second and third shootings together, the majority obscures material issues of disputed fact. But even if we assume that it might be appropriate and plausible to accept an interpretation of the facts that 'only a second or even fractions of a second' separated the two shootings, Officer McKee's own testimony supports a finding that sufficient time elapsed between the two volleys to allow him to deliberate and reassess whether force was required. Describing the circumstances, McKee explained that White 'was laying [sic] on his left side kind of with his arm underneath, his left arm underneath almost in front of him, and was trying to post himself back up, meaning push up to get himself back off the ground.' McKee also refers to these shots as the second in a series of 'double-taps,' not as an unpunctuated, single set of four shots. Thus, this record reveals a quintessential dispute of material fact that renders summary judgment inappropriate, particularly in an appeal of the denial of qualified immunity. But even if we undertake review and apply our precedent to the third volley of shots by Officer McKee, we should affirm the district court's denial of qualified immunity. First, I acknowledge that there may be instances in which the police could lawfully use lethal force to subdue an already wounded suspect. . . . Drawing all reasonable inferences in favor of the nonmoving party, as we must, McKee's testimony indicates that he had sufficient time to evaluate White's movements, discern his intent to get back up, and elect to fire again. Reasonably inferring that McKee possessed sufficient time to deliberate regarding whether additional force was necessary, a jury could have concluded that, under the circumstances, the use of such force was unreasonable. The threat posed by White is an order of magnitude less than the threat posed in cases where a suspect has a firearm. White was armed only with a knife, lay 15 feet from officers in an open field, and there were no civilians in the immediate vicinity. Numerous other officers were descending on the scene to reinforce McKee and their arrival was imminent. It is simply not a plausible argument that McKee was in immediate danger when he delivered the fatal shots. The majority's decision to depart from precedent and lump the second and third shootings together therefore distorts both the governing precedent and the factual reality. . . .This police shooting also points to a broader, troubling pattern. After serving his country in the war in Iraq, Jason White returned to the United States as a decorated veteran suffering from significant mental health problems. On the day the police shot him, he was suffering an acute mental health incident. Although we lack comprehensive data, '[i]t is safe to say that a third to a half of all use-of-force incidents involve a disabled civilian.'. . People with mental illness are 16 times more likely to be killed by police. . .This is a societal problem and police are often caught in an unenviable position on the frontlines of mental health emergencies. Our criminal justice system, moreover, serves as the de facto treatment provider for many individuals with mental illness, and the majority of jail inmates suffer from a mental health condition. . .Our failure as a society to adequately address the treatment of mental health problems routinely leaves these problems to be addressed through the criminal justice system. But the laws governing crime are a poor fit for the reality of dealing with mental health issues, perhaps because the selection of law enforcement officers and their training occupies so little common ground with the selection and training of those who treat mental health issues. And then we add the layer of qualified immunity that excuses 'all but the plainly incompetent or those who knowingly violate the law.'. . This over-thickening shield does little to force society to reconsider the propriety of leaving mental health issues in the hands of police

officers untrained to handle them. At least two members of the Supreme Court have concluded that the recurring grant of qualified immunity in these incidents sends the wrong message to law enforcement officers and 'tells the public that palpably unreasonable conduct will go unpunished.'. . . In addressing these events, I think we have embarked on the wrong road and the place to which it leads will prove detrimental to law enforcement, those with mental health issues, and our society as a whole. 'Because there is nothing right or just under the law about this, I respectfully dissent.'")

Latits v. Phillips, 878 F.3d 541, 549-53 (6th Cir. 2017) ("Several of our cases have concluded that deadly force was objectively unreasonable when the officer was to the side of the moving car or the car had already passed by him—taking the officer out of harm's way—when the officer shot the driver. . . But the fact that no one was in the car's direct path at the time the driver was shot does not end the analysis. . . We must also look to the prior interactions between Latits and Officer Phillips and the potential of imminent danger to other officers or members of the public in the area. . . .Altogether, Latits's conduct prior to being shot, when viewed in the light most favorable to the Plaintiff, showed a persistent intent to flee but not an intent to injure, and never placed the public or the officers at imminent risk. . . .Phillips argues that this case is comparable to *Plumhoff*, *Hocker*, *Williams*, and *Freland*. As explained above, these cases are distinguishable. In sum, considering the totality of the circumstances in the light depicted by the video and otherwise most favorable to the Plaintiff, we conclude that Latits did not present an imminent or ongoing danger and therefore that the shooting was not objectively reasonable. In addition, although police procedures do not set the bounds of the Fourth Amendment, we consider it relevant that Officer Phillips repeatedly violated police procedures in both ramming Latits and running up to his car. . . For these reasons, we conclude that Officer Phillips's use of deadly force was objectively unreasonable and in violation of Latits's constitutional rights. . . .The Plaintiff has not identified any caselaw where an officer under sufficiently similar circumstances was held to have violated the Fourth Amendment, and neither have we. The Plaintiff relies on *Sigley* and *Cupp* to argue that Phillips violated clearly established law. The dissent also argues that *Sigley* and *Cupp* had clearly established by 2010 that Phillips's conduct was unconstitutional. We have held that, as of 2007, *Sigley* and *Cupp* had clearly established that 'shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat.'. . But *Sigley* and *Cupp* are distinguishable from this case in a material way: Those cases involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to *initiate* flight. . . Here, Phillips shot Latits *after* Latits led three police officers on a car chase for several minutes—during which Latits repeatedly sought to evade capture—an important factual distinction that sets this case apart from *Sigley* and *Cupp*. . . This case presents a close call, but in light of the Supreme Court's recent analyses in *Mullenix* and *Pauly*, these cases do not suffice. They did not involve many of the keys facts in this case, such as car chases on open roads and collisions between the suspect and police cars. Accordingly, although we now hold that Phillips's conduct fell outside the bounds of the Fourth Amendment, controlling authority at the time of the events had not clearly established the rights we identify today. . . Although it is relevant to the first prong of the qualified immunity analysis, . . Phillips's violation of Ferndale Police Department policies

does not require a different outcome. . . . It must have been clearly established that the conduct at issue violates the Constitution, not internal policies. This case establishes important constitutional parameters. At the time of the actions of Officer Phillips, however, it cannot be said that existing precedent made it clear to reasonable officials that what Phillips did violated the Fourth Amendment. Thus, this case fails to satisfy the 'clearly established' prong of the qualified immunity doctrine. . . .We hold that Officer Phillips's conduct was objectively unreasonable and in violation of the Fourth Amendment. Its unreasonableness, however, was not clearly established at the time of Officer Phillips's actions, and he is therefore entitled to qualified immunity.")

Latits v. Phillips, 878 F.3d 541, 554-59 (6th Cir. 2017) (Clay, J., concurring in part and dissenting in part) ("The majority spends the bulk of its opinion explaining how Officer Phillips' use of deadly force was objectively unreasonable, citing case upon case (many from before 2010, the year of the incident in question) to conclude that Officer Phillips violated Latits' constitutional rights. In the final stretch, however, the majority abruptly shifts gears to hold that Latits' constitutional rights were not clearly established and that Officer Phillips is therefore entitled to qualified immunity. In so holding, the majority has created a nearly impenetrable barrier for plaintiffs seeking to vindicate their rights against governmental officials. Because I believe that the majority opinion is contrary to governing case law, which clearly establishes that an officer may not shoot a fleeing suspect who poses no danger to others, I respectfully dissent. . . . The unconstitutional nature of Phillips' conduct would have been clear to a reasonable police officer. Indeed, it was clearly established under *Tennessee v. Garner*, 471 U.S. 1, 11 (1985),that police officers may not fire at non-dangerous fleeing felons such as Latits. . . . Although *Garner* did not involve a preceding car chase, its holding was clear enough to have placed Phillips on notice that his conduct was unconstitutional. . . .Unlike *Mullenix*, this is not a case where a police officer may have needed more judicial guidance to determine whether the particular risk justified the use of deadly force. Indeed, the majority concludes that Latits 'did not present an imminent or ongoing danger' to officers or to any civilians. This case therefore falls into the category of cases that *Mullenix* distinguished—*i.e.*, those squarely controlled by *Garner*. In reaching its conclusion that Latits' right to be free from the use of deadly force in these circumstances was not clearly established, the majority markedly raises the legal barrier posed by the qualified immunity defense beyond any existing legal standard, making it virtually impossible for plaintiffs to overcome the defense even under circumstances where their rights have obviously been violated. The majority quotes *Mullenix* as holding that '[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . The majority then takes this general proposition and applies it literally, asking whether—along a continuum of more or less reasonable officials—*any* official could have believed that he was not violating the right. If any official could have so believed, the majority seems to conclude, then the right was not clearly established and hence there was no actionable violation. Under the majority's standard, no plaintiff could overcome a qualified immunity defense if *any* official could conceivably believe that he was not violating the plaintiff's rights. But this newly minted standard is not the law. Instead, 'the crux of the qualified immunity test is whether officers have "fair

notice" that they are acting unconstitutionally.' . . It was clearly established at the time of the shooting, based on Supreme Court and Sixth Circuit caselaw, that an officer may not use deadly force against a fleeing felon who poses no threat to others. . . .The majority contends that *Cupp* and *Sigley* are insufficiently similar to the facts in this case in order for it to be clearly established that Phillips' conduct violated the law. It is a truism that every case is distinguishable from every other. But the degree of factual similarity that the majority's approach requires is probably impossible for any plaintiff to meet. Indeed, the majority's attempt to meaningfully distinguish *Cupp* and *Sigley* is entirely unpersuasive. The majority says that these cases are different from the instant case insofar as 'each involved little more than one or more officers confronting a car in a parking lot and shooting the driver as he attempted to initiate flight.' That is precisely the situation we have here. . . Latits was shot as he was slowly backing away and attempting to resume his flight from police. Unlike the plaintiff in *Mullenix*, Latits made no threats, and he showed no intention to harm the officers or others. Absent some indication that Latits presented more of a threat than the suspects in *Cupp* or *Sigley*, preventing the resumption of a flight instead of a flight in the first instance is a distinction without a difference. . . .Again, applicable case law clearly establishes that an officer should not be protected by qualified immunity when the shooting victim poses no immediate danger to the officer or to the public. Our panel is unanimous in its conclusion that the officer in this case acted in an objectively unreasonable manner and needlessly cost a person his life. Because I also believe that Latits' right not to be seized by deadly force when fleeing arrest was clearly established at the time he was killed, I respectfully dissent.")

Smith v. City of Troy, Ohio, 874 F.3d 938, 944-46 (6th Cir. 2017) ("Whether the right alleged to have been violated is clearly established and whether the official reasonably could have believed that his conduct was consistent with that right are questions of law for the court. . . But if genuine issues of material fact exist as to whether the official committed acts that would violate a clearly established right, then dismissal of the claim is improper. . . When a defendant raises qualified immunity as a defense, the plaintiff bears the burden of demonstrating that the defendant is not entitled to qualified immunity. . . In order to deny public officials qualified immunity, 'existing precedent must have placed the statutory or constitutional question beyond debate.'. . When more than one officer is involved, the court must consider each officer's entitlement to qualified immunity separately. . . Finally, the court must segment the incident into its constituent parts and consider the officer's entitlement to qualified immunity at each step along the way. . . .It was well-established at the time of the incident in this case that a non-violent, non-resisting, or only passively resisting suspect who is not under arrest has a right to be free from an officer's use of force. . . A reasonable juror could conclude that, in pulling his arm away, Smith's resistance was minimal and that Osting's response in taking Smith to the ground was excessive. . . Viewing the record in the light most favorable to Smith, a reasonable officer in Osting's position would have known that he would violate Smith's right to be free from excessive force by using a leg sweep to force him to the ground. Accordingly, for purposes of summary judgment, we conclude that Osting violated Smith's right to be free from excessive force by knocking him to the ground and then landing on top of him. Osting is not entitled to qualified immunity for this use of force. Smith also has

presented a genuine factual dispute regarding whether his failure to put one of his arms behind his back while lying face-down on the ground constitutes 'resistance' sufficient to justify forcible handcuffing by Osting. Significantly, at no point during the entire episode was Smith under arrest for any offense whatsoever. And, during his deposition testimony, Osting conceded that the mere failure of a citizen—not arrested for any crime—to follow the officer's commands does not give a law enforcement official authority to put the citizen in handcuffs. If Smith indeed had committed no crime, if he was unarmed, and if no evidence was adduced that he posed a threat to himself or to others, Osting's forcible handcuffing of him would be excessive and in violation of well-established constitutional principles. Osting thus also was not entitled to qualified immunity for his actions in this regard, especially given the fact that there is no evidence that Osting took Smith to the ground for any reason other than to handcuff him and restrain him forcibly. Smith also claims that Osting failed to intervene to protect him from Officer Gates's allegedly excessive deployment of the taser to subdue him. In order to establish a claim against a police officer for failing to intervene or for failing to protect him from another officer's use of excessive force, the plaintiff must prove that the officer observed or had reason to know that excessive force would be or was being used and that the officer had both the opportunity and the means to prevent the harm from occurring. . . In this case, Osting was occupied trying to gain control of Smith's arms while Gates was deploying the taser. Consequently, no reasonable juror could find that Osting had the opportunity and the means to prevent Gates from tasing Smith excessively. . . . Osting had already taken Smith down and was struggling to gain full control of him before Gates arrived on the scene. Gates therefore could not have prevented Osting's initial use of force against Smith. Gates was justified in tasing Smith because Gates was unaware of what had transpired before his arrival on the scene and because Smith appeared to be resisting being handcuffed. . . Smith, however, has presented evidence that Gates tased him for 48 seconds in less than two minutes and that, under the circumstances, Smith did not have sufficient time to comply with the officers' commands to submit to handcuffing. It was clearly established at the time of the incident in this case that a police officer violates a suspect's right to be free from excessive force by repeatedly tasing the suspect without giving him a chance to comply with orders. . . Consequently, viewing the record in the light most favorable to Smith, we conclude that Gates's repeated deployment of the taser on Smith was unreasonable and that Gates is not entitled to qualified immunity on this aspect of Smith's excessive-force claim.")

Roell v. Hamilton Cty., 870 F.3d 471, 482-87 (6th Cir. 2017) ("The deputies were . . . required to take into account Roell's diminished capacity before using force to restrain him. . . But no caselaw supports Nancy Roell's assertion the deputies were prohibited from using *any* physical force against Roell before first attempting alternative de-escalation techniques. . . In sum, we agree with the district court's observation that 'the fact that Roell's resistance was probably caused by his excited delirium did not preclude the deputies from using a reasonable amount of force to bring him under control.'. . Despite Roell's apparent diminished capacity, he had committed a series of property crimes, was a threat to the Agarwals and to the deputies, and was actively resisting arrest. . . . The type of force employed by the deputies against Roell—physically restraining his limbs, wrestling with him, attempting to tase him, and shackling his arms and legs—was likely not

excessive. But we need not definitively answer this question because, at the time of the alleged violation, no caselaw clearly established that the degree of force used by the deputies violated Roell's Fourth Amendment rights. . . . We must determine, in other words, whether a reasonable officer would have known that the forcible physical restraint employed in this case against an individual who appeared mentally impaired, yet posed a potential threat to the officers and to others, violated that person's Fourth Amendment rights. . . .Unlike the officers in *Martin*, Deputies Alexander, Dalid, and Huddleston did not repeatedly beat Roell or apply compressive body pressure to his back. They instead 'grappled with Roell's arms and legs to try to control him, which they eventually did.'. . Deputy Huddleston did attempt to tase Roell, but no electricity was conducted into his body. And although this court has observed that use of a taser entails a higher level of force 'than simply knocking someone back to the ground,'. . . a 'growing national judicial consensus' exists that the use of a taser in dart mode constitutes only an intermediate use of force. . . . Martin, moreover, was 'unarmed and minimally dangerous,' whereas Roell was threateningly waving a hose with a metal nozzle that could be used as a weapon. Because of these factual differences, *Martin* did not put the deputies on notice that their actions violated Roell's clearly established right to be free from excessive force. Nor do the other cases cited by Nancy Roell, which hold that police use excessive force when they deploy gratuitous force or a taser against an individual who is already restrained or is doing nothing to resist arrest, provide such notice. . . .We believe that this case is instead more analogous to *Cook v. Bastin*, 590 Fed.Appx. 523 (6th Cir. 2014). . . .The *Cook* court held that the degree of force used by the officers was reasonable because Campbell had committed significant property destruction and a physical assault, posed an immediate threat to himself, the officers, and to others, and attempted to free himself from the officers' restraint. . . Like Campbell, Roell caused significant property damage, was a threat to the officers and to others, and resisted arrest during an episode of excited delirium. Although Deputies Alexander, Dalid and Huddleston did not observe any 'signs of physical violence,' they did observe that Roell was holding objects that could be used as weapons. True enough, the deputies wrestled with and attempted to tase Roell, arguably deploying a higher level of force than the officers in *Campbell*. But this court has previously held that an officer's 'single use of the taser in drive-stun mode' against a mentally unstable plaintiff who was a threat to officer safety and his own safety, and who was resisting police attempts to transport him to the hospital, did not constitute excessive force. . . And there is no question that the degree of force employed by Deputies Alexander, Dalid, and Huddleston was far less than the unconstitutionally severe force used by the officers in *Martin*. In sum, the relevant caselaw does not clearly establish that the deputies violated Roell's Fourth Amendment rights because their actions fell in the 'hazy border between excessive and acceptable force.'. . Finally, Nancy Roell relies on the procedures articulated in the training materials of the Ohio Peace Officer Training Commission (OPTC) and in proffered expert testimony in an effort to prove that Roell's right to be free from excessive force was clearly established. She first argues that the deputies did not follow the OPTC procedures when they neglected to recognize that Roell was exhibiting the common symptoms of excited delirium, proceeded to engage Roell before staging the scene with multiple officers and medical personnel, and failed to use verbal de-escalation techniques before attempting to physically restrain him. Nancy Roell also points to the expert testimony of Dr. Michael Lyman, who stated that de-

escalation was the 'standard technique' recommended for crime-related encounters with excited-delirium subjects and who opined that, had the deputies used verbal de-escalation, Roell would have likely been talked into surrendering without an altercation. Based on this evidence, Nancy Roell argues that the deputies had a 'clearly established duty' to use de-escalation techniques prior to using force against Roell. . . . A finding of qualified immunity is . . . not precluded simply because the deputies acted contrary to their training. *City of San Francisco v. Sheehan*, —– U.S. –—, 135 S.Ct. 1765, 1777, 191 L.Ed.2d 856 (2015) ("Even if an officer acts contrary to her training, however, ... that does not itself negate qualified immunity where it would otherwise be warranted."). In addition, although the deputies did not follow every OPTC protocol, we note that the training materials acknowledge that the use of a taser might be effective in controlling an individual suffering from excited delirium, that a physical struggle might ensue, and that force might be appropriate or necessary in order to restrain the individual. . . . In sum, Nancy Roell points to no caselaw clearly establishing that the deputies violated Roell's Fourth Amendment rights in effectuating his arrest. Even assuming that law-enforcement officers must 'adjust the application of force downward' when confronted with a conspicuously mentally unstable arrestee, . . . no precedent establishes that the level of force used by the deputies in this case was excessive or that the deputies were required to use only verbal de-escalation techniques. The content of the OPTC training material and Nancy Roell's proffered expert testimony do not change our conclusion. Deputies Alexander, Dalid, and Huddleston are therefore entitled to qualified immunity, meaning that the district court did not err in granting summary judgment to the them on Nancy Roell's § 1983 claim.")

Roell v. Hamilton Cty., Ohio, 870 F.3d 471, 490-94 (6th Cir. 2017) (Moore, J., dissenting) ("Our circuit law clearly states that when an individual 'exhibit[s] conspicuous signs that he [is] mentally unstable' and is 'unarmed,' '*Champion* require[s] the officers to de-escalate the situation and adjust the application of force downward.'. . There are disputed facts as to whether Roell was unarmed and as to how aggressively Roell was acting, which determine how much force was appropriate. Although the law governing this case is clear, the facts surrounding Roell's death are not. The district court erred by granting summary judgment on Nancy Roell's § 1983 claim against Deputies Alexander, Dalid, and Huddleston. I would reverse summary judgment on this claim, and I respectfully dissent. . . . If it is apparent to officers that an individual is unarmed and mentally unstable, then the officers must de-escalate and may not use as much force as would be permissible when confronted with an individual who was either mentally stable or armed. While the majority acknowledges that *Champion* mandates that '[t]he deputies were ... required to take into account Roell's diminished capacity before using force to restrain him,' it essentially brushes this requirement aside by asserting that 'no caselaw supports Nancy Roell's assertion the deputies were prohibited from using *any* physical force against Roell before first attempting alternative de-escalation techniques.'. . I agree that the deputies were not necessarily prohibited from using any physical force on Gary Roell, but that point is irrelevant to this case. The question in this case is whether the officers complied with their obligation, under *Champion* and *Martin*, to adjust their use of force downward. Even if the officers were permitted to use some physical force, they could have violated *Champion* and *Martin* by failing to adjust the level of force downward. . . . There

are several unresolved questions of fact relevant to whether the officers had, and, if so, whether they complied with, an obligation to adjust the level of force downward. . . . A jury should resolve the disputed, material facts and ultimately determine whether the officers complied with their obligation to adjust the level of force downward. Therefore, as to the majority's resolution of Nancy Roell's § 1983 claim against Deputies Alexander, Dalid, and Huddleston, I respectfully dissent.")

David v. City of Bellevue, 706 F. App'x 847, ___ (6th Cir. 2017) ("In *Brandenburg*, this court held that where the question of fact was whether Brandenburg's gun was up or down when police shot him, expert testimony that indicated that his finger was not on the trigger and that questioned whether his arm was lifted to aim a rifle at officers was sufficient to defeat qualified immunity. . . This case presents the same question. The expert acknowledges that two shots were fired while David was standing. The question, then, is whether expert testimony and facts that indicated that David did not have his arm raised with a weapon pointed at the officers are sufficient to defeat qualified immunity. As in *Brandenburg*, we hold that they are. The facts, taken in the light most favorable to David, show that it is a reasonable conclusion that David did not have his arm raised at Lawson. If that were the case, then the shooting would be unjustified. Accordingly, summary judgment is inappropriate. This holding does not implicate merely Lawson, who first pulled the trigger, but also removes qualified immunity from Matter as well. It is of no import that Matter shot only after Lawson opened fire. What counts is whether Matter knew that David did not pose a threat. We have held that an officer's opening fire—even if he was unsure who shot first [footonote omitted]—was sufficient to defeat qualified immunity if the victim was not a threat. . . If David's arm was by his side—as the facts construed in the best light for David would indicate—Matter's opening fire would also be unjustified and a constitutional violation.")

Roth v. Viviano, 704 F. App'x 548, 554-56 (6th Cir. 2017) ("During the pendency of this appeal and after argument, we addressed the situation in which the 'objective reasonableness' standard of *Graham* . . . does not fit 'because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer.' *Estate of Hill by Hill v. Miracle*, 853 F.3d 306, 314 (6th Cir. 2017). '[W]e suggest that a more tailored set of factors [than *Graham*'s] be considered in the medical-emergency context, always aimed towards the ultimate goal of determining "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them."'. . Accordingly, we held in *Estate of Hill* that a three-part test applies to determine whether an officer in a medical-emergency situation is entitled to qualified immunity:
(1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
(2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
(3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

. . . . Regarding the third *Estate of Hill* question, whether the force used was reasonable, the parties disagree whether the manner in which Roth was cuffed was reasonable. However, there is no testimony or evidence that cuffing her in either manner was not reasonable. There is no testimony from the EMT responders, for instance, that the straps would have adequately secured Roth had the cuff been removed, or that the cuffs interfered with Roth's medical treatment or were unnecessary to allow the EMTs to render aid. Accordingly, on this record, the district court properly determined that Viviano's actions were objectively reasonable as a matter of law and, applying *Estate of Hill*, we must AFFIRM the district court's grant of summary judgment to Viviano on Roth's Fourth Amendment claims on the basis of qualified immunity.")

Roth v. Viviano, 704 F. App'x 548, 556 (6th Cir. 2017) ("I concur in the result, but I write separately to explain that Officer Viviano is entitled to qualified immunity because the facts, taken in the light most favorable to Plaintiff Shannon Roth, demonstrate that he was acting as a medical responder and the right to be free of unreasonable seizure by a medical responder was not clearly established at the time of this incident.")

Mitchell v. Schlabach, 864 F.3d 416, 423-26 (6th Cir. 2017) ("The confrontation in this case was not a typical encounter between a police officer and a defiant suspect. Schlabach, the lone available officer at the time, shot Mitchell during a confrontation in the middle of an unpopulated national forest after Mitchell charged toward him in direct defiance of orders to drop to the ground. The extended, 100-mile-per-hour car chase in the rain that preceded the shooting would have heightened the heart rate, anxiety, and fear of any normal person, police officer or not. The available video evidence makes clear that Mitchell was close enough to pose a substantial threat to Schlabach's safety at the time he was shot. Even viewing the facts and video in the light most favorable to Plaintiff, we hold that Schlabach did not violate Mitchell's right to be free from excessive force because his decision to shoot was reasonable under the totality of the circumstances. To be clear, our decision in this case is largely driven by the available video evidence, which documents most of the relevant events from a helpful angle. If this case turned on Schlabach's after-the-fact testimony, summary judgment would likely have been inappropriate. Our holding today is based upon the factual context of a car chase involving a single officer, isolated from backup, who was charged by a suspect who had demonstrated a willingness to put lives at risk in order to evade arrest. This decision does not stand for the proposition that deadly force is reasonable or proper whenever a suspect charges an officer or defies an order. . . .While the previous discussion would be sufficient to justify our decision today, we also consider the second prong of the qualified immunity analysis: whether Schlabach's actions were contrary to 'clearly established' law at the time he acted. . . We hold that they were not. . . . As the dissent correctly notes, it is settled law that an unarmed defendant has a right not to be shot dead when he does not pose a risk of danger to police or the public. However, even viewing the facts in the light most favorable to the Plaintiff, we hold that the record evidence, including the video, show that Schlabach had probable cause to believe that Mitchell posed an immediate threat to his safety. The Plaintiff is unable to point to a case holding that it is unconstitutional for an officer to shoot a criminal suspect under similar circumstances. Since Schlabach did not violate any of Mitchell's

'clearly established' rights, the second prong of the qualified immunity analysis also supports our decision to affirm the district court's award of summary judgment.")

Mitchell v. Schlabach, 864 F.3d 416, 426-32 (6th Cir. 2017) (Moore, J., dissenting) ("Before explaining my view of the merits, I wish to amplify the legal standard for analyzing video evidence at the summary-judgment stage. I agree with the majority that if one party's 'version of events is so utterly discredited by the record that no reasonable jury could have believed him, ... [courts] should ... view[ ] the facts in the light depicted by the videotape.' *Scott v. Harris*, 550 U.S. 372, 380–81 (2007). Unfortunately, as this case and *Scott* itself illustrate, 'the light depicted by the videotape' is not always obvious. . . .It is a difficult task to consider the viewpoints of individuals whose experience one has not lived. But *Scott*, oddly enough in light of the aforementioned study, demands no less. The Supreme Court instructed us that in order to consider the light depicted by the videotape, we must determine that one party's 'version of events is so utterly discredited by the record that no reasonable jury could have believed him.'. . One cannot say that *every* reasonable jury would be so utterly convinced by a videotape as to disbelieve one party's version of events without considering how every reasonable juror, based on his or her experience, may view a police officer's actions as more or less reasonable or a suspect's actions as more or less threatening. It is therefore with the humble understanding that I, like anyone else, 'lack full insight into how the mechanisms of value-motivated cognition shape [my] and others' perceptions of particular facts,'. . . that I view the videotape and other facts in this case. I conclude that the record does not utterly discredit Plaintiff's version of events. . . .I concur that the ten-minute, high-speed car chase that preceded Mitchell's death was a serious crime. . . However, I disagree that the second and third *Mullins* factors weigh in favor of Schlabach when the facts are viewed in the light most favorable to Plaintiff. Therefore, and under the totality of the circumstances, I believe that Plaintiff has shown a constitutional violation at this stage of the case. . . .Schlabach did not state that he believed Mitchell to be armed with a handgun, a knife, or some other weapon. To infer such belief would be taking the facts in the light most favorable to Schlabach rather than Plaintiff. It is a remarkable admission for an officer to shoot someone whom he knew to be unarmed. Such an admission seriously undermines the majority's holding that Mitchell posed a serious threat to Schlabach. Beyond Schlabach's knowledge that Mitchell was unarmed, the facts viewed in the light most favorable to Plaintiff display a general lack of dangerousness on the part of Timothy Mitchell. First, a reasonable juror watching the dash-cam video could conclude that Mitchell walked toward Schlabach in a nondangerous manner. We have previously held that when a suspect walks toward an officer with his hands at his side, it is unreasonable for the officer, on this basis alone, to shoot the suspect. . . .Although the record does not indicate the exact distance between Schlabach and Mitchell when Mitchell was shot, a reasonable juror could conclude that Mitchell was far enough away that he did not pose an immediate threat to Schlabach. This point is perhaps best articulated by W. Ken Katsaris, a law-enforcement officer and instructor with over thirty years of extensive experience, who stated, 'I did not see where Mitchell in any way could conceivably be an immediate threat to the safety of the officer or others. Mitchell was obviously not armed, not threatening Schlabach, and appears to want to avoid the aggressive approach of Schlabach.'. .On this point, the majority once again draws inferences in favor of Schlabach rather than Plaintiff.

Recognizing that 'the video does not allow for a precise determination of the distance between Mitchell and Schlabach at the time of the first shot,' the majority nevertheless concludes that 'there is no question that Mitchell showed no signs of stopping and that one more step would have placed Mitchell in a position to attack Schlabach with his fists.'. . However, because the video does not reveal the distance between Mitchell and Schlabach, a permissible inference to draw is that the two were 21 feet apart, . . . rather than 'one more step' away. And whether Mitchell was 'charg[ing],'. . . or took an 'aggressive approach,'. . . such that he 'showed no signs of stopping,'. . . are the sort of descriptive conclusions that we ordinarily leave to a jury. I cannot say that there is not a single reasonable juror who would characterize Mitchell's gait as a 'walk' rather than a 'charge' or 'calm' rather than 'aggressive.' Katsaris's testimony only bolsters my view that a jury could differ with the majority's characterizations of Mitchell's demeanor and gait. . . .Timothy Mitchell was walking toward Schlabach when he was shot. After watching the dash-cam video, reasonable jurors could conclude that Mitchell was not walking 'aggressively' with '[c]lenched fists' and 'wide eyes,'. . . but rather that he was walking calmly toward Schlabach. . . .Although the first *Mullins* factor favors Schlabach, the second and third factors favor Mitchell. Particularly in a case such as this, where there are numerous statements and pieces of video footage that cast doubt on whether the suspect posed an immediate threat to the officer or others, summary judgment should not dispose of the case. . . Therefore, I believe that Plaintiff has put forth sufficient evidence that, when viewed in the light most favorable to him, demonstrate a violation of Timothy Mitchell's constitutional rights. . . .I fully recognize that ' "clearly established law" should not be defined "at a high level of generality."'. . However, and keeping in mind the central inquiry of whether 'existing precedent ... placed the statutory or constitutional question beyond debate,'. . there are nevertheless some 'obvious' cases in which general 'standards can "clearly establish" the answer, even without a body of relevant case law.'. . This is one such obvious case. . . . [W]hen cast in the light most favorable to Plaintiff, the facts of that fateful afternoon should have made it obvious to any reasonable officer that Timothy Mitchell, whom Schlabach believed to be unarmed and who was not otherwise dangerous, did not deserve to be met with deadly force. I do not believe that qualified immunity shields Schlabach from liability under § 1983. Therefore, I would reverse the district court's judgment and remand the case for further proceedings.")

Carden v. City of Knoxville, 699 F. App'x 495, 498-99(6th Cir. 2017) ("We are therefore bound to accept the district court's finding here that a reasonable jury could conclude that Carden no longer presented a threat once he had turned and begun to flee, and that Gerlach had no objective reason to believe otherwise. To the extent that Gerlach's arguments call any of those facts or inferences into question, such as in his argument that Carden posed a possible deadly threat at the time of the shooting, we must disregard them. . . However, we still retain jurisdiction to resolve the legal question presented in Gerlach's appeal. . . That question, as both sides agree, is whether Gerlach violated Carden's right to be free of excessive force when Gerlach fired on him from behind while he fled, unarmed, from an arrest for possessing a suspected stolen vehicle or for assaulting a police officer. Gerlach contends that the case law at the time of the encounter did not clearly establish that his use of deadly force would have been unjustified, even under the circumstances found by the district court. About that, however, he is mistaken. As the district court

explained, the law at the time of the encounter clearly established that deadly force would be excessive if used against an unarmed, fleeing felon who the officer lacked probable cause to believe posed a threat of serious physical harm. That much was made clear in *Bouggess v. Mattingly*, 482 F.3d 886 (6th Cir. 2007), decided nearly a decade before the fatal encounter in this case, where we upheld the denial of qualified immunity against an officer after he shot and killed a fleeing felon who had violently resisted arrest. . . There, as in this case, the decedent was suspected of a non-violent felony: there, dealing crack cocaine, . . . here, stealing a car. Like Carden, the decedent in that case after aggressively resisting arrest had turned and begun to flee, with no weapon drawn, when he was shot multiple times in the back by the officer. . . We held that those circumstances, though justifying the use of *some* force, did 'not justify *deadly* force, especially when the struggle ha[d] concluded and the suspect [was] in flight.'. . Indeed, later cases have only made clearer that the police may not fire on a non-dangerous suspect fleeing from arrest. . . That is exactly what the district court determined that a jury could find in this case, and the cases on the books at the time clearly indicated its unconstitutionality. . . .[E]ven if Gerlach had probable cause to fear for his safety *during* his struggle with Carden, it could well be that he lacked the same cause *after* the struggle had ended and Carden, still unarmed, had turned and begun to flee. Here the district court found that Gerlach could not reasonably have believed he was in danger once Carden had turned to run, and we may not second-guess that finding on interlocutory review . . . . *Bouggess* and its progeny are therefore clearly on point, and they just as clearly establish that the circumstances found by the district court did not justify the use of deadly force against Carden.")

Alexander v. County of Wayne, 689 F. App'x 441, 442 n.1 (6th Cir. 2017) ("Our dissenting colleague faults Officer Merrow for his actions preceding the shooting. As the district court recognized, however, this court does not scrutinize whether it was reasonable for the officer 'to create the circumstances' that led to the use of force. . . Instead, we focus on whether the officer's actions were objectively reasonable under the totality of the circumstances he faced 'at the time [he] made [his] split-second judgment[ ] immediately prior to using deadly force.' *Chappell v. City of Cleveland*, 585 F.3d 901, 909 (6th Cir. 2009).")

Alexander v. County of Wayne, 689 F. App'x 441, 442-50 (6th Cir. 2017) (Clay, J., dissenting) ("Even though it has been over half a century since Martin Luther King, Jr., gave his powerful 'I Have A Dream' speech, we continue to have an epidemic of unjustified and race-related police shootings in the United States. For instance, the New York Times reported that, '[a]ccording to the F.B.I.'s Supplementary Homicide Report, 31.8 percent of people shot by the police were African-American, a proportion more than two and a half times the 13.2 percent of African-Americans in the general population.' Sendhil Mullainathan, *Police Killings: What the Data Says*, N.Y. Times, October 18, 2015, at BU6. Similarly, ProPublica reported that '[y]oung black males in recent years were at a far greater risk of being shot dead by police than their white counterparts—21 times greater, according to a ProPublica analysis of federally collected data on fatal police shootings' from 2010 to 2012. Ryan Gabrielson, Ryann Grochowski Jones, and Eric Sagara, *Deadly Force, in Black and White*, ProPublica (April 21, 2017, 3:55 PM), https://www.propublica.org/article/deadly-force-in-black-and-white. It is against this backdrop

that we consider how the shooting of James Alexander, Jr., a young African-American man, may have been just another example out of countless others that demonstrate the pervasive and systemic racism so often evident in interactions between the police and people of color. As discussed in detail below, rather than placing this case in its proper context, the majority and the district court have treated this case so cavalierly that any concept of justice has been tossed aside. A key issue in this case is whether it was objectively reasonable for Officer Merrow to needlessly escalate the situation by grabbing onto the steering wheel of Alexander's vehicle and attaching his body to the side of the moving vehicle where nothing more was at stake than a minor ticket citation. The majority, in adopting the district court's opinion, frames the issue as whether it was reasonable for Merrow to use deadly force against Alexander while he was being 'dragged alongside Alexander's vehicle.'. . By doing so, the majority completely fails to take into account the totality of the circumstances that the shooting involved. Taking those circumstances into account, there is no acceptable justification for affording Merrow qualified immunity. Before proceeding with the analysis, it will be useful to briefly recount the facts. . . .Due to the self-serving nature of Merrow's testimony, the selective statements cherry-picked from the witnesses, and Alexander's inability to contradict this evidence, it is our duty as judicial officers to proceed with caution when weighing the evidence in a case like this. In fact, we are required on a motion for summary judgment to consider the facts in the light most favorable to the plaintiff and to make all reasonable inferences in the plaintiff's favor. As seen throughout the majority opinion and the district court's opinion, the evidence is not remotely considered in the light most favorable to Plaintiff. . . .One of the serious deficiencies with the majority opinion is its failure to consider the facts in the light most favorable to Plaintiff and make all reasonable inferences in Plaintiff's favor. Merrow contends that he was in 'imminent danger' of being run over by Alexander's vehicle. The majority agreed with Merrow and accepted his dubious contention that Merrow had an objectively reasonable belief that Alexander posed an imminent threat of serious physical harm to Merrow or others when he shot Alexander. Contrary to the majority opinion, the issue in this case is whether Merrow actively and unnecessarily placed himself in a dangerous position in order to effectuate an arrest by grabbing and holding onto the steering wheel of Alexander's moving vehicle when Merrow's prior interactions with Alexander suggested that the driver would not have endangered others if he was able to drive away. It is notable that neither Merrow nor any of the witnesses at the scene claimed that Alexander engaged in any assaultive or threatening behavior toward Merrow. Indeed, Merrow's partner at the scene, Tanner, was not even concerned enough about what was occurring to get out of the police vehicle. Viewing the facts in the light most favorable to Plaintiff, and under the totality of the circumstances, a reasonable jury could find that Merrow's use of deadly force violated Alexander's Fourth Amendment rights. The facts, viewed in the light most favorable to Plaintiff, demonstrate that Merrow 'actively "put himself in a dangerous position in order to effectuate an arrest"' by grabbing the steering wheel of the car in order to try to prevent Alexander from leaving. . . This action by the officer, in and of itself, was objectively unreasonable. No reasonable person, let alone a police officer, would grab hold of a steering wheel and continue to hold onto it as the car began to move, when nothing more was at stake than a minor ticket infraction. Merrow's explanation was that he wanted to steer the vehicle into a parked vehicle ahead in order to prevent Alexander from fleeing. Incredibly, Merrow claims he believed that

ramming the moving vehicle into a parked car was safer than simply permitting Alexander to leave the scene and have him arrested later based upon information that Merrow had already obtained from Alexander in writing the citation. The majority makes the outlandish claim that the officer feared for his life, and that is why it was reasonable for him to shoot Alexander. However, it is difficult to rationalize the officer's explanation when one examines the officer's own words. The notion that shooting Alexander reduced any threat of imminent danger is completely ridiculous for many reasons. At the moment the shots were fired, it was objectively unreasonable for Merrow to shoot Alexander. For one thing, Merrow should never have attached himself to the side of a moving vehicle—it was not as though Merrow was attempting to detain or arrest a person whom he had reason to believe to be a dangerous felon. Secondly, Alexander's foot or body, after being shot, could have acted as a deadweight on the gas pedal and the car could have sped off into incoming traffic with no one alive behind the wheel. This Court's previous opinions in *Godawa* and *Cupp* are informative and almost directly on point. . . . Like the officers in *Godawa* and *Cupp*, Merrow actively put himself in a dangerous position by gripping onto the steering wheel and not letting go once the car began to move. Merrow presented no evidence that Alexander was violent, that he had a gun or drugs in the car, or that he was going to drive recklessly on the road and endanger other drivers. The witness testimony did not suggest, prior to the officer grabbing the wheel, that Alexander was about to endanger individuals around the area. At most, one of the witnesses vaguely or ambiguously suggested that Alexander appeared to be driving toward a parked van or small truck. However, Merrow admitted that he was attempting to steer the car into a parked vehicle, so the fact that a witness thought that Alexander appeared to be driving towards a parked van should not count against Alexander. Importantly, the interaction between Merrow and Alexander prior to the shooting was apparently civil and non-confrontational, and gave Merrow no reason to believe that Alexander would recklessly endanger others with his vehicle. Alexander was honest with Merrow about why he was at the house, and was not confrontational with Merrow when Merrow first told him to step out of the vehicle. When Alexander realized that his vehicle was going to be impounded, he begged Merrow to refrain from impounding his vehicle, and told Merrow that his wife would divorce him if he lost his car. Additionally, Merrow had all of Alexander's information when he began to flee, Merrow's partner was in their police vehicle, and another officer in a second police vehicle was also at the scene. It would have been easier, and safer, for the other officers to pursue Alexander in their vehicles, or to arrest him later at his residence. Furthermore, prior to Alexander's attempt to drive away, Merrow only suspected Alexander of violating a local ordinance that prohibited loitering around alleged drug houses—an offense that is punishable by a citation and monetary fine instead of impoundment, as Plaintiff's lawyer pointed out at oral argument. It should also be noted that Merrow did not suspect Alexander of possessing drugs, or weapons, or any objects perceived as dangerous. Even assuming Alexander committed an additional offense by fleeing the scene, this offense alone does not justify Merrow's use of deadly force. . . Similar to *Cupp* and *Godawa*, the district court failed to view the facts in the light most favorable to Plaintiff. Applying the *Graham* factors to Plaintiff's version of the facts, it is obvious that Merrow's use of force in this case was objectively unreasonable. Although Alexander was fleeing from police, he was suspected of a minor offense and was non-confrontational with Merrow prior to fleeing. More importantly, Merrow actively and

inappropriately placed himself in a dangerous position even though Alexander posed no immediate threat to Merrow or any member of the public. In fact, Merrow was not too concerned about his safety if he was willing to attach his body to the outside of a moving vehicle. The problem with the outcome adopted by the district court and the majority is that it authorizes and encourages the irresponsible behavior demonstrated by Merrow. We should not approve of and support an officer's behavior when it is abusive, unreasonable, and indeed, senseless. Although this case differs from *Godawa* and *Cupp* in that the officers in those cases had not attached their bodies to the vehicles in the same manner as Merrow, the principle from those cases is applicable here—that an officer may not put himself or herself in a dangerous position when there is no need to do so in the first place, if the circumstances do not justify or warrant him or her in doing so, and then use that as an excuse to shoot the suspect. In other words, an officer should not be protected by qualified immunity when the victim poses no immediate danger to the officer or the public. Under the circumstances of this case, Merrow is not deserving of the protection granted by the qualified immunity doctrine. One can only conclude that the officer placed no value on the life of the deceased. The officer in this case acted in an objectively unreasonable manner, and needlessly cost a person his life. I therefore respectfully dissent.")

Thomas v. City of Columbus, 854 F.3d 361, 365-67 (6th Cir. 2017) ("In this circuit, we consider the officer's reasonableness under the circumstances he faced at the time he decided to use force. *See Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (describing the so-called 'segmented analysis' this circuit uses to analyze use-of-force claims). We do not scrutinize whether it was reasonable for the officer 'to create the circumstances.'. . Even if an officer approaches a scene recklessly, this will not necessarily render a later decision to protect himself unreasonable. . . Thus, we cannot, as Mr. Thomas urges, find a constitutional violation based on how Officer Kaufman approached the crime scene. Arguably, Officer Kaufman's decisions to rush toward the apartment without backup violated Columbus Police Department procedures. Arguably, his violations increased the likelihood that Officer Kaufman might have to use force. But those decisions were not seizures. Their reasonableness is not at issue. Instead, we must consider the circumstances that Officer Kaufman faced in the moment he decided to use force. Officer Kaufman had responded to a dangerous call in a high-crime area. He was alone. He ran towards the breezeway between two vehicles and then stopped at the parking lot's edge. Meanwhile, two people exited an apartment and then ran towards him, the first with a gun. About 40 feet initially separated Officer Kaufman from that person, and the distance only shrank as the person closed in on him. At this range, a suspect could raise and fire a gun with little or no time for an officer to react. Given these facts, a reasonable officer would perceive a significant threat to his life in that moment. Thus, Officer Kaufman's decision to fire his gun—even if Destin never raised his—was objectively reasonable. . . . To be clear, we do not hold that an officer may shoot a suspect merely because he has a gun in his hand. Whether a suspect has a weapon constitutes just one consideration in assessing the totality of the circumstances. . . Sometimes, the time or space available to an officer may mean that the reasonable thing to do is to monitor the suspect, issue a warning, or take cover. . . But Officer Kaufman acted objectively reasonably when he used deadly force here—even if facts beyond his knowledge meant that he actually faced no threat. . . .Officer Kaufman faced a tense, uncertain

situation. Someone ran towards him with a gun after exiting a burglary about 40 feet away. Officer Kaufman fired when the person with the gun closed the distance to around 10 feet. A reasonable officer would find a significant threat to his safety under these circumstances. Under the Fourth Amendment's objective reasonableness standard, he could respond with deadly force. Thus, we affirm.")

Nyilas v. Steinaway, 686 F. App'x 355, 356 n.2 (6th Cir. 2017) ("We note that this case, although less egregious than the recent case of *Moore v. City of Memphis*, ___ F.3d ___, 2017 WL 1314932 (6th Cir. Apr. 10, 2017), presents another example of the all-too-ready use of SWAT tactics in circumstances in which the need to forcibly enter the home was less than clear. While the officers in this case did not violate clearly established rules of constitutional law, it is entirely likely that they could have achieved their goals using much less intrusive and dangerous means.")

Moore v. City of Memphis, 853 F.3d 866, 870-72 (6th Cir. 2017) ("Here, the district court separated the Memphis Police Department's encounter with Moore into three segments: the Department's decision to use TACT to serve the warrant; TACT's use of a dynamic entry; and Penny's use of deadly force. Ultimately, however, the district court did not specifically analyze the reasonableness of the decision to deploy TACT; instead, the court found that the reasonableness of that decision merged with the reasonableness of the dynamic entry itself. . . .As an initial matter, the plaintiffs argue that the district court should have analyzed the police department's decision to use TACT separately from the dynamic entry that resulted from that decision. We disagree: the decision to use TACT was not itself an application of force under the Fourth Amendment. What the TACT team did when they got to Moore's house, however, was an application of force. So we turn to the question whether the so-called dynamic entry was unreasonable. . . . Here, the officers had several reasons to think that knocking and announcing would be dangerous, to wit: when Moore answered the door for officers during their initial visit to his home, he gestured with his hand behind his back as if he had a weapon; Moore's neighbor, Hillis, told Lynch that Moore had a gun; and (according to Hillis) Moore said he would 'shoot first and ask questions later' if the officers came back, and would kill Lynch in particular. Those reasons were enough to allow the officers to execute a no-knock entry. . . . The plaintiffs also challenge the officers' use of flash-bangs, both when they entered the house and just before Penny entered Moore's room. To determine whether an officer's use of flash-bangs was reasonable, we balance the officer's interest in using them against the suspect's interest in forbearance. . . Here, as the officers entered Moore's home, they had reason to believe that Moore would pose an immediate threat to their safety. Meanwhile, nothing in the record suggests that flash-bangs themselves posed a danger to Moore: he had no health conditions that made him vulnerable to loud noises or blinding light, and the house contained no accelerants or other substances that could easily ignite. . . The officers' initial use of flash-bangs was therefore reasonable. As for the second use, by then Moore had refused to comply with the officers' orders after they entered his home; instead he retreated into his bedroom. Officer Penny feared that Moore would barricade himself there, which could endanger the officers. Suffice it to say that, on this record, we see no basis to second-guess that judgment. . . . That leaves Officer Penny's decision to shoot Moore. . . . The plaintiffs argue that a

genuine dispute exists as to whether Moore pointed a gun at Officer Penny; in their view, Penny might have seen the phone in Moore's hand and mistakenly thought it was a gun. Be that as it may, however, the relevant question is not whether Moore in fact had a gun in his hand, but whether Penny reasonably thought that Moore did. And on this record a jury could not find otherwise. Before Penny entered Moore's bedroom, as noted above, Penny had good reason to think that Moore was armed. True, when Penny entered the room, smoke from the flash-bang might have obscured the object in Moore's hand. But the 911 recording makes clear that Penny thought it was a gun: he yelled 'Hands, Don! Hands, hands, hands!' immediately before he shot Moore. Penny's decision to shoot under these circumstances was the archetype of a split-second decision to which we must defer. . . As a matter of law, therefore, the defendants' use of force was not excessive under the Fourth Amendment. But that does not mean the dynamic entry, in particular, was wise. The warrant here concerned evidence only of a misdemeanor; and yet the defendants chose a course of action that, though constitutional, unavoidably jeopardized the officers' lives along with Moore's. In the end Moore was shot, though it just as easily could have been Penny—as the defendants themselves emphasize here. Meanwhile, the officers plainly had available to them other options that did not involve an immediate physical confrontation. The officers would have done well to consider them more seriously than they apparently did.")

Moore v. City of Memphis, 853 F.3d 866, 872 (6th Cir. 2017) (6th Cir. 2017) (Batchelder, J., concurring) ("Although I concur fully in my colleagues' reasoned opinion, I write separately to emphasize that, while the Memphis Police Department did not violate any clearly established rule of constitutional law, its decision to use a tactical unit and the way it used that unit are, in these circumstances which stem from a suspected animal cruelty misdemeanor offense, appalling. The fact is that the police department's conduct, while not constitutionally impermissible, was certainly disproportionate. Had cooler and more rational heads prevailed, Moore's life likely would have been spared and Memphis Animal Services would still have been able to investigate the animal cruelty complaints it had received. 'The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.' Thomas Jefferson to the Republican Citizens of Washington County, Maryland (March 31, 1809), *reprinted in* 1 The Papers of Thomas Jefferson 98–99 (J. Jefferson Looney ed., 2004). The Memphis Police Department would do well to think about this admonition.")

Estate of Hill v. Miracle, 853 F.3d 306, 313-15 (6th Cir. 2017) ("[A]pplying the *Graham* factors to the situation that Miracle faced is equivalent to a baseball player entering the batter's box with two strikes already against him. In other words, because Hill had not committed a crime and was not resisting arrest, two of the three *Graham* factors automatically weighed against Miracle. The key problem is that the district court tried to apply the *Graham* factors to a completely different factual situation—a medical emergency—where there was no crime, no resisting of arrest, and no direct threat to the law-enforcement officer. In doing so, the court failed to see the forest (the overall standard of objective reasonableness) for the trees (the three factors to use as an aid in assessing objective reasonableness in the typical situation). We fully sympathize with the district court's dilemma, however, because no appellate court has previously provided any guidance on

how to assess objective reasonableness in the present *atypical* situation of a medical emergency. In fact, most of the cases dealing with excessive force and taser use simply hold that an officer does not use excessive force by tasing a person who is actively resisting arrest, but does use excessive force if that person is not resisting arrest. . . . Rather than continuing to struggle with this dilemma, we suggest that a more tailored set of factors be considered in the medical-emergency context, always aimed towards the ultimate goal of determining 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.'. . Where a situation does not fit within the *Graham* test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:

(1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?

(2) Was some degree of force reasonably necessary to ameliorate the immediate threat?

(3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?

If the answers to the first two questions are 'yes,' and the answer to the third question is 'no,' then the officer is entitled to qualified immunity.

These questions and answers serve as a guide to assist the court in resolving the ultimate issue of 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them.'. . The factors that we establish and apply today are, like the *Graham* factors, non-exhaustive . . . and not necessarily dispositive in every case. Nonetheless, these additional considerations aid the ultimate inquiry of 'whether the totality of the circumstances justified a particular sort of ... seizure,'. . . and should be considered and ruled upon by the court for claims of excessive force arising in this context. Applying the above factors to the present case, we conclude that, based on the facts as viewed in the light most favorable to Hill, Miracle did not use excessive force against Hill when Miracle deployed his taser in drive-stun mode. As to the first factor, Hill was experiencing a medical emergency and was incapable of making a rational decision due to his hypoglycemic episode. In resisting the paramedics' attempts to save his life, Hill repeatedly kicked his feet and swung his fists in their direction. The paramedics were therefore put in immediate physical danger by Hill's combative actions. In addition, the testimony from Streeter indicates that both the paramedics and Miracle were at risk due to the blood spraying from Hill's arm. . . . And even if we were to assume that the safety risk from Hill's blood did not justify Miracle's use of a taser, Hill's mental state and combative actions posed an immediate threat to *himself*. Hill's extremely low blood-sugar level was in the hypoglycemic range and, if left untreated, would likely have led to a prolonged seizure and death. Like in *Caie*, therefore, Hill's mental and physical state rendered him 'at a minimum, ... a threat to his own safety.'. . Turning to the second factor, some degree of force was reasonably necessary to ameliorate the immediate

threat to the paramedics and to Hill. Because of his hypoglycemic episode, Hill was violently resisting the paramedics' attempts to render him life-saving assistance. The four paramedics were unable to gain physical control over Hill, who had already ripped an IV catheter out of his arm. Hill argues, and the district court agreed, that 'any danger could have been eliminated by simply stepping away from [Hill].'. . This proposed action, however, fails to take into account the fact that Hill needed immediate medical assistance. So stepping away from Hill might have eliminated the safety risk to the paramedics and to Miracle, but it would have had potentially fatal consequences for Hill. Under these circumstances, we conclude that some degree of force on the part of Miracle was reasonably necessary to protect the paramedics and, more importantly, to save Hill's life. We turn now to the final factor—whether or not Miracle's single use of a taser in drive-stun mode was excessive under the circumstances. Hill first argues that Miracle should have tried to handcuff or restrain Hill before deploying the taser, and that failing to do so was violative of Hill's Fourth Amendment rights. In support of this argument, Hill points out that the officers in *Caie* attempted to handcuff Caie and encountered resistance before tasing him. But in the present situation where four paramedics were unable to restrain Hill, we are hard-pressed to fault Miracle for not joining the fray. Hill also argues that the use of a taser in drive-stun mode is 'not recommended' and therefore excessive. He fails to acknowledge, however, that this mode is discouraged because of the difficulty in keeping the taser in contact with a person's skin, not because such use constitutes excessive force. Miracle in fact testified that he used his taser in drive-stun mode because this was the best option to 'minimize [the] damage' in light of Hill's medical emergency. We are not holding that a law-enforcement officer is always justified in using a taser to gain control over a person suffering from a medical emergency. But under the circumstances, Miracle's use of force was objectively reasonable. Four paramedics were unable to physically restrain Hill, whose health was rapidly deteriorating and who was unresponsive to Miracle's command to 'relax.' We conclude that a reasonable officer on the scene, without 'the 20/20 vision of hindsight,' would be justified in taking the same actions as Miracle.")

Woodcock v. City of Bowling Green, 679 F. App'x 419, 424-25 (6th Cir. 2017) ("Here, the incident lacked the essential elements that permitted the use of force in *Simmonds* and *Pollard*. Harrison displayed none of the aggression that the suspects did in *Simmonds* and *Pollard*. Casada may have thought that Harrison had a gun, but Harrison never gave Casada reason to think that he would use it imminently. The suspects in *Simmonds* and *Pollard* pointed objects at the officers; Harrison never moved his left arm. Casada argues that he faced a split-second decision, but the record shows that Casada and Kay agreed that Casada would shoot if Harrison moved past the point illuminated by the searchlight. Casada also did not shoot Harrison immediately after hearing his final declaration. He waited just over a minute, and asked Kay to run around the police car to move the searchlight. Harrison's shooting lacked the exigency, tension, or rapid evolution present in *Simmonds* and *Pollard*. When Casada fired the shot, he had no reason to believe that Harrison posed an imminent threat of serious harm to anyone. Accordingly, his use of deadly force was objectively unreasonable and violated the Fourth Amendment.")

Lewis v. Charter Township of Flint, 660 F. App'x 339, 343-47 (6th Cir. 2016) ("Where a person attempts to flee in a vehicle, 'police officers are "justified in using deadly force against a driver who objectively appears ready to drive into an officer or bystander with his car," but "may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety."' " *Godawa v. Byrd,* 798 F.3d 457, 464 (6th Cir. 2015) (quoting *Cass v. City of Dayton,* 770 F.3d 368, 375 (6th Cir. 2014)). Thus, 'where the car no longer "presents an imminent danger," an officer is not entitled to use deadly force to stop a fleeing suspect.' *Id.* (quoting *Smith v. Cupp,* 430 F.3d 766, 775 (6th Cir. 2005)). The dash-cam video does not conclusively show that a reasonable officer would have believed Lewis posed an imminent threat of serious physical harm to Needham or others in the vicinity. Rather, viewed in the light most favorable to the Estate, it shows that Lewis—who was not suspected of any violent crime—was merely trying to flee a traffic stop in a vehicle, which alone is not sufficient to justify the use of deadly force. . . Further, the video does not clearly show that Lewis 'targeted' Needham when he accelerated the vehicle and attempted to flee. Although Lewis's intent does not matter, the facts known to Needham at the time do. . . Because Needham ran in front of the vehicle after Lewis had started the ignition and less than a second before he accelerated forward, it is not clear from the video that a reasonable officer would have perceived that Lewis was 'targeting' him. Moreover, the video strongly suggests—and Needham appears to concede—that Needham fired into the driver's side window. This fact and Needham's position at the side of the car suggest he was clear of the vehicle and not in danger when he fired his weapon. Needham contends he fired through the driver's side window only because at the time, he was 'trying to dodge the vehicle.'. . Although that may be the case, the conclusion Needham asks the court to draw would require us to view the video in the light most favorable to Needham. However, a reasonable jury could reach a different conclusion, especially since the video appears to show Needham lowering his weapon as he jumps out of the vehicle's path, and then raising it again as the vehicle drives by him. . . .At this juncture, the record—consisting only of the dash-cam video—presents a scenario where, as in *Cupp,* it would be possible for a jury to conclude that the officer shot at the decedent in self-defense, but a reasonable jury could also conclude that the decedent 'was merely trying to flee ... and [the officer] purposefully shot [him] under circumstances of no threat to [the officer] or others.'. . That there was no video available in *Cupp* does not render it inapplicable because there are factual questions in the instant case bearing on the analysis that are not clearly depicted in the video. . . .Viewed in the light most favorable to Lewis, a jury could conclude from the video that a reasonable officer would not have believed he or anyone else was ever in danger. Moreover, 'the fact that a situation is rapidly evolving "does not, by itself, permit [an officer] to use deadly force,"'. . . and although the events here occurred within a matter of seconds, the video suggests Needham was already out of the way, and indeed had already lowered his gun, when he fired into the driver's side window. . . .Thus, the dash-cam video, standing alone, does not establish that Needham is entitled to summary judgment on the basis that that his actions were objectively reasonable under the circumstances. . . .There is longstanding precedent holding that it is unreasonable for an officer to use deadly force against a suspect merely because he is fleeing arrest; rather, such force is only reasonable if the fleeing suspect presents an imminent danger to the officer or others in the vicinity. . . This is the case even where the suspect flees in a vehicle. . . Relying on the Supreme Court's recent decision in *Mullenix*

v. Luna, 136 S. Ct. 305 (2015) (per curiam), Needham contends that existing precedent did not place 'the conclusion that [he] acted unreasonably in these circumstances "beyond debate."'. . . In *Mullenix*, the Court held that the broad propositions articulated in *Garner* and *Graham*—that an officer may not use deadly force against a fleeing felon who does not pose an imminent threat—were insufficiently specific to clearly establish whether it was objectively unreasonable for the officer in question to shoot at the fleeing suspect's vehicle from an overpass, notwithstanding that other officers had set up spikes nearby, and the officer had reportedly been told to 'stand by.'. . There, however, the officer had far more information about the imminent threat posed by the fleeing suspect, who led officers 'on an 18-minute chase at speeds between 85 and 110 miles per hour,'. . . was reportedly intoxicated, 'twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer,'. . . . Thus, in that case, there was no question that a reasonable officer could have perceived an imminent threat of danger. However, where, as here, the facts viewed in the light most favorable to the plaintiff permit a finding that a reasonable officer would not have perceived *any* imminent threat to himself or others, the broader propositions of *Graham* and *Garner* suffice to clearly establish the right at issue. . . Moreover, this circuit's decision in *Cupp* addressed similar factual circumstances, thereby clearly establishing the right at issue in this case. . . Further, although 'qualified immunity protects actions in the "hazy border between excessive and acceptable force,"'. . . '[t]here need not be a case with the exact same fact pattern or even "fundamentally similar" or "materially similar" facts,' in order to find an officer is not entitled to qualified immunity. . . . Rather, 'the *sine qua non* of the "clearly established" inquiry is "fair warning."'. . . Officers have fair warning that they may not use deadly force against a fleeing suspect where that person presents no imminent danger to the officer or others in the area. Because the video does not conclusively show whether that was the case here, Needham is not entitled to qualified immunity based on the video alone.")

Lewis v. Charter Township of Flint, 660 F. App'x 339, 347-49 (6th Cir. 2016) (Batchelder, J., dissenting) ("At the heart of the majority's analysis is its conclusion that, 'Viewed in the light most favorable to Lewis, a jury could conclude from the video that a reasonable officer would not have believed [that Officer Needham] or anyone else was ever in danger.'. . *No one* was *ever* in danger? That is not the video I have reviewed.To begin with, it is simply not true that, as majority puts it, 'the video does not clearly show that Lewis "targeted" Needham when he accelerated the vehicle and attempted to flee.'. . What it actually shows is that, after he perceived that Lewis was clambering *over the seat back from the back seat into the driver's seat*, Officer Needham began to run in front of the car to stop Lewis from escaping, drawing his weapon. At the moment Lewis began driving forward, the road ahead of him was clear of obstacles and traffic with the exception of the presence of Officer Needham. Then, the video shows with a clarity that no reasonable juror could ignore that, as Lewis was accelerating, Needham was moving *out* of the car's path, eventually exiting it, at which point Lewis swerved *toward* him. If swerving a car at someone is not 'targeting,' I do not know what is. . . . [E]ven if it were true that *Williams* is not on point, and even if a reasonable jury could conclude that any threat to those in the vicinity had dissipated by the time Officer Needham entered the comparative safety of being beside the swerving car rather than in its immediate path, the fact remains that he opened fire less than *one second* after he had

escaped from what can only be described as mortal peril. There is thus no basis for the majority's conclusion that Officer Needham violated the Constitution because, even accepting this construction of the facts, the decision to shoot was not unreasonable—it would be a quintessential example of 'a dangerous situation [that] evolved quickly to a safe one before the police officer had a chance to realize the change.'. . The majority stresses the fact that Needham lowered his gun as having some significance on this point. But they ignore the context: the video, again with indisputable clarity, reveals that Needham lowered his weapon and began moving out of the car's path as soon as Lewis began driving away and that he raised it again *only after* Lewis began to swerve toward him. Unlike *Cupp* and *Godawa*, which both involved material disputes about what exactly happened at the critical moments, . . . there is nothing murky or indeterminate about the video that could be construed in the plaintiff's favor here. Unlike *Cupp*, this is not a case where a reasonable jury could conclude that the officer was 'running towards the ... car' at the time he opened fire. . . Nor would anyone conclude that Officer Needham 'was never in the line of flight' and, hence, was 'never in any danger.'. . And unlike in *Godawa*, there is nothing in the record suggesting that Needham 'initiated the contact' between himself and the car, that the car 'did not drive in a manner that endangered [his] life,' or that he 'was effectively chasing' the car at the time he opened fire. . . These distinctions matter, and we are wrong to ignore them. Contrary to the majority's apparent preference here, the fact that an officer put himself in harm's way does not mean that his actions were therefore objectively unreasonable. . . Indeed, all else being equal, the decision to stand with gun drawn in front of a stationary vehicle whose driver appears to be getting ready to flee is not a constitutional violation, much less a clearly established one. . . Officer Needham's split-second decision to shoot did not violate Lewis's right to be free from excessive force. He—along with all except those who are 'plainly incompetent or ... knowingly violate the law'—is therefore entitled to qualified immunity. . . In refusing to grant such immunity here, the majority adds confusion not only to law of this circuit, but also to the difficult task faced by law enforcement in applying what we say is clearly established law. How exactly we expect them to conform their actions to the rule purportedly applied in this case is beyond me. I suppose they will conclude that they must stand idly by, obstructing would-be escapees with nothing more than entreaties to stop. That is not the law, nor should it be. The district court's order denying summary judgment in Officer Needham's favor should therefore be reversed.")

Jennings v. Fuller, 659 F. App'x 867, 871 (6th Cir. 2016) ("[A]s the officers point out, we analyze excessive force claims temporal segment by temporal segment. *See Claybrook v. Birchwell*, 274 F.3d 1098, 1104 (6th Cir. 2001). Thus, the fact that the initial takedown was clearly unconstitutional does not mean that all the officers' subsequent actions are *ipso facto* not protected by qualified immunity. In another circumstance, the officers might have a winning point. But after carefully reviewing the video evidence, we conclude that we cannot neatly separate the objectively reasonable wheat from the clearly unconstitutional chaff—the officers' actions and decisions fit together into a single, fluid incident that began and ended with what a reasonable jury could easily conclude were violations of Jennings's clearly established constitutional rights. A jury, not a court, will be better situated to disentangle what was and what was not excessive force. We therefore

affirm the district court's decision to deny the officers' request for qualified immunity and remand for further proceedings.")

Getz v. Swoap, 833 F.3d 646, 653-56 (6th Cir. 2016) ("[W]e have never held that an officer's failure to check for tightness or double lock handcuffs at the moment of arrest is, *per se*, excessive force. The analysis is, as always, fact specific and based on the totality of the circumstances. . .We hold that, given the arrestee's resistance and general noncompliance, Swoap did not violate the Fourth Amendment when he applied handcuffs without checking for tightness and double locking at the moment of arrest. Qualified immunity applies to this claim. . . . The analysis differs once an arrestee has complained that the handcuffs are too tight. In general '[t]he Fourth Amendment prohibits unduly tight or excessively forceful handcuffing during the course of a seizure.'. . In order for a handcuffing claim to survive summary judgment, a plaintiff must offer sufficient evidence to identify a genuine issue of material fact that (1) he complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced 'some physical injury' resulting from the handcuffing. . . .Our excessive-force-handcuffing cases almost exclusively involve plaintiffs who were compliant and gave officers no reason to delay responding to their complaints, and we have always noted such compliance. . . .Even cases in which a noncompliant arrestee resists or flees fail to provide much guidance to officers in defining the contours of the right to be free from excessively tight handcuffing. In many of those cases we found no violation either because officers immediately responded when the arrestee complained, *see, e.g.*, *Burchett*, 310 F.3d at 945, or because the arrestee failed to complain at all, *see, e.g.*, *Lyons v. City of Xenia*, 417 F.3d 565, 576 (6th Cir. 2005). Because these claims would have failed even if the plaintiff were compliant, we did not opine as to what effect noncompliance would have on the analysis. To the extent we have addressed cases in which an arrestee disobeys an officer, we have noted that in excessive force cases the fact of noncompliance amounts to a 'critical difference' and accordingly condoned greater use of force than we would have had the arrestee been compliant. . . .Here, it is undisputed that Getz attempted to flee, resisted arrest, belligerently continued to disobey orders after his arrest, and continued to address Swoap with abusive language. Our cases indicate that Swoap was entitled to some additional leeway in his approach to Getz as an arrestee. We hold that a reasonably competent officer could conclude that Swoap's actions were lawful. He is therefore immune from suit. . . .Recent decisions such as *Baynes v. Cleland* are not to the contrary. . . In that case we attempted to clarify the line between factual questions for the jury (the reasonableness of an officer's actions) and the question whether a right is clearly established. *Baynes* reversed a district court's grant of summary judgment based on qualified immunity, holding that 'the district court turned the factual determinations best left to the jury into factors militating in favor of qualified immunity.'. . That is not the case here. Our focus here is not on the facts, but on the dearth of law putting an officer on notice that his treatment of a belligerent and noncompliant arrestee is unlawful. . . . Even viewing the facts in the light most favorable to Plaintiff, it is clear that Getz was in handcuffs *and compliant* for a very short period of time before the handcuffs were removed. We conclude that, considering Getz's noncompliance, none of our precedents would have put Swoap on notice that his conduct violated the Fourth Amendment. Swoap is entitled to qualified immunity for the maintenance of Getz's handcuffs.")

Thompson v. City of Lebanon, 831 F.3d 366, 371-72 (6th Cir. 2016) ("A substantial portion of the officers' brief focuses on the insufficiency of the evidence before the district court to create a material issue of fact. They claim that the evidence showed that Officer McKinley's shot was accidental, and that no evidence showed that Thompson submitted to the officers' authority. They challenge the district court's observation that Thompson may not have been conscious. We lack jurisdiction to review these arguments. Nevertheless the officers raise three legal issues which we can decide on the basis of the plaintiff's version of the facts as recognized by the district court. On each issue, we affirm the district court's denial of summary judgment. The first legal issue is whether Officer McKinley seized Thompson. . . .On these facts Officer McKinley's shot, leading as it did to Officer McDannald's shots, 'had the intended effect of contributing to [Thompson's] immediate restraint,' and under *Floyd* this was a seizure. . . It does not matter that the plaintiff has admitted that Officer McKinley's bullet did not hit Thompson. . . The district court correctly applied *Floyd* to the plaintiff's version of the facts, and we affirm the district court's denial of summary judgment on this issue. The second legal issue is whether Officer McKinley's actions—as described by the plaintiff's evidence—were objectively unreasonable, and whether the law clearly established that unreasonableness at the time of the incident. Again, on the plaintiff's version of the facts, the answer to both questions is 'yes.' The officers concede that 'Thompson made no efforts to flee the vehicle, and that[ ] the total time during which McKinley exited his vehicle, ran towards the crash site, descended the embankment, gave Thompson two commands, and wielded and discharged his weapon was less than fifteen seconds.'. . And as we have already noted, the plaintiff presented evidence that Officer McKinley fired his weapon intentionally. It is clearly established that using deadly force against a suspect who does not pose a threat to anyone and is not committing a crime or attempting to evade arrest violates the suspect's Fourth Amendment rights. . . .The third and final legal issue presented on appeal is whether Officer McDannald's actions were objectively unreasonable, and whether the law was clearly established. Again, looking at the plaintiff's version of the facts, we affirm the district court's denial of qualified immunity. If a jury were to believe the plaintiff's version of the events, it could find that a reasonable officer would have been on notice that firing thirteen rounds into Thompson's vehicle and person violated his Fourth Amendment rights 'when Thompson had been seen to do nothing more than flee from police during the vehicular pursuit for potential driving under the influence.'")

Rucinski v. County of Oakland, 655 F. App'x 338, 342-43 (6th Cir. 2016) ("Rucinski asks us to ignore our 'segmented approach' to analyzing Fourth Amendment excessive force claims, whereby we are required to evaluate the reasonableness of officers' use of force by focusing on the moments immediately preceding that use of force, *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007), and not on the adequacy of planning or the length of time spent thinking through the problem at hand. Rucinski asks us to consider instead whether the deputies' lack of full investigation, poor planning, and alleged bad tactics in initiating contact with Rucinski either provoked Rucinski or created the circumstances that led to Beltz and McCann's use of force. Rucinski argues that we should abandon the 'segmented approach' because it improperly operates to protect officers that proactively create a need for force that would not have otherwise existed,

and reminds us that other circuits have adopted approaches that scrutinize whether officers created a provocation or other circumstances that led to officers' subsequent use of deadly force. . . .Although this may present a close question and send more excessive force cases to the jury for trial, *see, e.g.*, *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (stating that jury properly considered "events leading up to the shooting" in an excessive force case), we may not disregard this Court's long-standing practice of analyzing excessive force claims in segments. *See, e.g.*, *Lubelan*, 476 F.3d at 406 ("The proper approach under Sixth Circuit precedent is to view excessive force claims in segments."); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996) (using the segmented approach to analyze an excessive force claim). And in any event, even if we were able to consider whether the deputies, through their lack of planning and alleged bad tactics in initiating contact with Rucinski, created circumstances that led to McCann's use of deadly force, the Supreme Court has recently weighed in on this very issue, stating that plaintiffs 'cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.' *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. —, 135 S. Ct. 1765, 1777 (2015) (internal quotation marks omitted) (applying without adopting the Ninth Circuit law in *Billington*, 292 F.3d at 1190).")

[On segmenting approach, *see also* ***Scozzari v. City of Clare***, 653 F. App'x 412, 419-21 (6th Cir. 2016) ("In our circuit, we 'view excessive force claims in segments.'. . Time-frame 'is a crucial aspect' of segmentation. . . 'We measure the reasonableness of the use of deadly force at a particular time based on an objective assessment of the danger a suspect poses *at that moment.*' *Mullins v. Cyranek*, 805 F.3d 760, 766 (6th Cir. 2015) . . . Consequently, '[w]here the events preceding the shooting occurred in close temporal proximity to the shooting, those events have been considered in analyzing whether excessive force was used.'. .In *Dickerson v. McClellan* for instance, the decedent's estate brought two § 1983 claims, one for the officers' violation of the knock-and-announce rule, and another for their use of excessive force once inside the home. . . Like plaintiff Scozzari, the *Dickerson* plaintiffs claimed 'the officers should be held accountable for creating the need to use excessive force by their unreasonable unannounced entry.'. . We disagreed. 'Although both claims are premised on Fourth Amendment violations, the violation of the knock and announce rule is conceptually distinct from the excessive force claim.'. . . Plaintiff's proposed instruction—that the jury consider whether defendants' 'actions unreasonably add[ed] to, or increase[d], the risk that force might be used'—runs contrary to *Dickerson* and the cases that follow it. . . .The district court's instructions properly focused on that question. First, the court 'identif[ied] the "seizure" at issue,'—i.e., the apprehension of Scozzari. . . Then, as dictated in *Livermore* . . . and *Dickerson*, . . . the court asked the jury to examine whether 'the force used to effect that seizure'—in this case, lethal force—was 'objectively unreasonable in light of the totality of the circumstances that existed,' 'at the door of Cabin 17 on September the 18th, 2007, ... and not the events that preceded that circumstance.'. . . The alleged excessive force plaintiff claims defendants used in this case was lethal force, and only lethal force. Plaintiff failed to raise claims concerning any excessive force used prior to the shooting until *Scozzari II*. Thus, in response to the jury's questions, the district court correctly instructed that '[w]hile you may consider the events that occurred in close proximity' to the deadly force, 'the question framed for you'—as plaintiff

chose to frame it—'only relates to the officers' decision to use lethal force.'. . . Plaintiff contends that the court's instructions are out of step with *Claybrook v. Birchwell*, 274 F.3d 1098 (6th Cir. 2001), a case involving officers who mistook the armed decedent for a robber and shot him while he escorted his daughter-in-law outside of the store where she worked. . . . *Dickerson*, the court explained, required separation of the first segment, despite the fact that the officers approached Claybrook 'in clear contravention of Metro Nashville Police Department policy.'. . The second and third segments, by contrast, had to be considered together because 'the plaintiffs brought suit to contest *all* use of deadly force against their deceased father, not only the shot that took his life.'. . Regardless of whether the second round of fire was justified after Claybrook ran behind the steps and took aim at the officers, 'the defendants cannot ignore the fact that the shots were fired at Claybrook twice on the night in question.'. . How plaintiff believes *Claybrook* advances his claim to a new trial is unclear. Rather, we agree with the district court's assessment: 'As applied here, *Claybrook* only reinforces the legal authority for segmenting the incidents occurring at the door of Cabin 17 from those that took place before. The Officers' approach to the cabin and their attempt to open the door were not applications of deadly force, and so *Claybrook* does not require their consideration when determining whether the eventual application of deadly force was reasonable.' The events in this case are also more easily divided than those in *Claybrook* because plaintiff divided them. Here, in *Scozzari I*, plaintiff disputes only defendants' use of lethal force against Scozzari. He failed to raise claims relating to their use of non-lethal force until the later-filed *Scozzari II*. Directing the jury to consider 'the circumstances at the door of Cabin 17' where defendants actually initiated the use of deadly force, 'and not the events that preceded that circumstance,' is therefore consistent with *Claybrook* and the manner in which plaintiff presented his claims. We are hard pressed to find fault with the district court's reminder that 'the question framed for you only relates to the officers' decision to use lethal force,' when plaintiff did the framing. Finally, plaintiff relies on our observation in *Kirby v. Duva*, that '[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.' 530 F.3d 475, 482 (6th Cir. 2008). He takes this statement out of context. While reviewing the district court's denial of qualified immunity, the *Kirby* court reached this conclusion after pointing out that 'no one was ever in danger under the facts as presented by [the] plaintiffs.'. . Indeed, immediately before the above statement, the court remarked that '[e]ven in this final position ... [the defendant officer] was still two feet to the [vehicle's] side, and thus not in its path.'. . *Kirby* stands only for the proposition that an officer should refrain from applying deadly force in the absence of a risk of harm to himself or others—it does not raise a question over the district court's segmentation.")**]**

Kelly v. Sines, 647 F.3d 572, 576-77 (6th Cir. 2016) ("Kelly argues that Sines acted unreasonably by tasing him because he was restrained by his seatbelt during the entire incident. But when Sines fired his taser, it was not at all clear that Kelly was still wearing his seatbelt. After Sines removed Kelly from the truck, Kelly immediately sprang up to his feet on the pavement of the road outside of the truck, and a reasonable officer making a split-second judgment could have concluded, mistakenly, that Kelly's seatbelt was unfastened. It was only after Sines tried to pull Kelly to the ground for the second time that he appeared to realize that Kelly was still being restrained by his

seatbelt. Kelly also argues that when he stood up outside the truck, he was attempting to comply with Sines's orders. However, even if we assume that Kelly had no intention of harming or resisting Sines, Sines had no idea what Kelly's subjective intentions were at the time Kelly stood up. Perhaps Kelly stood up because he wanted to untangle his seatbelt, but perhaps he wanted to attack Sines. A reasonable officer acting in the heat of the moment would not have known what Kelly was going to do next, given his erratic behavior inside the truck. As such, it was not unreasonable for Sines to use a taser to subdue Kelly. . . Kelly's final argument with respect to Sines is that Sines's second firing of his taser was unjustified. . . After Sines first used his taser on Kelly, he told Kelly three times to get on the ground, before saying, 'I'll do it again!' Kelly did not get on the ground, and at no point did Kelly give any indication that he was trying to—or was unable to—comply with Sines's orders. Given Kelly's noncompliance, and the fact that Sines was standing in the middle of a lane on the highway, a reasonable officer making a split-second decision could have thought that Kelly posed enough of a threat to warrant a second use of the taser. In light of the rapidly unfolding and potentially dangerous situation, Sines's second firing of his taser was not unreasonable. In hindsight, Deputy Sines's actions seem excessive, given that Kelly was restrained by his seatbelt during the entire incident. But the Fourth Amendment does not require us to scrutinize officers' actions 'with the 20/20 vision of hindsight.'. . While Sines's split-second judgment may have proved wrong, his mistake was one that a reasonable officer could have made, given the 'tense, uncertain, and rapidly evolving' circumstances. . . As such, his conduct did not violate the Fourth Amendment, and he is entitled to qualified immunity.")

Rush v. City of Lansing, 644 F. App'x 415, 422-25 (6th Cir. 2016) ("In the time since the district court issued its decision, we decided two cases clarifying Sixth Circuit law with regard to the reasonableness of deadly force. *See, e.g., Mullins,* 805 F.3d 760; *Pollard,* 780 F.3d 395. *Mullins,* in particular, is persuasive here, as we held that it was not unreasonable for an officer to fire two shots in the five seconds *after* a suspect was no longer a threat. . . . Turning to this case, once the relevant facts are determined and all reasonable inferences are drawn in favor of the plaintiff, 'the question whether the [officer]'s actions were objectively unreasonable is a "pure question of law."'. . The district court based its conclusion that Clay no longer posed a threat, and that therefore Officer Rendon's actions were objectively unreasonable, on a number of facts. Clay was 'very small,' approximately 5′4″ and 125 pounds, and was seventeen years old. She was on her knees and about a foot out of arm's reach. She had just been shot in the stomach, and the police outnumbered her three-to-one. Following the first shot, Clay moved either forward or backward, but made no further moves to stab or injure any of the officers. But that is not all the record shows. The officers were in a confined space (a small room in a dark bank) with Clay. The second shot occurred just after Clay unquestionably *did* pose a threat by slashing at Rendon with a knife, and the second shot occurred very shortly after the first. Whether Clay slumped forward or backward following the first shot, there was no clear or unmistakable surrender, or any other action that would compellingly show that the threat had abated. Moreover, Clay's assault with the knife—a knife she produced unexpectedly from inside her coat—occurred after the officers had subdued and apparently disarmed her of her scissors from her first assault, and was accompanied by her misleading pleas of 'I'm sorry, I'm sorry.' Taking all of the record facts into account, Rendon was

justified in remaining apprehensive of further deception and threat from Clay. Thus, it was not unreasonable for Officer Rendon to continue using deadly force. . . . Based on the record evidence, it was not unreasonable for Rendon to perceive Clay as still posing a threat when he fired the second shot, even if he was ultimately mistaken in making a split-second assessment. We therefore hold that Rendon's use of deadly force was not objectively unreasonable under the circumstances and that no constitutional violation occurred. . . .Moreover, the right here was not clearly established in light of the many cases, including cases in our circuit, where courts have held that it was not unreasonable for officers to continue using deadly force—even mistakenly—when the officer had been faced with a severe threat in a rapidly-changing situation seconds before and the circumstances did not indicate that the threat had abated. . . Absent controlling authority, we require 'a robust consensus of cases of persuasive authority' to constitute clearly established law. . . We lack controlling authority here, and any robust consensus of cases is manufactured at too high a level of generality. Accordingly, we hold that Rendon did not violate a clearly established constitutional right.")

Rush v. City of Lansing, 644 F. App'x 415, 425-27 (6th Cir. 2016) (Stranch, J., dissenting) ("Derrinesha Clay was 17 years old at the time of her death. The district court found that when police officers first discovered Clay—'a very small woman at approximately 125 pounds and 5′4″ in height'—hiding in a storage closet and holding a pair of scissors, Clay 'was frantic, shaking, and saying "I'm sorry, I'm sorry."'. . The court further found that when Officer Brian Rendon later fired a bullet into Clay's head, killing her, Clay was 'on her knees more than [an] arm's length from Defendant Rendon. She had just been shot in the stomach. She was outnumbered three-to-one by the police.'. . And, '[a]ccording to two police officers,' she 'made no sudden moves to stab or otherwise injure an officer or herself.'. . Officer Rendon testified, by contrast, that after he shot Clay in the stomach she lunged at him with a knife which is why he shot her a second time. . . .I am therefore inclined to agree with the district court in the present case that, construing the facts in the light most favorable to plaintiff, as we must, any reasonable officer would have known that shooting Clay in the head when she did not pose an immediate threat and was not actively resisting violated her right to be free from excessive force. Finally, our circuit recognizes that in the 'typical' qualified immunity case, 'we defer to the district court's factual determinations' and 'ideally ... look no further than the district court's opinion for the facts and inferences cited expressly therein.'. . Derrinesha Clay is not alive to contest the timing of the two shots Officer Rendon fired into her body. And the district court declined to draw any inferences in Officer Rendon's favor based on his and his fellow officers' testimony that the two gunshots were very close together, determining instead that there existed disputes of material fact among the officers regarding Clay's actions in the time intervening between the shots. The district court's approach adheres to our precedent, which holds that when determining qualified immunity in cases where the witness most likely to contradict a defendant officer's story is the person shot dead, we ' "may not simply accept what may be a self-serving account by the police officer."'. . Instead, we ' "must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story[.]"'. . Some of the evidence tending to discredit Officer Rendon's account of Clay's threatening behavior comes from his fellow police officers present at the scene. On this record, I

would defer to the district court's determination that summary judgment is inappropriate in this case.")

Coitrone v. Murray, 642 F. App'x 517, 520-22 & n.2 (6th Cir. 2016) ("The district court properly determined that Coomes's use of force did not violate Coitrone's Fourth Amendment rights. Assuming that Coomes intentionally struck Coitrone's motorcycle, Coomes's use of force was objectively reasonable because the governmental interest in ending the immediate and substantial risk that Coitrone's flight posed to the public outweighed the substantial intrusion that Coomes's use of force imposed upon Coitrone's Fourth Amendment rights. . . .Even though 'intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force,'. . . and the intrusion imposed on Coitrone's Fourth Amendment interests was substantial, the governmental interest in ending Coitrone's flight outweighed this intrusion because the undisputed facts establish that his flight posed a substantial and immediate danger to the public. In *Scott v. Harris*, the Supreme Court held that law enforcement's use of force that poses 'a high likelihood of serious injury or death' to a fleeing individual is reasonable when that force is used in an attempt to terminate a chase that poses 'a substantial and immediate risk of serious physical injury to others.'. . .The undisputed facts establish that Coitrone, similar to the plaintiff in Scott, drove recklessly during the pursuit by driving his motorcycle as fast as 65 to 70 miles per hour, exceeding the speed limit by as much as 25 miles per hour, crossing the double-yellow line, and driving in the left lane of a two-lane road in order to pass vehicles traveling in the right lane. The undisputed facts also establish that Coitrone's reckless driving, like the actions of the plaintiff in Scott, posed an immediate and substantial danger to the safety of innocent bystanders because portions of the chase occurred in areas in which other drivers and pedestrians were present. Accordingly, the undisputed facts establish that Coomes's use of potentially deadly force against Coitrone was objectively reasonable because Coitrone, like the plaintiff in Scott, initiated a chase that posed a 'substantial and immediate risk of serious physical injury to others.'. . . Coitrone contends that he did not pose an immediate threat to others because at the time that the collision occurred 'heavy traffic ... made any further flight by Coitrone obviously impossible and required Coitrone to begin slowing to a stop.' This assertion fails because unlike the collision in *Walker,* which occurred in the middle of the night on an empty field, the collision here occurred on a Sunday morning near a church at which pedestrians and other drivers were present. Further, prior to the collision, Coitrone had exhibited a willingness to endanger others by driving recklessly in order to evade the police. A reasonable officer in Coomes's position would therefore be justified in believing that Coitrone might seriously injure these innocent bystanders by continuing to drive recklessly even though Coitrone had slowed down before he was struck. Accordingly, Coitrone's reliance on *Walker* is misplaced because Coitrone, unlike the motorcyclist in *Walker,* posed a substantial and immediate danger to innocent bystanders at the time of the collision. Coitrone also claims that Coomes's alleged violations of KSP policy during the pursuit establish that Coomes's use of force was objectively unreasonable. This argument fails because even if Coomes violated KSP policy during the pursuit, Coomes's violations of KSP policy would not establish that his use of force was unconstitutional. . . .Because Coomes did not violate Coitrone's constitutional rights, we do not reach the issue of whether Coomes is protected from liability by the doctrine of qualified immunity,

except to note the Supreme Court's recent observation that the 'Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity.' *Mullenix v. Luna,* 136 S.Ct. 305, 310 (2015).")

Kent v. Oakland Cty., 810 F.3d 384, 392-97 (6th Cir. 2016) ("Citing *Eldridge v. City of Warren,* 533 F. App'x 529 (6th Cir.2013), the deputies insist that Kent was actively resisting arrest because he refused to comply with their commands to calm down and demonstrated 'verbal hostility.'. . After comparing and contrasting taser cases from this circuit, the *Eldridge* court noted that active resistance could be characterized as 'noncompliance' that is coupled with 'some outward manifestation—either verbal or physical—on the part of the suspect [that] suggest[s] volitional and conscious defiance.'. . . Kent never attempted to flee officers, and he never attempted to prevent officers from handcuffing him. Rather, much like the claimant in *Goodwin,* who, like Kent, refused to comply with an officer's command and verbally indicated as much, Kent's conduct does not resemble the 'continued resistance and hostility' often present in our active resistance cases[.] . . . Here, the deputies knew they were responding to a natural death investigation and were aware that Kent's father had just passed away some fifteen minutes before they arrived. . . They were also well aware—perhaps most importantly—that the entire incident occurred in Kent's home, one of the most sacred of spaces under the Fourth Amendment's protections. . . Of course, officers are not precluded from using reasonable force in that setting, and it can sometimes be justified in the face of active resistance or an immediate threat to the safety of officers or others. . . Those circumstances, however, were largely absent when Kent was tased in his guest bedroom. Carefully balancing the unique facts presented in this totality-of-the-circumstances analysis, we conclude that 'the nature and quality of the intrusion on [Kent's] Fourth Amendment interest[s]' outweighs 'the countervailing governmental interests at stake.'. . Deputy Lopez's use of a taser was objectively unreasonable here. . . .[W]e turn to whether, in September 2013, it was clearly established that it was excessive force to tase an individual who refused to comply with officers' commands to calm down and yelled at emergency responders, but was never told he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased. Under recent precedent assessing the state of the law in 2010, we must answer that question in the affirmative. It is clearly established in this Circuit that 'the use of a Taser on a non-resistant suspect' constitutes excessive force. . . Conversely, it is also clearly established that tasing a suspect who 'actively resists arrest and refuses to be handcuffed' does not violate the Fourth Amendment. . . Relying again on *Eldridge's* statement that active resistance involves 'noncompliance ... paired with [ ] signs of verbal hostility,' *Eldridge,* 533 F. App'x at 535, the deputies argue it was clearly established that Kent's failure to comply with commands to calm down amounted to 'physical defiance' and his shouts at the deputies and EMTs amounted to 'verbal belligerence,' such that he was 'actively resisting arrest.' But in *Goodwin,* we recently rejected that very argument. Instead, we held that, as of June of 2010, it was clearly established that the use of a taser in response to very similar behavior—refusing to comply with commands to leave an apartment and saying as much to officers, when the claimant was never told he was under arrest and posed little safety threat to officers—constituted excessive force. . . If the claimant in *Goodwin* had a clearly established right to be free from the use of a taser in 2010, then it must be

said that Kent had the same clearly established right in September 2013. . . .Accepting Kent's version of the facts and based on the law before us, we must conclude that Kent—a man who yelled at officers and refused to comply with commands to calm down, but was never told that he was under arrest, never demonstrated physical violence, and had his arms in the air and his back to the wall when tased—had a right to be free from the use of a taser under these circumstances, and in September 2013, ' "t]he contours of [that] right [were] sufficiently clear"' to the deputies. In his thoughtful dissent, Judge Suhrheinrich suggests that we should look to guidance in the Eleventh Circuit with respect to the facts that give rise to a constitutional deprivation. But surely it demands too much from law enforcement personnel to be aware of the 'clearly established' holdings of other circuits. Where Sixth Circuit law is clear, it controls. [citing *Higgason*]")

Kent v. Oakland Cty., 810 F.3d 384, 398-402 (6th Cir. 2016) (Suhrheinrich, J., dissenting) ("Because I believe the majority analyzes the deputies' conduct through the lens of hindsight in denying them qualified immunity, I dissent. . . . Neither *Caie* nor *Goodwin* . . . establishes that Kent's aggressive and arguably threatening behavior posed mere passive resistance. Although Kent was not intoxicated, did not threaten the officers or EMTs with physical harm, and did not run from the police like the plaintiff in *Caie,* his behavior was equally volatile. He obstructed emergency medical treatment, disobeyed the officers' orders when they attempted to allow the EMTs to perform their duties, placed the EMTs in fear of violence, and goaded the police officers into using physical force. . . Reacting to the perceived medical emergency and the threat of physical interference with medical personnel, Deputy Lopez reasonably used a single five-second Taser cycle to deescalate Kent's aggression and restore order[.] . . . An Eleventh Circuit case presents a closer factual scenario to this case than either *Caie* or *Goodwin* and confirms that Deputy Lopez's decision to tase Kent did not violate the Constitution. [discussing *Draper v. Reynolds*] Here too, Kent was hostile and uncooperative, accused both the EMTs and officers of 'assault[ing]' his father, ignored repeated commands to calm down and exit the room, and yelled at everyone around him. As *Draper* indicates, just because Kent was not told he was under arrest, never expressly threatened to use violence, and never physically resisted the officers does not mean he could disobey and verbally antagonize the officers with impunity. Notably, the majority does not suggest what Deputy Lopez should have done instead of tasing Kent. A key reason judges should give deference to officers' judgment in difficult scenarios like this one is the inability of courts to recommend an alternative course of action for police officers. . . . Kent's irate overreaction created a stressful, difficult situation that forced Deputy Lopez to make a split-second, perhaps imperfect, but nevertheless reasonable judgment to subdue Kent by tasing. Kent should not be allowed to recover now because he believes Deputy Lopez's judgment was mistaken. Because I find Deputy Lopez's use of the Taser to subdue Kent did not violate the Constitution under the version of facts most favorable to Kent, I would reverse the district court's denial of qualified immunity to Deputies Lopez and Maher.")

Foster v. Patrick, 806 F.3d 883, 887-90 (6th Cir. 2015) ("The ultimate question is whether Patrick had an objectively reasonable belief that Foster posed an imminent threat of serious physical harm to him or others when he shot Foster. . .If the answer is no, then the use of deadly force violated

Foster's Fourth Amendment right. . . According to Leonard, Foster had assaulted a police officer without using a weapon; the struggle between Patrick and Foster had terminated; and Foster was fleeing at the time Patrick shot her. '[W]hile such action by a suspect justifies force, it does not justify *deadly force,* especially when the struggle has concluded and the suspect is in flight.'. . The facts viewed in the light most favorable to Leonard demonstrate that Patrick may have shot Foster before she stole the police cruiser. However, even assuming Foster committed a second crime by stealing the cruiser before she was shot, this action alone does not justify Patrick's use of deadly force. *See Smith v. Cupp,* 430 F.3d 766, 773 (6th Cir.2005) ("Although there was some danger to the public from [the suspect's] driving off in a stolen police car, the danger presented by [the suspect] was not so grave as to justify the use of deadly force."). Even without the benefit of hindsight, a jury could reasonably conclude that neither Patrick nor anyone else was in danger when he shot thirteen or fourteen rounds at Foster—eight of which actually struck Foster. . . . Even assuming that Foster assaulted Patrick, Foster had ceased that conduct and was attempting to flee when Patrick shot her. No one was in Foster's line of flight when she fled in the police cruiser. Finally, Patrick argues that Foster had access to two deadly weapons inside the police cruiser: a loaded shotgun above the driver's seat and a loaded rifle in the trunk. But nothing from the facts suggests that Foster knew about the weapons in the police cruiser or attempted to gain access to either of them. Furthermore, this court has previously acknowledged the danger presented when a suspect 'driv[es] off in a stolen police car,' but has concluded that such danger, without more, is 'not so grave as to justify the use of deadly force.' *Cupp,* 430 F.3d at 773. Moreover, 'the officer must have reason to believe that the car presents an imminent danger.' *Id.* at 775. Here, viewing the facts in the light most favorable to Leonard, Patrick did not have reason to believe that Foster would use the police cruiser or the weapons in compartments inside the cruiser to injure anyone. . . . [H]ere, unlike in *Plumhoff,* this circuit's precedent establishes with sufficient particularity that under the facts herein, Patrick could not shoot Foster as a suspected felon who was unarmed. Furthermore, there is a factual dispute about how violent the encounter between Patrick and Foster was *prior* to Foster's flight and Patrick's decision to shoot Foster. Finally, '[n]o subsequent controlling precedent has diminished the clarity of *Cupp's* holding or its applicability to the present case.' *Godawa,* 798 F.3d at 468. Because the violent encounter between Foster and Patrick had concluded and Foster was merely fleeing in a police cruiser without any indication that she would harm Patrick or anyone else with the cruiser when she was shot, *Cupp* and *Bouggess* clearly establish Foster's Fourth Amendment rights. . . .In sum, genuine disputes of material fact exist regarding the events that occurred when Patrick shot Foster. Under Leonard's version of the facts, a reasonable juror could conclude that Patrick's use of deadly force violated Foster's clearly established constitutional rights under the Fourth Amendment. Therefore, the district court properly denied summary judgment.")

Mullins v. Cyranek, 805 F.3d 760, 766-69 (6th Cir. 2015) ("The question of whether it was reasonable for Cyranek to believe that Mullins posed a significant threat at the time Mullins was shot is the crux of this appeal. In excessive force cases, the threat factor is 'a *minimum* requirement for the use of deadly force,' meaning deadly force 'may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.'. . On appeal, Cyranek

concedes that he shot Mullins only after Mullins threw his gun, but he maintains that the confrontation unfolded in such rapid succession that he did not have a chance to realize that a potentially dangerous situation had evolved into a safe one. . . . Here, it is undisputed that within a five-second span, Mullins removed a previously concealed firearm without any direction from Cyranek to do so, threw the weapon over Cyranek's shoulder after being commanded to drop it, and was then shot at twice and struck once by Cyranek. Importantly, all of these events transpired in the early evening hours in a breezeway leading onto Fountain Square, a populated city square with shops, restaurants, hotels, and offices in downtown Cincinnati. . . . While Cyranek's decision to shoot Mullins after he threw his weapon may appear unreasonable in the 'sanitized world of our imagination,'. . . Cyranek was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable. . . The fact that Mullins was actually unarmed when he was shot is irrelevant to the reasonableness inquiry in this case. . . Because only a few seconds passed between when Mullins brandished his firearm and when Cyranek shot Mullins, a reasonable officer in the same situation could have fired with the belief that Mullins still had the gun in his hand. . . While hindsight reveals that Mullins was no longer a threat when he was shot, we do not think it is prudent to deny police officers qualified immunity in situations where they are faced with a threat of severe physical injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat. . . Our reasoning applies equally to both of the shots fired by Cyranek. We have previously held that '[w]hen an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.'. . Here, however, Cyranek's second shot did not come at a time after which a reasonable officer would think the threat had passed. . . . Here, we find that at the time he fired both shots, it was reasonable for Cyranek to perceive Mullins as a serious threat to himself and others. That conclusion, coupled with the other reasonableness factors compels us to conclude that Cyranek's use of deadly force was reasonable under the circumstances. Our opinion should not be taken to condone the whole of Cyranek's behavior. Indeed, we find some of Cyranek's conduct problematic, particularly his failure to alert any other officers before physically confronting Mullins, and his decision, following the shooting, to alter the scene by moving Mullins's gun closer to his body. However, these misjudgments are not relevant to his qualified immunity defense. As noted above, we must analyze the reasonableness of an officer's use of deadly force based on an 'objective assessment of the danger a suspect poses *at that moment.*'. . We cannot say that during the critical moments just after Mullins drew his gun Cyranek's actions were unreasonable. At a minimum, we believe that reasonable officers could disagree about what force was necessary in this situation. And, thus, we find that no constitutional violation occurred and that Cyranek is entitled to qualified immunity.")

Al-Lamadani v. Lang, 624 F. App'x 405, 416-18 (6th Cir. 2015) (Batchelder, J., concurring in part and dissenting in part) ("I concur with the majority on the unlawful-seizure and failure-to-train claims. As for the excessive-force claim, however, the lead opinion falls into the same trap as the opinion in *Morrison v. Board of Trustees of Green Township,* 583 F.3d 394 (6th Cir.2009): it conflates the two-step qualified immunity analysis. Because the Supreme Court has disavowed the former manner of handling these claims, in which a court's determination on the merits would

dictate the result on qualified immunity, this court must follow the Supreme Court's mandates rather than its own. A failure to do so creates a constitutional requirement for police officers to investigate every handcuff-related complaint. Because the majority's analysis contradicts the Supreme Court's clear guidance on the issue, reaching the wrong result in the process, I respectfully dissent. The majority roots its holding in both *Morrison* and the long line of cases on which *Morrison* relied 'in which [this court] held that an officer is not entitled to qualified immunity if the plaintiff has shown a factual dispute as to whether the plaintiff complained that the cuffs were too tight, the officer ignored the complaints, and the plaintiff was injured from the cuffs.'. . . In *Saucier v. Katz,* 533 U.S. 194 (2001), the Supreme Court mandated that courts must look at two distinct questions when determining whether an officer is entitled to qualified immunity: first, 'whether a constitutional right would have been violated on the facts alleged' and second, 'whether the right was clearly established.'. . .Thus, to the extent that *Morrison,* despite its being decided after *Saucier,* conflates the merits and the qualified-immunity inquiries, it is inappropriate to rely on that case as dispositive. And it appears that this is exactly what *Morrison* did. The court affirmed the district court's denial of qualified immunity because it ruled that '[Morrison] has offered sufficient evidence to create a genuine issue of material fact regarding each element of the handcuffing test.'. . This is precisely what the Supreme Court in *Saucier* held to be improper. Instead of *Morrison,* we should follow the *Saucier*-compliant precedent of *O'Malley v. City of Flint,* 652 F.3d 662 (6th Cir.2011). In that case, we noted that even when a plaintiff makes a sufficient showing to survive summary judgment on the underlying excessive-force claim, 'a defendant officer may still be entitled to summary judgment on the basis of qualified immunity if it would not be clear to a reasonable officer that he was violating the plaintiff's rights.'. . We further noted that 'our precedents fail to notify officers that any response to a complaint of tight handcuffing other than an immediate one constitutes excessive force.'. . The majority held that *Morrison* and the cases on which *Morrison* relied 'clearly establish that a plaintiff can make a showing of a constitutional violation based on evidence of the plaintiff's complaint, the officer's refusal to respond, and the plaintiff's injury.'. . This does exactly what *O'Malley* called unreasonable: it obligates all officers in the future to stop and investigate each and every utterance of discomfort, or else face the specter of a jury trial on an excessive-force claim. Because qualified immunity is meant to protect 'all but the plainly incompetent or those who knowingly violate the law,'. . forcing every officer who does not investigate every utterance of discomfort—no matter how miniscule the complaint or how little time has passed—to go to trial is plainly inappropriate. Instead, we must look to whether 'the contours of a right are sufficiently clear' that '*every* reasonable official would have understood that what he is doing violates that right.'. . .Here, we have a situation in which an officer handcuffed a man in his home for about fifteen minutes, the man complained just once that his handcuffs were too tight, and the handcuffs left a small red mark that bruised. The cases in which we have found qualified immunity inappropriate featured much more egregious facts. . . The cases in which we have found qualified immunity appropriate, on the other hand, were for shorter time periods or featured less noticeable injuries. . . While there are differences between our case and the cases in which qualified immunity was found appropriate—most notably that both *Fettes* and *Lee* featured a discrete time period for the handcuffing while the police car drove to the station, as opposed to our case where the handcuffing was seemingly

indefinite in the moment—our case is much more factually similar to *Fettes* and *Lee* than it is to the *Morrison* line of cases. . . . Because the time period was so short, the injury so small, and the complaint so minimal, a contrary holding would clearly establish exactly what *O'Malley* feared: a requirement that every officer investigate every utterance of discomfort. If qualified immunity does not protect Officer Lang, it protects no police officer from a jury trial on an excessive-force claim premised on handcuffing. The underlying excessive-force claim and the qualified-immunity inquiry have two different analyses in view. The underlying excessive-force claim asks whether Officer Lang was objectively unreasonable in his use of handcuffs, such that he violated al-Lamadani's constitutional rights. The district court denied summary judgment on that claim, holding that there was a genuine dispute of material fact as to the officer's reasonableness. The qualified immunity inquiry, however, asks a slightly, but significantly, different question. It asks whether every reasonable officer would have known that he was violating al-Lamadani's constitutional rights through the use of handcuffs in this factual situation. It cares about more than one officer's reasonableness; it looks to *every* officer's reasonableness. Because the majority conflated the two analyses, and because I believe that this situation falls at the very least in the 'hazy border' between excessive and acceptable force such that a reasonable officer would have thought himself not to be violating al-Lamadani's rights, I respectfully dissent from the majority's excessive-force ruling.")

Baynes v. Cleland, 799 F.3d 600, 611-16 & n.3 (6th Cir. 2015) ("In *Hope*, the Supreme Court established that, for purposes of qualified immunity, the precise factual scenario need not have been found unconstitutional for it to be sufficiently clear to a reasonable official that his actions violate a constitutional right—that is, for the right to be 'clearly established.'. . In fact, the Supreme Court determined that government officials can still be on notice that their conduct violates established law even in novel factual circumstances. . . .To be sure, the Supreme Court also has also explained that generalizations and abstract propositions are insufficient to establish the law clearly. . . .Reading these cases together, the Supreme Court has made clear that the *sine qua non* of the 'clearly established' inquiry is 'fair warning.'. . While it is apparent that courts should not define clearly established law at a high level of generality, it is equally apparent that this does not mean that 'a case directly on point' is required. . . In fact, under *Hope*, a requirement that a prior case be 'fundamentally' or 'materially' similar to the present case would be too rigid an application of the clearly established inquiry. . . Rather, 'existing precedent must have placed the statutory or constitutional question beyond debate,' *al-Kidd*, 131 S.Ct. at 2083, although the specific conduct need not have been found unconstitutional. . . Our task, then, is to determine whether the contours of the right at issue have been made sufficiently clear to give a reasonable official fair warning that the conduct at issue was unconstitutional. This test has been applied, both explicitly and implicitly, in our own jurisprudence. . . In applying this test, both pre- and post-*Hope*, we have found that freedom from excessively forceful or unduly tight handcuffing is a clearly established right for purposes of qualified immunity. . . .The extent of case law in this Circuit suffices to put a reasonable officer on notice that excessively forceful or unduly tight handcuffing is a constitutional violation under the Fourth Amendment. The cases in this Circuit place it beyond peradventure that such a right exists; thus, the law is sufficiently clear for the purpose of the clearly

established prong of the qualified immunity analysis. These cases define the right that is clearly established not at a high level of generality or on the basis of a broad historical proposition, . . . but rather, in a particularized context: excessively forceful or unduly tight handcuffing, a type of excessive force, is a type of Fourth Amendment violation, which, in turn, is a constitutional violation. This level of particularity in defining the constitutional right easily meets the standards set out by the Supreme Court, which requires that the contours of a right to be sufficiently clear under preexisting law. . . Although the court first found the constitutional right at issue clearly established in this Circuit, in its subsequent pursuit of what it called a 'more particularized inquiry,' it then determined that the law had not been clearly established, essentially because no prior case presented the exact factual circumstances present in this case. The factual nuances the district court noted to distinguish Baynes' case from this Court's extensive precedent on unduly tight handcuffing amount to precisely the kind of rigidity the Supreme Court foreclosed in *Hope. Hope* was unequivocal in mandating that precise factual similarity is not required . . . . In this case, under the guise of determining whether the law regarding excessively forceful handcuffing is clearly established, the district court essentially made a determination of whether it believed that Deputy Cleland's behavior was reasonable—in other words, whether the deputy should be *liable* for a claim of unduly tight or excessive handcuffing. But such a determination infringes on the province of the jury and is therefore improper. The trial court had already determined—appropriately so—that Baynes had adduced sufficient evidence to state a claim for excessively forceful handcuffing sufficient to survive a motion for summary judgment. Indeed, Baynes had established already that genuine issues of material fact exist as to whether the deputies acted objectively reasonably. Then, a few pages later, the district court decided that, based on its view of the facts, there was an 'absence of ... egregious, abusive, or malicious conduct' that 'support[ed] the reasonableness of the deputy's conduct.' Such a determination is inappropriate under a 'clearly established' analysis. Once a plaintiff demonstrates a genuine issue of material fact as to whether there has been a constitutional violation, by making out a claim of excessively forceful handcuffing sufficient to survive summary judgment, weighing the evidence and determining whether an officer should be liable are tasks exclusively for the jury. In this case, however, the district court turned the factual determinations best left to the jury into factors militating in favor of qualified immunity. That is not the role of the district court in analyzing the second prong of a qualified immunity analysis; rather, it is to determine whether the law was clearly established at the time of the allegedly unconstitutional conduct. As discussed, *supra*, while a right may not be 'clearly established' at a 'high level of generality' or by broad historical assertions, neither must the specific conduct at issue have been found unconstitutional for a reasonable officer to be on notice that the conduct is unconstitutional. Rather, the *contours* of the right must be sufficiently clear such that a reasonable officer has fair warning. . . Such is the case in the Sixth Circuit with respect to the law surrounding excessively forceful or unduly tight handcuffing under the Fourth Amendment. Because, in the Sixth Circuit, the right to be free from excessively forceful or unduly tight handcuffing under the Fourth Amendment is clearly established law, no more specificity in defining this right is required. We recognize, however, that the district court's error was based in part on reliance on our unpublished decisions in *Fettes v. Hendershot,* 375 F. App'x 528 (6th Cir.2010) and *Lee v. City of*

Norwalk, Ohio, 529 F. App'x 778 (6th Cir.2013). We also note that the case of *O'Malley v. City of Flint,* 652 F.3d 662 (6th Cir.2011), would seem to disagree with our conclusion here.").

Godawa v. Byrd, 798 F.3d 457, 463-68 (6th Cir. 2015) ("Contrary to Defendant's claim, the video evidence in this case does not clearly contradict Plaintiffs' version of events, nor does it necessarily support Defendant's assertion that Godawa's vehicle 'target[ed]' him. . . Specifically, both videos can reasonably be interpreted as indicating that Defendant was not directly in front of the vehicle, but rather was located ahead of the vehicle *to the right* of the passenger side during the relevant timeframe, and that the car never 'targeted' Defendant. Moreover, based on the Finish Line surveillance footage and the nature of the movement depicted in the lapel video, it appears possible—and arguably likely—that Defendant was moving toward the car with his gun drawn in the moments before the apparent impact. A reasonable juror observing the video evidence could conclude that Defendant initiated the contact with Godawa's car in an apparent attempt to stop Godawa from fleeing the parking lot. With regard to the shooting, the Finish Line surveillance video may be reasonably interpreted as indicating that Defendant was effectively chasing Godawa's car before he fired the shot that killed Godawa and that he was not in harm's way at that critical moment. Accordingly, for the purposes of the following analysis, we assume that Defendant was not actively struck by Godawa's car, but initiated the impact with the vehicle in his efforts to keep Godawa from fleeing. Under this factual account, Godawa did not pose an immediate threat at the time Defendant discharged his weapon. . . .Where a suspect is attempting to flee in a vehicle, police officers are 'justified in using deadly force against a driver who objectively appears ready to drive into an officer or bystander with his car. But, as a general matter, an officer may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety.'. . An officer may, however, 'continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.'. . Still, where the car no longer 'presents an imminent danger,' an officer is not entitled to use deadly force to stop a fleeing suspect. . . In evaluating whether Defendant's conduct was objectively reasonable in the case at hand, our previous decision in *Cupp* is directly on point. . . . As in *Cupp,* viewing the facts in the light most favorable to Plaintiffs, Godawa never attempted to hit Defendant with his car and did not drive in a manner that endangered Defendant's life. . . Rather, Defendant actively 'put himself in a dangerous position in order to effectuate an arrest' by running alongside the car and using his body to try to block the exit. . . Likewise, Defendant was not in front of the car, but instead was positioned near the rear passenger side, at the time that he fired his weapon. From that position, Defendant would have had no reason to fear being struck by the car as it continued to advance. Defendant emphasizes how fast the events transpired, noting that he had 'less than two seconds to process being physically assaulted by a vehicle.'. . Under Plaintiffs' version of the facts, however, Defendant was not in danger. And critically, the fact that a situation is rapidly evolving 'does not, by itself, permit [an officer] to use deadly force.'. . In reaching our holding in *Cupp,* we distinguished *Brosseau v. Haugen,* 543 U.S. 194 (2004). The present case is similarly distinguishable from *Brosseau.* In *Brosseau,* the Supreme Court reversed a denial of qualified immunity for a police officer who had shot a suspected felon while he was attempting to evade

arrest and flee in a vehicle. . . The Court found that the suspect posed 'a major threat' to others, including officers located at the end of the street. . . Whereas Godawa was suspected of nothing more than drinking underage and having an open container in his car, the fleeing driver in *Brosseau* 'was a suspected felon with a no-bail warrant out for his arrest, with whom [the officer] had experienced a violent physical encounter prior to the shooting.'. . Additionally, the 'undisputed facts [in Brosseau] showed that the shooting officer believed the suspect had a gun and was fearful for officers in the immediate area.'. . In contrast, Godawa never displayed any violence in his interactions with Defendant and never engaged Defendant in a physical struggle. Critically, unlike the fleeing suspect in *Brosseau,* Godawa posed no discernable threat to the officers or to any other individuals at the time he was shot. Prior to Godawa's flight, Defendant only suspected him of having an open container in his car and underage drinking. Even so, the district court in this case determined that, in addition to the alcohol offenses, 'at the time the fatal shot was fired, the officer had probable cause to believe Godawa committed a number of violent and serious offenses, including attempted murder, first degree assault, wanton endangerment in the first degree, and fleeing and evading in the first degree.'. . Police officers are entitled to consider felonies committed by a fleeing suspect after the flight has commenced in determining the appropriateness of using deadly force. . . The district court, however, did not view the facts in the light most favorable to Plaintiffs in reaching its conclusion, and instead based its determination on a factual account that assumed Godawa had actively struck Defendant with his car. With the exception of fleeing and evading arrest, none of the offenses listed by the district court are applicable once the facts are viewed in the light most favorable to Plaintiffs, as we are required to do. Defendant cites to the Supreme Court's decisions in *Scott* and *Plumhoff* to support the argument that his behavior was objectively reasonable. Neither case supports Defendant's position. Both *Scott* and *Plumhoff* addressed police officers' use of deadly force to stop fleeing suspects who were engaged in high speed chases and whose recklessness had endangered police and bystanders. . . .Scott and Plumhoff establish that, where a fleeing driver is imperiling the lives of officers or the public, it will generally be objectively reasonable for a police officer to employ deadly force to end the flight. However, these cases simply do not stand for the proposition that an officer may reasonably use deadly force against a fleeing motorist where no such peril or risk exists. Applying the Graham factors to the Plaintiffs' facts, we conclude that Defendant's use of force in this case was objectively unreasonable; although he was fleeing from police, Godawa was suspected of only minor offenses and posed no 'immediate threat' to Defendant or any member of the public. . . . In light of this Circuit's on-point precedent and critical differences between the facts of this case and the facts of the cases relied upon by Defendant, we conclude that a reasonable jury could find that Defendant's use of force violated Godawa's Fourth Amendment rights. . . .The qualified immunity analysis does not end with the determination that, under the facts alleged, Defendant's use of force was objectively unreasonable. We must also determine whether the constitutional right being violated was clearly established at the time of the incident. . . .It is clearly established law that the '[u]se of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.'. . Relying on *Brosseau,* the *Plumhoff* Court concluded that, as of 2004, 'it was *not* clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger.'. . Accordingly, the *Plumhoff* Court determined that in order

to defeat the defendant's qualified immunity and demonstrate a clearly established right, the plaintiff in *Plumhoff* would need to show *either* (1) that the officer's conduct was 'materially different from the conduct in *Brosseau,*' or (2) that between February 21, 1999, when the events in *Brosseau* took place, and the date of the events at issue in *Plumhoff,* 'there emerged either "controlling authority" or a "robust consensus of cases of persuasive authority," that would alter [the] analysis of the qualified immunity question.'. . The Court ultimately determined that the plaintiff could not meet either requirement and thus failed to demonstrate a relevant clearly established right. . . Applying the same requirements in this case leads to the opposite outcome. First, as was addressed above, this case relates to 'materially different' conduct than was at issue in *Brosseau* and subsequent cases including *Scott.* Namely, under Plaintiffs' factual account, Defendant had no reason to believe that Godawa presented 'an actual and imminent threat to the lives of [any officers or civilians]' at the time of the shooting. . . Second, this Court's decision in *Cupp* established controlling authority that affects the relevant qualified immunity analysis in this case. The Court in *Brosseau* explicitly recognized that determining whether a right is clearly established requires a 'particularized' analysis, and that 'this area is one in which the result depends very much on the facts of each case.'. . *Cupp* addressed materially similar facts to the case at hand and established clear and controlling precedent that in a comparable situation to the circumstances facing Defendant, the use of deadly force violates the Fourth Amendment. No subsequent controlling precedent has diminished the clarity of *Cupp's* holding or its applicability to the present case. In sum, a genuine dispute of material fact exists regarding the circumstances of Defendant's impact with Godawa's vehicle. Under Plaintiffs' version of the facts, a reasonable juror could conclude that Defendant's use of deadly force violated Godawa's clearly established constitutional rights under the Fourth Amendment. Consequently, Defendant is not entitled to summary judgment, and the district court erred in granting qualified immunity to Defendant.")

Savage v. City of Memphis, 620 F. App'x 425, 428-29 (6th Cir. 2015) ("[A]s the district court found below, 'this case presents one of those rare instances where the use of deadly force was reasonable.' Plaintiffs present no evidence to cast doubt on Archie's stated belief that Dowdy was armed and posed a threat to others. And while Dowdy was ultimately found to be unarmed, '[a]n officer should be entitled to qualified immunity if he made an objectively reasonable mistake as to the amount of force that was necessary under the circumstances with which he was faced.' *Solomon v. Auburn Hills Police Dep't,* 389 F.3d 167, 175 (6th Cir.2004). As the district court held, 'there is nothing in the record to suggest that Officer Archie's mistake was objectively unreasonable,' particularly in light of the carjacking report and the undisputed fact that Dowdy held one hand in front of him at his waist as he fled. And the expert's conclusory assertion that Archie acted unreasonably cannot create a genuine issue of material fact. . . Moreover, Archie would be entitled to qualified immunity even if a genuine issue of material fact remained as to whether he acted reasonably. Plaintiffs point to only one case, *Garner,* to show that Archie's actions violated a clearly established right. But *Garner* hurts rather than helps their case. There, a Memphis police officer shot a suspected burglar, Garner, as he tried to escape custody. . . The officer's testimony established that he used deadly force only to prevent Garner's flight, as he 'was "reasonably sure" and "figured" that Garner was unarmed.'. . This testimony, along with burglary's traditional

classification 'as a "property" rather than a "violent" crime,' moved the Court to find the use of deadly force unreasonable under the circumstances. . . Here, by contrast, Archie had 'probable cause to believe that [Dowdy] ha[d] committed a crime involving the infliction or threatened infliction of serious physical harm'—namely, carjacking—and testified to the specific facts supporting his belief that Dowdy was armed and dangerous. . . Plaintiffs thus fail to carry their burden of showing that Archie is not entitled to qualified immunity.")

Goodwin v. City of Painesville, 781 F.3d 314, 321-29 (6th Cir. 2015) ("The 'careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake' called for in *Graham* indicates that a jury could reasonably find that Officer Soto violated Mr. Nall's Fourth Amendment right to be free from excessive force. The prolonged tasering of Mr. Nall was severe: Officer Soto's training indicated that it lasted well into the risky period and that the probes were in a position that could cause breathing problems during extended application. Further, the application of the *Graham* factors to the facts taken in the light most favorable to the Nalls shows: (1) that Mr. Nall's crime was not serious, (2) there was little basis to believe Mr. Nall was a threat to the officers or others, (3) Mr. Nall's initial resistance was at most a passive refusal to comply with a single request to leave his residence, and (4) it was objectively apparent that Mr. Nall's failure to present his hands to be cuffed was due to Taser-induced involuntary convulsions. The Officers' challenges to the Nalls' facts have no place in the court's qualified immunity analysis on appeal. Plaintiffs' facts state a constitutional violation. . . . Once a court finds a constitutional violation, it must next consider whether 'the right was clearly established at the time of the alleged violation.'. . A right is clearly established if '[t]he contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . Here, the district court framed the constitutional question as 'whether an intoxicated misdemeanant, who had not been placed under arrest and who had neither fled nor resisted, had a right not to be tasered twice in his own home for a total of 26 seconds, as of 26 June 2010.' On appeal, the Officers argue both that Mr. Nall had no clearly established right to be free of the initial tasering, and that he had no clearly established right to be free of a tasering that lasted 26 seconds. Time frames—the initial tasering and then the continued use of force—define two distinct constitutional questions. . . .There is no clearly established right for a suspect who 'actively resists' and refuses to be handcuffed to be free from a Taser application. . . Whether Mr. Nall had a clearly established right not to be tasered after refusing to step out of his apartment hinges on whether this refusal and his subsequent return to his living room constituted 'active resistance,' or was merely 'noncompliance' or no resistance at all. . . .To arrest a person in his home, police officers need both probable cause and either a warrant or exigent circumstances. A holding that a simple refusal to exit one's own home—and surrender the heightened Fourth Amendment protections it provides—constituted active resistance of an officer's command sufficient to justify a tasering would undermine a central purpose of the Fourth Amendment. . . .Though it is the Nalls' version of the facts that govern our inquiry here, even if a jury were to credit the Officers' account of events concerning Mr. Nall's alleged initial resistance in the doorway, it could still determine that the extended tasering of Mr. Nall was gratuitous because it extended far past the point that he had ceased resisting. . . .Our determination in *Landis*

that the officers were not entitled to qualified immunity regarding the use of a Taser, . . . provided notice that application of a Taser to a suspect who has ceased virtually all resistance constitutes excessive force, even if the suspect had resisted violently earlier in the encounter. *Landis* also demonstrates that whether a suspect has ceased resisting does not simply turn on whether the suspect has already been placed in handcuffs. . . . In some contexts this would counsel against holding an officer to a standard where it is necessary to evaluate changes in a suspect's behavior over a period of seconds, but with a Taser seconds count. Officer Soto had been trained about the potentially grave consequences of prolonged application, especially to the chest area. Furthermore, by Plaintiffs' account the change in Mr. Nall's physical state was drastic and immediately apparent to Officer Soto. On these facts, it is reasonable to hold the officer accountable for noting changes in Mr. Nall's physical state over the 26–second tasering period. . . Because Mr. Nall had a clearly established constitutional right not to be tasered when he was at most offering passive resistance to an officer, and because he also had a clearly established constitutional right not to be gratuitously tasered after ceasing all resistance to the officers, we affirm the district court's denial of summary judgment with respect to Mr. Nall's excessive force claim against Officer Soto. . . . Plaintiffs have presented sufficient evidence about Mr. Nall's condition during the 21–second tasering to make it a jury question whether a reasonable officer in Officer Hughes's or Officer Collins's position would have seen that the force being applied to Mr. Nall was excessive and taken action to get Officer Soto to stop applying it. Because *Turner* demonstrates that Officers Collins and Hughes had a clearly-established duty to protect Mr. Nall dating back to at least 1997, and the facts indicate that both failed in this duty, we affirm the district court's denial of qualified immunity to both officers on this claim.")

Brown v. Lewis, 779 F.3d 401, 418-19 (6th Cir. 2015) ("Under Brown's version of the facts, she was entirely compliant throughout the stop, and she had not fled from the police. When the officers told her to put her hands up, she did so. When they ordered her out of the car, she began to move out of the car. However before she could even reach a foot to the ground, two officers grabbed her by the back of her sweatshirt and threw her down. They then ground a knee into her back while placing the handcuffs. As the district court noted, 'the Officers acknowledge that Brown was fully compliant with every one of their orders; they observed no weapons or hostages in her car, and her hands were in clear view throughout the encounter.'. . The officers were not certain that any crime had occurred and had several guns pointed directly at Brown if she did begin to resist. The force used here was not reasonable in light of the totality of the circumstances. . . .Cases in other circuits provide directly analogous examples, revealing that pulling a compliant detainee out of her car and throwing her to the ground in the process of handcuffing her is clearly established excessive force. . . .Qualified immunity does not protect these officers against Brown's excessive-force claim. Brown's testimony reflects a degree of force against a compliant subject that was clearly established as excessive well before the officers seized her. At trial, the jury will determine whether the officers threw Brown to the ground as she describes, which officers participated in handcuffing her, and whether any non-participating officers should be held liable for failing to intervene.")

Greco v. Livingston Cnty., 774 F.3d 1061, 1064 (6th Cir. 2014) ("Clayton contends that he never seized Greco. The dog bit Greco only after he fell on a log, says Clayton, meaning it was an unintentional accident unprotected by the Fourth Amendment. . . That is where the 'light most favorable to the [plaintiff]' language kicks in: Even if the district court (or we) believed Clayton, the question remains whether a *jury* could reasonably decide that Clayton 'sicked the dog' on Greco. . . We agree with the district court that it could. Based on Greco and Stuart's testimony, a jury could reasonably conclude that Clayton found Greco and told her to put her hands on her head before the dog attacked, suggesting that the detention-by-canine was no slip-up. And even if Diago's initial bite had been an accident, the jury could consider Clayton's twenty-plus second delay in removing Diago an intentional seizure as well. That should be that. We have considered the argument Clayton raised before the district court and found it without merit.")

Cass v. City of Dayton, 770 F.3d 368, 374-77 (6th Cir. 2014) ("Cass asserts that the district court erred at both steps of the qualified immunity analysis—that the district court erred in concluding that Jordan's rights were not violated and that House did not violate clearly established law. We reach only Cass's first argument. . . Although Jordan was not the intended target of House's bullet, Cass's claim on his behalf is properly assessed under the Fourth Amendment. *See Fisher v. City of Memphis,* 234 F.3d 312, 318–19 (6th Cir.2000). . . . Since *Garner,* we have applied a consistent framework in assessing deadly-force claims involving vehicular flight. Although each case is tethered to its specific factual context, the critical question is typically whether the officer has 'reason to believe that the [fleeing] car presents an imminent danger' to 'officers and members of the public in the area.'. . . An officer is justified in using deadly force against 'a driver who objectively appears ready to drive into an officer or bystander with his car.'. . But, as a general matter, an officer may not use deadly force 'once the car moves away, leaving the officer and bystanders in a position of safety.'. . An officer may, however, continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when 'the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.'. . .Applying this framework, and cognizant that the ultimate question is one of objective reasonableness, we find that House did not use excessive force. As House approached the stopped Taurus, clearly signaling his status as a City police officer, Stargell accelerated. Despite House's evasive maneuver, House was struck in the leg as he rolled across the hood of the Taurus. Almost immediately after being hit, House heard St. Clair fire his weapon. Based on his assessment of the scene, he believed that St. Clair had fired in self-defense and that Johns and Murphy were also at risk of being struck by the vehicle. It was only at this point—after he himself had been hit by the Taurus and had heard St. Clair discharge his weapon in what House believed was self-defense—that he attempted to stop the Taurus by shooting at the driver. These facts are not contested in the record. Based on the fact that Stargell had demonstrated that 'he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around,'. . and based on House's professional assessment of what can only be described as a 'tense, uncertain, and rapidly evolving' situation, . . . House's use of deadly force was objectively reasonable. . . .Quite apart from the fact that House reasonably believed St. Clair to be in the direct path of the Taurus, Cass's argument lacks merit. His argument hinges on the proposition that St.

Clair in particular and none of the other officers more generally were in the Taurus's *direct* path when House used deadly force. But the inquiry is not nearly so narrow. The question is whether House reasonably believed that the lives and safety of both officers and members of the public 'in the area' were in imminent danger. . . . Although the Taurus had struck two officers, Cass suggests that the coast was clear for the car to proceed unmolested despite the presence of other officers to effect the arrest. This, of course, was not how the situation appeared in real time. Informed by his knowledge of the circumstances and of police tactics, House reasonably understood that Stargell, in his quest to escape, posed a continuing risk to the other officers present in the immediate vicinity, including Johns and Murphy. . . . Cass also makes much of the fact that House violated Dayton Police Department policy by placing himself in the Taurus's path. But '[t]he Supreme Court has been cautious to draw a distinction between behavior that violates a statutory or constitutional right and behavior that violates an administrative procedure of the agency for which the officials work.'. . House's alleged violations of City policy do not change our conclusion that he did not act objectively unreasonably under the circumstances.")

Shreve v. Franklin County, Ohio, 743 F.3d 126, 133, 134, 137, 138 (6th Cir. 2014) ("An excessive-force claim under the Eighth Amendment requires that the plaintiff show that force was not 'applied in a good-faith effort to maintain or restore discipline,' but instead applied 'maliciously and sadistically to cause harm.'. . But an excessive-force claim under the Fourteenth Amendment operates on a sliding scale. Generally, to constitute a Fourteenth Amendment violation, an official's conduct must 'shock[ ] the conscience.'. . When officials respond to 'a rapidly evolving, fluid, and dangerous predicament,'. . the Fourteenth Amendment's excessive-force standard is the same as the Eighth Amendment's. . . . The video recording in this case provides sufficient evidence for a jury to find that the situation in the cell afforded the deputies 'a reasonable opportunity to deliberate various alternatives prior to electing a course of action.'. . . But these same facts also compel the conclusion that the deputies did not act with 'deliberate indifference towards [Reed's] federally protected rights.'. . That they tried to handcuff him several times before using the Taser shows that they sought to minimize the Taser's use. The deputies also warned Reed that the Taser would hurt and that he did not want to be Tased, which showed that they were trying to avoid unnecessary harm. . . . We decline to put the onus on the deputies to assess at their risk the seriousness of Reed's seizure in order to determine whether it warranted immediate medical treatment. Their decision to use a Taser to subdue Reed before taking him to the hospital might have been unwise, but it was not unconstitutional.")

Shreve v. Franklin County, Ohio, 743 F.3d 126, 145, 148 (6th Cir. 2014) (Clay, J., dissenting) ("In concluding that Defendants did not violate Reed's constitutional rights, the majority impermissibly relies on its own subjective interpretation of the video as well as Defendants' one-sided account of the facts. This analysis is improper on summary judgment. In light of all of the evidence, including the video, a reasonable jury could undoubtedly find that the officers' use of force shocks the conscience because it was taken with deliberate indifference toward Reed's federally protected rights. . . . Based on the evidence presented, a reasonable jury could conclude that Reed was merely noncompliant, and was not actively resisting. Since the video supports both

parties' proffered interpretations of Reed's behavior, there is a genuine issue of fact regarding whether or not Reed was resisting. We must resolve this factual dispute in Reed's favor for the purposes of our analysis of the issue on appeal. . . .A jury could reasonably conclude that the officers' use of a taser gun on a non-threatening, mentally ill individual in the immediate aftermath of a seizure shocks the conscience because it was taken with deliberate indifference toward Reed's right to be free from excessive force. At the very least, the evidence presented raises an issue of material fact as to whether the officers' behavior shocks the conscience, and summary judgment on the issue of qualified immunity was therefore improper.")

Hocker v. Pikeville City Police Dept., 738 F.3d 150, 155 (6th Cir. 2013) ("Hocker adds that, by the time Baisden and Branham fired at his vehicle, neither one of them was in harm's way, eliminating any need to use lethal force against him. It is not that easy, particularly in the context of the lightning-quick evolution of this encounter. It is undisputed that neither officer knew where the other one was when they began firing. That one officer was safe does not mean the other one was. This reality by itself justified the officers' conduct. While it may be easy for *Hocker* to say that each officer was safe once the officer was no longer in the direct path of Hocker's vehicle, no reasonable officer would say that the night's peril had ended at that point. Hocker remained in the car, and for the prior ten minutes or so—from the officers' reasonable perspective—had put others, including most recently the officers, in harm's way with his car. What in that short time span would leave anyone with the impression that Hocker no longer presented a threat to their safety? He remained in the car, and the car engine remained on. Only Hocker's self-restraint stood in the way of further threats to their safety. From the officers' reasonable perspective, the peril remained. Hocker maintains that, whenever an officer fires at the driver's side of a *moving* (and potentially departing) vehicle, he acts unreasonably. But this is an invention. No case adopts such a per se rule. If there is a per se rule in this area, it is that the 'totality of the circumstances' governs every case. . . Hocker's three case citations say nothing to the contrary. One case never reached the reasonableness question. *See Sigley v. City of Parma Heights,* 437 F.3d 527, 536 (6th Cir .2006). In the other two cases, the court acknowledged that there are many factors at play when deciding the reasonableness of an officer's use of deadly force, including not just 'whether the suspect poses an immediate threat to the safety of the officers or others,' but also 'the severity of the crime at issue,' 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight,' *Smith v. Cupp,* 430 F.3d 766, 774 (6th Cir.2005), and whether the officers 'had sufficient time ... to assess the situation before' using deadly force, *Estate of Kirby v. Duva,* 530 F.3d 475, 482 (6th Cir.2008). Just so here. For the reasons just given, the officers acted reasonably as a matter of law based on these considerations.")

Eldridge v. City of Warren, 533 F. App'x 529, 529-30, 533-35 (6th Cir. 2013) ("What constitutes 'active resistance' by a suspect that justifies a police officer's use of force? In their pursuit of qualified immunity, two police officers ask us to conclude that a lethargic driver who clutched his car's steering wheel and provided unhelpful responses to the officers' queries was engaged in 'active resistance.' We decline to do so, and AFFIRM the decision of the district court. . . .The true flashpoint of this controversy is the third *Graham* factor—whether Eldridge 'actively resisted'

in a manner that warranted the use of a Taser. To Officers Moore and Horlocker, Eldridge was noncompliant and therefore actively resisting. They argue that their actions are protected under our precedent establishing that when an officer employs a Taser on a suspect who is actively resisting, such action does not constitute excessive force. We disagree. Taken in the light most favorable to Eldridge, a reasonable officer faced with the same circumstances could not have determined that Eldridge's actions bore the hallmarks of active resistance. Rather, these facts demonstrate that Eldridge was not actively resisting, and under our precedent it is unreasonable to tase a nonresisting suspect. . . .A review of the facts in the light most favorable to Eldridge indicates that the officers turned off the car and removed the keys from the ignition. For our purposes, then, Eldridge was not in control of a running vehicle at the time of the purported excessive force. Similarly, it remains disputed whether Eldridge was gripping the steering wheel. Under Eldridge's version of the facts, as explained by the district court, he was merely sitting behind the steering wheel, a fact we must consider to be true on interlocutory appeal. . . . Whether the officers receive qualified immunity thus turns on whether failing to comply with an officer's commands, with nothing more, constitutes active resistance. What makes the officers' argument difficult to accept on this issue, however, is the meaning of 'active resistance' under our precedent. In cases where we concluded that an officer's use of force was justifiable because it was in response to active resistance, some outward manifestation—either verbal or physical—on the part of the suspect had suggested volitional and conscious defiance, neither of which is present here. . . .If there is a common thread to be found in our caselaw on this issue, it is that noncompliance alone does not indicate active resistance; there must be something more. It can be a verbal showing of hostility, as was the case in *Caie.* It can also be a deliberate act of defiance using one's own body, as in *Hagans*, or some other mechanism, such as the truck in *Foos.* Taken in the light most favorable to Eldridge, his noncompliance was not paired with any signs of verbal hostility or physical resistance, and therefore cannot be deemed active resistance. . . .We further note that the two officers' actions violated a clearly-established right: the right of a suspect to be free from the use of physical force when he is not resisting police efforts to apprehend him. . . . In addition, the law was clear at the time of the alleged violation. . . Our decision in *Hagans* clarified that this particular right was 'clearly established' before and after May 2007—and more importantly for our purposes, before June 2009.")

Eldridge v. City of Warren, 533 F. App'x 529, 536-37 (6th Cir. 2013) (Norris, J. dissenting) ("The majority paints a compelling picture of a softly spoken driver offering 'polite responses to the officers' questions about his physical incapacity to move from his stationary vehicle' who was nevertheless tased by defendant officers. In painting this picture, the majority avers, as it should, that it is construing the facts in the light most favorable to plaintiff. However, this case is unusual two respects: first, the entire sequence of events was caught on the police cruiser's dashboard camera; and, second, plaintiff concedes that he has no recollection of the events. When uncontroverted video evidence is available, we should view 'the facts in the light depicted by the video tape.'. . Because the majority relies upon facts contradicted by the clear video evidence, I respectfully dissent. . . .Having reviewed the video tape of the encounter between plaintiff and the officers numerous times, the events captured strike me as a fairly routine arrest of an uncooperative

driver whom the officers had reason to suspect was under the influence of alcohol. . .In the course of their encounter he refused to comply with repeated, reasonable police commands and physically resisted the officers' efforts to remove him from his vehicle. . . .Unfortunately, the majority's opinion offers little guidance to officers confronting a similar situation in the future. Given the failed efforts initially to remove plaintiff from the truck, what should have happened next? The officers had immobilized the truck; should they have left him in it and waited for him to sober up (based on their reasonable assumption that he was under the influence of drugs or alcohol)? Ironically, such a strategy could have resulted in permanent brain damage or even death had plaintiff's low blood sugar persisted or worsened.")

Correa v. Simone, 528 F. App'x 531, 535, 536 (6th Cir. 2013) ("Looking at cases before May 2010, this Court's analysis of whether a defendant's right to be free from a taser shock was clearly established can be split into two lines of cases. First, this Court has generally found no clearly-established right where the suspect is actively resisting arrest, which can include physically resisting, fleeing the scene despite police orders, and not responding to orders to move. [collecting cases] In a second set of cases, this Court has found that plaintiffs' right to be free from a taser shock is clearly established where they have done nothing to resist arrest or are already detained. [collecting cases] Simone's argument is that the law regarding tasing a non-resistant but possibly armed suspect was not clearly established because none of our cases has dealt specifically with a suspect who was armed with a firearm. We disagree. As noted above, this Court's precedent has emphasized the concept of resistance when considering whether an officer's conduct violates established law. . . . The absence of case law specifically addressing gun possession does not bear on whether the law is clearly established. The precedent in this Circuit clearly holds that a police officer must encounter some level of resistance by the defendant to justify using a taser. The mere possession of a gun is not, in and of itself, resistance unless coupled with something more, such as a physical or verbal action. . . Holding otherwise would mean ignoring a significant amount of precedent establishing the importance of a defendant's resistance to an officer's calculation of whether to use his or her taser. Using a taser on a potentially armed suspect who is complying with all officer commands and not resisting violated clearly established law as of May 2010.")

Watson v. City of Marysville, No. 12–3478, 2013 WL 1224089, *3 (6th Cir. Mar. 26, 2013) (unpublished) ("The question presented here is whether it was clearly established in June 2008 that using a taser on a suspect disobeying repeated orders amounted to excessive force. It is clearly established that suspects have the right to be free from tasing where they are fully compliant with officers' orders, not resisting arrest, or immobilized and posing no threat of danger. *Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 509 (6th Cir. 2012). Although the case at bar does not present facts which fall neatly into this category, cases of like circumstances have found no clearly established right of a suspect to be free from tasing where he or she disobeys police orders and may be in possession of a weapon. . . Watson offers no sustained argument regarding the defense of qualified immunity. He fails to identify any case factually similar to this one, where a police officer has been denied qualified immunity on a charge of excessive force, based upon the

tasing of a suspect who disregards repeated commands and is believed to be armed. Therefore, Diehl and Sergeant Nicol are entitled to qualified immunity on the excessive force claim.")

Martin v. City of Broadview Heights, 712 F.3d 951, 960-63 (6th Cir. 2013) ("The bottom line is that a jury could find that the officers' conduct was unreasonable. The officers used their weight to compress Martin, struck his head and body multiple times, restrained his neck or chin, and placed him in a torso lock. These tactics were not justified by Martin's possible crime, the threat he posed to anyone's safety, or his resistance. The officers' failure to adhere to a departmental policy that explained the grave dangers of positional asphyxia verifies the unreasonableness of their actions. The quantum of force the officers used was constitutionally excessive, violating the Fourth Amendment right of an unarmed, minimally threatening, and mentally unstable individual to be free from gratuitous violence during an arrest. . . Having determined that the officers violated Martin's constitutional right, the next step is to consider whether that right was clearly established when the arrest occurred. . . . The prohibition against placing weight on Martin's body *after* he was handcuffed was clearly established in the Sixth Circuit as of August 2007. In *Champion*, we held that applying pressure to the back of a prone suspect who no longer resists arrest and poses no flight risk is an objectively unreasonable use of force. . . . The more difficult issue is whether the officers were on notice that the force they used against an unarmed and mentally unstable individual *before* he was subdued violated the Constitution. The officers argue that *Champion* is inapposite here because it only forbids creating asphyxiating conditions by putting substantial pressure on a handcuffed suspect's back. But this is too cramped a view of our precedents. The better view is that *Champion* proscribes the use of 'substantial or significant pressure' that creates asphyxiating conditions in order to restrain a subject who does not pose a material danger to the officers or others. That Champion himself was handcuffed when this occurred is incidental to the rule. . . .Martin exhibited conspicuous signs that he was mentally unstable. He was also unarmed. Confronted with such an individual, *Champion* required the officers to de-escalate the situation and adjust the application of force downward. Contrary to this command, the officers ignored Martin's diminished mental state and used excessive force to control him. Finally, BHPD's Positional Asphyxia Policy regulated the conduct of the officers when they encountered Martin, instructing them to recognize the risks of restraining an individual exhibiting bizarre and agitated behavior. . . Though they knew the hazards of the tactics they deployed against a high-risk individual, the officers failed to heed the policy's warnings. This is further evidence that the officers were on notice that their conduct exceeded the bounds of permissible force. To summarize: Our precedents and BHPD's own policies clearly established in August 2007 that the force the officers used to restrain Martin was excessive. A reasonable officer should have known that subduing an unarmed, minimally dangerous, and mentally unstable individual with compressive body weight, head and body strikes, neck or chin restraints, and torso locks would violate that person's clearly established right to be free from excessive force. The Constitution does not countenance this level of force. The officers are not entitled to qualified immunity.")

Jackson v. Wilkins, No. 12–1534, 2013 WL 827725, *3, *4 (6th Cir. Mar. 6, 2013) (not published) ("The Estate disputes this conclusion in two ways. First, it contends that Blaskie violated 'TASER

rules and procedures' when he allegedly tased Jackson while Jackson was running. The Estate has not cited any cases, however, that say that tasing a running suspect is an excessive use of force. So it has not shown that Blaskie violated clearly established law. *Cf. Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 509 (6th Cir.2012) (holding that, in May 2007, the use of a taser was not a violation of clearly established law). Second, the Estate contends that the officers used too much force after Jackson's collision with the dumpster arm, when they allegedly tased him 11 times, as well as punched and kicked him repeatedly. The Estate concedes, however, that Jackson was the 'strongest' and the 'most physical' person the officers had ever fought. So the officers had to use a significant amount of force to subdue him. Moreover, we give a 'measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case.'. . . And the officers used less force here than we have found reasonable elsewhere. For example, in *Williams v. Sandel*, 433 F. App'x 353, 362 (6th Cir.2011), we held that it was reasonable for officers to tase a suspect 37 times, in addition to using their batons and pepper spray, because the suspect 'remained unsecured and unwilling to comply with the officers' attempts to secure him[.]' *Id.* Blaskie and Wilkins acted similarly—they stopped applying force the moment Jackson stopped resisting them. In sum, Jackson's Estate cannot prove to a jury that Blaskie and Wilkins used excessive force during the arrest, or that they violated clearly established law. They are therefore entitled to qualified immunity.")

Jones v. City of Cincinnati, 736 F.3d 688, 695-97 (6th Cir. 2012), *cert. denied by Jones v. Abrams*, 133 S.Ct. 2802 (2013) ("Jones's survivors argue that the reasonableness of Pike's and Osterman's blows depends on a disputed factual issue: when Jones ceased resisting arrest and started struggling to breathe. Even assuming that Jones started struggling to breathe during the fifty-nine-second period of strikes and jabs, we still conclude that the officers did not act objectively unreasonably. Under the rapidly evolving circumstances of that morning, an objectively reasonable officer could not have discerned whether Jones resisted in an attempt to breathe or in defiance of commands. . . . Officer Abrams argues that his refusal to unhandcuff Jones despite a firefighter's request to do so was not objectively unreasonable. We agree. The video shows that approximately three minutes elapsed from the time when officers handcuffed Jones [MVR at 6:02:54] to when firefighters arrived by his side [MVR at 6:05:50]. Some time later, Firefighter Gregory Adams asked that Jones's handcuffs be removed. . . An objectively reasonable officer—given the short time to transition from handcuffing Jones to understanding his medical condition—could have thought that Jones's breathing problems did not warrant the removal of his handcuffs. Abrams testified that he did not remove Jones's handcuffs because putting them on was difficult, and he did not know if Jones was feigning injury. Abrams and Pike also testified that after a physical struggle, officers usually leave on handcuffs until the suspect is in jail. Although courts eschew considering an officer's subjective intent when applying the objective reasonableness test, *see Graham*, 490 U.S. at 397, an officer's explanation of his motivations inform a court's understanding about what an objectively reasonable officer would have done under such circumstances. Moreover, nothing in the record suggests that Adams or any other firefighter told Abrams that CPR could not be performed while Jones was handcuffed. . . . Without notice that performing CPR on a handcuffed person is ineffective or less effective, Abrams did not act objectively unreasonably in refusing to

remove Jones's handcuffs. . . . Because Pike, Osterman, and Abrams's actions were not objectively unreasonable, we need not decide whether Jones's rights under these circumstances were clearly established at the time of the incident. . . . Qualified immunity also shields the officers from the Fourteenth Amendment claim arising from a sixty-four-second delay in rolling Jones out of a prone position. To prevail on a claim for failure to provide medical care, Jones's survivors must show that the officers were 'deliberately indifferent' to Jones's 'sufficiently serious' medical need. . . .The officers concede that Jones developed a sufficiently serious medical need. We also assume that all six officers (1) were aware or could infer that Jones was at risk for positional asphyxia and (2) inferred that Jones was at risk by 6:02:32 a.m. when Officer Slade first asked, 'How 'bout we roll him?' Assuming these facts, we determine that the officers did not disregard Jones's substantial risk of positional asphyxia. . . .The officers' attempts to aid Jones undermine the claim that they deliberately disregarded Jones's substantial medical risk. . . . Our conclusion on deliberate indifference obviates any need to determine the clearly established law at the time of the incident.")

Campbell v. City of Springboro*, *Ohio, 700 F.3d 779, 789 (6th Cir. 2012) ("In contrast to the facts in *Robinette* and *Matthews*, the events in the present cases occurred in areas unlikely to expose police to ambush and the suspects were not believed to be a threat to anyone at the time the canine unit was called in. Although officers believed that Gemperline may have been a threat to herself, no weapons were found on her person and officers believed she might still be handcuffed. Clark also failed to give warnings to either of the suspects prior to Spike biting them. Even more important to this case is the question of whether or not Spike was properly trained. In both instances, Spike attacked the suspects without warning or a command from Clark. While the facts in the present case are not as extreme as in *White*, the facts are sufficiently analogous. Clark allowed a 'bite and hold' dog, whose training was questionable, to attack two suspects who were not actively fleeing and who, because of proximity, showed no ability to evade police custody. In light of Sixth Circuit case law, there is ample evidence to suggest that Clark acted contrary to clearly established law when he used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing.")

Marcilis v. Township of Redford, 693 F.3d 589, 599, 600 (6th Cir. 2012) ("Regardless of whether the force allegedly used by the police officers in this case was greater than necessary, we believe that the police officers could have reasonably believed that their conduct was a lawful means of exercising command of the situation. . . The warrant authorized the officers to search for weapons and drugs in both homes; and, with respect to the Suffield Drive search, Marcilis II had previously pleaded guilty to assaulting a police officer. Given the purpose of the searches, and the risks involved in a drug raid, . . . a reasonable officer in the police officers' position would have been justifiably concerned with his safety and 'could have believed' that the level of force used was lawful. . . The instant case is distinguishable from others where we have found that officers engaged in similar actions were not entitled to qualified immunity. . . .Under the circumstances here—a raid on two homes wherein police had been authorized to search for firearms and drugs—a reasonable officer would not have known that the force used here would be considered excessive.")

Austin v. Redford Tp. Police Dept., 690 F.3d 490, 497-99 (6th Cir. 2012) ("The Defendants also raise a further, purely legal, argument that this Circuit's precedent on the use of excessive force on subdued and unresisting subjects is irrelevant to situations involving noncompliance with police orders. Instead, they argue that Morgan's two discharges of his Taser in order to gain compliance with his order for Austin to put his legs in the police car did not violate any clearly established constitutional right. We review this legal argument de novo. . .Our 'prior opinions clearly establish that it is unreasonable to use significant force on a restrained subject, even if some level of passive resistance is presented.'. . Further, 'a line of Sixth Circuit cases holds that the use of non-lethal, temporarily incapacitating force on a handcuffed suspect who no longer poses a safety threat, flight risk, and/or is not resisting arrest constitutes excessive force.' . . Although Defendants cite non-binding authority from other courts for the proposition that use of a Taser to obtain compliance is objectively reasonable, each of those cases involved the potential escape of a dangerous criminal or the threat of immediate harm, neither of which is present here. . . Austin was already sitting in the backseat of the patrol car which was safely parked at the deadend of a street with traffic blocked by other police cars. There were several other officers present. And although Austin did not immediately comply with Morgan's request to put his feet in the patrol car, Austin did not refuse; rather, he stated he was having trouble breathing and asked Morgan to roll down the car window before shutting the door. We need not decide whether we would have reached the same conclusion as the Eleventh Circuit on the officer's three uses of a Taser in *Buckley;* in any event, it is clear that the facts present here are distinguishable from those in *Buckley*. . . . Viewing the evidence in the light most favorable to Austin, the district court found that Austin was not resisting; he was disoriented from at least two prior Taser deployments and at least one attack by a police dog; he was experiencing and complaining of shortness of breath; he was already placed in the patrol car leaving only his feet outside; and he did not have time to comply with Morgan's order before Morgan used his Taser. There is no evidence or allegation that Austin was belligerent, threatening or assaulting officers, or attempting to escape. As mentioned above, it is well established in this Circuit that the use of non-lethal, temporarily incapacitating force on a handcuffed suspect who no longer poses a safety threat, flight risk, and/or is not resisting arrest constitutes excessive force. . . 'Even without precise knowledge that the use of the [T]aser would be a violation of a constitutional right,' on these facts, Morgan 'should have known based on analogous cases that [his] actions were unreasonable. *Landis v. Baker*, 297 F. App'x 453, 463 (6th Cir.2008). Defendants' legal argument that this Circuit's precedent on the use of excessive force on subdued and unresisting subjects is irrelevant to situations involving noncompliance with police orders fails.")

Thomas v. Plummer, Nos. 11–3165, 11–3181, 2012 WL 2897007, *9, *10 & n.12 (6th Cir. July 17, 2012) (unpublished) ("Although Officer Plummer's use of force was excessive, Thomas's claim against him can proceed only if, as of August 23, 2009, 'every reasonable official would have understood that what he [was] doing violate[d]' the Fourth Amendment. . . '[T]he right [generally] to be free from physical force when one is not resisting the police [was] ... clearly established,' at least as of July 13, 2002. *Wysong v. City of Heath*, 260 F. App'x 848, 856 (6th Cir.2008). We have since applied this general rule in the context of taser use, holding that a suspect

not resisting arrest had a clearly established right not to be tased, as of October 28, 2006. . . This is so even if the plaintiff had offered, but later abandoned or been forced to abandon, violent resistence. *Landis,* 297 F. App'x 453 (holding that use of taser against plaintiff who violently resisted, but had already been subdued, violated clearly established law, as of November 2004). Here, Thomas surrendered, putting herself at the officers' mercy by falling to her knees and placing her hands above her head. Every reasonable officer would have understood that tasing a suspect in such a position was excessive in August 2009. Officer Plummer is not entitled to dismissal on the basis of qualified immunity. . . . Officer Plummer argues that the Cincinnati Police Department's finding that he violated department policy by deploying his taser, and its subsequent decision to fire him are not relevant to the 'clearly established right' analysis. Not so. '[G]uidance from experts in a field, and even the obvious cruelty inherent in a practice can contribute to the conclusion that an act was so aberrant that every reasonable official would have understood that it was unconstitutional.'. . Thus, the City's findings and action, while not dispositive, could play some role in determining how clearly unconstitutional Officer Plummer's act was. First, this case is, of course, unique. All cases are. But the Supreme Court has made pellucidly 'clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . The question is not whether the parties can dredge up a precisely analogous case from the federal reports, but whether 'the state of the law [at the time of the incident] ... gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional.'. . Second, *Kijowski* can establish that Officer Plummer had enough warning that his conduct was unconstitutional, as of August 23, 2009. Officer Plummer correctly notes that we did not publish *Kijowski* until April 2010. But this is irrelevant. *Kijowski* decided that, at least as of October 2006, a non-resistant suspect had a clearly established right not to be tased. The 'state of the law,' in other words, gave Officer Plummer ample warning that his use of force was unconstitutional.")

Hermiz v. City of Southfield, No. 10–1842, 2012 WL 1816230, at *3-*5 (6th Cir. May 21, 2012) (not reported) ("A reasonable jury drawing inferences in the estate's favor could determine that an officer that aimed and fired shots while to the side of the vehicle—including a shot fired far enough from the side to shatter the driver's-side window—would have had time to realize that he was no longer in the path of the car and no longer in immediate danger. Accepting this view of the circumstances, as we must, we conclude that Matatall lacked justification to fire at least his final shot. Even if the car appeared to head toward Matatall at one point, its single pass at five to ten miles per hour does not justify the inference that Hermiz posed an ongoing threat, especially considering that Hermiz's driving prior to the traffic stop presented no cause for concern. . . . Because the district court identified a factual dispute material to the constitutionality of Matatall's use of deadly force, the first prong of the qualified-immunity analysis resolves in favor of proceeding to trial. . . . Even if Matatall's actions violated the Fourth Amendment, he may still claim qualified immunity if the legal rules he violated were not 'clearly established' on September 27, 2007. . . . At the time of the incident, Supreme Court and Sixth Circuit case law clearly established the unreasonableness of shooting at the driver of a car that no longer poses a threat. . . . Though Matatall urges that a reasonable officer could have acted as he did under such rapidly changing circumstances, . . . we lack jurisdiction to review the factual question regarding whether

an officer had sufficient time to perceive, at the time of the last shot through the driver's-side window, that the passing car no longer presents an immediate threat. Because we decide the legal question—whether 'clearly established' Fourth Amendment law prohibited shooting at the driver of a fleeing car from the side, absent indications of an ongoing threat—in the estate's favor, we affirm the denial of summary judgment against Matatall.")

Walker v. Davis, 649 F.3d 502, 503, 504 (6th Cir. 2011) ("Here, Germany posed no immediate threat to anyone as he rode his motorcycle across an empty field in the middle of the night in rural Kentucky. . . . Nor does it matter that, at the time of Davis's actions, there were few, if any, reported cases in which police cruisers intentionally rammed motorcycles. It is only common sense–and obviously so–that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force. . . .Whether, in fact, the collision here was intentional is for a jury to decide. Davis insists it was not. But the facts, as we must view them, make out a violation of Germany's clearly established constitutional rights. The district court's denial of qualified immunity is affirmed.")

Walker v. Davis, 649 F.3d 502, 504, 511 (6th Cir. 2011) (McKeague, J., dissenting) ("I respectfully dissent because I think that the majority has significantly downplayed the level of risk that Germany posed to the public, and defined clearly-established law at too high a level of generality. Because I do not believe that Davis's alleged conduct was prohibited by clearly-established law, I would find that Davis is entitled to qualified immunity. . . . I find that this case is much closer to *Scott, Pasco, Abney* and *Sharp*–all cases in which the court concluded that the officer's decision to ram the vehicle was objectively reasonable, than it is to *Kirby* or *Garner.* . . . Because no one 'has identified a single case predating the conduct at issue that prohibits [ramming a car] in a materially similar context,' and because I believe that these cases demonstrate that Davis's actions 'at best fell in the hazy border between excessive and acceptable force,' the Plaintiff has failed to show that Davis's conduct was prohibited by clearly-established law.")

Greathouse v. Couch, No. 09-6011, 2011 WL 2989069, at *2, *3 (6th Cir. July 22, 2011) (not published) ("In applying the segmented approach, we have held that knock-and-announce rule violations are 'conceptually distinct' from excessive-force claims and are, accordingly, analyzed separately. . . In *Dickerson,* we considered and rejected an argument almost identical to Greathouse's, that 'officers should be held accountable for creating the need to use excessive force by their unreasonable unannounced entry.'. . In subsequent cases, we have continued to apply the segmented approach to excessive-force claims, without regard to earlier violations committed by police officers. . . Despite Greathouse's arguments to the contrary, the knock-and-announce rule violation is irrelevant to her excessive-force claim. The district court correctly segmented the events and evaluated the reasonableness of Couch's gunfire by looking only at the moments immediately preceding his use of force. . . We turn now to the question of whether Couch is entitled to qualified immunity on this excessive-force claim. . . .We may dispose of this case by reference to *Saucier's* second prong because, on these facts, even if there was a constitutional violation, it did not contravene clearly established law. . . .When a person aims a weapon in a police officer's

direction, that officer has an objectively reasonable basis for believing that the person poses a significant risk of serious injury or death. . . . A police officer need not wait for a suspect to open fire on him, much less wait for the suspect to actually hit him, before the officer may fire back. . . The circumstances in this case provide substantial grounds for Couch to have concluded that he had 'legitimate justification under the law' for firing at Mrs. King, and that he would contravene no clearly established law by doing so.")

Bletz v. Gribble, 641 F.3d 743, 751-54 (6th Cir. 2011) ("Whether events leading up to a shooting are legitimate factors to consider in assessing an excessive-force claim depends on the totality of the circumstances in question . . . . In the case before us, we need not decide precisely which preceding events (i.e., the breadth of the excessive-force segment) should properly be considered in analyzing the reasonableness of Gribble's use of deadly force. We can instead affirm the district court's denial of qualified immunity by looking only at the facts alleged by plaintiff in the moment immediately preceding the shooting. Zachary Bletz testified that Fred Bletz was lowering his gun in response to Gribble's command to do so. If Gribble shot Fred Bletz while the latter was complying with the officer's command, then Gribble violated Fred Bletz's clearly established Fourth Amendment right to be free from deadly force. . . . Because Fred's right to be free from deadly police force while complying with police commands to disarm was clearly established, both *Saucier* prongs have been met. . . Accordingly, we affirm the district court's decision to deny Gribble qualified immunity on the estate's Fourth Amendment claim.")

Coble v. City of White House, Tenn., 634 F.3d 865, 869-71 (6th Cir. 2011) ("Here, in contrast to the plaintiff in *Scott*, Coble does not merely characterize the recording differently. Rather, Coble insists that the facts differed from what was recorded. Coble testified that he screamed, that he called Officer Carney names, that he was forced to walk on his broken ankle, and that he was dropped face-first on the ground. His testimony is not 'blatantly contradicted' by the lack of corroborating sound on the audio recording. A reasonable jury could believe Coble's version of the events. . . . Even if part of Coble's testimony is blatantly contradicted by the audio recording, that does not permit the district court to discredit his entire version of the events. . . . We cannot say that Coble's version of the events was so utterly discredited by the record that no reasonable jury could believe it. Accordingly, there is a genuine question of material fact as to whether Officer Carney used excessive force, and the district court erred by granting summary judgment for Office Carney. . . The district court held that Officer Carney was entitled to qualified immunity because Coble failed to show the violation of a constitutional right. The district court based this finding, like its summary judgment finding, on the audio recording. Because we have determined that it was improper to rely on this audio recording over Coble's version of events, this finding is also subject to reversal. In light of its conclusion that Coble failed to show the violation of a constitutional right, the district court did not consider the second prong of the qualified immunity analysis. We leave consideration of whether the right was clearly established for determination by the district court in the first instance.")

Morrison v. Board Of Trustees Of Green Tp., 583 F.3d 394, 406, 407 (6th Cir. 2009) ("Officer Celender essentially asks this Court to impose a blanket *de minimis* injury requirement for excessive force claims. In support of this proposition, he cites several of our cases in which we denied the defendant police officer qualified immunity when the plaintiff presented evidence of particularly violent displays of physical contact. . . . But while an excessive use of force claim *may* be established through evidence of severe injury or physical contact, this Circuit has not required that this *must* be the case. . . . As discussed above, a reasonable juror could find based on the evidence that Officer Celender pushed Amanda's face into the ground absent a legitimate government interest, namely officer safety. . . . Officer Celender was on notice that his conduct was a violation of Amanda's constitutional rights to be free from excessive use of force because it was ' "obvious" under the general standards of constitutional care' existing as of October 30, 2002–the date of the relevant events–that such conduct violated her Fourth Amendment rights. . . .Therefore, we reject Officer Celender's argument that the right at issue was not 'clearly established.'").

Harris v. City of Circleville, 583 F.3d 356, 372, 373 (6th Cir. 2009) (Clay, J., concurring) ("In the qualified immunity context, the courts need not determine the 'specific constitutional right' at issue to resolve whether a defendant officer was sufficiently 'on notice that his conduct would be clearly unlawful.' . . . [O]n my reading of the required inquiry, Defendants would not be entitled to summary judgment regardless of whether the application of the Fourth Amendment was unclear at the time, and regardless of whether Harris remained in the joint custody of the arresting officers and the booking officers. By addressing those issues, the district court wrongly implied that Defendants' premise that they would be entitled to qualified immunity if the application of the Fourth Amendment was not fully settled at the time has some credence. It does not. The district court's decision to address this issue also perpetuates the notion that the application of the Fourth Amendment turns on whether the suspect remains in the continuing custody of the arresting officers, a premise that our decision in *Drogosch* unequivocally put to rest.Simply put, because our case law makes clear that Defendants' conduct was unconstitutional under any standard, it is irrelevant for qualified immunity purposes whether Harris' claims are controlled by the Fourth or Fourteenth Amendment, and thus it is irrelevant whether Harris remained in the joint custody of the arresting officers and the booking officers. And, despite what we unintentionally may have suggested in *Phelps,* it is not always necessary to determine the governing legal standard to resolve a qualified immunity claim. That is especially true in this context because this circuit's case law gave the officers more than sufficient notice that criminal suspects who already have been subdued and who present no possible threat to the officers or themselves have a clearly established constitutional right not to be gratuitously struck by a police officer. Although it may be helpful to the district court for us to clarify what standard it must apply when addressing the merits of Harris' claims, because we need not reach that constitutional question to resolve Defendants' present appeal, well-established principles counsel us to abstain from addressing the issue.").

Smoak v. Hall, No. 08-5442, 2009 WL 2778101, at *5-*7 (6th Cir. Sept. 2, 2009) (not published) ("We review a district court's denial of a Rule 50 motion *de novo*. . . . Bush asks us to do what we

are expressly forbidden to do–to look at the video and substitute our judgment for that of the jury. Bush's reliance on this case law is misplaced and this proposal is untenable. . . . Unless we are to say, as a matter of law, that a police officer may use as much force as he likes to subdue a noncompliant but handcuffed robbery suspect, the question of how much force in this situation is too much is a question for the jury. And, unless we are to rewrite or ignore our standard of review, we must defer to the jury's reasonable interpretation of the evidence, no matter how we might feel about that evidence if we were to assess it ourselves. . . . Bush's second claim on appeal is that the district court erred by denying him qualified immunity. We disagree. . . .[I]t was clearly established that the force Bush used was excessive. . . . As the family knelt on the side of the highway–the Cookeville officers' guns trained on them–Smoak complied while the troopers secured his hands behind his back, handcuffed his wife and step-son, and looked in his car. Up to this point, Smoak was remarkably compliant–in fact, commendably so.When Hall shot the dog, Smoak stood up, crying out, 'You shot my dog, you shot my dog!' Despite the fact that both Bush and Andrews had hold of the handcuffed Smoak, that Trooper Phann had hold of Smoak's step-son, Brandon, and that the two Cookeville officers had guns at the ready, Bush contends that he thought it was necessary to slam Smoak to the ground, i.e., that this use of force was, at most, a reasonable mistake. We disagree. Having reviewed the evidence, including the video, we find this use of force clearly unreasonable. Bush has not established that he was entitled to qualified immunity.").

Grawey v. Drury, 567 F.3d 302, 311-14 (6th Cir. 2009) ("Grawey, who was unarmed, did not pose an immediate threat to the officers or to others when Saad sprayed him. And Grawey was not actively resisting arrest or trying to flee at the time he was pepper sprayed by Saad. Rather, he had stopped running and placed his hands against the wall while he waited for the officer to arrive. . . . Even if Saad's use of pepper spray *per se* on Grawey was not excessive force, Saad's discharging enough pepper spray at a very close distance to cause Grawey to pass out supports a claim of excessive force. . . . Based on the caselaw that existed on June 16, 2005, the date of the alleged use of excessive force, Saad was on notice that his actions were unconstitutional. The general consensus among our cases is that officers cannot use force, including pepper spray, on a detainee who has been subdued, is not told he is under arrest, or is not resisting arrest. . . . While we must examine the issue from the perspective of the police officer, a reasonable police officer would know that using pepper spray on a suspect who has submitted, is not resisting, and is no danger to anyone constitutes excessive force. Moreover, discharging enough pepper spray in a detainee's face to cause him to lose consciousness is an obvious constitutional violation that does not require a specific body of caselaw to be clearly established.")

Vance v. Wade, 546 F.3d 774, 785, 786 (6th Cir. 2008) ("Although the facts in this case and those in *Saucier* are similar, this case involves a substantial difference: Vance asserts that Wade escorted him to a police vehicle, left that scene for several minutes, and *then* returned to Vance and forcibly crammed him into the floorboard of the vehicle. Further, although both cases involved a degree of tension and concern for keeping order, the level of tension and danger in this case was considerably lower. *Saucier* involved a demonstrator protesting a speech by the Vice President, whereas in this case a large crowd of approximately fifty people were standing outside a restaurant where officers

were executing a search warrant for illegal gambling machines. The time delay between Wade escorting Vance to the car and Wade's later actions in cramming Vance into car is the decisive factor that renders this case substantially different than *Saucier*. . . . Wade had secured the situation by the time that he handcuffed Vance and escorted him to the police vehicle. Consequently, when Wade returned to the vehicle several minutes later, it was objectively unreasonable for him to believe that any further force was necessary to maintain order because it would have been 'clear to a reasonable officer that [Wade's] conduct was unlawful in the situation he confronted.' . . . [A]ccording to Vance's allegations, Vance had been cooperatively sitting handcuffed in the back of a police vehicle for several minutes when Wade returned and used force.. . We therefore hold that Wade is not entitled to qualified immunity from Vance's claim that Wade used excessive force in cramming him into the back of a police vehicle.")

Landis v. Baker, 297 F. App'x 453, 2008 WL 4613547, at *10 (6th Cir. Oct. 16, 2008) ("The district court correctly concluded that the officers should have known that the gratuitous or excessive use of a taser would violate a clearly established constitutional right. . . . The defendant officers should have known that the use of a taser in stun mode, in rapid succession on a suspect who is surrounded by officers, in a prone position in a muddy swamp, who has only one arm beneath him, and who has just been struck several times with a baton would be a violation of a constitutional right. The fact that only Deputy Lynch pulled the trigger on the taser does not absolve Baker and Galarneau of liability."). *See also* ***Landis v. Galarneau***, No. 2:05-cv-74013, 2009 WL 4947600, at *6 (E.D. Mich. Dec. 14, 2009) ("As a threshold matter, the Court must address the unusual legal posture of the present motion for summary judgment, following as it does the Sixth's Circuit's opinion addressing the defendants' previous motion for summary judgment on the grounds of qualified immunity. The cases on unlawful force establish that the question of objective reasonableness is a question of law. Often there are factual disputes as to what precisely happened during the alleged unlawful force: for example, did the plaintiff attack the police officer or not? There are few such disputes in this case. The facts here are largely undisputed and the Sixth Circuit has already found that the facts could, if proved, constitute unlawful force. The question therefore arises whether the precedent established by the Sixth Circuit in this case require this Court to determine as a matter of law that a constitutional violation occurred, or, conversely, if the reasonableness of the force here is still a question for the jury. . .The Court concludes that the Sixth Circuit opinion affirming the denial of qualified immunity to defendants does not mandate a grant of summary judgment to the plaintiff. While the plaintiff is correct that most of the facts in the present case are undisputed, there are several. . .material factual disputes, including whether Keiser lunged at Galarneau and the number of times Galarneau struck Keiser with his baton. There are also various inferences that a jury would be entitled to draw on the undisputed facts, which inferences must be drawn in favor of the defendant on plaintiff's motion for summary judgment. Specifically, here a jury could interpret the largely undisputed facts as either suggesting that Keiser was still highly dangerous, and therefore the police response was justified, or a jury could interpret the undisputed facts as suggesting that Keiser was no longer dangerous, because he was surrounded by four police men, and was not trying to escape or aggressively resist arrest, and therefore the police response was not objectively reasonable. The

Sixth Circuit opinion drew all permissible inferences in favor of the plaintiff, and did not consider the question of excessive force where the inferences from the undisputed facts were drawn in favor of the defendant, as is necessary here. The Court therefore will proceed to determine whether summary judgment is appropriate based upon the facts in the record, construed in the light most favorable to the defendant.")

Kirby v. Duva, 530 F.3d 475, 482-84 (6th Cir. 2008) ("The plaintiffs' version of the events, relied upon by the district court, supports a holding that defendants violated Kirby's Fourth Amendment right to be free from excessive force. Under that version, the Ranger was moving slowly and in a non-aggressive manner, could not have hit any of the officers, and was stationary at the time of the shooting. Consequently, reasonable police officers in defendants' positions would not have believed that Kirby 'pose[d] a threat of serious physical harm, either to the officer[s] or to others.' . . . In fact, under Moore's testimony, it was Buckley who placed himself in potential danger by moving towards the rolling Ranger instead of fleeing or simply remaining where he was. . . . Where a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive. . . .Finally, and critically, defendants had sufficient time under plaintiffs' account to assess the situation before firing several rounds at Kirby. . . . Even if defendants were in close proximity to the Ranger and were thus unable to determine initially that Kirby did not pose a risk, each had an adequate opportunity to realize before shooting that the Ranger had stopped moving and that no one was in its path. . . . At the time of the shooting, it was clearly established under *Tennessee v. Garner* . . . that police officers may not fire at non-dangerous fleeing felons such as Kirby. . . . Although *Garner* did not, as defendants point out, involve the roadside execution of a search warrant, its holding was clear enough to have placed defendants on notice that their conduct was unconstitutional. *Garner* made plain that deadly force cannot be used against an escaping suspect who does not pose an immediate danger to anyone. That rule applies here, where reasonable police officers in defendants' positions would not have perceived a threat. This conclusion is not changed by the fact that the seizure occurred on a roadside or in an attempt to execute a search warrant. . . . Finally, *Brosseau v. Haugen* . . . upon which defendants rely heavily, does not require a contrary result. . . . Kirby not having presented a risk under the factual version on appeal, *Brosseau* does not preclude a finding that the right at issue was clearly established.")**.**

Ryan v. Park, No. 07-1659, 2008 WL 2130370, at *3, *4 (6th Cir. May 22, 2008) ("In this case, Ryan was fleeing, resisting, and obstructing police officers. She led three police cruisers on a chase that lasted almost eight minutes. As Ryan points out, this was not a high-speed chase, and the testimony and police reports from the defendants indicate that Ryan was driving at or below the speed limit during the chase. However, a chase need not be high-speed to be dangerous, and the record indicates that Ryan disobeyed traffic signals and stop signs. . . . The three factors highlighted by the Supreme Court in *Graham* weigh in favor of the reasonableness of the officers' use of force. First, although Ryan's initial crime was merely a traffic violation–swerving abruptly from one lane to another–Ryan ultimately committed the felony offenses of fleeing and eluding and assaulting, resisting, or obstructing an officer. This Court has held that officials are entitled to qualified immunity in the face of excessive force allegations even when the plaintiff 'was suspected of

relatively minor crimes' if the plaintiff resisted and the officials responded with force. *See Wysong v. City of Heath*, 2008 WL 185798 at *6-7 (6th Cir. Jan. 22, 2008) (slip opinion) (discussing such cases). Second, Ryan posed an immediate threat to herself and the officers. She refused to place her vehicle in park, and it continued to push against Clark's cruiser even after the chase ended. Once she exited the vehicle, she was on a busy street and the officers wished to quickly place her in custody. Third, Ryan actively resisted arrest and attempted to evade arrest. If a reasonable officer would have recognized Ryan's condition and understood that her non-responsiveness was beyond her control, this analysis might be different. However, under the circumstances, the officers could not be expected know that Ryan's non-responsiveness might be due to a seizure. Thus we find that, under the totality of the circumstances, the officers' actions were objectively reasonable.")**.**

Davenport v. Causey, 521 F.3d 544, 553, 554 (6th Cir. 2008) ("While neither Officer Pugh nor Officer Causey had been knocked unconscious, the situation here was similar enough to allow the use of deadly force without violating the Constitution. The officers were facing a large, violent, and angry individual who was unwilling to be brought under control by the officers. Mr. Davenport had already knocked Officer Causey to the ground and was delivering blows in rapid succession to Officer Pugh's head. Indeed, Mr. Davenport was more dangerous than the defendant in *Colston* because Mr. Davenport never broke off his attack and there was no indication that he would. Even though when looking in retrospect 'in the peace of a judge's chambers' it may seem that serious physical injury or death was not imminent, we cannot say that a reasonable officer on the scene facing such a suspect and having to decide very quickly could not have reasonably believed it was. . . Our analysis is not changed by the assumed fact that, when viewing the facts most favorably to the plaintiffs, the off-camera blow did not occur and Officer Causey did not see the whites of Officer Pugh's eyes. While both would bolster Officer Causey's decision to use deadly force, the circumstances provided sufficient cause for deadly force absent these two facts. Even though Officer Causey did cite the fact that Officer Pugh's eyes rolled to their whites as a reason he decided to use deadly force, it was still reasonable for him to shoot Mr. Davenport under the circumstances. Again, as detailed above, Mr. Davenport was a large, violent, and angry man who was unwilling to comply with direction from the police and who had attacked two police officers in quick succession, with only four seconds having elapsed while he delivered at least five blows to the two officers. In those four seconds Mr. Davenport had struck Officer Causey at least twice and knocked him to the ground, and had struck Officer Pugh in the head three times, strikes which Officer Causey had observed. At the time he was shot, Mr. Davenport was preparing to strike Officer Pugh on the top of his head with his fist for a fourth time. As conceded by the plaintiffs, Mr. Davenport had given no indication that he planned on retreating, and, if the fight were scored on points, Mr. Davenport was winning. While Officer Causey may have been mistaken in deciding that deadly force was required and that there was no time to warn Mr. Davenport, we cannot say that, given the rapidly evolving circumstances, his decision was unreasonable.").

Floyd v. City of Detroit, 518 F.3d 398, 409 (6th Cir. 2008) ("According to the facts that we must consider at this stage of the proceedings, the officers ran around the corner of the house with their guns drawn, spotted Floyd in the diminished light, and shot him without (1) announcing

themselves as police officers, (2) ordering him to surrender, or (3) pausing to determine whether he was actually armed. Based upon the facts as construed in the light most favorable to Floyd, we conclude that his right to be free from such excessive force was clearly established on the date in question. Neither officer is therefore entitled to qualified immunity as a matter of law.").

Lawler v. City of Taylor, Nos. 07-1329, 07-1442, 2008 WL 624770, at *2 (6th Cir. Mar. 5, 2008) ("The videotape also undermines Toro's claim that his use of force, after he threw Lawler to the floor, was reasonable. A jury could fairly conclude that, once Toro was kneeling on Lawler's back, it was gratuitous to knee him in the back twice and to hit him once with his elbow. Though Toro disputes some of Lawler's account, the video of the altercation would permit a jury to conclude that Lawler never posed a threat to Toro and that Toro used objectively unreasonable force in reaction to Lawler's continued pleas for leniency, verbal insults and drunken resistance. *See generally Scott v. Harris*, 127 S.Ct. 1769, 1775-76 (2007) (relying on a videotape in assessing summary-judgment evidence).")

Marvin v. City of Taylor, 509 F.3d 234, 246 n.6, 248 (6th Cir. 2007) ("The *St. John* court noted the passive resistance, but ultimately concluded that '[e]ven if there was evidence of resistance, it would be improper to determine whether the resistance justified the officers' actions because such a determination is for a jury in the first instance.' However, the standard articulated by the Supreme Court in *Scott* clearly dictates that it is a pure question of law for the court to determine whether, viewing the facts in the light most favorable to the plaintiff, the officers' actions were objectively reasonable under the circumstances. . . As such, the *St. John* court's determination that such a determination is for a jury in the first instance is directly contrary to subsequent Supreme Court authority. . . Therefore, this Court will take the resistance into account in analyzing the Defendants' actions. . . .[I]t is clearly established that handcuffing an arrestee in an objectively unreasonable manner is a Fourth Amendment violation. However, it is important to keep in mind that simply because the right not to be handcuffed in an objectively unreasonable manner was clearly established, it does not necessarily follow that the Defendants in the instant matter actually behaved in an objectively unreasonable manner. Again, the value of *Walton* and similarly situated cases is strictly limited to the 'clearly established' prong of the qualified immunity analysis because *Walton* did not perform the objective reasonableness analysis as announced by the Supreme Court in *Saucier* and recently re-articulated in *Scott*. But, we reiterate, to get to the clearly established prong, there must first be a constitutional violation. In any event, to the extent that the facts of *Walton* might be so similar as to presuppose a denial of qualified immunity here, those facts are distinguishable. The *Walton* court credited the suspect's claim that she told the officers that she had an injured shoulder and could not put her hands behind her back. . . Similarly, Marvin claimed he was physically unable to put his hands behind his back. In *Walton*, the officer responded to the suspect's refusal by saying '[w]e can do this the easy way or the hard way.' . . Similarly, Officer Minard told Marvin '[p]ut your arm[s] behind you or we'll put them behind you for you.'. . In *Walton*, the suspect obeyed the officer's command, put her hands behind her back, and allowed the officer to handcuff her. And herein lies the critical difference between the two cases: Marvin did not obey the officers' command, but instead resisted. Note also that the suspect in *Walton* was

not intoxicated, whereas the officers who were confronted with Marvin observed a person who was obviously intoxicated.")

Marvin v. City of Taylor, 509 F.3d 234, 253 (6th Cir. 2007)(Daughtrey, J., dissenting) ("The majority's decision to reverse the district court's denial of qualified immunity is apparently based not just on the 12 video files that were before the district court, but also on six additional video files that clearly were not before the district court. The majority justifies its consideration of this extraneous evidence on the basis of our authority to exercise de novo review of a district court's ruling on a motion for summary judgment. That review, however, does not allow us to resolve disputes of fact that are, as here, material to the outcome of the case, nor to consider evidence not introduced below or to find facts not found by the district court. Indeed, nothing in Federal Rule of Appellate Procedure 10, governing the record on appeal, permits the introduction–or, presumably, the consideration–of new evidence in the courts of appeal. For this reason, I would remand the case to the district court with a direction to identify the 12 files submitted into evidence below or, alternatively, to view all 18 files and reconsider its ruling on the defendants' motion for summary judgment in light of the intervening case of *Scott v. Harris*, 127 S.Ct. 1769 (2007). That recent Supreme Court opinion, released after the district court's decision was issued in this case, holds that in ruling on a motion for summary judgment, a district court need not view the facts in the light most favorable to the nonmoving party if that party's version of events is 'blatantly contradicted by the record, so that no reasonable jury could believe it.' . . As in this case, the record in *Scott* included videotapes that arguably conflicted with the non-moving party's version of events in a section 1983 action charging law enforcement officers with the use of excessive force. Whether or not *Scott* is applicable retroactively to this case in its current posture, clearly it would be both relevant and applicable to a new ruling by the district court on the motion for summary judgment.")

Green v. Taylor, 239 F. App'x 952, 2007 WL 2478663, at *8 (6th Cir. Aug. 30, 2007) ("The present situation is an 'obvious case' in which the standards articulated in *Garner* and *Yates* ' Aclearly establish"the answer, even without a body of relevant case law.'[*citing Brosseau*] The district court correctly determined that a reasonable jury could conclude under Green's version of the facts that Taylor had no reason to believe that the suspects posed an immediate risk to the officers or anyone else if the vehicle was not backing up or being used as a weapon.").

Murray-Ruhl v. Passinault, 2007 WL 2478584, at *8 (6th Cir. Aug. 29, 2007) ("When the suspect poses no immediate risk of death or serious danger, *Brosseau* does not control and *Tennessee v. Garner* provides a 'clearly established' right that fulfills the second prong of the qualified immunity analysis.").

Williams v. City of Grosse Pointe Park, 496 F.3d 482, 487, 488 (6th Cir. 2007) ("The dissent relies upon *Sigley v. City of Parma Heights*, 437 F.3d 527 (6th Cir.2006), and *Smith v. Cupp*, 430 F.3d 766 (6th Cir.2005), in support of its contention that the facts, when viewed in the light most favorable to the plaintiffs, demonstrate that Miller acted unreasonably. We respectfully disagree.

The *Sigley* and *Cupp* courts were both presented with a factual dispute regarding the events that gave rise to the officers' use of deadly force. . . In contrast, the facts of this case are undisputed, and while the dissent takes a different view of the events depicted on the video, we do not believe that any rational trier of fact could conclude that Miller acted unreasonably. Both *Sigley* and *Cupp* concluded that the plaintiffs' version of the facts *could* support a finding that the defendants acted unreasonably, and we have no difficulty with those conclusions. *Sigley* and *Cupp* are inapplicable to the facts of this case because the events depicted on the video demonstrate that Miller reasonably believed that Williams posed a threat of serious harm and acted in accordance with that belief. The dissent's assertion that *Smith* and *Cupp* should control the outcome of this case depends upon its view of the facts of this case–purportedly after viewing the evidence in the light most favorable to the plaintiffs–for which we find no support in the record.").

Bouggess v. Mattingly, 482 F.3d 886, 894, 895 (6th Cir. 2007) ("The question in this case, therefore, is whether Mattingly reasonably could have thought that he had probable cause to believe that Newby posed a serious danger to Mattingly or to others. Under the facts viewed in the light most favorable to Bouggess, Newby was (a) present at a crack deal; (b) uttered no threatening remarks toward Mattingly or anybody else; (c) never drew a weapon; (d) struggled with Mattingly in order to flee; (e) did not reach for Mattingly's gun; (f) did not fire Mattingly's gun at Mattingly's foot; (g) broke free from Mattingly and ran away, facing away from Mattingly; and (h) was shot three times in the back. Viewing the facts that way, no reasonable officer could have thought he had probable cause to use deadly force against Newby. . . . Certainly, *Garner*'s statement of the governing law may be applied differently in particular sets of circumstances, and reasonable minds can disagree over precisely which circumstances justify the use of deadly force. Nevertheless, the Supreme Court has recognized that there are obvious cases in which an officer should have been on notice that his conduct violated constitutional rights, despite the generalized nature of that Court's pronouncements of constitutional standards. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Our circuit and others have held that some cases can be so obvious under *Garner* and governing circuit precedent that officers should be presumed to have been aware that their conduct violated constitutional standards. . . . This is such an obvious case.").

Humphrey v. Mabry, 482 F.3d 840, 847, 848, 851 (6th Cir. 2007) ("In a situation such as the present one where the constitutional violations are based on the collective knowledge of a number of police officers, it is important to recognize that an individual officer is still entitled to qualified immunity if an objectively reasonable officer in the same position could have reasonably believed that he or she was acting lawfully. . . More specifically, where individual police officers, acting in good faith and in reliance on the reports of other officers, have a sufficient factual basis for believing that they are in compliance with the law, qualified immunity is warranted, notwithstanding the fact that an action may be illegal when viewed under the totality of the circumstances. . . . Accordingly, in a case such as this where one officer's claim to qualified immunity from the consequences of a constitutional violation rests on his asserted good faith reliance on the report of other officers, we consider: (1) what information was clear or should have been clear to the individual officer at the time of the incident; and (2) what information that officer

was reasonably entitled to rely on in deciding how to act, based on an objective reading of the information. . . . . We agree with our dissenting colleague that the complaint alleges an unconstitutionally intrusive seizure and use of force. We also agree that if several police mistakes had not occurred, Humphrey would have been spared his brief ordeal. . . However, all three defendant officers' individual mistakes were reasonable mistakes understandably committed in good faith while performing their job in a potentially dangerous situation. They are entitled to qualified immunity for those mistakes.").

Griffith v. Coburn, 473 F.3d 650, 659, 660 (6th Cir. 2007) ("*Brosseau* is fundamentally distinct from the present case. In *Brosseau* there was no factual dispute about the reasonableness of the officer's belief that the suspect posed risk to others. . . . When the facts in this case are viewed in the light most favorable to the plaintiff, it is clear that Partee posed no threat to the officers or anyone else. It follows that the use of the neck restraint in such circumstances violates a clearly established constitutional right to be free from gratuitous violence during arrest and is obviously inconsistent with a general prohibition on excessive force. . . .[I]f the jury concludes that Officer Sutherland used the neck restraint without an objectively reasonable belief that Partee posed a threat of serious bodily injury, then it is obvious to us that 'no reasonable officer could believe that such [use of force] would not violate another's constitutional rights.'")

Pigram v. Chaudoin, No. 05-6660, 2006 WL 2860773, at *3 (6th Cir. Oct. 5, 2006) (not published) ("Although the 'right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it,' the officers' interest justifies only the amount of force that a reasonable officer in the heat of the moment could have believed was needed to effectuate the arrest. In the present case, the slap cannot reasonably be construed as a means of subduing Pigram, especially given that Chaudoin's justification for the slap was not to protect himself, other officers, or the public, but rather was because Pigram had a 'smart-ass mouth.'. . . On the facts as we must take them, there was simply no governmental interest in slapping Pigram after he had been handcuffed, nor could a reasonable officer have thought there was. This Court's case law supports Pigram's right not to be slapped gratuitously. Specifically, cases in this circuit clearly establish the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest. [citing cases] Therefore, qualified immunity is not available for lack of a 'clearly established' right.")

Smoak v. Hall, 460 F.3d 768, 782 (6th Cir. 2006) ("In balancing the THP troopers' suspicion–based on an unsupported dispatch alerting the troopers to a 'possible robbery'–against the intrusiveness of the seizure, we conclude that the seizure of the Smoaks violated their Fourth Amendment rights because it became an arrest without probable cause.The Smoaks have not, however, met their burden of demonstrating that the THP troopers on the scene should have known that the unreasonable seizure was in violation of the Smoaks' constitutional rights. . . Caselaw from this circuit has endorsed the use of guns and handcuffs during a felony stop, even if only as part of an investigatory seizure. . . Although the use of guns and handcuffs in the present case was unreasonably intrusive, prior decisions had not made this clear. We are also faced with the question

of whether the approximately nine minutes that the Smoaks spent in handcuffs after the THP troopers were informed that no robberies had occurred is enough to deny the troopers qualified immunity. The law is clear that '[o]nce the purposes of the initial traffic stop [are] completed, there is no doubt that the officer [can] not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the reasonable suspicion to justify a further detention.' . . As a result, the traffic stop morphed into an arrest. But the THP troopers were still in the process of sorting out the disconnect between why they had pulled over the Smoaks in the first place and the new information received from the dispatchers. The Smoaks were also justifiably agitated and upset over the loss of their dog, and the troopers wanted to diffuse the situation. In this confusing factual scenario, we believe that the few extra minutes that the troopers took to release the Smoaks was not so unreasonable as to deny them the protection of qualified immunity.").

Bing v. City of Whitehall, Ohio, 456 F.3d 555, 570, 571 (6th Cir. 2006) ("Throwing a flashbang device into a house with knowledge that the dwelling will likely catch fire thus constitutes unreasonable force in these circumstances even assuming (without deciding) that the police would have been justified in using deadly force. Bing's right not to endure a second flashbang device in these circumstances, however, was not 'clearly established.' The Supreme Court has not clearly established such a right, nor has this court or other circuits. . . None of the cases concerning flashbang devices to which the parties refer involve policemen who knew that such devices would likely ignite flammable materials and thereby cause a fire. . . Given the lack of any case similar to this case finding a Fourth Amendment violation, it would not have been clear to a reasonable officer in the circumstances at issue that employing the second flashbang device violated the Constitution.")

Bing v. City of Whitehall, Ohio, 456 F.3d 555, 571, 572 (6th Cir. 2006) ("This set of facts assumed by the district court, if true, constitutes a violation of Bing's Fourth Amendment right against the use of deadly force. If, indeed, Bing did not have the gun after the police entered the house and posed no safety threat to anyone when he was shot to death in the back, then the danger he had once posed had abated. Under these assumptions, the officers had no legitimate interest in using deadly force that could counterbalance Bing's fundamental interest in his life. Therefore, under these assumptions, the *Graham* balancing test compels the conclusion that Bing's rights would have been violated. . . Moreover, the right allegedly violated is clearly established under the Supreme Court's ruling in *Tennessee v. Garner*. . . . No reasonable officer could fail to see that shooting an unarmed man in the back who has ceased to present a danger violates *Garner*. The district court therefore properly denied summary judgment to the officers with respect to the police-shooting deadly force claim.").

Alkhateeb v. Charter Township of Waterford, No. 05-1856, 2006 WL 1889240, at *9 (6th Cir. July 10, 2006) (not published) ("In our opinion, the unlawfulness of holding a gun to a suspect's head while berating him about his nationality is apparent. No reasonable officer in Lemos' position would think that what he was alleged to have done would be lawful. . . Moreover, in this Circuit,

the law is clearly established that an officer may not use additional gratuitous force once a suspect has been neutralized. . . . Thus, with the facts viewed in the light most favorable to Basim, the officers inflicted force that was gratuitous and would have been recognized by a reasonable officer as excessive. Officers are and have been on notice that the use of gratuitous force against a detained and passive or non-resisting suspect violates the Constitution. No reasonable officer would have believed that he could kick, kneel upon a suspect's neck, or hold a gun to a suspect's head when that suspect has shown no sign of resistance, no sign of being armed or dangerous, and is already subdued.").

Sigley v. City of Parma Heights, 437 F.3d 527, 536, 537 (6th Cir. 2006) ("The conflicting views of the facts demonstrate that there are unresolved factual issues regarding whether Mockler was chasing after Davis' car or the car was turning into him when he fired. Additionally, it is not clear whether Mockler had probable cause to believe that Davis posed a significant threat of death or serious physical injury to others. Viewing the evidence in a light most favorable to the Plaintiff, these are disputed factual issues that preclude the granting of summary judgment. . . . On appeal, Defendants argue, and the dissent asserts, that even if a constitutional violation occurred, Officer Mockler is entitled to qualified immunity. We disagree. Although, the district court did not address this issue because qualified immunity presents a purely legal issue we will discuss this issue. Viewing the facts in a light most favorable to the plaintiff, Mockler should not be granted qualified immunity. . . . The primary issue is whether the constitutional right allegedly violated was defined at the appropriate level of specificity to be clearly established. This is a legal issue. The contours of the right must be clear enough to put an officer on notice that the actions he is taking are unlawful. At the time of the shooting, '[u]se of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.'. . . Viewing the facts in a light most favorable to the plaintiff, the situation confronting Mockler was whether to shoot Davis, who did not intentionally create any harm to anyone on the scene, while attempting to flee.The dissent relies on *Brosseau* to support the granting of summary judgment based on qualified immunity. In *Brosseau*, the Court stated that the material facts taken in a light most favorable to the plaintiff showed that the shooting officer believed the suspect had a gun and was fearful for officers in the immediate area. . . The Court held that when the material facts identify official conduct within the 'hazy border' between excessive and acceptable force, the qualified immunity privilege applies. . . . . Accordingly, viewing the facts in a light most favorable to the Plaintiff, Mockler was running behind Davis' car, out of danger, and Davis drove in a manner to avoid others on the scene in an attempt to flee. Accepting these facts as true, Mockler would have fair notice that shooting Davis in the back when he did not pose an immediate threat to other officers was unlawful.").

Sigley v. City of Parma Heights, 437 F.3d 527, 538, 539 (6th Cir. 2006) (Batchelder, J., dissenting) ("I respectfully dissent. I would affirm summary judgment in favor of Officer Mockler because he was entitled to qualified immunity. Qualified immunity protects an officer from suit when the officer 'makes a decision that, even of constitutionally deficient, misapprehends the circumstances she confronted.' [citing *Brosseau*] In *Saucier v. Katz*, the Supreme Court held that a lower court

faced with a qualified immunity defense must first determine whether the plaintiff has asserted the violation of a constitutional right. . . Sigley clearly has done so. '[T]he next, sequential step is to ask whether the right was clearly established.' . . . Officer Mockler could not have known that his conduct was unlawful. Under *Tennessee v. Garner*, the use of deadly force is reasonable when an 'officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'. . The Supreme Court has addressed the question of when a suspect escaping in a vehicle poses such a threat. In *Brosseau v. Haugen*, the court held that an officer who fatally shot a suspect fleeing in a Jeep was entitled to qualified immunity. . . .Because the law did not clearly establish a Fourth Amendment right in favor of a 'disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight,' the officer was entitled to qualified immunity. . . This case is analogous to *Brosseau*. The defendants in this case have produced uncontroverted evidence that Davis posed a significant threat to the officers on the scene.").

Tallman v. Elizabethtown Police Dep't., No. 04-5723, 2006 WL 166610, at *6, *7 (6th Cir. Jan. 23, 2006) (unpublished) ("In sum, the *Graham* factors raise no genuine questions about the reasonableness of Bland's actions. At the moment of the incident, it was not unreasonable for Bland to perceive that Lee posed a serious threat to his safety. Therefore, Lee's constitutional rights were not violated and Bland is entitled to qualified immunity. . . . Furthermore, even if Bland's actions had violated Lee's Fourth Amendment rights, the right in question was not clearly established so as to preclude the application of qualified immunity. The cases cited by the parties demonstrate that 'this area is one in which the result depends very much on the facts of each case.... The cases by no means Aclearly establish" that [Bland's] conduct violated the Fourth Amendment.'[citing *Brosseau*]").

Tallman v. Elizabethtown Police Dep't., No. 04-5723, 2006 WL 166610, at **11-14 (6th Cir. Jan. 23, 2006) (Clay, J., dissenting) (unpublished) ("The key issue in this case is not whether it was reasonable for Officer Bland to chase Babb and Lee at high speeds; nor whether it was reasonable for him to have his gun drawn as he exited his car once the chase was over. The key issue in the case–the one that warrants a trial and the one the majority entirely ignores–is whether it was reasonable for Bland to charge full-speed at Lee with his gun drawn, giving Lee no meaningful chance to submit to his authority, and to continue at full-speed upon arriving at the passenger window, plunging into the passenger compartment, gun still in hand. After reading the majority opinion, one would not imagine that this is in fact what occurred. The only reason I am able to recount the event as it actually happened is because I have seen the videotape that recorded it for posterity–a videotape no jury will see. The majority has treated this case so cavalierly that justice has escaped. I therefore dissent. . . . I am firmly of the view that a reasonable jury could conclude Officer Bland's decisions to charge Lee with his gun drawn, without giving Lee a meaningful opportunity to comply with his instructions, and reach into the passenger compartment while still aiming the gun at Lee's head, were objectively unreasonable, indeed reckless. . . . Furthermore, on this record a reasonable jury could conclude that Bland's conduct went beyond mere negligence, i.e., beyond objective unreasonableness, such that application of the qualified immunity doctrine

would be improper. . . . The majority has dissociated itself with the remarkable facts of this case. As I have endeavored to explain, genuine issues of material fact abound. Was it reasonable for Bland to charge at Lee with his gun drawn, giving Lee no meaningful chance to submit to Bland's authority? To allow only 2.5 seconds for Lee to consider the instruction to exit the car and, moreover, to force Lee to consider this instruction while facing an advancing policeman with a gun trained directly at him? To continue full-speed upon arriving at Babb's car and to plunge through the passenger window with the gun still in hand and his finger pressing on the trigger? The case law and the record suggest some or all of these decisions may not have been reasonable under the circumstances of this case and, furthermore, that a reasonable officer would have known it. A trial is required. I therefore dissent.").

Ciminillo v. Streicher, 434 F.3d 461, 467-69 (6th Cir. 2006) ("Although the factors articulated in *Graham* each militate against a finding that Knight's conduct was reasonable, we must consider the totality of the circumstances. It is undisputed that Knight shot Ciminillo during the course of a riot. However, the fact that the shooting took place during a riot does not automatically render Knight's conduct reasonable. . . Taking the facts in the light most favorable to Ciminillo, it was objectively unreasonable for Knight to shoot Ciminillo as he attempted to leave the scene of the riot. The use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable. . . . Even though Ciminillo alleges facts that, if true, would constitute a violation of his Fourth Amendment rights, Knight may still be entitled to qualified immunity unless those rights were 'clearly established' at the time of the shooting. . . . Thus, we must determine whether it would have been clear to a reasonable officer in Knight's position that shooting Ciminillo with a beanbag propellant was unreasonable. It was clearly established law in this Circuit at the time of the underlying events that individuals have a right not to be shot unless they are perceived as posing a threat to officers or others. . . Although Knight did not use deadly force in shooting Ciminillo, that fact cannot insulate him from liability. At the time of the underlying events, this Court had previously held that the use of less-than-deadly force, including pepper spray, may be excessive. . . . Thus, in this Circuit, it was clearly established that individuals had a general right to be free from the unreasonable use of non-lethal force. Furthermore, Knight was on notice that it is unreasonable to use beanbag propellants against individuals who pose no immediate risk to officer safety. In *Deorle*, the Ninth Circuit held that the use of beanbag propellants against an unarmed man who posed no immediate threat was not objectively reasonable. . . . Given *Yates*, *Adams*, and *Deorle*, it was clearly established that shooting Ciminillo with a beanbag was objectively unreasonable. Thus, Knight is not entitled to qualified immunity.").

Smith v. Cupp, 430 F.3d 766, 771, 773-77(6th Cir. 2005) ("The plaintiffs have put forward sufficient evidence to show that Dunn's actions violated Smith's constitutional rights. According to the plaintiffs' evidence, Dunn shot Smith after the police cruiser was past Dunn and there was no immediate danger to anyone in the vicinity. Dunn's use of force was made even more unreasonable by the fact that Smith had been cooperative up to this point, and was arrested for the nonviolent offence of making harassing phone calls. Although there was some danger to the public from Smith's driving off in a stolen police car, the danger presented by Smith was not so grave as

to justify the use of deadly force. . . . Thus although events developed rapidly, under plaintiffs' version of the facts this is not a case where a dangerous situation evolved quickly to a safe one before the police officer had a chance to realize the change. . . Instead, this is a case where a jury could conclude that Officer Dunn was not in any danger in the first place. The fact that this was a rapidly evolving situation does not, by itself, permit him to use deadly force. Although this circuit's previous cases give substantial deference to an officer's decision to shoot a unarmed suspect in a car chase, the officer must have reason to believe that the car presents an imminent danger.[discussing cases] Though Smith could have used the police cruiser to injure or kill Officer Dunn, under the plaintiffs' version of the facts he was not doing so when Dunn shot him or even before Dunn shot him. Although Smith had possession of a dangerous 'weapon,' he was not threatening the lives of those around him with it when he was fatally shot. . . . It is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head. . . *Brosseau v. Haugen* does not preclude this court from finding the right at issue was clearly established because the *Brosseau* Court said that undisputed facts showed that the shooting officer believed the suspect had a gun and was fearful for officers in the immediate area. . . *Brosseau* is instructive on what makes law 'clearly established' in a case where an officer shoots a suspect fleeing in a car. *Brosseau* held that the two major excessive force cases, *Tennessee v. Garner* and *Graham v. Connor* . . . did not clearly establish the existence of the right alleged to have been violated in *Brosseau*. . . The *Brosseau* Court reasoned that the rule from *Tennessee v. Garner* did not apply because of the substantial risk of danger. . . In this case, the plaintiff's facts show there was no danger. The absence of any *Garner* preconditions to the use of deadly force makes this an 'obvious' case and distinguishes it from *Brosseau*. . . . The facts in *Brosseau* are not comparable to those in this case. In the light most favorable to Smith, there is no comparable evidence that Dunn had cause to believe that Smith posed an immediate risk of death or serious danger to Dunn, Rutherford, or nearby citizens. Smith was being arrested for a making harassing phone calls, not a crime involving the infliction or threatened infliction of serious physical harm. . . Unlike the situation in *Brosseau*, Smith and Dunn never struggled, Smith never displayed any violent tendencies, and the facts support a finding that a reasonable officer in Dunn's position would not have perceived danger to anyone at the scene. The fact that this case is very different from *Brosseau* permits the conclusion that *Garner*, by itself, clearly establishes the right at issue. . . . *Garner* and *Graham* clearly establish that a suspect fleeing in a car that has never posed a danger to anyone has the clearly established right not to be seized with deadly force. Because, *Garner* and its progeny clearly establish that Dunn violated Smith's constitutional rights by shooting him when the facts support a finding that a reasonable officer in Dunn's position would not have perceived Smith endangered anyone at the scene, we affirm the district court's denial of qualified immunity.").

Bultema v. Benzie County, No. 04-1772, 2005 WL 1993429, at *8, *9 (6th Cir. Aug. 17, 2005) (not published) ("It has long been held in this circuit that the right to be free from the use of excessive force under the Fourth Amendment is clearly established. . . More specifically, in the context of the police's use of chemical spray to subdue a suspect, we held that it was clearly established in 1999 that a police officer's use of pepper spray against a suspect after he was

handcuffed and hobbled constituted excessive force. . . With regard to Ketz's alleged blow to Bultema's head, we have also held for more than twenty years that it is clearly established in this circuit that 'a totally gratuitous blow' to a suspect who is handcuffed and offering no resistance violates the Fourth Amendment. . . Thus, applying these precedents to this case, we conclude that Ketz's actions as described by Stariha violated a clearly established constitutional right. Furthermore, we hold that Ketz's alleged actions were objectively unreasonable in light of this clearly established constitutional right. Ketz argues in his brief that 'a reasonable officer in Deputy Ketz's position would not necessarily have known that it might be unlawful to use pepper spray or force on a plaintiff who assaulted him and who was actively resisting him.' . . . [C]ontrary to Ketz's argument, regardless of what the suspect may have done to the police officer prior to the arrest, the police officer is constitutionally prohibited from exacting retribution once the suspect has been subdued. Accordingly, we have repeatedly upheld limits upon police action against those already restrained. . . . Therefore, we hold that under the facts as described by Stariha, no reasonable police officer in Ketz's situation would use pepper spray on Bultema or strike him in the head after he had already been placed in handcuffs.").

Myers v. Potter, 422 F.3d 347, 356, 357 (6th Cir. 2005) ("The particularized inquiry we employ to determine whether Hutchins should be entitled to qualified immunity is whether it would have been clear to a reasonable officer in Hutchins's position that the 'consent' obtained from Myers and his mother was legally insufficient to justify Raymond's seizure and detention. It is, we think, indisputable that a reasonable officer would have known that it was unlawful to take Myers into custody by using false representations as to the location and expected duration of the interrogation in order to obtain his consent and that of his mother. And no reasonable officer would have believed that Myers's detention was consensual after he made repeated requests to go home within hours of his detainment. . . . We hold that a reasonable officer in Hutchins's position would have known that, in light of Myers's detainment without probable cause or judicial authorization, the false representations made to him and to his mother to obtain their 'consent' to his detainment, and his repeated requests to be released, Raymond's clearly established constitutional rights were being violated. Accordingly, the district court erred in concluding that Officer Hutchins is entitled to qualified immunity.").

Lyons v. City of Xenia, 417 F.3d 565, 579 (6th Cir. 2005) ("*Brosseau* leaves open two paths for showing that officers were on notice that they were violating a 'clearly established' constitutional right–where the violation was sufficiently 'obvious' under the general standards of constitutional care that the plaintiff need not show 'a body' of 'materially similar' case law, *id.*, and where the violation is shown by the failure to adhere to a 'particularized' body of precedent that 'squarely govern [s] the case here,' *id*. at 599-600. Lyons has not satisfied either requirement for showing the violation of a 'clearly established' constitutional right. First, the constitutional violation, if any, was by no means an 'obvious' one that the 'general [excessive-force] tests set out in *Garner* and *Graham* ... can 'clearly establish' ... even without a body of relevant case law.' . . Even accepting all of Lyons' factual allegations as true, there is nothing 'obvious' about what Officer Foubert should have done upon entering a house from which a fellow officer had just placed a distressed

call for backup help and in which he could see immediately upon entering that the officer and resident were in close proximity to each other and in the middle of some form of confrontation. . . . . Second, no precedent 'squarely governs the case here.'. . As the cases that we have canvassed fairly indicate, the standards governing the constitutionality of Lyons' excessive-force tackling claim 'depend[ ] very much on the facts of each case.' . . To that end, we have been unable to identify a single case predating the conduct at issue that prohibits tackling in a materially similar context. 'Because the focus is on whether the officer had fair notice that her conduct was unlawful,' . . . and because Officer Foubert's actions, as in *Brosseau*, at best 'fell in the Ahazy border between excessive and acceptable force,"'. . . Lyons has failed to show the violation of a clearly established right in this more 'particularized' sense.").

Lyons v. City of Xenia, 417 F.3d 565, 589, 590 (6th Cir. 2005) (Tarnow, District Judge, dissenting) ("I do not read *Brosseau* to require that, for notice purposes, prior case law must be factually identical to the case sub judice. . . . [T]he issue is not whether prior case law presents identical, or even substantially similar, facts, but whether those cases would have put a reasonable officer on notice that his conduct would violate a constitutional right. In *Brosseau*, the Supreme Court left open one avenue by which a plaintiff may circumvent the notice requirement. In an 'obvious' case, a constitutional violation can be clearly established even without a body of relevant case law. . . I conclude that the law was sufficient to place Officer Foubert on notice that his action would violate Lyons's constitutional rights and that this is an obvious case in which a body of case law is not necessary. The events in question occurred in August 1998. At that time, it was clearly established that, before tackling a suspect to the ground, an officer should give the suspect an opportunity to voluntarily surrender. . . . Regardless of the status of the law in August 1998, I believe that reasonable officers would know, even without specific guidance from the courts, that tackling a woman who is merely resisting an unlawful arrest in her own home, without giving her fair warning, is unconstitutional. Thus, I place this case under the 'obvious' rubric established by the Supreme Court in *Brosseau* and conclude that a body of relevant case law is not necessary.").

St. John v. Hickey, 411 F.3d 762, 774 (6th Cir. 2005) ("[W]e conclude the right of a nonviolent arrestee to be free from unnecessary pain knowingly inflicted during an arrest was clearly established as of November 9, 2000, the day the defendants arrested St. John. Consequently, the defendants are not entitled to qualified immunity on St. John's claim that they violated his Fourth Amendment rights by attempting to place him in the back seat of the police cruiser after he specifically explained that his legs would not bend on account of his muscular dystrophy. Under these circumstances, a reasonable officer would have known that the manner of the arrest was clearly unlawful.").

Sample v. Bailey, 409 F.3d 689, 698-700 (6th Cir. 2005) ("In denying qualified immunity, the district court held that since the *Garner* decision in 1985, it has been clearly established that the use of deadly force is only constitutionally reasonable if 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' . . Bailey argues in his brief that this generalized statement is not particular enough to put a reasonable officer

on notice in the specific factual context of this case. Instead, Bailey argues that the absence of a factually similar precedent case requires this court to find that the constitutional right is not clearly established. Put another way, Bailey claims that a reasonable officer would be unaware that he could not use deadly force to seize a burglary suspect, who was unarmed but found hiding in a building at night. We disagree. In *Brosseau v. Haugen*, 125 S.Ct. 596, 599 (2004), the United States Supreme Court recently stated that *'Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality*'* and therefore may be insufficient to give a police officer fair warning of the constitutional parameters regarding the use of deadly force in a specific factual context. In *Brosseau*, the police officer was faced with the situation of *'*whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight*.'*. . The Court cited three cases, including one from this court, which reached different conclusions on whether a police officer in such a situation would be justified in using deadly force. As a result, the Court held that a reasonable officer who fully understood *Garner*'s general constitutional command nevertheless would not know whether the use of deadly force was permissible in that situation. Because a reasonable officer at that time would not have had fair warning that his conduct violated the Fourth Amendment, the Court held that the law was not clearly established and therefore, the officer was entitled to qualified immunity. . .By contrast, the Court recognized that *'*in an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law*.'* . . As the Supreme Court has noted, *'*officials can still be on notice that their conduct violates established law even in novel factual circumstances*.'*. . When a general constitutional principle *'*is not tied to particularized facts,*'* the principle *'*can clearly establish law applicable in the future to different sets of detailed facts*.'* . . The determinative issue is whether the officer had *'*fair warning that his conduct deprived [the plaintiff] of a constitutional right*.'*. . We hold that this case is *'*an obvious case*'* because it does not present a novel factual circumstance such that a police officer would be unaware of the constitutional parameters of his actions. We have held that it has been clearly established in this circuit for the last twenty years that a criminal suspect *'*ha[s] a right not to be shot unless he [is] perceived to pose a threat to the pursuing officers or to others during flight*.'* . . This articulation of the *Garner* rule is clearly established even in situations with diverse factual distinctions. . . . Though a factually similar precedent case may not have existed at the time these cases were decided, we held that the rule established in *Robinson* was particular enough to give a reasonable officer fair notice of his unconstitutional conduct. Thus, regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a perceived threat of serious physical harm to the officer or others. These factual distinctions between the cases do not alter the certainty about the law itself. Similarly, we conclude that the factual context of this case–the darkness, the unfamiliar building, Sample's intoxication and unresponsiveness–is sufficiently similar to our body of case law applying the *Robinson* rule so as to give Bailey fair warning that shooting a suspect who was not perceived as posing a serious threat to the officers or to others is unconstitutional.").

McKinley v. City of Mansfield, 404 F.3d 418, 440-42 (6th Cir. 2005) ("We decline to adopt the view of qualified immunity advanced by Defendants and the district court, namely, that since 'there is no federal case on point,' . . . Defendants are immune from suit. The Supreme Court's response to this argument is well-suited to the circumstances of this case: 'This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.'. . In cases where courts have dismissed Fifth Amendment suits against state employers on qualified immunity grounds, they have done so because the complaining employees did not allege that they had been subjected to the kind of compulsion and subsequent prosecution proscribed by *Garrity* and its progeny. . . . In stark contrast to these cases, McKinley presents sufficient evidence for summary judgment purposes to suggest that he was compelled to incriminate himself in precisely the manner held unlawful by the Supreme Court in *Garrity*. The Court's holding in that case bears repeating: 'We now hold that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic .'. . Particularly in light of the defendants' obvious familiarity with *Garrity*, . . . we take issue with the district court's representation that 'there is no federal case on point' because it is hard to imagine a case that could be more on point–in view of the facts before us– than *Garrity* itself. We conclude, therefore, that Defendant Fortney is not entitled to qualified immunity . . . . Finally, we address the criticisms of our dissenting colleague. The dissent suggests that Officer Fortney should be entitled to qualified immunity because we have established a *'*new right of action.*'* We are unclear how, but it makes no difference since in no sense is McKinley's right to sue Fortney 'new.' The dissent cannot mean that the use at a criminal proceeding requirement is new. In *Chavez*, the Court was asked whether the Fifth Amendment right against self-incrimination was truly as broad as the Ninth Circuit had interpreted it, which is to say, as a right not only against the use of one's self-incriminating statements in a criminal case but a right against being coercively questioned in the first instance. . . *Chavez* established a new rule of law only in the sense that it limited the right to sue for Fifth Amendment violations to only those cases in which such suits were already permissible under clearly established law, i.e., cases in which the plaintiff's incriminating statements had been used in a prior criminal proceeding. If the dissent means that our holding is *'*new*'* because we have sustained, at the summary judgment stage, a § 1983 action against a police officer on the allegation that he compelled the plaintiff to incriminate himself, we can only conclude the dissent misapprehends the nature of qualified immunity. The doctrine of qualified immunity does not mean that a state actor is qualifiedly immune unless the plaintiff can point to a prior case in which judgment was entered against the same type of state actor on the same facts. . .As we said recently: *'*Officials do not enjoy qualified immunity simply because the exact action in question has not previously been held unlawful by a court, but Ain light of pre-existing law the unlawfulness must be apparent." ' . . With regard to the present case, pre-existing law makes apparent the unlawfulness of compelling someone to make incriminating statements that are later used against him at trial. . . . Accordingly, we hold that a reasonable officer would understand

that what Fortney and his colleagues are alleged to have done violates the Fifth Amendment right against self-incrimination.").

Beard v. Whitmore Lake School District, 402 F.3d 598, 603, 607, 608 (6th Cir. 2005) ("In this case, the searches performed by the defendants were unconstitutional; however, at the time that the searches occurred, the law did not clearly establish the unlawfulness of the defendants' actions. We accordingly do not reach the third prong of the test–whether the plaintiff has offered sufficient evidence that the defendants' actions were unreasonable in light of clearly established law. . . . In this case, approximately twenty male students were searched, in the absence of individualized suspicion and without consent, in the hopes of locating missing money. Approximately five female students were searched under similar circumstances, but were also required to remove their clothes in the presence of one another. Under these circumstances, the searches were a violation of the Fourth Amendment. Assuming arguendo that Officer Mayrand was aware of these circumstances when ordering the female students to be searched, his conduct was also unlawful. As explained by the Supreme Court in *New Jersey v. T.L.O.*,. . . a school search violates the Fourth Amendment when the school undertakes a search of a student that is unreasonable. . . . . At the time of the search at issue, the prior law involving strip searches of students did not clearly establish that the defendants' actions in this case were unconstitutional. The Supreme Court cases on school searches, *T.L.O.* and *Vernonia*, set forth basic principles of law relating to school searches, yet do not offer the guidance necessary to conclude that the officials here were, or should have been, on notice that the searches performed in this case were unreasonable. . . . The Supreme Court has recently instructed that, for purposes of the 'clearly established' inquiry, the analysis ' 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' ' [citing *Brosseau*] Accordingly, cases'cast at a high level of generality,' will only be sufficient to clearly establish the unlawfulness of the defendants' actions where the conduct at issue is 'obviously' a violation based on the prior cases. . . This is not such an obvious case. In *T.L.O.*, the Court announced that school searches should be subject to a reasonableness standard. . . In determining whether a particular search is reasonable, the Court announced a two-pronged, multi-factor test that weighs the students' interest in privacy against the school's interest in maintaining a safe learning environment. . . Yet, the Court did little to explain how the factors should be applied in the wide variety of factual circumstances facing school officials today. Accordingly, *T.L.O.* is useful in 'guiding us in determining the law in many different kinds of circumstances'; but is not 'the kind of clear law' necessary to have clearly established the unlawfulness of the defendants' actions in this case. . . . Given the lack of a factual context similar to that of this case, *T.L.O.* and *Vernonia* could not have 'truly compelled' the defendants to realize that they were acting illegally when they participated in the searches of the students in this case. The Sixth Circuit cases involving student strip searches also do not clearly establish the unconstitutionality of the searches in the instant case. Indeed, in *Williams*, 936 F.2d 881, and *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir.1984), strip searches of students were found to be reasonable. Although the officials in each of those cases possessed individualized suspicion as to the particular student searched, the cases do not clearly state that such individualized suspicion is absolutely necessary to justify such a search. . . . The Sixth Circuit cases thus simply do not 'truly compel' the conclusion that the searches in

this case were not reasonable. Finally, we recognize that, at the time the searches were conducted, the Seventh Circuit had held that the strip search of a student in particular circumstances was not reasonable. . . In addition, some district courts in other circuits have held student strip searches to be unreasonable in cases more closely analogous to the instant case. [citing cases] These cases were not sufficient to establish clearly the unlawfulness of the defendants' actions in this case. In the 'rare instance' where it is proper to seek guidance from outside this circuit, the law will only be clearly established where the cases from outside this circuit 'both point unmistakably to the unconstitutionality of the conduct complained of and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.' . . The cases dealing with school strip searches from courts in other circuits are not 'clearly foreshadowed by applicable direct authority,' and therefore do not clearly establish that the searches in this case were unreasonable.").

Lemmon v. City of Akron, No. 5:16-CV-2356, 2018 WL 2289865, at *8–9 (N.D. Ohio May 18, 2018) ("The Sixth Circuit has made clear that courts are to apply a segmented approach in analyzing the reasonableness of an officer's actions. . . Under this approach, the reasonableness of the use of deadly force is measured from the moments immediately leading up to the use of force. . . . Here, the crucial time period includes the moments immediately preceding the use of deadly force. Sergeant Armstead's prior decision to pursue the individual he saw on the bicycle does not factor into the reasonableness equation. . . For the same reasons, the Court rejects Lemmon Sr.'s suggestion that Sergeant Armstead created the dangerous situation by failing to take a position of safety when he approached the scene. . . .Applying a segmented approach, and focusing on the moments immediately preceding the use of force, the Court finds that it was objectively reasonable for Sergeant Armstead to use deadly force against an individual who had already exhibited behavior that suggested he was armed, who was actively resisting, and who had made a sudden movement toward the officers. Regardless of what took place in the segments of time preceding the shooting, and notwithstanding the benefit of the hindsight knowledge that William was actually unarmed, the officers at the scene were faced with a rapidly escalating and dangerous situation. Under these circumstances, the Court cannot (and will not) second guess the decision to use deadly force. . . Further, because a reasonable fact-finder, viewing the facts in the light most favorable to Lemmon Sr., could not find that Sergeant Armstead violated William's constitutional rights, Sergeant Armstead is entitled to qualified immunity for the claims of excessive force and unreasonable seizure.")

Stahl v. Coshocton Cty., Ohio, No. 2:15-CV-572, 2017 WL 6508384, at *8-9 (S.D. Ohio Sept. 22, 2017) ("Specifically, the video evidence cited by both parties does not resolve the question whether Snyder moved in front of the path of Stahl's truck before or after it began accelerating forward. Moreover, if the latter, it is not clear from the video whether Stahl would have had time to brake to avoid hitting Snyder. Citing this ambiguity, Plaintiff contends that even if it was necessary for Snyder to use deadly force against Stahl to avoid being hit by Stahl's truck, Snyder is nevertheless unprotected by qualified immunity because he created that very danger by stepping into the path of a moving truck. Plaintiff cites *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) in support

of his argument. . . .*Enyart*, however, is distinguishable. Because of the ambiguity in the video evidence as to what exactly happened between Snyder and Stahl at the bottom of the embankment—and in what order—*Enyart* has superficial appeal. In reality, though, the totality of the circumstances leading to the use of deadly force is vastly different in each case. Prior to the shooting in *Enyart*, the suspect never posed a threat of danger to officers or the public. Central to the *Enyart* court's discussion were the facts that 'the underlying crime was not accomplished violently' and the suspect's 'escape attempt did not involve menacing a police officer or civilian with a weapon.'. . Assuming the vehicle was already moving when the officer jumped in front of it, therefore, any danger justifying the use of deadly force in *Enyart* would have been created solely by the officer's own actions. . . In this case, however, the danger necessitating the use of deadly force was created by Stahl himself. By the time deadly force was used against Stahl, he was no longer a non-violent fleeing suspect evading arrest for running a red light. Rather, Stahl was a violent fleeing felon who had proved he was 'willing to injure an officer that got in the way of escape [and] was willing to persist in extremely reckless behavior that threatened the lives of all those around.'. . Specifically, shortly before Snyder opened fire, Stahl had used his vehicle as a dangerous weapon to crash into Sharrock, sending him barreling into a concrete wall. . . At that point, Snyder and Stone had probable cause to believe Stahl had committed the violent felony of assaulting a police officer.")

Dunfee v. Finchum, 132 F. Supp. 3d 968, 978-79 (E.D. Tenn. 2015) ("While the Court declines to address whether Officer Finchum's conduct was constitutional, the pre-existing law leans toward constitutionality. . . . For Officer Finchum to have violated a clearly established right, it would have to have been clear to every reasonable officer on June 29, 2012, that a person suffering from a medical condition, who became combative toward police officers responding to a call for medical assistance, had a right not to be subjected to the force Officer Finchum employed on that day. The force Officer Finchum used against plaintiff was as follows: (1) placing a hand on plaintiff to keep him in the vehicle; (2) laying on top of plaintiff in the car; (3) tasing plaintiff in the car; (4) again laying down on plaintiff while outside the vehicle. All the while plaintiff headbutted and kicked Officer Finchum as well as other officers at the scene. Similar to *Caie*, in light of the circumstances in the present case, it is reasonable to assume there was a threat to the officers' safety, to the plaintiff himself, and to the safety of others. . . . Based on the pre-existing law holding that conduct similar to Officer Finchum's alleged use of force on June 2012 is constitutional, the Court finds that the contours of the right Officer Finchum is alleged to have violated were not so clear in June 2012 that every reasonable officer would have known that Officer Finchum's actions were unconstitutional. Thus, plaintiff fails to meet the clearly established prong to defeat qualified immunity. In light of this finding, the Court declines to address the second prong of qualified immunity, that is whether the alleged actions of Officer Finchum in June 2012 were constitutional. Accordingly, because not every reasonable officer would have understood that Officer Finchum's conduct in tasing and holding down plaintiff violated the Constitution under law existing as of June 29, 2012, the Court finds Officer Finchum is entitled to qualified immunity.")

Brock v. Harrison, No. 2:14-CV-0323, 2015 WL 7254204, at *2 (S.D. Ohio Nov. 17, 2015) ("The parties agree that the jury must be able to examine 'the totality of the circumstances' in order to determine whether a law enforcement officer's use of force was objectively reasonable. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396–97 (1989). Where, as here, an officer employs a firearm, the circumstances leading up to the shooting are relevant (and oftentimes vital) in determining whether the use of a firearm was justified. *See, e.g., Pollard v. City of Columbus*, 780 F.3d 395 (6th Cir. 2015) (holding that an officer's use of force following a vehicle pursuit was reasonable and basing that holding, at least in part, on the suspect's conduct during the pursuit). Here, Plaintiff's motion for segmentation of the evidence asks the Court to prevent both parties from presenting evidence of the events leading up to a shooting. That request, if granted, would cause the jury to view the shooting entirely out of context and with no way to determine whether Defendant's conduct was reasonable. The Court accordingly denies that request.")

Johnson v. Latzy, No. 1:12-CV-805, 2015 WL 470756, at *3 (S.D. Ohio Feb. 4, 2015) ("The essence of Plaintiff's Response is that Decedent Erica Collins dropped the knife before she was shot, so that Defendant's reaction was unjustified (Doc. 25). Plaintiff further contends that photos of the scene establish that Collins could not have advanced toward Defendant in a threatening manner because her body was ultimately positioned next to the front tire of the vehicle where she had been standing. . . Plaintiff further argues Defendant is not entitled to qualified immunity because shooting an unarmed suspect has been clearly established as excessive use of force since *Tennessee v. Garner* . . . Finally, Plaintiff contends Decedent was at most guilty of a non-violent misdemeanor as she 'never made any type of threatening movement toward anyone.'. . In Reply, for purposes of the motion, Defendant accepts the claims that Decedent dropped the knife, raised her hands, and said 'No' before she was shot. . . Even under such factual scenario, Defendant contends that he is entitled to qualified immunity. . . Defendant argues that the photographic evidence attached to Elisabeth's affidavit indisputably shows that Decedent's head was by the front tire, and her feet by the passenger door, such that no reasonable jury could conclude Decedent did not advance toward Defendant. . . Moreover, Defendant contends the facts show he was confronting, in a rapidly evolving situation, an unpredictable person who had already refused his shouted command to drop the knife. . . From Defendant's viewpoint, any reasonable officer would have viewed Decedent's movement toward him as hostile and aggressive. . . Having reviewed this matter, the Court finds Defendant's position well-taken that Decedent's movements were reasonably perceived by Defendant as hostile and aggressive. Defendant was responding to a 911 call regarding a domestic dispute when he saw Decedent brandishing a knife. The encounter unfolded rapidly. Decedent did not drop the knife when ordered to do so. The photographic evidence establishes that Decedent moved toward Defendant. Defendant had nowhere to easily retreat to as he was caged in by the position of his vehicle. Taken together, the Court finds the facts show Defendant reasonably understood that Decedent posed a threat of serious physical harm to himself or others. As such, though regrettable, his use of deadly force was permissible under the law.")

O'Neal v. Smith, No. 1:12-CV-971, 2015 WL 452306, at *3-4 (S.D. Ohio Feb. 3, 2015) ("The Court finds no Fourth Amendment claim for use of excessive force because a reasonable officer at the scene in the instant matter, who had just seen O'Neal back his car aggressively into another car, would have been justified to use deadly force to protect himself, fellow officers, and the public from a risk of serious physical harm. *See, e.g., Cass v. City of Dayton,* 770 F .3d 368 (6th Cir.2014). The Court concludes that Officer Smith reasonably acted in self-defense and thus did not violate O'Neal's right to be free from excessive force. Smith is, therefore, entitled to qualified immunity. . . .The remaining questions in the case are as to Plaintiff Mathews, who was shot in the arm, and the Plaintiffs' state law claims. Constitutional tort claims asserted by persons collaterally injured by police conduct who were not intended targets of an attempted official 'seizure' are adjudged according to substantive due process norms. *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708 (1998). Fundamentally, the substantive component of the due process clause insulates citizens against the arbitrary exercise of government power. . . Accordingly, conduct of a law enforcement officer which 'shocks the conscience' denies the victim fundamental substantive due process. . . In rapidly evolving, fluid, and dangerous situations, public servants' reflexive actions 'shock the conscience' only if they involve force employed 'maliciously and sadistically for the purpose of causing harm' rather than 'in a good faith effort to maintain or restore discipline.'. .Here, the Court finds no reasonable jury could conclude that Defendant Smith's actions amounted to anything other than a good faith effort to stop O'Neal and ensure public safety. The physical injuries were inadvertently inflicted and not due to malicious and sadistic force. As such, there is no basis for Mathews' claim as a passenger in the car.")

McKissic v. Miller, No. 1:12 CV 1057, 2014 WL 3798718 (N.D. Ohio Aug. 1, 2014) ("Officer Miller has cited no cases in which a Court has sanctioned the use of gunfire against an unarmed person, with no known proclivity for violence or for carrying a weapon, sitting in a stopped vehicle (albeit running), who has not previously attempted escape, or previously endangered or injured an officer during the same course of events. Further, he has cited no cases where a suspect was shot simply for raising his arm across his body or failing to immediately follow an officer's command. This Court has also failed to find any cases that would support qualified immunity under these alleged facts during its independent review. Although some cases have found no excessive force when the perceived danger arose from the suspect's position in a vehicle with the engine running, there was always an additional event that heightened the officer's belief that the driver would use the vehicle as a weapon. In almost every case sanctioning the officer's use of deadly or potentially deadly force, prior to an officer's use of gunfire the driver had either already hit an officer or a police vehicle, had engaged in aggressive driving that directly threatened an officer or the public, had fired shots or otherwise used force against an officer or civilian, was known to be in possession of a weapon, had previously fled during the same incident, had failed to respond to an officer's use of lesser force, and/or had engaged in a dangerous high speed chase prior to the execution of the stop. [citing cases] The Court, however, has found a multitude of cases in which the Sixth Circuit, and others have found a triable question of fact as to excessive force, and have denied qualified immunity on fact patterns far more similar to and often more ominous than those alleged in this case. [collecting cases] Therefore, when the facts as alleged by the Plaintiff and supported

by some evidentiary materials, are taken to be true, there remains a question of fact as to whether Officer Miller's actions constituted excessive force in violation of the Fourth Amendment of the U.S. Constitution. Further, the parameters of this established right would be 'sufficiently definite that any reasonable officer in the defendant's shoes would have understood that he was violating it' by shooting under the facts as alleged by Plaintiff, if found to be true.")

Turner v. City of Toledo, No. 3:07 CV 274, 2012 WL 1669836, at *11-*14 (N.D. Ohio May 14, 2012) ("Even if Lewis' taser deployments were unreasonable, they did not violate a clearly established constitutional right. . . . Plaintiff's attempt to rely on cases establishing the right of non-violent, non-resistant persons to be free from taser use is not persuasive. As explained above, such a description does not accurately characterize the events in this case. Rather, with regard to Lewis' first taser deployment, a right not to be tased after pulling away from an officer's grasp and causing a physical struggle—however brief or minor—was not clearly established in January 2005. . . . With regard to Lewis' second, third, fourth, and fifth taser deployments, a right not to be tased while thrashing on the ground, resisting efforts to be handcuffed and/or ankle cuffed, and ignoring commands to comply was not clearly established in January 2005. . . .The Court finds that all Defendant TPD Officers are immune from claims regarding the hog-tie and transport of Turner because such force was not unreasonable. Turner rolled, thrashed, and kicked his legs for several minutes before the officers attempted to further restrain him. Turner then successfully thwarted four officers' efforts to do so—despite being handcuffed—even kicking one officer in the face. The officers were able to gain control of Turner's legs only after Lewis tased him two more times. It was only then that the officers hog-tied Turner and made the decision to transport him in the hog-tie restraint. Such conduct is not unreasonable under the *Fourth Amendment.* . . .Even if the hog-tie and transport method were unreasonable, such force did not involve a clearly established constitutional right. . . . Plaintiff's argument that *Johnson* clearly established a right to be free from restraint methods that might cause positional asphyxia is unavailing. Instead, the Court finds that 'the lack of precedent from either the Supreme Court or the Sixth Circuit, combined with the split of authority over the restraint method used by the officers qualifying as excessive force, requires a finding that no constitutional right was violated.'")

McCline v. Roose, No. 1:07 CV 0545, 2009 WL 585844, at **9-12 (N.D. Ohio Mar. 6, 2009) ("The Court has reviewed each of these cases in which the officers were granted qualified immunity, each court holding that the use of a Taser did not amount to excessive force under the circumstances. Each of the cases relied upon by the defendant exhibits a material difference from the case at hand. In *Draper, Ewolski, Russo, Biggers* and *RT,* the tasered plaintiff was not handcuffed. . .The plaintiffs in *Devoe*, *Johnson* and *Goebel,* while handcuffed, nevertheless, continued to actively resist prior to the tasering, endangering the acting officer and others nearby. In the instant case, while Mr. McCline was on the sally port floor, he was according to the defendant 'simply [ ] noncompliant,' and according to the plaintiff, unable to rise to his feet due to his weight, his arthritis and because he was handcuffed. A recent, similar case helps to underscore the distinctions in the instant matter. In *Buckley v. Haddock,* the Eleventh Circuit found not unreasonable the officer's decision to twice taser a plaintiff who was placed under arrest for

refusing to sign a traffic ticket. While walking the handcuffed plaintiff to the police car to effect the arrest, the individual dropped to the road and refused to get up, sobbing that he was destitute and could not afford a traffic ticket. The suspect was noncompliant. The Court found the officer's use of force in this particular situation 'not outside the range of reasonable conduct under the Fourth Amendment' by underscoring three facts: the incident occurred at night on the side of a highway with considerable passing traffic; the deputy could not complete the arrest because the plaintiff was resisting getting into the patrol car; and, the deputy resorted to using the Taser only after trying to persuade the plaintiff to cease resisting and, further, provided the plaintiff ample time to comply. . . Viewing the evidence in the light most favorable to Mr. McCline, none of these three factors were at play in the instant matter. Mr. McCline and Officer Roose were safely in the Euclid City jail sally port, Officer Roose and at least three other individuals were available to bring Mr. McCline to the booking desk, and Mr. McCline was not provided an opportunity to comply. Viewing the evidence in the light most favorable to Mr. McCline, under the first *Saucier* factor, a jury could find that Officer Roose's use of the Taser amounted to excessive force. Accordingly, because a material issue of fact exists with respect to whether Officer Roose's conduct was objectively unreasonable under the Fourth Amendment totality of the circumstances test, the Court will deny the defendant's motion for summary judgment. . . . The Sixth Circuit has repeatedly held that the use of force on a subject who is disabled or has been neutralized is excessive force as a matter of law. . . The Sixth Circuit has further applied this rule in several instances involving claims that a police officer used excessive force in tasering or deploying pepper spray against a suspect. [collecting cases] . . . . Construing the facts in the light most favorable to Mr. McCline, a reasonable jury could conclude that Officer Roose tasered the plaintiff gratuitously and unreasonably.")

Pirolozzi v. Stanbro, No. 5:07-CV-798, 2008 WL 1977504, at *6, *7 (N.D. Ohio Apr. 28, 2008) ("Construing the facts in the light most favorable to the Plaintiff means that the Court must assume that the Defendant Officers applied substantial force to the head, neck, torso, and legs of Pirolozzi, a mentally ill individual who was no longer resisting arrest or posing a threat to anyone in the vicinity, to keep him motionless on the ground in a prone position for several minutes with his hands handcuffed behind his back. The Court also must assume that the Defendants used a taser device, brachial stuns, kicks, punches, and physical force against the decedent while he was on the ground. Thus, the plaintiff alleges, and shows cognizable evidence demonstrating, sufficient facts to show a constitutional violation that is actionable under § 1983. . . . The Plaintiff offers sufficient evidence to show a constitutional violation of the decedent's clearly established right to be free from excessive force. These individual defendants are not therefore entitled to qualified immunity in this case.")**.** [*See also* ***Pirolozzi v. Stanbro***, 2009 WL 961155, at *4 (N.D. Ohio Apr. 7, 2009) ("In denying summary judgment to the Defendant Officers on the § 1983 excessive force claim, the Court explained that it could not 'conclude as a matter of law that any of the officers are entitled to qualified immunity .'. . That is not synonymous with the conclusion that the Defendant Officers are liable under § 1983 for the use of excessive force. Again, denying summary judgment to one party is not the same as granting it to the other. It is simply a decision that sufficient disagreement about the facts exists to require that the case go to a jury.")]

Edwards v. City of Martins Ferry, 554 F.Supp.2d 797, 805-08 (S.D. Ohio 2008) ("In the instant case, Plaintiffs claim that the force used in effecting Mr. Edwards' arrest was unreasonable. Specifically, Plaintiffs assert that Officer Dojack's use of the taser on Mr. Edwards, who was 82 years old and suffering from Alzheimer's, was unconstitutionally excessive. . . The Court disagrees. . . . Plaintiffs concede that Officer Dojack had probable cause to stop Mr. Edwards and probable cause to arrest him, therefore, the only question is whether the use of the taser constitutes excessive force. . . . Plaintiffs argue that Mr. Edwards never threatened, attempted to hit or verbally abused Officer Dojack. But absent from this description is that Mr. Edwards refused to comply with Officer Dojack's initial orders. . . .Plaintiffs primary argument for why Officer Dojack's use of the taser was unreasonable is because Mr. Edwards was 82 years old and suffering from Alzheimer's. However, there is no caselaw provided in support of this argument that Mr. Edwards' age precludes use of the taser. Officer Dojack, at first, was merely trying to talk to Mr. Edwards, but soon realized that was not possible. Then, Officer Dojack attempted to grab him, but Mr. Edwards continued to pull away. Officer Dojack then attempted to restrain Mr. Edwards. Regardless of Mr. Edwards' age and the fact that he had Alzheimer's, he was not cooperating with Officer Dojack, and his actions could be construed as resisting arrest. . . . Even if the Court were to have found that Defendants did violate Plaintiffs' clearly established constitutional rights, Plaintiffs cannot establish that an objectively reasonable officer faced with the same circumstances as Officer Dojack would have recognized that the conduct violated a clearly established constitutional right. The final test for qualified immunity is whether an objectively reasonable officer under the circumstances would have known that the officer's conduct violated the constitution in light of the preexisting law. Considering the circumstances in this case, that Mr. Edwards refused to answer Officer Dojack's simple questions and refused to comply with his initial orders, and then backed away and drew his hands up, a reasonable officer would attempt to secure the arrest of the suspect. Then, when the suspect continued to resist arrest while the officer was trying to place handcuffs on him, a reasonable officer would take the use of force to the next level on the continuum to the taser. Therefore, such use of force under these circumstances was not a violation of Mr. Edward's constitutional rights. Accordingly, Defendant Officer Dojack is entitled to qualified immunity.").

Michaels v. City of Vermillion, 539 F.Supp.2d 975, 983, 986, 987, 989, 990 (N.D. Ohio 2008) ("[T]he *Saucier* directive to construe the evidence in the light most favorable to the plaintiff has particular significance when (1) there are disputed issues of fact and, (2) whether a constitutional violation occurred hinges on which version of the facts is accepted. That is, when the plaintiff's evidence, viewed in the most favorable light, amounts to a constitutional violation, prong one of the *Saucier* test is satisfied *even if the facts pertinent to the alleged constitutional violation are disputed*. . . . Focusing on the tasing–the specific conduct alleged to constitute excessive force–the *Graham* factors favor finding that, taking the facts as alleged by the Plaintiffs, a jury could find that a constitutional violation occurred. In other words, the discrepancy between the parties' accounts of the tasing constitutes a material issue of fact and, under the first prong of the *Saucier* test, the Plaintiffs' version of the facts rises to the level of a constitutional violation. . . . The same

construction of the facts necessarily applies to prong two as well; the question is whether the constitutional right that Officer Grassnig arguably violated under the prong one analysis is clearly established. . . . As discussed above in connection with prong one, construing the facts in the light most favorable to the Plaintiffs, a reasonable jury could conclude that Officer Grassnig tased Michaels gratuitously and unreasonably. Therefore, based on the well-established line of authority prohibiting the gratuitous use of nonlethal, temporarily incapacitating force, it would be clear to a reasonable officer that the manner in which Officer Grassnig allegedly used the taser on Michaels was unlawful under the circumstances. The 'clearly established' prong of the *Saucier* test is thus satisfied.").

Ashbrook v. Boudinot, 2007 WL 4270658, at *3, *8 (S.D. Ohio Dec. 3, 2007) ("Where there is authentic and uncontroverted video evidence that utterly discredits a litigants' version of events such that there is no *genuine* issue of material fact, the Court should view the facts in the light depicted by the videotape. *Scott v. Harris* , __ U.S. __, 127 S.Ct. 1769, 1776 (2007). . . .The video evidence confirms that the officers applied a reasonable amount of force in arresting, detaining, and transporting Ashbrook. Because the Court does not find a constitutional violation, it is unnecessary to determine whether Ashbrook's rights were clearly established.")

McGee v. City of Cincinnati Police Dept., No. 1:06-CV-726, 2007 WL 1169374, at *6 (S.D. Ohio Apr. 18, 2007) ("[S]ituations such as that at issue in the instant case, where an officer tases an individual who fails to comply with the officer's orders and who the officer has reason to believe is armed, fall into a grey area about which there does not appear to be clearly established law regarding the appropriate use of force. Indeed, Plaintiff does not cite one case in which a court has found the use of a taser unconstitutional under similar circumstances. Accordingly, Defendants are entitled to qualified immunity as to Plaintiff's excessive force claim.").

Carter v. Colerain Township, No. 105-CV-163, 2007 WL 869727, at *15 (S.D. Ohio Mar. 20, 2007) ("Generally speaking, individuals have a clearly established right to be free from the unreasonable use of non-lethal force. Defendants cite *Russo*, 953 F.2d at 1044-45, for the proposition that the use of a taser in order to obviate the need for greater force does not violate clearly established law. However, *Russo* involved a situation in which officers were faced with a potentially homicidal and suicidal suspect, armed with two knives, who had made threatening remarks to the officers. *Russo*, therefore, is not controlling in this case. Indeed, courts have found that under certain circumstances, such as where the suspect did not pose the level of threat described in *Russo*, the unreasonable use of a taser to subdue the suspect violates the suspect's clearly established right to be free from excessive force. [collecting cases]")

Glaeser v. Cheatham County Sheriff's Dept., No. 3:05cv1043, 2006 WL 3805660, at *6 (M.D. Tenn. Dec. 21, 2006) ("Using deadly force against a speeding or even a reckless driver will not always be objectively reasonable. Because it is not clear that a reasonable officer in the defendants' situation would not have known that engaging in the conduct alleged by Mr. Glaeser was violative of his clearly established right to be free from excessive force, Defendants' Rule 12(b)(6) motion

on the basis of qualified immunity must be denied at this stage in the proceedings. *Cf. Hayes v. Wickert*, No. C06-5402RJB, 2006 U.S. Dist. LEXIS 84316, at *13-*14 (W.D.Wash. Nov. 20, 2006) (holding that material issues of fact precluded summary judgment on defendant police officer's qualified immunity defense, even where it was undisputed that the plaintiff had run a stop sign, was speeding, was driving without headlights at night, was driving into oncoming lanes to avoid having to take curves, and had committed the felony of evading arrest, because it was not clear whether the plaintiff posed an "immediate threat to the safety" of the officer or others at the time the officer actually used deadly force).")**.**

Hoover v. Isaacson, No. 04-CV-70654, 2005 WL 1682051, at *5 (E.D. Mich. July 15, 2005) ("As discussed in the recent Sixth Circuit case of *Sample v. Bailey*, 409 F.3d 689, 2005 WL 1283517 (6th Cir. May 9, 2005), 'it has been clearly established in this circuit for the last twenty years that a criminal suspect Aha[s] a right not to be shot unless he [is] perceived to pose a threat to the pursuing officers or to others during flight.'". . The question this case turns on, then, is whether or not the defendant *could have reasonably believed* that Sommers' attempt to escape posed a threat of death or serious physical injury to himself or others. After considering the evidence offered in the case to date, it is the court's determination that it cannot rule on the question of qualified immunity as a matter of law. In a defendant's motion for summary judgment based on qualified immunity, the plaintiff is required to identify a clearly established right that was violated, and establish that a reasonable officer in the defendant's situation should have known that deadly force violated that right. . . However, where the question of qualified immunity 'is completely dependent upon which view of the facts is accepted by the jury,' a district court cannot grant qualified immunity to an officer on a claim such as this. . . In the instant case, defendant has testified that he was afraid of being struck by the vehicle. . . and about his general fear for his and other officers' safety at the time of the fatal shooting . . . However, plaintiff points out that defendant shot Sommers through the side passenger window, rather than the front windshield, and that he in fact admitted that he did not fire the shots until the vehicle was moving past him. . . Indeed, Isaacson concedes he was at the side of the vehicle at the time of the shooting . . . and did testify at deposition that he fired the shots 'knowing the guy just tried to run me over.' . . As plaintiff emphasizes, this testimony may indicate, to some extent, a retaliatory motive on the part of Isaacson. Furthermore, the court's repeated viewing of the videotapes confirms that Sommers' vehicle was significantly disabled, and that no specified individual was at an immediate risk of being hit by the vehicle at the time of the fatal shooting. Finally, the court notes that witnesses at the scene have offered varying depictions of the events. . . The court further notes it is not clear from the evidence, including the videotapes offered by defendant, exactly how disabled the van appeared to be at the time, what Sommers was doing inside the van, or whether in fact Sommers threatened to turn the van sharply in the officers' direction prior to the shooting, as asserted by defendant, and as testified to by defendant and Officer Bonacorsi. Thus, it is the court's determination that whether an officer in defendant's position would have found the use of deadly force reasonable under the circumstances depends on certain findings of fact which are in dispute in this case. Because defendant's entitlement to qualified immunity turns on the events unfolding in those moments before the fatal gunshots, which require the careful assessment of a fact finder,

this is a case where disputed material facts require the court to deny defendant's motion for summary judgment on the basis of qualified immunity.").

Armstrong v. U.S. Bank, No. C-1-02-701, 2005 WL 1705023, at *5 (S.D. Ohio July 20, 2005) ("In determining whether a right was clearly established, the Court may consider whether officers should be on notice from either the specific facts of particular prior cases or the general reasoning of such cases. . . Both *Greene* and *Hickey* are instructive here. In *Greene*, the Sixth Circuit held that a reasonable officer would not necessarily know that it was unlawful to use an eye irritant when a suspect was actively resisting arrest and the officer was following police procedure for restraining non-cooperative arrestees. . . In *Hickey*, by contrast, the Sixth Circuit held that a reasonable officer would have known that inflicting unnecessary pain on a nonviolent arrestee violated a clearly established constitutional right. . . In this case, under the facts alleged, while Armstrong did resist being handcuffed, Defendant Officers already had one of her wrists handcuffed before they used mace. Moreover, though Armstrong resisted arrest, she did not do so violently, but rather by backing away while crying. Considering the alleged facts in light of the general reasoning of cases involving similar facts, the Court holds that a reasonable officer would have known that, because Armstrong was not violent, inflicting unnecessary pain on her by spraying her with mace, throwing her up against the car, and roughing her up violated her clearly established constitutional rights. Likewise, given that Armstrong has alleged that Defendant Officers maced and threw against a car a mentally disabled woman whose resistance was limited to tearfully backing away, the Court finds Defendant Officers' actions were objectively unreasonable.").

Kaylor v. Rankin, 356 F.Supp.2d 839, 851, 852 (N.D. Ohio 2005) ("Kaylor's supposed crime, obstruction of official business, was not severe, and had not involved physical acts on his part. He was not threatening anyone's safety or attempting to flee. Once the officers undertook to arrest him, however, he actively resisted arrest, did so in an aggressive and physical manner, and continued to do so until finally subdued. During the scuffle, Officer Radde used pepper spray to subdue Kaylor. Although the Sixth Circuit recognizes circumstances in which the use of pepper spray by police officers will not be considered to be excessive force, those cases are, so far, limited to situations where either the defendant is armed or the officers fear for the arrestee's own safety. . . Kaylor was unarmed and presented no danger to himself. Therefore, under these circumstances, the use of pepper spray may have constituted excessive force in violation of the Fourth Amendment. . . Under the *Saucier* analysis, however, I cannot find that it would have been clear to a reasonable officer in Officer Radde's position that it would be unlawful for him to use pepper spray on an arrestee who was actively and aggressively resisting arrest. . . Because I cannot find that the right to be free from the level of force used here was clearly established, Officers Rankin and Radde are entitled to qualified immunity on plaintiff's unreasonable use of force claim.").

SEVENTH CIRCUIT

Sanzone v. Gray, 884 F.3d 736, 740-41 (7th Cir. 2018) ("The Estate contends that Gray impermissibly escalated the situation before shooting by not taking cover. But the law does not establish that such conduct is relevant to an excessive-force analysis, let alone that an officer may be liable based on actions before the shooting that might have led to the use of force. . . And the Estate contends that Gray should have used a less deadly method before shooting, but *Graham* makes it clear that the Fourth Amendment does not require the use of alternatives before deadly force in a situation such as this when there is 'no time.'. . Gray did not violate the Fourth Amendment, and so there is no need to assess whether a 'clearly established' right was at stake. Were it necessary, the Estate would be on shaky ground; the Estate admits that it cannot point to an analogous case decided before January 2014 that would put Gray on notice that his conduct was unreasonable. And the Estate's reliance on the general standard for excessive force 'is not enough' because the right must be ' "clearly established" in a more particularized, and hence more relevant, sense.'")

Tolliver v. City of Chicago, 820 F.3d 237, 246 (7th Cir. 2016) ("Qualified immunity applies to the actions of Officers Sobieraj and Debose here. Reasonable officers in their circumstances would have perceived the car as a deadly weapon that created a threat of serious physical harm. The Mitsubishi was only two car lengths from the officers when it began to move in their direction, and even at slow speeds, the officers had only seconds to react to the threat. Moreover, the officers had no way of knowing whether Tolliver would accelerate, shortening the space and time to react. By Tolliver's own account, the bullets were fired in rapid succession, over a period that could be measured in seconds. The officers stopped firing when the vehicle stopped moving and the threat had passed. During those few seconds, Sobieraj sprained his ankle as he moved away from the car. . . .If the officers began shooting before the car moved, the defendants agree that qualified immunity would not apply but that scenario would necessarily imply the invalidity of Tolliver's conviction for aggravated battery. Because of *Heck*, Tolliver would have to obtain the reversal of his conviction before he could proceed against the officers on that theory. And once the car began to move towards the officers, as a factual matter, there was no natural breaking point between the first few shots and the remaining shots. Even if it were possible to discern in those few seconds a meaningful break from the shots absolutely necessary to protect the officers and those that were unnecessary, the officers were entitled to qualified immunity because Tolliver had ducked out of sight, and the officers had no reason to know that he was disabled or that there was no need to continue firing. From a reasonable officer's perspective, the danger had not changed because the car continued to roll forward. In the totality of these circumstances, qualified immunity therefore applies to all of the officers' actions once the car began to move towards the officers.")

Williams v. Indiana State Police Dep't, 797 F.3d 468, 475-76, 478-80, 482-85 (7th Cir. 2015) ("*Sheehan* . . . cautions against interpreting the 'clearly established law' requirement too broadly and substituting general propositions of law for cases that are factually similar enough to apprise the officers of the contours of the constitutional protections due in the situation. We turn then, to the application of *Sheehan* and the other cases set forth above, to the facts of the individual cases before us, largely drawing from the thorough presentation of facts set forth in the comprehensive

district court decisions. . . .Under the rule as announced in *Sheehan*, it is of no consequence for purposes of the Fourth Amendment that Williams' injury and imminent injury were self-inflicted; the officers were not required to allow him to carry out his suicide attempt. When the officers entered Williams' room, they initially attempted to take control of him without using deadly force. As we discuss later, their initial use of the tasers was appropriate under constitutional standards given Williams' possession of a knife and his threat to stab anyone who entered. When that was unsuccessful, and Williams advanced on them brandishing the knife, the officers acted reasonably in using deadly force; plaintiffs do not argue otherwise. That brings us to the appellants' related argument, which is that a reasonable officer, upon opening the bathroom door, would have been able to see that Williams was not at risk of bleeding out and therefore there were no exigent circumstances necessitating action. Once again, the Supreme Court and this court have repeatedly rejected that type of second-guessing of the split second decisions officers are forced to make in confronting rapidly evolving situations. . . Williams had acknowledged that he had cut himself and that it was taking longer than he thought to lose sufficient blood to end his life, and had also admitted to taking all of the remaining Xanax pills in his possession in an attempt to end his life. He also threatened to kill anyone who entered. Faced with those undisputed facts, as a matter of law the officers possessed an objectively reasonable belief that action was needed to avoid the threat to his life and the potential threat to others inherent in the danger that he could emerge in that agitated state with the knives. The appellants argue that no exigency was present because Williams had not lost consciousness and 'it is generally well known that most suicide attempts are not successful, unless a gun is used,' and in support point to the testimony of a forensic pathologist that only 20–50% of suicide attempts are successful. This rather astounding argument is unavailing. Setting aside the obvious question that perhaps non-firearms suicide attempts are unsuccessful precisely because timely aid is rendered, the argument would alter the standard to one that would allow officers to act only in the event of imminent death. There is no support for such a standard that would prohibit officers from rendering aid to a person who has already harmed himself, or that would require them to wait until a hostile person emerged and attacked others before attempting to defuse the situation, and it is inconsistent with *Sheehan.* Finally, no clearly established law renders the officers' use of force unreasonable in light of the circumstances that they faced. Williams' presence in the confined space of a bathroom, inaccessible from the outside, presented the officers with limited options, which was further impacted by the space limits of the bedroom that adjoined it. The decision to employ tasers immediately upon opening the bathroom door was a reasonable use of force to subdue a person who potentially presented an immediate threat to himself and the officers once that door was opened. Under the qualified immunity standard, the appellants must demonstrate that "the right to be free from the particular use of force under the relevant circumstances was 'clearly established.' " *Abbott*, 705 F.3d at 725. Rather than establishing that such force was impermissible, our cases repeatedly have upheld the use of non-lethal force such as tasers in such situations. . . .In contrast, the appellants have failed to present any case that would establish that the use of a taser in a scenario such as this one is excessive. . . . The appellants here, like the plaintiffs in *Sheehan,* cannot point to any case involving a dangerous, obviously unstable person in possession of a weapon, making threats, which would have put the officers on notice that their conduct was constitutionally impermissible. Accordingly, the officers

were entitled to qualified immunity for their decision to open the door and utilize the tasers. Once the tasers were employed without effect, the officers were presented with a person advancing towards them with a knife, and in fact one officer was ultimately stabbed by Williams. The appellants do not contest that the officers acted reasonably in firing the shots at that point. Accordingly, the district court properly held that the officers were entitled to qualified immunity. . . .We turn then to the facts in *Brown*. . . . [I]in determining whether the district court properly denied qualified immunity, we accept the district court's determination that there was a genuine issue of fact as to whether John was raising the knife and advancing toward the deputies at the time he was shot. In denying the motion for summary judgment based on qualified immunity, the district court identified two factual scenarios under which, in its view, a jury could find that Blanchard unreasonably had seized John. The first theory of liability considered by the district court is that Blanchard unreasonably created an encounter that led to the use of force against John. According to the district court, Blanchard could be liable under that theory even if he established that he reasonably thought John was advancing on him with an upraised knife, if the jury found that Blanchard's actions in kicking in the door were not reasonably calculated to prevent John from harming himself, which was the only legitimate ground for initiating a seizure. Blanchard argues that the district court erred in denying qualified immunity on that ground, because it was not clearly established that pre-seizure conduct of a law enforcement officer can violate the Fourth Amendment's prohibition of unreasonable seizures. Blanchard is entitled to qualified immunity unless existing precedent placed the constitutional question beyond debate. . . That standard is not met here. Our caselaw is far from clear as to the relevance of pre-seizure conduct, or even as to a determination as to what conduct falls within the designation 'pre-seizure,' although the majority of cases hold that it may not form the basis for a Fourth Amendment claim. [collecting cases] Given the lack of clarity in cases in this area, we disagree that Blanchard was on notice that his conduct leading up to the encounter could itself be the basis for Fourth Amendment liability. . . . That does not mean that Blanchard's pre-seizure conduct is irrelevant to the Fourth Amendment claim. The sequence of events leading up to the seizure is relevant because the reasonableness of the seizure is evaluated in light of the totality of the circumstances. . . For instance, the short period of time that elapsed from Blanchard's arrival to the confrontation, and his abrupt action in kicking in the door, give context to John's possession of the knife that might be different if John had himself opened the door holding the knife. The circumstances known by Blanchard, or even created by him, inform the determination as to whether the lethal response was an objectively reasonable one. . . But our caselaw does not clearly establish that an officer may be liable under the Fourth Amendment solely for his pre-seizure conduct that led to the encounter. . . The second theory of liability considered by the district court concerns whether Blanchard is entitled to qualified immunity for using deadly force in the absence of probable cause to believe that John was threatening him at the time. Under this theory of liability, the issue is whether it is clearly established law that Blanchard could not constitutionally use lethal force against John in the circumstances facing Blanchard. On appeal, Blanchard argues both that the record establishes that he had probable cause to believe that John was raising the knife and advancing, and that even absent that John's possession of the knife in those circumstances were sufficiently threatening that he was entitled to qualified immunity. As we stated above, the first argument impermissibly seeks

a review of the district court's determination that there is a genuine issue of fact as to whether John was advancing with the knife. Accordingly, we review only whether Blanchard is entitled to qualified immunity regardless of whether John was merely holding the knife or advancing with it. In contrast to the situation presented in *Williams,* in this case, Blanchard resorted to the use of lethal force as an initial matter, and he did so despite the possession of a taser by Such who was present at the scene. There may have been reasons for that choice, given the confined nature of the mobile home including a hallway that was only 2–1/2 feet wide thus limiting mobility, but the record is undeveloped as to that. We must balance the nature of the force used—from lethal through the spectrum of non-lethal options such as flash bang devices, bean bags, pepper spray and tasers—with the governmental interest at stake. Even focusing the reasonableness inquiry, as Blanchard urges, on only the shooting itself as opposed to the second breach of the door that preceded it, the district court properly denied qualified immunity. It is well-established—and has been since long before the shooting at issue here—that 'a person has a right not to be seized through the use of deadly force unless he puts another person (including a police officer) in imminent danger or he is actively resisting arrest and the circumstances warrant that degree of force.'. . Accordingly, we have repeatedly recognized that officers could not use significant force on nonresisting or passively resisting suspects. . . If Nancy's description is accurate, and we must credit her version at this stage because the district court determined that it created a genuine issue of fact, then deadly force was used here even though John was merely passively resisting their entreaties, and in the absence of any threats of violence by John toward the deputies or anyone else. . . . Blanchard was faced with facts indicating that John posed a potential threat to himself, but there were no facts indicating that he was a threat to others, and in fact his mother's testimony that she was able to enter the room, talk with him, and hold his head indicates otherwise. Blanchard does not even dispute that proposition. Instead, he argues once again that the undisputed testimony established that John was shot because he approached the officers with a knife in a threatening manner. Blanchard fails to acknowledge that the district court determined that there was a genuine dispute of fact as to that matter, and that we cannot review that determination in this interlocutory appeal. That dispute of fact casts doubt on the contention that immediately after the door was kicked in a second time, John voiced resistance and then walked toward Blanchard with the knife, and as in *Weinmann* the mere possession of the knife is insufficient to warrant summary judgment. We are aware that officers responding to a scene in which a suicidal person is locked in a room are faced with the difficult determination as to whether delay in responding will allow the person to further harm himself or to become aggressive toward others. It is clearly established, however, that officers cannot resort as an initial matter to lethal force on a person who is merely passively resisting and has not presented any threat of harm to others. Blanchard is not entitled to qualified immunity under that theory of liability, and thus the district court properly denied the motion for summary judgment.")

Milan v. Bolin, 795 F.3d 726, 730 (7th Cir. 2015)("Police are not to be criticized for taking threats against them and their families seriously. But flash bangs are destructive and dangerous and not to be used in a search of a private home occupied so far as the police knew only by an elderly woman and her two daughters. We cannot understand the failure of the police, before flash banging the

house, to conduct a more extensive investigation of the actual suspects: Murray, living two doors away from the Milan home and thus with ready access to Mrs. Milan's open network, and the male Milans. The police neglect of Murray is almost incomprehensible. His past made him a prime suspect. A day of investigating him would have nailed him, as we know because a day of investigating—the day after the violent search of the home—did nail him. The district judge's denial of the defendants' motion for summary judgment appears eminently reasonable when one puts together the flash bangs, the skimpy basis for the search and its prematurity—the failure to check whether the network was open and the failure to conduct a more extensive investigation before deciding that flash bangs were appropriate means of initiating the search, the resulting neglect of Murray, and the handcuffing of the daughter. True, we mustn't base our decision on the wisdom of hindsight. If the police had had reasonable grounds for conducting the search as they did (that is, with flash bangs, yet without any but the most perfunctory, indeed radically incomplete, preliminary investigation), then the doctrine of qualified immunity would shield them from liability even though the flash bangs and ensuing search yielded no benefits for law enforcement. But, to repeat for emphasis, the police acted unreasonably and precipitately in flash banging the house without a minimally responsible investigation of the threats. The open network expanded the number of possible threateners and just one extra day of surveillance, coupled with a brief investigation of Murray and the three male Milans, should have been sufficient to reassure the police that there were no dangerous men lurking in the house. Precipitate use of flash bangs to launch a search has troubled us before, leading us to declare that 'the use of a flash bang grenade is reasonable only when there is a dangerous suspect and a dangerous entry point for the police, when the police have checked to see if innocent individuals are around before deploying the device, when the police have visually inspected the area where the device will be used and when the police carry a fire extinguisher.' *Estate of Escobedo v. Bender, supra,* 600 F.3d at 784–85. The police in this case flunked the test just quoted. True, they'd brought a fire extinguisher with them—but, as if in tribute to Mack Sennett's Keystone Kops, they left it in their armored SWAT vehicle. So while the defendants are correct to point out that a reasonable mistake committed by police in the execution of a search is shielded from liability by the doctrine of qualified immunity, . . . in this case the Evansville police committed too many mistakes to pass the test of reasonableness.")

Weinmann v. McClone, 787 F.3d 444, 449-51 (7th Cir. 2015) ("So what did McClone know? He knew four things: 1) Jerome had access to a firearm and maybe ammunition; 2) someone had called 911 saying that Jerome was suicidal; 3) Jerome did not want to talk to the dispatcher and had not responded to McClone's knocks; and 4) there were sounds from inside the garage that sounded like pattering on cupboard doors. In addition, Jerome had hung up on the dispatcher and told her to tell the officer to leave the premises. . . .McClone also insists that it is undisputed that he believed his life was in danger because of the way Jerome was holding the gun. The critical problem with that argument, as the district court recognized, is that the way in which Jerome was holding the gun *is* disputed. Our task is to determine, under Jerome's version of the facts, if McClone was objectively reasonable in his belief that his life was in danger. At the moment McClone kicked down the door and saw Jerome, McClone only knew the four relevant facts we reviewed earlier. Those facts are not enough to justify the instant use of deadly force. It does not matter for purposes

of the Fourth Amendment that McClone subjectively believed that his life was in danger. The test is an objective one, and taking the facts as Jerome presents them, it is not met. As the district judge rightly noted, if Jerome had the gun raised to his shoulder and pointed at McClone, then McClone would have been justified in using deadly force and hence entitled to qualified immunity. . . That alternate set of facts would have made McClone's assessment of the situation objectively reasonable. But, to repeat, the facts are disputed, and that is why the district judge was correct to determine that for present purposes Jerome has alleged actions that violated his Fourth Amendment right against unreasonable seizures. . . . Jerome relies on two Supreme Court cases, *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985), and a handful of decisions from our sister circuits. *Graham* and *Garner* stand for the proposition that a person has a constitutional right not to be shot unless an officer reasonably believes that he poses a threat to the officer or someone else. The court of appeals cases are even more specific: they say that officers may not use deadly force against suicidal people unless they threaten harm to others, including the officers. . . McClone argues that there is no rule flatly forbidding the use of deadly force even if a weapon is not directly pointed at an officer. But the cases on which he relies are different from this one: they involve suspects who threatened the officer in some way. . . As our account of Jerome's version of the facts demonstrates, there is no evidence that Jerome threatened McClone and so that theory cannot help McClone. Even if we were to conclude that no other decisions are sufficiently analogous to be pertinent, we would still be unable to uphold a finding of qualified immunity on this record. McClone's shooting of Jerome while Jerome was passively sitting in a chair with the gun across his lap would meet the alternative standard of plainly excessive conduct. Recall that qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . Kicking down a door and immediately shooting a suicidal person who is neither resisting arrest nor threatening anyone save himself is an excessive use of force. And each of the four shots inflicted injury on Jerome. McClone did not look through the other windows into the garage to see what Jerome was doing, nor did he try to talk to him. Instead, within three minutes of arriving at the scene, McClone opened fire. Either viewed as so plainly excessive that no analogous case is needed, or viewed in light of existing authority, this was an excessive use of force. . .The existence of a factual dispute about the circumstances surrounding McClone's decision to fire on Jerome precludes a ruling on qualified immunity at this point. The district court correctly recognized this, and thus its judgment is Affirmed.")

Bruce v. Guernsey, 777 F.3d 872, 879 (7th Cir. 2015) ("While arguable probable cause is a relatively flexible standard, it does not bend so far as to encompass Guernsey's actions at this early stage in the case. Recall that for mental-health seizures, the question is whether there is probable cause to believe that the subject of the seizure is a danger to herself or others. This record does not establish as a matter of law that Guernsey, whose *only* indication that Bruce might commit suicide was the knowledge that someone had said Bruce was potentially suicidal, reasonably believed that he had probable cause to continue to seize her. When determining whether arguable probable cause exists, we must take into consideration the particular circumstances facing the officer. Guernsey faced a calm and undisturbed high school student who was at a friend's house with several other companions and whose father was present and objecting to Guernsey's actions. Not only did

Guernsey take Bruce from D.F.'s home to the hospital against both her will and that of her father, but he also made misrepresentations on the petition for involuntary judicial admission and thus made it more likely that Bruce's confinement would continue. On this view of the facts, Guernsey is not entitled to qualified immunity. We stress, however, that this is an early stage of the case. It is possible that after further discovery, Guernsey may decide to move again for qualified immunity or for summary judgment.")

Williams v. City of Chicago, 733 F.3d 749, 758 (7th Cir. 2013) ("Viewing the evidence in the light most favorable to Williams, we do not find room for a reasonable mistake by the officers about whether they had probable cause to arrest Williams. The defendants argue that the officers reasonably concluded that the fire had been set intentionally. We can assume that is true, but the argument misses the mark. The question is not whether the fire was arson but whether it was reasonable to arrest Williams for arson. On this point, the defendants have only Williams's presence on the porch. And as explained above, it is and was well established that mere presence is not enough for probable cause. When asked, Williams freely identified himself and explained he was there trying to rouse any occupants in the locked and burning home. For purposes of summary judgment, we must assume there was no indication that Williams had been inside the home, let alone that he had set the fire. Based on those factual assumptions, there was no basis for reasonable minds to differ on whether there was probable cause to arrest Williams. On this record, these officers are not entitled to summary judgment on the defense of qualified immunity.")

Rabin v. Flynn, 725 F.3d 628, 633-35 (7th Cir. 2013) ("We agree with Rabin that a police officer's suspicion of wrongdoing that is premised on a mistake of law cannot justify a *Terry* stop. . . .This principle, however, does not help Rabin because it only makes sense in situations where a reasonable officer would know all the facts that he or she needs to determine whether the suspected activity is unlawful. . . . In this case, even if the officers should have known what a tan card was, the officers still did not know (or have reason to know) all the relevant *facts* to determine whether Rabin could lawfully carry a gun in public. . . specifically, whether Rabin's tan card was legitimate. Under these circumstances, it would not be clearly unreasonable for an officer to believe that releasing an individual that may be unauthorized to carry a deadly weapon would present an unacceptable risk of danger to themselves or the public. . . .And though we are troubled by the use of handcuffs in the context of a *Terry* stop even after Rabin's gun (the primary source of danger) had been confiscated, an officer could have reasonably believed under clearly established law at that time that handcuffs may be used during a *Terry* stop when dangerous weapons are generally involved. . . . .We do not intend to suggest that taking one-and-a-half hours to simply verify a gun license is reasonable under these circumstances. . . .But there is no evidence that *the individual officers* (or their ignorance of the law) were responsible for the prolonged verification process. When Flynn was presented with the tan card, he did not sit there scratching his head, but promptly turned to other channels in an attempt to verify it. Perhaps the police department or other relevant government agency should have had a system in place that could more efficiently verify tan cards. But Rabin does not point to any cases clearly establishing that *individual officers* are personally responsible for curing such systemic failures, which is hard to imagine given that such failures are

likely outside their control. . . . In sum, given the safety risks at stake, it was reasonable under clearly established law for the officers to temporarily detain Rabin pending the verification of his gun carrying license, even if the officers had known about the tan card exemption under the law. His prolonged detention was then caused by systemic failures outside the individual officers' control. So the officers are entitled to qualified immunity on Rabin's wrongful arrest claim.")

Rabin v. Flynn, 725 F.3d 628, 638-41(7th Cir. 2013) (Rovner, J., concurring) ("[B]eginning with our decision in *United States v. Glenna,* 878 F.2d 967 (7th Cir.1989), we have recognized a very limited set of circumstances in which police may place an individual in handcuffs without thereby converting a *Terry* stop into a de facto arrest. Our holding in *Glenna* was founded on evidence that gave police officers reason to be concerned for their safety as they confronted the defendant and attempted to determine whether he was engaged in a crime. . . . Subsequent cases have likewise sustained the use of handcuffs during *Terry* stops when the circumstances suggested either that an individual stopped for questioning might have a weapon or that he might be involved in criminal activity often associated with violence. . . . A second line of cases has relied on the risk of flight to justify the use of handcuffs while the detained individual is being questioned. . . . These decisions are consistent with our observation in *Glenna* that it will be the rare case in which it will be necessary, and thus consistent with the purpose and scope of a *Terry* stop, to temporarily immobilize a person with handcuffs while a police officer attempts to confirm or dispel a reasonable suspicion of criminal activity. . . . However, given our failure as a court to make explicit the limits which I believe are implicit in the facts and rationale of our decisions, along with our occasionally uncabined language regarding the use of handcuffs during *Terry* stops, I must join my colleagues in holding that the defendants here are entitled to qualified immunity. . . . Thus, the question is not whether it was clear, in December 2009, that Rabin had a Fourth Amendment right not to be arrested absent probable cause to believe he had committed a crime; that much is beyond dispute. The question, rather, is whether it would have been clear to a reasonable police officer that handcuffing someone in the course of a *Terry* stop initiated to determine that person's authority to carry a firearm in public—when the firearm has already been taken from him—transformed the stop into a de facto arrest requiring probable cause. I agree that the answer to that question is 'no.'. . . I can identify no prior case making clear that the use of handcuffs in the scenario presented here would take an investigatory detention across that difficult-to-discern boundary. In view of our statements about the 'trend' toward allowing the use of handcuffs and other forcible restraints during *Terry* stops, and our continuing reaffirmation that the use of handcuffs will not necessarily transform such a stop into an arrest, I believe that a reasonable officer could have thought the use of handcuffs was consistent with the permissible purpose and scope of the stop, particularly one involving a firearm. Officer safety has been a recurring theme in our cases sustaining the use of handcuffs during investigatory detentions. And although Rabin claimed a legal right to carry his firearm—which he had readily surrendered to Flynn at the beginning of the encounter—an officer might have reasonably thought that he was free to handcuff any individual being investigated for the possible illegal possession of a weapon in the name of safety, without transforming the investigatory stop into an arrest.")

Abbott v. Sangamon County, Ill., 705 F.3d 706, 725-33 (7th Cir. 2013) ("Although Deputy Sweeney used the same device, a model X26 Taser, [footnote omitted] on both Cindy and Travis, he did not employ it in the same manner—he used the taser in dart mode on Cindy and in drivestun mode on Travis. . . .Deputy Sweeney argues, and the district court held, that he is entitled to qualified immunity on Travis's excessive-force claim because he did not violate clearly established law. Alternatively, Sweeney contends that use of the taser under the circumstances was reasonable so there was no constitutional violation in the first place. We need not examine whether Sweeney's use of the taser on Travis was reasonable because we agree with the district court that use of the taser under these circumstances did not violate clearly established law. The facts viewed in Travis's favor appear to show that, as Sweeney was backing out of the driveway, Travis was fidgeting around in the backseat and successfully maneuvered his cuffed hands from behind his back to the front of his body. . . .On appeal, Travis does not challenge Sweeney's initial use of the taser, arguing instead that Sweeney violated clearly established law in tasing him multiple times after he had been subdued by the first tasing. . . Travis claims that the subsequent taser applications were excessive because he had been subdued by the first tasing and he was already handcuffed and in custody. . . He marshals three pepper-spray cases from other circuits to support his position, but while those cases support the general proposition that it is excessive to use such force on a subdued suspect, the arrestees in those cases, unlike here, were actually subdued. . . . Unlike the arrestees in these three cases, even Travis admits that he continued fighting with Sweeney after the first application of the taser, so he was not subdued. And even though he was handcuffed, he had moved his hands to the front of his body, which allowed him to overpower Sweeney at times. . . . Courts generally hold that the use of a taser against an actively resisting suspect either does not violate clearly established law or is constitutionally reasonable. . . .Cindy's excessive-force claim again presents a closer question. Cindy, like Travis, does not challenge the first tasing on appeal. With regard to the second tasing, Deputy Sweeney contends that he did not violate clearly established law because Cindy failed to follow his orders to roll over and then attempted to stand up. But there is a factual dispute over whether Cindy attempted to stand up or whether she did not move, and we must view the facts in her favor. The district court acknowledged that Cindy testified she was unable to move, but it concluded that this was irrelevant because the reasonableness of the force used is determined from the officer's perspective and there was no dispute that Cindy failed to comply with Sweeney's command. Because Cindy does not challenge the first tasing, we assume without deciding that it was reasonable under the Fourth Amendment or at least that a reasonable officer could have believed that it was reasonable. But the fact that an initial use of force may have been justified does not mean that all subsequent uses of that force were similarly justified. . . . The totality of the circumstances, when viewed in a light favorable to Cindy, demonstrates that Sweeney's second application of the taser could be determined by a jury to have been unreasonable. Cindy was shot in dart mode both times, which caused her to lose control of her skeletal muscles, a very significant intrusion on her Fourth Amendment interests. . . . Moreover, there is absolutely no evidence that Cindy posed a threat to Sweeney, herself, or anyone else, especially after the first tasing when she was lying on her back on the ground and not moving. . . .In short, there are no countervailing governmental interests that come close to off-setting the substantial intrusion on Cindy's Fourth Amendment interests exacted by the second tasing. . .

.Although Cindy has made out a constitutional violation, she must also show that the right that Sweeney violated was clearly established on June 25, 2007, the date of the incident. . . .The Supreme Court has not addressed an excessive force claim based on the use of a taser and the most analogous case from this circuit is *Cyrus*, which was decided in 2010 and did not consider qualified immunity. And although we cited several cases from other circuits holding that officers had used excessive force in deploying tasers under circumstances similar to those here—a misdemeanant who is not actively resisting—all of those cases were decided after June 25, 2007. The Ninth Circuit has held that the absence of any case law involving tasers means that officers are entitled to qualified immunity. *See, e.g.*, *Mattos*, 661 F.3d at 452. But, as the Sixth Circuit has explained, just as defining a right too broadly may defeat the purpose of qualified immunity, defining a right too narrowly may defeat the purpose of § 1983. *Hagans*, 695 F.3d at 508–09. Moreover, we have explained that '[e]very time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided.'. .Turning to the present case, we conclude that it was clearly established on June 25, 2007, that it is unlawful to deploy a taser in dart mode against a nonviolent misdemeanant who had just been tased in dart mode and made no movement when, after the first tasing, the officer instructed her to turn over. Prior to 2007, it was well-established in this circuit that police officers could not use significant force on nonresisting or passively resisting suspects. . . Rather, only a minimal amount of force may be used on such arrestees. . . .[I]t was well-established in 2007 that police officers cannot continue to use force once a suspect is subdued. . . . In contrast to the situation posed by Travis, no reasonable officer could have understood Cindy's conduct after the first tasing, as she describes it, to be active physical resistance. . . . In short, a genuine issue of material fact exists that must be resolved by a jury, so summary judgment on this claim was improper.")

Xiong v. Wagner, 700 F.3d 282, 290, 291 (7th Cir. 2012) ("We need not determine whether probable cause in fact existed at the time of Wagner's removal decision. Rather, we may rule on qualified immunity grounds that a reasonable caseworker *could have believed* that probable cause existed and accordingly wouldn't have understood his actions to violate a constitutional right. . . *Id.* Thus, as long as RCHSD workers 'could have believed [Thor's removal] to be lawful, in light of clearly established law and the information [they] possessed,' defendants are entitled to qualified immunity. . . *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). . . . Thus, because defendants could have reasonably believed that probable cause existed sufficient to justify Thor's seizure—and accordingly would not have understood their actions to violate clearly established law—qualified immunity shields them from any alleged liability stemming from Thor's initial removal. We therefore affirm the grant of summary judgment in defendants' favor on this claim.")

Phillips v. Community Ins. Corp., 678 F.3d 513, 528, 529 (7th Cir. 2012) ("[W]e ask whether it was clearly established on November 11, 2005 that multiple trauma-inducing shots would constitute excessive force when used to secure a non-resisting, intoxicated arrestee. We conclude that the right to be free from this amount of force was clearly established on the date of Phillips's

arrest. The officers contend that they are entitled to qualified immunity because, on the date of the arrest, no case from the Supreme Court or from this circuit had held use of the SL6 unconstitutional. They argue that if the law had clearly established that use of an SL6 was unlawful, police departments would no longer retain the weapon in their arsenal. The defendants misconstrue the qualified immunity analysis. . . . Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided. . . . Even assuming a lack of clarity about the propriety of shooting Phillips with the SL6 once, the officers should have known that it was unlawful to escalate force by shooting Phillips three more times when she was unresponsive, presented no immediate threat, and made no attempt to flee or even avoid police fire. That is, it was clearly established in November 2005 that officers could not use such a significant level of force on a nonresisting or passively resisting individual.")

Phillips v. Community Ins. Corp., 678 F.3d 513, 530-33, 536, 537 (7th Cir. 2012) (7th Cir. 2012) (Tinder, J., dissenting) ("I am aware of no case before this one. . . where we have reversed a jury verdict in favor of a defendant officer by concluding that the officer's use of force under the totality of circumstances was excessive as a matter of law. The facts in this case should not lead us to such an extraordinary result. Although most of the relevant facts in this case are undisputed, it is within the jury's province to determine what reasonable inferences to draw from those facts. . . .Admittedly, this is a difficult and close case. Nevertheless, given the situation faced by the officers, I believe that whether four shots was too many under the circumstances was a question properly presented to the jurors. Under these facts, and looking at the situation as it was unfolding at the time, a jury could have determined that it was reasonable for the officers to use the SL6 baton launcher to gain compliance with their orders. . . . [E]ven if there were some basis to undo the jury's verdict, . . . I think the judgment of the district court should be affirmed: the officers should be entitled to qualified immunity. . . .The SL6 was a relatively new weapon for use in the field by the Waukesha police department; Officer Hoffman had never used it in the field prior to this incident and was not aware that it could penetrate the flesh. . . . In this case, the officers used the SL6 as a non-lethal weapon to gain the suspect's compliance from a safe distance. The weapon was carefully aimed to strike only Phillips's legs. There was no clearly established law alerting the officers that their actions in this instance were unlawful. . . .The majority is correct that by using a new type of weapon officers 'do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided.'. . Certainly, qualified immunity doesn't give officers a green light to use new weapons in any unreasonable manner, but it does absolve them of personal liability where they acted cautiously (maybe too cautiously) in a close case requiring judgment calls. . . .Police officers must have the ability to make on-the-scene judgment calls that protect their safety and the safety of the public. That's what the officers attempted to do in this situation and there was no existing legal precedent warning them that their actions were unlawful.")

McComas v. Brickley, 673 F.3d 722, 725-27 (7th Cir. 2012) ("McComas was arrested on suspicion of committing two crimes: murder and assisting a criminal. . . . [T]he absence of arguable probable

cause for murder does not preclude judgment in favor of Brickley. The existence of arguable probable cause for either charge is enough to bar liability for false arrest under § 1983. . . .[T]he important question is whether there was arguable probable cause for the arrest in light of McComas's troubled interview and the way it contradicted the surveillance footage. Considering the totality of the undisputed facts, we find that arresting McComas was reasonable. *See Wheeler v. Lawson*, 539 F.3d 629, 639 (7th Cir. 2008) ("Qualified immunity protects those officers who make a reasonable error in determining whether there is probable cause to arrest an individual."). Because there was arguable probable cause on these facts, Brickley is protected by qualified immunity from an action for false arrest.")

Jones v. Clark, 630 F.3d 677, 680, 683-85 (7th Cir. 2011) ("In *Hiibel*, the Supreme Court held that it did not violate the Fourth Amendment for an officer to stop a citizen, request identification, and arrest the citizen for failing to comply with Nevada's stop and identify statute after the citizen refused to identify himself. . . Integral to *Hiibel's* holding, however, was that there was 'no question that the initial stop was based on reasonable suspicion.'. . Indeed, the premise of the Illinois law, just like the Nevada law at issue in *Hiibel*, is that the initial stop is justified under *Terry v. Ohio*. Where an initial stop is not based on specific, objective facts that establish reasonable suspicion, *Brown* controls rather than *Hiibel*, and the existence of a stop-and-identify statute is irrelevant. The facts as Jones describes them demonstrate that Officers Clark and Kaminski violated Jones's Fourth Amendment rights when they stopped and detained her, and so the officers are not entitled to qualified immunity on that claim. . . .The need to protect an official's ability to carry out important duties is the driving force behind the Supreme Court's recognition of qualified immunity as an entitlement to avoid trial and its corresponding decision to make denials of qualified immunity immediately appealable. . . Officers Clark and Kaminski took advantage of this framework in their appeal. Playing by the rules, they accepted Jones's version of events. But that version of events (to which they will not be bound as the case progresses) reveals nothing but a blatant and embarrassing abuse of police power. The district court correctly concluded that Jones's suit is not blocked by qualified immunity; we therefore AFFIRM its order.")

Cyrus v. Town of Mukwonago, 624 F.3d 856, 863 (7th Cir. 2010) ("Defense counsel suggested at oral argument that if Lieutenant Czarnecki's first use of the Taser was reasonable, all other uses were necessarily appropriate because once an officer is justified in using a particular level of force to effectuate an arrest, he can continue to use that same level of force until the suspect is apprehended. Not so. Force is reasonable only when exercised in proportion to the threat posed . . . and as the threat changes, so too should the degree of force . . . . Force also becomes increasingly severe the more often it is used; striking a resisting suspect once is not the same as striking him ten times. It's the totality of the circumstances, not the first forcible act, that determines objective reasonableness. Accordingly, a jury might reasonably conclude that the circumstances of the encounter here reduced the need for force as the situation progressed. When Czarnecki first arrived at the scene, he was the only officer on site, and his concern that Cyrus might retrieve a weapon or pose a threat to persons inside the house was clearly reasonable. On the other hand, once Cyrus

was on the ground, unarmed, and apparently unable to stand up on his own, the risk calculus changed. Or so a jury might reasonably conclude. Summary judgment was therefore inappropriate.")

Lewis v. Downey, 581 F.3d 467, 479 (7th Cir. 2009) ("We hold that a reasonable officer would understand that employing a taser gun under the version of the facts that Lewis has described would violate the prisoner's constitutional rights. Our case law makes this clear. . . . Lewis claims that he was prone on his bed, weakened, and docile. He asserts that he was told to rise one time and was not warned that a taser would be used against him if he failed to comply. He states that he was scarcely given enough time to turn his head and did not otherwise respond to Shreffler's order. If these truly are the facts, no reasonable officer would think that he would be justified in shooting Lewis with a taser gun. Accepting Lewis's story, we conclude that Officer Shreffler is not entitled to qualified immunity.")**.**

Baird v. Renbarger, 576 F.3d 340, 345, 346 (7th Cir. 2009) ("Renbarger urges this court to view his behavior at a high level of generality; he sees it as the mere pointing of a gun. We decline to take this perspective. 'Pointing a gun' encompasses far too great a variety of behaviors and situations. Renbarger pointed a submachine gun at various people when there was no suggestion of danger, either from the alleged crime that was being investigated or the people he was targeting. The Fourth Amendment protects against this type of behavior by the police.").

Guzman v. City of Chicago, 565 F.3d 393, 398, 399 (7th Cir. 2009) ("Bonnstetter should have known early on that the warrant did not accurately describe the premises to be searched. Once he knew that the house was not a single-family dwelling, he should have called off the search. Not doing so violated Guzman's constitutional rights. Interestingly, as this is a case for damages under § 1983, it may illustrate our recent observation that in some ways it is easier to protect Fourth Amendment rights though civil actions, rather than through the suppression of evidence in criminal cases. . . . As we said in *Sims*, civil cases–like our case today–do not raise concerns that illegally seized evidence essential to convicting the defendant of a grave crime might have to be suppressed, and the criminal let go to continue his career of criminality, even if the harm inflicted by the illegal search to the interests intended to be protected by the Fourth Amendment was slight in comparison to the harm to society of letting the defendant off scot free. . . . In the present case, we think there is no question that the search was illegal and there is no issue of qualified immunity–that is, no issue that somehow the fact that the officers did not have a right to enter Guzman's apartment was not clearly established. So a civil case vindicates Guzman's Fourth Amendment rights. There was no contraband found and therefore no criminal case. But one might wonder whether Ms. Guzman's Fourth Amendment rights would have been vindicated if the officers had found the dead body of a child in the apartment and the case was referred to Cook County circuit court for prosecution. Would the exclusionary rule have been invoked? Or would the officers have been found to be acting in good-faith reliance on the warrant? Or would the temptation be great to find that some other exceptions to suppression should be invoked? Finding that the execution of the search of the apartment was illegal, we will also reinstate Ms. Guzman's false arrest claim.")

Guzman v. City of Chicago, 565 F.3d 393, 399, 400 (7th Cir. 2009) (Rovner, J., concurring) ("I concur in the holding and the reasoning of the majority's thorough opinion, but I cannot concur in the substantial *dicta* devoted to attacking the exclusionary rule. This is a civil case; nothing incriminating was discovered during this illegal search, and no criminal charges ensued. There is thus nothing to exclude. The continued vitality of the exclusionary rule is a matter solely for the Supreme Court to consider. It is a far-reaching issue that would benefit from full argument, and should not be blithely dismissed absent that full presentation. Because it is not our province to comment on issues not before the court, I do not join that part of the majority's opinion.")

Marion v. City of Corydon, Indiana, 559 F.3d 700, 705, 706 (7th Cir. 2009) ("In this case, the government seizure occurred in the highway median, when law enforcement officers finally terminated Marion's freedom of movement. While evidence demonstrates that throughout the chase Marion had very little regard for the safety of officers or innocent bystanders, we limit our analysis to whether Marion posed a serious danger to officers or innocent bystanders once he was in the median. The evidence clearly demonstrates that, once in the median, Marion attempted to regain traction and drive toward the eastbound lanes of the highway, where many innocent bystanders were present. There is no question that he would have run over officers to reach the eastbound lanes and continue his flight eastbound, if he had the capability to do so. The key question, though, is whether it was objectively reasonable for officers to conclude that Marion posed an actual threat to officers or innocent bystanders once he reached the median. Marion claims that his vehicle was stuck in the mud, had three flat tires, was overheating, and that an objectively reasonable officer in the same circumstances as defendants would conclude that he did not pose a danger to anyone at that time. Despite Marion's contentions, it was reasonable for the officers to determine that he did actually pose a threat to the safety of officers and of innocent bystanders. While three of Marion's tires were flat, he had been able to travel on three flat tires at fairly high speeds for a significant stretch of time. Even after he entered the median and officers on foot surrounded his vehicle, the video evidence shows that Marion's vehicle continued to move forward significantly. Later, after he revved his engine, he was able to drive the vehicle backward as well. A reasonable officer would have concluded that, absent police intervention, Marion had the capability to run over officers and/or to reach the eastbound lanes of the highway. Moreover, a reasonable officer would have determined that, if he did reach the eastbound lanes, there was a significant possibility that Marion would have rammed one or more bystander's vehicles or caused an accident between bystanders' vehicles, posing a substantial risk of serious injury or loss of life. We conclude that, under the totality of the circumstances, it was reasonable for the officers to think that Marion seriously endangered officers and innocent bystanders, and it was reasonable for the officers to discharge their firearms in Marion's direction to stop him. Thus, there was no Fourth Amendment violation. Because there was no deprivation of a constitutional right in this case, the police officers are immune from liability.")

Viilo v. Eyre, 547 F.3d 707, 710 (7th Cir. 2008) ("While *Brown* and *Hells Angels* clearly establish that it is unreasonable for officers to kill a person's pet unnecessarily, these decisions are not

essential to reaching this conclusion. . . In 2001, we held that domestic animals are 'effects' within the meaning of the Fourth Amendment. . . The *Siebert* decision is enough to give police officers reasonable notice that unnecessarily killing a person's pet offends the Fourth Amendment.").

Holmes v. Village of Hoffman Estate, 511 F.3d 673, 687 (7th Cir. 2007) ("At the time of Holmes's arrest, it was of course clearly established that a police officer may not use excessive force in arresting an individual. Teipel claims that he was not on notice that the types of force Holmes alleges he employed were impermissible under the circumstances. However, accepting as true Holmes's contention that he did not physically resist the officers, we cannot say that Teipel could have reasonably thought the types of gratuitous force Holmes has described were justified. No reasonable officer could have thought that it was permissible to slam Holmes's head against the car simply because his fellow officer deemed him a 'smart ass,' for example, nor could the officer have thought it proper to continually grind his knee into the face of an unresisting arrestee.")

Duran v. Sirgedas, 2007 WL 1259059, at *6, *14 *15 (7th Cir. May 1, 2007) (not published) ("[T]he reasonableness of directing and holding partygoers inside the house is not the issue; rather, the issue is whether, in seizing the plaintiffs inside the house, Officers DeCianni and Peslak used excessive force by spraying pepper spray into the house. . . . Assaulting citizens who are safely detained without any provocation violates clearly established constitutional principles. . . . [U]nlike the plaintiffs inside the house, these plaintiffs [standing in yard] were not 'seized' within the meaning of the Fourth Amendment. Accordingly, their claim is analyzed under the due process clause of the Fourteenth Amendment. Conduct that violates the Fourteenth Amendment's guarantee of substantive due process must be so arbitrary that it 'shocks the conscience.' . . . In this case, the facts as set forth by the district court were that Sergeant Krummick and Officer DeCianni sprayed pepper spray at Amada Duran and her children, and Officer DeCianni also used excessive force by spraying Amada's niece, all while they were standing in the back yard. The district court did not find any evidence that these plaintiffs were refusing to follow a police order or were resisting arrest in any way. Nor did the district court conclude that the record evidence indicated that the officers were spraying pepper spray more broadly to disperse the crowd. Given these limited facts, we agree with the district court that a reasonable officer would know that spraying individuals (who allegedly were not resisting arrest, refusing to obey a lawful order to disperse, or otherwise interfering with official business) with pepper spray without justification could support a jury verdict based on the Fourteenth Amendment's 'shocks the conscience' standard, as it could be found to be 'conduct intended to injure in some way unjustifiable by any government interest.' *Lewis*, 523 U.S. at 840. Accordingly, based on the facts set forth by the district court, we conclude that at this stage Sergeant Krummick and Officer DeCianni were not entitled to qualified immunity on these claims.").

Sallenger v. Oakes, 473 F.3d 731, 741, 742 (7th Cir. 2007) ("The officers argue that the use of the hobble was not clearly established as unconstitutional since there are no cases from this circuit which have called the use of hobbles into question. Moreover, the defendants cite authority from our sister circuits holding that the use of a hobble was not clearly established as constitutionally

infirm so as to deny police officers qualified immunity. *See, e.g .*, *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir.2004); *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir.2001). Although the cases relied on by the defendants do suggest that the mere use of a hobble was not clearly established as constitutionally suspect, this does not speak to the totality of circumstances surrounding the use of the hobble on Andrew. Here, the alleged excessive force does not solely, or perhaps even primarily, involve the use of the hobble. Rather, here, the officers repeatedly struck Andrew with closed-fist blows and blows with a flashlight after he was handcuffed; they continued to strike him after he had stopped moving and placed him in a hobble; and, they failed to put him immediately on his side after they hobbled him. The question is not whether Andrew's right to be free from the officers' use of the hobble was clearly established; rather, the issue is whether Andrew's right to be free from the whole range of excessive force as described by the district court was clearly established. In the first part of our inquiry, we determined that the officers' use of force was objectively unreasonable. We further conclude that Andrew's right to be free from the excessive force inflicted on him by the officers was 'sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.'. . Viewing the facts in the light most favorable to the plaintiff, a reasonable officer would have known that administering closed-fist punches and flashlight blows, including ones to the head, after the arrestee was handcuffed, continuing to strike him after he had stopped resisting arrest and failing to place him in the proper position after hobbling him violated the individual's Fourth Amendment right to be free from excessive force.")**.**

Graham v. Hildebrand, No. 06-2169, 2006 WL 3102351, at *4, *5 (7th Cir. Oct. 26, 2006) (not published) ("Although we have not specifically addressed a qualified immunity defense in a case involving the use of pepper spray, other circuits have found an officer's use of pepper spray reasonable when the individual sprayed was either resisting arrest or refusing reasonable police requests. [citing cases] Viewing the facts in the light most favorable to the Grahams, they were not resisting arrest or otherwise interfering with the officers at the point when they were shot with pepper spray. And while they were not entirely 'passive' or 'incapacitated'–they were pushing other persons in the crowd– Officer Bennett has never asserted that he dispersed the pepper spray to stop them from fighting with others rather than because they were resisting him. Morever, by the Grahams' account, Bennett never gave them an opportunity to comply peacefully with his orders; he simply shot pepper spray without warning at the targets of an angry and potentially violent mob–the precise individuals, if the Grahams are telling the truth, that he should have been protecting. Because a jury could find that a reasonable officer in Bennett's position would have known, under the Grahams' version of events, that dispersing pepper spray in their faces was an excessive use of force, we vacate the grant of summary judgment on the excessive-force claim as to Bennett.").

Jones v. Wilhelm, 425 F.3d 455, 463-65 (7th Cir. 2005) ("By his own admission, . . . Wilhelm knew before he executed the warrant that the phrase 'upstairs apartment on the right' would lead him to a different apartment depending on which staircase taken. Where a warrant is open to more than one interpretation, the warrant is ambiguous and invalid on its face and, therefore, cannot be

legally executed by a person who knows the warrant to be ambiguous. . . We must emphasize that the Joneses' clearly-established rights were not violated because the warrant turned out to be ambiguous. Rather, the Joneses' rights were violated because Wilhelm knew the warrant did not particularly describe the place to be searched based on his prior surveillance of the building. . . Wilhelm recognized the warrant as ambiguous before the execution of the warrant, but failed to immediately stop execution and seek the necessary clarification of a warrant in order to make certain the warrant particularly described the place to be search as called for by the Fourth Amendment. . . . Wilhelm had prior knowledge of the building's layout before executing the warrant. As a result, he does not qualify for any good-faith exception. Where an officer executing a warrant knows or should have known that a warrant, which was valid when issued, now lacks the necessary particularity, then that officer cannot legally execute the warrant. . .Furthermore, if an officer obtains information while executing a warrant that puts him on notice of a risk that he could be targeting the wrong location, then the officer must terminate his search. . . . For all the reasons discussed, we find that the undisputed facts of this case establish that Wilhelm's actions violated the Joneses' clearly established rights because he (1) executed a validly issued warrant he knew to be facially ambiguous prior to the execution of the warrant; and (2) circumvented the magistrate judge and resolved the warrant's ambiguity based on information he should have disclosed to the magistrate who issued the warrant. Since Wilhelm's undisputed actions represent a violation of clearly-established, constitutional rights, we find that Wilhelm enjoys no qualified immunity as to the Joneses' warrant claim.").

Abdullahi v. City of Madison, 423 F.3d 763, 774, 775 (7th Cir. 2005) ("As a last-ditch effort to win the day, defendants argue (in just three pages of their appellate brief) that they are entitled to qualified immunity. . . . Here the plaintiff has certainly alleged violation of a valid constitutional right–if defendant Brooks applied deadly force to Mohamed while he was lying prone on the ground with his arms behind him, this would violate Mohamed's Fourth Amendment rights, as would an unjustifiable failure by the other officers to intervene. However, whether it would have been clear to a reasonable officer that Brooks' actions constituted unreasonable force under the circumstances–thus triggering the duty to intervene–is obviously a more difficult question. Presumably, if it would have been apparent to the other officers, just by watching, that Brooks was applying potentially deadly pressure to Mohamed while he was lying prone, then the officers would not be entitled to qualified immunity. Again, no one contends that deadly force was warranted in this case. However, it may have been difficult to tell how much force Brooks was applying, and at least one or two of the officers (those attempting to restrain Mohamed's legs) had their back to Brooks during the encounter. Additionally, this Court's 1997 decision in *Estate of Phillips* ruled that a similar takedown–during which one officer put a knee in Phillips' back for about one minute–was not unreasonable under the circumstances. . . However, since the very nature of Brooks' conduct remains undetermined, one can only speculate as to how visually obvious any violation of Mohammed's rights might have been. In other words, without knowing what Brooks did or how his conduct appeared to onlookers, it would be difficult to say that, as a matter of law, a reasonable officer could not have known that Brooks' conduct violated Mohamed's constitutional rights. A jury should decide whether Brooks' actions would have made

it clear to a reasonable officer that intervention was warranted, and, if so, whether Grady, Mueller and Murphy had a realistic opportunity to intervene.").

Green v. Butler, 420 F.3d 689, 701(7th Cir. 2005) ("[A]t the time of the incident at issue here, a reasonable agent would have known that a critical component of a reasonable entry under the Fourth Amendment was the knock and announce requirement. There was no reason for an agent to believe, under these facts, that dispensing with the requirement was justified by any exigency or futility. Nor was there any basis for a belief that the parolee's consent to search justified dispensing entirely with the knock and announce rule. Indeed, when an officer enters a home without knocking and announcing his identity and purpose, and without a manifest exigency or demonstration that compliance would be futile, the Fourth Amendment violation 'is so obvious that a reasonable state actor would know that what he is doing violates the Constitution.'").

Hosty v. Carter, 412 F.3d 731, 738, 739 (7th Cir. 2005) ("The district court held that any reasonable college administrator should have known that (a) the approach of *Hazelwood* does not apply to colleges; and (b) only speech that is part of the curriculum is subject to supervision. We have held that neither of these propositions is correct–that *Hazelwood's* framework is generally applicable and depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extracurricular activities. But even if student newspapers at high schools and colleges operate under different constitutional frameworks, as both the district judge and our panel thought, it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule. . . . Many aspects of the law with respect to students' speech, not only the role of age, are difficult to understand and apply . . . . 'Qualified immunity shields an official from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.' *Brosseau,* 125 S.Ct. at 599. That description is as apt here as it was in *Brosseau.* Public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved. Disputes about both law and fact make it inappropriate to say that any reasonable person in Dean Carter's position in November 2000 had to know that the demand for review before the University would pay the *Innovator's* printing bills violated the first amendment. She therefore is entitled to qualified immunity from liability in damages.").

Does v. Kane County, No. 17 C 3944, 2018 WL 1744672, at *6-7 (N.D. Ill. Apr. 11, 2018) ("Defendants argue that 'no controlling case would have told Loomis that he could not unshackle Salters so that Salters could use the bathroom.'. . Specifically, Defendant Loomis asserts that '[r]esearch has not revealed a case "analogous" to this one, where a guard unshackled an inmate so that the inmate could use the toilet, the inmate then overpowered the guard, and then the inmate committed more violent crimes.'. . Although courts should not define clearly established law at a high level of generality. . . '[t]his requirement does not mean that a plaintiff must be able to point to a case "on all fours" with the defendant officer's alleged misconduct.'. . Instead, 'there must be settled authority that would cause him to understand the illegality of the action.'. . Therefore, Plaintiffs need not point to an analogous case where 'a guard unshackled an inmate so that the

inmate could use the toilet, the inmate then overpowered the guard, and then the inmate committed more violent crimes' to survive Defendants' motions to dismiss based on qualified immunity. . . .Plaintiffs' allegations and all reasonable inferences indicate that Defendant Loomis was aware of Salters' violent propensities and the increased dangers to those nearby if Defendant Loomis lost control of Salters. Had Defendant Loomis not lost control of Salters, Jane Does I and II would not have been held hostage at gunpoint and brutalized and the other Plaintiffs would not have been terrorized by Salters wreaking havoc at the hospital causing a hostage situation and resultant police standoff. Based on *White*, *Reed*, *Monfils*, and *Paine*, the law at the time of Defendant Loomis' alleged misconduct was sufficiently clear that a reasonable officer would understand that his actions were unlawful. The Court therefore denies Defendants' motions to dismiss in this respect.")

McKnight v. Taylor, 210 F.Supp.3d 1069, 1074-75 & n.5 (S.D. Ind. 2016) ("The parties before us dispute whether McKnight was, in fact, holding a gun when he emerged onto the front porch of 403 Read Street. It turns out that he was not. He had the handset of a home telephone in his hand. But Officer Knight, Officer Taylor, Officer Montgomery, and Sergeant Hoover all reported to seeing a silver and black object approximately five to six inches long in McKnight's left hand at the time of their confrontation, and all reported thinking that the object was a medium-sized handgun. When the officers entered the residence following the shooting, they discovered McKnight's body lying near the entrance atop a silver and black phone matching the description of what the officers had believed to be a gun. The only gun located in the residence was found on the second story, near where McKnight had been shooting at the officers earlier during the incident. Defendant maintains that McKnight must have re-entered the home after being shot by Officer Taylor, traveled up the stairs to the second story where he dropped the gun, and then grabbed the silver and black telephone to make a call before falling on top of the phone and dying. Plaintiff, on the other hand, maintains that McKnight was holding the phone while on the porch and, after being shot by Officer Taylor, retreated into the home's first level where he collapsed and died. As Defendant recognizes, we must and do resolve this dispute in Plaintiff's favor as the non-moving party. However, our inquiry does not end here. The Seventh Circuit has affirmed the grant of summary judgment to an officer who shot a suspect under the reasonable *belief* that the suspect had a gun. *See Henning v. O'Leary*, 477 F.3d 492 (7th Cir. 2007). Indeed, in *Henning* the Court found that two officers' reasonable belief that a suspect who was engaged in a struggle with them had gotten his hands on or near a gun gave them the requisite reasonable cause to use deadly force. . . The Court stated further that '[p]olice officers cannot be expected to wait until a resisting arrestee has a firm grip on a deadly weapon...before taking action to ensure their safety.'. .Thus, because our focus here is on the reasonableness of Officer Taylor's *belief* that McKnight possessed a gun on the porch, the issues surrounding McKnight's actual possession of it are immaterial. As fully explicated in our prior order denying summary judgment on Counts I and III, none of the circumstances of the standoff at 403 Read Street, apart from McKnight's putative possession of a gun, furnished grounds for the reasonable use of deadly force. We thus concluded that: Taylor's decision to shoot and kill McKnight was *only* within Fourth Amendment bounds if Taylor *reasonably believed* McKnight to have been armed—and thus an imminent threat to the responding officers. But McKnight was apparently unarmed, and we lack sufficient facts at this stage to

determine whether Taylor's contrary belief was reasonable. . . . It is worth noting that despite our statement in our prior order that the absence of facts relevant to this determination created an 'issue of fact' preventing summary judgment, that phrasing may have been misleading; the objective reasonableness of force used by an officer in conducting a seizure remains a legal determination for the Court to resolve. *Fitzgerald v. Santoro*, 707 F.3d 725, 733 (7th Cir. 2013). . . . Based on the additional discovery and the second round of briefing performed by the parties focusing on this issue, we find, based on the totality of the circumstances known to Officer Taylor at the time of the shooting, he had the requisite reasonable cause to justify his use of deadly force.")

Flournoy v. Colbenson, No. 09 C 7159, 2014 WL 1477918 (N.D. Ill. Apr. 15, 2014) ("On these facts, viewed in the light most favorable to the Estate, the law points only in one direction: the use of the flash bang devices in this case was an unreasonable use of force to which qualified immunity does not apply. As discussed above, through the use of 'lucid and unambiguous' *dicta*, . . . we have repeatedly expressed our concern with the overuse of flash bang devices, especially where the circumstances do not warrant such extreme measures. This is because flash bang devices are essentially grenades and can be very dangerous and destructive. Despite the absence of a great deal of precedent in this area, the pertinent holdings and *dicta* do show a clear trend in the law that addresses the egregious circumstances of this case; even if the contours of the constitutional implications of the use of 'flash bang' devices in general is not clear, it is abundantly clear that this case arises in precisely the circumstances that this Court and other circuits have sought to avoid by providing detailed guidance on when the use of flash bang devices is (and is not) appropriate under the Constitution. . . If this were a borderline case, perhaps the relative paucity of judicial holdings forbidding the use of flash bang devices as compared to other more fully developed areas of Fourth Amendment jurisprudence would counsel in favor of a generous application of qualified immunity. However, on the facts of this case, the officers' conduct in the use of the flash bang devices so clearly exceeded the bounds of reasonableness in the circumstances that it cannot be said to lie near the 'hazy border between excessive and acceptable force' along which qualified immunity shields officers from liability for their snap judgments, if those judgments prove to be wrong upon further reflection. Based on the pre-existing case law, it was clearly established as of July 19, 2005, that throwing a flash bang device blindly into an apartment where there are accelerants, without a fire extinguisher, and where the individual attempting to be seized is not an unusually dangerous individual, is not the subject of an arrest, and has not threatened to harm anyone but himself, is an unreasonable use of force. Therefore, taking the facts as presented to us from the district court, the Defendants are not entitled to qualified immunity and the issue of the officers' decisions must be presented to a jury.") [*See also Flournoy v. City of Chicago*, 829 F.3d 869 (7th Cir. 2016) (evidence supported jury's finding that police officer did not use excessive force when he deployed flashbang grenade)]

Brown v. Blanchard, 31 F.Supp.3d 1003, 1012 (E.D. Wis. 2014) ("In the present case, I have identified two different factual scenarios under which Blanchard could be deemed to have unreasonably seized Brown: (1) using deadly force against Brown without probable cause to believe that Brown was threatening the deputies with serious physical harm; and (2) unreasonably

creating the encounter that led to Brown's threatening the deputies with serious physical harm. Under the first factual scenario, Blanchard is not entitled to qualified immunity because it is clearly established that an officer may not use deadly force to seize a subject who is not threatening the safety of the officer or anyone else. . . Under the second factual scenario, Blanchard is not entitled to qualified immunity because it is clearly established that an officer who shoots a suspect in an effort to protect himself cannot escape liability if the danger he faced was created by his own unreasonable conduct. . . Although no case precisely identifies Blanchard's conduct in the second scenario as the kind of 'unreasonable conduct' that creates a dangerous situation, I conclude that it would have been obvious to a reasonable officer in Blanchard's position that his or her course of conduct was unlawful despite the absence of a case saying as much. . . My conclusion is based on the obvious unreasonableness of Blanchard's conduct: in light of Such's observations of Brown through the bedroom window, there was no reason for Blanchard to immediately enter the room with his gun drawn and create a situation calling for the need to use deadly force. A specific case identifying this conduct as unreasonable is not needed to give the officer fair notice that the conduct is unlawful. Accordingly, Blanchard is not entitled to summary judgment.")

Washington v. Matson, No. 12–C–33, 2013 WL 203988, at *2 (E.D. Wis. Jan. 17, 2013) ("The officer does not need to have one-hundred percent certainty that the suspect intends to harm him; under such circumstances, he is entitled to place his own safety first if there is even a reasonable chance that a suspect could be dangerous. It should be remembered that a Taser is an alternative to the use of *deadly* force, and in fact Tasers and other types of stun guns often save suspects' lives by allowing the officers an alternative to their firearm. There is no suggestion that the Taser was used for anything other than to secure Washington's arrest by temporarily stunning him and to thwart a potential threat to the officer himself. In circumstances like those on the night in question, the officer does not need to give the suspect the benefit of the doubt. Here, Washington has not disputed the essential elements underlying the officer's claim that his use of non-deadly force was reasonable.")

Overton v. Hicks, No. 1:06-cv-1513-DFH-JMS, 2008 WL 2518229, at *6, *7 (S.D. Ind. June 17, 2008) ("Defendants are entitled to summary judgment for the use of the dog and the taser while Overton was in his car after warning him to comply. Those actions were objectively reasonable responses to a driver who was revving the engine of a car surrounded by police. Officer Hicks reported that Overton continued to rev the car's engine even after the dog bit him. . . Moving cars can be deadly weapons, warranting use of deadly force under certain circumstances. . . . There is no indication that deadly force would have been reasonable here, particularly given Officer Parker's testimony that he did not believe that Overton could have dislodged his car from the curb. . . But some force was warranted to prevent an attempt to escape, including the reasonable use of a police dog and a taser. . . . This finding of reasonableness is based only on the undisputed evidence that Overton was revving his car's engine and fumbling with the steering column-before the officers had any indication that Overton might have been in diabetic shock. Had Overton merely been passively resisting the officers' commands to get out of the car and show his hands, their use of a dog and a taser would have presented a closer question. . . . Perhaps the officers

violated the department's policy by not using an arm-lock or other less intrusive method, but the court's inquiry under the Fourth Amendment is whether the force used was reasonable under the circumstances, not whether it was the least forceful means possible.")**.**

Estate of Fields v. Nawotka, No. 03-CV-1450, 2008 WL 746704, at *6, *7 (E.D. Wis. Mar. 18, 2008) ("Under the plaintiffs' version of the facts which this court must credit, Nawotka was never in the direct path of Justin's vehicle, Nawotka fired his weapon as the vehicle was already traveling away from him, the vehicle was driving away at low speeds, and the vehicle was significantly damaged and had a flat tire. Under the plaintiffs' version of the facts, nobody in the immediate vicinity was in imminent danger of death or serious bodily injury when Nawotka fired his weapon. Under these facts and in light of clearly established law, a reasonable officer in Nawotka's position would not have believed that exercising deadly force was lawful. . . . Also, unlike the officers in *Scott* [*v. Edinberg*, 346 F.3d 752, 755 (7th Cir.2003)] and *Brosseau*, Nawotka does not claim that there were bystanders in the immediate vicinity that faced death or serious bodily injury at the time that he fired his weapon, and the record in this case does not reveal that anybody was in the vicinity of the vehicle's path when Nawotka fired his weapon. . . Moreover, when Nawotka fired his weapon, Justin's vehicle was badly damaged, traveling slowly, and had a flat tire. Even if there were people standing in the vicinity of the vehicle's path, a reasonable officer may not have concluded that they were in imminent danger.")**.**

Montgomery v. Morgan County, No. 1:06-cv-0915-RLY-TAB, 2008 WL 596068, at *9, *11(S.D. Ind. Feb. 29, 2008) ("Plaintiff contends that the 'totality of circumstances' measurement would encompass the decision of the deputies to force their way into the house with tasers and a gun drawn, despite the fact that they testified in deposition that before they entered the house they were in no fear of imminent danger. Defendants want the court to focus on the situation that existed when Hoffman fired his gun. As much as Plaintiff would like the question to be whether it was a good choice to enter the home, the answer to that question provides no basis for holding any of the officers liable. Even under a due process analysis, neither negligence nor gross negligence suffice to support liability under § 1983. . . . In short, it was constitutionally permissible for the deputies to go into the house and attempt to execute on the order of apprehension. Once they entered and Montgomery became hostile, attacking an officer in a manner that could inflict serious bodily harm, there is no doubt that it was reasonable for Hoffman to use his gun to stop Montgomery from swinging the pipe at Beaver. This is especially true in light of the deputies' efforts to first use less than lethal force, the Tasers, to subdue him. It would have been better for all if Worth or Beaver had successfully utilized the Tasers, but their efforts were stymied by Montgomery's own violence and no liability is created by an inaccurate Taser shot.")

Duran v. Town of Cicero, No. 01 C 6858, 2005 WL 2563023, at *12 (N.D. Ill. Oct. 7, 2005) ("First, we are analyzing plaintiffs' claim under the Fourth Amendment, not the Fourteenth, so defendants' conduct is evaluated for objective reasonableness. Moreover, defendants' framing of the 'clearly established law' inquiry is much too narrow. . . .At the time of the events in this case, it was clearly established that 'police officers do not have the right to shove, push, or otherwise

assault innocent citizens without any provocation whatsoever.'. .Pepper-spraying is a type of 'assault.' A clearly-established constitutional right can be demonstrated not only by pointing to a closely analogous case that established a right to be free from the type of force the police officers used on plaintiffs, but also by 'showing that the force was so plainly excessive that, as an objective matter, the police officers would have been on notice that they were violating the Fourth Amendment.' . . Here, the facts could support a finding that defendants used plainly excessive force by assaulting plaintiffs with pepper spray without justification (when those plaintiffs were confined in the house and not provoking the officers). Under the facts, there was no reason for the officers to believe that spraying into the house was justified. We therefore conclude that Officers DeCianni and Peslak are not shielded by qualified immunity from the Group I plaintiffs' claim of excessive force in spraying into the Durans' house.").

DeSalvo v. City of Collinsville, No. 04-CV-0718-MJR, 2005 WL 2487829, at *4, *5 (S.D. Ill. Oct. 7, 2005) (not reported) ("Krug does argue, however, that a citizen's right to be free from being tased is not a clearly established right, in that there is no clearly analogous case specifically establishing a right to be free from tasing. While this may or may not be the case, this Court finds that Krug's argument implicitly asserts a definition of DeSalvo's right that exceeds the appropriate level of specificity. . . DeSalvo's right in this case, defined at an appropriate level of specificity, poses to the Court a broader question: does a restrained person have a right to be free from a significantly violent level of force if he is, while perhaps not fully compliant with an officer's orders, acting in an otherwise peaceable manner? In answering this question, the Court finds the fact that Krug used a taser to inflict pain upon DeSalvo, rather than some other weapon, is of diminished importance. A taser is capable of inflicting a great deal of pain upon a person–shocking, burning, and even rendering numb its target–and is, in this sense, little different than a nightstick, mace, or any other weapon that a police officer might use against an adversary. A reasonable officer in the situation Krug confronted would have known that it would be unlawful to deliver a swift blow with a night stick to the back of DeSalvo's neck as he stood handcuffed at the rear of the squad car. A reasonable officer would also have known that spraying mace in the face of DeSalvo under the circumstances would be unlawful. So too, then, this Court finds, a reasonable officer in Krug's position would have known that it would be unlawful to tase DeSalvo under the circumstances of this case. Accordingly, the Court concludes that the rights of DeSalvo that Krug allegedly violated were 'clearly established' at the time of DeSalvo's arrest. Therefore, the Court rejects Krug's qualified immunity argument.").

EIGHTH CIRCUIT

Zubrod v. Hoch, No. 17-1202, 2018 WL 5117172, at *7, *10 (8th Cir. Oct. 22, 2018) ("Though we view the facts in the light most favorable to the nonmoving party, the Zubrods have not submitted competent, admissible evidence that rebuts the deputies' version of events. . . The deputies' statements were substantially the same regarding the material facts: Michael had already severely injured his victim and demonstrated hostility and violence toward the deputies. The deputies faced an individual who was dangerous, acting abnormally, strong, threatening, and

noncompliant, and each time they eased up to allow him to submit, he resumed his violent behavior. With the unsworn statements excluded, the Zubrods rely on Deputy Hoch's taser video. After reviewing it, we conclude that it shows a violent suspect who failed to comply with reasonable orders to turn around and resisted even after multiple tasings. This is consistent with the deputies' statements. The video does not provide any evidence that would lead a reasonable juror to conclude that Michael surrendered. . . . The Zubrods failed to raise a genuine, material fact question as to whether the Deputy Hoch's use of force was reasonable. Because we are satisfied that there was no constitutional violation, we need not undertake an analysis into whether the right in question was clearly established.")

Johnson v. City of Minneapolis, 901 F.3d 963, 967-71 (8th Cir. 2018) ("Officer Heiple believed that Johnson kicked him. . . There is no question (and Johnson does not contest) that assaulting a police officer is a crime under Minnesota law. . . Thus, our inquiry is not whether it was reasonable for an officer to believe a specific act constituted a violation of the law. . . or whether it was reasonable for an officer to believe a suspect had the requisite mindset (or *mens rea*) for a criminal violation[.] . . Instead, our inquiry here is whether it was reasonable to believe that the purported act (or *actus reus*), a kick, happened in the first place. Framed differently, the question is 'was it objectively reasonable for [Officer Heiple] to mistakenly believe, under the totality of the circumstances, that [Johnson]' kicked him? . . . We do not believe so. 'Considering the totality of the circumstances,' Officer Heiple did not make an 'entirely reasonable inference' that Johnson had kicked him. [citing *Wesby*] . . . .In sum, we find Officer Heiple lacked arguable probable cause to arrest Johnson. A review of the totality of the circumstances suggests that Officer Heiple had reason to know that Johnson could not deliver the type of pain he felt. Indeed, he had no information suggesting she was even in a position to do so. Most importantly, however, the arguable probable cause undergirding the warrantless arrest here was missing a fundamental element: observation—either by Officer Heiple or a witness who relayed that information to him—of a criminal act. . . . The next question is whether the 'unlawfulness of [Officer Heiple's] conduct was clearly established at the time.'. . In *Kuehl v. Burtis*, we held that an officer who did not witness a crime did not have arguable probable cause to arrest a suspect after speaking with her only for 'twenty seconds' when other eyewitnesses were present and would have exonerated her. . . Indeed, there are striking parallels to this case—the only investigation undertaken by Officer Heiple was asking Johnson twice if she had kicked him. There was one eyewitness (Moriarty) present that Officer Heiple could have easily turned to. And, as in *Kuehl*, Moriarty would have exonerated Johnson. Additionally, similar to *Kuehl*, there were no exigent circumstances that prevented Officer Heiple from speaking with Moriarty before the arrest. *Kuehl* is a 'controlling case' on these facts. . . . At bottom, 'a reasonable officer, looking at the entire legal landscape at the time of the arrests, could [not] have interpreted the law as permitting the arrest[ ] here.'")

Wenzel v. City of Bourbon, 899 F.3d 598, 602-03 (8th Cir. 2018) ("We conclude that the district court erred in ruling that Storm's use of deadly force was not reasonable under the circumstances. Considering the version of the evidence that the district court assumed or likely assumed in reaching its decision, the facts and circumstances confronting Storm were that of a fleeing suspect

whose reckless rules-violating driving constituted a hazard to oncoming motorists. Storm was aware of Wenzel's aggressiveness and of his violence towards law enforcement officers. The manner in which Wenzel exited his vehicle and charged towards Storm while exhibiting an angry visage was in keeping with the reputation he had earned during his earlier interactions with law enforcement officers. Given his knowledge of that reputation and the scant three seconds that he had to observe Wenzel's unabated approach towards him, it was reasonable for Storm to believe that Wenzel posed an immediate threat of serious physical harm to him, notwithstanding the fact that Storm could see that Wenzel's hands were empty and the later-discovered fact that Wenzel was unarmed. . . We reject Plaintiffs' contention that it was unreasonable for Storm to use deadly force when, they say, he could have used his baton or his pepper spray to subdue Wenzel. . . . A reasonable officer on the scene would have viewed Wenzel's indisputably aggressive approach as a precursor to a physical altercation. Storm was required to make a split-second decision in unpredictable and dangerous circumstances, and he was not constitutionally required to attempt to re-holster his firearm, grab his baton or pepper spray canister, and do battle with the fast-approaching, known-to-be-confrontational Wenzel. . . We reverse the order denying qualified immunity.")

Michael v. Trevena, 899 F.3d 528, 533-35 (8th Cir. 2018) ("Accepting Michael's version of events as true, Trevena and Chaffee's use of force was objectively unreasonable. The officers allegedly suspected Michael of making a false statement—a nonviolent misdemeanor. . . Michael was neither fleeing nor actively resisting arrest and, sitting in a lawn chair, he posed no threat to the security of the officers or the public. Accordingly, none of the *Graham* factors cuts in favor of a forceful arrest being reasonable. . . Under Michael's version of the facts, he was a nonviolent misdemeanant who neither fled nor actively resisted arrest, and posed no threat to the officers or other members of the public. . . Under these circumstances, it is objectively unreasonable to make an arrest by grabbing the suspect by the throat (Trevena), or using a baton with sufficient force to break the suspect's arm (Chaffee). Accordingly, neither officer is entitled to qualified immunity on Michael's excessive force claim. . . . Like the district court, the dissent believes that the dash cam video clearly shows Michael intentionally put his foot under the tire of his sister's vehicle (a minivan). We have watched the same video and we disagree. . . The video shows Michael walking quickly to the passenger side of the van. Michael's sister begins to drive away. We do not see Michael taking any steps backwards; his feet move but he remains immediately beside the van. As the van turns toward Michael and away from the curb, Michael's right foot moves under the rolling van. The van's rear tire—presumably the tire Michael says ran over his foot—is not visible because the van blocks the dash cam's view as it turns into the street. Though a jury could reasonably conclude that Michael put his foot under his sister's van on purpose, it could also reasonably conclude that Michael's sister deliberately turned the van toward him, and succeeded in running over his foot. Thus, this remains one of those 'usual' qualified immunity cases in which viewing the facts in the light most favorable to the nonmovant 'means adopting ... the plaintiff's version of the facts.'. . Here, that means assuming, for the purpose of summary judgment, that Michael's sister intentionally ran over his foot. . . . [T[he officers' belief, mistaken or otherwise, that they had probable cause to arrest Michael for violating N.D. Cent. Code § 12.1-11-03(1) was

unreasonable. Accordingly, neither Trevena nor Chaffee is entitled to qualified immunity.")

Church v. Anderson, 898 F.3d 830, 832-34 (8th Cir. 2018) ("On appeal, Church's main argument is that we should create an evidentiary presumption at the summary judgment stage against an officer who fails to use audio or video recording equipment that he has been issued. He argues that Anderson should not benefit from Church's inability to remember the incident given that Anderson failed to activate his recording equipment. The proposed presumption would permit the court to infer from the lack of audio evidence that Anderson's use of force was excessive, allowing the claims to proceed to trial. While we recognize that cases involving the use of force in which only one side can tell its story present 'a unique evidentiary problem,' we decline to adopt such a radical solution. . . Church admits that he knows of no court anywhere that has recognized such a presumption. Moreover, we must follow circuit precedent, . . . which places the burden of showing the violation of a clearly established right on Church[.] . . Church also claims that the physical evidence concerning the shooting and '[d]iscrepancies and variations' in Anderson's testimony are sufficient to bring his claims to trial even without the proposed evidentiary presumption. . . In particular, he points to Anderson's lack of physical injuries consistent with a violent assault, his knowledge that Church was unarmed, and his failure to use less violent means to subdue Church, as well as the jury's acquittal of Church on the more serious charge of assault with intent to inflict serious bodily injury. . . . Though Church was acquitted of the more serious charge, it is undisputed that he assaulted Anderson, who did have injuries consistent with such an assault, even if those injuries were limited. Weighing approximately 268 pounds, Church was far larger than Anderson, who weighed approximately 190 pounds. Anderson testified that he feared that he might lose consciousness and that Church could potentially access his service weapon and kill him. Given the size difference between the two men, Anderson's concerns about his safety, and the 'tense, uncertain, and rapidly evolving' situation, . . . it was reasonable for him to use deadly force to defend himself[.] . . . As for the availability of less lethal force, Anderson testified that he could not reach his taser or pepper spray—which were on the opposite side of his duty belt from his service weapon—due to Church's repeated punches. But even if we assume that Anderson could have used these alternatives, an officer need not 'pursue the most prudent course of conduct as judged by 20/20 hindsight vision.'. . And because deadly force was justified, Anderson was not required to warn Church before each shot and was permitted to use force until the threat had ended. . . While one shot did apparently enter Church's right shoulder area from the rear, this case bears little similarity to those in which 'an unarmed man was shot in the back of the head,'. . . or four of six shots entered the suspect from behind[.] . . . Anderson testified that he fired the second and third shots in rapid succession. The mere possibility that a shot hit Church as he withdrew is not enough to defeat qualified immunity if 'the record taken as a whole could not lead a rational trier of fact to find for' Church. . . There is no dispute that the second and third shots were fired together and that one shot hit Church from the front. 'This would be a different case if [Anderson] had initiated a second round of shots after an initial round had clearly incapacitated [Church] and had ended any threat of continued flight, or if [Church] had clearly given himself up. But that is not what happened.'. . Because Anderson's 'unrefuted version of these events establishes that his use of force was constitutionally reasonable, we must affirm.'")

Rogers v. King, 885 F.3d 1118, 1121-22 (8th Cir. 2018) ("Viewing the evidence in the light most favorable to Rogers and Boyd, and considering the totality of the circumstances, we conclude that Officer King's use of deadly force was objectively reasonable. The officers responded to Ambrose-Boyd's home after receiving a 911 call report that she was home alone, suicidal, and had a gun. The dangerousness of the situation escalated as the officers found themselves in a hallway with Ambrose-Boyd holding a gun. Ambrose-Boyd failed to respond to commands to drop the weapon. The officers testified that her mental state added to their fears and that she raised the gun to Officer Christoph's shin level. At that time 'a reasonable officer would have had probable cause to believe that [she] posed a threat of serious physical harm, and any mistake in believing that [s]he posed such a threat was objectively reasonable.'. . There is 'no constitutional or statutory right' that prevents an 'officer from using deadly force when faced with an apparently loaded weapon.'")

Frederick v. Motsinger, 873 F.3d 641, 645-47 (8th Cir. 2017) ("With this appeal awaiting oral argument, the Supreme Court rejected the Ninth Circuit's provocation rule, agreeing with other circuits that its 'fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.'. . The Court made clear that 'the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional.'. . If the use of deadly force was objectively reasonable under *Graham*, based on what the officers knew when the force was applied, 'it may not be found unreasonable by reference to some separate constitutional violation.'. . The Estate's Brief did not argue that it was objectively unreasonable for Officer Motsinger to use deadly force against a suspect who was charging a fellow officer with a knife raised in a stabbing position. Our prior cases support the district court's conclusion that Motsinger's use of deadly force in this situation was reasonable. . . Consistent with this precedent, counsel for the Estate conceded at oral argument that, applying *Mendez*, the shooting of Frederick did not in itself give rise to a Fourth Amendment violation. At oral argument, the Estate argued that the attempted tasing was objectively unreasonable, and this was a distinct Fourth Amendment claim raised and argued in the district court and vigorously pursued on appeal. The Supreme Court in *Mendez* noted 'the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation.... The harm proximately caused by ... two [Fourth Amendment] torts may overlap, but the two claims should not be confused.'. . Thus, we must address the Fourth Amendment tasing claim. . . .In this case, we agree with the district court that Officer Torkelson's decision to use non-lethal force, his taser, in an attempt to disarm Frederick after she refused repeated warnings to drop a four-inch knife was objectively reasonable—Frederick was in a small commercial space, in front of restrooms that might have been occupied, and brandishing a weapon that posed a danger to the officers and store customers. The Estate argues that Frederick had not directly threatened the officers with her knife before she was tased. But she was acting erratically, expressing irrational thoughts, holding a knife in a stabbing position, challenging the officers' authority, and disobeying commands to drop her knife. While Frederick did not lunge at the officers prior to being tased, Torkelson and Clifton reasonably perceived she was ready to use her knife against them or others. . . . Even if she was suffering from mental illness

or other impairment, the relevant inquiry is whether she posed a threat, not what prompted her threatening conduct. . . The district court also held that the officers are entitled to qualified immunity because 'it was certainly not clearly established that tasing a person standing in a public area who refused several commands to drop a knife would violate that person's constitutional rights.' We agree. What is 'clearly established law should not be defined at a high level of generality ... [but] must be particularized to the facts of the case.'. . Although the Supreme Court 'does not require a case directly on point for a right to be clearly established, existing precedent must have placed the ... constitutional question beyond debate' at the time the officers acted. . . As the above-cited Eighth Circuit cases demonstrate, existing precedent did not place 'beyond debate' that the officers violated Frederick's Fourth Amendment rights when they discharged a taser at Frederick in these circumstances.The judgment of the district court is affirmed.")

Tatum v. Robinson, 858 F.3d 544, 549-52 (8th Cir. 2017) ("[A] reasonable officer would not believe Tatum was 'actively' resisting arrest. True, witness affidavits describe Tatum as fighting and resisting Robinson. But the district court found these statements inconsistent with the security footage. On appeal, Robinson does not contend that Tatum physically struggled with him, threatened him, or attempted to flee before he used the pepper spray. Noncompliance and arguing do not amount to active resistance. . . . Robinson contends that pepper spraying Tatum was reasonable partly because Tatum was armed and pled guilty to resisting arrest. Officers found a metal shank in Tatum's coat pocket *after* he was in the security office. This later discovery does not justify Robinson's earlier use of pepper spray because there is no evidence he knew or suspected that Tatum had the shank at the time he used pepper spray. . . Neither does Tatum's later guilty plea justify Robinson's use of pepper spray. The guilty plea does not show *when* he resisted arrest. Viewed most favorably to Tatum, it does not show Tatum was resisting arrest before Robinson used the pepper spray. Robinson used force on a non-resisting, non-fleeing individual suspected of a completed, non-violent misdemeanor—the type of individual against whom the use of force is 'least justified.'. . .Here, by the undisputed facts, Robinson informed Tatum he was a police officer, told him he was under arrest, told him to put his hands on a clothes rack, warned him he would use pepper spray if he did not calm down, and then pepper sprayed him. Tatum was given an opportunity to comply. He did not, instead arguing angrily with Robinson. It was reasonable for Robinson to use *some* force. But it was not reasonable to immediately use significant force. In addition to the lack of justification from the three *Graham* factors, other facts and circumstances indicate only limited force was reasonable. Robinson was not alone—another security officer was close by, as were at least two Dillard's employees. . .Robinson was off-duty and in plain clothes. . . It was not reasonable for Robinson to immediately use pepper spray. Pepper spray can cause more than temporary pain. . . Robinson presents no evidence he attempted to use other force to secure compliance—no evidence he tried to grab Tatum's hands and place them on the clothes rack, for example. . . Instead, he proceeded to pepper spray Tatum 14 seconds after he encountered him, and necessarily fewer seconds after Tatum failed to comply with his command. . . .Given the limited justification for using force against Tatum, a jury could find that Robinson used an unreasonable amount of force when he pepper sprayed Tatum. . . .Tatum's right to be free

from the use of pepper spray under these facts was not sufficiently definite. A reasonable officer in Robinson's shoes could have believed he was not violating Tatum's rights by pepper spraying him because Tatum was angrily arguing and was warned before the pepper spray was used. The district court erred in concluding Tatum's right to not be pepper sprayed was clearly established. . . .Viewing the evidence most favorably to Tatum, Robinson choked him for an extended period of time although he was restrained and not resisting. A reasonable jury could find that Robinson's use of force was objectively unreasonable. . . . As of April 29, 2014, it was clearly established that a suspect's Fourth Amendment rights were violated by uses of force like Robinson's. . . These cases put the question of the constitutionality of choking Tatum beyond debate because they clearly establish that it violates the Fourth Amendment to choke a suspect who is handcuffed and not resisting. The district court correctly denied qualified immunity on the choking claim.")

Dooley v. Tharp, 856 F.3d 1177, 1182-84 (8th Cir. 2017) ("Tharp testified that when he screamed the command to drop the gun, '[i]nstantaneously, the subject began to turn toward us and I saw him spin around, raising his rifle and pointing it at me.' According to Tharp, he believed 'that the subject was going to fire at me or Deputy Hudson unless I fired first.' Hudson testified that Dooley had pointed the rifle at Tharp and 'look[ed] directly at Deputy Tharp as he moved his rifle into a firing position.' When viewed frame-by-frame, the video appears to contradict the officers' description. It shows Dooley turning to face the deputies and using his right hand to maneuver the rifle. . . It also shows that Dooley did not place his right hand near the trigger and did not place his left hand on the rifle. It shows that at the moment of the bullet's impact, Dooley's arms were crossed over his chest and the muzzle of the rifle was pointed toward the sky. As we said in *Aipperspach v. McInerney*, 766 F.3d 803, 808 (8th Cir. 2014), '[w]e agree with the general proposition that a video of the incident can create a genuine issue of material fact that precludes the grant of summary judgment in an excessive force case.' When viewed in slow motion, the video of Dooley's actions could be seen as creating a genuine issue of fact whether Tharp used excessive force in the light of Dooley's response to the shouted commands to drop the gun. But law enforcement officers are not afforded the opportunity of viewing in slow motion what appears to them to constitute life-threatening action. In contrast to the situation in *Scott v. Harris*, 550 U.S. 372, 378 (2007), the real-time view of the video does not clearly contradict Tharp's account of what he perceived Dooley's actions to have been. . . Accordingly, we must view Tharp's mistaken-perception action for objective reasonableness. . . . Viewing the dash-cam video at regular speed and considering the facts of this case in light of the forgoing decisions, we conclude that Tharp's mistaken perception that Dooley posed a threat of serious physical harm to Tharp was objectively reasonable. We agree with the district court's determination that '[a] reasonable officer could believe that at some point in this arc of movement the man was pointing his gun at the officers and [could] feel himself to be at risk of serious harm.'. . We thus conclude that, however tragic the circumstances of Dooley's death, Tharp was correctly granted qualified immunity in the constitutionally based action. In light of the post-shooting facts discovered by Hudson and Tharp, a less confrontational approach to the situation facing them—one that might have given them time to recognize that Dooley was in fact attempting to comply with Tharp's twice-shouted commands to drop the gun rather than preparing to fire upon him—might have prevented this needless loss of

life. . . Similarly, in retrospect, and with the 20/20 vision of hindsight, had Tharp identified himself as a law enforcement officer and given a warning, Dooley might well have reacted in such a way that did not involve maneuvering the barrel of the rifle as he did. As it was, however, Dooley's decision to fasten the pellet gun to his epaulet, coupled with Tharp's mistaken belief that Dooley was taking aim at the officers, ultimately resulted in his death.")

Malone v. Hinman, 847 F.3d 949, 954-55 (8th Cir. 2017) ("Based on these undisputed facts, the relevant question is whether Officer Hinman's use of deadly force against Malone was objectively reasonable under the circumstances. . . More specifically, the question is whether Officer Hinman had 'probable cause to believe that [Malone] pose[d] a threat of serious physical harm to the officer *or others*.'. . Viewing the facts in the light most favorable to Malone, he did not pose a threat of serious physical harm to Officer Hinman because he was running away from Officer Hinman. But we conclude that, looking at the circumstances from the perspective of a reasonable officer and taking the disputed facts in Malone's favor, Malone posed a threat of serious physical harm to *others*. Officer Hinman knew that approximately three gunshots had just been fired in a crowd of 40 to 50 people. He then saw Malone running away with a gun toward Officer Montgomery and others as the crowd dispersed. Officer Hinman instructed Malone to stop, but Malone did not stop because he did not hear Officer Hinman. . . Malone continued to run toward Officer Montgomery. The record shows that Malone was two to three feet from Officer Montgomery at the time that Officer Hinman fired his gun. The entire event occurred within three to ten seconds. Like the district court, we recognize the tragic nature of these events: 'Taking Malone's version as the truth, his good deed in defusing a dangerous argument, coupled with two split-second decisions, resulted in a promising young man's paralysis.' Nonetheless, applying the required review standard, we hold that Officer Hinman's use of deadly force was objectively reasonable. Therefore, the district court did not err in granting Officer Hinman's motion for summary judgment based on qualified immunity on Malone's excessive-force claim.")

Wallace v. City of Alexander, 843 F.3d 763, 769-70, 767 n.3 (8th Cir. 2016) ("Since the Supreme Court decided *Tennesse v. Garner* in 1985, it has been clearly established 'that the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted.'. . Further, such a threat must be 'immediate.'. . . We have thus concluded that an officer violated *Garner* by using deadly force to seize an individual who did not possess a weapon and was attempting to flee the scene of a potentially violent crime. . . Here, viewing the evidence in the light most favorable to the estate, Wallace did not pose an immediate and significant threat of serious injury to Cummings or bystanders because he may not have committed any violent felony, the physical struggle was minimal, and he was not 'holding a firearm' when he attempted to flee. . . Viewing the facts in the light most favorable to the estate, a reasonable fact finder could thus conclude that the seizure violated a clearly established constitutional right. . . .Cummings argues that an unintentional shooting would not violate the Fourth Amendment, but we need not address this argument in light of the district court findings from which we assume for the purposes of this appeal that Cummings intentionally shot Wallace. There is a circuit split on whether unintentional conduct can ever lead to Fourth Amendment

liability. *See Stamps v. Town of Framingham*, 813 F.3d 27, 37–39 (1st Cir. 2016) (collecting cases). Our court has thus far declined to reach this issue. *See McCoy v. City of Monticello*, 342 F.3d 842, 847 n.3 (8th Cir. 2003).")

Ransom v. Grisafe, 790 F.3d 804, 811-12 (8th Cir. 2015) ("It is undisputed that the officers knew a 911 call had reported shots fired, and that call was corroborated when the officers found Ransom's van where the caller said it would be. After arriving, the van backfired-a sound both sides agree could have been mistaken for a gunshot. Ransom then exited his van and appeared to the officers to disregard their order to get back in the car. Based on these facts, the officers were justified in using deadly force to neutralize what they reasonably believed was a risk of serious physical harm, either to themselves or to others. It is very fortunate that the officers missed with their shots. This would be a tragic case if Ransom, who by all means was abiding by the law, had been injured or killed. Though Ransom had done nothing wrong, and viewing the scene in his favor, the officers' fear of harm was reasonable, and the potential seizure from their gunshots did not violate Ransom's Fourth Amendment rights. . . .After firing at Ransom, the officers saw that their window was shot out (even though that was from their own ricocheting bullets). Although Ransom yelled that he had no gun and that the sounds were coming from his van, a reasonable officer in this position could not know whether Ransom's uncorroborated explanation was true. . . We believe the above facts provided the officers 'an objectively reasonable concern for [their] safety or suspicion of danger' that allowed them to handcuff and detain Ransom while they surveyed the scene for future danger.")

Ransom v. Grisafe, 790 F.3d 804, 815-16 (8th Cir. 2015) (Kelly, J., concurring in part and dissenting in part) ("Viewing the evidence in Ransom's favor, I conclude that the Detectives did detain Ransom against his will without probable cause to do so in violation of his constitutional right as described in *Hayes*. As a result, I believe the district court properly denied Detectives Randle and Grisafe's motion for summary judgment based on qualified immunity, and I respectfully dissent from the court's conclusion to the contrary in Part II(b). Under the same standard of review, however, I agree that Officers Phillips and Conaway and Sergeant Dearing are entitled to qualified immunity. I also acknowledge this odd result: The officers who open-fired on an unarmed man are given immunity; yet the detectives who transported the same unarmed man, without restraint, to a police station to ask him questions and then took him home would receive no immunity. But the peculiarity of the facts in this case leads to those conclusions. All involved parties agreed that the van's backfires sounded like gunshots. The 911 caller certainly thought so, too. It was reasonable for the officers to react as officers would be expected to react in the highly unusual and potentially dangerous situation presented in this case. How lucky that the officers did not hit Ransom, or anyone else, when they fired their guns. But even viewing the facts in Ransom's favor, and despite the frightening circumstances, the officers are immune under the law from this suit.")

Schoettle v. Jefferson Cnty., 788 F.3d 855, 861 (8th Cir. 2015) ("[T]he record indisputably shows that even if the officers became aware at some point during their interaction with Schoettle

that he was suffering a hypoglycemic episode, they were still confronted with a belligerent and impaired man who was refusing to comply with their orders to exit the vehicle and who was physically resisting their attempts to remove him from it. If the officers realized at some point that Schoettle's impairment was not attributable to any fault of his own, that knowledge would not have made Schoettle any less dangerous to himself and others while he was impaired. Given these facts, it is difficult to conceive how Schoettle could have received appropriate medical care without first being physically subdued. Indeed, as noted above, even after he was arrested Schoettle continued to resist until the ambulance arrived and was uncooperative with EMS personnel. The district court properly determined that the officers are entitled to qualified immunity and summary judgment on Schoettle's excessive force claim.")

Capps v. Olson, 780 F.3d 879, 885-86 (8th Cir. 2015) ("This Court must presume Capps was not facing Deputy Olson and Deputy Olson did not believe Capps possessed a weapon at the time of the shooting. If the jury were to determine that Capps refused to listen to Deputy Olson's commands and moved towards Deputy Olson with what appeared to be a weapon, the use of deadly force could have been objectively reasonable. However, taking the evidence in the light most favorable to Capps we must conclude there is a factual dispute as to whether Deputy Olson violated Capps's Fourth Amendment right against excessive force. . . .Based on the facts we are required to assume, Capps did not pose a threat of significant bodily injury or death to Deputy Olson or Scribner. And Deputy Olson had fair and clear warning at the time of the shooting that the use of deadly force against a suspect who did not pose a threat of serious bodily injury or death was unconstitutional.")

Aipperspach v. McInerney, 766 F.3d 803, 807, 808 (8th Cir. 2014) ("The responding officers were confronted with a suspect who held what appeared to be a handgun, refused repeated commands to drop the gun, pointed it once at Sergeant Jones, and then waved it in the direction of officers deployed along the ridge line in an action they perceived as menacing. In these circumstances, objectively reasonable officers had probable cause to believe that Al–Hakim posed a threat of serious physical harm to the officers. . . .We agree with the general proposition that a video of the incident can create a genuine issue of material fact that precludes the grant of summary judgment in an excessive force case, just as a video established undisputed facts warranting summary judgment in *Scott.* We nonetheless reject Aipperspach's contention because the video in this case does not cast doubt on the factual sequence of events; at most, it supports an inference that Al–Hakim may have intended to surrender, despite refusing repeated prior demands to drop the gun, or that he may have waved the gun above his head to regain his balance, rather than to threaten the police officers. Those possible inferences are not germane to the issue of Fourth Amendment objective reasonableness. As the district court recognized, 'the inquiry here is not into [Mr. Al–Hakim's] state of mind or intentions, but whether, from an objective viewpoint and taking all factors into consideration, [each defendant officer] reasonably feared for his life' or the lives of his fellow officers. . . The video taken from high above the scene shed no material light on that question. Aipperspach presented no evidence contradicting the testimony that many officers at the scene of this 'tense, uncertain, and rapidly evolving situation' perceived that Al–Hakim's actions

posed an immediate threat of serious physical harm to the officers. On appeal, she contends that the district court ignored various fact disputes in making its ruling. We have closely examined the record and conclude that the fact issues she identifies were not material to the summary judgment analysis. Rather, our many cases declining to second-guess the 'split-second judgments' of officers in similar circumstances warranted the district court's conclusion that there was no genuine issue of material fact precluding the grant of summary judgment. . . Our conclusion that the individual police officers did not violate Al–Hakim's Fourth Amendment rights in using deadly force resolves Aipperspach's appeal from the grant of summary judgment to the City of Riverside, Riverside Police Chief Gregory Mills, and the Kansas City Board of Police Commissioners. Absent a constitutional violation by the individual defendants, the municipal defendants are not liable to the plaintiff.")

Smith v. Conway Cnty., Ark., 759 F.3d 853, 860, 861 (8th Cir. 2014) ("Assuming a reasonable officer in Zulpo's position—actually being kicked—could believe the kick was purposeful and aggressive, establishing Zulpo's first use of the taser was reasonable, we cannot say the same for the second taser deployment. . . .As to the second taser strike, a jury could find Smith was nonviolent and an objectively reasonable officer would not use a taser on Smith as corporal inducement, given *Hickey's* pronouncement that such methods cannot be used as a first resort to induce compliance of a nonviolent inmate in routine circumstances. . . We emphasize the fact that our conclusion might well be different 'where security concerns are ... immediately implicated,'. . . or where the force is used as a reasonable last resort to preserve 'discipline[]'. . . . But here, viewing the evidence in the light most favorable to Smith, we see a nonviolent pretrial detainee in pain, seeking help, having taser probes affixed to his abdomen, no longer acting aggressively toward the jailers (if he ever was), and *attempting to comply with Zulpo's orders* to get up. No 'security concern' or disciplinary necessity is apparent. . . . At a minimum, with regard to Zulpo's second taser strike, the district court correctly found, inferring Smith was a nonviolent inmate, Smith's constitutional right to be free from being tased for non-compliance was clearly established by *Hickey* as of the date of the incident. The law does not authorize the 'day-to-day policing of prisons' either 'by stun gun,'. . . or by taser.")

Smith v. City of Minneapolis, 754 F.3d 541, 548, 549 (8th Cir. 2014) ("As with the first part of the encounter with Officer Devick alone, Ms. Smith does not cite case law clearly establishing that any of the officers' actions were unconstitutional as of December 2008. The officers claim, correctly it seems, 'Appellant's analysis of the officers' qualified immunity argument utterly misses the crucial issue: there is no case law which informs these officers that they were on notice that the punches, kicks, knee strikes and tasers they used on Smith were unconstitutional.'. . Ms. Smith's counsel conceded at oral argument that the case law regarding tasers, a relatively new technology, is 'evolving.' We suspect, even without specific case law outlining a definitive number of constitutionally validated taser probes administered, an 'obvious' case of excessive force could still be established under the clearly established prong. . . But this case is not such an obvious case. Ms. Smith has not cited any case, much less any case that could cast the 'constitutional question beyond debate,' *Al–Kidd*, 563 U.S. at ——, 131 S.Ct. at 2083, such that any of the five officers

would be on notice that his actions during the second part of the arrest violated Smith's constitutional right to be free from unreasonable seizure. . . Because we find none, and these case facts do not show an obvious constitutional violation, each officer is entitled to qualified immunity for his actions during the second encounter with Smith. The alleged conduct, even if unconstitutional, was not clearly established as such when it occurred.")

Loch v. City of Litchfield, 689 F.3d 961, 966 (8th Cir. 2012) ("The Lochs also note that Cassidy never brandished or aimed a firearm, and they assert broadly that '[i]t is objectively unreasonable to use deadly force against an unarmed suspect.' That is not the law. An act taken based on a mistaken perception or belief, if objectively reasonable, does not violate the Fourth Amendment. *Krueger v. Fuhr,* 991 F.2d 435, 439 (8th Cir.1993). Even if a suspect is ultimately 'found to be unarmed, a police officer can still employ deadly force if objectively reasonable.' *Billingsley v. City of Omaha,* 277 F.3d 990, 995 (8th Cir.2002).")

Hemphill v. Hale, 677 F.3d 799, 801 (8th Cir. 2012) (per curiam) ("In *Chambers,* we held that evidence of de minimis injury does not necessarily foreclose a Fourth Amendment excessive-force claim, that the force alleged was not reasonable under the circumstances, but that defendants were entitled to qualified immunity because the state of the law in August 2005 was such that a reasonable officer could have believed that as long as he did not cause more than de minimis injury to an arrestee, he would not violate the Fourth Amendment. . . .*Chambers,* however, did not address the situation alleged here: that the force was used in an attempt to coerce consent to a search. While in *Chambers* we stated that '[p]olice officers undoubtedly have a right to use some degree of physical force, or threat thereof, to effect a lawful seizure,'. . . we agree with the district court that officers do not have the right to use any degree of physical force or threatened force to coerce an individual to consent to a warrantless search of his home. . . Because no use of force to obtain Hemphill's consent to search would have been reasonable, the force Hale was alleged to have used—grabbing Hemphill by the neck, choking him, and hitting him two or three times while he was handcuffed—was objectively unreasonable given the facts and circumstances in the case. . .The law regarding forced consent was clearly established in August 2009 such that a reasonable person in Hale's position would have known that his actions were unreasonable.")

Shekleton v. Eichenberger, 677 F.3d 361, 366, 367 (8th Cir. 2012) ("Under these facts, Shekleton was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him. Shekleton has established that a violation of a constitutional right occurred in that a reasonable officer would not have deployed his taser under the circumstances as presented by Shekleton. . . .Having determined that Shekleton has established that a violation of a constitutional right occurred, we move to our next inquiry: determining whether Deputy Eichenberger's use of the taser against Shekleton constituted a clearly established constitutional violation. Deputy Eichenberger contends in his brief that at the time of the incident it was not a clearly established violation of law to use his taser under the circumstances and contends that our taser jurisprudence is in a state of flux. . . . Deputy Eichenberger is correct that at the time of the incident, we had not yet had an opportunity

to determine whether an officer's use of a taser on a nonviolent, nonfleeing misdemeanant was an excessive use of force. However, the right to be free from excessive force dates back to the adoption of the Bill of Rights of our Constitution . . . . That the level of force used must be justified in light of 'the severity of the crime at issue,' the suspect's flight risk, and the immediacy of the risk posed by the suspect to the safety of officers and others was the clearly established law on the night of the incident. . . In *Brown v. City of Golden Valley,* 574 F.3d at 491, decided after the incident between Shekleton and Deputy Eichenberger, we were presented with an officer's use of a taser in facts similar to this case. There, we determined that the general law prohibiting excessive force in place at the time of the incident was sufficient to inform an officer that use of his taser on a nonfleeing, nonviolent suspected misdemeanant was unreasonable, even though we did not have a case specifically addressing officer taser use prior to the incident. . .As in *Brown,* we agree that the general constitutional principles against excessive force that were clearly established at the time of the incident between Deputy Eichenberger and Shekleton were such as to put a reasonable officer on notice that tasering Shekleton under the circumstances as presented by Shekleton was excessive force in violation of the clearly established law.")

Montoya v. City of Flandreau, 669 F.3d 867, 871, 872 (8th Cir. 2012) ("[A]t the time Officer Hooper performed the 'leg sweep,' Montoya was not threatening anyone, was not actively resisting arrest, and was not attempting to flee. At most, her actions amounted to a violation of a law restricting disorderly conduct, a misdemeanor punishable by no more than thirty days' imprisonment, a fine of five hundred dollars, or both. . . Moreover, although not dispositive, the severity of the injuries she sustained is a relevant factor in determining the reasonableness of the force used, . . . and we cannot agree with the district court the fact Montoya sustained a broken leg is simply an 'unfortunate' and 'unintended' consequence of what the court described as objectively reasonable use of force by Officer Hooper. . .Based on the physical distance between Montoya and Cournoyer at the time of the incident (ten to fifteen feet), the nature of the crime at issue (disorderly conduct), and the degree of the injury suffered (a broken leg), we cannot say the force used by Officer Hooper was objectively reasonable as a matter of law. Accepting Montoya's version of events as true, as we must under the present procedural posture, we conclude genuine issues of material fact exists as to whether Officer Hooper used excessive force against Montoya. While a jury may credit Officer Hooper's characterization of the incident and disbelieve Montoya at trial, 'it is not our function to remove the credibility assessment from the jury.'. . . Finding Officer Hooper's use of force was objectively reasonable as a matter of law, the district court concluded Montoya failed to establish a violation of a constitutional right, entitling Officer Hooper to qualified immunity on her § 1983 claim. For the reasons stated above, however, the district court erred in concluding, as a matter of law, Officer Hooper did not violate Montoya's constitutional right to be free from excessive force. Viewing the record in the light most favorable to Montoya, as we must at this stage, we conclude she alleged sufficient facts to show a constitutional violation of her rights. We further conclude the constitutional right Officer Hooper allegedly violated was clearly established at the time of the misconduct, as required by the second prong of the qualified immunity analysis. . . . Assuming once again Montoya's story is true, the contours of the right at issue were sufficiently clear to inform a reasonable officer in Officer Hooper's position it was

unlawful for him to perform a 'leg sweep' and throw to the ground a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee.")

El-Ghazzawy v. Berthiaume, 636 F.3d 452, 460 (8th Cir. 2011) ("Counsel may shout 'officer safety' until blue-in-the-face, but the Fourth Amendment does not tolerate, nor has the Supreme Court or this Court ever condoned, pat-down searches without some specific and articulable facts to warrant a reasonable officer in the belief that the person detained was armed and dangerous. The Supreme Court has, in interpreting the Fourth Amendment, struck a balance between the justifiable concern for officer safety when confronting an individual and the substantial individual interest in being free from unreasonable intrusion. The Framers' concerns and clear intent to protect individuals from arbitrary government intrusion was enshrined in the Fourth Amendment to prevent situations such as those alleged here–officers, having no reason to fear for their safety, may not require citizens, whom they have not arrested, to stand up against gates or place their hands on police cars, and submit to searches. This has long been the law.")

McKenney v. Harrison, 635 F.3d 354, 358, 359 (8th Cir. 2011) ("We conclude that the entry into the home did not violate Barnes's clearly established constitutional rights. It was reasonable for the officers to believe that their obligation to knock and announce their presence, or to ascertain the arrestee's presence, does not apply to an abandoned property. . . .Even though it turned out that Barnes had not actually abandoned the house, officers do not violate the Fourth Amendment if they act upon a mistake of fact that is objectively reasonable . . . and they are also entitled to qualified immunity if a mistake about abandonment was objectively reasonable. . . . When Barnes made a sudden movement toward the window, which the officers reasonably interpreted as an active attempt to evade arrest by flight, the officers were entitled to use force to prevent Barnes's escape and effect the arrest. . . Although the charges were limited to misdemeanors, the officers executing the warrant were not required to let Barnes run free. Despite the fatal consequences of the incident, the level of force employed also was not unreasonable. Pollreis used only a single Taser shock. She was required to react in a split second as Barnes sought to escape through a window only six to eight feet away. The alternative of attempting to subdue Barnes by tackling him posed a risk to the safety of the officer and did not ensure a successful arrest. The officers had warned Barnes. Just before he lunged, Harrison told Barnes not to do anything stupid, and Pollreis said 'you don't want to be tased.' And although the outcome was tragic, a reasonable officer, knowing that a Taser is designed to incapacitate instantly, could have believed that the force would incapacitate Barnes before he reached the window, while he was not in an 'elevated position' and likely to fall. Under these circumstances, we conclude that the force used by Pollreis was reasonable.")

McKenney v. Harrison, 635 F.3d 354, 361, 363 (8th Cir. 2011) (Murphy, J., concurring) ("While I concur in the opinion of the court, I believe that law enforcement use of tasers merits further reflection. This case illustrates one kind of tragic result that can follow the employment of a taser. The developing law on taser use must consider the unique nature of this type of weapon and the

increased potential for possibly lethal results created by newer models. . . . [L]aw enforcement agencies would be well advised to address their potential liability from posttasing falls, both by rulemaking and by training.")

Krout v. Goemmer, 583 F.3d 557, 565 (8th Cir. 2009) ("As of July 2006, it was clearly established that a state actor may be liable for an unreasonable seizure under the Fourth Amendment if he fails to intervene to prevent the unconstitutional use of excessive force by another official.").

Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009) ("At the time Zarrett deployed his Taser and arrested Sandra, the law was sufficiently clear to inform a reasonable officer that it was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator.").

Engleman v. Murray, 546 F.3d 944, 951 (8th Cir. 2008) ("Even though Deputy Murray lacked the authority to execute the valid Arkansas arrest warrant in Oklahoma, we conclude that, taking the facts in the light most favorable to Engleman, Deputy Murray's belief that he was arresting Engleman in Arkansas was objectively reasonable. Therefore, we conclude Deputy Murray did not violate the Fourth Amendment and is entitled to qualified immunity.").

Engleman v. Murray, 546 F.3d 944, 951, 952 (8th Cir. 2008) (Bye, J., dissenting) ("I believe an out-of-state arrest by a police officer violates the clearly-established Fourth Amendment rights of the arrestee. I also believe genuine questions of material fact remain in dispute about whether it was objectively reasonable for an officer in Deputy Murray's position to have believed he was arresting Stephen Engleman in Arkansas rather than Oklahoma. I therefore respectfully dissent. First, I take issue with the Court's suggestion in footnote five that Engleman's arrest did not violate a clearly established constitutional right. The Fourth Amendment guarantees the right to be free from unreasonable seizures. And, that right is clearly established in the specific context of this case, because the recognition of the jurisdictional limits of an officer executing a warrant dates back to English common law, as the Court itself notes. This is not a situation where a peace officer licensed in the state of Arkansas merely crossed a municipal or county line. Rather, the officer executed an arrest warrant in a state where he knew he was unlicensed and had no authority. Would it comport with the Fourth Amendment for an Arkansas police officer to execute a warrant in, for example, the state of Maine? No. For the same reason, an arrest by an Arkansas officer in Oklahoma violates the Fourth Amendment's prohibition on unreasonable seizures.")

Moore v. Indehar, 514 F.3d 756, 763 (8th Cir. 2008) ("On the facts we are required to assume at this point in the case, Moore posed no threat to Officers Indehar and Hafstad or to any other person; Officer Indehar admitted as much in his deposition and in his responses to Moore's interrogatories. When Officer Indehar arrived on the scene, shots had been fired, however he specifically noted that Moore was not holding a firearm and the only action Moore took was to flee the scene. Thus, a reasonable officer would have known shooting Moore was a violation of Moore's constitutional

rights; as such, a right to be free from the use of excessive force in Moore's situation was clearly established.").

Kenyon v. Edwards, 502 F.3d 722, 724-28 (8th Cir. 2007) (*denial of pet. for reh'g and reh'g en banc*) (Beam, J., joined by Riley, J., dissenting) ("While it is not entirely clear what the district court purported to do, it is perfectly clear what it did not do. It did not follow the requirements of either *Schatz* or *Saucier.* The district court appears to have ruled that if a jury (or other undisclosed fact-finder) gives Kenyon's allegations their best factual gloss, Edwards violated Kenyon's constitutional right to be free from the use of excessive force. The district court does not appear to have dealt with *Saucier*'s second question at all. If the district court's cryptic order means that there are facts yet to be determined at this second step, this would constitute an even more egregious violation of both Supreme Court and circuit precedent. In reality, then, as earlier indicated, the district court ignored both *Schatz* and *Saucier* but the *en banc* panel now affirms this procedure through misuse of the evenly divided court affirmance rule. *Schatz* and the equally divided court rule aside, the district court apparently attempted to follow the route taken by the Ninth Circuit in *Saucier,* a pathway that was specifically and soundly rejected by the Supreme Court. . . . In summary, giving plaintiff Kenyon's allegations the most charitable reading possible, the district court tentatively determined that Officer Edwards possibly violated Kenyon's constitutional right to be free from excessive force. On this tenuous basis alone, and without ruling on Edwards' contention that a reasonable officer under the specific facts of this situation would not have known he was violating Kenyon's rights, the district court denied Edwards qualified immunity and set the underlying dispute for trial. At the previous trial, as also earlier noted, some number of the members of the jury rejected Kenyon's factual allegations. On appeal to a three-judge panel, two members of the panel rejected Kenyon's constitutional and reasonable knowledge claims. On appeal to a twelve-member *en banc* panel, six members of the *en banc* court would have granted Edwards immunity on one or both of his *Saucier* claims. So, although Kenyon has not mustered a necessary majority vote on any of the underlying or interlocutory claims at any point in this dispute, Officer Edwards is headed back to a jury trial on the excessive force claim through the unfortunate misapplication of the so-called equally divided court rule. We should never condone police brutality. Neither should we disregard the difficulties inherent in the work of our police community. The people of Searcy, Arkansas, sent Officer Edwards into a dicey situation in which he was forced to encounter plaintiff Kenyon, a less than cooperative individual based on undisputed portions of the record before us. Although Edwards handled his duties in a totally lawful manner in the view of some jurors and at least two (or perhaps more) of the circuit judges reviewing the matter, he now finds his time, reputation and personal assets in jeopardy at a jury trial that should not be allowed to occur. From this result I dissent. And if a majority of the *en banc* panel insists on pursuing this course of action, I urge Officer Edwards to seek relief through writ of *certiorari* to the United States Supreme Court.").

Ngo v. Storlie, 495 F.3d 597, 604 (8th Cir. 2007) ("[W]e agree with the district court that genuine issues of material fact exist as to whether a reasonable officer faced with these circumstances would have believed that his conduct was legal. Storlie exited his squad car and opened fire with

a semi-automatic machine gun on a kneeling, unarmed man. He fired within a 'split-second' of exiting the squad car, without giving any warnings or attempting to determine whether Ngo was, in fact, the suspect described on the radio transmission. Further, Storlie knew there was a plainclothes officer somewhere in the area. Thus, it was unreasonable for Storlie to fire on the first person he saw without first making the determination of who that person was.").

Richmond v. City of Brooklyn Center, 490 F.3d 1002, 1007, 1009 (8th Cir. 2007) The defendants do not dispute on appeal the jury's finding that Officer Bruce conducted the strip search in an unreasonable manner in violation of Richmond's Fourth Amendment rights. Therefore, we proceed directly to the second prong of the qualified immunity analysis, which asks whether the asserted constitutional right was clearly established. . . . In this case, the officers had reasonable suspicion that Richmond was concealing evidence on his person and were in a position to conduct a private, hygienic and non-abusive strip search on the spot, rather than risk Richmond disposing of the evidence during the course of his transportation to the police station. . . . No clearly established legal standards would have put a reasonable officer on notice that, in these particular circumstances, it was objectively unreasonable to lower the handcuffed arrestee's pants and boxer shorts to accomplish the strip search, rather than to risk loss of evidence by waiting until the arrestee was in an environment where handcuffs were not required.").

McVay ex rel Estate of McVay v. Sisters of Mercy Health System, 399 F.3d 904, 908 (8th Cir. 2005) ("Here, we need not inquire beyond the first step of the *Saucier* analysis. We hold, taking the facts alleged in the light most favorable to McVay, that there was no constitutional violation. McVay argues Sears violated her son's Fourth Amendment right to be free from an unreasonable seizure by employing excessive force in stopping him from exiting the hospital. . . . Given the circumstances in this case, including the fact that McVay was disoriented and exhibiting signs of lacking mental control, that he was barreling toward glass doors that Sears knew would not open, and the rapid pace of events as Sears raced to reach McVay before McVay reached the locked doors, even if Sears forced McVay to the floor in a 'tackle,' doing so was not an excessive use of force.").

Craighead v. Lee, 399 F.3d 954, 962 & n.4, 963 (8th Cir. 2005) ("Although the first question is one of objective reasonableness and the second question is also one of reasonableness, the Supreme Court emphasized in *Saucier* that the two questions are not duplicative and must be addressed separately. The key distinction between the two questions is that the right allegedly violated must be defined at the appropriate level of specificity before a court can determine whether it was clearly established. [citing *Brosseau*] Neither party has cited a case with facts substantially similar to those we are required to assume on this appeal, nor have we found one. Nonetheless, 'officials can still be on notice that their conduct violates established law even in novel factual circumstances .' [citing *Hope*]'Although earlier cases involving Afundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.' . . Hence, the issue is not whether prior cases present facts substantially similar to the present case but whether prior cases would have put a reasonable officer on notice that the

use of deadly force in these circumstances would violate Craighead's right not to be seized by the use of excessive force. At least since *Garner* was decided nearly 20 years ago, officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others. On the facts we are required to assume, Craighead did not pose a significant threat of death or serious physical injury to Lee at the time Lee fired the shotgun because the pistol was continuously over Craighead's head, pointed upward, as Craighead was keeping it from the smaller Scott. Even if Lee thought that Craighead posed a significant threat of death or serious physical injury to Scott, the facts we are required to assume show that Lee fired the shotgun in circumstances in which he knew or should have known that he would hit both Craighead and Scott, so he cannot have fired the shot to protect Scott. Nor does Lee claim that he fired to protect Scott. The facts we are required to assume show that a warning was feasible but not given. Moreover, Craighead was grappling with Scott; he was not fleeing when Lee fired the shot. . . . Unlike *Brosseau*, which the Supreme Court decided on December 13, 2004, the facts we must assume show that Lee gave no commands and made no attempt to use less-than-deadly force; nor, as mentioned, was Craighead fleeing when Lee fired. . . Before December 3, 2001, this Court had denied qualified immunity in at least four cases in which the plaintiff presented evidence to show that the officer used deadly force under circumstances in which the officer should have known that the person did not present an immediate threat of serious physical injury or death. [citing cases] Those cases, along with *Garner*, put officers on notice before December 3, 2001, that they may not use deadly force under circumstances in which they should know that the suspect does not present an immediate threat of serious physical injury or harm. Craighead's right not to be seized by deadly force was clearly established with sufficient specificity to meet the second prong of *Saucier*.").

Smith v. Appledorn, No. 11–2966 (JNE/SER), 2013 WL 451320, *4, *5 (D. Minn. Feb. 6, 2013) ("Smith correctly observes that some recent district court opinions could be read to apply a bright-line rule when Tasers are used on nonviolent, nonresisting suspected misdemeanants. *See Newton v. Walker*, No. 11–cv–1499, 2012 WL 4856163, at *3 (D.Minn. Oct. 12, 2012). The Court rejects the idea that Tasers—or any other of the modern nonlethal alternatives—should occupy a *sui generis* position in search and seizure law. The problem with tasing a 'fully compliant individual, who has committed no crime,'. . . is not the choice of using a Taser rather than boots; it is the use of force at all. It has been clearly established for many years that an officer cannot seize a person without having specific and articulable facts to justify the intrusion. . . A reasonable officer in 2009 would have known that it would be unreasonable to use any amount of force to seize a person in the position—injured, complying, and not fighting—that Smith maintains that he was in. Because there are material fact issues that are in dispute, the Court denies Defendant's motion for summary judgment.")

McClennon v. Kipke, Civ. No. 10-2598 (RHK/JJK), 2011 WL 5177393, at *3-*5 (D. Minn. Oct. 31, 2011) ("[T]he Eighth Circuit recently noted that 'over the course of more than fifteen years, ... it ... remain[ed] an open question in this circuit whether an excessive force claim requires some minimum level of *injury*.' *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir.2011) (emphasis

added). Indeed, different Eighth-Circuit panels had reached different answers to that question since the 1990s. [citing cases] *Chambers* put an end to this uncertainty, holding that the excessive-force inquiry must focus on the force applied and *not* its end result, that is, the level of injury. . . . But as *Chambers* noted, the Eighth Circuit's inconsistent decisions had left it unclear for more than a decade whether 'an officer violated the rights of an arrestee by applying force that caused only *de minimis* injury.'. . . In other words, it was not clearly established pre-*Chambers* that an officer violated an arrestee's rights, no matter how much force he applied, if he caused only *de minimis* injuries. . . As a result, the Eighth Circuit determined that the police officers in *Chambers,* who were accused of excessive force but who caused only *de minimis* injuries, were entitled to qualified immunity because at the time of the plaintiff's arrest ("ugust 2005) it was 'reasonable for the officers to believe that they remained within constitutional bounds if that was the result' of their conduct. . .Seizing on *Chambers,* the Individual Defendants argue they are entitled to qualified immunity here because (1) McClennon suffered only *de minimis* injuries and (2) it was not clearly established on December 20, 2006, that inflicting a *de minimis* injury was unconstitutional. (Def. Mem. at 12-17.) The latter assertion cannot seriously be disputed in light of *Chambers.* And the Court agrees with the former assertion, because case law indicates that McClennon's injuries were *de minimis.* . . . Although not expressly argued by him, McClennon also appears to suggest that the officers' application of a Taser necessarily inflicted something more than *de minimis* injury. . .But while a Taser delivers a 'painful and frightening blow' that can render 'even the most pain tolerant individuals utterly limp,' *McKenney v. Harrison,* 635 F.3d 354, 362 (8th Cir. 2011), the Eighth Circuit has held that in the absence of evidence of long- term effects, the use of a Taser does 'not inflict any serious injury.'")

Neely v. Jefferson County, Ark., No. 5:10-cv-40-DPM, 2011 WL 3565585, at *3 (E.D. Ark. Aug. 12, 2011) ("Dolphin is entitled to qualified immunity in any event. He was trained not to tase suspects in a body of water without a second officer or rescue team being present. Jefferson County's written taser policy also prohibited using the taser if a suspect might fall into a deep body of water after being immobilized. Despite his training, Dolphin did not remember this part of the policy. Dolphin's actions thus violated the letter of the policy. This fact weighs against the reasonableness of Dolphin's actions. But no clearly established law echoes the County policy. Instead, 'case law related to the [t]aser is [in the] developing stage[.]' *McKenney*, 635 F.3d at 361-62 (Murphy, J., concurring). Therefore, even if Dolphin violated the Fourth Amendment by tasing Howie near deep water, his violation of law was not well-established in February 2007.")

Orsak v. Metropolitan Airports Com'n Airport Police Dept., No. 08-5274 (JRT/FLN), 2009 WL 5030776, at *12, *13 (D. Minn. Dec. 14, 2009) ("The Court notes that Officer Wingate's account of the incident differs significantly from the facts as the Court must view them for purposes of summary judgment. . . .The Court will observe that the deployment of tasers by law enforcement has become widespread. Tasers obviously can and do serve an important function. The fact that tasers have become ubiquitous does not mean the device should be used routinely or indiscriminately. As noted above, tasers cause pain to the victim which is often excruciating and very painful. Given the constitutional requirement that use of force not be unreasonable, it is

critical that the use of tasers be limited to situations in which officer safety is a legitimate concern and other, less painful means of subduing a difficult individual are not available. When the facts in this case are viewed in a light most favorable to the plaintiff, Officer Wingate's actions in ordering use of the taser fail the test. Ultimate resolution of this case, however, will depend on a jury's determination of the facts and a jury's assessment of the credibility of the witnesses.").

Mahamed v. Anderson, No. 07-4815 ADM/FLN, 2009 WL 873534, at *5 (D. Minn. Mar. 30, 2009) ("Reviewing courts have split on whether the use of a taser is a clearly established constitutional violation depending on the degree of aggressiveness of the defendant. [collecting cases] Viewing the facts in the light most favorable to Mahamed, he was uncooperative but not dangerous or threatening, and therefore the use of a taser violated his clearly established constitutional right to be free from excessive force. For this reason, summary judgment is denied on the claim of excessive force against Pedersen.")

Nunn v. City of Woodbury, Civil No. 05-632 ADM/JSM, 2006 WL 3759748, at *9 (D. Minn. Dec. 21, 2006) ("As is discussed above, Officer Gort's conduct did not violate Plaintiffs' constitutional rights. Even if it did, the right at issue is not clearly established. It is true that from a generalized perspective, the right to be free from unreasonable seizures under the Fourth Amendment is clearly established. However, when viewed in a more particularized sense, it would not be clear to a reasonable officer that Gort's actions were unlawful in the situation he confronted. From Officer Gort's objective perspective, Nunn was fleeing from police after receiving a disorderly conduct citation and engaging in a course of conduct in which he followed police squad cars at a very close distance, flashed his bright lights, and honked his horn. Nunn appeared aggressive, angry, and uncontrollable. Nunn had already stopped his vehicle once after sliding into a snow bank, only to reverse out of it and continue driving away from the police. Gort ended the pursuit by ramming his squad car into Nunn's car at a speed of approximately twenty miles per hour. It cannot be said that no reasonably competent officer, making a split-second judgment in this tense, uncertain, and rapidly evolving situation, would have taken the same action that Officer Gort did. Accordingly, the Officer Defendants are entitled to qualified immunity.")

NINTH CIRCUIT

Silva v. Chung, No. 17-16406, 2018 WL 3358418, at *2–3 (9th Cir. July 10, 2018) (unreported) ("Officer Chung's use of his Taser violated clearly established law. In *Bryan v. MacPherson*, this court, sitting en banc, held that one deployment of the Taser X26 in dart-mode against a belligerent individual who was unarmed, non-threatening, and apprehended for a minor traffic violation, was excessive. . . Here, Haleck was met with even greater Taser force, and was not belligerent. . . . Officers Chung, Critchlow, and Kardash used pepper spray numerous times on Haleck. Appellants concede that a warning did not precede each deployment of pepper spray. Officer Kardash testified he pepper sprayed Haleck two to three times, Officer Critchlow testified he pepper sprayed Haleck four to five times, and Officer Chung testified he pepper sprayed Haleck two to three times. Pepper spray is regarded as an 'intermediate force' that presents a significant intrusion upon an

individual's liberty interests. . . Under our case law, a reasonable officer would be on notice in 2015 'that police officers employ excessive force in violation of the Fourth Amendment when they use pepper spray upon an individual who is engaged in the commission of a non-violent misdemeanor and who is disobeying a police officer's order but otherwise poses no threat to the officer or others.'. . Viewing the facts in the light most favorable to Appellees, considering the number of times Haleck was pepper-sprayed, the three *Graham* factors, the availability of alternative means for executing arrest, and Haleck's vulnerable mental state, there is a factual issue for the jury whether Appellants' use of force violated both the Fourth Amendment and clearly established law.")

Losee v. City of Chico, 738 F. App'x 398, ___ (9th Cir. 2018) ("Viewed in the light most favorable to Losee, there is a disputed question of fact as to whether Sergeant Zuschin had an objectively reasonable fear of serious physical harm to himself or others when firing his four shots at the Honda. Sergeant Zuschin was the first officer to fire his weapon. Although it is not clear which, if any, of Sergeant Zuschin's shots struck Sharpe in the head, on appellant's version of the facts, Sergeant Zuschin was not in immediate danger of being struck when he fired his first two shots because he could have avoided the Honda as it slowly backed away from the utility pole. . . Nor was there an immediate threat of physical harm when Sergeant Zuschin fired his last two shots at the Honda, through the back window, as it began to pull forward in a direction away from him and the other officers positioned behind him.")

Vos v. City of Newport Beach, 892 F.3d 1024, 1032-36 (9th Cir. 2018) ("Here, the facts are such that a reasonable jury could conclude that Vos was not an immediate threat to the officers. The officers had surrounded the front door to the 7-Eleven, had established positions behind cover of their police vehicles, and outnumbered Vos eight to one. The officers saw that Vos had something in his hand as he charged them, but they did not believe he had a gun, and the officers had less-lethal methods available to stop Vos from charging. Even though only eight seconds passed between when Vos emerged from the back room and when he was shot, construing the facts as they are presented by the Parents and depicted in the video footage, a reasonable jury could conclude that Vos did not pose an immediate threat such that the use of deadly force was warranted. . . .While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,'. . . the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis[.] . . .Because the district court concluded that no constitutional violation occurred, it did not reach the question of whether the law was clearly established. . . On this record, we conclude that the individual officers are entitled to qualified immunity as a matter of law. . . . Here, officers confronted a reportedly erratic individual that took refuge in a 7-Eleven, cut someone with scissors, asked officers to shoot him, simulated having a firearm, and ultimately charged at officers with something in his upraised hand. The relevant inquiry is whether existing precedent placed the conclusion that officers acted unreasonably in these circumstances 'beyond debate.'. . It did not. . . Because Vos acted aggressively, the law was not established by either *Deorle* or *Bryan*. . . Rather, as discussed above, the most analogous case is likely *Lal*, which

was decided two months before the events that took place here. . . . Accordingly, the defendant officers are entitled to qualified immunity on the § 1983 claims and the district court's grant of summary judgment as to the individual officers is affirmed on that ground.")

Vos v. City of Newport Beach, 892 F.3d 1024, 1042-43 (9th Cir. 2018) (Bea, J., dissenting in part) ("It is possible that other means could have brought down Vos without this tragic loss of life. But a reasonable officer could have believed that the alternate means would not have done the job without the risk that Vos stab one of them. The officers had two seconds to make these calculations before deciding to deploy force to stop the charging man. Neither should this case turn on Vos's mental illness. While we may consider whether a person is emotionally disturbed in determining what level of force is reasonable, we have never ruled that police are obligated to put themselves in danger so long as the person threatening them is mentally ill. . . . . But that is exactly what the majority does here. . . . [T]he majority . . . creates a *per se* rule that in *all* circumstances the governmental interest in deadly force is diminished where the subject is mentally ill. While in *some* circumstances that may be true, in circumstances such as our case—where a mentally ill person charged at officers while wielding a metal weapon above his head—it is not. To hold otherwise would be to render meaningless the language in *Bryan* that we will not 'create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.'. . The majority states 'the fact that Vos was acting out and had invited the officers to use deadly force on him is sufficient under our precedent for a reasonable jury to conclude that the government's interest in using deadly force on Vos was diminished.'. . By the majority's logic, so long as an extremely dangerous person 'acts out' or otherwise evinces mental illness, an officer's interest in self-defense is somehow diminished. The majority's position is simply untenable either as a matter of precedent or logic. . . .Because I think the officers reacted reasonably to the threat they faced, I respectfully dissent in part and would affirm the decision of the district court.")

Felarca v. Birgeneau, 891 F.3d 809, 822-23 (9th Cir. 2018) ("[E]ven assuming, without deciding, that subordinate officers used excessive force against each plaintiff, we conclude that plaintiffs Felarca, Mulholland, Lynch, Tombolesi, and Chung have not met their required burden to show the law was clearly established at the time that the officers' baton strikes violated their constitutional rights. . . .We define the law at issue here as follows: whether an officer violates clearly established law when, after several warnings to disperse have been given, the officer uses baton strikes on a plaintiff's torso or extremities for the purpose of moving a crowd actively obstructing the officer from carrying out lawful orders in a challenging environment. To meet their burden, plaintiffs must generally identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment. . . Plaintiffs have identified no such case. They devote scant argument to the second step and fail to address it at *all* as to these claims. Although the same cases supporting the first step may also support the second step, they do not do so here. For the reasons discussed in Part III.A, *supra*, plaintiffs' reliance on *Young* and *Headwaters* does not convince us that every reasonable officer would have concluded that the case law existing at the time of the force alleged here clearly established that such force was excessive.")

Felarca v. Birgeneau, 891 F.3d 809, 823 (9th Cir. 2018) (Watford, J., concurring) ("I join all but section III of the court's opinion. In my view, the officers used excessive force when they struck plaintiffs with batons solely for the purpose of dispersing the crowd. The level of force used here was intermediate, not minimal, and neither plaintiffs nor the other protestors posed a threat to the safety of the officers (or anyone else) that could justify the use of intermediate force. . . Yes, plaintiffs were engaged in a mild form of 'active resistance,' in the sense that they, along with other protestors, locked arms and refused commands to let the officers reach the tents. But the protestors were otherwise peaceful, and the university's interest in overcoming their resistance was insubstantial. There was no urgent need to remove a handful of tents from campus. The tents weren't harming anyone; they weren't even blocking access to campus facilities. The university administrators just wanted to avoid the spectacle of having the tents remain overnight. That desire isn't weighty enough to justify the serious risk of injury posed by striking students with metal batons. Nonetheless, the officers are entitled to qualified immunity because the law at the time they acted did not clearly establish the illegality of their conduct. I would rule for the defendants on the direct force claims solely on that basis.")

Perez v. City of Roseville, 882 F.3d 843, 855-57 (9th Cir. 2018) ("Given the absence of any material evidence that Perez's affair had a meaningful effect upon her on-the-job performance, or resulted in a violation of a narrowly tailored department regulation, and taking the evidence in the light most favorable to her, the defendants violated Perez's constitutional rights by terminating her in part on the basis of her extramarital affair. We recognize that, since *Thorne*, at least two other circuits have adopted rules that appear to be in some tension with our case. *See Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017) (concluding Constitution not violated where two sheriff's deputies were fired for moving in with each other's wives before finalizing divorce from their current wives because the Sheriff's policies were supported by a rational basis); *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008) (upholding termination of officer on basis of extramarital affair under rational basis test because there is no "fundamental liberty interest 'to engage in a private act of consensual sex' "). We reject the approach taken by the Fifth and Tenth Circuits for the following reasons. First, our binding precedent in *Thorne* compels us to do so. Because the State's actions in this case 'intrude on the core of a person's constitutionally protected privacy and associational interests,' we must analyze them under 'heightened scrutiny.'. . Moreover, even if we were to agree that the Department's action here need only satisfy rational basis review, *Thorne* explains that it cannot survive any level of scrutiny without either a showing of a negative impact on job performance or violation of a constitutionally permissible, narrowly drawn regulation. . . . Second, the Fifth and Tenth Circuits fail to appreciate the impact of *Lawrence v. Texas*, 539 U.S. 558 (2003), on the jurisprudence of the constitutional right to sexual autonomy. . . . As the Court explained, the liberty protected by the Due Process Clause must extend *equally* to *all* intimate sexual conduct between consenting adults, regardless of whether they are of the same sex or not, married or unmarried. . . .*Lawrence* makes clear that the State may not stigmatize private sexual conduct simply because the majority has 'traditionally viewed a particular practice,' such as extramarital sex, 'as immoral.'. . Thus, without a showing of adverse job impact or violation of a narrow, constitutionally valid departmental rule, the Constitution forbids the

Department from expressing its moral disapproval of Perez's extramarital affair by terminating her employment on that basis. . . . Although Perez's termination violated her constitutional rights to privacy and intimate association, the defendants are entitled to qualified immunity unless those rights were clearly established at the time of the violation. Although we 'do[ ] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'. . We reaffirm that, for purposes of qualified immunity, a Ninth Circuit precedent is sufficient to clearly establish the law within our circuit. [*citing Hughes v. Kisela*] This rule is in no respect affected by *White*, which dealt only with the clarity, rather than the source, of established law for qualified immunity purposes. The district court concluded that the defendants were entitled to qualified immunity because Leah Begley's complaint alleged that Perez and Begley engaged in on-duty sexual conduct. This is true only with respect to the investigation conducted by the IA. There were, however, two parts to Perez's allegations and two parts to *Thorne*. Because the district court both conflated the applicable law regarding investigations and terminations and misapplied *Thorne*'s clearly established rule regarding terminations to the facts of this case, we reverse its grant of qualified immunity to the defendants. *Thorne* clearly established two ways in which a police department can violate the right of its officers to sexual privacy: (1) through 'an unbounded, standardless inquiry' into matters 'totally irrelevant to on-the-job sex,' . . . and (2) by relying on 'private non-job-related' sexual conduct without any evidence of 'an impact upon ... on-the-job performance' or in the absence of a constitutionally permissible, narrowly tailored regulation[.]. . In other words, a department can violate its employees' rights to privacy and intimate association either by impermissibly investigating their private sexual conduct or by taking adverse employment action on the basis of such private conduct. The district court was correct insofar as it concluded that our 'holding in *Thorne* does not show that the IA *investigation* into [Perez]'s relationship with Begley violated a clearly established constitutional right.'. . This is so because Begley's wife's complaint alleged *on-the-job* sexual misconduct. The district court, however, conflated the constitutionality of the *investigation* into *on-duty* conduct with the constitutionality of Perez's *termination* on the basis of her *off-duty* extramarital affair. The district court's qualified immunity discussion did not consider Perez's termination. *Thorne* clearly established the unconstitutionality of *terminating* a police officer on the basis of 'private, off-duty, personal' sexual conduct, unless a department can show that such conduct either adversely affected the officer's on-the-job performance or violated a constitutionally permissible, narrowly tailored department policy. . . Since *Thorne*, any reasonable police official in this circuit has had fair notice that the constitution protects police officers from termination based on wholly private sexual conduct which does not adversely affect their job performance or violate a narrowly tailored constitutional regulation.")

Zion v. County of Orange, 874 F.3d 1072, 1075-76 (9th Cir. 2017) ("Plaintiff doesn't challenge Higgins's initial nine-round volley, but does challenge the second volley (fired at close range while Zion was lying on the ground) and the head-stomping. By the time of the second volley, Higgins had shot at Zion nine times at relatively close range and Zion had dropped to the ground. In the video, Zion appears to have been wounded and is making no threatening gestures. . . While Higgins couldn't be sure that Zion wasn't bluffing or only temporarily subdued, Zion *was* lying on the

ground and so was not in a position where he could easily harm anyone or flee. A reasonable jury could find that Zion was no longer an immediate threat, and that Higgins should have held his fire unless and until Zion showed signs of danger or flight. Or, a jury could find that the second round of bullets was justified, but not the head-stomping. Defendants argue that Higgins's continued use of deadly force was reasonable because Zion was still moving. They quote *Plumhoff* v. *Rickard*: '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.'. . But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting. . . This is particularly true when the suspect wields a knife rather than a firearm. . . In our case, a jury could reasonably conclude that Higgins could have sufficiently protected himself and others after Zion fell by pointing his gun at Zion and pulling the trigger only if Zion attempted to flee or attack. . . . If a jury determines that Zion no longer posed an immediate threat, any deadly force Higgins used after that time violated long-settled Fourth Amendment law. We have cases holding that the use of deadly force against a non-threatening suspect is unreasonable. *See, e.g.*, *Tennessee* v. *Garner*, 471 U.S. 1, 11–12 (1985); *Harris* v. *Roderick,* 126 F.3d 1189, 1201 (9th Cir. 1997). We've also held that continued force against a suspect who has been brought to the ground can violate the Fourth Amendment. . . .If a jury were to find that Higgins shot and/or stomped on Zion's head after Zion no longer posed an immediate threat, Higgins would have been 'on notice that his conduct would be clearly unlawful.'. . Defendants therefore aren't entitled to qualified immunity.")

Petersen v. Lewis Cty., 697 F. App'x 490 (9th Cir. 2017) (*on remand from Supreme Court for reconsideration in light of White v. Pauly*) ("We consider this case on remand from the Supreme Court and affirm. The district court erred by finding that there were material factual disputes regarding whether McKnight's use of deadly force was reasonable. The record reflects that Petersen refused to heed McKnight's commands and started to charge McKnight. At the time he used force, McKnight knew that a person matching Petersen's description was in the area and might be armed with a knife. Given these facts, McKnight's actions were reasonable; he did not act with excessive force in violation of Petersen's constitutional rights. Even if McKnight had acted unreasonably, Petersen failed to identify any clearly established law putting McKnight on notice that, under these facts, his conduct was unlawful. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (reiterating "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality' " (citations omitted)). The district court therefore correctly granted qualified immunity to McKnight on the excessive force claim.)

Woodward v. City of Tucson, 870 F.3d 1154, 1161-62 (9th Cir. 2017) ("The district court, in denying qualified immunity to Defendants as to the seizure of and use of force on Duncklee, relied on its previous conclusion that the warrantless entry violated Duncklee's constitutional rights and, thus, everything that occurred thereafter was part of that initial violation. Citing the provocation theory from *Alexander*, the court remarked that Plaintiff's ' "excessive force claim turns on the force the officers used in entering the [apartment],"'. . . and concluded that 'it was clearly

established as a matter of law that drawing their guns and letting themselves into the apartment violated a constitutional right to be free from excessive force.'. . .However, in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), decided after the district court's opinion in this case, the Supreme Court abrogated *Billington* and the provocation theory. The Supreme Court concluded that the provocation theory was incompatible with established federal excessive force jurisprudence and held that an earlier 'Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.'. . The Court recognized that the provocation theory conflated distinct Fourth Amendment violations and held that the objective reasonableness of each search or seizure must be analyzed separately. . . In light of *Mendez*, the district court erred in relying on the provocation theory. . . .We shall begin with the second prong: was it 'clearly established' under the undisputed facts of this case that Defendants should not have used deadly force on Duncklee? These facts, as summarized in declarations made by Meyer and Soeder, are that upon opening the bedroom door with guns drawn, Duncklee immediately advanced towards the officers, yelling or growling, with a two-foot length of broken hockey stick raised in a threatening manner. The apartment was small and cluttered, making it difficult for the officers to retreat. Before firing, Officer Meyer yelled 'police, stop' at Duncklee. We conclude that reasonable officers in Defendants' positions would not have known that shooting Duncklee violated a clearly established right. Indeed, the case law makes clear that the use of deadly force can be acceptable in such a situation.")

Holloway v. Horn, 701 F. App'x 608, 609-10 (9th Cir. 2017) ("Under California law, Holloway could have violated the statute either by attempting to deter Officer Horn from pursuing him 'by means of ... threat,' or by resisting him 'by the use of force or violence,' Cal. Penal Code § 69(a), when he removed a gun from his pants and threw it over the fence, even if he never pointed it at Officer Horn. Under California law, the mere brandishing of a weapon in the open may be 'threat[ening]' or 'violen[t].' Displaying a weapon, even if only momentarily, before throwing it over a fence, could plausibly be intimidating to an officer in pursuit. . . . Even if Officer Horn were correct that a conviction under § 69 required that Holloway point his gun at Horn, that would not change the outcome of this case. Taking the remaining facts in the light most favorable to Holloway, he threw his gun over the fence before Officer Horn shot him. Holloway suffered immediate paralysis upon being shot, yet when other officers arrived, they found his gun on the other side of a tall wooden fence about ten feet away. Plaintiff had been shot in the back, including directly in his spinal cord, supporting the inference that he was not pointing a firearm at Officer Horn at the time that Horn opened fire. This is sufficient to deny qualified immunity, even under the strict requirement of *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam), that a case exists that places the constitutional issue 'beyond debate.' In *Curnow v. Ridgecrest Police*, 952 F.2d 321, 322, 325 (9th Cir. 1991), we denied qualified immunity to officers because, at the time they opened fire, the victim was not pointing his gun at the officers and was not facing them. *Curnow* was recently cited with approval in a case denying qualified immunity at the summary judgment stage. *See Newmaker v. City of Fortuna*, 842 F.3d 1108, 1116-17 (9th Cir. 2016). Moreover, Holloway alleges that Officer Horn shot him several times when he was on the ground after he had thrown

the gun over the fence. Shooting an unarmed, injured person who is unmoving and bleeding profusely while lying on the ground would in itself be sufficient to defeat qualified immunity.")

Van Bui v. City and County of San Francisco, No. 14-16585, 2017 WL 2814388, at *2 (9th Cir. June 28, 2017) ("It was clearly established as of December 2010 that officers 'may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed,' including in some circumstances in which the suspect has 'committed a violent crime in the immediate past.'. . Even where a suspect was holding a rifle, a weapon more imminently dangerous than the X-Acto knife at issue here, we held that it was unreasonable to shoot a suspect who did not point the weapon at the officers and was not facing the officers at the time they used deadly force. . . It was likewise well established that, 'whenever practicable, a warning must be given before deadly force is employed,'. . . and that a suspect's mental illness weighs against the use of deadly force, *see Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001). It thus would have been clear to a reasonable officer in 2010 that it was unreasonable to shoot without adequate warning a mentally ill suspect walking slowly with an X-Acto knife who at no point threatened the officers with the knife and who was turning away from the officers at the time he was shot.")

Davis v. United States, 854 F.3d 594, 599, 601 (9th Cir. 2017) ("Davis argues that Conley violated the Fourth Amendment because his detention of her was unreasonably prolonged and degrading, particularly given that she is elderly, her clothing was urine-soaked, the detention took place in a public parking lot, and the moon rock paperweight had already been seized. Viewing the facts in the light most favorable to Davis, we agree. . . .Considering these facts in the light most favorable to Davis, as well as the facts Conley knew at the time of the detention, the district court correctly concluded that Davis has raised genuine issues of material fact as to whether Conley's detention of Davis was unreasonably prolonged and degrading under *Foxworth*, and that Conley was not entitled to qualified immunity as a matter of law.")

Ames v. King County, Washington, 846 F.3d 340, 349-51 (9th Cir. 2017) ("On balance, we conclude the government interests at stake—here, Briganti's urgent need for life-saving emergency medical care and the need to protect the first responders and other motorists from potential harm—outweighed any intrusion on Ames's Fourth Amendment rights. We think Deputy Volpe's use of force in this case was reasonable in response to the totality of the circumstances. She needed to make a split-second decision during rapidly evolving circumstances to disable Ames. Deputy Volpe did not know whether Ames had access to a weapon in the truck. Ames refused Deputy Volpe's commands, resisted being pulled from her truck, and (whether or not by choice) was not submitting to being handcuffed. Even were we to conclude Deputy Volpe was mistaken in the judgments she made as to the amount of force required, as a matter of law her actions did not rise to the level of plain incompetence or a knowing violation of clearly established law regarding police actions in response to this serious medical emergency. . . Accordingly, Deputy Volpe is entitled to qualified immunity from Ames's excessive force claim. . . .Deputy Volpe's use of force while discharging her community caretaking function was objectively reasonable in light of the unfolding emergency with which she was faced. As the lone law

enforcement officer on the scene, responsible for assuring the safety of Briganti, Ames, the first responders, and other motorists, Deputy Volpe needed to act quickly to disable the clearly panicked mother from leaving with her gravely ill son and enable the aid crew immediately to treat Briganti. The level of force Deputy Volpe employed to remove Ames from the truck and apply handcuffs did not rise to the level of a constitutional violation under these circumstances. Likewise, Deputies Sawtelle and Christian did not violate Ames's Fourth Amendment rights when they searched her truck in an attempt to find the medications Briganti had ingested in his overdose. The deputies' actions were reasonable under the emergency doctrine and they are entitled to qualified immunity from suit.")

Fletes v. City of San Diego, 687 F. App'x 640 (9th Cir. 2017) ("The district court did not err in dismissing Fletes's Fourth Amendment claim, because Fletes was not seized. . . The officers unequivocally testified that the driver of the car—and not Fletes—was the intended object of their shots, and there is no evidence in the record to the contrary. Moreover, even if the officers had seized Fletes, the officers' use of force was 'objectively reasonable' under the circumstances.")

Vasquez-Brenes v. Las Vegas MPD, No. 14-16939, 2016 WL 6648698, at *1–2 & n.1 (9th Cir. Nov. 10, 2016) (not reported) ("Vasquez-Brenes argues that Miller's conduct violated the clearly established federal law set forth in *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991). But that case involved an officer's use of deadly force on a fleeing armed suspect. *Id.* at 325. This case involves the use of deadly force on a large man wielding a blunt object who continued to advance on Miller after repeated warnings and after being tased twice and shot twice with beanbag rounds. *Curnow* thus is plainly distinguishable, and no other case cited by Vasquez-Brenes provides the specific guidance required by the Supreme Court. *See Saucier*, 533 U.S. at 201. Thus, even assuming that Miller's conduct violated Brenes's constitutional rights, it did not violate clearly established law. . . . Nor do the cases cited by the dissent place the 'constitutional question beyond debate.'. . In *A.K.H. v. City of Tustin*, an officer fatally shot an unarmed suspect as he was removing his hand from his sweatshirt pocket. . . . In *Glenn v. Washington County*, officers fatally shot an intoxicated man who held a pocketknife to his own neck while threatening to commit suicide. . . . These cases address whether the defendant officer reasonably believed deadly force 'was necessary to protect himself or others from death or serious bodily harm.'. . But we have assumed *arguendo* that Miller's use of deadly force violated Brenes's constitutional rights. The jury's resolution of an issue of disputed fact under these circumstances is only material if Miller's conduct violates clearly established law under Brenes's version of events, but not under Miller's version. Even if we resolve all factual disputes in Brenes's favor, neither Vasquez-Brenes nor the dissent have cited authority showing that Miller's conduct violated clearly established law.")

Vasquez-Brenes v. Las Vegas MPD, No. 14-16939, 2016 WL 6648698, at *1–2 & n.1 (9th Cir. Nov. 10, 2016) (not reported) (Callahan, J., concurring) ("I fully concur in the memorandum disposition. I write separately only to state that I also find that, taking the facts in the light most favorable to Brenes, Officer Miller's conduct did not violate a constitutional right. *See Gonzalez v. City of Anaheim*, 747 F.3d 789, 793 (9th Cir.) (deadly force reasonable if officer has probable

cause to believe suspect poses significant threat of death or serious physical injury), *cert. denied sub nom. Wyatt v. F.E.V.*, 135 S. Ct. 676 (2014).")

Vasquez-Brenes v. Las Vegas MPD, No. 14-16939, 2016 WL 6648698, at *1–2 & n.1 (9th Cir. Nov. 10, 2016) (not reported) (Owens, J., dissenting) ("On the morning of November 15, 2010, Anthony Brenes walked around a parking lot with a cane and at one point threw a rock. Less than three minutes after police arrived to ensure public safety, Brenes was dead. Whether bean bag rounds and taser jolts failed to stop his walking is, in my view, irrelevant. What matters – and what a jury should decide – is if the officer reasonably believed that deadly force was needed to save his own life. . . There are too many unanswered questions to take this question away from the jury.")

C.B. v. City of Sonora, 769 F.3d 1005, 1029-31 (9th Cir. 2014) (en banc) (majority opinion denying qualified immunity on excessive force claim) ("C.B. also argues that the officers used excessive force in violation of the Fourth Amendment when, upon removing him from school grounds, they handcuffed C.B. for twenty-five to thirty minutes. . . . We have not yet considered whether *Graham* or *T.L.O.* applies to law enforcement officers' use of force against a student in a school setting, and we do not resolve that question today. But we believe that *Preschooler II*, *Gray*, and *Shade* could have led a reasonable officer to conclude that *T.L.O.* governs police use of force in response to school-related incidents as well. In no event, however, do we think that an officer could have reasonably believed that *T.L.O.* governs police use of force once a student is in police custody and outside the confines of the school setting, as C.B. was throughout the commute to his uncle's place of business. Ultimately, in our view, whether *T.L.O.* or *Graham* governed Chief McIntosh's and Officer Prock's actions at any given moment is of little consequence. Chief McIntosh's and Officer Prock's use of handcuffs on a calm, compliant, but nonresponsive 11–year–old child was unreasonable under either standard. . . .At the time of the incident, the law was also clearly established that, at a minimum, police use of force in response to school-related incidents had to be reasonable in light of the circumstances and not excessively intrusive. . . And the law was clearly established that, as a general matter, police use of force must be carefully calibrated to respond to the particulars of a case, including the wrongdoing at issue, the safety threat posed by the suspect, and the risk of flight. . . Although these general standards 'cannot always, alone, provide fair notice to every reasonable law enforcement officer that his or her conduct is unconstitutional,'. . . 'in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law.'. .Applying handcuffs to C.B., and keeping him handcuffed for the approximately thirty minutes it took to drive to his uncle's business, was an obvious violation of these standards. It is beyond dispute that handcuffing a small, calm child who is surrounded by numerous adults, who complies with all of the officers' instructions, and who is, by an officer's own account, unlikely to flee, was completely unnecessary and excessively intrusive. . . .In sum, we hold that Chief McIntosh and Officer Prock are not entitled to qualified immunity for handcuffing C.B.")

C.B. v. City of Sonora, 769 F.3d 1005, 1023-24, 1026-29 (9th Cir. 2014) (en banc) (Paez, J., joined by Silverman, J., dissenting from the majority's holding that Chief McIntosh and Officer Prock are entitled to qualified immunity on C.B.'s Fourth Amendment seizure claim) ("T.L.O. is distinguishable from this case in a critical respect: T.L.O. involved the conduct of school administrators, not law enforcement officers. . . We have not yet decided whether T.L.O.'s reasonableness standard or, instead, traditional Fourth Amendment rules apply to law enforcement searches and seizures in school settings, and there is no need to do so today. At the time of the incident, at least two of our sister circuits had held that T.L.O.'s reasonableness standard governs law enforcement conduct concerning school-related incidents in school settings. . . Consequently, at the time of this incident, an officer could have reasonably believed that T.L.O. governed law enforcement searches and seizures on school grounds for school-related purposes. Nonetheless, applying T.L.O.'s reasonableness standard does not aid Chief McIntosh and Officer Prock. Taking the facts in the light most favorable to C.B., . . . the officers knew only the following when they decided to handcuff C.B. and remove him from school grounds: (1) the school had reported an 'out of control' juvenile; (2) C.B. was a 'runner'—whatever that may mean—who had not taken some unknown medication; (3) C.B. sat quietly looking at the ground and never made any movements the whole time police were present; (4) C.B. was unresponsive in the three and a half minutes during which Officer Prock tried to engage with him; and (5) Coach Sinclair wanted C.B. removed from the school grounds. The officers acted reasonably at the outset by seeking to engage with C.B. to investigate the dispatch that they had received about an 'out of control' minor. What they found, though, was a quiet but nonresponsive child. During the entire time police were present, the child did nothing threatening or disobedient. . . . When viewed in relation to these circumstances, the officers' decision to seize C.B. and remove him from school grounds was not reasonable. . . .In sum, taking the evidence in the light most favorable to C.B., a reasonable jury could conclude that Chief McIntosh and Officer Prock violated C.B.'s Fourth Amendment rights when they seized him and took him into custody. . . We next consider whether it was clearly established on September 28, 2009, that removing C.B. from school grounds was a violation of the Fourth Amendment. . . .At the time of C.B.'s seizure, the law was clearly established that, at a minimum, police seizures at the behest of school officials had to be reasonable in light of the circumstances and not excessively intrusive. . . .The removal from school grounds of a compliant and calm 11–year–old child—a decision that was made sans any police investigation, without any knowledge of disobedience, and after only minutes on the scene—is an obvious violation of the constitutional principle that the nature of the seizure of a schoolchild must be justified by the circumstances. Even without on-point case law, it is beyond dispute that police officers cannot seize a schoolchild who they do not know to have committed any wrongdoing, who does not appear to pose any threat to himself or others, and who engages in no act of resistance the entire time the officers are present. . . Chief McIntosh and Officer Prock do not argue that *T.L.O.* justified seizing C.B. In fact, they argue that they are entitled to qualified immunity only because they reasonably, even if mistakenly, believed they had 'reasonable cause'. . .to take C.B. into custody pursuant to California Welfare & Institutions Code sections 601(a) and 625(a). An officer who reasonably but mistakenly believes that his actions are warranted under state law may be entitled to qualified immunity. . . . In sum, the officers knew of no defiant act by C .B.; any belief that C.B. was beyond

the school's control was not reasonable because it lacked any basis in fact. Moreover, even assuming it was reasonable to believe that C.B. had earlier defied a school official by refusing medicine and running, it was apparent that C.B. had not run off school grounds and was, instead, sitting calmly in the school playground. Such a singular instance of disobedience does not even come close to satisfying the statutory requirement that the minor be 'beyond the control' of his custodian. . . . Chief McIntosh and Officer Prock argue that their belief that sections 601(a) and 625(a) applied in this instance was reasonable because Coach Sinclair allegedly told Chief McIntosh that C.B. was 'out of control,' 'would run off campus,' and was 'yelling and cussing.'. . Whatever the merits of the argument that a reasonable officer might have believed that sections 601(a) and 625(a) justified taking a child into custody in light of these additional facts, that is not the scenario presented here. Neither Coach Sinclair nor C.B.—the other witnesses present during this purported exchange—recalls Coach Sinclair making these statements. Although it is possible that C.B.'s and Coach Sinclair's recollections are incomplete, when taking the facts in the light most favorable to C.B., . . . it must be assumed that it is Chief McIntosh's account that is inaccurate. . .Based on the foregoing, Chief McIntosh and Officer Prock are not, in my view, entitled to qualified immunity with respect to C.B.'s unlawful seizure claim.")

C.B. v. City of Sonora, 769 F.3d 1005, 1033-38 & n.5 (9th Cir. 2014) (en banc) (M. Smith, J, concurring in part, and dissenting in part, with whom O'Scannlain, Tallman, and Bybee, JJ., join in full, and with whom Kozinski, C.J., and Graber and Gould, JJ., join as to Part I, which is the opinion of the court)("A majority of the en banc court agrees that Chief McIntosh and Officer Prock (the officers) are entitled to qualified immunity with respect to C.B.'s unlawful seizure claim. A reasonable officer would not have known that taking a child in C.B.'s situation into temporary custody was unreasonable, and therefore unconstitutional. However, I respectfully dissent from the majority's conclusion denying the officers qualified immunity with respect to C.B.'s excessive force claim. In my view, the officers are entitled to qualified immunity on both of C.B.'s Fourth Amendment claims because the constitutional rights at issue in this case were neither clearly established nor 'obvious' at the time C.B. was taken into temporary custody. . . .Our court. . . has been singled out and chastised by the Supreme Court for our propensity to improperly find 'clearly established' rights. Specifically, the Court has mandated that 'courts—*and the Ninth Circuit in particular*—not ... define clearly established law at a high level of generality.' *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011) (emphasis added) (internal citation omitted). Despite the Court's clear instruction that we not 'define clearly established law at a high level of generality,' the majority's hurried discussion of the second prong of the qualified immunity analysis does just that. . . . I respectfully disagree with the majority's characterization of these facts as an 'obvious violation' of C.B.'s constitutional rights, and with its conclusion that this case is not therefore subject to the Court's admonitions against defining 'clearly established law' in overly general terms. . . .[T]he facts of this case, even when viewed in the light most favorable to C.B., . . . do not come close to constituting an 'obvious' violation of a 'clearly establish[ed]' right. . . . Assuming *New Jersey v. T.L.O.'s* reasonableness standard applies, as my colleagues do, C.B. cannot show that a reasonable officer would have understood that taking him into temporary custody was unreasonable, and therefore unconstitutional. . . .A reasonable officer in this situation, faced with

a juvenile who (a) was reportedly a 'runner,' (b) was 'out of control,' (c) ignored the officer's questions, and (d) had not taken his medication, would not have known that taking such a juvenile into temporary custody in order to transport him safely to his uncle was an 'obvious' violation of his constitutional rights. . . .I respectfully disagree with the majority's conclusion that the scope of C.B.'s right to be free from excessive force was clearly established. . . . [A]ssuming without deciding that *Graham v. Connor*, 490 U.S. 386, 396 (1989), controls in this situation, handcuffing C.B. was clearly reasonable when balanced against the need to ensure C.B.'s safety by preventing him from fleeing or injuring himself. . . . Additionally, it was not clearly established that keeping a juvenile in C.B.'s situation handcuffed for approximately thirty minutes while the officers transported him to his uncle was unconstitutional. A reasonable officer could have believed that it was permissible to keep C.B. handcuffed to ensure his safety in light of the fact that C.B. could have hurt himself in the car, or attempted to flee while the officer was removing the handcuffs before placing C.B. in the car. Moreover, handcuffing C.B. to prevent flight comports with standard police procedure. . . .Although handcuffing a juvenile is not a matter to be taken lightly, neither is the juvenile's safety. . . . Under the majority's new rule, officers are now damned if they do, and damned if they don't, when dealing with schoolchildren who are known runners. Because this case is not an 'obvious' one where general standards clearly establish C.B.'s rights, a reasonable officer would not have known that handcuffing C.B. to safely take him into temporary custody violated his constitutional rights. . . . The Supreme Court's recent case law illustrates the substantial protection that qualified immunity affords police officers. Although each case is decided based on its specific facts, the reality is that the Supreme Court in the recent past has rarely denied qualified immunity to police officers. As one scholar has observed, before the recent reversal of a grant of qualified immunity in *Tolan*, 134 S.Ct. 1861, the Court had not ruled against a police officer in a qualified immunity case since *Groh v. Ramirez*, 540 U.S. 551 (2004), decided nearly a decade earlier. *See Will Baude, Tolan v. Cotton—when should the Supreme Court interfere in 'factbound' cases?,* The Washington Post, The Volokh Conspiracy (May 7, 2014, 9:40AM), http: // www.washingtonpost.com/news/volokhconspiracy/wp/2014/05/07/ tolan-v-cotton-when-should-t he-supreme-court-interfere-in-factbound-cases/ ?tid=pm_ national_pop (last visited September 22, 2014).")

C.B. v. City of Sonora, 769 F.3d 1005, 1038-40 (9th Cir. 2014) (Gould, J., with whom Kozinski, C.J., and Graber, J., join, concurring in part in Judge Paez's opinion and concurring in part in Judge M. Smith's opinion) ("I join Parts I, II.A, II.B, II.C.2, and II.D of Judge Paez's opinion, concerning the factual background, rejection of the challenges to jury instructions and to evidentiary rulings, and the conclusions that Chief McIntosh and Officer Prock used excessive force in violation of the Fourth Amendment when, in removing C.B. from school grounds, they handcuffed him for 25 to 30 minutes and that they are not entitled to qualified immunity for handcuffing C.B. I join in Part I of Judge M. Smith's opinion, concerning the unlawful seizure claim, concluding that the officers are entitled to qualified immunity as to the seizure of C.B. . . .When a school official makes a determination that it is necessary to remove a student from campus to maintain order, protect that student or others, or otherwise to prevent the destruction of the 'proper educational environment,'. . . in my view a reasonable officer could have believed that he or she was entitled to rely on that

judgment. On the issue of excessive force by handcuffing: Police officers may reasonably believe that the Fourth Amendment permits them to give deference to a school official's request that a student be removed from campus. But that reasonable belief in deference does not extend to the level of force that they may use to accomplish the removal. . . The officers violated the Fourth Amendment by handcuffing C.B., and they are not protected from C.B.'s excessive force claim by qualified immunity. None of the reasons motivating the Supreme Court's decision in *T.L.O.* bears on police officers' use of force. Neither the need for compliance with school rules, nor the close relationship between teachers and students, nor the importance of maintaining the educational environment has any connection with the amount of force permissibly used by officers in carrying out an otherwise reasonable request from school officials. . . .The Supreme Court's jurisprudence has firmly established that the force police officers apply must be reasonable. Under the totality of the circumstances, it was not reasonable to handcuff a small and docile 11–year–old child. The Supreme Court's law requiring that a reasonable level of force be used against the citizenry is crystal clear and well established.")

C.B. v. City of Sonora, 769 F.3d 1005, 1040-42, 1045-47 (9th Cir. 2014) (en banc) (Berzon, J., with whom Thomas, J., joins, concurring in part and dissenting in part) ("I concur in Judge Paez's opinion, with one exception: as to C.B.'s unlawful seizure claim, I concur in the result reached by Judge Paez but would reach that result via different reasoning. As to the seizure issue, the reliance on *New Jersey v. T.L.O*, 469 U.S. 325 (1985), in the three other opinions in this case is, in my view, entirely beside the point. The police officer defendants have consistently maintained that they seized C.B. because they had reasonable cause to believe he was a child covered by California Welfare and Institutions Code section 601(a). But section 601(a) does not cover C.B.'s circumstance, nor could a reasonable police officer have thought it did. As the defendants have never suggested that they could, or did, seize C.B. to enforce the school's own rules and disciplinary needs, we should be reviewing their actual defense, not manufacturing one for them. . . We are reviewing a judgment entered after a jury trial. Over the course of that trial, the police officers repeatedly explained that they took C.B. into custody pursuant to the Welfare and Institutions Code. . . .Simply put, the police officers are defending against C.B.'s allegations on the ground that they behaved as law enforcement officers, not school administrators or officials, when they arrested C.B. pursuant to their asserted statutory authority to do so. The officers do *not* purport to have been enforcing school disciplinary policies as agents of the school. We should not be evaluating the officers' seizure of C.B. by recourse to a justification that they neither offer as authority for their conduct nor endorse. . . The officers' sole contention, then, is that they had cause to take C.B. into custody because he was 'beyond the control of" his 'custodian' under section 601(a). They had no such cause for two reasons: (1) the school is not C.B.'s custodian, and (2) he was not 'beyond the control' of his parents, guardian, or custodian. . . . In sum, section 601(a) has not been applied to include and does not include a single act of defiance of school officials. The officers simply had no cause to take C.B. into custody under this provision. . . Nor does qualified immunity insulate the officers from C.B.'s Fourth Amendment claims. . . . By 2008, the law was clearly established that the constitution requires police officers to have *some* legal cause to take children into custody. . . .In short, there was *no* cause, probable, reasonable, or otherwise, to take

C.B. into temporary custody under section 601, and no reasonable officer could have believed otherwise.")

Gonzalez v. City of Anaheim, 747 F.3d 789, 794-97 (9th Cir. 2014) (en banc) ("The key issue in this case is whether a reasonable jury would necessarily find that Wyatt perceived an immediate threat of death or serious physical injury at the time he shot Gonzalez in the head. . . That requires us to consider exactly what was happening when the shot was fired. . . . The dispute in this case concerns the relevant set of facts, in particular whether the minivan had violently accelerated and was moving at a high rate of speed. That remains a question of fact for the jury, as to which we must draw all inferences in favor of the nonmoving party at the summary judgment stage. . . . [T]he existence of an immediate threat to safety in this case is based on the sudden acceleration and speed of the van. Gonzalez's action could not have presented a threat sufficient to justify the use of deadly force unless it caused the car to move in a way that immediately threatened the safety of the officers or the public. The defendants did not argue that such a threat was posed if the minivan was actually going only 3 to 7 miles per hour. They argued that '[t]he undisputed evidence is that decedent was speeding down the street going approximately 40 to 50 MPH with Officer Wyatt trapped inside the van.' If that were true, we agree that summary judgment in favor of defendants would be appropriate, as the primary dissenting opinion contends. There was a genuine dispute about that fact, however, based on Wyatt's own testimony. This case is about the standard for summary judgment, not whether law enforcement officers face danger and are permitted to use deadly force when faced with an immediate threat to safety. . . . Similarly, a jury could find that Wyatt reasonably perceived a threat, but not one that justified the immediate use of deadly force. As noted above, the jury may consider the availability of other methods to subdue a suspect. Wyatt had a police baton, pepper spray, and a taser. He could have used any of them, or he could have shot Gonzalez in a nonlethal area of the body to try to stop him from driving further. Instead, he used his gun and intentionally shot Gonzalez in the head. If the jury found that the car was moving slowly at the time, it could also find that other alternatives could have been used and that the use of deadly force was unreasonable. . .A jury could also find that Wyatt failed to give a warning before he shot Gonzalez in the head. The absence of a warning does not necessarily mean that Wyatt's use of deadly force was unreasonable. . . A rational jury may find, however, that if the car was moving at an average speed of 3 to 7 miles per hour, a warning was practicable and the failure to give one might weigh against reasonableness. . . We do not hold that a reasonable jury must find in favor of the plaintiffs on this record, only that it could. The jury could also reasonably find, to the contrary, that the minivan was moving dangerously fast and that Wyatt reasonably perceived an immediate threat to his safety sufficient to support the use of deadly force. Other factors identified in *Graham* would support a verdict in favor of the defendants here, as well. By the time Wyatt pulled the trigger, the crimes at issue were relatively severe and Gonzalez was plainly resisting arrest or attempting to evade arrest by flight. . . But based on the record before us, we cannot say that a verdict in favor of the defendants on the claim for excessive force is the only conclusion that a reasonable jury could reach.")

Gonzalez v. City of Anaheim, 747 F.3d 789, 798-801, 809-12 (9th Cir. 2014) (en banc) (Trott, J., with whom Kozinski, CJ., and Tallman and Bea, JJ., join dissenting in part and concurring in part) ("The issue here is different from our usual two-part fare in Fourth Amendment excessive force litigation. Officers Wyatt and Ellis do not request qualified immunity under prong two of the *Saucier v. Katz, Pearson v. Callahan* test on the ground that what they did had not been clearly established to be a violation of the excessive force prohibition of the Fourth Amendment. When questioned during oral argument why his clients were not asking for qualified immunity, counsel pointed out that the summary judgment threshold issue under either approach—which we call 'prong one' in judicial short form—is the same, i.e., whether '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'. . . If not, the question of immunity becomes moot. . . Focusing on prong one, these officers maintain that the law covering their actions was established twenty five years ago; and pursuant to that established law, what they did shortly after midnight on September 25, 2009, was objectively reasonable and therefore constitutional. The Supreme Court law they relied on as to their encounter with Gonzalez is this: when faced with a suspect who is resisting arrest and attempting to evade apprehension by flight from serious crimes under circumstances that pose an immediate threat to their safety or the safety of others, police officers may use deadly force to protect themselves and the public at large. . . .The threshold question at the summary judgment stage of whether or not an officer's actions were objectively reasonable under the Fourth Amendment is 'a pure question of law,' not a question of fact reserved for a jury. . . Included in this 'pure question of law' is whether a suspect's actions have risen to a level warranting deadly force. . . In handing down this ruling, the *Scott* Court explicitly rejected Justice Stevens's dissenting view that the objective reasonableness of an officer's actions should always be a question for the jury. . . The status of this threshold issue as 'a pure question of law' makes it all the more important that what we say about it can be relied upon by those who must act accordingly in the field. Fair warning is sine qua non of a rule when it applies to officers who must react quickly in tense situations. . . . In summary starting with the three *Graham* factors, I conclude that the facts in the record compel one conclusion, and only one conclusion a jury could reach: Officer Wyatt's use of deadly force to stop Gonzalez's behavior was objectively reasonable. First, Officer Wyatt was 'confronted with a serious crime,' indeed multiple crimes. Second, Gonzalez posed 'an immediate threat' to Officer Wyatt's safety and to the safety of others. Third, Gonzalez was 'actively resisting arrest' and attempting to evade arrest by flight. I cannot envision any scenario wherein this case might survive a motion for judgment as a matter of law pursuant to Rule 50(a)(B). . . .The 'factual dispute' my colleagues in the majority see as 'material' is the speed Gonzalez was driving when Officer Wyatt shot him. Because the only summary judgment disputes that matter are those that are 'material,' I disagree. The actual or the estimated speed of the van at the moment of the shooting is not material. Neither is the 'average speed' of an accelerating vehicle in flight from the police. What is material is that Gonzalez suddenly accelerated his van away from the traffic stop with Officer Wyatt trapped inside and traveled for a block before it crashed. Who cares how fast the van was going? Gonzalez's representatives admit that Gonzalez unexpectedly tried to flee without warning, and that when Officer Wyatt tried to stop him, Gonzalez physically fought him off. I do not comprehend how this constellation of facts fails to demonstrate a real threat of

impending harm to Officer Wyatt, as well as to members of the public. In an unconvincing attempt to make this dispute over speed 'material,' the majority unwittingly engages in exactly the type of rear-view-mirror microanalysis the Supreme Court has told us to eschew. The majority has converted Officer Wyatt's precarious ten-second episode in Gonzalez's van into an ex post facto exercise in calculus, the world of the derivative and the integral. They impose a new duty on police officers: when you are in a zone of immediate danger involving a moving vehicle in which you are being kidnaped, you must calculate the speed of the vehicle as you try to turn off the ignition and to disengage the gearshift. Then, you must refrain from using deadly force until the vehicle speeds up to a point where a crash will surely threaten your life (or have the presence of mind to try something else). At that point, the use of deadly force too late will not only disable the driver, but probably you, too. And let us not forget, the majority thinks it would be nice if you would give one more warning before you shoot. . . .Next, we get to the majority's should-have-shot-the-gun-out-of-his-hand suggestion, which comes from Hollywood westerns, certainly not from the streets of our cities. . . .The majority says Officer Wyatt could have used a baton, pepper spray, or maybe a Taser. The record does not contain a shred of evidence that such methods would have been effective—to the contrary. To speculate that such methods would have safely ended the chase disregards the officers' escalating reasonable use of nonlethal force against Gonzalez, hitting him with their fists, trying to put him in a carotid hold, and striking him with a flashlight, but nothing worked. Officer Wyatt warned him that he would be shot if he continued to display dangerous behavior, but even a threat of that magnitude did not register. Officer Wyatt ordered him to stop the van. Verbal commands and warnings had no effect. Under these circumstances, giving him another warning was neither feasible nor required, nor would it have caused Gonzalez to stop. He was determined, albeit foolishly, to try to escape."). [footnotes omitted]

Gonzalez v. City of Anaheim, 747 F.3d 789, 814 (9th Cir. 2014) (en banc) (Kozinski, CJ., with whom Trott, Tallman and Bea, JJ., join, dissenting) ("It's undisputed that, at the time he fired the fatal shot, Officer Wyatt was trapped inside a moving vehicle driven by a man who had resisted the verbal commands, physical restraints, lethal threats and bodily force of two uniformed officers. How fast the van was moving and how far it had traveled are beside the point. What matters is that Officer Wyatt was prisoner in a vehicle controlled by someone who had already committed several dangerous felonies. No sane officer in Wyatt's situation would have acted any differently, and no reasonable jury will hold him liable. The only thing this remand will accomplish is to give plaintiffs a bludgeon with which to extort a hefty settlement. The Supreme Court should foil the plan with a swift summary reversal.")

Lal v. California, 746 F.3d 1112, 1117, 1118 (9th Cir. 2014) ("Plaintiffs admit that Lal was holding a football-sized rock over his head when he continued to advance toward Officers Newman and Otterby, who shot him when he was about a yard away. In light of Lal's prior actions—the high speed chase, hitting himself with a stone, throwing rocks at the officers—the officers reasonably believed that Lal would heave the rock at them. Indeed, Plaintiffs do not really argue otherwise. Instead, they argue that the officers should have retreated or that they somehow should have defused the situation before Lal started advancing. These contentions are not factually or

legally persuasive. The confrontation was in a ditch alongside a freeway, and the officers could hardly allow Lal to proceed on foot onto the freeway. Nor could they have allowed Lal to remain in his truck and reenter the freeway, for Lal's wish to commit suicide would have endangered the lives of others, as well as his own. Indeed, the officers were exploring alternate methods of dealing with Lal, attempting to continue the engagement with Lal until the K–9 unit arrived. But Lal forced the issue by advancing on the officers. By the time that Lal, contrary to the officer's commands, advanced to within seven or eight feet of the officers, thereby creating a reasonable fear of imminent serious physical harm, spraying Lal with pepper spray would not have stopped Lal from hurling the rock at the officers. The fact that Lal was intent on 'suicide by cop' did not mean that the officers had to endanger their own lives by allowing Lal to continue in his dangerous course of conduct. . . . Together, *Scott* and *Reynolds* prevent a plaintiff from avoiding summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. Rather, the court must decide as a matter of law 'whether a reasonable officer could have believed that his conduct was justified.'. .In the case at bar, there is no suggestion that the officers intentionally provoked Lal. Rather, the totality of the circumstances shows that they were patient. They allowed Lal to lead them on a 45–minute high-speed chase, during which they tried to talk him into surrendering, and when he got out of the truck, they were willing to give him time to cool off. Instead, it was Lal who forced the confrontation. Thus, even assuming that it might have been possible for the officers to have given Lal a wider berth, under our opinion in *Billington*, there is no requirement that such an alternative be explored. A police officer's immunity does not become less if his assailant is motivated to commit 'suicide by cop.'")

George v. Morris, 736 F.3d 829, 835-39 (9th Cir. 2013) (amended opinion, denying reh'g and reh'g en banc) ("Because this inquiry, under *Scott v. Henrich* and its progeny, concerns genuineness—namely 'the question whether there is enough evidence in the record for a jury to conclude that certain facts are true'—we may not decide at this interlocutory stage if the district court properly performed it. . .The dissent, however, would have us effectively cast off the interlocutory-review framework. . . It tells us we may do so under the banner of *Scott v. Harris*, a case in which not a single Justice of the Supreme Court 'discussed the limits of the collateral order doctrine in qualified immunity cases' or even cited the Court's prior authorities on the subject. . . Even accepting for the sake of argument, though, that *Scott v. Harris* is meant to establish an exception to the rules for interlocutory review, the dissent does not fit within that case's terms either. It points to no videotape, audio recording, or similarly dispositive evidence that 'blatantly contradict[s]' or 'utterly discredit[s]' Carol's side of the story. . .Our decision not to assume *Scott v. Harris* implicitly abrogated a line of precedent also accords with the Supreme Court's later guidance. In a more recent section 1983 case, the Court reaffirmed that 'immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a "purely legal issue."' [citing *Ortiz v. Jordan*] Thus, in this appeal, we are confined to the question of 'whether the defendant[s] would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in plaintiff's favor.'. . .The deputies' appeal touches on two questions of qualified immunity. First, the deputies claim

the shooting did not violate the Constitution. Second, they assert that even if Donald's Fourth Amendment rights were violated, they did not violate law clearly established at the time they acted. . . Usually we can start with the second prong of qualified immunity if we think it advantageous. . . . Here, though, we are not satisfied that the deputies have adequately pursued that argument. . . .We need not definitely decide, however, whether they waived the argument at the district court. On appeal, the deputies have not advanced an argument as to why the law is not clearly established that takes the facts in the light most favorable to Carol. . . . As to whether the deputies violated the Fourth Amendment, two Supreme Court decisions chart the general terrain.[discussing *Graham* and *Garner*]. . . . In *Glenn v. Washington County,* we found that in a 911 scenario without flight or an alleged crime, the officers' decision to shoot an individual holding a pocket knife, 'which he did not brandish at anyone,' violated the Constitution. . . Reviewing *Long* and *Scott,* we explained that the fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. . . . This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. On this interlocutory appeal, though, we can neither credit the deputies' testimony that Donald turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Given that version of events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive. Contrary to the dissent's charge, we are clear-eyed about the potentially volatile and dangerous situation these deputies confronted. Yet, we cannot say they assuredly stayed within constitutional bounds without knowing '[w]hat happened at the rear of the George residence during the [four minutes between when] Mr. George walked out into the open on his patio and the fatal shot.'. . That is, indeed, 'the core issue in this case.'. . . Today's holding should be unsurprising. If the deputies indeed shot the sixty-four-year-old decedent without objective provocation while he used his walker, with his gun trained on the ground, then a reasonable jury could determine that they violated the Fourth Amendment.")

Johnson v. Bay Area Rapid Transit Dist., 724 F.3d 1159, 1170, 1180 (9th Cir. 2013) ("We construe the facts, overwhelming or otherwise, in Grant's father's favor and ask whether the district court properly denied Mehserle immunity on the basis of those facts. As recounted above, before the district court was evidence that: Grant struggled with Mehserle and Pirone because they were preventing him from breathing; Grant was adequately subdued before Mehserle shot him; Pirone was surprised by Mehserle's command that he stand back (because Pirone thought Grant was adequately subdued); and Grant's hands were behind his back when Mehserle shot him. . . In light of these and other facts, which Mehserle disputes, the district court concluded that 'there is a genuine issue of material fact as to whether Mehserle's actions were required by a legitimate law enforcement purpose....' We do not disturb that conclusion, *Johnson,* 515 U.S. at 314, and agree that given the factual dispute before it, which must be resolved by a jury, the district court *could not* have properly granted Mehserle qualified immunity. Accordingly, and correctly, it did not. . . . Our society vests law enforcement officers with the authority to carry and use weapons and tactics that may injure, sometimes fatally, people they suspect of committing crimes. Officers

are given a degree of responsibility concomitant with that grave authority, with the expectation that they will exercise it discerningly. Because of that expectation, the doctrine of qualified immunity dictates that courts will not substitute their judgment for the officers' own in evaluating the officers' reactions to novel and dangerous situations. But none of that means we abandon our expectation that the police will discharge their duties professionally and responsibly. Bearing that expectation in mind, we are presented with the plaintiffs' account of facts in which one officer, Pirone, responded to a call regarding a misdemeanor scrape on a train—which concluded before he arrived—by pulling a weapon [Taser] on a group of men who were standing around talking. Pirone sought to intimidate the group, which he assumed may have been responsible for the fight. Pirone then sought out two of the men who walked away from him by pacing the platform and screaming profanities in his search for them. The men were all handcuffed and held overnight—but never charged with a crime—after another officer, Mehserle, shot and killed one among them. It is possible that a jury will conclude, after weighing all the facts, that the officers committed no constitutional wrongs. But our task at this stage in the litigation is not to attempt to weigh the facts and resolve the issues definitively in favor of one party or another. It is instead to construe the facts in the manner most favorable to the plaintiffs, who have a right to their day in court, and then ask if our solicitude of the judgment of law enforcement in this case requires us to shield the officers from further participation in this lawsuit. . . Construing the facts in the plaintiffs' favor, we agree largely with the district court that the officers should stand trial for the constitutional violations of which they are accused.")

Barnard v. Theobald, 721 F.3d 1069, 1076 (9th Cir. 2013) ("Here, the jury found—by special interrogatory—that all of the Officers in this case used an unreasonable amount of force against Charles. . . . At bottom, the Officers claim that if Charles was actually resisting, or if the Officers could have reasonably believed that he was resisting, then the Officers are entitled to qualified immunity as a matter of law. . . . The Officers are simply mistaken in their understanding of the law. Resistance, or the reasonable perception of resistance, does not entitle police officers to use *any* amount of force to restrain a suspect. . . . Here, the jury concluded that the amount of force used by the Officers was unreasonable, even in light of their mistaken belief that Charles was resisting.")

Furnace v. Sullivan, 705 F.3d 1021, 1027-30 (9th Cir. 2013) ("Prison regulations are drafted to further institutional safety and other prudential considerations, rather than being drawn to perfectly trace the contours of prisoners' constitutional rights. Accordingly, they are not wholly descriptive of the extent of those rights. However, in *Hope*, for example, the Supreme Court looked to rules promulgated by the Alabama Department of Corrections to aid it in determining whether a prison guard was on notice of constitutional limitations on the use of force. . . Here, OP 29 bears directly on the situation that the officers confronted, and is therefore relevant to determining whether the officers could have thought their conduct was reasonable and lawful. . . . [W]e conclude that it is not clear that the application of force was required under Furnace's version of the facts because Morales could have, as SVSP's OP 29 prescribes, simply ordered Furnace to remove his fingers from the food port rather than immediately discharging pepper spray on him. OP 29 directs

correctional officers to 'issue a warning that chemical agents will be used' likely because 'the threat of the use of mace, except in a few instances, brings about compliance and in most instances, avoids any necessity of physical force.'. . . The officers are entitled to qualified immunity for 'reasonable, but mistaken, beliefs as to the facts establishing the existence of ... exigent circumstances,'. . . and the district court granted qualified immunity on summary judgment largely on this premise. However, Furnace's resting his fingers on the port appears *less* threatening than the situation described by OP 29, where an inmate "refuses to relinquish control of the food port, despite the warning." We therefore disagree with the district court's conclusion that Furnace's actions, as he describes them, were reasonably perceived as an exigency that justified deviation from OP 29 and justified discharging pepper spray at Furnace without warning. . . .Applying the *Hudson* factors to the facts as Furnace alleges them, we find that a significant amount of force was employed without significant provocation from Furnace or warning from the officers. We therefore conclude that qualified immunity was inappropriately granted at the summary judgment phase of this litigation. . . . We caution that we do not mean to suggest that any and every deviation from prison policy automatically jeopardizes a correctional officer's entitlement to qualified immunity. . . . However, barring urgency or exigent circumstances, that important interest is less compelling when the appropriate response to a situation has been prescribed by the prison's own written policies.")

Marquez v. City of Phoenix, 693 F.3d 1167, 1175, 1176 n.8 (9th Cir. 2012) ("Here the relevant factors favor a finding that this use of force was reasonable. Once Roper and Guliano traversed Ronald's barricade, they were greeted by a blood-spattered room, an injured adult, and a child in evident distress. This alone was cause to believe that at least one serious crime had occurred. As a result, this case is easily distinguished from the only instance in which we have found the use of an electronic control device to be unreasonable-where officers deployed the device in 'probe mode' against two unarmed women, who had committed (at most) minor infractions and who were not actively resisting arrest. *Mattos,* 661 F.3d at 445. It also renders inapposite those cases in which police are summoned to protect mentally disturbed individuals from themselves. *See, e.g., Drummond,* 343 F.3d at 1058. . . . [A]lthough the officers used significant force in this case, it was justified by the considerable government interests at stake. . . . Because we conclude that there was no constitutional violation here, we need not reach the district court's alternative conclusion that the officers were entitled to qualified immunity because any violation of the Fourth Amendment was not clearly established at the time of the incident. . . We do note, however, our recent discussion in *Mattos.* As that case makes clear, as late as 2006 there was no case law even suggesting—let alone clearly establishing—that the use of an electronic control device on an individual suspected of domestic violence who was actively resisting arrest violated the Constitution. . . While this incident occurred several months later, there were no intervening legal developments, which would have placed any possible violation that occurred in this case 'beyond debate.'. . *See generally Cockrell v. City of Cincinnati,* 2012 U.S.App. Lexis 3787, *11 (6th Cir.2012) (unpublished) (collecting cases and concluding that as of 2009 courts had granted qualified immunity whenever "plaintiffs [were] tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers").

Marquez v. City of Phoenix, 693 F.3d 1167, 1180 (9th Cir. 2012) (Schroeder, J., dissenting in part) ("I agree with the majority that TASER adequately warned that repeated shocks in stressful situations could lead to death. I therefore disagree with the majority's holding that the force was not deadly. Because there was no established law on the point at the time of Ronald's death, however, I concur in the result on the federal claim discussed in Part III of the majority opinion. The officers were entitled to qualified immunity. *See Mattos v. Agarano*, 661 F.3d 433, 452 (9th Cir.2011) (en banc).")

Nelson v. City of Davis, 685 F.3d 867, 884-87 (9th Cir. 2012) ("Defendants correctly note that there is no binding precedent that has specifically addressed the use of pepperball projectiles. As we have previously held, however, '[a]n officer is not entitled to qualified immunity on the ground[ ] that the law is not clearly established every time a novel method is used to inflict injury.'. . Pepperball projectiles, while a relatively new means of applying both pepper spray and concussive force to the target, merely combine two types of force that we have already recognized as unreasonable when aimed at individuals who pose no threat and have committed, at most, minor offenses. . . In the cases in which we have held that the unreasonable application of a new form of force was not clearly established, our holdings were premised on the fact that these particular methods represented novel means of applying pain. [collecting cases] Although the pepperball projectile is a relatively new mechanism by which a combination of concussive impact and chemical irritants can be applied to individuals by law enforcement, the type of pain inflicted is the same or greater than that caused by weapons that this court has already recognized constitute excessive force when applied individually under similar circumstances. Thus, just as our prior cases provided notice to all reasonable officers that targeting Nelson and his group with a projectile weapon with concussive force that could cause serious physical injury *or* targeting them with pepper spray was unreasonable under the Fourth Amendment, our precedents make it equally clear that utilizing a weapon against Nelson's group that combined *both* of these forms of force amounted to a constitutional violation. . . . In light of our holding in *Deorle*, a reasonable officer would have known that firing projectiles, including pepperballs, in the direction of individuals suspected of, at most, minor crimes, who posed no threat to the officers or others, and who engaged in only passive resistance, was unreasonable. . . . Under the factual circumstances present in this case, a reasonable officer would have been on notice that both the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors, and the release of pepper spray in the area occupied by those individuals, would constitute unreasonable force in violation of the Fourth Amendment. The defendants contend that a consideration of the larger context in which the force was used compels a different conclusion. They are correct that the context of the officers' actions must be considered, and indeed in reaching our conclusion, we have taken into account the particular circumstances in which the use of force occurred on Picnic Day at U.C. Davis. We must nonetheless conclude that the unreasonableness of their conduct would have been known to any reasonable officers. Although the officers used force against Nelson and his group during their attempt to disperse a crowd, there was no exigency motivating the officers' actions and they were aware at the time of the shooting

that they were using force that might lead to serious injury against non-threatening individuals who had committed no serious crime. . . . We hold that a reasonable officer should have known that the firing of the pepperball gun towards Nelson and his friends, given the minimal governmental interests at stake, was in violation of Nelson's clearly established Fourth Amendment right, even when that force was applied in the larger context of crowd dispersal.")

Glenn v. Washington County, 673 F.3d 864, 872, 877-80 (9th Cir. 2011) (denying reh'g en banc and amending prior opinion) ("Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent Lukus from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution; could be worse than the problem. On the facts presented here, viewed favorably to the plaintiff, the officers' use of force was not undisputably reasonable. The district court also held that the officers were justified in shooting Lukus with the beanbag gun because he posed an immediate threat to officers and bystanders. In coming to this conclusion, the district court relied primarily on Lukus' possession of a knife. Although there is no question this is an important consideration, it too is not dispositive. Rather, courts must consider 'the totality of the facts and circumstances in the particular case'; otherwise, that a person was armed would always end the inquiry. . . . The district court cited several reasons the defendants offered for their decision to use a beanbag shotgun rather than a taser, such as that Lukus' position and distance relative to the officers would have made firing the taser difficult. But there was conflicting evidence on these points, so on summary judgment we must assume that a taser would have been a feasible option. Although a jury could ultimately disagree that the officers were in optimal taser range or that use of a taser was otherwise feasible or preferable, these are disputed questions of fact. . . . Balancing these various considerations, we hold that the district court erred in granting summary judgment on the constitutionality of the officers' use of force. We recognize that the officers have offered evidence that could support a verdict in their favor. A jury could view the facts as the district court did, and likewise reach the conclusion that the officers' use of force was reasonable. But on summary judgment, the district court is not permitted to act as a factfinder. The circumstances of this case can be viewed in various ways, and a jury should have the opportunity to assess the reasonableness of the force used after hearing all the evidence. . . .As the district court recognized, "the officers' decision to employ the beanbag gun is critical to the resolution of" the reasonableness of the lethal force as well '[b]ecause the use of less-lethal force precipitated the use of deadly force.'. . . Because there is a triable issue of whether shooting Lukus with the beanbag shotgun was itself excessive force, under *Billington* there is also a question regarding the subsequent use of deadly force. Even assuming, as the district court concluded, that deadly force was a reasonable response to Lukus' movement toward the house, a jury could find that the beanbag shots provoked Lukus' movement and thereby precipitated the use of lethal force. If jurors conclude that the provocation–the use of the beanbag shotgun–was an independent Fourth

Amendment violation, the officers 'may be held liable for [their] otherwise defensive use of deadly force.'. . Even if the jury determines that the use of 'less-lethal' force was justifiable, however, the question still remains whether escalating so quickly to deadly force was warranted. The critical issue is whether Lukus posed an immediate safety risk to others. . . . Even before the final beanbag round was fired, the officers began firing a total of 11 shots at Lukus, eight of which struck him, causing him to bleed to death on his grandmother's porch within minutes. . . . As with the use of beanbags, there are material questions of fact about Lukus' and the officers' actions that preclude a conclusion that the officers' rapid resort to deadly force was reasonable as a matter of law. Again, the disputed facts and inferences could support a verdict for either party, and the jury must resolve these factual disputes. Accordingly, we reverse the district court's summary judgment on the use of lethal force.")

Young v. County of Los Angeles, 655 F.3d 1156, 1160, 1162, 1163, 1165-68 (9th Cir. 2011) ("Both pepper spray and baton blows are forms of force capable of inflicting significant pain and causing serious injury. As such, both are regarded as 'intermediate force' that, while less severe than deadly force, nonetheless present a significant intrusion upon an individual's liberty interests. . . . In pepper spraying Young and striking at him multiple times with a baton while landing at least two blows, Wells used a significant amount of two forms of intermediate force known to cause serious pain and to lead in some cases to serious physiological consequences. Whatever such force is ultimately labeled, there is no question that its use against an individual is a sufficiently serious intrusion upon liberty that it must be justified by a commensurately serious state interest. . . .When, as here, a suspect's disobedience of a police officer takes the form of passive noncompliance that creates a minimal disturbance and indicates no threat, immediate or otherwise, to the officer or others, it will not, without more, give rise to a governmental interest in the use of significant force. Because neither of Young's suspected offenses indicated that he posed a danger to Wells or the public such that there would be a heightened interest in the use of force to subdue him, the 'severity of the crime at issue' weighs against a finding that the government had an interest in the use of significant force. . . .Having determined that the force allegedly used against Young was significant and that the governmental interest in the use of that force minimal, we conclude that, taking the facts in the light most favorable to Young, the force used by Wells was excessive in violation of the Fourth Amendment. Our conclusion comports with the logical notion that it is rarely necessary, if ever, for a police officer to employ substantial force without warning against an individual who is suspected only of minor offenses, is not resisting arrest, and, most important, does not pose any apparent threat to officer or public safety. . . . The legal principles that dictate our conclusion that the force involved was excessive were clearly established and indeed, long-standing, prior to 2007, the time of the use of force at issue in this case. . . .The principle that it is unreasonable to use significant force against a suspect who was suspected of a minor crime, posed no apparent threat to officer safety, and could be found not to have resisted arrest, was thus well-established in 2001, years before the events at issue in this case. Just as in *Blankenhorn*, these well-established principles of Fourth Amendment law sufficed to put Wells on notice that the force used was excessive–that to pepper spray an individual and strike him with a baton for disobeying a traffic

officer's order to get back in his car (and sitting instead on the curb eating his broccoli) constituted a violation of the Fourth Amendment.")

Torres v. City of Madera, 648 F.3d 1119, 1124, 1127-30 (9th Cir. 2011) ("The question that confronts us now is whether Officer Noriega's conduct in mistakenly applying deadly force to Everardo was objectively unreasonable under the totality of the circumstances. . . . [I]f Officer Noriega knew or should have known that the weapon she held was a Glock rather than a Taser, and thus had been aware that she was about to discharge deadly force on an unarmed, non-fleeing arrestee who did not pose a significant threat of death or serious physical injury to others, then her application of that force was unreasonable. . . . Taking into account all the facts and circumstances facing Officer Noriega at the time of the mistaken shooting, a reasonable jury could find that her mistake was unreasonable because her own prior incidents of weapon confusion put her on notice of the risk of repetition, her daily practice drawing weapons at her sergeant's instruction equipped her with the training to avoid such incidents, and the non-exigent circumstances surrounding Everardo's deadly shooting did not warrant such hasty conduct heightening the risk of weapon error. . . . [I]f a jury were to find Officer Noriega's mistaken belief that she was holding her Taser rather than her Glock unreasonable, her use of force in this situation was excessive and violated Everardo's Fourth Amendment rights. Because there remain material factual issues in dispute on which a jury could make such a finding, the Torres Family has properly alleged the violation of a constitutional right, and summary judgment based on failure to do so was improper. . . . While the constitutional violation prong concerns the reasonableness of the officer's *mistake of fact*, the clearly established prong concerns the reasonableness of the officer's *mistake of law*. . . . Thus, for purposes of determining whether Officer Noriega is entitled to qualified immunity under *Saucier's* second prong, we assume she 'correctly perceived all of the relevant facts' and ask whether an officer could have reasonably believed at the time that the force actually used was lawful under the circumstances. . . . [This is a case where the suspect was already arrested, handcuffed, and in the back seat of a patrol car. There is no suggestion that Everardo was armed, that he was fleeing, or that he posed a threat to any officers or anyone else. While locating the outer contours of the Fourth Amendment may at times be a murky business, few things in our case law are as clearly established as the principle that an officer may not 'seize an unarmed, nondangerous suspect by shooting him dead' in the absence of 'probable cause to believe that the [fleeing] suspect poses a threat of serious physical harm, either to the officer or to others.'. . Officer Noriega applied deadly force to an unarmed, nondangerous suspect, and there could be no reasonable mistake that this use of force was proscribed by law. . . . *Jensen* and *Wilkins* are materially indistinguishable from this case for purposes of qualified immunity. Although those two cases involved mistakes of identity, whereas here we deal with a mistake of weapon, we have never required a prior case 'on all fours prohibiting that particular manifestation of unconstitutional conduct' to find a right 'clearly established.'. . . Were we to require such granular specificity under the second *Saucier* prong, we would effectively wrench of all meaning the Supreme Court's admonition that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . While the test of whether a right is 'clearly established' must not be so broad that the important shield of qualified immunity is rendered meaningless, . . . nor can it be so narrow that the immunity

is transformed from one 'qualified' in nature to one absolute. . . . While a jury might ultimately find Officer Noriega's mistake of weapon to have been reasonable, it was inappropriate for the district court to reach this conclusion in the face of material disputes of fact. At this stage of the proceeding, Officer Noriega has not shown an entitlement to qualified immunity, and summary judgment was therefore improperly granted.")

Torres v. City of Madera, 648 F.3d 1119, 1130 (9th Cir. 2011) (Siler, J., concurring) ("I concur in the majority opinion herein. However, because I was on the original panel in the Fourth Circuit in *Henry v. Purnell,* 619 F.3d 323 (4th Cir.2010), *vacated and superceded by Henry v. Purnell,* __ F.3d __, 2011 WL 2725816 (4th Cir. July 14, 2011) (en banc), I should explain why I agreed in *Henry* that the officer was entitled to qualified immunity, but the officer in this case does not have that protection. . . . In my opinion, unlike the case law in the Fourth Circuit at the time of the conduct in *Henry,* the law in effect in the Ninth Circuit in this case was clearly established by *Wilkins v. City of Oakland,* 350 F.3d 949, 955 (9th Cir.2003), and *Jensen v. City of Oxnard,* 145 F.3d 1078, 1086 (9th Cir.1998). In both *Wilkins* and *Jensen,* it was a situation in which one officer shot another thinking the officer who was shot was someone else. Thus, both were situations in which the officer had a mistake of fact, thinking the victim was a criminal offender. Moreover, in the case at bar, the person who was killed, Torres, was already secured and in the police cruiser. In contrast, the circumstances were that Henry was not in custody but was being pursued on foot by Officer Purnell, who had an arrest warrant for Henry. The majority in *Henry* (en banc) found clearly established law from *Tennessee v. Garner,* 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), that an officer who shoots a fleeing suspect violates the suspect's Fourth Amendment rights if there was no probable cause to believe that the suspect posed a significant threat of death or physical injury to the officer or others. *Id.* Moreover, the majority in this case at bar suggests that *Garner* was the clearly established law at the time of the conduct in our case. I am not prepared to go that far, and I think we need not do so, because the precedent from *Wilkins* and *Jensen* clearly established the federal law for the Ninth Circuit to be followed in this case.")

Liberal v. Estrada, 632 F.3d 1064, 1078-82 (9th Cir. 2011) ("Because we hold that Officer Estrada's mistake of fact was not reasonable, he is not entitled to qualified immunity. Officer Estrada asks us to conclude that it is a reasonable mistake to believe that windows that are rolled down and that cannot be viewed at all are in fact rolled up and tinted. This we cannot do. . . . Construing the facts in the light most favorable to Plaintiff, we must assume that Officer Estrada could not have seen Plaintiff's front car windows at all and that, indeed, the two made eye contact through the open windows. That being so, it would not be reasonable for Officer Estrada to believe that he had seen illegally tinted front windows. The officer-defendants also argue that Officer Estrada had reasonable suspicion to stop and detain Plaintiff because the officer reasonably believed that Plaintiff was trying to avoid him by making several turns and then parking next to a dumpster in a darkened alley. . . .[E]ven if Officer Estrada reasonably suspected that Plaintiff was avoiding him, such noncooperation, without more, does not support a suspicion that Plaintiff was engaged in criminal activity. We therefore affirm the district court's denial of qualified immunity to Officer Estrada for the initial traffic stop. . . . In this case, the use of force against Plaintiff

occurred *after* he had complied with Officer Estrada's requests for his driver's license and registration. . . .There was no evidence to suggest that Plaintiff was either armed or dangerous. Construing the facts in favor of Plaintiff, the use of force was not reasonable and violated clearly established constitutional law. Therefore, Officers Estrada and Keegan are not entitled to qualified immunity. . . . Just because the required analysis in this case involves a fact-intensive determination of reasonableness, rather than application of a bright-line rule, does not mean that there are no situations in which clearly established constitutional violations can occur. The legal test for deciding whether the length of a detention was unreasonable in violation of the Fourth Amendment was clearly established at the time that the officers detained Plaintiff, and we apply it here. . . . In this case, Officer Estrada had checked Plaintiff's license with dispatch 36 seconds after the stop. . . . Plaintiff contends that he was detained not as part of an investigative stop, but for an 'attitude adjustment.' The facts, seen in the light most favorable to him, support that conclusion. . . . Prolonging a detention merely to engage in an 'exaggerated display[ ] of authority' is unreasonable and unconstitutional. . . . We therefore hold that an objectively reasonable officer responding to the scene of Plaintiff's detention would have known that its duration of 45 minutes without probable cause, during which the officers were not diligently pursuing their investigation was an unlawful detention of unreasonable duration in violation of clearly established Fourth Amendment law.")

Bryan v. MacPherson, 630 F.3d 805, 825-33 (9th Cir. 2010) (superseding opinon and denial of reh'g en banc) ("We, along with our sister circuits, have held that tasers and stun guns fall into the category of non-lethal force. . . Non-lethal, however, is not synonymous with non-excessive; all force–lethal and non-lethal–must be justified by the need for the specific level of force employed. . . Nor is 'non-lethal' a monolithic category of force. A blast of pepper spray and blows from a baton are not necessarily constitutionally equivalent levels of force simply because both are classified as non-lethal. Rather than relying on broad characterizations, we must evaluate the nature of the specific force employed in a specific factual situation. . . . .We recognize the important role controlled electric devices like the Taser X26 can play in law enforcement. The ability to defuse a dangerous situation from a distance can obviate the need for more severe, or even deadly, force and thus can help protect police officers, bystanders, and suspects alike. We hold only that the X26 and similar devices when used in dart-mode constitute an intermediate, significant level of force that must be justified by the governmental interest involved. . . . Officer MacPherson relies heavily on the Eleventh Circuit opinion in *Draper v. Reynolds*, 369 F.3d 1270 (11th Cir.2004), which addressed the use of a taser during the arrest of an aggressive, argumentative individual. Although we do not adopt *Draper* as the law of this circuit, the present case is clearly distinguishable from the one before the Eleventh Circuit. . . . [T]he officer in *Draper* was confronting a belligerent, argumentative individual who was angrily pacing within feet of his position. Officer MacPherson, by contrast, was confronted with a half naked, unarmed, stationary, apparently disturbed individual shouting gibberish at a distance of approximately twenty feet. The only similarity to the factual circumstances in *Draper* is that both Draper and Bryan were stopped for a traffic violation, were loud, and were tasered by the police. . . . [T]here was no substantial government interest in using significant force to effect Bryan's arrest for these misdemeanor

violations that even the State of California has determined are minor. . . . Officer MacPherson now argues that use of the taser was justified because he believed Bryan may have been mentally ill and thus subject to detention. To the contrary: if Officer MacPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means. . . . Thus, whether Officer MacPherson believed that Bryan had committed a variety of nonviolent misdemeanors or that Bryan was mentally ill, this *Graham* factor does not support the deployment of an intermediate level of force. . . . [W]e have held that police are 'required to consider A[w]hat other tactics if any were available" to effect the arrest.' *Headwaters,* 240 F.3d at 1204 (quoting *Chew,* 27 F.3d at 1443). . . . We do not challenge the settled principle that police officers need not employ the 'least intrusive' degree of force possible. . . . We merely recognize the equally settled principle that officers must *consider* less intrusive methods of effecting the arrest and that the presence of feasible alternatives is a *factor* to include in our analysis. . . . [W]hile by no means dispositive, that Officer MacPherson did not provide a warning before deploying the X26 and apparently did not consider less intrusive means of effecting Bryan's arrest factor significantly into our *Graham* analysis. . . . We thus conclude that the intermediate level of force employed by Officer MacPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing, without advancing in any direction, next to his vehicle. Officer MacPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer MacPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply 'no immediate need to subdue [Bryan]' before Officer MacPherson's fellow officers arrived or less-invasive means were attempted. . . Officer MacPherson's desire to quickly and decisively end an unusual and tense situation is understandable. His chosen method for doing so violated Bryan's constitutional right to be free from excessive force. . . .All of the factors articulated in *Graham*–along with our recent applications of *Graham* in *Deorle* and *Headwaters*–placed Officer MacPherson on fair notice that an intermediate level of force was unjustified. . . . However, as of July 24, 2005, there was no Supreme Court decision or decision of our court addressing whether the use of a taser, such as the Taser X26, in dart mode constituted an intermediate level of force. Indeed, before that date, the only statement we had made regarding tasers in a published opinion was that they were among the 'variety of non-lethal "pain compliance" weapons used by police forces.'. . And, as the Eighth Circuit has noted, '[t]he Taser is a relatively new implement of force, and case law related to the Taser is developing.' *Brown v. City of Golden Valley,* 574 F.3d 491, 498 n. 5 (8th Cir.2009). Two other panels have recently, in cases involving different circumstances, concluded that the law regarding tasers is not sufficiently clearly established to warrant denying officers qualified immunity. *Mattos v. Agarano,* 590 F.3d 1082, 1089-90 (9th Cir.2010); *Brooks v. City of Seattle,* 599 F.3d 1018, 1031 n.18 (9th Cir.2010). Based on these recent statements regarding the use of tasers, and the dearth of prior authority, we must conclude that a reasonable officer in Officer MacPherson's position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July 2005. Accordingly, Officer MacPherson is entitled to qualified immunity.").

Byrd v. Maricopa County Sheriff's Dept, 629 F.3d 1125, 1146, 1147 (9th Cir. 2011) ("This litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an inmate's right under the Fourth Amendment to be free from unreasonable searches. Because the cross-gender nature of the search is a critical factor in the strip searches discussed in these cases, we cannot agree with our dissenting colleagues that the gender of the officer conducting the search is irrelevant. . . Interestingly, Maricopa County never challenged the precept that cross-gender strip searches are constitutionally infirm in the absence of an emergency. Rather, it painstakingly attempted to establish that the cross-gender search Byrd underwent was not a strip search. Indeed, Maricopa County's policy prohibits cross-gender strip searches. The admission implicit in Maricopa County's determined effort to avoid having the search characterized as a strip search, coupled with the nearly universal opprobrium expressed in the cases addressing cross-gender strip searches, reflects the extreme degree of unreasonableness presented by the facts of this case. . . In this case, the indignity of the non-emergency strip search conducted by an unidentified female cadet was compounded by the fact that there were onlookers, at least one of whom videotaped the humiliating event. For these reasons, we conclude that the cross-gender strip search, as conducted in this case, was unreasonable.")

Wilkinson v. Torres, 610 F.3d 546, 551-53 (9th Cir. 2010) ("Here, Torres did not violate a constitutional right. Even construing the facts in the light most favorable to Plaintiffs, a reasonable officer in Torres' position had probable cause to believe that Wilkinson posed an immediate threat to the safety of Key and himself. . . When he fired the shots, Torres was standing in a slippery yard with a minivan accelerating around him. The driver of the minivan had failed to yield to police sirens as well as to direct commands to put his hands up and to stop the vehicle. . . The minivan was accelerating, its tires were spinning, mud was flying up, and a fellow officer was nearby either lying fallen on the ground or standing but disoriented. The situation had quickly turned from one involving a crashed vehicle to one in which the driver of a moving vehicle, ignoring police commands, attempted to accelerate within close quarters of two officers on foot. In this 'tense, uncertain, and rapidly evolving' situation, a reasonable officer had probable cause to believe that the threat to safety justified the use of deadly force. . . . Because we conclude as a matter of law that deadly force was authorized to protect a fellow officer from harm, it makes no difference in this case whether Torres fired seven rounds or eleven. . . . Because we conclude that Torres did not violate a constitutional right, we need not reach the question of whether that right was clearly established.")

Wilkinson v. Torres, 610 F.3d 546, 555, 556 (9th Cir. 2010) (Marshall, District Court Judge, dissenting) ("I respectfully dissent on the ground that the majority today decides as a matter of law what I believe is a question of fact properly reserved for the jury. The reasonableness of an officer's use of excessive force pursuant to the Fourth Amendment is a fact-intensive inquiry for the jury, which if raised on summary judgment, must be evaluated in the light most favorable to the victim. . . Similarly, where the same disputed facts also give rise to both a Fourth Amendment claim and a Fourteenth Amendment 'purpose to harm' claim, material and triable issues of fact exist as to

both. . . . I find we lack jurisdiction to review Torres's appeal that he is entitled to qualified immunity because there are material issues of fact in dispute. . . .If I were to accept jurisdiction of this case, I would nonetheless affirm the district court's denial of summary judgment.")

Espinosa v. City and County of San Francisco, 598 F.3d 528, 538, 539 (9th Cir. 2010) ("Where a police officer 'intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.' *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir.2002). If an officer intentionally or recklessly violates a suspect's constitutional rights, then the violation may be a provocation creating a situation in which force was necessary and such force would have been legal but for the initial violation. . .In this case, the district court did not err in finding that there are genuine issues of fact regarding whether the officers intentionally or recklessly provoked a confrontation with Sullivan. Evidence strongly suggests that the initial entry into the apartment by Officer Morgado violated Sullivan's Fourth Amendment rights. Viewing the evidence in the light most favorable to the plaintiffs, there is evidence that the illegal entry created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable. . . . Based on the foregoing, the district court properly denied the summary judgment motion regarding qualified immunity because defendants failed to show as a matter of law that they did not violate Sullivan's Fourth Amendment rights.").

Torres v. City of Madera, 524 F.3d 1053, 1054-57 & n.5 (9th Cir. 2008) ("In this interlocutory appeal, we face an issue remarkably similar on its facts to that faced by the Fourth Circuit in *Henry v. Purnell*, 501 F.3d 374 (4th Cir.2007). There, a deputy sheriff, intending to deploy a Taser device holstered near his firearm, instead drew and fired his service weapon, wounding a suspect fleeing arrest. Here, Madera City Police Officer Marcy Noriega . . . made the same mistake with even more tragic consequences: she shot and killed Everardo Torres ("Everardo"), an arrestee sitting handcuffed in the back of a patrol car. We conclude that Everardo was seized within the meaning of the Fourth Amendment, and further conclude, as did our sister circuit, that the officer's mistake is governed by Fourth Amendment reasonableness analysis. . . . Madera argues that Everardo was not 'seized' by the firing of the Glock because the Glock was not a 'means intentionally applied,' *Brower*, 489 U.S. at 597. However, the Ninth Circuit employs a 'continuing seizure' rule, which provides that 'once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers.' . . Because Everardo was handcuffed and placed in the back of the patrol car, where he remained when Officer Noriega fired, Everardo remained 'in the custody of the arresting officers,' and the officers' conduct continued to be governed by the Fourth Amendment. Even though Everardo was 'seized' within the meaning of the Fourth Amendment, Officer Noriega can only be liable under Section 1983 if her conduct was unreasonable. . . .There is no question that Officer Noriega intended to draw her Taser but mistakenly drew her Glock. Faced with almost precisely the same situation–an officer's mistake in drawing his Glock when he intended to draw his Taser–the Fourth Circuit concluded that the relevant inquiry was whether the officer's mistake in using the Glock rather than the Taser was objectively unreasonable. . . . We agree that this is the appropriate inquiry. The Supreme Court has applied a reasonableness analysis

to honest mistakes of fact in a variety of situations. . . Although Everardo was already 'seized' at the time of the shooting, it is Officer Noriega's mistaken use of her Glock–not the preceding acts of placing Everardo under arrest and handcuffing him–that the district court must examine for reasonableness. This is in keeping with our 'continuing seizure' cases, where our focus is on the aspect of the seizure the plaintiff alleges is 'unreasonable.' . . . *Henry* concluded, and we agree, that five factors were relevant to the reasonableness determination: (1) the nature of the training the officer had received to prevent incidents like this from happening; (2) whether the officer acted in accordance with that training; (3) whether following that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training. . . While these factors are relevant to the determination of whether Officer Noriega acted reasonably, we also stress that 'the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments.' . . Since the parties did not brief the issue of whether Officer Noriega's mistake was a reasonable one, the factual record is insufficiently developed for this court to make this determination, and we remand to the district court to determine in the first instance whether Noriega's conduct was unreasonable under *Graham*, 490 U.S. at 396-97, and to otherwise proceed with the matter. . . . Because we cannot resolve the reasonableness inquiry here, we cannot resolve whether Officer Noriega's conduct violated the Fourth Amendment–a question whose resolution is condition precedent to the qualified immunity determination. . . Of course, should the district court conclude that Officer Noriega acted unreasonably, Officer Noriega may nevertheless be entitled to qualified immunity if the objective unreasonableness of her conduct in the course of Everardo's seizure was not clearly established.").

Estate of Montanez v. City of Indio, No. 517CV00130ODWSHK, 2018 WL 1989533, at *12 (C.D. Cal. Apr. 25, 2018) ("Turning to the force used by Officer Cordova, viewing the evidence in the light most favorable to Plaintiffs, the state law as of August 20, 2016, when the shooting occurred, gave Officer Cordova fair warning that his use of deadly force was unconstitutional. Therefore, Defendants' argument that Officer Cordova is entitled to qualified immunity on this claim at the summary judgment phase fails. As described above, a jury could reasonably conclude that (1) both Officers knew or had reason to know that Montanez was mentally ill, (2) Montanez at most committed the misdemeanor of exhibiting a potentially deadly weapon, and (3) Cordova could have used less intrusive force given that Cordova and Fowler outnumbered Montanez, and Montanez was elderly and significantly smaller than Cordova. In *Estate of Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), the Ninth Circuit determined that the case law as of 2013 clearly established that an officer's use of deadly force against an armed individual who was not pointing a weapon at the officer violated the Fourth Amendment. The *Gelhaus* court cites *George v. Morris*, 736 F.3d 829 (9th Cir. 2013), where police officers responded to the 911 call of the decedent's wife, who could be heard exclaiming that her husband had a gun. . . The husband, sixty-four years old, with terminal brain cancer, was using a walker when he moved onto his balcony in view of the officers. . . He was holding a gun in his left hand with the barrel pointing down. . . The officers identified themselves and instructed him to show his hands. . . At this point, an officer testified

that the husband 'turn[ed] straight east and raise[d] [the gun]' and 'point[ed] it directly at [him],' prompting him to fire. . . However, there was reliable evidence to support the plaintiff's version of the event, so the court assumed the husband did not take any other actions that would have been objectively threatening and held that 'a reasonable fact-finder could conclude the deputies' use of force was constitutionally excessive.'. . Here, viewing the facts in the light most favorable to Plaintiffs, Officer Cordova used lethal force against Montanez, who was mentally ill, barefoot, seventy-one years old, of slight build, and holding a pair of scissors that were not pointed directly toward Cordova. The Court finds that Defendants have not met the burden of proving the absence of a clearly established right under these circumstances. Therefore, considering the law at the time set forth in *George* and *Gelhaus*, the Court cannot find that Officer Cordova is entitled to qualified immunity.")

Estate of Price v. Roseburg Police Dep't, No. 6:15-CV-01114-JR, 2017 WL 4287197 (D. Or. Sept. 27, 2017) ("City defendants' arguments concerning qualified immunity focus exclusively on whether 'the law ... in the Ninth Circuit was unsettled as to what circumstances constituted excessive use of a Taser.'. . Contrary to city defendants' assertion, Taser-specific case law is not necessary to resolve whether the right at issue was clearly established. . . Likewise, a court may 'look to whatever decisional law is available' – including 'decisions of state courts, other circuits, and district courts' and 'unpublished decisions'– in determining whether qualified immunity attaches. . . . In sum, the Court finds that no reasonable jury could conclude that Walton's or Cordell's actions were objectively reasonable based on the totality of the circumstances. The Court recognizes that Walton and Cordell were required to make difficult judgments. Nevertheless, once Price was permanently down, Walton tased him an additional thirteen times – and Cordell tased Price twice and pepper sprayed him at least once – despite the fact that Price was unarmed, non-violent, had committed no serious crime, offered no active resistance, and posed no tangible threat to anyone, save perhaps to himself. The degree of force used, at least after Walton's second tase, was excessive. . . . The Court finds it was clearly established by 2013 that conduct analogous to Walton's or Cordell's was unconstitutional. . . . In fact, it was well-settled long before the underlying events transpired that officers cannot use intermediate force against a non-threatening individual simply for failing to comply with police commands.")

Abuka v. City of El Cajon, No. 17-CV-00089-BAS-NLS, 2017 WL 3671512, at *4–5 (S.D. Cal. Aug. 25, 2017) ("The fact that an officer's conduct, leading up to a deadly confrontation, was imprudent, inappropriate, or even reckless is not sufficient to avoid dismissal where the officer's conduct at the time of the shooting does not otherwise shock the conscience. . . Moreover, looking at pre-shooting tactics does risk 'the sort of hindsight bias the Supreme Court has forbidden.'. . Furthermore, the Court recognizes that in *Mendez*, the Supreme Court rejected the Ninth Circuit's 'provocation rule' that an officer may be liable for an otherwise reasonable use of force where the officer intentionally or recklessly provoked the violent confrontation by an act that was itself an independent Fourth Amendment violation. . . Nonetheless, as discussed above, whether Officer Gonsalves acted with a purpose to harm unrelated to any law enforcement objective will be a key

factual analysis in this case. His pre-shooting conduct may be relevant to support a claim that Officer Gonsalves was not acting to fulfill a law enforcement objective, but instead was trying to teach the suspect a lesson, bullying him, attempting to get even with him, or intending to harm, terrorize, or kill him. . . Therefore, the Court **DENIES** the Motion to Strike while noting that the fact that Officer Gonsalves may have acted negligently will be insufficient on its own to support the alleged constitutional violation.")

K.J.P. v. County of San Diego, No. 3:15-CV-2692-H-MDD, 2017 WL 3537740, at *3 (S.D. Cal. Aug. 17, 2017) ("The Supreme Court recently reversed the Ninth Circuit's provocation rule. *County of Los Angeles, Calif. v. Mendez*, 137 S.Ct. 1539, 1546-47 (2017). In doing so, however, the Court did not say that provocation was irrelevant, only that it should be considered as part of the 'totality of the circumstances.'. . Thus, a triable question of fact remains as to whether Phounsy was provoked still defeats summary judgment. . . . Plaintiffs argue that Phounsy was mentally ill at the time of the incident, as a result of being unable to sleep for multiple days. . . Furthermore, when Deputies Krull and Collins arrived on scene, a jury could find that there was no need to immediately subdue Phounsy[.] . . . Given the disputed facts, the Court declines to find qualified immunity at this time.")

Estate of Simpson v. Yellowstone Cty., 229 F.Supp.3d 1192, 1207-08 (D. Mont. 2017) ("Unlike law enforcement in *Mullenix*, *Garner*, *Kisela*, and *Plumhoff*, Rudolph and Robinson were not confronted with the hazy border between excessive force and force appropriate to effect Simpson's arrest, because they had no legal basis for arrest. Indeed, Rudolph and Robinson did not even have probable cause to arrest Simpson. Simpson was not suspected of committing a felony or any violent crime, he had not led the deputies on a high speed chase, the deputies did not think he was armed, and he was not driving dangerously. Instead, Rudolph and Robinson merely suspected the Explorer that Simpson was driving was stolen. They knew the color, and had identified the number of doors. But even then, they admittedly were not sure whether it was the right car or one that just looked like the stolen Explorer. And, they had no idea who was driving the car. So, as Simpson was driving back toward them on White Buffalo Road, all Rudolph and Robinson had was reasonable suspicion that the vehicle was stolen. As a result, 40 years of law provided them with the authority only to conduct a *Terry* stop in order to determine whether criminal activity was afoot. . . To that end, the deputies admitted that they attempted to stop Simpson to determine whether the vehicle he was driving had been stolen. . . What makes this case quite distinct from all of the cases relied upon by the parties is Rudolph and Robinson never attempted a proper stop. They immediately used deadly force. Knowing that Simpson had 'no way out,' they parked the patrol car in the middle of the road and did not turn on the patrol car's overhead lights which would have given Simpson advance notice of the deputies' presence. . . Then, without discussing any less deadly alternative for stopping Simpson, they loaded their weapons, stepped onto a snow covered road with those weapons aimed, shouted at a man inside a moving car with its windows up, gave no warning they would shoot, allowed him four seconds to try to stop under these highly questionable circumstances on a snowy road, and then shot him. And all this where the video demonstrates that they did not have cause to believe Simpson posed a threat to them. Even without the benefit of

pre-existing court decisions, any reasonable officer would recognize that using deadly force to effect a *Terry* stop violates clearly established law. Regardless, the deputies had the benefit of long-standing case law. According to established Ninth Circuit law, in a typical *Terry* stop where an officer has no reason to suspect danger, it is a Fourth Amendment violation for an officer to employ aggressive tactics such as drawing a weapon, forcing a suspect to lie prone on the ground, and using handcuffs. . . Such tactics transform the *Terry* stop into an arrest. . . In fact, the Ninth Circuit has long recognized that '[w]here there is no need for force, *any* force used is constitutionally unreasonable.'. .That law is dispositive here. If it is well-established that officers may not so much as use handcuffs or draw a weapon to effectuate a *Terry* stop, it is axiomatic that they may not use deadly force to do so. When law enforcement illegally attempts an arrest, the 'countervailing government interest' required by *Graham* is absent. No level of force is justified in such circumstances. Given the clarity of Ninth Circuit law on the use of force in *Terry* stops, every reasonable officer would have known that the deputies' conduct violated the Fourth Amendment in light of the specific context of this case. Thus, viewing the facts in the light most favorable to the Estate, Rudolph and Robinson are not entitled to qualified immunity on the excessive force claim.")

Greer v. City of Hayward, 229 F.Supp.3d 1091, 1103-07 (N.D. Cal. 2017) ("A recent case from the Eastern District of California (which the parties inexplicably failed to cite) analyzed a similar factual scenario in which the detainee, who was clearly under the influence, 'was restrained and prone on the ground for approximately eight to ten minutes with four officers applying body-weight pressure to his back.' *Garlick v. Cty. of Kern*, 167 F. Supp. 3d 1117, 1155 (2016). The court noted that '[p]revailing precedent in the Ninth Circuit is that law enforcement officers' use of body weight to restrain a "prone and handcuffed individual [ ] in an agitated state" can cause suffocation "under the weight of restraining officers," therefore, such conduct may be considered deadly force.' *Id.* (citing *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056–67 (9th Cir. 2003)). 'Known as "compression asphyxia," prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers.' *Id.* (citation omitted). . . . Under *Drummond*, and viewing the facts in a light most favorable to plaintiff, the nature and quality of the force used here could constitute lethal force. . . . The appropriate inquiry is 'whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [he] confronted.' *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015). Greer cites to *Drummond* to support his position that 'fact patterns such as the one presented here—where officers use excessive force against a suspect in a prone position, resulting in asphyxia... do not shield officers from liability under qualified immunity.'. . The *Garlick* court agreed. . . Several unpublished Ninth Circuit decisions also support plaintiff's position. [citing cases] Accordingly, *Drummond* created clearly established law on a particularized level sufficient to give fair and clear warning to officers. . . BART and Tougas contend that officers are entitled to 'breathing room regarding use of force,' that they 'need not retreat or desist,' and have a 'right to self-defense.'. . That may be, but clearly established law indicates that the officers' use of prolonged pressure while Greer lay on the ground in a prone position was substantially likely to cause death or serious injury, and such force may not have been reasonable under the circumstances. A jury may agree with Tougas's view of the

evidence, but given the disputed facts and the clearly established law, I cannot find that Tougas is entitled to qualified immunity as a matter of law.")

Moore v. City of Berkeley, No. C14-00669 CRB, 2016 WL 6024530, at *4-6 (N.D. Cal. Oct. 14, 2016) ("Dr. Spitz's opinion that Moore died due to compression of her diaphragm that strained an already-enlarged heart has sufficient support in the record. Even though he did not say specifically what materials he reviewed, Dr. Spitz discusses the coroner's report in considerable detail. . . That report provides the officers' account of what happened. . . More importantly, the officers' deposition testimony does not establish, as a matter of law, that 'they did not use any significant body weight on or near' Moore's diaphragm. . . The whole point of independent medical analysis – whether from the coroner, Dr. Spitz, or another qualified expert – is to test whether the officers' account can be believed. And it matters all the more in cases pitting the word of the police against the silence of the dead. This is such a case. Officer Smith arrested Hayes and took him away just before the struggle started. . . Officer Brown ordered Sterling, Moore's purported caretaker, out of the apartment shortly afterwards. . . Only the involved officers saw what happened from then on. So, without body camera footage, the Court must rely on medical analysis and officer testimony alone. Faced with this conflicting evidence, a reasonable jury could find that Moore died because of the struggle. Nonetheless, the officers may still prevail on summary judgment if they can show either (1) that the force they used was reasonable under the Fourth Amendment despite its heartbreaking consequences, or (2) that no clearly established law informed a reasonable officer that it violated Moore's Fourth Amendment rights. . . .[L]ike *Deorle*, the officers had a diminished interest in using force because they confronted, not someone who had committed a serious crime, but someone who was mentally ill. . . That said, Moore continued to lash out and kick throughout the struggle, which can have significant consequences. . . That does not warrant using a gun, but it does warrant restraining Moore's limbs in the way the officers did here. Finally, officers may use 'physical coercion' when taking someone into custody. . . That is especially true when a person resists arrest. Plaintiff maintains that, rather than resisting arrest, Moore was 'bucking for air.'. . But that could only have been true later in the struggle. The moment the officers tried to arrest her, Moore yanked two officers to the floor, kicked, and screamed. . . So even if Moore started bucking for air at some point, nothing in the record suggests how the officers could have discerned when thrashing against arrest became bucking for air. And though Moore's weight suggested a higher risk of health problems, the officers had little choice but to restrain her once the struggle started. That being so, the force used – though fatal when combined with an enlarged heart – was reasonable based on what the officers could know at the time. The Court therefore GRANTS summary judgment on Plaintiff's Fourth Amendment excessive force claim. . . .Even if the force used had violated Moore's Fourth Amendment rights, qualified immunity would shield the officers from liability. To overcome this defense, clearly established law must have placed the constitutional question 'beyond debate.'. . . Put another way, the 'violative nature of particular conduct' must be clearly established when the alleged constitutional violation happened. . . Here, it was not. Plaintiff argues that *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003), made clear that the officers' conduct violated the Fourth Amendment. . . But *Drummond* was a very different case. There, the officers allegedly 'crushed Drummond against the ground' and

pressed 'their weight on his neck and torso.'. . And they continued to do so even though Drummond made 'repeated cries for air' and offered 'no resistance.'. . Here, by contrast, there is no hint of neck trauma. . . Moore also continued to thrash and kick until the moment the officers managed to apply an ankle restraint. . . She did not cry out for air. And when Moore relented, the officers relented. . . So even if Moore did not cry out because she could not, this is not a case where officers continued to use force despite having every reason to know that the person was compliant and desperate for air. . . Instead, this case resembles *Luchtel v. Hagemann*, 623 F.3d 975 (9th Cir. 2010), which held it was reasonable to restrain a woman who 'did everything she could to keep the officers from handcuffing her,' including thrashing and kicking, because 'she was afraid the officers were trying to kill her.'. . The officers pinned Luchtel to the ground but, perhaps because she did not have a heart condition, she survived. . .At bottom, this case falls too close to *Luchtel* and too far from *Drummond*. Qualified immunity therefore applies to Plaintiff's Fourth Amendment excessive force claim.")

Jackson v. Cty. of San Bernardino, 191 F. Supp. 3d 1100, 1114-15 (C.D. Cal. 2016) ("[T]he use of a Taser XREP round on a person who is elevated 10-15 feet off the ground may no longer be a 'less-than-lethal' use of force—it may be lethal. . . .There are no facts which would justify the use of lethal force against Jackson at the time Bannes allegedly deployed the Taser dart if Jackson was in an elevated position. Significantly, Bannes does not contend that use of lethal force was reasonable—only non-lethal. Viewing the facts in a light most favorable to Plaintiff, the Court does not find that Bannes' use of force as a matter of law was reasonable under the totality of the circumstances. . . .The Ninth Circuit has held that training officers received from their own police department alerting officers to the risk of serious injury or death with regards to a specific type of force used under certain circumstances is 'fair warning' that the force is unreasonable under those circumstances. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir.2003). SBSD officers are explicitly trained that they cannot deploy the Taser XREP round or the bean bag round at an individual who is in an elevated position because it can cause the individual to fall and the muscle incapacitation effects of the Taser XREP round can prevent the individual from bracing his or her fall. . . Thus, Bannes was trained that use of a Taser XREP round on an elevated individual is likely to cause serious bodily injury or death. In the Ninth Circuit, it is settled that in order to use lethal force, a reasonable officer under the same circumstances must believe himself or others face a threat of serious physical harm. . . As stated above, Bannes has not established undisputed facts which demonstrate he or others faced a serious threat of serious physical harm. Accordingly, viewing the facts in a light most favorable to Plaintiff, Bannes had more than fair warning that use of a Taser dart on an elevated person is likely to cause risk of serious bodily injury or death and that the use lethal force is unreasonable. Bannes has therefore not established that he is entitled to qualified immunity.")

Brawley v. Punt, 186 F.Supp.3d 1102, 1107-15 (D. Mont. 2016) ("The outcome of this case seems inevitable given the status of the Supreme Court's qualified immunity jurisprudence in vehicular flight cases. But it shouldn't be. The jury of any given community in our federal system plays a significant constitutional role. When violence occurs, whether prosecuted by the state or claimed

as a violation of the constitutional prohibition against the use of excessive force, the community should have a role. Part of that role is structural. Part of that role is based on the principle of transparency. Part of that role is based on a community's judgment of the propriety and extent of force that is justifiable. When lethal force is employed by the police it should not be immunized by a judge who is confronted with an argument about qualified immunity, unless, and only unless, the law is unclear. It defies common sense and logic to reduce the level of generality in this analysis to a level of specificity that randomly occurs. Such a view means the conduct of officers using deadly force to kill another human being, a citizen, is never subject to the transparency of a public trial where the objective reasonableness of the deadly use of force is measured by a properly instructed jury. . . Instead, 'I was in fear for my life,' and 'I was concerned about my fellow officers,' becomes a rote post hoc incantation. The core question is whether any community wants to immunize police officers who kill a person whenever there is an escape attempt of a fleeing vehicle. Surely the cases from our Supreme Court cannot be so broadly viewed, and yet, that seems the case. While circuit courts have generally held that the immediacy of the danger posed by a fleeing driver raises factual questions, *see, e.g., Gonzalez v. City of Anaheim*, 747 F.3d 789, 796-97 (9th Cir. 2014); *Adams v. Speers*, 473 F.3d 989, 993-94 (9th Cir. 2007); *Foster v. Patrick*, 806 F.3d 883, 888-89 (6th Cir. 2015); *Lytle*, 560 F.3d at 412-18, the Supreme Court has never found the use of deadly force in connection with a car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity, *see Mullenix v. Luna*, ___U.S.___, 136 S. Ct. 305, 310 (2015) (per curiam) (collecting cases). It is under this conflicting framework that this case must be resolved. . . .There is discretion to decide the order in which to address this two-prong test. . . When the facts are construed in favor of the plaintiff, the circumstances here give rise to a constitutional violation. On the other hand, because the law may not be clearly established, Officer Punt could be entitled to qualified immunity as a matter of law. . . .Here, Officer Punt gives the rote recitation of *Agarano* as justification for his use of force: fear for his own safety and fear for the safety of others. Construing the facts in the light most favorable to the plaintiff, a jury could find that Officer Punt s use of deadly force was not reasonable under the circumstances. There are three videos where in my view raise serious issues of fact about not only what happened but also whether the 'fear of personal safety' argument would be convincing to a jury in Billings, Montana. . . . Several cases from other circuits with facts similar to this case also provide useful guidance. [court discusses number of cases] With these cases in mind, the question here is whether Brawley posed a threat to Officer Punt. Construing the facts in the plaintiff's favor insofar as they are consistent with the video footage, . . . a jury could conclude that he did not. Officer Punt did not start firing his weapon until after the cruiser hit him. Punt ran toward the cruiser while it was reversing in an arc, made contact with the driver's side of the cruiser and hood, and then slid off the front of the cruiser. After he was on the ground, the cruiser continued to reverse away from him along its arced path. Punt then got up and approached the cruiser on foot during the cruiser's forward acceleration apparently in a direction where he was not in the zone of danger where he might be hit by the accelerating cruiser. At the point he fired, the cruiser was no longer facing him, but parallel to him as the first and fatal shot went through the passenger window into Brawley's side. Officer Punt then continued to shoot at the right side and rear of the cruiser as it accelerated down the street. . . .While it may have been objectively reasonable for Officer Punt to shoot at one

point, reasonableness changes with the circumstances. . . .Construing the facts in the plaintiff's favor, a jury could find even if there was a sufficient risk to Officer Punt at the time the cruiser initially hit him, there was no immediate risk to Officer Punt's safety at the time the shots were fired. . . The next question is whether Brawley posed an immediate threat to others. Here, a jury could conclude, as the courts determined in *Foster*, *Smith*, and *Lytle*, that he did not or that if he did, Officer Punt's response was not reasonable under the circumstances. . . . Some courts have found that the use of deadly force is reasonable where it followed a prolonged, highspeed chase. [collecting cases] Nevertheless, a jury should be allowed to assess the nature of the short chase here, the fact that Brawley hit both Officer Punt in a glancing blow and reversed into a tree in his attempt to flee, the severity of the escape involved, and all the other circumstances in the case, . . . including the fact that there were no bystanders in the immediate path of the vehicle as it accelerated forward . . . . While a fully marked and fully equipped police cruiser has a greater potential for causing harm, *see Long v. Slaton*, 508 F.3d 576, 582-83 (11th Cir. 2007) (collecting cases on unlawful uses of a stolen police cruiser), that fact alone does not justify the use of deadly force, *Smith*, 430 F.3d at 774-75; *Foster*, 806 F.3d at 887. There is no indication that Brawley was going to use the cruiser for anything other than escape or that Brawley knew about the weapons or attempted to use or gain access to either of them. . . Considering the circumstances of this case in the light most favorable to the plaintiff, a jury could conclude that Brawley was not an immediate threat to Officer Punt or others at the time he was shot and killed. Even if a jury determined that he posed a threat, it could find that Officer Punt's response to that threat was unreasonable. . . .Whether a right is clearly established is based on the specific context of a case. . . The Supreme Court has always found that an officer is entitled to qualified immunity in a shooting involving a fleeing vehicle. . . The Supreme Court always holds that the law in such cases was not clearly established. *Brosseau*, 543 U.S. at 200 (applying the law in 1999); *Plumhoff*, 134 S. Ct. at 2024 (again in 2004); *Mullenix*, 136 S. Ct. at 312 (and again in 2010). As a result, the law would only be clearly established for the purposes of this case (1) if the facts were so markedly different from those three cases as to make it distinguishable or (2) a significant change in the law occurred between 2010 and 2013. . . Neither is the case here. While I believe our Ninth Circuit law on qualified immunity is the better approach, I see no way around the view of the Supreme Court. The circumstances of this case are comparable to *Brosseau*, *Plumhoff*, and *Mullenix*. . . .Here, Officer Punt confronted a potentially armed, recently-arrested individual set on escaping who was involved in a previous prolonged standoff with law enforcement. The relevant inquiry is whether existing precedent places the conclusion that Officer Punt acted unreasonably in these circumstances 'beyond debate.'. . While *Foster*, *Smith*, and *Lytle* come close, none of the precedent squarely governs" the facts here. *Mullenix*, 136 S. Ct. at 309. Under *Mullenix*, given Brawley's conduct, it would be difficult to say that only someone 'plainly incompetent' who 'knowingly violates the law' would have acted as Officer Punt did. . . Consequently, while I disagree, Officer Punt is entitled to qualified immunity even if he was mistaken as the level of force reasonable under the circumstances. . . .*Mullenix* gives great cause for consternation. It provides no guidance on the constitutionality of similar conduct in future cases but instead stands for the proposition that a suspect fleeing in a car always poses some sort of threat and that, due to the nature of that threat, it is not clearly established—and likely never will be—that deadly force cannot be used against

that suspect. It seems to do what *Lytle* was concerned *Scott* may be interpreted to do, i.e. declare 'open season' on fleeing motorists. . . While couched as a discussion on whether the law was 'clearly established,' *Mullenix* may have the practical effect of eviscerating the Fourth Amendment reasonableness analysis beyond all usefulness in the car-chase context. Moreover, it is vexing that the applicable law in this all-too-common scenario remains 'unclear' despite at least four Supreme Court decisions and over thirty circuit court decisions addressing the use of deadly force in vehicular flight situations. However, because the law of the Supreme Court on the use of deadly force in such circumstances compels the conclusion that the law was not clearly established specifically in the context of this case, Officer Punt is entitled to qualified immunity. A far better resolution is to let a jury decide if the fleeing suspect is fair game for the use of deadly force.")

Estate of Sauceda v. City of N. Las Vegas, No. 211CV02116GMNNJK, 2015 WL 7737338, at *4, *8 (D. Nev. Dec. 1, 2015) ("Judge Gordon withheld judgment on Plaintiffs' excessive force claim under a provocation theory as well as Plaintiffs' related state law claims for intentional or negligent infliction of emotional distress, assault and battery, and negligence. Judge Gordon explained that if, in taking the facts in the light most favorable to Plaintiffs, Officer Pollard's conduct leading up to the shooting constituted a separate violation of constitutional rights, then Defendants' request for summary judgment on these claims must be denied. . . Specifically, Judge Gordon requested additional briefing on whether Officer Pollard's warrantless search of the covered porch with his gun drawn and without announcing himself as an officer constituted a constitutional violation that provoked the deadly confrontation. . . Having reviewed the parties' supplemental briefs on this issue, the Court finds that there is at least a genuine issue of material facts concerning whether Officer Pollard's actions leading up to the shooting constituted a constitutional violation. Therefore, Defendant are denied summary judgment on the remaining claims. To establish liability for the shooting under a provocation theory, Plaintiffs must show (1) Pollard's conduct leading up to the confrontation recklessly or intentionally provoked the confrontation, and (2) Pollard's reckless or intentional conduct constituted an independent Fourth Amendment violation. . . .Prior to Officer Pollard's search, the Ninth Circuit held that a misdemeanor offense 'rarely, if ever,' would justify a warrantless entry into a home. . . . Here, Officer Pollard was chasing individuals he believed may have committed the misdemeanor offense of discharging firearms within city limits. Accordingly, it was clearly established at the time of his pursuit that his actions would only be constitutional in the case of rare exigent circumstances. Defendants' argument in favor of qualified immunity relies almost entirely on the Supreme Court's recent holding in *Stanton v. Sims*, 134 S. Ct. 3 (2013). . . . Unlike the officer in *Stanton*, however, Officer Pollard—when viewing the facts in a light most favorable to Plaintiffs—did not actually witness a crime, was not wearing an identifiable uniform, did not arrive in a marked police car, and did not identify himself as an officer. Moreover, instead of merely kicking open a gate, Officer Pollard quietly approached and then, when asked to identify himself, suddenly charged onto private property late at night with his gun drawn and began chasing several fleeing individuals onto a covered porch. Given the unreasonableness of these actions, even if the exigent circumstances here—namely, suspecting that some of the pursued individuals may have previously committed the misdemeanor of discharging a firearm and might escape arrest—fell within those

'rarest cases' where the pursuit was constitutional, the Court finds that no officer could have reasonably believed that the manner in which Officer Pollard acted immediately prior to and during the pursuit was constitutional. . . The officers could not have reasonably relied on the exigency of pursuing the fleeing suspects in order to justify their otherwise unconstitutional search when that exigency was itself created by their own unreasonable actions in stealthily approaching and rushing onto the Saucedas' property with guns drawn and without identifying themselves. . . Accordingly, regardless of whether an officer could reasonably believe that pursuit of the suspected misdemeanants onto a porch was constitutional, because no officer could reasonably believe that the manner of Officer Pollard's search here was reasonable, Defendants have failed to show they are entitled to qualified immunity.")

Estate of Sauceda ex rel. Sauceda v. City of N. Las Vegas, No. 211-CV-02116-APG-NJK, 2015 WL 871611, at *5-6 (D. Nev. Mar. 2, 2015) ("Even if Pollard's use of deadly force was reasonable at the moment of the shooting, he may still be liable under a provocation theory. 'Officers may be held liable for an otherwise lawful defensive use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation.' *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1216 (9th Cir.) cert. granted sub nom. *City & Cnty. of S.F., Cal. v. Sheehan*, —— U.S. ——, 135 S.Ct. 702, 190 L.Ed.2d 434 (2014); *see also Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir.2002). Thus, to establish liability for the shooting under a provocation theory, plaintiffs must show (1) Pollard's conduct leading up to the confrontation recklessly or intentionally provoked the confrontation, and (2) Pollard's reckless or intentional conduct constituted an independent Fourth Amendment violation. . . .There is no evidence Pollard intentionally provoked the confrontation with Sauceda. But viewing all reasonable disputes of fact in plaintiffs' favor, there is a triable issue as to whether Pollard's warrantless entry onto the covered porch, with his gun drawn, was reckless. The officers were responding to misdemeanor celebratory gunfire, and Pollard admits that when he approached Sauceda's home he did not see any weapons and he did not otherwise feel threatened. . . In the dark, Pollard's fatigue-style uniform did not readily identify him as a police officer, and the officers were driving an unmarked pickup truck. Viewing witness testimony in plaintiffs' favor, Pollard drew his weapon, chased after people, entered Sauceda's covered porch without a warrant and without announcing himself as a police officer, and pointed his weapon at people. A reasonable jury could find Pollard acted recklessly. As to whether this conduct constituted an independent constitutional violation, the parties do not adequately address this question. . . .Because neither party has adequately briefed whether this conduct violates one or more constitutional rights, I will direct the parties to submit supplemental briefs on this issue. Additionally, although *Billington* clearly established the provocation doctrine long before this incident, because the parties have not adequately briefed whether Pollard's conduct constituted an independent constitutional violation that provoked the confrontation, they also have not adequately briefed whether any rights violations were clearly established at the time of the incident. . . . While *Garner* informs the inquiry, it does not sufficiently address the facts of this case. Defendants likewise do not address whether, viewing the facts in the light most favorable to plaintiffs, Pollard's conduct in drawing his weapon and chasing after potential misdemeanants onto a tarp-covered porch and then aiming

his weapon at them without announcing he is a police officer violates clearly established rights. I therefore will direct the parties to also brief the issue of whether, viewing the facts in the light most favorable to plaintiffs, it was clearly established at the time of the incident that Pollard committed an independent Fourth Amendment violation that provoked the deadly confrontation with Sauceda.")

McKay v. City of Hayward, 949 F.Supp. 971, 984, 985, 989 (N.D. Cal. 2013) ("In sum, two circuits have held that warnings are required before deploying a police dog. Three others have concluded that a prior warning is not dispositive of the reasonableness of seizing an individual with a police dog, and thus there is no clearly established right to be warned. District courts applying this precedent have been similarly split, depending on the circumstances of the seizure. The Court concludes that the law is not clearly established to put the individual officers here on notice that failing to give a warning before entering Mr. Porter's backyard was unlawful. The Ninth Circuit's consideration of verbal warnings as just one factor of many in its analyses of the reasonableness of such seizures supports this conclusion. Because the law was not clearly established, it was not clear to Officer Cox that his actions were unlawful. Nor could it have been clear to Officers Purnell and Miller that they had a duty to intervene and stop Cox's deployment of Nicky. . . . Whether the conduct of the officers was reasonable, however, is disputed. Construing the facts in favor of plaintiffs, a jury may infer that the City was deliberately indifferent in continuing to deploy Cox and Nicky in spite of Nicky's having bitten bystanders in the past. Accordingly, the Court DENIES summary judgment on plaintiffs' § 1983 excessive force claim against the City.")

Lucas v. City of Visalia, No. 1:09–CV–1015 AWI JLT, 2013 WL 1915854, *14, *15 (E.D. Cal. May 8, 2013) ("The facts of this case are different from *Mattos*, as explained above. The basis for the taser application was not due to active resistence to an arrest. The basis was that Lucas posed an immediate threat. As discussed above, when viewed in the light most favorable to the non-moving party, only Lucas's angry and intoxicated state supports the use of force. No crimes (or at best non-violent misdemeanors) were at issue, there was a less severe force option available, Esparza's conduct appears the more culpable, Lucas was not evading or resisting arrest, and, most importantly, Lucas was not an immediate threat to anyone. To be sure, the law regarding taser use is developing. However, the facts of excessive force in this case are clearer than in *Mattos*. The Fourth Amendment jurisprudence was sufficiently clear in 2008 for an officer to know that it is improper to use any force on an individual who is in his own home, who is not posing an immediate threat to officers or to others, who is not being investigated for criminal activity, and who is not evading or resisting arrest. . . Because the evidence indicates that no force was justified at the time of the first taser application, and the facts of this case are distinguishable from *Draper, Brooks*, and *Mattos*. The Court finds that a reasonable officer would know that using a taser against Lucas would violate his Fourth Amendment rights. Qualified immunity for the first taser application will be denied. . . .Qualified immunity for the second taser application is not as straightforward as the analysis under the first taser application. Lucas's resistence is similar to Mrs. Brooks's resistence. As described above, the officers were attempting to effectuate an arrest. . . When the officers attempted to remove Brooks from her car, she stiffened her body and grabbed the steering wheel

in order to remain in her car. . . In this case, Lucas kept his hands under his stomach, despite commands to move his hands and O'Rafferty's physical efforts to move Lucas's hands. Although the type of resistence in *Brooks* is similar to this case, the officers in *Brooks* had probable cause to arrest Mrs. Brooks for failing to sign the citation. . . In this case, the officers have not argued that they had probable cause to arrest Lucas for any offense, nor have they explained when probable cause to arrest Lucas may have developed. . . . If probable cause to arrest developed before the second taser application, then the Court would grant Esparza and O'Rafferty qualified immunity under *Brooks.* If probable cause developed after the second taser application, then *Brooks* would be distinguishable. In the absence of argument from the officers on the existence of probable cause at the time of the second taser application, the Court will not hold that probable cause to arrest existed. Without probable cause to arrest at the time of the second taser application, Lucas's resistence has not been shown to be sufficiently similar to *Brooks* in order to justify qualified immunity. For the same reasons that qualified immunity was inappropriate for the first taser application, qualified immunity is inappropriate for second taser application.") [*See also* ***Lucas v. City of Visalia,*** 2013 WL 3733506 (E.D. Cal. July 16, 2013) ("[T]he Court cannot hold that probable cause to arrest Lucas under Penal Code § 415(2) existed prior to the second tasing. Without probable cause to arrest, there was no justification or reason for the officers to demand that Lucas roll over and be handcuffed, nor was there reason or justification for Esparza to use the taser on Lucas to get him to comply. The absence of probable cause distinguishes this case from *Brooks,* and Lucas's conduct was not sufficiently similar to Mrs. Mattos's conduct. Given the evidence presented, the Court cannot grant qualified immunity on the basis of *Mattos v. Aragano.*")]

Wise v. Kootenai County, No. 2:11–cv–00472–CWD, 2013 WL 1789716, *8, *9 (D. Idaho Apr. 25, 2013) ("[T]he Court finds that, viewing the facts in the light most favorable to Plaintiff, a reasonable jury could conclude that the multiple applications of the taser in drive-stun mode after Plaintiff was rendered incapacitated by Deputy Dunkin's use of the taser in dart mode was unreasonable under the totality of the circumstances, i.e., it was excessive for the purposes of the Fourth Amendment. . . .Having concluded that Plaintiff has sufficiently alleged disputed facts supporting a constitutional violation, the next step in the qualified immunity analysis is whether the constitutional right was clearly established at the time of the conduct. At this step, the Court asks whether the contours of the right at issue were '"sufficiently clear" that every "reasonable official would have understood that what he was doing violates that right."'. . Defendants argue that, assuming the Court finds a constitutional violation, the 'Deputies are still entitled to qualified immunity as it would not have been clear to any reasonable officer on October 19, 2009, that the use of a taser in the situation they confronted was unconstitutional.'. . On this point, Plaintiff provides no assistance to the Court. . . . The Court also specifically asked Plaintiff's counsel at the hearing whether any case existed establishing the alleged constitutional violation. Plaintiff's counsel stated that he was not aware of any such case. Applying the applicable case law to the facts of this case, the Court concludes that, as of October 19, 2009, a reasonable officer would not have known that the use of a taser in the situation confronted by Deputies McAvoy and Dunkin was unconstitutional. The Deputies are therefore entitled to qualified immunity.")

Williams v. City of Merced, No. 1:10–cv–01999–MJS, 2013 WL 498854, *15, *16 (E.D. Cal. Feb. 7, 2013) ("As discussed above, use of a taser in drive stun mode is a less than an intermediate level of force. Tasers are designed to cause temporary immobilization, most often in order to secure handcuffs. . . The Ninth Circuit and this Court recently, after the events in this case, held that the law regarding tasers was not sufficiently and clearly enough established to warrant denying officers qualified immunity under the facts of those respective cases. . . Here, Plaintiff was at least minimally resistive to being placed under arrest. A reasonable officer in Defendant Pinnegar's position could have believed that Plaintiff's conduct presented some threat, however minimal, to the safety of Defendant or other officers. Given the state of the case law on September 11, 2009, the Court concludes that it was not clearly established that a reasonable officer in Defendant Pinnegar's position would know that the use of hands-on force and a taser was unconstitutional.")

Al-Kidd v. Gonzales, No. 1:05–cv–093–EJL–MHW, 2012 WL 4470776, *6, *7, *10, *11 (D. Idaho Sept. 27, 2012) ("The parties do not appear to question the law on qualified immunity as stated in the Report. (Dkt. 336 at 18–19.) What is in question on this objection is the Magistrate Judge's application of the facts of this case to that law on the *Franks* claim. Here, however, once it is determined that a *Franks* violation occurred, qualified immunity does not apply. *See Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1295 (9th Cir.1999); *Harvey v. Estes*, 65 F.3d 784, 788–89 (9th Cir.1995) (In order to defeat qualified immunity, a plaintiff must "establish both a substantial showing of the deliberate falsity or reckless disregard of the truth of the statements in the affidavit and the materiality of those statements to the ultimate determination of probable cause."); *see also* (Dkt. 336 at 21.) Because the Plaintiff established both prongs of the *Franks* claim against Agent Gneckow, the Court concludes Agent Gneckow is not entitled to qualified immunity. Accordingly, the objection is denied. . . . Based on its own *de novo* review of the record in this case, this Court concludes that Agent Mace's conduct was objectively reasonable in this case such that he is entitled to qualified immunity. The fact that Agent Mace stated later that he did not know the legal standard does not preclude qualified immunity. Again, Agent Mace had no independent knowledge of the falsity of the statements and/or the material omissions in the warrant application and affidavit. Thus, Agent Mace's reliance on the materials provided was reasonable given his limited role and knowledge of the facts and circumstances of the investigation. Moreover, as the Court has determined above, the warrant contains an indicia of probable cause such that given what Agent Mace knew at the time, his reliance upon the information provided by other law enforcement officers was reasonable as was his belief that the warrant application supported a finding of probable cause. Agent Mace is precisely the kind of individual for which qualified immunity is meant to protect; one who acted in an objectively reasonable manner in presenting a warrant application and affidavit which, based on what he knew at the time, appeared to be supported by probable cause. . . .The fact that the warrant was later determined to be lacking does not open Agent Mace up to liability where his actions were objectively reasonable. . . The facts in this case evidence that Agent Mace acted reasonably and is entitled to qualified immunity.")

Hulstedt v. City of Scottsdale, 884 F.Supp.2d 972, 999, 1002-04 (D. Ariz. 2012) ("The Ninth Circuit has written that summary judgment is rare in cases of police misconduct, because 'police misconduct cases *almost* always turn on a jury's credibility determinations.' *Santos v. Gates,* 287 F.3d 846, 853 (9th Cir.2002) (emphasis added). This case is an exception to that general caution. Almost everything the officers heard was recorded and transcribed, and the shooting itself was recorded on video. The officers fired at an unarmed man who was walking away from them. Although he had issued threats against D.H. earlier, nothing he did after walking outside would suggest to a reasonable officer that he was placing D.H. in imminent danger of suffering any more harm than falling to the ground. By shooting David, the officers caused the very harm that a reasonable officer could believe that David posed to D.H. Considering 'the totality of the facts and circumstances in the particular case,' no reasonable officer could have believed that shooting David without warning, while he calmly walked back towards his house with D.H. over his head, was a proper means of protecting D.H.'s safety. . . .The question at issue is whether it was clearly established, before November 7, 2008, that before using force officers had to consider whether that force could harm parties other than the intended targets. As discussed below, cases from the Ninth Circuit and elsewhere had clearly established this principle at this time. Indeed, it is difficult to see how the *Graham* test could fail to include consideration of harm to third parties. If Sgt. Slavin and Sgt. Dorer were not required to consider D.H.'s safety in any way when they were using force against David precisely to protect D.H., and if deadly force were indeed justified, they could have used force that would have killed D.H. (or others) and not violated the Fourth Amendment. Such a result does not square with the reasonableness requirement of *Graham.* . . . The Ninth Circuit's holding that the officer violated Brosseau's Fourth Amendment rights remains good law and served to clearly establish, for the purposes of qualified immunity, that similar shootings violate the Fourth Amendment. The officer had stated that part of the reason she shot the man was to protect pedestrians in front of the jeep. The officer stated that she was '"aware of the background exposure," but she nonetheless believed she had a safe shot because she thought the bullet would be stopped by the Jeep's engine block before reaching the bystanders.'. . The Ninth Circuit found that the threat posed by the man did not justify using deadly force. In doing so, it acknowledged that harm to bystanders was part of the calculus, noting that the officer did not fire again 'because she thought the risk [of hitting a bystander] became too great as [the driver] began to drive away.' . . Other district courts in the Ninth Circuit have held that it was clearly established prior to 2008 that *Graham* requires consideration of whether the use of force may cause harm to those who are not targets of the force. Although these cases were decided after 2008, they involved incidents occurring prior to 2008, and therefore demonstrate that other district courts have determined that the principle was clearly established in the Ninth Circuit prior to this incident.")

James v. City of Seattle, No. C10–1612JLR, 2011 WL 6150567, at *8-*9 (W.D. Wash. Dec. 12, 2011) ("Mr. James was in the midst of operating a vehicle with two passengers at the time he was tasered. The risk of injury from tasering a driver in control of a moving vehicle–not not only to the driver, but also to the passengers, the officers, and other persons in the area–is something that a police officer trained in the use of a taser should foresee. . . Indeed, Mr. James has asserted that he lost control of the vehicle as result of the tasing, and that this placed everyone in the vehicle, as

well as the officers at the scene, at risk of injury. In light of the factors above, and viewing the evidence in the light most favorable to Mr. James, the court concludes that the evidence supports more than one reasonable inference and that a reasonable jury could find a Fourth Amendment violation. . . .Having determined that a reasonable jury could conclude that Mr. James's constitutional rights were violated by Officer House's use of his taser, the court must next consider whether Officer House nevertheless is entitled to qualified immunity because the constitutional violation described above was not '"sufficiently clear" that every "reasonable official would have understood that what he [was] doing violate[d] that right."'. . . Given the lack of clarity in the case authority concerning the level of force employed when a taser is deployed in dart form prior to the Ninth Circuit's ruling in *Bryan,* the court finds that Officer House is still entitled to qualified immunity.")

Quyen Kim Dang v. City of Garden Grove, No. SACV 10-00338 DOC (MLGx), 2011 WL 3419609, at *9 (C.D. Cal. Aug. 2, 2011) ("Prior to September 3, 2008, no Supreme Court or Ninth Circuit decision had discussed the constitutionality of Tasers. In 2010, the Ninth Circuit issued its decision in *Bryan,* holding that the use of a Taser in a closely analogous factual situation violated the Constitution. If the events at issue in this case had taken place after the publication of the *Bryan* decision, there is no doubt that the officers' claim of qualified immunity would fail. The lack of on-point case law discussing this issue prior to September 3, 2008, however, makes the qualified immunity question a much closer call. Indeed, the Ninth Circuit in *Bryan* granted the police officers qualified immunity precisely because the state of the law surrounding Taser use was acknowledged to be murky as of the date of the violation. Although the events in this case took place nearly three years after the incident in *Bryan,* little binding, on point case law was issued between 2005 and September 3, 2008. Given this lack of clarity, the Court declines to find that a per se proscription against Taser use in situations like the one at hand was clearly established as of the date of the violation. Accordingly, a reasonable officer in Karschamroon's shoes could have believed that the use of the Taser was permissible. By contrast, given the evidence suggesting that Officer Gendreau was aware that Andy, at the time of the tasering, faced an increased risk of cardiac arrest from the application of the Taser, the qualified immunity doctrine does not shield Officer Gendreau from liability. Although the Court cannot locate prior binding case law discussing a scenario where an officer used a Taser on a mentally ill, non-combative subject stopped for a minor violation, in spite of a known risk that the subject could suffer cardiac arrest, the Court finds that this action was so 'patently violative' of Andy's constitutional rights that no specific guidance from the court was needed to put a reasonable officer on notice that such conduct is forbidden.")

Ciampi v. City of Palo Alto, No. 09-CV-02655-LHK, 2011 WL 1793349, at *17 (N.D. Cal. May 11, 2011) ("The Court agrees with Defendants. . . that they are entitled to qualified immunity on the excessive force claim. It is only recently that the Ninth Circuit has definitively determined the level of force associated with Tasers deployed in dart mode. . . For this reason, in its recent Taser decisions, the Ninth Circuit has uniformly found that the law surrounding tasers was not clearly established and concluded that the officers were entitled to qualified immunity. [citing *Bryan,*

Mattos, Brooks] However, these cases involved conduct that occurred between 2004 and 2006, whereas here the conduct occurred on March 15, 2008. . .The Ninth Circuit's decision in *Mattos* establishes that the law regarding Tasers was not clearly established as of August 23, 2006, at least for cases in which the conduct alleged was not 'so patently violative of [the plaintiff's] constitutional rights that reasonable officials would know without guidance from the courts that the action was unconstitutional.'. . Based on its review of district court decisions within this Circuit, the Court finds that by March 2008, it was clearly established that use of a Taser upon a suspect who had already been subdued and arrested was objectively unreasonable and constituted excessive force. . . In other circumstances, however, the case law was much less clear. There are relatively few decisions that address Taser use in detail, and those that do vary in their assessment of the quantum of force involved and reasonableness of applying that force to subdue an unrestrained suspect. . . In *Bryan,* the Ninth Circuit granted qualified immunity in a case where the officer shot his Taser, without warning, at an 'unarmed, stationary individual, facing away from an officer at a distance of fifteen to twenty-five feet' who had been stopped for not wearing his seatbelt. . . In this case, although Plaintiff was similarly unarmed and stopped based on suspicion of a non-violent misdemeanor, he was located much closer to the officers and was given some warning that he would be shot with a Taser if he did not comply with the officers' orders. The Court has not found that the law regarding Tasers was significantly clarified between 2005, when the conduct in *Bryan* occurred, and March 15, 2008, when the incident at issue in this case occurred. *Bryan* thus appears to compel a finding of qualified immunity in this case. Accordingly, although the Court finds that triable issues of fact exist regarding the reasonableness of deploying a Taser in dart mode against Plaintiff, the Court concludes that Defendants are entitled to qualified immunity on this claim.")

Azevedo v. City of Fresno, No. 1:09-CV-375 AWI DLB, 2011 WL 284637, at *9, *10, *15 (E.D. Cal. Jan. 25, 2011) ("[T]he use of a taser in dart mode is an intermediate and significant quantum of force. Given the nature of the use of force, something more than nonviolent misdemeanors must be at play to justify its use. While Azevedo was clearly in flight when Carr deployed the taser, the Court cannot say as a matter of law that Azevedo's flight made use of the taser reasonable. The misdemeanors involved were all non-violent, and the evidence indicates that Azevedo did not pose an immediate threat to the officers. Importantly, Azevedo and Carr were running at full speed on the street. It was understood that the taser would immobilize Azevedo. It should have also been understood that uncontrolled falls are an inherent risk associated with tasers. The potential for injury from an uncontrolled fall is increased if a full speed foot race over concrete is occurring. In the absence of an immediate threat posed by Azevedo, a reasonable jury could conclude that the nature of the force and the risk of injury were too great relative to the offenses at issue. . . Summary judgment on the issue of whether Carr violated Azevedo's Fourth Amendment rights will be denied. . . . Having found that Azevedo's version of the facts prohibits summary judgment on whether the Fourth Amendment was violated, the Court will proceed to determine whether Carr is entitled to qualified immunity. The use of force at issue occurred on November 7, 2007. After reviewing the cases cited by the parties, the Court concludes that, as of November 7, 2007, the law was not so clearly established that a reasonable officer in Carr's position would know that use of

the taser on Azevedo was unconstitutional. . . . Given the crimes at issue, the active flight and evasion of Azevedo following a question regarding weapons, Carr's fatigue, and the sparse yet developing state of the law on November 7, 2007, the Court concludes that the law regarding taser use was not clearly established such that a reasonable officer in Carr's position would know that use of the taser on Azevedo was improper.")

Villegas v. City of Colton, No. 5:09-cv-00644-DEW, 2010 WL 5252721, at *4 (C.D. Cal. Dec. 9, 2010) ("In *Marquez v. City of Phoenix*, 2010 WL 3342000 (D.Ariz.Aug.25, 2010), the court examined the state of the law regarding taser applications in deterrnining whether a police officer who used a taser in late July, 2007 was liable for a § 1983 excessive force claim. The court in *Marquez* pointed out that it was not until *Bryan v. McPherson*, 590 F.3d 767, in 2009 that the Ninth Circuit announced what level of force use of a taser in dart mode constitituted. . . The alleged tortious actions in the case at hand occurred in November 2006, half a year before the events in *Marquez.* As *Marquez* makes clear, the law regarding the use of tasers was not clearly established in July 2007. As such, it could not have been clearly established in November 2006. Defendants, then, are entitled to qualified immunity from Villegas's claim for unreasonable and unnecessary use of physical force. Villegas's first claim for relief is dismissed with prejudice.")

Snauer v. City of Springfield, No. 09-cv-6049, 2010 WL 4875784, at *5, *6 (D. Or. Nov. 23, 2010) ("Here, Sether was trained in the use of a taser and knew well that a tasered suspect becomes temporarily paralyzed. The type of taser used by Sether deploys dart probes which cause neuromuscular incapacitation, which is different from a stun gun mode which is designed to effect pain compliance. . . . The police are expressly warned by the manufacturer that: 'Taser-induced strong muscle contractions usually render a suspect temporarily unable to control his or her psychomotor movements. This may result in secondary injuries such as those due to falls. This loss of control, or inability to catch oneself, can in some circumstances increase the risk(s) of serious injury or death ... [P]ersons at higher risk include: those located at elevated or unstable platforms (e.g., trees, roofs, ladders, ledges, cranes, loading docks).'. . It is undisputed that Sether was trained not to Taser a suspect where the suspect may fall from a significant height. Although the parties quibble over what is meant by 'significant,' it is obvious that the greater the height, the greater the danger. I note that the height of a loading dock, used as an example by Taser in its manual as a height creating a higher risk of serious injury or death, is approximately four feet. It does not take a panel of judges to alert a reasonable police officer that causing a paralyzed man to tumble head first onto the ground from a platform six to seven feet above the ground 'creates a substantial risk of causing death or serious bodily injury.'. . I find it illuminating that in the Springfield training material, the instructions specify that volunteers who subject themselves to tasering are to be placed on mats and assisted by two spotters who are instructed to grab hold to support the volunteer both before and during exposure. . . One cannot imagine a training exercise in which a volunteer stands atop a six foot high platform and is tasered without the help of spotters. A law enforcement agency would never subject an officer or other volunteer to such a training exercise–notwithstanding the lack of any case law on the subject– because they already know such would inevitably result in serious bodily injury and even death. In short, the police do not need

judges to explain the obvious to them before they can be held accountable for an unreasonable or excessive use of force. As explained by plaintiff's expert, Josh Foster, a former Texas police officer and trainer on the use of Tasers: Anyone trained to operate and carry a TASER in the field should, by TASER International standards, clearly understand that the application of the TASER to a suspect who is high off the ground would be considered a deadly force application in that the potential result of the particular use of force could cause serious bodily injury or even death. The defendant does not dispute that the circumstances presented here did not justify the use of deadly force. Thus, even accepting at face value that Sether had probable cause to arrest Snauer for multiple misdemeanors, such does not justify the use of force creating a substantial risk of death or serious bodily injury, and no reasonable officer would have failed to understand that deadly force was unlawful under these circumstances. . . Accordingly, defendant Sether's motion for summary judgment on the basis of qualified immunity should be denied.")

Gregory v. County of Maui, 523 F.3d 1103, 1108, 1109 (9th Cir. 2008) ("*Drummond* is distinguishable from this case, even accepting that the officers here should have recognized that Gregory was 'emotionally distraught.' Unlike the police in *Drummond*, the officers here did not immediately use force upon encountering Gregory, but rather first attempted verbally to coax him into dropping the pen. Moreover, the officers had reason to believe that Gregory posed a threat to them, because he refused their requests, acted in an aggressive manner, and had already assaulted Finazzo. Further, Gregory had committed an underlying offense, a trespass. . . Finally, unlike *Drummond*, Gregory resisted the officers throughout the encounter, and the officers in this case ceased using force once Gregory was handcuffed. . . . Thus, even though 'the governmental interest in using such force is diminished by the fact that the officers [were] confronted ... with a mentally ill individual,' the undisputed facts show that the officers in this case reasonably used the minimal force necessary to disarm and to restrain Gregory, and that they ceased such force once the threat was neutralized.").

Lehman v. Robinson, 228 F. App'x 697, 699, 700 (9th Cir. 2007) ("Construed in the light most favorable to Lehman, the facts alleged are that defendant officers Robinson and Tygard shot and killed Lehman as he sat in his car, with all the tires shot out, surrounded by at least ten armed police officers and numerous police vehicles. Other officers on the scene had instructed all present to hold their fire, and defendants knew Lehman was not armed with a gun. Defendant Tygard testified that he knew Lehman did not have a gun, but only a pocket knife. Another officer present described the knife as 'a little folding knife.'. . . When viewed in the light most favorable to Lehman, the record suggests that Lehman had no readily available avenue of escape and was contained. Lehman was not suspected or accused of any crime. . . . When told to drop his knife and get back in his pickup truck, Lehman partially obeyed, by reentering the vehicle, but not dropping the knife. . . . At the point of the shooting, Lehman had been pepper sprayed and tasered, and at least partially subdued. The area had also been cleared of pedestrians. . . . In light of all of the facts, construed in the light most favorable to Lehman, when defendants shot and killed Lehman the situation did not require lethal force as confirmed by the testimony of multiple officers on the scene. Therefore, we conclude that defendants' use of force against Lehman was

unreasonable and violated his Fourth Amendment right to be free of lethal force unless others' lives and safety are under immediate threat. In accordance with the second step of the Saucier framework, we consider whether the Fourth Amendment right prohibiting the use of deadly force except when the lives and safety of others are seriously imperiled was clearly established in 2002 when defendants shot and killed Lehman. . . . The cases cited by the defendant officers are all distinguishable in this respect. Unlike the suspect in *Smith v. Freland*, 954 F.2d 343, 344 (6th Cir.1992), who led police on a chase at speeds in excess of ninety miles per hour and who police believed may have been armed with a gun, Lehman could not travel anywhere quickly, as any reasonable officer could tell from the state of Lehman's completely flattened tires, and the officers had engaged in sufficient verbal negotiations to discern Lehman was armed only with a small knife. The district court distinguished in detail *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), another case on which defendants rely; we agree with the district court's analysis and do not repeat it here. The district court's denial of qualified immunity to defendants Robinson and Tygard is AFFIRMED."), *cert. granted,* 128 S. Ct. 1219 (2008) (*judgment vacated and remanded in light of Scott v. Harris*), *aff'd on remand by* ***Lehman v. Robinson,*** No. 05-15636, 2009 WL 2952165 (9th Cir. Sept. 16, 2009) (""("Because the video does not clearly contradict the version of events recounted by the plaintiffs, and for the reasons stated in our prior memorandum disposition, . . . the district court's denial of Robinson and Tygard's motion for summary judgment based on qualified immunity is **AFFIRMED.**").

Long v. City and County of Honolulu, 511 F.3d 901, 906, 907 (9th Cir. 2007) ("We hold that Officer Sterling's conduct meets the objective reasonableness standard. Prior to taking the fatal shot, Sterling had observed Long's agitated behavior, heard him threaten to shoot the police, observed him carrying a .22 caliber rifle, and knew that he had previously shot at a car full of people and wounded two people therein earlier that night. Under these circumstances, when fellow officers radioed that Long was yelling threats at them and then radioed that Long was shooting at them, Sterling had probable cause to believe that Long posed an immediate danger to these officers. In the exigent circumstances of the night, Sterling acted in an objectively reasonable manner. We are mindful that we must be wary of self-serving accounts by police officers when the only non-police eyewitness is dead. . . We note, however, that here, unlike the situation in *Scott*, we have the benefit of multiple eye witnesses and a CAD report that fairly accurately recorded the SWAT team's activities on the night of Long's death. Ms. Long's claims of factual error in the police accounts do not change our analysis. From the perspective of a reasonable officer in Sterling's position, it is immaterial whether Marini and Cannella jumped into the ditch at 4:47 or 4:52 a.m. Though a closer question, whether Long actually fired his rifle at these officers is also immaterial. It is enough that Sterling heard the radio transmission and observed Long point the rifle in the officers' direction. Accordingly, we hold that Officer Sterling did not violate Long's Fourth Amendment rights and that he is entitled to qualified immunity.")

Tekle ex rel Tekle v. United States, 511 F.3d 839, 850 (9th Cir. 2007) (*amended opinion on reh'g*) ("The totality of the circumstances supports the conclusion that not only was Tekle's detention unreasonable, but a reasonable officer would have known that an eleven-year-old child who was

unarmed, barefoot, vastly outnumbered, and was not resisting arrest or attempting to flee should not have been kept in handcuffs for fifteen to twenty additional minutes.").

Wakefield v. City of Escondido, 2007 WL 2141457, at *1 (9th Cir. July 26, 2007) ("[W]hen viewed in the light most favorable to Wakefield, evidence at trial showed that Parker repeatedly and without warning deployed taser shots against an unarmed individual who was partially restrained, who had committed no serious offense, who was in the throes of a claustrophobic attack, and who pleaded with Parker not to shoot him. . . Under those facts, 'closely analogous pre-existing case law' is not required to put Parker on notice that his conduct was unlawful.")

Blankenhorn v. City of Orange, 485 F.3d 463, 481 (9th Cir. 2007) ("In assessing the state of the law at the time of Blankenhorn's arrest, we need look no further than *Graham's* holding that force is only justified when there is a need for force. We conclude that this clear principle would have put a prudent officer on notice that gang-tackling without first attempting a less violent means of arresting a relatively calm trespass suspect–especially one who had been cooperative in the past and was at the moment not actively resisting arrest–was a violation of that person's Fourth Amendment rights. This same principle would also adequately put a reasonable officer on notice that punching Blankenhorn to free his arms when, in fact, he was not manipulating his arms in an attempt to avoid being handcuffed, was also a Fourth Amendment violation. Finally, we hold that no reasonable officer would have believed that hobble restraints on his wrists and ankles, in addition to handcuffs, were necessary to maintain control of him and prevent possible danger to passersby. Therefore, we conclude that the state of the law was 'clearly established' at the time of Blankenhorn's arrest and gave the arresting officers sufficiently fair notice that their conduct could have been unconstitutional.").

Winterrowd v. Nelson, 480 F.3d 1181, 1186 (9th Cir. 2007) ("An officer may not use force solely because a suspect tells him he is incapable of complying with a request during the course of an ordinary pat-down. The officers here admit that they could have patted Winterrowd down without forcing his arm behind his back. They have shown no justification for pushing him onto the hood of the police car and yanking his arm. While the officers tell a different story, we must accept Winterrowd's version of the event. Because the facts, if resolved in Winterrowd's favor, would show the officers violated his clearly established constitutional rights, the district court did not err in denying the motion for summary judgment on grounds of qualified immunity.").

Davis v. City of Las Vegas, 478 F.3d 1048, 1057 (9th Cir. 2007) ("Any reasonable officer in Officer Miller's position would have known, in light of the *Graham* factors discussed *supra* and our case law interpreting them, that swinging a handcuffed man into a wall head-first multiple times and then punching him in the face while he lay face-down on the ground, and breaking his neck as a result, was unnecessary and excessive.")**.**

Adams v. Speers, 473 F.3d 989, 993, 994 (9th Cir. 2007) ("Reviewing *de novo* the district court's denial, we find its judgment impeccable. On the facts presented by the Adamses and the

disciplinary report of the CHP itself, a jury could find Speers to be an officer off on a mission of his own creation, abandoning his assignment, picking up a buddy for no apparent reason except the excitement of the chase, barging in ahead of the police already engaged in pursuit, once attempting to use force against Alan and twice doing so, creating each time a serious hazard for himself as well as Alan, and finally stepping out of his patrol car and, without warning and without the need to defend himself or the other officers, killing Alan. Shooting of this sort was established as unconstitutional by *Tennessee v. Garner*, *supra*, almost twenty years ago. *See Vaughan v. Cox*, 343 F.3d 1323 (11th Cir.2003), *on remand from* 536 U.S. 953 (2002). No officer acting reasonably in these circumstances could have believed that he could use deadly force to apprehend Alan. . . . Accepting the Adamses' facts as true, this case falls within the obvious: the absence of warning and the lack of danger to the shooter or others distinguish the case from *Cole*, *Smith*, and *Brosseau*. On these facts, Officer Speers was not entitled to qualified immunity.").

Harveston v. Cunningham, 216 F. App'x 682, 685 (9th Cir. 2007) (not published) ("When Officer Cunningham sprayed Harveston, Harveston was already handcuffed, and even under Officer Cunningham's account, Harveston was merely trying to roll over and stand up. Viewed in the light most favorable to Harveston, these facts could suggest the use of pepper spray was objectively unreasonable in violation of Harveston's constitutional rights. However, we find that the right was not clearly established at the time of this incident. . . Despite the fact that Harveston was handcuffed, he was not completely subdued, and he continued to resist the officers until Officer Cunningham finally used the pepper spray. Under these circumstances, a reasonable officer could conclude that the use of the pepper spray was lawful, and Harveston fails to identify persuasive authority to the contrary. Thus, because the right was not clearly established, Officer Cunningham is entitled to qualified immunity and summary judgment was proper on the excessive force claim for use of the pepper spray.").

Randall v. Williamson, No. 05-35112, 2006 WL 3390397, at * 1 (9th Cir. Nov. 22, 2006) (unpublished) ("Under *Tennessee v. Garner*, 471 U.S. 1 (1985), deadly force violates the Fourth Amendment where 'the suspect poses no immediate threat to the officer and no threat to others.' . . If the van had come to a complete stop, as plaintiff contends, there was no cause to believe that Vent was a danger to Williamson or to anyone else when Williamson shot him. Unlike the plaintiff in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), Vent was not suspected of a crime of violence. At the time Williamson fired, the officer knew only that Vent was suspected of traffic violations and had failed to pull over when ordered to do so earlier that evening. . . And, assuming that Vent had stopped the van, he was not attempting to flee the scene–unlike the suspect in *Brosseau*. Perhaps the record at trial will reveal more, in which case Williamson may renew his claim of qualified immunity. But at this stage of the proceedings, defendant has shown insufficient undisputed facts to justify the use of deadly force under *Garner*. We take seriously the Court's statement in *Saucier v. Katz*, 533 U.S. 194, 205 (2001), that a material factual dispute should not always defeat summary judgment in qualified immunity cases. What the Court was saying, though, is that even if there is a disputed issue of material fact, summary judgment may nonetheless be appropriate on qualified immunity grounds–if the facts, taken in a light most favorable to the

injured party, do not show a constitutional violation. *Saucier* says nothing to suggest that we can affirm summary judgment where there are material disputed facts, and where the injured party's version of those facts show a rights violation that would be clear to a reasonable officer.")

Randall v. Williamson, No. 05-35112, 2006 WL 3390397, at *3, *5 (9th Cir. Nov. 22, 2006) (unpublished) (Tallman, J., dissenting) ("Neither Supreme Court nor circuit precedent would have put a reasonable officer in Officer Williamson's position on notice that using deadly force to stop Vent from committing further dangerous crimes would violate Vent's Fourth Amendment rights. We must view what happened from the objective perspective of a reasonable police officer facing the specific uncontested events that took place on the afternoon of October 29, 2000. . .First, Vent erratically tore through the streets of Fairbanks as he fled from several officers, including Officer Williamson who chased Vent earlier in the pursuit, in what became almost an hour-long chase. He recklessly wove through traffic, sped through busy parking lots full of Sunday shoppers, and ran at least seven red lights and three stop signs. Then, Vent drove through two rows of stopped cars, scraping at least one on the way, to avoid stopping at Officer Williamson's solitary road block, despite Officer Williamson's obvious demands that he do so. That he endangered other citizens and pursuing officers by his behavior cannot seriously be questioned. And, finally, Vent employed his van as a deadly weapon when he assaulted and struck Officer Williamson on his shins with the van because the officer would not retreat from discharging his duty to arrest the felon. . . . In sum, Officer Williamson reasonably believed Vent posed a significant threat of great bodily injury or harm to himself and others, and no case with the requisite level of specificity establishes otherwise. The law permits an officer to employ deadly force to preserve public safety. *See Brosseau*, 543 U.S. at 197-98. Accordingly, I would AFFIRM the district court's order granting qualified immunity to Officer Williamson.").

Motley v. Parks, 432 F.3d 1072, 1083, 1085, 1088 (9th Cir. 2005) (*en banc*) ("The touchstone of the Fourth Amendment is reasonableness. Aside from that well-settled principle, though, the law concerning what level of suspicion officers had to have before conducting a parole search–if any–was in 'disarray' when appellees searched Motley's apartment. . . . Of course, the lack of a Supreme Court decision does not prevent a finding that a right is clearly established. Naturally, our decisions relating to the legality of searches of probationers and parolees are binding on law enforcement officers in this circuit. But our caselaw provides no clearer a picture of what was constitutionally required when the officers searched Motley's apartment. . . . Against that backdrop, we simply cannot say that the contours of when officers could conduct parole-related searches was 'sufficiently clear' so that appellees understood that their warrantless and suspicionless search of Motley's apartment violated her rights. . . . In summary, the officers are entitled to qualified immunity for their search of Motley's apartment because, first, they had probable cause to believe that parolee Jamerson was living there; and second, it was not clearly established that a particularized suspicion of wrong doing on Jamerson's part was required as a prerequisite to the search of his residence.")

Motley v. Parks, 432 F.3d 1072, 1089 (9th Cir. 2005) (*en banc*) ("In this case, as in *McDonald*, none of the factors justifying the use of force toward Juan exists. While it may have been reasonable for Kading to have drawn his firearm during the initial sweep of a known gang member's house, his keeping the weapon trained on the infant, as he was alleged to have done, falls outside the Fourth Amendment's objective reasonableness standard. Motley has stated a constitutional violation. . .Having determined that Motley's factual allegations, if true, establish a constitutional violation, we turn our attention to evaluating whether the law was clearly established such that a reasonable officer would have known that the conduct was unlawful. To be clearly established for qualified immunity purposes, the contours of the asserted right must be 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'. . . Viewing the evidence in the light most favorable to Motley, the conduct engaged in by Officer Kading was objectively unreasonable given the absence of danger posed by Juan to Kading or any of the other officers at the scene. The use of any force was unwarranted under these circumstances. Any reasonable officer should have known that holding an infant at gunpoint constituted excessive force. 'Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle [Officer Kading] to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established.'").

Moreno v. Baca, 431 F.3d 633, 642 (9th Cir. 2005) ("Appellants' first assertion–that the parole search condition stripped Moreno of 'a normal scope of Fourth Amendment protection'–does not justify the suspicionless search and seizure. While Moreno's parole status may have rendered it unclear what level of suspicion was required to conduct such a warrantless search, if Appellants had known of the parole condition at the time of the search and seizure, it is uncontested that this fact was unknown to Appellants at the time of their actions and was not a fact on which Appellants relied. Because the Deputies did not know of Moreno's parole status and his outstanding arrest warrant at the time they searched and seized him, those circumstances cannot justify their conduct. At the time of the incident in this case, it was clearly established that the facts upon which the reasonableness of a search or seizure depends, whether it be an outstanding arrest warrant, a parole condition, or any other fact, must be known to the officer at the time the search or seizure is conducted. . . Appellants' other argument–that the officers reasonably believed that the facts known to them constituted 'reasonable suspicion'–is also unpersuasive. It was well-established at the time of Moreno's detention that nervousness in a high crime area, without more, did not create reasonable suspicion to detain an individual.")

Blanford v. Sacramento County, 406 F.3d 1110, 1119 (9th Cir. 2005) ("In sum, Blanford was armed with a dangerous weapon, was told to stop and drop it, was warned that he would be shot if he didn't comply, appeared to flaunt the deputies' commands by raising the sword and grunting, refused to let go of the sword, and was intent upon trying to get inside a private residence or its backyard with the sword in hand. The tragedy is that he persisted even after he admitted seeing the deputies and hearing them order him to drop the sword, resulting in a terrible injury. However, that this happened does not make the deputies' actions objectively unreasonable, or

unconstitutional. . . It follows that the deputies are entitled to qualified immunity. Even if we have misjudged the constitutional issue, neither Supreme Court nor circuit precedent in existence as of November 13, 2000 would have put a reasonable officer in the deputies' position on notice that using deadly force in the particular circumstances would violate his Fourth Amendment rights. While they certainly would have known from *Garner* and *Graham* that shooting Blanford required probable cause (supported by objectively reasonable facts) to believe that he posed a threat of serious physical harm to themselves or to others, the deputies would not have found fair warning in *Garner*, *Graham*, or any other Supreme Court or circuit precedent at the time that they could not use deadly force to prevent someone with an edged sword, which they had repeatedly commanded him to drop and whom they had repeatedly warned would otherwise be shot, from accessing a private residence where they or people in the house or yard might be seriously harmed. In this they may have been mistaken, but reasonably so.").

Blanford v. Sacramento County, 406 F.3d 1110, 1120 (9th Cir. 2005) (Noonan, J., dissenting) ("Having examined the objective circumstances that *Graham* directs us to, I find no crime, no immediate threat to the officers, no resistance to arrest, and a pathetic if possible attempt to evade arrest. The court says that the case is 'difficult.' It is indeed difficult to say that a reasonable officer would not have known that he violated Matthew Blanford's constitutional right to life and constitutional right to be free of police violence when the officer gunned him down at short range. Let me add one further circumstance mentioned in *Garner* that might justify the use of lethal force: probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others. As glossed by *Graham*, the significant threat must also be immediate. The officers have not been able to name a single human being who was significantly or immediately threatened by Matthew Blanford. What the officers have supplied is speculation: someone might have been in the house, although no one answered the door; someone might have been in a neighbor's backyard if Blanford could have gotten there; Blanford might have entered the house through the garage, although no one knows whether the garage opened into the house. Not only is there no evidence that any human person was in significant or immediate danger. The officers knew that Blanford had been walking the streets for some time without harming or endangering anyone. They also knew that a bizarre sword-carrier had been seen before in the neighborhood and had disappeared into it without harm or threat to anyone. So why did they need to use deadly force to restrain Blanford at his parents' doorstep? If imagined persons and imagined emergencies constitute reason to shoot, no community is safe from officers too quickly frustrated and angered by being ignored. The case is one that demands judgment by the citizens of Sacramento County assembled as a jury, not immunity for the injury-inflicting police.")

San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 977, 978 & n. 17 (9th Cir.2005) ("While the governmental interest of safety might have provided a sound justification for the intrusion had the officers been surprised by the presence of the dogs, the same reasoning is less convincing given the undisputed fact that the officers knew about the dogs a week before they served the search warrants. The officers had substantial time to develop strategies for immobilizing the dogs. They knew or should reasonably have known that the Fourth

Amendment requires officers to avoid intruding more than is necessary to enforce a search warrant. . . As the district court explained, the officers 'created an entry plan designed to bring them into proximity of the dogs without providing themselves with any non-lethal means for controlling the dogs. The officers, in effect, left themselves without any option but to kill the dogs in the event they–quite predictably– attempted to guard the home from invasion.' Having determined that the officers violated the plaintiffs' Fourth Amendment rights for purposes of the first step in the qualified immunity analysis, the second step asks whether the constitutional right was clearly established. As the Supreme Court has cautioned, it is not enough that there is a generally established proposition that excessive use of force is unlawful. . . '[T]he right that the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' . . However, 'it is not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness [of defendant's actions] was apparent in light of pre-existing law.' . . . Both parties concede that the ultimate question is whether the state of the law at the time was clear enough to provide reasonable officers with sufficient notice that their conduct was unlawful. Prior to the events at issue in this case, we had held that unnecessary destruction of property in the course of executing a warrant is unconstitutional. . . We also had held that the killing of a person's dog constitutes an unconstitutional destruction of property absent a sufficiently compelling public interest. . . We also had recognized that in assessing reasonableness under the Fourth Amendment an appropriate factor is whether the officer considered alternatives before undertaking intrusive activity implicating constitutional concerns. . . These cases should have alerted any reasonable officer that the Fourth Amendment forbids the killing of a person's dog, or the destruction of a person's property, when that destruction is unnecessary–i.e., when less intrusive, or less destructive, alternatives exist. A reasonable o fficer should have known that to create a plan to enter the perimeter of a person's property, knowing all the while about the presence of dogs on the property, without considering a method for subduing the dogs besides killing them, would violate the Fourth Amendment. . . . Finally, this case is not the kind where the officer was reacting to a sudden unexpected situation, where the officers were confronted with exigent circumstances. The Fourth Amendment allows officers to use a certain amount of force because they are 'often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving....' . . . In this case, however, the SJPOs were given a week to plan the entry. Other than the officers' interest in preserving evidence, the officers were not presented with exigent circumstances that necessitated killing the dogs. Accordingly, the failure to develop any realistic non-lethal plan for dealing with the dogs is simply not the type of reasonable mistake in judgment to which a court should give deference in determining whether the officers are entitled to qualified immunity. . . . The police officers' opportunity to plan ahead distinguishes this case from the recent Supreme Court decision, *Brousseau v. Haugen*,. . . In this case, there was no element of surprise coloring the officers' judgment.").

Watts v. McKinney, 394 F.3d 710, 711, 712 (9th Cir. 2005) ("A lawyer must be zealous on behalf of his client. But zeal needs to be tempered by commonsense. The Supreme Court in *Hudson*

proscribed the use of force for the malicious and sadistic purpose of causing harm. Watts' declaration, describing the vengeful acts of a frustrated investigator, identifies the unconstitutional purpose and deeds. To suppose that any reasonable person, let alone a trained prison officer, would not know that kicking a helpless prisoner's genitals was cruel and unusual conduct is beyond belief. The Supreme Court did not need to create a catalogue of all the acts by which cruel and sadistic purpose to harm another would be manifest; but if it had, such act would be near the top of the list. The case must go to trial.").

Garcia v. City of Imperial, No. 08cv2357 BTM(PCL), 2010 WL 3834020, at *11 (S.D. Cal. Sept. 28, 2010) ("Before *Bryan* was decided, it was unclear whether use of a Taser X26 in dart mode constituted an intermediate level of force or something less. Furthermore, as of 2007, neither the Ninth Circuit nor the Supreme Court had decided an excessive force case involving the use of a taser. Therefore, the Court simply cannot say that a reasonable officer would have known that use of a taser in the situation confronting Heredia was unlawful. Indeed, the use of force in this case is more understandable than the use of force in *Bryan.* In *Bryan*, Bryan was standing in one place and was twenty to twenty-five feet away from the officer. No other civilians were close by. In contrast, in this case, Plaintiff jumped over a wall into a backyard while running away from the police, failed to comply with an officer's command to stop and get on the ground, walked away from the officer, and attempted to open a window to a home that could have been occupied. Heredia's conduct was not objectively unreasonable in light of clearly established law at that time.")

Haflich v. McLeod, No. CV 09-161-M-DWM-JCL, 2010 WL 3613980, at *9, *10 (D. Mont. Aug. 2, 2010) ("As a general proposition, the decisional law applicable to the use of a taser is developing and, as of November 23, 2007, was 'not sufficiently clearly established to warrant denying officers qualified immunity.'. . McLeod's position, however, misses the mark as to the proper identification of the particular clearly established right at issue in this case. A court's conclusion as to the applicable legal standard that is clearly established need not always be based on 'closely analogous case law' decisions. . . .In a case of an obvious violation of a constitutional right, a broad and general statement of the right can be sufficient, by itself, to 'clearly establish' the right. . . Although the law regarding the use of a taser is not clearly established as McLeod asserts, the clearly established right at issue in this case is not uniquely defined by or tied to the use of a taser, irrespective of the other circumstances surrounding McLeod's use of the taser. . . . Again, under the circumstance of this case construed in Haflich's favor, Haflich was handcuffed and seat belted in the rear seat of McLeod's patrol car at the time McLeod tasered him without warning. No reasonable officer confronting these circumstances–where the need for force is nonexistent–could reasonably have concluded his conduct was constitutionally permitted. . . Thus, prior to November 23, 2007, it was clearly established that where a police officer has physical control over a suspect, and there is no need for any further force, then the use of force is clearly unconstitutional.")

Williams v. Kitsap County, No. 08-05430-RBL, 2008 WL 5156319, at *5 (W.D. Wash. Dec. 8, 2008) ("In this case, like in *Doerle,* the suspect's erratic behavior indicated that he may be emotionally disturbed, and there was little effort on behalf of the officers to "talk him down." The deputies testified that they yelled at Williams to drop his machete, but they did not testify that they warned him that they would shoot if he did not comply. Most importantly, Williams did not pose a threat of death or serious bodily injury to the deputies, as the Court in *Garner* requires, if he was not holding the machete before he was shot. Defendants cite *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir.2005), in support of their argument that even if the deputies violated the Fourth Amendment, it was not clearly established that the deputies' use of deadly force was unconstitutional. In that case, the court held that the police officers, who shot a suspect armed with a sword, were entitled to qualified immunity. . . . This case, however, is distinguishable from *Blanford* because there is a question of fact as to whether Williams was actually armed at the moment the deputies opened fire. Additionally, unlike in *Blanford,* there is no evidence in this case that the deputies warned Williams that they would shoot if him if he did not drop his machete, and there is evidence that he stood still, or nearly still, before he was shot.").

Kaady v. City of Sandy, No. CV. 06-1269-PK, 2008 WL 5111101, at *21 (D. Ore. Nov. 26, 2008) ("After reviewing the case law, I conclude that, as of September 2005 when Bergin used his Taser on Kaady, police officers had reasonable notice that they may not use a Taser against an individual suspect who does not pose a threat and has merely failed to comply with commands. I therefore deny Bergin's motion for summary judgment on plaintiffs' First Claim for Relief, which alleges that the Taser constituted excessive force. On the other hand, because Willard used his Taser after Kaady posed a threat, I find that Willard is entitled to qualified immunity. I . . . grant Willard's motion for summary judgment on plaintiff's First Claim for Relief.").

Neal-Lomax ex rel. Lomax v. Las Vegas Metropolitan Police Dept., 574 F.Supp.2d 1170, 1187 (D.Nev. 2008) ("Even if a genuine issue of fact remained that Rader violated Lomax's rights by using the Taser on Lomax five times in quick succession while Lomax was on the gurney, Rader's belief that he used an appropriate amount of force was reasonable. Rader was faced with a resisting individual who would not obey commands, who was struggling against all forms of restraint, and who needed prompt medical care. His use of the Taser was effective in gaining momentary compliance and assisting the housing security officers and medical personnel in making progress in restraining Lomax. Efforts at using lesser means of force, such as verbal commands and physical restraining of his limbs by the security officers, were insufficient to gain control over Lomax to permit medical personnel to assist him. Plaintiffs point to no clearly established law that multiple Taser applications in short succession on a struggling suspect constitute excessive force such that a reasonable officer in Rader's position would know Rader's conduct was unlawful. Although Plaintiffs point to Rader's alleged failure to conform to departmental policy and his training, Rader's conduct was not directly contrary to his training and LVMPD policy such that a reasonable officer would know his conduct was not only contrary to policy and training, but also unconstitutional.").

Hayes v. Wickert, No. C06-5402RJB, 2006 WL 3373051, at **4-6 (W.D. Wash. Nov. 20, 2006) ("The severity of the crimes at issue here weighs against holding that shooting Plaintiff was reasonable. The undisputed facts indicate that Plaintiff violated various traffic laws: he ran a stop sign, was speeding, was driving without his lights at night in an apparently unpopulated area, and was driving into the oncoming lanes to avoid having to take curves, as well as the felony of eluding a police officer. The next factor to consider in determining whether an officer's use of force was reasonable is examining whether the suspect posed an 'immediate threat to the safety' to Officer Wickert or others. Officer Wickert argues that he opened fire because he felt Plaintiff was attempting to hit him when he backed the car up after losing control on the gravel road. However, there are issues of fact as to whether Officer Wickert's safety was threatened. In the Plaintiff's version of events, he had already backed the car up before Officer Wickert arrived at the gravel road. Because the Court must 'take the facts in the light most favorable to the party asserting the injury,' *Saucier* at 201, Officer Wickert is unable, for the purposes of this motion, to establish that his use of force was reasonable because he feared serious injury or death. Officer Wickert also argues that his use of force was reasonable because he feared for the safety of others based on Plaintiff's speeding, driving without lights at night, and his driving into oncoming lanes of traffic (reckless driving). Considering all the facts and circumstances, Officer Wickert is unable, for the purposes of this motion, to establish that his use of force was reasonable because he feared an 'immediate threat' to the safety of others. *Graham* at 396. The record is silent on whether there were any people nearby. The record does indicate that these events took place at night. Officer Wickert points to *Brosseau v. Haugen,* 543 U.S. 194 (2004) in support of his position that his use of force was reasonable because he was concerned about the safety of others. . . In *Brosseau,* the Supreme Court affirmed this Court's judgment, and found that a police officer was entitled to qualified immunity because prior case law did not 'clearly establish' that the police officer's conduct violated the Fourth Amendment. *Id.* at 201. However, at this stage in the inquiry the Court is examining whether a constitutional violation occurred, not whether the violated right was clearly established. The Supreme Court did not address the first factor under *Saucier,* whether Haugen's constitutional rights had been violated, in that case. In any event, the factual setting in *Brosseau* was different then in the instant case. There, police were called to neighborhood during day to respond to a fight between Haugen and two other men at Haugen's mother's house. *Id.* at 196. When the police arrived Haugen fled. *Id.* After a search, Haugen ran back to his mother's front yard and jumped into a Jeep, parked in the driveway, which was facing an occupied car, also parked in the driveway. *Id.,* at 196. There was another occupied vehicle parked behind the car. *Id.* An officer ran up to the Jeep, pulled her gun and ordered Haugen out of the vehicle. *Id.* The police officer broke the driver's side window and tried, but failed, to get the keys. *Id.* As the Jeep started, or shortly after it began to move, the officer jumped back and to the left and fired on shot at Haugen. *Id.* at 196- 197. The officer there explained that she shot Haugen because she was 'fearful for the other officers on foot who she believed were in the immediate area, for the occupied vehicles in Haugen's path, and for any other citizens who might be in the area.' *Id.* at 197. Here, unlike in *Brosseau,* there is no evidence that there were other people in the area, much less that there was an 'immediate' threat to their safety. Accordingly, this factor, at this stage in the case, weighs against a finding that Officer Wickert's use of force was reasonable here. At least, there

are material issues of fact. The final factor in considering whether Officer Wickert's use of force was reasonable is a consideration of whether the suspect was 'actively resisting arrest or attempting to evade arrest by flight.' *Graham* at 396. Here, viewing the facts in a light most favorable to the Plaintiff, Plaintiff was not actively resisting arrest. He was attempting to evade arrest, and he alleges that Officer Wickert's shot entered his shoulder as he was accelerating away. This factor also weighs against a finding that Officer Wickert's use of deadly force reasonable. . . . The next step under *Saucier* in determining if Officer Wickert is protected by qualified immunity, is to ascertain if Plaintiff's constitutional right was clearly established at the time of the injury. . . . Under the circumstances alleged, a reasonable officer would have had fair notice that shooting an individual suspected of violating traffic laws and eluding police was unlawful. There are issues of fact as to when Plaintiff began backing his car, and if Plaintiff version of events is believed, Officer Wickert jumped out of his patrol car and immediately began firing shots. Under those circumstances, Officer Wickert could not reasonably have believed his safety was endangered, and would have fair notice that shooting Plaintiff was unlawful. Moreover, unlike in *Brosseau,* or the other cases cited by Officer Wickert, the record does not contain evidence that there were others in the area who's safety was immediately threatened. A reasonable officer, under the facts alleged by Plaintiff, would have reasonable fair notice that shooting the Plaintiff here was unlawful.")

Hunt v. County of Whitman, No. CS-03-119-FVS, 2006 WL 2096068, at *6, *7 (E.D. Wash. July 26, 2006) ("Even though a jury question exists with respect to whether the deputies violated the Fourth Amendment by opening fire, they are entitled to qualified immunity unless Mr. Hunt's right to be free from deadly force was clearly established on December 7, 2000. . . .The plaintiff characterizes this as a case in which the deputies shot an emotionally distraught man who, although armed, had not committed a serious crime prior to their arrival, was not attempting to flee, and who had turned his back toward the deputies whom he allegedly was threatening. . . .Significantly, the plaintiff has failed to cite a single case, much less a case decided before December 7, 2000, in which a law enforcement officer has been held to violate the Fourth Amendment by shooting an armed man who is aware of the officer's presence, who is capable of shooting the officer, who has ignored repeated instructions to put his firearm down, and who has given credible indications that he is contemplating a violent resolution of the standoff. As a result, it would not have been clear to a reasonable law enforcement officer that it was unlawful to shoot Chester Hunt even assuming he did not verbally threaten the officers or point his handgun at them as he stood in the bed of the pickup. Rather, this is a situation in which, even if the plaintiff's account is correct, the officers' decision to shoot fell within the hazy border between ' "excessive and acceptable force."'").

Tungwarara v. United States, 400 F.Supp.2d 1213, 1220, 1221 (N.D. Cal. 2005) ("The Court therefore concludes that some level of suspicion is required under the Fourth Amendment to conduct strip searches of non-admitted aliens. . . Indeed, this Court concludes that this right is now clearly established in light of the reasoning employed by the Ninth Circuit in *Wong*, which applies analogously to the right to be free from non-routine searches absent some level of suspicion. . . . The more difficult issue is whether Tungwarara's Fourth Amendment right to be free from a strip search absent suspicion that she was concealing weapons or contraband was clearly established in

2002. As the court in *Wong* recognized, prior to its decision in that case the law was unsettled regarding the extent to which non-admitted aliens enjoyed substantive constitutional rights. . . . The strip search here was an unwarranted and painful affront to Plaintiff's privacy and dignity, and this Court has concluded that it was unconstitutional. At the same time, the pat-down search here did not constitute the kind of 'gross physical abuse,' 'reckless indifference to safety,' or 'torture' that was more clearly forbidden by the case law as of 2002. . . This is not a case where the official's actions were so egregious that the Court can conclude that Tungwarara's right was clearly established absent clearly applicable contemporaneous decisional law. [citing *Brosseau*]. . . . Accordingly, although this Court concludes that a non-invasive strip search of a non-admitted adult alien at the border without any suspicion of any kind is unconstitutional, the Court cannot conclude that this right was clearly established at the time of the incident. If the same search had occurred later after the Ninth Circuit's decision in *Wong*, or had been more invasive or abusive at the time, the Plaintiff's 'clearly established' rights would likely have been violated. On the uncontested facts of the search here, however, Ludwigs is entitled to qualified immunity.").

McCartor v. City of Kent, No. C05-0032Z, 2005 WL 2600421, at *9, *10 (W.D. Wash. Oct. 12, 2005) ("Given a possible constitutional violation, the next inquiry is whether Mr. McCartor's constitutional right to be free of the use of deadly force under the circumstances was 'clearly established' at the time of the incident. The short answer is 'no.' Plaintiffs argue that Mr. McCartor's flight in the car is analogous to the burglar's flight on foot in *Garner*, the United States Supreme Court case in which the Court held that it is unlawful to use deadly force on an apparently unarmed suspected felon. . . .The case before the Court, however, involves a suspect who was 'armed'–with his vehicle. Even Plaintiffs admit, albeit in a different part of their case, that a car can be a deadly weapon. . . Not only was Mr. McCartor armed, but also he demonstrated a repeated willingness to use his car to thwart the police's efforts to arrest him and to endanger Officer Buck's safety. These differences between the facts of the case before the Court and the *Garner* case precludes the use of *Garner* as binding precedent to show that Mr. McCartor's right to be free of Officer Gagner's use of deadly force was 'clearly established' at the time of the incident. At oral argument, Plaintiffs argued that Officer Gagner should have been on notice that his conduct was unlawful because of the Sixth Circuit case of *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir.2000). In that case, a police officer shot at a vehicle that was driving towards him, injuring the passenger of the vehicle. . . The Sixth Circuit affirmed the District Court's judgment upholding a jury verdict finding the officer liable for the passenger's injuries. . . Although the jury must have found the officer's shooting to be 'objectively unreasonable' in order to find him liable, the case law does not explain the jury's rationale (nor could it have explained it). . .Without any Fourth Amendment analysis, and because of the different fact patterns of the cases, *Fisher* cannot be said to have 'clearly established' the unreasonableness of Officer Gagner's use of deadly force. . .Plaintiffs have failed to locate a single case, binding or otherwise, holding that it is unlawful to use deadly force against a suspect who threatens the safety of others and who refuses to yield to police officers despite the officers' repeated attempts to stop him through the use of non-deadly force.")**.**

Logan v. City of Pullman, 392 F.Supp.2d 1246, 1265-68 (E.D. Wash. 2005) ("Neither party can point the Court to controlling case law in the United States Supreme Court or this Circuit dealing with the use of pepper spray under the circumstances confronted by the Defendant Officers. However, the parties point the Court to a handful of relevant cases, which certainly define some of the acceptable limits of the use of pepper spray. . . . In light of the existing law, the Court determines it would be clear to a reasonable officer that the use of O.C. must be preceded by a warning when the officer's safety is not threatened and the officer is not trying to overcome resistance to arrest. Further, in light of *LaLonde* and *Headwaters*, a reasonable officer would know he has an obligation to render assistance after using O.C. and alleviate the symptoms of those individuals who were affected by the O.C. If the facts alleged by Plaintiffs are proven, the Defendant Officers used O.C. in a situation where a reasonable officer would have known it was clearly unlawful and did not render the necessary assistance they were obligated to provide under the Fourth Amendment. Accordingly, the Defendant Officers are denied qualified immunity with respect to Plaintiffs' Fourth Amendment claims. . . . In conclusion, under the second prong of the *Saucier* analysis, the Court determines the law was clearly established such that a reasonable officer would know (1) his refusal to assist and calm individuals who were suffering from affects of O.C.; (2) taking efforts to keep individuals inside a building where O.C. was sprayed; and (3) preventing others from helping those individuals harmed by the O.C. would result in a violation of the individuals' Fourteenth Amendment rights. Accordingly, the Defendant Officers are not entitled to qualified immunity with respect to the Plaintiffs' Fourteenth Amendment claims.")

Escobedo v. City of Redwood City, No. C 03-3204-MJJ, 2005 WL 226158, at *9 (N.D. Cal. Jan. 28, 2005) (not reported) ("Neither Defendants nor Plaintiffs cite cases to support their respective positions regarding whether a reasonable police officer would know that the officers' specific conduct here–the continued use of nunchucks after initial use proved ineffective, the use of nunchucks on an already-handcuffed detainee, and the officers' full weight on the already handcuffed and prone suspect's back and neck–violated Escobedo's clearly-established Fourth Amendment right regarding excessive force. However, the Court's review of excessive force cases in which specific aspects of conduct were assessed under *Saucier* reveals that a reasonable officer would have known that these actions, if they occurred as claimed by Plaintiffs, were constitutionally excessive. For example, in *Drummond*, the Ninth Circuit found that a reasonable officer would have 'fair warning' that the pressure applied to the detainee in that case–two officers leaning their weight on the detainee's neck and torso for a substantial period of time–was unconstitutional. The instant case is distinguishable from the facts of *Drummond* in that the officers claim not to have been specifically aware that Escobedo was having trouble breathing and in that Escobedo was struggling with the officers fairly fiercely. However, neither of those distinctions alter the Court's conclusion here. First, the evidence indicates that Escobedo was screaming for help; whether or not he specifically said he could not breathe is not particularly significant in light of the force exerted by the officers. Second, although Escobedo was struggling with the officers, he was face-down, being held by six police officers, and handcuffed. The officers' continued pressure on his back (and possibly his neck) and their continued use of nunchucks in these circumstances, if true, was excessive and a reasonable officer would have known that. The

Billington case cited by Defendants is distinguishable on its facts because the detainee in question physically attacked the officer and tried to turn the officer's gun on him. . . Escobedo did not pose that type of threat to the six police officers on top of him, particularly after he was handcuffed. The defendant officers are not entitled to qualified immunity here.").

TENTH CIRCUIT

Lee v. Tucker, 904 F.3d 1145, 1149-50 (10th Cir. 2018) ([W]e lack jurisdiction to review the defendants' arguments, adopted by the dissent, that Lee posed an immediate threat and that he actively resisted arrest or attempted to flee. In this case, the district court 'conclude[d] that these disputed facts are indeed material, and it is for the jury to decide whether Mr. Lee resisted.' Consideration of challenges to this conclusion would 'require [us to] second-guess[ ] the district court's determinations of evidence sufficiency' and would accordingly exceed our interlocutory jurisdiction. . . We therefore dismiss the appeal as to these issues. . . . We do, however, have jurisdiction to review whether the facts as the district court found them would constitute a legal violation. . . . *Cavanaugh* establishes that the use of a Taser without warning on a non-resisting misdemeanant violates the Fourth Amendment's excessive force protections. Under the facts articulated by the district court, defendants violated *Cavanaugh's* dictate by repeatedly applying a Taser without warning, despite the fact that Lee was not resisting the officers and had not been advised that he was being detained. Although defendants seek to argue that Lee was in fact resisting their efforts to arrest him, we have no jurisdiction to review the district court's evidentiary conclusions.")

Lee v. Tucker, 904 F.3d 1145, 1151, 1158-59 (10th Cir. 2018) (Phillips, J., dissenting) ("I would conclude that the four deputy sheriffs did not act with excessive force under the Fourth Amendment, and, accordingly, that they violated no clearly established law. For this dissent, I focus on the majority's analysis of the clearly-established-law prong of qualified immunity. . . . I cannot see how *Cavanaugh* squarely governs Lee's case. Unlike the officer in *Cavanaugh*, the deputies here were locked in a physical struggle with Lee and had exhausted other efforts to handcuff him before Deputy Tucker used a Taser. Unlike the unsuspecting Ms. Cavanaugh, Lee had every reason to believe that the longer he succeeded in resisting the handcuffing, the more likely a deputy would use a Taser. Unlike what happened to Ms. Cavanaugh, Lee's body was not penetrated by fired prongs that left him limp and subject to a brain injury upon falling and hitting concrete steps. The more appropriate case in guiding our decision on the clearly-established-law prong is *Aldaba v. Pickens* (*Aldaba II*), 844 F.3d 870 (10th Cir. 2016). . . . Though a year earlier we ruled that the officers *had* violated Mr. Aldaba's clearly established Fourth Amendment rights, . . . we reversed ourselves on our initial clearly-established-law ruling after the Supreme Court vacated that judgment and remanded for our consideration in light of *Mullenix*. . . The second time around, we rejected the argument that *Cavanaugh* had provided the necessary clearly established law to overcome qualified immunity. . . If *Cavanaugh* cannot provide clearly established law sufficient to rule that Tasering a disturbed hospital patient is not excessive force, I don't see how the majority can reach a different result for Deputy Tucker's Tasering Lee during

a physical struggle after other efforts to subdue Lee for handcuffing him failed. Though *Aldaba II* was decided two years after Lee's arrest, it surveyed all preceding cases in concluding that no precedent clearly established that all but plainly incompetent officers, or officers knowingly violating the law, would act with excessive force under the Fourth Amendment in Tasering a disturbed hospital patient. The same conclusion should apply for the deputies here in their Tasering an intoxicated, belligerent suspected wife-abuser, ending a dangerous physical struggle by handcuffing him.")

Clark v. Colbert, 895 F.3d 1258, 1264 (10th Cir. 2018) ("[T]he fact that Clark was experiencing a psychotic episode cannot itself prevent summary judgment. Clark's illness factors into our analysis only as one circumstance in the totality. And though we have held police officers can incur liability for 'reckless' conduct that begets a deadly confrontation, *see Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997), that is not what happened here. No reasonable juror could find the officers' use of pepperballs to be a reckless provocation. . . At best, the officers wrongly predicted how Clark would react to the pepperballs. To say they should have known the plan would create a need to shoot Clark is to indulge in the very sort of hindsight revision the law forbids. . . This analysis compels affirmance of the district court's Fourth Amendment ruling. For Sheriff Colbert to be liable in any capacity for a violation of Clark's constitutional rights, Clark must show his constitutional rights were, in fact, violated. . . He has failed to produce sufficient evidence of that fact. The officers in this case confronted an armed and irate suspect who had already attacked his own brother. When he refused to submit to arrest, the officers preferenced nonlethal means of arrest over more dramatic and violent options. No reasonable juror could find the use of pepperballs objectively unreasonable in violation of the Fourth Amendment.")

Redmond v. Crowther, 882 F.3d 927, 939 (10th Cir. 2018) ("[A]lthough *Whitley* repeats the Eighth Amendment's general framework, the Supreme Court recently reminded us that it is a 'longstanding principle that clearly established law should not be defined at a high level of generality.' *White*, 137 S. Ct. at 552. General legal standards therefore rarely clearly establish rights. . . They only do so in 'an obvious case.'. . That is, a case in which the 'contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'. . This is no such case. Indeed, *White* is instructive. In that case, the Supreme Court reversed our circuit's conclusion that a right was clearly established. . . Our circuit erred, the Court explained, by relying on cases which laid out 'excessive-force principles at only a general level' to clearly establish the right, rather than 'identify[ing] a case where an officer acting under similar circumstances' violated that right. . . Redmond asks us to repeat this same mistake. Nor do the most factually similar cases from our circuit clearly establish that inadvertent exposure to gas violates the Eighth Amendment. To the contrary, in *Gargan*, a non-precedential unpublished decision, we held spraying an unarmed prisoner secured in his segregation cell with pepper spray did not violate the Eighth Amendment. . . And in *DeSpain*, we held it would violate the Eighth Amendment to 'indiscriminately' spray a prison tier with pepper spray as a practical joke. . . Neither case clearly establishes that it violates the Eighth Amendment to use CS gas to secure an uncooperative prisoner and, in doing so, inadvertently expose other prisoners to the gas. In sum,

Nicholes and Powell are entitled to qualified immunity on the claim they violated the Eighth Amendment by exposing the prisoners to CS gas. Redmond cannot establish that the officers violated the Eighth Amendment and, even assuming they did, the right would not be clearly established.")

Farrell v. Montoya, 878 F.3d 933, 937-39 10th Cir. 2017) ("The application of controlling precedent to our case is straightforward. The Farrells were fleeing when Montoya fired his gun at their vehicle. Like the defendants in *Hodari D* and *Brooks*, they were not seized because, in fleeing, they were not submitting to the officers. Because they were not seized when Montoya fired his gun, there can be no excessive-force claim. . . Therefore, no reasonable jury could 'find facts supporting a violation of a constitutional right,' and the Farrells cannot overcome Montoya's qualified-immunity defense. . . . The Farrells also argue that they submitted to DeTavis when they pulled over (twice) before Montoya arrived, creating a seizure that continued at least until Montoya fired his gun. But neither this court, nor any court of which we are aware, has adopted the concept of an ongoing seizure. . . under which once a person is seized, the seizure is deemed to continue even after the individual takes flight. . . .In short, when Montoya fired at the van, the Farrells were fleeing. Though they had been seized moments before, that seizure ended when they no longer submitted to the officers' authority. And Montoya's shots themselves did not effect a seizure because the van continued its departure. The Farrells' alleged intent to submit when they could reach a police station was irrelevant because their conduct—the flight from the officers—did not manifest submission. As there was no seizure, there could be no unreasonable seizure, even if Montoya was using deadly force. The Farrells' claims against Montoya fail for lack of any violation of the Fourth Amendment.")

Harte v. Bd. of Commissioners of Cty. of Johnson, Kansas, 864 F.3d 1154, 1193-94 (10th Cir. 2017) (Phillips, J., joined by Moritz, J., in majority of panel on this issue) ("[T]hough I find it unreasonable to send seven deputies dressed in bulletproof vests, one displaying an assault rifle and the rest displaying pistols, to execute a warrant for a suspected small-time marijuana grow against a family with no criminal history, I can't say that *every* reasonable official would necessarily know that this conduct amounts to excessive force. . . The cases that the Hartes cite don't persuade me otherwise. Therefore, I would affirm the district court's grant of summary judgment in favor of the deputies.")

Estate of Redd by and through Redd v. Love, 848 F.3d 899, 911 (10th Cir. 2017) (In case brought by estate of arrestee, who committed suicide after he was arrested for illegally trafficking in Native American artifacts, the court concluded that "even interpreting the facts most favorably to the Estate, we see no constitutional violation. Agent Love's conduct—deploying twenty-two agents wearing soft body armor and carrying firearms in compliance with agency policy—was not objectively unreasonable under the circumstances. With this in mind, we of course also agree with the district court's conclusion that the Fourth Amendment right at issue in this case wasn't clearly established. Thus, we conclude that Agent Love was entitled to qualified immunity.")

Carabajal v. City of Cheyenne, Wyoming, 847 F.3d 1203, 1210-13 (10th Cir. 2017) ("Even if Officer Thornton's conduct constituted excessive force under the Fourth Amendment, it was not clearly established at the time of the shooting that Officer Thornton's conduct was unlawful. Typically, a preexisting Supreme Court or Tenth Circuit decision, or the weight of authority from other circuits, must make it apparent to a reasonable officer that the nature of his conduct is unlawful. . . Such precedent must have put the question of the reasonableness of the officer's conduct 'beyond debate.'. .As discussed above, this court in *Thomas* determined that an officer was entitled to qualified immunity in a situation involving suspects fleeing at relatively low speeds, given the threat of serious physical harm posed by a car moving in the officer's direction. . . The existence of this decision alone seems to foreclose Mr. Carabajal's argument that the unlawfulness of Officer Thornton's conduct was clearly established, and the cases upon which Mr. Carabajal relies do not alter that conclusion. Mr. Carabajal argues that the Supreme Court's decision in *Mullenix v. Luna* suggests that qualified immunity is more limited in cases where the driver travels at a low speed. But even accepting this inference as accurate, it suffices to say that an implication cannot put the unlawfulness of certain conduct beyond debate. We also question whether Officer Thornton's conduct at issue here was any more troubling than that of the officer who was granted qualified immunity in *Mullenix*. From an overpass 20 feet above I-27, that officer fired six shots at a fleeing vehicle traveling 85 miles per hour, inadvertently killing the driver, all in an effort to disable the vehicle. . .Mr. Carabajal also relies on three decisions from other circuits to contend that Officer Thornton was on fair notice of the unconstitutional nature of his conduct. . . Such cases, however, are too factually distinct to speak clearly to the situation Officer Thornton confronted. While Mr. Carabajal's cases involved disputes of material fact as to the position of the police officer relative to the vehicle at issue and therefore the threat posed to the officer, the video evidence here clearly shows Officer Thornton was positioned in the path of Mr. Carabajal's vehicle as it lurched forward. Even if these cases were not factually distinguishable, they are insufficient to demonstrate that the weight of authority makes it apparent that Officer Thornton's conduct was unreasonable, particularly in light of our decision in *Thomas* and the Eleventh Circuit's decision in *Robinson v. Arrugueta*, 415 F.3d 1252 (11th Cir. 2005). In *Robinson*, the court held that it was reasonable for an officer to use deadly force to stop a slow-moving vehicle advancing in his direction, and that clearly established law did not indicate otherwise. . .We emphasize, however, that our holding is not a blanket rule that a police officer is entitled to qualified immunity whenever he or she uses deadly force against the driver of a vehicle that is moving in the direction of the officer or other individuals. The determination of qualified immunity remains heavily dependent on the claim in light of the unique circumstances of each case. As discussed above, we conclude this particular claim warrants qualified immunity. . . . [I]n *Plumhoff v. Rickard*, . . . the Court noted the disagreement among federal appellate courts as to whether an automobile passenger is seized when an officer uses deadly force against the driver of the vehicle. . . Some circuits have interpreted the intent requirement in *Brower* to mean that the officer must have had the objective intent to stop a particular individual, while other circuits have interpreted it to require the objective intent to act in such a way that causes the intended result — a stop — regardless of the target. *Compare, e.g., Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 794–96 (1st Cir. 1990) (holding that a passenger who was accidentally shot by a police officer did not have a Fourth Amendment claim because the

officer's intent was to shoot the fleeing driver, not the passenger), *with, e.g., Vaughan v. Cox*, 343 F.3d 1323, 1328–29 (11th Cir. 2003) (holding that a passenger who was accidentally shot was subjected to a Fourth Amendment seizure because the officer fired his weapon to stop the car). In *Childress v. City of Arapaho*, this court held that two hostages who were passengers in a vehicle being pursued by the police were not seized when police fired shots at the vehicle, inadvertently wounding the hostages. . . Plaintiffs maintain that *Childress* is distinguishable because it involved the police attempting to deliver hostages from a dangerous situation. However, we need not address whether our holding in *Childress* extends to passengers like V.M.C. We may affirm the district court's judgment as to this claim on any ground supported by record. . . Plaintiffs are not pursuing a municipal liability claim based on any seizure of V.M.C. . . . As to the individual liability of Officer Thornton, we note that he raised the defense of qualified immunity in his answer, . . . and pursued it by motion after this claim was dismissed. . . We conclude that, even if Plaintiffs pled a plausible unreasonable seizure claim as to V.M.C., Officer Thornton would be entitled to qualified immunity. This is so because Plaintiffs cannot demonstrate that the law was clearly established that a seizure of V.M.C. occurred in these circumstances. . .We are comfortable deciding this legal issue on qualified immunity given Plaintiffs' critique of the law contained in their opening brief:

The Tenth Circuit has yet to address whether the Fourth Amendment protects an automobile passenger seized during the use of deadly force against the driver. Other circuit courts of appeals are divided on the issue. The Supreme Court noted the split in the Circuits in *Plumhoff*, but specifically 'express[ed] no view on this question.' However, the *Plumhoff* Court hinted at a way forward, noting that in a previous case, *County of Sacramento v. Lewis*, the Court held that a passenger 'could recover under a substantive due process theory only *if the officer had a purpose to cause harm* unrelated to the legitimate object of the arrest.'

. . . We doubt Plaintiffs have the factual predicate for what they perceive as a hint. Regardless, a hint as to what the law may be cannot substitute for clearly established law. . . As Plaintiffs unequivocally acknowledge, the law simply is not clearly established.")

Clark v. Bowcutt, 675 F. App'x 799, 805-10 (10th Cir. 2017) ("We elect to focus on the first prong—*viz*., whether the defendant committed a constitutional violation—and it proves dispositive. . . .Ms. Clark limits her claim to the argument that deadly force was unconstitutionally used when Deputy Bowcutt 'deliberately stepped in front of Burkinshaw's vehicle as it was moving forward and remained in front of the vehicle despite opportunities to move aside' before shooting Mr. Burkinshaw. . . Ms. Clark also argues that the pursuit leading up to the shooting did not create an imminent threat of harm and therefore did not justify the use of deadly force. Deputy Bowcutt, on the other hand, contends that his use of deadly force was justified because he reasonably perceived that Mr. Burkinshaw's operation of the Volkswagen posed an immediate threat of death. We recognize that this case presents a unique set of facts and circumstances. In accordance with Supreme Court precedent instructing us to review the reasonableness of Deputy Bowcutt's actions by 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,'. . . we will consider the three non-exclusive factors set forth in *Graham*, 490 U.S. at

396, and the four factors articulated in *Estate of Larsen*, 511 F.3d at 1260, to shed light on whether a constitutional violation occurred. Ms. Clark does not dispute that the third *Graham* factor, 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight,' . . . favors Deputy Bowcutt. Specifically, Ms. Clark concedes that Mr. Burkinshaw 'was attempting to evade arrest by flight.'. . Therefore, we need only consider whether the first and second *Graham* factors support her claim. . . .The second *Graham* factor, 'whether the suspect poses an immediate threat to the safety of the officers or others,'. . . more clearly favors Deputy Bowcutt and proves crucial to the outcome here. We reach this conclusion after first considering whether Deputy Bowcutt 'could have reasonably perceived he was in danger at the precise moment that he used force and whether his own reckless or deliberate conduct (as opposed to mere negligence) unreasonably created a need to use force.'. . Deputy Bowcutt argues that his use of deadly force was justified because he reasonably perceived that Mr. Burkinshaw's operation of the Volkswagen posed an immediate threat of death. Acknowledging that the dashboard camera video does not capture the entire episode in this case, it is nevertheless readily apparent to us from examining the video that Mr. Burkinshaw posed an immediate threat to Deputy Bowcutt's safety. Mr. Burkinshaw continued to drive his Volkswagen forward as Deputy Bowcutt stepped backwards; his vehicle's bumper was just inches away from Deputy Bowcutt. Despite Deputy Bowcutt's orders to stop, Mr. Burkinshaw did not. Deputy Bowcutt had mere seconds to react. We conclude that a reasonable officer in Deputy Bowcutt's position 'would have feared for his life,'. . and his actions in firing at Mr. Burkinshaw were reasonable. Even if he was mistaken as to the imminence of the threat to his safety, it is axiomatic that '[a]n officer may be found to have acted reasonably even if he has a mistaken belief.'. . . If a reasonable officer in Deputy Bowcutt's position 'would have feared for his life,' then the 'urgency of terminating the chase would increase and the balance would tip in the officer['s] favor.'. . .Ms. Clark also makes much of the purported recklessness of Deputy Bowcutt's conduct in stepping in front of Mr. Burkinshaw's Volkswagen. Similarly, the district court concluded that '[i]f Bowcutt could have reasonably moved out of the way, his decision to step in front of the car and remain there when it became apparent Burkinshaw was not going to stop may be found by a jury to have been reckless and to have unnecessarily created the need to use deadly force.'. . However, '[t]his is tantamount to the proposition that a citizen has a Fourth Amendment right to be free of police actions contributing to the use of deadly force *by the citizen*.'. . . That proposition is unsupported by our precedent. . . . Moreover, our inquiry on excessive force must focus on whether 'the officer was in danger in the moment of the threat.'. . And '[m]ere negligent actions precipitating a confrontation would not ... be actionable under § 1983[.]'. . . We would be hard-pressed to label Deputy Bowcutt's conduct negligent, much less reckless. Deputy Bowcutt's act of stepping in front of the Volkswagen did not unreasonably create the need to use force; the totality of the circumstances shows that his actions were reasonable. . . . Accordingly, with the totality of the factual circumstances in mind, the *Estate of Larsen* factors—viewed alongside the variables that *Graham* specifically identifies—powerfully support Deputy Bowcutt's position that his use of deadly force was reasonable.")

Aldaba v. Pickens, 844 F.3d 870, 871-74 & n.1, 877-80 (10th Cir. 2016) (on remand from Supreme Court) ("After the Supreme Court granted certiorari in *Pickens v. Aldaba,* 136 S. Ct. 479 (2015)

(mem.), it vacated our judgment and remanded 'for further consideration in light of *Mullenix v. Luna*, 577 U.S. ----, 136 S. Ct. 305 ... (2015) (*per curiam*).' Having further considered our earlier opinion, we now hold that the three law-enforcement officers are entitled to qualified immunity because they did not violate clearly established law. We do not decide whether they acted with excessive force. Hence we reverse the district court's judgment and remand with instructions to grant summary judgment in favor of the three law-enforcement officers. . . .The *Mullenix* Court rejected the rationale that the Fifth Circuit used to deny Trooper Mullenix qualified immunity. Specifically, the Supreme Court rejected the Fifth Circuit's using as clearly established law a general rule that 'a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others."'. . It harked back to *Brosseau*, where it had rejected as 'mistaken' the Ninth Circuit's use of an equally general test for excessive force taken from *Tennessee v. Garner*, 471 U.S. 1 (1985), namely, that 'deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'. . In repeating the proper rule for what qualifies as clearly established law, the *Mullenix* Court quoted its earlier cases. . . .We summarize by noting that the *Mullenix* Court rejected the Fifth Circuit's analysis applying Trooper Mullenix's acts against a general legal rule—that is, 'a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others"'—to meet the requirement of clearly established law. . . Instead, though not requiring a case directly on point,[1] the Court looked to see if any case would make it clear to every reasonable official that Trooper Mullenix's actions would amount to excessive force in violation of the Fourth Amendment. **[fn.1** The Estate relies heavily on *Hope v. Pelzer*, . . . which pronounced that law is clearly established if it gives officials 'fair notice' or 'fair warning' that 'his conduct deprived his victim of a constitutional right.' To show clearly established law, the *Hope* Court did not require earlier cases with 'fundamentally similar' facts, noting that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.'. . This calls to mind our sliding-scale approach measuring the egregiousness of conduct. . . But the Supreme Court has vacated our opinion here and remanded for us to reconsider our opinion in view of *Mullenix*, which reversed the Fifth Circuit after finding that the cases it relied on were 'simply too factually distinct to speak clearly to the specific circumstances here.'. . We also note that the majority opinion in *Mullenix* does not cite *Hope v. Pelzer*, 536 U.S. 730 (2002). As can happen over time, the Supreme Court might be emphasizing different portions of its earlier decisions. In this regard, we note Justice Thomas's dissent in *Hope*, where he complains that the Court ignored *Malley v. Briggs*'s pronouncement that qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'. . In any event, the Supreme Court told us to apply *Mullenix*, so we do.**]** The Court found no case doing so. . . In this regard, it cited key facts distinguishing Trooper Mullenix's case from earlier ones—'when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards [another officer's] position.'. . The *Mullenix* Court concluded that none of its precedents 'squarely governed' this situation. The precedents did not establish 'beyond debate' that Mullenix had acted with excessive force. . . The *Mullenix* Court required more than an excessive-force finding insufficiently backed

by existing precedent (choosing not to address whether the Fifth Circuit's excessive-force finding was correct). . . .We erred in a somewhat different way by relying on excessive-force cases markedly different from this one. Although we cited *Graham v. Conner*, 490 U.S. 386 (1989) to lead off our clearly-established-law discussion, we did not just repeat its general rule and conclude that the officers' conduct had violated it. Instead, we turned to our circuit's sliding-scale approach measuring degrees of egregiousness in affirming the denial of qualified immunity. . . We also relied on several cases resolving excessive-force claims. But none of those cases remotely involved a situation as here: three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment. . . 'A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right."'. . . Although plaintiffs can overcome a qualified-immunity defense without a favorable case directly on point, 'existing precedent must have placed the statutory or constitutional question "beyond debate."'. . 'The dispositive question is "whether the violative nature of the *particular conduct* is clearly established."'. . In the Fourth Amendment context, 'the result depends very much on the facts of each case,' and the precedents must 'squarely govern' the present case. . . . Under these rules, the Estate cannot show that the officers violated clearly established law. As mentioned, the Estate's offered cases differ too much from this one, so reading them would not apprise every objectively reasonable officer that restraining Leija for medical treatment, as here, would amount to excessive force (and, again, we do not decide whether the officers acted with excessive force). The vast differences between the Estate's primary cases and this one are best seen by examining them individually. [Court discusses *Casey*, *Cavanaugh*, and *Cruz*] None of these three cases would advise 'every reasonable official' that Tasering Leija to hasten life-saving care would amount to excessive force under the Fourth Amendment. Here, the three law-enforcement officers were not arresting Leija. Instead, they were assisting his medical providers, who needed to control him so they could provide emergency care. Leija was beyond reason and if allowed to leave the hospital would face death—so said his doctor. Unlike the officers in the three cases above, the law-enforcement officers here tried to calm Leija and Tasered him only after their other efforts had failed. Undoubtedly, they faced a difficult situation, and no nearby medical provider advised against using the Taser. We have found no case presenting a similar situation. We certainly cannot say that every reasonable officer would know that the Fourth Amendment condemned using a Taser to avoid a full-out physical confrontation with a patient whose life depended on immediate treatment. No case renders a Fourth Amendment violation 'beyond debate.'. . .Finally, the Estate relies on a line of cases in which plaintiffs alleged that law-enforcement officers had used excessive force against persons suffering from mental illness or diminished capacity. As with the above cases, these cases did not involve medical providers standing nearby while officers used a Taser to subdue a person temporarily out of his mind and needing life-assisting medical treatment. Instead, these additional cases involve force used to detain persons for non-medical reasons. With this key difference in mind, we cannot say that clearly established law informed the officers that their actions would violate the Fourth Amendment. . . . As with the Estate's other cases, none of these additional cases would inform the three officers 'beyond debate' that their actions would be excessive force. Again, the officers here

were acting to restrain Leija so that his medical providers—standing by observing—could administer life-saving care. The three officers' conduct is nothing like that exhibited in the cited cases. Certainly, none of those cases squarely governs this one. And nothing suggests that the three law-enforcement officers were plainly incompetent or knowingly violated the law. . . Accordingly, we remand this case with instructions that the district court grant summary judgment in favor of the three officers based on qualified immunity.")

A.M. v. Holmes, 830 F.3d 1123, 1153 n.17 (10th Cir. 2016) ("As we noted *supra* in Part II, in conducting a clearly-established-law analysis, this circuit uses a sliding-scale approach that demands less specificity in the clearly established law the more egregious the conduct that effects the constitutional violation. In other words, the latter (i.e., the egregiousness of the conduct) is in inverse relationship with the former (i.e., the specificity of the clearly established law). Under such an approach, we do not gainsay that, under certain circumstances where the excessive force is of a particularly egregious nature (e.g., an incredibly reckless taking of a human life by a law-enforcement officer), *Graham* or little more may qualify as the clearly established law that defeats a qualified-immunity defense. *See Pauly v. White*, 814 F.3d 1060, 1075 (10th Cir. 2016) ("Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law." (quoting *Casey*, 509 F.3d at 1284)), *pet. for cert. filed* (U.S. July 11, 2016) (No. 16–67); *see also Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015) (noting that hardly any caselaw specificity was necessary in our clearly-established-law inquiry because the appeal involved a deadly motor-vehicle accident where the officer was "speeding on [his] own business"). It would border on the fatuous, however, for A.M. to suggest that Officer Acosta's treatment of F.M.—notably, his handcuffing of him—constitutes one of those rare instances of egregious conduct where *Graham*, alone, would be a sufficient source of clearly established law.")

Davis v. Clifford, 825 F.3d 1131, 1137 (10th Cir. 2016) ("Looking at other circuits, this case is closely akin to *Deville v. Mercantel*, 567 F.3d 156 (5th Cir. 2009), which held that the law was clearly established that officers used excessive force in executing a minor traffic stop by breaking the driver's-side window, roughly extracting the driver from the car, and tightly handcuffing her, causing severe nerve damage, when she passively resisted arrest. . . Because all of the *Graham* factors are in Davis' favor, 'a reasonable officer would know based on his training that the force used was not justified.'. . Thus, viewing the evidence in the light most favorable to Davis, we conclude she has met her burden to demonstrate that the law was clearly established that the officers used excessive force. Thus, Clifford and Fahlsing are not entitled to qualified immunity and we reverse the district court's grant of summary judgment to these two officers.")

Perea v. Baca, 817 F.3d 1198, 1202-05 (10th Cir. 2016) ("We first determine whether the officers' repeated tasering of Perea after he had been subdued constitutes a violation of the Fourth Amendment right to be free of excessive force. Holding that it does, we then consider whether it was clearly established, at the time of the violation, that such conduct was unconstitutional. Because it is clear from this circuit's precedent that using disproportionate force, in this case a

taser, against a subdued misdemeanant is a violation of the Fourth Amendment, we affirm the denial of qualified immunity. . . .The officers tasered Perea once in 'probe mode' and nine times in 'stun mode' within the span of two minutes, continuing after Perea had been effectively subdued. Even if Perea initially posed a threat to the officers that justified tasering him, the justification disappeared when Perea was under the officers' control. It is not reasonable for an officer to repeatedly use a taser against a subdued arrestee they know to be mentally ill, whose crime is minor, and who poses no threat to the officers or others . . . Because the officers repeated use of the taser cannot be described as reasonable, at least after the point Perea was subdued, the third *Graham* factor weighs against the officers. Viewing the facts as stated by the district court in the light most favorable to Appellees, Jaramillo and Baca's actions were objectively unreasonable. Perea was tackled to the ground for—at most—a traffic infraction. He posed no threat to the officers or others until the officers initiated the arrest. The officers then tasered him repeatedly despite not explaining what they were doing or why they were attempting to subdue him. Most egregiously, they continued tasering Perea after he was effectively subdued and brought under the officers' control. The repeated use of the taser against a subdued offender is clearly unreasonable and constitutes excessive force under the Fourth Amendment. . . Having concluded that the officers' conduct violated the Fourth Amendment, we next address whether—at the time of the events of this case—it was clearly established that the officers' actions constituted excessive force. It is clearly established that specific conduct violates a constitutional right when Tenth Circuit or Supreme Court precedent would make it clear to every reasonable officer that such conduct is prohibited. . . .[O]ur precedent is clear that continued use of force after an individual has been subdued is a violation of the Fourth Amendment. We must accordingly conclude that continuing to taser Perea, a subdued misdemeanant, violated clearly established law.")

Tenorio v. Pitzer, 802 F.3d 1160, 1164-65 (10th Cir. 2015) ("[T]he district court ruled that the record supports some potential jury findings that would establish Tenorio's claim—in particular, that Tenorio 'did not "refuse" to drop the knife because he was not given sufficient time to comply' with Pitzer's order; that Tenorio made no hostile motions toward the officers but was merely 'holding a small kitchen knife loosely by his thigh and ... made no threatening gestures toward anyone.'; that Tenorio was shot 'before he was within striking distance of [Pitzer]; and that, for all Pitzer knew, Tenorio had threatened only himself and was not acting or speaking hostilely at the time of the shooting.'. . . As previously noted, we cannot second guess the district court's assessment of the evidence on this interlocutory appeal; and we are comfortable that the evidence, viewed in this light, suffices for Tenorio's claims. In fact, our precedents compel this result. Our decision in *Zuchel v. City & County of Denver,* 997 F.2d 730, 735–37 (10th Cir.1993), as construed in *Walker v. City of Orem,* 451 F.3d 1139, 1160 (10th Cir.2006), sets forth the clearly established law that resolves this case.")

Tenorio v. Pitzer, 802 F.3d 1160, 1166-67, 1170 (10th Cir. 2015) (Phillips, J., dissenting) ("I would reverse the district court's denial of summary judgment for Officer Pitzer based upon qualified immunity. I see no violation of Russell Tenorio's constitutional rights, let alone one clearly established in our law. . . .As I read the majority opinion, it refuses qualified immunity to

any law-enforcement officer who shoots a knife-wielding suspect unless that person 'charges' the officer and aggressively motions toward the officer with the knife. . . The majority believes this result is compelled by this single sentence taken from *Walker v. City of Orem,* 451 F.3d 1139, 1160 (10th Cir .2006):

> It was specifically established [in *Zuchel v. City & Cty. of Denver,* 997 F.2d 730, 735–36 (10th Cir.1993) (*Zuchel II*)] that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect.

I disagree with the majority that *Walker* so dramatically shrunk—or intended to shrink—our analytical framework applied in *Zuchel II* until now. Rather than narrowing a robust totality-of-circumstances inquiry to two meager factors, I believe *Walker* simply recognized the importance of those factors as part of evaluating qualified immunity. . . . In short, I believe the majority has derailed our qualified-immunity analysis from its previously sensible course, and rerouted it away from Supreme Court and Tenth Circuit precedent. Its quick knockout punch to qualified immunity absent charging, slashing, and stabbing precludes officers from firing shots even when a knife-wielding man gets within, or extremely close to, stabbing range so long as he gets there by walking (not charging) and has positioned his knife for a quick thrust (without the fanfare of menacingly waving it before striking).")

King v. Hill, 615 F. App'x 470, 477, 479 (10th Cir. 2015) ("The Supreme Court said in *Tennessee v. Garner*, 471 U.S. 1 (1985), that '[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead.'. . . *Garner,* which involved a fleeing suspect rather than a defiant and threatening one, does not alone clearly establish the law applicable to the circumstances of this case. But it supplies a foundational principle concerning the limits on the use of deadly force against unarmed suspects. . . .We conclude that, taken together, *Garner, Zuchel, Zia,* and *Walker* clearly establish that a reasonable officer in Deputy Hill's circumstances would have understood that shooting Mr. King was unconstitutional deadly force in violation of the Fourth Amendment. The district court therefore correctly denied Deputy Hill's motion for summary judgment on the issue of qualified immunity.")

Fancher v. Barrientos, 723 F.3d 1191, 1201(10th Cir. 2013) ("According to the factual scenario upon which the district court based its rejection of Barrientos's claim to qualified immunity, which this court lacks the authority to review, Barrientos fired six shots into a suspect who was 'no longer able to control the vehicle, to escape, or to fire a long gun, and thus, may no longer have presented a danger to the public, Deputy Barrientos, or other responding officers.'. . Prior to shooting Dominguez, Barrientos 'stepped back, felt safer, and noticed Mr. Dominguez slump.'. . This allowed him 'enough time ... to recognize and react to the changed circumstances and cease firing his gun.'. . Under these circumstances, we have no trouble concluding Barrientos lacked probable cause to believe Dominguez posed a threat of serious harm to Barrientos or others at the time he fired shots two through seven. . . We further have no trouble concluding a reasonable officer in Barrientos's position would have known that firing shots two through seven was unlawful. . .

Accordingly, the district court, in evaluating Barrientos's assertion of qualified immunity, did not err in concluding Barrientos violated clearly established law when he fired shots two through seven.")

Wilson v. City of Lafayette, No. 11–1403, 2013 WL 518558, *2-*6 (10th Cir. Feb. 13, 2013) (not published) ("To demonstrate the infringement of a clearly established right, a plaintiff must direct this court 'to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits.'. . This isn't to say a plaintiff must always identify a case on point. Sometimes even a 'general constitutional rule that has already been established can apply with obvious clarity to the specific conduct in question.'. . . In all events, however, it remains necessary for the plaintiff to demonstrate that 'every reasonable official would have understood that what he' did violated the law. . . Turning first to the published cases from this and other circuits and the Supreme Court, none would have clearly alerted a reasonable officer in August 2006 that the conduct at issue in this case amounted to constitutionally excessive force. To the contrary, as the Sixth Circuit held after conducting an exhaustive survey of relevant cases from across the country, 'prior to May 2007 (and for several years after), no case in any circuit held that officers used excessive force by tasing suspects who were actively resisting arrest, even though many of them ... were suspected of innocuous crimes, posed little risk of escape and had not yet physically harmed anybody.' *Hagans v. Franklin Cnty. Sheriff's Office,* 695 F.3d 505, 511 (6th Cir.2012). . . . [T]here is no dispute Mr. Wilson was fleeing or that his actions in reaching for his pocket, especially after being warned not to do so, could lead a reasonable officer to worry he might have a lethal weapon and was prepared to use it. Whether the tasing in our case amounted to the use of 'deadly force' subject to heightened scrutiny, moreover, the law did not say in 2006, nor do the Wilsons suggest otherwise. Given all this, we cannot say the case law the Wilsons cite, even if it predated the incident at issue, would go so far as to clearly establish a Fourth Amendment violation in this case. Were we to slide down the scale further still, away from cases altogether and toward more general constitutional principles, we would still be unable to say Officer Harris should have known his conduct was constitutionally excessive. . . . To win damages, the Wilsons must show the force the officer used under the rapidly evolving circumstances he faced was *clearly* excessive as of 2006. And this the Wilsons fail to do: they identify no authority or general legal principle suggesting the use of the taser in this case was *clearly* excessive in light of Officer Harris's legitimate self-defense interest. . . .Without case law to support their cause or any clear lesson to be drawn from the *Graham* factors, the Wilsons and dissent seek to make much of the fact that Officer Harris 'intentionally' or at least 'recklessly' aimed the taser at Mr. Wilson's 'head.'. . But under long settled Fourth Amendment law, our analysis may not be informed by the officer's subjective intent or motives in deploying that force. . . . Given all this, we simply cannot share the dissent and Wilsons' confidence that the officer's testimony is worthy of no credence and he ' "intentionally" shot Wilson in the head in the same way [he] "intentionally" [chose] to use a taser to stop the defendant instead of tackling him.'. . . Given the direction we have from the Supreme Court and this court's precedent, and in light of the state of the law as of 2006, we cannot say the district court erred in its decision to grant qualified immunity.")

Wilson v. City of Lafayette, No. 11–1403, 2013 WL 518558, *6, *11-*13 (10th Cir. Feb. 13, 2013) (not published) (Briscoe, C.J., concurring in part in the result, and dissenting) ("I respectfully concur in part, and dissent in part. The majority fails to give sufficient weight to the fact that the taser used by Officer Harris on August 4, 2006, had a targeting function, that Officer Harris fired at Ryan Wilson from only ten to fifteen feet away, and that the training manual specifically warned officers against aiming at the head or throat unless necessary. . . . Even if Ryan Wilson's conduct here was more culpable than in the taser cases cited by the majority, an intentional or reckless taser shot *to the head* seems to merit an even higher burden for a government actor to justify his use of force. . . . Because there is no evidence that tasing Ryan Wilson in the body would not have sufficed, tasing him in the head, if intentional or reckless, was an unreasonable use of force in affecting the arrest. Thus, viewing the evidence in the light most favorable to the plaintiffs, Harris violated Ryan Wilson's Fourth Amendment right to be free from an unreasonable seizure. . . .As alleged, Officer Harris's conduct was sufficiently egregious that the lack of perfectly analogous taser cases at the time of Ryan Wilson's death should not shield Harris from suit. . . . If a jury were to conclude that Harris intentionally or recklessly shot Ryan Wilson in the head with the taser, his conduct would be egregious. . . . And a reasonable officer would know that aiming or recklessly tasing Ryan Wilson in the head under the circumstances presented was unconstitutional.")

Wilson v. City of Lafayette, No. 11–1403, 2013 WL 518558, *14-*17 (10th Cir. Feb. 13, 2013) (not published) (Matheson, J., concurring) **("**Construing the evidence in the light most favorable to the Wilsons, Officer Harris was 10 to 15 feet away from Ryan Wilson when he tasered him in the head. Despite the countervailing circumstances—including Ryan Wilson's felony conduct, fleeing arrest and ignoring law enforcement commands, and reaching for his pocket—the *Graham* factors point to excessive force, as Chief Judge Briscoe concludes. The clearly established law element of qualified immunity, however, is closer for me. Because the Wilsons bear the burden of proving that element, *Lynch v. Barnett*, 703 F.3d 1153, 2013 WL 49713, at *3 (10th Cir.2013), I concur in the result reached by Judge Gorsuch in affirming Officer Harris's qualified immunity. I add a few comments on the clearly established law issue. . . .[A] clearly established constitutional violation exists if there is a Supreme Court or Tenth Circuit decision on point or the clear weight of authority from other courts establishes the law as the plaintiffs contend. . . No such case law is available here. Second, if the officer's conduct was 'obviously egregious,' a clearly established constitutional violation may exist even if there are no cases specifically on point. . . .Officer Harris's conduct in this case—tasing a resisting, fleeing, and potentially threatening felony suspect in the head in violation of safety protocol—while excessive, does not seem to reach the level of egregiousness of the foregoing examples. Third, a violation may be clearly established based on general constitutional principles. . . Courts have found police conduct to violate clearly established law absent case law on point and without labeling the behavior egregious if the *Graham* factors tilt so clearly in favor of the plaintiff that any reasonable officer would have been on notice that the force used was unlawful. . . .In addition, cases published after the incident can establish that the law was *not* clearly established at the time of the incident. . . .The level of force in the present case was greater than that applied in the two cases in *Mattos*, which did not involve taser shots to

the head, but the seriousness of Mr. Wilson's suspected crime was also greater than that of the crime in *Mattos.* The taser shot to the head in this case constituted more force than a single taser shock. In this way, it may be considered analogous to the repeated taser use in *Orem.* However, the risk at the time Officer Harris fired his taser was also greater than the risk faced by the officer in *Orem;* the *Orem* suspect was physically restrained, while Mr. Wilson was actively resisting arrest, fleeing, and reaching for his pocket. In short, although I believe the *Graham* analysis establishes a constitutional violation in this case, whether it is so one-sided as to make the violation clearly established absent case law on point is less clear.")

Kaufman v. Higgs, 697 F.3d 1297, 1304 (10th Cir. 2012) ("In sum: the Defendants have never contended that their encounter with Mr. Kaufman was other than consensual; the law was well established that a citizen has no obligation to answer an officer's questions during a consensual encounter; and the Colorado Supreme Court had made it clear that the Colorado obstruction statute is not violated by mere verbal opposition to an officer's questioning, thus making it beyond dispute Mr. Kaufman's conduct did not violate the statute. It follows that the Defendants could not have reasonably thought that they were justified in arresting Plaintiff and their motion for summary judgment on the ground of qualified immunity should have been denied. We should reverse the judgment of the district court and remand for further proceedings consistent with this opinion.")

Morris v. Noe, 672 F.3d 1185, 1196-98 (10th Cir. 2012) ("Because the existence of excessive force is a fact-specific inquiry, . . . 'there will almost never be a previously published opinion involving exactly the same circumstances.' . . Thus, we have adopted a sliding scale: 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'. . In fact, we do not always require case law on point. '[W]hen an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law.'. . .The district court discussed, and Plaintiff cites, a number of cases involving police tackles or takedowns. Most of these cases are of limited usefulness, however, because the facts are dissimilar to this case. Several cases found excessive force based on abusive conduct subsequent to the takedown. . . . Ultimately, however, we may conclude a constitutional right was clearly established, even in the absence of similar prior cases, if the force is clearly unjustified based on the *Graham* factors. . . . *Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest. . . . Noe had reason to believe Morris was, at most, a misdemeanant. But Morris posed no threat to Noe or others, nor did he resist or flee. Thus, based on the facts assumed by the district court, Morris's right to be free from a forceful takedown was clearly established under *Graham.* Defendant is not entitled to qualified immunity on either of Plaintiff's claims.")

Romero v. Story, 672 F.3d 880, 889-91 (10th Cir. 2012) ("The Supreme Court has told us that when law enforcement officers knock on a door without a search warrant and the occupant makes the decision to open the door and speak to the officers, the occupant 'may refuse to answer any questions at any time.'. . This holding is unremarkable and certainly not novel. If the officers want

to force a suspect to speak, they *must* have reasonable suspicion or probable cause. The Constitution mandates no less. Because we hold Defendants lacked reasonable suspicion to detain Plaintiff for the vandalism, Defendants lacked probable cause to arrest Plaintiff for flight or evasion under N.M. Stat. Ann. § 30–22–1(B), thereby violating Plaintiff's constitutional right to be free from unlawful arrest. . . Even though we hold Plaintiff has alleged a constitutional violation for unlawful arrest, Plaintiff still must show Defendants violated a clearly established constitutional right. . . .Having determined the district court properly denied Defendants qualified immunity as to Plaintiff's unlawful arrest claim, we must now move to Plaintiff's excessive force claim. The district court did not decide the excessive force claim. Instead, the court interpreted our precedent to hold that the outcome of an excessive force claim depends on the outcome of an unlawful arrest claim. . . . But this was a misreading of our case law. We have held that where, as here, a case involves 'claims of both unlawful arrest and excessive force arising from a single encounter,' the district court must 'consider both the justification the officers had for the arrest *and* the degree of force they used to effect it.'. . In *Cortez,* we emphasized the inquiries regarding unlawful arrest and excessive force are 'separate and independent, though the evidence may overlap.'. . In application, a plaintiff may argue law enforcement officers unlawfully arrested him. If the plaintiff successfully proves his case, 'he is entitled to damages for the unlawful arrest, which includes damages resulting from any force *reasonably* employed in effecting the arrest.'. . If the plaintiff also alleges excessive force, the district court must conduct a separate and independent inquiry *regardless* of whether the plaintiff's unlawful arrest claim is successful. . . And if the district court concludes the arrest was unlawful, the court *may not* automatically find any force used in effecting the unlawful arrest to be excessive. Instead, the district court must then analyze the excessive force inquiry under the assumption the arrest was lawful. . . . Plaintiff argues we should find excessive force and deny qualified immunity on that claim rather than remand to the district court for an independent examination of Plaintiff's excessive force claim. . . . Because the district court did not even evaluate whether the force was excessive, we vacate the denial of qualified immunity as to Plaintiff's excessive force claim and remand to the district court to evaluate the excessive force claim *separate* and *independent* from the unlawful arrest claim.")

White v. Martin, 425 F. App'x 736, 2011 WL 2210098, at *7-*9 (10th Cir. 2011) ("Even when conduct is unreasonable under the Fourth Amendment, the defendant may still have a qualified immunity defense on whether there was a violation of a clearly established constitutional right at the time of the incident. . . . .[A] factually identical case is not required, but 'it must still be apparent to a reasonable officer in light of pre-existing law that his conduct was unlawful.'. . .[T]he video evidence allows inferences in favor of Mr. White that he was choked when not resisting, was not a threat, was not attempting to flee, and was seeking assistance from the other trooper. Once these inferences are made, and taking into account the other evidence, the violation of Mr. White's Fourth Amendment right against excessive force is clearly established for purposes of denying the summary judgment motion. Whether these inferences will hold up following additional discovery or at trial will be determined in further proceedings in the district court.")

Cavanaugh v. Woods Cross City, 625 F.3d 661, 666, 667 (10th Cir. 2010) ("[T]he qualified immunity analysis involves more than 'a scavenger hunt for prior cases with precisely the same facts.'. . . In this case, we need not engage in the extended inquiry of deciding whether there is a prior case decided at the appropriate level of certainty. In *Casey,* we faced very similar factual circumstances: a police officer used her Taser against a non-violent misdemeanant who appeared to pose no threat and who was given no warning or chance to comply with the officer's demands. *Casey*, 509 F.3d at 1281-82. There we held that the officer's actions violated the Fourth Amendment, and that the law was clearly established as of August 25, 2003, the date on which the incident occurred. . . Of course, we are bound by prior Tenth Circuit precedent. Following *Casey's* holding that the law was clearly established as of August 25, 2003, it was clearly established on December 8, 2006 that Officer Davis could not use his Taser on a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning. The district court therefore properly denied qualified immunity.")

Thomas v. Durastanti, 607 F.3d 655, 671 (10th Cir. 2010) ("Given Mr. Thomas's version of the events and what the record establishes, we have addressed the legal question of whether the force was excessive. *See Scott,* 550 U.S. at 381 n.8. We cannot say that the use of deadly force in these circumstances was objectively unreasonable; courts have little difficulty in concluding that an officer's reasonable perception that a vehicle may be used as a weapon may allow for the use of deadly force. . . . The fact that flight from a traffic stop may have precipitated these events does not make the vehicle any less dangerous. . . In these close confines, Agent Durastanti's actions (even if mistaken) were within the range of reasonableness allowed law enforcement agents under the excessive force and qualified immunity doctrines.")

Thomas v. Durastanti, 607 F.3d 655, 671-74 (10th Cir. 2010) (Ebel, J. dissenting) ("Thomas' claim was two-fold: 1) Durastanti used excessive force when, although in no immediate danger, he deliberately stepped in front of the Lincoln and began firing into it in an effort to stop the Lincoln's flight. And 2) even if the use of deadly force was reasonable at the moment Durastanti first fired into the Lincoln, his own reckless or deliberate conduct in approaching the Lincoln with his gun drawn, while wearing plain clothes, having just gotten out of an unmarked Ford Explorer, and never identifying himself as a law enforcement officer, precipitated the later need to use deadly force by creating circumstances in which the Lincoln's driver, Almario Smith, reasonably believed he was about to be robbed or assaulted. We need address only Thomas' first theory in order to affirm the denial of qualified immunity. In defense of Thomas' allegation that Durastanti, not being in any immediate danger, deliberately stepped into the Lincoln's path and began shooting in order to stop the Lincoln's flight, Durastanti asserts, to the contrary, that he was rushing around the back of his Explorer to check on his partner and in doing so found himself confronted by the Lincoln accelerating towards him as it headed out of the parking lot. Being only a car's length away from the Lincoln and unable to get out of its way, Durastanti feared for his life and therefore shot at the Lincoln in self defense. Confronted with these divergent stories, the district court held that factual disputes material to this claim precluded entering summary judgment for Durastanti based upon qualified immunity, specifically determining that '[t]he actions of all the individuals involved in

this incident are in dispute.'. . We do not have jurisdiction, in this interlocutory appeal, to consider the propriety of the district court's determination that there remain disputed issues of material fact. . . Nonetheless, the majority concludes we can ignore these factual disputes because they are either not genuine or not material to Thomas' claim. I am not persuaded. . . . The majority . . . errs in relying on *Scott* to disregard a genuine factual dispute regarding the speed of the Lincoln when Durastanti shot into the car. Moreover, the majority does not even address the district court's determination that there were genuine disputes regarding the facts most material to Thomas' claim, how Durastanti got in front of the Lincoln and where he was when he first shot into that car. We do not have jurisdiction to review that determination. . . And the district court did not err in determining that a reasonable jury could find that Durastanti acted unreasonably in light of the facts as Thomas has alleged them and as a reasonable officer in Durastanti's position would have perceived them. I would, therefore, affirm the district court's decision to deny Durastanti qualified immunity.")

Zia Trust Co. ex rel. Causey v. Montoya, 597 F.3d 1150, 1154, 1155 (10th Cir. 2010) ("Turning to the case at hand, we cannot say, viewing the record in a light most favorable to the plaintiffs, that Officer Montoya acted reasonably. First, according to Glen Causey's testimony, Officer Montoya exited his vehicle with his weapon already drawn and proceeded to a position in front of Megan's van without identifying himself as a police officer or, indeed, saying anything at all. It is unclear, at least under the plaintiffs' alleged facts, whether Megan even knew that Office Montoya was a police officer. Second, although the tires of the van were pointed toward Officer Montoya, the plaintiffs allege–and there is some support in the record–that it was obviously stuck on a retaining wall and that the van jumped forward less than a foot, if at all, when Megan revved the engine. Additionally, given the lighting conditions, whether or not Officer Montoya could even see the direction the tires were pointing is a material fact that has been hotly disputed. Third, according to Officer Flores's testimony, Officer Montoya may have been standing up to fifteen feet away from the van at the time of the shooting. Although we have never laid down a *per se* rule regarding distance, we cannot say that a van fifteen feet away, which according to the plaintiffs was clearly stuck on a pile of rocks, gave Officer Montoya probable cause to believe that there was a threat of serious physical harm to himself or others. Finally, although Officer Montoya testified in his deposition that he saw Megan change gears and that he could see in Megan's face what he intended, as stated above, how close Officer Montoya was and what exactly he could see is disputed. Accordingly, reading the record in the light favorable to the plaintiffs, it is not clear that Megan manifested an intent to harm Officer Montoya or anyone else at the scene. Our analysis of course only accounts for the plaintiffs' version of events, a version which a jury may later reject. However, under this version we agree with the district court that the plaintiffs have met their burden of showing a constitutional violation. Having determined the existence of a constitutional violation for purposes of summary judgment, we must now consider whether the law was clearly established at the time of the violation. . . . Viewing the record in the light most favorable to the plaintiffs, we have already determined that Officer Montoya did not have 'probable cause to believe that there was a serious threat of serious physical harm' to himself or others. . . As such,

Officer Montoya violated clearly established law when he used deadly force against Megan Causey.”)**.**

Fisher v. City of Las Cruces, 584 F.3d 888, 901 (10th Cir. 2009) (“It is long established law of this and other circuits that a triable claim of excessive force exists where a jury could reasonably conclude that the officer handled a cooperating arrestee in a manner that the officer knew posed a serious risk of exacerbating the arrestee’s injuries, which were themselves known to the officer.”).

Green v. Post, 574 F.3d 1294, 1304, 1309, 1310 (10th Cir. 2009) (“[E]ven were we to conclude that the Greens can establish a constitutional violation under the middle-level standard, we would conclude that Deputy Post is entitled to qualified immunity because the law was not clearly established at the time of the incident. While it may have been clearly established that an officer can be liable if the plaintiffs show that he intended to harm the plaintiffs in the context of a high-speed pursuit, it was not clearly established what specific standard applied to the particular facts of this case–i.e., where the officer was engaged in a high-speed non-emergency response to a call to locate and arrest a suspected gas thief. We illustrate this uncertainty in the law by surveying Supreme Court, Tenth Circuit and other circuits’ case law as of June 2006. [surveying cases] Our recitation of these cases from various circuits, many of which involve high-speed police pursuits, is not intended to suggest that the case before us fits into the category of a high-speed police pursuit. Indeed, our review of the cases indicates that there are no clear categories of cases into which we can neatly fit a particular situation. Rather, there are many permutations on the theme of police pursuits; while most involve high speeds, there are many variables, including whether the officer is responding to an emergency or not, whether he or she is directly pursuing a fleeing suspect or not, and, significantly under *Lewis* and cases interpreting it, whether the officer has time for actual deliberation. The conundrum presented by this last factor–whether the officer has time to deliberate–is what appears to have led some courts to simply declare that all high-speed police pursuits are evaluated under an intent-to-harm standard, ‘regardless of whether the chase conditions arguably afforded pursuing officers time to deliberate.’. . It accordingly appears to us that, as of June 2006, there was no general consensus of cases that would have led Deputy Post to know that his conduct in speeding through an intersection on a yellow light, in pursuit of a reported gas thief but not responding to an ‘emergency,’ without his lights and siren on, would violate the substantive due process rights of Green, absent an intent or purpose to harm Green. And, there is clearly no evidence that Post had any such malicious intent or purpose. While Post was, by his own admission, not faced with an emergency call, that circumstance does not clarify the standard of liability in this circuit; it merely suggests that there may have been more opportunity for Post to deliberate, and arguably the public interest served by his response was slightly less. . . But, while a few circuits have held that officers involved in all high-speed pursuits are subject to an intent-to-harm standard of culpability, this circuit has not so held, and we have not provided any clear guidance on when an officer responding to a non-emergency police call–more particularly, a rapid response to such a call–does and/or does not have time to deliberate. In sum, we cannot say that the law was clearly established in June 2006, such that a reasonable officer in Deputy Post’s situation would have known that his conduct was a violation of Green’s constitutional rights.)

Buck v. City of Albuquerque, 549 F.3d 1269, 1290, 1291 (10th Cir. 2008) ("Having determined that the Excessive Force Plaintiffs have sufficiently alleged a constitutional violation, we now turn to the second prong of the qualified immunity analysis, asking whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights. . . The law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if 'a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct' at issue. . .Here, Capt. Gonzales cabins his argument to the authorization of 'the limited deployment of tear gas, pepper spray and non-lethal projectiles,'. . . urging that clearly established law did not prohibit these actions in this particular situation. He contends that the district court did not define the right allegedly violated with the appropriate level of specificity . . . . [W]e have little difficulty in holding that the law was clearly established at the time of the alleged infraction. *See Fogarty*, 523 F.3d at 1162 ('Considering that under [the plaintiff's] version of events each of the *Graham* factors lines up in his favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions.').").

Weigel v. Broad, 544 F.3d 1143, 1153, 1154 (10th Cir. 2008) ("The district court compared the facts of *Cruz*, where the decedent was hog-tied, to the facts of this case and concluded there was no clearly established law prohibiting the troopers' actions because of the dissimilarity between the factual scenarios. . . . Although we held there was not clearly established law prohibiting the officers' actions at the time they encountered Mr. Cruz, we also made clear that similar future conduct was prohibited. Specifically, we stated, 'officers may not apply th[e hog-tie] technique when an individual's diminished capacity is apparent.'. . . The district court believed that the type of restraint used in *Cruz* was sufficiently different from that employed on Mr. Weigel that *Cruz* did not clearly establish the unconstitutionality of defendants' alleged actions. But our analysis in this case of the constitutionality of the restraint of Mr. Weigel does not require us to compare the facts of *Cruz* to the allegations here. It is based on more general principles. The Fourth Amendment prohibits unreasonable seizures. We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself. . . . If *Cruz* had not been handed down, perhaps Wyoming troopers would not have received training on positional asphyxia and would be uninformed about the danger. But the reasonableness of an officer's actions must be assessed in light of the officer's training. The defendants' training informed them that the force they used upon Mr. Weigel produced a substantial risk of death. Because it is clearly established law that deadly force cannot be used when it is unnecessary to restrain a suspect or secure the safety of officers, the public, or the suspect himself, the defendants' unnecessary use of deadly force violated clearly established law.").

Weigel v. Broad, 544 F.3d 1143, 1170, 1171 (10th Cir. 2008) (O'Brien, J., dissenting) ("No Supreme Court case is directly on point and the only relevant opinion from this circuit is *Cruz*. However, by its express terms *Cruz* applies only to hog-tying individuals with apparent diminished

capacity. . .A hog-tie is a restraint technique whereby a person's hands are cuffed behind his back, his feet are bound together, drawn up behind his back and attached to the handcuffs. It results in his ankles being bound to his handcuffed wrists behind his back with twelve inches or less of separation. . . A similar technique is referred to as hobbling. . . The only difference between the two techniques is the distance between ankles and handcuffed wrists; a separation of twelve inches or less is a hog-tie, a greater distance is a hobble. . . . In *Cruz* we expressly did not forbid all hog-ties let alone the less restrictive hobble. Our discussion would lead any reader to think the distinction significant and the reach of the decision limited. It gives no warning that it should be read expansively to address lesser forms of positional restraint. This is not a hog-tie case; it is not even a hobble case. No attempt was made to pull Weigel's ankles behind him in any way, let alone tie them to his handcuffed wrists. The majority relies on *Hope* for the proposition that a prior case need not address the very action in question in order to clearly establish the law. . . . To be useful to officers in the field (or in a fight) the warning imparted must be crisp and clear; specific and simple. A 'spotted dog' case provides that warning, generalized musings do not. Three judges have carefully read, even parsed, the language of *Cruz*. With the luxury of time and the benefit of briefing and argument from counsel, we take away dramatically different views of its holding. The troopers did not have that luxury, yet even in the aftermath of a desperate fight they knew hog-tying was prohibited and did not do it or anything like it. To expect them to have coaxed from *Cruz* anything akin to the majority's holding is contrived.").

Vondrak v. City of Las Cruces, 535 F.3d 1198, 1207 (10th Cir. 2008) ("Admittedly, this is a close case. McCants' only factual basis for conducting the field sobriety tests was Vondrak's admission to drinking one beer several hours earlier, and the specificity of Vondrak's statement makes it less suspicious than in many of the cases cited above. Nevertheless, given that Vondrak admitted consuming alcohol, McCants had the reasonable suspicion necessary to perform the field sobriety tests–or, at the very least, the arguable reasonable suspicion entitling her to qualified immunity.").

Vondrak v. City of Las Cruces, 535 F.3d 1198, 1208, 1209 (10th Cir. 2008) ("The district court correctly concluded that McCants and Krause were not entitled to qualified immunity on Vondrak's excessive force claim for unduly tight handcuffing. Although the officers claim to have been unaware that Vondrak's handcuffs were tight, Vondrak has presented evidence that the officers 'ignored [his] timely complaints (or [were] otherwise made aware) that the handcuffs were too tight.'").

Fogarty v. Gallegos, 523 F.3d 1147, 1158, 1159 (10th Cir. 2008) ("The defendants' arguments that the police had probable cause to arrest Fogarty rest only on characterizations of the protest in general, and not on evidence of Fogarty's individual actions. The Fourth Amendment plainly requires probable cause to arrest Fogarty as an individual, not as a member of a large basket containing a few bad eggs. In other words, that Fogarty was a participant in an antiwar protest where some individuals may have broken the law is not enough to justify his arrest. . . . Under Fogarty's version of events–that he was peacefully drumming a samba at a reasonable volume–well-settled constitutional and state-law precedent would have put reasonable officers on notice

that they lacked probable cause to effectuate an arrest. . . . We underscore that these conclusions regarding probable cause are compelled by our constrained jurisdiction and our view of the facts in the light most favorable to Fogarty. Most of the deposed officers denied even witnessing Fogarty's arrest, and none admitted to physically arresting him. Their depositions therefore contain little that might contradict Fogarty's account of his own behavior. If defendants demonstrate at trial that the arresting officers had objective reason, even if mistaken, for believing that Fogarty's drumming tended to disturb the peace by increasing the potential for violence or public alarm as defined by the New Mexico courts, they may well be entitled to qualified immunity . But on the record before us, we cannot at this juncture reach such a conclusion as a matter of law.").

Fogarty v. Gallegos, 523 F.3d 1147, 1161, 1162 (10th Cir. 2008) ("Although the general factors outlined in *Graham* are insufficiently specific to render every novel use of excessive force unreasonable, '[w]e cannot find qualified immunity wherever we have a new fact pattern.'. . Thus, our circuit uses a sliding scale to determine when law is clearly established. . . Under this approach, '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'. . Relevant here, '*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest.'. . With respect to the use of pepper balls and tear gas, we acknowledge that our precedential opinions have not directly addressed the Fourth Amendment implications of what defendants call 'less lethal' munitions. Nevertheless, a reasonable officer would have been on notice that the *Graham* inquiry applies to the use of these methods just as with any other type of pain-inflicting compliance technique. We find it persuasive that, in prior cases, we have assumed that the use of mace and pepper spray could constitute excessive force. [citing cases] Considering that under Fogarty's version of events each of the *Graham* factors lines up in his favor, this case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions. We likewise conclude that it would be apparent to a reasonable officer that the use of force adequate to tear a tendon is unreasonable against a fully restrained arrestee. . . Viewing the facts in the light most favorable to Fogarty, we conclude that defendants cannot avail themselves of qualified immunity at this stage of the litigation.").

Chidester v. Utah County, No. 06-4255, 2008 WL 635361, at *10 (10th Cir. Mar. 6, 2008) ("While we have determined it was objectively unreasonable for Deputy Parker to tackle Mr. Chidester given Deputy Parker already had a weapon aimed at him, we note the extreme exigency of the situation. The situation is unlike other cases where the suspect person was already identified and then under the officer's total physical control for the purpose of preventing him or her from fleeing, using a weapon, or otherwise becoming a threat. We have not found a case, nor have plaintiffs directed us to one, that would put Deputy Parker on notice his split-second decision to tackle Mr. Chidester under the circumstances presented was clearly unlawful. Thus, we cannot say it was unreasonable for Deputy Parker to mistakenly believe the law allowed a greater level of force for the purpose of obtaining the requisite safety needed during the exigent circumstance presented.").

Casey v. City of Federal Heights, 509 F.3d 1278, 1284-86 (10th Cir. 2007) ("In 1992, we held that *Graham* itself was enough to constitute clearly established law in an excessive force case. *Mick,* 76 F.3d at 1135. More recently, however, the Supreme Court has held that *Graham's* 'general proposition ... is not enough' to turn *all* uses of excessive force into violations of clearly established law. . . . In other words, the fact that it is clear that any unreasonable use of force is unconstitutional does not mean that it is always clear *which* uses of force are unreasonable. 'Ordinarily,' we say that for a rule to be clearly established 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.' . . However, because excessive force jurisprudence requires an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case,' *Graham,* 490 U .S. at 396, there will almost never be a previously published opinion involving exactly the same circumstances. We cannot find qualified immunity wherever we have a new fact pattern. . . . We have therefore adopted a sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.' . . . We have located no case in which a citizen peacefully attempting to return to the courthouse with a file he should not have removed has had his shirt torn, and then been tackled, Tasered, knocked to the ground by a bevy of police officers, beaten, and Tasered again, all without warning or explanation. But we need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as Officer Sweet allegedly did. *Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest. . . . Officer Lor gave Mr. Casey no opportunity to comply with her wishes before firing her Taser. While we do not rule out the possibility that there might be circumstances in which the use of a Taser against a nonviolent offender is appropriate, we think a reasonable jury could decide that Officer Lor was not entitled under these circumstances to shoot first and ask questions later. Cases in our Circuit and others that have considered the reasonable use of Tasers confirm this conclusion. . . . We have located no published decision in which an officer's use of a Taser has been upheld in circumstances this troubling. Officer Lor testified that the policy of the Federal Heights police department is that a Taser can appropriately be used to 'control' a target. . . However, it is excessive to use a Taser to control a target without having any reason to believe that a lesser amount of force–or a verbal command–could not exact compliance. Because a reasonable jury could find that Officer Lor lacked any such reason, she is not entitled to summary judgment on the constitutional violation. . . . On the summary judgment record–which of course may be disputed at trial–Officer Lor's use of the Taser was without any legitimate justification in light of *Graham*. We do not know of any circuit that has upheld the use of a Taser immediately and without warning against a misdemeanant like Mr. Casey. Therefore, Officer Lor is not entitled to qualified immunity from this excessive force suit.").

Walker v. City of Orem, 451 F.3d 1139, 1150, 1151 (10th Cir. 2006) ("In sum, based on the facts recited in plaintiffs' complaint, the lengthy detention alleged in this case was unreasonable and was not justified by either the need for investigation of a crime or control of a crime scene. Having concluded that plaintiffs have adequately alleged a violation of their Fourth Amendment rights,

we turn to whether the legal rule protecting those rights allegedly violated by defendants was 'clearly established' at the time of the events in question. . . . While there were certainly some suggestions in the law prior to *Lidster* that the interrogation of witnesses was subject to Fourth Amendment constraints at least as stringent as those involving detention of suspects, we have found no pertinent Supreme Court or Tenth Circuit decision prior to the events in question, and no clearly established weight of authority from other courts, that would have made the unlawfulness of the officers' conduct apparent to them. In sum, '[t]he contours of the right [were not] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.' [citing *Brosseau*]").

Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006) ("We conclude that plaintiff's version of the facts presented on summary judgment support a claim of a violation of David Walker's Fourth Amendment right to be free from excessive force. Plaintiff's version of events suggests that Officer Peterson acted precipitously in shooting David, who posed a danger only to himself. The crimes at issue (theft of the vehicle, eluding the officers) were not particularly severe. David did not pose an immediate threat to the safety of the officers or others. He had made no threats and was not advancing on anyone with the small knife. He was holding the knife to his own wrist. While Officer Peterson stated that he believed David was pointing a gun at him, this belief was not reasonable, if plaintiff's version of events is accepted, and she is given the benefit of every reasonable inference. The angle of David's hands and the amount of light on the scene should have permitted Officer Peterson to ascertain that he was not holding a gun in a shooting stance. Finally, David was not actively resisting arrest, and there was no need to use deadly force to prevent him from fleeing and possibly harming others. The right to be free from excessive force was well established in this circuit at the time of the events in question. . . It was specifically established that where an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him, that it was unreasonable for the officer to use deadly force against the suspect. [citing *Zuchel*] Plaintiff's version of the facts therefore shows the violation of a clearly-established constitutional right. We must therefore affirm the district court's order denying qualified immunity to Officer Peterson. . . Much of what has already been said about the circumstances surrounding Officer Peterson's actions also applies to Officer Clayton's conduct. At the time he fired at David, Officer Clayton was behind the cover of his vehicle, fifty-eight feet away from David. David was not advancing on him and had not threatened him in any way, other than allegedly pointing his hands in Officer Clayton's direction in what Officer Clayton interpreted as a 'classic shooting stance.' Officer Clayton had not seen a gun in David's hands. Whether he reasonably believed from the shots he heard, and the fact that Officer Peterson had ducked behind the Subaru, and the position of David's body and hands, that he or others were in danger from David, is a factual question that remains to be resolved. When reviewing the denial of a motion for summary judgment based on qualified immunity, we are not only required to accept plaintiff's version of events; we are also required to draw all reasonable inferences in favor of the non-moving party. . . We conclude that, given all reasonable inferences, plaintiff's version of the facts shows the violation of a

constitutional right. That right is also clearly established. We must therefore affirm the district court's denial of qualified immunity to Officer Clayton.")

Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1204, 1205, 1206 n.4 (10th Cir. 2006) ("No court has ruled that an otherwise unreasonable seizure becomes reasonable when the officers intend it as a prank. We will not do so here. When law enforcement officers acting under color of state law seize non-consenting private citizens, they must act in furtherance of legitimate law enforcement interests and on the basis of sufficient facts. . . . Fuerschbach's allegations, if true, establish that Hoppe and Martinez seized her without any legitimate justification. Therefore, Fuerschbach's Fourth Amendment claim survives the first prong of the qualified immunity analysis. . . Because Fuerschbach's allegations demonstrate that the officers violated clearly established constitutional rights of which a reasonable person would have known, her claims clear the second hurdle of the qualified immunity analysis as well. . . . We conclude that it would have been clear to a reasonable officer in Hoppe and Martinez's shoes that seizing a private citizen without any legitimate basis was unlawful. Nor would an officer's perception of the seizure as a prank have made the legal standard less clear. . . .[T]he officers are not entitled to qualified immunity simply because no previous court has rejected a prank exception to the Fourth Amendment.").

Blossom v. Yarbrough, 429 F.3d 963, 968 (10th Cir. 2005) (granting qualified immunity on first prong; AThis case is readily distinguishable from *Carr* upon which the district court relied. In that case, the plaintiff relied on testimony that the officers fired eleven shots at the suspect after he had dropped a piece of concrete that the officers claimed was a possible weapon. All eleven shots struck the decedent in the back! . . . The court in *Carr,* viewing the facts in the light most favorable to the plaintiff, determined that there was some evidence the officers shot an unarmed man who was not advancing on them. . . In this case, the evidence indicates uncertainty in the mind of Deputy Yarbrough as to whether Mr. Pickup was armed. Mr. Pickup advanced on Yarbrough in what reasonably appears to be an effort to get his weapon. Under these circumstances, Mr. Pickup posed an immediate threat to the safety of the officer, and the use of deadly force, while tragic, was reasonable.")

Jones v. Hunt, 410 F.3d 1221, 1229-31 (10th Cir. 2005) ("Without doubt, it was clearly established by January 2003 that a seizure must be reasonable. . . In *Terry*, decided in 1968, the Court instituted the rule that, at minimum, a seizure must be 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.' . . . It was also clearly established by the date of the seizure that the Fourth Amendment's strictures apply to social workers. . . Indeed, in 1994 we applied the *Terry* standard to a social worker's seizure of a child at a public school. . . Our conclusion is based on clearly and narrowly articulated Fourth Amendment principles. . . . In *Brosseau v. Haugen*, 543 U.S. __ (2004), the Supreme Court considered how factually related existing precedent must be to an alleged violation to render a rule of law 'clearly established.' The Court concluded that the standard established in *Graham*. . . was 'cast at a high level of generality' and therefore did not clearly establish a Fourth Amendment

violation. . . The tests enunciated in *Hill* and *Terry* are far more specific than the general standard set forth in *Graham*. Furthermore, the Court's recent qualified immunity jurisprudence does not allow public officials such as Haberman, who are alleged to have committed blatant Fourth Amendment violations, to obtain immunity from suit. The *Brosseau* Court acknowledged that even with regard to highly general standards, 'in an obvious case, these standards can Aclearly establish" the answer, even without a body of relevant case law.'. . Implicit in the Court's reasoning is the recognition that officials committing outrageous, yet *sui generis*, constitutional violations ought not to shield their behavior behind qualified immunity simply because another official has not previously had the audacity to commit a similar transgression. We conclude that the Fourth Amendment violation as alleged in this case is both obvious and outrageous, and that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . A social worker who lacks any legitimate justification for seizing a child, but nonetheless seizes the child and demands, in direct contravention of a court order, that she enter the custody of her abusive father, would clearly know that his conduct is unconstitutional.").

Felts v. Bd. of County Commissioners, No. 13-CV-1094 MCA/SCY, 2017 WL 4480118, at *1-2 & n.2 (D.N.M. Oct. 6, 2017) ("Defendants argue that Plaintiff cannot rely on 'pre-shooting conduct' or the theory that Officers Hill and Martin recklessly created the situation that resulted in the deadly use of force . . ., relying on two recent United States Supreme Court decisions. [*Sheehan* and *Mendez*] Relying on these cases, 'Defendants seek to exclude any and all evidence, documentary or testimonial, regarding the events that precede the encounter with Plaintiff which resulted in the shooting, which seeks to question the officers' judgment or to speculate that if only the officer had taken different actions, the shooting would not have occurred.'. . Defendants' request is not justified by *Sheehan* or *Mendez*. In *Mendez*, the Court stated, by footnote, that it was declining to address an argument on which it did not grant certiorari: whether, under *Graham's* totality of the circumstances test, the jury may 'tak[e] into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it.'. . This Court agrees with the analysis of Magistrate Judge Wormuth in *Johnson v. City of Roswell*, Civ. No. 15-1071 GBW/CG, 2017 WL 4083568, *7 n.5 (D.N.M. Sept. 13, 2017), that, '[g]iven the Supreme Court's explicit statement [in the *Mendez* footnote] that it was not addressing the broader relevance of pre-shooting conduct, the Tenth Circuit's precedents on the matter remain controlling.' The controlling Tenth Circuit precedent, is that '[t]he reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.' *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995). Given that Tenth Circuit law has not been overturned, the law as set forth by the Court in its *Memorandum Opinion and Order* of September 23, 2016 remains controlling and the Court will apply this law to the case. . . .The Court recognizes that, to the extent the Supreme Court is drawing a distinction between 'unreasonable police conduct prior to the use of force that foreseeably created the need to use [force]' in *Mendez*. . . and 'bad tactics that result in a deadly confrontation that could have been avoided' in *Sheehan*, . . .this distinction is not well-defined. To the extent necessary, the Court harmonizes *Sheehan* and *Mendez* by recognizing a difference

between 'unreasonable police conduct,' *Mendez*, which results in constitutionally unreasonable use of force under the totality of the circumstances, and 'bad tactics,' *Sheehan*, despite an otherwise reasonable use of force.[2] [fn 2: It is important to note that this case is factually distinct from *Sheehan* and *Mendez* because, in both of those cases, a lower court had ruled that the actual use of force was reasonable, and the plaintiff was attempting to establish liability based on a separate purported constitutional violation or bad tactic. . . In this case, the issue of whether the use of force was reasonable must be determined by the jury.] The Court must allow evidence pertaining to the 'totality of the circumstances.'. . Accordingly, this Court does not read *Sheehan* or *Mendez* to preclude the jury from considering what the officers knew or should have known leading up to the moment of the use of force in deciding whether the use of force was reasonable under the totality of the circumstances. In this case, the jury must be aware of the pre-shooting conduct, under the totality of the circumstances test, in order to determine whether, at the moment of the shooting, the use of force was reasonable and whether Officer Hill had probable cause to believe that Plaintiff presented a threat of serious physical harm to Hill or another person.")

Estate of Redd v. Love, 62 F. Supp. 3d 1268, 1277-78 (D. Utah 2014) ("Here, since the *Graham* factors weigh so heavily in favor of finding a violation of Dr. Redd's constitutional protection against excessive force, it is evident that sending so many heavily armed agents to arrest Dr. Redd and search his home violated the Fourth Amendment. In light of the clarity and force of the *Graham* analysis here, the court concludes that Agent Love knew or should have known, even absent a more factually similar case on point, that his decision to deploy over 80 heavily armed agents in such a raid, and to call more to the scene after agents had already secured Dr. Redd, his family, and his home, would constitute excessive force under the circumstances. When viewing the factual allegations in a light most favorable to Dr. Redd, the court concludes that Dr. Redd has raised sufficient factual allegations to support a finding that Agent Love's conduct violated a clearly established right.")

Cardall v. Thompson, No. 2:10–cv–305 CW, 2012 WL 90417, at *7 (D. Utah Jan. 11, 2012) ("[I]f disputed facts are taken in Anna's favor, the *Graham* factors almost universally weighed against taser deployment and the tasing was without lawful justification. Heeding the Tenth Circuit's recent warning that generalized principles should not be excessively relied upon to support a qualified immunity analysis, however, this court will undertake a more fact-specific inquiry. . . The court did not identify a Tenth Circuit case, or case from any jurisdiction, involving the tasing of a mentally ill individual who was confused and reluctant to obey officers' commands to get down on the ground. The Tenth Circuit, however, has held that 'it was clearly established on December 8, 2006 that [an officer] could not use his Taser on a nonviolent misdemeanant who did not pose a threat and was not resisting or evading arrest without first giving a warning.'. . It is true that, unlike the plaintiff in *Cavanaugh*, Brian Cardall was given an opportunity to comply with police demands before being tased. Taking the facts in favor of Anna, however, Brian was a nonthreatening misdemeanant who was not resisting arrest and had no warning he might be tased. Authority from other jurisdictions concords. [collecting cases] Brian was tased although he was

not guilty of any serious crime or attempting to flee. If all factual disputes are resolved in favor of Anna, Brian was not a threat to the officers who impatiently tased him when, in his confusion, he was slow to comply with their demands. Tenth Circuit case law, as well as authority from other jurisdictions, explicitly holds that tasings under similar circumstances violated clearly established Fourth Amendment law.")

Asten v. City of Boulder, No. 08-cv-00845-PAB, 2009 WL 2766723, at *13 (D. Colo. Aug. 26, 2009) ("[U]nder the Tenth Circuit's 'sliding scale' regarding clearly established law, although identical facts cannot be found in the case law, general constitutional doctrine combined with the nature of the facts–the unforewarned tasing of a mentally unstable woman in her own home–lead the Court to conclude that the law at issue was clearly established at the time Officer Frenzen used his taser to seize Ms. Asten.").

ELEVENTH CIRCUIT

Wilson v. Parker, No. 17-15294, 2018 WL 3954222 (11th Cir. Aug. 17, 2018) (not published) ("Parker was faced with a difficult choice. He could either shoot an apparently intoxicated or mentally ill man, or he could stand aside and risk a fellow officer being seriously harmed or killed. Even if the situation could have been handled better—a proposition that is by no means certain—'we are mindful that officers make split-second decisions in tough and tense situations,' and '[w]e are "loath to second-guess decisions made by police officers in the field."'. . Viewing the facts from the perspective of a reasonable officer on the scene, we conclude Parker did not violate Wilson's Fourth Amendment rights. Accordingly, Parker was entitled to summary judgment with respect to the excessive force claim.")

Manners v. Cannella, 891 F.3d 959, 969-75 (11th Cir. 2018) ("[F]or purposes of granting qualified immunity to law enforcement officers, it is enough that there is 'arguable probable cause' for a warrantless custodial arrest. . . .The district court found probable cause to arrest Manners for running a stop sign. Even taking (as we must) Manners's version of the facts to be true—that he did obey the stop sign—the district court determined that Cannella's observation could have been mistaken, but a mistaken though reasonable belief could support probable cause. We cannot agree that this resolves the question. Even assuming there would have been probable cause to arrest Manners if he ran the stop sign or if Cannella reasonably but mistakenly believed Manners had done so, on this record, there is an undeniable and material factual dispute that precludes summary judgment. Officer Cannella consistently said that Manners failed to stop at the sign. . . . Conversely, Manners consistently said that he stopped as required, indeed, he asserted that he came to a 'complete stop.' The street was in some state of darkness. On this record, a reasonable factfinder could find that Cannella neither saw nor reasonably thought he saw Manners run a stop sign. In the face of a direct factual dispute, summary judgment is inappropriate. . . The district court was not free to resolve a material factual dispute between Manners and Cannella.. . . .There was, however, both arguable and actual probable cause to arrest Manners for fleeing or attempting to elude a law enforcement officer. . . .To be entitled to qualified immunity on the three

§ 1983 claims, the officers needed only arguable probable cause. . . A reasonable officer in Cannella's shoes, and cognizant of the facts known to Cannella, could have believed that Manners had committed the offense of fleeing or attempting to elude a law enforcement officer. It does not alter our evaluation simply because the period of time was short so long as Manners could reasonably and safely have complied with the officer's direction but did not do so. . . .Manners says he 'feared for his life' because he was a black male alone with a law enforcement officer on an empty, dark residential street in the middle of the night, and he 'had no reasonable means of avoiding the danger except by driving to [a] safe, well-lit area.' . . . A general distrust of all police officers is not enough to establish the real, imminent, and impending nature of the danger requirement. Nor is there any showing on this record that either Officer Cannella or the Hollywood police department posed a direct, real, imminent, and impending danger. Nor, finally, was there any reason for Officer Cannella to know why Manners did not comply with his demand to stop until Manners reached a well-lit gas station. And even if some exigency existed, Cannella had no reason to know of any perceived necessity. Again, probable cause is based on the facts known to the law enforcement officer. . . .Because we have determined that there was probable cause for the arrest, the officers had the right to use some quantum of force to arrest Manners. Manners claims that a clearly established constitutional violation occurred even if the arrest was lawful because the officers used unnecessary and gratuitous force when they punched and tased him. But law enforcement officers conducting a lawful arrest have the right to take reasonable physical steps to place a suspect under arrest. . . .Of the *Graham* factors, the most relevant one here is resisting arrest. From the video recording, it is abundantly clear that Manners refused to be handcuffed beginning with Cannella's first efforts and continuing throughout a struggle with many officers who attempted to subdue him for at least three full minutes. . . . The videotape establishes, as we've repeated, that Manners thwarted Cannella's efforts to handcuff him for quite some time. The force necessary to handcuff Manners was not excessive under any clearly established precedent. Nor was the use of tasers by Cannella and Sabillon unconstitutionally excessive. The use of a taser 'beyond [the arrestee's] complete physical capitulation' repeatedly in a short period where an arrestee was mostly cooperative and made no attempt to flee would be excessive. . . Here, however, the taser was used to restrain, subdue, and handcuff Manners, whose resistance was evident from the outset. It is also clear from the video that the use of the taser, and indeed any force employed by the police, ended once Manners was subdued. He was never tased 'beyond his complete physical capitulation.' In short, we agree with the district court's determination that the force used by the officers was not constitutionally excessive, and that no controlling case law suggested otherwise.")

Beckman on behalf of Campbell v. Hamilton, No. 17-12407, 2018 WL 1907151, at *3–5 (11th Cir. Apr. 23, 2018) (not reported) ("Plaintiff argues that Deputy Hamilton acted unreasonably by not announcing himself and by taking Campbell by surprise. First, in the light of Campbell's erratic and violent conduct and his intoxicated state, an objectively reasonable officer could have concluded it was necessary -- for officer safety -- to approach Campbell cautiously and without being seen or heard. We have recognized that '[s]hock and surprise may be proper and useful tools in avoiding unnecessary injury to everyone involved when dealing with potentially violent

suspects.'. . In the light of the circumstances, that Campbell may have been surprised by Deputy Hamilton's presence at Campbell's house does not render the use of deadly force unreasonable, particularly given that Campbell immediately got a gun. Further, even if the officers failed to declare themselves verbally, that both Deputies Hamilton and Brown were in full uniform when they stepped into view from behind Campbell's home is undisputed. In the light of all the surrounding circumstances -- including the officers' dress and that, upon the officers' arrival, Campbell acted by turning and retreating to the porch -- an objectively reasonable officer in Deputy Hamilton's position could have believed that Campbell was in fact aware of the officers' presence. . . In support of her contention that Campbell was shot while still unaware of the officers' presence, Plaintiff also relies on Campbell's utterance about being 'startled,' 'scared,' or 'surprised.' Campbell's utterance, however, is not inconsistent with Deputy Hamilton's testimony and creates no genuine issue of fact about whether Campbell saw the officers before he was shot. Besides, whether Campbell was meaningfully aware of the police before he was shot is not by itself critically important in this case, considering all the circumstances. In the light of the rapidly evolving circumstances -- only 2 to 4 seconds having elapsed from when Deputies Hamilton and Brown stepped out from around the house to when Campbell was shot -- we cannot say it was constitutionally unreasonable for Deputy Hamilton to use deadly force without first identifying himself verbally or issuing a verbal warning that deadly force would be used. . . Plaintiff also contends that Deputy Hamilton's use of deadly force was unreasonable given that Campbell's gun was not aimed at Deputy Hamilton when Campbell was shot. Plaintiff does not dispute, however, that Campbell was holding a gun when he was shot -- a gun that Deputy Hamilton says Campbell retrieved immediately after Deputies Hamilton and Brown stepped into view. Given that Campbell had been actively shooting at the Whitaker home (a home with people in and around it) moments before, had expressly threatened to kill people, and had again armed himself, an objective officer under the circumstances could have believed reasonably that Campbell posed a threat of imminent danger even if Campbell's gun was not already aimed at Deputy Hamilton. . . .The reasonableness of force used is not judged 'with 20/20 vision of hindsight.'. . In this case, because an objective policeman in Deputy Hamilton's place could have believed reasonably that Campbell (who was armed) was aiming -- or in the process of aiming -- a gun toward him, Deputy Hamilton is entitled to qualified immunity even if mistaken. . . In the light of the circumstances, Deputy Hamilton's use of deadly force was reasonable in the Fourth Amendment sense: no constitutional violation. . . In addition, we conclude separately that the law was not clearly established at the time of the shooting in 2013 that Deputy Hamilton's act (given the circumstances) violated federal law. . . Deputy Hamilton is personally entitled to immunity.")

Shaw v. City of Selma, 884 F.3d 1093, 1099–101 (11th Cir. 2018) ("The estate contends that summary judgment should not have been granted because there is a genuine issue of material fact about whether Shaw had raised the hatchet in his hand when Williams shot him. And if he hadn't, the estate argues that no officer reasonably could have believed that Shaw posed an immediate threat to Williams or others. Given the light in which we must view the evidence at this stage of the proceeding, we assume that the factual premise of that syllogism is correct: that Shaw did not raise the hatchet he was holding. But the legal premise—that no reasonable officer could have

feared serious injury or death unless the hatchet-holding hand was raised up at the time—is wrong. The reasonableness of the shooting depends on the totality of the circumstances. . . Shaw was mentally ill and dangerous. Williams had been warned moments before that Shaw 'would fight [him] in a minute.' And Shaw had been reported for threatening customers with a knife at the same Church's Chicken only a few days before. On this occasion Shaw presented a clear danger. He was an armed and noncompliant suspect who had ignored more than two dozen orders to drop the hatchet. At the time he was shot, Shaw was advancing on Williams with hatchet in hand. He was close to him—within a few feet—and was getting closer still, yelling at Williams to 'Shoot it!' Shaw could have raised the hatchet in another second or two and struck Williams with it. Whether the hatchet was at Shaw's side, behind his back, or above his head doesn't change that fact. Given those circumstances, a reasonable officer could have believed that Shaw posed a threat of serious physical injury or death at that moment. . . A reasonable officer could have also concluded, as Williams apparently did, that the law did not require him to wait until the hatchet was being swung toward him before firing in self-defense. . . .The shooting of a mentally ill man was tragic, as such shootings always are, but tragedy does not equate with unreasonableness.")

Spencer v. City of Orlando, 725 F. App'x 928, ___ (11th Cir. 2018) ("To be clear, the officers were not required to wait until Marquis successfully restarted the car and drove toward them before they defended themselves. In *Long*, again dealing with a similar use of deadly force, this Court held that '[e]ven if we accept that the threat posed by [the suspect] to [the officer] was not immediate in that the cruiser was not moving toward [the officer] when shots were fired, the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect.'. . Similarly, it was not unreasonable for the officers here to fire before Marquis—who was by all accounts trying to restart the Hyundai—moved the car toward them.")

Wells for Chambers v. Talton, 695 F. App'x 439, 445 (11th Cir. 2017) ('When he made the decision to shoot, Deputy Glidden had probable cause to believe that Chambers was the burglar, that he was armed with a .45 caliber pistol, and that he posed a threat to officers and the public. Thus, Deputy Glidden had to make a 'split second judgment' in a situation that was rapidly unfolding. A reasonable officer in Deputy Glidden's position could have believed that deadly force was necessary to prevent the decedent's escape and avert a threat of harm to others. Deputy Glidden resorted to deadly force after his verbal commands and physical altercation did not subdue the decedent. Under the evidence in the record at the time of summary judgment, viewed in the light most favorable to the plaintiff, we conclude that the district court properly determined that the use of deadly force did not violate Chambers' Fourth Amendment rights. Accordingly, we hold the district court properly granted qualified immunity to Deputy Glidden.")

Knight through Kerr v. Miami-Dade County, 856 F.3d 795, 813-15 (11th Cir. 2017) ("Knight and Cure next contest the exclusion of the Miami-Dade Police Department's pursuit policy. . . The plaintiffs wanted to introduce evidence and testimony at trial that the officers allegedly violated the pursuit policy; the trial court decided to exclude this evidence due to its attenuation from the

circumstances preceding the use of force at issue in the case. The trial court excluded this evidence due, in part, to the risk that it would confuse the jurors by leading them to believe that they could find liability based on a violation of the pursuit policy rather than on a violation of the Fourth Amendment. Notably, the plaintiffs do not argue that the officers' alleged violation of the pursuit policy was itself a Fourth Amendment violation. They argue instead that the officers' decision to pursue the Cadillac created a situation that required the use of deadly force. However, many police departments have internal procedures that are more restrictive of conduct than what is otherwise permitted under state and federal law, and the Supreme Court has observed that a violation of these policies 'does not itself negate qualified immunity where it would otherwise be warranted.' *City & Cty. of San Francisco, Ca. v. Sheehan*, 135 S. Ct. 1765, 1777 (2015). Thus, the plaintiffs 'cannot establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.'. . Indeed, 'so long as a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot succeed 'by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless.'. . The risk of confusing the jury on this point was not insubstantial, and the court did not abuse its considerable discretion by trying to mitigate that risk. Moreover, the probative value found in this evidence was decreased measurably because it concerned events that were temporally separated from the actual use of force. As we have said, '[i]n determining whether the officers in this case are entitled to qualified immunity, we analyze the precise circumstances immediately preceding [the victim's] being shot' rather than more-attenuated events that occurred before and after the shooting. . . It was within the trial court's discretion to conclude that an alleged violation of the pursuit policy fell outside of this window. After Officers Robinson and Mendez began following the Cadillac, the cars drove for approximately six-tenths of a mile before coming to a stop at the dead end. Cure testified that after the cars stopped, approximately two minutes passed between the moment the officers exited their car and the moment that the first shot was fired; during those two minutes, the officers were issuing commands and asking the occupants to exit the Cadillac with their hands up. The trial court carefully considered the temporal separation between any claimed pursuit-policy violation and the moment that shots were fired, and it concluded that the relevant violations were only those that occurred after the cars stopped. This was a careful, fact-bound decision. We cannot say that it amounted to an abuse of discretion. . . . To the extent that the plaintiffs suggest that the pursuit itself constituted a separate Fourth Amendment violation, they have provided no evidence suggesting that the officers' pursuit independently violated clearly established law. . .'The plaintiffs have again offered no cases from the United States Supreme Court, the Eleventh Circuit, or the Florida Supreme Court, and thus they cannot show that a reasonable officer would have known that his conduct was violating clearly established law.")

Davidson v. City of Opelika, 675 F. App'x 955, 957-60 (11th Cir. 2017) ("The video evidence in this case is conclusive. Although we do view the facts and draw reasonable inferences in Davidson's favor, the Supreme Court has instructed us that when there is a reliable video recording of disputed events, we are to view facts 'in the light depicted by the video[ ].' *Scott v. Harris*, 550 U.S. 372, 381 (2007). Here, that video proves that a reasonable officer in Hancock's position would

fear for his life because of the unique way in which Davidson extended his wallet in his clasped hands. . . . [T]he second factor—whether Davidson posed an immediate threat to Hancock—decides this case. . . . The district court determined that Davidson presented such a threat because '[a]fter reaching behind himself in a motion akin to upholstering [sic] a weapon, Davidson stood clutching a black object with both hands, pointing towards Officer Hancock as though he was preparing to shoot.'. . The positions of the object and Davidson's hands—established by the video—are key. To be clear, Davidson exiting his vehicle, reaching behind himself, and holding an unidentified object would not have been sufficient to make Hancock's use of deadly force reasonable under the circumstances. But the unusual position of the dark object in Davidson's outstretched and clasped hands would have led a reasonable officer to believe that Davidson was pointing a gun at him. For that reason, we concur with the district court that Davidson objectively posed a grave and immediate threat to Hancock. . . .With all facts, as supported by video evidence, viewed in a light favorable to Davidson, Hancock's use of force was objectively reasonable. In so holding, we do not want to understate the suffering Davidson endured as the result of Hancock's disastrous mistake. But the positions of Davidson's wallet and hands the moment before the shooting mean that mistake did not violate Davidson's constitutional rights.")

Williams v. Deal, 659 F. App'x 580, 596, 600-01 & n.16 (11th Cir. 2016) (per curiam) ("The plaintiff points us to a line of cases from the Ninth Circuit generally holding that 'where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force.'" *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). The district court declined to rule on whether this initial contact was a separate constitutional violation, instead considering the incident as a whole. . . But the plaintiff asserted as much below and on appeal. So we address it here. Even if we applied the Ninth Circuit's rule, the plaintiff's second theory fails because there was no *unconstitutional* provocation. . . .[W]e conclude that the initial use of force—Officer Deal grabbing and attempting to push Mr. Williams back into the car—was not excessive under the circumstances. Perhaps this wasn't the wisest course of action. Maybe it was a bad idea. But '[w]e do not sit in judgment to determine whether an officer made the best or a good or even a bad decision in the manner of carrying out an arrest.'. . Even under the cases the plaintiff relies on from a sister circuit, action that *complies* with the Fourth Amendment 'is not rendered unreasonable because it provokes a violent reaction.' *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 & n.4 (2015) (discussing those cases but declining to endorse or reject them). . . . The plaintiff's final theory is that the shooting itself was an unconstitutional use of excessive force given the totality of circumstances. The Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), guides the Fourth Amendment reasonableness analysis where a police officer uses deadly force. . . Under *Garner*, the use of deadly force is 'more likely reasonable if: the suspect poses an immediate threat of serious physical harm to officers or others; the suspect committed a crime involving the infliction or threatened infliction of serious harm, such that his being at large represents an inherent risk to the general public; and the officers either issued a warning or could not feasibly have done so before using deadly force.' *Penley*, 605 F.3d at 850. '[O]nce we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to

the extent supportable by the record' the reasonableness of a use of deadly force 'is a pure question of law.' *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007). . . . We recognize that there is a difference of opinion about this. *See Scott*, 550 U.S. at 390 (Stevens, J., dissenting) (reasoning that '[d]epending on the circumstances ... the question of the reasonableness of the officer's actions should be decided by a jury'); *see also* Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe*? Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 843 (2009). But the opinion that matters is the Supreme Court's opinion. Recognizing that there's room to judge underlying facts differently, we have tried to confront any 'unconscious priors' in deciding this case. *See* Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* 17 (2016). . . .In two respects, we part company with the district court's analysis of the third factor—the feasibility of issuing a warning. First, the order says 'whether it was feasible for Deal to have issued a warning prior to firing is also an integral one of fact for jury determination.' That's not so. As part of the reasonableness inquiry, a determination whether it was feasible to issue a warning is a legal conclusion drawn from facts. . . Here there's no genuine dispute of material fact about what happened, only the legal significance of what happened. Second, the order overemphasizes the significance of a verbal warning. '[A] mechanical application of these factors ... is not appropriate.'. . *Garner* isn't 'a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.'. . The fact that Mr. Williams was unarmed at the time of the gunshot doesn't change this result. Mr. Williams was actively and violently resisting a lawful seizure. There had been a struggle at close quarters. Punches had been thrown and landed. Even if Mr. Williams didn't succeed in partly removing the gun from the holster, a reasonable officer would have perceived that Mr. Williams was attempting to gain control of the gun when he kept advancing. 'Under the circumstances a reasonable officer would perceive a substantial risk that [Mr. Williams] would seriously injure or kill him, either by beating ... him, or by taking his gun and shooting him with it.' *See Billington*, 292 F.3d at 1185; *see also DeLuna v. City of Rockford*, 447 F.3d 1008, 1013 (7th Cir. 2006) (an officer "need not wait until there is a physical struggle for control of his weapon before a situation presents an imminent danger of serious physical injury"); *Blossom v. Yarbrough*, 429 F.3d 963, 968 (10th Cir. 2005) (holding that deadly force was lawful because the suspect was advancing on the officer in what appeared to be an effort to get his weapon). In these circumstances, a police officer needn't risk his life on the chance that the advancing suspect has or will suddenly develop peaceful intentions. . .We conclude that this use of deadly force was objectively reasonable under all of the circumstances. In keeping with the standard of review, we have reviewed the record looking for some evidence which contradicts the police officer's account of the incident in a way that makes a difference. We've found none. The plaintiff hasn't shown that Officer Deal violated the Fourth Amendment. Accordingly, he is entitled to judgment from the plaintiff's Fourth Amendment excessive-force claim.")

Clemons v. Knight, 662 F. App'x 725, 728 (11th Cir. 2016) ("The deputies' use of deadly force did not violate Mitchell's and Gilmer's constitutional rights under the Fourth Amendment. In the light of Mitchell's evasive behavior and Sasse's presence near the front of Mitchell's jeep, both deputies reasonably feared that Mitchell's use of the jeep created an imminent danger of serious

injury to Sasse. . . The deputies were entitled to fire their guns to protect Sasse. . . Because the officers were justified in responding to the danger created by the jeep with deadly force, the deputies were immune from liability for Gilmer's injuries and for Mitchell's death.")

Nigro v. Carrasquillo, 663 F. App'x 894, 896-97 (11th Cir. 2016) ("Both parties, and the district court, relied on our decision in *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002). There, where officers pepper sprayed the plaintiff while she was sitting in the back of a patrol car, we held that the *Graham* factors weighed in the plaintiff's favor. Critically, however, we noted in that case that the plaintiff was not resisting arrest or attempting to flee. . .We recognized in *Vinyard*, that '[c]ourts have consistently concluded that using pepper spray is reasonable, [ ] where the plaintiff was either resisting arrest or refusing police requests.'. . We stated that 'pepper spray is generally of limited intrusiveness, and it is designed to disable a suspect without causing permanent physical injury.'. . And we further acknowledged that 'pepper spray is a very reasonable alternative to escalating a physical struggle with an arrestee.'. . Officer Carrasquillo's use of pepper spray did not constitute excessive force in violation of the Fourth Amendment. Officer Carrasquillo applied two short bursts of pepper spray in response to Ms. Nigro's violently kicking the patrol car door and resisting arrest. The use of minimal force associated with a couple of two-second bursts of pepper spray was reasonable force to prevent Ms. Nigro from further damaging government property, injuring herself, or harming the officers. First, we have explained—albeit under different facts—that '[p]epper spray is a specially noninvasive weapon and may be one very safe and effective method of handling a violent suspect who may cause further harm to himself or others.'. . Here Ms. Nigro, who has been detained pursuant to Florida's Baker Act, was acting violently inside the patrol car. Second, in *Vinyard* we said in dicta that the use of pepper spray to subdue an arrestee who was acting violently in a patrol car is not excessive force. . . That dicta is persuasive, and we follow it in this case.")

Smith v. LePage, 834 F.3d 1285, 1295-97 (11th Cir. 2016) ("The officers tried to get Mr. Smith to cooperate for two to three minutes before deploying the taser. Although the crimes Mr. Smith was suspected of were mere misdemeanors, a reasonable officer on the scene could have believed that Mr. Smith posed a danger to himself or others and was actively resisting arrest. In these circumstances, our precedent dictates that the officers' single taser discharge on Mr. Smith during the first tasering was reasonable. Leading up to the second tasering, Mr. Smith was barricaded in his bathroom and repeatedly disobeyed the officers' commands to come out. When he eventually did start coming out of the bathroom, he moved toward the exit rather than immediately surrendering. There is a material dispute over whether Mr. Smith was armed at the time. Viewing the evidence and all factual inferences in the light most favorable to the plaintiffs, we must assume for purposes of summary judgment that Mr. Smith no longer had the knife at the time. Even so, our precedent does not necessarily require that a noncompliant suspect be armed to justify the use of a nonlethal taser. . . In this tense situation, we cannot say that the officers' single use of a taser on Mr. Smith was unreasonable. . . . As is often true in qualified immunity cases, there are different accounts of what happened here. The plaintiffs say that Mr. Smith dropped the kitchen knife on the staircase when he was tased the first time and did not pick it back up. We must therefore infer

that he did not have a knife while barricaded in the bathroom. The officers say, to the contrary, that Mr. Smith was visibly armed with the kitchen knife while barricaded in the bathroom, and came out of the bathroom violently slashing with it. There is material evidence in the record supporting both accounts. . . .It is not this Court's function to weigh the facts and decide the truth of the matter at summary judgment. . . Instead, where there are 'varying accounts of what happened,' the proper standard requires us to adopt the account most favorable to the non-movants. . . Applying that standard here, we accept for purposes of summary judgment that Mr. Smith was unarmed when he was barricaded inside the bathroom and when he exited. . . .With the facts properly framed, we turn to whether these facts can support a clearly established constitutional violation. First, the use of deadly force in this circumstance was a constitutional violation. The officers did not have probable cause to believe Mr. Smith posed a threat of serious physical harm when he left his bathroom without a weapon and moved toward the only exit. . . .Second, the violated right was clearly established at the time of the shooting. . . .*Garner* clearly established that Mr. Smith had a right to be free from deadly force when he was not threatening the officers, was merely suspected of misdemeanor offenses, and was attempting to escape. . . .The officers had 'reasonable warning' that fatally shooting an unarmed person suspected of a misdemeanor in his own home merely because he was moving toward them was a constitutional violation. . . Thus, we affirm the District Court's denial of summary judgment on the plaintiffs' § 1983 claim against Officers Ings and LePage for shooting Mr. Smith.")

Thomas v. Moody, 653 F. App'x 667, 674-75 (11th Cir. 2016) ("Under the facts and circumstances of this case, which includes video evidence, we cannot say that Officer Moody violated Thomas's' constitutional rights by using objectively unreasonable force. As in *Pace*, *Robinson*, and *McCullough*, Thomas's aggressive and dangerous driving threatened serious harm to other citizens and the officers as he drove through four stop signs, almost hitting one car, and as he drove through the parking lot. That threat escalated when Thomas rammed into a parked car as the officers closed in. Indeed, the Plaintiff admits that, even though the Explorer was stationary for a moment (as most, a few seconds), Thomas never turned off the engine, never attempted to exit the Explorer, and never raised his hands. . . . Even if the Plaintiff did establish that a federal constitutional violation occurred, which she did not, that federal law was not clearly established at the time that Thomas used his car as a dangerous weapon. We cannot say that Officer Moody had fair warning that his conduct was unlawful in the dangerous situation he confronted. . . If anything, the prevailing law in this Circuit at the time of Thomas's death affirmatively provided that Officer Moody's actions were objectively reasonable. . .In sum, Officer Moody's use of deadly force did not violate Thomas's constitutional rights. Moreover, on June 28, 2012, it was not clearly established that Officer Moody was prohibited from using deadly force against Thomas under the circumstances of this case. Because Moody violated no constitutional right, let alone a clearly established one, we conclude that he is entitled to qualified immunity.")

Ayers v. Harrison, 650 F. App'x 709, 715 (11th Cir. 2016) ("Here Officer Harrison had even less cause than the officers in *Gilmere* and *Lundgren* to believe that Rev. Ayers presented an imminent risk of harm. First, Officer Harrison and his colleagues concededly had no probable cause to

believe that Rev. Ayers was involved with drugs or was armed or dangerous. Second, *Gilmere* demonstrates that, even in cases where a suspect engages in a struggle, police officers are still required to properly assess whether the suspect is a *genuine* threat based on the information available to them at the time. Officer Harrison did no such thing. Without notice, Officer Harrison approached Rev. Ayers in an unmarked SUV which partially blocked the path of Rev. Ayers' car. Officer Harrison, who was not in uniform, then drew his weapon, without first identifying himself as a law enforcement officer. Instead of evaluating whether Rev. Ayers was a true threat—or was simply scared of being robbed—when he put his car in reverse and backed up, Officer Harrison fired his weapon without warning or provocation. *Gilmere* and *Lundgren* provided Officer Harrison with sufficient notice that his use of deadly force was unconstitutional.")

Boynton v. City of Tallahassee, 650 F. App'x 654, 660-61(11th Cir. 2016) ("Norton emphasizes that the police department's use of force policy allows officers to use a 'stun gun' on suspects who exhibit 'active physical resistance,' which is defined to include 'bracing or tensing.' Two things about that. First, that policy does not guide our analysis — the Fourth Amendment does. Second, we do not suggest that 'tensing' will never justify the use of a stun gun or taser under any circumstances. We hold only that from the evidence in the record a jury could find Norton's use of a taser on Boynton nine times was unreasonable under the circumstances. Norton contends that he is nonetheless entitled to qualified immunity, which protects government officials acting within their discretionary authority unless they violate a 'clearly established' right. . . The parties agree that Norton was acting within his discretionary authority. To decide whether a right is 'clearly established,' we consider whether, based on the law applicable at the time of the alleged violation, it would have been 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'. . When this incident occurred in 2010, it would have been. In 2009 this Court considered the reasonableness of an officer's repeated use of a taser on an individual who was not accused of any crime; who did not pose an immediate threat to the officer or others; who was not belligerent or aggressive; and who was not trying to flee or evade arrest. . . The officer in *Oliver* deployed her taser 'at least eight and as many as eleven or twelve times,' even after the individual was 'immobilized,' 'limp,' and 'writhing in pain.'. .Under those circumstances, we held that the officer was not entitled to qualified immunity because the force used was 'so plainly unnecessary and disproportionate that no reasonable officer could have thought that [it] was legal.'. . In light of *Oliver*, a reasonable officer in Norton's position would have known that repeatedly tasing Boynton, who was not argumentative, aggressive, or mobile, was unreasonable under the Fourth Amendment. Norton is not entitled to qualified immunity on Boynton's excessive force claim at this time.")

Singletary v. Vargas, 804 F.3d 1174, 1182-85 (11th Cir. 2015) ("Because we, the district court, and the parties agree on the governing legal principles, the question before us then becomes whether the district court's construction of the evidence in the record was accurate. Having carefully reviewed that evidence in the light most favorable to Plaintiff, we disagree with the district court and conclude that a reasonable officer would have reasonably perceived that he was in imminent danger of being run over by Lechner's car. Thus, the officer's firing of his gun in an

effort to stop the car did not constitute excessive force. . . . Given the video evidence, Plaintiff's testimony cannot call into question Defendant's assertion that he was in the path of Lechner's car when the latter accelerated toward him, thereby causing Defendant to reasonably fear for his life. . . . In short, taking the evidence in the light most favorable to Plaintiff, we conclude that this evidence demonstrates that Lechner's car began accelerating toward Defendant as he stood in front of it and that his use of deadly force to stop what appeared to be an imminent threat to his life was not excessive. That being so, Defendant did not violate the Constitution when he responded with deadly force. . . . Even assuming a constitutional violation, Defendant is entitled to qualified immunity unless Plaintiff can show that his Fourth Amendment rights were 'clearly established' at the time of the shooting. . . .As explained above, it is well established that an officer may constitutionally use deadly force when his life is threatened by a car that is being used as a deadly weapon. . . The district court thus acknowledged that Defendant would be entitled to qualified immunity if he reasonably believed Lechner was trying to run him over with the car and thus feared for his safety. The court nevertheless denied qualified immunity because it discounted undisputed video evidence showing that Defendant was in the path of the car when it accelerated and that he fired just as—or a split second after—Lechner hit the brakes. Properly accounting for this evidence, our case law did not put Defendant on notice that his use of deadly force violated any clearly established rights.")

Murphy v. Demings, 626 F. App'x 836, 840-41 (11th Cir. 2015) (per curiam) ("We also conclude that, under the circumstances, Deputy Caron's act of shooting Plaintiff was not outside the range of reasonable conduct. Deputy Caron was confronted with an armed robbery suspect who was fleeing police, and who had already hit two police cars without stopping and had engaged in a high-speed chase. When Plaintiff made a sudden movement toward his waistband, an objective officer in Deputy Caron's situation could have believed reasonably that Plaintiff was reaching for a gun and that Plaintiff posed an imminent threat of serious physical injury to the officers and to others. Faced with a 'tense, uncertain, and rapidly evolving' situation, Deputy Caron made a split-second decision to fire his gun in an attempt to disarm or incapacitate Plaintiff. Given the circumstances, we cannot say that Deputy Caron's decision was unreasonable in the Fourth Amendment sense. Although Plaintiff was running away from Deputy Caron when he was shot and had not threatened definitely the officers with a gun, 'the law does not require officers in tense and dangerous situations to wait until the moment a suspect uses a deadly weapon to act to stop the suspect.'. .We also reject Plaintiff's contention that Deputy Caron acted unreasonably by failing to warn Plaintiff about the potential use of deadly force. Although a warning is one factor that weighs in favor of reasonableness, . . . the Supreme Court has stressed that '*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force."'. .Instead, reasonableness is determined based on all the facts and circumstances of each individual case. . .Under the facts and circumstances of this case, Deputy Caron's use of deadly force was not outside the range of reasonable conduct under the Fourth Amendment. An objectively reasonable officer possessing the same knowledge as Deputy Caron could have believed that the use of deadly force against Plaintiff was justified, to prevent serious injury to the officers and to bystanders. And we are highly confident that Deputy Caron—given

the circumstances—violated no clearly-established constitutional right of which a reasonable person would have known. As a matter of law, Deputy Caron is entitled to summary judgment.")

Salvato v. Miley, 790 F.3d 1286, 1294-95 (11th Cir. 2015) ("Because the standard for excessive force is clearly established and our precedents and those of the Supreme Court make clear that firing without first warning on a retreating, apparently unarmed suspect is excessive, Miley had 'fair warning,'. . . that her actions were unconstitutional. . . .Miley does not contest that Brown's use of force was unreasonable. . . .Because the record, viewed in the light most favorable to Salvato, establishes that Miley was 'in a position to intervene,'. . . but failed to do so, the district court did not err when it denied her qualified immunity.")

Cook v. Peters, 604 F. App'x 663, 667-68 (10th Cir. 2015) ("[C]ase law with similar facts is not always required in excessive force cases. Rather, a plaintiff can establish that his right was clearly established if application of the *Graham* factors alone would put a reasonable officer on notice that his actions were unconstitutional. . . Because Mr. Peters' actions were clearly unconstitutional based on the *Graham* factors, Mr. Cook was not required to present case law with similar facts.")

Alday v. Groover, 601 F. App'x 775, 777-78 (11th Cir. 2015) ("Alday has cited no case with materially similar facts from the Supreme Court, the Eleventh Circuit, or the Supreme Court of Georgia which might have given Groover fair warning that his actions were unconstitutional, nor has our research revealed such a case. Thus Alday can surmount the qualified immunity hurdle only if Groover's conduct was 'so far beyond the hazy border between excessive and acceptable force that [Groover] had to know he was violating the Constitution even without case law on point.'. . However, we have the benefit of some guidance from *Buckley v. Haddock,* 292 F. App'x 791 (11th Cir.2008), where this Court granted qualified immunity to an officer using a Taser to gain the compliance of a handcuffed suspect. There, a handcuffed, uncooperative plaintiff refused an officer's order to move from the ground to the patrol car. . . The officer applied the Taser a total of three times to the uncompliant, but otherwise sedate, plaintiff. . . Two judges of this court concluded that the first two taser shocks did not violate the Constitution. . . While the unpublished *Buckley* opinion is not binding precedent and certainly does not establish that the use of taser shock on a handcuffed plaintiff to bring compliance *is* constitutional, the clear views of those two judges of this court are relevant to the issue of whether the lesser conduct in the instant case violated *clearly established* constitutional law. . .For this reason, Groover is entitled to qualified immunity.")

Willis v. Mock, 600 F. App'x 679, 684-85 (11th Cir. 2015) ("The use of deadly force can be constitutionally reasonable where a driver 'intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight' from law enforcement. . . That is the case here. This is true whether or not Willis knew that he was being chased by multiple officers from multiple jurisdictions across multiple counties. The fact is Willis's riding put himself and the public at risk or loss of life or property. And because the Fourth Amendment's reasonableness inquiry is conducted from the officers' perspective, not Willis's, . . . it is irrelevant whether he

decided to barrel through the roadblock and continue his headlong flight because he reasonably believed that the officers were going to fire their weapons at him. In sum, we conclude that Captain James and Sergeant Turner's conduct did not violate Willis's Fourth Amendment rights and, therefore, the district court's grant of summary judgment as to them will be affirmed.")

Quiles v. City of Tampa Police Dep't, 596 F. App'x 816, 820-21 (11th Cir. 2015) ("Given the teaching of the post–1985 development of the law (all that matters is reasonableness), the district court's focus on our opinion in *Acoff* is misplaced. In *Acoff*—decided only a few months after *Garner* was decided—we treated *Garner* as having established a 'standard for defining the reasonable use of deadly force to seize a person.'. . We described the *Garner* standard as containing three distinct elements, one of which was the issuance of a warning when feasible. . . In explaining why a directed verdict for defendant was improper in that case, we relied on a number of things, including our reasoning that '[t]he jury was certainly entitled to conclude that a warning was feasible and this alone would have established a violation of the legal standard.'. . But, in the light of the Supreme Court's later clarification in *Scott* of the *Garner* legal standard, we now know and had published precedents by 2011 that an officer's failure to issue a seemingly feasible warning—at least, to a person appearing to be armed—does not, in and of itself, render automatically unreasonable the use of deadly force. . . . Given the facts and circumstances of this case, Officer Savitt's use of deadly force was not outside the range of reasonable conduct under the Fourth Amendment. He faced what was reasonably perceived as a grave danger. An objectively reasonable officer possessing the same knowledge as Officer Savitt could have believed that the use of deadly force against Quiles was justified, to prevent serious injury to the officers and to bystanders. The Constitution was not violated. Moreover, given the circumstances and the train of precedents, we are even more confident that Officer Savitt, in 2011, violated no clearly-established constitutional right of which a reasonable person would have known; as a matter of law, he personally is entitled to immunity.")

Montero v. Nandlal, 597 F. App'x 1021, 1025-26 (11th Cir. 2014)) ("Montero did initially resist being arrested, and he arguably posed some threat to Nandlal and Blackman once the struggle began. However, Nandlal had no reason to believe that Montero was armed, and we must assume, taking the facts in the light most favorable to Plaintiff, that he was not reaching for either deputy's gun at any time during the confrontation. Crucially, there is evidence to support Plaintiff's assertion that, at the time Nandlal decided to shoot Montero, the latter was on his back, subdued and immobilized, with Deputy Blackman standing over him. Montero's resistance had therefore ended, and any physical threat he presented had been neutralized when the shooting occurred. . .Thus, seemingly having ended at the time of the shooting, Montero's earlier resistance does not, taken by itself, legitimize Deputy Nandlal's later decision to shoot him. . . . Nandlal is nonetheless entitled to qualified immunity unless Plaintiff can show that Montero's Fourth Amendment rights were 'clearly established' at the time of the shooting. . . To be clearly established, the contours of a right must be 'sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'. . Fair warning is most commonly provided by materially similar precedent from the Supreme Court, this Court, or the highest state court in which the case

has arisen. . . However, a judicial precedent with identical facts is not essential for the law to be clearly established. . . .We set forth the factors relevant to deciding whether an officer's use of deadly force was reasonable in several cases that pre-date April 9, 2010. . . None of those factors indicate that it would be reasonable to shoot—four times, in rapid succession and without any warning-an unarmed suspect who is subdued, immobilized, and lying on his back with another officer standing over him. We also observed, in several cases pre-dating April 9, 2010, that an officer may constitutionally use deadly force against a suspect whom the officer reasonably believes (1) 'poses a threat of serious physical harm to the officer or others' or (2) has 'committed a crime involving the infliction or threatened infliction of serious physical harm.'. . . Based on the assumed facts, these cases likewise make it obvious that Nandlal violated Montero's Fourth Amendment rights by using deadly force against him. The only crime that Nandlal suspected Montero of committing was misdemeanor disorderly intoxication, which did not involve or threaten the infliction of physical harm. Nor was there any basis upon which Nandlal could otherwise reasonably perceive Montero, who was unarmed, immobilized, and lying beneath Deputy Blackman, as posing a threat of serious physical harm. . . In short, Nandlal had 'fair warning' on April 9, 2010 that his conduct violated the Fourth Amendment. Of course, a jury might well find that Nandlal reasonably perceived Montero to be a serious threat because he was not in fact subdued at the time of the shooting or because at some point during the struggle he had reached for Nandlal's gun belt. But assuming Plaintiff's version of the facts to be correct, as we must do in reviewing a defendant's motion for summary judgment, existing case law provided sufficient warning to alert Nandlal to the fact that shooting Montero, under these circumstances, would violate the latter's Fourth Amendment rights. Accordingly, qualified immunity for Deputy Nandlal is not warranted on these facts.")

Bussey-Morice v. Gomez, 587 F. App'x 621, 627-28, 630-31 (11th Cir. 2014) [*Bussey I*] ("Because we find that the alleged illegality of Gomez and Hewatt's behavior was not clearly established at the time of their actions, we need not decide whether a constitutional violation took place. . . .Here, even viewing the facts in the light most favorable to Bussey–Morice, we find that it was not clearly established at the time of the incident, under either method, that Gomez and Hewatt's conduct violated Bussey's right to be free from excessive force. First, we agree with the district court that no decision from the United States Supreme Court, this Court, or the Florida Supreme Court has clearly established that an officer's repeated use of a Taser constitutes excessive force under circumstances identical to these. Consequently, Bussey–Morice must demonstrate that this case presents one of those rare circumstances in which, as a matter of obvious clarity, Gomez and Hewatt's actions violated the Fourth Amendment. We find that she cannot. . . .On this record, despite the tragic nature of Bussey's death, we simply cannot conclude that clearly established law precluded Gomez and Hewatt from using their Tasers in the manner used here. Rather, we find the circumstances of this case to be more akin to the facts of *Hoyt v. Cooks*, 672 F.3d 972 (11th Cir.2012), a case in which we determined that police officers were entitled to qualified immunity on excessive-force claims in a situation where they repeatedly used their Tasers in an attempt to subdue a mentally unstable arrestee. . . .Ultimately, we find that the facts here do not present behavior that, under the difficult circumstances present in the hospital's emergency-room lobby

on December 19, 2009, was so egregious that it should have been obvious to Gomez and Hewatt that they were violating Bussey's clearly established right when they tased Bussey. Rather, because they were faced with an aggressive, psychotic, non-compliant individual in a hospital, where others could have been injured, Gomez and Hewatt reasonably could have believed that, in deploying their Tasers multiple times, their actions were lawful.")

Saunders v. Duke, 766 F. 3d 1262, 1269 (11th Cir. 2014) ("The district court's grant of qualified immunity was based on the assumption that, by lifting his head, Mr. Saunders was being uncooperative or was resisting. That assumption, however, does not read the allegations of the complaint in the light most favorable to Mr. Saunders. First, the complaint can fairly be read to allege that Mr. Saunders kept his face off the pavement the whole time he was on the ground (which was for a 'long period'), and did not just lift it up all of a sudden in defiance of contrary commands. Second, Mr. Saunders specifically alleged that, once he was handcuffed and on the ground, he did not resist and did not do anything to threaten the agents or anyone else. But even if the complaint could be read to allege that Mr. Saunders disobeyed an order by lifting his head off the hot pavement, that minor transgression does not mean that the force allegedly used was a constitutionally permissible response, or that the agents are entitled to qualified immunity. . .The agents did not, by Mr. Saunders' account, merely exert some pressure to guide his head downward. Instead, they 'slammed' his head against the pavement with 'extreme force,' and, not surprisingly, this resulted in significant injuries to Mr. Saunders. The human skull is a relatively hearty vessel for the brain, but it will generally not fare well in a contest with hardened cement.")

Harper v. Davis, 571 F. App'x 906, 912-14 (11th Cir. 2014) ("[A] reasonable officer might question whether 'any danger had passed' when defendants tasered Harper. Unlike the *Lee* plaintiff—who did nothing wrong but to tap her horn—Harper had reportedly beaten his wife, pointed a gun at his nephew, fired rounds into the ceiling, threatened suicide, and fled armed into the woods before the police arrived. . . Furthermore, Harper stood in a tree just above Perkins (a position of tactical advantage) when defendants spotted him. Finally, as defendants hollered at Harper to show his hands and descend, Perkins shouted, 'He's got the fuckin' gun in the tree with him.' In this chaotic moment-with the suspect cornered but loose and an unsecured rifle somewhere nearby-a reasonable officer might use a 'degree of physical coercion' bordering on deadly force to make an arrest and ensure the safety of his fellows. . . At least Harper was not 'fully secured' such that force was 'unnecessary to any legitimate law enforcement purpose.'. . .On summary judgment, the trial court quoted our decision at the motion-to-dismiss stage to show that tasering Harper was unreasonable. . . In that opinion we found—based on scarce evidence in the complaint—that Harper '(1) was at least four feet up in a tree with his hands raised, (2) posed no threat to [the officers'] safety or the safety of others, (3) had no chance, and did not attempt, to flee, and (4) merely put his hands in the air in compliance with the instructions of at least one officer.'. . We concluded that tasering a suspect so situated obviously violated the Fourth Amendment. . .Harper would have us make the same finding now, but we refuse to do so. First, in our previous opinion, we had no occasion to consider the initial *Graham* factor, the crimes leading to Harper's arrest . . . . After discovery we know, however, that defendants were told Harper

overdrank, beat his wife, fired a rifle in his home, threatened suicide, then fled with his weapon into the woods. Harper's crimes were indeed so worrisome that Gourley, Davis, and the other officers donned bulletproof vests before tracking. We doubt a reasonable officer would find it 'readily apparent' that defendants' force was excessive under the circumstances. . . Discovery evidence also leads us to reconsider another *Graham* factor: whether a reasonable officer would think Harper made no attempt to escape arrest. . . On this score, the trial court highlighted that Harper tried to surrender but could not raise his hands and descend the tree at the same time. . .Yet this analysis misses an important point. In qualified immunity cases, we ask not whether the *suspect* intended to surrender, but rather whether a *reasonable officer on the scene* would think the suspect was surrendering. . . One must remember that Gourley and Davis found Harper in a tree. This initial position betokened flight, not gentle surrender. . . And while we concede that the officers' twofold commands made compliance difficult, we disagree that defendants behaved unreasonably under the circumstances. To arrest their suspect, the officers had to coax Harper from the tree; to ensure the suspect did not shoot them, the officers needed Harper to show his hands. We cannot hold in hindsight that defendants' commands were improper or that it was readily apparent that tasering Harper was unwarranted. . . Finally, we disagree that a reasonable officer would think Harper posed no 'immediate threat to the safety of the officers or others.'. . In finding that Harper posed no danger to defendants, the trial court noted that Harper's 'hands were raised and empty' when the officers deployed their Tasers, and Harper 'had abandoned the gun far enough away that he would have had to move away from his current perch to access it.'. . But once again, this analysis views the evidence from Harper's perspective, not an officer's. Even if Harper were entirely unable to harm defendants—whether because his rifle was out of reach, because he was trying to show his hands, or because he planned to surrender—a reasonable officer in defendants' shoes would have thought Harper was dangerous. Before the search, Gourley and Davis learned that Harper was drunk and had a gun. Then, in the tense seconds after the officers found their suspect in the tree, and as Harper fumbled to show his hands and come down, Perkins exclaimed, 'He's got the fuckin' gun in the tree with him.' Gourley tasered Harper immediately, and Davis followed suit just seconds after. Even drawing reasonable inferences in Harper's favor, we cannot say it was obviously clear that defendants' acted excessively to neutralize the perceived threat. To echo our holding in *Carr v. Tatangelo*, a 'reasonable but mistaken belief that probable cause exists for using [significant] force is not actionable under § 1983.'. . In sum, Harper failed to show that defendants infringed his clearly established constitutional rights. Thus we grant Gourley and Davis qualified immunity without directly assessing the constitutionality of their conduct. By so holding, we do not wish to belittle the personal tragedy Harper suffered on that late spring night. No doubt losing one's mobility and one's family in a single stroke inflicts wounds beyond repair. Even so, we cannot hold defendants liable for conduct that the law did not clearly prohibit. For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded with instructions that judgment be entered for Gourley and Davis.")

Morton v. Kirkwood, 707 F.3d 1276, 1283, 1285, 1286 (11th Cir. 2013) ("Like *Garner*, . . . *Vaughan* gave fair warning that the use of deadly force against a non-resisting suspect who posed no danger violates a suspect's Fourth Amendment right to be free from excessive force. While the

facts of neither *Vaughan* nor *Garner* exactly match the facts here, Morton presented *less* of a safety and flight risk than the driver in *Vaughan* or the suspect in *Garner*. The truck in *Vaughan* was speeding on a highway; Morton's car was parked. In *Vaughan,* the driver refused to stop when the police ordered him to do so; Morton immediately raised his hands when he heard Officer Kirkwood shout. In *Vaughan,* the driver was suspected of car theft; Morton was suspected of no crime. And in *Garner* a criminal suspect sought to flee, whereas Morton did not flee and was not suspected of a crime. '[I]n the light of pre-existing law,' here *Garner* and *Vaughan,* 'the unlawfulness' of Kirkwood's alleged actions was 'apparent,' and so qualified immunity does not apply. . . .In short, if Morton's version of events is accurate, a reasonable officer on the scene with knowledge of the attendant facts would not have shot Morton, hitting him with seven bullets, while he sat stationary in his car with his hands up. This alleged conduct violated Morton's Fourth Amendment rights. And clearly established law gave Kirkwood fair warning that the use of deadly force under these circumstances would be unconstitutional.")

Terrell v. Smith, 668 F.3d 1244, 1255, 1256, 1258 (11th Cir. 2012) ("The reasoning of our cases in this area readily spells the outcome in this one. Officer Smith was forced to make a split-second decision concerning whether the use of lethal force was necessary. Beyond himself, two other people were within a few feet of the moving vehicle as these rapidly unfolding and uncontrolled events transpired. "Even if in hindsight the facts show that [the officer] perhaps could have escaped unharmed," *Robinson,* 415 F.3d at 1256, an objectively reasonable law enforcement officer could well have perceived that the moving vehicle was being used as a deadly weapon, especially after the driver had been repeatedly ordered to stop. In short, Smith was attempting to make an arrest that he had the legal right to make while standing in a position where he was legally entitled to be. Zylstra refused to heed Smith's commands to stop the vehicle and turned the car 'in a dangerous and aggressive manner which provided the officers with probable cause to believe that [Zylstra] ... posed a threat of serious physical harm or death to the officers, or other passersby, especially in light of the speed with which the incident unfolded.'. . The use of lethal force was objectively reasonable under the Fourth Amendment. . . In this case we could end our analysis with our holding that Officer Smith did not violate Zylstra's Fourth Amendment rights. Nevertheless, we turn to the second question anyway: whether the law was clearly established and fairly placed Officer Smith on notice that his conduct was clearly unlawful under the peculiar circumstances of the case. We do so in order to make a complete record in the face of this tragic shooting, and we hold that the plaintiffs have failed to carry their burden on this prong as well. . . . In short, the clearly established law as interpreted by the United States Supreme Court, this Court, and the Florida Supreme Court would not have given Officer Smith fair notice that his actions would violate the Fourth Amendment. The fact-specific precedent of this Court suggested precisely the opposite, and neither a broader clearly established principle nor the words of the Fourth Amendment alone provided sufficient guidance. The second qualified immunity prong, therefore, also resolves in the officer's favor.")

Edwards v. Shanley, 666 F.3d 1289, 1295, 1296, 1298 (11th Cir. 2012) ("That Officer Shanley reasonably decided to use the dog in the first instance does not mean, however, that the use of the

dog was reasonable for the duration of the attack. Rather, the *Graham* factors compel the conclusion that Officer Shanley used unreasonable force when he subjected Edwards to five to seven minutes of dog attack, while Edwards was pleading to surrender and Officer Shanley was in a position to immediately effect Edwards's arrest. Critical to this determination is the fact that, in subjecting Edwards to the dog attack, Officer Shanley *increased* the force applied at the same time the threat presented by Edwards *decreased.* To be sure, the seriousness of Edwards's fleeing Officer Lovett had not changed, and thus under the first *Graham* factor we accept that Officer Shanley had some reason to approach Edwards with concerns for his own safety. But insofar as fleeing from the police raises doubt about the danger an individual poses, Edwards mitigated that doubt by laying prone with his hands exposed and begging to surrender. As a result, the second and third *Graham* factors weigh in favor of Edwards's argument that extraordinary force was not necessary or appropriate for the entire duration of the dog attack. Indeed, evaluating Officer Shanley's conduct at the time of the prolonged attack makes its unreasonableness plain. Because Edwards was begging to surrender, and because Officer Shanley could safely give effect to that surrender, the further infliction of pain was gratuitous and sadistic. This the Constitution does not tolerate. . . . Quite simply, after we held in *Priester* that it was unconstitutional to subject a compliant suspect to the 'eternity' of two minutes of dog attack, . . . it is plain that it is also unconstitutional to subject a similarly compliant suspect to a longer attack of five to seven minutes, especially where that suspect is pleading for surrender. Indeed, this case is in many regards easier than *Priester*, because while the same factors weigh against the need for extraordinary force—'[t]here was no confusion. Plaintiff did not pose a threat of bodily harm to the officers or to anyone else. And, he was not attempting to flee or to resist arrest.' *Priester*, 208 F.3d at 927—Officer Shanley used greater force than did the officers arresting Priester. The record thus presents 'a concrete factual context so as to make it obvious to a reasonable government actor that his actions violate federal law.'. . As a result, Officer Shanley cannot claim qualified immunity on the grounds that he did not know he was violating Edwards's constitutional rights. In sum, we hold that clearly established federal law prohibits the police from subjecting a compliant subject who is attempting to surrender to a lengthy dog attack.")

Fils v. City of Aventura, 647 F.3d 1272, 1290-92 (11th Cir. 2011) ("[T]he facts we must accept show that Maurice was not violent. He did not disobey orders. He did not resist arrest. And he posed no risk to the Defendants or anyone else at the club. Therefore, Bergert's and Williams's tasing violated Maurice's Fourth Amendment rights. . . . Our circuit uses two methods to determine whether a reasonable officer would know that his conduct is unconstitutional. The first method looks at the relevant case law at the time of the violation. . . . The second method looks not at case law, but at the officer's conduct, and inquires whether that conduct 'lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the officer], notwithstanding the lack of fact-specific case law.'. . .Under either method, Bergert and Williams should have known that their conduct violated Maurice's Fourth Amendment rights. Maurice was tased even though he committed at most a minor offense; he did not resist arrest; he did not threaten anyone; and he did not disobey any instructions (for none were given). These facts are sufficiently similar to the facts of *Priester* and *Vinyard* that these

Defendants were on notice that their conduct violated Maurice's rights. . . . .While these cases are not identical to Maurice's case, they need not be 'materially similar'; the precedent need only provide the Defendants with 'fair warning.'. .These cases do just that. Even if these cases did not exist, the Defendants' conduct would fall under the narrow 'obvious clarity' exception described above. The facts as we must accept them show that Maurice showed no hostility to the Defendants, did not disobey any orders, and did not make any menacing gestures. Assuming these facts, no reasonable officer could ever believe that it was appropriate to shoot his taser probes into Maurice and shock him. This line is not hazy, and Bergert's and Williams's actions were clearly wrong.")

Sanders v. City of Dothan, 409 F. App'x 285, 290 (11th Cir. 2011) ("Plaintiff argues that because Sanders was handcuffed and in the back of the police car, Eggleston violated a clearly established constitutional right by tasering him. However, none of the ways of defeating qualified immunity apply here. There is no case law with facts indistinguishable from the present case clearly establishing a constitutional right not to be tasered in these circumstances. Plaintiff does not dispute that Eggleston tasered Sanders in furtherance of the legitimate law-enforcement activity of searching for contraband in Sanders' mouth to prevent him from possibly destroying it by swallowing the contraband. It is not clearly established that a police officer is prohibited from momentarily tasering an uncooperative handcuffed arrestee who–after multiple warnings–refuses to comply with that justifiable law-enforcement objective. This law-enforcement conduct is not so clearly in violation of constitutional rights that qualified immunity can be denied without a decision on point. Because the right that Plaintiff alleged that Eggleston violated is not clearly established, Eggleston is entitled to qualified immunity on the claim of excessive force.")

Jean-Baptiste v. Gutierrez, 627 F.3d 816, 822 (11th Cir. 2010) ("Officer Gutierrez reasonably responded with deadly force, and he was not required to interrupt a volley of bullets until he knew that Jean-Baptiste had been disarmed. Officer Gutierrez faced more than a possibility of harm. Officer Gutierrez was confronted by a suspect of a dangerous crime who was lying in wait and holding a gun. Until Officer Gutierrez verified that Jean-Baptiste was disarmed, Officer Gutierrez had 'no reason to trust that [Jean-Baptiste] would not suddenly attempt to do him harm.'. .The district court found that Officer Gutierrez acted 'maliciously and sadistically,' but any 'subjective beliefs regarding the circumstances [were] irrelevant to the qualified immunity inquiry.'. . The decision about qualified immunity turns on the objective reasonableness of the use of force. . . . The district court erred in denying Officer Gutierrez's motion for summary judgment based on qualified immunity. There is no dispute that Officer Gutierrez acted within his discretionary authority when he used deadly force to secure Jean-Baptiste, and Jean-Baptiste failed to prove that Officer Gutierrez was not entitled to qualified immunity.")

Brown v. City of Huntsville, Ala., 608 F.3d 724, 739, 740 (11th Cir. 2010) ("Given the facts in the light most favorable to Brown, the district court improperly granted summary judgment to Defendant Norris on Brown's excessive force claim. Under Brown's version, Norris's actions in effecting the arrest constitute excessive force. Each *Graham* factor supports Brown. First, Brown was not arrested for a serious crime. Second, Brown did not pose a threat to anyone's safety. Third,

under Brown's account of the facts, she was cooperative, was not resisting arrest, and was not attempting to flee. She complied with Defendant Norris's requests and attempted to get out of the vehicle but was delayed by the door locks, which she clearly communicated to Norris. Brown then had actually opened the door and was getting out when Norris pushed her back in the car and sprayed her. Norris's subjective beliefs are not relevant. What we consider instead is what an objectively reasonable officer in Norris's situation would have believed, taking as true Brown's testimony. Given that Brown had submitted to Norris's authority, was getting out of the car to be arrested, and posed no threat, Norris's conduct in pushing her back into the car, gratuitously using pepper spray, and then slamming her to the pavement, was excessive force that violated Brown's constitutional rights. . . Furthermore, an objectively reasonable police officer would have known it was unlawful to use pepper spray and other force against an arrestee who was suspected only of a minor offense (playing music too loud), was not threatening the officer or the public, was not attempting to flee, and who had communicated her willingness to be arrested. Although the law permits some use of force in any arrest for even minor offenses, the law was clearly established in 2005 that Defendant Norris's combined gratuitous use of pepper spray and other force against Brown in this minor offense context violated the Constitution.").

Powell v. Haddock, No. 09-14944, 2010 WL 476706, at *1, *2 (11th Cir. Feb. 12, 2010) (not published) ("Under the facts portrayed by Powell, there was no arguable probable cause to arrest her, and certainly no justification for deploying a taser. Deputy Rackard argues that he had arguable probable cause to arrest Powell for resisting an officer without violence once she failed to follow his instructions, but there was no instruction given that Powell failed to obey and her words alone did not rise to the level of resisting an officer. . . As to Deputy Rackard's use of his taser, Powell had simply taken steps away from Deputy Stone before Deputy Rackard deployed his taser the first time, and Powell was on the ground and unable to resist when Deputy Rackard tasered her a second time. There was no evidence that Powell's 'behavior was violent, aggressive, and prolonged' or that she was a 'danger to herself and others.' *Mann v. Taser Intern, Inc.*, 588 F.3d 1291, 1306 (11th Cir.2009) (holding that use of a taser constituted reasonable force when methamphetamine user's behavior was violent and extended). Rather, it was clearly established, at the time of Powell's arrest, that such force cannot constitutionally be used against a non-threatening suspect when the alleged crime of the suspect is a minor offense. [citing *Vinyard v. Wilson*] For these reasons, the district court's denial of summary judgment based on qualified immunity is **AFFIRMED.**")**.**

Sanchez v. Hialeah Police Dept., No. 09-11821, 2009 WL 4829872, at *4 (11th Cir. Dec. 16, 2009) (not published) ("In sum, a jury could reasonably conclude that Officer Del Nodal's use of the ASP constituted excessive force under the circumstances alleged by Sanchez, because he was arrested for a minor, non-violent crime, he did not pose a serious threat to anyone's safety, he did not attempt to escape, he was no longer resisting at the time he was beaten, he was not given an opportunity to comply with the officers' instructions to get on the ground, and he suffered serious head injuries. Accordingly, the district court correctly determined that Officer Del Nodal violated Sanchez's constitutional right to be free from excessive force. We further conclude that Officer

Del Nodal's alleged use of excessive force violated a clearly established right at the time of the incident in June 2003. [citing cases] [O]ur case law clearly established before June 2003 that, under the circumstances alleged by Sanchez, Officer Del Nodal's conduct constituted excessive force. For this reason, the district court correctly declined to grant Officer Del Nodal qualified immunity, and we therefore need not determine whether Officer Del Nodal's 'conduct [was] so egregious that a constitutional right was clearly violated, even in the total absence of case law.'. . We likewise conclude that Officer Garrido is not entitled to qualified immunity from Sanchez's claim that Officer Garrido, despite being in clear view and restrainable range, failed to intervene and stop Officer Del Nodal's use of excessive force. . . . According to Sanchez, Officer Garrido was in close proximity to Officer Del Nodal on the same side of the car when Officer Del Nodal began beating Sanchez with the ASP. Thus, under the facts alleged by Sanchez, Officer Garrido could be held liable for failing to intervene and stop Officer Del Nodal's use of excessive force. Moreover, an officer's duty to intervene in this regard was clearly established in this Circuit well before June 2003.")**.**

Oliver v. Fiorino, 586 F.3d 898, 907, 908 (11th Cir. 2009) ("Quite simply, though the initial use of force (a single Taser shock) may have been justified, the repeated tasering of Oliver into and beyond his complete physical capitulation was grossly disproportionate to any threat posed and unreasonable under the circumstances. On this summary judgment record, Oliver has established a violation of the Fourth Amendment. . . .No decision from the United States Supreme Court, or from this Court, or from the Florida Supreme Court, has clearly established that an officer's repeated use of a Taser constituted excessive force under circumstances like these. Indeed, neither the United States Supreme Court nor the Florida Supreme Court has even addressed the use of Tasers in an excessive force inquiry, and this Court has only squarely done so in one published decision, *Draper v. Reynolds*, 369 F.3d at 1270, which, as we have said, is not directly on all fours with this case. The question then boils down to this: whether it would be clear to every reasonable officer, even in the absence of case law, that the force used-repeatedly tasering Oliver over a two-minute period without warning-was excessive under the circumstances. We agree with the district court's determination that the force employed was so utterly disproportionate to the level of force reasonably necessary that any reasonable officer would have recognized that his actions were unlawful. The need for force was exceedingly limited. Again, Oliver was not accused of or suspected of any crime, let alone a violent one; he did not act belligerently or aggressively; he complied with most of the officers' directions; and he made no effort to flee. Tasering the plaintiff at least eight and as many as eleven or twelve times over a two-minute span without attempting to arrest or otherwise subdue the plaintiff-including tasering Oliver while he was writhing in pain on the hot pavement and after he had gone limp and immobilized-was so plainly unnecessary and disproportionate that no reasonable officer could have thought that this amount of force was legal under the circumstances. When measured against these facts, the officers violated a clearly established right.")**.**

Howell v. Sheriff of Palm Beach County, No. 09-10940, 2009 WL 3296681, at *5, *6 (11th Cir. Oct. 15, 2009) ("Courts have consistently concluded that using pepper spray is excessive force in

cases where the crime is a minor infraction, the arrestee surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else. Courts have consistently concluded that using pepper spray is reasonable, however, where the plaintiff was either resisting arrest or refusing police requests, such as requests to enter a patrol car or go to the hospital. Furthermore, as a means of imposing force, pepper spray is generally of limited intrusiveness, and it is designed to disable a suspect without causing permanent physical injury. Indeed, pepper spray is a very reasonable alternative to escalating a physical struggle with an arrestee. . . . In the present case, the crime involved was a minor infraction–violation of a noise ordinance. Taking the facts in the light most favorable to the plaintiffs, Howell responded to Dougan's confrontational tone with an equally brash one, but he was not acting in a physically aggressive manner. No one contends that Howell displayed a weapon at that point, touched Dougan, or even made a move toward him. The fact that Dougan allowed Howell to be taken into the house after spraying him with pepper spray does suggest that Dougan was not attempting to subdue Howell, to stop him from resisting arrest, or to prevent him from fleeing. Dougan told Howell to turn the music down but did not require Howell to physically submit to police authority or even request that he do so. Under the circumstances, *Vinyard* provided 'materially similar facts or facts that gave a reasonable police officer in [Deputy Dougan's] situation fair and clear warning that the conduct here, especially the use of pepper spray, violated the Constitution.' . . Although the use of pepper spray is often 'a very reasonable alternative to escalating a physical struggle with an arrestee,'. . . the district court did not err in concluding that there was a genuine issue of material fact about whether that use of force was excessive under the particular facts the plaintiffs alleged in this case. Therefore, at this point in the proceedings, Dougan is not entitled to qualified immunity.").

Whittier v. Kobayashi, 581 F.3d 1304, 1308, 1309 (11th Cir. 2009)("In the context of qualified immunity, this Court has stated 'the issue is not whether reasonable suspicion existed in fact, but whether the officer had Aarguable" reasonable suspicion.'. . In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. . . .In this case, we conclude Kobayashi is entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team. . .Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. . . . The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Kobayashi actually believed as he stood outside the Whittier/Diotaiuto residence, Kobayashi's *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry.").

Estate of Garczynski v. Bradshaw, 573 F.3d 1158, 1169, 1171 (11th Cir. 2009) ("In contrast to *Montoute*, Garczynski had not yet fired his gun and was not attempting to escape. As in *Montoute*, however, the officers did not have control over Garczynski and there was nothing to prevent him

from shooting at the officers in an instant. . .The officers could reasonably believe that the weapon was loaded, as it actually was, given Garczynski's expressed intent to commit suicide. As in *Montoute*, Garczynski repeatedly disobeyed the officers' orders, first to show his hands and then to drop his gun. These factors, even assuming that Garczynski never pointed the gun at the officers, provided a sufficient basis for the officers reasonably to believe that Garczynski posed an immediate risk of serious harm to them. . . . The officers' use of force in dealing with an armed and potentially suicidal individual was objectively reasonable in this case. Finding no constitutional violation, we agree with the district court that the individual officers were entitled to qualified immunity and summary judgment as to the Estate's § 1983 claims of excessive and deadly force.").

Crenshaw v. Lister, 556 F.3d 1283, 1291-93 (11th Cir. 2009) ("Before analyzing the threshold issue of whether Lister violated Crenshaw's constitutional right to be free from excessive force, it is first necessary to determine the operative facts surrounding the canine incident. . . . Under Crenshaw's version of the incident, as determined above, Crenshaw has not shown that Lister violated his constitutional right to be free from excessive force. This is so because, under the circumstances, it was objectively reasonable for Lister to use a canine to locate and apprehend Crenshaw. Crenshaw was suspected of having committed one, and perhaps two, armed robberies, which can be characterized as a serious crime. He actively fled from the police–first in his vehicle, and then by foot after crashing his vehicle into a marked patrol car–and attempted to hide in a densely wooded area. And because Crenshaw was suspected of armed robbery and was a fugitive from the police, Lister had every reason to believe that Crenshaw was armed and dangerous. Thus, all three factors identified by the Supreme Court in *Graham* weigh heavily against Crenshaw. . . . While it would have been objectively unreasonable for Lister to allow the canine to continue attacking Crenshaw *after* he was secured, . . . Crenshaw does not allege that this occurred. Thus, under Crenshaw's version of the facts, there is no indication that Lister's use of the canine involved greater force than necessary or was in any way 'malicious' or 'sadistic.'").

Lloyd v. Van Tassell, 2009 WL 179622, at *3 (11th Cir. Jan. 27, 2009) ("The aforementioned evidence was material to the extent it supports a finding of excessive force. Although Lloyd's arrest involved a serious crime and a potentially dangerous situation for the deputies, Lloyd presented evidence that the application of force was objectively unreasonable because it came after he already was subdued and handcuffed, and he did not resist. Accordingly, we conclude that the district court erred in granting summary judgment to Card on the merits of this claim. In addition, we conclude that the district court erred in granting qualified immunity to Card on this claim. Although Card's alleged action involved a discretionary function because making an arrest is part of a deputy's duties, it would amount to a constitutional violation because it tended to establish an objectively unreasonable amount of force, as discussed above. In addition, the alleged circumstances surrounding the use of force and our prior case-law make clear that this alleged use of force violated Lloyd's clearly established rights. Thus, the district court erred in finding that Card was entitled to qualified immunity and summary judgment on Lloyd's excessive force claim.")

Galvez v. Bruce, 552 F.3d 1238, 1244, 1245 (11th Cir. 2008) ("Galvez does not contend that any federal statute or constitutional provision is specific enough to clearly establish that Bruce's conduct was unlawful. Thus, Galvez must demonstrate that caselaw existing at the time of Bruce's actions either establishes a broad, applicable principle of law or has materially similar facts such that it would put Bruce on notice that his actions were unlawful. Galvez argues that *Slicker v. Jackson,* 215 F.3d 1225 (11th Cir.2000), and *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir.2002), are materially similar cases to his and that these cases establish and apply the principle that fully secured arrestees cannot be subjected to force like that inflicted on him by Bruce. . . . As discussed above, under Galvez's version of the facts, he was a fully-secured, cooperative, misdemeanor arrestee at the time Bruce slammed him into the wall. . . .Under these circumstances, we agree with Galvez that our decisions in *Slicker* and *Lee* should have put Bruce on notice that he would be violating Galvez's constitutional rights by repeatedly slamming Galvez's body into the corner of a concrete wall with force sufficient to break his ribs and cause a leaking aneurysm. The lesson of *Slicker* and *Lee* is that qualified immunity is not available to officers who subject arrestees to significant force after 'the arrest ha[s] been fully effected, the arrestee completely secured, and all danger vitiated.'. . . Under Galvez's version of the facts, Bruce should have considered his use of force similar to that in *Slicker* and *Lee.* Given the state of the law in 2004, it should have been clear to Bruce that repeatedly slamming a fully secured and compliant Galvez against the corner of a concrete wall, with force sufficient to break Galvez's ribs and cause a leaking aneurysm, was unlawful.").

Shepard v. Davis, 300 F. App'x 832, 841, 842 (11th Cir. 2008) ("[O]n August 5, 2002, the preexisting case law from the Supreme Court, this circuit, and the Supreme Court of Florida clearly established that (1) in the absence of consent or exigent circumstances, a warrantless arrest made within a suspect's home is unreasonable under the Fourth Amendment; and (2) a person does not consent to being pushed back into his home and arrested in his living room by merely opening the front door in response to a knock and announcement by law enforcement officers, especially when that person immediately asks if the officers have a warrant. Applying this clearly-established law to the facts of this case, a reasonable officer would have had 'fair and clear warning' that he could not go to a suspect's home, knock on his front door, wait for him to answer, and without hearing anything else besides, 'May I help you ... I am Dwayne Shepard,' or 'Do you have a warrant,' grab the suspect's arm, push him six feet into his living room, and arrest him on his couch, all without a warrant of any kind. At this juncture, there is nothing in Shepard's amended complaint that places him in the threshold or inside the doorway. Simply put, Shepard's arrest was not a 'threshold' arrest. Accordingly, because Officer Budnick violated Shepard's clearly-established Fourth Amendment rights by arresting Shepard in his home without a warrant, consent, or exigent circumstances, we find that he is not entitled to qualified immunity on Shepard's unlawful arrest claim. . . . This case is entirely different from *McClish*. According to Shepard, he was arrested six feet inside of his house. *McClish,* on the other hand, was pulled outside of his house, where he then was arrested. . . As the aforementioned cases make clear, and *McClish* reaffirmed, at the time of Shepard's arrest, the law was clearly established that a warrantless arrest could not be made

within the home absent consent or exigent circumstances. Officer Budnick had fair warning that his conduct violated the Fourth Amendment, and he therefore is not entitled to qualified immunity.")

Buckley v. Haddock, 292 F. App'x 791, 798, 799 (11th Cir. 2008) ("Plaintiff resisted arrest. Given this circumstance in the context of all the other facts, Deputy Rackard's gradual use of force, culminating with his repeated (but limited) use of a taser, to move Plaintiff to the patrol car was not unconstitutionally excessive. In addition, even if Plaintiff could establish that some of the deputy's use of force violated the Fourth Amendment, the deputy still would be entitled to qualified immunity because the applicable law at the time did not clearly establish that the deputy's conduct–given the circumstances–was unconstitutional.").

Buckley v. Haddock, 292 F. App'x 791, 799-806 (11th Cir. 2008) (Martin, J. dissenting) ("I respectfully dissent from the judgment in this case. I write to express my view that the Fourth Amendment forbids an officer from discharging repeated bursts of electricity into an already handcuffed misdemeanant–who is sitting still beside a rural road and unwilling to move–simply to goad him into standing up. I also conclude that at the time of the incident, Deputy Rackard was on fair notice that his conduct was unconstitutional. Not only did Deputy Rackard unnecessarily discharge his taser gun against Mr. Buckley three times, but each time he did so, he repeatedly prodded Mr. Buckley's body with the stun gun's live electrodes–inflicting additional pain and leaving Mr. Buckley with sixteen burn scars. Because our law clearly establishes such conduct as unconstitutional, I would affirm the district court's denial of qualified immunity and allow this action to proceed. . . . This is not a case about whether an officer may use a taser gun to subdue an unruly or dangerous individual. . . . Rather, the question in the case is whether a taser gun may be used repeatedly against a peaceful individual as a pain-compliance device–that is, as an electric prod–to force him to comply with an order to move. . . . Like the district court below, I conclude that the repeated and sustained use of the taser gun for the sole purpose of coercing Mr. Buckley to move was unreasonable under the circumstances and thus violated the Fourth Amendment. . . . Although the Eleventh Circuit has not spoken in terms of 'pain compliance,' at the very least, the Fourth Amendment prohibits the infliction of gratuitous pain and injury as a means to coerce compliance. . . . I would also find, under the second prong of *Saucier*, that the law was clearly established at the time of the incident that Deputy Rackard's conduct was unconstitutional. Whatever the debatability of employing a single, controlled electric shock against a non-compliant individual to coerce him into movement, in this case Deputy Rackard repeatedly prodded Mr. Buckley's body which maximized the level of pain he experienced. In light of the repeated and continuous nature of the force used against Mr. Buckley, the substantial pain and bodily injury that resulted, and the absence of any arguable justification, I have no difficulty in concluding that no particularized preexisting case law was necessary for it to be clearly established that Deputy Rackard's conduct was unconstitutional. Deputy Rackard's use of force was so grossly disproportionate to the need for force that no reasonable officer would have believed such conduct was legal.").

Chaney v. City of Orlando, 291 F. App'x 238, 243, 244 (11th Cir. 2008) ("In a claim of excessive force, there are two ways to show that the law clearly established that the particular amount of force used was excessive. . . The first of those ways is to show that, in a materially similar factual situation, the law has held that the officer's conduct was unlawful. . . Where the case law is not materially similar, we look to the second way and consider whether other case law has provided sufficient notice to 'every' reasonable officer that such force is unlawful. . . .Chaney is unable to show that Cute's conduct violated any clearly established right. There was no evidence at trial indicating that Cute's conduct of physically grabbing Chaney, pulling him out of his car, throwing him to the pavement, handcuffing him, using his Taser on Chaney's back, or putting his foot on Chaney's head was so obviously wrong that he would have known that it was unlawful and Chaney has cited no case law that would have provided Cute with such notice. There was no Eleventh Circuit case law at the time of the incident which would have provided Cute with notice that use of a Taser constituted unreasonable or excessive force, . . . or notice that the use of force was unlawful to prevent Chaney from communicating with what Cute perceived to be a hostile crowd. . . . . The facts in this case also foreclose it from the narrow exception to qualified immunity available if the plaintiff can show that the officer's conduct was so outrageous as to be unconstitutional 'even without caselaw on point.'. . Trial testimony clearly indicated that, as an officer of the Orlando Police Department, Cute was allowed, in the face of passive resistance, to use a Taser and, in the face of active resistance, higher levels of force to gain compliance from a suspect. . . Based on the lack of sufficient evidence supporting the jury verdict regarding excessive force, and the sufficient evidence supporting Cute's entitlement to qualified immunity, the district court correctly granted Cute judgment as a matter of law on the use of force claim.").

Sharp v. Fisher, 532 F.3d 1180, 1184 (11th Cir. 2008) ("Applying *Scott* to the facts of this case, we conclude that Fisher's conduct in attempting the PIT maneuver to the Sharp vehicle was reasonable. When Fisher acted, he knew Sharp was fleeing from law enforcement officials, she was traveling at a high rate of speed, law enforcement officials had chased her at least 20 miles, the high speed chase had crossed state lines, numerous law enforcement officials from multiple jurisdictions had been involved in the chase, she had failed to respond to blue lights and sirens and had given no indication of stopping the pursuit or slowing down, there were several civilian vehicles on the Interstate during the pursuit, and she was driving erratically. It was Katie Sharp who intentionally placed herself, her passenger, and the public in danger by engaging in the high speed chase and fleeing from the officers which ultimately produced the choice between two evils that Fisher confronted. . . We conclude that the car chase Katie Sharp initiated posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Fisher's attempt to terminate the chase through the use of the PIT maneuver was objectively reasonable. Therefore, no Fourth Amendment violation occurred, and Fisher is entitled to summary judgment.").

Moretta v. Abbott, No. 07-10795, 2008 WL 2229757, at *1-*2 (11th Cir. June 2, 2008) ("The complaint filed on behalf of Allen, a minor, alleged that the two officers shot Allen with a taser gun causing 50,000 volts of electricity to enter the body of Allen, a 6-year old, 53-pound child.

Allen convulsed violently and vomited as his body was shocked with the 50,000 volts. The officers handcuffed Allen as he vomited. The complaint also alleged that the tasering caused severe, significant and permanent injury to Allen, including extreme mental and physical suffering and loss of bodily function, and has resulted in large doctors and hospital bills. . . . [T]he district court concluded that the reasonable inferences from the complaint were that: '[F]rom the moment the police officers arrived on the scene, through the time the officers deployed a taser into Allen's body and handcuffed him, Allen posed no threat to anyone's safety, including himself.'. . On these alleged facts and in this Rule 12(b)(6) posture, we agree with the district court that plaintiffs have alleged excessive force that violated the constitutional rights of Allen, . . . and we agree with the district court that the officers are not entitled to qualified immunity because their conduct violated the clearly established rights of Allen. Even in the absence of factually similar case law, an officer can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases. . . We conclude that, at the time of this incident in August of 2003, every reasonable officer would have known that the taser force used under these circumstances was unlawful. The conduct at issue here lies so obviously at the very core of what the Fourth Amendment prohibits, that the unlawfulness of the conduct was readily apparent to an official in the shoes of these officers.")**.**

Reese v. Herbert, 527 F.3d 1253, 1274 (11th Cir. 2008) ("It is beyond question that the law was 'clearly established' so as to give the defendants fair warning that their actions in such circumstances violated Reese's Fourth Amendment rights. No particularized, preexisting case law was needed to inform them that an officer is not entitled to qualified immunity where his conduct goes 'so far beyond the hazy border between excessive and acceptable force that [he knows that he is] violating the Constitution.' . . Reese's version of the facts demonstrates a beating that 'falls within Athe core of what the Fourth Amendment prohibits": a severe beating of a restrained, non-resisting suspect.'. . Accordingly, defendants are not entitled to summary judgment on the ground of qualified immunity.").

Hadley v. Gutierrez, 526 F.3d 1324, 1333, 1334 (11th Cir. 2008) ("We hold that a handcuffed, non-resisting defendant's right to be free from excessive force was clearly established in February 2002. In *Lee,* 284 F.3d 1188, we concluded that slamming a non-resisting criminal suspect's head onto hood of a car constituted excessive force. Along those same lines, we proclaimed in *Skrtich*, 280 F.3d at 1303, that '[b]y 1998, our precedent clearly established that government officials may not use gratuitous force against a prisoner who has been already subdued....' Applying 'the excessive force standard would inevitably lead every reasonable officer ... to conclude that the force' used here–punching a non-resisting criminal suspect for no apparent reason other than malice–is not protected by our constitution.").

Nicarry v. Cannaday, 260 F. App'x 166, 170 (11th Cir. 2007) ("The evidence, even viewed in the light most favorable to Nicarry, shows that Cannaday's use of force was objectively reasonable because Cannaday had probable cause to believe that Nicarry posed a threat of serious physical harm to Cannaday and his fellow officers on the scene. Nicarry led police on a night-time motor

vehicle pursuit and then a foot chase through a quiet residential neighborhood. During the chase, Nicarry refused to pull over and had fled from officers, first in his van and then on foot. Cannaday and the other officers found Nicarry hiding in a dark shed in the backyard of a residence. As the officers arrived, they formed a rough semi-circle between ten and fifteen feet from the shed door. Nicarry was commanded to come out of the shed, but did not do so. Within seconds of being commanded a second time to come out of the shed, Nicarry, a very large man, charged from the shed at full speed while holding a screwdriver and ran in the general direction of at least some of the officers. Nicarry admitted not only that he was running full speed, but that he leapt off a lawnmower as he charged out. Although Cannaday had his gun drawn, he did not fire until he saw the metal object in Nicarry's hand and heard someone call out a warning about a screwdriver. We stress that, even under Nicarry's version of events, the entire episode after the second command lasted only a few seconds and only a few feet separated Nicarry and the officers who were trying to apprehend him. Given the split-second, rapidly escalating nature of the situation, we conclude that a reasonable officer in Cannaday's shoes could have perceived that Nicarry posed an immediate threat of serious physical harm to himself and his fellow officers. Specifically, it was reasonable, under the circumstances of Nicarry's earlier flight in his van and on foot and his refusal to come out of the shed when first ordered to do so, to believe that Nicarry intended to evade capture and flee and to use the screwdriver as a weapon against any of the officers clustered around the shed that got in his way.")

Long v. Slaton, 508 F.3d. 576, 584, 585 (11th Cir. 2007) ("To demonstrate that the law at the time clearly established that Defendants' conduct would violate the Constitution, Plaintiffs might point to either (1) earlier case law from the Supreme Court, this Court, or the highest court of the pertinent state that is materially similar to the current case and therefore provided clear notice of the violation or (2) general rules of law from a federal constitutional or statutory provision or earlier case law that applied with 'obvious clarity' to the circumstances, establishing clearly the unlawfulness of Defendants' conduct. . . And 'where the applicable legal standard is a highly general one, such as Areasonableness," preexisting case law that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law.' *Thomas v. Roberts*, 323 F.3d 950, 954 (11th Cir.2003). Plaintiffs have failed to cite controlling and materially similar case law that would establish that Deputy Slaton's use of deadly force was clearly unlawful. Plaintiffs cite *Vaughan*, 343 F.3d 1323, as a materially similar case. But it is factually too different. We do not read *Vaughan* as capable of putting every objectively reasonable officer on notice that deadly force could not be used in the circumstances presented in this case. In *Vaughan*, this Court concluded that an officer used unreasonable force when he, without warning, discharged his firearm at suspects fleeing in a stolen truck. . . The present case has, at least, three additional facts not present in *Vaughan* and that an objectively reasonable police officer could believe 'might make a difference' for whether the conduct in the present instance would violate federal law. . . In this case, unlike *Vaughan*, the fleeing driver was in an unstable frame of mind, had taken possession of a marked police cruiser, and had been warned that deadly force would be used if he did not leave the cruiser. Therefore, we believe that the situation in *Vaughan* is too different from this case

to cause every objectively reasonable officer to know that the use of deadly force in the circumstances of this case must violate federal law. Plaintiffs also attempt to rely on *Garner*, 105 S.Ct. 1694, as having clearly established broad principles that cover the contours of this case with obvious clarity. As the Supreme Court recently pointed out, however, '[w]hatever *Garner* said about the factors that might have justified shooting the suspect in that case, such Apreconditions" have scant applicability to this case, which has vastly different facts.'. . [citing *Scott v. Harris*] . . . . Simply put, the Supreme Court's decision in *Garner*–which does not involve a fleeing motor vehicle–offered little insight on whether an officer, consistently with the Fourth Amendment, may use deadly force to stop a man who has stolen a police cruiser and has been given clear warnings about the use of deadly force. *Garner* does not apply to the circumstances of this case with obvious clarity.Nor does this case present otherwise an obvious violation of Long's rights under the Fourth Amendment. We do not believe that every objectively reasonable officer in Deputy Slaton's position must have known that firing his weapon at the police cruiser under these circumstances would be an unconstitutional application of force. Results in these kinds of cases– involving reasonableness and balancing–are extremely fact dependent; at worst, Deputy Slaton's acts fell within the 'hazy border between excessive and acceptable force.' . . Therefore, because preexisting law did not provide fair warning that shooting at Long in this situation would violate federal law, Defendants are entitled to qualified immunity.")

Long v. Slaton, 508 F.3d. 576, 586 (11th Cir. 2007) (Forrester, J., sitting by designation, concurring in part and dissenting in part) ("I respectfully dissent from the opinion of the majority in the action against Deputy Slaton. To the recitation of the facts by the majority, I would add that Deputy Slaton had dealt with the deceased before without any major problem and that the shooting occurred in a fairly rural area several miles from Florence, Alabama. As I understand the law, the use of deadly force is reasonable only where there is a serious threat of imminent or immediate physical harm to the officer or others. . . I can find no arguable probable cause for such a belief in this case. To be sure, with the deceased in possession of a patrol car, the outcome of these events is uncertain, but the possibility that a nonviolent fleeing felon will later pose a threat of physical harm to others is remote and highly speculative. I do not believe that this officer is entitled to qualified immunity either. *Vaughan* provides notice that seizing a fleeing felon in a vehicle by shooting him is unreasonable. Although there are differences between that case and this, *Vaughan* is not 'fairly distinguishable.'. . In *Vaughan*, the truck was northbound on I-85 between Newnan and Atlanta traveling at speeds exceeding eighty miles per hour. At one point it rammed a police vehicle which was attempting a rolling roadblock. These facts present circumstances more fraught with immediate threat than those in the instant case, and this court determined that a jury could find that the officers in *Vaughan* violated the suspect's Fourth Amendment rights and were not entitled to qualified immunity.").

Dukes v. Miami-Dade County, 232 F. App'x 907, 2007 WL 1373176, at *4 & n.8 (11th Cir. May 10, 2007) ("Here, the pleadings sufficiently alleged a constitutional violation that is clearly established. . . . The recent Supreme Court case *Scott v. Harris* does not undermine our conclusion. . . . As noted above, the Plaintiffs' Original Complaint alleged that Defendant

Goldberg shot Dukes after Dukes began to drive away from the blockade. In the Amended Complaint, the Plaintiffs alleged that Defendant Goldberg shot Dukes before the Plaintiffs' car began to move after being boxed in. Although the Original Complaint alleges facts that are more likely to justify the use of deadly force than the Amended Complaint, the differences in allegations do not effect [sic] the outcome of our analysis here.").

Walker v. City of Riviera Beach, 212 F. App'x 835, 2006 WL 3772005, at *2 (11th Cir. Dec. 22, 2006) ("The district court ruled that summary judgment could not be granted in favor of Officer Patterson on the basis of qualified immunity because 'genuine issues of material fact' existed as to whether Officer Patterson's conduct was unconstitutional. This application of the summary judgment standard was mistaken because–in resolving qualified immunity issues–a 'material issue of fact' never exists. 'When conducting a qualified immunity analysis, district courts must take the facts in the light most favorable to the party asserting the injury.' *Robinson v. Arrugueta*, 415 F.3d 1252, 1257 (11th Cir.2005). Consideration of the record in this light eliminates all issues of fact.")**.**

Walker v. City of Riviera Beach, 212 F. App'x 835, 2006 WL 3772005, at *3 (11th Cir. Dec. 22, 2006) ("We have no 'controlling and materially similar case' declaring Officer Patterson's strike to Walker's head with the gun unconstitutional. But we accept that Officer Patterson's supposed conduct is obviously unconstitutional, notwithstanding the lack of precedent. Officer Patterson first pursued Walker for speeding, and Walker did not immediately pull over when Officer Patterson flashed his lights and shouted for Walker to yield. Walker eventually pulled into a parking lot, and Officer Patterson approached the vehicle on foot with gun drawn. Walker turned off the car and did not resist arrest or attempt to flee again. Nevertheless, Officer Patterson unnecessarily 'slammed' his pistol into Walker's head. Viewing the evidence in the light most favorable to Walker, 'no particularized preexisting case law was necessary for it to be clearly established that what [Officer Patterson] did violated [Walker's] constitutional right to be free from the excessive use of force.'. . Such an unwarranted pistol whip lies at the core of what the Fourth Amendment prohibits.")**.**

Gray ex rel Alexander v. Bostic, 458 F.3d 1295, 1306, 1307 (11th Cir. 2006) ("Gray does not cite and we cannot locate a case addressing before today when it may be reasonable to use handcuffs in an investigatory stop absent a safety rationale. Thus, no factually similar pre-existing case law put Deputy Bostic on notice that his use of handcuffs to discipline Gray was objectively unreasonable for Fourth Amendment purposes. However, our inquiry does not end here. Even in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases. . . . We. . . conclude that Deputy Bostic's conduct in handcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights. . . . Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable. We emphasize that the Court is

not saying that the use of handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case.").

Baltimore v. City of Albany, Georgia, No. 02-00125 CV-WLS-1-1, 2006 WL 1582044, at **5-7 (11th Cir. June 9, 2006) (not published) ("The Supreme Court reasoned in *Brosseau* that if an officer has probable cause to believe that a suspect 'poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force,' and therefore the officer is immune from suit for using deadly force. . . . Notably, there is a dearth of case law in this circuit to support the proposition that the use of a flashlight to strike an arrestee over the head necessarily constitutes deadly force. . . . Nonetheless, in the cases that have specifically addressed the issue, there appears to be agreement that striking a suspect in the head with a heavy flashlight or other blunt instrument at least poses a 'substantial risk of serious bodily injury,' if not death. We adopt this conclusion and find that such action constitutes deadly force under our definition of that term.. . .Viewing the record in the light most favorable to Baltimore, we conclude that it was not objectively reasonable for Officer Long to strike Baltimore on the head with a heavy flashlight, apparently knocking him to the ground and causing a serious wound. . . . The next inquiry under *Saucier* is whether, at the moment Long acted, 'every objectively reasonable police officer would have realized the act[ ] violated already clearly established federal law.' . . . Although *Garner* and *Graham* are themselves too general to provide the 'clearly established law' that would have given Officer Long 'fair warning' that his conduct would violate Baltimore's constitutional rights, . . . we find that this case is 'obvious' enough for the standards set forth in *Garner* and *Graham* to provide the necessary 'particularized' guidance for reasonable officers. . . . Even under the chaotic circumstances of the moment, the fact remains that four officers were engaged in arresting Baltimore for violating a city ordinance. Although a hostile crowd tried to abort the arrest, there is no indication that Baltimore was going to escape the grasp of the officers. Reasonable officers in Long's situation would not have violently struck a misdemeanor suspect, who was being subdued by several officers, in the head with a blunt object to effectuate an arrest for violating the city's open container ordinance. This is a case where a 'general constitutional rule already identified in the decisional law ... appl[ied] with obvious clarity' to Long's conduct, as use of force that could cause death or serious harm to effectuate a misdemeanor arrest was excessive under these circumstances.")

Troupe v. Sarasota County, 419 F.3d 1160, 1168, 1169 (11th Cir. 2005) ("Here, the SWAT Team surrounded the Oldsmobile, and Hart was disobeying their clear orders to put his hands up and surrender. The Oldsmobile suddenly moved forward and backward and the Officers had to make split-second decisions of whether they could escape before anyone suffered serious injury. In their briefing earlier, they were told that Hart was dangerous and had tried to escape from police before and would likely be carrying a weapon. Additionally, the three officers surrounding Hart's car, and a fourth in the yard all separately concluded that deadly force was needed and appropriate to stop Hart, but they did not shoot because they did not have a clear shot and were worried about a cross-fire situation. Bauer was directly in Hart's path as the Oldsmobile accelerated toward him. He had only 3-5 seconds to assess the situation before shooting. Even if in hindsight the

facts show that the SWAT Team could have escaped unharmed, a reasonable officer could have perceived that Hart posed a threat of serious physical harm. In *Brosseau* . . . the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others. In *Brosseau*, like the present case, the Officer fired through the driver's side window and the bullet entered the driver's back. . . Here, Gooding and Bauer perceived that Hart was attempting to escape and could potentially endanger more lives and thus, Bauer shot through the driver's side window and hit Hart in the back. Because the *Brosseau* Court held that it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening to escape and cause harm to others, and because of the similarities of these two cases, [footnote distinguishing *Harris v. Coweta County*, 406 F.3d 1307 (11th Cir.2005)] the district court did not err in finding that the officers' conduct did not violate a constitutional right and that Gooding and Bauer were entitled to qualified immunity. . . Finally, because our inquiry ends at the first step, we need not determine whether the law was clearly established at the time of the incident.").

Robinson v. Arrugueta, 415 F.3d 1252, 1256 (11th Cir. 2005) ("Here, Arrugueta was standing in a narrow space between the two vehicles, Walters was disobeying Arrugueta's orders to put his hands up, the Escort was suddenly moving forward and Arrugueta had to make a split-second decision of whether he could escape before he got crushed. At the most, Arrugueta had only 2.72 seconds to react to what he perceived as a threat of serious physical harm from Walters. . . . Even if in hindsight the facts show that Arrugueta perhaps could have escaped unharmed, we conclude that a reasonable officer could have perceived that Walters was using the Escort as a deadly weapon. Arrugueta had probable cause to believe that Walters posed a threat of serious physical harm. In the case of *Brosseau v. Haugen*, . . . the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others. Here, Arrugueta perceived that Walters was attempting to crush him and endanger his life. Because it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening escape and possible harm to others, it is also constitutionally reasonable for an officer to use deadly force when he has probable cause to believe that his own life is in peril. . . Thus, we conclude that Arrugueta is entitled to qualified immunity under the first step of the Saucier analysis. . . . Even though our inquiry ends at the first step of the analysis, we note that the district court was correct in finding that, under the second step, the law was not clearly established, and thus, Arrugueta is entitled to qualified immunity under this step as well.").

Evans v. Stephens, 407 F.3d 1272, 1279-83 (11th Cir. 2005) (en banc) ("[T]his case provides no opportunity to decide the question of when jailers–for security and safety purposes–may lawfully conduct strip searches of persons about to become inmates in the general jail population. This case raises no questions about the necessities of jail administration. . . This case involves a different kind of search altogether: a post-arrest investigatory strip search by the police looking for evidence (and not weapons). Officer Stephens–who was not a jailer–testified (without contradiction from others) that he strip-searched Plaintiffs because he (as the arresting officer) believed them to be in

possession of illegal drugs: the search was part of a criminal investigation looking for evidence. Never has the Supreme Court explicitly addressed the standard applied to determine if a post-arrest investigatory strip search (away from the complicated context of the nation's borders) violates the Fourth Amendment. . . . [W]e are confident that an officer must have at least a reasonable suspicion that the strip search is necessary for evidentiary reasons. . . Perhaps the actual standard is higher than reasonable suspicion, especially where, as here, the search includes touching genitalia and penetrating anuses. But because Officer Stephens–in the light of the supposed facts–did not meet even the minimum possible standard of reasonable suspicion, we need not decide if the actual standard is something even higher to decide whether Officer Stephens failed to comply with the Constitution. . . . We also conclude the manner in which Officer Stephens conducted the strip search violated Plaintiffs' constitutional rights. . . . [T]he totality of the circumstances–for example, the physical force, anal penetration, unsanitariness of the process, terrifying language, and lack of privacy–collectively establish a constitutional violation, especially when the search was being made in the absence of exigent circumstances requiring the kind of immediate action that might make otherwise questionable police conduct, at least arguably, reasonable. . . . A post-arrest investigatory strip search did not obviously violate the Fourth Amendment on its face in 1999. In addition, in 1999, no applicable cases provided a police officer with fair notice that he must have, at least, a reasonable suspicion to conduct a post-arrest investigatory strip search of an adult and with fair notice that the facts before Officer Stephens were insufficient to make his suspicion reasonable for the search. . . The law was not settled for what standard applied to post-arrest investigatory strip searches, and Supreme Court precedent was very deferential to post-arrest investigations. . . *Justice v. Peachtree City,* 961 F.2d 188, 192-93 (11th Cir.1992), could not squarely govern this case: it addressed a strip search of a juvenile arrested for minor offenses (loitering and truancy), and it acknowledged that unique concerns arise with strip searching youngsters. *See generally, Brosseau v. Haugen,* 543 U.S. __, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). And *United States v. Boyce,* 351 F.3d 1102, 1109 (11th Cir.2003), was decided four years after the incident in question. So, Officer Stephens is protected by qualified immunity insofar as the claim is one for conducting a strip search at all. Qualified immunity, however, does not shield Stephens from Plaintiffs' separate claim that the manner of the strip search violated their rights under the Fourth Amendment. No preexisting case law established this violation or made it obviously clear. *Justice* and *Bell* were the only applicable cases to address strip searches, and they could not squarely govern this case. Both were materially different from this case, and both upheld strip searches. But the text of the Fourth Amendment prohibits 'unreasonable' searches. Seldom does a general standard such as 'to act reasonably' put officers on notice that certain conduct will violate federal law given the precise circumstances before them: Fourth Amendment law is intensely fact specific. But we conclude the supposed facts of this case take the manner of the searches well beyond the 'hazy border' that sometimes separates lawful conduct from unlawful conduct. *See generally, Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir.2000). The violation was obvious. Every objectively reasonable officer would have known that, when conducting a strip search, it is unreasonable to do so in the manner demonstrated by the sum of the facts alleged by Plaintiffs. The totality of the facts alleged here made this violation–on the day of the search–clear from the terms of the Constitution itself: No objectively reasonable policeman

could have believed that the degrading and forceful manner of this strip search (especially in the light of the complete lack of circumstances that might have called for immediate action to conduct a search without the time for cool and calm thought about how to proceed) was 'reasonable' in the constitutional sense.").

Evans v. Stephens, 407 F.3d 1272, 1296, 1297 (11th Cir. 2005) (en banc) (Barkett, J., concurring in part and dissenting in part) ("[T]he law was clearly established through *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and *United States v. Himmelwright*, 551 F.2d 991 (5th Cir.1977), that the initiation of a strip search without reasonable suspicion was unconstitutional. Thus, Stephens was not entitled to qualified immunity for either the initiation of the search or the manner in which it was conducted. . . . If, before 1999, the Fourth Amendment imposed a reasonable suspicion requirement on *border* strip searches, where authority to search is less constrained than it is in an ordinary domestic search incident to arrest, it is unquestionable that *at least* the same degree of suspicion was required to conduct the strip searches in this case. *Schmerber* and *Himmelwright* clearly established before 1999 that reasonable suspicion was required to conduct an investigatory strip search. Based on the facts of this case, no reasonable officer could have believed that a strip search was justified simply because the arrestees were nervous when stopped by the police and claimed to be lost.").

Mercado v. City of Orlando, 407 F.3d 1152, 1158-61 (11th Cir. 2005) ("Even though Padilla violated Mercado's constitutional rights, he could still be afforded qualified immunity provided that Mercado's rights were not clearly established at the time of the incident. Mercado can demonstrate that his right was clearly established in a number of ways. First, he can show that a materially similar case has already been decided, giving notice to the police. . .He could also show that a broader, clearly established principle should control the novel facts in this situation. . . . Finally, he could show that this case fits within the exception of conduct which so obviously violates that constitution that prior case law is unnecessary. . .To make this showing, Mercado must point to law as interpreted by the Supreme Court, the Eleventh Circuit, or the Supreme Court of Florida. . . . Mercado, however, can point to no controlling case law from the Supreme Court or this Circuit dealing with the Sage Launcher. Although there are some cases dealing with 'less lethal' weapons, such as pepper spray, none of them is 'materially similar' to the facts in this case or 'truly compels' the conclusion that Mercado had a right established under federal law. . . If there is no case law directly on point, '[g]eneral statements of the law contained within the Constitution, statute, or caselaw may sometimes provide Afair warning" of unlawful conduct.' . . These principles may give notice to officers, provided that the decisions clearly apply to the situation at hand. The 'reasoning, though not the holding' of prior cases can also send 'the same message to reasonable officers' in novel factual situations. . . The general principle of law must be specific enough to give the officers notice of the clearly established right. Indeed, the principle that officers may not use excessive force to apprehend a suspect is too broad a concept to give officers notice of unacceptable conduct. . . Mercado, however, relies on the principle that deadly force cannot be employed in a situation that requires less-than-lethal force. . . Because the Fourth Amendment protects citizens from. 'unreasonable' seizures, the use of deadly force must be reasonable under

the circumstances. . . Using deadly force in a situation that clearly would not justify its use is unreasonable under the Fourth Amendment. Under Florida law, 'deadly force' means any 'force that is likely to cause death or great bodily harm,' but does not include 'the discharge of a firearm by a law enforcement officer or correctional officer during and within the scope of his or her official duties which is loaded with a Aless lethal munition."' . . . 'Less-lethal munition' is, in turn, defined as 'a projectile that is designed to stun, temporarily incapacitate, or cause temporary discomfort to a person without penetrating the person's body.'. . According to Orlando policies, the Sage Launcher is defined as a 'less lethal' munition; however, they also recognize that some uses of the weapon should only be employed in deadly force situations. Shooting a suspect in the head is specifically forbidden unless the situation requires deadly force. As noted above, for the purposes of summary judgment, we must assume that Padilla intended to shoot Mercado in the head based on Mercado's injuries and the proven accuracy of Padilla's weapon. Because shooting a subject in the head with a Sage Launcher employs force 'likely to cause death or great bodily harm,' this action can be considered 'deadly force.' Both Padilla and Rouse were aware that police policy forbade them from utilizing this magnitude of force under the facts at bar. Because this situation was clearly not a deadly force situation, and because the officers utilized deadly force to subdue Mercado, they violated the clearly established principle that deadly force cannot be used in non-deadly situations. Furthermore, this is one of the cases that lie 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.' . . The facts in this case are also 'so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.' . . We have repeatedly held that police officers cannot use force that is 'wholly unnecessary to any legitimate law enforcement purpose.' . . Officer Padilla should not have needed case law to know that by intentionally shooting Mercado in the head, he was violating Mercado's Fourth Amendment rights. When the officers entered the apartment, they found Mercado crying on the floor of his kitchen with a loose cord around his neck and a kitchen knife placed up to, but not poking into, his chest. From a distance of about six feet away, Padilla twice shouted for Mercado to drop his knife, and then discharged the Sage Launcher, hitting Mercado in the head from short range. Assuming that Padilla was aiming at Mercado's head intentionally, his use of force was clearly excessive.").

Purcell ex rel. Estate of Morgan v. Toombs County, 400 F.3d 1313, 1324 n.25 (11th Cir. 2005) ("Unlike *Hope*, the preexisting case law here varied enough from the material facts of this case that a reasonable jailer could believe that the factual differences could make the situation at this Jail lawful even when circumstances in the earlier cases were determined to be unlawful under federal law: the precedents do not 'squarely govern' the case here.[citing *Brosseau*]").

Mitchell v. City of Mobile, Alabama, No. CV 15-0360-CG-C, 2017 WL 1740364, at *15–16 (S.D. Ala. May 3, 2017) ("Plaintiff urges the Court to consider this event, which falls outside the moment deadly force was used, in its Fourth Amendment 'reasonableness' evaluation. . . The Court declines to consider this event for three reasons. First, Plaintiff's complaint limits her federal claim to Chandler's and Wilson's use of 'excessive, unreasonable, and unnecessary deadly force.'. .

Because Wilson's actions prior to the use of deadly force are not made the basis of the constitutional claim, Plaintiff cannot rely on them now to rescue that claim. Second, § 1983 protects plaintiffs from constitutional violations, not state law violations or, as Plaintiff asserts, violations of departmental policies. . . . Moreover, a recent Supreme Court decision torpedoes Plaintiff's argument. The plaintiff in *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), supported her Fourth Amendment claim with expert testimony that the defendant law enforcement officers 'fell short of their training by not using practices designed to minimize the risk of violence when dealing with the mentally ill.'. . The Supreme Court canvased the caselaw and concluded that 'the officers' failure to accommodate [the plaintiff's] illness [did not] violat[e] clearly established law.'. . The Court then rejected the plaintiff's reliance on her expert's opinion: 'Even if an officer acts contrary to her training, however, ... that does not itself negate qualified immunity where it would otherwise be warranted.'. . Therefore, it cannot be said that Wilson's choice in initially approaching Mitchell, assuming she violated proper municipal procedure, renders any future actions per se unreasonable. Third, assuming Wilson failed to follow the procedure in question, MO-2011-03, her actions constituting such failure occurred outside of the relevant timeframe upon which the Court makes its 'reasonableness' determination. . . .[O]fficers presented with the choice to use or not use force are faced with making a split-second decision. Whether that decision is reasonable should be based on the totality of circumstances in that moment. . . Thus, evaluating what Wilson may have done when she initially approached Mitchell deviates from this premise.")

Small v. Glynn Cnty., Ga., 77 F.Supp.3d 1271, 1275-81 (S.D. Ga. 2014) ("The United States Supreme Court recently re-emphasized that at the summary judgment stage, the judge's function is 'not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'[citing *Tolan*] As the high Court stressed, 'Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, [as in *Tolan*], a court decides only the clearly-established prong of the standard.'. . With that recent pronouncement in mind, the Court has taken due care to credit contradicting evidence in favor of the Plaintiffs and draw evidentiary inferences in favor of the Plaintiffs as the nonmoving party. In order to view the facts from the perspective of the Plaintiffs' best case, as must be done at this stage, the following facts are taken from the evidence-supported portions of the Plaintiffs' own submissions, the video evidence of the incident, and the unrefuted facts submitted in connection with the summary judgment motions. To the extent any facts are in dispute, they are viewed in the light most favorable to the Plaintiffs. Where competing inferences are possible, based on the evidence, the Court accepts the inference that favors the Plaintiffs. . . . [E]ven when reviewing any disputed issues of fact in favor of the Plaintiffs, Sasser and Smith did not violate Small's Fourth Amendment rights. Furthermore, the law at the time of the incident did not clearly establish and place the officers on notice that their actions would be unlawful. To the contrary, as discussed below, the Eleventh Circuit cases most factually similar to the present hold that no Fourth Amendment violation occurred. . . .Here, even viewing the Plaintiffs' facts at their best, the evidence shows that Sasser and Simpson had an objectively reasonable belief that Small posed a threat of serious physical harm to themselves and to others. . . . By the time deadly force was used,

Small had committed more than multiple counts of reckless driving; she had struck a police car and drove in such a way that reasonable officers in her path would perceive aggravated assault had occurred. Under the circumstances, it was reasonable to perceive that Small had used her car as a deadly weapon. By revving the engine and advancing forward, the threat she posed to Simpson and Sasser was reasonably perceived as serious and immediate. The final *Lee* factor—she sought to evade or resist arrest—persisted until she was shot.")

Chambers v. U.S., No. 5:11–CV–420–OC–10TBS, 2013 WL 4080118, *5, *10, *11 (M.D. Fla. Aug. 13, 2013) ("In summary, at the time of the events involved in this case, July 20, 2008, there were only two cognizable Eleventh Circuit decisions involving use of a taser device in making an arrest of a non-compliant free person—that is, cases governed by the Fourth Amendment—and both had found such use to be reasonable, not unconstitutional. To be sure, each of those cases involved a single use of the taser whereas this case presents multiple tasings, but that difference is of little consequence in either stage of a qualified immunity analysis in which the ultimate focus is upon conduct that the law *condemns*, not so much on conduct that the Constitution *allows.* The Court might well conclude the analysis at this point, therefore, by simply declaring that Crain's use of the taser (at least up to the time that Chambers was handcuffed) was not objectively unreasonable or, even if it was, that Crain is entitled to qualified immunity for those acts because the law was not clearly established to that effect at the time. There would still be an issue, however, concerning Chambers' claim that he was unnecessarily tased after he was handcuffed and no longer posed a physical threat or risk of flight. Later cases should be examined to determine whether such abuse—taking Chambers' testimony that it occurred—constituted: (1) objectively unreasonable force in violation of the Constitution; and, if so (2) whether the violation was one of such 'obvious clarity'that the law should be deemed to have been clearly established even in the absence of comparable decisions as of July 20, 2008. . . . In all of the excessive force cases involving tasers decided by the circuit since late 2008, qualified immunity has been denied on five occasions. *Powell v. Haddock,* 366 F. App'x 29 (11th Cir. Feb. 12, 2010); *Oliver,* 586 F.3d 898; *Fils,* 647 F.3d 1272; *Harper v. Perkins,* 459 F. App'x 822 (11th Cir. Feb. 29, 2012); and *Thompson v. Mostert,* 489 F. App'x 396 (11th Cir. Sept. 12, 2012). On the other hand, qualified immunity has been granted in seven cases. *Chaney,* 291 F. App'x 238; *Buckley v. Haddock,* 292 F. App'x 791 (11th Cir. Sept. 9, 2008); *German v. Sosa,* 399 F. App'x 554 (11th Cir. Oct. 12, 2010); *Floyd v. Corder,* 426 F. App'x 790 (11th Cir. May 12, 2011); *Hoyt v. Cooks,* 672 F.3d 972 (11th Cir.2012); *McQueen,* 506 F. App'x 909; and *Brown v.. Calicchio,* 510 F. App'x 822 (11th Cir. Feb. 25, 2013). . . .The most appropriate basis on which to compare the two groups of taser cases is the way in which the Court of Appeals has applied the three prong test of *Graham v. Connor* in all of them. The difference between the two sets of cases on that basis is clear, consistent and conspicuous. In all of the examples in which qualified immunity has been denied, the offense or purported offense justifying an arrest was minor or non-existent, the subject who was tased posed no immediate threat to the officers or others, and the subject was compliant, not resisting or attempting to evade arrest by flight. The use of a taser device in those circumstances has been universally treated by the court of appeals as excessive or objectively unreasonable in violation of the Fourth Amendment. Additionally, in those cases, the court has consistently found that the 'clearly

established' law condemning such conduct (for purposes of qualified immunity analysis) has been met either by the prior decisions in *Priester* and *Vinyard,* . . . or by the 'obvious clarity' exception to the general requirement of materially similar precedent. Conversely, in all of the cases in which qualified immunity has been granted, while the underlying offense justifying arrest is not uniformly serious, the cases are universally characterized by violent or non-compliant belligerent behavior on the part of the subject, posing a clear threat to the safety of the officer if he or she had proceeded to engage in hand-to-hand combat in an effort to secure the subject by handcuffing without the incapacitating aid of the taser. . . .Viewing the facts in the light most favorable to Chambers, the Court concludes that partial summary judgment should be granted with respect to any claim of Chambers for liability or damages based upon any tasings or other force used against his person up to the time that he was handcuffed. There is no genuine issue of material fact that Chambers was, up to that point in time, aggressively and physically resisting being handcuffed incident to arrest. To the extent there are differences in the factual accounts of the witnesses and parties concerning the details of the encounter between Chambers and Officer Crain, the Court finds those differences to be immaterial. . . . Here, there can be no genuine dispute that Chambers physically resisted Crain's attempt to complete an arrest by handcuffing him. Chambers has admitted that he refused to kneel and be handcuffed on Crain's command, and his continuing resistance is established by the indisputable fact that two disinterested strangers found it necessary to physically intervene in aid of Crain whom they perceived to be fighting a losing battle. . . .In summary, there was no objectively unreasonable use of force by Crain—and no violation of the Fourth Amendment—up to the time that Chambers was brought under physical control and handcuffed. Or, alternatively, if there was a constitutional violation during that phase of the engagement, Crain would be, and is, entitled to qualified immunity with respect to that part of the *Bivins* claim because the applicable law was not clearly established that use of the taser was constitutionally prohibited in the factual circumstances Crain was confronting. . .On the other hand, there are material issues of fact with respect to the tasings, if any, that occurred after Chambers was handcuffed; and the law is, and was, clearly established as of 2008 that the 'gratuitous' use of force against an already restrained and non-resisting arrestee is excessive. As we have held on numerous occasions, the gratuitous use of force when a criminal suspect is restrained and not resisting arrest constitutes excessive force. The motion for summary judgment (Doc. 31) will be, and is DENIED with respect to the events that occurred after Chambers was restrained by handcuffing. With respect to trial of the *Bivins* claim before a jury, the Court's intent will be to use special interrogatories to obtain a jury verdict with respect to the disputed issues of critical historical fact. The Court will then apply the law to those facts in accord with the procedure prescribed by the Court of Appeals in *Johnson v. Breeden,* 280 F.3d 1308, 1317 (11th Cir.2002).")

Estate of Breedlove v. Leone, No. 6:11–cv–2027–Orl–31TBS, 2013 WL 1703551, *13 (M.D. Fla. Apr. 19, 2013) ("Police officers have a difficult job and often have to make split-second decisions to defend themselves or protect others from harm. Qualified immunity grants the police a large degree of protection from suit when acting within their discretionary authority, but this discretion is not unbounded. Viewing the evidence in the light most favorable to the Plaintiff, the conduct at

issue here is more akin to an execution than an attempt to arrest an unarmed suspect. The qualified immunity bar is not set that low.")

Steen v. City of Pensacola, 809 F.Supp.2d 1342, 1349-56 (N.D. Fla. Aug. 22, 2011) ("The issue of whether Chief Mathis has supervisory liability is necessarily dependent on there being an underlying Section 1983 violation in the first instance. Thus, if the underlying Section 1983 claim fails, *a fortiori*, so does the supervisory liability claim against Chief Mathis. . . . Therefore, the relevant question is whether Officer Ard's use of his taser on the facts of this case was a violation of Steen's constitutional rights and, if so, whether the right was 'clearly established' on October 3, 2009. . . . As the Eleventh Circuit recently noted: 'A "taser" is a non-deadly weapon.' *Fils v. City of Aventura*, __ F.3d __, 2011 WL 3241618, at *1 n. 2 (11th Cir. July 28, 2011). . . Although it is true (as the plaintiff has observed) that tasing someone who is on a bicycle while driving alongside him in a vehicle may carry with it the *possibility* of serious injury or even death (e.g., if the tasing is followed by an impact with the vehicle), that outcome by no means a 'virtual certainty' as it was in both *Garner* and *Vaughan.* . . The fact that Steen died (while unfortunate) does not convert the use of non-deadly force into deadly force. Consequently, the 'deadly force' test does not apply, and the question is whether the force used was reasonable under the three-factor *Graham* analysis. . . . Although the danger caused by Steen fleeing on his bicycle may not be the same as that caused by the speeding motorist in *Harris,* there was a serious threat to the safety of others caused by his flight and Officer's Ard's pursuit. Thus, the second *Graham* factor must be evaluated as both favorable and unfavorable to the plaintiff. However, even if the first two *Graham* factors – no serious crime, and no immediate threat –weighed entirely for the plaintiff, I cannot ignore that Steen was fleeing the scene and disregarding Officer Ard's repeated orders to 'stop the bike.'. . . The factual record in this case has not yet been fleshed out, and I am only considering the plaintiff's allegations in the complaint and the facts as seen in the attached video. Based only on those limited facts, I cannot say that the single use of a taser on the fleeing, albeit non-violent, Steen was an unconstitutional use of excessive force. Ultimately, however, I do not need to make that decision. I will simply assume *arguendo* that there was a constitutional violation and proceed to the second step of the qualified immunity analysis. . . . The Supreme Court '[does] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.' *Ashcroft v. al-Kidd*, __ U.S. __, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011). In determining if existing case law provided an officer with fair warning that a specific use of force was unlawful 'beyond debate,' the Eleventh Circuit has made clear that it '[does] not expect public officials to sort out the law of every jurisdiction in the country.'. . The plaintiff has not identified – and my research has not revealed – a case from the United States Supreme Court, the Eleventh Circuit, or the Florida Supreme Court, 'stak[ing] out a bright line' and holding that it is excessive force for a police officer in a vehicle to tase someone who is fleeing on a bicycle. . . The cases cited by the plaintiff either do not involve a fleeing suspect (the third *Graham* factor used to analyze reasonableness), . . . and/or they are otherwise 'fairly distinguishable.'. . . [T]o the extent that the plaintiff contends there is a 'controlling case' that clearly established on October 3, 2009, that Officer Ard's use of force was unconstitutional, I find that each cited case is readily distinguishable. . . I will now turn to the second method of determining whether Officer Ard had

'fair warning' that his conduct was unlawful. The second method – for 'obvious clarity' cases – is a 'narrow exception to the normal rule that only case law and specific factual scenarios can establish a violation.'. . . The plaintiff contends that in this case 'we are dealing with an officer that [sic] intentionally deployed his Taser from the window of his speeding patrol car at an individual riding on another vehicle (a bicycle), from a distance of no more than eight (8) feet while both vehicles were underway.' These conditions, the plaintiff further contends, 'presented an abnormally high likelihood of serious injury or death to Mr. Steen.' Relying primarily on *Garner*, *Vaughan*, and *Oliver, supra*, the plaintiff insists that the purported excessive force in this case was clearly established under the 'obvious clarity' standard. I do not agree. As previously discussed, *Garner* and *Vaughan* are plainly distinguishable. To paraphrase the Supreme Court in *Harris, supra*, tasing a person riding a bicycle 'is, in fact, not much like a policeman's shooting a gun so as to hit a person' and thus does not pose the same 'near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car [traveling 80 + mph on an interstate highway] and shooting the motorist.'. . While it was obvious and apparent in those cases that the force being used was 'virtually certain' to result in death, that is simply not the case here. . . . Because it can scarcely be claimed that 'every objectively reasonable government official' in Officer Ard's position would have known that tasing a suspect who was fleeing on his bicycle violated clearly established federal law, this case is not one of 'obvious clarity.'. . . A taser is generally recognized as having many useful and lawful applications for law enforcement purposes. It is not a deadly weapon, as the Eleventh Circuit recently noted in *Fils, supra.* Accordingly, I must conclude that, as of that date, it was not clearly established to 'every objectively reasonable government official' (and thus, there was no 'fair warning') that discharging a single taser shock to a suspect attempting to flee on a bicycle was unconstitutional.Therefore, Chief Mathis is entitled to qualified immunity on the supervisory liability claim.")

Reed v. Barnett, No. 09-0200-WS-N, 2011 WL 5376300, at *6-*8 (S.D. Ala. Dec. 22, 2010) ("The Eleventh Circuit has several times determined that the use of a taser did not constitute excessive force, but none of these cases involved facts like those presented by the plaintiff here. . . .As under the plaintiff's version of facts here, no serious crime was suspected and neither a danger to the officer nor a risk of flight was presented. . . Applying the relevant factors to the version of the facts supported by the evidence that is most favorable to the plaintiff, Barnett employed unconstitutionally excessive force. . . . The plaintiff cites ten Eleventh Circuit cases to show that Barnett's conduct violated clearly established law, but none meets his burden. . . . To the doubtful extent that *Hadley* could be read as automatically invalidating any use of force against a suspect who, though not yet handcuffed, is not actively resisting, it postdates the incident at issue and thus was not binding on Barnett. In sum, it was not clearly established on March 14, 2008 that the force Barnett employed, under the circumstances he encountered, violated the Fourth Amendment. He is therefore entitled to qualified immunity.")

Borton v. City of Dothan, No. 1:08-CV-654-WKW [WO], 2010 WL 3328361, at *12 (M.D. Ala. Aug. 24, 2010) ("Three unprovoked tasings on a mentally disturbed patient, who is not under arrest

and who has been secured face down on a gurney with handcuffs and Posey restraints, amount to excessive force in violation of the Fourth Amendment. On these facts, no particularized preexisting case law is needed for it to be clearly established that Officer Schulmerich's tasing of Ms. Borton violated her Fourth Amendment right to be free from the use of excessive force.")

Franks v. Devane, No. 1:06-CV-173 (WLS), 2008 WL 794814, at * 4 (M.D. Ga. Mar. 21, 2008) ("As with the Plaintiff in *Besher*[*s*], Plaintiff in the case at bar intentionally endangered himself and the public. The chase by the officers involved county, city, and state patrol officers. It spanned two counties and 14 miles. Plaintiff was clocked on more than one occasion doing more than 120 mph. He had passed numerous vehicles over the double yellow line and driven in the wrong lane of traffic. There is some evidence that Plaintiff even taunted his pursuers by stopping and waiting for them to catch up. By the time, officers determined to set up a roadblock, Devane had determined that the chase may eventually lead into a highly congested school zone. Based on the facts and the controlling case law, if Devane's actions were intentional, they were objectively reasonable under the circumstances.")

Mancha v. Immigration and Customs Enforcement, 2007 WL 3144012, at *6(N.D.Ga. Oct. 24, 2007) ("Nothing about my decision today should reflect the view that immigration officials are authorized to stop and interrogate drivers on the road simply because they happen to be driving near a caravan of immigration officials. Here, based on these specific facts, there was an objective basis for a brief and limited stop. The officers are entitled to qualified immunity. Their actions did not violate the Fourth Amendment, let alone clearly established law, as they had 'arguable reasonable suspicion' to conduct a limited stop. . . There was no obvious and flagrant violation of Morales's Fourth Amendment rights. The Defendant should prevail on his claim of qualified immunity.")

Scheuerman v. City of Huntsville*, *AL, 499 F.Supp.2d 1205, 1220 (N.D.Ala July 23, 2007) ("This is *not* a case where a uniformed officer uses potentially deadly force by crashing into the driver to prevent harm to others, after activating his blue lights and siren, and chasing a car whose driver is fleeing and driving recklessly in the dead of night. *See Scott v. Harris* , 127 S.Ct. 1769 (2007).This is *not* a case where a uniformed officer, attempting to apprehend a drug trafficker, identifies himself and uses deadly force in self-defense of a moving car. *See Robinson v. Arrugueta,* 415 F.3d 1252 (11th Cir.2005).This is not a case where a uniformed officer uses deadly force on a suspected felon after he avoids an investigatory pat-down, flees in a car, and engages in a highspeed reckless chase with multiple police cars in tow, and refuses to get out of his car once it had been blocked on three sides and told by police to exit his vehicle. *See Pace v. Capobianco,* 283 F.3d 1275 (11th Cir.2002).Instead, this is a case in which an off-duty investigator, who was not in uniform, exited his unmarked vehicle to confront an individual, and drew his weapon when there was no reasonable suspicion that a crime had even been committed. It is undisputed that plaintiff did not see Weaber exit his vehicle, and was not aware that Weaber was walking toward plaintiff's automobile, until Weaber's arm, with his hand holding a gun, appeared through his front window. Viewing the totality of the circumstances, it was not objectively reasonable for Weaber

to use deadly force on the plaintiff. . . . The parties agree that the encounter at issue lasted only three to five seconds. Under these peculiar circumstances, the court finds it was objectively unreasonable for Weaber to approach plaintiff's vehicle unannounced, grab onto plaintiff's car as it was being placed in reverse, and then start shooting plaintiff's midsection to make plaintiff stop."), *aff'd,* 2008 WL 656080 (11th Cir. Mar. 12, 2008).

Stephens v. City of Butler, Ala, 2007 WL 1834898, at *11, *12 (S.D. Ala. June 23, 2007) ("The instant case presents an issue closer to *Vinyard* than to *Draper,* in that the plaintiff was under more control of the three officers than the plaintiff in *Draper*. Nonetheless, even if the court were to accept that a single application of the taser would have been appropriate under *Draper*, the issue before the court is the repeated use–at least four separate trigger pulls by Lovette followed by one use by Jackson–of a taser in such an instance. The repeated use of a taser on an unarmed arrestee who had made no effort to escape, no movement that could be deemed an attack or threat to any officer, who was in custody, in the jail, and was surrounded by three officers, would be objectively unreasonable and excessive, particularly where the use of force was over something as minor as being verbally unruly and refusing to don jail garb. This determination applies with equal force to defendant Jackson, who applied his taser to the plaintiff after defendant Lovette had already repeatedly done so. The plaintiff's facts support a reasonable inference that Jackson simply 'piled on' with full knowledge of the facts as stated above. . . . [T]he state of the law at the time of the incident at issue gave defendants Lovette and Jackson fair warning that the repeated use of tasers on a non-violent arrestee in circumstances similar to those presented in this case was excessive.")

Harrell v. Campbell, 482 F.Supp.2d 1368, 1372 & n.4, 1373 (N.D. Fla. 2007) ("*Brosseau*, *Robinson*, and *Troupe* do not undermine the conclusion that, under *Vaughan,* Deputy Goodman is not entitled to summary judgment. The distinction is the risk of serious physical harm; there was a greater risk in *Brosseau*, *Robinson*, and *Troupe* than in *Vaughan*, and a greater risk in *Vaughan* than in the case at bar. . . . Any argument that *Vaughan* did not survive *Brosseau* cannot succeed, at least in this court. *Robinson* and *Troupe*, which were decided after *Brosseau*, cited and quoted *Vaughan* at length without casting the slightest doubt on its continued validity. A district court in this circuit must continue to treat *Vaughan* as good law. And there is no reason to defer issuance of this order pending the Supreme Court's decision on review of *Harris v. Coweta County, Georgia*, 433 F.3d 807 (11th Cir.2005), *cert. granted sub nom. Scott v. Harris*, 127 S.Ct. 468, 166 L.Ed.2d 333 (Oct. 27, 2006). Any change that may result from the Supreme Court's decision in that case can be addressed in due course. . . . A juror could conclude that a reasonable officer in a modern patrol car would know that without resorting to lethal force he could thwart the escape of a known suspect driving a Volkswagen with a flat tire. And if, as the Eleventh Circuit said in *Vaughan*, giving a warning was feasible there, it may also have been feasible here. For these reasons, and especially in light of *Vaughan*, Deputy Goodman is not entitled to summary judgment."), *aff'd. by Harrell v. Goodman*, 250 F. App'x 284 (11th Cir. 2007).

Rauen v. City of Miami, No. 06-21182-CIV, 2007 WL 686609, at *21, *22 (S.D. Fla. Mar. 2, 2007) ("As discussed elsewhere in this Order, Defendants argued that the conduct of officers in

'herding' the Plaintiffs did not constitute a seizure within the meaning of the Fourth Amendment. The undersigned has resolved this issue in favor of Plaintiffs, finding that the allegations support a claim that the officers' conduct did, in fact, result in a seizure. Nevertheless, the discussion of that issue, and the competing case law on that issue, demonstrates that the actions of the officers, and thus, the Individual Defendants' directing of those actions, did not violate 'clearly established' federal law. In addition, because it was not clear at the time of the officers' actions that those actions would result in a seizure of Plaintiffs, it cannot be said that it was clearly established that the use of force, even excessive force, in herding the Plaintiffs would result in a violation of the Fourth Amendment, which is only implicated where there is, in fact, a seizure. Each of the Individual Defendants is thus entitled to qualified immunity with respect to Counts Eight, Ten, Twelve, and Fourteen of the TAC. . . . While the parties agree that a cause of action for failure to intervene to prevent Fourth Amendment violations does exist, the Individual Defendants are entitled to qualified immunity on these claims because, again, the law was not clearly established that the officers' conduct in herding the Plaintiffs and using force against them implicated the Fourth Amendment. In other words, at the time that the skirmish line was allegedly herding the Plaintiffs, the Individual Defendants were not aware that any seizure was occurring and, thus, were not aware that the Fourth Amendment was (allegedly) being violated. It cannot be said, therefore, that the law was 'clearly established' that the Individual Defendants' failure to intervene to prevent the officers' actions would result in a violation of Plaintiffs' Fourth Amendment rights. Each of the Individual Defendants is entitled to qualified immunity with respect to Counts Sixteen, Eighteen, and Twenty of the TAC.").

N.A. by and through Ainsworth v. Inabinett, No. 2:05-CV-740-B, 2006 WL 297222, at *7, *8 (M.D. Ala. Feb. 7, 2006) ("Having found that Deputy Inabinett violated N.A.'s Fourth Amendment right to be free from a gratuitous, unprovoked beating with fists followed by a taser gun assault–absent any provocation, resistance, legitimate law enforcement or other reasonably necessary purpose–the court addresses the second prong of the qualified immunity inquiry: was this constitutional right clearly established at the time of the deputy's encounter with N.A.? . . . . Defendant Inabinett is correct that 'the Plaintiffs have not cited ... any case containing materially similar facts' and plaintiffs' counsel conceded at oral argument that he can not identify such a case. However, the court concurs with Plaintiff that the Fourth Amendment's prohibition on excessive force is sufficiently clear so that no reasonable officer would believe it appropriate to make an unprovoked physical assault–consisting of beating with his fists and then firing a taser gun weapon–on a reportedly suicidal minor who was then not engaged in any criminal activity or other resistance which made reasonably necessary the use of any force at all. The Eleventh Circuit has found obvious clarity in the Fourth Amendment's prohibition against excessive force sufficiently to deny qualified immunity to officers using more than de minimis force against offenders or suspects after they have been restrained sufficiently to cease the acts which triggered the need for force at the outset. . . Thus, on facts alleging no need for force at all, fair notice surely derives from the same source.").

Fitch v. Scott, No. 2:03-CV-465-FTM29DNF, 2005 WL 1925028, at *7 (M.D. Fla. Aug. 10, 2005) (not reported) ("Taking the facts in the light most favorable to plaintiffs, an objectively reasonable officer in Deputy Edwards' position could not have believed that he was entitled to use deadly force. While Deputy Edwards argues that plaintiffs have not identified any case law on point, this is not dispositive under the facts of this case. Officers have been on notice since 1985 that deadly force would be justified only by a reasonable belief that they or the public were in imminent danger. . . . It is hardly surprising after *Garner* that there are few reported assertions that shooting a suspect who is surrendering is not excessive. Indeed, the Eleventh Circuit and others circuits have noted that even pepper spraying an arrestee who is surrendering constitutes excessive force. . . The Court finds that under plaintiffs' version of the facts an objectively reasonable officer in Deputy Edwards' position could not have reasonably believed that he was entitled to shoot Fitch at the time he did so.").

Maiorano v. Santiago, No. 6:05CV107ORL-19KRS, 2005 WL 1200882, at *8 (M.D. Fla. May 19, 2005) (not reported) ("The Court's research reveals no case with facts materially similar to the case at hand. Considering Plaintiff's allegations, no factually particularized, preexisting case law was necessary for it to be obvious to an objectively reasonable officer facing Santiago's situation that his conduct violated Plaintiff's right to be free from the use of excessive force. In other words based on the bare allegations of the Amended Complaint, it cannot be said that an objectively reasonable officer could believe that it would be reasonable to use a taser against Plaintiff, without advance warning or a verbal command to desist, because of Plaintiff's action of engaging in an unspecified type of physical altercation with another student.").

Reed v. City of Lavonia, 390 F.Supp.2d 1347, 1362, 1363 (M.D. Ga. 2005) ("In this case, even though Reed was not handcuffed, the facts, when viewed in the light most favorable to him, show that Reed was not attempting to flee, was not offering any resistance, and was not belligerent or uncooperative and that he attempted to comply with the officers commands. If these facts are true, existing case law served as a clear and fair warning to Defendants Masionet and Carlisle that the use of force in such circumstances would violate an arrestee's Fourth Amendment rights. Even assuming that existing case law did not provide Defendants with clear and fair notice that their acts, as alleged by Plaintiff, would violate Reed's Fourth Amendment right to be free of excessive force during arrest, the Court further finds that such decisional law is not necessarily required in this case. As stated above, materially similar case law is not necessary if the officers' alleged conduct lies 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent ... notwithstanding the lack of case law.'. . Here, as discussed above, Reed was allegedly passive, compliant and cooperative when Officers Masionet and Carlisle arrived on scene, sprayed him with pepper spray, physically attacked him, and began beating him with the baton. He was not intoxicated, did not possess (or appear to possess) a weapon, and made no attempt to flee or resist arrest. According to Reed, he surrendered to the officers' authority when they arrived and made every attempt to comply with the officers' commands. Even when Reed was on the ground, as the officers commanded, Masionet continued to beat him as Carlisle held him in a choke-hold, restricting his airflow and restraining his

movement. In these circumstances, 'no particularized preexisting case law was necessary for it to be clearly established that what [Defendants Masionet and Carlisle allegedly] did violated [Reed's] constitutional right to be free from excessive force.'").

IX. AVAILABILITY OF INTERLOCUTORY APPEAL

Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (denial of qualified immunity, **to the extent that it turns on an issue of law,** is an appealable "final decision"). The Court noted, *id.* at 528:

> An appellate court reviewing the denial of ... immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment ... on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Plumhoff v. Rickard, 134 S. Ct. 2012, 2019, 2020 (2014) ("The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden. The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris,* and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291. Accordingly, here, as in *Scott,* we hold that the Court of Appeals properly exercised jurisdiction, and we therefore turn to the merits.")

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1946, 1947 (2009) ("[R]espondent contends the Court of Appeals had jurisdiction to determine whether his complaint avers a clearly established constitutional violation but that it lacked jurisdiction to pass on the sufficiency of his pleadings. Our opinions, however, make clear that appellate jurisdiction is not so strictly confined. . . . Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said in *Johnson*, it is a 'fact-related' legal inquiry. . . To conduct it, a court of appeals may be required to consult a 'vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.'. . . That process generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment. . . Finding those concerns predominant, *Johnson* held that the collateral orders that are 'final' under *Mitchell* turn on 'abstract,' rather than 'fact-based,' issues of law. . . The concerns that animated the decision

in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings. True, the categories of 'fact-based' and 'abstract' legal questions used to guide the Court's decision in *Johnson* are not well defined. Here, however, the order denying petitioners' motion to dismiss falls well within the latter class. Reviewing that order, the Court of Appeals considered only the allegations contained within the four corners of respondent's complaint; resort to a 'vast pretrial record' on petitioners' motion to dismiss was unnecessary. . .And determining whether respondent's complaint has the 'heft' to state a claim is a task well within an appellate court's core competency. . . Evaluating the sufficiency of a complaint is not a 'fact-based' question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here. The District Court's order denying petitioners' motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction.")

Behrens v. Pelletier, 516 U.S. 299, 312, 313 (1996) ("Denial of summary judgment often includes a determination that there are controverted issues of material fact, . . . and *Johnson* surely does not mean that every denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under *Cohen* and *Mitchell*. [cite omitted] *Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity . . , typically, the issue whether the federal right allegedly infringed was 'clearly established[.] [cites omitted] Here the District Court's denial of petitioner's summary-judgment motion necessarily determined that certain conduct attributed to petitioner (which was controverted) constituted a violation of clearly established law. *Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' This argument was presented by petitioner in the trial court, and there is no apparent impediment to its being raised on appeal. And while the District Court, in denying petitioner's summary-judgment motion, did not identify the particular charged conduct that it deemed adequately supported, *Johnson* recognizes that under such circumstances 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'").

Johnson v. Jones, 515 U.S. 304, 319, 320 (1995) ("[W]e hold that a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.").

Swint v. Chambers County Commission, 514 U.S. 35, 51 (1995) ("The Eleventh Circuit's authority immediately to review the District Court's denial of the individual police officer

defendants' summary judgment motions did not include authority to review at once the unrelated question of the County Commission's liability. The District Court's preliminary ruling regarding the County did not qualify as a 'collateral order,' and there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise.").

NOTE: In ***Johnson v. Fankell***, 520 U.S. 911 (1997), the Court held, in a unanimous opinion, that defendants have no federal right to an interlocutory appeal from a denial of qualified immunity in state court. In response to petitioners' argument that the Idaho rules were interfering with their federal rights, the Court noted:

> While it is true that the defense has its source in a federal statute (§ 1983), the ultimate purpose of qualified immunity is to protect the state and its officials from overenforcement of federal rights. The Idaho Supreme Court's application of the State's procedural rules in this context is thus less an interference with federal interests than a judgment about how best to balance the competing state interests of limiting interlocutory appeals and providing state officials with immediate review of the merits of their defense.

Id. at 919, 920. In response to petitioners' further argument that the Idaho rule did not sufficiently protect their right to prevail before trial, the Court explained:

> In evaluating this contention, it is important to focus on the precise source and scope of the federal right at issue. The right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in ' 1291. The former right is fully protected by Idaho. The latter right, however, is a federal procedural right that simply does not apply in a nonfederal forum.

Id. at 921.

D.C. CIRCUIT

Feld v. Feld, 688 F.3d 779, 781-783, (D.C. Cir. 2012) ("It is true that we are powerless to review a challenge to the legal sufficiency of evidence that was rejected at summary judgment and not brought again in a Rule 50 motion. . . But the Supreme Court has left open the question whether the same rule applies to preserving 'purely legal' arguments that were rejected at summary judgment. . . At least six circuits have said it does not. [collecting cases] We agree. . . .At least two circuits have taken the opposite approach and require a Rule 50 motion to preserve for appeal any issue first raised in a motion for summary judgment. [citing cases from First Circuit and Fourth Circuit and noting that Fifth and Eighth Circuits have not settled on position] . . . .We conclude

that we have jurisdiction to hear Karen's legal argument because we hold a Rule 50 motion is not required to preserve for appeal a purely legal claim rejected at summary judgment.")

Moore v. Hartman, 644 F.3d 415, 422 (D.C. Cir. 2011), *cert. granted, vacated and remanded in light of Reichle v. Howards,* 132 S. Ct. 2088 (2012) ("The Postal Inspectors first challenge the sufficiency of the evidentiary basis for the district court's determination that 'there is a genuine issue of material fact as to whether the government lacked probable cause to prosecute [Moore],' *Moore VI*, 730 F.Supp.2d at 175. This is precisely the sort of determination, however, that the Supreme Court held in *Johnson* is not immediately appealable. . . . Under *Johnson*, we lack jurisdiction at this stage of the proceeding to review the court's fact-based determination because it is not a 'final decision[ ]' within the meaning of 28 U.S.C. § 1291.")

International Action Center v. United States, 365 F.3d 20, 24 (D.C. Cir. 2004) ("[T]he fact that the qualified immunity claim is not ripe for appeal with respect to the active participation claims should not prevent the MPD supervisors from obtaining prompt review of the denial of qualified immunity as to the inaction claims. . . A contrary approach would lead to what the Supreme Court has termed the 'intolerable" result that A[i]f the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as the plaintiff has alleged (with or without evidence to back it up) violation of one Aclearly established" right.'").

Farmer v. Moritsugu, 163 F.3d 610, 613, 614 (D.C. Cir. 1998) ("[T]he Supreme Court has distinguished between appeals raising 'abstract' legal issues–i.e., 'whether the facts alleged ... support a claim of violation of clearly established law,'. . . and appeals challenging evidentiary sufficiency–i.e., whether the summary judgment record raises genuine issues of fact for trial. [citing *Johnson v. Jones*] As we see it, this precedent draws a critical line between appeals of the 'I cannot, as a matter of law, be held liable' variety and appeals of the 'I did not, as a matter of fact, do it' variety. The former is permitted, notwithstanding the absence of a final judgment in the case. . . ; the latter, however, is not. . . . Moritsugu has effectively conceded the facts as alleged by Farmer, contesting instead whether those facts could support a conclusion that he violated Farmer's constitutional rights.").

FIRST CIRCUIT

McKenney v. Mangino, 873 F.3d 75, 83-84 (1st Cir. Oct. 6, 2017) ("[T]he defendant makes a series of factbound arguments. Most notably, the defendant repeatedly insists—contrary to the inferences drawn by the district court—that he reasonably perceived McKenney as an imminent danger at the time of the shooting, such that he was left with no real choice but to fire his weapon. In turn, he urges reversal in light of evidence that he maintains the district court either overlooked or insufficiently considered. These facts include data points such as that McKenney had ignored police commands to drop his loaded weapon, had at one time raised his gun, and was approaching

the defendant (and the unarmed civilian in the defendant's cruiser) at the time he was shot. But there is a rub: the defendant's characterization of the summary judgment record collides head-on with the district court's synthesis of the facts. The defendant either ignores or gives unduly short shrift to evidence that was central to the district court's conclusion that, on the version of the facts most hospitable to the plaintiff, the defendant had 'ample opportunity to observe [McKenney's] actions and movements' before pulling the trigger and that the defendant's decision to shoot McKenney was 'unreasonably precipitous.'. . These facts include McKenney's suicidality, the slowness of his gait, the clear visibility, the fact that six minutes had elapsed since any officer had last ordered McKenney to drop his weapon, the fact that nobody had warned McKenney that deadly force would be used if he failed to follow police commands, and the six-minute gap between when McKenney raised his gun skywards and when the defendant pulled the trigger. Rather than accept arguendo that McKenney never came close to pointing his gun in the defendant's direction, the defendant devotes much sound and fury to the proposition that he reasonably perceived McKenney to be aiming his weapon at him. In short, the defendant has woven factbound arguments regarding both the immediacy of the threat posed by McKenney and the feasibility of less drastic action into the warp and woof of his challenge to the district court's qualified immunity analysis. Such an intertwining of disputed issues of fact and cherry-picked inferences, on the one hand, with principles of law, on the other hand, places these arguments beyond our jurisdictional reach on interlocutory appeal. . . To sum up, the precedents make pellucid that the most relevant factors in a lethal force case like this one are the immediacy of the danger posed by the decedent and the feasibility of remedial action. . . Taking the facts in the light most amiable to the plaintiff (as the law required it to do), the district court concluded that a rational jury could reasonably infer both that McKenney did not pose an imminent threat and that viable remedial measures had not been exhausted. The court also concluded that these facts should have been obvious to an objectively reasonable officer in the defendant's position. Although the defendant invites us to adopt a spin on the summary judgment record different from that taken by the district court, we lack jurisdiction to accept that invitation under *Johnson* and its progeny. . . . Accordingly, we dismiss the defendant's factbound challenges to the district court's order for lack of jurisdiction.")

Morse v. Cloutier, 869 F.3d 16, 24-26 (1st Cir. 2017) ("The bottom-line question is not — as the defendants suggest — what a reasonable officer would have known. Rather, the bottom-line question is whether a reasonable officer would have thought, given the facts known to him, that the situation he encountered presented some meaningful exigency. . . Here, the district court focused on what the officers actually knew and what they reasonably could have suspected when they reached Morse's doorstep. It concluded that '[a] reasonable juror could credit this evidence and find that there was no objective basis for the officers to believe that exigent circumstances existed.'. . In reaching this conclusion, the court applied the proper legal standard. . . . The defendants' second line of attack challenges the district court's determination that, on the summary judgment record, the exigent circumstances question is freighted with genuine disputes of material fact. . . The plaintiffs counter that this determination is factual in nature and, therefore, that we lack jurisdiction to review it in these interlocutory appeals. Because jurisdiction is both a legally and a logically antecedent question, . . . we address the plaintiffs' argument first. A defendant

asserting a qualified immunity defense may obtain interlocutory review of a denial of his motion for summary judgment, even if the district court concluded that the record presented a genuine dispute of material fact, as long as he accepts as true the plaintiff's version of the facts and argues that he is entitled to qualified immunity on that version of the facts. . . The defendants insist that, for purposes of these appeals, they have accepted the plaintiffs' version of the facts and challenge only the application of the law to those facts. Here, however, the defendants say one thing and do another. The arguments that they raise on appeal attempt to contradict, in significant ways, the plaintiffs' version of the facts. . . . The short of it is that the defendants plainly rest their appeals on an alternative version of the facts, that is, a version different from that relied on by the plaintiffs. Each version has some factual support in the record and, in the last analysis, each depends on what inferences a factfinder elects to draw from among reasonable, but conflicting, alternatives. By suggesting that the district court did not choose appropriately from among these competing sets of inferences and by asking us to discount the plaintiffs' plausible rendition of the facts, the defendants are making a quintessentially factbound argument 'inextricably intertwined with whatever "purely legal" contentions' their briefs contain. . . It follows that the defendants' exigent circumstances argument entails a prototypical factual dispute, not eligible for interlocutory review.")

Filler v. Kellett, 859 F.3d 148, 154-55 (1st Cir. 2017) ("Kellett contends that 'Filler is trying to get around the rule of immunity for withholding exculpatory evidence by reframing his claim as one about giving legal advice.' Kellett's 'end-run' contention, however, is too fact-dependent for us to be able to review it at this time. Count I of the complaint alleges that Kellett 'assumed the role of legal counsel' to law enforcement officers, 'and advised them not to comply with lawful defense ... subpoenas.' But, it is not at all clear that, in advancing the assertion that Filler is merely attempting an 'end run,' Kellett is presenting a legal argument that she is entitled to absolute immunity based on the facts set forth in the complaint, rather than a factual argument that she is entitled to absolute immunity based on her distinct understanding of the facts that transpired. . . . [W]e find ourselves in a situation where Filler's claims against Kellett are 'not clearly foreclosed and ... do not clearly reveal the degree to which the conduct relied on could be considered part of the decision to prosecute or intimately associated with the judicial proceedings, rather than purely investigative or administrative.'. . In consequence, the 'the availability of the defense of absolute immunity as to these claims must await the development of facts during discovery.'. .Kellett does contend in this regard that, because the advice was given after the case against Filler was initiated, she was necessarily acting in her prosecutorial capacity and thus entitled as a matter of law to absolute immunity. But, as we have noted, the fact that a prosecutor engaged in certain activities after a prosecution had already commenced is not necessarily dispositive of the question whether absolute immunity attaches. . .A similar problem prevents us from reviewing Kellett's assertion of absolute immunity as it relates to the allegations in Count I that Kellett tampered with and withheld exculpatory evidence. . . . [E]ven if Kellett may have a basis for asserting the absolute immunity defense, she does not identify with any specificity why she is entitled to immunity with respect to the allegations in Count I that pertain to her treatment of evidence. And it is by no means clear that every allegation in Filler's complaint concerning such treatment by her occurred during the judicial

rather than the investigative phase. . . . In light of the undifferentiated nature of Kellett's assertion of absolute immunity with respect to her treatment of evidence, it is unclear whether the parties' dispute over immunity with respect to the allegations in Count I concerning the treatment of potentially exculpatory evidence is a legal one about what protection the law affords a prosecutor either before or during the judicial phase, or instead a factual one about when the alleged conduct occurred. In consequence, we also lack jurisdiction to review this aspect of her absolute immunity defense in this interlocutory appeal. For, here, too, while Filler's claim against Kellett is not 'clearly foreclosed' by absolute immunity, 'the availability of the defense of absolute immunity as to these claims must await the development of facts during discovery.'")

McCue v. City of Bangor, 838 F.3d 55, 61-65 (1st Cir. 2016) ("After reviewing de novo all of the magistrate judge's determinations, the district court adopted the Recommended Decision in full. This appeal followed. The only issue before us is the pretrial denial of qualified immunity as to the plaintiff's allegation that the officers used excessive force after McCue had ceased resisting, as well as the corresponding denial of immunity under the MTCA for the state law assault claim. . . . Johnson and its progeny foreclose assertion of appellate jurisdiction over the defendants' interlocutory appeal. The magistrate judge's opinion, fully affirmed by the district court, denied summary judgment precisely '[b]ecause the record includes factual disputes regarding Plaintiff's claim that Defendants used excessive force after Mr. McCue allegedly ceased resisting.'. . In particular, the record contains facts that, when viewed most favorably to the plaintiff, could support a finding that McCue stopped resisting at some point during his encounter with the officers, and that the officers should have realized that he had stopped resisting, but that the officers 'continued to exert significant force ... no longer necessary to subdue Mr. McCue or to reduce the threat that he posed to himself or others.'. . And they continued to use such force after McCue told them that they were hurting his neck. In light of these remaining factual issues, we cannot assume jurisdiction over the defendants' interlocutory appeal. Maintaining that they do not dispute the facts for the purposes of their appeal, the defendants argue that we have appellate jurisdiction notwithstanding the district court's identification of material factual disputes. They repeatedly assert that they construe the facts in the light most favorable to the plaintiff and that even so construed, 'the videotape evidence conclusively establishes that there is at most a timeframe of 66 seconds for which the trial court could have concluded that Mr. McCue may have stopped resisting arrest and the Defendants may have continued to apply force.' They further argue that 'this momentary continuance of force' for up to 66 seconds did not violate McCue's Fourth Amendment right to be free from unreasonable seizure. Plaintiff disagrees and says that the record supports a finding that 4 minutes and 25 seconds is the true period involved. As a matter of law, our circuit has assumed interlocutory appellate jurisdiction where the defendant 'accepted as true all facts and inferences proffered by plaintiffs, and [where] defendants argue[d] that even on plaintiffs' best case, they [we]re entitled to immunity.' *Mlodzinski*, 648 F.3d at 28. Even 'a defendant who concedes arguendo the facts found to be disputed is not barred by *Johnson* from taking an interlocutory appeal on a legal claim that the defendant is nevertheless entitled to qualified immunity on facts not controverted.' . . But this avenue is not available to the defendants here because, contrary to their protests, they have not in fact accepted the version of the facts most favorable to the plaintiff.

In at least four different places in their brief, the defendants stress that, construing the Car 22 video in the most plaintiff-favorable light, there was at most 66 seconds in which they might have continued to apply force after McCue had stopped resisting. The defendants appear to have arrived at this number by misconstruing a statement of fact by the magistrate judge. Explaining why Blanchard punched McCue's lower back, buttocks, or thigh region after the officers had secured both his wrists and ankles, the magistrate judge observed that Blanchard might have done so because McCue 'squeezed' Blanchard's injured hand 'extremely hard' or, alternatively, in order to 'facilitate bringing together Mr. McCue's ankles and wrists to complete the five-point restraint.'. . The defendants inaccurately characterize this observation, asserting that the magistrate judge found that Blanchard could have punched McCue because 'McCue was resisting the Defendants' efforts to put him in a five-point restraint.' Pinpointing this moment when Blanchard punched McCue as the last moment in which the magistrate judge found that McCue had resisted, the defendants count 66 seconds from that point to the point when McCue is lifted off the ground. This insistence on 66 seconds both mischaracterizes the magistrate judge's statements about the facts and fails to present those facts in the light most favorable to the plaintiff. First, neither reason that the magistrate judge cited to account for Blanchard's punch (to prevent McCue from squeezing his hand or to facilitate the five-point restraint) necessarily equates to resistance by McCue. At this point, McCue's wrists and ankles had already been cuffed, thus minimizing his range of movements and the danger that he posed to his own and others' safety. Simply put, there is no indication in the Recommended Decision that the hand squeeze should be construed as continued resistance, much less resistance justifying the force used. The defendants' inference as such, of course, also demonstrates their failure to accept the version of facts most favorable to the plaintiff. Second, our independent assessment of the Car 22 video, construed in the light most favorable to the plaintiff, discredits the defendants' 66-seconds theory. . .The video, from 2:18 to 2:22, captures McCue resisting detainment by kicking his legs, thrashing his torso, and shouting an expletive at the officers. In contrast, from 2:22 until the officers lift him off the ground at 7:08, McCue periodically growls and makes other noises but does not kick or thrash his body again. He also complains that the officers are hurting his neck, but we cannot ascertain from the video if the officers adjusted their positions in response. Viewed in the light most favorable to the plaintiff, McCue's noises and slight movements after the 2:22 mark -- and even his squeezing of Blanchard's hand – 'may not constitute resistance at all, but rather a futile attempt to breathe while suffering from physiological distress.'. . In short, McCue's movements after 2:22 of the Car 22 video are not dispositive of whether he continued resisting. And from this perspective, there could be close to five minutes -- not 66 seconds -- during which the officers continued to exert force on a nonresisting McCue. Because the defendants have not, in fact, accepted the plaintiff's best version of the facts, we hold that there remains a genuine dispute of fact that precludes appellate jurisdiction over the denial of summary judgment. Finally, this factual dispute is material to the question on the merits. Depending on the amount of time for which the officers exerted force on McCue after he had ceased resisting, a jury could find that the officers' actions were unconstitutional under law that was clearly established in September 2012, the month of McCue's fatal encounter with the officers. The defendants argue that they should win because there was no clearly established law on this point. They are wrong. We 'adhere[ ] to a two-step approach to

determine whether a defendant is entitled to qualified immunity.' *Stamps v. Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016). First, we ask whether the facts as alleged by the plaintiff make out a violation of a constitutional right. If so, we next ask whether that right was 'clearly established' at the time of the alleged violation. . . In determining whether the law was clearly established, we 'ask "whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right," and then consider "whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right."'. . Here, we focus on the 'clearly established' prong of the qualified immunity analysis. This circuit has recognized that a 'First Circuit case presenting the same set of facts' is not necessary to hold that defendants 'had fair warning that given the circumstances, the force they are alleged to have used was constitutionally excessive.'. . We have also looked to the case law of sister circuits in determining whether a right was clearly established. . . Even without particular Supreme Court and First Circuit cases directly on point, it was clearly established in September 2012 that exerting significant, continued force on a person's back 'while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force.' *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (quoting *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004)). At least four circuits had announced this constitutional rule before the events in question here. . . .[A]s the abundant case law demonstrates, a jury could find that a reasonable officer would know or should have known about the dangers of exerting significant pressure on the back of a prone person, regardless of any lack of formal training. In sum, the disputed factual issue -- when McCue ceased resisting and for how long after that moment the officers continued to apply force on his back -- is material to the question of whether qualified immunity is proper.")

Morales v. Chadbourne, 793 F.3d 208, 218-19 (1st Cir. 2015) ("Donaghy contends that, even if probable cause was required, he is entitled to qualified immunity because he had probable cause when issuing the detainer against Morales, or, at the very least, the law was not clearly established in 2009 that the circumstances applicable to the issuance of the detainer did not constitute probable cause. . . .Because Donaghy's argument clearly rests on factual grounds and does not present a pure issue of law, his appeal on this ground 'must be dismissed for want of appellate jurisdiction.'")

Goguen v. Allen, 780 F.3d 437, 438, 455-58 (1st Cir. 2015) ("We conclude that the defendants' appeal must be dismissed for want of appellate jurisdiction. The defendants' arguments on appeal take issue with the district court's factual assessments and do not present a pure issue of law for this court's consideration. Consequently, following our holdings in *Cady v. Walsh,* 753 F.3d 348 (1st Cir.2014), and *Penn v. Escorsio,* 764 F.3d 102 (1st Cir.2014), we cannot entertain the defendants' appeal. . . .Our review of the defendants' briefing before this court convinces us that their arguments suffer from the same infirmities as those of the defendants in *Stella, Díaz, Cady,* and *Penn*. In their recitation of the facts and substantive arguments, the defendants repeatedly ignore evidence, and reasonable inferences therefrom, on which the magistrate judge based her conclusion that there were genuine issues of material fact concerning whether the defendants' actions were punitive and retaliatory. . . . [O]n an interlocutory appeal, we are not at liberty to

reexamine a district court's determination that there is a genuine issue of material fact as to a government actor's motivation in taking specific actions. . . As our discussion here demonstrates, 'overlook[ing] this separability problem' would leave us mired in numerous factual disputes that we well may face again after trial. Under such circumstances, the collateral order doctrine does not allow, and concern for the wise use of judicial resources warns against, the exercise of appellate jurisdiction. . . The defendants have not come forward with any purely legal issues that call into question the district court's denial of their motion for summary judgment on qualified immunity grounds. Consequently, we do not have jurisdiction over the defendants' appeal. The appeal is dismissed for want of jurisdiction.")

Penn v. Escorsio, 764 F.3d 102, 105 (1st Cir. 2014) ("Defendants now appeal, steadfastly asserting qualified immunity. But Defendants' appeal relies heavily on factual arguments despite our holding that 'a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact.'. . In particular, Defendants concede clearly established law at the time Lalli attempted suicide dictated officers must take some reasonable measures to thwart a known, substantial risk that a pre-trial detainee will attempt suicide. But the district court found a reasonable jury could conclude Defendants 'effectively failed to take any action to forestall' this risk as to Lalli. Based on the conceded law and the district court's factual analysis, Defendants cannot show they are entitled to qualified immunity at the summary judgment phase of this litigation. Therefore, after winnowing away the chaff to reveal the very narrow legal question we may answer under 28 U.S.C. § 1291 and the collateral order doctrine, we affirm. . . .In sum, we 'need not consider the correctness of the plaintiff's version of the facts,'. . . except, perhaps, to the extent they are 'blatantly contradicted by the record[.]'. . . But, assuming those plaintiff-friendly facts and inferences not blatantly contradicted by the record, we cannot shirk our duty to decide as a matter of law whether Defendants, on those assumed facts, violated the law and whether that law was clearly established such that Defendants are not entitled to qualified immunity. Before we reach this purely legal question, however, we must peel away the facade by which Defendants persistently portray as legal arguments what are in reality purely factual disputes. . . . Defendants do indeed assert (1) they did not violate Lalli's rights, or at least (2) a reasonable officer in their position would not have known he was violating Lalli's clearly established rights. But their arguments to support these assertions are entirely factual and thus not appropriate for interlocutory appeal. . . . As we recently stated in *Cady,* these 'fact-based challenge[s] would, of course, not defeat jurisdiction if ... advanced in the alternative. But nowhere in the defendants' brief does there appear any developed argument that the defendants are entitled to summary judgment even if the district court's conclusions about the record were correct.'. . As such, we have no basis on which to exercise jurisdiction over whether Defendants violated Lalli's clearly established rights through deliberate indifference to the risk that he would attempt suicide. . . . Ultimately, Defendants hang their hat on disagreements with how the district court weighed the evidence as to whether they in fact took any action that might have actually forestalled a substantial risk that Lalli would attempt suicide. As important as this issue may be, we do not have jurisdiction to address it on interlocutory appeal as it turns on questions of evidentiary sufficiency. . . . In sum, Defendants concede that

clearly established law dictated they take *some action* to abate a known risk, whereas the district court found a jury could conclude Defendants took effectively *no action* to abate a known risk. As such, on the purely legal question of qualified immunity here, we affirm. . . . Before we close, a caveat. This opinion should not be construed as holding Defendants are totally ineligible for qualified immunity. Depending on what Defendants can prove at trial, they may indeed be entitled to raise qualified immunity as an affirmative defense. . . Rather, we simply hold that, on the clearly established law conceded by Defendants themselves and the reasonable pro-plaintiff inferences drawn by the district court below, Defendants are not entitled to qualified immunity at the summary judgment phase.")

Cady v. Walsh, 753 F.3d 348, 350, 359-61(1st Cir. 2014) ("The plaintiff, noting there are material issues of fact in dispute, including conflicts in the opinions of expert witnesses, argues that there is no appellate jurisdiction under the doctrine of *Johnson v. Jones*, 515 U.S. 304 (1995), even if the defendants were theoretically eligible for the protections of qualified immunity. Like the district court, we bypass the question of whether qualified immunity is categorically unavailable to these defendants, because the district court's denial of immunity turned on findings that there remain disputed issues of material fact and inference. We do not have jurisdiction over this interlocutory appeal under *Johnson.* We dismiss this appeal for want of appellate jurisdiction. . . . The magistrate judge's opinion-adopted in full by the district court-denied summary judgment on the basis of the conclusion that there are genuine issues of fact and inference on the deliberate indifference claims against these three defendants. The opinion includes separate determinations as to each defendant, makes clear what portions of the record support those determinations, and outlines at length the permissible inferences that the magistrate judge believed a reasonable juror might draw from the evidence. . .Though the defendants urge us to view this appeal as presenting a pure issue of law (whether they are entitled to qualified immunity individually as a matter of law on the facts), they nowhere develop the argument that, even drawing all the inferences as the district court concluded a jury permissibly could, they are entitled to judgment as a matter of law. . . .The defendants are correct that we have 'assumed interlocutory appellate jurisdiction where defendants have accepted as true all facts and inferences proffered by plaintiffs, and [where] defendants argue that even on plaintiffs' best case, they are entitled to immunity.'. . And we may, consistent with *Johnson,* exercise review even where the defendants accept the plaintiffs' version only for the sake of argument. . . However, that formulation does not confer jurisdiction in this case. The defendants' briefing before us plainly disputes both the facts identified by the magistrate judge as well as the inferences proffered by the plaintiff and deemed reasonable by the magistrate judge. With respect to each individual defendant, the defendants' briefing objects to the way the district court construed the facts and argues that the district court and magistrate judge erred in their conclusions as to what a reasonable juror could find. Those fact-based arguments are inextricably intertwined with whatever 'purely legal' contentions are contained in the defendants' briefs: were we to attempt to separate the legal from the factual in order to address only those arguments over which we might permissibly exercise jurisdiction, we simply would not know where to begin. . . It is not merely that the Statement of Facts in the defendants' brief, as in most briefs, shades the district court's determinations in a favorable manner. Such a tactic would, on its

own, be insufficient to defeat jurisdiction. Rather, the defendants' brief repeatedly attacks the district court's factual conclusions, making no effort to separate fact-based arguments from 'purely legal' ones. . . .Finally, the defendants' objection to the district court's analysis of whether the constitutional rights in play were 'clearly established' also does not transform this appeal into one that turns on a pure issue of law. . . The defendants do not separate their qualified immunity arguments from their merits-based ones, and neither set of arguments concedes, even if only for the sake of argument, that the district court was correct in its determinations regarding what inferences were permissible on the summary judgment record. Because the defendants fail to pose even the qualified immunity question in a manner that would permit us to conclude that 'the answer to it does not depend upon whose account of the facts is correct,'. . . we lack the authority to provide an answer. This case fits squarely within *Johnson,* and we do not have jurisdiction to review it at this stage.")

Campos v. Van Ness, 711 F.3d 243, 248 & n.8 (1st Cir. 2013) ("In short, defendants-appellants have not convinced us that Campos's story is so 'blatantly contradicted by the record ... that no reasonable jury could believe it.'. . Nor have they attempted, in the alternative, to accept all of Campos's facts and inferences as true and 'argue that even on [Campos's] best case, they are entitled to immunity.'. . We therefore *dismiss* the appeal for lack of jurisdiction. . . . Defendants-appellants have suggested that '[w]hether the [Lincoln] was moving before or shortly after the shot was fired is immaterial for purposes of qualified immunity.' They have not, however, elaborated on that statement or explained why this case (on the facts as Campos has presented them) is analogous to the Eleventh Circuit and Supreme Court cases they cite. 'It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.'")

Bergeron v. Cabral, 560 F.3d 1, 6 (1st Cir. 2009) ("To recapitulate, we have jurisdiction to resolve the defendant's first ground for qualified immunity: that decommissioning does not constitute an adverse employment action, cognizable in a First Amendment retaliation suit (or, at the very least, that a reasonable public official would have believed that to be so). Conversely, we lack jurisdiction over the defendant's second theory of qualified immunity: that the record evidence is insufficient to support a finding that she acted out of political animus in decommissioning the plaintiffs. We limit our substantive discussion accordingly.")

Berube v. Conley, 506 F.3d 79, 82 (1st Cir. 2007) ("Berube contends that we lack jurisdiction to entertain this appeal from the denial of summary judgment. . . . But *Johnson* does not bar this appeal. Even accepting Berube's version of events, except so far as it would contradict his guilty plea, it is a question of law whether on the facts so assumed there is any violation of law. . . Thus we may consider this appeal on the basis of the facts offered or not disputed by Berube. Whether such a set of assumed facts constitutes a constitutional violation is a question of law we review *de novo*.").

Garnier v. Rodriguez, 506 F.3d 22, 25 (1st Cir. 2007) ("This review is limited to the issue of qualified immunity. As explained in *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 55 n. 10 (1st Cir.1991), 'when presented with an interlocutory appeal from an order denying summary judgment on the ground of qualified immunity, we have so far refrained from endorsing any form of pendent appellate jurisdiction over otherwise nonappealable interlocutory orders.'. . . The denial of a motion to dismiss on statute of limitations grounds is such a nonappealable interlocutory order.")

Cruz-Gomez v. Rivera-Hernandez, 444 F.3d 29, 33 & n.5, 34 (1st Cir. 2006) ("We should point out that there does exist an exception to the *Johnson* rule. A denial of qualified immunity because of factual issues is still reviewable if qualified immunity is warranted on the plaintiff's version of the facts together with facts that are not disputed . . . . No such situation, however, is presented here. . . . To determine, then, whether or not we have jurisdiction to consider Rivera's qualified immunity claim, we must examine the grounds upon which the district court, in its order denying summary judgment, rejected Rivera's qualified immunity argument. The district court–after laying out the 'trifurcated inquiry' for determining whether qualified immunity is available to a particular defendant under § 1983 . . . and running through the first two prongs of the analysis–stated explicitly, with regard to the third prong, that '[b]ecause there remains a disputed factual issue as to whether Defendants' actions were motivated by Plaintiff's political affiliation, Defendants' motion for summary judgment on this ground is denied.'. . Clearly, then, the district court declined to enter summary judgment on Rivera's qualified immunity claim based on its determination that 'the pretrial record set[ ] forth a Agenuine" issue of fact for trial.'. . Accordingly, pursuant to *Johnson* and its progeny, the district court's decision regarding Rivera's qualified immunity claim may not be challenged through an interlocutory appeal.").

Olmeda v. Ortiz-Quinonez, 434 F.3d 62, 65 (1st Cir. 2006) ("Qualified immunity doctrine protects government officers and employees from suit on federal claims for damages where, in the circumstances, a reasonable official could have believed his conduct was lawful. . . The immunity is not merely from damages, but (with some qualifications) from having to endure a trial. So–as a court-made exception to the final judgment rule–immediate appeals are permitted from such denials. . . One wrinkle is that the Supreme Court has disallowed such an immediate appeal where the district court's denial of immunity rested upon its determination– whether right or wrong–that immunity turned on a disputed issue of material fact. . . Yet, whatever the district court's reasoning, immediate appellate review is still permitted if immunity is required as a matter of law regardless of how the factual issue is resolved. . . In the present case, there may well be disputed factual issues as to whether Olmeda suffered significant adverse employment action and, if so, whether this was motivated at least in part by hostility to her political affiliation. However, the defendants' main claim on appeal–that Olmeda's job is not constitutionally protected against political discrimination–does not require that any disputed factual issue be decided. To that extent, we have jurisdiction to consider defendants' claim to immunity, regardless of the district court's own reasons for denying the motion.")**.**

Rivera-Jimenez v. Pierluisi, 362 F.3d 87, 95 (1st Cir. 2004) ("As to the third prong of the qualified immunity determination, '[t]he reasonableness inquiry is also a legal determination, although it may entail preliminary factual determinations if there are disputed material facts (which should be left to a jury).' . . In the instant appeal, the lower court determined that questions remained as to the issue of defendants' motive which precluded entry of summary judgment on qualified immunity grounds. Since 'pre-trial qualified immunity decisions are immediately appealable as collateral orders when the immunity claim presents a legal issue that can be decided without considering the correctness of the plaintiff's version of the facts,'. . . we cannot exercise jurisdiction over this part of the qualified immunity analysis. Doing so would entail making a determination of material facts.").

Camilo-Robles v. Zapata, 175 F.3d 41, 43-45, 47, 48 (1st Cir. 1999) ("In the supervisory liability context, the qualified immunity inquiry at times presents peculiar problems. Under prevailing jurisprudence, neither a finding of 'no liability' nor a finding of qualified immunity follows invariably upon a showing that the defendant-supervisor's conduct, in and of itself, failed directly to violate federally protected rights. Thus, in a subset of supervisory liability cases, courts facing the need to conduct a qualified immunity analysis have been compelled to go beyond the paradigmatic *Harlow* inquiry. This, in turn, has given rise to vexing questions of appellate jurisdiction. . . . When a plaintiff premises his section 1983 claim on allegations that the defendant-supervisor was a primary violator or direct participant in the rights-violating incident, the qualified immunity framework envisioned by *Harlow* and its progeny works quite well. In contrast, the framework engenders some confusion when applied to cases in which the defendant- supervisor is sued as a secondary or indirect violator. In such cases, liability attaches if a responsible official supervises, trains, or hires a subordinate with deliberate indifference toward the possibility that deficient performance of the task eventually may contribute to a civil rights deprivation. . . . In these 'neglect-of-risk' cases, confusion arises when qualified immunity is factored into the mix because we accept by hypothesis that the supervisor's actions have not, in themselves, infringed on any federally protected right. This means that, unlike the typical section 1983 case, we cannot concentrate the *Harlow* inquiry on the underlying right; if we did, the supervisor's qualified immunity would depend entirely on the reasonableness of the subordinate's actions, and such an approach would contravene the axiom that the actions of persons sued in their individual capacities under section 1983 must be assessed on their own terms. . . Such an approach also would frame the relevant inquiry in terms disquietingly close to those involved in the forbidden doctrine of respondeat superior. To resolve this enigma, courts consigned to struggle with neglect-of-risk cases generally have incorporated a review of the merits of derivative tort liability into the qualified immunity calculus. The ensuing analysis customarily centers around whether the supervisor's actions displayed deliberate indifference toward the rights of third parties and had some causal connection to the subsequent tort. . . To the extent that this methodology heightens the imbrication between merits and immunity inquiries, it is imperfect. . . . Nonetheless, we use the methodology because it is what our precedent (and that of almost every other circuit) requires for the performance of this type of supervisory liability/qualified immunity analysis. . . [B]ecause the standard qualified immunity framework fits neglect-of-risk cases awkwardly, . . . efforts to

distinguish appealable pretrial denials of qualified immunity from non-appealable ones–always a Byzantine endeavor– become even more difficult. . . . Because of its focus on tort causation and culpability, the qualified immunity analysis in neglect-of-risk cases seldom, if ever, raises abstract questions of law about whether a right was clearly established. Moreover, the law is well-settled anent a supervisor's liability for the conduct of his subordinates. Thus, in interlocutory appeals from the denial of qualified immunity in this subset of cases, the jurisdictional question frequently falls into the gray area, compelling the appellate tribunal to decide whether the assertion of qualified immunity turns on the existence of genuine issues of material fact (which is how the plaintiff invariably will characterize the situation) or on a purely legal entitlement to surcease under the relevant causation and culpability standards, regardless of factual disputes (which is how the defendant invariably will characterize the situation). . . . In this instance, the state of the record, the standards for summary judgment, and the fact-intensive nature of derivative tort liability analysis all coalesce to bring this case squarely into the *Johnson* realm. Hence, we dismiss Zapata's appeal, without prejudice, for want of appellate jurisdiction.").

Camilo-Robles v. Hoyos, 151 F.3d 1, 8 (1st Cir. 1998) ("When the district court's order is unilluminating, the appellate court must fend for itself. Anticipating the dilemma that such an inscrutable order may pose in the qualified immunity context, the Court prophesied 'that a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . Hence, we must perform the equivalent of an archeological dig and endeavor to reconstruct the probable basis for the district court's decision.").

Berthiaume v. Caron, 142 F.3d 12, 15 (1st Cir. 1998) ("The genuine disputes insulated from immediate review under *Johnson* are those involving facts, such as what happened. Questions of law application–for example, whether a set of assumed facts add up to a constitutional violation–are not so insulated and are ordinarily subject to de novo review. . . This is equally true in deciding whether the assumed facts show a violation of 'clearly established' law.").

Diaz v. Martinez, 112 F.3d 1, 3-5 (1st Cir. 1997) ("*Stella* survives the emergence of *Behrens* fully intact and remains the law of this circuit. . . . Since Vazquez does not argue that the facts asserted by the plaintiffs, even if altogether true, fail to show deliberate indifference–he argues instead what his counsel termed at oral argument 'the absence of facts,' i.e., that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context–the district court's determination is not reviewable on an interlocutory appeal.").

Berdecia-Perez v. Zayas-Green, 111 F.3d 183, 184 & n.1 (1st Cir. 1997) ("To the extent that the appellants claim that their actions are insulated from First Amendment scrutiny as a matter of fact because their only intention was to obey the law, the record presents an issue of fact as to their intent–an issue of the type that can no longer be resolved on interlocutory appeal. . . . The lack of specific findings by the lower court, while not fatal to its ruling on summary judgment, . . .

complicates the appellate task. Especially in light of the jurisdictional questions that attend the denial of summary judgment motions raising qualified immunity defenses, we urge the district courts, either by rescripts or bench decisions, to give us some indication of their reasoning.").

Hayes v. State of Rhode Island, 70 F.3d 1252 (Table), 1995 WL 714278, *1 (1st Cir. Dec. 4, 1995) (per curiam) ("[Defendant's] second argument on appeal is as follows: even if there was a clearly established constitutional right to be free from sex discrimination in the workplace, '[i]t cannot be said that Paradis' action was objectively unreasonable given the extraordinary circumstances confronting him.' Although cloaked as a purely legal issue, this argument is actually fact-based.The objective reasonableness of [defendant's] conduct . . . will necessarily turn on an issue of fact: whether the conduct was motivated by sex-based animus. . . .[W]e lack jurisdiction to consider the second issue.").

Carter v. Rhode Island, 68 F.3d 9, 13-14 (1st Cir. 1995) ("We can discern no permissible ground for treating the district court ruling – that there was a trialworthy issue of fact as to whether appellants harbored a discriminatory intent – as an immediately appealable law-based decision within the meaning of *Johnson* . . . . *Johnson* announces a jurisdictional rule – signaling a new day in the First Circuit [cite omitted] – and not one to be undone by recasting fact-based rulings denying summary judgment on qualified immunity defenses into law-based 'collateral orders' immediately appealable under *Cohen* . . . . The *Johnson* rule would be undermined – its important aims frustrated . . . were defendant officials, spurred by the prospect of delay and the leverage it occasions, permitted to contrive insubstantial 'issues of law' as grounds for interlocutory review.").

Stella v. Kelley, 63 F.3d 71, 74, 77-78 (1st Cir. 1995) ("The bottom line [after *Johnson*], then, is simply this: a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact, as distinguished from an order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right, is not reviewable on demand. In reaching this branch of its holding, the Court abrogated our earlier decision in *Unwin v. Campbell*. [cite omitted] Consequently, we acknowledge that *Unwin* and its progeny are no longer good law. . . . We lack jurisdiction to review, on an interlocutory basis, the district court's finding that there is a genuine factual dispute regarding a substantive element of the plaintiffs' constitutional claim, namely, the selectmen's actual motivation in removing the plaintiffs from office.").

Lowinger v. Broderick, 50 F.3d 61, 64 (1st Cir. 1995) ("This Court, time and again, has heeded the Supreme Court's instructions in this area and exercised jurisdiction over such appeals, including appeals from district courts that had concluded that there were genuine issues of material fact, and, on several occasions, this Court has reversed the denial of summary judgment. [cites omitted] . . . . The central question presented by this appeal is whether the district court properly concluded that the record demonstrated genuine issues of material fact regarding [defendant's]

entitlement to immunity and, therefore, that [defendant] was not entitled to summary judgment as a matter of law.").

Buenrostro v. Collazo, 973 F.2d 39, 44 (1st Cir. 1992) ("Qualified immunity is... an affirmative defense, and the 'right' to have it determined in an intermediate appeal can be waived if it is not properly asserted below.").

Prokey v. Watkins, 942 F.2d 67 (1st Cir. 1991) ("...*Mitchell* and its progeny did not alter the traditional roles of the judge and jury in cases involving qualified immunity. In *Mitchell*, the Court emphasized that 'the appealable issue is a purely legal one: whether the facts alleged ...support a claim of violation of clearly established law.'[cite omitted] Once a party has obtained at the interlocutory stage the fullest review feasible on qualified immunity viewed as a 'purely legal' question, the action should proceed to trial, following a normal course.").

SECOND CIRCUIT

Brown v. Halpin, 885 F.3d 111, 117-18 (2d Cir. 2018) ("The defendants contest the district court's interpretation of *Jackler*. We need not reach this question, however, because at this stage factual disputes preclude resolution of whether Halpin is entitled to qualified immunity. With regard to the first category of speech, Halpin argues that Brown was not ordered to make 'false' statements because reasonable people can disagree as to the meaning of the relevant Connecticut statutes and Yelmini, the alleged mastermind behind the fraudulent scheme, believed that the 'own occupation' standard was accurate. . . .While it may be true that Yelmini honestly believed that retirees are entitled to benefits under Connecticut law if they cannot perform their 'own occupation,' this conclusion is not evident on the face of the pleadings. The question of whether Halpin is entitled to qualified immunity is accordingly not a pure question of law that can be decided on interlocutory appeal because it depends on the resolution of a factual dispute: whether the proposed revisions to Brown's memoranda were false. We likewise find that factual disputes preclude determination at this time as to whether Brown's second category of speech, her statements to the Auditors, was protected. In order to be entitled to First Amendment protection, a public employee must show, among other factors, that he or she 'spoke as a citizen.'. . . The question of whether one was speaking pursuant to official job duties is 'largely a question of law for the court.'. . However, this legal analysis is informed by factual considerations. . . Here, although Brown alleges that speaking to the Auditors was outside of her job responsibilities, Halpin insists that Brown spoke 'with the state auditors because she was in an official position that required ... her to do so[.]' . . A factual determination on this point is accordingly 'a necessary predicate to ... whether immunity is a bar,'. . and Brown's written job responsibilities are sufficiently ambiguous that we cannot resolve this dispute at this phase of the litigation. We must thus dismiss Halpin's appeal.")

Soto v. Gaudett, 862 F.3d 148, 156-62 (2d Cir. 2017) ("For the reasons that follow, we conclude that, given the pertinent allegations in the complaint, the district court erred in failing to apply the

fleeing-suspect principle to Csech and should have granted his qualified-immunity-based motion for summary judgment. With regard to Stepniewski and Robinson, we lack jurisdiction to entertain their appeals, because the district court denied their motions on the ground that there were genuine issues of material fact to be resolved before their entitlement to qualified immunity could be known, and because the record, when viewed in the light most favorable to the plaintiff, does not entitle them to qualified immunity as a matter of law. The appeals by the City and Gaudett in his official capacity--entities to which principles of qualified immunity are inapposite--are also dismissed for lack of appellate jurisdiction. . . .Thus, 'after the denial of the defendants' motions for summary judgment, "we have jurisdiction to review a denial of qualified immunity to the extent it can be resolved on stipulated facts, *or on the facts that the plaintiff alleges are true*, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find."' 'What we may not do, after *Johnson* and *Behrens*, is entertain an interlocutory appeal in which a defendant contends that the district court committed an error of law in ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense.'. . . There is . . . no dispute as to the fact that when Csech shot Soto with his taser, Soto was fleeing. As the district court noted, no precedent as of January 23, 2008, established that a suspect who was fleeing had a right not to be stopped by means of a taser. There being no remaining material facts to be determined with respect to the excessive force claim against Csech, the undisputed fact that Soto was fleeing when Csech tased him was therefore dispositive. Csech should have been granted summary judgment on the basis of qualified immunity, dismissing this claim against him. . . .In light of [the] evidence, a rational juror could find that, when Stepniewski and Robinson fired their tasers, Soto had never given any indication of possessing a weapon and was not fleeing; that Soto was on the ground, completely entangled in taser wires . . . struggling even to get into a push-up position; and that with Stepniewski and Robinson in such close proximity to Soto in those circumstances, the firing of their tasers constituted objectively unreasonable use of force. The district court's ruling that the evidence, taken in the light most favorable to the plaintiff, was sufficient to create triable issues relevant the entitlement of Stepniewski and Robinson to qualified immunity is not immediately appealable. . . .Robinson's own statements support an inference that his cruiser struck Soto. And the revisions of that aspect of his earliest statements may cast doubt on the credibility of his assertions that his collision with Soto was accidental. The district court's ruling that the record evidence is sufficient to require a trial on these issues affecting the applicability of the accidental-contact principle is not immediately appealable.")

Gardner v. Murphy, 613 F. App'x 40, 43-44 (2d Cir. 2015) ("In resolving this appeal, we do not reach several questions as a result of the limits on our jurisdiction. First, we lack jurisdiction to review whether there is in fact a 'genuine' factual dispute regarding the extent of Gardner's deprivation of exercise or the adequacy of the defendants' proffered safety justification or of their consideration of feasible alternatives. . . Second, because we must 'disregard any disputed facts or facts that contradict [Gardner's] version of events,'. . . we do not resolve the factual disputes necessary to decide the merits of Gardner's underlying constitutional claim. As a result, we do not consider whether the defendants would be entitled to qualified immunity if there were in fact an adequate safety justification for imposing the exercise-restraint policy on Gardner. We similarly

lack jurisdiction to determine Gardner's entitlement to equitable relief, which does not depend on the defendants' entitlement to qualified immunity.")

Taylor v. Rogich, 781 F.3d 647, 648-50 (2d Cir. 2015) ("This appeal comes to us in an unusual posture. The district court did not certify this appeal pursuant to 28 U.S.C. § 1292(b). Rather, Rogich asserts that we have jurisdiction to hear this appeal under 28 U.S.C. § 1291, which permits appeals from 'final decisions' of the district courts. As we have had occasion to observe, '[t]ypically, an interlocutory appeal from a district court's denial of a claim of qualified immunity is brought after the district court denies the claim at the pleading stage or upon denial of the defendant's motion for summary judgment based on the plaintiff's, or an agreed upon, version of the facts.'. . The present appeal comes to us after a trial on the issue of liability and before a determination of the issue of damages. Moreover, it challenges the denial of a motion pursuant to Rule 50 on the ground that the defendant was entitled to judgment as a matter of law in his favor because the jury was obligated to credit his version of the events, which he argues compels the conclusion that he was entitled to qualified immunity. . . .The present case differs from *Britt* because the defendant's appeal challenges the sufficiency of the evidence relied on by the jury. Indeed, the order from which he appeals, as we previously observed, specifically rejected his argument that 'when his version of events is credited, the Court must enter judgment as a matter of law in favor of the Defendant, Keith Rogich.' That is simply another way of arguing that the evidence was insufficient to sustain the jury's verdict. The Supreme Court has made it clear that we lack appellate jurisdiction to decide an interlocutory appeal from a district court's denial of a claim of qualified immunity to the extent that the denial involves only a question of evidence sufficiency. . . Although the issue normally arises, as in *Johnson,* on interlocutory appeals from summary judgment motions, we see no reason why the rule should differ in cases where the appeal is from a decision denying a Rule 50 motion for judgment as a matter of law, rendered following the liability phase of a bifurcated trial. Indeed, the burden facing a defendant at that stage, who faces only a short trial on the issue of damages in which his conduct is not directly at issue, is considerably less than that on a defendant who claims entitlement to summary judgment, which would prevent an entire trial. We note that the Seventh Circuit has held that, in some circumstances, denials of Rule 50 motions may not be appealable even when they raise solely issues of law. In *Mercado v. Dart*, 604 F.3d 360, 363 (7th Cir.2010) (Easterbrook, *J.*), after the jury returned a verdict on the issue of liability but before the presentation of evidence about damages, the defendant filed a notice of appeal for the purpose of challenging the jury's rejection of his claim of immunity. . . In the course of resolving the appeal, Judge Easterbrook wrote that, even if it involved solely an issue of law, different considerations of policy were present in such a mid-trial appeal than were present in a post-trial appeal after a jury was discharged. . . . The trial in this case was never intended to be a unitary trial which was disrupted by a mid-trial appeal on the issue of qualified immunity. The trial on liability ended on June 4, 2013. The presiding judge then invited written elaborations of the parties' positions on qualified immunity. The briefing extended through the summer and fall of 2013, and the judge decided the motion, in an extensive written opinion, on January 2, 2014. Thus, unlike the situation addressed by Judge Easterbrook, there was no oral ruling on a mid-trial motion, intended as a mere step along the way to a verdict.

Any disruption of the possibility of a smooth progression to the damages phase of the trial had already occurred, quite independent of the appealability of the judge's eventual decision on the qualified immunity motion. Similarly, there was no mid-trial disruption in *Britt.* There, the case was tried to verdict on both the issue of liability and damages. . . The order granting a new trial, from which the appeal was taken, was entered after the jury had been discharged. . . In sum, while we have had occasion to distinguish this case from other cases that would pose a problem of a mid-trial disruption occasioned by a mid-trial appeal, we leave open the question of whether an interlocutory appeal in such a case would lie even if it were based purely on an issue of law. Because the appeal in this case is based on the sufficiency of the evidence, we hold only that such an appeal on qualified immunity grounds must be dismissed. . . Accordingly, for the reasons stated above, the appeal is DISMISSED for lack of appellate jurisdiction.")

Raspardo v. Carlone, 770 F.3d 97, 112 (2d Cir. 2014) ("The individual defendants here contend that, even when all disputed factual issues are resolved in favor of the plaintiffs, they are entitled to qualified immunity. We thus need not resolve any disputed facts or weigh the sufficiency of the evidence as prohibited by *Jones,* 515 U.S. at 319–20, to determine if the plaintiffs suffered actionable sexual harassment or disparate treatment. Whether the defendants' conduct, as examined by viewing the evidence presented at summary judgment in a light favorable to the plaintiffs, violated the plaintiffs' Fourteenth Amendment rights to equal protection (through sexual harassment or disparate treatment) is a question of law. We therefore have appellate jurisdiction to determine whether the defendants violated the plaintiffs' constitutional rights based on the plaintiffs' version of the facts.")

McColley v. County of Rensselaer, 740 F.3d 817, 825, 826 (2d Cir. 2014) ("A confidential informant's credibility is plainly relevant—even critical—to the probable cause determination, and thus the fact that surveillance provided no evidence or even suggestion of criminal activity should have been included in the warrant affidavit. Just as with the omission of McColley's identity, the omission of the unsuccessful surveillance altered the 'totality of the circumstances' under which the information provided by the CI should have been assessed. And just as with the omission of McColley's identity, the weight that an issuing magistrate would have given to this information is a question for the finder of fact. . . The dissent's insistence on the existence of arguable probable cause does not alter our analysis. Arguable probable cause, a doctrine imported into this Circuit's corrected affidavit jurisprudence in *Escalera,* . . . exists if '(a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'. . The dissent conflates the questions of facts regarding the CI's credibility with that of whether reasonable officers could disagree as to the existence of probable cause. Questions of fact exist in this case with respect to the reliability of the CI's information regarding 396 First Street. Whether *reasonable* officers would disagree on whether there was probable cause is equally dependent on the questions of fact previously identified. If the CI's information regarding McColley's home was not reliable, then reasonable officers would *not* disagree as to the lack of probable cause. The dissent would have the doctrine of arguable probable cause swallow the entire rule of qualified immunity as well as the related

limitation on our jurisdiction. This cannot be. The information omitted from the warrant application was indeed 'necessary to the finding of probable cause' because both McColley's identity and the lack of criminal activity observed at her home go directly to the 'totality of circumstances' review that underlies the assessment of probable cause based upon information provided by confidential informants. The Appellants would have this Court conclude that once information has been provided by a confidential informant who has proven reliable in the past, a warrant is necessarily supported by probable cause when based upon information from that confidential informant. This view misapprehends the 'totality of circumstances' test—in assessing whether there is probable cause based upon a confidential informant's reports, courts must look to *all* of the circumstances bearing upon the information's reliability. . . .In this case, McColley's identity, the fact that the CI did not report that a woman was present in the apartment . . . and the fact that attempts at independent corroboration via surveillance showed no sign of criminal activity are all omissions that bear upon the reliability of the overall information provided. While we share the concerns raised in the concurrence with respect to the particularly intrusive method of entry used in this case, . . . issues of fact underlie the weight that the issuing judge would have given the omitted information regardless of the method of entry employed. As such, this case lies outside of the jurisdiction of this Court to perform interlocutory review of the denial of summary judgment. The issue of qualified immunity, including the question of reasonableness as to the type of warrant sought and used, is not properly before us at this stage of the proceedings. . . . For all of the reasons discussed above, the appeal is dismissed for a lack of jurisdiction.")

McColley v. County of Rensselaer, 740 F.3d 817, 826, 827, 831, 832, 836, 837 (2d Cir. 2014) (Calabresi, J., concurring) ("Despite the fact that they reach opposite conclusions, my colleagues' opinions both find strong support in our Court's case law. This is because our precedents in this area are as divided as our panel. Judge Pooler would send this case to a jury, having identified a question of fact: the weight a neutral magistrate would give to evidence omitted from Investigator Michael Riley's warrant affidavit. The existence of such a fact question strips us of jurisdiction over this interlocutory appeal. Judge Raggi would instead dismiss Plaintiff Ronita McColley's Fourth Amendment claim against Riley. She would do so either because an affidavit, even without the omissions, would still have established probable cause for the search of McColley's home, or, alternatively, because *some* reasonable people might find that such probable cause would have been established. This would, in turn, suffice to give rise to 'arguable probable cause,' which, she asserts, would result in qualified immunity for Riley. This latter scenario, in which some would and others would not find probable cause on the basis of the corrected affidavit, is, of course, precisely what Judge Pooler describes as a factual dispute about the weight of the omitted evidence. But while Judge Pooler concludes that such a dispute strips us of jurisdiction, Judge Raggi sees it as a basis for granting Riley qualified immunity as a matter of law. . . .Since a question of fact exists, I join Judge Pooler's judgment that we lack jurisdiction to hear this qualified immunity appeal. In other words: because the issue of whether a warrant for an *unannounced* invasion of McColley's apartment would have issued had Riley provided in his warrant affidavit all the information he had requires the resolution of factual questions, I join Judge Pooler in concluding we do not have jurisdiction, and that this case ought to be returned to the district court for a jury

trial. . . . On the one hand, some of our cases do say that determining the weight a magistrate would give omitted evidence is a question of fact. And that question eludes summary judgment if, but only if, reasonable factfinders could disagree about the answer—that is, about whether probable cause would still be found. Yet, if reasonable people disagree about the existence of probable cause, then *arguable* probable cause has, by definition, been established under others of our cases! Since *arguable* probable cause exists whenever reasonable people disagree about the existence of *actual* probable cause, no case of this sort should ever go to a jury. Either a court will decide probable cause (one way or the other) as a matter of law, or the court will find that probable cause is open to reasonable dispute and will on that basis dismiss the case, again as a matter of law, on qualified immunity grounds. But, to continue around the circle of our cases, this, of course, conflicts with the clear holding of *Velardi* that doubtful cases' must be sent to a jury. . . .By identifying, as I believe I have, this conflict in our cases, I do not mean to suggest that one side, rather than the other, is the 'correct' one. It is only to say that we are dealing with two confusing, and at times confused, lines of cases. Our Court would do well to provide clarity in this area. But the task is not an easy one, and, in any event, this case does not require us—and thus does not allow us—to undertake it. We need not resolve the tension I have described because the only question this case *requires* us to confront—whether the particular warrant that was granted still would have issued had the affidavit been more complete—can be easily answered, I believe, under either line of our case law. . . .In light of the fact that there is conflicting evidence on whether the officers had a particularized belief—as against only the generalized conjecture that drug traffickers typically have firearms—that Sport, Stink, and Chuck were armed, there is indisputably a question of fact on an important issue. And that question precludes summary judgment and deprives us of jurisdiction over this interlocutory appeal. . . .This disputed and material question of fact is enough for me to conclude that summary judgment was inappropriate under *either* line of this Circuit's cases and, therefore, to join Judge Pooler's holding that we have no jurisdiction over the issue of qualified immunity at this time, and that this case must return to the district court for further proceedings, and possibly proceed to trial.")

McColley v. County of Rensselaer, 740 F.3d 817, 837, 838, 845-47, 851 (2d Cir. Jan. 21, 2014) (Raggi, J., dissenting) ("My colleagues Judges Pooler and Calabresi conclude, albeit for different reasons, that we lack jurisdiction over this interlocutory appeal from a denial of qualified immunity. Judge Pooler thinks that certain omissions from defendant Michael Riley's affidavit in support of a search warrant for premises inhabited by plaintiff Ronita McColley raise questions of fact as to probable cause to search at all. Judge Calabresi thinks the omissions undermine authorization to conduct the search on a 'no knock' basis. I respectfully disagree with both conclusions. . . . Upon review of a corrected affidavit, I identify no material question of fact as to the existence of probable cause to search or reasonable suspicion to do so on a no-knock basis, much less any dispute as to the existence of arguable probable cause or reasonable suspicion. Accordingly, I would exercise jurisdiction and order that judgment be entered in favor of Riley on grounds of qualified immunity. . . . [O]n the totality of circumstances presented in the corrected affidavit, I conclude that probable cause to search was so plainly established as a matter of law as to admit no genuine issue of fact as to whether a judge would issue the requested warrants. . . .

[E]ven if the corrected affidavit does not state probable cause as a matter of law—which I submit it does—it certainly provides 'an objective basis to support arguable probable cause.'. . Because the existence of arguable probable cause renders any factual disputes arising out of omitted information 'not material to the issue of qualified immunity,' I respectfully submit that the inability to discern what weight a judge might give the omitted information in making a probable cause determination is immaterial to qualified immunity. . . *see also Velardi v. Walsh,* 40 F.3d at 573 ("[P]laintiffs may not unwrap a public officer's cloak of immunity from suit simply by alleging even meritorious factual disputes relating to probable cause, when those controversies are nevertheless not material to the ultimate resolution of the immunity issue." (internal quotation marks omitted)). In the absence of a material factual dispute as to Riley's entitlement to qualified immunity on McColley's probable cause challenge, I respectfully submit that we have jurisdiction to award him summary judgment. . . . For the reasons stated in the preceding section, I think we must conclude that Riley had at least arguable reasonable suspicion to think that evidence would be destroyed and officers would be in danger if they knocked and announced their presence before entering the four apartments, including the First Street apartment, associated with the targets of the drug trafficking then under investigation. . . .In sum, based on the particularized information in the corrected affidavit detailed in this opinion, as well as our own case law, it cannot be said that Riley was 'plainly incompetent' or 'knowingly violate[d] the law' in concluding that reasonable suspicion of danger and evidence destruction supported a no-knock entry into the First Street apartment. . . To conclude, because I am convinced that the challenged search warrant is supported, as a matter of law, by both probable cause to search the First Street apartment and reasonable suspicion to do so on a no-knock basis—or at least by arguable probable cause and arguable reasonable suspicion—I respectfully dissent from the decision to dismiss this case for lack of jurisdiction. I would instead enter judgment in favor of Riley on the ground of qualified immunity.")

Stansbury v. Wertman, 721 F.3d 84, 89 (2d Cir. 2013) ("We may exercise pendent jurisdiction to decide whether Stansbury 'has alleged a constitutional violation at all' before deciding whether Wertman is shielded by qualified immunity. . . Although it is no longer required, *see Pearson v. Callahan,* 555 U.S. 223, 236 (2009), the probable cause inquiry may precede any inquiry into qualified immunity because there cannot be an allegation of a constitutional violation where probable cause justifies an arrest and prosecution. . . In this case, it is 'beneficial,'. . . to first address whether Wertman had probable cause, because it best serves the interests of judicial economy. . . . Thus, because the probable cause inquiry is inextricably intertwined with the immunity question, we will exercise our 'discretion[ ][to] consider otherwise nonappealable issues' based on our review of the question of qualified immunity.")

Winfield v. Trottier, 710 F.3d 49, 53, 54 (2d Cir. 2013) ("As there are no disputed facts in this case, Plaintiffs' argument is essentially that an appeals court lacks jurisdiction over an interlocutory appeal that turns on a determination of reasonableness. But in other contexts, courts hold that reasonableness may be a question of law when the facts are undisputed. . . .Plaintiffs fail

to cite a single case holding that an appellate court lacks jurisdiction to review a ruling on qualified immunity when the facts are undisputed.")

Clubside, Inc. v. Valentin, 468 F.3d 144, 161 (2d Cir. 2006) (as amended) ("In some instances, we have discretion to review pendent appeals by parties who are not entitled to immediate appellate review if they raise issues that are necessary to ensure meaningful review of the immediately appealable issues or are inextricably intertwined with the appealable issues. . . . Simply put, if a claim fails as to the individual defendants because there was no violation of the plaintiff's constitutional rights, then it necessarily fails as to the municipality as well. Here, we have concluded that the individual board members are entitled to qualified immunity on Clubside's substantive due process claim because they did not violate Clubside's substantive due process rights under the Fourteenth Amendment. It is therefore not possible for Wallkill to be held liable on this claim. Exercising our pendent appellate jurisdiction, we hold that Clubside's substantive due process claim against Wallkill should be dismissed.").

Skehan v. Village of Mamaroneck, 465 F.3d 96, 112 (2d Cir. 2006) ("Thus, where a court grants summary judgment to the individual defendants based on their qualified immunity on the grounds that the defendants did not violate the plaintiffs' constitutional rights, and that ruling necessarily forecloses a finding of municipal liability, a court may exercise its pendent appellate jurisdiction and reverse the denial of the municipality's summary judgment motion, as well. . . This is such a case: our decision that plaintiffs' claim against the Board cannot proceed necessarily disposes of the claim against the Village.")**.**

Demoret v. Zegarelli, 451 F.3d 140, 152 (2d Cir. 2006)("Where the standards for finding a violation under other statutes are the same as those for finding a constitutional violation under § 1983, and we premise a finding of qualified immunity on the fact that no individual defendant violated the plaintiff's constitutional rights, liability under statutes other than § 1983 also tends to be inextricably intertwined with the qualified immunity question. Finally, where a municipality's liability arises solely from the actions of an employee who is entitled to qualified immunity, we may, in our discretion, reach the liability of the municipality under the doctrine of pendent appellate jurisdiction.").

Holeman v. Ctiy of New London, 425 F.3d 184, 192, 193 (2d Cir. 2005) ("The question whether the police have qualified immunity for a use of deadly force is likewise governed by the standard of objective reasonableness. . . The district court held that there are genuine issues of material facts regarding whether Darrel Holeman complied with the police officers' commands and whether he possessed the silver handgun. The extent of any compliance would be immaterial if Holeman drew a handgun, however, and the district court does not point to record evidence supporting the Plaintiffs-Appellees' theory that the silver handgun was planted by the police (no such evidence jumps out). . . But we lack jurisdiction to review the district court's ruling with respect to the use of deadly force because the ruling is premised on the genuineness of a dispute about a material fact. In an interlocutory appeal of a qualified immunity claim, where the parties dispute material facts, the issue of whether there is sufficient evidence to support plaintiff's version of the material

facts is within the province of the district court. . . We therefore dismiss the appeal with respect to Officer Garcia's use of deadly force. . . . As to the post-shooting use of force, the district court likewise concluded that material facts were genuinely in dispute–i.e., whether Holeman possessed the silver handgun and whether he presented a continued threat after being shot–and therefore the court denied summary judgment. We lack jurisdiction to review that ruling for the same reason we lack jurisdiction to review the denial of summary judgment on the use of deadly force. For the foregoing reasons: as to the initial traffic stop and the attempted pat-down, we direct that summary judgment be entered in favor of defendants; as to the use of deadly force and use of post-shooting deadly force, we dismiss this appeal for lack of jurisdiction.").

Sadallah v. City of Utica, 383 F.3d 34, 39 (2d Cir. 2004) ("Normally, we would not have jurisdiction to consider plaintiffs' claims against the City because only the issue of Hanna's entitlement to qualified immunity was immediately appealable. When, however, an appellate court 'has taken jurisdiction over one issue in a case, it may, in its discretion, exercise jurisdiction over an independent but related question that is inextricably intertwined with the [appealable issue] or is necessary to ensure meaningful review of that issue.' . . Here, plaintiffs' 'stigma plus' claim against the City is 'inextricably intertwined with' the issue of Hanna's qualified immunity, because plaintiffs' entire case against the City is based on precisely the same argument that we rejected in finding for Hanna on the qualified immunity issue. Accordingly, we may dispose of plaintiffs' claims against the City. Because they have not established a 'plus' sufficient to maintain a 'stigma plus' claim, plaintiffs' due process claim against the City must be dismissed.").

Loria v. Gorman, 306 F.3d 1271, 1280 (2d Cir. 2002) ("The critical issue is whether the interlocutory appeal raises purely legal issues. Once a defendant asserting qualified immunity has agreed to be bound by the plaintiff's version of the facts, the issues become purely legal and we have jurisdiction over an interlocutory appeal from a denial of immunity.").

Locurto v. Safir, 264 F.3d 154, 164, 165, 170 (2d Cir. 2001) ("[E]ven when a district court rejects a qualified immunity defense due to a perceived need for further discovery, an appellate court may exercise jurisdiction to review an interlocutory appeal that questions whether–on the plaintiff's version of the facts– defendant's actions violated the plaintiff's clearly established constitutional rights as a matter of law. . . . [W]e hold that where a district court denies an initial dispositive motion on qualified immunity grounds prior to discovery, the appealability of that ruling depends not on whether the motion was denied without prejudice to its renewal following discovery, but rather on whether the ruling turns on a question of law. . . . Unlawful intent, a necessary element of plaintiffs' properly framed First Amendment retaliation claim, is an issue on which the district court found a genuine issue of material fact sufficient to defeat defendants' motion for summary judgment based on qualified immunity. Because plaintiffs' claim turns on an issue of fact rather than on a question of law, that portion of the present interlocutory appeal pertaining to the First Amendment claim must therefore be dismissed for lack of appellate jurisdiction.").

Martinez v. Simonetti, 202 F.3d 625, 633 (2d Cir. 2000) ("While claims of immunity are 'sometimes practically intertwined with the merits,'. . . the collateral order doctrine, permitting immediate appellate review of qualified immunity issues, nonetheless requires that a distinction be made between legal-based and fact-based appeals. Here, if Officer Heinz-Faljean had argued that, even taking as true the circumstantial evidence that she was aware of plaintiff's beating, she was entitled to a finding of objective reasonableness as a matter of law, her appeal could go forward. She grounds her argument instead on the alleged insufficiency of the evidence to show her awareness of Martinez' plight. As such, she appeals 'a portion of a district court's summary judgment order that, though entered in a Aqualified immunity" case, determines only a question of Aevidence sufficiency," i.e., which facts a party may, or may not, be able to prove at trial.' Accordingly, the trial court's order denying Officer Heinz-Faljean's motion for summary judgment is not a 'final order' for purposes of appellate review.").

X-Men Security, Inc. v. Pataki, 196 F.3d 56, 66, 67 (2d Cir. 1999) ("Where the district court bases its refusal to grant a qualified-immunity motion on the premise that the court is unable to, or prefers not to, determine the motion without discovery into the alleged facts, that refusal constitutes at least an implicit decision that the complaint alleges a constitutional claim on which relief can be granted. That purely legal decision does not turn on whether the plaintiff can in fact elicit any evidence to support his allegations; it thus possesses the requisite finality for immediate appealability under the collateral order doctrine. . . . A district court's perceived need for discovery does not impede immediate appellate review of the legal questions of whether there is a constitutional right at all and, if so, whether it was clearly established at the time of the alleged conduct, for until 'th[ese] threshold immunity question[s are] resolved, discovery should not be allowed.'").

Tolbert v. Queens College, 164 F.3d 132, 139 (2d Cir. 1999) ("In the present case . . . the facts as to the conduct in which appellants engaged are sharply disputed, and there is no hypothetical assumption by appellants that they engaged in the conduct that Tolbert alleges. Although appellants argue that discrimination based solely on language does not violate any clearly established constitutional rights, there is a dispute as to whether that was the extent of their conduct, and the district court found that the statements attributed to Liebman by Tolbert and Meltzer could be interpreted by a rational factfinder as reflecting a grading policy designed to give preferential treatment to certain students at least in part because of their ethnic background. Appellants do not even remotely suggest that they would be entitled to qualified immunity if, in grading the examinations, they discriminated on the basis of race or ethnicity. Rather, their premise, like that of the petitioners in *Johnson*, is 'we didn't do it.' . . . [T]he district court's denial of summary judgment on the basis that the evidence is sufficient to support a jury's finding that appellants engaged in the conduct described by Tolbert is not immediately appealable.").

Gubitosi v. Kapica, 154 F.3d 30, 33 (2d Cir. 1998) (per curiam) ("Here the gravamen of Kapica's qualified immunity defense (and this appeal) is that he lodged the charges against plaintiff because of her insubordination, not because of her complaints regarding police practices– and that plaintiff

has offered no affirmative evidence to counter this assertion that he 'didn't do it'–that is, he 'didn't retaliate.' Having reviewed the record for allegations favorable to plaintiff that were sufficiently supported to create jury issues,. . . and having assumed those allegations to be true, we have nevertheless failed to identify 'affirmative evidence from which a jury could find' that plaintiff has carried her burden of showing that Kapica engaged in retaliation." *citing Crawford-El v. Britton*).

Tierney v. Davidson, 133 F.3d 189, 194 (2d Cir. 1998) ("Even where the lower court rules that material disputes of fact preclude summary judgment on qualified immunity, we may still exercise interlocutory jurisdiction if the defendant contests the existence of a dispute or the materiality thereof, or (what may be the same thing) contends that he is entitled to qualified immunity even under plaintiff's version of the facts.").

Lee v. Sandberg, 136 F.3d 94, 101 (2d Cir. 1997) ("Here, for the purposes of this appeal and in accord with *Salim*, the State Troopers stipulate to plaintiff's factual allegations that Mrs. Lee was not a credible informant and that the State Troopers consequently did not have actual probable cause to arrest plaintiff. Therefore, despite the district court's conclusion that Mrs. Lee's credibility presented a genuine issue of material fact, we have appellate jurisdiction to review the denial of summary judgment on the basis of these facts stipulated to by the parties.").

Martinez v. City of Schenectady, 115 F.3d 111, 114 (2d Cir. 1997) ("Here, the district court unambiguously stated that questions of fact prevented a ruling that the officers are entitled to qualified immunity. The district court, however, never specified exactly what those fact questions were. Simply declaring that genuine issues of fact exist is not sufficient, in and of itself, to prevent an appeal. [*citing Behrens* and *Salim*] . . . . Thus, we have jurisdiction to determine whether, assuming that Martinez's version of the facts is correct, the officers are entitled to qualified immunity.").

Salim v. Proulx, 93 F.3d 86, 89-91 (2d Cir. 1996) ("Though it was arguable that *Johnson* intended to preclude an interlocutory appeal whenever a district judge denied summary judgment on the ground that a material fact was genuinely in dispute, the Court's subsequent decision in *Behrens* dispelled such a notion. . . . After *Johnson* and *Behrens*, several types of fact-related rulings remain appealable. The clearest example is where the defendant appeals the denial of an immunity defense on the ground that, on stipulated facts, the defense is established as a matter of law. Similarly, an appeal is available where the defendant accepts, for purposes of the appeal, the facts as alleged by the plaintiff. [citing *Jemmott*] Indeed, *Behrens* goes further and permits an appeal where a defendant contends that the immunity defense is established on those facts, alleged by the plaintiff, that the district court ruled were sufficiently supported to create jury issues. . . . Even if the district court did not identify the particular charged conduct that it deemed adequately supported, *Johnson* permits an appeal, though it acknowledges that a 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . . Thus, as long as the defendant

can support an immunity defense on stipulated facts, facts accepted for purposes of the appeal, or the plaintiff's version of the facts that the district judge deemed available for jury resolution, an interlocutory appeal is available to assert that an immunity defense is established as a matter of law. . . . To summarize, whether the defendant claims that he 'didn't do it,' or that it was objectively reasonable to believe that his action did not violate clearly established law, *Johnson* and *Behrens* instruct that a denial of the immunity defense is not subject to interlocutory appeal to challenge a trial judge's rejection of a defendant's contention that the plaintiff's evidence is insufficient to create a jury issue as to either of the defendant's claims. . . . An appeal is available, however, to challenge the trial judge's rejection of the immunity defense where the defendant contends that on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find, the immunity defense is established as a matter of law because those facts show either that he 'didn't do it' or that it was objectively reasonable for him to believe that his action did not violate clearly established law. What we may not do, after *Johnson* and *Behrens*, is entertain an interlocutory appeal in which a defendant contends that the district court committed an error of law in ruling that the plaintiff's evidence was sufficient to create a jury issue on the facts relevant to the defendant's immunity defense.").

In re State Police Litigation, 88 F.3d 111, 126 (2d Cir. 1996) ("Viewed in the light most favorable to plaintiffs as the parties opposing summary judgment, the record more than suffices to show genuine issues of fact to be tried. . . . In light of these factual issues, the policy considerations underlying the immediate appealability of a denial of summary judgment based on a determination of legal issues, set out in *Mitchell* and adumbrated in *Johnson v. Jones*, are not served by an immediate appeal. The qualified-immunity defense asserted here depends on the resolution of defendants' factual premise that there was no listening to recorded confidential conversations; if the factfinder finds such listening, the qualified-immunity defense will be mooted, for defendants do not contend that they have immunity if there was listening; if the factfinder concludes that there was no such listening but finds in favor of plaintiffs nevertheless, the qualified-immunity defense can be determined at that point. The postponement of consideration of defendants' immunity defense until after trial does not deprive defendants of an opportunity to avoid a trial, for the nature of their defense affords them no such opportunity: recording is conceded, and the immunity defense asserted here cannot be resolved without a trial to determine, inter alia, whether there was listening, to what extent there was listening, and whether there was use. Thus, though the qualified-immunity defense is meant to protect defendant officials from going to trial, that defense as asserted here, even if upheld, can have no such effect, for an appellate opinion in favor of either party on the hypothetical legal question posed by defendants would not eliminate the need for a trial on any claim.").

Jemmott v. Coughlin, 85 F.3d 61, 66 (2d Cir. 1996) ("[D]efendants' motion seeking summary judgment on the ground of qualified immunity was denied by the district court because 'plaintiff has raised questions of fact as to the defendants' actions and intent sufficient to preclude a finding' of qualified immunity at this stage. For the purpose of this appeal, however, the defendants are not contesting the sufficiency of plaintiff's proof, or the district court's ruling that disputed issues of

fact require the denial of their summary judgment motion. Instead, they argue that even if plaintiff's allegations are accepted as true, no clearly established constitutional right was violated. Thus, we proceed as if the defendants had moved to dismiss plaintiff's complaint under Rule 12(b)(6) for failure to 'state a claim of violation of clearly established law.' . . . The district court's rejection of the defendants' argument is a purely legal determination that we have jurisdiction to review.").

Genas v. State of New York Dep't of Correctional Servs., 75 F.3d 825, 833 (2d Cir. 1996) ("The [district] court held that since '[p]laintiff ha[d] put forth specific, nonconclusory circumstantial evidence of retaliation sufficient to overcome the heightened evidentiary standard for qualified immunity,' defendants were not entitled to summary judgment. This ruling is not appealable under *Johnson*. The district court came to the correct legal conclusion that the law of retaliation is clear, and then determined that a fact issue remains as to an element of the claim on the merits. *Johnson* bars pretrial appellate review of such 'sufficiency of the evidence' claims. In addition, the *Johnson* Court explicitly extended its ruling to constitutional tort cases that, like the case before us, involve questions of intent.").

Blue v. Koren, 72 F.3d 1075, 1084 n.6 (2d Cir. 1995) ("Ordinarily, a district court's ruling that a genuine dispute of facts material to a claim of qualified immunity exists is not appealable. [*citing Johnson*] However, we exercise pendent jurisdiction in the instant matter because the district court's ruling in that regard is intertwined with the issue of the standard to be applied in retaliation cases and review of that ruling is necessary to a meaningful review of the appealable issue of whether the district court applied the proper standard. [*citing Swint*] Explication of the proper standard in the abstract is clearly far less helpful to the parties or the district court than an application of it in a concrete setting, particularly when we deal with an issue of first impression.").

Rodriguez v. Phillips, 66 F.3d 470, 476, 479 (2d Cir. 1995) ("*Johnson* does not disturb the rule that whether a disputed fact is material is a question of law and therefore, in the qualified immunity context, a finding of materiality is subject to prompt de novo review. . . . We now review in turn each of plaintiffs' claims to determine whether a clearly established right was violated, or whether any disputed factual issues identified by the district court are material to the resolution of defendants' qualified immunity defense. . . . In the context of the confrontation described in Rodriguez' own words, there was no clearly established First Amendment right to approach and speak to Officer Rubin. We conclude, therefore, that even if Rubin's actions were in retaliation for that exchange, the corrections officer still was entitled to qualified immunity and the district court wrongly denied his motion for summary judgment on this cause of action . . . .").

Lennon v. Miller, 66 F.3d 416, 422 (2d Cir. 1995) ("Inasmuch as the parties do not dispute the material facts and the court did not cite any such factual disputes, the question of the reasonableness of the officers' actions is the only question that could have prevented the court from ruling 'as a matter of law' on the qualified immunity defense. However, in the absence of a material factual dispute, the question of whether it was objectively reasonable for the officers to

believe that they did not violate the plaintiff's rights is a purely legal determination for the court to make. [cites omitted] The determination challenged here does not concern the existence of genuine issues of fact; no party disputes the facts here. Rather, the appellants argue that the district court erred as a matter of law in failing to apply properly the qualified immunity standard. Because this case poses only a legal question about the objective reasonableness of the defendants' actions under undisputed facts, *Johnson* does not preclude appellate jurisdiction.").

Kaluczky v. City of White Plains, 57 F.3d 202, 207 (2d Cir. 1995) ("The Supreme Court has recently cautioned that, on an interlocutory appeal from an order rejecting a claim of qualified immunity, a claim involving a 'pendent party' is an 'unrelated question' that cannot be resolved under pendent jurisdiction. [citing *Swint*] However, the Court did not otherwise narrow the scope of pendent jurisdiction, and appeared to contemplate pendent appellate jurisdiction over an independent but related question that is 'inextricably intertwined' with the issue of qualified immunity or is 'necessary to ensure meaningful review' of that issue. . . The defendants ask this Court to exercise pendent jurisdiction in order to decide whether Kaluczky's status as a confidential policymaking employee bars his invocation of First Amendment rights in the circumstances presented and whether Kaluczky's six-year term of office affords him additional First Amendment protection. The immunity question turns on whether it was objectively reasonable for the defendants to believe that their conduct violated Kaluczky's clearly established constitutional rights. That question entails an inquiry into the nature and extent of the rights that Kaluczky can assert, and whether Kaluczky's entitlement is well-settled. In our view these issues are 'inextricably intertwined'. We therefore conclude that there is 'sufficient overlap in the factors relevant to the appealable and nonappealable issues to warrant our exercising plenary authority over the appeal.' [cite omitted]").

Weaver v. Brenner, 40 F.3d 527, 533, 537-38 (2d Cir. 1994) ("[I]f resolution of the qualified immunity defense hinges upon disputed factual issues, or upon mixed questions of fact and law, an immediate appeal does not lie under the collateral order doctrine. Appellate review must in that event await resolution of the factual issues at trial. The reason for this is plain: when material factual issues are present, a district court decision does not finally determine any claims of right. Whether the applicability of qualified immunity depends upon genuine issues of material fact is a legal question subject to de novo review . . . . Since we have exercised jurisdiction over an issue in this case, we may consider other nonappealable issues in our discretion, if the appealable and nonappealable issues sufficiently overlap to warrant our exercising plenary authority over the appeal.").

Whalen v. County of Fulton, 19 F.3d 828, 830 (2d Cir. 1994) ("The denial of the motion [for summary judgment] without prejudice to renewal before trial does not conclusively determine the disputed question, namely, whether the individual defendants are entitled to qualified immunity. For this reason we need not decide whether the validity of the denial of the summary judgment motion can be determined as a matter of law because, even if the validity of the order could be

decided on this record, the order lacks that element of finality necessary for an interlocutory appeal under the collateral order doctrine.").

Whalen v. County of Fulton, 19 F.3d 828, 832 (2d Cir. 1994) (Walker, J., dissenting) ("The majority ... concludes that we lack jurisdiction because the district court did not definitively resolve the question of whether defendants are entitled to qualified immunity. The practical consequence of the majority's decision is to allow the district court to resolve this question at any time as long as defendants who deserve qualified immunity will be spared a trial. I believe the majority's approach misapprehends the protection afforded by the qualified immunity doctrine. This doctrine protects immunized defendants not only from trials, but also from broad based discovery where there is no showing that defendants have violated a clearly established right . . . .").

O'Neill v. Town of Babylon, 986 F.2d 646, 649 (2d Cir. 1993) (jurisdiction to hear appeal because issue of qualified immunity can be resolved as a matter of law.).

Cartier v. Lussier, 955 F.2d 841, 844-45 (2d Cir. 1992) (if factual determination is necessary predicate to resolution of qualified immunity issue, interlocutory review is not available; whether disputed facts are material to resolving the applicability of the doctrine is a legal question . . . if, even when all facts as alleged by the nonmoving party are regarded as true, the moving party is still entitled to judgment as a matter of law, then factual disputes, however genuine, are not material, and their presence will not preclude summary judgment).

THIRD CIRCUIT

Roth v. City of Hermitage, 709 F. App'x 733, ___ (3d Cir. 2017) ("In this case, the District Court effectively (if temporarily) denied qualified immunity because it ruled that additional factual development was needed in state court before the Court could fully resolve the merits of Roth's claim. Therefore, by implication it concluded that qualified immunity could not be granted on the current record, and that decision was immediately appealable under the collateral order doctrine. . . . That is true even though the District Court's stay order does not immediately subject McGonigle to 'the personal costs and aggravations of presenting a defense.'. . The order still subjects him to the continued threat of future litigation. Accordingly, we have jurisdiction. . . The District Court was required to rule on the qualified immunity defense before dismissing without prejudice and granting a stay. We have emphasized that 'a district court must avail itself of the procedures available under the Federal Rules to facilitate an early resolution of the qualified immunity issue.'. . Or, in other words, 'the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense ... so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.'. . Because the District Court did not consider qualified immunity, McGonigle did not benefit from 'the substance of the qualified immunity defense,'. . . and remains potentially liable in a future suit. Failing to consider the qualified immunity defense before dismissing without prejudice on the merits was error because the District Court failed to resolve a 'motion asserting qualified immunity ... at the earliest possible stage in the litigation.'. .

Accordingly, we will remand to allow the District Court to consider whether the claims against McGonigle should be dismissed with prejudice on the basis of qualified immunity.")

Davenport v. Borough of Homestead, 870 F.3d 273, 278 (3d Cir. 2017), *cert. denied,* 138 S. Ct. ___ (2018) ("Insofar as the District Court's order pertains to Schweitzer, Matakovich, and Kennedy, 'we possess jurisdiction to review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right.'. . . However, we lack jurisdiction to review the order insofar as it pertains to Gorecki because he challenges the District Court's determination that the 'pretrial record sets forth a "genuine" issue of fact' for the jury. . . Relying on the taxicab's dash-camera footage, Gorecki argues that the District Court should have concluded that no reasonable jury could find that he discharged his firearm into Burris's vehicle *after* the pursuit ended. . . And Gorecki's legal challenges assume the absence of this otherwise disputed fact. Because we are unable to address the factual challenge about *when* Gorecki discharged his firearm at Burris's vehicle at this stage of the proceedings, we are precluded from addressing the derivative legal challenges.")

Frank C. Pollara Grp., LLC v. Ocean View Inv. Holding, LLC, 784 F.3d 177, 187-88 (3d Cir. 2015) ("In light of *Ortiz,* it is clear that, if an earlier dispositive argument is not renewed through motions for judgment as a matter of law under Rule 50(a) and Rule 50(b), the litigant propounding the argument may not seek appellate review of a decision rejecting it, unless that argument presents a pure question of law that can be decided with reference only to undisputed facts. To the extent our decision in *Pediatrix* suggests otherwise, it has been overruled by *Ortiz.* While we are mindful that '[i]t would be unfair to ... penalize [a litigant] for failing to jump up and down or labor an objection' that is already a part of the record, . . . it is not unfair to make litigants deal with the full record. Again, '[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.' *Ortiz,* 562 U.S. at 184. Insofar as an issue has a factual component, the failure to raise the issue in motions for judgment as a matter of law at and after trial makes it inappropriate for an appellate court to address what should have been directed to 'the judge who saw and heard the witnesses and had the feel of the case which no appellate printed transcript can impart.'. . The failure to preserve arguments in properly filed Rule 50 motions is particularly vexing when, as is often the case, a litigant is really challenging the sufficiency of the evidence. . . *Ortiz* clarified that only 'neat abstract issues of law' fit the exception to the rule requiring that arguments be preserved in Rule 50 motions. . . Cases in which the facts that could render an actor answerable for his conduct are disputed or in which questions exist as to what occurred simply do not fit.")

George v. Rehiel, 738 F.3d 562, 571 (3d Cir. 2013) ("Here, . . . the district court did not specifically engage in the traditional qualified immunity analysis before denying the individual federal defendants' motions to dismiss. Rather, as noted, in its order addressing the individual federal defendants' motion for clarification, it simply said the 'defense of qualified immunity in this case may be clarified by discovery.' However, in that same order the district court held that the amended complaint stated a valid claim against each federal defendant for violation of the First and Fourth

Amendments. Thus, because the district court held that the amended complaint sufficiently pled valid constitutional claims against the individual federal defendants, the practical effect of the district court's order was a denial of the defense of qualified immunity. Accordingly, we will regard that order as an appealable collateral order.")

Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60, 69 (3d Cir. 2011) ("Pursuant to *Iqbal*, our appellate jurisdiction extends beyond merely determining whether the complaint avers a clearly established constitutional violation, and we also have the power to consider the sufficiency of the complaint itself. . . '[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded.'. . . Accordingly, 'the sufficiency of [a plaintiff's] pleadings is both "inextricably intertwined with" and "directly implicated by" the qualified immunity defense.'")

Griffin-El v. Beard, No. 10-2335, 2011 WL 332481, at *3 & n.2 (3d Cir. Feb. 3, 2011) ("We will . . . vacate the District Court's denial of summary judgment on the basis of qualified immunity and remand for the District Court to specify, in compliance with *Forbes*, which material facts, if any, preclude qualified immunity as to each Appellant. On remand, the District Court should ensure it analyzes separately the specific conduct of each Appellant in determining whether Griffin-El has 'adduced evidence sufficient for a factfinder to conclude that a reasonable public official would have known that his or her conduct had violated clearly established constitutional rights.'. . . We are sensitive to the burden we impose on the able District Court where, as here, a plaintiff sues a host of individuals. But each state actor is entitled to have the defense of qualified immunity considered in the context of his or her specific conduct in determining whether there is indeed a genuine dispute of fact material to the question of whether 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'")

Blaylock v. City of Philadelphia, 504 F.3d 405, 414 (3d Cir. 2007) ("In *Scott*, although the District Court held that Harris's conduct during the chase (other than his speeding) was a fact subject to reasonable dispute, the Supreme Court disagreed. *Scott* would thus appear to support the proposition that, in this interlocutory appeal, we may exercise some degree of review over the District Court's determination that the degree of resemblance between Andre and Dana's accomplice is subject to reasonable dispute. In *Scott*, however, the District Court was charged with determining whether the defendants' conduct was reasonable under the circumstances, and the Court had before it a videotape of undisputed authenticity depicting all of the defendant's conduct and all of the necessary context that would allow the Court to assess the reasonableness of that conduct. Moreover, as the Supreme Court held, the videotape clearly supported Scott's version of events, and 'blatantly contradicted' Harris's. Such a scenario may represent the outer limit of the principle of *Johnson v. Jones*–where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review. Here, by contrast, we have only two police photographs, and an argument by the defendants not that the two men depicted are similar in appearance, but that one of the men depicted in the photographs must be similar in appearance to a third person whose picture we do

not have. As the District Court noted, the photographs show little more than that 'both Omar and Andre Blaylock are young black men who had short hair at the time their police photographs were taken,'. . .and, other than the officers' affidavits stating that they thought they were observing Omar selling drugs with Dana, there is 'no evidence relating to the physical characteristics of [Dana's accomplice].' Moreover, as Andre's counsel noted at argument, the photographs do not depict Andre's or Omar's height, weight, or build. Thus, unlike *Scott v. Harris*, we do not have a situation in which 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it.' Even if we assume that the photographs are so similar to each other that a police officer could reasonably mistake one photograph for the other, that does not establish that no reasonable jury could find that Andre did not resemble Dana's accomplice (who is undisputedly not Omar).Because the officers make no arguments regarding the false arrest claim that do not ask us to contradict the District Court's determination of which facts are subject to genuine dispute, we will dismiss that portion of their appeal for lack of jurisdiction under *Johnson v. Jones*.")**.**

Hamilton v. Leavy, 322 F.3d 776, 786 (3d Cir. 2003) ("We recently announced in *Forbes v. Township of Lower Merion,* 313 F.3d 144, 146 (3d Cir.2002), a supervisory rule requiring district courts to set out what facts they relied on and the legal reasoning they used to determine whether to grant a summary judgment motion for qualified immunity. We now extend this rule to require district courts to provide the same information when deciding motions for summary judgment based on absolute immunity defenses. Accordingly, we remand to the District Court in order for it to reconsider whether the defendants are entitled to quasi-judicial absolute immunity.")

Forbes v. Township of Lower Merion, 313 F.3d 144, 148, 149 (3d Cir. 2002) ("In this case, the District Court denied Salkowski's and McGowan's summary-judgment motions without identifying the set of material facts that the Court viewed as subject to genuine dispute. As a consequence, we are greatly hampered in ascertaining the scope of our jurisdiction. If the District Court had specified the material facts that, in its view, are or are not subject to genuine dispute, we could 'review whether the set of facts identified by the district court [as not subject to genuine dispute] is sufficient to establish a violation of a clearly established constitutional right,' *Ziccardi*, 288 F.3d at 61, but based on the District Court's spare comments in denying the defendants' summary-judgment motion, we are hard pressed to carry out our assigned function. We do not fault the District Court for not specifically identifying the genuinely disputable material facts because our prior qualified-immunity cases have not imposed the requirement. However, we find that the lack of such a specification impairs our ability to carry out our responsibilities in cases such as this. . . . We cannot hold that the District Court's denial of summary judgment constituted error here because in the absence of a clear supervisory rule, the Federal Rules of Civil Procedure do not impose on trial courts the responsibility to accompany such an order with conclusions of law. . . We instead exercise our supervisory power to require that future dispositions of a motion in which a party pleads qualified immunity include, at minimum, an identification of relevant factual issues and an analysis of the law that justifies the ruling with respect to those issues.").

Ziccardi v. City of Philadelphia, 288 F.3d 57, 62 (3d Cir. 2002) ("In our view, *Johnson* clearly applies to factual disputes about intent, as well as conduct. First, we see nothing in the *Johnson* Court's reasoning that supports a distinction between issues of conduct and issues of intent. . . . Second, at least one passage in *Johnson* refers directly to questions of intent and suggests that the Court specifically contemplated that its decision would not allow interlocutory appeals regarding the sufficiency of the evidence of intent.").

Bines v. Kulaylat, 215 F.3d 381, 384 (3d Cir. 2000) ("The Supreme Court has not decided whether denial of summary judgment based on a good-faith defense can ever fall within the collateral-order doctrine. We have not, nor has any other circuit court of appeals, decided the issue. Nevertheless, we find our course amply guided by previous decisions in which we have addressed the collateral-order doctrine. Those decisions clearly indicate that denial of summary judgment based on a good-faith defense does not permit an interlocutory appeal.").

In re Montgomery County, 215 F.3d 367, 374 (3d Cir. 2000) ("Because the District Court never explicitly addressed the Appellants' immunity claims, we must decide whether we have interlocutory jurisdiction to review an implied denial of those claims. We join the other Circuit Courts of Appeals that have addressed this issue and hold that we do. [citing cases]").

Acierno v. Cloutier, 40 F.3d 597, 609 (3d Cir. 1994) (en banc) (overruling *Prisco*, which had held that orders denying qualified immunity in cases seeking both damages and injunctive relief were not immediately appealable).

Kulwicki v. Dawson, 969 F.2d 1454, 1460 (3d Cir. 1992) (while recognizing that "...Courts of Appeals do not take a uniform view of appellate jurisdiction over denials of immunity[,]" court concluded that "[o]ur jurisdiction to hear immunity appeals is limited only where the district court does not address the immunity question below, or where the court does not base its decision on immunity *per se*....Insofar as there may be issues of material fact present in a case on appeal, we would have to look at those facts in the light most favorable to the non-moving party.").

Kulwicki, *supra*, 969 F.2d at 1461 n. 7 ("We note that an appeal from a denial of immunity where factual issues remain is distinct from that where the defendant official denies taking the actions at issue. Unlike a claim of official immunity, the 'I didn't do it' defense relates strictly to the merits of the plaintiff's claim, and is therefore not immediately appealable.").

FOURTH CIRCUIT

Adams v. Ferguson, 884 F.3d 219, 224 (4th Cir. 2018) ("Whether Ferguson owed Mitchell a duty under state negligence law is neither 'inextricably intertwined' with the question of whether Ferguson owed Mitchell a duty under the United States Constitution, nor is it 'necessary' to resolve these state law issues to 'ensure meaningful review' of Ferguson's claimed federal constitutional immunities. We therefore lack jurisdiction to review the district court's denial of

Ferguson's motion to dismiss Adams's state law claims and remand those claims to the district court.")

Ussery v. Mansfield, 786 F.3d 332, 337-38 & n.4 (4th Cir. 2015) (*Johnson* prohibits us from reviewing on interlocutory appeal the district court's conclusion that the record does not definitively indicate the extent of Ussery's injuries. Thus we cannot and do not review the district court's assessment of the evidence. However, in denying summary judgment, the district court necessarily held that Ussery could satisfy the *Norman* standard. To be sure, the court did not expressly state that Ussery could establish a violation of clearly established law under *Norman*. But to deny the officers' motion for summary judgment, the court had to reach that conclusion. We undoubtedly have jurisdiction to review that purely legal conclusion. . . . Our jurisdiction in cases such as this is circumscribed but critical. For the Supreme Court has made plain that qualified immunity 'is an *immunity from suit* rather than a mere defense to liability' and 'is effectively lost if a case is erroneously permitted to go to trial.'. . .We note that an order denying summary judgment on the basis of qualified immunity would be entirely unreviewable if the defendant officers *conceded* that Ussery's version of the facts would establish that the officers violated clearly established law. . . . [T]he officers in this case challenge both legal and factual conclusions of the district court, and our interlocutory jurisdiction permits review of the legal conclusions.")

Tobey v. Jones, 706 F.3d 379, 390 & n.4 (4th Cir. 2013) ("Mr. Tobey was *not* required to cross-appeal the district court's dismissal of his Fourth and Fourteenth Amendment claims, as our pendent jurisdiction is limited, and should only be used in extraordinary circumstances. . . . Therefore, the district court's decision to dismiss Mr. Tobey's Fourth Amendment claim is inconsequential to this Court's finding that Mr. Tobey asserted a plausible First Amendment claim. Again, viewing the facts in the light most favorable to Mr. Tobey, we find that it is unsettled whether his behavior was in fact 'disruptive' or that it was 'eminently reasonable' to effectuate an arrest based on his conduct in spite of the text of the Fourth Amendment written on his chest. . . Thus, Mr. Tobey's First Amendment claim properly survives the motion to dismiss.")

Kane v. Lewis, 483 F. App'x 816, 823 (4th Cir. 2012) ("Here, the district court denied the officers' motion for summary judgment based on qualified immunity with regard to Kane's knock-and-announce claim 'because a dispute of material fact exists as to whether the officers knocked and announced.'. . 'Whether we agree or disagree with the district court's assessment of the record evidence on that issue ... is of no moment in the context of this interlocutory appeal.'. . This is because 'there is no legal issue on appeal on which we could base jurisdiction.'. . Illustrative of this point is the fact that the officers present no legal questions in their opening brief, only arguments about the disputed factual questions regarding the knock-and-announce claim. As such, we must also dismiss the cross-appeal for lack of jurisdiction.")

Al Shimari v. CACI Intern., Inc., 679 F.3d 205, 221-23 (4th Cir. 2012) (en banc) ("Here, as in *Iqbal*, there is no 'vast pretrial record' to encumber our decisionmaking, . . . but the issues before us are more factually entrenched and far less amenable to meaningful analysis by resort merely to

the plaintiffs' pleadings. Thus, unlike *Iqbal*, these appeals encompass fact-based issues of law, with the need for additional development of the record being among those 'matters more within a district court's ken.'. .Hence, insofar as an interlocutory appeal of a denial of immunity requires resolution of a purely legal question (such as whether an alleged constitutional violation was of clearly established law), or an ostensibly fact-bound issue that may be resolved as a matter of law (such as whether facts that are undisputed or viewed in a particular light are material to the immunity calculus), we may consider and rule upon it. . . .*Behrens*, then, confers jurisdiction of these appeals only if the record at the dismissal stage can be construed to present a pure issue of law. We might discern such an issue if we were of the opinion, as the dissenters evidently are, that persons similarly situated to the appellants are inevitably and invariably immune from suit premised on any and all conduct occurring (1) when they are in a war zone, by virtue of (2) a contract with the government. But not even *Saleh*, which receives a ringing endorsement in both dissents, went that far. . . . The appellants are requesting immunity in a context that has been heretofore unexplored. These are not disputes in which facts that might be material to the ultimate issue have been conclusively identified. Moreover, those facts that may have been tentatively designated as outcome-determinative are yet subject to genuine dispute, that is, a reasonable fact-finder could conclude in favor of either the plaintiffs or the defendants. . . Because the courts' immunity rulings below turn on genuineness, we lack jurisdiction to consider them on an interlocutory appeal.")

Al Shimari v. CACI Intern., Inc., 679 F.3d 205, 224 (4th Cir. 2012) (en banc) (Duncan, J., concurring) ("I respect the majority's well-reasoned opinion in this case and therefore fully concur in its conclusion that we lack jurisdiction to hear this appeal. I write separately only to express my hope that the district courts in these consolidated appeals will give due consideration to the appellant's immunity and preemption arguments—especially in light of the Supreme Court's recent opinion in *Filarsky v. Delia*, 132 S.Ct. 1657 (2012), as discussed in Judge Niemeyer's dissent—which are far from lacking in force.")

Al Shimari v. CACI Intern., Inc., 679 F.3d 205, 248-57 (4th Cir. 2012) (en banc) (Niemeyer, J., joined by Wilkinson, J., and Shedd, J., dissenting) ("The majority today disregards controlling Supreme Court precedents and belittles the gravity of the issues presented in these cases, purporting to find comfort in its narrow application of the collateral order doctrine. Its effort is regrettably threadbare. Military contractors performing work in the Iraqi war zone under the command and control of the United States military have invoked our jurisdiction, claiming immunity from tort suits brought by foreign nationals detained as part of the war effort. As a matter of convenience, the majority ducks making a decision on this issue of greatest importance to the public interest because it feels that discovery and further district court proceedings would assist it in making a decision. But in giving that as a reason, the majority fails to follow the Supreme Court's *command* in *Behrens v. Pelletier*, 516 U.S. 299 (1996), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that we hear such claims of immunity *now*, simply on the basis of the complaint. It is simply too easy to claim, as does the majority, that unresolved facts bar consideration now of the defendants' immunity claims. There are always unresolved facts. Without any explanation, the

majority fails to recognize that the *undisputed facts of the plaintiffs' claims* alone allow a court to rule on the defendants' immunity claims *as a matter of law.* It would appear that only the Supreme Court can now fix our wayward course. . . .To the extent the majority is simply stating the well-established rule that a collateral order immunity appeal must present a purely legal question, there can be no debate that the appeals in the cases before us present just such a question. *Mitchell, Behrens,* and *Iqbal* establish without question that these appeals present a purely legal question because we are asked to decide whether the defendants are entitled to derivative immunity *on the basis of the facts as alleged by the plaintiffs* in their complaints. The possibility that a factfinder might construe these facts in favor of the *defendants* at a later time does not, by some heretofore unknown legal device, create a factual dispute that deprives us of jurisdiction at the motion-to-dismiss stage. As a matter of logical necessity, there can be no genuine issue of material fact when we are reviewing only the facts as alleged by the plaintiff in the complaint. The majority simply ignores *Mitchell's* statement that 'the appealable issue is a *purely legal one: whether the facts alleged'* support a claim of immunity. . .The majority's claim that it could only discern a 'pure issue of law' if it 'were of the opinion, as the dissenters evidently are, that persons similarly situated to the appellants are inevitably and invariably immune from suit,' *ante,* at 32–33, demonstrates the fundamental error of its approach. If the majority believes that the defendants cannot establish their claims to immunity from suit, accepting as true the facts in the complaint, then *it should deny the derivative immunity defense on the merits* and allow the district courts to proceed and develop a fuller factual record. Indeed, *Behrens* considers this very possibility, allowing the defendants to pursue a second immunity appeal after the denial of summary judgment even if they have already unsuccessfully appealed the district court's denial of their motion to dismiss. . . Surprisingly, the majority *admits* that we have jurisdiction to review whether 'facts that are undisputed or viewed in a particular light are material to the immunity calculus,'. . . but then mysteriously concludes that we cannot determine whether these same facts *establish* immunity. Thus, under the majority's novel approach to the collateral order doctrine, we have jurisdiction to review whether undisputed facts are 'material' to a question of immunity, but we have no jurisdiction to review the immunity determination itself. Such a rule finds absolutely no legal support. . . .[R]ecently, the Supreme Court has reaffirmed the need to protect those who perform government *functions* with immunity regardless of whether they are public employees, such as military officers, or private individuals retained to perform the same function. *See Filarsky v. Delia,* 132 S.Ct. 1662, 1663 (2012). . .But the majority never disputes this, nor even discusses why the allegations in the complaint present only a frivolous and unsubstantial claim to derivative immunity. Instead, it frames the dispositive question as one of finality. In so doing, the majority ignores the fundamental and well-established principle that a district court's denial of a motion to dismiss based on an immunity from suit is a final, immediately appealable collateral order. Whether discovery could help make the issue more clear or whether the district courts wanted a fuller record before ruling on the merits of immunity is irrelevant. The defendants claim entitlement to be protected *from the litigation process,* and the court's refusal to grant the immunity denied them that protection and was therefore an appealable decision under *Mitchell, Behrens, Iqbal, Jenkins, Winfield,* and *McVey.* It is most regrettable that the majority so readily tramples on these precedents, which clearly provide us with appellate jurisdiction *at this stage of the*

proceedings to consider the substantial claims of immunity asserted by the defendants on the basis of the facts alleged in the complaint.")

Bellotte v. Edwards, 629 F.3d 415, 427 (4th Cir. 2011) ("The Bellottes. . . contend that because we have appellate jurisdiction over the denial of qualified immunity with respect to the no-knock entry and excessive-weapons claims, *see Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), we should choose to exercise pendent jurisdiction over the cross-appeal. Specifically, the Bellottes contend that '[i]t would be in the interest of judicial economy to resolve all of these issues on this appeal' because '[b]oth the Police Defendants' appeal and the Plaintiffs' cross-appeal deal with the constitutionality of the search of the Bellotte residence and whether the Police Defendants are entitled to qualified immunity.' This argument misses the mark. For starters, '[p]endent appellate jurisdiction is an exception of limited and narrow application driven by considerations of need, rather than of efficiency.'. . Even if this were otherwise a proper case for pendent jurisdiction, '[w]e are constrained by the language of the Supreme Court as well as our own precedent from recognizing efficiency considerations as a basis for the exercise of pendent appellate jurisdiction.'. . Instead, we have recognized that such jurisdiction is proper only when an issue 'is (1) inextricably intertwined with the decision of the lower court to deny qualified immunity or (2) consideration of the additional issue is necessary to ensure meaningful review of the qualified immunity question.'. . The Bellottes have not argued that any of the issues on cross-appeal are 'inextricably intertwined with,' or 'necessary to ensure meaningful review of,' the denials of qualified immunity below such that pendent appellate jurisdiction is now appropriate. This omission is understandable. Our review of the qualified immunity denials in no way requires an evaluation of the claims that were dismissed on summary judgment concerning the validity of the search warrant and the reasonableness of elements of the search other than the no-knock entry and use of weapons. The appeal and the cross-appeal, while sharing certain wholesale commonalities of fact (the incidents leading up to and during the search of the Bellotte residence) and law (the Fourth Amendment), nevertheless present quite distinct factual and legal issues at the retail level. . . We therefore dismiss the cross-appeal for lack of jurisdiction.")

H.H. ex rel. H.F. v. Moffett, 335 F. App'x 306, 312 (4th Cir. 2009) (collecting cases from sister circuits that have found deferrals of decision on an immunity claim while discovery was conducted immediately appealable where district court had Aplainly decided. . . as a matter of law" that defendants' alleged conduct violated plaintiff's clearly established constitutional rights)

Iko v. Shreve, 535 F.3d 225, 235, 236 (4th Cir. 2008) ("We agree with Plaintiffs that the officers' appellate argument on this claim asks us to revisit a number of factual disputes. As explained in their briefs and extensively at oral argument, however, the officers *also* argue that the right to be free from an excessive deployment of force by pepper spray was not clearly established–a question of law that does not require us to revisit any factual disputes. We possess jurisdiction over such a legal determination. . . . Again, on appeal, the officers argue about the contours of their legal duty to address Iko's medical needs and whether existing case law clearly established that he be treated, on the facts accepted by the district court. There is, therefore, a legal question appropriate for our

review at this time: whether the officers' failure to secure medical care for Iko after he was doused in pepper spray and collapsed in the medical room violated Iko's clearly established right to have his medical needs addressed.").

Ridpath v. Bd. of Governors of Marshall University, 447 F.3d 292, 305, 306 (4th Cir. 2006) ("Generally, qualified immunity must be raised in an answer or a dismissal motion. . . Moreover, where–as here– defendants raise an issue such as qualified immunity only in a reply brief, a district court is entitled to refuse to consider it at that stage of the proceedings. . . . We are not, however, precluded from considering an affirmative defense that was not properly asserted in the trial court, if the court has nonetheless chosen to address it. . . Such review is particularly appropriate if the plaintiff suffers no prejudice, and if hearing the appeal serves 'the strong public policy in economizing the use of judicial resources by avoiding relitigation.'. . Here, we cannot say that Ridpath was prejudiced by the district court's consideration of the untimely qualified immunity claims of the Board and the Administrators. Indeed, the court rejected them. Moreover, although there is no indication in the record that Ridpath was allowed to respond to these claims, it also does not appear that he sought to do so. Ridpath fully addressed the relevant qualified immunity issues in his submissions to us, and he did not initially object to our jurisdiction. In these circumstances, and in the interest of judicial economy, we will consider the merits of the qualified immunity claims of the Board and the Administrators.").

Altman v. City of High Point, 330 F.3d 194, 207 n.10 (4th Cir. 2003) ("High Point has also appealed the denial of summary judgment. Normally, High Point's appeal would be improper because the denial of summary judgment is not a final order subject to interlocutory appeal and High Point cannot defend on the basis of qualified immunity. However, our resolution of the claims against Officers Moxley and Perdue fully resolves the claims against High Point as well, since a municipality cannot be liable in the absence of a constitutional violation by one of its agents. . . For that reason, we find that the issues raised by High Point on appeal are 'inextricably intertwined' with those raised by the officers. Accordingly, we will exercise pendent appellate jurisdiction over High Point's appeal and reverse the district court's denial of summary judgment as to the City.").

Lewis v. Boucher, No. 01-1584, 2002 WL 939556, at *4, *5 (4th Cir. May 9, 2002) (unpublished) ("Here, the district court explicitly stated that a reasonable jury could find that Boucher shot Lewis in the back, but it did not fully set forth the other facts it assumed to be supported by the summary judgment record when it rejected Boucher's qualified immunity defense. We have therefore undertaken the inquiry mandated by *Winfield* in order to identify the facts that the district court likely assumed in making its qualified immunity ruling. We conclude that, viewed in the light most favorable to Lewis, the evidence in the summary judgment record would allow a reasonable jury to conclude that Lewis was pulled over for a minor traffic violation (driving with a headlight out); that Lewis was completely unarmed; that in the moments before he was shot, Lewis kept his hands visible in compliance with Officer Boucher's request "to show [Boucher] his hands or to get down on the ground;" that Lewis did not threaten Boucher physically or verbally; and that Boucher issued no verbal warning before he shot Lewis. Along with the fact that Boucher shot Lewis in the

back, these are the facts the district court likely assumed in its summary judgment ruling. They provide the factual basis for our review of the district court's legal conclusion that Boucher was not entitled to qualified immunity on Lewis's excessive force claim. Assuming this factual basis, we have no difficulty in concluding that the district court correctly denied Boucher's motion for summary judgment on the ground of qualified immunity.").

Brown v. Gilmore, 278 F.3d 362, 366 n.2 (4th Cir. 2002) ("Brown contends that the officers may not appeal the district court's denial of qualified immunity because the district court determined that there were genuine issues of material fact in dispute. . . However, this appeal does not turn on disputed facts, but, rather, presents a question of law–whether the facts taken in the light most favorable to Brown allege a constitutional violation at all. . . . And the Supreme Court only recently made clear in *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001), that qualified immunity is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' . . The questions of law presented in this case are thus precisely those which should be resolved at 'the earliest possible stage in litigation' if appeal under the collateral order doctrine is to serve the purposes of immunity at all.").

Gould v. Davis, 165 F.3d 265, 269 (4th Cir. 1998) ("While the district court is correct that different facts in evidence could be used to support different conclusions as to whether the officers deserve qualified immunity, this does not indicate a factual dispute, but rather, a question of law. The district court's order does not point to disputed questions of fact, but rather, disputed legal inferences that could be drawn from what is an undisputed factual record. . . . Here, there is no dispute about what information the officers had before them when they applied for and executed the no-knock warrant; the only question is whether the hypothetical "reasonable officer" would have known, given those undisputed facts, that his conduct was in violation of clearly established constitutional law. . . . .[W]e have jurisdiction to review the district court's order.").

McVey v. Stacy, 157 F.3d 271, 276 (4th Cir. 1998) ("[I]n rejecting the immunity defense 'at this early stage,' the district court necessarily subjected the commissioners to the burden of further trial procedures and discovery, perhaps unnecessarily. Its order implicitly ruled against the commissioners on the legal questions of (1) whether the plaintiff has adequately stated a claim for violation of a First Amendment right, and, if so, (2) whether the asserted constitutional right was clearly established at the time the defendants acted. . . These questions do not raise factual questions concerning the defendants' involvement, which would not be appealable under *Johnson*. On the contrary, they are answered with the facts of the complaint assumed to be true as a matter of law. They are therefore the very questions that *Mitchell* held were appealable. . . . [W]e have jurisdiction to consider whether the defendants' conduct as alleged in the complaint is, as a matter of law, protected by qualified immunity.").

Rish v. Johnson, 131 F.3d 1092, 1100-01 (4th Cir. 1997) ("In sum, the evidence supporting a conclusion that the prison officials possessed actual knowledge of a substantial risk of harm to the inmates is insufficient to raise a genuine issue of material fact. And, there is no clearly established

law dictating that prison officials are deliberately indifferent to a substantial risk of bodily harm if they fail to provide equipment to inmates to ensure that they may follow universal precautions in performing the duties of an orderly. Thus, the district court erred in refusing to grant summary judgment to the prison officials on the basis of qualified immunity.").

Rish v. Johnson, 131 F.3d 1092, 1101 (4th Cir. 1997) (Murnaghan, J., dissenting) ("This Circuit's decision in *Winfield* . . . almost totally emasculated the Supreme Court's *Johnson* holding. In *Winfield*, we held that 'in determining what facts the district court "likely assumed," we must determine what the evidence actually shows when viewed in the light most favorable to the nonmoving party.'. . Today's majority uses the *Winfield* holding to return to the precise practice that the Supreme Court overruled in *Johnson*–reversing a denial of summary judgment on the grounds of qualified immunity because the circuit court believes that 'the evidence presented was insufficient to create a triable issue of fact.'").

Ervin v. Mangum, No. 93-7129, 1997 WL 664606, at *8 (4th Cir. Oct. 27, 1997) (unpublished) (Wilkins, J., concurring in judgment) ("*Johnson* and *Winfield* acknowledged that in order to conduct the legal analysis that is properly considered on interlocutory appeal from a denial of summary judgment on the basis of qualified immunity, a reviewing court must know the factual circumstances to which the legal standards are to be applied. . . The question arises, then, how a reviewing court is to determine the factual basis to which it should look in resolving the legal question over which it possesses jurisdiction. The *Johnson* Court recognized that it will often be possible for an appellate court to utilize the facts that were assumed by the district court in denying the motion for summary judgment. . . But, the Court also accepted that when the district court fails to set forth the facts on which its decision was based, 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.' . . . . [The district court's] ruling falls short of providing an adequate factual basis for us to conduct a review of the officials' entitlement to qualified immunity. . . . This lack of specificity in the ruling of the district court dictates that we must conduct a review of the record to determine what the evidence, viewed in the light most favorable to Ervin, discloses. . . . Hence, under these circumstances it is necessary to conduct the type of analysis undertaken by the majority, and I agree with its ultimate conclusion that, viewed in the light most favorable to Ervin, the undisputed facts demonstrate that the prison officials are entitled to qualified immunity on Ervin's claims of deliberate indifference to a substantial risk of harm and, except for Officer Scott, to a serious medical condition.").

Gillen v. Huggins, Nos. 94-2654, 94-2655, 1997 WL 657134, *2 (4th Cir. Oct. 23, 1997) (unpublished) ("Like the district court in *Winfield*, the district court in this case has found that genuine issues of material fact are at issue. Were this factual finding the appellants' sole ground of contention, we would have no jurisdiction to consider it as a final decision under 28 U.S.C.A. § 1291 (West 1993). But even assuming that the resolution of those disputed facts favors the appellants, the appellees' alleged conduct must nonetheless have violated clearly established statutory or constitutional rights of which a reasonable person would have known. The district

court's denial of appellants' motion for summary judgment necessarily indicates the court's ruling that a reasonable trier of fact, assessing the undisputed facts and construing disputed facts in favor of the non-movant, could find that the appellants violated a right of which a reasonable person would have known. . . Our consideration of that ruling provides the jurisdictional basis for this appeal.").

Winfield v. Bass, 106 F.3d 525, 529-30 (4th Cir. 1997) (en banc) ("[E]ach decision of a district court denying a governmental official's request for summary judgment based upon qualified immunity will encompass a determination that the facts are sufficiently controverted to warrant a trial and that the legal right purportedly violated was clearly established. Obviously, if a determination by a district court that genuine issues of material fact warrant trial were sufficient to prevent us from exercising jurisdiction over an appeal from an order rejecting a qualified immunity defense, we would never have jurisdiction over such appeals–a result plainly at odds with *Mitchell* and its progeny. [citing *Behrens*] Consequently, we conclude that we possess jurisdiction to consider an appeal from a decision of a district court rejecting a government official's claim of entitlement to qualified immunity to the extent that the official maintains that the official's conduct did not violate clearly established law. Alternatively, to the extent that the appealing official seeks to argue the insufficiency of the evidence to raise a genuine issue of material fact–for example, that the evidence presented was insufficient to support a conclusion that the official engaged in the particular conduct alleged–we do not possess jurisdiction under ' 1291 to consider the claim and, therefore, may not do so absent some independent jurisdictional base.").

Winfield v. Bass, 106 F.3d 525, 535 (4th Cir. 1997) (en banc) ("In sum, we conclude that when a district court fails to set forth fully the factual basis upon which its legal conclusion that a governmental official is not entitled to summary judgment on the basis of qualified immunity, this court reviews the evidence properly before the district court for purposes of considering the summary judgment question. It then determines what the evidence, viewed in the light most favorable to the nonmoving party, demonstrated. This is the factual basis that the district court 'likely assumed' in rendering its legal conclusion and is the factual basis upon which this court must render its decision on the purely legal issues presented in the appeal. Furthermore, when undisputed material facts are present that the district court did not consider in ruling on the qualified immunity issue, this court need not ignore those facts in rendering its legal decision.").

Winfield v. Bass, 106 F.3d 525, 541 (4th Cir. 1997) (en banc) (Motz, J., concurring) ("I write separately simply to note that in this case we have no occasion to reach the question of whether we are also at liberty to follow this approach when the district court has adequately set forth the facts it finds in dispute. That is, in this more usual case, do we have jurisdiction to go beyond the district court's holding and plumb the summary judgment record to make our own assessment as to what are the material facts, taken in the best light for the plaintiff, or are we limited to the facts relied upon by the district court. *Behrens* and *Johnson* would seem to hold that we must accept the facts as relied upon by the district court. However, resolution of that question must await another day.").

Elliott v. Leavitt, 105 F.3d 174, 177 (4th Cir. 1997) (Wilkinson, C.J., concurring in denial of reh'g en banc) ("*Behrens*' warning that appellate jurisdiction is not abolished simply because the case involves asserted factual disputes was an apparently vain attempt to preempt precisely the sort of over-reading of *Johnson* proposed by my dissenting colleagues. Under *Behrens*, we are to respect the role reserved for the trial court by *Johnson*, but we are not to slam the door to interlocutory appeals on the district court's mere recitation of the mantra that 'a genuine issue of fact exists.'").

Elliott v. Leavitt, 105 F.3d 174, 181, 184 (4th Cir. 1997) (Motz, J., dissenting from denial of rehearing en banc) ("In short, the district court held that there was a question of whether 'particular conduct occurred,' i.e., the court held that there was sufficient evidence to support the Elliotts' version of the story and deny summary judgment. This decision is precisely the type that *Behrens* and *Johnson* conclude is not an immediately appealable, final decision. *Behrens* and *Johnson* direct that an appellate court cannot hear appeals of district court decisions which involve a finding that particular conduct occurred, or might have occurred, unless the appellate court can 'take, as given, the facts that the district court assumed' and rule as a matter of law. [cites omitted] In this case the panel simply disagrees with the district court's reading of the facts, and impermissibly replaces its reading of the evidence for the district court's. . . . Officers Leavitt and Cheney may ultimately be held entitled to immunity. The district court may even have erred in denying them immunity at this juncture. But, unquestionably the basis for the district court's denial was its assessment that 'the evidence could support a finding that particular conduct [Archie had no gun] occurred.' . . . Equally clearly, the basis for the majority's decision to reverse is its assessment that the same evidence could not 'support a finding' that this 'particular conduct occurred.' . . . *Behrens* and *Johnson* forbid an appellate court from making this reassessment on interlocutory appeal.").

Jackson v. Long, 102 F.3d 722, 727 (4th Cir. 1996) ("The *Johnson* principle is limited to the circumstance where the dispute on appeal is whether a factual dispute was created. If, however, resolution of the factual dispute is immaterial to whether immunity should be afforded, the underlying legal question about whether immunity is to be afforded remains and may be appealed under *Mitchell* as a collateral order. . . . The facts which are relevant for determining whether Sheriff Long has immunity must be taken from the viewpoint of Sheriff Long at the time he terminated the jailers and not of an independent factfinder looking later in hindsight at whether the assault actually occurred or whether Sheriff Long proved to be right in his decisions. No factual question was raised about whether Sheriff Long reasonably believed that sufficient facts existed to initiate an investigation or that he could, as a matter of state law, dismiss Jackson and Penland as at-will employees.").

Bonner v. Anderson, 81 F.3d 472, 476 (4th Cir. 1996) ("Application of the qualified immunity defense requires a court to answer two questions: (1) whether the constitutional right allegedly violated was clearly established, and (2) whether genuine issues of material fact exist regarding the officer's conduct. . . The first inquiry presents a purely legal issue; the second calls for factual

determinations. . . . The difficulty with [Defendant's] position at this stage of the proceedings pertains to the second element of qualified immunity. The disputes centering on whether the police announced their presence and, more importantly, whether someone opened and quickly shut the door to the Mealey house are genuine issues of material fact. . . . In accordance with the precept of *Johnson*, . . . we dismiss [Defendant's] appeal.").

Buonocore v. Harris, 65 F.3d 347, 361 n.9 (4th Cir. 1995)("The *Jones* Court made it clear that appellate jurisdiction over the question of whether a defendant violated clearly established rights of which a reasonable person would have known should not be regarded as a basis for exercising pendent jurisdiction over fact-related qualified immunity questions.").

Finelli v. Tabb, 67 F.3d 67, 70 (4th Cir. 1995) ("Here . . . the deputies insist that *Johnson* is inapplicable because, as a matter of law, undisputed material facts objectively show that they acted reasonably without excessive force under the circumstances that confronted them. The deputies' argument is predicated on the belief that appellate courts should comb the record to determine de novo whether the facts are undisputed and whether any genuine issues of material fact exist. But this exercise is what *Johnson* precludes. It is the course we followed in *Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir.1988), which the Court rejected in *Johnson* . . . . As *Johnson* explains, the district court's denial of qualified immunity because of its conclusion that a genuine issue of material fact exists for trial is not immediately appealable.").

FIFTH CIRCUIT

Perniciaro v. Lea, 901 F.3d 241, 251 (5th Cir. 2018) ("Although we lack jurisdiction to consider 'whether there is enough evidence in the record for a jury to conclude that certain facts are true,' we do have jurisdiction 'to decide whether the district court erred in concluding as a matter of law that officials are not entitled to qualified immunity on a given set of facts.'. . Accordingly, we have jurisdiction to review whether—taking Perniciaro's summary judgment evidence as true—defendants' 'course of conduct [is] objectively unreasonable in light of clearly established law.'. . Within that narrow universe, our review is de novo.")

Washington v. Salazar, No. 17-20532, 2018 WL 4024829, at *3-4 (5th Cir. Aug. 21, 2018) ("In short, we 'consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment.'. . 'Where the district court has identified a factual dispute, we ask whether the officer is entitled to summary judgment even assuming the accuracy of the plaintiff's version of the facts.'. . .Salazar attempts to circumvent this court's limited jurisdiction by arguing that his actions were objectively reasonable, yet his argument is not a purely legal one. In fact, his argument depends largely on his own version of the facts, which Washington genuinely contests. This is exactly the kind of thing that precludes summary judgment. . . . We have explained that in denying qualified immunity at the summary-judgment stage, 'the district court can be thought of as making two distinct

determinations, even if only implicitly.'. . First, that 'a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law.'. . Second, that 'a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct.'. . We lack jurisdiction to 'review the district court's decision that a genuine factual dispute exists.'. . So the only proper issue for this appeal is whether, *under Washington's version* of the facts, it was objectively reasonable for Salazar to believe probable cause existed. It wasn't. Under Washington's version of the facts, all he did was walk down the street with a shotgun at his side, pointed at the ground, and speak to valets on the sidewalk. There is no indication Washington carried his shotgun in a threatening way. And it is not unlawful to openly carry a firearm in Texas, aside from the enumerated proscriptions in the Penal Code. . . Accepting Washington's version of the facts as true, it would have been objectively unreasonable for Salazar to believe probable cause existed for *any* alleged offense. We agree with the district court: 'evidence is conflicting whether Washington was physically on licensed premises, and whether Salazar was ever so advised.' These outstanding fact issues are material, meaning they could affect the case's outcome. . . Accordingly, we lack jurisdiction over Salazar's appeal.")

Escobar v. Montee, 895 F.3d 387, 392-93 (5th Cir. 2018) ("Pendent appellate jurisdiction may be proper where (1) the court will decide some issue in the properly brought interlocutory appeal that necessarily disposes of the pendent claim . . . (2) addressing the pendent claim will further the purpose of officer-immunities by helping the officer avoid trial. . . (3) the pendent claim would be otherwise unreviewable. . . or (4) the claims involve precisely the same facts and elements. . . Escobar's cross-appeal does not fit any of those categories. Deciding Montee's appeal will not necessarily dispose of Escobar's cross-appeal, as evidenced by the disposition in the district court. Nor would addressing Escobar's first-bite claim further the purposes of QI by helping Montee avoid trial. And Escobar's claim is reviewable through the normal course of appellate review. Finally, as explained above, the first-bite claim and continued-bite claim do not involve precisely the same facts in such a way as to be 'inextricably intertwined.' Indeed, the claims 'were treated separately by the district court,' and differences in facts include whether Montee gave warnings before releasing Bullet and whether the knife remained within grabbing distance once dropped. . . Because Congress has provided 'statutory instructions ... to control the timing of appellate proceedings,'. . . we must be cautious about creating 'ad hoc appellate jurisdictional rules.'. . This is not the 'rare and unique' case to warrant such an ad hoc exception to the normal course of review. . . Accordingly, we dismiss the cross-appeal for want of jurisdiction.")

Lempar v. Collier, No. 16-20731, 2018 WL 654367, at *1 (5th Cir. Jan. 31, 2018) (not reported) ("We cannot question a district court's view that factual disputes exist, and those disputes must be conceded in the plaintiff's favor. . . Breaking it down, this analysis requires the following steps: (1) identifying the issues on which a genuine dispute exists; (2) viewing those disputed facts in favor of the plaintiff as the summary judgment posture requires, *Lytle*, 560 F.3d at 409; and (3) determining whether those facts show a violation of clearly established law that overcomes a qualified immunity defense, *Pearson v. Callahan,* 555 U.S. 223, 243–44 (2009). Only this third phase is subject to our interlocutory review. That poses a problem in cases like this in which the

district court denied qualified immunity but did not specify the disputed factual issues it found. Although we can scour the record and try to determine the disputed issues on which the district court based its ruling, . . .that already difficult task is complicated here by the number of defendants. A denial of qualified immunity must identify factual disputes tied to a particular defendant that overcome the immunity defense. . . We have thus remanded cases in which the district court did not tie the existence of disputed issues to each defendant. . .That is the proper course here given the number of defendants and the conclusory district court ruling.")

Emesowum v. Cruz, No. 17-20245, 2018 WL 385389, at *1 (5th Cir. Jan. 11, 2018) (not reported) ("[A]lthough we may review whether a fact issue is *material* to the qualified immunity analysis, we lack jurisdiction to consider whether a factual dispute is *genuine*. . . In its order denying summary judgment, the district court held that 'the evidence creates a disputed fact issue concerning [the officers'] entitlement to qualified immunity.' But the court declined to specify what facts create the issue. When the district court denies a motion based on qualified immunity 'simply because "fact issues" remain, this Court has two choices. We can either scour the record or determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order.'. . In this case, it is unclear from the record what facts the district court identified as disputed. We therefore conclude that a limited remand is the 'more efficient alternative' here.")

Winfrey v. Pikett, 872 F.3d 640, 644 (5th Cir. 2017) ("[W]e hold that this Court lacks jurisdiction over Pikett's interlocutory appeal. Pikett, 'despite giving lip service to the correct legal standard, ... does not take the facts in a light most favorable to [Megan].'. . The parties dispute whether: (1) Megan admitted that she was in Burr's home roughly two weeks before Burr's murder; and (2) the scent lineups were properly conducted and thus informed investigators, prosecutors, and the jury that Megan was in direct contact with Burr's clothes shortly before his murder or merely that Megan had been in Burr's home at some point in time. Megan contends that she never admitted that she had been in Burr's home two weeks before the murder, and she says the scent lineups 'falsely informed the investigators, prosecutors, and jury that [she] had been in direct contact with Burr's clothing, shortly before his murder.' Pikett, however, contends that Megan admitted that she was in Burr's home roughly two weeks before his murder, and he says the scent lineups merely prove that Megan had been in Burr's home at some point in time. In short, Pikett's argument hinges on these factual disputes being resolved in his favor. So his appeal boils down to a challenge of the genuineness, not the materiality, of factual disputes because he does not 'contend[ ] that "taking *all* [Megan]'s factual allegations as true[,] no violation of a clearly established right was shown."'. . We have no jurisdiction over such a challenge.")

Hamilton v. Kindred, 845 F.3d 659, 663-64 (5th Cir. 2017) ("At the time of the incident, it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm. . . The district court found that 'there [was] a serious dispute as to the material facts' regarding each element of bystander liability. We lack jurisdiction

to review the district court's determination that a genuine factual dispute exists. . . Because we find that excessive force applies in this case and disputes of material fact remain, Kindred's appeal is DISMISSED.")

Guerra v. Bellino, 703 F. App'x 312, 315-17 (5th Cir. 2017) (per curiam) ("The plaintiffs argue we have no jurisdiction because the district court's order and Bellino's brief focus exclusively on issues of fact. We are not stripped of jurisdiction simply because the district court determined that genuine issues of fact exist. . . We may review the district court's determination 'that those disputed issues are material to the issue of qualified immunity.'. . The materiality of factual disputes is a question of law and is thus reviewable. . . . The plaintiffs assert that the video here is not determinative because it does not show Guerra 'attacking' Bellino. This assertion misapprehends the qualified-immunity standard, though. Qualified immunity requires that Bellino reasonably believed Guerra posed a threat of serious harm. . . We have viewed the video. Though grainy, the video shows that Bellino's detainee suddenly turned and charged toward him in the dark from less than a car's length away. The plaintiffs even concede that the video shows Guerra 'moving quickly' toward Bellino. Also, toward the end of the video, Meline states, 'The guy just charged the cop, and he shot him.' In light of these filmed facts, which are undisputed, the factual issues identified by the district court are immaterial.")

Guerra v. Bellino, 703 F. App'x 312, 318-19 (5th Cir. 2017)) (per curiam) (Graves, J., dissenting) ("The majority disregards two well-established principles in the doctrine of qualified immunity. First, when reviewing a denial of a motion for summary judgment based on qualified immunity, our jurisdiction is limited; it extends only to 'the materiality of any factual disputes, but not their genuineness.'. . Second, 'we must view the facts in the light most favorable to the plaintiff.'. . Overreaching our jurisdictional mandate, the majority resolves factual disputes to hold that Sergeant Bellino's fatal shooting of Guerra was objectively reasonable. To do so, the majority concludes that 'Bellino's credibility is immaterial' because of 'irrefutable proof' in the form of a dark, grainy eyewitness video. I respectfully dissent. The majority concludes that, because the eyewitness video shows one indistinct figure (Guerra) 'move rapidly in [the] direction' of another indistinct figure (Bellino), a reasonable officer, with 'mere seconds to determine how to respond to this visibly agitated detainee,' would have been justified in using deadly force. The eyewitness video is only dispositive if it 'utterly discredit[s]' Guerra's 'version of events' so that 'no reasonable jury could have believed him.'. . It does not. At most, the video is inconclusive regarding whether Guerra was rushing at Bellino or instead was fleeing from him, albeit at an angle, and posed no reasonable threat. . . The district court correctly deemed the video inconclusive. Its finding is consistent with eyewitness testimony by Meline, who filmed the encounter and who stated: '[F]rom where I was standing, I couldn't tell if [Guerra ran] directly at [Bellino] or if he was angled a bit and he was trying to run past him.' But relying solely on the grainy video, the majority posits that any factual issues identified by the district court are entirely immaterial, including whether Guerra's flight path was at an angle from Bellino. This conclusion contradicts Supreme Court precedent. As the Court explained, '[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend

him does not justify the use of deadly force to do so.'. . Here, the nonmoving parties have proffered evidence that Guerra was unarmed, nonthreatening, and was shot dead while attempting to flee the scene. The medical examiner's report, which found '[n]o evidence of close range firing,' supports their version of the facts. The video evidence here does not utterly discredit the nonmovants' version of the facts. . . On these disputed issues of material fact, we lack jurisdiction to review.")

Cooper v. Brown, 844 F.3d 517, 526 n.12 (5th Cir. 2016) ("Some courts have used the doctrine of 'pendent appellate jurisdiction' to review partial-summary-judgment orders alongside orders denying QI. . .This court, however, has held that '[p]endent appellate jurisdiction should be exercised only in 'rare and unique' circumstances,' where the non-final claim is 'inextricably intertwined' with the QI inquiry. . . We generally have resisted efforts to bootstrap non-final claims into QI appeals. . . Because there are no 'rare and unique' circumstances here, we decline to exercise pendent appellate jurisdiction.")

Hinojosa v. Livingston, 807 F.3d 657, 664-68, 671-72, 675 (5th Cir. 2015) ("[T]o determine whether we have jurisdiction over this interlocutory appeal, we must determine whether the district court's order complied with our precedent for issuing such orders. . . First, the district court must determine 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.'. . . When reviewing a complaint that meets this standard, the district court may defer its qualified immunity ruling and order limited discovery if 'the court remains "unable to rule on the immunity defense without further clarification of the facts."'. . Such a discovery order must be 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. . .We first ask whether the complaint pleads facts that, if true, would permit the inference that Defendants are liable under § 1983 for an Eighth Amendment violation and would overcome their qualified immunity defense. We conclude that it does. . . .Here, the complaint alleges an Eighth Amendment violation. The complaint alleges that Defendants subjected Hinojosa to dangerous heat conditions in conscious disregard of the serious risk that the heat posed for prisoners who, like Hinojosa, suffered from certain medical conditions, took certain medications, and had recently been transferred from air-conditioned jails to non-climate-controlled facilities. . . . . Prison officials cannot escape liability in a conditions-of-confinement case like this one by arguing that, while they allegedly were aware of and consciously disregarded a substantial risk of serious harm to a discrete class of vulnerable inmates, they were not aware that the particular inmate involved in the case belonged to that class. . . . In sum, then, the complaint adequately alleges an Eighth Amendment violation based on Hinojosa's conditions of confinement. . . . Having determined that the complaint's factual allegations, if true, would establish Defendants' liability for an Eighth Amendment violation and overcome a qualified immunity defense, we next ask whether further clarification of the facts was necessary for the district court to rule on the qualified immunity defense. We easily conclude that it was. When reviewing a well-pleaded complaint and a defendant's motion to dismiss on the basis of qualified immunity, a district court may defer its qualified immunity ruling and order limited discovery when 'the court remains "unable to rule on the immunity defense without further clarification of the facts."'. . In other words, a district court may elect the defer-and-discover approach 'when the defendant's immunity

claim turns at least partially on a factual question' that must be answered before a ruling can issue. . . Here, the district court held that it was unable to rule on Defendants' qualified immunity claim because factual development was needed as to their 'knowledge, actions, omissions and/or policies in regards to TDCJ prison operations in times of extreme heat.'. . .The factual questions of what Defendants knew, when they knew it, and whether they investigated and considered possible remedial measures, are undoubtedly necessary to answer before determining whether Defendants acted reasonably in light of clearly established law. Of course, as detailed above, Defendants' knowledge is central to the deliberate indifference element of Plaintiff's Eighth Amendment claim. However, their knowledge is also highly relevant to qualified immunity, because it bears heavily on the reasonableness of their actions. . . . The reasonableness analysis must be different from the deliberate-indifference analysis, because '[o]therwise, a successful claim of qualified immunity in this context would require defendants to demonstrate that they prevail on the merits, thus rendering qualified immunity an empty doctrine.'. . 'In light of these complexities, we have observed that "[a]dditional facts ... are particularly important when evaluating the [reasonableness] prong of the qualified immunity test."'. . That holds true in this case. The district court did not err in determining that factual development was needed to rule on Defendants' qualified immunity defense. . . Our foregoing discussion establishes that the district court was empowered to defer its qualified immunity ruling and issue a discovery order. However, the breadth of the ordered discovery is critically important. Qualified immunity is immunity not only from judgment, but also from suit . . . . We therefore must determine whether the discovery that the district court ordered was "narrowly tailored to uncover only those facts needed to rule on the immunity claim." *Id.* (quoting *Lion Boulos,* 834 F.2d at 507–08). While this presents a somewhat close question, we conclude that the district court's discovery order was appropriately tailored. . . . Because, as set forth above, the district court's order complies with our precedent, we DISMISS this interlocutory appeal for want of jurisdiction. We express no opinion on how the district court should rule on Defendants' qualified immunity defense.")

Carroll v. Ellington, 800 F.3d 154, 167-68 (5th Cir. 2015) ("Because interlocutory appeal on qualified-immunity grounds would protect the right of public officials not to undergo a *second* trial erroneously, we agree with the Second Circuit that we have interlocutory appellate jurisdiction over the purely legal aspect of whether the officers in this case were entitled to qualified immunity. We also reject the Carrolls' argument that this interlocutory appeal was untimely filed and therefore waived because the deputies did not file an interlocutory appeal from the district court's pretrial summary-judgment ruling. In this case, the deputies have consistently asserted, and therefore have not waived, the defense of qualified immunity. They timely filed an interlocutory appeal from the district court's denial of their Rule 50 motions soon after the district court ruled. Therefore, we have interlocutory appellate jurisdiction. . Our jurisdiction to review this collateral order is limited. We have jurisdiction to review only the 'purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law.'")

Brauner v. Coody, 793 F.3d 493, 497 (5th Cir. 2015) ("Neither remand nor dismissal is necessary here. 'The mere existence of some factual dispute is not enough to defeat this court's jurisdiction

over an interlocutory appeal: If the disputed facts are not material to this legal question, "the denial of summary judgment is [immediately] reviewable as a question of law."'. . As will be seen, the facts in the record before us are either undisputed or not material.")

Webb v. Livingston, 618 F. App'x 201, 206-07, 209-11 (5th Cir. 2015) ("If the complaint alleges facts sufficient to overcome the defense of qualified immunity, and the district court is 'unable to rule on the immunity defense without further clarification of the facts,' then it may allow discovery 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'. . When a district court complies with this procedure, this court lacks jurisdiction to review the interlocutory order. . . However, the court does have jurisdiction if the district court: (1) fails to find that the complaint overcomes the defendant's qualified immunity defense; (2) refuses to rule on the qualified immunity defense; or (3) issues a discovery order that is not narrowly tailored to uncover facts relevant only to the issue of qualified immunity. . . Our jurisdiction over this appeal hinges on the first and third inquiries, that is, whether the district court properly found that the complaint overcame Appellants' qualified immunity defense and whether the district court's discovery order was narrowly tailored to uncover facts relevant to the defense. . . We review a district court's decision to defer ruling on a motion to dismiss and its discovery order for abuse of discretion. . . . By containing facts, which, if true, demonstrate that Appellants violated the decedents' clearly established Eighth Amendment right to be free from extreme heat, Appellees' allegations are sufficient to overcome Appellants' qualified immunity defense. . . Because the district court properly conducted this threshold inquiry, it was within its discretion to determine whether limited discovery was necessary to rule on Appellants' entitlement to the immunity defense. . . . A district court's discovery order is neither avoidable nor overly broad, and therefore not immediately appealable, when: (1) the defendant's entitlement to immunity turns at least partially on a factual question; (2) the district court is unable to rule on the immunity defense without clarification of these facts; and (3) the discovery order is narrowly tailored to uncover only the facts necessary to rule on the immunity defense. . .Applying the first factor, the district court properly concluded that Appellants' entitlement to qualified immunity turned at least partially on an issue of fact. To determine whether Appellants are entitled to qualified immunity, the district court must evaluate whether Appellants acted with deliberate indifference by subjectively disregarding a known risk, *Farmer*, 511 U.S. at 834, and whether the Appellants actions were objectively reasonable despite the alleged deliberate indifference. . . Appellants' subjective knowledge is a question of fact, . . . which this court has recognized is 'peculiarly within the knowledge' and possession of Appellants. . . Therefore, the district court did not err in concluding that Appellants' immunity defense, which required an inquiry into Appellants' alleged deliberate indifference, turned in part on an issue of fact. Moving to the second factor, the district court was within its discretion in concluding that it was unable to rule on the immunity defense without further clarification of the facts. To rule on the immunity defense, the district court must assess 'whether the official's conduct would have been objectively reasonable at the time of the incident.'. . This determination is complicated when, as here, the deliberate indifference standard must be reconciled with the second prong's objective reasonableness standard. . . .[T]he district court did not err in concluding that further factual clarification was necessary to resolve the immunity issue. . .Finally, under the third factor, the

limited discovery is narrowly tailored. The ordered discovery seeks to reveal what Appellants knew, when they knew it, and what actions (or inactions) they took in light of this knowledge. Moreover, the district court was careful to prevent discovery that pertained to the merits of Appellees' underlying claims, and excluded discovery relevant to other heat-related litigation. Consequently, the district court's discovery order is narrowly tailored to uncover only the facts necessary to rule on the immunity defense. Because the immunity defense turns on an issue of fact, the district court concluded that it could not determine Appellants' entitlement to the defense without discovery, and discovery was limited to the issue of qualified immunity, the district court did not abuse its discretion. . . Accordingly, this court lacks jurisdiction to review the district court's discovery order.")

Fuentes v. Riggle, 611 F. App'x 183, 190-91 (5th Cir. 2015) ("Riggle attempts to circumvent our jurisdictional limitations by arguing that whether a reasonable jury could return a verdict in favor of the plaintiffs is a 'question of law.' Yet summary judgment—and all of its facets—is always a question of law. The final judgment rule, however, places limits on which questions of law are subject to interlocutory review. Were we to accept Riggle's argument, the distinction drawn in our cases between questions of genuineness and questions of materiality would be obliterated. We would be left conducting a plenary, de novo review of the district court's decision on the summary judgment motion. Riggle's argument therefore fails. Nevertheless, we must pause for a moment to consider Riggle's argument predicated on *Scott v. Harris.* In *Scott v. Harris,* the Supreme Court heard an appeal from a denial of summary judgment on qualified immunity grounds and held that the district court erred in accepting the plaintiff's version of facts as correct when an undisputed video recording of the car chase at issue existed. . . . Considering an appeal from the district court's denial of summary judgment, the Supreme Court noted that while the norm at summary judgment is to adopt 'the plaintiff's version of the facts,' the situation is altered where there is 'a videotape capturing the events in question.'. . The Court concluded that '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'. . . Jurisdictionally speaking, *Scott* is problematic, as deciding whose version of the facts must be accepted falls squarely within the realm of a dispute as to genuineness. *Scott* could be interpreted one of two ways. First, *Scott* may merely indicate that, if (and only if) there is a dispute of the materiality of a factual issue, the court need not evaluate the materiality issue while accepting an account of the facts plainly discredited by undisputed documentary evidence. Under such an interpretation, we would lack jurisdiction over an argument that there is no genuine dispute because of the existence of a videotape without an accompanying contention that the factual dispute is immaterial. Alternatively, *Scott* may stand as an exception to the general rule, that the genuineness of a fact dispute cannot be reviewed, where there is undisputed documentary evidence that contradicts a plaintiff's factual account. . . . The second interpretation is problematic, as it would extrapolate a significant, and nebulous, exception to the general rule in *Johnson* from an opinion (*Scott*) that never addresses jurisdiction. Yet we need not pass on whether or to what extent such an exception exists, as *Scott* is plainly inapplicable here. . . .There is no undisputed, contemporaneous recording of the disputed events here, as there was in *Scott,* or

its equivalent. As such, *Scott,* and any exception it may portend from the normal jurisdictional limits in an appeal from a denial of a motion for summary judgment, does not apply. Riggle has no doubt marshalled evidence that tends to undermine Juan Fuentes's account of Victor Fuentes's death. His arguments that such evidence precludes the existence of a genuine dispute of fact for purposes of Rule 56(a) are, however, not cognizable in an interlocutory appeal.")

Zapata v. Melson, 750 F.3d 481, 484-86 (5th Cir. 2014) ("This court generally lacks jurisdiction to entertain interlocutory appeals taken from district court discovery orders because such orders are nonfinal and therefore not immediately appealable. . . However, we have repeatedly held that a district court's order that declines or refuses to rule on a motion to dismiss based on a government officer's defense of qualified immunity is an immediately appealable order. *Backe v. LeBlanc,* 691 F.3d 645 (5th Cir.2012); *Wicks v. Miss. State Emp't Servs.,* 41 F.3d 991 (5th Cir.1995); *Helton v. Clements,* 787 F.2d 1016 (5th Cir.1986). That is because such an order is tantamount to an order denying the defendants qualified immunity. . . . '[T]his court has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.'. . As we explained in *Wicks,* a district court must first find 'that the plaintiffs pleadings assert facts which, if true, would overcome the defense of qualified immunity.'. . 'Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.'. . 'After the district court finds a plaintiff has so pleaded, if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim."'. . . 'This court lacks jurisdiction to review interlocutory orders in qualified immunity cases complying with these requirements.'. . 'But we may review the order under the collateral order doctrine when a district court fails to find first that the plaintiffs complaint overcomes a defendant's qualified immunity defense, *Wicks,* 41 F.3d at 994–95; when the court refuses to rule on a qualified immunity defense, *Helton,* 787 F.2d at 1017; or when the court's discovery order exceeds the requisite "narrowly tailored" scope, *Lion Boulos,* 834 F.2d at 507–08.'. .The defendants argue that we have jurisdiction and that the district court's order should be vacated because the district court did not follow the careful procedure set forth in *Backe, Wicks, Helton,* and *Lion Boulos.* We agree. The district court did not explicitly rule on the defendants' qualified-immunity defense other than to note that the plaintiffs 'set out the reasons [they] felt that qualified immunity did not apply,' that the defendants 'have not contradicted those allegations,' and that accordingly, whether the defendants are entitled to qualified immunity 'is certainly contested.' The district court failed to make an initial determination that the plaintiffs' allegations, if true, would defeat qualified immunity, falling short of the finding required by *Backe* and *Wicks;* and unlike the court in *Lion Boulos,* the district court did not identify any questions of fact it needed to resolve before it would be able to determine whether the defendants were entitled to qualified immunity. . . Because we conclude that the district court did not fulfill its duty under either step of the framework just described, 'for materially the same reasons,' we both have jurisdiction to review the district court's discovery order and we must vacate it.")

Backe v. LeBlanc, 691 F.3d 645, 647-49 (5th Cir. 2012) ("Appellants moved to dismiss based on qualified immunity under Federal Rule of Civil Procedure 12(b)(6), arguing that Appellees failed to plead specifically a City policy causing a deprivation of constitutional rights, facts plausibly demonstrating their deliberate indifference to Appellees' constitutional rights, and facts plausibly demonstrating that Appellants ratified or authorized any unconstitutional conduct. The district court refused to rule on Appellants' threshold qualified immunity defense, concluding that '[a]lthough qualified immunity might become a relevant defense to liability once the facts are known, it is too early to make that determination now.' It denied Appellants' motion to dismiss pending general discovery. . . LeBlanc and Wiley appeal, contending that the district court abused its discretion by failing to rule on their immunity claim before permitting general discovery. Additionally, LeBlanc and Wiley argue that Appellees' constitutional claims fail for lack of plausibility in the first place, or for failure to articulate facts which plausibly overcome their qualified immunity defenses. . . . One of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive, *Helton v. Clements,* 787 F.2d 1016, 1017 (5th Cir.1986). Consequently, this court has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense. As we explained in *Wicks, supra,* a district court must first find 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity.'. . Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity. *After* the district court finds a plaintiff has so pled, if the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.' *Lion Boulos,* 834 F.2d at 507–08. This court lacks jurisdiction to review interlocutory orders in qualified immunity cases complying with these requirements. *See, e.g., Edwards v. Cass Cnty., Tex.,* 919 F.2d 273, 275–76 (5th Cir.1990). But we may review the order under the collateral order doctrine when a district court fails to find first that the plaintiff's complaint overcomes a defendant's qualified immunity defense, *Wicks,* 41 F.3d at 994–95; when the court refuses to rule on a qualified immunity defense, *Helton,* 787 F.2d at 1017; or when the court's discovery order exceeds the requisite 'narrowly tailored' scope, *Lion Boulos,* 834 F.2d at 507–08. For materially the same reasons, we both have jurisdiction to review and must vacate the district court's order here. The court stated that it was 'premature to address the defendant's assertions of qualified immunity before discovery has taken place,' but as the Supreme Court has noted, that is *precisely* the point of qualified immunity: to protect public officials from expensive, intrusive discovery until and unless the requisite showing overcoming immunity is made. Even if we liberally interpret the district court's order as making the requisite finding that Appellees pled facts overcoming qualified immunity, the district court was permitted to authorize only discovery narrowly tailored to rule on Appellants' immunity claims. An order that simultaneously withholds ruling on a qualified immunity defense while failing to constrain discovery to develop claimed immunity is by definition not narrowly tailored. The district court doubly abused its discretion by (apparently)

refusing to rule on LeBlanc's and Wiley's motions to dismiss and by failing to limit discovery to facts necessary to rule on their qualified immunity defense. . . . For these reasons, this court has appellate jurisdiction over the district court's order whose effect denied these officials the benefits of orderly handling of their qualified immunity defense. We must vacate and remand, and we instruct the court to follow the procedures outlined in *Lion Boulos, Helton,* and *Wicks.*")

Fulton v. Caraway, No. 10-30213, 2010 WL 4386748, at *1, *2 (5th Cir. Nov. 4, 2010) (not reported) ("Because the denial of the motion for a Rule 7(a) reply is not a final judgment, we must address whether this court has jurisdiction to hear the appeal. . . We have jurisdiction to determine our jurisdiction. . . We requested that the parties brief the question of whether the 'order denying the motion ... is appealable at this stage of the litigation pursuant to [Fed.R.Civ.P.] 54(b), or the collateral order doctrine, or whether there exists some other basis of appellate jurisdiction.' The Kenner Appellants argue that we have jurisdiction pursuant to 28 U.S.C. § 1291 and the *Cohen* collateral order doctrine. . . . They contend that permitting an interlocutory appeal of the district court's denial of their motion for a Rule 7(a) reply vindicates the *Harlow v. Fitzgerald* qualified immunity doctrine . . . by ensuring that the issue of qualified immunity will be decided at the earliest possible time. The district court's denial of their motion, they continue, will subject them to discovery, a burden of litigation from which qualified immunity should protect them. . . They conclude that the order 'clearly and finally resolved an important issue separate from the merits of the lawsuit.' We disagree with the Kenner Appellants' conclusion. The Supreme Court has held that even under the required narrow reading of the appealable collateral order doctrine, government officials are permitted to appeal decisions in which the district court denies them qualified immunity. . . The rationale for permitting such appeals is that qualified immunity is a defense not only from liability, but also from the burdens of litigation. . . When a district court order denying qualified immunity 'turns on an issue of law,' the order conclusively determines that the defendant must bear the burdens of discovery, a decision which is 'conceptually distinct from the merits of the plaintiff's claim' and 'would prove effectively unreviewable on appeal from a final judgment.'. . We unquestionably would have jurisdiction over an appeal of a denial of a motion to dismiss a § 1983 claim on a defense of qualified immunity. . . But this case presents a different situation: the Kenner Appellants appeal from a non-dispositive motion. The Supreme Court requires that a collateral order fulfill three stringent conditions to be appealable: it must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, *and* be effectively unreviewable on appeal from a final judgment. . . The denial of the motion for a Rule 7(a) *Schultea* reply does not fulfill the first requirement–the order did not conclusively determine the disputed question. The district court's order does not contain a ruling on whether the facts alleged would overcome qualified immunity, only that they were detailed enough to allow the court to rule on any subsequent dispositive motion. We are unwilling to expand the collateral order doctrine this far. We do not have jurisdiction over this appeal; it is therefore DISMISSED.")

Sanchez v. Fraley, No. 09-50821, 2010 WL 1752123, at *5, *6 (5th Cir. Apr. 30, 2010) (not reported) ("Our circuit has not yet addressed whether *Scott* carves out an exception, and we need not do so today. If such an exception does exist, then it does not apply on these facts. The district

court was presented with a quintessential fact issue–the officers' deposition testimony differed in a material respect from Chavez's deposition testimony. . . This case is thus a far cry from *Scott*, where a videotape blatantly and demonstrably contradicted Harris's version of events. To the extent that the officers are challenging Chavez's credibility and personal knowledge, . . this is similarly inappropriate for determination on summary judgment. . . . For the foregoing reasons, we DENY Sanchez's motion to dismiss the appeal, and we AFFIRM the district court's order denying summary judgment on the basis of qualified immunity.").

Morgan v. Hubert, 335 F. App'x 466, 2009 WL 1884605, at *4 (5th Cir. July 1, 2009) ("We are of the opinion that placing Morgan, a prisoner in protective custody at the time, on the field with the general prison population created an objective and substantial risk to his safety. . . .The question of what Hubert subjectively knew is a question of fact. . . Hence, we lack jurisdiction to consider it on the merits. . . As such, the only issue here is whether Morgan alleged sufficient facts to state a plausible case against Hubert individually, including the requisite subjective knowledge.") [remanding for limited discovery of facts going to issue of qualified immunity; *See Morgan v. Hubert*, 459 F. App'x 321 (5th Cir. 2012) (holding that because warden was not deliberately indifferent, warden was entitled to qualified immunity with respect to inmate's § 1983 Eighth Amendment claim.]

Meza v. Livingston, 537 F.3d 364, 366, 367 (5th Cir. 2008) ("A district court's failure to rule on a summary judgment motion while awaiting a magistrate judge's report and recommendation on that motion is . . . unreviewable. Here, although the initial briefing on the summary judgment motion was completed as of May 11, 2007, the magistrate ordered additional briefing, and Defendants appealed before the district court could receive the magistrate's report. . . . Defendants urge that '[a]lthough this Court has not issued any further published opinions [after *Helton*] recognizing other instances where the refusal or failure to rule resulted in an immediately appealable order under the collateral order doctrine,' other circuits have. In those cases, the district court either refused to rule, failed to explain its reasons for delaying a ruling on qualified immunity until trial, or 'extend' *Helton* to the facts of this case, as none of these circumstances apply here.").

Flores v. City of Palacios, 381 F.3d 391, 401, 402 (5th Cir. 2004) ("Kalina next argues that a reasonable police officer would not have been on notice in 2002 that firing a single gunshot at a suspect's car would constitute a use of deadly force. Kalina was on notice, however, that using force 'carrying with it a substantial risk of causing death or serious bodily harm' is 'deadly force.'. . He was also on notice that deadly force would only be justified by a reasonable belief that he or the public was in imminent danger. . . The only thing he did not know for sure was whether shooting at Flores's car in the way that he did carried with it a substantial risk of death or serious bodily harm. The flaw in Kalina's argument is that this last question is one of fact, not one of law. The district court found that he used deadly force, thereby assuming, as a factual matter, that Kalina created a substantial risk of death or serious bodily harm when he shot Flores's car. On an interlocutory appeal of this nature, we cannot review whether that factual question is genuine, and it is obviously material. . . We therefore accept the district court's factual assumption for summary

judgment that Kalina reasonably should have known that his action caused a substantial risk of death or serious bodily harm.").

Castillo v. City of Weslaco, 369 F.3d 504, 506, 507 (5th Cir. 2004) ("The Supreme Court has recognized that the second step of the *Harlow* test is different at the summary judgment stage than it is when the defendant asserts qualified immunity after the initial pleadings. [citing *Behrens*] 'At the earlier stage, it is the defendant's conduct as alleged in the complaint that is scrutinized....' . . . On summary judgment, 'the plaintiff can no longer rest on the pleadings' and the court must look 'to the evidence before it (in the light most favorable to the plaintiff) in conducting the *Harlow* inquiry.' . . . Consequently, the court must highlight evidence that, if interpreted in the light most favorable to the plaintiffs, identifies conduct by the defendant that violated clearly established law. . . By outlining this factual scenario the court does not make a determination that the alleged conduct occurred. Rather, it concludes that there is evidence in the record that, when interpreted in the light most favorable to the plaintiff, establishes conduct by the defendant that violated clearly established law. . . Ordinarily the district court in denying the summary judgment motion will outline 'the factual scenario it believes emerges from viewing the summary judgment evidence in the light most favorable' to the plaintiff. . . It will also highlight the evidence in the record supporting its conclusions, and it will determine whether the defendant's conduct, as outlined in the factual scenario, was 'objectively reasonable' in light of the relevant clearly established law. . . In cases where the district court failed to outline the relevant factual scenario and the evidence in the record establishing the relevant conduct, the Supreme Court has authorized 'the court of appeals [to] undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . We, however, have determined that there is another option in these situations. In certain cases, rather than combing through the record ourselves and concluding what factual scenario the district court likely assumed in applying the *Harlow* test, we will remand to the district court so that it can outline the factual scenario it assumed in making its decision. . . Although we are not required to make such a remand, in some cases it may provide a 'more efficient alternative.' . . In this case, the district court did not outline the factual scenario it assumed in construing the summary judgment evidence in the light most favorable to the Officers. In fact, it appears that it rested its ruling solely on the allegations made by the Officers in their Third Amended Complaint. This would be improper in light of the Supreme Court's instructions in *Behrens*. Considering it is not clear that the district court assumed a factual scenario supported by summary judgment evidence in applying the *Harlow* test, and if it did, what that factual scenario is, the more 'efficient alternative' in this case is to remand to the district court for it to outline the factual scenario it assumed in making its decision."), *appeal after remand,* 2004 WL 2294769 (5th Cir. Oct. 13, 2004).

Kinney v. Weaver, 367 F.3d 337, 347, 348 (5th Cir. 2004) (en banc) ("The standard of review that we apply in an interlocutory appeal asserting qualified immunity differs from the standard employed in most appeals of summary judgment rulings. Ordinarily, we would review the district court's denial of summary judgment de novo, applying the same standard as the district court. . .The district court, of course, applies the standard of Rule 56, according to which summary

judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. . . On appeal, we would ordinarily apply that same Rule 56 standard, and we would reverse the district court's denial of summary judgment if we concluded that the district court found a genuine factual dispute when, on our own review of the record, no such genuine dispute exists. But, as explained above, in an interlocutory appeal we lack the power to review the district court's decision that a genuine factual dispute exists. Therefore, we do not apply the standard of Rule 56 but instead consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment. . . Where factual disputes exist in an interlocutory appeal asserting qualified immunity, we accept the plaintiffs' version of the facts as true.")

Reyes v. City of Richmond, 287 F.3d 346, 350, 351 (5th Cir. 2002) ("To determine whether a denial of summary judgment based on qualified immunity is immediately appealable, this Court looks at the legal argument advanced. When a district court denies summary judgment on the basis that genuine issues of material fact exist, it has made two distinct legal conclusions: that there are 'genuine' issues of fact in dispute, and that these issues are 'material.' This Court may not review a conclusion that issues of fact are genuine, . . . but we can review a district court's conclusion that an issue of law is material. [citing *Bazan*] An officer challenges materiality when he contends that 'taking *all* the plaintiff's factual allegations as true no violation of a clearly established right was shown.' [citing *Cantu*]").

Gonzales v. Dallas County, 249 F.3d 406, 411-13 (5th Cir. 2001) ("The jurisdictional question, then, is whether the record reflects undisputed facts upon which we may make a determination of the legal question before us: whether a reasonable public official could have believed, in the light of clearly established law, that the specific conduct of discharging Gonzales did not violate his constitutional rights. . . .[U]nder the qualified immunity analysis, the question is whether it would have been objectively reasonable for an officer to conclude that terminating Gonzales's employment did not violate his rights under the First Amendment because his November 1997 altercation with the shoplifter would have caused his termination notwithstanding that he had testified against Castillo before the grand jury. . . . In the light of the record before us, we hold that a reasonable public official would have believed that the decision to terminate Gonzales's employment would not 'violate clearly established ... constitutional rights' because the same employment action would have been taken even if Gonzales had not testified against Castillo before the grand jury.").

Bazan v. Hildago County, 246 F.3d 481, 491-93 (5th Cir. 2001) ("In short, in stating that 'a jury has to decide if this is the way this occurred', the district judge concluded that the Trooper's credibility was at issue and thus that a real–*genuine* –dispute existed as to *material facts*– what occurred in the field, when deadly force was employed. . . . We emphasize the narrow factual situation which this case addresses– one in which *the sole surviving witness* to the central events is the defendant himself, an interested witness. Obviously, summary judgment *vel non* for a case of this type turns on the summary judgment record. And, based on this summary judgment record,

the district court concluded genuine issues exist as to material facts. Again, that *genuineness* conclusion is *not* reviewable on interlocutory appeal from a summary judgment denial of qualified immunity; *only issues of law are. . .* For the foregoing reasons, because the district court concluded that the events that occurred in the field are *genuinely disputed,* in the light of both the Trooper's being the sole surviving witness and the evidence regarding events at the vehicle, *and* because these factual issues control the outcome of the case (*are material*), we lack jurisdiction to consider the propriety of the summary judgment denial.") (emphasis in original).

Thompson v. Upshur County, 245 F.3d 447, 456 (5th Cir. 2001) ("Ideally, the district court's order denying summary judgment based on qualified immunity explains what facts the plaintiff may be able to prove at trial, i.e. what particular facts the court assumed in denying summary judgment urged on the basis of qualified immunity. This facilitates appellate review by allowing this Court to focus on the aforementioned purely legal issues. When, as is true to some extent here, the court below fails to do this and, instead, denies the motion simply because 'fact issues' remain, this Court has two choices. We can either scour the record and determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order.").

Domino v. Texas Dep't of Criminal Justice, 239 F.3d 752, 754 (5th Cir. 2001) ("Reddy argues that even when the disputed facts are viewed in Domino's favor, Reddy was not deliberately indifferent to Domino's serious medical needs and therefore did not violate Domino's constitutional rights. We agree with Reddy that this court has jurisdiction over this appeal to decide that legal issue when the disputed facts are viewed in Domino's favor.").

Wagner v. Bay City, 227 F.3d 316, 320 (5th Cir. 2000) ("In deciding an interlocutory appeal of a denial of qualified immunity, we can review the materiality of any factual disputes, but not their genuineness. . . So, we review the complaint and record to determine whether, assuming that all of Wagner's factual assertions are true, those facts are materially sufficient to establish that defendants acted in an objectively unreasonable manner. Even where, as here, the district court has determined that there are genuine disputes raised by the evidence, we assume plaintiff's version of the facts is true, then determine whether those facts suffice for a claim of excessive force under these circumstances. Moreover, in light of the fact that the district court did not specifically identify those factual issues as to which it believed genuine disputes remained, we conduct an analysis of the record to determine what issues of fact the district court likely considered genuine. This ensures that the defendants' right to an immediate appeal will not be defeated because of the district court's failure to articulate its reasons for denying summary judgment. . . It follows that we do have jurisdiction to review the denial of summary judgment on all of these claims.").

Steadman v. Texas Rangers, 179 F.3d 360, 369 (5th Cir. 1999) (Emilio M. Garza, J., specially concurring) ("I concur, but write separately to elaborate on the majority's statement that '[e]ven the existence of disputed issues of material fact does not preclude review where the district court's

actions were based in law.' . . The statement simply stands for the proposition that we can consider an unsuccessful summary judgment motion that asserts qualified immunity when the defendant takes the genuine issues of material facts off the table by accepting the plaintiff's version of the facts and thereby leaves us with nothing to review but legal issues.").

Lemoine v. New Horizons Ranch and Center, Inc., 174 F.3d 629, 634 (5th Cir. 1999) ("The crux of appellants' argument is that even if the district court correctly identified the factual issues above, such factual findings are immaterial because these failures show nothing more than mere negligence. As plaintiff must prove more than negligence to state a constitutional violation, say the appellants, plaintiff cannot make out a legal claim and the district court erred in denying their motions for summary judgment. As the appellants' claim is a legal one, we have appellate jurisdiction over it and proceed accordingly.***").***

Reyes v. Sazan, 168 F.3d 158, 161 (5th Cir. 1999) ("The Supreme Court since *Schultea* has attempted to clarify the jurisdiction of the courts of appeal to review a denial of qualified immunity. At present, the rule of jurisdiction comes to this: Legal conclusions are immediately appealable, but not the sufficiency of the evidence to support the denial. . . .The appellate court can consider the materiality of disputed issues of fact, but not contentions that there are factual disputes. . . The Supreme Court's refinement of qualified immunity jurisdiction has only made the more important *Schultea's* emphasis upon the reply as a tool of the trial court insisting on particularity in pleading. Indeed, the Court's vigorous adherence to the distinction between fact and law–or genuine issues and material issues–underscores the strength of the *Schultea* approach. Whether the complaint is insufficiently particular, and thus a reply to the defense of qualified immunity is needed, is a question of law. Similarly, we can examine afresh whether a reply is 'tailored to the assertion of qualified immunity and fairly engage[s] its allegations,' *Schultea*, 47 F.3d at 1433, a look that does not require reviewing the record to determine if the reply's factual assertions are true.").

Meyer v. Austin Independent School District, 161 F.3d 271, 274 (5th Cir. 1998) ("We cannot consider a claim 'that the district court erroneously concluded that a genuine issue of fact exists.'. . Therefore, in the instant case, we could not reexamine the plaintiffs' affidavits and determine that these affidavits did not present sufficient evidence that the administrators failed to give them a chance to tell their side of the story. . . At the same time, we can consider a claim 'that a material issue of fact exists,' . . . *i.e.* that the legal conclusion the district court drew was incorrect. Thus, for example, we would have jurisdiction to hold that meetings with parents always provide adequate due process for children, or to hold that the law does not require school officials to give students a chance to tell their side of the story.").

White v. Balderama, 161 F.3d 913, 914 (5th Cir. 1998) (per curiam) ("The district court's supplemental order reveals that it found that genuine factual issues remained as to which of the three bullets fired by Balderama actually struck and injured White, what direction White's car was heading in when he failed to observe Balderama's order to stop, and whether Balderama acted reasonably in continuing to shoot at White's vehicle after the first shot. Balderama asserts,

however, that '[i]t is an indisputed historical fact that the first shot, fired while the vehicle was approaching Officer Balderama at a sixty (60) degree angle, entered the driver's side door and struck plaintiff in the right thigh.' Based on this statement, Balderama argues on appeal that this initial shot was 'beyond reproach,' an action for which he is 'demonstrably entitled to immunity,' and that the second and third shots are irrelevant to the legal issue of objective reasonableness because they did not injure White. He does not contend that his actions would have been objectively reasonable no matter which bullet struck White. His argument thus hinges on portions of his statement of facts that differ from the facts assumed by the district court. Balderama's appeal is therefore effectively a challenge to the genuineness of the factual issues, and we lack jurisdiction to consider it. . . Accordingly, we therefore DISMISS Balderama's appeal for lack of jurisdiction.").

Hayter v. City of Mount Vernon, 154 F.3d 269, 273 (5th Cir. 1998) ("Hayter's appeal falls squarely within the Supreme Court's description of claims that *Johnson* permits a public official to pursue on interlocutory appeal. The actions and conduct of the parties involved were not the subject of the material issue of genuine fact which the magistrate found precluded summary judgment. Instead, the disputed question was whether or not the defendants' conduct, i.e., their actions based on their belief that the substance they found in Hayter's car was marijuana, was reasonable. As such, the magistrate's ruling is precisely the type that the Supreme Court noted was appealable; therefore, this Court has jurisdiction to hear this appeal.").

White v. Balderama, 153 F.3d 237, 240-42 (5th Cir. 1998) ("The Supreme Court's recent jurisprudence on interlocutory appeals from denials of summary judgment on the basis of qualified immunity indicates that we possess jurisdiction to hear an interlocutory appeal challenging the materiality of the fact issues that led the district court to deny summary judgment but that we lack jurisdiction to hear interlocutory appeals challenging the genuineness of those fact issues. . . . We further observed in *Colston* that the specificity of the district court's order denying summary judgment dramatically affects the ease with which we can apply the *Johnson/Behrens* rule . . . . The district court's conclusion that genuine issues of material fact preclude a conclusive determination that Balderama did not violate clearly established law may have been predicated upon any number of potential factual issues, but the court did not specify what factual issues led it to this conclusion. Thus, we are unable to determine whether Balderama's statement in his appellate brief of the facts viewed in the light most favorable to White comports with the district court's conception of the facts viewed in the light most favorable to White, and thus whether Balderama is making a reviewable materiality challenge or an unreviewable genuineness challenge on appeal. . . . In *Johnson* and *Behrens*, the Supreme Court indicated that, in order to deal with the problem created by a lack of specificity in a district court's order denying summary judgment on the basis of qualified immunity, we have the authority to '"undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."'. . . However, we conclude that a more efficient alternative exists for making this determination in this case: a limited remand to the district court for the purpose of

allowing it to articulate specifically what factual scenario it believes emerges from viewing the summary judgment evidence in the light most favorable to White.").

Colston v. Barnhart, 146 F.3d 282, 284-86 (5th Cir. 1998) (*denying application for reh'g en banc*) ("We believe that the key to understanding *Johnson* and *Behrens* rests on the recognition that when a district court denies a motion for summary judgment on the ground that 'genuine issues of material fact remain,' the court has made two distinct legal conclusions. First, the court has concluded that the issues of fact in question are genuine, i.e., the evidence is sufficient to permit a reasonable factfinder to return a verdict for the nonmoving party. . . . Second, the court has concluded that the issues of fact are material, i.e., resolution of the issues might affect the outcome of the suit under governing law. *Johnson* makes clear that an appellate court may not review a district court's determination that the issues of fact in question are genuine. . . . *Behrens*, on the other hand, makes clear that an appellate court is free to review a district court's determination that the issues of fact in question are material. . . . In this case the district court's statement was not sufficiently specific. This lack of specificity required us to undertake a review of the record to determine whether we had jurisdiction over Barnhart's appeal. As our majority opinion reflects, we conducted this review, and because we determined that Barnhart's version of the facts mirrored the version of the facts that we determined the district court likely assumed, we concluded that Barnhart was properly challenging the materiality of the factual issues the district court believed in dispute and that we therefore possessed jurisdiction over his appeal. On the merits, we concluded that Barnhart was entitled to qualified immunity.")

Colston v. Barnhart, 146 F.3d 282, 286, 288, 292-94 (5th Cir. 1998) (DeMoss, J., *dissenting from order denying reh'g en banc*) ("This case presents serious issues concerning our appellate jurisdiction in cases involving the denial of summary judgment on the grounds of qualified immunity. I express the following views in the hopes that they may help to attract the Supreme Court's attention to the increasingly complex panorama of doctrine and dissent that has evolved as the courts of appeals have struggled to reconcile the holdings of *Johnson* and *Behrens*. . . . The error of the panel opinion's approach is evident. Neither *Johnson* nor *Behrens* contemplates a 'cumbersome review of the record' for the threshold purpose of determining whether there is appellate jurisdiction. It is, rather, only a suggestion for how to proceed on determining whether the plaintiff alleged a violation of then-clearly-established law after appellate jurisdiction has already been determined. . . . The majority's approach is mistaken not only because it misreads *Behrens*, but more fundamentally because it results in the core substantive issue in a case being reviewed as a collateral order. . . . [T]he panel majority erred in determining that our Court had interlocutory jurisdiction to address the merits of the ultimate factual dispute as to whether under all of the circumstances Trooper Barnhart's use of deadly force by shooting Colston twice in the back was or was not excessive. The "cumbersome review of the record" contemplated by *Johnson* and *Behrens* is conducted for the limited purpose of establishing a set of facts (sufficiently supported by the evidence for the purposes of summary judgment) that are then used to answer the abstract legal question of whether the plaintiff has alleged a violation of clearly-established law. Behrens authorizes nothing more. . . . The panel majority's use of the genuineness-or-materiality

distinction is simply not a useful theory of appealability. The trouble is that the analysis makes every denial of summary judgment appealable. Such an interpretation of *Behrens* entirely swallows the rule in *Johnson* . . . .").

Wren v. Towe, 130 F.3d 1154, 1157-58 (5th Cir. 1997) ("[T]he existence of disputed issues of material fact does not necessarily preclude review of the case. . . . Many of the facts relating to the availability of qualified immunity are in dispute, but this alone does not prevent summary judgment. A district court's denial of summary judgment is not immune from interlocutory appeal simply because the denial rested on the fact that a dispute over material issues of fact exists. . . To foreclose appeal, the disputed facts must be central to and not severable from the matter of qualified immunity. . . In this case, we feel that we have jurisdiction based on the undisputed facts, even if we assume the resolution of disputed facts in the Wrens' favor.").

Colston v. Barnhart, 130 F.3d 96, 98, 99 (5th Cir. 1997) ("The district court's determination that fact issues were presented that precluded summary judgment does not necessarily deny us jurisdiction over this appeal. . . We can determine as a matter of law whether Barnhart is entitled to qualified immunity after accepting all of Colston's factual allegations as true. . . We therefore have interlocutory jurisdiction to determine the legal issue of whether Barnhart's conduct was objectively reasonable.").

Colston v. Barnhart, 130 F.3d 96, 102 (5th Cir. 1997) (DeMoss, J., dissenting) ("The majority attempts to establish appellate jurisdiction by assuming away the disputed issues of material fact found by the district court. Specifically, the majority purports to accept Colston's factual allegations as true. It then turns to the question of the objective reasonableness inquiry, which our Court has acknowledged to be a question of law that may be decided by a judge in the absence of any dispute over material facts. . . But the majority then goes astray, drawing inferences in the wrong direction and viewing the record in the light most favorable to Barnhart. In light of the district court's conclusion that the objective reasonableness of Barnhart's actions could not be determined at summary judgment because of the unsettled state of the record–a conclusion based solely on the district court's evaluation of 'evidence sufficiency' –our Court has no appellate jurisdiction to review that judgment.").

Hart v. O'Brien, 127 F.3d 424, 436 (5th Cir. 1997) ("[T]he district court determined that there were sufficient uncontested facts to establish that the officers engaged in the conduct in question, but that there were insufficient uncontested facts to decide whether the officials enjoyed immunity as a matter of law. Hence, the officials may argue on interlocutory appeal (as they do here) that, contrary to the district court's judgment, enough uncontested facts exist to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune. . . Accordingly, under *Mitchell*, *Johnson*, and *Behrens*, we have jurisdiction over the officials' interlocutory appeal of the district court's denial of summary judgment on the grounds of immunity . . . .").

Hart v. O'Brien, 127 F.3d 424, 455-56 (5th Cir. 1997) (Benavides, J., concurring in part and dissenting in part) ("Under the collateral order doctrine, a defendant may argue on interlocutory appeal that even if the disputed facts are viewed in the plaintiff's favor, the remaining undisputed facts demonstrate that the plaintiff's constitutional rights were not violated or that the defendant's conduct was objectively reasonable in light of clearly established law. . . This is because the question for interlocutory review–the existence of immunity–is a purely legal question that is separable from the merits of a plaintiff's claim. . . The majority, however, relies on the presence of undisputed facts to justify its interlocutory review of Hart's compliance with her burden of production, an issue that the Supreme Court has found to be inextricably intertwined with, rather than separate from, the merits of her claims. . . Thus, the existence of undisputed evidence pertaining to the district court's finding of a genuine issue of material fact does not transform that determination into one that is immediately appealable under the collateral order doctrine.").

Coleman v. Houston Independent School District, 113 F.3d 528, 531 (5th Cir. 1997) ("[Defendant] does not challenge the sufficiency of the evidence underlying Coleman's allegations of discrimination. Instead, taking as given the facts assumed by the district court, [Defendant] claims that she is entitled to qualified immunity as a matter of law, because those assumed facts do not constitute a violation of clearly established federal law. Therefore, under the rule of *Jones* and *Behrens*, we may exercise appellate jurisdiction over this interlocutory appeal, for in doing so we do not decide the sufficiency of the evidence, nor do we decide disputed factual contentions.").

Nerren v. Livingston Police Dep't, 86 F.3d 469, 472 (5th Cir. 1996) ("In the wake of *Behrens*, the *Johnson* modification (if any) on appellate review applies only when 'what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred.' Thus, we cannot review the 'evidence sufficiency issue' (i.e., whether the nonmovant presented sufficient summary judgment evidence to create a dispute of fact). But we retain interlocutory jurisdiction to 'take, as given, the facts that the district court assumed when it denied summary judgment' and determine whether these facts state a claim under clearly established law.").

Doe v. Hillsboro Independent School District, 81 F.3d 1395, 1401 (5th Cir. 1996) ("Unlike *Johnson*, which was reviewed at the summary judgment-level, the instant case involves the complaint-level denial of a motion to dismiss under Rule 12(b)(6). In the Rule 12(b)(6) context, there can never be a genuine-issue- of-fact-based denial of qualified immunity, as we must assume that the plaintiff's factual allegations are true. Thus, denials of motions to dismiss on the basis of qualified immunity are always 'purely legal' denials. Accordingly, under *Mitchell* and *Johnson*, we have interlocutory jurisdiction to determine whether Jane has stated a claim under § 1983. And, if so, whether it is immune to dismissal at this stage on grounds of qualified immunity."), *opinion vacated on other grounds on reh'g en banc*, 113 F.3d 1412 (5th Cir. 1997) (en banc).

Cantu v. Rocha, 77 F.3d 795, 803 (5th Cir. 1996) ("In the wake of *Behrens*, it is clear that *Johnson*'s limitation on appellate review applies only when 'what is at issue in the sufficiency

determination is nothing more than whether the evidence could support a finding that particular conduct occurred.'[citing *Behrens*] . . . . What was disputed and decided by the district court in the case now before us was whether the conduct as alleged violated a clearly established statutory or constitutional right of which a reasonable person would have known. This is precisely the variety of order that *Johnson* distinguishes as being separable from the merits and appealable on interlocutory appeal.").

Morin v. Caire, 77 F.3d 116, 119-20 (5th Cir. 1996) ("Although the immunity exception does not apply to the decision to deny the plaintiffs' state law claims, we also may have jurisdiction to review that decision. In the interest of judicial economy, this court may exercise its discretion to consider under pendant appellate jurisdiction claims that are closely related to the issue properly before us. Although we generally exercise this power with caution, it is appropriate for us to do so in this situation, for if we were to refuse to exercise jurisdiction over the state law claims, our refusal would defeat the principal purpose of allowing an appeal of immunity issues before a government employee is forced to go to trial.").

McGee v. Brown, No. 94-16827, 1995 WL 451094, *1 (5th Cir. July 28, 1995) (not published) ("*Johnson* makes clear that where an unresolved issue of fact remains regarding a defendant's intent, a circuit court lacks jurisdiction to hear an appeal of a district court's denial of a qualified immunity claim.").

Hale v. Townley, 45 F.3d 914, 918 (5th Cir. 1995) ("If disputed factual issues material to qualified immunity are present, the district court's denial of summary judgment . . . on the basis of qualified immunity is not appealable.").

Mangieri v. Clifton, 29 F.3d 1012, 1015-16 (5th Cir. 1994) ("We have jurisdiction to review a summary judgment denial of qualified immunity only to the extent that 'it turns on an issue of law.' . . . Because the district court determined that a question of fact exists regarding the reasonableness of the probable cause to arrest determination, Mangieri contends that we lack jurisdiction to hear this appeal. We do not agree. We recently determined that a district court errs in 'holding that the objective reasonableness prong of the qualified immunity standard is generally a factual question for the jury.' *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir.1993). Following the Supreme Court's decision in *Hunter v. Bryant*,. . . we held that in evaluating a claim of qualified immunity, the district court is to make a determination of the objective reasonableness of the official's act as a matter of law. *Lampkin*, 7 F.3d at 434-35. Our interpretation of *Hunter* does not preclude the possibility that a disputed question of fact might still eliminate our jurisdiction to hear an appeal of a denial of summary judgment . . . . A denial of summary judgment based on a material factual dispute would still be appropriate if there are 'underlying historical facts in dispute that are material to the resolution of the questions whether the defendants acted in an objectively reasonable manner.' [citing *Lampkin*] The parties in *Lampkin* disputed whether force was used against the plaintiffs, the amount of time the plaintiffs were detained, and whether any reason existed to detain the plaintiffs. We concluded that this

court would be unable to make the determination of the objective reasonableness of the officer's activities 'without settling on a coherent view of what happened in the first place.'. . .In this case, however, there is general agreement as to the factual events that gave rise to this lawsuit. Mangieri was using a bullhorn at full volume when the officers, responding to a disturbance call, witnessed the disturbance for themselves and then proceeded to arrest Mangieri without first admonishing him to stop. The only material factual dispute revolves around the reasonableness of the officer's decision to arrest Mangieri without first issuing a warning. Motions for summary judgment based on qualified immunity are, in the normal course of events, to be resolved as a matter of law. [citing *Hunter*] Because the historical factual background of this case is not in controversy, the district court erred in refusing to consider the motion for summary judgment because of the disputed issue of the reasonableness of the police officer's decision to arrest Mangieri.").

Samaad v. City of Dallas, 940 F.2d 925, 942 (5th Cir. 1991) ("Assuming *arguendo* that the denial of qualified immunity ultimately turned on an issue of fact [defendant's intent], the only reason that is so is that the court erroneously decided an issue of law, i.e., whether the complaint stated a constitutional cause of action at all. Accordingly, the district court's denial of summary judgment, at an analytically prior stage, *did* turn on an issue of law. . . . Therefore we have jurisdiction over the appeal. . . .").

Leghart v. Hauk, 25 F. Supp.2d 748, 753 (W.D. Tex. 1998) ("In light of the Fifth Circuit's recent opinion in *White v. Balderama*, ... regarding the problematic nature of reviewing district court denials of summary judgment in the qualified immunity context, the Court sets forth the following factual scenario upon which it relies and which precludes it from entering summary judgment in favor of Hauk on the basis of qualified immunity.").

SIXTH CIRCUIT

Bunkley v. City of Detroit, Michigan, 902 F.3d 552, 559-61 (6th Cir. 2018) ("[O]n an interlocutory appeal from the denial of qualified immunity, we may decide a challenge to the district court's legal determination that the defendant's actions violated a constitutional right or that the right was clearly established. . . We may also decide a challenge to a legal aspect of the court's factual determinations, such as whether the court properly assessed the incontrovertible record evidence. . . And we may decide, as a legal question, a challenge to the court's factual determination insofar as the challenge contests that determination as 'blatantly contradicted by the record, so that no reasonable jury could believe it.'. . We may not, however, decide a challenge to the district court's determination of ' "evidence sufficiency," i.e., which facts a party may, or may not, be able to prove at trial.'. . . Therefore, putting these 'mays' and 'may nots' together into a single jurisdictional rule: we may not decide a challenge aimed solely at the district court's determination of the record-supported evidence, but we may decide a challenge with any legal aspect to it, no matter that it might encroach on the district court's fact-based determinations. . .It is true that, following *Johnson*, we readily cited the district court's finding of contested facts to dismiss such

interlocutory appeals for lack of jurisdiction. But after *Plumhoff*, we adopted a different approach in which we instead excise the prohibited fact-based challenge so as to establish jurisdiction. . . Under this approach, when legal and factual challenges are confused or entwined, 'we must separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine').'. . We likewise separate an appellant's reviewable challenges from its unreviewable. . . That is, we must 'ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . By ignoring the defendant's attempts to dispute the facts, we follow the same path as did the district court—considering the sufficiency of the plaintiff's proffered evidence, drawing all reasonable inferences in the plaintiff's favor—and, ideally, we would need look no further than the district court's opinion for the pertinent facts and inferences. *DiLuzio*, 796 F.3d at 611. Sometimes, we can simply adopt the district court's recitation of facts and inferences. *See Johnson*, 515 U.S. at 319, 115 S.Ct. 2151. Of course, in briefing or arguing for reversal on legal grounds, the defendant-appellant may—indeed, for some arguments, must—point to some other of the plaintiff's proffered evidence, or some incontrovertible record evidence, to support that argument. . . Alternatively, or correspondingly, the plaintiff-appellee may point to additional record evidence in support of its position, or to bolster the district court's determination. Thus, while we need not engage in a plenary review of the record, neither are we limited to only the facts, evidence, or inferences that the district court has stated expressly. . . Rather, we must make the legal determination of whether the defendant violated a clearly established right, based on those now (for this purpose) undisputed record facts, i.e., once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record.'. . Moreover, our respect for the district court's factual determinations is such that, if the district court has cited no facts or evidence (e.g., has 'simply den[ied the] summary judgment motion[ ] without indicating [its] reasons for doing so'), we 'may have to undertake a cumbersome review of the record to determine what facts the district court ... likely assumed.'. . . It bears mention, however, that, in determining the relevant set of facts for the purpose of deciding an interlocutory appeal, we do not ourselves make any findings of fact or inferences for purposes of any subsequent proceedings.")

Stillwagon v. City of Delaware, Ohio, No. 17-3873, 2018 WL 4055972, at *7-8 (6th Cir. Aug. 24, 2018) (not reported) ("We note that, on appeal, defendants at times argue for different facts than those contemplated by the district court. Defendants now frame the underlying issue as whether Stillwagon *hit* Mattingly in the head. But Stillwagon was prosecuted for *shooting* Mattingly in the head and his § 1983 claims arose from defendants' affirmative efforts to create a false narrative of events by fabricating evidence, filing false reports, and making misleading omissions in an effort to 'prove' that Stillwagon *shot* Mattingly in the head, even though no such shooting occurred. We decline to address this factual discrepancy, as an interlocutory appeal of a denial of qualified immunity based on evidentiary disputes is not permitted. . . The appealable issue is, whether the facts as asserted by Stillwagon (i.e., malicious prosecution for shooting Mattingly in the head) violated clearly established law. Our holding addresses this legal issue, not any factual dispute raised for the first time by defendants on appeal. . . . Based on what a reasonable officer

could have known as set forth above, we affirm the district court's holding that, when viewing the evidence most favorably toward Stillwagon, a jury could reasonably conclude that officers lacked probable cause to arrest Stillwagon for felonious assault and that the evidence produced by Stillwagon, viewed in the light most favorable to him, shows that he was falsely arrested.")

Hansen v. Aper, No. 17-2220, 2018 WL 3997321, at *3 (6th Cir. Aug. 21, 2018) (not published) ("Hansen argues that this court does not have jurisdiction over Aper's appeal because the district court denied summary judgment based on its conclusion that genuine issues of material fact existed. In contrast, Aper argues that this case does raise a 'pure issue of law'—whether the facts Hansen plead are sufficient to deny Aper qualified immunity. Aper claims that the current state of the law is 'ambiguous' and insufficient to put a law enforcement officer in Aper's position on notice that his actions were unlawful. He further argues that we should reevaluate the legal standard we apply to § 1983 handcuffing cases and require that Hansen produce more evidence to prove that he suffered an injury caused by the handcuffs. Insofar as Aper claims that the law did not put him on notice that his actions were illegal, we have jurisdiction over this appeal because whether law is 'clearly established' is a legal issue. . . But our jurisdiction does not extend to Aper's other argument, which is that Hansen failed to produce sufficient evidence proving an injury causally related to the handcuffing. . . . Therefore, we dismiss for lack of jurisdiction Aper's claim that Hansen did not produce sufficient evidence of injury.")

Barry v. O'Grady, 895 F.3d 440, 443-44 (6th Cir. 2018) ("We have . . . recognized two narrow exceptions to the rule prohibiting fact-based interlocutory appeals. First, '[i]n exceptional circumstances, an appellate court may overrule a district court's determination that a factual dispute exists where evidence in the record establishes that the determination is "blatantly and demonstrably false."'. . And second, we may overlook a factual disagreement if the defendant, despite disputing the plaintiff's version of the story, is 'willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal.'. . Put another way, if the issues on appeal are 'purely legal' and if 'this court can ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue,' 'then there is an issue over which this court has jurisdiction.'. . But to the extent that the defendant's argument 'rel[ies] on [his] own disputed version of the facts,' we have no jurisdiction to hear the appeal. . . The upshot is that, in most appeals of denials of qualified immunity, we must defer to the district court's determinations of fact. Beyond determinations of fact, '[w]e have also held that a defendant may not challenge the inferences that the district court draws from those facts, as that too is a prohibited fact-based appeal.' *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015). Indeed, 'ideally we need look no further than the district court's opinion,' and 'we often may be able merely to adopt the district court's recitation of facts and inferences,'. . . as we have done here. That well-settled standard is dispositive in this case. Given that the district court's decision turned on its determination that disputed issues of material fact remain, we may exercise jurisdiction only if O'Grady can satisfy one of the two narrow exceptions to *Johnson*. As an initial matter, O'Grady does not attempt to argue that any of the district court's factual conclusions were 'blatantly and demonstrably false.'. . To be sure, O'Grady's argument on appeal is based almost exclusively on disagreements with

the district court's factual determinations and inferences. After all, his brief starts with a 24–page recitation of the facts, in which he uses facts in the record—as well as facts not in the record—to draw inferences in his favor. But he does not explain why any of the district court's conclusions were blatantly and demonstrably false; he merely disagrees with them. That is insufficient to give us jurisdiction. . . . [W]e would have jurisdiction if O'Grady argued that he wins even when we view the facts—as we must—in a light favorable to Barry. He does not. Instead, O'Grady applies his own factual conclusions and inferences to both of Barry's surviving claims. Throughout his argument on the First Amendment claim, O'Grady outlines the correct legal standard but then simply draws his own favorable inferences or ignores the district court's inferences in favor of Barry.")

Barry v. O'Grady, 895 F.3d 440, 445-49 (6th Cir. 2018) (Sutton, J., dissenting) ("Teresa Barry has given us plenty of good reasons to deny qualified immunity to Judge James O'Grady on the ground that a material dispute of fact clouds what happened in this case and precludes summary judgment. Rather than accept those reasons and rather than provide useful law-of-the-case precedent for the upcoming trial and any appeal from that trial, the court dismisses the appeal on the ground that we lack subject matter jurisdiction to review the fact inferences drawn by the district court under *Johnson v. Jones*. . . . This approach gives *Johnson v. Jones* a bad name, cannot be reconciled with Supreme Court precedent, and makes little sense. If appellate courts have no jurisdiction to review the inferences drawn by a district court judge in resolving a claim of qualified immunity at summary judgment, how are they supposed to apply de novo review to the district court's decision, as Supreme Court decisions since *Johnson* do? *See, e.g.*, *Plumhoff v. Rickard*, —— U.S. ——, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014); *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). I respectfully dissent. . . . *Johnson* establishes an important principle—but a limited principle. An officer may not appeal the denial of a qualified immunity ruling solely on the ground that the plaintiff's record-supported facts are wrong. In the rare case in which that is all the officer does—saying in effect only that the plaintiff is lying—an appellate court should dismiss the appeal for lack of jurisdiction. Otherwise, we have jurisdiction to decide—on de novo review—whether, after reading the factual record in the light most favorable to the plaintiff, the officer should win as a matter of law on the first or second prong of qualified immunity. That's all there is to it. Each of our too-many-to-count additional glosses on *Johnson* is needlessly complicated, inconsistent with later Supreme Court cases, contradicts our duty to apply fresh review to a district court's summary judgment decision, and ultimately is hurtful to the party it is designed to help: the plaintiff. The key gloss used today (and not for the first time) is to transform *Johnson* into a rule about what the district court did, as opposed to what the defendant officer did. No longer is the subject-matter-jurisdiction question about what *the officer does*, namely raise a legal question about whether the plaintiff's record evidence creates a material issue of fact for trial. It is a subject-matter-jurisdiction question about what the *district court did*, namely drew 'inferences' that have become a forbidden source of appeal because in our circuit 'that too is a prohibited fact-based appeal.' *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015). Consider the defendant official's appellate stance today to see how far we have come in transforming *Johnson*. The defendant recounts Barry's story about the raunchy November

conversation. . . He notes that Barry thought he grew 'hostile' to her after the female attorney came to speak to him and describes the evidence to which she points to support that allegation. . . And he recounts the harsh language and inappropriate comments that Barry alleges he made. . . I have little doubt that the defendant will challenge the veracity of those allegations at trial, as he is entitled to do. But at this stage, he has accepted the statements and done what every appellant has been allowed to do since the creation of Civil Rule 56: raise a legal challenge about whether, even accepting those facts and the inferences from those facts, he should win as a matter of law. Even on Barry's version of the facts, the defendant thinks his conduct was not severe enough to create a hostile work environment that violated her clearly established rights. . . That is a legal question—two legal questions really. And the defendant is permitted to take an interlocutory appeal to argue that the evidence, even when viewed in Barry's favor, could not prove that he retaliated against her in violation of her clearly established rights under the First Amendment. . . Yet the court refuses to decide whether the district court drew the proper inferences when it denied Barry qualified immunity. . . Instead, it dismisses the appeal for lack of jurisdiction. . . It escapes me how this approach can be consistent with the responsibilities assigned to us in reviewing a summary judgment decision. Namely: Are the facts, when read in the light most favorable to the plaintiff, 'sufficient as a matter of law to state a triable question under each legal element essential to liability[?]' *Walton v. Powell*, 821 F.3d 1204, 1209 (10th Cir. 2016) (Gorsuch, J.) (rejecting the broad view of *Johnson* adopted by several of our cases). Answering that law-bound question is 'a core responsibility of appellate courts.'. . .Instead of following the examples of *Scott* and *Plumhoff*, some panels of our court have buried the two cases in exceptions. One exception: *Johnson* does not apply to cases where all genuinely disputed facts are caught on video. *See, e.g., Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015). But that wasn't so in *Plumhoff*, and at any rate this innovation has no support in the Civil Rules or case law. The other exception: *Johnson* does not apply if the record evidence, whether videotaped or not, 'blatantly contradict[s]' the inferences that the district court drew. . . But just because the Court identified a district court's obvious error in evaluating the evidence as a *sufficient* condition for jurisdiction doesn't mean it's a *necessary* one. A rule that applies based on the medium of evidence or based on whether the district court's inferences are really wrong, not just conventionally wrong, is not a rule—and as standards go it is a terribly confusing way to decide something as essential as the subject matter jurisdiction of the court. Indeed, because this approach implicates a matter of subject matter jurisdiction, we may never look the other way. The arguments may not be forfeited or waived, requiring us to initiate this ineffable task in every summary judgment appeal involving qualified immunity—whether the lawyers press it or not. If any doubt remains about the oddity of our approach to *Johnson*, the Supreme Court's approach to interlocutory appeals at the motion-to-dismiss stage should dispel it. At that stage, we accept the complaint's allegations as true and review whether the district court's pro-plaintiff inferences are 'plausible.'. . That is analogous to what we should do at the summary judgment stage. How strange to say that we have subject matter jurisdiction to overturn the inferences that the district court drew when reviewing one type of interlocutory appeal (motion to dismiss) but that we lack jurisdiction to overturn those same inferences when reviewing another type of interlocutory appeal (summary judgment). We stand alone in pushing *Johnson* so aggressively. Most circuits, true enough, have some decisions

wrestling with the reach of *Johnson*. And most of them have some opinions going both ways. *See Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring in part and concurring in the judgment) (listing cases). But none seem to invoke *Johnson* as often as we do. A database search reveals that our published and unpublished opinions have cited *Johnson* seventy-one times since the Court decided *Plumhoff* in 2014, when one might have thought the Supreme Court rejected the full-flowering form of *Johnson*. The Tenth Circuit comes in a distant second with twenty-nine citations. The First, Second, Third, Fourth, Fifth, Seventh, Ninth, Eleventh, and D.C. Circuits have cited the case between zero and seventeen times. The long and the short of it is that we are spending a lot of time doing something that no one else seems to be doing. Making matters worse, our broad reading invites a host of inefficiencies and complications. How exactly does an appellate court decide what the district court inferred? Should we defer only to the inferences that the district court explicitly drew? *See Lewis v. Tripp*, 604 F.3d 1221, 1226 (10th Cir. 2010). I doubt it. District courts are busy and will not parse out every inference they make in every denial of summary judgment. Subject matter jurisdiction should not turn on whether a district court happened to say 'I infer' on one day but not another. Should we instead scrutinize the record to figure out what inferences we think the district court drew or it implied? I doubt that as well. It weds the already difficult task of record review with the guess work implicit in any attempt to divine what the district court was thinking when it denied summary judgment. Keep in mind that these innovations replace something we know how to do and have been doing for years: determine whether the defendant officer, after reading all reasonable inferences in the record in favor of the plaintiff, should win as a matter of law or whether a material triable issue of fact requires a jury trial. I know how to do one of these tasks but have little idea how to do the other. Oddly enough, all of this can be evaded by the clever attorney who makes sure to raise a prong-two qualified immunity argument—which to date remains a legal question subject to interlocutory review. Then he or she can use pendent jurisdiction over the rest of the appeal, as the two are invariably 'inextricably intertwined.'. .Last but not least, our approach to *Johnson* hurts the parties it means to help. Just ask Teresa Barry. Had we reached the merits of her claim, we might have affirmed the district court's denial of qualified immunity on the ground that a material fact dispute remained. That might have given Barry and the trial judge clear direction as to what was at stake and what law should control the jury trial at prongs one and two of the qualified immunity inquiry. And in a future appeal, the law of the case would establish the contours of what the jury could permissibly decide. Instead, Barry returns to the district court empty-handed. In the final analysis, our gloss on *Johnson* fails to respect Supreme Court precedent, ignores the de novo standard of review applicable in reviewing summary judgment decisions, can be sidestepped at ease, and hurts the people it is designed to help. The court seeing things differently, I respectfully dissent.")

Mathis & Sons, Inc. v. Commonwealth of Kentucky Transportation Cabinet, 738 F. App'x 866, ___ (6th Cir. 2018) ("The defendants' fourth claim is that 'there [wa]s no "clearly established" law so as to put a reasonable public official on notice that the conduct in question here would be constitutionally violative.' . . Basically, the defendants' argument is that they were duty bound to pursue their legitimate concerns that Mathis & Sons was not actually eligible for DBE

[Disadvantaged Business Enterprise] status and they had no way of knowing that doing so would violate the Constitution. On the one hand, this is an improper fact-based challenge to the district court's finding that Mathis & Sons produced sufficient evidence that a jury could find that the 'concerns' were a fabricated and implausible rationalization for racial discrimination. On interlocutory appeal from the denial of qualified immunity, as here, we lack jurisdiction to 'decide an appeal challenging the district court's determination of "evidence sufficiency."' *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015) (quoting *Johnson v. Jones*, 515 U.S. 304, 313 (1995)).On the other hand, this is a purely legal challenge—over which we have jurisdiction, *see id.* at 608-11—in which the defendants are claiming that the law did not clearly proscribe their specific conduct. We may review this based on Mathis & Son's proffered evidence and the inferences the district court drew from that evidence, *see id.* at 609 (explaining that 'a defendant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal'), namely, that the alleged 'concerns' were actually a fabrication used as cover for the violation of Mathis & Sons' rights, concocted by these defendants, who 'were motivated by discriminatory intent or purpose,' *Mathis & Sons*, 2017 WL 3045125 at *10. The defendants argue that, even so, Mathis & Sons has failed to identify any precedent directly on point to demonstrate that this conduct was contrary to 'clearly established law,' as is required under the second prong of the qualified immunity analysis. . . .The question here. . . is whether the established law forbidding racial discrimination would 'apply with obvious clarity' to the defendants' acts, if "motivated by discriminatory intent or purpose" and intended to harm Mathis & Sons' business. That is, would a KYTC employee of ordinary common sense know, without need for specific instruction from a federal court, that fabricating alleged concerns and falsifying Reed Hampton's recommendation, due to racial animus, would violate Mathis & Son's rights? We are confident that he or she would know.")

Williams v. Godby, 732 F. App'x 418, ___ (6th Cir. 2018) ("We have also explained that the defendant-appellant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal. *See Romo v. Largen*, 723 F.3d 670, 674–75 (6th Cir. 2013). . . . [B]ecause we defer to the district court's factual assessments, ideally we need look no further than the district court's opinion for the facts and inferences cited expressly therein. . . That is, we can often merely adopt the district court's recitation of facts and inferences. . . And we find it appropriate to do so here, given Officer Godby's arguments and Williams's counterarguments. Thus, in deciding this appeal, we adopt the district court's articulated facts and inferences. It bears mention, however, that, in adopting or accepting the district court's factual determinations for the purpose of deciding this interlocutory appeal, we are not ourselves making any findings of fact or inferences for purposes of any subsequent proceedings.")

Pelton v. Perdue, 731 F. App'x 419, ___ (6th Cir. 2018) ("Often appellants in this context intertwine appropriate legal challenges with inappropriate factual challenges. When that happens, we can 'ignore the defendant's attempts to dispute facts and nonetheless resolve the legal issue.' *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005). As a practical matter, this means that we defer to the district court's findings of fact and ideally need not look further

than the district court's opinion for the facts adopted by the court. Of course the defendant-appellant is also permitted to point elsewhere in the record to evidence presented by the plaintiff or some incontrovertible record evidence. *DiLuzio*, 796 F.3d at 611 (citing *Scott*, 550 U.S. at 380, 127 S.Ct. 1769). The plaintiff-appellee is likewise entitled to point to additional record evidence in support of the district court's denial of summary judgment. . . The lodestar of this inquiry is this: 'we must make the *legal* determination of whether the defendant violated a clearly established right, based on ... "the relevant set of facts and draw[ing] all inferences in favor of the nonmoving party *to the extent supportable by the record*.'. . . Where the district court does not make clear which facts were relied upon, we 'may have to undertake a cumbersome review of the record to determine what facts the district court ... likely assumed.'. . .[T]he officers' arguments from the record ask this court to adopt *their* interpretation of the record evidence, which is exactly the kind of fact-based argument that is precluded by our jurisprudence on this kind of appeal. . . Therefore, because the officers do not otherwise claim that the district court improperly assessed uncontroverted record evidence or made a factual determination blatantly contradicted by the record, . . . we review their claims in light of the record as presented in the Joint Statement of Facts, drawing all reasonable inferences in favor of Pelton.")

Hopper v. Plummer, 887 F.3d 744, 756-58 (6th Cir. 2018) ("The district court inferred from this evidence that each of the officers may have been aware of the contextual facts indicating Richardson's need for medical treatment because he was struggling to breathe while in a prone position. And 'a defendant may not challenge the inferences the district court draws from th[e] facts, as that ... is a prohibited fact-based appeal.' *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 609 (6th Cir. 2015). Because the district court's finding of a genuine issue of material fact as to defendants' 'knowledge of a substantial risk of serious harm' is premised on Richardson's continuous complaints about his inability to breathe, its qualified immunity inquiry was sufficiently individualized, even if it referred to 'those on the scene' and the 'individual' defendants rather than list each officer by name. . . Defendants' argument provides no basis for relief. . . . We are precluded from deciding an interlocutory appeal premised on a challenge either to the inferences a district court draws from its record-supported factual determinations or to ' "evidence sufficiency," *i.e.*, which facts a party may, or may not, be able to prove at trial.'. . Defendants do not accept the district court's conclusion that there was sufficient evidence to create a genuine issue of material fact. For example, defendants contend the district court failed to 'factor into [its] analysis that medical staff was on the scene throughout' and 'the undisputed evidence is that corrections officers were holding Richardson so the medical personnel could assess and treat him.' Yet the district court pointed to specific facts about the medical staff response, and underscored that defendants may have refused a medic's and a nurse's request to reposition Richardson to allow for a proper medical assessment. Defendants also do not accept the district court's finding that the plaintiff presented evidence that 'Richardson continually told those on the scene that he could not breathe.' Instead, they inappropriately argue that the evidence is insufficient to support that conclusion because not every officer testified to hearing Richardson's complaints or to being present when the complaints were made. We have noted that 'the deliberate indifference threshold is higher for correctional officers where ... an inmate is receiving medical treatment[.]'.

. But our reasoning is premised on non-medical prison officials reasonably relying on or deferring to medical staff expertise, and it is sharply disputed whether and to what extent defendants did so here. . . .'When the legal arguments advanced rely entirely on a defendant's own disputed version of the facts, the appeal boils down to issues of fact and credibility determinations that we cannot make.'. . Because defendants' medical-personnel argument turns on such determinations, we cannot consider it on interlocutory appeal.")

Hopper v. Plummer, 887 F.3d 744, 760 (6th Cir. 2018) ("[D]efendant Sheriff Plummer appeals from the district court's denial of summary judgment on plaintiff's § 1983 claims brought against him in his official capacity. . . That is not an independently appealable 'final decision' under 28 U.S.C. § 1291. . . Accordingly, we may exercise our pendent appellate jurisdiction over Sheriff Plummer's appeal only if his motion for summary judgment is 'inextricably intertwined with the qualified immunity analysis properly before the Court.'. . In other words, only 'when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well.'. .That is not the case here. The officers' appeal of the qualified immunity issues is not 'inextricably intertwined' with Sheriff Plummer's appeal because their 'liability turns on whether the force they used to restrain [Richardson] violated his clearly established constitutional rights,' while municipal liability turns on separate questions of the jail's training and supervision obligations and practices as well as its policies and customs. . . Because pendent jurisdiction is inapplicable, we cannot consider Sheriff Plummer's interlocutory appeal.")

Sanders v. Jones, 728 F. App'x 563, ___ (6th Cir. 2018) ("Taking Sanders's facts 'at their best,'. . . Jones's statement permits an inference that Jones knew or strongly suspected from viewing the video that the person who sold the confidential informant the drugs was not Sanders, or at least, did not look like Sanders. Because Jones contests this critical factual issue, there is no legal question for us to review at this juncture. Indeed, the district court found that 'Jones himself acknowledged upon a closer inspection of the footage that it was not Sanders who participated in the drug deal. Thus, the question becomes whether Defendant "acted with something akin to deliberate indifference in failing to ascertain that [the plaintiff] ... was not the person wanted."'. . The district court thus found that Jones's deposition testimony regarding the screenshot of the video raised a 'genuine' issue as to whether Jones recklessly misidentified Sanders as the person who sold drugs to the confidential informant. . . In other words, a summary judgment order that determines 'only a question of "evidence sufficiency," *i.e.*, which facts a party may, or may not, be able to prove at trial' is not appealable. . . It does not appear that the district court's determination was 'blatantly and demonstrably false' such that we could ignore it and retain jurisdiction, because neither the screenshot nor the video are in the record. . . The district court will have to factor this problem of missing evidence into its calculus when resolving this case on remand.")

Enoch v. Hogan, 728 F. App'x 448, ___ (6th Cir. 2018) ("Because 'there cannot be any disputed questions of fact' in our review of this Rule 12(c) motion and, at this stage, 'our review solely involves applying principles of law to a given and assumed set of facts,' this case falls outside the

parameters of *Johnson*, and we may properly exercise jurisdiction. *Barnes v. Winchell*, 105 F.3d 1111, 1114 (6th Cir. 1997). We therefore turn to the substance of Defendants' qualified immunity arguments.")

Barton v. City of Lincoln Park, 726 F.3d 361, 367-68 (6th Cir. 2018) ("A pendent appellate claim is 'inextricably intertwined' with a properly reviewable claim on collateral appeal 'only if ... appellate resolution of the collateral appeal necessarily resolves the pendent claim as well.'. . Though the exercise of pendent jurisdiction is a matter of discretion, 'the "inextricably intertwined" requirement is not meant to be loosely applied .... Rather [it] is satisfied only if the resolution of the properly appealable issue "necessarily and unavoidably" decides the non-appealable issue.'. . While the district court's mention of the *Monell* claims in addressing Officer Behrik's qualified-immunity defense is curious, it does not inextricably intertwine the two issues. Although we agree that Officer Behrik is entitled to qualified immunity, that determination turns solely on Officer Behrik's duty to intervene on any alleged force, rather than any training or policy. The City's liability hinges on its failure to train and supervise the officers. This court has previously recognized that an officer's appealable claim and a city's non-appealable claim are inextricably intertwined where 'the finding of nonexistence of a constitutional claim for immunity purposes necessarily decides[s] the whole case not only in favor of the officer, but also in favor of the city ....'. . . Thus, Officer Behrik's challenge to the denial of qualified immunity is not 'inextricably intertwined' with the district court's summary-judgment ruling on the City's *Monell* liability. Moreover, the claims against the remaining officers were not before the district court. Those claims of excessive force will continue. Because resolution of Officer Behrik's interlocutory appeal does not necessarily determine the City's training and supervision obligations, we do not have jurisdiction to consider the City's municipal-liability appeal.")

McGaw v. Sevier County, Tennessee, 715 F.App'x 495, 498-99 (6th Cir. 2017) ("It is true that, in narrow circumstances, a court of appeals may review the denial of a motion for summary judgment through the court's pendent jurisdiction, but Sevier County's appeal does not qualify for this exception. A court hearing an appeal may in its discretion exercise pendent jurisdiction 'where the appealable and non-appealable issues are "inextricably intertwined," meaning that "the appealable issue at hand cannot be resolved without addressing the nonappealable collateral issue."'. . Thus, where the question of a municipality's liability is coterminous with a determination of an officer's qualified immunity, a court may exercise pendent jurisdiction over the former claim in the course of an appeal of the latter. . .Here, however, this court lacks jurisdiction over Sevier County's claim because the county's liability is not foreclosed by our determination that the officers were entitled to qualified immunity. The district court denied the county's motion for summary judgment because it held that there were genuine issues of material fact as to whether the county had properly trained its officers to recognize inmates' medical needs. The fact that these officers did not act with deliberate indifference because they reasonably relied on Nurse Sims's diagnosis of McGaw's needs does not resolve the disputes over whether the county's training procedures were adequate or appropriate as a whole. Lack of training could conceivably have

affected Nurse Sims's action, and that would not at all intertwine with the officers' immunity claims. Without such intertwining, pendent appellate jurisdiction is lacking, and it is not appropriate for us to exercise it here. For these reasons, the judgment of the district court is reversed with respect to the officer defendants, and Sevier County's appeal is dismissed for lack of jurisdiction.")

Bays v. Montmorency Cty., 874 F.3d 264, 270-71 (6th Cir. 2017) ("Our decision to affirm the district court's denial of qualified immunity does not necessarily decide the question whether the district court erred in granting summary judgment to the County on the failure-to-train claim. That the Bays have a cognizable claim against Sigler by no means shows that they have a cognizable claim against the County. That Sigler may have shown deliberate indifference to Shane's medical needs does not show that the County failed to train its employees in this area or had a policy designed to violate such rights. . . *Mattox v. City of Forest Park* does not change our minds. . . The district court in that case denied the officer and the city summary judgment in a § 1983 suit. We overturned the district court's summary judgment against the officer after finding that he had not violated any constitutional right and thus deserved qualified immunity. . . Because a municipality cannot be held liable if none of its officers violated a constitutional right, our qualified immunity decision necessarily subverted the district court's summary judgment against the city. That meant the city's appeal was inextricably intertwined with the qualified immunity appeal, which in turn meant we could exercise pendent jurisdiction over it. . . The Bays' claim differs materially. Our review of Sigler's qualified immunity claim does not necessarily decide whether the Bays produced enough evidence to save their claim against the County. It could be that the district court correctly held that the Bays failed to carry their burden. Or it could be that the district court erred and the County is liable. The question remains open for appeal after the district court renders final judgment in the case. For these reasons, we affirm the district court's denial of qualified immunity to Donna Sigler and dismiss the Bays' appeal for lack of jurisdiction.")

Thibault v. Wierszewski*,* 695 F. App'x 891, 904 (6th Cir. 2017) ("In short, viewing the evidence in the record in the light most favorable to the plaintiff—as we must—it becomes clear that the facts underlying Wierszewski's determination that he had probable cause to arrest Thibault are in dispute. Moreover, those disputes are neither minor nor immaterial. Consequently, the district court properly denied summary judgment to Wierszewski on his asserted claim of qualified immunity.")

Thibault v. Wierszewski*,* 695 F. App'x 891, 904-05 (6th Cir. 2017) (Sutton, J., dissenting) ("As I read *Johnson*, as our court's cases read *Johnson*, and as the Supreme Court itself has read *Johnson*, it deprives us of jurisdiction over an appeal from denial of qualified immunity only when the defendant's argument boils down to an attack on the plaintiff's evidence-supported version of the facts. . . But when a defendant challenges the reasonableness of *inferences* the district court drew from the plaintiff's account of the facts, we must hear the appeal. *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007). That's especially true when an inference implicates a mixed question of law and fact, as it typically will in a qualified immunity case. Today's case illustrates the problems

with a broad reading of *Johnson*. Like the defendant in *Scott*, Wierszewski argues that the district court drew an untenable inference from the video evidence: that Thibault's performance on the sobriety tests showed he was not driving while intoxicated. According to Wierszewski, that untenable inference gave rise to an untenable legal conclusion: that Wierszewski was not entitled to qualified immunity because he unreasonably concluded he had probable cause to arrest Thibault. On Wierszewski's view, the undisputed facts in the case—most notably, Thibault's difficulty maintaining his balance during several of the tests—establish that he had a reasonable basis for the arrest even if we resolve all other factual disputes in Thibault's favor. The Supreme Court recently made clear that deciding legal claims of this sort is 'a core responsibility of appellate courts' that *Johnson* does not limit. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014). Yet today the court finds itself without jurisdiction, and thereby strips Wierszewski of immunity from suit (and his right to an interlocutory appeal, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)) without considering his legal argument on the merits. For these reasons, I respectfully dissent.")

Harmon v. Hamilton County, Ohio, 675 F. App'x 532, 538-43 (6th Cir. 2017) ("In determining the scope of our jurisdiction, we must 'separate an appellant's reviewable challenges from its unreviewable.'. . In earlier decisions, we held a challenge was unreviewable where the appellant failed to 'overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case.'. . In recent decisions, however, we clarified that we may still decide appeals that contain a 'pure question of law, despite the defendants' failure to concede the plaintiff's version of the facts for purposes of the interlocutory appeal.'. . In those cases, we can 'ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . Thus, a defendant's failure to concede the plaintiff's version of the facts is not fatal so long as there is a pure question of law that we may review. . . In ascertaining which facts are disputed or not, 'ideally we need look no further than the district court's opinion for the facts and inferences cited expressly therein.'. . . Thus, we must determine whether Defendants have raised prohibited fact-based challenges, and if they have, whether they have also raised pure questions of law over which we may exercise jurisdiction. . . .We conclude that Defendants rely on disputed facts at every point in their argument on appeal, divesting this court of appellate jurisdiction over Plaintiffs' excessive force claim. . . . All in all, we have no appellate jurisdiction over these fact-based challenges. Nor do Defendants raise any legal question for us to review, such as whether, based on Plaintiffs' version of the facts, "the district court's legal determination that ... [Defendants'] actions violated a constitutional right or that the right was clearly established." *See DiLuzio*, 796 F.3d at 609. Therefore, we dismiss Defendants' excessive force interlocutory appeal for lack of appellate jurisdiction. . . .It is true that this court has taken seemingly inconsistent views as to whether the existence of probable cause is a question of fact or law. . .We need not try to resolve these inconsistencies today. Instead, we conclude that there are factual questions *underlying* the probable-cause determination—separate and apart from the issue of whether probable cause is either legal or factual in nature—that preclude our ability to exercise jurisdiction over the false-arrest claim.")

Thompson v. City of Lebanon, 831 F.3d 366, 372-77 (6th Cir. 2016) (Stranch, J., concurring in part and dissenting in part) ("I concur in the majority's conclusion that we lack jurisdiction to review the defendants' evidence-based arguments and respectfully dissent from the conclusion that we have jurisdiction to review other issues. Our cases that define the limits of interlocutory appellate jurisdiction over denials of qualified immunity involving factual disputes—*Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002), *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005), *Estate of Carter v. City of Detroit*, 408 F.3d 305 (6th Cir. 2005), and *McKenna v. City of Royal Oak*, 469 F.3d 559 (6th Cir. 2006)—show that we lack jurisdiction over any aspect of this case. I dissent not because I dispute the outcome proposed by the majority but because I believe we must honor the limitations—set by Congress, the Supreme Court, and our own precedent—that govern interlocutory jurisdiction. . . .In the instant case, Officers McKinley and McDannald continue to insist on appeal that McKinley fired his weapon accidentally and that the officers' accounts of the events preceding Thompson's death are truthful, despite the district court's finding that both issues are genuinely disputed and its recognition that the credibility of each officer is in question. With respect to the first dispute, answering the factual question of whether or not Officer McKinley intended to use his weapon is a necessary prerequisite to making a legal determination about whether McKinley seized Thompson for Fourth Amendment purposes. . . Similarly, knowing the particular facts and circumstances that confronted the officers in the moment they killed Thompson is essential to determining whether or not the officers' actions were objectively reasonable as a matter of law. . . With respect to the record evidence on summary judgment, the district court found that submitted video evidence from McKinley's dashboard camera is ambiguous, that 'there are conflicting assessments by the parties' expert witnesses as to what occurred during the shooting[,]' that a third officer's 'statements suggest a different series of events than what was reported by McKinley and McDannald,' and that 'numerous inconsistencies in McKinley and McDannald's accounts call their narratives into doubt, in addition to other significant reasons that a jury might question their credibility.'. . These factual disputes are neither 'minor[,]'. . . nor 'immaterial to the legal issues raised by the appeal,'. . . . Rather, they are the basis of the legal arguments that McKinley and McDannald present to this panel: that no Fourth Amendment seizure took place and that neither McKinley's nor McDannald's actions were objectively unreasonable. Because the officers' factual assertions are crucial to their claims, I would hold that governing precedent obliges us to dismiss this case for lack of jurisdiction and return it to the district court for the trial judge to undertake the core function of trial courts—supervise trial proceedings before the jury assigned to hear this case.")

Rolen v. City of Cleveland, 657 F. App'x 353 (6th Cir. 2016) ("We have previously noted that merely stating that one has conceded the facts is insufficient to establish jurisdiction. . . We remind defendants who wish to bring interlocutory appeals based on qualified immunity that 'a defendant will have a solid jurisdictional position if the defendant claims that the plaintiff cannot show a violation of the clearly established law even assuming everything alleged is true.'. . Law enforcement officers may interact with individuals during a consensual encounter 'without any objective level of suspicion.'. . When officers wish to engage in a non-consensual encounter, it rises to the level of an investigative detention. . . The Fourth Amendment allows an officer to

conduct an investigatory stop of an individual if they have reasonable suspicion of criminal activity. . . To conduct a protective frisk of an individual, an officer must further believe 'that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others.'. . Whether a *Terry* frisk is constitutional depends on the validity of the initial *Terry* stop. Officers must have reasonable suspicion to conduct a close-proximity investigation *before* they are entitled to conduct a protective frisk. . . . On appeal, Craska only argues that he is entitled to qualified immunity for frisking Ficker and not for the stop itself. . . Because he has not set forth a basis for constitutional authority to conduct an investigatory stop of Ficker, Craska cannot demonstrate that he was entitled to conduct a protective frisk. Since our analysis of this issue is not conditioned on any disputed facts, we have jurisdiction and deny Craska qualified immunity. . . .The facts the parties disagree about directly implicate the considerations surrounding a deadly force claim. Thus, we lack jurisdiction over this issue, as it is not our place to resolve these factual disputes.")

Williams v. Morgan, 652 F. App'x 365, 375 (6th Cir. 2016) (Stranch, J., concurring in the judgment) ("I agree with much of the reasoning and the outcome of the majority opinion. I write separately to address how we have jurisdiction over this case in light of the final judgment rule, reflected in 28 U.S.C. § 1291, and its function of protecting the role of trial courts and the efficiency of the appellate system. Specifically, my point concerns our jurisdiction over interlocutory appeals from denials of qualified immunity that involve factual disputes. We have long recognized that we have jurisdiction to review neat legal questions on interlocutory appeal. . . . Relying on our precedent in two prior cases—*Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002), and *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005)—*Estate of Carter* noted that 'this court can ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . *Phelps* and *Beard* provide both the authority for and the parameters governing this proposition. *Phelps* explains that we have jurisdiction to disregard defendants' attempts to dispute plaintiffs' facts only in cases where 'the legal issues are discrete from the factual disputes[.]'. . *Beard* holds that interlocutory jurisdiction over appeals from denials of qualified immunity involving disputed facts only exists where 'some minor factual issues are in dispute' and 'it does not appear that the resolution of [such] factual issues is needed to resolve the legal issues' also presented. . . If, on the other hand, disputed factual issues are 'crucial to' a defendant's interlocutory qualified immunity appeal, we remain 'obliged to dismiss it for lack of jurisdiction.'. . It is clear in the instant case that Officer Morgan disputes factual issues that are crucial to his interlocutory appeal, therefore we do not have jurisdiction over this case under the line of cases including *Phelps*, *Beard*, *Estate of Carter*, and *McKenna*. There is another limited exception to the final judgment rule, however, that is present in this case. We have recognized that the Supreme Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), created a narrow exception to the jurisdictional limitations on interlocutory appeals, allowing courts of appeal to assert interlocutory jurisdiction in qualified immunity appeals where a defendant claims that a 'trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false[.]'. . Because Officer Morgan has made such a claim

here, I agree that this court has jurisdiction to hear his appeal, and I respectfully concur in the outcome reached by the majority.")

Zuhl v. Haskins, 652 F. App'x 358, 361-64 (6th Cir. 2016) ("[W]e may decide an appeal challenging the district court's *legal* determination that the defendant's actions violated a constitutional right or that the right was clearly established. . .We may also decide an appeal challenging a *legal* aspect of the district court's factual determinations, such as whether the district court properly assessed the incontrovertible record evidence. . . And we may decide, as a *legal* question, an appeal challenging the district court's factual determination insofar as the challenge contests that determination as 'blatantly contradicted by the record, so that no reasonable jury could believe it.'. . We may not, however, decide an appeal challenging the district court's determination of ' "evidence sufficiency," *i.e.*, which facts a party may, or may not, be able to prove at trial.'. . .These types of prohibited fact-based ('evidence sufficiency') appeals challenge only the plaintiff's allegations (and the district court's acceptance) of 'what [actually] occurred[ ] or why an action was taken or omitted,' *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011), who did it, *Johnson*, 515 U.S. at 307, or 'nothing more than whether the evidence could support a [jury's] finding that particular conduct occurred,' *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). We have also explained that the defendant-appellant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal. . . In the event that legal and factual challenges are confused or entwined, 'we must separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is "genuine").'. . Similarly, we can separate an appellant's reviewable challenges from its unreviewable. . . That is, we can 'ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . .In his brief on appeal, Deputy Haskins claims to be accepting Jason's version of the facts, but then flatly disputes Jason's evidence and relies on his view of the evidence to argue that his actions were objectively reasonable. . . .But rather than dismiss the appeal outright, we can instead discard the fact-based or 'evidence sufficiency' challenges and exercise the jurisdiction we do have to review the district court's legal determinations, based on the plaintiffs' version of the facts and the inferences as articulated by the district court. . . .Accepting Jason's version of the facts and the district court's inferences, as we must in deciding this interlocutory appeal as a matter of law, we conclude that the force as alleged was excessive, in violation of Jason's constitutional rights. Moreover, the right to be free of such excessive force was clearly established as of January 29, 2010, the morning at issue here.")

Zuhl v. Haskins, No. 14-2346, 2016 WL 3346071, at *5 (6th Cir. June 16, 2016) (Stranch, J., concurring in part and dissenting in part) (not published) ("I concur in Part I and all but the final paragraph of Part II.A of the majority's opinion. I respectfully dissent, however, because our cases that define the limits of interlocutory appellate jurisdiction over denials of qualified immunity involving factual disputes—*Phelps v. Coy*, 286 F.3d 295 (6th Cir. 2002), *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005), *Estate of Carter v. City of Detroit*, 408 F.3d 305 (6th Cir. 2005), and *McKenna v. City of Royal Oak*, 469 F.3d 559 (6th Cir. 2006)—show that we

lack jurisdiction in this case. In *Estate of Carter*, we explained that if 'aside from [any] impermissible arguments regarding disputes of fact, [a] defendant [appealing a qualified immunity denial] also raises the purely legal question of whether the facts alleged ... support a claim of violation of clearly established law, then there is an issue over which this court has jurisdiction.'. . We also noted another limited area of jurisdiction with respect to interlocutory qualified immunity appeals. Relying on our precedent in *Phelps* and *Beard*, *Estate of Carter* noted that 'this court can ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . Thus, *Estate of Carter* derives its authority and its limitations from the precedential principles articulated in *Phelps* and *Beard*. *Phelps* explains that we have jurisdiction to disregard defendants' attempts to dispute plaintiffs' facts *only* in cases where 'the legal issues are discrete from the factual disputes[.]'. . *Beard* provides that interlocutory jurisdiction over appeals from denials of qualified immunity involving disputed facts only exists where 'some minor factual issues are in dispute' and 'it does not appear that the resolution of [such] factual issues is needed to resolve the legal issues' also presented. . . If, on the other hand, disputed factual issues are 'crucial' to a defendant's interlocutory qualified immunity appeal, we remain 'obliged to dismiss it for lack of jurisdiction.'. . We reiterated these limitations on interlocutory jurisdiction in *McKenna,* distinguishing our exercise of jurisdiction in *Estate of Carter* and dismissing the interlocutory appeal in *McKenna* on the grounds that 'the officer-defendants have in fact made no legal argument for qualified immunity which can be extracted from their reliance on disputed facts.'. .In the instant case, as the majority recognizes, Haskins 'flatly disputes [Zuhl's] evidence and relies on his view of the evidence to argue that his actions were objectively reasonable.'. . Because Haskins disputes factual issues that are crucial to his interlocutory appeal, I would hold that we lack jurisdiction over this case and are obliged to dismiss under our precedent.")

Richko v. Wayne Cty., Mich., 819 F.3d 907, 921-22 (6th Cir. 2016) ("Because Cameron's appeal on the basis of qualified immunity is not coterminous with the issue of Wayne County's municipal liability, we lack pendent jurisdiction over the County. Our conclusion is bolstered by the Supreme Court's holding in *Swint.* There, the Court reversed the Eleventh Circuit's exercise of pendent jurisdiction, which was based on the theory of judicial economy, over a county commission's appeal from the denial of summary judgment. . . The Court held that the question of the county commission's liability was not 'inextricably intertwined' with the individual defendants' immunity from suit because the claim against the commission focused on whether one of the individual defendants qualified as a county policymaker, whereas the individual defendants' claims were based on whether they had violated clearly established law. . . Here, Wayne County's potential liability is based on its alleged de facto policy of not reviewing an inmate's mental-health records in the MH–WIN system. This issue is not inextricably intertwined with the decision to deny summary judgment to Cameron based on qualified immunity, and a review of the former issue is not necessary to ensure a meaningful review of the latter. We therefore decline to exercise pendent jurisdiction over Wayne County's interlocutory appeal.")

McDonald v. Flake, 814 F.3d 804, 815-17 (6th Cir. 2016) ("[S]ince we have already determined that the rights the plaintiffs are claiming here were clearly established at the time of the incident, we must now decide whether Officer Flake's conduct, on these facts, violated those rights. We conclude that it did. On these facts, Officer Flake led a group of alcohol-impaired officers in an attack on the unsuspecting plaintiffs, in violation of *Turner*, 119 F.3d at 429; inflicted excessive force on these subdued plaintiffs during this police encounter and seizure, in violation of *Chappell*, 585 F.3d at 908; and ultimately arrested these battered plaintiffs without probable cause, in violation of *Everson*, 556 F.3d at 500. On this evidence, a jury could reasonably find for the plaintiffs. Under this analysis, the decision is obvious. We AFFIRM the district court's denial of Officer Flake's motion for summary judgment on the basis of qualified immunity. . . . As demonstrated in the foregoing section, the appealable issue here (whether Officer Flake's conduct violated plaintiffs' clearly established rights) is readily resolved without consideration of the existence or contours of the alleged policy or custom that underlies the claim of municipal liability. Moreover, the City's core argument on the merits of its appeal demonstrates fully the independence or unrelatedness of these issues: the City insists that the plaintiffs cannot prove municipal liability *even if* they prove that Officer Flake violated their rights as alleged. Consequently, we may not extend pendent appellate jurisdiction to this issue. . .As the plaintiffs point out, Officer Flake's appeal was solely a fact-based challenge to the plaintiffs' evidence and the district court's findings, which was both contrary to settled law and in flagrant disregard of the district court's direct admonition that Flake must accept the plaintiffs' version of the facts in order to raise a justiciable appeal. Despite his protests in his response filing, Flake cannot overcome this problem. His appeal was 'obviously without merit.' The City claims to base its right to appeal on pendent appellate jurisdiction but, even acknowledging the controlling law (i.e., that the appealable issue must necessarily depend on the outcome of the pendent issue, otherwise referred to as being 'inextricably intertwined'), the City made no such argument. In fact, the City's argument demonstrated that the issues were not interdependent. In its response to the motion, the City asserts that the appeals are interdependent because we could make a fact determination that Officer Flake did *not* drink any alcohol (despite the plaintiffs' evidence and the district court's ruling), which would then allow both defendant-appellants to prevail. But that theory is untenable here. Rather, at this stage of the proceedings, there was no reasonable claim of pendent appellate jurisdiction. This appeal was 'obviously without merit.' The unmistakable futility of these appeals is compelling. . . This gross futility and the defendants' disregard for the warning necessarily influences our view of whether the defendants intended 'delay, harassment, or other improper purposes,' *Bridgeport Music*, 714 F.3d at 944. In suggesting that the true purpose was delay, the plaintiffs point out that Officer Flake engaged in over two years of discovery before filing his motion for qualified immunity and then filed the appeal only days before trial was scheduled to begin. The City filed its appeal after that and only after the district court had denied its motion to continue trial to a later date. The district court itself expressed that it was 'disturbed' and 'troubled' by this timing, suggesting that it suspected the defendants of improper gamesmanship. The defendants respond, correctly, that they filed their appeals within days of the district court's order denying their motions. In *Yates*, 941 F.2d at 448, we warned that, 'unfortunately,' defendants could employ these interlocutory appeals from the denial of qualified immunity 'for the sole purpose of

delaying trial,' 'often to the disadvantage of the plaintiff.' Specifically, when 'disappointed by the denial of a continuance, [such defendants] may help themselves to a postponement by lodging a notice of appeal.'. . By design, or merely as a result, '[d]efendants may defeat just claims by making [the] suit unbearably expensive or indefinitely putting off the trial.'. . Here, the defendants argued the facts and evidence, in complete disregard of the law and the district court's warnings, thus ensuring that they had no chance of success but nonetheless obtaining the postponement of trial that the district court had denied them, while also causing the plaintiffs unnecessary effort and expense in responding to them. . .This was also a waste of judicial resources. . . Because these appeals were so clearly futile and apparently prosecuted for improper purposes, we conclude that sanctions are warranted. . . Therefore, pursuant to our authority under Federal Rule of Appellate Procedure 38, we hereby sanction Officer Flake in the amount of $1500. We further sanction the City in the amount of $1500. These sanctions are to offset some of the plaintiffs' appellate attorney's fees and costs, to compensate the plaintiffs, in part, for defending this frivolous appeal.")

Brown v. Chapman, 814 F.3d 436, 446-47 (6th Cir. 2016) ("Unlike a denial of summary judgment on qualified-immunity grounds, a denial of summary judgment on municipal-liability grounds does not fall under the collateral-order doctrine. Although the doctrine's first two requirements would be satisfied—the denial is conclusive and review of it would not affect any other issue in the case—the City would not be able to satisfy the third requirement because this court could review the question of municipal liability after the district court rendered a final judgment. . . Nor can we exercise pendent appellate jurisdiction over the City's appeal. On an interlocutory appeal, when a municipality's right to summary judgment is 'inextricably intertwined' with a qualified-immunity analysis, a court may exercise pendent appellate jurisdiction over the municipality's appeal. . . . Plaintiff's claim against the officers turns on whether they knew of and disregarded a substantial risk of serious harm to Brown's health and safety; plaintiff's claim against the City is based on a theory of ratification by failure to investigate. Although the two overlap, plaintiff's claim against the officers does not necessarily resolve her claim against the City. Indeed, a finding that the officers are entitled to qualified immunity would not foreclose a finding that the City was liable here. If, for example, 'the [City] ratified [the officers'] misconduct which, though unconstitutional, was not in violation of clearly-established law,' a court could find the officers immune but the City liable. . . Accordingly, we conclude that the City's right to summary judgment is not 'inextricably intertwined' here with the qualified-immunity analysis and therefore dismiss the City of Cleveland's appeal for lack of jurisdiction.")

Morabito v. Holmes, 628 F. App'x 353, 356 (6th Cir. 2015) ("Plaintiff contends that Defendants' appeal raises factual issues that we may not resolve in an interlocutory appeal. However, Defendants' ultimate claim, that they are entitled to qualified immunity because Plaintiff has failed to present evidence of excessive force sufficient to raise a material issue of fact, is a reviewable question of law. In addition, the facts surrounding the denial of medical care claim are not in dispute, and therefore denial of qualified immunity on that claim is a pure question of law. Under Ohio law, our jurisdiction over an interlocutory order denying statutory immunity turns on whether the statute is one that provides immunity from liability (not reviewable) or one that provides

immunity from suit (reviewable). *Sabo v. City of Mentor,* 657 F.3d 332, 336 (6th Cir.2011) (citing *Chesher v. Neyer,* 477 F.3d 784, 793 (6th Cir.2007)). 'Ohio's immunity statutes were revised in 2003 to provide immunity from suit.' *Id .; see also* Ohio Rev.Code § 2744.02(C). Therefore, the district court's denial of immunity under Ohio Rev.Code § 2744 is reviewable.")

Kindl v. City of Berkley, 798 F.3d 391, 398-403 (6th Cir. 2015) ("Defendants' principal arguments regarding qualified immunity reduce merely to a factual contention that Plaintiff cannot prove that they should have known of, much less that they were in fact aware of, Kindl's serious medical need. We lack jurisdiction to consider these arguments. . . Defendants also attempt rather incredibly to argue that Kindl did not have a serious medical need. This, too, is a factual dispute that does not qualify as a pure question of law sufficient to create appellate jurisdiction at this stage of the proceedings. . . . Defendants first argue that the video of Kindl's time in cell one conclusively establishes that she did not act in a way that would have alerted the two officers to her need for medical treatment. We need not decide whether a video with such frequent lapses as the one in this case may even qualify as the sort of irrefutable evidence that would come within the *Scott* exception because, upon our review, even with its imperfections, the video reflects that Kindl sought the attention of the officers after experiencing a seizure, that she urinated on herself, that she fell off the bench, and that she experienced additional seizures before her death. Moreover, the video does not conclusively establish, as Defendants claim, that she never again sought help after the 8 p.m. conversation—to the contrary, it shows her apparently calling out on at least one occasion, and at other points the video footage would be consistent with her speaking. . . .We are in no better a position than the district court—or more to the point, a jury—to determine whether based on Kindl's statements, convulsions, alleged moans, requests for attention, and appearance, Defendants subjectively understood the gravity of her situation. The ultimate 'inference' regarding Defendants' knowledge depends on credibility determinations as well as the composite of evidence ultimately put before a jury. Permitting interlocutory appellate review under the guise of considering only 'inferences' would thus erase the well-established boundaries protecting the function of the ultimate factfinder and deviate from binding precedent set out in *Johnson* and its progeny. . . .In sum, Defendants fail to identify any pure question of law that might entitle them to qualified immunity on the objective element of the deliberate indifference claim. The cases they cite in aid of their appeal do not cast into doubt the seriousness of alcohol withdrawal as a medical condition, much less overcome the existence of evidence supporting the district court's conclusion that Plaintiff met her summary judgment burden in establishing that Kindl had a serious medical need. Instead, each case cited by Defendants discusses whether the particular evidence in the record was sufficient to show that the defendants 'appreciated' the detainee's medical needs. . . Defendants' arguments in reliance on these cases, at bottom, repackage their factual dispute with regard to the subjective prong of Plaintiff's deliberate indifference claim. Because Defendants are simply making another 'impermissible argument[ ] regarding disputes of facts,'. . . we do not have jurisdiction over their appeal of the district court's denial of qualified immunity.")

DiLuzio v. Vill. of Yorkville, Ohio, 796 F.3d 604, 609-12 & n.1 (6th Cir. 2015) ("[W]e may decide an appeal challenging the district court's *legal* determination that the defendant's actions violated

a constitutional right or that the right was clearly established. . .We may also decide an appeal challenging a *legal* aspect of the district court's factual determinations, such as whether the district court properly assessed the incontrovertible record evidence. . . And we may decide, as a *legal* question, an appeal challenging the district court's factual determination insofar as the challenge contests that determination as 'blatantly contradicted by the record, so that no reasonable jury could believe it.'. . . We may not, however, decide an appeal challenging the district court's determination of ' "evidence sufficiency," *i.e.,* which facts a party may, or may not, be able to prove at trial.'. . Because such a challenge is purely fact-based, lacking any issue of law, it 'does not present a legal question in the sense in which the term was used in *Mitchell,*'. . . and is therefore not an appealable 'final decision' within the meaning of 28 U.S.C. § 1291. These types of prohibited fact-based ('evidence sufficiency') appeals challenge directly the plaintiff's allegations (and the district court's acceptance) of 'what [actually] occurred[ ] or why an action was taken or omitted,' *Ortiz v. Jordan,* 562 U.S. 180, 190 (2011), who did it, *Johnson,* 515 U.S. at 307, or 'nothing more than whether the evidence could support a [jury's] finding that particular conduct occurred,' *Behrens v. Pelletier,* 516 U.S. 299, 313 (1996). We have also held that a defendant may not challenge the inferences the district court draws from those facts, as that too is a prohibited fact-based appeal. *Romo v. Largen,* 723 F.3d 670, 673–74 (6th Cir. 2013). . . . Although an argument could be made that the Supreme Court has rejected this proposition (thus implicitly overruling *Romo*), we decline to make such a holding. In *Plumhoff,* the police fatally shot a fleeing driver, the plaintiff sued claiming excessive force, and the accused officers moved for summary judgment on qualified immunity grounds. *Estate of Allen v. City of West Memphis,* No. 05–2489, 2011WL197426, *1–3 (W.D.Tenn., Jan. 20, 2011). The district court denied the motion by drawing certain inferences from the evidence. . . .On direct appeal, we affirmed and accepted those inferences, but with sparse discussion. . . . In reversing the decision, however, the Supreme Court considered the same evidence but drew the opposite inferences. . . . That is, the Court drew its own inferences from the evidence, it did not defer to the district court's inferences. But the Court did not discuss its approach to assessing the inferences and the question of deference (or jurisdictional effect) was not at issue. Moreover, those were inferences drawn from incontrovertible video evidence, not inferences drawn in the light most favorable to the plaintiff from the plaintiff's record-supported evidence, as we have here and as is the typical case. Because this latter distinction may matter and because *Plumhoff* offers no consideration of the issue, we decline to read *Plumhoff* as deciding this issue in the ordinary case. Accordingly, *Romo* remains the law of the Circuit. . . . As a rule, we either dismiss these fact-based ('evidence sufficiency') appeals for lack of jurisdiction or excise the prohibited challenge. . . . As a matter of practical application, this is merely to say that we may not decide a challenge directly to the district court's determination of the record-supported evidence or the inferences it has drawn therefrom, but we may decide a challenge with any legal aspect to it, no matter that it might encroach on the district court's fact-based determinations. . . . And, in the event that legal and factual challenges are confused or entwined, 'we must separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is "genuine").'. . Similarly, we can separate an appellant's reviewable challenges from its unreviewable. . . That is, we can 'ignore the defendant's attempts to dispute the facts and

nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'. . . In so doing, because we defer to the district court's factual determinations, ideally we need look no further than the district court's opinion for the facts and inferences cited expressly therein. That is, in deciding these legal challenges on interlocutory appeal from the denial of qualified immunity, we often may be able merely to adopt the district court's recitation of facts and inferences. . . Of course, in briefing or arguing for reversal on legal grounds, the defendant-appellant may—indeed, for some arguments, must—point to some other of the plaintiff's record evidence, or some incontrovertible record evidence, to support that argument. . . Alternatively, or correspondingly, the plaintiff-appellee may point to additional record evidence in support of its position, or to bolster the district court's determination. Thus, while we need not engage in a plenary review of the record, neither are we limited to only the facts, evidence, or inferences that the district court has stated expressly. . . Rather, we must make the *legal* determination of whether the defendant violated a clearly established right, based on those now (for this purpose) undisputed record facts, i.e., 'once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record.*'. . Moreover, the presumption favoring the district court's factual determinations is such that, if the district court has cited no facts or evidence (e.g., has 'simply den[ied the] summary judgment motion[ ] without indicating [its] reasons for doing so"), we "may have to undertake a cumbersome review of the record to determine what facts the district court ... likely assumed.'. . Finally, it bears mention that, in accepting the district court's factual determinations and relying on the plaintiff's record evidence for the purpose of deciding the interlocutory appeal, we do not ourselves make any findings of fact or inference for purposes of any subsequent proceedings. . . In this appeal, the defendants proclaim that they are accepting plaintiff DiLuzio's version of the facts but, in reality, they rest each of their arguments (but for one) on their own version of the disputed facts and the inferences they would draw from them. For each of their challenges, we will discard the fact-based or 'evidence sufficiency' portion of the appeal—that is, any challenge to the district court's view of the facts or its associated inferences or, more frequently, any challenge to plaintiff DiLuzio's version of the record-supported evidence—and resolve the legal challenge based on those given facts and inferences.")

Oliver v. Greene, 613 F. App'x 455, 456-59 (6th Cir. 2015) ("*Johnson v. Jones* is narrow and applies only when the challenge on appeal is to an underlying decision that 'merely decided a question of evidentiary sufficiency, *i.e.*, which facts a party may, or may not, be able to prove at trial.'. . As we have said elsewhere, '*Plumhoff* appears to cabin the reach of *Johnson* to "purely factual issues that the trial court might confront if the case were tried."' *Roberson v. Torres,* 770 F.3d 398, 403 (6th Cir.2014) (quoting *Plumhoff,* 134 S.Ct. at 2019). *See also Family Service Ass'n ex rel. Coil v. Wells Twp.*, —— F.3d ——, No. 14–4020, 2015 WL 1726571, *5 (6th Cir. Apr. 16, 2015) ("[The defendant] may be wrong on the merits but that does not deny us jurisdiction to say so—or for that matter deny [the plaintiff] the *benefit* of a merits ruling that establishes on this record that a jury reasonably could rule for him."). Here, Greene raises two arguments on appeal, neither of which directly challenges the district court's finding of a genuine dispute of material fact as to whether Oliver's actions created a threat to Greene and others. Instead, Greene argues

that his evidence, including the surveillance video, so overwhelms (i.e., blatantly contradicts) Oliver's version that it renders the facts undisputed (and in his favor). . . Alternatively, Green argues that he was entitled to qualified immunity even if we accept Oliver's version, thus rendering the facts undisputed (in Oliver's favor). . .Consequently, we have jurisdiction over this interlocutory appeal. . . .Greene's primary contention is that his evidence, most notably the surveillance video, renders the facts and events in question undisputed, such that the district court erred by 'accept[ing] the Plaintiff's version of events as true,'. . . and 'viewing the evidence in the light most favorable to Plaintiff, as required on summary judgment[.]'. . . While Greene is partially correct about the value of a surveillance video, he is incorrect about the district court's analysis and whether the material facts are subject to genuine dispute here. . . . Here, Oliver contends that Greene needlessly subjected him to excessive force by taking him to the ground, choking him, and repeatedly punching him in the face. Greene replies that, initially, he was trying to restrain Oliver, an unruly inmate, and later was just defending himself. Moreover, Greene argues that his evidence, including not only the video but also certain deposition testimony and exhibits, blatantly contradict Oliver's version and therefore render 'undisputed' the events at the initiation of the altercation and prove unequivocally that Oliver initiated it. Greene also cites cases to support his contention that courts can, pursuant to *Scott*, rely on evidence other than video (e.g., medical records) to refute a party's version of events. Taking this last contention first, it goes too far on the present facts. Here, Greene's claim is that his other evidence (deposition testimony, affidavits, and prison records) is more credible than is Oliver (a proven liar) and, therefore, he has blatantly contradicted Oliver to the point that there is no dispute of fact as to whether Oliver started the fight. That is neither *Scott's* holding nor the law. Oliver urges one view, Greene's evidence supports another. That is a dispute. As for the surveillance video and this court's ability to view the facts in the light depicted by the video (such that it speaks for itself), Greene is mistaken about that as well. Greene does not argue that the district court ignored or misrepresented the events in the video. . . .Alternatively, Greene argues that he was entitled to qualified immunity even accepting Oliver's version of events. Greene bases this argument on what he sees as '[t]he undisputed facts surrounding [his] use of force'; facts that allegedly indicate force was necessary 'to protect himself' from Oliver's assaults and 'to maintain or restore order.'. . But Oliver denies that he provoked Greene and contends that Greene needlessly injured him by way of excessive force when he took him to the ground, choked him, and repeatedly punched him in the face. Under this version of the facts, Greene did subject Oliver to excessive force and, correspondingly, is not entitled to qualified immunity.")

Oliver v. Greene, 613 F. App'x 455, 459-61 (6th Cir. 2015) (Karen Nelson Moore, J., concurring in the judgment) ("The majority and I agree that we have jurisdiction to decide whether the record blatantly contradicts Oliver's version of the facts. We also agree that the video and the record as a whole do not definitively show that Oliver's description of the event is incredible. We disagree, however, about whether, after concluding that the record does not blatantly conflict with Oliver's version of events, we have jurisdiction to consider Greene's claim that he is immune from suit. Binding precedent in this court compels the conclusion that we do not. We are without jurisdiction to consider interlocutory appeals contesting a denial of qualified immunity insofar as the appellant officer disputes the plaintiff's record-supported version of the facts. . . The one exception to this

rule is when 'the plaintiff's version of the facts, which the district court accepted, was "so utterly discredited by the record ... that no reasonable jury could have believed him."'. . Once the court of appeals has concluded that the record does not blatantly contradict the plaintiff's version of events, however, we do not have jurisdiction to conduct a de novo review of the district court's determination that there is a genuine dispute of material fact. . . Neither the Supreme Court nor this court sitting en banc has overruled *Romo,* and therefore we are bound by its holding. . . The majority further contends that Greene has argued alternatively that he is entitled to qualified immunity even if the court accepts Oliver's version of the facts. True, Greene purports to raise an alternative argument in his 'Summary of Argument' that even under Oliver's facts the force Greene used was not excessive as a matter of law. . . but Greene does not actually make the argument in his brief. Greene's entire argument is premised on his own version of the facts. After reciting the standard of review and the purpose of qualified immunity, Greene immediately launches into argument about why Oliver is not to be believed. . . Greene then argues that his use of force was justified to protect himself and to maintain or restore discipline. . . But his arguments rest entirely on two critical, disputed facts: first, that Oliver struck or attempted to strike Greene three times. . . and second, that Oliver had disobeyed several orders. . . . The only authorities Greene cites in support of his argument are cases where the corrections officers' use of force was justified by self-defense. . . In sum, Greene's entire 'legal' argument rests on a finding that Oliver punched him and disobeyed orders and nothing more, and Greene does not address whether his use of force was justified if Oliver had simply pointed his finger and had followed orders. Our published cases establish that '[m]ere conclusory statements that the officers construe the facts in the light most favorable to the plaintiff cannot confer jurisdiction upon this Court,' *Thompson v. Grida,* 656 F.3d 365, 368 (6th Cir.2011), unless we can isolate *legal* arguments. . . Because Greene's entire legal argument rests on his version of the facts, we do not have jurisdiction to reach the alternative qualified-immunity argument. Thus, I would affirm the district court on the sole basis that the record does not blatantly contradict Oliver's version of the facts. Insofar as Greene otherwise disputes Oliver's version of the facts, Greene's appeal should be dismissed.")

Family Serv. Ass'n ex rel. Coil v. Wells Twp., 783 F.3d 600, 607 (6th Cir. 2015) ("Coil claims we should dismiss this interlocutory appeal for want of jurisdiction rather than affirm the district court's decision. *See Johnson v. Jones,* 515 U.S. 304 (1995). Coil takes a narrow jurisdictional requirement and tries to turn it into something it is not. *Johnson* applies to interlocutory appeals that solely contest the plaintiff's account of the facts. . . That is not this case. Officer Kamerer maintains that, even 'accept[ing] a review of the record in a light most favorable to [Coil],' his conduct still does not violate the Fourth or Fourteenth Amendments. . . He may be wrong on the merits but that does not deny us jurisdiction to say so—or for that matter deny Coil the *benefit* of a merits ruling that establishes on this record that a jury reasonably could rule for him. Appeals contesting whether the undisputed facts support reasonable suspicion or deliberate indifference do not run afoul of *Johnson. See Gardenhire v. Schubert,* 205 F.3d 303, 312 (6th Cir.2000) (reasonable suspicion); *Williams v. Mehra,* 186 F.3d 685, 690 (6th Cir.1999) (en banc) (deliberate indifference). And in this setting *Johnson* does not prevent appellate courts from performing their

customary function of determining whether a material fact dispute precludes summary judgment. *See Plumhoff v. Rickard*, 134 S.Ct. 2012, 2019 (2014).")

Pollard v. City of Columbus, Ohio, 780 F.3d 395, 401-02 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 217 (2015) ("Unlike in *Romo*, we are not presented with 'dueling accounts of what happened.'. . Pollard asserts that, at the time the officers fired, Bynum was unarmed, injured, and trapped in the Cadillac. However, the officers do not dispute that account. . . They simply maintain that, despite being unarmed, injured, and trapped, Bynum was still a threat, first, because he appeared to have a gun and, second, because they had strong reason to believe he would use the gun. Because the officers 'concede the facts in the light most favorable to [the appellee], they 'raise *a pure issue of law,'*. . . which this court may entertain on appeal. Thus, we deny Pollard's motion to dismiss for lack of jurisdiction with respect to the officer-defendants. . . . Because a municipality is not entitled to qualified immunity, *Owen v. City of Independence,* 445 U.S. 622, 657, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the collateral order doctrine does not extend to summary-judgment orders on municipal-liability claims. Nevertheless, to the extent the issues raised in the City of Columbus's appeal are 'inextricably intertwined' with the officers' claims of qualified immunity, we may exercise pendent jurisdiction over the appeal. . . The deprivation of a constitutional right is a prerequisite to municipal liability under § 1983. . . Thus, there is a clear connection between the City's appeal and the officers' claims of qualified immunity. If the officers did not commit a constitutional violation, Pollard's municipal-liability claim necessarily fails because the prerequisite for municipal liability is not met. Conversely, if the officers committed a constitutional violation, the prerequisite has been met and Pollard can proceed with her claim against the City. As such, the City's appeal is 'inextricably intertwined' with the officers' appeal, and Pollard's motion to dismiss for lack of jurisdiction is DENIED with respect to the City.")

Brown v. Lewis, 779 F.3d 401, 411 (6th Cir. 2015) ("It is not always clear from the officers' initial brief that they accept Brown's entire version of events. For example, the officers contend that only one of them participated in handcuffing Brown, so the others could not be liable for any excessive force. The court does not have jurisdiction to review these contentions because they reflect a dispute of fact. The officers do nonetheless raise questions of law concerning the application of the Fourth Amendment to Brown's version of the facts, including the full use of force she describes. This court has jurisdiction over those questions.")

Harris v. Lasseigne, 602 F. App'x 218, 221-22 (6th Cir. 2015) ("The plaintiff has the burden of demonstrating that the defendant should not be granted qualified immunity. . . Lasseigne is entitled to qualified immunity if the court determines that his actions in shooting Craft 'did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'. . The court first determines 'if the facts alleged make out a violation of a constitutional right,' and next decides 'if the right at issue was "clearly established" when the event occurred such that a reasonable officer would have known that his conduct violated it.'. . The court must answer both questions in the affirmative to deny qualified immunity. . . It was clearly established at the time of the shooting that an officer violates the Fourth Amendment if he shoots a suspect

without 'probable cause to believe that the suspect poses a threat of serious harm, either to the officer or to others.'. . Here, the parties agree that Craft posed no threat of serious physical harm apart from the shotgun. Thus, if Craft threw the shotgun over the fence before Lasseigne fired, Lasseigne violated Craft's Fourth Amendment rights. Harris asserts exactly that-that Craft threw the gun over the fence before the shot. Thus, under her version of the incident, Lasseigne was not entitled to qualified immunity. The district court held that a reasonable jury could accept that version; hence it denied qualified immunity to Lasseigne. On appeal, Defendant argues that the district court should not have relied on Plaintiff's version of the facts because it is 'blatantly contradicted by the record.' However, Lasseigne's arguments amount to an attempt to demonstrate that his evidence is more plausible than Plaintiff's evidence. He spends time discussing how Craft's injuries would allow him to throw the gun after he was shot. However, this does not answer the question of whether he was holding the gun when he was shot. He also argues that the video stills show Craft turning the shotgun toward the officers before it went out of view, but a review of the video stills does not make clear that Craft was doing as he claims. Also, the video stills do not answer the question at issue because the relevant events occurred off-camera. While a jury would certainly not be required to conclude from Plaintiff's evidence that Lasseigne used excessive force, the evidence relied upon by the district court was not 'so utterly discredited by the record as to be rendered a visible fiction.'. . To deny qualified immunity, the court need not conclude that the inferences drawn by the Plaintiff are the only reasonable inferences that could be drawn, but must simply find that the inferences drawn are reasonable and not blatantly contradicted. While Plaintiff's and Lasseigne's evidence contradict each other, neither renders the other 'a visible fiction.'. . Lasseigne characterizes his appeal as one dealing with purely legal issues, but his appeal does not concede the facts in a light most favorable to Plaintiff. As a result, '[w]e are left with precisely the sort of factual dispute over which this Court lacks jurisdiction.'")

Ragsdale v. Sidoti, 574 F. App'x 718 (6th Cir. 2014) ("Ragsdale claims that we should dismiss this interlocutory appeal for want of jurisdiction rather than affirm the district court's decision. . .He is correct that, generally speaking, we lack jurisdiction to hear immediate appeals from the denial of qualified immunity that solely contest the other side's account of the facts. . . But two realities give us jurisdiction here. One is our line of precedents giving us jurisdiction over these kinds of appeals if the officer claims that the claimant and district court rely on an account of the incident that is 'blatantly' contradicted by the record. *Moldowan v. City of Warren,* 578 F.3d 351, 370 (6th Cir.2009). That is precisely what Officer Sidoti is arguing—wrong though he ultimately may be about the merits at this stage of the case. The other is that Officer Sidoti separately makes legal arguments in his brief—that mistakes of fact and law are still entitled to qualified immunity, . . . wrong again though he may ultimately be about the merits at this stage of the case. We thus have jurisdiction over the appeal. *See Chambers v. Ohio Dep't of Human Servs.,* 145 F.3d 793, 797 (6th Cir.1998).")

Jones v. Sandusky County, Ohio, 541 F. App'x 653, 658, 659 (6th Cir. 2013) ("Like the defendants in *Chappell,* defendants argue that certain facts considered by the district court, such as whether Jones had time to comply with the officers' orders, were not material and did not create

a genuine issue of material fact. . . . Further, defendants object to the legal analysis the court applied to the facts not in dispute, specifically whether the court properly examined both prongs of the qualified immunity analysis set forth in *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), and the application of this court's segmenting rules. These issues are independent of any factual disputes that are to be determined by a jury. Thus, defendants 'have identified purely legal issues that are, pursuant to the collateral order doctrine, subject to appellate jurisdiction.'. . . Accordingly, we have jurisdiction as to Mario's and Jose's appeals of the denial of summary judgment based on qualified immunity. Similarly, defendant Overmyer argues that the district court improperly equated the availability of summary judgment to him with the issue of qualified immunity for defendants Mario and Jose. Because the claim against Overmyer is inextricably linked to the claims against Mario and Jose, we have jurisdiction with respect to Overmyer's appeal of the denial of summary judgment on plaintiffs' supervisory liability claim. As to plaintiffs' claims of municipal liability under § 1983, this court does not have interlocutory jurisdiction over the district court's denial of summary judgment as to Sandusky County because such an order is not immediately appealable. Qualified immunity does not protect municipalities, but shields only government officials from individual liability. . . .The court may only consider issues that are 'inextricably intertwined' with the qualified immunity analysis. . . Because we conclude that the district court properly determined that there were factual questions as to whether a constitutional violation occurred with respect to plaintiffs' claims against the individual defendants, we decline to exercise jurisdiction and dismiss Sandusky County's appeal because it is not 'inextricably intertwined' with the question of the individual defendants' right to qualified immunity.")

Younes v. Pellerito, 739 F.3d 885, 889, 890 (6th Cir. 2014) ("There is one limited exception to the requirement that a defendant seeking qualified immunity must concede the plaintiff's factual account-the plaintiff's account can be disregarded where the evidence is "'so utterly discredited by the record' as to be rendered a 'visible fiction.'". . . In *Harris* the plaintiff's account was totally discredited because it was contradicted by video evidence of the incident. . .Here, the officers challenge Younes's account and some statements of his witness, Kania, based on their own testimony and that of the 'independent' witness Yassine, who initially called the police. The officers' testimony of the incident is not the type of evidence in the record which 'utterly discredit[s]' Younes' version of the facts and therefore the officers must accept the plaintiff's version of the facts in order for this Court to have jurisdiction over their suit. . . . Despite claiming otherwise, the officers failed to satisfy the jurisdictional requirement to appeal a denial of qualified immunity that they must concede the most favorable view of the facts to Younes. We are left with 'precisely the sort of factual dispute over which this Court lacks jurisdiction.'")

Hidden Village, LLC v. City of Lakewood, Ohio, 734 F.3d 519, 524 (6th Cir. 2013) ("The collateral order doctrine secures our jurisdiction over George, Fitzgerald and Barrett's appeal concerning their liability under the federal civil rights statutes. All three sought, and all three were denied, qualified immunity. Because official immunity is not just a defense to liability but a defense to standing trial, a denial of immunity is a collateral order subject to immediate appeal. . .

That conclusion leads to another—that we have pendent appellate jurisdiction over Lakewood's appeal. The city raised two defenses in the trial court: (1) that no statutory or constitutional violation occurred, and (2) that, if one did occur, it did not result from a municipal custom or policy. But the city wisely raises only the first defense in this appeal. Whether a violation occurred is inextricably intertwined with, indeed duplicates the first step of, the individual defendants' qualified immunity defense. . . Whether a municipal policy authorized any violation is not.")

Romo v. Largen, 723 F.3d 670, 671 (6th Cir. 2013) ("Because this is an interlocutory appeal, we are bound by the district court's finding that a genuine dispute of material fact existed as to whether Largen had observed [certain] activity, in the absence of objectively incontrovertible evidence that he had. We therefore affirm the district court's denial of qualified immunity on Romo's § 1983 claim.")

Martin v. City of Broadview Heights, 712 F.3d 951, 963 (6th Cir. 2013) ("[I]n the face of a constitutional violation, we lack subject-matter jurisdiction to entertain an appeal of the municipal-liability claim because the only path to review the City's claim is foreclosed here. . . .The officers' challenge to the denial of qualified immunity is not 'inextricably intertwined' with the district court's summary-judgment ruling on the City's *Monell* liability. The officers' liability turns on whether the force they used to restrain Martin violated his clearly established constitutional rights. But the City's liability hinges on its failure to train and supervise the officers. Because resolution of the officers' interlocutory appeal does not *necessarily* determine the City's training and supervision obligations, we do not have jurisdiction to consider the City's municipal-liability appeal at this time.")

Essex v. County of Livingston, No. 11–2246, 2013 WL 1196894, *6 (6th Cir. Mar. 25, 2013) (unpublished) ("Defendants also ask this Court to review the district court's denial of their motion for summary judgment on Plaintiffs' § 1983 claim against the County. However, unlike Bezotte, the County is not entitled to an interlocutory appeal from the district court's denial of summary judgment as to it unless the issues raised in the County's appeal are 'inextricably intertwined with' or 'necessary to ensure meaningful review of' the qualified immunity inquiry. . . Despite our determination on qualified immunity, the question of whether Bezotte was deliberately indifferent in implementing policies pertaining to deputy training and supervision is not necessarily resolved; consequently, the issue of the County's potential liability is unresolved at this early stage of the litigation. It is still plausible that Bezotte could have known of a pattern of misconduct or could have anticipated Boos' conduct as a result of Bezotte's failure to provide specific training on sexual assault. Accordingly, we lack jurisdiction over the County's appeal.")

Quigley v. Tuong Vinh Thai, 707 F.3d 675, 680 (6th Cir. 2013) ("[E]ven where, as here, the defendant makes 'impermissible arguments regarding disputes of fact,' if the defendant also raises the purely legal issue of whether the plaintiff's facts show that the defendant violated clearly established law, 'then there is an issue over which this court has jurisdiction.'. . Because Thai

advances this proper, purely legal argument, we have jurisdiction to resolve the legal issue and need not dismiss the entire appeal.")

Campbell v. City of Springboro, Ohio, 700 F.3d 779, 795 (6th Cir. 2012) (McKeague, J., concurring in part and dissenting in part) ("The City of Springboro . . . may be held liable for a policy of deliberate indifference to obvious inadequacies in training or supervision. Further, as the majority recognizes, the City may not assert qualified immunity in defense of a § 1983 claim. In fact, the majority uses this fact to justify its refusal to consider the City's appeal. To be sure, the denial of the City's motion for summary judgment is an interlocutory order that would not ordinarily be subject to immediate review under the collateral order doctrine. We have discretion, however, to exercise pendent appellate jurisdiction over issues not independently appealable if those issues are 'inextricably intertwined' with matters properly before us. . . Considering the manifestly close relationship between plaintiffs' theories of liability against Clark, Kruithoff and the City, the exercise of pendent appellate jurisdiction over the City's appeal would certainly be appropriate in this case.")

Stefan v. Olson, No. 11–3775, 2012 WL 3799211, *5, *6 (6th Cir. Aug. 31, 2012) (not reported) ("We recognize that the jurisdictional question tethered to the law-fact distinction can pose a conundrum to litigating parties, especially upon a cursory reading of the applicable case law. It is well settled that a denial of qualified immunity is not appealable on grounds of whether the record sets forth a genuine issue of fact for trial. . . Nor can an interlocutory appeal of this nature challenge whether the evidence supports a finding that the alleged conduct actually occurred. . . Rather, '[f]or appellate jurisdiction to lie over an interlocutory appeal, a defendant seeking qualified immunity must be willing to concede the facts as alleged by the plaintiff and discuss only the legal issues raised by the case.'. . .For purposes of this appeal, McCune has properly conceded, both in her reply brief and at oral argument, that we must take the facts in the light most favorable to Stefan. . . She maintains that the conceded facts do not support the conclusion that she was 'deliberately indifferent to [Reid's] medical needs.'. . . Questions of a Defendant's specific conduct are questions of basic fact, while the question of whether those actions could meet the legal standard for deliberate indifference is a mixed question of law and fact that we review *de novo* as a question of law. . . Furthermore, contrary to Appellee's assertion, should factual or inferential disputes remain on appeal, this court may choose to address only the legal issues and thus avoid the need to dismiss the appeal for lack of jurisdiction.")

In re AMTrust Financial Corp., 694 F.3d 741, 750, 751 & n.4 (6th Cir. 2012) ("Despite summarizing its ruling in unfortunately broad language,. . . the opinion in *Ortiz* was actually limited to cases where summary judgment is denied because of factual disputes. The Court brushed aside the defendants' claim that they were appealing a purely legal issue that would be preserved for appeal even without a Rule–50 motion: 'We need not address this argument, for the officials' claims of qualified immunity hardly present "purely legal" issues capable of resolution "with reference only to undisputed facts."'. . . Indeed, this court recently recognized that '*Ortiz* leaves open the possibility' that such purely legal claims 'may still be considered.' *Nolfi v. Ohio Ky. Oil*

Corp., 675 F.3d 538, 545 (6th Cir.2012); *see also Fencorp, Co. v. Ohio Ky. Oil Corp.*, 675 F.3d 933, 940 (6th Cir.2012). . . . Another panel has read *Ortiz* differently, stating, in an unpublished opinion, that a party's claimed right to appeal, after trial, a summary-judgment denial on purely legal issues 'is now clearly foreclosed in light of the Supreme Court's recent decision in *Ortiz v. Jordan.' Doherty v. City of Maryville*, 431 F. App'x 381, 384 (6th Cir.2011). This statement was *dicta*, however, as the court ultimately held that the issue was indeed reviewable in the context of a Rule 50(a) motion. . . Similarly, the other cases cited in AFC's supplemental-authority letter do not appear to have applied *Ortiz* to bar review of purely legal issues. . . . The district court's ambiguity ruling was a pure question of law. . . Thus, under this circuit's longstanding precedent, the district court's decision 'may be appealed even in the absence of a post-judgment motion.'")

Kennedy v. City of Cincinnati, No. 11–3212, 2012 WL 1871566, at *1, *2 (6th Cir. May 23, 2012) ("This matter is a clear example of an impermissible appeal from an interlocutory denial of summary judgment. Nevertheless, Kennedy attempts to avoid dismissal by fitting his case into a possible exception acknowledged in *Ortiz:* that an order denying summary judgment on 'a purely legal issue' capable of resolution 'with reference only to undisputed facts' may be appealed. . . .Just as was the case in *Ortiz*, however, Kennedy's appeal is not of a purely legal character. In denying Kennedy's motion, the district court concluded that Kennedy had shown a constitutionally protected interest in access to the public pool. At the same time, it explicitly noted that summary judgment was inappropriate due to the 'disputed questions of fact' that remained 'as to what procedural process was afforded or available—pre-revocation and post-revocation.'. . .Kennedy counters that, notwithstanding these fact disputes, the evidence proffered to the district court on summary judgment unequivocally demonstrates that he was not afforded notice or a meaningful opportunity to be heard—even when that evidence is viewed in the light most favorable to Zucker. But *Ortiz* precludes precisely this type of inquiry into whether the evidence presented at the summary judgment stage merits judgment as a matter of law. 'Once [a] case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.'. . Thereafter, a court of appeals does not have jurisdiction over an appeal based on evidence presented prior to trial. . . and can review a claim only 'in light of the character and quality of the evidence received in court,' *Ortiz*, 131 S.Ct. at 889. Since Kennedy's appeal falls entirely in the former category, it is not cognizable in this Court.")

Sabo v. City of Mentor, 657 F.3d 332, 336 (6th Cir. 2011) ("Throughout his brief and oral argument before this Court, Tkach has maintained that Mr. Sabo pointed his gun in the direction of fellow police officers and civilians. Sabo heavily disputes this fact, arguing that Mr. Sabo never pointed the gun, and the district court, apparently using 'aimed' interchangeably with 'pointed,' . . . assumed the plaintiff's version of the facts. Tkach has never argued that he is entitled to qualified immunity even if Mr. Sabo did not point the gun. Tkach's only argument rests on a version of the facts that differs from the version the district court assumed. Accordingly, Tkach's appeal presents no pure legal issue for review, and we lack jurisdiction to hear it.")

Thompson v. Grida, 656 F.3d 365, 368 (6th Cir. 2011) ("The issue on appeal is not whether the officers were entitled to qualified immunity under the officers' version of the facts; the issue on appeal is whether Thompson contests that version of the facts. He does. The officers assert that Thompson disregarded commands to 'Get Back,' Mrs. Thompson engaged in loud, threatening, and confrontational behavior to Officer Shuburt, and Thompson resisted the officers and refused their commands to roll over. Thompson's pleadings and the depositions dispute these facts and instead claim that Thompson did not resist the officers and obeyed their requests. Thompson successfully disputed, before a jury, any claim that he had assaulted an officer. The officers have failed to satisfy the requirement that they concede the most favorable view of the facts to Thompson. This is precisely the sort of factual dispute over which this Court lacks jurisdiction.")

Bomar v. City of Pontiac, 643 F.3d 458, 462 (6th Cir. 2011) ("On appeal, although Main concedes that he punched and pepper-sprayed Bomar after handcuffing her, he contests the district court's determination that a genuine issue exists as to whether Bomar was under control after being handcuffed and, in doing so, deprives this court of jurisdiction.")

Huckaby v. Priest, 636 F.3d 211, 216 (6th Cir. 2011) ("Defendants here refuse to concede the facts in the light most favorable to Pierce, and fail to raise a legal issue on appeal that is separate from their interpretation of the disputed facts in a light most favorable to Defendants. . . Because we lack appellate jurisdiction over such factual issues, Defendants' failure to concede these facts precludes the award of qualified immunity. Accordingly we dismiss the officers' appeal from the denial of qualified immunity on interlocutory appeal for lack of jurisdiction.")

Smith v. Leis, 407 F. App'x 918, 2011 WL 463540, at *6 (6th Cir. Feb. 10, 2011) (not published)("Here, like in *Everson, Skousen, Wallin,* and *Summers,* 'the district court permitted discovery to continue before first resolving the qualified-immunity question,' which forced Defendants 'to go through a large part of the litigation process that the qualified immunity doctrine seeks to avoid.'. . As in *Everson,* the district court's actions here were 'even more egregious, as it did not simply let discovery continue through to the original cutoff date, but rather ordered an additional [thirty] days of discovery' on the class certification motion after the original cutoff date had passed. . . Although a district court may hold a motion for summary judgment raising claims of immunity in abeyance, it may do so only after inquiring 'whether any facts material to the plaintiff's claims are genuinely at issue' and then making a finding that those material facts are in dispute. . . No such inquiry was undertaken nor was such a finding made by the district court in this case. In light of the Supreme Court's reiteration that immunity questions should be resolved 'at the earliest possible stage in litigation,'. . . and this court's repeated directive that a district court may not avoid ruling on a motion for summary judgment raising immunity claims,. . . the district court's failure to rule on the motion for summary judgment is immediately appealable. Additionally, although this court qualified its holding in *Everson* by stating that the decision to hold the motion in abeyance was immediately appealable '*unless* that decision is related to the proper disposition of the motion,' that exception does not apply here. . . The district court ordered discovery solely on the issue of the adequacy of the proposed class representatives and not, for

example, on a conclusion that there existed a well-supported need for discovery to resolve the immunity issues raised in the motion for summary judgment resulting from a specific factual dispute. The court also denied the motion to stay in part on the basis of judicial economy, explaining that a decision on the motion for summary judgment would be res judicata as to the class representatives and not the putative class members. However, this does not otherwise trump the requirement that the district court decide the issue of immunity promptly so that Defendants are not subjected to further litigation that they sought to avoid by filing the motion. . . Similarly, although the district court noted that Fed.R.Civ.P. 23 requires that a court determine whether to certify a class action '[a]t an early practicable time after a person sues or is sued as a class representative,' this also does not mean that the court is obligated to decide a motion for class certification prior to a motion for summary judgment on immunity grounds. . . Again, permitting further litigation prior to ruling on the immunity claims directly contradicts this court's mandate that district courts may not avoid ruling on properly raised claims of immunity. . . Accordingly, we conclude that the *Skousen* line of cases and this court's decision in *Everson* are controlling, and that the district court's failure to rule on Defendants' motion for summary judgment raising claims of immunity is immediately appealable.")

Brown v. Metcalf, Nos. 08-4629, 08-4632, 08-4636, 09-3082 2010 WL 653540, at *1, *2 (6th Cir. Feb. 24, 2010) (unpublished) ("In short, while the district court denied summary judgment based upon qualified immunity, it explicitly did so, not on the legal merits of the claim, but on the fact that further discovery was necessary. In essence, then, counsel for defendants seek to appeal that portion of the district court's order granting plaintiff's motion to compel discovery based upon its conclusion that plaintiff had come forward with a sufficiently detailed Rule 56(f) affidavit to place material facts at issue. As explained below, we do not have jurisdiction to entertain such an appeal because it turns on a disputed factual issue, not on an issue of law. . . .We recognize, of course, that the district court's conclusion is by its very nature preliminary when a Rule 56(f) affidavit provides the basis for a factual dispute because it assumes that discovery will produce the evidence that the Rule 56(f) affidavit describes. In this case, the district court acknowledged this distinction and explicitly invited defendants to renew their motions after completion of discovery. At that point, an appeal to this court will lie should the district court deny these renewed motions on an issue of law. The appeals are **dismissed** for lack of jurisdiction.").

Chappell v. City Of Cleveland, 585 F.3d 901, 906 (6th Cir. 2009) ("[T]he district court's determination that there is a factual dispute does not necessarily preclude appellate review where, as defendants here contend, the ruling also hinges on legal errors as to whether the factual disputes (a) are *genuine* and (b) concern *material* facts. . . In *Scott*, the Eleventh Circuit was held to have erred by accepting the plaintiff's version of the facts as true even though that version was so conclusively contradicted by the record that no reasonable jury could believe it. . . . Defendants Habeeb and Kraynik contend that the district court committed legal error not unlike the error committed by the Eleventh Circuit in *Scott.* Specifically, they argue the district court erred as a matter of law (a) by treating the objective reasonableness of their use of force as a question of fact instead of a question of law; (b) by treating unsupported speculation that McCloud did not pose an

imminent threat of serious harm as creating a 'genuine' dispute; and (c) by treating evidence that the detectives did not announce themselves as 'Cleveland Police' as going to a 'material' fact issue even though it was not–per the 'segmented analysis' that must be applied–part of the circumstances immediately preceding the use of deadly force. For reasons more fully developed below, we agree with defendants on the latter two points. What's most important at this stage, however, is that defendants are not 'merely quibbling with the district court's reading of the factual record,' . . . but have identified purely legal issues that are, pursuant to the collateral order doctrine, subject to appellate jurisdiction.").

Hanson v. City of Fairview Park, Ohio, No. 08-4238, 2009 WL 3351751, at *9, *11 (6th Cir. Oct. 20, 2009) (McKeague, J., dissenting) ("In some of our previous cases, we have required the defendant to concede the plaintiff's version of the facts before we evaluated the legal issue. . . However, the Supreme Court has not required such a mechanical concession before evaluating whether a police officer acted reasonably. *See Scott v. Harris* , 550 U.S. 372, 378 (2007)(reversing the lower court finding that the officer was not entitled to qualified immunity because facts were in dispute). The Supreme Court has placed emphasis on whether the facts in dispute are *genuine* or *material* to the outcome of the case, rather than simply whether *any* factual dispute exists. . . . Thus, in cases where a factual dispute exists, our job is to evaluate the plaintiff's version of the facts to determine whether the defendant acted reasonably, and not simply to accept the district court's stated reason for denying summary judgment. . . . Because I find that Brewer has presented a purely legal issue on appeal, I would hold that this court does have jurisdiction over the appeal. In resolving Brewer's legal issue, I accept as true Mrs. Hanson's version of the facts. That is, I assume that Scott Hanson was *not* holding any golf clubs at the time Brewer shot him. I now turn to the legal issue of whether Brewer is entitled to qualified immunity. . . . Irrespective of the time at which Hanson dropped the golf clubs, his actions were sufficient to give Brewer probable cause to believe that Hanson posed a threat of immediate and severe physical harm, especially considering that this was a quickly unfolding situation in which Brewer was forced to make a split-second judgment. Accordingly, in my opinion Brewer's use of deadly force was justified even under Mrs. Hanson's version of the facts. A reasonably competent officer would not conclude that his actions were unlawful under this set of facts. The analysis could end there, with the conclusion that Brewer acted reasonably and is therefore entitled to qualified immunity. However, in the interest of thoroughness, I undertake to evaluate the second part of the test. That is, assuming that Brewer did not act reasonably, was the law clearly established? . . . . Neither the Supreme Court nor the Sixth Circuit has evaluated facts similar to these, but other circuits have, in analogous circumstances, held that an officer's use of deadly force was reasonable. Hence, in my opinion, it can not be said that Brewer violated any clearly established constitutional right.").

Moldowan v. City of Warren, 578 F.3d 351, 370 (6th Cir. 2009) ("In trying to reconcile *Scott* with the Supreme Court's edict in *Johnson,* this Court has concluded that ' Awhere the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal."').

Everson v. Leis, 556 F.3d 484, 491-93 (6th Cir. 2009) ("Here, we are faced with an appeal set between the *Skousen* line of cases and *Kimble*. Like *Kimble* and unlike the *Skousen* line, the district court did not deny or dismiss without prejudice Defendants' motion for summary judgment. Yet, like the *Skousen* line and unlike *Kimble*, the district court did permit additional discovery without first resolving the question of qualified immunity. The question becomes, then, whether this case is more like *Kimble* or more like the *Skousen* line. We side with the latter. The rationale for qualified immunity clearly favors jurisdiction here. Like in *Skousen*, *Wallin*, and *Summers*, the district court permitted discovery to continue before first resolving the qualified-immunity question. Thus, Defendants would 'be forced to go through a large part of the litigation process that the qualified immunity doctrine seeks to avoid.' . . Arguably, the district court's actions here are even more egregious, as it did not simply let discovery continue through to the original cutoff date, but rather ordered an additional ninety days of discovery, to begin more than a year past the original discovery-cutoff date. . . . If a district court can thwart interlocutory appeal by refusing to address qualified immunity through abeyance rather than dismissal, then the district court can effectively ignore this court's directive that district courts address qualified immunity promptly. . . . For these reasons, we find that a district court's decision to hold in abeyance a motion seeking qualified immunity is immediately appealable *unless* that decision is related to the proper disposition of the motion. . . . Thus, the district court did not have sufficient grounds under Rule 56(f) for ordering a new discovery period. Without some sound reason for refusing to rule on Defendants' motion that was related to the proper resolution of the motion (e.g., a well-supported need for discovery), the district court's refusal to rule can be appealed immediately to this court.").

Davenport v. Causey, 521 F.3d 544, 554 (6th Cir. 2008) ("We have previously held that where we evaluate whether a constitutional violation has occurred due to a proper appeal from a denial of qualified immunity, we can also evaluate the constitutional question in regard to the city because the question is the same, and therefore the appeal is 'inextricably intertwined.'. . Establishing a constitutional violation in the particular circumstance is required to maintain an action against a city for inadequate training of its police officers. . . .When evaluating Officer Causey's appeal, we determined that a constitutional violation did not occur. The city, therefore, is also entitled to summary judgment.").

Floyd v. City of Detroit, 518 F.3d 398, 411 (6th Cir. 2008) ("Where a court determines that no violation of the plaintiff's constitutional rights occurred, obviously the governmental entity cannot be liable for its failure to train or for developing a custom that led to a constitutional violation. Once a violation is determined to have occurred, however, the question of municipal liability turns not simply on the actions of the individual state actors, but rather on the separate question of whether the violation may be attributed to a municipal policy or failure to train.. . That question, *Bultema* held, was 'not indisputably coterminous with, or subsumed in' the question of the individual defendants' entitlement to qualified immunity. . . The same result obtains here. Because a jury could find that Officers Quaine and Reynoso violated Floyd's rights, the question of the City's liability under both § 1983 and state law turns on the separate issues of its training practices

and policies. Pendant jurisdiction is thus inapplicable, meaning that we lack jurisdiction to consider the City's interlocutory appeal.").

Wysong v. City of Heath, 260 F. App'x 848, 853, 854 (6th Cir. 2008) ("Neither the majority nor Justice Stevens's lone dissent in *Scott* mentioned *Johnson v. Jones,* or addressed the question of jurisdiction, but logic dictates that *Scott* must have modified *Johnson*'s language about jurisdiction in order to reach the result it did. In *Blaylock*, the Third Circuit reconciled *Scott* and *Johnson* by saying that *Scott* represents 'the outer limit of the principle of *Johnson v. Jones*–where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review.' *Blaylock*, 504 F.3d at 414. We agree with, and follow, the Third Circuit's view as a principled way to read *Johnson* and *Scott* together and to correct the rare 'blatan[t] and demonstrabl[e]' error without allowing *Scott* to swallow *Johnson*. Here, Wysong himself admitted in a deposition that no factual dispute exists, so we are comfortable in saying that any determination to the contrary is 'blatantly and demonstrably contradicted by the record,'. . . and that we have jurisdiction 'to say so, even on interlocutory review.' *Blaylock*, 504 F.3d at 414.")**.**

Elliot v. Lator, 497 F.3d 644, 649-51 (6th Cir. 2007) ("The question is whether this mere assertion of a claim of qualified immunity , *without being raised by defendants in a motion for summary judgment or a motion to dismiss,* is enough to support appellate jurisdiction when that claim is denied by the district court. Put another way, is the district court's ruling in this case an 'appealable interlocutory decision' under *Mitchell?* We think it is not. . . . The primary procedural distinction between this case and *Mitchell* is that there the defendant had filed a motion for summary judgment on grounds of qualified immunity , whereas here the troopers failed to file any such motion, only raising the qualified immunity claim as part of their response to the Elliots' motion for summary judgment. Is this a distinction that makes a difference? We think it is. . . . Imagine, for example, that we were to exercise our jurisdiction to hear the troopers' interlocutory appeal in this case. Imagine further that we were to reverse the decision of the district court and find the troopers entitled to qualified immunity on the Elliots' unreasonable seizure claim, just as the troopers had argued in their response to the Elliots' motion for summary judgment. This would be the equivalent of our finding the troopers' affirmative defense of qualified immunity to be meritorious, and it would force the district court on remand to deny the Elliots' motion for summary judgment. However, as a response to a plaintiff's motion for summary judgment, a meritorious affirmative defense simply puts the case back into the realm of the jury, because it indicates that there exist facts which, when viewed in light most favorable to the defendant (the non-moving party), could permit the defendant to prevail at trial. Thus, without a motion or cross-motion for summary judgment from the troopers (i.e., the *defendants*), our ruling in their favor would most likely result in the case being sent back for a full-blown trial. Ironically, this would subject the troopers to additional trial proceedings, which is the exact opposite of what officers hope to achieve by raising the qualified immunity issue on interlocutory appeal. . . . If a defendant is genuinely interested in cutting off future trial proceedings, the logical (and proper) vehicle for this is a well-briefed motion to dismiss or for summary judgment, not an end-run interlocutory appeal.The existence of the

Elliots' additional Fourth Amendment claim for excessive force reinforces this analysis. Unlike the unreasonable seizure claim, the district court denied summary judgment in favor of the Elliots with respect to this excessive force claim. . . .Still, defendants appear not to have challenged this claim, either in their response to the Elliots' motion for summary judgment or in the instant appeal. Perhaps they believe that if they are accorded qualified immunity with respect to the unreasonable seizure claim, then it should follow that they be immune from the excessive force claim as well. Not so. The two claims are related, to be sure, but they are not inseparable, nor does the outcome of one dictate the outcome of the other.").

Meals v. City of Memphis, Tenn., 493 F.3d 720, 727 (6th Cir. 2007) ("To the extent the issues raised in the City's appeal are 'inextricably intertwined' with the question of qualified immunity of Officer King, and review of those issues is necessary for meaningful review of her claim of qualified immunity , we have pendent jurisdiction over them. Should the appellee establish that Officer King committed a constitutional violation, then she may also be able to establish liability as to the City. More importantly, if we conclude that Officer King committed no constitutional violation, then the City is not liable under § 1983 on appellee's theory. Therefore, we will exercise jurisdiction over the City's appeal.")**.**

Livermore ex rel Rohm v. Lubelan, 476 F.3d 397, 403 (6th Cir. 2007) ("Language in our earlier decisions interpreting *Johnson* suggests that where, as here, the appellant fails to concede the facts as alleged by the appellee, this court is completely deprived of jurisdiction over the appellant's interlocutory appeal. [citing *Berryman*] Subsequent cases, however, have rejected that approach and clarified that we may consider a pure question of law, despite the defendants' failure to concede the plaintiff's version of the facts for purposes of the interlocutory appeal . . . . We therefore conclude that this court has jurisdiction over defendants' interlocutory appeal to consider whether, accepting the facts as alleged by Livermore, defendants are entitled to qualified immunity from Livermore's claim of excessive force.")

Lawrence v. Chabot, No. 05-1082, 05-1397, 2006 WL 1342316, at *8 & n.2 (6th Cir. May 16, 2006) (not published) ("Lawrence has failed to argue, much less provide any case law to demonstrate, that the defendants violated clearly established constitutional rights. . . There is no need to decide whether the defendants violated Lawrence's constitutional rights when Lawrence waived the issue of whether the rights were clearly established. Lawrence cannot demonstrate that the defendants are not entitled to qualified immunity. For these reasons, we do not disturb the district court's holding that Van Aken and Armbrustmacher are entitled to qualified immunity. . . . Avoiding the preliminary question of whether there was a constitutional violation does not contravene *Saucier* . . . . *Saucier* instructs lower courts to decide whether a constitutional right has been violated before deciding whether that violated right is clearly established. In this case, we do not decide on the merits whether any allegedly violated right was clearly established. We simply hold that Lawrence has waived any challenge on appeal to the defendants' qualified immunity defense by failing to make any argument that the rights violated were clearly established. *Saucier* does not compel courts to answer waived issues.")**.**

Kimble v. Hoso, 439 F.3d 331, 334, 335 (6th Cir. 2006) ("The question we must answer . . . is whether the district court's delay in ruling on the defendants's motion for summary judgment qualifies as a conclusive determination of the issue of qualified immunity or some other collateral order in this case. We conclude that it does not and thus we lack jurisdiction over the defendants's appeal. The district court in this case did not make any decision on the merits or otherwise as to the defendants's motion for summary judgment. Rather, the district court merely delayed ruling on the defendants's motion in order to permit the Kimbles to respond to the summary judgment motion. While reasonable minds can differ as to whether the district judge was providing the Kimbles's counsel with unnecessary extensions, it seems to us to be reasonable that the district judge was attempting to ensure that the Kimbles's case was not erroneously dismissed solely on the grounds of their attorneys's ineptitude. Thus, nothing in the circumstances of this case suggests that the district court's decision to delay in ruling on the defendants's summary judgment motion in order to ensure that the plaintiffs filed a brief in opposition constitutes a conclusive ruling on the qualified immunity issue. The defendants point to this Court's decision in *Skousen v. Brighton High School*, 305 F.3d 520 (6th Cir.2002), as grounds for concluding that this Court has jurisdiction over the defendants's interlocutory appeal. The defendants's brief suggests that *Skousen* is a nearly identical case to the one now before this Court and thus should control our legal analysis. We read *Skousen* as being sufficiently distinct so as not to control here. In *Skousen*, the defendant filed a motion for summary judgment on the grounds of qualified immunity. The district court denied the defendant's motion without prejudice on the grounds that it was untimely because discovery was not yet completed. We ruled that the district court's failure to rule on the merits of the defendant's motion was legal error. Our basis for this holding was the Supreme Court's decision in *Harlow* . . . that stated that 'until [the] threshold immunity question is resolved, discovery should not be allowed.' Thus, in *Skousen* we reasoned that the district court was required to address the merits of the defendant's summary judgment motion 'prior to permitting further discovery.'. . Not permitting the defendant to appeal the district court's denial of their motion on timeliness grounds would defeat the purpose of the qualified immunity, the *Skousen* court reasoned. Qualified immunity is immunity from suit, not merely a defense against liability. Thus, the purpose of qualified immunity would be defeated if a defendant was required to face further stages of litigation, such as discovery, before the qualified immunity question was addressed. Thus, the *Skousen* court decided that where the district court's denial of a summary judgment motion defeats the essential purpose of qualified immunity, the court of appeals has jurisdiction to review an interlocutory appeal. The procedural history of this case differs from that in *Skousen* in two critical ways. First, while in *Skousen*, there was an order denying the defendant's summary judgment motion (albeit without prejudice and not on the merits), here there has been no ruling whatsoever on the defendants's motion on the merits or otherwise. Thus, unlike in *Skousen*, there is no order which even arguably allows this Court to conclude that, as required by the collateral order doctrine, the issue of qualified immunity has been conclusively determined. Moreover, this case differs from *Skousen* in that the district court did not delay ruling on the defendants's motion for the legally erroneous reason of permitting further discovery. On the contrary, the district court's earlier order made it abundantly clear that the district court was

cognizant of Supreme Court's ruling in *Harlow*, as the district court stayed further discovery until the issue of qualified immunity was addressed. Instead, the district court merely delayed ruling on the defendants's motion based on concerns that the Kimbles's failure to oppose the motion was based on the negligence of counsel rather than their lack of a colorable claim. This type of delay, which does not require the defendants to face any additional stages of litigation, does not undercut the essential purpose of qualified immunity. Based on these critical differences, we conclude that *Skousen* does not support the defendants's argument that we have jurisdiction over the defendants's interlocutory appeal.").

Smith v. Cupp, 430 F.3d 766, 771, 772 & n.2 (6th Cir. 2005) ("This court has jurisdiction to hear Dunn's appeal notwithstanding his failure to concede–for purposes of this interlocutory appeal– disputed facts that are favorable to the plaintiff. It is clear that this court is without jurisdiction to review any argument that depends upon a dispute of facts. . . . Dunn's argument concerning whether there is a dispute of facts, however, is only one of the arguments presented in his brief. Dunn also argues that the district court misapplied *Saucier* . . . by failing to consider whether the right Dunn was alleged to have violated was clearly established. . . . If, 'aside from the impermissible arguments regarding disputes of fact, the defendant also raises 'the purely legal question of whether the facts alleged ... support a claim of violation of clearly established law,' then there is an issue over which this court has jurisdiction. Therefore, this court can ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.' . . . After *Brosseau*, Dunn's argument that the district court failed to consider whether the right at issue was clearly established is greatly strengthened, and should be considered the main argument, even if not originally treated as such by Dunn.")**.**

Howser v. Anderson, 150 F. App'x 533, 2005 WL 2673521, at *3 n.4, *6 (6th Cir. Oct. 19, 2005) ("Like *Estate of Carter*, this case is one of many cases where, if the right is clearly established, the conduct is objectively unreasonable. We thus choose to collapse the second and third prongs discussed in some of our cases into one prong in this case. . . . While this court has never held, and does not hold here, that a defendant bears the burden of proof on whether he or she deserves qualified immunity, we do not believe that dismissing this appeal for want of jurisdiction transfers the burden of proof to Defendant in this case. . . Here, Plaintiff has provided sufficient law that Defendant's actions, taken in a light most favorable to the Plaintiff, violated the decedent's clearly established constitutional rights. When a plaintiff makes such a showing, a defendant must either defeat that showing by distinguishing the law cited by the plaintiff, or he or she must accept that his or her case is not susceptible to dismissal on the basis of qualified immunity and proceed to a trial on the merits. . . Here, *Garner* itself would preclude a reasonable officer from using deadly force against an arrestee whose hands are visible, since even if the officer had reason to believe the arrestee was armed, neither he nor Mr. Webb were then in immediate danger. . . Because Defendant cannot and does not distinguish the law cited by Plaintiff, and because he never concedes the facts in the light most favorable to Plaintiff, we lack jurisdiction over his appeal.")**.**

Strutz v. Hall, 124 F. App'x 939, 2005 WL 451786, at *1, *2 (6th Cir. Feb. 25, 2005) (not published) ("In short, when a legal determination respecting qualified immunity requires the resolution of a disputed issue of material fact, appellate jurisdiction does not exist under *Mitchell*. . . Defendants raise the 'community caretaker' standard as a defense to their actions, and for the purposes of this appeal are willing to accept plaintiffs' version of the facts. In order to invoke this defense, the government action in question must be 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'. . As the district court noted, '[u]nder this record, it must be left to the trier of fact to determine whether Defendants sought only to ensure the welfare of the children [when they administered breath tests], or whether they also sought to achieve law enforcement objectives.' . . We conclude that the resolution of this case hinges on a question of fact, not a question of law or a mixed question of law and fact. Under the circumstances of this case, it is irrelevant that defendants concede the plaintiffs' version of the facts because this appeal still turns on the same issue of fact that the district court pointed out.")**.**

Tucker v. City of Richmond, 388 F.3d 216, 224 (6th Cir. 2004) ("The City purports to appeal the district court's denial of its motion to dismiss this claim or, in the alternative, for summary judgment. It is undisputed that the City's appeal is not appealable as a collateral order, but the City urges us to exercise pendent jurisdiction over its appeal. The exercise of pendent jurisdiction, while discretionary, is appropriate 'where the appealable and non-appealable issues are Ainextricably intertwined."'. . The City's appeal is inextricably intertwined with the individual defendants' interlocutory appeal because there can be no municipal liability under section 1983 for maintaining a policy of unconstitutionally retaliating against individuals who exercise their First Amendment rights when no such unconstitutional retaliation has actually occurred. . . In light of our holding that Tucker has suffered no unconstitutional retaliation, his claim against the City must fail.").

Derfiny v. Pontiac Osteopathic Hospital, 106 F. App'x 929, 2004 WL 1543166, at *4 (6th Cir. July 6, 2004) ("Trial courts should resolve questions of qualified immunity in the earliest possible stage of litigation because qualified immunity is immunity from suit 'rather than a mere defense to liability,' and 'it is effectively lost if the case is erroneously permitted to go to trial.'. . Nevertheless, the district court failed to address the issue of qualified immunity prior to its ruling. In fact, the reasons stated in the record upon which the district court ruled were Defendants' failure to examine Plaintiff for a five month period, and their deliberate indifference, which subsequently was the proximate cause of Plaintiff's injuries. Therefore, absent a discussion and analysis of qualified immunity, in addition to the inclusion of disputed factual issues that gave rise to the denial of Defendants' summary judgment, this matter is not properly before this court for a strictly legal review of the district court's qualified immunity determination on an interlocutory appeal. . . For these reasons, this Court will remand the matter back to the district court to determine Defendants' request for qualified immunity as a matter of law.")

Derfiny v. Pontiac Osteopathic Hospital, 106 F. App'x 929, 2004 WL 1543166, at *10(6th Cir. July 6, 2004) (Gwin, District Judge, dissenting) ("Although sympathetic to the majority's frustration with the district court's failure to provide analysis and reasoning for its denial, I find no reason and certainly no requirement that we remand. [footnote omitted] In reviewing a denial of qualified immunity, appellate courts conduct de novo review. . . Therefore, we accord no deference to the legal analysis the district court used in reaching its decision to deny the Doctors qualified immunity. Additionally, to bring the interlocutory appeal, the Doctors have had to concede all facts in the Derfiny's favor. Thus, it is irrelevant what facts the district court relied on. Further, case law makes clear that an appellate court can consider the denial of the defense of qualified immunity, to the extent the defense turns on an issue of law, regardless of whether or not the district court fully analyzed, or even explicitly considered, the defense.").

Crockett v. Cumberland College, 316 F.3d 571, 578, 579 (6th Cir. 2003) ("The City also contends that we have jurisdiction over its appeal under principles of pendent appellate jurisdiction. Citing *Mattox v. City of Forest Park,* the City argues that on interlocutory appeal, where a municipality's right to summary judgment is 'inextricably intertwined' with a qualified immunity analysis, a court may exercise pendent appellate jurisdiction over the municipality's argument. . . While the City accurately recites the pendent appellate jurisdiction doctrine, its argument ultimately fails. Hamlin's appeal challenges the denial of qualified immunity, which turns on whether there was probable cause for the arrest of the plaintiffs, while the City argues that there was no municipal custom or policy that could form the basis for its § 1983 liability here. Although Hamlin's appeal and the City's appeal overlap in some respects, the two appeals are not 'inextricably intertwined' because resolution of Hamlin's interlocutory appeal of the probable cause issue does not necessarily resolve the City's interlocutory appeal of the municipal policy or custom requirement. For that reason, we reject the application of pendent appellate jurisdiction to the City's appeal.").

Hoover v. Radabaugh, 307 F.3d 460, 465-69 (6th Cir. 2002) ("The crux of this case is the defendants' motivation in terminating Hoover. If they fired him because of his protected speech, qualified immunity should be denied. If they terminated him because of his insubordination, the opposite is true. The district court decided that there was a question of material fact as to whether the defendants entertained impermissible motives in discharging Hoover. We must decide whether this decision as to motivation is a legal or factual one. Under *Dickerson,* we are first tasked with determining whether the plaintiff's facts spell out a constitutional violation, and then with determining whether that violation was of a clearly established constitutional right. We hold today that we do not have jurisdiction to review the factual determination of the district court that there was a genuine issue of material fact as to whether or not the defendants entertained unconstitutional motivations. [footnote omitted] Because the determination of the district court was factual and did not raise significant legal questions, we dismiss that issue for lack of jurisdiction. . . . Although we lack jurisdiction to review, on interlocutory appeal, a district court's determination that a genuine issue of fact as to the defendant's motivation remains for trial, we retain jurisdiction over the purely legal question of what constitutes a clearly established constitutional right. . . .We agree with the

district court that, as a matter of pure law, the rights here are clearly established: a reasonable official would know that terminating an employee with the motivation, even in part, of quieting the plaintiff's public speech about the illegal activities of the Department violates the Constitution. Beyond that, we lack jurisdiction to review the district court's determination as to factual issues as they relate to defendants' actual motivation.").

Hoover v. Radabaugh, 307 F.3d 460, 470 (6th Cir. 2002) (Cole, J. concurring in part, dissenting in part) ("Once it admits that we lack jurisdiction over the protected speech issue, the majority should go no further in considering that argument. Instead, the majority continues to evaluate the second qualified immunity prong–whether the federal right at issue is clearly established. The majority attempts to retain jurisdiction by noting that the second qualified immunity prong involves a pure question of law over which we have interlocutory appellate jurisdiction. While that may be true, our lack of jurisdiction over the first qualified immunity prong means that there is no need for us to address the second prong, and the majority goes too far by doing so.").

Hoover v. Radabaugh, 307 F.3d 460, 470 (6th Cir. 2002)(Cole, J. concurring in part, dissenting in part) ("Here, because the city's liability depends on an issue separate from the qualified immunity analysis–whether there was a municipal policy, custom, or practice in place that chilled employees' free speech rights–the City of Circleville's argument is not inextricably intertwined with the qualified immunity analysis. Consequently, this Court lacks pendent appellate jurisdiction over that argument.").

Nuens v. City of Columbus, 303 F.3d 667, 670 (6th Cir. 2002) ("Because the District Court denied Bridges' summary judgment motion on qualified immunity grounds, our court has jurisdiction over his appeal with respect to the issue of qualified immunity. However, we are not required to confine our review to the viability of the qualified immunity defense. . . Having jurisdiction over the qualified immunity issue also entitles us to review whether Neuens put forth a *prima facie* § 1983 claim. . . .[W]e conclude that the district court erred in denying Bridges' motion for summary judgment on the issue of qualified immunity. If after its independent review the district court concludes that Bridges did not act under color of state law, we instruct the district court to dismiss the complaint for failure to state a claim upon which relief may granted. Furthermore, where no action was taken under color of state law, the district court need not reach the issue of qualified immunity.").

Klein v. Long, 275 F.3d 544, 549, 550 (6th Cir. 2001) ("In this case, the district court did not explicitly deny a claim of qualified immunity. However, because the district court recognized that the defendants were presenting the affirmative defense of qualified immunity at the hearing on defendants' motion for summary judgment and because the court denied defendants' motion for reconsideration/rehearing based on qualified immunity, the district court effectively denied defendants' claim of qualified immunity. . . . The defendants in this case concede that we must view the facts as alleged by Klein. . . We therefore have jurisdiction to review the district court's

denial of summary judgment to determine whether, viewing the facts in the light most favorable to Klein, the defendants violated Klein's clearly established rights.").

Claybrook v. Birchwell, 274 F.3d 1098, 1103-05 (6th Cir. 2001) (appeal after remand) ("As noted above, the defendants concede that there are disputed facts in the record. The most important of these is the disparity between the testimony of the officers and that of Quintana Claybrook as to whether the first shot in the initial volley of bullets was fired by one of the officers or by Claybrook. On appeal, the officers argue that this conflict in testimony is immaterial, as precedent requires that this court 'carve up' an excessive force claim into a series of temporal components and consider only the reasonableness of defendants actions in the instant before they fired the shot that mortally wounded Claybrook. . . We believe, however, that this view too narrowly construes the relevant circuit precedent and that, instead, we must consider the reasonableness of the defendants' actions in this case from the moment the first shot was fired. . . . The defendants here are correct in their assertion that, under *Boyd* and *Dickerson*, we must analyze the events surrounding Claybrook's death in temporal segments. However, the defendants' assertion that the holdings of these cases mandate that we look only at what occurred in the moments immediately before Claybrook was fatally shot in the head too narrowly construes the cases' holdings. The 'segmenting' rules of *Boyd* and *Dickerson* divided the analysis of the use of deadly force from the analysis of possible erroneous actions taken by the officers prior to shots being fired. In *Dickerson*, this meant that the court found irrelevant to the claim of excessive force analysis whether the police officers had unlawfully failed to announce their presence in Dickerson's home prior to shots being fired. In *Boyd*, the court refrained from considering whether Boyd was, in fact, the suspect of the call to which the officers were responding and whether he had fired any shots that evening, instead limiting its analysis to the reasonableness of the officers firing at Boyd in light of their testimony that he had pointed a gun at them. In both cases, we divided prior events from those immediately preceding the use of force. Here, we note, the evening's events are not so easily divided. The defendants view those events in two segments, the first extending from the officers' decision to enter the F & J Market's parking lot and confront Claybrook through the initial firefight between the officers and Claybrook, and the second beginning when Claybrook ran around the market to hide behind the concrete steps and ending with the shots that killed him. They argue that we are concerned only with the second sequence of events and must make our determination based only upon the reasonableness of the officers firing at Claybrook after he had positioned himself behind the concrete steps and pointed a gun at the officers. The defendants contend that the reasonableness of their actions in approaching Claybrook out of uniform and in an unmarked car, demanding that he drop his weapon without identifying themselves as police officers, and opening fire on Claybrook, are irrelevant to this analysis. We simply disagree with their contention that the initial exchange of bullets should not weigh upon our analysis. Under the precedent of *Dickerson* and *Boyd*, we instead conclude that the evening's events are properly viewed in three segments: first, the officers' approach and confrontation of Claybrook; second, the initial firefight taking place in front of the market; and third, the shots fired after Claybrook's move to a position behind the concrete steps. Moreover, we conclude that all events taking place in the second and third segments are material to our analysis. Although the officers' decision to approach Claybrook in the manner

that they did was in clear contravention of Metro Nashville Police Department policy regarding procedures for undercover officers, under *Dickerson*, any unreasonableness of their actions at that point may not weigh in consideration of the use of excessive force. . . However, the defendants contend that we should also exclude from our consideration the reasonableness of the force used in the initial firefight between the officers and Claybrook. Yet, the plaintiffs brought suit to contest all use of deadly force against their deceased father, not only the shot that took his life. Therefore, we must consider the reasonableness of force used in both the second and third segments of the evening's events. In other words, the defendants cannot ignore the fact that shots were fired at Claybrook twice on the night in question. In the first instance, Claybrook was fired upon by unidentified, non-uniformed officers whom Quintana Claybrook, and likely Royal Claybrook also, thought to be robbing the market. Regardless of whether the shots fired at Royal Claybrook were warranted after he had fled to a position behind the concrete steps and aimed his gun at the officers, this initial fire fight also constitutes deadly force used against Claybrook by the officers. Therefore, we must analyze its reasonableness to determine whether this use of force was excessive under the circumstances. . . Critical to the analysis of the reasonableness of the use of deadly force in this initial confrontation is the determination of who fired the first shot. Because this fact remains in dispute at this point in the proceedings, we conclude that we do not have jurisdiction to proceed under *Johnson v. Jones*.").

Frantz v. Village of Bradford, 245 F.3d 869, 877 (6th Cir. 2001) ("[W]e hold that plaintiff here cannot bring a separate constitutional claim for malicious prosecution under the Fourth Amendment. Thus, we deny appellant's request for qualified immunity on the grounds that plaintiff cannot bring, as a separate claim, the claim from which appellant seeks immunity. For the same reason, we dismiss this appeal. Plaintiff's Fourth Amendment claims are still pending before the district court and must be addressed there, consistent with this opinion.").

Scott v. Clay County, 205 F.3d 867, 879 (6th Cir. 2000) ("[O]ur conclusion that no officer-defendant had deprived the plaintiff of any constitutional right a fortiori defeats the claim against the County as well. . . Ergo, this court, in its discretionary exercise of pendent party appellate jurisdiction over the appellant Clay County, further directs that the plaintiff's federal claims against it shall be dismissed.").

Hoard v. Sizemore, 198 F.3d 205, 221, 222 (6th Cir. 1999) ("For the purpose of considering whether, in light of its resolution of the qualified immunity issues, we can and should assert pendent appellate jurisdiction in this case, it is necessary to place the plaintiffs' claims into two categories: (1) the claims of the four plaintiffs who fall within the *Branti* exception and therefore fail to assert a constitutional violation, and (2) the claims of the 15 plaintiffs over which this court has no jurisdiction because there remains an issue of fact as to defendant Sizemore's motivation. The defendants' appeal as to the *Branti* plaintiffs presents 'the quintessential case for application of pendent jurisdiction,' calling for an 'exercise [of] our discretion to do so in the interest of judicial economy.' . . . . A city or county and its leaders may not be held liable when there has been no constitutional violation by one of the city or county's employees. . . . We therefore hold that the

claims of [the] four plaintiffs against the 'pendent' defendants must be dismissed, because the plaintiffs' failure to establish a constitutional violation disposes of any liability on the part of these defendants. However, having concluded that we do not have jurisdiction to consider Sizemore's appeal of the district court's denial of his motion for summary judgment as to the final 15 plaintiffs, because there are genuine issues of material fact as to his motivation for discharging them, we cannot assert pendent appellate jurisdiction over the appeal of the remaining defendants concerning the claims of these 15 plaintiffs.").

Ellis v. Washington County and Johnson City, 198 F.3d 225, 229 (6th Cir. 1999) ("The question then comes down to this: In a qualified immunity appeal by a state official, should the court of appeals look behind a *Johnson v. Jones* type factual dispute to determine if the factual dispute is based only on uncorroborated hearsay that will not be admissible at trial. We would prefer to avoid these kinds of evidentiary issues when ruling on our jurisdiction to decide qualified immunity under *Johnson v. Jones* . . . . [T]he only factual dispute in this case arises from the rankest type of inadmissible hearsay. Based on the Sheriff's deposition, the statement to the press was unreliable and inadmissible in evidence. No exception to the hearsay rule would let it in. Nonetheless, restrained as we are by *Johnson*, we must dismiss Jamerson's appeal because a factual dispute remains.").

Williams v. Mehra, 186 F.3d 685, 695, 696 (6th Cir. 1999) (en banc) (Merritt, J., dissenting in part and concurring in part) ("In the panel decision in this case, the majority opinion and Judge Boggs' dissenting opinion spend most of the 35 pages of opinions arguing over the facts. The facts are complex and detailed. There are no stipulations of facts by the parties and the parties do not agree as to what the facts are. Thus it seems to me that under the authority of *Johnson v. Jones* this case should be dismissed for lack of appellate jurisdiction. The Court tries to get around the obvious problem of appellate jurisdiction by two little sleight-of-hand tricks. First, the court says that 'plaintiff's facts [were] admitted by defendants for purposes of this appeal,' thereby attempting to eliminate any factual issue by asserting that the defendants have conceded or in effect stipulated the facts for purposes of arguing the 'deliberate indifference' legal issue on which qualified immunity depends. The second trick used by the court is simply to find various facts against the plaintiff. For example, the court says: 'To make this case, plaintiff would need to show that the doctors actually knew that dispensing Sinequan tablets in a pill line constituted an excessive risk to Wade's health or safety. We hold that as a matter of law, plaintiff has not done this.' Thus the court says that as a matter of fact-finding the doctors did not have the requisite state of mind to meet the standard of deliberate indifference because they did not have the requisite knowledge. Plaintiff contends that the facts when taken together circumstantially prove that the doctors knew the necessary facts and thus had the requisite state of mind. Thus the first trick is to assume anyway the facts and the second trick the court employs is simply to find the facts against the plaintiff. This is not what the Supreme Court had in mind when it decided *Johnson v. Jones*, *supra*, and admonished federal appellate courts not to get involved in interlocutory appeals when the district court has found a genuine issue of fact concerning appellate jurisdiction.").

Mattox v. City of Forest Park, 183 F.3d 515, 523, 524 (6th Cir. 1999) ("If the plaintiffs have failed to state a claim for violation of a constitutional right at all, then the City of Forest Park cannot be held liable for violating that right any more than the individual defendants can. The inquiry is precisely the same in both cases, and the justification for the decision in *Swint* is not present here. This court has used pendent appellate jurisdiction under circumstances similar to the case sub judice in *Brennan v. Township of Northville*, 78 F.3d 1152 (6th Cir.1996). In *Brennan*, the court decided that the plaintiff had not alleged a constitutional violation, and that decision indisputably resolved the other issue appealed–the grant of summary judgment on liability to the plaintiff. . . Without alleging a constitutional violation, Brennan could not receive summary judgment on his § 1983 claim. In fact, the *Brennan* court remarked on the very scenario present here–the city in that case also had been adjudged liable on summary judgment for violating Brennan's constitutional rights, and the court indicated that it would have reached the city's claim as well, but for the fact that the city was not a party to the appeal and its summary judgment motion could not be reviewed. Neither *Brennan* nor today's decision is contrary to *Swint*, which left open the possibility that two determinations (one immediately appealable and one not) could be 'inextricably intertwined' and thus appropriately reviewed together.").

Berryman v. Rieger, 150 F.3d 561, 562-65 (6th Cir. 1998) ("We hold that in order for. . . an interlocutory appeal based on qualified immunity to lie, the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case. Here the defendants have not so conceded the facts. The appeal should not have been filed because there is clearly a factual dispute at the heart of the qualified immunity issue, and so we dismiss this interlocutory appeal. Moreover, in light of the fact that three and a half years ago a panel of this Court sent this case, originally filed in 1992, back to the District Court pointing out in detail that there are genuine issues of material fact for trial on the constitutional tort claims at issue, . . . we impose upon the defendants double costs and attorney's fees under 28 U.S.C. § 1912 for bringing this appeal and unnecessarily protracting the litigation. . . . A defendant who is denied qualified immunity may file an interlocutory appeal with this Court only if that appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law. . . . If the defendant does not dispute the facts alleged by the plaintiff for purposes of the appeal, 'our jurisdiction is clear.' *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir.1996). If, instead, the defendant disputes the plaintiff's version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal. *Id*. Only if the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a prima facie violation of clear constitutional law may we decide that the defendant is entitled to qualified immunity on an interlocutory appeal. . . . As this case illustrates, we often cannot adequately assess our jurisdiction to hear interlocutory appeals on qualified immunity until the appeal is fully briefed and argued. We have learned by experience that defendants sometimes attempt simply to protract the litigation and manipulate the fact-law distinction drawn by *Mitchell, Johnson*, and *Behrens* to create the appearance of jurisdiction. Only by testing that presentation with the fully fleshed arguments of an adversary and our skeptical questioning of counsel can we divide the legal from

the factual. Given the difficult inquiry required under *Mitchell*, *Johnson*, and *Behrens* in all but the clearest circumstances, normally the safest course would be for the parties to address the jurisdictional issues along with the merits in their briefs and for this Court to postpone a final decision on jurisdiction until the case is argued. In the future, a defendant who wishes to file such an appeal after being denied qualified immunity should be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the case. Such a defendant will have a solid jurisdictional position if the defendant claims the plaintiff cannot show a violation of clearly established law even assuming everything alleged is true. Once a defendant's argument drifts from the purely legal into the factual realm and begins contesting what really happened, our jurisdiction ends and the case should proceed to trial. That is exactly what happened in this case. Because the defendants' appeal attempts to persuade us to believe their version of the facts, we must dismiss the appeal. Where it clearly appears, as here, that the defendant is unnecessarily protracting the litigation, the court should consider imposing double costs and attorney's fees as a deterrent.").

Chappel v. Montgomery County Fire Protection District No. 1, 131 F.3d 564, 572-73 (6th Cir. 1997) ("Where . . . what is at issue includes abstract questions of law which this court has jurisdiction to consider, it is an open question whether this court will also exercise pendent appellate jurisdiction over related questions of fact. . . . [W]e fully intend to consider the defendants' legal argument that, even on the facts taken in the light most favorable to Chappel, Chappel has failed to state a claim under section 1983. This consideration, however, is far different from a reconsideration of the district court's conclusion that certain material facts are genuinely in dispute. Moreover, even if we have the discretionary authority to exercise pendent appellate jurisdiction over the district court's finding regarding the sufficiency of the evidence, we decline to exercise our discretion in this case.").

Turner v. Scott, 119 F.3d 425, 428 (6th Cir. 1997) ("If we determine, as we do here, that asserted factual disputes are not material, what remains for decision is a purely legal issue. If it were otherwise a district court could always insulate its qualified immunity rulings from interlocutory review by mouthing the appropriate shibboleth. Such a result would jeopardize the immunity from suit that the qualified immunity doctrine is designed to protect.").

Turner v. Scott, 119 F.3d 425, 430-33 (6th Cir. 1997) (Cohn, District Judge, dissenting) ("In the guise of a claim of qualified immunity, defendant Scott has persuaded the majority to allow his appeal as of right from a claim that there is no genuine issue of material fact over the assertion that he stood by and allowed a fellow officer to assault plaintiff in circumstances where he could have prevented the assault. . . . The majority has conflated the principles of qualified immunity with the principles governing conventional summary judgment. The majority opinion is directly contrary to the Supreme Court's decision in *Johnson v. Jones*. . . . Here the district judge was dealing with rather conventional principles of § 1983 law, working in a fact-intensive environment. The district judge simply ignored the qualified immunity defense since it appeared to be a 'make-weight' argument and an afterthought. The majority is using the defense of qualified

immunity to enable it, on an interlocutory appeal, to reverse the district judge's decision denying summary judgment, because the majority does not find a genuine issue over the extent of Scott's knowledge of his fellow officer's attack on plaintiff and his ability to intervene to prevent it. . . .Scott's summary judgment motion, and the district judge's denial of it, clearly and unequivocally regarded the existence of a material fact, namely whether Scott had any knowledge of the assault on plaintiff by his fellow officer. . . . The substantive question in this appeal is not, as the majority puts it, a 'neat abstract issue of law.'. . . This is certainly a 'we didn't do it' case, as Justice Breyer puts it in *Johnson*. . . . The suggestion that it is necessary for the Court of Appeals to always independently examine the record to determine whether there is a genuine issue of material fact to prevent a district court from "insulat[ing] its qualified immunity rulings from interlocutory review by mouthing the appropriate shibboleth" . . . is not well taken. District court judges take the same oath as do court of appeals judges, and in my experience observe the same principles of adjudication.").

Turner v. Scott, 119 F.3d 425, 429 n.3 (6th Cir. 1997) ("The dissent's conclusion that the order in question here is not immediately appealable stems, we think, from a failure to recognize the significance of the threshold inquiry. The issue on a claim of qualified immunity is not solely whether the right alleged to be violated was clearly established. Rather, as we have said, the first step in the qualified immunity analysis is to determine whether any right has been violated at all. This is the unmistakable holding of *Siegert*–and nothing in *Johnson* purports to eliminate the first step. The *Siegert* framework explains why Officer Scott is entitled to an immediate appeal if we conclude as a matter of law that no reasonable jury could find that Officer Scott violated any right of Mrs. Turner. The *Siegert* framework also explains why it was appropriate for the parties' lawyers and the district court to focus on the facts of the squad room incident, as they did at the summary judgment hearing.").

Nichols v. City of Parma, No. 96-3931, 1997 WL 289673, *2, *3 (6th Cir. May 28, 1997) (unpublished) ("The defendants have limited their appeal to the narrow question of whether they are entitled to qualified immunity with respect to the plaintiffs' wrongful arrest and detention claims. . . . The difficulty we face in this case is that the district court has not identified those facts that the plaintiff has supported with sufficient evidence and that implicitly supported the court's denial of summary judgment. The Supreme Court has suggested that in this situation a circuit court may 'undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . . We believe that the better procedure here is for the district to make this determination in the first instance and to provide findings and conclusions sufficiently detailed to facilitate efficient appellate review. The district court, after studying the *Behrens* and *Johnson* cases, should set out the facts that it is assuming in denying qualified immunity or conduct an evidentiary hearing on this issue in order to make findings and conclusions on the immunity issue. We therefore remand this case to the district court for further proceedings.").

Dickerson v. McClellan, 101 F.3d 1151, 1157 (6th Cir. 1996) ("[R]egardless of the district court's reasons for denying qualified immunity, we may exercise jurisdiction over the officers' appeal to the extent it raises questions of law. Since the facts regarding whether the officers violated Dickerson's Fourth Amendment rights by failing to knock and announce are undisputed, our jurisdiction is clear. On the other hand, we review the excessive force claim only to determine whether, viewing the facts in the light most favorable to the plaintiffs, the officers violated Dickerson's clearly established rights. If we conclude that the officers are not entitled to qualified immunity as a matter of law on the excessive force claim and that genuine issues of material fact exist, we are without jurisdiction to proceed.").

McCloud v. Testa, 97 F.3d 1536, 1545-46 (6th Cir. 1996) ("Our decision to exercise jurisdiction in this case is supported by *Blair v. Meade* . . . where the court held that it had interlocutory jurisdiction to consider the appeal of a district court's denial of qualified immunity in a patronage case, despite the fact that the district court thought there were disputed issues of motivation, because, regardless of the factual dispute, the plaintiffs did not have a valid claim under the First Amendment. . . . First, we hold we have jurisdiction to review Testa's purely legal argument that he is entitled to qualified immunity because the discharge of members of one faction of the same party by a member of another faction of the same party, where the factions are associational groups only, and have no particular ideology, is not a violation of clearly established First Amendment rights. Second, we hold that we have jurisdiction to review Testa's argument that the law was not sufficiently clear that plaintiffs' positions did not fall into the *Branti* exception.").

Archie v. Lanier, 95 F.3d 438, 443 (6th Cir. 1996) ("It seems clear that *Swint* intended to restrict discretionary appellate jurisdiction, rather than to expand it. The Court did not intend to enlarge the already narrow categories of interlocutory appeals when it stated that nonappealable questions may be addressed if they are "inextricably intertwined" with the issue that is appealable. Given the extent to which the Court engaged in a thorough explanation of the limited nature of appellate jurisdiction, the "inextricably intertwined" requirement was not meant to be loosely applied as a matter of discretion. Rather, the terms can only be understood, in the context of the opinion, to mean that pendent jurisdiction may be exercised only when the immunity issues absolutely cannot be resolved without addressing the nonappealable collateral issues.").

Noble v. Schmitt, 87 F.3d 157, 163 (6th Cir. 1996) ("Defendants' *Forsyth* appeal in this case presents the precise evidence sufficiency issues that the Court declined to entertain in *Johnson*. They argue that Noble's evidence does not prove that Schmitt forcibly medicated and restrained Noble, that Stevens formed a strategy to provoke Noble to act out, or that Defendants restricted Noble's privileges to retaliate against him for filing grievances against them. This '"we didn't do it"' argument is irrelevant to this appeal.").

Brennan v. Township of Northville, 78 F.3d 1152, 1158 (6th Cir. 1996) ("This case . . . presents a situation in which the holding on qualified immunity–that plaintiff has failed to raise a constitutional claim–has everything to do with the merits of the summary judgment in favor of

plaintiff: without a constitutional claim, the judgment for Brennan simply cannot stand . . . . As this appeal presents the quintessential case for application of pendent appellate jurisdiction, we exercise our discretion to do so in the interest of judicial economy. We reverse the partial summary judgment in favor of Brennan on the issue of liability, at least as it applies to the police officer defendants. A distinct problem remains with respect to the township of Northville, however. Northville is not a party to this appeal, although the summary judgment for Brennan applies equally to it as a defendant. . . . [B]ecause Northville has not been made a party here, . . . we will not extend pendent appellate jurisdiction to the judgment against it.").

Blair v. Meade, 76 F.3d 97, 102 (6th Cir. 1996) (Ryan, J., dissenting) (district court had denied immunity on ground that there was a genuine issue of material fact as to whether defendant was motivated by plaintiffs' political affiliations when he refused to rehire them; majority of panel reversed on ground that even if plaintiffs' terminations were politically motivated, plaintiffs stated no constitutional claim. Judge Ryan thought there was no jurisdiction over the appeal. "Indisputably, in this case the district court's basis for denying the defendant's request for summary judgment on grounds of qualified immunity was the existence of a factual dispute as to Meade's motivation for terminating the plaintiffs. While I agree with the majority that the district court's analysis may have been misguided, that does not lead me to the conclusion that this court is entitled to take jurisdiction over the appeal in order to determine whether there is another basis on which we can resolve the case without reference to the factual dispute that was the district court's basis. Irrespective of whether the district court's opinion was a model of qualified immunity analysis, the pertinent issue is whether the decision of the district court that was appealed, is appealable. Since the basis for the denial was the existence of a disputed fact, it was not.").

Hundley v. Parker, 69 F.3d 537 (Table), No. 95-5399, 1995 WL 646500, *6 (6th Cir. Nov. 2, 1995) ("[D]efendants' appeal of the district court's denial of summary judgment on the basis of qualified immunity as to plaintiff's right to be protected by prison officials from violence caused by other inmates is dismissed because the district court found that there was a genuine issue of material fact as to this issue.").

Sanderfer v. Nichols, 62 F.3d 151, 153 n.2 (6th Cir. 1995) ("Although the district court in the case at bar phrased its denial of qualified immunity in terms of finding more 'than a scintilla' of evidence supporting a constitutional violation by Jansen, this order is immediately reviewable because, as discussed below, the plaintiff's version of events, regardless of the sufficiency of the supporting evidence, does not state a claim for such a violation.").

Christophel v. Kukulinsky, 61 F.3d 479, 485 (6th Cir. 1995) ("The right to appeal is limited to questions of law . . . and a defendant entitled to invoke a qualified immunity defense may not appeal the denial of a motion for summary judgment if the district court's order determines only whether the record reflects genuine issues of fact for trial.[citing *Johnson*] A defendant's right to appeal the denial of qualified immunity does not turn on the phrasing of the district court's order,

however. Even when the district court denies summary judgment without stating its reasons for doing so, a court of appeals may decide the legal question underlying the qualified immunity defense. [cite omitted] Although the district court's denial of defendants' motion for summary judgment in this case was premised in part on the existence of fact issues, the factual dispute does not affect defendants' right to qualified immunity. The legal question squarely presented by defendants' motion was whether the facts alleged by Christophel demonstrate that defendants violated her constitutional right to procedural due process, thus negating defendants' entitlement to qualified immunity from suit.").

Bunch v. Village of New Lebanon, 57 F.3d 1069 (Table), Nos. 94-4098, 94-4141, 1995 WL 329260, *2 (6th Cir. May 31, 1995) (entertaining appeal and affirming district court's denial of summary judgment based on qualified immunity and district court's conclusion that "when there are 'factual disputes surrounding a shooting such that the reasonableness of the shooting cannot be determined without determining which of competing versions of the facts are true, the reasonableness of the shooting and the applicability of the qualified immunity become questions for the jury.'" (quoting district court)).

McLaurin v. Morton, 48 F.3d 944, 949 (6th Cir. 1995) (holding denial of summary judgment based on qualified immunity is immediately appealable even where other § 1983 damage claim will proceed to trial despite successful appeal).

Black v. Parke, 4 F.3d 442, 445 (6th Cir. 1993) ("Although this case is properly before us on interlocutory appeal of the qualified immunity determination, we cannot confine our review to the qualified immunity defense alone. In *Carlson v. Conklin* . . . we held that we first must decide whether the plaintiff has stated a section 1983 claim against the individual defendants before addressing the qualified immunity question.").

Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *1 n.7 (N.D. Ohio Dec. 6, 2017) ("The Court's qualified immunity decisions seek 'to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'. . And *Forsyth's* allowing some interlocutory appeals sought to reduce distracting discovery and trials. But, *Forsyth* wrongly assumed that qualified immunity defenses would limit the nonfinancial burdens associated with discovery. It has not. In an exhausting study, Professor Joanna Schwartz examined over 1,100 Section 1983 cases in five representative districts, including the Northern District of Ohio. She found 'just 0.6% of cases were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds.' Joanna C. Schwartz, *How Qualified Immunity Fails* 127 Yale L.J. 2, 7 (2017). Important for deciding whether *Forsyth's* occasional grant of interlocutory appeal rights makes sense, Schwartz found that defendants almost always otherwise incurred defense and discovery costs before qualified immunity defenses become ripe. Regarding qualified immunity, 'available evidence suggests that qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and illsuited to

shield government officials from discovery and trial in most filed cases. Qualified immunity may, in fact, increase the costs and delays associated with constitutional litigation.' . . Qualified immunity does not shield government officials from litigation headaches. And interlocutory appeals exacerbate governmental expenses. Here, this case will likely be tried in less than four days. Defendants may win. And even if defendants lose at trial, an appellate court can examine the same immunity issues, only on a more complete record. An interlocutory appeal worsens government expenses, it does not lessen them.")

Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *2-5 (N.D. Ohio Dec. 6, 2017) ("An appeal is frivolous when the defendant's argument for immunity refused to accept the plaintiff's version of the facts. . . When a court denies immunity because one version of disputed facts would allow a plaintiff to recover, it is because the court found that defendant's presented version of the facts was disputed, and a trial must settle these factual disputes. . .Plaintiffs argue that is what occurred here. They argue that both the City Defendants' and County Defendants' summary judgment immunity arguments refused to accept Plaintiffs' version of the facts, and so any interlocutory appeal is frivolous. The Court agrees. . . .The City Defendants solely argued that no constitutional violation occurred based on their version of the facts. Although Plaintiffs bear the burden of proving that a defendant is not entitled to qualified immunity, that burden only arises if the City Defendants actually raise the defense. The Court finds that the City Defendants failed to raise qualified immunity as a defense and that the Court's denial of their summary judgment was based on a finding that material disputes of fact existed. For these reasons, the Court GRANTS Plaintiffs' motion to certify the City Defendants' interlocutory appeal as frivolous. . . . Finally, this Court recognizes that courts often allow interlocutory appeals of qualified and absolute immunity decisions. . . However, years of experience and the exhaustive empirical study described above undermines the Supreme Court's reasoning for allowing this exception to the final judgment rule. Interlocutory appeals of immunity under *Forsyth* sought to reduce the disruption of governmental functions and to reduce litigation expenses caused by incorrect district court decisions. . .In *Mitchell v. Forsyth*, the case that created this final judgment rule exception, both of these justifications supported allowing an interlocutory appeal. The *Mitchell* plaintiff had sued the Attorney General of the United States. The Attorney General raised immunity defenses at the start of the litigation, and before discovery. Allowing interlocutory appeal in *Forsyth* potentially saved both the Attorney General and the Department of Justice hundreds or thousands of hours of distraction and expense when the constitutional right was discreet. *Mitchell*, however, is wildly atypical. Typically civil rights lawsuits with immunity issues involve claims against relatively low-level government officers, such as a police officer with minimal supervisory authority. Law suit disruption to governmental functions is minimal. Additionally, and perhaps more importantly, few defendants raise immunity at early stages of the litigation, if they raise that defense at all. . . Because plaintiffs can plead a clearly established constitutional violation with relative ease, immunity is typically argued on summary judgment, which occurs near discovery's end. . . At that point, an interlocutory appeal saves only the distraction and expense associated with trial. These savings are minimal, however, because the Courts of Appeals affirm district courts' denials of immunity at astoundingly high rates. . . In the

typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs. Additional expense and burden result because an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal. And importantly, Section 1983 defendants win many trials. These wins both vindicate the defendants and avoid the appeal's expense. In the Judiciary Act of 1789, the Founders considered and wisely adopted the final judgment rule with few exceptions. The final judgment rule is central to the efficient administration of justice and, absent important reasons, should control. This case provides an especially potent example of the imprudent nature of interlocutory appeals. Plaintiffs in this case were originally convicted in 1996, and an Ohio court overturned that conviction in 2014. In between those dates, Plaintiffs, the State of Ohio, the City of East Cleveland, the Ohio and federal courts, and numerous prosecutors, defense attorneys, and hired experts have spent an untold number of hours and dollars attempting to do justice both for these three men, and for Clifton Hudson, the victim of the crime Plaintiffs' were convicted of. An interlocutory appeal could delay this case for more than a year. Although the Defendants are all retired government officers, they are nevertheless represented by current city and state attorneys. This extra year of appellate litigation will undoubtedly consume considerable state and city resources. Moreover, no matter the outcome of the trial, an appeal will almost assuredly follow. As such, the court of appeals will likely have to address the issues in this case twice, potentially doubling the briefing, travel, and general preparation expenses of both the parties and the Sixth Circuit. . . For the preceding reasons, the Court **GRANTS** Plaintiffs' motions to certify Defendants' appeals as frivolous. The Court **DECLINES TO STAY** the trial of this matter pending appeal.")

See also ***Wheatt v. City of East Cleveland***, No. 1:17-CV-377, 2018 WL 4501053, at *1–2 (N.D. Ohio Sept. 20, 2018) ("On November 9, 2017, the Court held that the City Defendants had waived their right to assert a qualified immunity defense. Defendants appealed, and successfully moved to stay trial proceedings during the pendency of the Sixth Circuit appeal. On July 12, 2018, the Sixth Circuit affirmed the Court's holding that the City Defendants had forfeited their claim to qualified immunity. The Sixth Circuit issued its mandate on August 6, 2018. On the same day, Plaintiffs moved the Court to set a trial date. On July 20, 2018, the City Defendants filed a petition for a writ of certiorari with the Supreme Court of the United States. This petition was docketed on August 30, 2018. Defendants did not move to stay the Sixth Circuit's mandate under Federal Rule of Appellate Procedure 41(d)(2), nor have they moved the Supreme Court to stay proceedings under 28 U.S.C. § 2101(f) and Supreme Court Rule 23. . . Defendants now argue that the filing and docketing of the cert petition deprives the Court of jurisdiction to conduct a trial.
Defendants are incorrect. The issuance of a mandate 'transfer[s] jurisdiction of the case back to the District Court,' and the filing of a cert petition does not automatically stay district court proceedings. Unless the Sixth Circuit recalls its mandate, or the City Defendants obtain a stay, the Court enjoys the jurisdiction it reacquired upon issuance of the mandate to proceed to trial. . . .For

the forgoing reasons, the Court GRANTS Plaintiffs' motion to set a trial date. Trial is set for November 13, 2018 at 8:00 a. m.")

SEVENTH CIRCUIT

Williams v. Cline, 902 F.3d 643, 648-51 (7th Cir. 2018) ("A defendant invoking immunity under prong one can raise two types of arguments. First, he may argue there is insufficient evidence to support the plaintiff's version of the facts, . . .or that under defendant's version of the facts, no constitutional violation occurred. . . At bottom, these are *factual* arguments over which we lack interlocutory jurisdiction. . . Second, the defendant may also argue that, accepting the facts and inferences in the light most favorable to the plaintiff, no constitutional violation occurred. This is a purely *legal* question that we have jurisdiction to review. . .Our jurisdictional analysis under the second prong is often more straightforward. After all, 'whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions' is typically 'a question of law,' and thus, within our jurisdictional purview. . . Nevertheless, we would lack jurisdiction under the second prong if, for example, a defendant argued that under *his* version of the facts, the law was not clearly established. Such a litigation strategy would no longer be 'conceptually distinct from the merits of the plaintiff's claim.'. .The inquiry does not end there. In addition to examining the qualified immunity prongs separately, we must also consider how defendants frame their qualified immunity arguments on appeal. It is well settled that 'an appellant challenging a district court's denial of qualified immunity effectively pleads himself out of court by interposing disputed factual issues in his argument.'. . Of course, any reference to a disputed fact, however cursory, is not automatically disqualifying. . . To the contrary, 'the mere mention of disputed facts in an otherwise purely legal argument is not fatal, and we have held accordingly that jurisdiction exists where the appellant mentions factual disputes but the legal argument is not dependent on those factual disputes—i.e., where the legal and factual arguments are separable.'. .Rather, '[t]he key inquiry is whether the appellant's arguments necessarily depend upon disputed facts. If an argument is not dependent upon disputed facts, the court simply can disregard mention of the disputed facts and address the abstract issue of law.'. . A number of cases from our circuit effectively illustrate this principle. [discussing cases] Thus, if the defendant interposes disputed factual issues in his interlocutory argument, and if those disputed factual issues are material to the qualified immunity analysis, then the defendant has effectively pleaded himself out of court and we do not have jurisdiction. Applying this framework to the facts and pleadings in the instant case, we conclude that this court lacks jurisdiction to decide whether a constitutional violation occurred, that is, prong one of the qualified immunity inquiry. . . . Collectively, then, defendants' prong one arguments are intertwined with disputed facts—namely, whether the defendants were on notice that Williams had a serious medical condition. Defendants do not concede these critical disputed factual issues for purposes of prong one of qualified immunity. Nor was their cursory statement at oral argument sufficient to overcome the jurisdictional hurdle in this procedural posture. On the whole, defendants rely upon material factual disputes that are inseparable from the legal question of whether a constitutional violation occurred. Because their arguments require us to revisit these disputed factual questions, we lack jurisdiction to decide the first step of

the qualified immunity analysis. . . . Nevertheless, we conclude that this court has jurisdiction to answer the second question—whether the alleged constitutional right at issue was clearly established at the time of the incident. Defendants argue that, 'even assuming arguendo that appellants' actions amounted to a constitutional violation, if the law did not put them on notice that their conduct would clearly be unlawful, then they are entitled to qualified immunity.' This is a 'legal issue[ ] ... quite different from any purely factual issues that the trial court might confront if the case were tried.'. . To answer this question, we 'simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.'. . Indeed, 'deciding legal issues of this sort is a core responsibility of appellate courts.'. . Defendants' alternative argument focuses not on which facts plaintiff can prove, but instead on whether the undisputed facts 'show a violation of clearly established law'—a purely legal question within the scope of our interlocutory appellate jurisdiction. . . Consequently, we conclude that this court has appellate jurisdiction to decide whether the constitutional right alleged by plaintiffs was clearly established at the time of Williams' death. As discussed below, however, because the district court failed to make an individualized assessment of each defendant officer's claim of qualified immunity, we must remand the case for that purpose.")

Williams v. Cline, 902 F.3d 643, 652-54 (7th Cir. 2018) (Ripple, J., dissenting) ("The majority concludes that, given the factual findings of the district court, we lack jurisdiction to consider the first prong of the qualified-immunity analysis: whether the individual officers violated Mr. Williams's constitutional rights. It concludes, however, that we have jurisdiction to consider the second prong of the qualified-immunity analysis: whether those constitutional rights were clearly established. This approach, in my view, suffers from two infirmities. First, it fails to recognize that the district court's lack of a defendant-by-defendant analysis infected both prongs of its qualified-immunity analysis. Second, it interposes the two-pronged, substantive analysis of qualified-immunity claims into its consideration of jurisdiction. One of the fixed stars in this area of our work is that qualified immunity 'is an *individual* defense available to each individual defendant in his individual capacity.'. . Determining whether an *individual* officer is entitled to qualified immunity involves a two-step analysis: 1) whether the individual officer violated Mr. Williams's constitutional rights; and 2) whether those rights, 'articulated at a meaningful level of particularity,' were clearly established at the time of the incident. . . As the majority notes, '[o]ur cases demonstrate a painstaking commitment to an individualized qualified immunity analysis, especially when the facts relative to the alleged constitutional violation differ from defendant to defendant.'. . The district court failed to follow this elemental step. Although its recitation of the facts acknowledges the officers' varying encounters with Mr. Williams, its qualified-immunity analysis does not reflect an officer-by-officer approach. Instead, the court reached a blanket conclusion that the officers had violated Mr. Williams's constitutional rights and that those rights, considered abstractly, were clearly established at the time that Mr. Williams was apprehended. Counsel and this court, therefore, were left with a vague, amorphous determination. As a result, there was much confusion in the briefs and at oral argument as to whether the defendants were attempting to appeal a question of law or of fact as we, in effect, struggled to do the work of the district court. Turning to the second infirmity, I have grave reservations about our

deciding the question of our own jurisdiction on the prong-by-prong basis of substantive qualified-immunity analysis. Courts do not exercise jurisdiction over 'prongs' of a substantive analysis; they exercise jurisdiction over judgments or orders of courts whose actions are subject to their review. Indeed, in deciding that the denial of qualified immunity was an immediately appealable collateral order, the Court spoke in terms of the 'claim of qualified immunity.'. .Here, we either have jurisdiction over the order of the district court denying qualified immunity or we do not. In the case of an order denying qualified immunity to an individual officer, we may consider such appeals to the extent the defendant presents an abstract issue of law: whether the actions of a defendant violated the constitutional rights of the plaintiff or whether the right violated was clearly established at the time that the defendant acted. . . Appellate review is precluded only when the district court's denial of qualified immunity is based on a factual issue that cannot be divorced from the purely legal questions related to qualified immunity. . . Even if key facts are disputed, however, appellate review still is possible when, for purposes of appeal, the defendant concedes that the plaintiff's version of the facts is correct or when the defendant accepts that there are factual disputes but takes each disputed fact in the light most favorable to the plaintiff. . . In short, the presence of a pure question of law as to either prong of the qualified-immunity analysis provides a basis for our jurisdiction. However, our jurisdiction over the *claim* of qualified immunity, once jurisdiction is secure, is not so limited. I am aware of only one published opinion from our court, *Estate of Clark v. Walker*, 865 F.3d 544, 551-53 (7th Cir. 2017), that explicitly employs a prong-by-prong consideration of jurisdiction. . . However, *Estate of Clark* neither explains the rationale behind, nor the authority supporting, its use of jurisdictional terminology. No doubt, we and other courts have employed the term 'jurisdictional' in a casual manner when discussing appellate review of qualified-immunity cases. . . . As I already have noted, I agree with my colleagues that this case comes to us in an unfinished state, a condition that impeded significantly the ability of counsel to present the appeal to us and that makes careful decision-making on our part difficult. Given the state of the record, the appropriate course is to pretermit the question of appellate jurisdiction and remand the case to the district court for an individualized determination of qualified immunity for each of the defendants. . . Once we have a more fulsome analysis, we then can consider whether we have jurisdiction as to the qualified-immunity claim of each defendant and assess seriously whether a prong-by-prong approach to jurisdiction is appropriate.")

Thompson v. Cope, 900 F.3d 414, 419- 20 (7th Cir. 2018) ("In such appeals, we lack jurisdiction over factual disputes. . . We must take the facts as the district court assumed them or accept the plaintiff's version of the facts, . . but we can also look to undisputed evidence even if the district court did not consider it[.] . . If the appellant challenges the facts or inferences drawn from them, we lack jurisdiction over that challenge. . . . The district court held here that Cope acted in a law-enforcement capacity because he assisted the officers 'in effectuating Heishman's arrest, not rendering emergency medical services.'. . Assuming that the role or capacity in which paramedic Cope acted when he administered the sedative is an issue of fact, . . .we lack jurisdiction to review that finding by the district court. The appellants argue that undisputed facts require the opposite conclusion because Cope assessed Heishman, thought he was under the influence of drugs and in a state of excited delirium (which is a medical emergency), and decided independently to

administer the sedative. The district court considered those facts and said that they did 'not negate the overarching fact that Medic Cope was asked by law enforcement officers to assist them in dealing with a combative, resisting arrestee.'. . The appellants repeatedly challenge the district court's inference, but in this interlocutory appeal, we cannot 'revisit the inferences that the district court found could reasonably be drawn.'. . In essence, the appellants challenge the sufficiency of the evidence. They argue that the evidence is insufficient to support the district court's conclusion that Cope helped officers arrest Heishman. That looks like 'a back-door effort to contest the facts,'. . . but we need not decide that issue definitively. We have jurisdiction to decide the appeal on a different issue of law. . . .When a district court denies summary judgment based on qualified immunity, our review of legal issues is both permitted and *de novo*.")

Breuder v. Bd. of Trustees of Cmty. Coll. Dist. No. 502, 888 F.3d 266, 271 (7th Cir. 2018) ("The Supreme Court has told us that interlocutory appeals complicate and delay the administration of justice, and the category of permissible appeals should not be expanded. See, e.g., *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). And it has thrown cold water on 'pendent appellate jurisdiction' in particular. *Swint v. Chambers County Commission*, 514 U.S. 35, 43–51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Although *Swint* did not kill the doctrine—it survived in *Clinton v. Jones*, 520 U.S. 681, 707 n.41, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), at least with respect to Presidents—*Swint* concluded that the doctrine must be strictly limited to avoid undermining the discretion that § 1292(b) gives to district judges and appellate judges. See also *Microsoft Corp. v. Baker*, —— U.S. ——, 137 S.Ct. 1702, 1714, 198 L.Ed.2d 132 (2017). Extending the doctrine to allow state-law claims to receive interlocutory review any time a constitutional claim permits a qualified-immunity appeal would do far too much damage to both § 1291 and § 1292(b). We decline the invitation.")

Hurt v. Wise, 880 F.3d 831, 839-42 (7th Cir. 2018) ("The defendant may accept, for purposes of the qualified immunity inquiry, the facts and reasonable inferences favorable to the opponent of immunity, and argue that *those* facts fail to show a violation of clearly established law. . . The defendants here have tried to take the latter approach, but they have not quite succeeded. Rather than fully accepting the facts in the light most favorable to the plaintiffs, the EPD and KSP Defendants, relying on *Scott v. Harris*, 550 U.S. 372 (2007), have asked us to revisit the inferences that the district court found could reasonably be drawn from Deadra's and William's recorded interrogation. That we cannot do without going beyond our jurisdiction on this interlocutory appeal. Nothing in *Scott* undermines this point. . . .If the question is whether someone was driving recklessly, video evidence showing a high rate of speed, use of the oncoming traffic's lane, and running red lights is plainly relevant. If instead the question is what a person meant in a videotaped interview, we are back in the land of inferences that must be taken favorably to the opponent. . . . *Scott* did not create a *per se* rule that video evidence is always subject to an appellate court's independent assessment. Indeed, nothing about video evidence justifies placing it in such a privileged position. . . And not all disputes are about what events transpired. Sometimes the availability of qualified immunity turns on the inferences that are permissible in light of the historical facts. . . Where the parties disagree about inferences, the fact that evidence is found in a

video is not important—the purpose of the evidence is what matters. . . .The video evidence of William's and Deadra's interrogations does not portray the kind of uncontestable facts that were before the Court in *Scott*. It is no more and no less than a record of an interrogation, and so we review it just as we would have if the interviews had been audiotaped, recorded by a stenographer, or reduced to affidavits. We therefore turn to the defendants' qualified immunity motions using the facts and reasonable inferences in the light most favorable to the Hurts. We leave the final resolution of these issues to the trier of fact, should the case get that far. . . .Essentially, all of the defendants are asking us to reweigh the evidence available to the Hurts, including the filmed interrogations, and to come to an independent conclusion about the existence of arguable probable cause. That is plainly inappropriate: we do not sit to resolve disputed issues of fact, nor do we have appellate jurisdiction over those issues.")

Stinson v. Gauger, 868 F.3d 516, 522-28 (7th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. ___ (2018) ("Regarding the due process claim of fabrication of evidence, the district court concluded that 'Stinson has sufficient evidence to get to trial' and explained its conclusion that sufficient evidence in the record existed. The district court also stated that qualified immunity did not apply because the law as of 1984 and 1985 clearly established that an investigator's fabrication of evidence violated a criminal defendant's constitutional rights. As for Stinson's claim of failure to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that the opinions were fabricated, the district court ruled that there was enough evidence to go to a factfinder on this claim as well. The court also stated that it was clearly established by 1984 that the withholding of information about fabricated evidence constituted a due process violation, citing among others our decision in *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012). Gauger, Johnson, and Rawson appealed. A panel of our court concluded that the defendants were not entitled to absolute immunity, that we had jurisdiction to consider appeals of the denial of qualified immunity at summary judgment, and that the defendants were entitled to qualified immunity. We granted rehearing en banc. . . . The defendants here, invoking a qualified immunity defense, seek to appeal the district court's summary judgment order that concluded the pretrial record set forth a genuine issue of fact for trial. While *Johnson* might seem to end matters, we examine whether any subsequent Supreme Court decisions limit *Johnson*'s reach. [court discusses *Scott, Plumhoff,* and *Mullenix* and finds those cases consistent with *Johnson*, because in each of those cases, "the Court decided a purely legal issue, not a question of evidentiary sufficiency."] If what is at issue in the sufficiency determination is whether the evidence could support a finding that particular conduct occurred, 'the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell.*' [citing *Behrens*] So appeal is possible only if 'the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts show[ ] a violation of "clearly established" law.'. . *Johnson*'s distinction between appeals of evidentiary sufficiency determinations and those of legal issues also makes practical sense, as the principle helps keep qualified immunity interlocutory appeals within reasonable bounds. Our basic question in determining whether we have jurisdiction over this appeal, then, is whether our case is one of evidentiary sufficiency or one of a question of law. Stinson maintained in this suit that Gauger, Johnson, and Rawson violated

his due process right to a fair trial by: (1) fabricating the principal evidence of his guilt (the opinions that his dentition matched the bite marks on Cychosz), and (2) failing to disclose, as required by *Brady,* the defendants' agreement to fabricate this opinion evidence. . . .On appeal, the defendants assert that they are crediting Stinson's account and asking only for a legal determination of whether Stinson's version of the facts means they violated a clearly established constitutional right. Accepting a plaintiff's version of the facts in the summary judgment record can help allow us to consider a defendant's legal arguments in a qualified immunity appeal. . . Here, however, the premise of the defendants' assertion is not true; rather, the defendants fail to take as true Stinson's version of the facts, and they fail to do so on significant matters. . . .[D]espite their statements to the contrary, the defendants on appeal have not asked us to view the record in the light most favorable to Stinson. That means that although they try to suggest otherwise, the defendants are not asking us for review of an abstract question of law, but rather they seek a reassessment of the district court's conclusion that sufficient evidence existed for Stinson to go to trial. . . The nature of the defendants' appeals further demonstrates that they do not present the requisite abstract questions of law. Johnson and Rawson maintain they did not intentionally fabricate their opinions and so did not fail to turn over *Brady* material. But whether their opinions were intentionally fabricated or honestly mistaken is a question of fact, not a question of law. *Johnson* itself explains that we lack jurisdiction over factual questions about whether there is sufficient evidence of intent. . . . The district court concluded that the evidence in the record meant that a reasonable jury could find that Johnson and Rawson fabricated their opinions. The district court recounted that, taking the record in the light most favorable to Stinson, Johnson altered the missing tooth identification only after meeting with the detectives, after they interviewed Stinson and observed his dentition. Johnson did not have any new information before making the switch, and he has never said the change was a matter of reevaluation. The district court also stated Johnson and Rawson had to have known that Stinson was excluded from causing the bite marks because of obvious differences between Stinson's teeth and the bite mark patterns. Bowers, Stinson's expert in the current case, opined that Johnson and Rawson knowingly manipulated the bite mark evidence and Stinson's dentition to make them appear to match. Both the four-odontologist panel and Bowers found no empirical or scientific basis for finding a bite mark on Cychosz's body where Stinson has a missing tooth. They also found inexplicable Johnson's and Rawson's conclusion that Stinson's upper second molars made a bite mark because molars are located so far back in the mouth. And if Stinson's version of the facts is accepted, there was also a cover up of the switch in tooth identification, as no police report accounts for it. From all of this evidence, the district court concluded there was sufficient evidence for a factfinder to draw an inference that the defendants were lying. . . .Rarely will there be an admission of subjective intent. The intent to fabricate is a question of fact that the district court concluded could be inferred in Stinson's favor by the evidence in the record at summary judgment, and the defendants' challenge to whether that is true is the type of appeal forbidden by *Johnson.* Whether Gauger knew that Johnson and Rawson fabricated their opinions that the bite mark evidence matched Stinson's dentition was a related, and important, factual dispute at summary judgment. Gauger argued that because he is not a dentist, he cannot be blamed for Johnson's and Rawson's expert conclusions. The district court determined that taking the facts in Stinson's favor, 'Gauger was cognizant of Johnson's shifting

view of which tooth was missing' and 'was fully aware' of the 'contents of his conversations with Johnson and what he implied in their second meeting, following his and Jackelen's interview of Stinson,' namely that Gauger implied a desired result in the expert opinions. . . But on appeal, Gauger argues that the evidence in the record does not support a conclusion that Gauger knew the dentists were producing false opinions. . . This challenge to the sufficiency of the evidence is again precluded by *Johnson.* We note that the district court's conclusion that circumstantial evidence might prove intentional collusion between Gauger and the two experts is the kind of finding of historical fact that implicates *Johnson*, not an 'abstract question of law.' Evidence in the summary judgment record supporting an inference that there was an agreement included that there was an opportunity to agree (the detectives met with Johnson after interviewing Stinson, and Johnson called Rawson), and that later experts say no competent odontologist could have possibly concluded that Stinson was the assailant. In short, the appeals here are not like *Harris* and *Plumhoff* where the facts are clear and the only question is the legal implication of those facts. Instead, the defendants' appeals fail to take all the facts and inferences in the summary judgment record in the light most favorable to Stinson, and their arguments dispute the district court's conclusions of the sufficiency of the evidence on questions of fact. With *Johnson* still very much controlling law, we lack jurisdiction over the defendants' qualified immunity appeals in this case.")

Stinson v. Gauger, 868 F.3d 516, 529-30 (7th Cir. 2017) (en banc), *cert. denied,* 138 S. Ct. ___ (2018) (Sykes, J., joined by Bauer, Flaum, and Manion, JJ., dissenting) ("My colleagues have misread the district judge's decision and failed to recognize the limits of jurisdictional principle announced in *Johnson v. Jones*[.] . . To the first point, the judge's decision denying summary judgment actually contains two rulings. The judge held that (1) the evidentiary record reveals genuine factual disputes about whether certain key events occurred; and (2) the defendants are not entitled to qualified immunity because the evidence in the record, when construed in Robert Stinson's favor, would permit a reasonable jury to find that they violated his right to due process by fabricating evidence used to wrongly convict him, *see Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012), and suppressing evidence of the fabrication, *see Brady v. Maryland*, 373 U.S. 83, 83 (S.Ct. 1194, 10 L.Ed.2d 215 1963), both of which are clearly established constitutional violations. The judge's order does not neatly separate rulings (1) and (2), which I confess makes it more difficult to correctly apply the *Johnson* principle. But the absence of clean lines in the judge's reasoning does not make the entire decision unreviewable. Our task is to determine whether the decision below contains a legal ruling about qualified immunity. If it does, then we may review it. Here, there's no question that the judge's decision *does* contain a legal ruling about qualified immunity. For the reasons explained in my opinion for the panel, *Johnson* does not block jurisdiction over this appeal. *Stinson v. Gauger*, 799 F.3d 833, 838–40 (7th Cir. 2015). . . .The lesson of this part of the Court's opinion in *Johnson* is that a 'mixed' qualified-immunity order is immediately reviewable, at least in part. If the district court holds that the summary-judgment record, viewed in the plaintiff's favor, shows a violation of clearly established law—that is, would permit a reasonable jury to find for the plaintiff on his constitutional claim—then the defendant

may take an immediate appeal to obtain review of *that* determination *even if* the order also identifies a genuine factual dispute.")

Nettles-Bey v. Williams, 819 F.3d 959, 961-62 (7th Cir. 2016) ("Appellants' brief makes it clear that they think that the district judge got the facts wrong. Their summary of argument tells us: '[T]he record is devoid of evidence to support the inference that religious discrimination led to Plaintiff's arrest and detention'. The first caption in the argument section of their brief begins: 'The district court erred in concluding that a triable fact issue existed as to whether the Defendant officers were motivated by discriminatory animus toward Moors'. From beginning to end, appellants' brief is about what the record shows and what inferences a reasonable juror could draw. That's the domain of *Johnson;* appellants' line of argument has nothing to do with uncertainty in federal law. Appellants' reply brief tells us that *Johnson* is irrelevant. They observe that whether to grant summary judgment is a question of law, at least in the sense that a district judge does not make any findings of fact (but must take matters in the light most favorable to the party opposing the motion) and that a court of appeals decides without deferring to the district court's view. They add that immunity likewise is about questions of law. It follows, they believe, that they are entitled to contend in a pre-trial qualified-immunity appeal that the district judge erred in evaluating the record and that, as a matter of law, they are entitled to immediate decision in their favor. If that is right, however, then *Johnson* itself is wrong. The question posed by the Supreme Court for qualified-immunity appeals is whether legal uncertainty affected the *primary conduct* of which the defendants are accused. That's the qualified-immunity issue: Whether it is clearly established that federal law (statutory or constitutional) forbade the public employees to act as they did. *Johnson* holds that, when addressing this question about the propriety of the defendants' behavior, the court of appeals must accept as given the district court's reading of the record. If the district judge concludes that a reasonable jury could resolve a particular factual dispute in the plaintiff's favor, the court of appeals must address the question about legal uncertainty on that understanding. Appellants insist that *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), and *Plumhoff v. Rickard*, —— U.S. ——, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014), modify the approach of *Johnson* and entitle them to contest the district court's factual understanding. Whether, and if so how far, that may be true when there is *also* a dispute about the nature of and uncertainty in the federal legal principles that govern the public officials' primary conduct is an interesting question, which this court may address in *Stinson v. Gauger*, No. 13–3343 (7th Cir. argued en banc Feb. 9, 2016). Neither *Scott* nor *Plumhoff* allows an appeal whose *sole* goal is to upset how the district judge understood the record. We have nothing more to say about *Scott* and *Plumhoff*, because there is no uncertainty at all about the rules of federal law that govern the question whether police may hold a person's religion against him when deciding whether to make an arrest. That they cannot has been established for a long, long time—and appellants do not argue otherwise. They do say that there is uncertainty about a different issue that they call a dispute of law: Whether standing orders to police in South Holland require an arrest for criminal trespass whenever the owner demands. This is not a dispute about federal law—and it does not concern 'law' at all. There is a factual dispute about whether Clark *did* demand Nettles–Bey's arrest, and a further dispute about whether officers in South Holland are obliged to honor the owner's wishes in the face of

exculpatory information such as Nettles–Bey's contention that he was present at the invitation of someone he honestly (and reasonably) thought to be the owner. The chief of police himself testified by deposition that officers have discretion. These are among the issues that may be explored at the impending trial. The appeal is dismissed for want of jurisdiction.")

Allman v. Smith, 790 F.3d 762, 763 (7th Cir. 2015) ("The City invokes the doctrine of 'pendent appellate jurisdiction,' which barely survived its scathing treatment in *Swint v. Chambers County Commission,* 514 U.S. 35 (1995), and today allows a court of appeals to review an interlocutory order only when it is 'inextricably intertwined' with an appealable decision. . . The City maintains that its attempt to have the claims dismissed on the merits is 'inextricably intertwined' with the Mayor's attempt to be free of the risk of damages liability, but the contentions are not 'intertwined' at all, let alone 'inextricably' so. *Mitchell* described an immunity appeal as 'conceptually distinct from the merits'. . . , which the Court saw as an essential condition of interlocutory review. It is not only possible but also normal to resolve a's request for qualified immunity without deciding the merits of a's claim. . .The principal question in an immunity appeal is whether uncertainty in legal doctrine makes it inappropriate to award damages against a public official—that is, whether the law was 'clearly established' before the official acted. . . A general principle does not support personal liability; instead the law's application to a type of situation must be developed enough to 'place[ ] the statutory or constitutional question beyond debate.'. . The question on the merits, by contrast, concerns who is in the right, not how much legal uncertainty must be cleared away to find the answer. The district judge held that factual investigation, perhaps including a trial, is necessary to determine whether the plaintiffs' rights under the First Amendment have been violated. We therefore limit the appeal to Mayor Smith's arguments about the only two plaintiffs with respect to whom the district judge denied his request for immunity: Robin Allman and Margaret Baugher.")

Chriswell v. O'Brien, 570 F. App'x 617, 617 (7th Cir. 2014) ("O'Brien has taken an interlocutory appeal to contend that he is entitled to the benefit of qualified immunity. He included this defense in his motion asking the district court to dismiss the suit against him; when denying the motion, the judge did not mention immunity. That omission raises the possibility that the judge has reserved decision on the immunity defense and, if so, the appeal would be premature. See, e.g., *Khorrami v. Rolince,* 539 F.3d 782 (7th Cir. 2008). But the judge did not purport to reserve decision, nor did he indicate a plan to return to the subject. Instead he denied O'Brien's motion outright. This means that we have jurisdiction, see *Hanes v. Zurick,* 578 F.3d 491, 493–94 (7th Cir.2009), though we are disappointed that a district judge would deny a motion to dismiss without addressing all of the defenses it presents.")

Allman v. Smith, 764 F.3d 682, 684-86 (7th Cir. 2014) ("The city claims that the doctrine of 'pendent appellate jurisdiction' allowed it to appeal. It moved in the district court to stay further proceedings in that court until we resolved its appeal. But the motion was denied. The two motions to stay (the mayor's and the city's) are the only matters before our panel, a motions panel. The mayor is entitled to a stay because he's claiming qualified immunity. But is the city entitled to a

stay? Or even to ask us for a stay? Can it be considered a party to this appeal? These are the interesting questions, and the answers depend on the applicability of the doctrine of pendent appellate jurisdiction, for it is the only possible ground for the city's claim to be a party to this appeal. It is an embattled doctrine. . . . The plaintiffs' claims against the city may, as we have indicated, hinge on the outcome of the mayor's appeal. If the merits panel that will decide that appeal concludes that the mayor did not violate the plaintiffs' constitutional rights (his principal contention), then the suit against the city collapses. But if the panel concludes that although the mayor may have violated those rights they were not sufficiently well established when he did so to defeat his immunity, the plaintiffs' claims against the city will survive his (successful) appeal. That is, a finding that the mayor is immune from liability may leave the merits of the plaintiffs' claims against the city unresolved. The posture of the city's case is a compelling reason to stay the proceedings in the district court involving the city until the merits panel decides the mayor's appeal. If the panel finds that there was no constitutional violation by the mayor at all (rather than that qualified immunity saves him, but of course not the city, from being held liable to the plaintiffs), then any proceedings that had taken place in the district court regarding the plaintiffs' claim against the city will have been a waste of time. This possibility provides a compelling reason for allowing the city to appeal from the denial of the stay that it sought in the district court. The plaintiffs, in contrast, want to try their case against the city, and then, if the merits panel rejects the mayor's appeal from the denial of qualified immunity, hold a second trial, to resolve their claims against the mayor. The trial of the claims against the city has been scheduled for the fall of this year; there is no guarantee that the mayor's appeal will have been briefed, argued, and decided by the merits panel by then. There is thus no guarantee that the panel's decision will come in time to head off the trial should the merits panel decide that the mayor did not violate the plaintiffs' constitutional rights, in which event the claims against the city, being derivative, will evaporate. The prospect of two trials involving the same facts and witnesses is not an attractive one. If the district court proceedings against the city are stayed, and the merits panel decides that the mayor did not violate the plaintiffs' constitutional rights, there will be no trial. If (with the stays granted) the merits panel decides that the mayor did violate the plaintiffs' constitutional rights but is entitled to qualified immunity, there will be one trial, against the city. Finally, if the merits panel rejects the mayor's appeal, the plaintiffs can try their claims against both the mayor and the city in a single proceeding. Each of these outcomes is preferable to allowing the proceedings in the district court against the city to continue while the mayor's appeal is under consideration by this court. A further danger if the city's case isn't stayed is that of conflicting findings between our court and the district court on whether the mayor violated the constitutional rights of the two remaining plaintiffs. That would be an issue in a trial of the claim against the city, since if the answer was negative the city would be off the hook. It might also be an issue for our court in the mayor's appeal, as he will be arguing not only that he had qualified immunity from being sued by the two plaintiffs for violating their constitutional rights but also that he hadn't violated them at all, in which event immunity would be moot. The city's claimed status as a party to the mayor's appeal thus is indeed 'pendent' because of its interdependence with the mayor's appeal. In identical circumstances four other circuits have upheld pendent appellate jurisdiction. *Hidden Village, LLC v. City of Lakewood,* 734 F.3d 519, 523–24 (6th Cir.2013); *Demoret v. Zegarelli,* 451 F.3d 140, 152 (2d Cir.2006); *Avalos*

v. City of Glenwood, 382 F.3d 792, 801–02 (8th Cir.2004); *Altman v. City of High Point*, 330 F.3d 194, 207 n. 10 (4th Cir.2003). None has denied it. We can't think of any reason to reject this consensus. And it is significant that the cases we just cited all postdate *Swint,* the case that shrunk the doctrine of pendent appellate jurisdiction to its current slim proportions. But the scope of our pendent jurisdiction of the city's claim is exceedingly narrow. The city is a party only for the purpose of being able to ask us to reverse the district court's denial of a stay of proceedings against it in that court. We have no jurisdiction over its appeal from any rulings by the district court other than that denial. It will be the business of the merits panel to decide the mayor's appeal from the denial of summary judgment regarding the two plaintiffs whom the district judge declined to dismiss. We hereby stay the district court proceedings both against the mayor and against the city.")

Huff v. Reichert, 744 F.3d 999, 1004 (7th Cir. 2014) ("In an interlocutory appeal from the district court's denial of qualified immunity at summary judgment, we have jurisdiction to consider 'only the purely legal question of whether, for purposes of [the defendant's] qualified immunity defense,' the facts asserted by the plaintiffs make out a violation of clearly established law. . . Thus, we accept the plaintiffs' (or the district court's) version of the facts and ask whether the defendant is nevertheless entitled to qualified immunity. . . In addition, a defendant official 'may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of material fact.'. . But summary judgment orders are appealable when they concern 'an "abstract issue of law" relating to qualified immunity,'. . . such as whether the right at issue is clearly established or whether the district court correctly decided a question of law . . . .")

Gutierrez v. Kermon, 722 F.3d 1003, 1014 (7th Cir. 2013) ("Our cases have given fair warning that an interlocutory appeal will be dismissed if the argument for qualified immunity is dependent upon disputed facts. . . . Rather than accept the district court's factual assumptions, Kermon has simply ignored or denied that a factual dispute exists and built his argument for qualified immunity on that disputed fact. . . .Here, the district court found that the issue of whether Gutierrez was swaying or walking with an unsteady gait is a genuine factual dispute in need of a jury's attention. Officer Kermon's unabashed reliance on that disputed fact in support of his plea for qualified immunity deprives us of jurisdiction over this interlocutory appeal. We therefore Dismiss this appeal for want of jurisdiction.")

Whitlock v. Brueggemann, 682 F.3d 567, 574-76 (7th Cir. 2012) ("No matter how vigorously the police defendants contend that these issues are the sort of abstract legal questions we have jurisdiction to review at this stage of the litigation, they are not. They are merely a 'back-door effort to contest the facts.'. . The police defendants frame their appeal as a challenge to the sufficiency of the court's explanation but they are essentially arguing that there is no dispute of material fact and that the district court failed to appreciate this (as evidenced by its lack of citation to the record). This is no more than a 'sufficiency of the evidence' appeal that we have no jurisdiction to consider. . . The defendants are correct that the district court's opinion in this case

could have been more thorough. We strongly encourage district courts to offer full, reasoned explanations of their decisions, complete with detailed citations to the record. But a district court's failure to do so, though regrettable, does not somehow transform a decision based on disputes of fact into one that contains a reviewable question of law. . . .The brevity of the district court's opinion thus raises no legal question in and of itself that permits us to exercise jurisdiction here. In each of the examples the defendants give of this court's remanding to a district court to reevaluate summary judgment, we did so not because the court's reasoning was insufficient but because the district court had made some legal error and failed to conduct a proper qualified immunity inquiry in the first place . . . Here the court has addressed the qualified immunity question, and the police defendants raise no issue with the court's analysis beyond their contention that the district court did not thoroughly discuss the facts. . . .With all of that said, our best judgment is that we lack jurisdiction to consider the police defendants' appeals because none of the issues they raise are legal questions sufficiently separable from the merits. Even if we were to address the merits of their appeal, this limited review of the record shows that there is enough admissible evidence supporting the plaintiffs' claim to create a dispute of material fact.")

Whitlock v. Brueggemann, 682 F.3d 567, 579, 580 (7th Cir. 2012) ("Under the functional line the Supreme Court drew in *Buckley*, a prosecutor does not enjoy absolute immunity before he has probable cause. . . .Plaintiffs have not appealed the district court's holding that McFatridge had absolute immunity for all post-probable cause conduct, and so we have nothing to say about it. In the end, we conclude just as we did in *Hill* that we cannot resolve the absolute immunity question for McFatridge's conduct during the first period without resolving the factual dispute over the moment when probable cause developed. If McFatridge took no action related to the investigation before that point and became involved only after he had put on his prosecutorial hat, then he will be entitled to absolute immunity. If, on the other hand, plaintiffs can prove that he fabricated evidence before probable cause arose, then absolute immunity is off the table. We conclude that we have no jurisdiction over this aspect of the appeal. . . . The focus of our case, as we have narrowed it, is exclusively on the period before probable cause supported the prosecution, when a prosecutor is unquestionably acting in an investigative role. Because there are factual issues that must be resolved before we can pinpoint that moment, it is not suitable for resolution at this time.")

Hernandez v. Cook County Sheriff's Office, 634 F.3d 906, 912, 913 (7th Cir. 2011) ("[A] finding of waiver is a legal determination which enables appellate review of the denial of qualified immunity. . . . The district court erred by ruling that the defendants waived their qualified immunity argument as to the First Amendment retaliation claims. . . . [T]his case is readily distinguishable from the numerous precedents in this circuit upholding findings of waiver where arguments were not raised until the reply brief. . . Moreover, it is absolutely clear that the defendants' underdeveloped opening brief argument supplied adequate notice to the plaintiffs and caused them no prejudice.")

Jones v. Clark, 630 F.3d 677, 680 (7th Cir. 2011) ("The official's right to immunity turns on two questions: first, whether the facts presented, taken in the light most favorable to the plaintiff,

describe a violation of a constitutional right, and second, whether the federal right at issue was clearly established at the time that the alleged violation occurred. . . The way that the first inquiry is phrased is reminiscent of the approach to dismissals under Federal Rule of Civil Procedure 12(b)(6) or rulings on summary judgment: the reviewing court takes the record in the light most favorable to the opponent of the motion and asks whether the case can proceed. This avoids the need to resolve disputed issues of fact. The second inquiry even more obviously involves pure questions of law. The trick there is to ensure that we are evaluating the situation at the correct level of specificity. . . When the district court denies qualified immunity at summary judgment because the plaintiff's evidence, if believed by a trier of fact, would suffice to show a constitutional violation, and the court concludes that the governing rule is well established, any appeal must be limited to the legal underpinnings of the court's ruling. *Behrens* clarified that a district court's assertion that factual disputes preclude a defendant's claim of immunity does not itself deprive the court of appeals of jurisdiction. . . An immediate appeal on stipulated facts may still be possible, or the defendant may concede for purposes of the appeal that the plaintiff's version of the facts is correct, or he may accept the district court's view that there are factual disputes but take each disputed fact in the light most favorable to the plaintiff. . . In a collateral-order appeal like this one, where the defendants say that they accept the plaintiff's version of the facts, we will take them at their word and consider their legal arguments in that light. If, however, we detect a back-door effort to contest the facts, we will reject it and dismiss the appeal for want of jurisdiction. By the same token, an appeal from a denial of qualified immunity cannot be used as an early way to test the sufficiency of the evidence to reach the trier of fact. In such a case, where there really is no legal question, we will dismiss the appeal for lack of jurisdiction.")

Mercado v. Dart, 604 F.3d 360, 363, 366 (7th Cir. 2010) ("To date, the Supreme Court has treated only two kinds of orders as 'final' for the purpose of an immunity appeal: denial of a motion to dismiss the complaint and denial of a motion for summary judgment. See generally *Behrens v. Pelletier*, 516 U.S. 299, 305-11, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). These two orders often are the outcome of focused engagements after full briefing; each represents the end of a discrete stage in the litigation, during which the legal issue has crystallized and been resolved as a matter of law. Oral denial of a mid-trial motion under Rule 50, by contrast, is not final by that standard. It is possible to see how an order denying a motion for summary judgment can be called 'final' for some purposes even though the judge has allowed the suit to proceed; but a mid-trial ruling is not 'final' for *any* purpose. It is a step on the way to a verdict. And a mid-trial motion under Rule 50 does not assert a 'right not to be tried' or even a 'right to be free of costly discovery'; it asserts a right to *win* (that's why it is called a 'motion for judgment as a matter of law'). Discovery and trial have occurred by the time lawyers start making Rule 50 motions. A judge's oral statement allowing the trial to proceed may presage a final decision (judgment on the verdict) but is not itself a final decision. . . . This interlocutory appeal is dismissed because it is not from a 'final decision' and because it is frivolous")

Viilo v. Eyre, No. 08-1627, 2008 WL 4694917, at *4, *5 (7th Cir. Oct. 27, 2008) ("The present case easily fails the standard for appealability in the aftermath of *Johnson* and *Behrens*. The district

court held that '[a] reasonable jury could find that at Eyre's order Carter shot Bubba as he was crying, sitting down, moving slowly, or headed to the backyard.' *Viilo v. City of Milwaukee*, 552 F.Supp.2d 826, 840 (E.D. Wis. 2008). The defendants have manifestly not based their appeal on these facts. . . . In denying rather than embracing the facts the district court held to be sufficiently well-supported to create jury issues, the defendants have pleaded themselves out of court. The appeal is therefore DISMISSED.").

Khorrami v. Rolince, 539 F.3d 782, 786-90 (7th Cir. 2008) ("The primary weakness of the Government's appeal is that the order that might have supported appellate jurisdiction over this appeal does not exist. . . . The district court . . . did not reject the qualified immunity defense. Instead, it explicitly set the claim aside to be adjudicated later . . . . Unless the district court delays so long in ruling that the delay becomes a *de facto* denial, a decision not to rule on a motion is just that: inaction. . . . The Government contends that qualified immunity is the right to be free from all burdens of litigation, period. That statement goes too far. . . .In the event of a brief pretrial postponement of a qualified immunity argument at the same time as the court is considering a motion under Rule 12(b)(6), the district court is the only judicial tribunal that may revisit the issue. While this will embroil the defendant official for a brief time in the litigation, there is no way to avoid these burdens altogether and at the same time conduct the litigation in a way that is fair and orderly to both parties. The fact that the Supreme Court has recognized that more than one appeal from an order denying qualified immunity is permissible . . . shows that the Court recognizes that a certain amount of pretrial activity, including the discovery necessary to prepare a motion for summary judgment (or defend against one), is inevitable. All of what we have just said may have been true before the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Government concedes, but, in its view, *Twombly* changed everything. . . . The Government suggests that perhaps a higher pleading standard is appropriate in a qualified immunity case, but the Supreme Court has squarely rejected that proposition. *See Crawford-El v. Britton*, 523 U.S. 574, 594-96 (1998). . . . In the end, the Government is trying to conflate its argument over pleading standards with the argument over qualified immunity. Orders denying qualified immunity (when they exist) and rulings denying Rule 12(b)(6) motions are subject to different rules for appellate jurisdiction. In the end, we have before us only an attempted appeal from a presumed denial of qualified immunity. We repeat that the lack of a ruling from the district court under these circumstances is not the functional equivalent of a denial of the motion. We also find it procedurally unacceptable to rule on the sufficiency of the complaint through the back door, using the Government's theory that a complaint that fails to allege a constitutional violation clearly enough to satisfy *Twombly* is all that it needs in order to appeal. Khorrami's story is plausible enough that we can conclude that he properly alleged a violation of clearly established law by someone acting under color of law. That showing, in turn, is sufficient to satisfy us that no interlocutory appeal is authorized here: there was no order denying qualified immunity, no constructive denial resulted, and the issue was not sufficiently concluded to allow for another form of interlocutory appeal. The appeal is therefore Dismissed for want of appellate jurisdiction.")**.**

White v. Gerardot, 509 F.3d 829, 836, 837 (7th Cir. 2007) ("*Sallenger* and *McKenna* thus counsel that, where the appellant's arguments rely on disputed facts, this court has jurisdiction only if the legal arguments for qualified immunity do not depend on, or are separable from, disputed facts. Of course, this does not mean that the mere mention of disputed facts in an otherwise purely legal argument extinguishes our jurisdiction. . . Rather, the key inquiry is whether the appellant's arguments necessarily depend upon disputed facts. If an argument is not dependent upon disputed facts, the court simply can disregard mention of the disputed facts and address the abstract issue of law without running afoul of *Johnson*. Here, Detective Gerardot's only argument on appeal is that a reasonable officer in his shoes would not have known that using deadly force against Ford was unconstitutional because he believed that Ford had just fired shots into a large crowd, that Ford was concealing a weapon in front of his body and that Ford was going to shoot him when he turned around with his hands at waist level. Because there is an issue of material fact as to whether Ford was surrendering with his hands in the air, Detective Gerardot's argument necessarily depends on his version of the facts. Indeed, Detective Gerardot would be hard pressed to develop any purely legal argument for why he is entitled to qualified immunity if Ford had his hands in the air and was surrendering, as alleged by Ms. White and as assumed by the district court. . . Detective Gerardot's legal arguments are wholly dependent upon, and inseparable from, his reliance on disputed facts and therefore we conclude that we do not have jurisdiction to consider his appeal.").

McKinney v. Duplain, 463 F.3d 679, 693 (7th Cir. 2006) ("The district court denied Officer Duplain's motion for summary judgment based, in part, on its belief that a genuine issue of material fact existed as to whether McKinney had charged Officer Duplain. Although that conclusion rested on the district court's reliance on several problematic expert opinions, under the Supreme Court's holding in *Johnson*, this court lacks jurisdiction to review the district court's conclusion that a genuine factual dispute exists. Therefore, we must DISMISS for lack of jurisdiction.").

Leaf v. Shelnutt, 400 F.3d 1070, 1078, 1079 (7th Cir. 2005) ("A defendant may appeal the denial of qualified immunity with respect to particular claims even when he still will be required to go to trial on a matter separate from the claims for which he asserted qualified immunity. . . A plaintiff often seeks relief for a single incident on multiple theories of liability. When this occurs, the defendant does not lose his right to appeal the denial of qualified immunity as to one theory of liability even when he still will be required to go to trial on another theory. As several of our sister circuits have recognized, . . .the term 'claim' must be employed in this context in a manner that is compatible with the unique, yet firmly established, principles established by the Supreme Court with respect to the doctrine of qualified immunity. Consequently, in employing the term 'claim' when determining whether a defendant may invoke the defense of qualified immunity, we must keep in mind that qualified immunity is designed to ensure that a defendant does not stand trial unnecessarily on an allegation that lacked a reasonable grounding in established law at the time the act was committed. We also must keep in mind that the defense of qualified immunity is only effective when it is applied at a meaningful level of generality. This requirement ensures that a defendant will have to stand trial only when he could reasonably anticipate that his conduct may give rise to liability for damages. Defining 'claim' in light of these considerations quite naturally

produces a different and more narrow definition of the term 'claim' than we would encounter in other contexts such as *res judicata*. There, in determining whether the same 'claim' arose in earlier litigation, 'claim' has become a surrogate for the term 'cause of action,' and that term has been defined in turn to include all theories of liability arising out of the same transaction or occurrence. . . Any other course would frustrate the Supreme Court's directive that an appeal of the denial of qualified immunity 'cannot be foreclosed by the mere addition of other claims to the suit.'").

Beischel v. Stone Bank School District, 362 F.3d 430, 433, 434 (7th Cir. 2004) ("The bottom line was that Beischel was granted judgment on her claim that she had been denied a property interest without due process of law. The defendants, except for Kathy Rosenheimer, were denied qualified immunity on that claim. However, the defendants won dismissal of Beischel's claim based on a denial of a liberty interest without due process of law and all of her claims under Wisconsin law. Even though there is no final judgment in the case, the defendants have appealed both the decision denying qualified immunity and the decision on the merits. We, of course, have appellate jurisdiction over the decision denying qualified immunity as a matter of law. . . And although we are ordinarily 'skittish' about the doctrine of pendent appellate jurisdiction, . . . we agree with the parties who contend that the issues on the merits are so intertwined with the appealable claim that jurisdiction exists over the entire appeal. And as it turns out, the dispositive issues in our decision today are issues on the merits rather than on qualified immunity.").

Anderson v. Cornejo, 355 F.3d 1021, 1022, 1023 (7th Cir. 2004) ("'We didn't do it' may be a good defense, but it is unrelated to immunity (a doctrine designed to protect public officials from the effects of guessing wrong in a world of legal uncertainty) and thus, *Johnson* held, not a proper ground of interlocutory appeal. *Johnson* precludes the managerial defendants from denying that the line inspectors used race and sex as selection criteria. Plaintiffs believe that, if we must assume that racial discrimination occurred on defendants' watch, and they did nothing to stop it, there could be no point to the appeal. We should just let the case proceed to trial. Recognizing the force of *Johnson*, the managers concede (for purpose of the appeal only) that some line inspectors at O'Hare behaved unconstitutionally, and they further concede (again *arguendo*) that they did not lift a finger to rectify the problem. There remains a *bona fide* question about legal doctrine, and thus about immunity: would reasonable persons, knowing what the managers knew (or were bound to learn), have recognized that the Constitution required them to intervene? We may address that question without transgressing *Johnson*, and as in *Saucier* may give either of two answers: first, that taking all evidence in the light most favorable to the plaintiffs there was no requirement to act; or, second, that there is such a requirement but that a reasonable person would not have understood at the time that the law required this. Thus it is possible, consistent with *Johnson*, to cover the question whether the plaintiffs have a good legal theory as well as the immunity defense; but, as *Johnson* and *Saucier* hold, . . . this must be done by taking the evidence and reasonable inferences in plaintiffs' favor.")

West v. Schwebke, 333 F.3d 745, 747, 748 (7th Cir. 2003) ("Qualified immunity is available unless the rules of law on which plaintiffs rely are so clearly established that a reasonable state

actor is bound to understand how they apply to the situation at hand. . . Defendants acted after *Foucha* had made it clear that *Youngberg* applies to civil detainees who have committed criminal acts. . . This leaves only the question whether defendants' use of seclusion could be justified on either security or treatment grounds–and the district judge thought this question unresolvable short of trial, given the clash of expert opinions. An interlocutory immunity appeal may not be used to present factual disputes for pretrial appellate resolution.").

Finsel v. Cruppenink, 326 F.3d 903, 904, 905 (7th Cir. 2003) ("This is but another in what seems like an ever-increasing flow of interlocutory appeals in cases where district courts deny motions for summary judgment based on qualified immunity. Although the appeal is certainly permissible, . . . it will not, even if successful, serve the primary purpose of permitting interlocutory review– sparing a government defendant the rigors of a trial. That goal will not be achieved because other parts of this case cannot be resolved, short of a settlement, without a trial. Nevertheless, despite concerns about the wisdom of this sort of piecemeal approach to cases like this we soldier on, starting with the facts viewed in the light most favorable to the plaintiff . . . . A).

Garvin v. Wheeler, 304 F.3d 628, 634 (7th Cir. 2002) ("We have consistently held that a cry of 'I didn't do it' does not present any distinctly legal issue or seek protection from legal uncertainty, and therefore cannot be raised in an interlocutory appeal from the denial of qualified immunity.").

Hammond v. Kunard, 148 F.3d 692, 695 (7th Cir. 1998) ("[In] a motion to dismiss, we assume that all of the facts of the complaint are true, rendering the applicability of qualified ... immunity a purely legal question over which we have jurisdiction.").

Clash v. Beatty, 77 F.3d 1045, 1046, 1048-49 (7th Cir. 1996) ("If the district court's denial of Beatty's summary judgment motion indicated that the question of whether the qualified immunity defense was available required further factual development, we have no jurisdiction to entertain this appeal under *Johnson*. If, on the other hand, the appeal raises only legal issues about the possible application of qualified immunity, we have jurisdiction under *Behrens* and *Mitchell*. . . . As the *Behrens* opinion put it . . . this is a case where what is at issue is whether the evidence could support a finding that particular conduct occurred: a shove that was objectively unreasonable in light of the harm that Clash then presented. That determination is not truly 'separable' from the plaintiff's claim. Accordingly, we dismiss this appeal.").

Rambo v. Daley, 68 F.3d 203, 207 (7th Cir. 1995) ("We simply do not have jurisdiction to review a contention of insufficient evidence on interlocutory appeal. [citing *Johnson*] Therefore, because the merit of the qualified immunity defense turns on the sufficiency of the plaintiff's evidence, we dismiss this portion of the appeal for want of jurisdiction.").

Jones v. Johnson, 26 F.3d 727, 728 (7th Cir. 1994) ("Defendants do not deny that if they beat plaintiff, as he believes they did, then they lack immunity. Whether they beat the plaintiff is a

question that must be resolved in the district court before it may be reviewed on appeal. When asked at oral argument if they could lose the factual dispute and still prevail, defendants' lawyer answered no. In consequence, we lack appellate jurisdiction over the contention that the defendants did not commit or abet battery.), *aff'd*, ***Johnson v. Jones***, 115 S. Ct. 2151 (1995).

Hill v. Shelander, 992 F.2d 714, 718 (7th Cir. 1993) (where court is ". . . unable to resolve the immunity question without resolving a disputed issue of fact," it lacks jurisdiction over the appeal of the immunity question.) *Accord* ***McDonnell v. Cournia***, 990 F.2d 963, 967 (7th Cir. 1993); ***Marshall v. Allen***, 984 F.2d 787, 792 (7th Cir. 1993).

Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991) ("It would extend ***Mitchell*** well beyond its rationale to accept an appeal containing nothing but a factual issue ....***Mitchell*** did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that ***Mitchell*** does not authorize an appeal to argue 'we didn't do it.'").

EIGHTH CIRCUIT

Berry v. Doss, 900 F.3d 1017, 1021 (8th Cir. 2018) ("[D]efendants that have been denied qualified immunity cannot create appellate jurisdiction by using qualified immunity verbiage to cloak factual disputes as a legal issue. . . This is true because we are obligated to look beyond their characterization of the issue to 'determine whether [they are] simply arguing that the plaintiff offered insufficient evidence to create a material issue of fact.'. .Here, the rehabilitation officials' arguments hinge on substantive factual disputes such as the extent and magnitude of harassment and threats experienced by Berry, the degree to which the correction officials knew of the harassment and threats, and whether (and how) they sought to protect him. For us to reach their 'legal' argument that they responded reasonably and did not violate clearly established law, we would have to cast aside the district court's factual presumptions, analyze the factual record, and resolve genuine factual disputes against the non-moving party. Such review exceeds our jurisdiction.")

Wenzel v. City of Bourbon, 899 F.3d 598, 601 (8th Cir. 2018) ("We have jurisdiction over this interlocutory appeal under the collateral order doctrine. . . When reviewing the denial of qualified immunity, we accept as true the facts that the district court found were adequately supported, as well as the facts that the district court likely assumed, to the extent they are not 'blatantly contradicted by the record.'. . We review *de novo* issues of law. . . Plaintiffs moved to dismiss the appeal, arguing that the district court's denial of qualified immunity was based on a disputed fact—namely, whether Storm could see Wenzel's hands. For purposes of our review, we will assume that Storm could see that Wenzel was not holding a weapon in his hands, for the record does not 'blatantly contradict' that fact. We thus deny the motion to dismiss and proceed to the legal question whether Storm's conduct violated Wenzel's clearly established federal rights.")

Thompson v. City of Monticello, Arkansas, 894 F.3d 993, 999-1000 (8th Cir. 2018) ("Singleton and Thompson each believe the video supports his version of how the incident transpired. They also disagree as to whether Thompson's behavior can be characterized as aggressive and confrontational such that a reasonable officer in Singleton's shoes would have believed he posed an immediate threat. Having reviewed the video, we note that it captures only part of the incident, and that it does not clearly show where Thompson's other hand was positioned when he turned to point at his house. But the video does not conclusively disprove Thompson's view of the incident. Singleton simply disagrees with 'the district court's conclusions regarding evidence sufficiency and the genuineness of factual disputes—conclusions that we have no jurisdiction to review.'. . And, under the district court's version of the facts, Singleton's conduct constituted a violation of Thompson's Fourth Amendment right to be free from excessive force. . . . Next, Singleton argues that, in December 2010, it was not clearly established that he could not tase Thompson. . . But Singleton has attempted to define Thompson's constitutional right by describing him as aggressive, confrontational, and resistant. In doing so, Singleton has construed disputed facts in his own favor, and has effectively 'asked us to examine a matter over which we lack jurisdiction, *i.e.*, which facts [Thompson] may, or may not, be able to prove at trial.'. .Nevertheless, it was clearly established in December 2010 that the facts as found by the district court would give rise to a Fourth Amendment violation. . . . By December 2010, it was clearly established that intentionally tasering, without warning, an individual who has been stopped for a nonviolent misdemeanor offense and who is not resisting or fleeing arrest while his hands are visible violates that individual's Fourth Amendment right to be free from excessive force.")

Webb v. City of Maplewood, 889 F.3d 483, 488 (8th Cir. 2018) ("Unlike the district court's denial of the City's defense of immunity, the question of whether the complaint states a claim of municipal liability cannot normally be reviewed on interlocutory appeal. . . We may review that issue only if it is 'coterminous with, or subsumed in,' the issue of the City's immunity from suit. *Manning v. Cotton*, 862 F.3d 663, 671 (8th Cir. 2017). The issues are not inextricably intertwined here, however, since we have determined that the district court correctly denied the City immunity without having found it necessary to decide whether the complaint sufficiently pleads the City's *Monell* liability. . . Since the issues are separate, we do not have jurisdiction to review whether the complaint states a claim of municipal liability, and we express no view on that question.")

Burnikel v. Fong, 886 F.3d 706, 711-12 (8th Cir. 2018) ("The officers have defined the constitutional right in terms of disputed facts viewed in their favor—that Burnikel appeared threatening, that he failed to comply with orders, and that he resisted arrest. This they are not entitled to do. The officers have, in effect, asked us to examine a matter over which we lack jurisdiction—'*i.e.*, which facts a party may, or may not, be able to prove at trial.'. .Assuming that Burnikel's version of the story is true—that he merely inquired about Hunemiller's well-being, that he did not threaten anyone, did not appear to threaten anyone, did not resist arrest, and did not fail to comply with the officers' commands—a reasonable officer standing in Fong's or Wessels's shoes would have understood that the amount of force they used was excessive. . . Long before

Burnikel's arrest, 'this court (among others) had announced that the use of force against a suspect who was not threatening and not resisting may be unlawful,'. . . and it was clearly established in 2013 that it was unlawful to strike a nonviolent person who had committed no crime, who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only infraction was to call out to a police officer, whom he mistakenly thought was a man attacking a woman. Accordingly, a reasonable officer would have understood that purposefully dropping Burnikel face-first onto the concrete after he had been subdued and handcuffed would violate clearly established law.")

Raines v. Counseling Assocs., Inc., 883 F.3d 1071, 1075 (8th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3038 (U.S. July 11 2018) ("Whether the officers reasonably believed Raines posed a sufficient threat depends on what occurred. The district court was unable to make this determination based on the evidence presented. Having reviewed the evidence in the record, we conclude that there is a key factual question in this case about whether Raines advanced on Officer Hanson just before being shot, which is both material and disputed, that precludes us from resolving the legal issue of whether the officers' conduct constitutes a violation of clearly established law. While we have jurisdiction to determine whether conduct constitutes a violation of clearly established law, 'we lack jurisdiction to determine whether the evidence could support a finding that particular conduct occurred at all.'. . Accordingly, the court's determination on the issue of qualified immunity was not a final decision. . . .The appeal is dismissed for lack of jurisdiction.")

Estate of Walker v. Wallace, 881 F.3d 1056, 1059-60 (8th Cir. 2018) ("The district court did indeed mention that 'disputes of fact remain regarding whether Victor voluntarily consented to the inspection,' and we have said that when the appeal from the denial of qualified immunity turns on whether the plaintiff consented to a search, which is a factually intensive inquiry, we lack jurisdiction. . . We conclude nonetheless that we have jurisdiction. Wallace's briefs and oral argument make clear that he is challenging whether he violated clearly established law when he inspected the plaintiffs' house after receiving Millbrooks's signature on a consent-to-search form. Whether certain actions violate clearly established law is the archetypal question of law that is reviewable on interlocutory appeal. . . We have said that the typical 'appealable issue is whether the federal right allegedly infringed was "clearly established."'. . This is precisely what Wallace asks us to review. The way in which the district court resolved the motion does not necessarily govern whether we have jurisdiction. . . Where the appellant does not challenge that factual disputes exist but rather whether, even if the facts are construed in a light most favorable to the appellees, he violated a clearly established right, we have jurisdiction over the interlocutory appeal.")

Franklin v. Peterson, 878 F.3d 631, 635-38 (8th Cir. 2017), *cert. denied*, No. 17-1572, ___ S. Ct. ___ (U.S. Oct. 29, 2018) ("On the claim that the officers unlawfully used deadly force against Franklin, the officers argue that the district court accepted nearly all of the facts provided by the officers as undisputed, including, importantly, that Franklin fought with the officers, gained

control of a sub-machine gun, shot two of them, and then struggled with an officer over control of the firearm. According to the officers, '[n]one of this was controverted below; all of it was assumed by the district court.' In fact, according to the officers, the district court accepted all of the facts presented and focused on only two additional facts—the alleged time gap and the absence of blood on the MP5—in its denial of qualified immunity. As to these facts, the officers argue that they are either not material or are blatantly contradicted by the record. The problem with this argument, however, is that the district court did *not* hold that the facts relayed in its recitation were undisputed, and more importantly, we lack jurisdiction to review the factual issues that abound in this appeal. . . .At no point did the district court deem particular facts undisputed, nor did it conduct a legal analysis based upon assumed facts. What the district court *did* do is plainly hold that the estate's evidence raised a genuine dispute as to whether the story told by the officers is true. For example, the court held that there was at least circumstantial evidence that Franklin was not in possession of the MP5 when Officers Peterson and Meath used deadly force against him. This statement by the district court, read in context, was not a determination that this precise moment was determinative in the constitutional analysis, but rather that based on the evidence presented by the estate, the court simply could not determine whether the evidence presented supported a finding that the officers faced a threat of serious physical harm when they used deadly force. This doubt informed by the evidence of the lapse in time and the absence of blood, according to the district court, calls into dispute the officers' version of the alleged struggle. Because the relevant legal inquiry is whether the officers believed that Franklin posed a threat of serious physical harm, and there was a question as to whether the version advanced by the officers was true, the district court denied qualified immunity in this instance. As stated by the district court, "[i]ndeed, [the estate's] evidence raises fact questions regarding the sequence of events leading to the use of deadly force against Franklin, as well as the existence and nature of any threat posed by Franklin when the officers shot him.' The instant case stands in contrast to appeals from denials of qualified immunity at summary judgment where this court does conduct a qualified immunity analysis based on facts the district court assumed, or necessarily assumed, viewed in the light most favorable to the nonmoving party. [collecting cases] Unlike *Wallace* and other cases where this court exercised jurisdiction, what is at issue here are the facts themselves. The officers here acknowledge that the material issue is whether Officers Peterson and Meath reasonably believed that Franklin posed a threat of serious bodily harm or death. To answer that question the officers argue that the primary facts relied upon by the district court to deny qualified immunity are either immaterial or blatantly contradicted by the record. Both claims involve wholly factual issues we are without jurisdiction to review. . . These officers do not argue that even if inferences are made in the estate's favor the use of deadly force was reasonable in this circumstance, but rather they argue the inferences raised by the estate from the evidence presented are not plausible—a factual dispute. . . The district court did not make any legal determinations based upon facts viewed in the light most favorable to the estate, it merely held that the factual dispute at this stage prevents such an analysis. Whether each officer reasonably believed Franklin posed a sufficient threat depends on what occurred—a determination the district court held it could not make based on the evidence presented thus far. . . The district court's basic conclusion that 'it is not clear what happened or what the parties will prove' is not appealable, as it is not a final

order. . .While we have jurisdiction to determine whether conduct the district court deemed sufficiently supported for purposes of summary judgment constitutes a violation of clearly established law, we lack jurisdiction to determine whether the evidence could support a finding that particular conduct occurred at all. . . It is the latter situation we find ourselves in today. There are no facts the district court necessarily assumed that would allow us to conduct a legal analysis, or at least none advanced by the officers. . . The factual arguments made by the officers on appeal regarding materiality and sufficiency should be made to a jury and do not run to a legal issue on appeal. Accordingly, under *Johnson*, qualified immunity does not prevent suit here because the precise question for trial is the factual question, an issue which is inseparable from, and necessarily informs, the legal one. . . Just as in *Johnson*, the district court determined that the summary judgment record raised a genuine issue of fact concerning whether the officers faced a threat of bodily injury sufficient to support the use of deadly force. Thus, the court's determination was not a final decision. . . We dismiss the appeal for lack of jurisdiction.

Franklin v. Peterson, 878 F.3d 631, 638-40 (8th Cir. 2017), *cert. denied,* No. 17-1572, ___ S. Ct. ___ (U.S. Oct. 29, 2018) (Loken, J., dissenting) ("I respectfully dissent. When reviewing an interlocutory appeal from the denial of qualified immunity, we have jurisdiction to determine whether 'a given set of facts violates clearly established law.'. . In conducting this review, 'the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.'. . .In this case, it is uncontroverted that police officers cornered Walter Franklin hiding in the basement of a home he broke into while fleeing the police. Franklin refused to surrender, and a violent struggle ensued. Franklin grabbed an officer's gun and fired, wounding two officers. Officer Durand continued to struggle with Franklin and yelled, 'he's got a gun.' Officers Peterson and Meath fired their handguns, mortally wounding Franklin. . . .In my view, accepting as true the alleged seventy-second gap between the shots that wounded two officers and the shots that killed Franklin, and the lack of blood on Durand's MP5, there is no existing precedent establishing 'beyond debate' that Officers Peterson and Meath acted unreasonably in using deadly force. . . .On this record, I conclude the district court erred in failing to rely on Supreme Court and Eighth Circuit precedents demonstrating that the alleged unreasonable use of deadly force was not beyond debate. Therefore, I would reverse the denial of qualified immunity to Officers Peterson and Meath.")

Hoyland v. McMenomy, 869 F.3d 644, 651-52 (8th Cir. 2017) ("Hoyland misunderstands the legal standard. To be sure, an appellate court cannot maintain jurisdiction over an interlocutory appeal when the legal reasonableness of an officer's actions turns on disputed factual questions. . . But here we have no historical facts in dispute. The events of that night were recorded on three cameras located in squad cars and Hoyland's cell phone. The question raised on appeal is whether the material facts, viewed in a light most favorable to Hoyland, show that the officers' actions were objectively reasonable given their knowledge and clearly established law. 'Our inquiry is a quintessentially legal one, and we accordingly have jurisdiction to consider defendants' appeal.'")

Ferguson v. Short, 840 F.3d 508, 511-12 (8th Cir. 2016) ("The parties dispute whether the detectives' appeal involves qualified immunity. Indeed some of the 19 points that the detectives raise on appeal involve issues unrelated to qualified immunity, which we cannot review. For example, we lack jurisdiction under *Johnson* to review whether 'Ferguson failed to present sufficient evidence to show he was deprived of a constitutional right or that [the detectives] reached an agreement to deprive him of his constitutional rights.' But we usually do not throw the baby out with the bathwater when an interlocutory appeal raises both reviewable qualified-immunity questions and unreviewable ones. *See, e.g.*, *White v. McKinley*, 519 F.3d 806, 812–13 (8th Cir. 2008). Some of the points raised here do, at least on their surface, raise qualified-immunity issues. Ferguson is correct that the detectives cannot save their interlocutory appeal simply by framing their arguments in terms of qualified immunity. *Austin v. Long*, 779 F.3d 522, 524 (8th Cir. 2015). But instead of classifying the multiple points on appeal as either wheat or chaff, we resolve this case on the ground that we simply lack an order denying a motion for summary judgment on qualified-immunity grounds. The district court issued a thorough 62-page opinion resolving the motion for summary judgment, but qualified immunity made only a brief cameo appearance in one paragraph at the beginning of the opinion's discussion section. In that paragraph, the district court set out the broad principles of qualified immunity; nowhere were these principles, in this paragraph or elsewhere in the opinion, applied to the facts. The opinion reads like an ordinary summary-judgment ruling, determining if there are factual disputes and resolving legal points unrelated to qualified immunity. We are therefore unable to construe this order as one from which an interlocutory appeal can lie. Ferguson asks us simply to dismiss this appeal, arguing that the detectives failed to raise and preserve the qualified-immunity issue in the district court altogether and only now couch their appeal in terms of qualified immunity to ensure our jurisdiction. We are unwilling to go that far. References to qualified immunity are peppered throughout the detectives' suggestions in support of their motion for summary judgment. In fact, the first numbered paragraph in the detectives' two-page motion for summary judgment says, 'Summary Judgment is also appropriate on the basis of qualified immunity.' So this is not a situation where the detectives raise an argument only in an inconspicuous footnote. . . Since we conclude that the detectives raised the qualified-immunity issue on the face of the papers, we remand the case to the district court for consideration of the motion for summary judgment on the basis of qualified immunity. In considering that motion, the district court of course can decide as a preliminary matter whether the detectives discussed the issue of qualified immunity in sufficient detail and with sufficient citations to undisputed record evidence to enable the district court to rule on the matter. . . If it determines that the detectives did so, the district court can then enter an explicit order and judgment on the matter one way or the other. If it determines that the detectives did not do so, the district court can proceed to resolve the case in the ordinary course and may consider any motions by the detectives as may be consistent with any scheduling orders that the district court deems applicable. We deny the motion to dismiss the appeal and remand the case to the district court.")

Mallak v. City of Baxter, 823 F.3d 441, 446-47 (8th Cir. 2016) ("Unlike in *Johnson* and *Plumhoff*, key factual questions in the present case are both material and disputed. Mallak contends that the officers' accesses of her data violated the DPPA, which prohibits the access and use of motor

vehicle records 'for a purpose not permitted' under the act. . . According to Mallak, because she had no interactions with law enforcement related to these accesses of her information, the officers must have accessed her data for personal reasons unrelated to their official duties. The appellants do not dispute that accessing an individual's data to satisfy some personal interest constitutes a violation of clearly established law under the DPPA. Instead, they contend that Mallak failed to present evidence creating a factual dispute regarding whether the officers accessed her data for such an improper purpose. . . . The district court denied the defendants qualified immunity because it found that these facts gave rise to a genuine dispute regarding the officers' purposes in accessing Mallak's data, particularly as Mallak had not yet had the opportunity to take the officers' depositions in order to inquire further into the circumstances of their accesses. Under *Johnson,* we lack jurisdiction to reevaluate on interlocutory appeal the district court's determination that this question 'sets forth a "genuine" issue of fact for trial.'")

Thompson v. Murray, 800 F.3d 979, 983-84 (8th Cir. 2015) ("The record does not blatantly contradict the version of the facts that the district court likely assumed. . . This version of the facts has at least some support in the forensic evidence, camera footage, the opinions of Thompson's experts, and common sense. Defendants argue that the facts were undisputedly otherwise, but this argument challenges the district court's conclusions regarding evidence sufficiency and the genuineness of factual disputes-conclusions that we have no jurisdiction to review. Murray is entitled to qualified immunity unless the above-described facts demonstrate that he violated a clearly established constitutional or statutory right of which a reasonable person would have known. . . An officer may not use deadly force against a fleeing suspect unless the suspect poses an immediate and significant threat of serious injury or death to the officer or to bystanders. . . This general standard can be sufficient to clearly establish a fleeing suspect's rights in a case where they have obviously been infringed. . . Defendants argue that in a more particularized sense, 'there is no case law clearly establishing that the use of deadly force is inappropriate' against a suspect who is 'bearing down on' an officer and who is 'driving into oncoming traffic through a heavily trafficked intersection while running a red light after being chased by police and refusing to stop even when guns are aimed at him.' Although this argument is framed to pose the purely legal question whether Jermell's right to be free from the use of deadly force was clearly established, it is founded on facts not assumed by the district court—for example, that, at the time of the shooting, Jermell's vehicle was moving toward Murray, who was in an unprotected position, or toward the slowed or stopped oncoming traffic, and at a high enough speed to pose an immediate and significant risk of serious injury. At bottom, this is an argument about the sufficiency of the evidence, a question we lack jurisdiction to review, however inventively it is structured as an abstract legal argument.")

Ellison v. Lesher, 796 F.3d 910, 915-17 (8th Cir. 2015) ("Although the precise fact pattern described by the district court has not been the subject of a Supreme Court decision, officers were on fair notice that they could not enter a home simply because they perceived as mouthy a resident who told them that he wanted no help and desired to be left alone. Indeed, the officers do not argue that entry was permissible on that basis. They contend, as noted, that other facts not accepted by

the district court justified their search. Limited as we are by the facts assumed in the district court's order, we affirm the denial of qualified immunity on the claim that McCrillis and Lesher unlawfully entered Ellison's residence. . . . We conclude, again, that we cannot accept the contention advanced by Lesher, because her framing of the abstract legal issue is premised on a set of facts that was not assumed by the district court. Lesher avers that Ellison charged at her and the other officers while swinging a cane. The district court, construing the evidence in the light most favorable to Ellison, thought it was 'unclear whether or not Ellison was holding his cane,' and that '[d]iscrepancies and variations in the officers' testimony make it impossible to determine what the facts and circumstances confronting Lesher were at the moment when she shot and killed Ellison.'. . We do not have jurisdiction to review whether Ellison's estate will be able to prove at trial that Lesher shot Ellison while he was empty-handed. . . We must accept for purposes of our decision that Ellison was not wielding the cane when the shooting occurred. Considering the abstract legal issue based on the facts assumed by the district court, we conclude that Lesher is not entitled to qualified immunity. If Lesher shot Ellison while he was simply standing in his apartment and holding no cane, then there were not reasonable grounds to believe that Ellison posed a serious threat of death or serious physical injury to the officers or others. Ellison's refusal of a command to lie down on the floor did not, by itself, make reasonable the use of deadly force. Ellison's right to be secure against a seizure by the use of deadly force under those circumstances was clearly established as of December 2010. Since the 1985 decision in *Tennessee v. Garner,* 'officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others.'. . Although the precise scenario described by the district court does not appear in a reported decision, the officers were on fair notice that the use of deadly force would not be reasonable. Lesher does not contend that a reasonable officer could have believed that it was reasonable to use deadly force merely to enforce an order that Ellison lie on the ground. Her argument is premised on a different set of facts that the district court declined to accept in resolving the motion. We therefore affirm the denial of qualified immunity on Ellison's claim against Lesher based on the use of deadly force.")

Franklin v. Young, 790 F.3d 865, 867 (8th Cir. 2015) ("Essentially, Young argues that the district court erred in finding a genuine dispute of material fact over whether he violated Franklin's Eighth Amendment rights. By challenging the district court's finding on sufficiency of the evidence, Young is 'asking us to engage in the time-consuming task of reviewing a factual controversy about intent.'. . . This is 'precisely the type of controversy that the [Supreme] Court concluded should not be subject to interlocutory appeal' because of unnecessary delay, the 'comparative expertise of trial and appellate courts, and wise use of appellate resources.'. . For these reasons, we lack jurisdiction to consider whether the pretrial record sets forth a genuine issue of material fact, and therefore this appeal is dismissed.")

Letterman v. Does, 789 F.3d 856, 861 (8th Cir. 2015) ("Appellants challenge simply whether their actions, as supported by the evidence and reasonable inferences drawn from that evidence when taken in the light most favorable to the Lettermans, constitute deliberate indifference. The Lettermans first argue the question presented goes beyond our jurisdiction. We have jurisdiction

to hear the appeal only if it presents a question of law. . . The Lettermans assert Appellants are attempting to challenge a factual, rather than a legal, conclusion; we disagree. We retain jurisdiction to consider legal issues, such as the application of law to set of facts. . . In this case, we retain jurisdiction to answer Appellants' legal question: 'whether the facts [as presented on summary judgment] support a claim of violation of clearly established law.'")

New v. Denver, 787 F.3d 895, 899-902 (8th Cir. 2015) ("'When there is no dispute among the parties as to the relevant facts ... a court should always be able to determine as a matter of law whether or not an officer is eligible for qualified immunity.'. . However, if a public official's qualified immunity as well as his Fourth Amendment liability turn on genuine issues of material fact, rather than on an issue of law, we lack appellate jurisdiction because the decision denying qualified immunity is not an immediately appealable collateral order. . . New argues we lack jurisdiction in this case because the district court's ruling was based upon a genuine issue of material fact, 'whether Mr. Denver truly made an honest or objectively reasonable mistake in believing the leaves to be marijuana.' On the unique facts presented, this threshold issue requires close scrutiny. Whether an officer is entitled to qualified immunity because he 'acted reasonably under settled law in the circumstances' is a question of law for the court, both before and after trial. . . Predicate facts that will defeat summary judgment based on qualified immunity 'include only the relevant circumstances and the acts of the parties themselves, and not the conclusions of others about the reasonableness of those actions.'. . .In this case the critical jurisdictional issue is whether any disputed facts are *material* to the question whether Sgt. Denver could reasonably have believed he had probable cause to arrest David New for unlawful possession of marijuana. The district court concluded that Sgt. Denver's 'credibility' was a disputed issue of material fact 'in the face of contrary evidence—a negative lab result and the contrary averments of Mr. New.' Here, the court's reference to credibility is logical and highlights the unusual nature of the issue. The Supreme Court has repeatedly emphasized 'that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.'. . Thus, the Court has held, an arrest that is based upon sufficient probable cause does not violate the Fourth Amendment because the arresting officer did not correctly identify the law being violated, or because he made a pretextual arrest for another law enforcement purpose. . . Here, however, the *existence* of probable cause turned on Denver's belief that the leaves were marijuana. Qualified immunity does not protect 'the plainly incompetent or those who knowingly violate the law.' Thus, whether the arrest was objectively reasonable for qualified immunity purposes requires an evaluation of the objective credibility of Sgt. Denver's conclusion that the two leaves were marijuana. Our appellate jurisdiction turns on whether there are disputed predicate facts preventing prompt determination of this issue of law. In our view, the 'contrary evidence' cited by the district court is not relevant to this issue. New's contrary opinion and the negative lab report are evidence that the two leaves were not *in fact* marijuana. But neither is, alone or in combination, material to the question of arguable probable cause. Because the Constitution 'does not guarantee that only the guilty will be arrested,' New's assertion that he was not in possession of marijuana 'is largely irrelevant.'. . New testified that he had only seen marijuana leaves on television, and that he only briefly saw a single finger of one leaf sticking out of the bag where Denver put the two leaves. This is not probative

evidence that Denver lacked a reasonable, good faith belief that he had probable cause to arrest because he had found two leaves of marijuana in New's car. Likewise, the subsequent negative lab report does not cast material doubt on Denver's testimony that he believed the two leaves were marijuana. . . . New has failed to identify any other material fact disputes that preclude us from deciding whether Denver had arguable probable cause to arrest as a matter of law.Thus, we have jurisdiction to determine that issue. . . . On these undisputed facts, we conclude that an objectively reasonable police officer with Sgt. Denver's training and experience could have reasonably believed that the leaves he found in David New's car were marijuana, giving Denver probable cause to arrest and have the leaves tested for THC. New cites no case in which an officer was denied qualified immunity in analogous circumstances, and we have found none. More than evidence of a mistake is required to deny a public official qualified immunity from § 1983 damage liability.")

New v. Denver, 787 F.3d 895, 902-03 (8th Cir. 2015) (Gruender, J., dissenting) ("The court correctly cites *Johnson v. Jones*, which held that 'a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'. . But the court nonetheless reviews whether the pretrial record here sets forth a genuine issue of fact for trial. Instead, we should follow *Johnson* and dismiss this interlocutory appeal for lack of jurisdiction. As the court explains, New's § 1983 claim requires an evaluation of the objective credibility of Sgt. Denver's conclusion that the two leaves were marijuana. New argues that 'no reasonable officer would have concluded the leaves were marijuana.' He testified that the part of the leaf he saw did not look like marijuana 'at all'; Denver testified that the leaves were marijuana. Based on this and other evidence, the district court held that 'issues of fact remain as to whether Mr. Denver truly made an honest or objectively reasonable mistake in believing the leaves to be marijuana.' Under *Johnson,* we cannot review such determinations of 'evidence sufficiency.'. . Recognizing this limitation, the court finds jurisdiction by deeming New's evidence immaterial rather than 'probative' of Sgt. Denver's 'reasonable, good faith belief that he had probable cause.'. . But this is simply weighing evidence. Every fact-based summary-judgment ruling asks whether a party's evidence is sufficiently probative. That is how trial courts decide what *Johnson* says we cannot examine: 'which facts a party may, or may not, be able to prove at trial.'. . As such, to accept the court's analysis undercuts *Johnson* significantly. And, moreover, the court's analysis contradicts our earlier holding that we cannot 'decide whether a dispute is genuine by finding certain evidence insufficiently probative.' *Livers v. Schenck*, 700 F.3d 340, 350–51 (8th Cir.2012); *see Mader v. United States,* 654 F.3d 794, 800 (8th Cir.2011) (en banc). Accepting the court's analysis also implicates *Johnson's* concern about increased appellate workloads. . . . When we face more complicated cases, the court's rule would have us sift through, not the hundred or so pages here, but thousands of pages, carefully sorting for nuggets of probative evidence. This is precisely what *Johnson* chose to forbid. I am sympathetic to the court's desire to reach the merits. . . . Our lack of jurisdiction subjects Denver to continued suit based on what seems like scant evidence. Nonetheless, when the Supreme Court decided *Johnson,* it was aware of the need to protect officials from erroneously permitted trials. . . The Court still held that we cannot review an order

deciding 'whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'. . As such, we should dismiss this appeal for lack of jurisdiction. I respectfully dissent.")

Austin v. Long, 779 F.3d 522, 524 (8th Cir. 2015) ("Here, Long argues that 'Austin did not put forth sufficient evidence to demonstrate that Long's decision to terminate his employment was motivated by any racial animus,' so the district court erred in finding a dispute of material fact over whether Long's stated reasons for firing Austin were a pretext for racial discrimination. By 'challenging the district court's finding of the sufficiency of the evidence,' Long is 'asking us to engage in the time-consuming task of reviewing a factual controversy about intent.'. . This is 'precisely the type of controversy that the [Supreme] Court concluded should not be subject to interlocutory appeal' because of unnecessary delay, the 'comparative expertise of trial and appellate courts, and wise use of appellate resources.'. . We conclude that we lack jurisdiction to consider Long's sufficiency of the evidence challenge to the district court's findings on pretext. . .To the extent that Long challenges the district court's interpretations of law, we review them de novo. . . Long is not entitled to qualified immunity if Austin establishes that Long violated his clearly established constitutional rights. . . Austin asserts that Long violated his clearly established right to be free from racial discrimination in the workplace. Austin supports this assertion by offering evidence that Long treated him differently from similarly situated coworkers, thus proving that Long's stated reasons for firing him were a pretext for racial discrimination.")

Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014) ("[I]f the parties agree on the law but disagree about the facts, there is no issue for us to decide on an interlocutory appeal. . . Applying these principles to this case, we have no jurisdiction at this juncture to decide whether 'the district court's determination of evidentiary sufficiency' was correct. . . We can, however, accept the district court's factual findings as true and decide whether those facts, as a 'purely legal issue,' involve a clearly established violation of federal law. . . Because this is what the officials' appeal asks us to do, we have jurisdiction over this case under the collateral order doctrine.")

Payne v. Britten, 749 F.3d 697, 701, 702 (8th Cir. 2014) ("Our court, therefore, has jurisdiction over interlocutory appeals arising not only from a district court's reasoned denial of qualified immunity, but also from a district court's failure or refusal to rule on qualified immunity. In the latter instance, however, our court only exercises its jurisdiction to compel the district court to decide the qualified immunity question. . . . Because the district court in the present case did not decide whether the officials are immune from Payne's suit, we have jurisdiction to order a remand. Exercising that jurisdiction, we now, as we must, remand the case for the district court to conduct the proper analysis. . . . We write further because, although we are compelled to remand, we are sympathetic with the district court in this case and understand clearly why the district court followed the seemingly reasonable, but impermissible, path that it chose. The prison officials are legally entitled to a ruling on their assertions of qualified immunity. In the present case, as with many cases, however, such a ruling would appear to be at the expense of efficiently getting to the heart of the material issue in the case. Here, that issue clearly involves a simple fact question: what is in the withheld mail (much of which is mail that only the officials have seen)? In this regard, the

contents of the withheld mail appear to be contested. . . As we understand the core legal issues surrounding the allegations in this case, any analysis of the merits of the qualified immunity defense will require the district court to assess whether the regulation or policy at issue under which the mail is being held is valid and neutral and whether it addresses a legitimate penological concern. . . A qualified immunity analysis will then require the district court to conduct an independent review of the evidence to determine if the officials have demonstrated an exaggerated response to those penological concerns in relation to a particular item of mail that has been confiscated. . . .In the absence of such evidence, the district court is bound to take the plaintiff's allegations as true and presume that the mail does not, in fact, contain material that runs afoul of any neutral and valid restrictions. As such, it would seem that if the content of the mail is contested, the district court cannot grant qualified immunity to the officials in this case without first reviewing the withheld mail. Simply put, the district court appears to have correctly determined that this is a case where, ultimately and eventually, the documents will matter for the qualified immunity analysis. Nevertheless, the district court may not force public officials into subsequent stages of district court litigation without first ruling on a properly presented motion to dismiss asserting the defense of qualified immunity. Courts may ask only whether the facts as alleged plausibly state a claim and whether that claim asserts a violation of a clearly established right. . . .In summary, all parties at all times are entitled to their appropriate share of process. The defendants in this case, like any public officials, are entitled to a reasoned denial or grant of their claim of qualified immunity at the motion to dismiss stage, the summary judgment stage, and any other permissible stage at which a proper motion is filed. By following the path described herein, courts will ensure in all cases that public officials receive this process. . .We reverse the district court's order converting the officials' motion to dismiss into a motion for summary judgment; vacate the district court's partial denial of the officials' motion for summary judgment; and remand with instructions for the district court to decide, consistent with this opinion, whether the officials are entitled to qualified immunity on the pleadings under Rule 12(b)(6).")

Payne v. Britten, 749 F.3d 697, 704-08 (8th Cir. 2014) (Riley, C.J., concurring in part and dissenting in part) ("District courts have an obligation to 'resolv[e] [qualified] immunity questions at the *earliest possible stage* in litigation.'. . In Payne's case, the earliest possible stage was the officials' motion to dismiss for failure to state a claim upon which relief could be granted. The officials appropriately based their motion on qualified immunity, invoking their entitlement to be free of the burden of further litigating Payne's claims. To rule on that motion, '[t]he district court needed to *first* determine whether the complaint alleged enough facts to demonstrate the violation of a *clearly established* statutory or constitutional right.'. . Instead of making that determination and ruling on the motion by either granting or denying qualified immunity at the pleading stage, the district court refused the officials the decision—one way or the other—to which they were entitled. On its own motion, the district court directed the officials to 'supplement the record with properly authenticated evidence to show that they were censoring and confiscating [Payne's] mail in accordance with a legitimate criminal investigation.' That *sua sponte* order was an abuse of discretion. The officials had a right to a qualified immunity ruling *on the pleadings*. . . To vindicate their right to such a ruling, the officials had no obligation to submit *any* 'properly authenticated

evidence.' On the contrary, qualified immunity provides 'an entitlement not to ... face [such] burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated *clearly established* law.'. . This entitlement is so important that it may be asserted, appealed, reasserted, and again appealed at multiple stages in the same case. . . As *Behrens* makes clear, by refusing to decide whether Payne's 'complaint alleged enough facts to demonstrate the violation of a clearly established statutory or constitutional right,'. . . the district court deprived the officials of two definite opportunities and a third possible opportunity to avoid the cost and inconvenience of producing evidence. First, a decision by the district court on the pleadings that the officials were entitled to qualified immunity would obviously have freed the officials from the burden of ongoing litigation. Second, if the district court decided the officials were not entitled to qualified immunity, the officials could have immediately appealed that denial to our court. . . This second opportunity to challenge the sufficiency of the plaintiff's pleadings frequently proves decisive. . . Third, if our court decided the officials were not entitled to qualified immunity, the officials could have petitioned the Supreme Court for a writ of certiorari—an unlikely but possible path to qualified immunity at the pleading stage. . . .Like the majority, I am 'sympathetic with the district court in this case,'. . . but for very different reasons. I am sympathetic to the difficult task any district court confronts trying to apply the complex doctrine of qualified immunity in the face of opinions which demand a ruling. . . without providing any guidance on how to reach a correct ruling. Rather than discussing the 'efficiency' of not following the law, the court's opinion should clarify how to apply this law. Having prepared some thoughts in the hope of assisting with the qualified immunity analysis, I offer the following. A determination of the qualified immunity question at a particular stage in the proceedings does not necessarily mean a grant of immunity: often, the determination entails a reasoned *denial* of immunity. But without a thorough qualified immunity analysis by the district court—either granting or denying immunity—'we cannot fulfill our function of review.'. . . Qualified immunity requires district courts to answer two questions. Question one: did each individual defendant official violate a constitutional or statutory right? . . . Question two: was the right clearly established when the violation occurred? . . . A district court may answer either question first. . . . What a district court cannot do is *deny* qualified immunity without resolving *both* questions in the plaintiff's favor. . . Neither is a district court permitted to decline to answer either question. . . At the pleading stage, these principles mean an individual defendant official is entitled to qualified immunity '*unless* [the] plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.". . At the summary judgment stage, a defendant is entitled to qualified immunity unless '(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation.'. . At the trial stage, a defendant is entitled to qualified immunity unless (1) the jury reasonably finds facts establishing that the defendant violated a constitutional or statutory right, and (2) the right was clearly established at the time the violation occurred. . .The first question develops from stage to stage: it evolves from a construction of the pleadings, to a review of the record in the light most favorable to the plaintiff, to a deferential consideration of facts found by a jury. The second question does not change: the question is always

whether the right was clearly established. . . .To meet their burden to show the right at issue was clearly established, 'plaintiffs [must] point either to "cases of controlling authority in their jurisdiction at the time of the incident" or to "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."'. . Without one or the other, qualified immunity applies—regardless of whether there is a factual dispute about what occurred—because the defendant did not have 'fair and clear warning' that his conduct was unlawful. . . This is true 'whether or not the constitutional [or statutory] rule applied by the [district] court [i]s correct,' because qualified immunity applies unless the rule is 'beyond debate.'")

Burton v. Arkansas Secretary of State, 737 F.3d 1219, 1237 (8th Cir. 2013) ("In the present case, '[o]ur jurisdiction on this appeal is limited to the question of qualified immunity, but the answer to that question necessarily includes a determination whether any constitutional or statutory rights were violated in the first place.'. . .Here, 'our resolution of the qualified immunity issue' as to Burton's § 1983 race discrimination claim 'necessarily resolves' the Title VII race discrimination claim. . . Therefore, we conclude that we may exercise pendent jurisdiction over such claim. For the reasons set forth in Part II.A., *supra,* we hold that the district court correctly denied summary judgment to the state defendants on Burton's Title VII race discrimination claim. However, our resolution of the § 1983 retaliation claim against Chief Hedden does not 'necessarily resolve' the Title VII retaliation claim against the state defendants. We did not analyze the merits of the § 1983 retaliation claim due to Burton's failure to plead a violation of his First Amendment rights. Therefore, we decline to exercise pendent jurisdiction over the Title VII retaliation claim against the state defendants.")

Roberts v. City of Omaha, 723 F.3d 966, 975, 976 (8th Cir. 2013) ("The district court also denied summary judgment to the city, reasoning '[t]here are ... issues of fact with respect to the adequacy of the City's training.' We ordinarily only have ' "jurisdiction on interlocutory appeal ... [to resolve] the issue of qualified immunity."'. . However, we have pendent appellate jurisdiction over certain claims that are 'inextricably intertwined' with the qualified immunity analysis. . . . Roberts alleged the city deprived him of the benefits of a public service—safe and lawful police detention—because the city failed properly to train its employees under the ADA and Rehabilitation Act. As is the case for failure to train claims arising under § 1983, actions under the ADA and the Rehabilitation Act require proof of deliberate indifference. . . In *Szabla*, we held, where the constitutional right allegedly violated by individual officers was not clearly established at the time of the occurrence, the municipality could not be liable for failure to train because the risk of harm 'was not so obvious at the time of th[e] incident that [the municipality's] actions [could] properly be characterized as deliberate indifference.'. .Roberts can only prevail on his ADA and Rehabilitation Act claims by showing the city's deliberate indifference to his alleged right to be free from discrimination in the circumstances of this case, but the city, like the individual officers, lacked notice the officers' actions might have violated Roberts's asserted rights. *See id.* Our decision granting qualified immunity to the individual officers necessarily forecloses liability against the municipality on Roberts's failure to train claims as well. . . The issue of the city's liability therefore is 'inextricably intertwined' with the qualified immunity issues

in this appeal. . . Having jurisdiction over this pendent appellate claim, we reverse the district court's denial of the city's motion for summary judgment on Roberts's ADA and Rehabilitation Act failure to train claims against the city.")

S.L. ex rel. Lenderman v. St. Louis Metropolitan Police Dept. Bd. of Police Com'rs, 725 F.3d 843, 854, 855 (8th Cir. 2013) ("S.L. also need not prove liability of any individual municipal employee to succeed on her deliberate indifference claim because the Board may be liable if 'the combined actions of multiple officials' created a pattern of unconstitutional conduct which could not be individually attributed to any one officer. . . Nor would a grant of qualified immunity to Harris and Isshawn–O'Quinn 'necessarily resolve[ ]' S.L.'s claim that the Board, Isom, and Harris failed to supervise Arnold, Lorthridge, and Isshawn–O'Quinn. . . To establish liability for failure to supervise, S.L. must show 'deliberate indifference [to] or tacit authorization of the offensive acts.'. . With respect to the Board and Chief of Police Isom, this issue 'requires entirely different analys[i]s' from the question of qualified immunity, *Veneklase v. City of Fargo,* 78 F.3d 1264, 1270 (8th Cir.1996), because it would require examination of SLMPD supervision and training policies rather than the actions of individual officers, *see Tilson v. Forrest City Police Dep't,* 28 F.3d 802, 812–13 (8th Cir.1994). Granting qualified immunity to Harris also would not resolve S.L.'s failure to supervise claim against him. Harris is entitled to qualified immunity if his conduct did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known,' *Harlow,* 457 U.S. at 818, but he may be liable for failure to supervise even without having 'personally participated in any constitutional deprivation' or 'know[ing] about any violation at the time it occurred,' *Wever v. Lincoln Cnty., Neb.,* 388 F.3d 601, 606 (8th Cir.2004) (citation omitted). The issues raised by the municipal defendants are thus not inextricably intertwined with the question of qualified immunity, and we lack jurisdiction to consider them at this time.")

Robbins v. Becker, 715 F.3d 691, 694 (8th Cir. 2013) ("The district court must resolve immunity questions with sufficient clarity for the court of appeals effectively to exercise its interlocutory review of the legal issues surrounding the denial of summary judgment based on qualified immunity. We have 'rejected attempts [by district courts] to enter truncated orders that did not provide a "thorough determination of [the defendants'] claim of qualified immunity."'. . '[R]ecogniz[ing] the importance of a thorough qualified immunity analysis,'. . . we repeatedly have remanded where the district court's 'analysis is so scant that we are unable to discern if the district court even applied both steps of the qualified immunity inquiry to all of the summary judgment claims[.]'. . .Like in *Solomon, Handt, McNeese, Katosang,* and *O'Neil,* the district court in this case failed to discuss the qualified immunity standard or otherwise demonstrate it was applying the two-step qualified immunity analysis. . . The officers 'are entitled to a thorough determination of their claim of qualified immunity.'. . .We remand to the district court for a more detailed consideration and explanation, consistent with this opinion, of the officers' claims of qualified immunity.")

Solomon v. Petray, 699 F.3d 1034, 1038, 1039 (8th Cir. 2012) ("Here, the cursory nature of the district court's denial of summary judgment requires that we remand this case for a more detailed consideration of the claims of qualified immunity. The order contains no findings of fact, viewed in the light most favorable to Solomon or otherwise. It is not even apparent from the text of the order whether the district court considered the claim of personal use of excessive force by Thomas, which Solomon raised for the first time in his brief in response to the motions for summary judgment. However, the absence of findings of fact is not the infirmity which requires us to remand the case. . . It is instead the complete absence in the order of any explicit reference to, or analysis of, Jones's and Thomas's claims of qualified immunity which leaves us unable to determine whether the district court even considered the issue of qualified immunity before denying the motions for summary judgment. We express no opinion regarding the merits of Jones's and Thomas's claims of qualified immunity. However, 'we are certain, and the case law is clear, that they are entitled to a thorough determination of their claim[s] of qualified immunity if that immunity is to mean anything at all.'")

Handt v. Lynch, 681 F.3d 939, 944, 945 (8th Cir. 2012) ("Here, as in *Jones,* 'we are unable to discern if the district court even applied both steps of the qualified immunity inquiry to all of the summary judgment claims.'. . In the background section of the order, the district court did an admirable job of explaining the facts of this case and construing those facts in the light most favorable to Handt. This is not, then, a situation where we are called upon to 'undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . The problem here arises instead in the analysis of the qualified immunity claims. For instance, the district court repeatedly stated in the analysis that there were material issues of fact in dispute. When considering the issue of qualified immunity, however, the district court is to 'view those facts in a light most favorable to the non-moving party as long as those facts are not so "blatantly contradicted by the record ... that no reasonable jury could believe [them]."'. . Then the court should determine if those facts demonstrate a constitutional violation that is clearly established. The district court's decision, however, lacks consideration of the individual defendants' actions with respect to each of the constitutional claims. As relevant here, Handt has raised five separate claims of constitutional violations (unlawful seizure, unlawful search, denial of procedural due process, denial of substantive due process, and cruel and unusual punishment) against two sets of defendants (the intake officers and Carson). Thus, the court must analyze whether the facts pertaining to each defendant, or in this case the two sets of defendants, support Handt's claims of constitutional violations. . . .These defendants are entitled to consideration by the district court of their claims to qualified immunity as to each of the constitutional claims asserted against them. Therefore, it is necessary that we remand this matter to the district court to engage in a full qualified immunity analysis in the first instance.")

Jones v. McNeese, 675 F.3d 1158, 1162, 1163 (8th Cir. 2012) (*Jones II*) ("In this case, the district court's analysis on qualified immunity is no more thorough or informative than the orders we rejected in *O'Neil* and *Katosang.* Indeed, we find it difficult to discern from the order whether the

district court applied either step of the qualified immunity inquiry to the claims alleged by the plaintiff(s) . . . And, the passing reference to the previous denial order does not provide more clarity because the district court did not consider summary judgment facts at that stage in the proceedings. . . Accordingly, drawing upon the reasoning in *O'Neil* and *Katosang*, we conclude the district court's analysis was far too ' "abbreviated,"' ' "terse,"' 'and ' "not laid out step-by-step,"' undermining the mandate that requires district courts to make 'a thorough determination of [the defendant's] claim of qualified immunity.'. . The Supreme Court has recognized that because it is 'extremely helpful to a reviewing court,' a district court 'presumably will often state' 'the facts that [it] assumed when it denied summary judgment.'. . Here, the district court declined to articulate any facts. We make clear, however, that our decision to remand is not based on this failure—that is, that the lack of these facts may require us to 'undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. . Rather, we remand because the analysis is so scant that we are unable to discern if the district court even applied both steps of the qualified immunity inquiry to all of the summary judgment claims. And, ultimately, if qualified immunity is to mean anything at all, Dr. McNeese was entitled to a more thorough determination of his claim of qualified immunity at the summary judgment stage. . .Therefore, as we have previously explained, 'we can neither affirm nor reverse the denial of qualified immunity based on the cursory commentary advanced by the district court in its denial order.'. . . Accordingly, we vacate and remand this case to the district court for a more detailed consideration and explanation of the validity, or not, of the defendant's claim to qualified immunity.") [See *Jones v. McNeese*, 883 F.Supp.2d 897 (D. Neb. 2012) (denying qualified immunity on remand with detailed analysis), rev'd by ***Jones v. McNeese***, 746 F.3d 887 (8th Cir. 2014) (finding plaintiff produced insufficient evidence of racial discrimination or due process violation and thus defendant was entitled to qualified immunity)]

Cooper v. Martin, 634 F.3d 477, 481, 482 (8th Cir. 2011) ("The defendants argue that this court has pendent appellate jurisdiction to dismiss the § 1983 claims against the official-capacity defendants because those claims are inextricably intertwined with the consideration of Martin's qualified immunity. *See Lockridge v. Bd. of Trustees of University of Ark.*, 315 F.3d 1005, 1012-13 (8th Cir.2003) (en banc). 'An issue is inextricably intertwined with properly presented issues only when the appellate resolution of the collateral appeal necessarily resolves the pendent claims as well.'. . '[I]n order for municipal liability to attach, individual liability must first be found on an underlying substantive claim.'. . Martin's qualified immunity therefore is inextricably intertwined with the liability of the official-capacity defendants. Because Martin is entitled to qualified immunity, the official-capacity defendants cannot be subject to § 1983 liability.")

Doe v. Flaherty, 623 F.3d 577, 586 (8th Cir. 2010) ("In addition to our limited jurisdiction to review the denial of qualified immunity, we have jurisdiction to review 'issues of law that are closely related to the qualified immunity determination.' *Henderson v. Baird*, 29 F.3d 464, 467 (8th Cir.1994). We may exercise 'pendent appellate jurisdiction ... where the otherwise nonappealable decision is inextricably intertwined with the appealable decision.'. . We have held that two issues are inextricably intertwined 'when the appellate resolution of the collateral appeal

necessarily resolves the pendent claim as well.'. . In this case, the resolution of the qualified immunity claim necessarily resolves the Title IX claim, and we thus have jurisdiction to review the district court's denial of the motion to dismiss on that claim."

Shannon v. Koehler, 616 F.3d 855, 865, 866 (8th Cir. 2010) ("[W]e reject the defendants' assertion that we have pendent appellate jurisdiction to review either the district court's denial of summary judgment on the *Monell* claims against the City and Chief Frisbie or the district court's decision on the bifurcation issue. . . . The only remotely plausible argument for exercising jurisdiction over the present defendants' pendent claims hinges on finding that those claims are 'inextricably intertwined' with Officer Koehler's qualified immunity defense. . .They are not. . . . Our decision to uphold the district court's denial of qualified immunity to Officer Koehler did not resolve whether the City and Chief Frisbie are entitled to summary judgment on the *Monell* claims, so those matters cannot be described as inextricably intertwined. . . . Likewise, our resolution of the qualified immunity appeal said nothing about the propriety of the district court's decision on the bifurcation issue, so those matters are not inextricably intertwined either. In short, the requirements for exercising pendent appellate jurisdiction are not met in this case because affirming the denial of qualified immunity to Officer Koehler did not resolve the pendent claims. Since we see no other source of jurisdiction to consider the pendent claims, we dismiss this appeal insofar as it challenges the district court's denial of summary judgment on the *Monell* claims against the City and Chief Frisbie and the district court's decision on the bifurcation issue.")

Langford v. Norris, 614 F.3d 445, 458, 459 (8th Cir. 2010) ("We can certainly review the denial of qualified immunity to the state defendants without also reviewing the denial of summary judgment to the medical defendants. The question, then, is whether the medical defendants' appeal raises a pendent claim that is inextricably intertwined with Byus's qualified immunity appeal. . . . The medical defendants contend that '[t]he issue of actual injury [presented in their appeal] is dispositive as to the claims made against ... Byus.'. . . The medical defendants get the analysis backward; resolving the collateral claim (the denial of qualified immunity) must necessarily resolve the pendent claim (what the medical defendants call the 'issue of actual injury'), not the other way around. The pendent claim that the medical defendants have identified is not coterminous with, or subsumed in, the qualified immunity claim, for holding that Byus is entitled to qualified immunity would not necessarily decide whether Langford and Hardin were actually injured by the medical defendants' alleged failure to provide efficacious treatment. . . . Consequently, we dismiss the medical defendants' appeal in its entirety.")

Petersen v. Reisch, 585 F.3d 1091, 1093 (8th Cir. 2009) ("Where, as here, the denial of a summary judgment motion based upon qualified immunity contemplates the filing of another such motion well before trial, *Mitchell* is not implicated. The district court expressly did not 'conclusively determine the disputed question' when it denied the motion without prejudice and ordered Petersen to amend her complaint, and Reisch and Russell to answer anew. Qualified immunity is still reviewable and is not effectively lost with the denial of the defendants' motion because Reisch and Russell may file another similar motion after Petersen amends her complaint. Unlike in *Mitchell*,

where there were 'simply no further steps that [could] be taken in the District Court to avoid the trial the defendant maintains is barred,' the district court has essentially reset the litigation at the pleading stage. . . The district court's rulings were administrative and equitable in nature, allowing Petersen's new counsel to clarify her pleading after which Reisch and Russell may pursue their same defenses, including qualified immunity. The district court's order did not rest on any issue of law, . . .or resolve the qualified immunity question. The district court's order was therefore not final within the meaning of 28 U.S.C. § 1291 and *Mitchell.* Lacking jurisdiction, we remand the case to the district court.").

Sherbrooke v. City of Pelican Rapids, 513 F.3d 809, 813 (8th Cir. 2008) ("We do not have jurisdiction to consider 'which facts a party may, or may not, be able to prove at trial,'. . . but the city and the police officers do not bring this sort of fact-based appeal. Their contention is that even taking the facts in the light most favorable to Sherbrooke, neither the traffic stop nor the recording of Sherbrooke's statements violated Sherbrooke's clearly established rights under the Fourth Amendment. This is a purely legal question over which we have jurisdiction. . . We also have jurisdiction to consider the district court's grant of partial summary judgment in favor of Sherbrooke, because it turns on the very same legal issue as the denial of qualified immunity –that is, whether the recording of Sherbrooke's conversation with his attorney violated the Fourth Amendment. . . And we have jurisdiction to consider the City's appeal of the denial of summary judgment on Sherbrooke's allegation that a municipal policy caused a violation of his constitutional rights, because the merits of the City's appeal is inextricably intertwined with the question whether the officers violated Sherbrooke's rights.")**.**

Hinshaw v. Smith, 436 F.3d 997, 1002, 1003 (8th Cir. 2006) ("While the denial of a motion for summary judgment is generally unreviewable as an impermissible interlocutory appeal, we have limited authority under the collateral order doctrine to review the denial of a motion for summary judgment to the extent the motion is based on the right to absolute or qualified immunity, which protects a defendant from having to defend a lawsuit.. . . We therefore have jurisdiction over the individual Board members' appeals, as well as Smith's appeal to the extent those appeals challenge the district court's denial of qualified or absolute immunity on legal grounds, but not to the extent they involve questions of evidence sufficiency. . . We also have pendent jurisdiction over claims that are 'inextricably intertwined' with the qualified immunity issue, 'that is, [we have jurisdiction] when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well .' . . This pendent jurisdiction extends to the claims that Hinshaw's speech was not constitutionally protected for First Amendment purposes, as the issues 'require application of the same constitutional test, and therefore, the question concerning whether the speech is entitled to constitutional protection is 'coterminous with, or subsumed in' the qualified immunity issue.' . . We therefore have jurisdiction over the §1983 claim against LOPFI as an entity (which is not eligible for qualified immunity) and the state law wrongful termination claims to the extent disposition of those claims rests on the legal conclusion of whether Hinshaw's speech was entitled to protection. However, claims not premised on this constitutional issue-such as disputes involving

causation or state law claims unrelated to Hinshaw's First Amendment rights-are not properly before the court, and we do not address them.")**.**

Nebraska Beef, Ltd. v. Greening, 398 F.3d 1080, 1083 (8th Cir. 2005) ("The question before us, then, is whether, in light of *Siegert*, *Johnson*, and *Behrens*, the availability of a *Bivens* remedy is an issue of law that is 'closely related' to or 'inextricably intertwined' with the denial of qualified immunity. . . Although the lack of a *Bivens* remedy would not entitle the [defendants] to qualified immunity, . . . the issue is 'analytically antecedent to, and in a sense also pendent to, the qualified immunity issue.' . . It is a purely legal question that presents none of the judicial economy concerns addressed in *Johnson*. In fact, common sense tells us that addressing this potentially dispositive legal question serves the interests of judicial economy. If we remanded to the district court and the plaintiffs prevailed at trial, we would likely see the same appeal again, after the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception. Accordingly, we conclude that we have jurisdiction to consider the availability of a *Bivens* remedy.").

Wever v. Lincoln County, Nebraska, 388 F.3d 601, 605 n.5 (8th Cir. 2004) ("Carmen contends on appeal that the district court erred in interpreting Wever's complaint. Essentially, Carmen argues that the district court erred in interpreting Wever's broadly worded complaint to 'adequately set forth a Fourteenth Amendment claim against Sheriff Carmen for failure to provide Wever, a pretrial detainee, mental health care.'. . Though neither party has so argued, we lack jurisdiction to review the district court's interlocutory interpretation of Wever's complaint. This court has jurisdiction over 'final decisions' of district courts. . . The district court's decision denying Carmen's motion based on the sufficiency of the pleadings is not final–the claim goes forward. This court does have jurisdiction to hear interlocutory appeals from the denial of summary judgment based on qualified immunity. . . Jurisdiction based on the denial of qualified immunity does not extend to matters that are not 'final' unless the two are inextricably intertwined. . . The district court's construction of the complaint to adequately allege a claim is not inextricably intertwined with the district court's ruling on qualified immunity. . . We therefore lack jurisdiction to review the district court's construction of the complaint. Because we cannot review the district court's decision, we use its conclusion that Wever adequately set forth a complaint for failure to provide mental health care to a pretrial detainee in our qualified immunity analysis.").

Avalos v. City of Glenwood, 382 F.3d 792, 801 (8th Cir. 2004) ("The municipal defendants also argue that, because the claims against them are intertwined with our qualified immunity decision, we have jurisdiction to decide whether summary judgment was improperly denied. . . .We conclude our decision on Detective Wake's entitlement to qualified immunity 'necessarily resolves' the remaining claims in the municipal defendants' favor. . . . As discussed in the previous section, we conclude the plaintiffs have failed to establish a violation of their substantive due process rights. Try as they might, the plaintiffs simply have not demonstrated any of the municipal defendants' policies applied to Karl, who was not a CI. Karl, Maria, Detective Wake, and Detective Daley all stated under oath Karl was never enlisted as a CI. Indeed, the Task Force officers

specifically and repeatedly instructed Karl not to get involved in the investigation. Regardless of any alleged deficiencies in the Task Force's procedures, they did not apply to Karl. Thus, the plaintiffs are unable to show either (1) a deprivation of a constitutional right or (2) a municipal custom or policy that caused such deprivation.").

Bankhead v. Knickrehm, 360 F.3d 839, 844 (8th Cir. 2004) ("Our jurisdiction on this appeal is limited to the question of qualified immunity, but the answer to that question necessarily includes a determination whether any constitutional or statutory rights were violated in the first place. . . We find no evidence in this record sufficient to support a finding that Mr. McCook selected Ms. Holmstrom for any reason other than her qualifications nor is there any evidence of substance of wrongful intent (in the sense of discrimination or retaliation) against the other two defendants. . .The complaint named the three defendants in both their individual and official capacities. Qualified immunity is a defense only against a claim in one's individual capacity. . . Suits against public employees in their official capacity are the legal equivalent of suits against the governmental entity itself. . . Ordinarily, the question of the liability of a governmental entity, or of governmental officials sued in their official capacity, would not be open on an interlocutory qualified-immunity appeal. Here, however, our ground of decision in favor of the defendants in their individual capacity–that there was not substantial evidence of illegal intent–is of course also fatal to the official-capacity suit. On a qualified-immunity appeal, if the ground of decision would, as a necessary legal consequence, inevitably require a judgment for another defendant, or for the same defendants in another capacity, the ordinarily narrow nature of our qualified-immunity jurisdiction does not prevent us from saying so. . . Accordingly, this action should be dismissed in its entirety against all three defendants in their individual and official capacities.")

Schatz v. Gierer, 346 F.3d 1157, 1160 (8th Cir. 2003) ("Although the district court's complete denial of defendants' motion to dismiss implies the denial of qualified immunity, we have held previously that such an inference is insufficient for an interlocutory appeal. . . . Because there was no determination by the district court on the qualified immunity issue raised by the motion-to-dismiss defendants, we conclude that we have no jurisdiction to review the district court's order on that issue or on the defendants' other merit-based arguments. Accordingly, we dismiss the appeal. In doing so, we reiterate that the Supreme Court repeatedly has emphasized the need to address qualified immunity at the earliest possible stage in the litigation.").

Bradford v. Huckabee, 330 F.3d 1038, 1040 (8th Cir. 2003) ("The district court dealt with (and rejected) Appellants' sovereign immunity defense against the First Amendment claim against them in their official capacities, noting that the plaintiff 'has stated a claim for civil conspiracy,' and that in 'all other respects the motion to dismiss is denied.' While we understand the parties' contention that these statements imply a denial of qualified immunity, we do not think that such an inference is sufficient for an interlocutory appeal at this point in time. . . . The district court needed to first determine whether the complaint alleged enough facts to demonstrate the violation of a clearly established statutory or constitutional right arising under the First Amendment and civil conspiracy statute. . . . The Supreme Court has emphasized that qualified immunity should

be addressed as early as possible in litigation. . . Thus, we raise this jurisdictional defect sua sponte, conclude that we have no jurisdiction to hear this appeal, and remand for a proper determination of Appellants' qualified immunity.")

Lockridge v. Bd. of Trustees of Univ. of Arkansas, 315 F.2d 1005, 1012, 1013 (8th Cir. 2003) ("We believe that this case presents an exceptional circumstance in which we have jurisdiction over issues that are 'inextricably intertwined' with those appealable at the interlocutory stage. An issue is 'inextricably intertwined' with properly presented issues only ' 'when the appellate resolution of the collateral appeal necessarily resolves the pendent claims as well.' . . Here, we have decided that because Mr. Lockridge was aware of the opening, did not apply, and told his supervisor that he was not going to apply for the position, Mr. Lockridge does not have an equal protection claim or a § 1981 discrimination claim against Dr. Jones individually. The same *McDonnell Douglas* burden-shifting analysis is applicable to all of Mr. Lockridge's discrimination claims, including his Title VII claim against the board of trustees of the university. We therefore conclude that our resolution of the qualified immunity issue in this case 'necessarily resolves' all of the other claims in favor of the defendants.").

Krein v. Norris, 309 F.3d 487, 493 (8th Cir. 2002) ("As we noted in our first panel opinion, while the Supreme Court has repeatedly emphasized the importance of deciding qualified immunity issues at the earliest possible stage of litigation, not all qualified immunity issues may be decided on summary judgment. *Krein v. Norris,* 250 F.3d at 1188. Indeed, summary judgment is not appropriate when there is a genuine issue of material fact surrounding the question of the plaintiff's or a defendant's relevant *conduct*– because, under those circumstances, the court cannot determine as a matter of law what predicate facts exist in order to decide whether or not the defendant's conduct violated clearly established law. . . .[I]n the present case, to the extent defendants appeal the district court's holding that there remain genuine issues of material fact, and to the extent that they challenge the sufficiency of plaintiff's evidence to support that conclusion, [footnote omitted] we hold that we lack interlocutory appellate jurisdiction.")

Brayman v. United States, 96 F.3d 1061, 1064 (8th Cir. 1996) ("In the present case, the district court determined that material issues of fact remain concerning the three claims for which qualified immunity was denied. However, the district court did so without first expressly considering whether these claims, as alleged, support a violation of clearly established law. [citing *Siegert*] We conclude that we have jurisdiction to consider this question of law with regard to each claim.").

Samuels v. Meriwether, 94 F.3d 1163, 1166 (8th Cir. 1996) ("Unlike *Johnson*, the present case involves application of the law and does not turn on the sufficiency of the evidence. The actions of the City and its employees are not in dispute. We only need to apply legal standards to the facts as construed in favor of the non-moving party. In qualified immunity cases, we also have limited jurisdiction to reach the merits. . . We may decide claims that are "inextricably intertwined" with the district court's denial of the summary judgment motion. . . In the present case, both the qualified immunity claim and the Procedural Due Process and Fourth Amendment claims require

application of the same constitutional tests. [T]he analyses of the underlying constitutional claims are subsumed in the qualified immunity issue.").

Allison v. Dep't of Corrections, 94 F.3d 494, 496 (8th Cir. 1996) ("The crux of the individual defendants' argument is that their actions were reasonable given their knowledge at the time of Allison's termination. This issue is immediately appealable upon the denial of a qualified immunity claim. . . . To the extent the individual defendants assert issues concerning what facts Allison may or may not be able to prove at trial, we lack jurisdiction to consider them. . . .").

Heidemann v. Rother, 84 F.3d 1021, 1027 (8th Cir. 1996) ("The procedural circumstances of the case before us are similar in many important respects to those which were before the Supreme Court in *Behrens*. In rejecting defendants' qualified immunity claim in the present case, the district court stated, without further explanation, that 'factual disputes exist in this action such that genuine issues of material fact remain for trial.' We, therefore, find it necessary to review the record and consider the legal context of plaintiffs' constitutional and statutory claims, in order to determine whether this interlocutory appeal raises abstract issues of law relating to qualified immunity over which we presently have jurisdiction. We hold that it does. Accordingly, consistent with the Supreme Court's guidance in *Behrens*, we now examine, as to each of plaintiffs' constitutional and statutory claims, (1) what material facts are not genuinely in dispute, viewing the evidence in the light most favorable to plaintiffs, and (2) whether, assuming such facts, defendants infringed a clearly established constitutional or statutory right.").

Erickson v. Pennington, 77 F.3d 1078, 1080 (8th Cir. 1996) ("[Defendants] devote much of their brief to challenging the credibility of Erickson's evidence. We lack jurisdiction to consider these challenges. Instead, we can decide whether the facts as Erickson presents them show a violation of clearly established law.").

Miller v. Schoenen, 75 F.3d 1305, 1308-09 (8th Cir. 1996) ("That some issues must be reviewed in a qualified-immunity appeal does not mean that we have jurisdiction to review all of the points addressed in the summary-judgment motion. Only those issues that concern what the official knew at the time the alleged deprivation occurred are properly reviewed in this type of interlocutory appeal. We have jurisdiction to review those issues because their review is necessary in order to determine whether a reasonable state actor would have known that his actions, in light of those facts, would violate the law. . . . We are thus left with the following distinction. The question of what was known to a person who might be shielded by qualified immunity is reviewable, to determine if the known facts would inform a reasonable actor that his actions violate an established legal standard–the right to speak freely, the right to be free from unreasonable searches and seizures, a prisoner's right to adequate medical care, for example. Conversely, if the issues relate to whether the actor actually committed the act of which he is accused, or damages, or causation, or other similar matters that the plaintiff must prove, we have no jurisdiction to review them in an interlocutory appeal of a denial of a summary-judgment motion based on qualified immunity. . . . We thus have jurisdiction to review whether sufficient evidence exists that the

defendants actually knew of Miller's need for specialized care and acted reasonably in light of that knowledge, the subjective component of the claim.").

Prosser v. Ross, 70 F.3d 1005, 1006-07 (8th Cir. 1995) ("The district court denied Ross's motion for summary judgment on his qualified immunity defense because it found that 'material factual disputes on plaintiff's claims against defendant Ross' precluded it. The district court did not indicate in its order what material facts it believed were in dispute . . . . We must first determine whether this appeal is properly before us. Although some orders denying qualified immunity are appealable before trial, . . . the Supreme Court has recently indicated that our jurisdiction in such cases extends only to 'abstract issues of law.' [*citing Johnson*] This limitation will sometimes make it difficult to determine whether jurisdiction exists because deciding whether an officer is entitled to qualified immunity requires a 'fact-intensive' inquiry. [*citing Reece*] Here, however, we believe that the facts required to determine whether Ross is entitled to qualified immunity are not genuinely in dispute. We therefore have jurisdiction.").

Kincade v. City of Blue Springs, 64 F.3d 567, 571 (8th Cir. 1995) ("In this case, our jurisdiction to hear the individual Appellants' qualified immunity claims is without doubt. We conclude that we have jurisdiction to hear the Appellants' claims that Kincade's August 5, 1991, speech is not constitutionally protected because the claims are 'inextricably intertwined' with their qualified immunity arguments. Both issues require application of the same constitutional test, and therefore, the question concerning whether the speech is entitled to constitutional protection is 'coterminous with, or subsumed in' the qualified immunity issue. However, we conclude that the Appellants' argument that Kincade has presented insufficient evidence to establish that his August 5, 1991, speech caused his termination is not 'inextricably intertwined' with the qualified immunity claims. This causation argument presents significantly different issues. Moreover, in another recent case a unanimous Supreme Court held that 'a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.' [citing *Johnson*] The district court here decided that there were genuine issues of fact for trial on the causation issue, and thus, we decline to address it.")

Reece v. Groose, 60 F.3d 487, 489-90 (8th Cir. 1995) ("The Supreme Court has thus delineated our jurisdiction in qualified-immunity cases. If, as in *Swint*, a party asks us, in an interlocutory appeal, to examine a question that is separate and distinct from the qualified-immunity issue, we must dismiss the appeal for want of jurisdiction. If, on the other hand, the party asserting qualified immunity asks us to examine the facts as they were known to the government official in order to determine whether clearly established law would be violated by his actions, *Anderson* requires that we accept jurisdiction and address their arguments. We believe this holding is consistent with the Supreme Court's latest opinion on the subject, *Johnson v. Jones* . . . . To be sure, the issue raised by the present appeal-whether reasonable officers would have done more to protect Reece after placing him in administrative segregation-is fact-intensive. Parts of the Supreme Court's opinion in *Johnson* can be read to prohibit the exercise of appellate jurisdiction over such issues on a

pretrial appeal. . . . We think the safer course is to apply the root principle that denials of qualified immunity are immediately appealable, and to apply this principle even in cases where the issue of qualified immunity is itself fact-intensive.").

Sanders v. Brundage, 60 F.3d 484, 486 (8th Cir. 1995) ("If the issue on appeal is whether a certain point of law was 'clearly established,' then the denial of summary judgment is immediately appealable. . .However, if the issue on appeal is whether the pretrial evidence is sufficient to create a genuine issue of material fact, then the denial of summary judgment is not immediately appealable. [citing *Johnson*]").

Washington v. Wilson, 46 F.3d 39, 41 (8th Cir. 1995) ("In allowing the suit to proceed (by finding genuine issues of material fact to exist), the logical conclusion is that the district court rejected the appellants' qualified immunity arguments. But the law in this Circuit is clear. The issue must at the very least be mentioned by the district court, and preferably reasons affirming or denying qualified immunity should be articulated before this Court has jurisdiction to engage in meaningful review.").

Johnson v. Hay, 931 F.2d 456 (8th Cir. 1991)(once notice of appeal is filed as to denial of summary judgment on qualified immunity grounds, district court should not act further).

NINTH CIRCUIT

Hernandez v. City of San Jose, 897 F.3d 1125, 1139-40 (9th Cir. 2018) ("The Court 'interpret[s] the "inextricably intertwined" standard narrowly' and applies it in 'extremely limited' circumstances. . . 'The standard is only satisfied where the issues are (a) ... so intertwined that [the Court] must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.'. . .Neither prong is satisfied here. First, we need not decide 'the pendent issue'—whether the Attendees have stated a § 1983 claim against the City premised on their ratification theory—in order to decide the issue 'properly raised on interlocutory appeal'—whether the Officers are entitled to qualified immunity. . . Whether the allegations concerning Chief Garcia's public statements and his failure to discipline his officers are sufficient to constitute ratification is an issue that is not necessary for deciding whether the Officers violated the Attendees' due process rights on the night of the Rally by directing them towards violent protesters. Recognizing this, the City proceeds only under the second prong of the test, arguing 'resolution of the issue properly raised [on] appeal necessarily resolves the pendent issue.' According to the City, 'a negative answer to the question whether the employee violated the Constitution will always necessarily resolve the pendent issue of whether the municipality was liable for the violation.' While this might be true in some cases, *see, e.g.*, *Huskey*, 204 F.3d at 906, the principle is inapplicable here because we have held the Officers *violated* the Attendees' due process rights, based on the allegations in the FAC. That may mean that the City—through Chief Garcia's ratification of his officers' conduct—is also liable under § 1983, but it does not

'*necessarily* resolve[ ]' the issue one way or another. . . The City's liability will turn on whether Chief Garcia 'took ... steps to reprimand or discharge the [Officers], or ... failed to admit [their] conduct was in error.'. . The Officers' liability, as discussed at length above, will turn on whether they increased the danger to the Attendees and acted with deliberate indifference to that danger. Because we must apply 'different legal standards' to whether Chief Garcia actually ratified the Officers' conduct and to whether that conduct was unconstitutional, the two issues are not 'inextricably intertwined,' and the City's appeal is not subject to pendent jurisdiction.")

Maddox v. City of Sandpoint, No. 17-35875, 2018 WL 3569028, at *1-2 (9th Cir. July 25, 2018) (not reported) ("On appeal, defendants failed to present the facts in a light most favorable to the plaintiff, and accordingly have forfeited the legal argument that, based on those facts, they are entitled to qualified immunity. . . Both in their briefing and at oral argument, defendants merely dispute the circumstances attendant to Jeanetta's encounter with the police and contend that she posed an immediate threat to the officers based on their version of the facts. But 'a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'. . And where, as here, an appellant-officer's opening brief 'lapse[s] into disputing [the plaintiffs'] version of the facts' and does 'not advance[ ] an argument as to why the law is not clearly established that takes the facts in the light most favorable to' the plaintiffs, '[w]e will not do [the] appellant[s's] work for [them], either by manufacturing [their] legal arguments, or by combing the record on [their] behalf for factual support.'. . Addressing the defendants' purely factual disputes with the district court's qualified-immunity determination is beyond the limited scope of our appellate jurisdiction. . . .Our disposition of defendants' appeal on forfeiture grounds does not prevent them from 'raising ... qualified immunity at a subsequent stage in the litigation, such as in a Rule 50 motion for judgment as a matter of law.'")

Sjurset v. Button, 810 F.3d 609, 616-17 (9th Cir. 2015) ("We have held that the *Behrens* rule applies in cases "where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts." *Knox v. Sw. Airlines,* 124 F.3d 1103, 1107 (9th Cir.1997). This is particularly important in the qualified-immunity context because "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant,* 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Sjurset correctly points out that *Johnson* would preclude us from determining the reasonableness of *the DHS officials'* actions based on the facts that remain in dispute. But *Johnson* is inapplicable here because this appeal is based on undisputed facts as they relate to a purely 'abstract issue of law'—that is, whether *the Stayton officers* violated clearly established law when they acted in reliance on the DHS officials' determination. The district court explicitly acknowledged that the facts concerning the Stayton officers' actions are not in dispute. What the district court did find in dispute—namely, the number of calls that Moller–Mata made to Sjurset and Borchers on the day before the welfare check, the nature of Borchers's drug abuse, and whether viewing the children through a window could reasonably give rise to a showing of imminent danger—do not form the basis of the Stayton officers' appeal. These disputed facts might well apply to the reasonableness of the DHS officials' protective-custody determination, but they do

not apply to whether the Stayton officers violated clearly established rights of the plaintiffs by relying on the DHS officials' protective-custody determination. In addition, the district court noted that the parties all agreed that DHS, and not the Stayton officers, made the decision to take protective custody of the children. There is no dispute that the Stayton officers entered Sjurset's residence and assisted in the children's removal in reliance on that decision. Finally, no one disputes that, under Oregon law, DHS has the statutory authority to take protective custody '[w]hen [a] child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare.'. . These undisputed facts provide a sufficient basis to determine whether the Stayton officers' reliance on DHS's determination violated any clearly established right of the plaintiffs. An analysis based on these facts is therefore appropriate.")

Branscum v. San Ramon Police Dep't, 606 F. App'x 860, 862-63 (9th Cir. 2015) ("Under the doctrine of *Johnson v. Jones,* 515 U.S. 304 (1995) and its progeny, '[a]ny decision by the district court "that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal"' from the denial of summary judgment based on qualified immunity. . . In other words, '[f]or purposes of the appeal of the denial of immunity, we must "take, as given, the facts that the district court assumed when it denied summary judgment for [a] (purely legal) reason."'. . We are therefore bound by the district court's determinations as to the existence of genuine disputes of fact. *George* rejected the argument that *Scott v. Harris,* 550 U.S. 372 (2007), 'implicitly abrogated' *Johnson* and its progeny. . . 'Even accepting for the sake of argument, though, that Scott,' in light of *Plumhoff v. Rickard,* 134 S.Ct. 2012 (2014), was 'meant to establish an exception to the rules for interlocutory review,'. . that exception would not apply here. The various video recordings do not provide 'dispositive evidence that "blatantly contradict[s]" or "utterly discredit[s]" [Branscum's] side of the story.'. . . Rather, the video footage is, as the district court determined, susceptible to more than one interpretation. . . We nonetheless do have jurisdiction to consider the officers' qualified immunity appeal. . . Taking, 'as given, the facts that the district court assumed when it denied summary judgment,'. . . we hold that the district court correctly denied qualified immunity.")

Chavez v. U.S., 683 F.3d 1102, 1108 (9th Cir. 2012) ("While the district court here did not address the issue of qualified immunity, the supervisory defendants raised qualified immunity as a defense in their answer to the complaint, and both their motion under Rule 12(c) and their objections to the Magistrate Judge's Report and Recommendation made frequent reference to qualified immunity. Thus, by failing to address the question of qualified immunity, the district court denied the supervisory defendants' defense *sub silentio.* Where an appellate court has jurisdiction to review the denial of a qualified immunity defense, it also has jurisdiction to review predominantly legal issues, such as the sufficiency of a complaint, that are 'inextricably intertwined with' and 'directly implicated by' the issue of qualified immunity. . . Accordingly, we have jurisdiction to review both whether the supervisory defendants have qualified immunity—which turns on legal issues such as whether they allegedly violated 'clearly established' rights, *Behrens v. Pelletier,* 516 U.S. 299, 313 (1996)—and whether the complaint adequately alleges any claim against the supervisory

defendants.")

Padgett v. Wright, 587 F.3d 983, 985, 986 (9th Cir. 2009) ("Wright's interest in immediately appealing the district court's denial of qualified immunity was an interest in avoiding 'stand[ing] trial or fac[ing] the other burdens of litigation.'. . Because the trial has already occurred, there is no longer any compelling reason for us to deviate from the general rule preventing us from reviewing denials of summary judgment. . . It would be particularly inappropriate for us to hear this appeal, as it focuses entirely on the threshold question of whether a constitutional violation occurred. Wright's opening brief makes no argument as to whether he is entitled to qualified immunity *even if* the facts shown by the plaintiffs make out a violation of a constitutional right, as it fails to address 'whether the right at issue was Aclearly established" at the time of defendant's alleged misconduct.'. . By now, however, a jury has found that Wright did violate Joseph Padgett's constitutional rights. Wright can obtain review of the final judgment by appealing it once final judgment is entered. We will not entertain a prejudgment qualified immunity appeal asking us to decide the same question a jury has already decided. We thus dismiss the appeal.").

Mueller v. Auker, 576 F.3d 979, 989, 990 (9th Cir. 2009) ("[W]e conclude that the grant of summary judgment to Eric Mueller as a matter of law on the merits of a constitutional claim, and against a defendant asserting qualified immunity, is the equivalent of a denial of such an assertion. Such denial where the district court has held that no cognizable factual disputes exist vests us with jurisdiction under the collateral order doctrine. . . . In effect, the denial in this case and the grant on the merits, even though it was not 'independent of the cause itself,' *Iqbal,* 556 U.S. at __, are 'inextricably intertwined,' opening the door to the doctrine of 'pendent Jurisdiction.'. . . . Likewise, [Officer] Aguilar may appeal the district court's grant of summary judgment in favor of the [plaintiffs] Durans on the issue of section 1983 liability. The legal issues involved in that appeal-whether Aguilar violated clearly established constitutional protections–are identical to those governing the question of Aguilar's qualified immunity. As the relevant facts are not disputed, the resolution of the qualified immunity question will also decide the question of Aguilar's liability. Delaying our consideration of the liability issue until after the trial on damages would thus serve no purpose.")

Moss v. U.S. Secret Service, 572 F.3d 962, 972-74 (9th Cir. 2009) (*Moss I*) ("Defendants insist that, where qualified immunity is at issue, a district court may not defer ruling on the question of whether an official's actions violated clearly established law, and that orders deferring such a ruling should therefore be immediately appealable. This court squarely rejected that argument in the context of a deferred ruling on an absolute immunity defense. [citing *Miller v. Gammie,* 335 F.3d 889, 894 (9th Cir.2003) (en banc)] Further, Defendants' argument is difficult to reconcile with the Supreme Court's recognition that limited discovery, tailored to the issue of qualified immunity, will sometimes be necessary before a district court can resolve a motion for summary judgment. . . But even assuming that orders deferring a ruling on qualified immunity are immediately appealable in some circumstances, those circumstances are clearly not present here. In the context of a denial of qualified immunity, the policy justification for permitting immediate

appeal rests on the fact that qualified immunity is an immunity from suit, distinct from the merits of the underlying claim. . . Thus, an order clearing the way for burdensome pre-trial discovery obligations renders the denial of immunity effectively unreviewable on appeal from final judgment–immunity from suit is of no use at that late stage. . . As discussed above, the district court has yet to order *any* discovery or to compel the Agents to submit to depositions. Thus, to the extent that this portion of Defendants' interlocutory appeal is premised on a need to obtain appellate review before being subjected to burdensome pretrial obligations, that need has not been shown, and the appeal is premature. . . . Before the district court, Defendants firmly resisted all discovery requests and contended that their motion to dismiss ought to be considered prior to any discovery. The court, reasonably, found the argument persuasive and suggested a pretrial sequence that would permit prompt resolution of the qualified immunity motion while holding discovery in abeyance. After getting the litigation sequence they asked for, Defendants now seek an immediate appellate ruling on their summary judgment motion without allowing Plaintiffs the benefit of discovery relating to the core factual matters at issue on their defense of qualified immunity. We therefore lack jurisdiction over this portion of Defendants' appeal; accordingly, it must be dismissed.")

Maropulos v. County of Los Angeles, 560 F.3d 974, 975, 976 (9th Cir. 2009) ("[I]n the mine run of cases, we cannot undertake appellate review effectively when forced to guess what the district court did in order to determine whether we even have jurisdiction. District courts are much better situated than we are to sift through submissions of fact in order to identify those that are genuinely disputed and material, or alternatively, to isolate those that are not controverted or can be assumed as true for the purpose of deciding sufficiency to show a violation of a clearly established right. A clear statement of the basis for a decision by the district court not only facilitates appellate review, but assists the parties in evaluating whether to take an appeal in the first place. In this way, we mutually contribute to 'the just, speedy, and inexpensive' determination of disputes, as Rule 1 of the Federal Rules of Civil Procedure directs. Having experienced similar difficulties in determining the scope of jurisdiction to hear interlocutory appeals from the denial of qualified immunity, our colleagues on the Third Circuit now require district courts ruling on summary judgment motions based on qualified immunity where material facts are in dispute to specify which facts are in dispute and why they are material. [citing *Blaylock* and *Forbes*] We embrace the principle, and encourage all district judges within the circuit to articulate the basis upon which they deny qualified immunity and, when it is for reasons of sufficiency of the evidence to raise genuine issues of fact, to spell out the triable issues and why they preclude immunity before trial.").

Adams v. Speers, 473 F.3d 989, 990, 991 (9th Cir. 2007) ("Preliminary to statement of the facts, we note that Officer Speers can make an interlocutory appeal from the ruling on immunity only if he accepts as undisputed the facts presented by the appellees. *See Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir.2001). As Speers' briefs show, he is familiar with this maxim governing such appeals, but at times his briefs lapse into disputing the Adamses' version of the facts and even into offering his own version of the facts. We regret these lapses and, as they are made by the Attorney General of the State of California defending Speers, we take this occasion to advise the Attorney General

that such practice could jeopardize our jurisdiction to hear the interlocutory appeal. This exceptional remedy is available only if the issue of immunity is presented as a question of law. *See Johnson v. County of Los Angeles*, 340 F.3d 787, 791 n. 1 (9th Cir.2003). As an appellate court, we are in no position to adjudicate disputed facts that have not gone through the crucible of trial. Still less are we in a position to accept as true something asserted to be a fact by the appellant that has not been tested in any judicial process. The exception to the normal rule prohibiting an appeal before a trial works only if the appellant concedes the facts and seeks judgment on the law.")**.**

Carter v. Denison, 110 F. App'x 6, 2004 WL 1895018, at *2 (9th Cir. Aug. 24, 2004) ("Since we find the officers did not use excessive force as a matter of law, there is no basis for *Monell* liability against the City. . .The City's *Monell* liability is 'inextricably intertwined' with the officers' entitlement to qualified immunity; thus we have pendent jurisdiction to address this issue as well.").

Kwai Fun Wong v. United States, 973 F.3d 952, 961, 962 (9th Cir. 2004) ("The INS officials also seek review of the district court's denial of their motion to dismiss the constitutional and RFRA claims for failure to state a claim, a decision not ordinarily subject to immediate appeal. . . Whether a complaint fails to allege legally cognizable claims is, however, 'inextricably intertwined' with the qualified immunity issue. To determine whether the INS officials are entitled to qualified immunity, we must first consider whether, taken in the light most favorable to the plaintiff, the facts alleged show the violation of a constitutional or statutory right. *See Saucier,* 533 U.S. at 201. Similarly, in reviewing a district court's denial of a motion to dismiss for failure to state a claim, we must consider whether, construing the allegations of the complaint in the light most favorable to the plaintiff, it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'. . So to determine whether the facts as alleged show that the INS officials violated a legal right (the qualified immunity inquiry), we have to determine whether the facts as alleged state a claim for violation of constitutional or statutory rights. . . We may therefore exercise pendent jurisdiction to review the district court's denial of the substantive motion to dismiss.").

Way v. County of Ventura, 348 F.3d 808, 810 (9th Cir. 2003) ("In this case, the district court decided the first [*Saucier*] inquiry, and the County seeks to appeal this ruling before the second is reached. By not considering the second inquiry in *Saucier's* analysis, however, the district court did not arrive at a final, appealable decision on the County's qualified immunity.").

Cunningham v. City of Wenatchee, 345 F.3d 802, 808, 809 (9th Cir. 2003) ("Notwithstanding the decisions of *Johnson* and *Behrens,* the courts still seem to be in somewhat disarray as to the proper rules to follow. Our job as an appellate court is not to critique the Supreme Court decisions, but to do our best to interpret them. . . .We hold in the present case the facts involved are distinguishable from those in *Johnson.* In following the admonition in *Mitchell,* we assume the facts shown by Cunningham, the nonmoving party, as being true for the purpose of deciding the abstract legal question governing qualified immunity. We also find that the allegations made by

Cunningham and the proof adduced by him in the summary judgment proceeding sets apart the legal issue of qualified immunity from the merits of the case. We therefore find that this court has jurisdiction to entertain Perez's appeal from the denial of the motion of summary judgment relating to the qualified immunity defense.").

Miller v. Gammie, 335 F.3d 889, 894, 895, 899 (9th Cir. 2003) (en banc) ("This is an appeal from the deferral, pending limited discovery, of a ruling on a motion to dismiss on grounds of absolute immunity. Orders denying immunity are generally appealable. . . The district court in this case, however, did not enter an order that categorically denied the motion to dismiss on the ground of absolute immunity. Rather, it deferred ruling on [defendants'] absolute immunity claim until completion of limited discovery. The three-judge panel treated that deferral as an effective denial of the motion, and it assumed appellate jurisdiction under the collateral-order doctrine stemming from the Supreme Court's decision in *Cohen* . . . . The panel pointed out that the Supreme Court has held that absolute immunity, where applicable, is a protection not only from liability but also from being answerable in any way for one's actions. . . . District court orders deferring a ruling on immunity for a limited time to ascertain what relevant functions were performed generally are not appealable. This is because they are not orders that deny the claimed existence of immunity, which are interlocutorily appealable on that basis. . . Nor are they appealable under *Cohen,* because collateral orders are appealable only when they conclusively decide a collateral issue. . . An order deferring a ruling is not conclusive. . . . Because the order in this case was not itself immediately appealable, as the district court fully understood, we cannot review it de novo as we would on ordinary appellate review. We can, however, as we have done in past similar situations, treat the notice of appeal as a petition for a writ of mandamus and consider the issues under the factors set forth in *Bauman* [*v. United States District Court,* 557 F.2d 650, 654-55 (9th Cir.1997), which include whether the district court clearly erred.] . . . . Under the functional analysis laid out by the Supreme Court, the district court did not err when it deferred ruling on the motion to dismiss on the pleadings until the nature of the functions the defendants allegedly performed was sufficiently outlined to permit the court to apply *Antoine* and *Kalina.*").

Ganwich v. Knapp, 319 F.3d 1115, 1119 & n.6 (9th Cir. 2003) ("Forcing the defendant officers to undergo discovery, without the possibility of appeal to us, would erode any qualified immunity to the burdens of discovery the officers might possess. We hold that the district court's denial of the officers' pre-discovery qualified immunity motion was an immediately appealable final judgment. . . . We have pendent party jurisdiction over defendant Pierce County's appeal because our decision on the individual officers' qualified immunity claims necessarily will decide whether Pierce County is entitled to summary judgment on the merits of the constitutional questions.")

Cunningham v. Gates*,* 229 F.3d 1271, 1286 (9th Cir. 2000) ("[A] denial of summary judgment on qualified immunity grounds is not always unappealable simply because a district judge has stated that there are material issues of fact in dispute. . .An appellate court still has jurisdiction to consider defendants' assertion that the dispute of fact is not material. . . This is different from a

claim that the court's findings are not supported by the record, as a claim of materiality is solely one of law, and therefore is reviewable on an interlocutory basis.").

Cunningham v. Gates, 229 F.3d 1271, 1286 (9th Cir. 2000) ("Unlike our *Huskey* opinion, our decision does not necessarily resolve the City's appeal by determining that plaintiffs did not demonstrate an actual injury. . . Rather, because the question of actual injury involves factual disputes outside of our scope of review, today's decision assumes plaintiffs may be able to convince a jury that they suffered constitutional injuries caused by some combination of police action and city official inaction. . . . Thus, we lack jurisdiction to review the City's appeal from the district court's denial of its summary judgment motion because this issue is not 'inextricably intertwine' with any of the issues properly before us on interlocutory appeal.").

Huskey v. City of San Jose, 204 F.3d 893, 904, 905 (9th Cir. 2000) (" Huskey's theory of the City's § 1983 liability rests solely on Gallo's allegedly unconstitutional actions and his contention that those actions are attributable to the City because Gallo was a policymaker for the Office. . . . Our conclusion that Gallo and the other individual defendants were entitled to qualified immunity because Huskey failed to allege a constitutional deprivation necessarily forecloses the possibility of the City's § 1983 liability for Gallo's actions. Based on the foregoing analysis, we conclude that this is a proper case for the exercise of pendent party appellate jurisdiction. We have recognized that pendent party appellate jurisdiction may be permissible under the 'inextricably intertwined' exception suggested by the Supreme Court in *Swint*. . . We hold that the 'inextricably intertwined' exception suggested in *Swint* applies to the City's appeal in this case. The Sixth and Tenth Circuits have both come to the same conclusion when presented with facts similar to those presented in the instant matter. *See Mattox v. City of Forest Park*, 183 F.3d 515, 523-24 (6th Cir.1999); *Moore v. City of Wynnewood*, 57 F.3d 924, 929-31 (10th Cir.1995). We are persuaded by their reasoning.").

Huskey v. City of San Jose, 204 F.3d 893, 905, 906 (9th Cir. 2000) ("We hold that the 'inextricably intertwined' exception suggested in *Swint* applies to the City's appeal in this case. The Sixth and Tenth Circuits have both come to the same conclusion when presented with facts similar to those presented in the instant matter. . . We are persuaded by their reasoning. . . . That the liability of the City of San Jose is inextricably intertwined with the conduct of its City Attorney under Huskey's theory of the case can be demonstrated by the following syllogism: The City would be liable to Huskey for the deprivation of his federal constitutional rights resulting from a policy or custom adopted by Gallo in her role as a city policymaker. Huskey has failed to present legally sufficient evidence that any custom or policy adopted by Gallo deprived him of his federal constitutional rights. Therefore, the City is not liable to Huskey under § 1983.").

Price v. Kramer, 200 F.3d 1237, 1244 (9th Cir. 2000) ("In the present case, the defendants did not avail themselves of their right to an interlocutory appeal of the pre-trial ruling, if indeed they had one. Having failed to take whatever timely opportunity existed, they now ask us to review the pre-trial qualified immunity order as though the subsequent trial and jury verdict had never

transpired. Notably, during oral argument, defense counsel could not provide the court with a reason for their not having filed such an interlocutory appeal, aside from the fact that the time for doing so eventually elapsed. The defendants' complaint to us now–that in retrospect the officers should have been immune from suit at the time of the pretrial order–is long past due and unreviewable on this appeal.").

Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1297 (9th Cir. 1999) ("In deciding whether the rulings are inextricably linked, we conduct a preliminary review of the issues and consider the non-frivolous contentions of the parties, rather than first resolving the merits and then determining whether the rulings are inextricably linked. We also consider the various bases on which the issues might be resolved, but, again, do not make that determination before deciding the jurisdictional question. In this case, given that both sides rely heavily on the resolution of the conspiracy issue as dispositive of the qualified immunity question, and given that our preliminary review suggests that the conspiracy ruling could well be determinative of this appeal, we hold that the questions are inextricably intertwined and we exercise jurisdiction over the conspiracy ruling.").

Thomas v. Gomez, 143 F.3d 1246, 1248 (9th Cir. 1998) ("[A] denial of summary judgment on qualified immunity grounds is not always unappealable simply because the district court concludes that the issues of fact in dispute are material. . . Under *Johnson* and *Behrens*, an appellate court has jurisdiction to hear an interlocutory appeal where defendants assert that the district court erred in determining that the disputed facts were material. . . No such assertion is made here. On appeal the officers' sole argument is that the record does not support the district court's determination that a factual dispute exits. The officers contend that they are entitled to qualified immunity because they presented uncontroverted evidence in their motion for summary judgment that 'they did not have the intent to inflict pain on Plaintiff unnecessarily or for a malicious purpose.' The resolution of this contention turns exclusively on factual issues. Their materiality is not at issue.").

Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997) ("[W]e have jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts, while we do not have jurisdiction over an interlocutory appeal that focuses on whether there is a genuine dispute about the underlying facts. . . . Even if disputed facts exist about what actually occurred, a defendant may still file an interlocutory appeal if the defendant's alleged conduct in any event met the standard of objective legal reasonableness under clearly established law regarding the right allegedly infringed.").

Collins v. Jordan, 102 F.3d 406, 412 (9th Cir. 1996) ("[A] denial of summary judgment on qualified immunity grounds is not always unappealable simply because a district judge has stated that there are material issues of fact in dispute. . . An appellate court still has jurisdiction to consider defendants' assertion that the dispute of fact is not material. . . Such a claim is of a different character from a claim that the court's findings are not supported by the record. The claim of lack

of materiality is solely one of law, and therefore is reviewable on an interlocutory basis."), *opinion amended on other grounds*, 110 F.3d 1363 (9th Cir. 1997).

Chateaubriand v. Gaspard, 97 F.3d 1218, 1223-24 (9th Cir. 1996) ("The district court determined that Chateaubriand presented sufficient evidence for a jury to find that the Caucus leaders were aware of his complaints and demoted him because of them. We have no jurisdiction to review factual issues in this context. [cites omitted] The only issue before us is purely legal: whether the alleged facts support a claim of violation of clearly established law. To resolve this issue, we assume, as the district court did, that the Caucus leaders demoted Chateaubriand in retaliation for his speech.").

Cutright v. City of Phoenix, Nos. 94-15462, 94-15463, 1996 WL 84917, *2 (9th Cir. Feb. 28, 1996) (Table) ("This case is distinguishable from *Johnson* . . ., in which the Supreme Court held that when the district court denies summary judgment because genuine issues of material fact exist, the decision is not a "final decision" appropriate for an interlocutory appeal. Here, the district court should have made a determination as to the objective reasonableness of the officers' conduct, which is a question of law. Instead, the district court, without discussing objective reasonableness, held that a genuine issue of fact existed as to the subjective reasonableness of the officers' conduct and, accordingly, denied summary judgment. As a result, the district court failed to properly address the second prong of the qualified immunity defense. This was an error of law and, therefore, immediate appeal was appropriate.").

Armendariz v. Penman, 75 F.3d 1311, 1317-18 (9th Cir. 1996) (en banc) ("It is clear from *Johnson*, then, that we have jurisdiction to review the district court's decision that the defendants' alleged conduct violated clearly established law, but the collateral order doctrine does not provide appellate jurisdiction to review the district court's decision that genuine issues of material fact exist for trial. Neither we nor the Supreme Court has decided definitively whether an appellate court with jurisdiction to review a final collateral order may ever simultaneously review related rulings that are not themselves immediately appealable. . . . Even assuming, however, that such discretionary 'appellate pendant jurisdiction' exists, we would not exercise it here."), *overruled on other grounds*, ***Crown Point Development, Inc. v. City of Sun Valley,*** 2007 WL 3197049, at *4 (9th Cir. Nov. 1, 2007) ("[I***t*** is no longer possible in light of *Lingle* and *Lewis* to read *Armendariz* as imposing a blanket obstacle to all substantive due process challenges to land use regulation.).

Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996) ("Because the defendants challenge the purely legal determination of whether the district court erred in determining that the law was clearly established, we have jurisdiction over this issue . . .However, insofar that a genuine issue of material fact exists for trial, namely whether Carnell informed the officers that she had been raped, we conclude that we do not have jurisdiction to address that issue. . . And the resolution of that disputed issue of fact impacts the question whether reasonable officers could have believed that their conduct in arresting Carnell and booking her at the police station, rather than taking her to a clinic for medical attention was lawful in light of the circumstances.").

Pellegrino v. United States, 73 F.3d 934, 938 (9th Cir. 1996) (Wallace, C.J., concurring and dissenting) ("The majority's approach would seem to deny appellate jurisdiction over appeals from denials of qualified immunity for any case with disputed facts. Because I believe the majority misunderstands *Johnson*, I respectfully dissent. . . . *Johnson* does not preclude an appellate court from reviewing whether an officer violated clearly established law under any given set of facts. . . The majority goes afield by failing to perceive the difference between determining the existence of a triable issue of fact and reviewing assumed facts. . . . *Johnson* requires that an appellate court must first determine what exactly it is asked to review. Do we review a given set of facts to see whether they violate clearly established law or do we review a determination of which facts present "genuine" issues? In this case, I believe it is the former.").

Mujahid v. Mindoro, No 93-17025, 1995 WL 430552, *1 (9th Cir. July 17, 1995) (not reported) ("The Supreme Court has recently held that 'a defendant, entitled to invoke a qualified- immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.' However, in *Johnson*, the Court also stated, '[w]hen faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.' Because the defendants contend that the district court erred in determining that a clearly established right existed, we have jurisdiction over this case.").

TENTH CIRCUIT

Montoya v. Vigil, 898 F.3d 1056, 1063-65 (10th Cir. 2018) ("Before addressing Montoya's specific contentions about the record, we find it useful to explain the basis of our jurisdiction over interlocutory qualified immunity appeals. Montoya's argument assumes the jurisdictional inquiry turns on whether or not the defendants adequately raised qualified immunity before the district court. That is not so. Our jurisdiction is based on district courts' '*decisions*,' not on the particular arguments parties make in their briefs below. . . So the true jurisdictional inquiry is whether or not the district court *decided* the qualified immunity question at issue, not whether the defendants adequately raised the defense. On appeal, the plaintiff can very well argue the court should affirm because the defendant failed to adequately raise the defense below. But such an argument would go to the defendant's preservation of a merits argument, not this court's jurisdiction. That being so, we arrive at a simple rule: if the district court explicitly decided the qualified immunity question, we will usually have jurisdiction over the interlocutory appeal. There may be, of course, other considerations that remove our jurisdiction over an interlocutory qualified immunity appeal even when the district court explicitly decides the question. For example, a particular denial of qualified immunity may be too intertwined with questions of evidence sufficiency for our interlocutory review to be appropriate. *Johnson v. Jones*, 515 U.S. 304, 317, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997). But in general, if the district court decided the qualified immunity question, we

have jurisdiction to review it—regardless of whether or not the defendant properly raised the defense. The reverse of this rule is not true, however. A district court's *failure* to expressly decide the qualified immunity question does not necessarily mean we *lack* jurisdiction, because the district court's silence can operate as an implicit denial that is immediately appealable. *E.g.*, *Lowe v. Town of Fairland*, 143 F.3d 1378, 1380 (10th Cir. 1998). In this context, it becomes important to make sure the defendants explicitly raised the defense. For how could the district court implicitly decide a question that was not clearly before it? If the defendant did not expressly raise the defense, we cannot interpret the district court's silence as an implicit denial of qualified immunity at that stage in the litigation. And that means there is no decision denying qualified immunity for us to review. With these maxims in mind, we turn to the jurisdictional questions here. It is clear we have jurisdiction over the qualified immunity question regarding Montoya's malicious prosecution claim. The district court explicitly decided that issue, holding Montoya had pleaded facts 'show[ing] malicious prosecution' under 'clearly established law.'. . We may review that holding in this interlocutory appeal. As explained earlier, Montoya may argue the Detectives forfeited their immunity defense at this stage in the litigation, but this would be a reason to affirm the district court on other grounds, not to dismiss for lack of jurisdiction. It is equally clear, however, that we lack jurisdiction to review the qualified immunity question with respect to the false arrest claim. The district court never mentioned that question. And we cannot conclude this omission was an implicit denial because the Detectives did not expressly raise the defense below. Having reviewed the briefing below, we cannot find a single instance in which the Detectives raised qualified immunity against Montoya's false arrest claim. . . Instead, they only argued Montoya failed to state a claim for false arrest. The Detectives resist this result by offering a different reading of the record—indeed, a different reading of what it means to assert qualified immunity. As they see it, arguing Montoya failed to state a claim for false arrest under Rule 12(b)(6) is the same as invoking qualified immunity. Since a government official is entitled to qualified immunity when 'the facts that a plaintiff has alleged' fail to 'make out a violation of a constitutional right,'. . . the Detectives contend that a failure-to-state-a-claim argument is really a qualified immunity argument by another name. That is not correct. It is true that if the plaintiff failed to state a claim under Rule 12(b)(6), the government would also be entitled to qualified immunity. But we have already held that '[a]lthough to a certain extent a qualified immunity analysis overlaps with a 12(b)(6) analysis, we do not have jurisdiction to review the merits' of a Rule 12(b)(6) failure-to-state-a-claim argument when the defendant appeals the district court's denial of qualified immunity. *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 515–16 (10th Cir. 1998). As the Supreme Court has explained, 'a claim of immunity is conceptually distinct from the merits of the plaintiff's claim,' and an 'appellate court reviewing the denial of the defendant's claim of immunity need not ... *even determine whether the plaintiff's allegations actually state a claim*.'. . .Therefore, although the Rule 12(b)(6) and qualified immunity arguments can be similar—sometimes exceedingly so—they are not the same. And since it is defendants' burden to raise a qualified immunity defense, *Crawford-El*, 523 U.S. at 586–87, 118 S.Ct. 1584, a Rule 12(b)(6) failure-to-state-a-claim argument, without more, is insufficient to raise qualified immunity. Standing alone, a defendant's Rule 12(b)(6) argument fails to notify either the district court or the plaintiff that the defendant is

invoking qualified immunity—with all its attendant complexity and possibility for interlocutory appeal. In short, the Detectives' Rule 12(b)(6) argument did not adequately raise a qualified immunity defense against the false arrest claim, and therefore the district court's silence cannot be construed as an implicit denial of immunity. We consequently have no jurisdiction to hear the Detectives' qualified immunity arguments against Montoya's false arrest claim.")

Perry v. Durborow, 892 F.3d 1116, 1119-20 (10th Cir. 2018) ("[T]he district court relied on four factual findings in determining that Durborow wasn't entitled to qualified immunity. And Durborow's opening brief repeatedly takes issue with one of these four findings. So does his reply brief. Specifically, Durborow doggedly insists that to the extent the Jail's male detention officers were freely entering the female pod in violation of the Jail's emergencies-only policy, he remained unaware of that fact. For instance, both Durborow's opening brief and his reply brief state that to the extent the 'male officers allegedly enter[ed] the female pod against policy and training,' they did so 'without Durborow's knowledge.'. .Durborow's repeated challenges to this key factual finding would normally deprive us of jurisdiction over this interlocutory appeal. . . But Durborow unequivocally—if belatedly—clarified at oral argument that he accepts all of the district court's factual findings as true for purposes of this interlocutory appeal. And that concession necessarily includes the district court's finding that Durborow was aware the male detention officers were entering the female pod on a regular basis and in violation of the Jail's emergencies-only policy. Thus, we reject Perry's argument that we lack jurisdiction to resolve the purely legal question before us. . . Instead, we will proceed to address whether, based on '[t]he district court's factual findings and reasonable assumptions,' Durborow is entitled to qualified immunity. . . .But before we address the legal issue before us, we hasten to add this caveat: A defendant who brings an interlocutory appeal like this one and then 'challenge[s] ... the district court's determinations of evidentiary sufficiency' (as Durborow initially and repeatedly did here) does so at his or her own peril. . . .As we pointed out in *Ralston*, the 'jurisdictional limitation' at issue here 'has been in place' for more than two decades. . . Thus, we 'expect[ ] practitioners [to] be cognizant of, and faithful to' this limitation throughout *the entire course* of interlocutory appeals like this one, . . .—not just when they are pressed, at oral argument, to abandon the factual challenges they repeatedly advance in their briefs.")

Ralston v. Cannon, 884 F.3d 1060, 1067-68 (10th Cir. 2018) ("It is certainly true that a mere determination on the part of a district court that genuine issues of material fact preclude summary judgment does not necessarily bar this court's exercise of appellate jurisdiction in a particular case. . . We have jurisdiction to review such denials of qualified immunity 'if our review would [not] require second-guessing the district court's determinations of evidence sufficiency.'. . This court, then, has jurisdiction over appeals challenging the denial of a qualified-immunity-based motion for summary judgment only if a defendant-appellant does not dispute the facts a district court determines a reasonable juror could find but, instead, 'raises only legal challenges to the denial of qualified immunity based on those facts.'. . As should be clear from the background set out above, Cannon does not assert on appeal that a conscious or intentional interference with Ralston's right to free exercise, whether relatively brief or not, is consistent with the First Amendment. . .

Nor does he assert that it was not clear during the time period in question that an intentional or conscious placement of a substantial burden on Ralston's right to free exercise would violate the First Amendment. Instead, he simply asserts the district court erred in determining a reasonable juror could conclude he acted intentionally or consciously. This court lacks jurisdiction to take up such an issue in an interlocutory appeal from the denial of summary judgment. In closing, this court notes that the jurisdictional limitation at issue in this appeal has been in place since the Supreme Court's decision in *Johnson*, . . . more than twenty years ago. *Johnson* made clear that allowing appeals from district court determinations of evidentiary sufficiency simply does not advance the goals of the qualified-immunity doctrine in a sufficiently weighty way to overcome the delay and expenditure of judicial resources that would accompany such appeals. . . It certainly follows, then, that appeals like the instant one that flaunt the jurisdictional limitations set out in *Johnson* serve only to delay the administration of justice. . . That being the case, this court expects practitioners will be cognizant of, and faithful to, the jurisdictional limitation set out in *Johnson*.")

Brown v. City of Colorado Springs, 709 F. App'x 906, 916-17 (10th Cir. 2017) ("Whether a claim is inextricably intertwined often depends on whether we address the constitutional-violation prong of the qualified-immunity analysis. In cases where we do not do so—instead electing to resolve a claim under the clearly-established-law prong—we have repeatedly declined to exercise pendent appellate jurisdiction over municipal-liability and official-capacity claims. . . In contrast, when we have resolved the constitutional-violation prong of the qualified-immunity analysis, we have found interrelated claims. . . .Even when we have jurisdiction to consider pendent appellate claims, doing so is generally disfavored. . . And 'when we resolve an individual-capacity § 1983 claim on the clearly-established-law prong of qualified immunity, our analysis often ... does *not* turn on issues inextricably intertwined with those implicated by an official-capacity claim arising out of the same facts.'. . Because we decided this case based solely on clearly established law, the claims here are not inextricably intertwined and we lack pendent appellate jurisdiction to consider the municipal-liability claims against Colorado Springs or the official-capacity claims against the named defendants.")

Clark v. Bowcutt, 675 F. App'x 799, 802-03 & n.4 (10th Cir. 2017) ("[E]ven where the district court has purported to rest its denial of summary judgment in the qualified-immunity context on the existence of genuine issues of material fact, we may still exercise jurisdiction over a defendant's interlocutory appeal where the defendant 'is willing to concede the most favorable view of the facts to the plaintiff for purposes of the appeal,'. . . and to respond to the plaintiff's claims 'based on the facts they have alleged[.]'. . . .In light of these principles, we conclude that we can properly exercise jurisdiction over the district court's denial of Deputy Bowcutt's qualified-immunity defense. We readily acknowledge, however, that Deputy Bowcutt does only the bare minimum amount necessary to make this result possible; he does himself no favors. Specifically, on more than one occasion in his opening brief, Deputy Bowcutt attempts to advance his own version of the facts, including references to his subjective state of mind. . . However, in his reply brief, in a section titled 'Clarification of Issues Presented,' Deputy Bowcutt *unequivocally*

acknowledges that the facts must be 'taken in the light most favorable to Clark,' and his 'challenge[ ]' is to 'the legal analysis the district court employed to determine that Deputy Bowcutt is not entitled to qualified immunity.'. . . Though the timing of Deputy Bowcutt's acceptance of Ms. Clark's version of the facts is far from optimal, in our discretion, we take his acceptance into account and deem it sufficient to establish our jurisdiction over his interlocutory appeal. . . . We caution, however, that, in our discretion, we also very likely could have alternatively treated Deputy Bowcutt's late-blooming, jurisdiction-saving acceptance as waived. . . Accordingly, litigants would be well-advised not to follow Deputy Bowcutt's practice.")

Walton v. Powell, 821 F.3d 1204, 1208-10 (10th Cir. 2016) ("In an effort to ensure the 'wise use of appellate resources,' *Johnson* did tell us to take as given the district court's assessment of what facts a reasonable jury could accept at trial and focus our attention instead on 'abstract' questions of law. . . But what was supposed to be a labor-saving exception has now invited new kinds of labor all its own. Often enough, a party will argue that the district court failed to identify what facts a jury might reasonably find—an assertion that requires us, first, to decide if the district court did or didn't determine the facts a jury could find and, second, to determine the facts for ourselves if the district court didn't. . . Then there are the cases where the district court's assessment of the facts is 'blatantly contradicted' by the record—or someone alleges it is—and we must again sort out the dispute by asking whether there is a 'blatant' contradiction and, if so, what a reasonable jury could find given the record at hand. . . Indeed, without special modifications like these the *Johnson* exception would leave appellate courts often unable to adjudicate appeals from interlocutory rulings denying qualified immunity (rendering *Mitchell*'s promise a dead letter) or bound to accept a clearly mistaken factual account and so left to decide less a case or controversy than a hypothetical question. . . Neither, we must always remember, is the *Johnson* exception applicable outside the summary judgment context. When we review denials of qualified immunity at the motion to dismiss stage or after trial the Supreme Court has told us not to apply *Johnson* and instead determine for ourselves de novo which facts are and are not sufficiently well-pleaded or proven that a reasonable jury could adopt them before proceeding to determine whether those facts suffice to state a claim or support the verdict. . . Much as we do when reviewing decisions granting summary judgment outside the qualified immunity context. . . Indeed, in most every situation but those *Johnson* carves out appellate courts traditionally and routinely *do* assess de novo what facts a jury might accept and that task is not considered incompatible with normal principles of appellate review or unduly inefficient. But however far *Johnson*'s exception extends and whatever its consistency with general practice or capacity to fulfill its promised efficiencies, it doesn't extend so far as to bar consideration of Mr. Powell's appeal or any part of it. To be sure, *Johnson* requires us to accept as true the facts the district court expressly held a reasonable jury could accept. And in our recitation above and analysis below we do just that, treating as true all the facts the district court held a reasonable jury could find even as we are quite confident Mr. Powell would dispute nearly all of them. But *Johnson* does not *also* require this court to accept the district court's assessment that those facts suffice to create a triable question on any legal element essential to liability. That latter sort of question is precisely the sort of question *Johnson* preserves for our review. To be fair, we can understand why Ms. Walton might think otherwise. Indeed, we have

struggled ourselves to fix the exact parameters of the *Johnson* innovation. But the Supreme Court has recently provided some helpful and clarifying guidance in *Plumhoff v. Rickard,* —– U.S. —– –, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014). There the Court explained that *Johnson* only forecloses courts of appeals from reconsidering a district court's assessment of 'evidence sufficiency, *i.e.,* which facts a party may, or may not, be able to prove at trial.'. . By way of illustration, the Court pointed to *Johnson* itself, where the parties disputed whether certain officers were or 'were not present at the time of [an] alleged beating' and the district court held a reasonable jury could find the officers were indeed present. . . It is *that* sort of 'evidence sufficiency' question *Johnson* (usually) precludes us from reconsidering. Meanwhile, *Johnson* does *not* forbid a court of appeals from deciding whether the facts as determined by the district court are sufficient as a matter of law to state a triable question under each legal element essential to liability. Deciding 'evidence sufficiency' questions of *this* sort is, instead, 'a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.'. . Since *Plumhoff,* our own decisions have made this distinction clear and abided it emphatically. . . Indeed, if the rule were otherwise and we could not consider the sufficiency of the (given) facts to sustain a lawful verdict, a great many (most?) qualified immunity summary judgment appeals would be foreclosed and *Mitchell*'s promise of assuring a meaningful interlocutory opportunity to vindicate what is supposed to be an immunity from trial would be 'irretrievably lost.'. . Neither can we discern a reason why questions of causation would be immune from this arrangement. Ms. Walton suggests that, even if we have authority to hear certain portions of this appeal, we may not hear that portion of it. In her view, the district court's assessment that a reasonable jury could find causation—that her political affiliation was a substantial or motivating factor in her dismissal—is particularly inappropriate for our review. But Mr. Powell asks us to decide whether the facts the district court held a reasonable jury could find suffice as a matter of law to permit a favorable judgment for the plaintiff on the element of causation. And that seems to us precisely the sort of question *Plumhoff* preserves for appellate review. Courts of appeals regularly decide whether the facts as presented (in a complaint, at summary judgment, or after trial) are enough to permit a reasonable jury to render a favorable judgment on causation (just like any other legal element essential to liability). . . And *Plumhoff* makes clear we may do the same thing in the qualified immunity context while respecting the district court's special role in ascertaining the relevant facts for our analysis. Under *Johnson,* it is for the district court to tell us what facts a reasonable jury might accept as true. But under *Plumhoff,* it is for this court to say whether those facts, together with all reasonable inferences they permit, fall in or out of legal bounds—whether they are or are not enough as a matter of law to permit a reasonable jury to issue a verdict for the plaintiff under the terms of the governing legal test for causation or any other legal element.")

Henderson v. Glanz, 813 F.3d 938, 948-51 (10th Cir. 2015) ("[I]f on interlocutory appeal from a denial of qualified immunity a defendant-appellant's 'argument is limited to a discussion of [his or her] version of the facts and the inferences that can be drawn therefrom' and presents only 'a challenge to the district court's conclusion [p]laintiffs presented sufficient evidence to survive summary judgment,' we lack jurisdiction to consider that argument. . . Conversely, our jurisdiction 'is clear when the defendant does not dispute the facts alleged by the plaintiff' and raises only legal

challenges to the denial of qualified immunity based on those facts. . . . Even when an appellant challenges the district court's findings of genuine issues of material fact, the Supreme Court has recognized two circumstances in which we may nonetheless exercise interlocutory review. First, 'if a district court fails to specify which factual disputes precluded a grant of summary judgment for qualified immunity, ... we "may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."'. . 'Second, when the "version of events" the district court holds a reasonable jury could credit "is blatantly contradicted by the record," we may assess the case based on our own de novo view of which facts a reasonable jury could accept as true.'. . . Ms. Henderson asserted in her summary judgment briefing and asserts on appeal that DO Johnson knew the door to the tub room was unlocked when she left the medical unit hallway. DO Johnson's argument. . . does not accept as true Ms. Henderson's version of this fact. The district court did not make any factual determination about DO Johnson's knowledge of the door being unlocked, but it did determine that DO Johnson was aware of a substantial risk of harm to Ms. Henderson. DO Johnson's argument is therefore not based on the facts viewed in the light most favorable to Ms. Henderson. . . .The district court's factual determination of DO Johnson's awareness of the risk of assault is not clearly contradicted by the record. . . . Further, although the district court did not say whether a reasonable jury could find that DO Johnson knew the door was unlocked when she left the hallway of the medical unit, the court determined there was a genuine issue of material fact about whether DO Johnson was aware of a risk of assault to Ms. Henderson based on (1) DO Johnson's failure to secure Inmates Johnson and Williams before leaving the hallway of the medical unit, (2) her failure to check on Ms. Henderson before leaving, and (3) her inability to express why there was no risk of assault to Ms. Henderson. DO Johnson's argument challenges the district court's finding of a disputed issue regarding risk awareness. Under this circumstance, where the district court specified the facts on which it based the denial of summary judgment, . . . we lack jurisdiction over DO Johnson's interlocutory appeal because it 'would require second-guessing the district court's determinations of evidence sufficiency[.]' . . . Instead of accepting these facts as true or viewing the facts in the light most favorable to Ms. Henderson, Defendants argue Sheriff Glanz had no notice of a risk of assault because there had been no documented instances of inmate-on-inmate assault in the Jail. This argument ignores the district court's factual determination that staff-on-inmate assaults gave Sheriff Glanz notice about the risk of other kinds of assault—including the risk of sexual assault to female inmates by male inmates in the medical unit—caused by lack of surveillance and adequate staffing. Sheriff Glanz's argument poses 'a challenge to the district court's conclusion [that Ms. Henderson] presented sufficient evidence to survive summary judgment .'. . We may not consider this challenge on appeal unless the record clearly contradicts the district court's factual determinations or the district court failed to identify the factual disputes on which it rested its decision to deny qualified immunity. Defendants do not argue that either circumstance arises here. The district court clearly stated, and the record does not contradict, the facts it relied on in denying qualified immunity to Sheriff Glanz. We lack jurisdiction over Sheriff Glanz's interlocutory appeal because it 'would require second-guessing the district court's determinations of evidence sufficiency.' . . . The district court determined that a reasonable jury could find that DO Thomas was aware of the risk of assault to Ms. Henderson. But this

determination is 'blatantly contradicted by the record.' *See Lewis*, 604 F.3d at 26 (quoting *Scott*, 550 U.S. at 380). The record indicates that, when DO Thomas left to deliver the gurney for the medical emergency, he knew only that Ms. Henderson was in the tub room and that DO Johnson was in the medical unit outside the tub room. DO Thomas testified that he believed the door to the tub room was locked when he left. Ms. Henderson presented no evidence to the contrary. These undisputed record facts blatantly contradict the district court's factual determination that DO Thomas could have been subjectively aware of a substantial risk of bodily harm to Ms. Henderson. We therefore have jurisdiction to determine whether, as a matter of law, DO Thomas violated Ms. Henderson's clearly established constitutional right.")

Callahan v. Unified Gov't of Wyandotte Cty., 806 F.3d 1022, 1026-27, 1030 (10th Cir. 2015) ("Plaintiffs argue that we lack jurisdiction to hear this appeal because the district court's order relied on disputes of material facts and not questions of law. But if the district court inadequately explains the factual basis for its decision, we have the authority to 'review the entire record *de novo* to determine for ourselves as a matter of law which factual inferences a reasonable jury could and could not make.'. . Invoking this, Defendants argue that the district court did not sufficiently identify the facts supporting its conclusion. Therefore, they argue, we should perform an independent review of the record. We find that unnecessary. The district court made clear that it based its decision on disputed facts and, despite its brief explanation, . . . sufficiently established for us what the operative facts were. Regardless, we have jurisdiction to hear the individual Defendants' appeals. In reaching our decision, we are not 'second-guessing the district court's determinations of evidence sufficiency.'. . Rather, 'under any view of the facts,' we cannot say that Defendants violated Plaintiffs' clearly established rights. . . .Of course, an entity defendant is not entitled to qualified immunity and the denial of summary judgment is not immediately appealable. *Moore v. City of Wynnewood,* 57 F.3d 924, 928–29 (10th Cir.1995). We refuse to exercise pendent jurisdiction to avoid that result.")

Cox v. Glanz, 800 F.3d 1231, 1243-44 (10th Cir. 2015) ("At the outset, we acknowledge that Ms. Cox's concerns regarding the district court's methodology have some merit. The court's analysis was *not* consonant with our settled mode of qualified-immunity decisionmaking. Specifically, the court's central focus was on the existence *vel non* of genuinely disputed issues of material fact, and that focus is counter to our established qualified-immunity approach. . . At the summary-judgment phase, a federal court's factual analysis relative to the qualified-immunity question is distinct . . . .Although its mode of analysis focusing on the existence *vel non* of factual disputes was wanting, the district court clearly adjudicated Sheriff Glanz's defense of qualified immunity and ruled against him, albeit tacitly so. Perhaps because it was set adrift by the deficiencies of the parties' briefing, which are explicated *infra,* the district court did not mention qualified immunity in its summary-judgment order. However—critically, for purposes of our interlocutory review—the court did explicitly deny Sheriff Glanz *all* relief in its order, and part of the relief that Sheriff Glanz unquestionably sought in his summary-judgment briefing was qualified immunity. Consequently, the court effectively denied Sheriff Glanz the defense of qualified immunity when it denied his summary-judgment motion. . . Ms. Cox nevertheless suggests that the court's fact-

based manner of disposing of the defense divests us of jurisdiction to reach the qualified-immunity issue on appeal. We disagree. Notably, Sheriff Glanz has accepted the truth of Ms. Cox's version of the facts for purposes of this appeal. Under our controlling caselaw . . . , that ordinarily will permit us to address the legal issues presented by the agreed-upon set of facts, and there is nothing about this case that would counsel against following that path.")

Cox v. Glanz, 800 F.3d 1231, 1256-57 (10th Cir. 2015) ("Sheriff Glanz has not asked us to exercise our discretion to assume pendent jurisdiction over the official-capacity claim in this interlocutory appeal, and we 'will not make arguments for [him] that [he] did not make in [his appellate] briefs.'. . . But quite apart from that failing, we harbor grave doubt as to the propriety of exercising pendent jurisdiction over this claim. In other words, we question whether either of the two accepted rationales for exercising pendent appellate jurisdiction could be established here—i.e., interrelatedness of claims or the need to ensure meaningful review of a properly appealable claim. First, we strongly doubt that Ms. Cox's pendent (i.e., official-capacity) and non-pendent (i.e., individual-capacity) claims are interrelated. We generally will allow 'a suit [against the county] to proceed when immunity [based on a lack of clearly established law] shields the individual defendants.'. . This is because, as we suggested in *Moore,* when we resolve an individual-capacity § 1983 claim on the clearly-established-law prong of qualified immunity, our analysis often, as a matter of law, does *not* turn on issues inextricably intertwined with those implicated by an official-capacity claim arising out of the same facts. . . Stated otherwise, even if the Sheriff had sought pendent appellate jurisdiction, we would be inclined to reject his request on the ground that determining his entitlement *vel non* to qualified immunity here implicates an issue distinguishable from the official-capacity inquiry. And that specific qualified-immunity issue, as discussed *supra,* is whether the challenged conduct constituted an Eighth Amendment violation under clearly established law existing in July 2009. Additionally, we can undertake—indeed we *have* undertaken in Part III.A, *supra*—a meaningful analysis of Sheriff Glanz's appeal from the denial of qualified immunity (i.e., the non-pendent claim) without exercising pendent jurisdiction over the official-capacity claim. Our determination that Sheriff Glanz is entitled to qualified immunity on the individual-capacity § 1983 claim, as we have discussed at length, turns on whether Sheriff Glanz's conduct and that of his identified subordinates with respect to Mr. Jernegan constituted an Eighth Amendment deliberate-indifference violation *under then-extant clearly established law.* We were not required to decide the core issues implicated in the official-capacity § 1983 claim, which include whether, *under our current law,* that challenged conduct as regards Mr. Jernegan gave rise to an Eighth Amendment violation. Therefore, as shown from our analysis *supra,* we have grave doubt that there would be any appropriate basis for our exercise of pendent jurisdiction over the official-capacity claim. Ultimately, under our controlling circuit precedent, '[t]here is nothing anomalous about allowing ... a suit [against an official defendant] to proceed when immunity [based on a lack of clearly established law] shields the individual defendants.'. . The foregoing applies with equal force to this appeal: Sheriff Glanz does not ask us to exercise pendent appellate jurisdiction over the official-capacity claim, and we perceive no reasoned basis to do so *sua sponte.* As a result, '[n]othing at this point prevents [Ms. Cox's] claim against [the Sheriff in his official capacity] from proceeding.'. . We thus decline to exercise pendent jurisdiction over Ms. Cox's

official-capacity claim. And, because the pendent-jurisdiction doctrine is the only legally cognizable jurisdictional foothold for this claim, we are constrained to dismiss this aspect of the Sheriff's appeal for lack of appellate jurisdiction.")

Attocknie v. Smith, 798 F.3d 1252, 1256 (10th Cir. 2015) ("Plaintiff contends that we lack jurisdiction because the district court based its denial of the summary-judgment motions on the existence of fact questions that must be resolved by a jury before the legal issues may be addressed. We have jurisdiction, however, because we may determine whether Cherry and Smith are entitled to qualified immunity by applying clearly established law to the facts for which the district court said there was sufficient supporting evidence.")

Castillo v. Day, 790 F.3d 1013, 1018 (10th Cir. 2015) ("Although Day attempts to characterize the issue on appeal as Plaintiffs' failure to assert a violation of a constitutional right under clearly established law, her argument is limited to a discussion of her version of the facts and the inferences that can be drawn therefrom. Thus, Day's argument is actually a challenge to the district court's conclusion Plaintiffs presented sufficient evidence to survive summary judgment. . . As such, this court lacks jurisdiction to review her appeal at the interlocutory stage.")

Martinez v. Mares, 613 F. App'x 731, 736-37 (10th Cir. 2015) ("Mr. and Ms. Martinez are correct that Defendants' briefing to this court improperly challenges the district court's resolution of disputed facts and impermissibly states those facts in the light most favorable to Defendants. But Defendants also argue that they enjoy qualified immunity even under the facts alleged by Mr. and Ms. Martinez. Admittedly, this argument has evolved over the course of this appeal. But by the time of oral argument, Defendants had wisely abandoned any attempt to challenge the district court's factual findings and instead focused their challenge on the question of whether, even accepting the facts as alleged by Mr. and Ms. Martinez, the Officers had violated Mr. Martinez's clearly established constitutional rights. Resolution of this purely legal question falls squarely within our jurisdiction.")

Leatherwood v. Welker, 757 F.3d 1115, 1118, 1119 (10th Cir. 2014) ("The issue in this case is whether the Defendants' conduct violated the Fourth Amendment with an unreasonable search and the method of analysis should be the same as in *Plumhoff* and *Scott* . Fourth Amendment reasonableness is a legal question, and on this record it is plainly quite different than any factual issues which might be resolved at a trial. . . In other words, we need not engage in second-guessing whether the evidence supports an inference 'that particular conduct occurred.' *Behrens,* 516 U.S. at 313. Defendants ask us to review primarily legal issues, and we have jurisdiction to do so.")

Felders ex rel. Smedley v. Malcom, 755 F.3d 870, 878, 879 (10th Cir. 2014) ("[I]f the district court holds that a reasonable jury could find certain facts in favor of the plaintiff, we generally take these facts as true, even if the record would suggest otherwise upon our de novo review. . . Our jurisdiction is therefore limited to a review of the district court's abstract legal conclusions, in particular, 'whether the district court's factual determinations, taken as true, "suffice to show a

violation of law," and, further, "whether that law was clearly established at the time of the alleged violation."'. . Finally, it should be remembered, '[d]etermining whether there is a genuine issue of material fact at summary judgment is itself a question of law.'. . Here, the district court found that it was clearly established law that an improper search occurs if an officer facilitates a drug dog's entry into a vehicle before probable cause has been established. The court also found as a matter of law that Malcom did not have probable cause prior to conducting the sniff. But the district court ultimately denied summary judgment because issues of fact remained as to whether Malcom conducted an unconstitutional search, based on the timing of Duke's alert and Malcom's possible facilitation of Duke's entry into the car. We have jurisdiction to consider Malcom's legal challenges to the district court's determination that (1) he lacked probable cause prior to conducting the dog sniff; (2) facilitating the entry of a drug sniffing dog into a vehicle without probable cause violates clearly established law for purposes of qualified immunity; and (3) viewing the facts in the light most favorable to Felders, issues of material fact existed as to whether Malcom facilitated Duke's entry and whether Duke alerted prior to entering the car. Taking all facts in the light most favorable to Felders, we agree that Malcom did not have probable cause prior to conducting the dog sniff, the law was clearly established that facilitating a dog's entry into a car prior to establishing probable cause violates the Fourth Amendment, and that issues of fact remain regarding the timing of Duke's alert and Malcom's possible facilitation.")

Estate of Booker v. Gomez, 745 F.3d 405, 409-10 (10th Cir. 2014) ("Under this limited jurisdiction, we may review: ' "(1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation."'. . Under the Supreme Court's direction in *Johnson v. Jones*, 515 U.S. 304 (1995), however, this court has no interlocutory jurisdiction to review 'whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'. . Thus, 'if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record might suggest otherwise as a matter of law.'. .A key exception to *Johnson's* jurisdictional rule arises if a district court fails to specify which factual disputes precluded a grant of summary judgment for qualified immunity. When faced with this circumstance, we are unable 'to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is "genuine").'. . Accordingly, before we can review abstract legal questions, we 'may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'. .This is one such 'cumbersome review' case.")

Plascencia v. Taylor, 514 F. App'x 711, 719 (10th Cir. 2013) ("Generally, a party may not 'appeal an order denying summary judgment [on qualified immunity] after a full trial on the merits.' *Ortiz v. Jordan,* 131 S.Ct. 884, 889 (2011). Rather, a party ordinarily must renew a qualified immunity argument under Rule 50. . . However, the *Ortiz* Court left open the possibility that a 'qualified immunity plea raising an issue of a purely legal nature' may be 'preserved for appeal by an

unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b).'. . Our circuit recognized this exception prior to *Ortiz. See Haberman v. Hartford Ins. Grp.,* 443 F.3d 1257, 1264 (10th Cir.2006). And we have stated that the exception remains valid following the *Ortiz* decision. *See Stewart v. Beach,* 701 F.3d 1322, 1329 n. 7 (10th Cir.2012); *see also Feld v. Feld,* 688 F.3d 779, 782 (D.C.Cir.2012) (noting that a majority of circuits recognize this exception for purely legal issues).")

Roosevelt-Hennix v. Prickett, 717 F.3d 751, 754, 757-60 (10th Cir. 2013) ("In denying Prickett qualified immunity, the district court simply stated as follows: 'I am denying the motion for summary judgment as to Prickett ... because it is ... disputed factually as to the need for the use of a taser device under all these circumstances. And ... this is quintessentially a jury matter.'. . In light of the district court's failure to set out which set of facts it assumed when it denied summary judgment, . . .Prickett's brief on appeal sets out a version of the encounter and asserts he is entitled to qualified immunity given that factual background. . . For her part, Roosevelt–Hennix sets out a materially different version of the facts and argues, given that set of facts, the district court correctly denied Prickett's assertion of qualified immunity. Given this unfortunate state of affairs, this court has no alternative other than 'to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to [Roosevelt–Hennix], likely assumed.'. . That cumbersome review demonstrates a factual milieu at odds with Prickett's version. . . . As should be apparent from the discussion set out above, the resolution of this appeal turns entirely on questions of evidentiary sufficiency. Put simply, Prickett's arguments as to both prongs of the qualified immunity analysis—the existence of a constitutional violation that is clearly established—depend entirely on the assertion Roosevelt–Hennix actively resisted the officers' proper attempts to place her in leg restraints. Accordingly, as required by *Lewis,* this court turns to the record to determine whether it contains sufficient evidence from which a reasonable juror could find: (1) Roosevelt–Hennix informed the officers she was physically incapable of complying with the request to place her feet outside the patrol vehicle for hobbling; and (2) the officers did not attempt to aid her in moving her feet outside the patrol vehicle before applying the taser. . . .Having rejected, as at odds with the record, the factual underpinnings of Prickett's appeal, we take this opportunity to urge district courts to heed *Johnson's* admonition to state the facts the court is assuming for purposes of resolving a summary-judgment based request for qualified immunity. . . Such a consistent course of action preserves the district courts's institutional advantage, at this interlocutory stage, in determining 'the existence, or nonexistence, of a triable issue of fact.'. . It will also help prevent the waste of judicial resources, as the Supreme Court has made clear evidentiary sufficiency appeals simply do not advance the purposes of qualified immunity. . . The caveat here, of course, is that Prickett's appellate brief makes clear he would have brought this appeal under the blatantly-contradicted exception to *Johnson* even if the district court had set out the facts it assumed for purposes of resolving Prickett's summary judgment motion. For that reason, we emphasize that the exception means what it says. Litigants should be cognizant of the limited nature of the exception, and of their duty of candor to this court, before bringing such an appeal. . . . This court's de novo review of the record reveals sufficient evidence for a jury to conclude Roosevelt–Hennix informed the officers she was physically unable to comply with their

request to move her feet outside the patrol vehicle. It likewise contains sufficient evidence for a jury to conclude the officers never attempted to aid Roosevelt–Hennix in moving her feet before applying the taser. Unsurprisingly, Prickett does not assert an entitlement to qualified immunity under that version of the facts. Accordingly, the order of the district court denying Prickett's motion for summary judgment is hereby affirmed**.**")

Lynch v. Barrett, 703 F.3d 1153, 1163, 1164 (10th Cir. 2013) ("*Moore* tells us that *if* we had held in this case that Defendant Officers' conduct did not violate Plaintiff's constitutional right to court access, that holding would have resolved any issue presented by Defendant City's appeal. This is because Plaintiff's claim against the City is premised on his claim Defendant Officers violated his right to court access. . . In that case, nothing would be gained by declining to dispose of the City's appeal on the merits because 'appellate resolution of the collateral appeal *necessarily* [would] resolve[ ] the pendent claim as well.'. . But because we *assumed* Defendant Officers violated Plaintiff's right to court access and *held* they were entitled to qualified immunity based on the lack of clearly established law, Defendant City's appeal in not 'inextricably intertwined' with Defendant Officer's appeal. Nor need we resolve the City's appeal to ensure meaningful review of the Officers' appeal. . . . Nothing at this point prevents Plaintiff's claim against Defendant City from proceeding. Accordingly, we dismiss Defendant City's appeal for want of subject matter jurisdiction.")

Stewart v. Beach, 701 F.3d 1322, 1329 (10th Cir. 2012) ("[T]o the extent Judge Belot's order denying Beach qualified immunity turned on the purely legal issue of whether the constitutional right he considered to be at issue was clearly established at the time of Beach's conduct, it remained appealable even after final judgment. And to the extent that order turned on a disputed question of fact, the issue of qualified immunity would be appealable only after a trial on the merits, 'but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court.' *Ortiz*, 131 S.Ct. at 889. Accordingly, there is no force to Stewart's argument that Judge Belot's denial of qualified immunity was binding on Judge Robinson as the law of the case because it was a final appealable order from which Beach did not immediately appeal.")

Morris v. Noe, 672 F.3d 1185, 1189 (10th Cir. 2012) ("Here, the district court denied summary judgment for two reasons, one appealable, and one not. First, the district court determined that fact issues remained on Plaintiff's constitutional claims. . . Second, the court held that Defendant was not entitled to qualified immunity based on the facts viewed most favorably to Plaintiff. . . We have jurisdiction over only the latter determination.")

Copar Pumice Company, Inc. v. Morris, 639 F.3d 1025, 1030-32(10th Cir. 2011) ("In response to Copar's waiver argument, appellants contend that they preserved review of their qualified immunity claim by filing motions for summary judgment. They rely on our precedent distinguishing between summary judgment denials based on abstract legal issues and those based on factual disputes. . . The Supreme Court recently considered this precise issue. . . . Some language in *Ortiz* appears to undermine *Haberman.* As to direct review of the denial of summary

judgment, the Court noted that 'the time to seek that review expired well in advance of trial.' *Ortiz*, 131 S.Ct. at 891. The Court further cited its repeated holdings that 'an appellate court is powerless to review the sufficiency of the evidence after trial' absent a Rule 50(b) motion. . . But the Court stopped short of announcing a categorical rule. Acknowledging defendants' contention that a motion for summary judgment preserves a legal issue even without a Rule 50(b) motion, the Court stated: 'We need not address this argument, for the officials' claims of qualified immunity hardly present purely legal issues.'. .The same is true here. . . . The district court was abundantly clear that it was denying appellants' qualified immunity motion for summary judgment because 'there are genuine issues of material fact regarding whether the Defendants complied with the relevant statutes and permit.' The district court similarly denied appellants' other motion for summary judgment because 'there is a genuine issue of material fact whether the NMED inspectors' search went beyond the consent that the permit provided, and because there is a genuine dispute of material fact whether Ismael Gomez consented.' The issue decided by the jury was not whether AQCA or Copar's permit conditions allowed a warrantless search. Copar conceded during summary judgment briefing that ACQA was a constitutionally adequate substitute for a warrant as long as Morris and Yantos complied with the statute. And the jury was instructed, without objection by appellants, that 'excessive investigation' beyond the scope of the statutory authorization would render Morris and Yantos liable absent consent. By returning a verdict in favor of Copar, the jury necessarily found that Morris and Yantos did not comply with ACQA and did not otherwise obtain consent. These are 'factual disputes,' not 'purely legal question[s].' *Haberman,* 443 F.3d at 1264. Because Morris and Yantos were denied qualified immunity based on factual rather than legal issues, we may not review that denial absent a Rule 50(b) motion. 'Failure to renew a summary judgment argument–when denial was based on factual disputes–in a motion for judgment as a matter of law ... at the close of all the evidence is considered a waiver of the issue on appeal.' *Wolfgang,* 111 F.3d at 1521 (citation omitted). And because appellants withdrew their Rule 50(b) motion, we have no occasion to consider the propriety of the district court's decision.")

Lewis v. Tripp, 604 F.3d 1221, 1225-30 (10th Cir. 2010) ("[I]n *Johnson v. Jones* the Supreme Court indicated that, at the summary judgment stage at least, it is generally the district court's exclusive job to determine which *facts* a jury could reasonably find from the evidence presented to it by the litigants. 515 U.S. 304, 313 (1995). After doing so, the district court and we may then consider the 'abstract' *legal* questions whether those facts suffice to show a violation of law and whether that law was clearly established at the time of the alleged violation. . . Ordinarily speaking, it is only these latter two questions–and not questions about what facts a jury might reasonably find–that we may consider in appeals from the denial of qualified immunity at summary judgment. Of course, 'determining whether there is a genuine issue of material fact at summary judgment is [itself] a question of law,' *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1947 (2009), one we routinely review *de novo* in appeals from the grant of summary judgment. Still, *Johnson* held that this practice doesn't normally pertain to appeals from the denial of qualified immunity. . . So, for example, if a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true–and do so even if our

own *de novo* review of the record might suggest otherwise as a matter of law. *Johnson's* rule might appear, at first glance, to foreclose at least a good portion of Dr. Tripp's appeal. After all, his primary complaint seems to be that the district court erred when it found sufficient facts in the record from which a jury could infer his involvement in the allegedly illegal search. But that isn't the end of the matter, because *Johnson's* rule has attracted exceptions that we must also consider. Without attempting an exhaustive list of those exceptions, the Supreme Court has drawn our attention to at least three. First, the Court has indicated that, when the district court at summary judgment fails to identify the particular charged conduct that it deemed adequately supported by the record, we may look behind the order denying summary judgment and review the entire record *de novo* to determine for ourselves as a matter of law which factual inferences a reasonable jury could and could not make. [citing *Behrens*]. . . Second, when the 'version of events' the district court holds a reasonable jury could credit 'is blatantly contradicted by the record,' we may assess the case based on our own *de novo* view of which facts a reasonable jury could accept as true. [citing *Scott v. Harris*] Third, we need not defer to the district court's assessment of the reasonable factual inferences that arise from a complaint at the motion to dismiss stage, but may instead assess for ourselves the sufficiency of the complaint as a matter of law *de novo.* [citing Iqbal] . . . .This case falls within the first of these exceptions. The initial obligation of the district court in assessing a qualified immunity defense at summary judgment is to set forth with specificity the *facts*–the who, what, when, where, and why–that a reasonable jury could infer from the evidence presented by the parties. . . Only then can the district court (and we, on appeal) undertake the job of answering the question whether the defendant is entitled to qualified immunity on those facts as a matter of law. Put differently, unless the district court undertakes the essential task of specifying what a reasonable jury could find the facts to be, there is no way it (or, later, we) can rationally determine whether those facts constitute a violation of clearly established law. . . . Given that we lack from the district court a set of facts about Dr. Tripp's conduct to guide our qualified immunity analysis, it falls on us to review the entire record, construing the evidence in the light most favorable to Dr. Lewis as the plaintiff, and to ask *de novo* whether sufficient evidence exists for a reasonable jury to conclude that Dr. Tripp trenched upon Dr. Lewis's clearly established rights. . . .In short, while the record before us permits the inference that Dr. Tripp was doing his *lawful*–and statutorily-charged–duty of alerting the authorities to a possible case of the unauthorized practice of medicine, the record lacks any facts suggesting Dr. Tripp 'knew or reasonably should have known' that doing so would lead to an *unlawful* search or seizure, let alone one in violation of clearly established law.")

Cassady v. Goering, 567 F.3d 628, 634(10th Cir. 2009) ("At issue in this case is Sheriff Goering's entitlement to qualified immunity prior to a retrial. Mr. Cassady asserts that Mr. Goering lost or waived his right to an interlocutory appeal of the denial of qualified immunity. He does not provide us with authority for this proposition, however. . . . We have never held that a qualified immunity ruling is unreviewable following a trial, and we have allowed defendants to reassert qualified immunity claims post-trial where there were factual disputes requiring a jury determination. . . Here, Mr. Goering is facing a retrial and we see no reason why he should be prohibited from appealing the post-trial order rejecting his qualified immunity claim.")

Weigel v. Broad, 544 F.3d 1143, 1151 n.3 (10th Cir. 2008) ("In defendants' cross-appeal, they assert the district court erred in holding that the troopers 'unreasonably applied excessive force, in violation of the Fourth Amendment.'. . Plaintiffs contend we have no jurisdiction over the cross-appeal, arguing the district court only certified for appeal the issue of whether a lack of clearly established law shielded defendants from suit. We disagree. Although Rule 54(b) permits only those claims which the district court has declared final to be appealed separately, the rule provides for appeal of an entire claim, not certain issues within a claim. . . In granting plaintiffs permission to appeal interlocutorily, the district court necessarily certified for appeal plaintiffs' entire § 1983 claim, the validity of which is part of the qualified immunity analysis. Defendants' cross-appeal is thus better characterized as simply an argument urging us to affirm the district court's decision; in effect, defendants contend the district court reached the right decision for the wrong reason.").

Price-Cornelison v. Brooks, 524 F.3d 1103, 1119 n.1 (10th Cir. 2008) (O'Brien, J., dissenting in part, concurring in part, concurring with the result in part) ("The majority cites *Cortez*, 478 F.3d at 1120 n. 16, for the proposition that we lack jurisdiction to review a sufficiency of the evidence determination in the context of a defendant's appeal from the denial of summary judgment based on qualified immunity. This proposition, which stems from *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995), may be a dead letter in light of *Scott v. Harris* , 127 S.Ct. 1769 (2007). In *Scott*, an appeal from the denial of summary judgment based on qualified immunity, the Court held the court of appeals erred in crediting respondent's version of the events (which was credited by the district court) because it 'is so utterly discredited by the record that no reasonable jury could have believed him.' . . Thus, it appears we would have jurisdiction to review a district court's conclusion that the evidence is sufficient to survive summary judgment in the qualified immunity context. . . if the issue was properly raised.").

Weise v. Casper, 507 F.3d 1260, 1264-66 (10th Cir. 2007), *cert. denied*, 131 S. Ct. 7 (2010) ("If a district court cannot rule on the merits of a qualified immunity defense at the dismissal stage because the allegations in the pleadings are insufficient as to some factual matter, the district court's determination is not immediately appealable. . . . Second, Defendants argue that the district court should have first analyzed the purely legal issue of whether a constitutional violation occurred based on the facts contained in the complaint and, if so, whether the constitutional right alleged to have been violated was clearly established. . . While this would be the ordinary course, . . . this analysis can only proceed after the court determines that a defendant is entitled to assert qualified immunity in the first instance. . . . The district court recognized that Defendants are not public officials and decided more inquiry was necessary before engaging in any further aspect of qualified immunity analysis. The district court did not abuse its discretion in ordering limited discovery given its concerns. Third, Defendants rely on *Behrens*, 516 U.S. at 305-14, in arguing that the district court's discovery order forces them to renew their defense on summary judgment, thus depriving them of their right to dispose of the case at the dismissal stage. . . *Behrens* does not provide that Defendants are automatically entitled to appeal both the denial of a motion to dismiss

and a motion for summary judgment. Rather *Behrens* rejects the 'one-interlocutory-appeal' approach and clarifies that the denial of qualified immunity at the dismissal stage does not preclude a renewal of that defense at summary judgment after further factual development has occurred. . . Further, it is well established that limited discovery may be necessary to resolve qualified immunity claims on summary judgment. . . Finally, Defendants argue that some of our sister circuits have exercised appellate jurisdiction in analogous cases. . . We disagree as each of the cases relied upon by Defendants are distinguishable from this case. . . . Indeed, we have recognized that a district court cannot avoid ruling on the merits of a qualified immunity defense when it can resolve the purely legal question of whether a defendant's conduct, as alleged by plaintiff, violates clearly established law. . . The decisions relied upon by Defendants, however, are clearly distinguishable from the instant case. Here, the factual issue involves not whether Defendants' conduct violated a constitutional right, the factual issue involves the threshold question of whether Defendants are entitled to assert qualified immunity in the first instance. . . . In this case, the district court made no legal decision whatsoever, explicit or implicit, on the merits of Defendants' motions. The district court only determined that the allegations in the complaint even taken as true did not adequately address whether Defendants were entitled to assert qualified immunity, and thus ordered discovery on that question. Accordingly, the district court's interlocutory order is not appealable.")

Weise v. Casper, 507 F.3d 1260, 1268-73 (10th Cir. 2007), *cert. denied*, 131 S. Ct. 7 (2010) (McConnell, J., dissenting) ("Contrary to the majority's holding, the district court's decision denying the defendants' motions to dismiss on qualified immunity grounds is an appealable order, turning as it does on a pure question of law: whether private citizens voluntarily assisting at a federally-sponsored event, when sued for alleged constitutional violations under *Bivens*, are entitled to invoke the protections of qualified immunity in the absence of proof that they were closely supervised by federal officials. Because the district court answered that legal question in the negative, it denied the defendants' motions for qualified immunity at the dismissal stage and ordered limited discovery to determine whether they were so supervised. As explained below, the court's legal conclusion was in error. The court should have gone on to the merits of the qualified immunity claim: whether the plaintiffs' complaint alleged a constitutional violation, and if so, whether that violation was clearly established. . .This court has jurisdiction to review that erroneous decision. I therefore respectfully dissent. . . . In this case, the district court conclusively resolved that the defendants had no 'right ... to avoid the burden[ ] of ... discovery,' *Behrens*, 516 U.S. at 308, on the issue of whether they were closely supervised by federal officials, notwithstanding the defendants' legal argument that such supervision is not a necessary predicate to their invocation of qualified immunity. . . Whether the defendants are correct depends on resolution of an 'abstract'–and important–question of law: whether the Supreme Court's holding that employees of a private, for-profit corporation conducting government functions are not entitled to qualified immunity, *Richardson v. McKnight*, 521 U.S. 399 (1997), also eliminates immunity for private citizens who voluntarily assist in performing such functions at the behest of federal officials. The majority's holding that the district court's order is not appealable denies the defendants the valuable right to obtain a ruling on this significant legal question, and exposes them

to the burden of discovery on an issue that can be resolved as a matter of law, on the pleadings. The majority's holding thus directly conflicts with *Behrens* and *Mitchell*. . . . All that the district court has held here–because it is all that can be held on a Rule 12(b)(6) motion–is that the facts in the complaint do not show that the defendants are entitled to invoke qualified immunity. That is a legal conclusion about the scope of qualified immunity for private parties, and we must decide whether it is correct. . . . The defendants here more resemble the 'private individual briefly associated with a government body, serving as an adjunct to government in an essentially governmental activity,' which the Court excluded from its rule in *Richardson*, than they do the employee of 'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, [which] undertakes that task for profit and potentially in competition with other firms.' *Richardson*, 521 U.S. at 413. Therefore, the allegation that the defendants here were directed by federal officials and acted pursuant to federal policy is enough for me to conclude that they are entitled to raise a qualified immunity defense at this stage of the litigation, without proof that their activities were closely supervised by federal officials.")**.**

Harris v. Morales, 231 F. App'x 773, 777 (10th Cir. 2007) ("Mr. Harris contends that the conditions for an interlocutory appeal have not been satisfied in this case. We disagree. We recognize that the district-court order denying summary judgment to Captain Gore appeared to address only evidentiary sufficiency. On appeal, however, Captain Gore does not dispute Mr. Harris's account of what happened. Accordingly, the only issue on appeal is whether Captain Gore is entitled to qualified immunity on Mr. Harris's version of events. . . Furthermore, as we have stated, it is not dispositive that the district-court order did not explicitly address Captain Gore's qualified-immunity argument. To hold otherwise would be to deny Captain Gore the precise entitlement– namely, the right not to be burdened by litigation–afforded by qualified immunity. . . . That we have jurisdiction, however, does not mean that we must, or should, resolve the merits of the appeal. The district court did not fully consider qualified immunity; it did not address whether the applicable constitutional right was 'clearly established' at the time of Captain Gore's actions. . . . We therefore remand to the district court for further consideration on the issue of qualified immunity. On remand the court should address qualified immunity before proceeding further on the Eighth Amendment claim against Captain Gore. The court may consider any new arguments or evidence on the qualified-immunity issue so long as the opposing party is given an opportunity to respond.").

Dyer v. Rabon, No. 06-5085, 2006 WL 3539162, at *1, *2 (10th Cir. Dec. 7, 2006) ("Appellants argue on appeal that the district court erred in refusing to address their respective qualified immunity motions and that this refusal is immediately appealable. Appellee argues that because the district court has not yet ruled on the issue of qualified immunity, the issue is not ripe for appeal. Our decisions in *Workman v. Jordan*, 958 F.2d 332 (10th Cir.1992), and *Lowe v. Town of Fairland, Okla*., 143 F.3d 1378 (10th Cir.1998), make clear that a district court's postponement of or failure to rule on a qualified immunity defense is immediately appealable. This result is driven by the purpose behind qualified immunity, which protects an official not only from liability, but

also 'from the ordinary burdens of litigation, including far-ranging discovery.'. . Accordingly, we may properly turn to the merits. These same two cases, however, also make clear that this court should not determine whether qualified immunity exists where the district court has not yet passed upon the issue. As pointed out in *Workman*, although Appellants ask us to determine this issue, and this court has honored such a request in at least one other case, see *Laidley v. McClain*, 914 F.2d 1386, 1394 (10th Cir.1990), we believe the better practice is to remand such a determination to the district court. . . .").

Robbins v. Wilkie, 433 F.3d 755, 763, 764 (10th Cir. 2006) ("[A]fter *Behrens*, no circuit has held that an appellate court lacks jurisdiction over denial of a motion for summary judgment when the motion raises the same legal arguments as a prior un-appealed motion to dismiss but relies on evidence developed during discovery. . . . If public officials can avoid discovery by success on a motion to dismiss based on qualified immunity, they should not be prevented from filing the motion because of a fear that denial of the motion will prevent them from raising the defense again once their evidence is strengthened through discovery. Additionally, public officials should not be forced to appeal an order denying dismissal on qualified immunity to preserve appeal of a potential subsequent order denying summary judgment on the same issue. Such a rule would dramatically increase the number of interlocutory appeals at the dismissal stage. . . . Thus, in the present case, Defendants' failure to appeal the district court's denial of dismissal on qualified immunity does not divest this court of jurisdiction to consider Defendants' current appeal because Defendants' summary judgment motion relies in part on evidence developed during discovery.").

Daniels v. Glase, No. 97-7115, 1999 WL 1020522, at *6 (10th Cir. Nov. 11, 1999) (unreported) ("We have held that the exercise of 'pendent jurisdiction over interlocutory appeals must be narrowly focused on those claims the review of which would not require the consideration of legal or factual matters distinct from those raised by the claims over which we unquestionably have jurisdiction.' [citing *Malik*] Such is the case here with respect to Ms. Daniels' claim against Sheriff Glase in his official capacity. We concluded above that Ms. Daniels has failed to alleged the deprivation of a constitutional right in connection with Mr. Daniels' suicide. That necessarily includes the conclusion that the County cannot be liable.").

Malik v. Arapahoe County Dep't. of Social Services, 191 F.3d 1306, 1317 (10th Cir. 1999) ("[O]ur application of the 'inextricably intertwined' standard for exercising pendent jurisdiction over interlocutory appeals must be narrowly focused on those claims the review of which would not require the consideration of legal or factual matters distinct from those raised by the claims over which we unquestionably have jurisdiction. We therefore decline to exercise jurisdiction over appellants' claims that the district court erred when it accepted and relied upon inadmissible hearsay evidence in its denial of their motion for summary judgment, upheld plaintiffs-appellees' outrageous conduct claim, and held in abeyance appellants' motion for attorney fees. We may, however, exercise pendent appellate jurisdiction over appellants' claim that the district court erred in dismissing plaintiffs- appellees' conspiracy claim for damages under 42 U.S.C. § 1985, because we necessarily considered the issue in our review of the district court's denial of Coleman's

absolute immunity defense. . . Appellants' legal challenge to the conspiracy claim is based solely on their contention there was no constitutional deprivation. This challenge necessarily fails given our resolution of appellants' immunity claims. We do not disturb the district court's finding of disputed facts sufficient to allege concerted action. . . Accordingly, we affirm the district court's refusal to dismiss plaintiffs- appellees' 42 U.S.C. § 1985 conspiracy claim.").

Armijo v. Wagon Mound Public Schools, 159 F.3d 1253, 1259 (10th Cir. 1998) ("[I]f the district court concludes that a genuine issue of material fact exists in denying qualified immunity, but does not set forth with specificity the facts presented by the plaintiff that support a finding that the defendant violated a clearly established right, then we may look behind the order denying summary judgment. In such circumstances, but only in such circumstances, we may review the entire record, construing the evidence in the light most favorable to the plaintiff, and determine de novo whether the plaintiff in fact presented sufficient evidence to forestall summary judgment on the issue of qualified immunity. Conversely, where the district court makes a legal finding and states specific facts upon which that finding is based, we do not have jurisdiction to delve behind the ruling and review the record to determine if the district court correctly interpreted those facts to find a genuine dispute.").

Lowe v. Town of Fairland, 143 F.3d 1378, 1380 (10th Cir. 1998) ("We have previously concluded that we have jurisdiction over an appeal from an order postponing a decision on qualified immunity. [*citing Workman*] In *Workman*, we reasoned that unless such orders are immediately appealable, a defendant loses his right to be free from the burdens of discovery and trial. Other circuits have concluded that orders failing or refusing to consider qualified immunity are also immediately appealable. [*citing* cases] We agree with this approach. Regardless of whether a district court merely postpones its ruling or simply does not rule on the qualified immunity defense, if we deny appellate review, a defendant loses the right not to stand trial. . . Accordingly, we may properly exercise jurisdiction over this appeal.").

Shinault v. Cleveland County Bd. of Commissioners, 82 F.3d 367, 370 (10th Cir. 1996) ("Shinault asserts that Skinner fired him for political patronage reasons. The district court first found that, based upon the events set out above, there was a genuine issue of material fact as to Skinner's motive for firing Shinault. The court then made the two-part legal finding, . . . that (1) Shinault's assertion, if true, amounts to a violation of his First Amendment right of association and (2) that right was clearly established at the time of the dismissal such that a reasonable person in the defendant's position would have known that his conduct violated the right. Under *Johnson*, Skinner may make an interlocutory appeal of these two legal findings. However, Skinner fails to contest either of them: he does not argue that firing a person for political patronage reasons is not a violation of that person's First Amendment right of association, nor does he argue that such a rule was not clearly established at the time of the termination. Instead, Skinner contests the factual finding that he had an illegitimate motive in firing Shinault. But the district court found that a genuine issue of material fact existed as to whether Skinner fired Shinault for engaging in constitutionally protected political activities and, under *Johnson*, that finding is unreviewable.").

Sevier v. City of Lawrence, Kansas, 60 F.3d 695, 700 (10th Cir. 1995) ("Individual defendants . . . may interlocutorily appeal the denial of qualified immunity. . . However, *Johnson* provides that the scope of such appeals is limited to "purely legal" challenges to the district court's ruling on whether a plaintiff's legal rights were clearly established, and cannot include attacks on the court's "evidence sufficiency" determinations about whether there are genuine disputes of fact. . . . In *Johnson*, the Supreme Court explicitly overruled our previous decisions holding that public officials could collaterally appeal district court rulings denying qualified immunity because of a finding of disputed material facts. . . The Supreme Court distinguished purely legal questions, which are easier to analyze separately from the underlying merits, from claims that implicate factual issues. . . The Court further observed that limiting collateral review to legal issues reduces the risk of delaying litigation and expending appellate resources on factual inquiries better suited to trial court expertise. . . Finally, the Court noted that narrowing the exceptional circumstances under which interlocutory appeals may be heard preserves the legislative command of 28 U.S.C. 1291 . . . .").

Moore v. City of Wynnewood, 57 F.3d 924, 930 (10th Cir. 1995) ("[D]espite its suggestion that appellate jurisdiction should never be exercised over nonfinal appeals that do not fall under the collateral order doctrine-unless they are certified or specially permitted by judicial rulemaking-*Swint* does not completely foreclose the use of pendent appellate jurisdiction . . . . Specifically, the Court suggested that pendent appellate jurisdiction might still be appropriate where the otherwise nonappealable decision is 'inextricably intertwined' with the appealable decision, or where review of the nonappealable decision is 'necessary to ensure meaningful review' of the appealable one . . . . As we read *Swint*, a pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal-that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well. Here, we conclude that the two appeals are coterminous because Moore's federal and state law claims against the City . . . are both premised on his claim that Defendants violated his First Amendment rights and because we hold that no such First Amendment violation occurred. As such, the issues presented in the City's appeal are no broader than those in [individual official's] permissible collateral appeal, and our disposition of [individual official's] appeal fully disposes of his claims against the City.").

ELEVENTH CIRCUIT

Saunders v. Sheriff of Brevard County, 735 F. App'x 559, ___ (11th Cir. 2018) ("We may exercise appellate jurisdiction over the denial of qualified immunity on a motion for summary judgment, . . . but we lack jurisdiction to conduct interlocutory review of Saunders' *Monell* claim against Sheriff Ivey. The defendants urge us to exercise pendent jurisdiction over the *Monell* claim because it is, they say, 'inextricably intertwined' with our qualified immunity analysis. We

disagree. While it is true that an absence of any constitutional violation would be fatal to assertions of both personal and *Monell* liability, it remains the case that these forms of liability are subject to different standards. For instance, if officers violated a plaintiff's constitutional rights but those rights were not 'clearly established,' then *Monell* liability could survive even though qualified immunity would preclude individual liability. For these reasons, this Court has previously found *Monell* issues sufficiently distinct from issues relating to qualified immunity, and has thus held *Monell* claims ineligible for interlocutory review. . . The defendants have failed to persuade us that we may—let alone should—chart a different course here. We therefore address in this appeal only whether defendants Wright and Jeter are entitled to qualified immunity.")
Posada v. Brioso, No. 17-13430, 2018 WL 1975023, at *1 (11th Cir. Apr. 26, 2018) (not reported) ("In light of the fact that the district court refused to conduct a qualified immunity analysis because of deficiencies in the briefing and the evidence, dismissed the summary judgment motion without prejudice, emphasized that its order was 'not a final decision,' and encouraged the parties 'to seek leave to file an amended and corrected motion for summary judgment,' we think its order was too tentative and incomplete to constitute a final decision under *Mitchell*. Under these circumstances, the order did not 'finally and conclusively determine[ ] the defendant[s'] claim of right not to stand trial on the plaintiff[s'] allegations,' because 'further steps [ ] can be taken in the District Court to avoid the trial the defendant[s] maintain[ ] is barred.'. . Accordingly, we lack jurisdiction to hear the appeal of the qualified immunity issue at this time.")

Smith v. LePage, 834 F.3d 1285, 1292 (11th Cir. 2016) ("We choose to exercise pendent appellate jurisdiction over the plaintiffs' claims in their cross-appeal. First, like the traffic stop in *Hudson*, the legality of the officers' entry to the Smith home is intertwined with our resolution of the appealable claims. In reviewing the totality of the circumstances surrounding the shooting, we consider whether the officers lawfully seized Mr. Smith in the first place. . . Second, the legality of the officers' use of their tasers is intertwined with the appealable claims, because it involves essentially 'the same facts and the same law.'. . Finally, Sgt. Gamble's actions as a supervisor are intertwined with the appealable claims because the facts are essentially the same and the plaintiffs claim that Sgt. Gamble was responsible for the second tasing and the shooting. In the interest of judicial economy, we will consider all the claims on appeal.")

Black v. Wigington, 811 F.3d 1259, 1270-71 (11th Cir. 2016) ("Although we sometimes exercise 'pendent appellate jurisdiction' to review 'nonappealable decisions of the district court when [we] already ha[ve] jurisdiction over one issue in the case,' *Stewart v. Baldwin Cty. Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir.1990), we cannot exercise that jurisdiction here. We can exercise pendent appellate jurisdiction 'only under rare circumstances.'. . It is not available unless the nonappealable issue is 'inextricably intertwined' with or 'necessary to ensure meaningful review' of the appealable issue. . . And 'we may resolve the Eleventh Amendment immunity issue here without reaching the merits of' the Blacks' argument under the Equal Protection Clause. . . We can decide whether Congress abrogated the sheriff's sovereign immunity (it did) and whether the sheriff's conduct plausibly violated the Equal Protection Clause (it did) '[w]ithout expressing any view on the merits' of the Blacks' argument. . . So, we lack jurisdiction to review whether the

Blacks' argument that the sheriff violated the Equal Protection Clause should have been dismissed at summary judgment and express no view on this issue.")

McQueen v. Johnson, No. 11–15069, 2013 WL 425979, *3-*5 (11th Cir. Feb. 5, 2013) (not reported) ("McQueen's cross-appeal falls within our pendent appellate jurisdiction. . . . It is necessary to determine the reasonableness of Johnson's initial use of force in order to determine whether the subsequent uses of force by Johnson, O'Reilly, and Tatum mere seconds later were reasonable. . . Accordingly, we have jurisdiction over McQueen's cross-appeal regarding the partial grant of qualified immunity to Johnson. . . .The subsequent uses of force by Officers Johnson, O'Reilly, and Tatum were also objectively reasonable. As both the officers and McQueen agree, McQueen had the misfortune of falling on top of his hands after being incapacitated by Johnson's initial tasing. As a result, McQueen's hands were obscured under his body at the same time that the police were yelling at McQueen to reveal his hands, and many officers had already observed that there was a second weapon located in the same area as his hands. Despite McQueen's unfortunate inability to make his hands visible, a reasonable *officer* in this rapidly evolving situation could perceive that, rather than being incapacitated, the armed robbery suspect who undoubtedly had at least one firearm on his body was continuing to resist the officers' orders. Deputy Sergeant Johnson's second use of his taser—after reasonably believing that McQueen was being non-compliant and seeing that officers were still unable to handcuff him—was therefore reasonable. The reasonableness of this action was confirmed by the discovery of a second firearm—McQueen's service firearm—secreted in his belt shortly thereafter. After seeing this second weapon, Officers O'Reilly and Tatum, who had not seen the second firearm before and who could reasonably assume that McQueen was still not complying with the orders to make his hands visible, simultaneously tased the still-armed McQueen once more and released the K–9. Under these circumstances, in which a second firearm was revealed within arm's reach and the armed robbery suspect's hands remained beneath him in close proximity to a second gun, the officers acted reasonably in using additional force to immobilize a questionably noncompliant McQueen.")

Feliciano v. City of Miami Beach, 707 F.3d 1244, 1250 n.3 (11th Cir. 2013) ("Feliciano maintains that we lack jurisdiction over this interlocutory appeal because the officers' challenge to the denial of qualified immunity centers on a number of disputed issues of material fact, including whether they actually smelled marijuana coming from the apartment, saw Gonzaga holding a joint, or found marijuana that was already in her home before their arrival. Although we do lack interlocutory jurisdiction under 28 U.S.C. § 1291 when the *only* issues appealed in a qualified immunity case are evidentiary issues about which facts a party may, or may not, be able to prove at trial, we have jurisdiction where the district court's denial of qualified immunity is based, even in part, on a question of law. . . And that includes the district court's determination in this case that the officers were not entitled to qualified immunity under a given set of facts. . . Moreover, in the course of deciding such an interlocutory appeal, we may resolve any factual issues that are part and parcel of the core legal issues. . . The requirement that the evidence be viewed in the light most favorable to the plaintiff can itself create an issue of law. . . We do have jurisdiction over this appeal.")

Keating v. City of Miami, 598 F.3d 753, 760 (11th Cir. 2010) ("[I]nterlocutory appeal is available when the denial of qualified immunity is only partially based on an issue of law. . .The fact that Timoney, Fernandez, Cannon, and Burden also argue that the Protesters did not meet the heightened pleading standard for § 1983 actions does not foreclose this Court's jurisdiction. At the motion to dismiss stage in the litigation, 'the qualified immunity inquiry and the Rule 12(b)(6) standard become intertwined.'. . '[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded.' [citing *Ashcroft v. Iqbal*] Thus, because Timoney, Fernandez, Cannon, and Burden argue that the First Amendment violations were not clearly established, we have jurisdiction over their appeal from the denial of qualified immunity as to the Protesters' First Amendment claims. . . Additionally, our jurisdiction extends to determine whether the Protesters' complaint sufficiently alleges clearly established constitutional violations.")

Keating v. City of Miami, 598 F.3d 753, 760-62 (11th Cir. 2010) ("The district court granted Timoney, Fernandez, Cannon, and Burden qualified immunity as to the Protesters' Fourth Amendment claims. It determined that the 'herding' of the Protesters away from the demonstration area constituted an unlawful seizure in violation of the Fourth Amendment. However, the district court found that the conduct did not violate clearly established law. Despite the fact that the district court granted their motion to dismiss on the Protesters' Fourth Amendment claims, Timoney, Fernandez, Cannon, and Burden appeal the adverse determination that their conduct constituted an unlawful seizure in violation of the Fourth Amendment. Because Timoney, Fernandez, Cannon, and Burden were granted qualified immunity, we do not have jurisdiction over this issue on interlocutory appeal. Nor would we if Timoney, Fernandez, Cannon, and Burden were appealing a final order. First, this issue does not satisfy the *Cohen* test for immediate review on interlocutory appeal because, regardless of a decision on the merits, the result is the same: Timoney, Fernandez, Cannon, and Burden would still be entitled to qualified immunity. Thus, this issue would not be unreviewable on appeal from the final judgment. . . Second, a party normally may not appeal from a favorable judgment. . . Third, and most basically, the Supreme Court has denied jurisdiction and discussed the lack of jurisdiction for this type of appeal under procedurally similar circumstances. . . . Although there are real concerns about the non-reviewability of adverse findings in this situation, [footnote omitted] we do not have jurisdiction to review an appeal from the district court's adverse determination, that 'herding' of the Protesters constituted an unlawful seizure in violation of the Fourth Amendment because Timoney, Fernandez, Cannon, and Burden were granted qualified immunity on the Protesters' Fourth Amendment claims.")

Killmon v. City of Miami, 199 F. App'x 796, 2006 WL 2769526, at *2 (11th Cir. 2006) ("The Protesters' argument that we lack jurisdiction fails. We have jurisdiction over this appeal, because the denial of the Officers' defense of qualified immunity turns on whether the complaint of the Protesters alleges a violation of a clearly established right. The complaint alleges that the Officers were ordered by their commander to arrest the Protesters who were walking peacefully on the railroad tracks as instructed by other police officers. The Officers argue that these allegations

require a finding of probable cause, and the Protesters respond that the complaint adequately alleges an arrest without probable cause. The dispute then does not turn on the sufficiency of the evidence, which would foreclose our jurisdiction . . . . instead, this appeal turns on whether the facts alleged in the complaint establish that the Protesters were arrested without probable cause.”).

Koch v. Rugg, 221 F.3d 1283, 1297, 1298 (11th Cir. 2000) (“When discriminatory intent is a predicate factual element of the underlying constitutional tort, [footnote omitted] we have recognized that sufficiency of discriminatory-intent evidence generally is not part of the core qualified immunity analysis. . . In deciding whether jurisdiction is appropriate in a case where the interlocutory appeal is based on qualified immunity, we do not consider facts that the parties might prove at trial but whether the government actors’ undisputed conduct, analyzed objectively, violates clearly established law. . . . Because Vice President Rugg and Dean Forrester have based their interlocutory appeal from denial of qualified immunity solely on the lack of evidence to show racially discriminatory intent in their decision not to hire Dr. Koch for the temporary full-time position, a critical element of the principal case for trial rather than core qualified immunity issues, [footnote omitted] we lack jurisdiction.”).

Stanley v. City of Dalton, 219 F.3d 1280, 1287 (11th Cir. 2000) (“[W]hen both the ‘evidence sufficiency’ and clearly established issues are raised, we have two options of how to treat the factual issue. First, we may take the facts that the district court assumed when it denied qualified immunity as a given and address only the pure legal issues in the appeal. Or, we may conduct our own analysis of the facts in the light most favorable to the plaintiff. [citing *Johnson v. Clifton*]. We may choose to conduct our own factual analysis either because the district court did not adequately identify the facts or because ‘such a determination is part of the core qualified immunity analysis.’ *Id*. Also, as stated in *Johnson v. Clifton*, ‘even if such a determination were not part of the core qualified immunity analysis, it would be Ainextricably intertwined” with that analysis and within the appellate court’s pendent jurisdiction.’ . . . . Although we may independently review the record facts, we will not disturb a factual finding by the district court if there is any record evidence to support that finding. . . We, like the district court, must consider the record evidence regarding the defendant’s conduct in the light most favorable to the plaintiff. In this appeal, because Chadwick raises both ‘evidence sufficiency’ and clearly established law arguments, we have jurisdiction to review them. Choosing the latter of our two options, we have made an independent review of the facts from the record.”).

Hartley v. Parnell, 193 F.3d 1263, 1270-72 (11th Cir. 1999) (“The concurring opinion takes the position that the doctrine of qualified immunity does not apply in an individual capacity public official lawsuit, unless a court determines that a constitutional violation has been alleged (if at the motion to dismiss stage) or a genuine issue of material fact concerning such a violation exists (if at the summary judgment stage). To suggest that qualified immunity applies where no wrong has been committed, it says, is a non sequitur. What we ought to do, according to the concurring opinion, is direct the district court to enter summary judgment for the individual defendant on the merits, not on qualified immunity grounds. We disagree. Let us begin with why it matters. It

matters because this is an interlocutory appeal, and courts of appeal have jurisdiction to review interlocutorily denials of summary judgment based on qualified immunity, but not denials of summary judgment that go only to the merits of a claim. . . . If there had been no qualified immunity defense raised in this case–if the only grounds for which summary judgment had been sought was on the merits–the denial of summary judgment would not be appealable; we would have to dismiss this appeal for lack of appellate jurisdiction. . . It is only because of the qualified immunity issue that we have appellate jurisdiction to review the denial of summary judgment. . . . [I]n its recent *Wilson* opinion, the Supreme Court described the determination of the merits as part of the process of evaluating a qualified immunity claim . . . . Thus, determining the merits of a claim is part and parcel of the qualified immunity inquiry, not a separate question. . . . Because our only basis for appellate jurisdiction at this stage of the case is fastened to the issue of qualified immunity, it would be incongruous for us to deny that the issue before us is one of qualified immunity. Instead of denying that which is essential, we will recognize that qualified immunity is the issue we are deciding, and we will do here what we did in *Burrell* and *Cottrell*, which is to reverse the district court's denial of the individual plaintiff's [sic] motion for summary judgment on qualified immunity grounds.").

Mencer v. Hammonds, 134 F.3d 1066, 1069-71 (11th Cir. 1998) ("Even if the court had based its denial only on a bald assertion that sufficient evidence existed to allow a jury to find an equal protection violation, . . . *Johnson* would not foreclose our review of this appeal. . . . A denial of qualified immunity at summary judgment necessarily involves two determinations: 1) that on the facts before the court, taken in the light most favorable to the plaintiff, a reasonable jury could find that the defendant engaged in certain conduct, and 2) that the conduct violated 'clearly established law' such that a reasonable person in defendant's position would have had notice that his actions were unlawful. . . *Johnson* establishes only that a plaintiff [sic] may not base an interlocutory appeal on the district court's first determination by itself. . . . A determination of whether the evidence supports a finding that a defendant engaged in certain conduct, however, is necessary to reach a determination of whether that conduct violated clearly established law. . . . Thus, if we are confronted with an appeal from a denial of qualified immunity, we may exercise our discretion to review the district court's preliminary determination as a means of reaching the issue of clearly established law. . . . In this case, Mencer, in order to defeat Hammonds' defense of qualified immunity, had to present the district court with enough evidence to allow a reasonable jury to find that Hammonds intended to discriminate against her. She did not do so.").

Walker v. Schwalbe, 112 F.3d 1127, 1135-37 (11th Cir. 1997) (Birch, J., concurring in part and dissenting from portion of majority's decision discussing and concluding that the defendants are not entitled to qualified immunity with respect to plaintiff's retaliation claim) ("[T]he defendants do not argue in this appeal that, viewing the facts in the light most favorable to the plaintiff, they nonetheless are entitled to qualified immunity. Rather, the defendants argue, in essence, that viewing the facts as the defendants allege them to be, they had another legitimate reason for demoting Walker, separate and apart from any First Amendment concerns. Because there is no conclusive support for the defendants version of the facts, the defendants' challenge effectively

requires that we decide a factual issue– whether there is conclusive foundation to confirm the defendants' contention that Walker did violate state law–based neither on the record nor the drawing of reasonable inferences based on facts previously found. In my opinion, this type of purely factual decision-making is not the proper subject of an interlocutory appeal based on qualified immunity. This is not to say that we may never exercise jurisdiction whenever the underlying intent of a state actor is intertwined with the issue of qualified immunity; indeed, our circuit precedent holds otherwise. . . . [B]ecause the record does not reveal definitively that Walker violated a valid state anti-nepotism policy at the time the relevant events occurred, it also does not explicitly show that the defendants could have demoted Walker, at least in part, for violating this policy. Indeed, because we cannot discern conclusively at this juncture whether the defendants had some lawful justification for their decision to demote Walker, we do not know whether there exists an application of materially similar facts to law that may or may not have placed the defendants on notice that their conduct violated a clearly established right; in other words, we cannot decide the core qualified immunity question. For this reason, I believe that it is inappropriate to reach the remaining issue raised in this appeal.").

McMillian v. Johnson, 88 F.3d 1554, 1563 (11th Cir. 1996) ("[T]his circuit has not construed *Johnson* to bar immediate appellate review of fact-based rulings in all circumstances, and the Supreme Court's subsequent decision in [*Behrens*] confirms that *Johnson* did not work such a constriction of interlocutory appellate jurisdiction over orders denying a qualified immunity defense. . . . so long as the core qualified immunity issue is raised on appeal, a final, collateral order is being appealed, and the appellate court has jurisdiction to hear the case, including challenges to the district court's determination that genuine issues of fact exist as to what conduct the defendant engaged in.").

Cottrell v. Caldwell, 85 F.3d 1480, 1485 (11th Cir. 1996) ("The Court in *Behrens* specifically rejected the contention that a district court's holding that material issues of fact remain bars interlocutory appellate review of related issues of law, labelling that contention a misreading of *Johnson*. . . . The contrary holdings in *Mastroianni v. Bowers*, 74 F.3d 236, 238 (11th Cir.1996), and *Babb v. Lake City Community College*, 66 F.3d 270, 272 (11th Cir.1995), preceded *Behrens* and cannot be reconciled with it. Where prior panel precedent conflicts with a subsequent Supreme Court decision, we follow the Supreme Court decision. . . . Accordingly, under *Johnson*, we lack interlocutory appellate jurisdiction over the denial of summary judgment on qualified immunity grounds where the sole issues on appeal are issues of evidentiary sufficiency. However, as clarified by *Behrens*, *Johnson* does not affect our interlocutory jurisdiction in qualified immunity cases where the denial is based even in part on a disputed issue of law.").

Beauregard v. Olson, 84 F.3d 1402, 1403 (11th Cir. 1996) ("For purposes of our review we accept as true both that Plaintiffs' job duties were ministerial and that Olson fired them for political reasons. [footnote omitted] Even so, Olson says he is entitled to qualified immunity. So, we have jurisdiction [citing *Behrens*] to decide the core qualified immunity question of whether it was

clearly established before Olson acted that he could not lawfully fire these deputized clerical employees of the Tax Collector's office for political reasons.").

Johnson v. Clifton, 74 F.3d 1087, 1091 (11th Cir. 1996) ("It seems clear to us that the Supreme Court [in *Johnson*] was not changing the well-established law of qualified immunity in the context of summary judgment, just elaborating on it. When faced with a motion for summary judgment based on qualified immunity, the District Court must determine whether there is a genuine issue of material fact as to whether the defendant committed conduct that violated clearly established law. This analysis can be broken down into two parts. First, what was the official's conduct, based on the pleadings, depositions, and affidavits, when viewed in the light most favorable to the non-moving party? Second, could a reasonable public official have believed that such conduct was lawful based on clearly established law? The resolution of the second issue constitutes a final, collateral order. . . A ruling on such an issue is immediately appealable. . . When such a ruling is appealable, the first issue–the factual issue–may be addressed by an appellate court because it is a part of the core qualified immunity analysis. [cite omitted] However, if only the first issue is appealed, namely what conduct the defendant engaged in based on the evidence viewed in the light most favorable to the plaintiff, and not the second issue, namely whether that conduct violated clearly established law, then the appellate court has no jurisdiction to hear the case. [citing *Johnson*] The first issue–the factual issue–can only be heard because it is a necessary part of the core qualified immunity analysis, the resolution of which constitutes a final, collateral order; when the core qualified immunity issue is not appealed, then the factual issue may not be either. . . When the core qualified immunity issue is raised on appeal, the appellate court has two options regarding how to deal with the factual issue. 'When faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.' . . . Or, the court of appeals can conduct its own review of the record in the light most favorable to the nonmoving party. First, the appellate court may have to do so because the trial court failed to state the facts it assumed. . . Second, the appellate court can do so because such a determination is part of the core qualified immunity analysis, as discussed above. [cite omitted] Third, even if such a determination were not part of the core qualified immunity analysis, it would be 'inextricably intertwined' with that analysis and within the appellate court's pendent jurisdiction. [cite omitted] Of course, if there is any evidence in the record to support the District Court's ruling that there was a genuine issue of material fact as to whether the official actually engaged in the conduct that violated clearly established law, the District Court's factual ruling will not be disturbed.").

Dolihite v. Maughon, 74 F.3d 1027, 1034 n.3 (11th Cir. 1996) ("Unlike *Johnson* and unlike *Ratliff*, the primary argument of each appealing public official in this case is that a reasonable public official could have believed that his or her actions were lawful, in light of clearly established law and the information possessed by each official. . . This argument raises the core qualified immunity issue and is, therefore, immediately appealable under *Mitchell* . . . and *Johnson*. With respect to several subissues relating to several of the appellants, in order to evaluate the core qualified

immunity issue presented by each appellant, we have identified precisely the relevant actions of the appellant and the relevant information possessed by each, of course, taking all reasonable inferences in favor of Dolihite. We are confident we have jurisdiction to do this. . . . Our conclusion that we have jurisdiction to identify the precise actions and the precise knowledge of each appellant is supported by the recent Eighth Circuit decision in *Reece v. Groose*, 60 F.3d 487 (8th Cir.1995). . . . Even if we are incorrect in our conclusion that the identification of the precise acts and knowledge of each appealing public official is part and parcel of the core qualified immunity issue, we are satisfied that it would be "inextricably intertwined" with the core issue, and thus would be within our pendent appellate jurisdiction. . . . Ordinarily, we might simply "take as given" the district court's identification of each appellant's actions and knowledge. . . However, with respect to the appellants in this case other than Jurls, we cannot conclude that the district court's identification of the actions and knowledge of each appellant was adequate. The Supreme Court in *Johnson* acknowledged that in such a circumstance, an appellate court appropriately would have to undertake such identification.").

McElroy v. City of Macon, 68 F.3d 437, 438 n.* (11th Cir. 1995) ("We have looked at *Johnson* . . . and conclude that defendants may immediately appeal the denial, based on untimeliness, of a summary judgment motion in a qualified immunity case. [cites omitted] We see *Johnson*'s constraint on interlocutory appeals to be, itself, limited to barring appeals in which the issue is whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.").

Babb v. Lake City Community College, 66 F.3d 270, 272 (11th Cir. 1995) (per curiam) ("The claim of immunity must be 'conceptually distinct' from the merits of the plaintiff's claim; and the interlocutory appeal from its denial must be limited to the issue of whether the undisputed facts show a violation of 'clearly established' law. . . Where, as in this case, a district court finds that there exists a genuine issue of material fact regarding the conduct claimed to violate clearly established law, there is no 'final decision' and no interlocutory appellate jurisdiction under *Mitchell* to review the denial. . . An order determining the existence or non-existence of a triable issue of fact–the sufficiency of the evidence–is not immediately appealable.").

Kelly v. Curtis, 21 F.3d 1544, 1556 (11th Cir. 1994) ("[Defendants] were brought into federal court on the basis of federal claims, which we have held are now out of the case insofar as Curtis and Moore are concerned. If these two defendants are also entitled to summary judgment on the state law claims, then by declining to exercise our discretionary pendent appellate jurisdiction, we might undermine the purpose of permitting an interlocutory appeal from the denial of summary judgment on qualified immunity grounds...We do not hold that a court of appeals should always exercise pendent appellate jurisdiction over the state law claims against a defendant once it has held that defendant is entitled to summary judgment on qualified immunity grounds as to all the federal claims. We do, however, recognize such a situation as a special one that may warrant the exercise of our discretion to review.").

McKinney by McKinney v. DeKalb County, Ga., 997 F.2d 1440, 1442 (11th Cir. 1993) ("The issue on this appeal of a denial of summary judgment based on qualified immunity is a purely legal one: first, whether there was a clearly established constitutional right, and second, whether, viewed most favorably to the plaintiffs, the alleged facts show a violation of that right.").

Collins v. School Board of Dade County, Fla., 981 F.2d 1203, 1205 (11th Cir. 1993) ("The district court's order declining to rule on the qualified immunity issue pending trial effectively denies defendants the right not to stand trial. Because the 'reserved ruling' is not materially different from an outright denial of a summary judgment motion, an immediate appeal on the qualified immunity issue is permissible.").

Green v. Brantley, 941 F.2d 1146 (11th Cir. 1990) (*en banc*) ("...denial of summary judgment based upon qualified immunity is appealable as a collateral order...even if an additional damage claim will proceed to trial regardless of the outcome of the appeal.").

X. TIMING & FREQUENCY OF APPEALS

Ortiz v. Jordan, 131 S. Ct. 884, 888, 889, 892 (2011) (holding party may not appeal an order denying summary judgment on qualified immunity grounds after a full trial on the merits and, absent a Rule 50(b) motion, an appellate court is "powerless" to review the sufficiency of the evidence after trial.)

Behrens v. Pelletier, 116 S. Ct. 834, 839-40 (1996) ("*Harlow* and *Mitchell* make clear that the [qualified immunity] defense is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery ....' Whether or not a later summary-judgment motion is granted, denial of a motion to dismiss is conclusive as to this right. . . . [R]esolution of the immunity question may 'require more than one judiciously timed appeal,' because the legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss.").

FIRST CIRCUIT

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 94-96 (1st Cir. 2003) ("This proposition–that a district court must actually file the certification of frivolousness to retrieve jurisdiction over the proceedings–is the springboard for defendants' argument that the trial in this case was a nullity. . . . This jurisdictional dispute might have been avoided if the district court had promptly ruled on the defendants' motion to continue the trial pending the resolution of their *Forsyth* appeal. . . . If the court had entered that order denying the stay on December 2, prior to beginning the trial, its jurisdiction over the proceedings would have been clearly established even without the inclusion of certification language in the opinion. We have never adopted the *Apostol* certification procedure in this circuit. Although appellants urge us to do so here in the hopes of adding fuel to their trial nullity argument, we decline their invitation. Whatever the merits of the certification

procedure may be, its primary innovation– permitting the district court to reclaim jurisdiction from the court of appeals in the wake of a *Forsyth* appeal–has no relevance to this case. The defendants' notice of appeal was patently meritless, and therefore failed to divest the district court of jurisdiction in the first instance.").

Rosario-Diaz v. Ortiz, 140 F.3d 312, 316 (1st Cir. 1998) ("We have held that a defendant may bring an interlocutory appeal from a district court's refusal to entertain an untimely pretrial motion that raises a qualified immunity defense. *See Valiente v. Rivera*, 966 F.2d 21, 23 (1st Cir.1992) (per curiam); *Zayas-Green v. Casaine*, 906 F.2d 18, 23 (1st Cir.1990). . . . Given the baldness of the appellants' transgressions, the potential prejudice to the plaintiffs and to the orderly administration of the court's docket caused by the late filings, and the need to deter such conduct, we think the district court's refusal to entertain the appellants' motions for summary judgment is a concinnous sanction, well within the court's discretion. . . In reaching this conclusion, we do not denigrate the important purpose served by the qualified immunity doctrine. Nonetheless, it is (or should be) evident that a public official's right to raise a qualified immunity defense is commensurate with his responsibility to do so diligently and in keeping with the trial court's lawful case-management orders. . . The appellants' flagrant breach of this duty amply justifies the district court's carefully balanced rejoinder (precluding a belated pretrial sortie but leaving the appellants free to raise the qualified immunity defense at trial).").

Guzman-Rivera v. Rivera-Cruz, 98 F.3d 664, 667-69 (1st Cir. 1996) ("These considerable rights to raise and appeal the defense of qualified immunity are not, however, unlimited. . . . Delay generated by claims of qualified immunity may work to the disadvantage of the plaintiff. . . . Delay is also costly to the court system, demanding more time and energy from the court and retarding the disposition of cases. We must balance the need to protect public officials from frivolous suits with the need to have cases resolved expeditiously. Without some limit on the ability of defendants to raise immunity issues, any suit implicating the defenses of absolute and qualified immunity faces the possibility of at least three independent motions for summary judgment: (i) a motion for summary judgment on the non-immunity defenses, (ii) a motion for summary judgment based on absolute immunity, which can be appealed immediately; (iii) a motion for qualified immunity which can also be appealed immediately. The potential for delay is considerable. In order to reduce the potential for abuse by defendants, we believe that the defense of qualified immunity may be deemed to have been waived if it is not raised in a diligent manner during the post-discovery, pre-trial phase. To find otherwise is to invite strategic use of the defense by defendants who stand to benefit from delay. This ruling does not inhibit the ability of defendants to raise a defense of qualified immunity and benefit from the protections it offers. Our ruling today in no way prevents a defendant from raising the defense of qualified immunity at summary judgment, regardless of whether it was raised prior to discovery. We, therefore, adopt the position of the Sixth Circuit that the district court has the discretion to deny motions for summary judgment that are not filed in an expeditious manner. . . . In the instant case, however, defendants raised the qualified immunity defense very late in the pre-trial, post-discovery phase, despite the fact that they had ample opportunity to have the issue resolved expeditiously earlier in the proceedings,

rather than generating additional delay by filing this third motion for summary judgment. The question before this court, therefore, is whether the defendants waived the right to raise the defense at this stage by failing to do so in a diligent manner and by failing to offer an explanation for the delay. Upon de novo review, we hold that the defense of qualified immunity has been waived for the pre-trial stage. . . . This decision does not imply, however, that the defense has been waived for other stages of the litigation. Because the defense of qualified immunity may be raised and appealed at multiple stages of the trial, it would be inappropriate to find waiver for all stages in the current case. We need not decide whether a sufficient showing of prejudice to the plaintiff would result in waiver for all stages: even assuming so arguendo, there is no such showing in the instant case. Our decision thus leaves defendants free to present the qualified immunity defense at trial, despite the fact that the defense is waived for pre-trial purposes.").

SECOND CIRCUIT

Plummer v. Quinn, 2008 WL 383507, at *2 (S.D.N.Y. Feb. 12, 2008) ("In some circuits, a district court may proceed to trial despite a defendant's interlocutory appeal of the denial of qualified immunity if the court certifies that the appeal is frivolous or being used for purposes of delay. *See e.g., Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir.1989). Although the Second Circuit has not specifically addressed the issue, some courts in this circuit have adopted this approach. *See e.g., Palmer v. Goss*, No. 02 Civ. 5804, 2003 WL 22519454, at *1 (S.D.N.Y. Nov. 5, 2003); *Bean v. City of Buffalo*, 822 F.Supp. 1016, 1019 (W.D.N.Y.1993). However, having determined that Quinn is entitled to an interlocutory appeal and that there is a possibility that the Court of Appeals will reverse this Court's denial of summary judgment based on the doctrine of qualified immunity , Defendants' appeal cannot be characterized as frivolous. Accordingly, Plaintiff's motion for certification of the appeal as frivolous is denied.")

FOURTH CIRCUIT

Thompson v. Farmer, 945 F. Supp. 109, 111-12 (W.D.N.C. 1996) ("Relying on *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir.1989), Thompson has urged this Court to certify Farmer's appeal as frivolous and proceed to trial. Farmer argues that the Fourth Circuit has not adopted *Apostol* such that this Court has no authority to certify the appeal as frivolous. This Court has reviewed the Seventh Circuit's decision in *Apostol* and agrees with Thompson that this Court has power to certify an appeal as frivolous in an appropriate case. The Court believes that the reasoning of *Apostol* is well-rooted in the general principles governing appellate jurisdiction such that the Fourth Circuit would adopt its eminently sensible holding. Indeed, it seems the Supreme Court has approved of this procedure. *See Behrens v. Pelletier*, 116 S.Ct. 834, 841 (1996) (citing four circuits that have adopted this procedure). Of course it is also true, as Farmer notes, that the Court of Appeals will also satisfy itself that the appeal has merit sufficient to confer appellate jurisdiction. But there is no necessary conflict between appellate review and use of the procedure outlined in *Apostol*–they are complementary procedures. This is even more certain when one considers that

Apostol also recognizes that the Court of Appeals may stay an action in the district court while it reviews the district court's determination that an appeal is frivolous.").

SIXTH CIRCUIT

English v. Dyke, 23 F.3d 1086, 1089 (6th Cir. 1994) ("[A] qualified immunity defense can be raised at various stages of the litigation including at the pleading stage in a motion to dismiss, after discovery in a motion for summary judgment, or as an affirmative defense at trial. [*citing* Kennedy v. City of Cleveland, 797 F. 2d 297, 300 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987)] A denial of the defense at any stage entitles a defendant to an immediate appeal. If the trial court's ruling is affirmed on appeal, the defendant may raise the defense at the next stage of litigation and appeal again if the defense is denied. *Id*.").

Krycinski v. Packowski, 556 F.Supp.2d 740, 744-45 (W.D. Mich. 2008) ("As a practical matter, it is also important to recognize the disruption that interlocutory appeals create in the litigation process. Indeed, this disruption is the principal policy reason underlying the general rule against piecemeal appeals. . . The Supreme Court has carved out a narrow exception for federal qualified immunity decisions, . . . but even that narrow exception has, in practice, expanded beyond the Supreme Court's original basis for it. The original and understandable justification for the limited right to interlocutory appeal was to permit resolution of genuinely legal issues so that individual defendants did not have to endure the full trial-court process before having an appellate decision on a purely legal issue. . . However, in practice many motions for summary judgment on qualified immunity do not come up for consideration or decision until discovery has been completed in the case. The legal immunity issues are often inextricably bound up with factual issues, and denial of summary judgment at this stage of the case has less to do with a narrowly crystalized issue of law than with a morass of genuinely disputed facts. When interlocutory appeals routinely happen in this context they rarely serve to clarify a decisive legal issue in the case, and they always build new and significant delay into the trial process. This Court does not believe that this practice is in keeping with the policy rationale of the Supreme Court in *Johnson* and *Mitchell*. In an effort to address this issue in future cases, this Court intends to include a new deadline in case management orders applicable to cases in which qualified immunity may apply. The deadline will be early in the case and will be for any qualified immunity issue that a defendant may wish to raise and from which it may elect to take an interlocutory appeal if its motion is denied. The filing of such a timely motion will, under the case management order, toll discovery and other case management deadlines until the motion is resolved. If the deadline passes without a motion, the case management order will deem defendants to have waived interlocutory appeal of any denial of summary judgment on a subsequently asserted qualified immunity defense. . . On the one hand, this will effectuate the purposes recited by the Supreme Court in *Johnson* and *Mitchell* by providing defendants with an early opportunity to raise a qualified immunity defense that truly presents a narrow legal issue and that, if granted, would actually protect defendants from not only liability but also suit. On the other hand, it will also prevent the routine and disruptive use of

qualified immunity defenses that come late in the case–after discovery, on the eve of trial, and usually inextricably intertwined with factual disputes.")

Rodriguez v. City of Cleveland, No. 1:08-CV-1892, 2009 WL 1661942, at *2 (N.D. Ohio June 10, 2009) ("The Court finds that the Defendants' interlocutory appeal does not present non-frivolous, appealable questions of law and therefore it grants the Plaintiff's motion to preserve the trial date and to deem the Defendants' interlocutory appeal to be frivolous. First, in light of the Defendants' brief, which is replete with references to disputed facts (a wholly improper inquiry on interlocutory appeal), it is not at all clear that the Defendants' interlocutory appeal is non-frivolous and was not submitted merely for the purposes of delay. Further, the Court has been unable to find that the Defendants have presented 'neat abstract issues of law' that can properly be considered by the Sixth Circuit on interlocutory appeal.")

Blair v. City of Cleveland, 148 F. Supp.2d 919, 922 (N.D. Ohio 2000) ("Under the court's holding in *Apostol*, where a court finds that an appeal is frivolous, or where the defendants use claims of immunity in a manipulative fashion, the district court may certify that the defendant has surrendered the entitlement to a pretrial appeal and proceed with trial. . . . The Sixth Circuit, while not applying the holding in *Apostol*, has cited that court's logic with approval. . . . Despite its determination that genuine issues of material fact preclude a finding of qualified immunity, the court declines to certify that the officers' appeal is frivolous. Acknowledging the importance of public officials' right to avoid trial where they are entitled to immunity, the court does not wish to defeat the purpose of the rule by forcing the officers to defend themselves at trial, effectively extinguishing their right to qualified immunity. Erring on the side of caution, the court instead stays the trial of Plaintiffs' claims against Officers Tankersley and Gibson, pending the outcome of their appeal on the issue of qualified immunity.").

Blair v. City of Cleveland, 148 F. Supp.2d 919, 923 (N.D. Ohio 2000) ("While it is true that in order to hold the City liable, there must be proof that the officers violated Plaintiffs' constitutional rights, the elements of proof required for suits against the City and individual defendants vary in other important respects. An example best illustrates the point. Plaintiffs contend that Officers Tankersley and Gibson violated Michael Pipkins' constitutional rights by using excessive force to effect his arrest. Plaintiffs also contend that the City may be held liable for the alleged violation, based upon a failure to train its officers in the proper use and/or avoidance of certain neck restraints. A reasonable jury could find that the officers did, indeed, use excessive force in violation of Pipkins' rights. However, assuming the officers succeed in their appeal of this court's order, it could be determined that a reasonable officer would not have known that his actions violated a clearly-established right, and that the officers are therefore immune. As indicated above, there is no such immunity to protect the City. Notwithstanding the officers' immunity, a jury could still find that the City violated Pipkins' constitutional rights by failing to adequately train its employees. Therefore, uncertainty as to whether Officers Tankersley and Gibson will be held immune to Plaintiffs' claims does not mandate that this court stay the trial of Plaintiffs' claims against the City. . . . Notwithstanding the court's decision to stay the trial of Plaintiffs' claims against Officers

Tankersley and Gibson pending a resolution of their interlocutory appeal, it is in the interest of justice to proceed with the trial of Plaintiffs' claims against the City of Cleveland.").

SEVENTH CIRCUIT

Fairley v. Fermaint, 482 F.3d 897, 901 (7th Cir. 2007) (on reh'g and reh'g en banc denied) ("We now hold, in accord with *Behrens* and *Toeller*, that a public official may appeal from an order conclusively denying a motion (based on qualified immunity) seeking summary judgment, whether or not the official has appealed from an order denying a motion to dismiss the complaint, and whether or not the motion for summary judgment rests on new legal or factual arguments. But once a conclusive resolution has been reached at either stage, a renewed motion for the same relief, or a belated request for reconsideration, does not reopen the time for appeal.")

May v. Sheahan, 226 F.3d 876, 879, 880 (7th Cir. 2000) ("*Apostol v. Gallion*, 870 F.2d 1335, 1337-38 (7th Cir.1989), held that a notice of appeal presumptively deprives the district court of jurisdiction to proceed with a trial on the merits of the claims on appeal. The *Apostol* court concluded that whether a public official asserting immunity should face a trial 'is precisely the aspect of the case involved in the appeal' because the ultimate question in a *Forsyth* appeal is whether a public official should have to undergo the burdens of litigation. . . In this appeal, we face the related but unresolved issue of whether a district court retains jurisdiction to allow proceedings short of trial to go forward during the pendency of a proper *Forsyth* appeal. . . . In the years since *Apostol*, the Supreme Court has made clear that a *Forsyth* appeal implicates more than just a public official's right to avoid a trial, it also protects a public official from burdensome pretrial proceedings, including, most notably, discovery. . . Thus, there can be no doubt that a *Forsyth* appeal divests a district court of the authority to order discovery or conduct other burdensome pretrial proceedings. But what about a district court's authority to accept an amended complaint? . . . . Allowing a plaintiff to alter the allegations in his or her complaint would have an obvious effect on a pending *Forsyth* appeal. . . . Moreover, allowing a plaintiff to file an amended complaint while a *Forsyth* appeal is pending does place a litigation burden on a defendant public official. . . . [D]epriving the district court of jurisdiction to accept an amended complaint during a *Forsyth* appeal will not forever prevent a plaintiff from amending his or her complaint, but it will give the court of appeals the opportunity to both pass on many of the allegations the plaintiff will likely end up relying on and offer guidance to the district court (and the parties) on the legal issues involved in the case. . . . If a district court certifies the appeal to be frivolous, it may proceed forward with the case despite the pendency of the appeal. . . Thus, district court proceedings need not be delayed by successive appeals that raise only issues previously decided. . . . [W]e conclude that a *Forsyth* appeal deprives a district court of jurisdiction to accept an amended complaint filed while the appeal is pending. Therefore, the amended complaints May filed while this appeal was pending are nullities and the complaint in effect when this appeal was filed, his original Amended Complaint, is the operative document. Accordingly, this appeal is not moot, and our jurisdiction is secure.").

Monfils v. Taylor, 165 F.3d 511, 518-20 (7th Cir. 1998) ("Because the jury trial proceeded while Taylor's appeal on the qualified immunity issue was pending, we are left with what turns out to be a thorny problem. We are dismayed that this case proceeded in a fashion which allowed this problem to arise. . . . [T]he fact is that everyone proceeded in this case as though Taylor's individual constitutional liability was not being tried. . . . It is true that at trial Taylor was not the subject of a jury question as to a substantive due process violation. But, in what is a very important concern, he was the only person whose conduct was used to attempt to establish a substantive due process violation against the City. And the City, with the same lawyer representing it who represented Taylor (and the other officers) on the negligence claim against him, vigorously argued that Taylor's actions did not violate Monfil's constitutional rights. The question submitted to the jury was:

Did the City of Green Bay violate the constitutional rights of Thomas Monfils not to be deprived of his life or liberty absent due process of law in one or more of the following ways:

* * *

C. Ratification of unconstitutional conduct on the part of Chief Deputy Taylor?

The answer was 'yes.' The jury could not have answered 'yes' to the question without concluding that Taylor violated Monfils' constitutional rights. And that is precisely the claim against him individually. The unique situation presented here puts us in the position of having to determine whether the individual claim against Taylor must be tried–which would really be a second trial of the issue, or whether the verdict question, which by necessity includes a finding that Taylor's conduct was unconstitutional, if supported by sufficient evidence, will allow us to bypass another trial. . . . [E]ven though the qualified immunity issue was on appeal, the fact of the matter is that Taylor's conduct was the subject of considerable attention during the trial. The individual constitutional claim against Taylor, given the very unusual circumstances of this case, was, for all intents and purposes, tried to this jury. And it was not only tried in a legalistic, technical sense; in reality, the issue was tried in full, for Taylor's lawyers argued that his conduct, in all respects, was blameless. In the unique circumstances of this case, we see a number of problems if the matter is now sent back to the district court for another trial (which would actually be a retrial) of the due process claim against Taylor individually. If the case against Taylor is tried again, a risk of inconsistent verdicts arises. We would also be running afoul of principles of judicial economy and, we think, fairness. We will, therefore, proceed to answer the as-yet unanswered question as to whether the evidence was sufficient for the jury to conclude that Taylor placed Monfils in a position of danger greater than he would otherwise have faced. . . . Weighing all the factors and, above all, emphasizing that our conclusion grows out of the unique posture of the case–a posture we recommend that district courts attempt to avoid in the future–we find, based on the principle of law of the case, that the jury's finding of 'unconstitutional conduct on the part of Chief Deputy Taylor'. . . is binding as to the claim against Taylor in his individual capacity.").

Chan v. Wodnicki, 67 F.3d 137, 139-40 (7th Cir. 1995) ("The first question presented by [defendant's] new motion is the status of the appeal from the denial of immunity after the stay is denied. . . . The second question is whether, even if [defendant's] claim of immunity is not moot, the appeal is moot because the denial of the stay allowed the trial to go forward, and the appeal was only from the decision of the district court to allow the trial to go forward. . . . The claim of immunity survives the denial of a stay. . . . The trial has not made his claim of immunity moot, for while the immunity is from trial as well as from judgment, by the same token it is from judgment as well as from trial. . . . The denial of the stay was a ruling merely on the equities of postponing trial, not on the merits of the appeal. We add that our conclusion . . .is in accordance with the only decision that we have found on the question. *Langley v. Adams County*, 987 F.2d 1473, 1477 (10th Cir.1993).).

Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989) (Judge Easterbrook, concerned that defendants might invoke ***Forsyth*** appeals for purpose of delay, suggested that trial courts certify such appeals as frivolous and proceed with the trial. Faced with a finding of frivolousness by the district court, the defendant would have to seek a stay from the court of appeals in order to bring the trial to a halt. The district court must provide a reasoned finding to accompany its certification of frivolousness.).

Estate of Heenan ex rel. Heenan v. City of Madison, No. 13-CV-606-WMC, 2015 WL 3539613, at *2-4 (W.D. Wis. June 5, 2015) ("While *Apostol* recognizes a means to keep a trial involving a public official as defendant on track and avoid needless delays caused by meritless appeals, courts have been appropriately reluctant to enter such certifications. . . Indeed, the court found but a handful of examples of district courts certifying an interlocutory appeal from the denial of qualified immunity to the Seventh Circuit as frivolous or a sham, all of which have come from the Northern District of Illinois. . . The Western District of Wisconsin has been particularly reticent to provide such a certification, even when faced with appeals that appear to be without merit. . . Curiously, despite the rarity of such certifications, the Seventh Circuit *routinely* dismisses appeals from a denial of qualified immunity because it turns on factual disputes, like those at issue here, or finds the factual issues preclude qualified immunity altogether. . . . As counsel for Heimsness acknowledges in its response to plaintiff's motion and again at oral argument, in the fairly well-established limits on interlocutory appeals from denials of qualified immunity, the Seventh Circuit would have to find as a matter of law that an objectively reasonable police officer could have believed that Heenan, as a breaking and entering suspect, posed an imminent threat to Heimsness because he did not go down to the ground after Heimsness gave a single command to do so, at gunpoint and without identifying himself as a police officer, but instead advanced slowly towards Heimsness while flailing his arms around and swatting at him, *despite* also knowing that (as viewed in the light most favorable to plaintiff):

• Heenan had just voluntarily disengaged from a physical exchange with the purported victim,
• the victim immediately, urgently and repeatedly shouted to Heimsness that the suspect was his "neighbor";
• Heenan was obviously, extremely intoxicated;

• Heenan had no visible weapon, including nothing in either hand;
• another officer was on the scene behind Heenan at the time of the shooting, prepared to provide support;
• Heimsness was successfully able to get a distance of between four to six feet between himself from Heenan by just employing a light push with Heimsness's non-dominant hand;
• in response to this push, Heenan stumbled and fell backward until hitting a light pole; and
• Heimsness then shot Heenan from a distance of between four to six feet as Heenan was then crouched against the pole, unable to retreat further.
Although Heimsness's counsel represents an intent to abide by these facts on appeal. . . , they repeatedly failed to do so in written submissions and arguments to this court on summary judgment. . . Moreover, if the facts *are* interpreted in favor of plaintiff, the court is hard-pressed to see any merit in defendant's appeal for reasons addressed at length in this court's summary judgment decision. Still, whatever 'frivolous' may mean in this context, it is an even lower bar than an appeal 'without merit.'. . Accordingly, the court remains reticent to deny Heimsness one of the intended benefits of qualified immunity—avoiding an unnecessary trial—by certifying the appeal as frivolous. This case illustrates a perplexing dynamic. On the one hand, a public official is generally entitled to bring an interlocutory appeal from the denial of qualified immunity *and* to a complete stay of the proceedings, except in rare circumstances where the district court certifies such an appeal as frivolous. Even then, the Seventh Circuit is likely to grant an emergency stay. . . On the other hand, it is the fairly common practice of the Seventh Circuit to dismiss qualified immunity appeals for lack of jurisdiction where the determination ultimately depends on disputes of fact. Moreover, despite the *Apostol* decision being now more than 25 years old, district courts and summarily the Seventh Circuit have seldom, seriously considered its application to require trials to proceed without a full appeal on a claim of qualified immunity. Even so, unless the Seventh Circuit advises that the standard by which district courts should deem appeals of denials of qualified immunity 'frivolous' or 'sham' are different from their ordinary meaning, this court must decline to find that defendant Heimsness or his counsel have acted in bad faith by appealing this court's summary judgment decision, however likely it believes remand will ultimately be required. Instead, the court can only bolster plaintiff's view that a lengthy stay while waiting for the resolution of a marginal appeal will inevitably prejudice the parties and the court by requiring a completely new ramp up for a trial that is now less than three weeks away, not to mention impose an added burden on Mr. Heenan's parents, other relatives and friends who are still awaiting their day in court. At minimum, it would seem a good practice to consider expediting an interlocutory appeal under these circumstances.")

Trombetta v. Bd. of Education, Proviso Township High School District 209, No. 02 C 5895, 2004 WL 868265, at *3, *4 (N.D. Ill. Apr. 22, 2004) ("The law is clear that a suspension of proceedings due to a particular defendant's immunity-related appeal does not operate as a stay on the remainder of the case, at least so long as the rest of the case is properly severed. The Seventh Circuit has recently recognized that the divestiture of jurisdiction that applies following an interlocutory appeal on immunity grounds is 'limited' and that the trial court has authority to proceed with portions of the case 'not related to the claims on appeal, such as claims against other

defendants.' *May v. Sheahan,* 226 F .3d 876, 880 n. 2 (7th Cir.2000). There may be, as the court indicated in *May,* prudential reasons why a trial court may not wish to proceed with trial as to non-immune defendants when other defendants have a pending appeal. In that case, the court cited to *Monfils v. Taylor,* 165 F.3d 511, 519 (7th Cir.1998), upon which defendants also rely in their motion for reconsideration. But the considerations that were at issue in *Monfils* do not apply in this case, at least not to any significant extent. First, the Court has no intention of submitting to the jury in this case special interrogatories asking them to determine if any particular Board member violated the constitution, a key problem identified by the Seventh Circuit in *Monfils.* And in this case unlike in *Monfils,* determination of the District's liability will not necessarily be based on the conduct of any particular Board member, or even on the conduct of any Board member at all: Jackson, who has no pending immunity appeal, remains as a defendant in the case. In sum, unlike in *Monfils,* the Court has been given no persuasive reason why the rest of the case should await the appeal's termination. Thus even if defendants' request for a continuance were timely, it would be without merit.").

Manning v. Dye, No. 02 C 372, 2003 WL 21704431, at *1, *2 (N.D. Ill. July 22, 2003) (not reported) ("Under ordinary circumstances, the filing of a notice of appeal on an immunity issue divests the district court of jurisdiction to proceed on the claims against the defendant claiming immunity . . .But this does not occur if the appeal is 'baseless,' and the district court so finds. . . . Only those appeals that are 'unfounded' meet the standard. . . . Having considered the issue, this Court concludes that Miller and Buchan's appeal is indeed baseless and that a stay of the case pending the appeal is not warranted. . . . [Manning's] claim is premised on a violation of *Brady v. Maryland,* 373 U.S. 63 (1963), based on Miller and Buchan's failure to disclose exculpatory and impeaching information–specifically the fact that they had induced Dye to frame Manning and their knowledge he was lying. More importantly for present purposes, Miller and Buchan's argument is foreclosed by two recent decisions issued by the same court to which they are taking their appeal. Specifically, the extension of *Briscoe* and *House* that would be required to confer immunity on Miller and Buchan was squarely rejected by the Seventh Circuit in *Ienco v. City of Chicago,* 286 F.3d 994, 1000 (7th Cir.2002), which preceded our ruling in this case, and again in *Newsome v. McCabe,* 319 F.3d 301, 304 (7th Cir.2003), which followed our ruling by about three weeks. . . . In short, the Seventh Circuit would have to overrule both *Ienco* and *Newsome,* two recent and carefully considered decisions, in order for Miller and Buchan to prevail. Under the circumstances, their appeal on the absolute immunity issue is baseless as *Apostol* and *McMath* use that term."). [*See also Manning v. Miller,* 355 F.3d 1028 (7th Cir. 2004)]

Ruffino v. Sheahan, 61 F. Supp.2d 767, (N.D. Ill. 1999) ("Fortunately, the generally automatic stay that results from the appeal of a denial of qualified immunity may be denied when the legal issue the defendant has raised is 'frivolous.' . . . The court finds that this is just such an extreme and unusual case. As to the merits of the legal issue defendant raises, the court finds that defendant's position is so unsupportable that his appeal to the Seventh Circuit can only be another dilatory tactic to avoid bringing this matter to trial.), *aff'd,* 218 F.3d 697 (7th Cir. 2000).

Vidmar v. City of Chicago, No. 98 C 0951, 1999 WL 409929, at **3-5 & n.5 (N.D. Ill. June 7, 1999) (not reported) ("The linch pin to defendant Mingo's ability to obtain a stay is whether the interlocutory appeal on the qualified immunity issue is, as the *Apostol* court put it, 'a proper *Forsythe* [sic] appeal.' Mindful of the substantial costs exacted by a stay of trial court proceedings pending the determination of a qualified immunity appeal, the Seventh Circuit has authorized district courts to deny a request for a stay when the appeal is so thin as to be 'frivolous.'. . In that event, the district court may explain its view that the appeal is frivolous and 'get on with the trial.'. . The Seventh Circuit cautioned that this authority 'must be used with restraint,' but emphasized that used judiciously 'it may be valuable in cutting short the deleterious effects of unfounded appeals.'. . . As this Court held in ruling on the qualified immunity issue, plaintiff has asserted a violation of a federal constitutional right (the right, as a white individual, to be free from racial discrimination), and has also met his burden of showing that this right was clearly established at the time of defendant Mingo's challenged conduct in 1997. Defendant Mingo's submission in support of his request for a stay offers no argument or authority that defendant Mingo would not have known that to take action against a white employee for racially motivated reasons was impermissible. . . . The Court thus concludes that defendant Mingo's appeal of the qualified immunity issue is so thin on the merits that it is 'frivolous' as that term was used by the Seventh Circuit in the *Apostol* decision. . . . In these circumstances, to permit the appeal to delay plaintiff's trial against not only defendant Mingo but against the Board as well is unwarranted. . . . This Court believes that if a stay of proceedings were granted for defendant Mingo, the Court also would be obliged to stay the proceedings against the Board. The jury's determination of defendant Mingo's reasons for his actions would be critical to the Board's liability vel non under Title VII. Allowing the action to proceed to trial against the Board, while proceedings were stayed against defendant Mingo pending appeal, thus could create the same complex situation that 'dismayed' the Seventh Circuit in *Monfils v. Taylor* . . . .").

NINTH CIRCUIT

Rodriguez v. County of Los Angeles, 891 F.3d 776, 790-92 (9th Cir. 2018) ("Recognizing the importance of avoiding uncertainty and waste, but concerned that the appeals process might be abused to run up an adversary's costs or to delay trial, we have authorized the district court to go forward in appropriate cases by certifying that an appeal is frivolous or waived. . . 'In the absence of such certification,' however, 'the district court is automatically divested' of its authority 'to proceed with trial pending appeal.'. . .Unlike defects in constitutional or statutory jurisdiction, which deprive a court of the power to act and thus void actions taken while jurisdiction was lacking, . . . an error in following our circuit's divestiture procedure does not entirely eliminate the authority of the district court to hear a case. . . . [W]e conclude that the actions taken in the district court in violation of *Chuman* require reversal only if the error was prejudicial. We do not ignore the significance of the error of proceeding to trial in this case while the interlocutory appeal was pending. . . . We nonetheless conclude that the error was harmless here as well. We begin with the premise that 'a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial

record sets forth a 'genuine' issue of fact for trial.'. . We may exercise jurisdiction over issues that do not require resolution of factual disputes, including in cases where officers argue that they have qualified immunity, assuming the facts most favorable to the plaintiff. . . Here, during the pendency of the qualified immunity appeal, we issued a show cause order inviting appellants to identify the issues, if any, over which we had jurisdiction. Appellants' response failed to identify issues over which we would have had jurisdiction. Instead, appellants either relied on disputed facts or made conclusory assertions insufficient to show that they had a colorable claim to qualified immunity even if all inferences were drawn in appellees' favor. . . .Appellants thus failed to show cause why we should not have dismissed the interlocutory appeal of the immunity ruling by the district court for lack of jurisdiction, though the trial started before we issued a ruling to that effect. Though we initially concluded that the jurisdictional issue was not suitable for summary disposition, further review reveals that appellants' interlocutory appeal was frivolous. It is thus clear that the district court's error was harmless.").

Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) ("[U]nder the *Apostol* rule, a district court may certify in writing that the appeal is frivolous or waived. Without such certification, the trial is automatically delayed until disposition of the appeal. . . This circuit has addressed the issue of the effect of appeals from interlocutory orders in a closely related context. In an appeal from the denial of a motion to dismiss on the basis of double jeopardy, as in a qualified immunity appeal, the issue to be addressed by the court is whether the defendant will be forced to appear at trial. *United States v. LaMere,* 951 F.2d 1106, 1108 (9th Cir.1991). The court in *LaMere* adopted a 'dual jurisdiction' rule wherein 'an appeal from the denial of a frivolous ... motion [to dismiss based on double jeopardy] does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous'. . . This court now adopts the rule set forth in *LaMere* in the context of interlocutory qualified immunity appeals. Should the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial. . . In the absence of such certification, the district court is automatically divested of jurisdiction to proceed with trial pending appeal. Because the district court did not certify this interlocutory appeal as frivolous or forfeited, the district court is automatically divested of jurisdiction to proceed with trial.")

Kendrick v. County of San Diego, No. 15CV2615-GPC(AGS), 2018 WL 3361354, at *1–2, *4 (S.D. Cal. July 10, 2018) ("An appeal of an order denying qualified immunity 'normally divests the district court of jurisdiction to proceed with trial[;]' however, under the Ninth Circuit's decision in *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992), a district court 'may certify the appeal as frivolous and may then proceed with trial[.]'. . Under *Chuman*, '[s]hould the district court find that the defendants' claim of qualified immunity is frivolous,' it 'may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial.'. . If a district court certifies an appeal as frivolous, the defendant may then apply to the Ninth Circuit for a discretionary stay. . . 'An appeal is frivolous if it is wholly without merit.'. . A qualified immunity claim is frivolous if it 'is unfounded, so baseless that it does not invoke

appellate jurisdiction.'. . An appeal of qualified immunity defense may not be made based on whether there are genuine issues of material fact at issue. . .Plaintiff argues that as to Deputy Block, Defendants' appeal is frivolous as the Court properly denied qualified immunity based on clearly established law under *George v. Morris*, 736 F.3d 829 (9th Cir. 2013). As to the unreasonable seizure claim by Cynthia, Plaintiff argues that the case of *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075 (9th Cir. 2013) put the individual defendants on notice that their actions would violate the Fourth Amendment. Defendants do not substantively challenge the denial of qualified immunity as to Deputy Block. Instead, they primarily argue that the Court's order on qualified immunity as to the seven individual Defendant deputies and detectives who conducted an investigation after the incident are entitled to a separate determination that the law governing their actions was clearly established. They assert that the Court failed to consider the action of each person individually based on the facts known to each of them so it was 'obvious to all reasonable governmental actors, in the defendant's place, that what he is doing violates the federal law.'. . They argue that the seven deputies accused of an unlawful detention all acted based on different information and at different times. . . In reply, Plaintiff argues that Defendants' argument is a red herring as their argument relates to the sufficiency of the evidence and not a legal issue falling within the appellate court's limited jurisdiction to hear an interlocutory appeal challenging a denial of qualified immunity. . . .The Court recognizes that clearly established law must be particularized to the facts of each individual defendant. . . However, officers in the subsequent chain of the alleged seizure may also rely on the conduct of prior officers that proper procedures were followed. . . Therefore, as to the seven individual defendants on the unreasonable seizure claim by Cynthia Kendrick, the Court concludes the appeal is not frivolous and declines to certify it as such under *Chuman*. On the issue of excessive force by Deputy Block, the Court disagrees with Defendants and concludes it is clearly established by the Ninth Circuit ruling in *George v. Morris*, 736 F.3d 829 (9th Cir. 2013) that Deputy Block's conduct, relying on Plaintiff's version of the facts, was a violation of the Fourth Amendment. Therefore, Defendants' appeal of the qualified immunity ruling concerning Deputy Block is frivolous. Because the facts underlying the qualified immunity analyses are intertwined as to all the Defendants, the case will be stayed pending resolution of the interlocutory appeal in order to conserve judicial resources.")

Estate of Anastacio Hernandez-Rojas v. United States, No. 11CV522 L (DHB), 2015 WL 9592533, at *3-4 (S.D. Cal. Dec. 31, 2015) ("In their summary judgment motions, defendants contended that qualified immunity bars plaintiff's First Amended retaliation claim because only the Fourth Amendment governs the use of force during an arrest. In *Graham v. Connor*, 490 U.S. 386 (1988), the Court provided that 'all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment ....'. . . The Court however found that plaintiffs' retaliation claim alleged a First Amendment violation relying on *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006) and *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). Further, the Court found that the right based on retaliation was clearly established. This is the type of legal issue that is appropriate to be taken on appeal in the area of qualified immunity, *i.e.* it is an 'abstract issu[e] of law' relating to qualified immunity. Accordingly, the

Court finds that the appeal of plaintiffs' first amendment retaliation claim is appropriately taken at this time. . . . Because at least one issue on appeal is appropriately before the Court of Appeals, the Court finds that defendants' appeal is not frivolous. As an appeal divests the district court of jurisdiction, defendants' motion to stay is redundant: the case is stayed pending a decision from the appellate court.")

Gilbaugh v. Balzer, No. Civ. 99-1576-AS**,** 2001 WL 34041845, at *1 (D. Ore. Sept. 6, 2001) (not reported) ("Presently before the court is Plaintiff's Motion for Certification that Defendants' Appeal is Frivolous. The court agrees that Plaintiff has not presented any evidence that Peter Gilbaugh did not grab for Balzer's gun just before he was shot. However, the conflicts in the evidence noted in the opinion call the Officer's credibility into question. Accordingly, an issue exists with regard to whether Officer Balzer's statement that Gilbaugh grabbed for his gun, which is the sole piece of evidence on that issue, is credible. The Ninth Circuit has clearly held that any genuine issue of material fact concerning the underlying historical facts bars a finding of qualified immunity at the summary judgment stage. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir.1995). The court finds that Defendants' appeal of this ruling is not well founded. Plaintiff's motion (75) to certify the appeal as frivolous is GRANTED.").

TENTH CIRCUIT

Martinez v. Mares, 613 F. App'x 731, 735 & nn. 8 &9 (10th Cir. 2015) ("After Defendants filed their notice of appeal from the partial denial of summary judgment, Mr. and Ms. Martinez asked the district court to certify the appeal as frivolous so it could retain jurisdiction and proceed with the case. . . The district court granted the motion, concluding the appeal was frivolous because it challenged 'the Court's decision, not because of the Court's application of the facts to the governing law (which *would* be a permissible basis for interlocutory appeal), but rather because [Defendants] do not agree with the way the Court resolved certain factual issues.'[8] [fn8 Defendants claim in their opening brief that their appeal is not frivolous. If the district court's frivolousness certification were improper, Defendants might argue that any actions taken by the district court in the absence of a proper frivolousness certification should be vacated for lack of jurisdiction. *See Stewart v. Donges,* 915 F.2d 572, 579 (10th Cir.1990) . . . . But here, Defendants have not identified any action taken by the district court after their notice of appeal was filed. . . Accordingly, we need not consider whether the district court properly retained jurisdiction.] As a result, the district court retained jurisdiction over the case, which is proceeding in the district court.[9] [fn. 9 The fact that the district court certified the appeal as frivolous does not affect our jurisdiction. Instead, the case may proceed in both forums, with the district and appellate courts exercising concurrent jurisdiction.]")

Walker v. City of Orem, 451 F.3d 1139,1146, 1147, 1152 (10th Cir. 2006) ("Did, then, the district court retain the power after the appeal was filed to rule in favor of the officers on qualified immunity? We think not. The filing of the notice of appeal was an event of jurisdictional significance, which divested the district court from granting further relief concerning the issues on

appeal. . . We see no reason to depart from this rule, even where the relief granted favored the appealing party. . . This does not mean that a party, having filed a notice of appeal from the denial of a motion to dismiss on the basis of qualified immunity, has no option but to await the outcome of the appeal if facts subsequently emerge that it believes demonstrate its entitlement to summary judgment. An appealing party in that situation may seek to abate the appeal while requesting that we remand to the district court for consideration of a summary judgment motion. The officers have filed no such motions in this case, however, and our decision in their favor on their appeal from the motion to dismiss makes it unnecessary to consider whether we could or should grant such an abatement and remand nunc pro tunc. . . . [T]he officers' qualified immunity appeals [did not] divest the district court from determining whether the Sheriff's Office was entitled to summary judgment. The appeals only divested the district court of jurisdiction over claims against the individual officers.").

Langley v. Adams County, Colorado, 987 F.2d 1473, 1477 (10th Cir. 1993) (Plaintiff misconstrues the purpose and effect of the *Stewart* certification procedure. In *Stewart [v. Donges*, 915 F.2d 572, 577-78 (10th Cir. 1990)], we recognized that ordinarily the filing of a notice of appeal 'divests the district court of its control over those aspects of the case involved in the appeal.'. . . Because this divestiture of jurisdiction is subject to abuse and can unreasonably delay trial, we recognized in *Stewart* a procedure by which a district court may maintain jurisdiction over a defendant if the court certifies that the defendant's appeal is frivolous. . . Once a district court so certifies a qualified immunity appeal as frivolous and thus regains jurisdiction, that does not affect our jurisdiction.").

Gallegos v. City and County of Denver, 984 F.2d 358, 362 (10th Cir. 1993) ("Defendants' appeal in this case is not from an order of the district court denying summary judgment based on qualified immunity, but rather from an order denying summary judgment and postponing a decision on the qualified immunity question until trial. [cite omitted] In essence, the district court in this case is requiring the defendants to go to trial before determining whether or not they are entitled to qualified immunity. This illustrates the kind of undermining of the purpose of qualified immunity which the Supreme Court seeks to avoid in *Harlow* and *Mitchell*.").

Workman v. Jordan, 958 F.2d 332, 335-36 (10th Cir. 1992) (if court allows limited discovery to develop or clarify facts needed to rule on immunity claim and defers decision on immunity, such order is not immediately appealable; if court postpones decision on qualified immunity until trial, order is appealable).

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Olson v. Stewart, 240 F.Supp.3d 1251, 1252-53 (N.D. Fla. 2017) ("This appeal raises only the issue of whether I have properly construed the record. This is not and should not be an immediately appealable issue. . .Deciding whether any appeal should be dismissed is of course the province of the Eleventh Circuit, not of this court. The Eleventh Circuit will not rule on its

jurisdiction prior to the trial date. So the stay issue must be addressed while the appeal is pending. Deputy Whitfield says he has an absolute right to a stay pending appeal. That is not so. Three factors cut against granting a stay, and one cuts in favor. . . First, the case is ready for trial. If the case is not stayed, the factual disputes will be tried to a jury within six weeks. The jury will be properly instructed. The jury will determine the actual facts; the jury will not be required to accept as true one side's version. At that point, we will know whether Ms. Olson complied with the deputies' instructions, as she says, or disobeyed a deputy's instruction, as the defendants say. As a practical matter, it is likely that the verdict will settle the matter and that the Eleventh Circuit will never have to deal with the case at all. That is what happens in most cases of this kind that are tried in this court without interruption by an interlocutory appeal. . . Second, if the case is stayed pending appeal, then no matter which side wins the appeal, it is likely that the case will still have to be tried. This is so because there are state-law claims against the Sheriff for which there is no qualified-immunity defense. If the case is stayed and the Eleventh Circuit eventually resolves the appeal for Ms. Olson, nothing related to the merits will have changed. The trial that goes forward on remand (a year or more in the future) will be precisely the same as the trial that could take place in six weeks. The one thing that will have changed is the cost of the litigation—the defendants will have paid much more in fees, and Ms. Olson's attorney will have a much larger contingent fee claim. If, on the other hand, the case is stayed and the Eleventh Circuit resolves the appeal for Deputy Whitfield based only on qualified immunity—the issue that purportedly justifies the appeal—the claims against the Sheriff will still have to be tried. The trial will be identical to the trial that could take place in six weeks. All the same witnesses will testify, and the jury will resolve the same factual disputes. The damages issues will be the same. The only change will be that Ms. Olson will be unable to recover attorney's fees if she wins. To be sure, the Eleventh Circuit could resolve the appeal for Deputy Whitfield on the basis that the arrest and use of force were not unconstitutional—not just on the basis of qualified immunity. If, as is likely, any such ruling also controlled the state-law issues, this would end the case. Note, though, that the justification for an immediate appeal is the purported need for a prompt ruling on the issue of qualified immunity, not on the underlying constitutional issue. Allowing an interlocutory appeal so that the underlying constitutional issue can be resolved makes no more sense here than in any other kind of federal case. Indeed, allowing an interlocutory appeal so that the underlying constitutional issue can be resolved runs afoul of an even more important principle: federal courts should decide constitutional issues only when necessary to resolve an actual dispute. . . This principle counsels against unnecessarily resolving constitutional disputes on hypothetical facts—'facts' determined by artificially resolving disputes in favor of the nonmoving party. If the case is not stayed, in six weeks we will know the actual facts, and if appellate review is still needed at all, the Eleventh Circuit will address any constitutional issues on the actual facts. . . The purported justification for an immediate appeal of any order denying qualified immunity is the need to protect an individual public officer from remaining in a case—and thus having his personal assets at risk—longer than necessary. Qualified immunity is immunity from suit,

not just immunity from liability. The purported justification misses the mark here for two reasons. First, the appeal, even if successful, will keep Deputy Whitfield in the case longer; the appeal will not get him out of the case sooner. Second, Deputy Whitfield's personal assets are only superficially at risk. He has coverage for these claims from the same fund that covers the Sheriff. As a practical matter, Deputy Whitfield has no skin in the game. Deputy Whitfield is represented by the same attorney who represents the Sheriff. There is no separation—not a single ray of light—between the interests of the Sheriff and Deputy Whitfield. The law allows interlocutory appeals in qualified-immunity cases in some circumstances, and Deputy Whitfield is entitled to assert that this appeal qualifies. The Sheriff, though, is entitled neither to appeal nor to insist that the claims against him be delayed. . . That brings us to the one factor that cuts in favor of a stay. The defendants have asked for it, and Ms. Olson has consented. In the past, the Eleventh Circuit has accepted jurisdiction in most qualified-immunity appeals. Denying a consented motion to stay at this point would do more harm than good, because the attorneys would have to prepare for a trial while seeking a stay in the Eleventh Circuit. The circuit might well grant a stay shortly before the trial. Trying cases is difficult enough without that kind of last-minute confusion. As a matter of discretion, and with considerable misgivings, I conclude that the balance favors granting a stay. . . This is a case study on how not to run a railroad. In the federal judiciary, we generally do an excellent job of resolving disputes correctly in accordance with the law—when we finally get around to resolving them. But the process takes too long and costs too much. We bemoan the disappearing trial, but we adopt procedures that cause delays and increase costs, making it harder and harder to actually resolve factual disputes through trials. This case is an illustration. The case is ready for trial and could be resolved correctly, based on the actual facts, within six weeks. Instead, the case will now be delayed, probably for a year or more, awaiting an appellate ruling on hypothetical facts. The appellate ruling, if it ultimately makes any difference at all, probably will affect only the issue of attorney's fees, not resolution of the underlying dispute on the merits. This will happen based on the demonstrably false assertion that it will more quickly exonerate a party who has no skin in the game. As I said, a case study on how not to run a railroad. The events at issue occurred in less than an hour on December 8, 2012. Ms. Olson filed suit nearly three years later, on November 22, 2015. The case is finally ready for trial. There is no good reason for further delay. But the circumstances have conspired against good case management.") [*See also* ***Olson v. Stewart***, 737 F.3d 478, ___ (11th Cir. 2018) ("[T]he District Court did rule that, even if Deputy Whitfield is entitled to qualified immunity on Ms. Olson's separately-pled excessive force claim, his use of force would remain relevant to the amount of damages Ms. Olson might recover on her false arrest claims. This comports with our Circuit precedent. *See Bashir v. Rockdale Cty.*, 445 F.3d 1323, 1332 (11th Cir. 2006) ("[T]he damages recoverable on an unlawful arrest claim include damages suffered because of the use of force in effecting the arrest.") . . .The District Court correctly denied qualified immunity to Deputy Whitfield on Ms. Olson's false arrest claims and correctly ruled that Ms. Olson may recover damages for the force Deputy Whitfield used during her arrest.")]

Owens v. Alabama Dept. of Mental Health and Mental Retardation, No. 2:07cv650-WHA, 2008 WL 4722038, at *2, *3 (M.D. Ala. Oct. 24, 2008) ("At no time has the court either denied the defense of qualified immunity, denied the right to raise the defense of qualified immunity, or indicated that it will not rule on the defense now that it has been raised. Instead, the court has merely allowed the Plaintiffs time in which to file a response to the motion on the merits, and the court has every intention of considering the Second Motion for Summary Judgment in due course. It may well be that some, or all, of the Defendants will be found entitled to qualified immunity. The court is well-aware that a non-frivolous appeal of a denial of qualified immunity divests this court of jurisdiction over federal constitutional claims against individual defendants. . . The Defendants' Notice of Appeal is not a non-frivolous appeal. In evaluating the Motion to Stay Proceedings, the court finds helpful the analysis of the Seventh Circuit Court of Appeals in *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir.1989), a case cited favorably by the Eleventh Circuit on two occasions. *See Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir.2004); *Skrtich v. Thornton*, 280 F.3d 1295, 1306 (11th Cir.2002). . . . This court is persuaded by this reasoning and concludes that the appeal from the Order denying a motion to shorten time is frivolous because the Defendants have forfeited their right to a pre-trial determination of the merits of their motion through their manipulative, and delaying, tactics. If this case is not one in which Defendants have forfeited their right to pre-trial determination of qualified immunity , then the right can never be forfeited. The court will, therefore, deny the Emergency Motion to Stay. The court will further certify, in accordance with *Apostol*, that the appeal is frivolous and taken for the purpose of delay. The court notes that this decision has no impact on the Defendants' continued right to assert qualified immunity from judgment at trial, and the court has every intention of ruling on that defense in due course.").

Davenport v. City of Columbus, GA, No. 4:06-CV-150 (CDL), 2008 WL 3871729, at *4 (M.D. Ga. Aug. 18, 2008) ("Defendants now appear to argue that a reasonable officer in Boren's shoes would have taken the same actions absent any retaliatory motive and that Boren should therefore receive qualified immunity. However, the objective reasonableness of Boren's actions is irrelevant where, as here, sufficient evidence exists for a jury to disbelieve Boren's proffered nonretaliatory reasons (i.e., his 'reasonable' reasons) and find that his sole motivation was retaliatory. The Court has not found that Boren is not entitled to qualified immunity. The jury may very well find that Plaintiff's version of the facts is not true. In that case, Boren will be entitled to qualified immunity. However, because genuine issues of material fact exist, that determination is premature and cannot be made based upon the pretrial record. Thus, finding that genuine issues of material fact exist as to whether Boren retaliated against Plaintiff because of her complaints of race discrimination and further finding that if such retaliation occurred it would be a clear violation of § 1981, the Court denied Boren's motion for summary judgment on his qualified immunity defense. . . The issue presently before the Court is not whether its rulings on Defendants' motions for summary judgment were erroneous. The issue is whether those rulings are immediately appealable. Since those rulings denied summary judgment on the qualified immunity defenses based upon the finding of genuine issues of material fact, it is clear that those rulings are not immediately appealable. In

light of the clearly established legal precedent on this issue, Defendants have no reasonable expectation to believe that such rulings are immediately appealable. Accordingly, Plaintiff's right to her day in court should be delayed no longer, and Defendants' motion for a stay must be, and is hereby, denied.")**.**

Rigdon v. Georgia Bd. of Regents, No. CV406-240, 2008 WL 2986389, at *2 (S.D. Ga. Aug. 4, 2008) ("It is proper . . . for the district court to stay proceedings pending appeal of a denial of immunity. . . But the district court may also 'declare that the appeal is frivolous, and if it is the district court may carry on with the case.'").

Andre v. Castor, 963 F. Supp. 1169, 1169-71 (N.D. Fla. 1997) ("The plaintiff . . . asks this Court to certify to the Court of Appeals that the defendants' qualified immunity appeal is 'frivolous.' She argues that there is simply nothing for the defendants to appeal, in that the Court deferred ruling on the defense of qualified immunity until the record was more developed. The defendants contend that this Court lacks jurisdiction to make such a certification and, even if it had jurisdiction, the defendants have advanced a colorable claim of immunity. The plaintiffs request is, apparently, one of first impression for both this district and this circuit. . . . This Court concludes that, contrary to the defendants' argument, it has power to certify as 'frivolous' and 'for purposes of delay' a notice of appeal based on qualified immunity. . . . [T]he only arguable basis for the defendants' appeal is the Court's decision to defer, rather than rule, on the issue of qualified immunity. A decision to defer ruling is, by definition, not 'final,' 'conclusive,' or 'important.' [*citing Johnson v. Jones*] . . . . As such, the Court finds no arguable basis in law or fact for the defendants' notice of appeal from its order. . . . Rather, the only plausible motivation behind the notice of appeal is delay. The stated basis of the Court's decision to defer ruling was the defendants' representation in open court that they would soon be filing a motion for summary judgment on the defense of qualified immunity. . . . Even if the defendants were to convince the circuit court that this Court erred in its decision to defer ruling on whether the complaint alleges a violation of clearly established law, the appellate remedy would be a remand to this Court with directions to rule on the issue. The Eleventh Circuit would lack jurisdiction to render an original order on the merits of the defendants' claim to immunity. . . . Having certified that the defendants' notice of appeal is frivolous, the Court orders the parties to continue discovery in this case. . . during the pendency of appeal. Dispositive motions and trial, however, will be stayed pending resolution of the appeal.").